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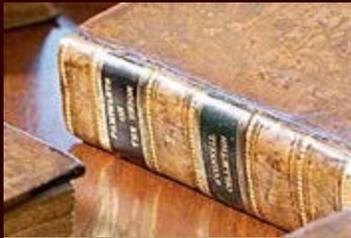


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2011 NEWS ARCHIVE

11/22/11

The Boston College Law Review (BCLR) has published its November edition, available [here](#).

This November issue includes the following student notes and articles by outside authors:

Babette E.L. Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries*

When he sat on the U.S. Court of Appeals for the First Circuit, Justice Steven Breyer noted the compelling dynamic between regulation and antitrust laws. He wrote that although antitrust and regulation attempt to achieve similar goals of low prices, efficiency, and innovation, “[e]conomic regulators seek to achieve them directly by controlling prices through rules and regulations; antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.” Breyer underscored the tension in the fight for jurisdictional control between regulation and antitrust. In *FCC Regulation Versus Antitrust: How Net Neutrality Is Defining the Boundaries*, Professor Babette E.L. Boliek explores this tension in the context of the jurisdictional battle over net neutrality governance. On one side is the potential regulator, the Federal Communications Commission; on the other side is the antitrust enforcer, the Department of Justice. Boliek, an associate professor of law at Pepperdine School of Law, provides a detailed, legally coherent road map for Congress to resolve the jurisdictional dilemma. Describing the FCC’s current attempts at regulating net neutrality as “agency overreach,” Boliek provides a workable standard for limiting such overreach and relying on vigorous antitrust authority to govern anticompetitive behavior in the net neutrality arena.

Bryan Clark and Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can and Can't Do to Limit Judicial Review*

Over the years, many authors have discussed judicial oversight of agency actions. In *Regulatory Hide and Seek: What Agencies Can and Can't Do to Limit Judicial Review*, Bryan Clark and Amanda C. Leiter, an associate professor of law at the Catholic University Columbus School of Law, explore the lesser discussed topic of agencies’ role in modulating that oversight. They consider cases in which the timing or form of an agency action has curtailed judicial review of the agency’s policy choices. In some such cases, the authors posit, the agency’s choice of form deprived the court of statutory or Article III jurisdiction. In others, the court chose to delay or deny review to avoid interfering with agency policy development. Despite these differences, Clark and Leiter argue, all such “reviewability” cases pose important constitutional questions about the degree to which an agency should be able to limit judicial oversight of its activities. The authors conclude that courts pay too little attention to these questions, and propose a more systematic framework for evaluating the constitutional implications of allowing an agency to modulate the availability of judicial review by manipulating the structure of its actions.

Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*

Some constitutional theorists defend unbounded executive power to respond to emergencies or expansive discretionary powers to complete statutory directives. Against these anti-Madisonian approaches, Professor Thomas P. Crocker examines how the textual assignment of republican virtues helps to constitute and constrain the president's power. In his article, *Presidential Power and Constitutional Responsibility*, Crocker, an associate professor of law at the University of South Carolina School of Law, posits that the Madisonian solution for constitutional constraint both creates institutions for unenlightened statesmen and relies on virtue to make governing possible. Constitutional responsibility is a consistent textual theme found in the command to "take Care that the Laws be faithfully executed," the responsibility to remain faithful to the office of president, and the obligation to preserve the Constitution itself. Although presidential discretion in executing and in interpreting the laws is inevitable, Crocker argues, he also explains why presidents are constrained by virtues such as care and fidelity, by integrity in interpretive practices, and by the normative and structural obligations of office. Crocker contends that these Article II obligations, paired with the statutory and implied constitutional duty to do only what is both necessary and proper, provide textual grounds for thick normative constraints on presidential power even in the absence of more robust structural constraints. A president's "necessary" power to complete statutory directives is constrained by obligations to do only what is "proper." A president has great responsibility, Crocker concludes, both in executing the laws and in constituting the national community through constitutional practices and commitments.

Brendan S. Maher, *The Benefits of Opt-in Federalism*

The United States Supreme Court, after hearing five and a half hours of oral argument, will have the final say on the constitutionality of the Patient Protection and Affordable Care Act ("ACA"). Regardless of how the Court resolves what has become an intense constitutional debate, Brendan S. Maher has recognized a choice-maximizing characteristic of the ACA that could positively influence policy-making decisions for generations to come. In *The Benefits of Opt-in Federalism*, Maher points out that the architecture of the ACA empowers individuals and states to choose whether they want their insurance benefits to be governed by state law or federal law. Maher is an assistant professor of law at Oklahoma City University School of Law and has previously published on benefit theory and policy. That history, along with appellate litigation experience involving ERISA, uniquely positioned Maher to identify the novel structure of the ACA, which he labels, "opt-in federalism." The concept of enabling people to choose whether state or federal law should apply, Maher argues, need not be limited to the ACA. And so Maher articulates how opt-in federalism can play an important role in answering benefits questions both in the health care and retirement settings. The theory of opt-in federalism, Maher asserts, offers enticing prospects of maximizing individual preferences, promoting desirable evolution of legal rules, and restoring to states their traditional function of regulating local insurance arrangements, all while accommodating disagreement regarding the essence of optimal legal rules.

