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Final 2013-14 Issue of Boston College Law Review Now Available

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Final 2013-14 Issue of Boston College Law Review Now Available

2014 NEWS ARCHIVE

05/20/14

The final issue of the *Boston College Law Review* for the 2013-2014 academic year is now available. The issue features four articles from outside professors and three student notes, summaries of which are included below. The full articles are available at the BCLR [website](#).

"Over the year, the *Review* has published nearly 2000 pages of law review text spanning 22 articles, 18 student notes, and 14 case comments," said BCLR Editor-in-chief David A. Libardoni '14 in a recent email. "We are very proud of the work we've done, and we are confident that next year's Board of Editors will continue to maintain BCLR's high standards."

Abstracts

[Mirit Eyal-Cohen, *Legal Mirrors of Entrepreneurship*](#)

In *Legal Mirrors of Entrepreneurship*, Professor Mirit Eyal-Cohen of the University of Pittsburgh School of Law proposes a new legal model for promoting innovation and economic development that uses entrepreneurial character, rather than firm size, as a criteria for allocating benefits. The Article first reviews the elements of economic development theory as described by Joseph Schumpeter, who emphasized the role of the entrepreneur in developing the economy. The Article then describes the history of small business in America, explaining why the law mistakenly favors small businesses today. Next, the Article proposes a five-dimensional legal model of economic entrepreneurship, taking into account a firm's age, knowledge procurement, innovation yield, labor expansion, and entrepreneurial success. Eyal-Cohen then shows how this model could be used by policymakers to incentivize entrepreneurial firms and encourage economic growth. By looking at entrepreneurship instead of firm size, the model will make the law consider economic theory, rid the law of anachronistic small business favoritism, and provide policymakers with more accurate tools to recognize and encourage innovative firms that have the potential to improve the economy.

[Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*](#)

The U.S. Supreme Court and some state courts have constitutionalized an increasingly rigid and broad vision of adversarial adjudication's requirements. Commentators often celebrate this adversarial revolution as expanding defendants' rights of confrontation, cross-examination, and self-representation. Yet in her Article, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, Professor Mary Fan of the University of Washington School of Law explains that the adversarial revolution also has created an arsenal of tactics to retraumatize victims of sexual assault and general violent crime. Recognizing that certain adversarial rights were historically forged for adjudicating crimes against the sovereign, Fan challenges the rigid application of adversarial ideals to crimes of sex and violence involving victims. In light of this understanding, Fan discusses how best to reduce the iatrogenic harms inflicted upon victim-witnesses by the adversarial process, and defends a subset of protective measures that avert further injury to victims while remaining sensitive to defendants' right.

[Claudia E. Haupt, *Active Symbols*](#)

Visual representations of religious symbols create difficulty for courts. Lacking empirical data on how images communicate, courts routinely dismiss visual religious symbols as “passive.” In her Article, *Active Symbols*, Claudia E. Haupt of Columbia Law School challenges the notion that symbols are passive, applying insights from cognitive neuroscience research to Establishment Clause theory and doctrine. Haupt argues that visual symbolic messages can be at least as active as textual messages. Therefore, Haupt contends that religious messages should be assessed in a medium-neutral manner in terms of their communicative impact—that is, irrespective of their textual or visual form. Providing a new framework for assessing religious symbolic messages, Haupt reconceptualizes the dominant competing approaches to symbolic messages in Establishment Clause doctrine—coercion and endorsement—as matters of degree on a spectrum of communicative impact. Haupt’s focus on communicative impact reconciles the approaches to symbolic speech in the Free Speech and Establishment Clause contexts and allows Establishment Clause theory to more accurately account for underlying normative concerns.

[Sarah E. Light, *The Military Environmental Complex*](#)

Current legal rules tell us that the military can disregard environmental laws when they conflict with the military’s national security mission. But in *The Military-Environmental Complex*, Wharton School Professor Sarah E. Light argues that the military’s roles as a war fighter, a landlord, a first user of pre-commercial technologies, and a potential high-demand consumer provide it with the opportunity to lead the way in sustainable energy use. Congress, the President, and the DoD have already taken important steps to reduce energy use, particularly through partnerships with the private sector. Such public-private partnerships among the military, private financiers, and technology firms are an essential form of collaboration with the potential to transform our nation’s energy profile for the better. With reference to the lessons of the military-industrial complex—and with controls to limit fraud, abuse, and rent-seeking behavior—these efforts should be expanded in the new Military-Environmental Complex.

[Riley Lovendale, Note, *Tax vs. Penalty, Round Two: Interpreting the ACA’s Assessable Payment as a Tax for Federal Award Cost Allowances*](#)

In his Note, *Tax vs. Penalty, Round Two: Interpreting the ACA’s Assessable Payment as a Tax for Federal Award Cost Allowances*, Riley Lovendale examines an ambiguity in the Patient Protection and Affordable Care Act (ACA). The ACA imposes an “assessable payment” on certain employers that fails to offer affordable health insurance to their employees. Unfortunately, this assessable payment label poses a problem for nonprofits and other nonfederal entities receiving federal awards. Per uniform guidance from the Office of Management and Budget, these entities may use federal awards to pay taxes, but not fines or penalties. In light of the Supreme Court’s 2012 decision in *National Federation of Independent Business v. Sebelius*—which held that the ACA’s individual mandate’s “shared responsibility payment” could, for constitutional purposes, be interpreted as a tax—and the characteristics of the ACA’s assessable payment itself, Lovendale argues that an assessable payment should likewise be interpreted as a tax. Lovendale concludes that interpreting the assessable payment as a tax recognizes its inherent functionality as such and ensures that Congress does not escape political accountability for imposing taxes by using ambiguous terminology to describe them.

[Monica Thoele, Note, *Throwing Admiralty Jurisdiction a Lifevest: Preserving Jurisdiction for Maritime Torts That Do Not Involve Vessels*](#)

In her Note, *Throwing Admiralty Jurisdiction a Lifevest: Preserving Jurisdiction for Maritime Torts That Do Not Involve Vessels*, Monica Thoele examines some lower federal courts’ recent departure from the Supreme Court’s current test for establishing admiralty jurisdiction for in

personam tort suits. Contrary to the current test, some lower courts have started denying admiralty jurisdiction if a vessel is not involved in the tort. Thoele explains that a vessel requirement upsets the spirit of the Extension of Admiralty Jurisdiction Act of 1948, forces judges to decide an issue of fact at the outset of litigation, and inadequately protects maritime commerce. Thus, Thoele proposes that the best solution would be for Congress to pass a new admiralty jurisdiction statute that incorporates both the 1948 Act and the Supreme Court's test and explicitly states that a vessel's involvement is not required to establish admiralty jurisdiction.

[Michael Welsh, Note, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*](#)

In his Note, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, Michael Welsh examines the Supreme Court's recent expansion of the equal sovereignty doctrine, which states that the federal government cannot enact legislation that renders states unequal in power. In 2013, in *Shelby County v. Holder*, the Supreme Court held that the doctrine applied to all disparate treatment of states. As a result, the expanded doctrine leaves federal statutes enacted under the Commerce Clause—such as the Professional and Amateur Sports Protection Act (PASPA), which prohibits state-sanctioned sports gambling in all states except Nevada—on uncertain constitutional grounds. In his Note, Welsh argues that *Shelby County* requires Congress to justify all disparate treatment of states by demonstrating that the unequal treatment is sufficiently related to the problem Congress sought to address. Under this approach, Welsh contends that PASPA violates the equal sovereignty doctrine because exempting Nevada is not reasonably related to remedying the national problem of sports gambling that PASPA seeks to address.