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2012 NEWS ARCHIVE

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Newton, MA--The May issue of the Boston College Law Review recently went to press. The issue can be found at http://bclawreview.org/.

Abstracts:

**Benjamin Levin**, *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry*

In *Made in the U.S.A.: Corporate Responsibility and Collective Identity in the American Automotive Industry* Benjamin Levin, an attorney at Neufeld Scheck & Brustein, LLP, challenges the corporate-constructed image of American business and industry. By focusing on the automotive industry and particularly on the tenuous relationship between the rhetoric of automotive industry advertising and doctrinal corporate law, Levin examines the ways that social and legal actors understand what it means for a corporation or its products to be American. In a global economy, Levin questions, what does it mean for a corporation to present the impression of national citizenship? Considering the recent bailout of American automotive corporations, the automotive industry today, according to Levin, acts as a powerful vehicle for problematizing the conflicted public/private nature of the corporate form and for examining what it means for a corporation to be American. By examining the ways in which consumable myths of the American corporation interact with the institutions and legal regimes that govern American corporations, Levin argues that the advertised image of the national in the global economy serves as a broad corporate veil, obscuring the consumer’s understanding of corporate identity and corporate accountability. Levin situates the identification of corporate nationality within a broader framework of debates on corporate social responsibility and interrogates long-held cultural conceptions of the American corporation and corporate decision making.

**Reid Kress Weisbord**, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*

Even though most Americans do not intend to die intestate nor do most understand the consequences of intestacy, a majority die without executing a will. As Reid Kress Weisbord, Assistant Professor at Rutgers University School of Law-Newark points out, most scholars, when addressing this issue, simply accept the high rate of intestacy. Whether it is because people don’t want to face their own mortality or other matters relating to death, many accept the intestacy rate as, as Weisbord puts it, a fait accompli. Weisbord offers an alternative explanation by ascribing blame on the relative inaccessibility of the will-making process: people don’t write wills because the will-making process is obscure, complex, and costly. In *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, Weisbord advocates for renewed consideration of statutory form wills with several innovations, most notably, the creation of a "testamentary schedule"—an optional form will attached to the state individual income tax return that could be prepared and filed electronically. By integrating the two, Weisbord suggests, people would be thinking about wills right as they are required to prepare legally significant tax docs that take into account considerations relevant to estate planning.

**Samuel R. Wiseman**, *Habeas After Pinholster*

In April 2011, the Supreme Court in *Cullen v. Pinholster* placed a road block in the way of a
prisoner’s ability to introduce new evidence in a federal habeas review of a state court decision. The Court held that federal court habeas review must be limited to evaluating the reasonableness of the state court decision solely on the basis of the record before the state court. Accordingly, new evidence developed in an evidentiary hearing before the federal court could not be considered. As Samuel R. Wiseman notes in Habeas After Pinholster, the opinion, which attracted seven votes from the nine Justices, was not particularly divisive or controversial. But in delivering much-needed analysis and insight into the new reality of post-conviction due process after Pinholster, Wiseman writes “Pinholster will have significant ramifications, not just for the habeas petitioners immediately affected, but for the resolution of fundamental questions surrounding AEDPA, the Suspension Clause, and postconviction due process.” A Florida State University Law Professor, Wiseman deftly contrasts the pre-Pinholster and post-Pinholster worlds for prisoner’s who may no longer use the federal courts to adequately develop claims they were unable to develop in state court. With such federal review curtailed, Wiseman theorizes that the stakes have been raised at the state court level where Pinholster is likely to “provoke a variety of challenges to the fairness of state procedures.” Wiseman goes on to examine Suspension Clause and Due Process issues he expects to arise in Pinholster’s wake. The Article is among several Professor Wiseman has published highlighting the contours of pre-trial and post-trial criminal procedure issues.

Dustin M. Dow, Note, The Unambiguous Supremacy Clause

The theory behind the Supremacy Clause is simple. In a conflict, federal law trumps state law. Whether or not the Supremacy Clause should—or even can—be invoked to invalidate a state law or action on preemption grounds reveals a more complex issue. In The Unambiguous Supremacy Clause, Dustin M. Dow explores a long dormant but recently emerging Supremacy Clause issue, examining which parties may or may not enforce the Supremacy Clause’s ordering power to invalidate a state law or action. Using the backdrop of three Supreme Court cases that have discussed the issue without deciding it, Dow argues that the Supremacy Clause by itself should not provide a federal court cause of action to enjoin a state law when an allegedly preemptive federal law does not otherwise provide a private cause of action. In reaching this conclusion, Dow notes that policy concerns such as the respect for federalism and Separation of Powers among the federal branches should preclude any notions that the Supremacy Clause provides private litigants a stand-alone cause of action.

Mathilda McGee-Tubb, Note, Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA

The Family Educational Rights and Privacy Act (FERPA) requires that universities receiving federal funds through the U.S. Department of Education maintain baseline student privacy protections. Simultaneously, state open records laws require public universities, as state actors, to disclose certain types of information upon a request from the public. When both statutes apply to requested information, courts have reached opposite results as to the universities’ obligations. In her Note, Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA, Mathilda McGee-Tubb examines this conflict and courts’ varied rationales for their holdings. McGee-Tubb argues that the solution is actually a simple one: if FERPA is a valid federal conditional funding statute, then the Supremacy Clause must dictate the outcome when FERPA and a state open records law conflict. Employing the unconstitutional conditions doctrine offered by South Dakota v. Dole and its progeny, McGee-Tubb determines that FERPA is valid. Therefore, when a state open records law would require disclosure of information protected by FERPA, FERPA must trump the contradictory state law requirements as binding federal law.

Tokufumi J. Noda, Note, The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use

In the context of land use, the Religious Land Use and Institutionalized Persons Act (RLUIPA) allows religious institutions to challenge land-use decisions that unfairly discriminate against religious land use. Of the various mechanisms in the statute that provide relief, the substantial burden and equal terms provisions have created confusion in the courts and controversy among scholars. In his Note, The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use, Tokufumi Noda observes that courts and scholars
have framed the discussion of RLUIPA as a matter of power and control. Further, Noda looks to Judge Richard Posner’s application of the substantial burden and equal terms provisions to refract the discussion on RLUIPA through the lens of a law and economics approach. Although a community-centered, fact-specific, law and economics approach by a court raises its own set of questions, Noda argues that this perspective can be a useful tool in opening new ways of thinking about RLUIPA’s application and religious discrimination in land use.

**Meredith Regan**, Note, *All the World Wide Web Is a Stage: Free Speech, Expressive Association, and the Right to Choose Your Audience*

The proliferation of smartphones and other small data recording devices that can instantly upload content to the internet have lead both lawmakers and litigants to apply anti-wiretapping laws to information posted online. In *All the World Wide Web Is A Stage: Free Speech, Expressive Association, and the Right to Choose Your Audience*, Meredith Regan examines how the application of these statutes may cause the First Amendment’s protection of free speech and expressive association to conflict. The Supreme Court would be most likely to address the disclosure of an illegally obtained recording online by allowing such a recording to be disclosed when it contains content of public concern. Regan argues that this public concern approach, however, is both over- and under-inclusive when applied to the online disclosure of recordings. Because the public concern test fails to acknowledge how the internet allows people to communicate with different kinds of publics with a speech interest in viewing online recordings or the varying kinds of associations who might need protection against disclosure, the public concern approach ought to be replaced with an approach that balances the right to expressive association and the right to free speech.