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1 Should a Duty to the Corporation Be Imposed on Institutional Shareholders?

Roberta S. Karmel

The common law principle that directors owe a primary duty to their corporation and a secondary duty to the shareholders of that corporation has been gradually eroded by the federal securities laws so that directors are charged with owing duties to shareholders, with the corporation and other corporate constituents relegated to a lower status. Further, the shareholder primacy model has become the dominant model in scholarship theories with regard to the firm, although other models have been proposed and debated. Under the shareholder primacy model, shareholders are considered the "owners" of the corporation and therefore given rights at the expense of other corporation constituents. Although modern institutional investors do not behave like owners of corporate property, the shareholder primacy norm has been strengthened and reinforced by the Sarbanes-Oxley Act of 2002. Further, in the wake of recent corporate scandals, institutions have been demanding more rights, specifically more rights with respect to the nomination of corporate directors. In view of these demands, this Article inquires as to whether large shareholders should obtain any such rights without also acquiring duties to the corporations in which they invest and to other shareholders.

23 Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions

Andrew R. Brownstein and Igor Kirman

The past twenty years have witnessed a significant increase in the number of shareholder proposals submitted to American public corporations and in the number of such proposals that have received majority support during shareholder meetings. Although some companies have responded to majority vote resolutions by implementing the proposals or reaching settlement with the proponents, a significant number of companies have not adopted the changes suggested by these resolutions. The refusal of companies to adopt such suggested changes, even when doing so after careful consideration by the board of directors, has in turn led some activist shareholders to employ pressure tactics against such companies. After canvassing these changes, this Article examines what companies and their directors should do in response to shareholder resolutions that obtain majority shareholder votes. The Article concludes that directors retain the ultimate responsibility to act in what they believe to be the best interest of all shareholders, even if that means not adopting majority vote resolutions. At the same time, it also notes that the changed corporate governance climate makes it essential for companies and their directors to treat majority vote resolutions seriously and recommends
possible enhanced procedures for considering and acting on such resolutions.

79 Fiduciary Duties of Directors of a Corporation in the Vicinity of Insolvency and After Initiation of a Bankruptcy Case
Myron M. Sheinfeld and Judy Harris Pippitt
This Article discusses the general fiduciary duties of directors of corporations and how those duties are altered when a corporation is in the zone or vicinity of insolvency and when the corporation is insolvent. The different tests for determining a corporation’s insolvency are outlined. The Article also analyzes the fiduciary duties of directors in a Chapter 11 bankruptcy case. In particular, the Article discusses directors’ duties in managing the bankruptcy estate, directors’ responsibilities under Sarbanes-Oxley, and the exculpations of directors that are permitted in Chapter 11 plans of reorganization. The Article provides directors with practical guidelines for properly exercising their fiduciary duties in Chapter 11.

109 Collapsing Corporate Structures: Resolving the Tension Between Form and Substance
Steven L. Schwarcz
When is a corporate structure legitimate, and when should it be collapsed? Although most urgent in the context of structured finance transactions, this question also arises in other important corporate contexts, including piercing the corporate veil, substantive consolidation, recharacterizing sales as transfers intended for security, and collapsing LBO transactions. In a larger sense, it is one of the most fundamental questions in corporation law; at the basis of any finding that the private ordering of a firm, or of the relationship between firms, is unenforceable or that the law should disrespect form in favor of substance. In the past, judges and scholars have attempted to formulate rules for determining when to collapse corporate structures only in isolated contexts. This Article first examines and synthesizes these isolated sources of law. The synthesis reveals that judges implicitly have been grappling with one of the most difficult conceptual problems of contract law: the circumstances under which externalities should defeat contract enforcement. By addressing that problem directly through contract theory and economics, this Article proposes an overall theory for collapsing corporate structures and then uses that theory to derive rules of general application. Finally, the Article examines how this theory and its derivative rules might inform, or be informed by, the related debate over whether limited liability should be the default rule in corporation law.

