Northern Illinois University Law Review

Volume 34 | Issue 1 Article 8

9-1-2013

Vol. 34, no. 1, Fall 2013: Table of Contents

Northern Illinois University Law Review

Northern Illinois University
Law Review

Volume 34 Fall 2013 Number 1

ARTICLES

Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case

Catherine Jean Archibald..... ……1

This year was a historic time in the gay rights movement. While the nation held its collective breath, the Supreme Court deliberated over the questions of whether same-sex couples have constitutional rights to marry and have their marriages recognized by the federal government. In its landmark decision issued last summer, the Supreme Court struck down part of the Federal Defense of Marriage Act (DOMA), finding that same-sex couples married under state law must have their marriages recognized by the federal government. However, in its other same-sex marriage decision, the Supreme Court avoided the question, for now, of whether same-sex couples have a constitutional right to marry in the first place, finding instead that the petitioners in the case did not have standing to appeal the lower court decision. Thus, it is almost certain that the Supreme Court will address the question of whether same-sex couples have a constitutional right to marry in a later case brought by a proper petitioner. When the Court does decide to address the constitutionality of the same-sex marriage prohibitions still present in most state laws, it must find them unconstitutional. As this Article will show, under clear Supreme Court precedent, same-sex marriage exclusions discriminate based on sex and must therefore be scrutinized with a heightened standard of review. As courts have uniformly found, same-sex marriage exclusions cannot pass heightened review. Thus, when the Supreme Court does address the question of whether same-sex couples have a constitutional right to marry, it must answer in the affirmative because the exclusions cannot pass the heightened scrutiny required under a sex discrimination analysis.

How Tax Increment Financing (TIF) Districts Correlate with Taxable Properties
Randall K. Johnson ..... ….39

This article deals with Tax Increment Financing (TIF), which is a popular economic development tool. TIF borrows against future tax revenues to subsidize current development projects. In Illinois, this economic development tool is justified by its promise to expand the local tax base: by increasing tax revenues, increasing the number of taxpayers or increasing the number of taxable properties in the area. However, it is not clear that TIF delivers on its promise.

A new dataset, which is introduced in this article, helps to clarify the issue. It does so by providing information about the number of TIF Districts in suburban Cook County, Illinois, the number of taxable properties therein and the nature of the relationship between these variables. If these variables move together, which would indicate that TIF Districts positively correlate with taxable properties, this article will find that TIF delivers on its promise.

Rethinking the Worker Classification Test:
Employees, Entrepreneurship, and Empowerment
Griffin Toronjo Pivateau ..... ….67

The structure of the American workplace depends on the ability to distinguish between employees and independent contractors. Unfortunately, the law provides little to guide employers in classifying workers. The legal tests to determine worker status are confusing, yield inconsistent results, and are not suited to the evolving employment relationship. Traditionally, courts examine the amount of control exerted over the putative employee by the employer: The more control exerted by the employer over the work, the more likely it is that the worker will be considered an employee. Control, however, is not the only factor to examine in determining worker status. Several appellate courts have suggested that another factor--the entrepreneurial opportunity for profit or loss--should play a greater role in classification decisions. In this article, I propose an employee-centric classification test based on the presence of genuine entrepreneurial opportunity. I examine the common elements of entrepreneurship and create a revised worker classification test that accurately reflects the difference between employee and independent contractor.

Consideration for a Price:
Using the Contract Price to Interpret Ambiguous Contract Terms
Donald J. Smythe 109

Most contract cases involve disputes about the interpretation of the contracts. There is a voluminous law and economics literature on contract interpretation, but ironically, it does not address whether and how the contract term that is usually of most interest to economists – the contract price – might be used to interpret other ambiguous contract terms. This is no doubt in part because there are legal authorities that discourage courts from considering the adequacy of the contract price in deciding whether other clauses are contractually enforceable. However, these authorities are much more persuasive for some contracts than for others. Indeed, in some contracts

