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THE AMERICAN CONSTITUTION: BASIC CHARTER OR FIRST DRAFT? ..... *Theodore C. Sorensen* 709

The American Constitution is a remarkable and uniquely successful national charter, so brilliantly crafted that it has required only seventeen amendments in the last two hundred years. However, the current Congress has lost sight of this, proposing nearly one hundred amendments in the last seventeen months. This reflects a distressingly casual attitude toward the Constitution, and it ignores the fact that our Constitution should be seen as a framework of this country's enduring values rather than a tool to advance a particular political agenda.

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AN OIL STRIKE IN HELL: CONTEMPORARY LEGENDS ABOUT THE CIVIL JUSTICE SYSTEM ..... *Marc Galanter* 717

Contemporary discourse about the civil justice system is laced with a set of resilient legends that are often mistaken for the products of systematic social inquiry. Many of these legends are connected with the "jaundiced view" that derides the civil justice system as unfair and mischievous. The prominence of the jaundiced view and the persistence of these legal legends are supported by a deficient knowledge base in conjunction with cognitive biases, media distortions, professional and political opportunism, interacting with the inherent indeterminacy of the legal system, and general ambivalence about the expansion of remedy.

FROM *BAREFOOT* TO *DAUBERT* TO *JOINER*: TRIPLE PLAY OR DOUBLE ERROR? ..... *Michael H. Gottesman* 753

This Article traces the Supreme Court's inconsistent rulings over the past fifteen years regarding the standards for admissibility of expert scientific testimony. It criticizes *Daubert* for usurping the right to jury trial, elevating the plaintiff's burden of proof, and altering the substance of state tort law in diversity cases. It argues that *Joiner* goes far beyond *Daubert*, authorizing federal trial judges to exclude the findings of well-established branches of science devoted to making predictions of causation when certainty is unattainable.

A MORE COMPLETE LOOK AT COMPLEXITY ..... *Jeffrey W. Stempel* 781

The matter of "complex" litigation has held a prominent place in scholarship about civil litigation. Articles abound on the subject, and casebooks have been devoted to it—all without a widely accepted working professional definition as to what constitutes "complexity." Judicial "competence" has also been a topic of note, but here too a working definition has yet to emerge. A good deal of the competence debate has emphasized the role of the jury but has said little regarding other dimensions of institutional competence.

In addition to lacking common definitional understanding, the profession is also divided regarding the competence of courts to adjudicate the complex. This Article comprehensively surveys the elements of both complexity and competence, applies these criteria, and concludes that despite shortcomings, courts remain the most effective default system for the resolution of complex disputes. Several means of improving performance are proposed.

THE PERFORMANCE OF THE AMERICAN CIVIL JURY: AN EMPIRICAL PERSPECTIVE ..... *Neil Vidmar* 849

The jury is at the center of controversy over the ability of courts to deal with complexities of contemporary civil litigation. Juries have been said to be incompetent, biased, sympathy-prone, confused by battles between experts and complex evidence, hostile to corporate defendants and doctors, gullible, excessively generous in awarding compensatory damages, and out of control when awarding punitive damages. Most of these claims have been made on the basis of anecdotes, unreliable statistics, and appeals to "common sense." However, over the past quarter century, a substantial body of empirical research on juries has assessed the claims and most of the time has found them to be not substantiated. This Article presents a comprehensive review of this research.

WHAT JURIES CAN'T DO WELL: THE JURY'S PERFORMANCE AS A RISK MANAGER ..... *Reid Hastie & W. Kip Viscusi* 901

The legal system will not function effectively or fairly if juries are asked to make decisions that are beyond their competency. A large body of empirical literature shows that unaided lay-decisions about uncertain, risky events exhibit many errors and biases. The results of an original empirical study demonstrated that mock-jurors are susceptible to dramatic hindsight effects in their judgments of liability for punitive damages. A companion study of experienced trial judges found the judges *ex ante* and *ex post* decisions were much more consistent. This Article explores the implications of these findings for the reform of legal procedures in punitive damages judgments.

Should the Courts' Jurisdiction Be Narrowed?

THE (CLOUDY) FUTURE OF CLASS ACTIONS ..... *Edward H. Cooper* 923

This article explores the tensions revealed by contemporary debates over the class-action practice that has emerged from Rule 23 of the Federal Rules of Civil Procedure as it was amended in 1996. The basic theory of class representation is explored and found inadequate. Reactions to proposed amendments published for comment in 1996 underscore the practical ways in which the lack of clear theory exacerbates the evaluation of present practice and attempts to improve it.