147 A History of the Creation and Jurisdiction of Business Courts in the Last Decade
Mitchell Bach and Lee Applebaum
Specialized practices operated by those possessing an extraordinary body of knowledge, training and/or experience are a routine and expected part of daily life. Specialized “business courts” or “commercial courts” within
state trial court systems have become increasingly common since the early 1990s, and it appears that such courts are finding a firm place in the legal community. The authors set out some of the history and jurisdictional scope of these “business courts” designed to create a reliable venue for the thoroughgoing address of business and commercial litigation.

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FOR THE BENEFIT OF THE GOVERNMENT: EXEMPTING CIVIL RESTITUTION PENALTIES FROM DISCHARGE UNDER SECTION 523(a)(7) OF THE BANKRUPTCY CODE ............. 131
Restitution is a critical law enforcement tool. It requires defendants to repay ill-gotten gains, operates to deter future wrongdoing, and may compensate victims for the harm they sustained. For these reasons and others, the Supreme Court held in Kelly v. Robinson that criminal restitution penalties are exempt from discharge under 11 U.S.C. § 523(a)(7). The Supreme Court has not ruled, however, on the dischargeability of restitution arising from civil wrongdoing, and federal courts of appeals have split regarding whether section 523(a)(7) exempts civil restitution debts as well. This Note critiques both sides of the split and argues that the Supreme Court’s reasoning in Kelly provides the best test for determining when civil restitution should and should not be discharged. Specifically, it argues that courts should exempt a civil restitution obligation from discharge if the primary purpose of that debt is to promote the government’s interests in effective law enforcement, rather than to ensure the monetary compensation of private parties. From Kelly, this Note derives a two-part test for determining the primary purpose of a given restitution obligation.

WHAT’S GOOD FOR THE GOOSE ISN’T ALWAYS GOOD FOR THE GANDER: THE INEFFICIENCIES OF A SINGLE DEFAULT RULE FOR DELIVERY OF POSSESSION OF LEASEHOLD ESTATES ................................................................. 171
Delivery of possession of leasehold estates is controlled by two competing rules. The American Rule requires landlords to deliver superior legal possession of the leasehold to new tenants. The English Rule requires landlords to go a step further and deliver actual possession of the leasehold. A majority of jurisdictions and legal scholars accept the English Rule as the superior default rule. This Note argues, however, that the English Rule is only superior for certain types of leasehold estates. In many instances, particularly in the area of commercial leaseholds, the American Rule is the more efficient rule. By examining four different types of leasehold estates, this Note shows how each rule can be beneficial and lead to the most efficient outcome. The combination of the American and English Rules as penalty default rules for delivery of possession properly tailors the default rule so as to maximize efficient outcomes when a holdover tenant disrupts the new tenant from taking actual possession of the leasehold.
A LINE ALREADY DRAWN: THE CASE FOR VOLUNTARY EUTHANASIA AFTER THE WITHDRAWAL OF LIFE-SUSTAINING HYDRATION AND NUTRITION

When life-sustaining hydration and nutrition is withheld from an incompetent and immobile patient like Terry Schiavo, death comes to the patient by dehydration within about two weeks. Americans should be permitted to arrange for euthanasia at that point, as opposed to merely dehydrating to death, and should be able to incorporate their desire for euthanasia into an advance directive. A state constitutional right of privacy could provide the legal avenue permitting effectuation of such a choice.
Rethinking Article I, Section 1:
FROM NONDELEGATION TO EXCLUSIVE DELEGATION

Thomas W. Merrill 2097

The first substantive clause of the Constitution—providing that “[a]ll legislative Powers herein granted shall be vested in a Congress”—is associated with two postulates about the allocation of legislative power. The first is the nondelegation doctrine, which says that Congress may not delegate legislative power. The second is the exclusive delegation doctrine, which says that only Congress may delegate legislative power. This Article explores the textual, historical, and judicial support for these two readings of Article I, Section 1, as well as the practical consequences of starting from one postulate as opposed to the other. The Article concludes that exclusive delegation is superior to the nondelegation doctrine, either in its present unenforced version, or if it were enforced more strictly. The nondelegation doctrine demands that Congress constrain the discretion of agencies by resolving, at some level, specific policy disputes. The exclusive delegation doctrine requires that Congress consider who is to resolve policy disputes and over what domain of controversies. Given the realities of modern government, Congress is better suited to answer questions about which institution should make policy than it is to make policy itself. The exclusive delegation doctrine would reorient understanding of the allocation of legislative power in a way that provides a better fit with institutional realities, and yet would also preserve an important measure of exclusive power to Congress as the first branch of our national government.