Vincent Chiappini, Note, *How American Are American Depositary Receipts? ADRs, Rule 10b-5 Suits, and Morrison v. National Australia Bank*

In his Note, *How American Are American Depositary Receipts? ADRs, Rule 10b-5 Suits, and Morrison v. National Australia Bank*, Vincent Chiappini explores the international reach of U.S. securities laws. America has enacted strong anti-fraud laws that allow private plaintiffs to sue issuers of securities. For the last several decades, American courts judged whether to apply these laws to securities with foreign elements based on how much of the alleged fraud's conduct and effects took place in the United States. A 2010 Supreme Court case, however, replaced the old tests with an entirely new, bright-line "transactional test." Yet, balancing this concern for clarity without forgetting fairness is not so simple in a world of global commerce. Securities like American Depositary Receipts (commonly called ADRs) blur these bright lines because they are hybrids of American and foreign securities. Considering the competing interests of investors, securities issuers, foreign governments, and Congress, Chiappini proposes a strategy for dealing with ADRs under the Supreme Court's new test.

Randall L. Newsom, Note, *Cease and Desist: Finding an Equitable Solution in Trademark Dispute Between High Schools and Colleges*

For high school sports teams, the fiercest competition may often come from the school down the road or the neighboring county. But for a growing number of high schools, colleges and universities are proving to be formidable, if not unlikely, opponents. In his Note, *Cease and Desist: Finding an Equitable Solution in Trademark Dispute Between High Schools and Colleges*, Randall L. Newsom examines trademark battles between high schools and colleges over the use of sports team names and logos. When a college discovers that a high school is using names or logos covered by the college's trademark, the college typically sends a "cease and desist" letter to the high school in order to protect its trademark. Newsom notes that upon receiving the letter, a high school is placed in a position of unequal bargaining power, creating a presumption that the college is correct in asserting its rights. The presumption, never tested in court, leads most high schools to settle the dispute rather than litigate their own rights. Newsom argues such a presumption should not exist and that in fact colleges may be overstating their trademark rights. To resolve the uncertainty, Newsom calls for high schools and colleges to re-evaluate their positions and articulates a uniform settlement that would benefit both sides of a sensitive, yet unresolved, debate.

Kevin C. Quigley, Note, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*

In a landmark 2005 decision, *Granholm v. Heald*, the U.S. Supreme Court ruled that states could not constitutionally discriminate in interstate commerce by permitting in-state wineries to ship directly to customers while prohibiting the same for out-of-state wineries. States previously had argued, with some success historically, that the Twenty-first Amendment authorized them to regulate liquor as they pleased—without Commerce Clause interference. *Granholm* seemed to clearly establish, once and for all, that "the Twenty-first Amendment does not supersede other provisions of the Constitution." In his Note, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, Kevin C. Quigley identifies and discusses several recent federal courts of appeals that have refused to heed this clear message when confronted with challenges to laws discriminating against out-of-state wine retailers. Quigley argues that a simple Commerce Clause analysis should apply to discrimination against all out-of-state business interests, regardless of their status with respect to the traditional three-tier regulatory system.

Eli R. Shindelman, Note, *Time for the Court to Become 'Intimate' with Surveillance Technology*

The Fourth Amendment protects people's reasonable expectations of privacy when there is an actual, subjective expectation of privacy and when society recognizes that expectation as reasonable. Eli R. Shindelman, in his Note *Time for the Court to Become 'Intimate' with Surveillance Technology*, posits that Fourth Amendment protections should evolve over time according to society's beliefs about which areas of an individual's life should be protected. Law enforcement has seized on the rapid growth in technology over the past two decades to expand its surveillance capabilities. Shindelman argues that Fourth Amendment protections, however, have not kept pace with technology. Consequently, federal courts have used outdated precedent that addresses archaic forms of surveillance technology when analyzing the constitutionality of law enforcement's use of significantly more sophisticated surveillance technology. Shindelman highlights that some states have expressed dissatisfaction with this outdated precedent and have relied on their own state constitutions to provide citizens with increased protection. Acknowledging a change in what society recognizes as a reasonable expectation of privacy, the U.S. Court of Appeals for the D.C. Circuit, in *United States v. Maynard*, ruled that prolonged use of Global Positioning System (GPS) surveillance technology deserves Fourth Amendment protections because GPS creates an "intimate picture." The D.C. Circuit's "intimate picture" test, Shindelman concludes, ought to be used by other courts to appropriately protect individuals from ever-changing forms of surveillance technology.