CONTRACTING ACCESS TO THE COURTS: MYTH OR REALITY? BOON OR BANE? ..... *Jeffrey W. Stempel* 965

The last quarter of the Twentieth Century has seen substantial division in the legal profession regarding whether resort to litigation is too easy or too difficult. This Article surveys developments and finds that, although the record is mixed, a close examination suggests that access to adjudication has declined. Although the impact of increased barriers to access is also a matter of debate, it appears that restricted access is on the whole detrimental to society, with the detriment falling more heavily upon certain classes of disputants.

RECENT JUDICIAL AND LEGISLATIVE DEVELOPMENTS AFFECTING THE PRIVATE SECURITIES FRAUD CLASS ACTION ..... *Richard H. Walker & J. Gordon Seymour* 1003

Over the course of the last decade, the substantive and procedural law governing private securities fraud class actions has undergone dramatic changes. This Article surveys four relatively recent developments—the Supreme Court's decisions in *Lampf*, *Pleva*, and *Central Bank*, the Private Securities Litigation Reform Act of 1995, and the current legislative effort to preempt state securities fraud class actions—and discusses their implications for the future of the private securities fraud class action.

Should There be Mandatory Alternative Dispute Resolution?

NEW WINESKINS FOR NEW WINE: THE NEED TO ENCOURAGE FAIRNESS IN MANDATORY ARBITRATION ..... *Paul H. Haagen* 1039

In the past fifteen years, the Supreme Court has aggressively reinterpreted the Federal Arbitration Act, extending the potential reach of agreements to arbitrate and preventing the states from effectively regulating such agreements. This reinterpretation has created powerful incentives for parties with market power to mandate arbitration procedures that are one-sided and oppressive. This Article explores ways of changing the incentives to encourage appropriate and fair arbitral proceedings without unnecessarily limiting contractual freedom.

CONSUMER ARBITRATION OF STATUTORY CLAIMS: HAS PRE-DISPUTE [MANDATORY] ARBITRATION OUTLIVED ITS WELCOME? ..... *Richard E. Speidel* 1069

This Article considers the question of whether pre-dispute arbitration clauses associated with the traditional model of arbitration have outlived their usefulness. The answer is a qualified yes for consumer contracts, especially where there is no collective bargaining agreement and statutory claims are involved. This Article explores the complex reasons for this conclusion and recommends several amendments to the Federal Arbitration Act that, along with various private initiatives such as the American Arbitration Association's Consumer Due Process Protocol, are needed to protect the public interests involved.

SECURITIES ARBITRATION: ISSUES OF INTEREST ..... *Isaac C. Hunt, Jr.* 1095

This Article discusses the merits of a proposed punitive damages cap in arbitration and the appropriateness of mandatory arbitration for employment discrimination claims. Banning punitive damages would detrimental because it would create the perception that arbitration puts claimants at a disadvantage compared to other forums. In addition, the author reaffirms his commitment to ending the practice of mandatory arbitration for employment discrimination claims.

ELEMENTS OF A FAIR AND EFFICIENT SECURITIES ARBITRATION SYSTEM ..... *David S. Ruder* 1101

This Article describes a model for a fair and efficient securities arbitration system and evaluates a series of proposals for improvement of the securities arbitration system administered by the National Association of Securities Dealers, Inc. ("NASD") made by the NASD Arbitration Policy Task Force. Elements of a fair and efficient arbitration system include: independent administration; SEC oversight; a sound system for selection of unbiased, experienced arbitrators; special systems designed for simple, standard, and complex arbitration cases; procedural fairness, efficiency, and speed; relatively low costs; available alternative dispute resolution systems; procedures to resolve stale disputes; and fair notice to customers that they are entering into a pre-dispute arbitration agreement.

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A DARK DAY FOR HABEAS CORPUS: SUCCESSIVE PETITIONS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ..... *Deborah L. Stahlkopf* 1115

This Note examines amendments to the federal habeas corpus statutes through the Anti-Terrorism and Effective Death Penalty Act of 1996, in particular focusing on the effect of the amendments on successive petitions brought by federal and state prisoners. Although the 1996 amendments were purportedly intended to curb "abuse of the writ" by limiting repeated meritless petitions, they in reality do much more: they effectively deny prisoners the right to bring some types of claims altogether.