REGULATORY TAXINGS

Eduardo Moisés Peñalver 2182

The tension between the Supreme Court’s expansive reading of the Takings Clause and the state’s virtually limitless power to tax has been repeatedly noted, but has received little systematic exploration. Although some scholars, most notably Richard Epstein, have used the tension between takings law and taxes to argue against the legitimacy of taxation as it is presently practiced, such an approach has failed to gain a significant following. Instead, the broad legal consensus is that legislatures effectively have unlimited authority to impose tax burdens. Nevertheless, this Article demonstrates that every attempt to formulate a “Reconciling Theory,” a theory that would square the prohibition of takings with such a broad tax power, yields a substantial
category of Regulatory Taxings: government actions that—though they would likely be deemed takings under current doctrine—cannot be distinguished from taxes under the particular Reconciling Theory being examined.

This Article argues that the persistence of the category of Regulatory Taxings demonstrates that present takings doctrine is far too broad to fully reconcile with longstanding constitutional norms governing taxation. Given the overwhelming consensus that existing taxation practices are largely constitutional, Professor Perlitzer identifies a need for the Supreme Court to adopt a narrower understanding of the Takings Clause. At a minimum, Professor Perlitzer concludes that any regulation that can easily be translated into a permissible tax should not be deemed a taking in need of compensation. Professor Perlitzer further asserts that broadly applicable regulations and regulations of fungible property should rarely be treated as takings.

NOTES

LIMITING STEEL CO.: RECAPTURING A BROADER “ ARISING UNDER” JURISDICTIONAL QUESTION

Joshua Schwartz

In Steel Co. v. Citizens for a Better Environment, the Supreme Court put an end to hypothetical jurisdiction, a previously common practice whereby a lower court would “assume without deciding” the existence of jurisdiction and dismiss a case on easier merits grounds. Since jurisdiction is “power,” said the Court, any opinion on the merits where jurisdiction may be lacking is “ ultra vires.” Nearly seven years after Steel Co., lower courts remain uncertain as to the reach of this jurisdiction-first rule, and some have exploited Steel Co.’s several exceptions to reach cause-of-action questions rather than delve into uncertain areas of jurisdictional law. This Note argues that while the repudiation of hypothetical jurisdiction was doctrinally correct, courts should consider cause-of-action dismissals quasi-jurisdictional. This conception would recapture jurisdiction as a limit on the power of courts to declare violations of legal rights, rather than a limit on their power to hear cases.

NEWLY COMPELLING: REEXAMINING JUDICIAL CONSTRUCTION OF JURIES IN THE AFTERMATH OF GRUTTER V. BOLLINGER

Joshua Wilkenfeld

For years, constitutional doctrine had invalidated judicial attempts to construct community-reflective juries. In the recently decided case of Grutter v. Bollinger, however, the Court held that where a diversity-enhancing system promotes the performance of internal processes of and enhances the legitimacy of a core governmental function, that classification system (if narrowly tailored) fulfills a compel-
ling governmental interest and survives strict scrutiny. This Note applies Grutter to the jury context, by examining the possibility that diverse juries function better than their homogenous counterparts. Thereafter, this Note argues that much like in the educational affirmative action context, judicial construction of community-reflective juries enhances the perceived legitimacy of the justice system. All of these gains can be achieved while tailoring the government classification system as narrowly as the system upheld in Grutter. As a result of these benefits, jury construction efforts should be allowable under Grutter and the Fourteenth Amendment.