for the sale of goods between sophisticated business parties the contract price provides costless information that may be highly relevant to interpreting parties' intended bargains. From an economic perspective, therefore, courts would be remiss in such cases if they ignored it. Indeed, it is not clear that the drafters of the UCC intended to preclude courts from considering the contract price in interpreting sales contracts; the Official Comments to the UCC actually appear to prescribe that in at least some contexts courts should evaluate the contract price in interpreting parties' intended bargains. It should not be surprising therefore that many courts have in fact considered the adequacy of the contract price in interpreting parties' intended bargains under UCC contracts. But to the extent that they have, they have done so without any guidance from economic theory. This article presents an economic analysis of bargains and uses it to provide some guidelines to courts about how to use the contract price to interpret whether disputed terms are an intended part of parties' bargains. It then illustrates how the guidelines might have been applied in some recent sales cases. The hope is that the use of some basic economic analysis might help to improve the resolution of at least some contractual disputes.

A Bend in the Law & Literature: Greed, Anarchy, and Dictatorship in the African Worlds of V.S. Naipaul and Ngugi Wa Thiong'o

Dustin A. Zacks 169

This Article examines two giants of colonial and postcolonial fiction involving African states that heretofore have been largely ignored by the law and literature movement. Nobel Prize winner V.S. Naipaul and East Africa's foremost novelist Ngugi Wa Thiongo'o are worth studying for their vivid descriptions of the challenges postcolonial societies face – challenges such as corruption and authoritarianism that are usually addressed, at least in legal scholarship, in the context of international or human rights law, rather than in the context of narrative fiction.

The Article also critiques traditional academic literary criticism for its disparate treatment of the two authors. Naipaul is attacked as being a snobbish Westerner, whose gloomy pronouncements about the state of the law and the prospect of reform in African states arise from his supposedly racialist opinions. Thiong'o, by contrast, has been heralded for giving an authentic, non-Western view of Kenya's independence and post-independence struggles.

The Article should serve as a reappraisal of the previous criticism of Naipaul's work in light of the precision of his dire descriptions of corrupt African officialdom, which compares favorably with Thiong'o's supposedly more authentic voice.

NOTE AND COMMENT

Two Years Is too Long: The Two-Year Ban on the Agency Model Can Save the E-Book Industry but Ruin Bookstores

Jessica Harrill 189

Ever since electronic books and their e-readers hit the market, there has been a near constant struggle between the e-book retailers and the publishers, on who should set the price for each e-book. In 2011, when Apple decided to join the e-reader battle, the publishers changed their pricing scheme with all e-book retailers, giving the publishers most of the power. An investigation by the Department of Justice into Apple and five of the six major publishing companies led to an antitrust suit for fixing prices that most publishers have since settled out of court. This Comment argues that one specific clause in the settlement, allowing e-book retailers more freedom to pick its own prices for two years without publisher interference, will contribute to the problem the Department of Justice is attempting to prevent. While the settlement removes the price-fixing problems brought about by the publishers' actions, this Comment explains how the two year ban on publisher interference with prices will hurt the literary industry in the long run. To do this, the Comment will show that allowing major e-book retailers an opportunity to lower their prices significantly and gain a monopoly over others not equipped to handle the low prices might lead to more problems with the Department of Justice in the future.

Equal Pay for Women Can Become a Reality: A Proposal for Enactment of the Paycheck Fairness Act

Catherine Lerum 221

The Equal Pay Act of 1963 has proved ineffective for women pursuing claims based on sex discrimination in the workplace. Legislative history indicates that the overall purpose of the EPA was to eliminate the wage gap; however, this honorable goal has not been achieved. The Paycheck Fairness Act, which was first introduced to Congress in 1997, will amend the EPA and further the original intent of Congress: eliminate the wage gap between men and women. The proposed legislation urges several new propositions, but this Legislative Note focuses on three amendments. First, the PFA would amend the infamous "any other factor other than sex" affirmative defense with a business justification defense. Second, the PFA clearly defines the term "establishment." Last, the PFA would alter the original EPA collective action into a Federal Rule of Civil Procedure 23 class action. The overall goal of this Legislative Note indicates—based on case law, legislative history, and other scholarly material—that through these three amendments women will be able to more effectively pursue claims concerning sex discrimination.