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## *Articles*

CONGRESS' TEMPTATION TO DEFECT: A POLITICAL AND ECONOMIC THEORY OF LEGISLATIVE RESOLUTIONS TO FINANCIAL COMMON POOL PROBLEMS ..... *Susan Block-Lieb* 801

In this Article, Professor Block-Lieb describes the political process for enactment, repeal, and revision of the federal bankruptcy laws. The predominant metaphor in bankruptcy scholarship compares the creditors of a financially distressed debtor to fishers in a pond they own in common, and justifies the Bankruptcy Code as legislation needed to resolve this common pool problem. The Article combines game theory with public choice and interest group theories in a model of legislative resolutions to common pool problems. It identifies the weaknesses inherent when rules of liability are enacted to resolve common pool problems, generally, and financial common pool problems, specifically; and distinguishes the pressure for their enactment or repeal from the pressure for their revision. The Article concludes by reviewing the legislative history of the federal bankruptcy laws from 1800 to date, and finds that, to a large extent, this experience supports the proposed model.

CHARITABLE ENDOWMENTS AND THE DEMOCRATIZATION OF DYNASTY ..... *Evelyn Brody* 873

Charitable endowments and other investment assets exceed $500 billion. The taste for perpetual endowments appears to persist as the happy coincidence of donors' desire for immortality for themselves and their cultural beliefs, the professional staffs' desire for employment and authority, and society's desire for narrowly controlled investment capital. While tax laws could be reformed to encourage charities to increase current expenditures, society might better take subsidies now based on

organizational form and redirect them to any provider of public goods, nonprofit or proprietary.

DERIVATIVES AND REHYPOTHECATION FAILURE: IT'S 3:00 P.M., DO YOU KNOW WHERE YOUR COLLATERAL IS? ..... *Christian A. Johnson* 949

Pledgors in derivative transactions commonly grant "use" or "rehypothecation" rights to the secured party. This right entitles the secured party to use, pledge, or sell the pledged collateral prior to the pledgor satisfying its obligations to the secured party. Granting this right, however, places the pledgor at risk in the event that the secured party becomes insolvent or bankrupt prior to returning the collateral. Although a pledgor may be able to set off its obligations to the secured party against the unreturned collateral, there are also other protections that the pledgor should consider prior to granting a right of rehypothecation.

THE EMERGING CRONYISM DEFENSE AND AFFIRMATIVE ACTION: A CRITICAL PERSPECTIVE ON THE DISTINCTION BETWEEN COLORBLIND AND RACE-CONSCIOUS DECISION MAKING UNDER TITLE VII ..... *Ann C. McGinley* 1003

Comparing the law's treatment of cronyism and affirmative action, Professor McGinley posits that the mere use of—or failure to use—race in decision making should not determine whether an employer is liable under Title VII. Instead, Professor McGinley proposes that even in the absence of an conscious race-based decision, Title VII should be reinterpreted to uphold the "merit principle" for the classes of persons the Act was designed to protect. Moreover, where the decision is consciously race-based, the law should consider the historical and social context in which the decision is made and the type and extent of injuries caused by the decision in determining its legality under Title VII.

PLACED IN PURGATORY: CONDITIONAL RELEASE OF INSANITY ACQUITTEES ..... *Grant H. Morris* 1061

Typically, persons acquitted of crime by reason of insanity are treated in secure mental institutions until they are no longer dangerous. For these patients, conditional release programs provide a transitional step between institutional confinement and community freedom. Conditional release programs impose constraints on patients, closely monitor their activities, and seek revocation of outpatient status when community treatment is unsuccessful. This Article reports on a study of all insanity acquittee patients processed through one conditional release

program over a nine-year period. The study examines recommendations of the program's mental health professionals on questions of patient status: should the patient's conditional release be revoked; should the patient be retained in the program for an additional year; should the patient be restored to sanity. The Article concludes with recommendations to assure that conditional release programs achieve the legitimate objective of enhanced community security without inflicting impermissible punishment on the patients they treat.

## *Essay*

*UNITED STATES V. LANIER*: SECURING THE FREEDOM TO CHOOSE ..... *Johanna R. Shargel* 1115

To date, no federal court has recognized women's constitutional right to be free from sexual assault by a state official acting under color of state law. Last term, in *United State v. Lanier*, the Supreme Court remanded the issue to the Sixth Circuit for consideration. This Essay maintains that sexual assault is clearly a constitutional crime when committed by a state actor. Rather than relying on the Fifth Amendment's protection of bodily integrity, this Essay argues that the right to be free from state-imposed sexual assault is most appropriately found within the framework of substantive due process. Because substantive due process protects against state interference with decisions about whom to marry, whether to terminate a pregnancy, and whether to conceive a child, it logically must protect against state interference with the decision about whether, and with whom to, have sexual relations. Approaching the issue of sexual assault in this manner also focuses needed attention on the fact that rape, like other substantive due process violations, is fundamentally a violation of the victim's decision making capacity, her personal autonomy. Finally, this Essay posits that recognizing sexual assault as a constitutional violation when committed by a state official acting under color of state law would not impermissibly destroy any of the carefully drawn lines of federalism.

## *Note*

THE 1996 ARIZONA EMPLOYMENT PROTECTION ACT: A RETURN TO THE EMPLOYMENT-AT-WILL DOCTRINE ..... *Marzetta Jones* 1139

This Note examines the history of the employment-at-will doctrine in Arizona and how the doctrine has been affected by the Arizona Employment Protection Act of 1996. The Note focuses on the different provisions of the Act and how these provisions strengthen Arizona's status as an employment-at-will state. The Note concludes by discussing several constitutional concerns raised by critics of the Act.