ESSAY

FIRMS, COURTS, AND REPUTATION MECHANISMS:
TOWARDS A POSITIVE THEORY OF
PRIVATE ORDERING

Barak D. Richman

This Essay formulates a positive model that predicts when commercial parties will employ private ordering to enforce their agreements. The typical enforcement mechanism associated with private ordering is the reputation mechanism, in which a merchant community punishes parties in breach of contract by denying them future business. The growing private ordering literature argues that these private enforcement mechanisms can be superior to the traditional, less efficient enforcement measures provided by public courts. However, previous comparisons between public and private contractual enforcement have presented a misleading dichotomy by failing to consider a third enforcement mechanism: the vertically integrated firm.

This Essay develops a model that comprehensively addresses three distinct types of enforcement mechanisms—firms, courts, and reputation-based private ordering. The model rests on a synthesis of transaction cost economics, which compares the efficiencies of firms versus markets, and the private ordering literature, which compares the efficiencies of public courts versus private ordering. It hypothesizes that private ordering will arise when agreements present enforcement difficulties, high-powered market incentives are important, and the costs of entry barriers are low. The Essay then conducts an illustrative test by comparing the model’s predictions to documented instances of private ordering.
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One of the leading justifications for the 2003 U.S.-led invasion of Iraq and removal of the Ba'ath Party from power was that Iraq had developed chemical and biological weapons, and was rapidly developing nuclear capability. The author's previous article, "Enforcing Arms Control Agreements by Military Force: Iraq and the 800-Pound Gorilla," argued that the invasion was lawful, even without Security Council authorization, by taking a new, injury-remedy approach to war theory. With no weapons of mass destruction yet found in Iraq, new justifications must be found to legitimize the invasion. The author revisits the injury-remedy approach, incorporating good and bad faith, and a tort-based approach to humanitarian intervention.

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Navigating Past the "Spirit of Insubordination":
A Twenty-First Century Model Student Conduct Code
with a Model Hearing Script

Edward N. Stoner II
John Wesley Lowery

Since Thomas Jefferson struggled with the "spirit of insubordination" of the young gentlemen at the University of Virginia over a century and three-quarters ago, college administrators have struggled with the challenges of allowing students to test boundaries while still behaving in a manner conducive to creating a good living/learning environment for the entire academic community. In this article, the authors set forth a model student conduct code and a model hearing script that student affairs officials may use to assist them in dealing with the spirit of insubordination when it exceeds campus boundaries, while complying with the requirements of outside law and good student affairs practices.

The Threat to Constitutional Academic Freedom

J. Peter Byrne

In order to protect free and responsible education and scholarship, constitutional academic freedom protects institutional academic decision making from undue political interference. This article analyzes judicial decisions from the past fifteen years that have misconstrued constitutional academic freedom, often because of judicial misunderstanding of the academic context of speech by teachers and students. Grutter v. Bollinger provides a doctrinal basis for strengthening constitutional academic freedom, but that will be accomplished only if the educated public trusts the commitment of colleges and universities to the pursuit of truth and understanding.

"The Equitable Rule": Copyright Ownership of Distance-Education Courses

Michael W. Klein

Almost three million college students are enrolled in online distance-education courses in the United States. Once these
courses are developed, who owns them? An analysis under the Copyright Act suggests the courses are works made for hire and are, therefore, owned by their institution. Rather than assert ownership, however, institutions should implement a copyright ownership policy that shares the bundle of rights under copyright with faculty. This article provides model provisions for campus copyright policies.

Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination

Mary Ann Connell
Donna Euben

The past two decades have seen significant growth in the law of sexual harassment under both Title VII and Title IX. In 1998, the Supreme Court decided four landmark cases that further defined the contours of this evolving area of the law, including Oncale v. Sundowner Offshore Services, Inc. In Oncale, the Court held that Title VII's prohibition against sexual harassment applied in the same-sex context. This article explores the impact of the Oncale holding in both the employment and education contexts by examining the evolving judicial treatment of same-sex sexual harassment and sexual orientation discrimination claims.

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