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ARTICLES

The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough

Robert J. Landry, III 245

The scholarship addressing the changes to individual consumer chapter 7 cases under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has largely focused on application of the mechanics of the means test and the presumption of abuse standard. The focus of this article is the application of the abuse standard in cases in which the means test is not applicable, has been passed, or has been rebutted. The author argues that most of the litigation and attention in the post-BAPCPA era will be in this area. The resulting complex statutory framework may be insufficient for debtors to obtain bankruptcy relief.

The Proverbial Axe to the Judicial Oak: The Impact of *Stoneridge* on Plaintiff's Actions Under § 10(b)

Laura D. Mruk 281

This article analyzes the United States Supreme Court decision of Stoneridge Investment Partners, LLC v. Scientific-Atlanta, *in which the Court held that fraud claims under section 10(b) of the Securites Exchange Act of 1934 cannot be sustained against third parties that did not directly mislead investors. After providing a brief overview of section 10(b) and rule 10b-5 jurisprudence, this note will discuss the facts surrounding the* Stoneridge *decision and provide an in-depth discussion of the majority opinion. This article ultimately advances the argument that the* Stoneridge *Court erred in its analysis of the plain language of the statute, previous case law, and the facts of the case and, thus, erred in its decision. Specifically, this article will assert that the* Stoneridge *Court effectively has nullified liability under 10(b)-5(a) and (c). Finally, this article will consider the lasting impacts of the decision on securities litigation.*

ESSAYS

A Turn to Politics: Sanford Levinson's *Our Undemocratic Constitution* and Debates in Contemporary Constitutional Theory
Kenneth D. Ward 311

In the last generation, politics has replaced philosophy as constitutional theory's center of gravity. While theorists once focused on judicial authority and looked to philosophy to validate the principles of justice that judges enforced, they now tend to consider how judges fit into the broader political process that defines constitutional doctrine. This essay considers how the change obscures important questions about the nature of democratic government. It does so by examining Sanford Levinson's recent book, Our Undemocratic Constitution*—an attempt to bridge academic theory to the practice of politics that is emblematic of constitutional theory's emphasis of politics over philosophy.*

Peace Is Not the Absence of Conflict, but the Presence of Justice
Reid C. Pixler 335

An issue seldom, if ever, addressed regarding the conflict in Iraq is the role of the Iraqi criminal justice system in addressing acts of terrorism. The figures of "detainees" or "enemy combatants" held by the United States have been widely published, but little comment has been made regarding the challenges facing a small judicial system attempting to function in a war zone. Most of the judges assigned to the major crimes courts live in the same community where the court is located and have modest, if any, special security for their families. This short account details the conflict between the competing political interests grasping for power in post-Saddam Iraq and how the first "Traveling Judges Court," or Task Force Zorro, made an impact in northern Iraq. Once the citizens of Mosul learned of a truly independent court making rulings on the evidence, and not as the result of political or sectarian influence, confidence in the government rose dramatically and cooperation in the identification of terrorists and their "safe houses" became significant. There are no easy solutions to the problems in Iraq. This article addresses some of the "minority" populations living in Iraq, such as the Turkish Kurds and Iranian revolutionaries, whose future is directly dependent upon the role of the United States, and it explores the Rule of Law as a pivotal component in achieving a lasting peace.

Torture and Habeas Corpus as Information-Forcing Devices
Marc D. Falkoff 425

In his remarks before a panel of the Modern Language Association, Professor Falkoff asks his audience to set aside, for a moment, the provocative theories about state-sanctioned torture that have gained traction among literary critics over the years. States may indeed engage in torture, he argues, to terrorize the people or even to build communal bonds among its citizens, but cultural theorists have been wrong to dismiss as pretextual the one justification for torture that resonates with liberals and conservatives alike—that it must be available as an option to force information from a terrorist who would otherwise be unwilling to reveal the details of a threat of mass destruction. Professor Falkoff suggests that such "ticking time bomb" hypotheticals cannot be countered by ignoring them or by simply dismissing them as fanciful. Instead, the hypotheticals can be effectively rebutted only by bringing more information into the public about whom we as a nation have actually tortured and whether or not the information gained from the torture was reliable. The primary legal device for doing so is the writ of habeas corpus, which Professor Falkoff argues turns the habeas lawyer into a kind of mirror image of the state-sanctioned torturer, forcing the state to reveal information about its policies that it would prefer to keep secret.

Torture, Interrogation, and American Modernist Literature
Caleb Smith 433

Originally given as part of a special session panel, "Torture and Interrogation," at the annual convention of the Modern Language Association in San Francisco, California, on December 27, 2008, this paper connects contemporary critical discussions of interrogation to the representation of lynching and police brutality in the early twentieth-century United States. It places American modernist literature, especially William Faulkner's Light in August, *within a broad cultural tradition of thought about extralegal violence, and it argues that the novel's poetic strategies for depicting and analyzing such violence offer a diagnostic alternative to the sentimental discourse that dominates debates about interrogation in the interpretive humanities and critical legal theory. Critics tend to approach interrogation as either a technique of intelligence gathering or a ritual of domination, two apparently irreconcilable views. Faulkner's novel, whose aesthetics depend on a contrast between figures of stasis and figures of motion, suggests that the posing of questions plays a necessary role in the ritual exercise of power. The question transforms a repetitive or regressive act into a forward-looking investigation oriented towards an indefinite future.*

NOTE

Where There's a "Will," There Should Be a Way: Why *In re Salvino* Unjustifiably Restricts the Application of § 523(a)(6) to Exclude Willful and Malicious Breaches of Contract

Michael D. Martinez 441

In accordance with the Bankruptcy Code's policy of limiting the privilege of discharge to "honest but unfortunate" debtors, the Code provides that certain types of debts shall be excepted from discharge as a matter of law. Of the twenty-one exceptions to discharge, the exception for "willful and malicious" injuries contained in section 523(a)(6) of the Code has given rise to a split of authority in the United States Circuit Courts of Appeals regarding whether tortious conduct is an essential element of a willful and malicious injury, as defined in section 523(a)(6). This note analyzes the decision in Wish Acquisition v. Salvino *(In re* Salvino*) that a debt arising from a breach of contract not accompanied by tortious conduct is not subject to exception to discharge under section 523(a)(6). This note challenges the reasoning of the court in In re* Salvino *and argues that the court has immunized an entire class of wrongdoers who were not intended to benefit from the Bankruptcy Code's privilege of granting honest debtors a discharge in bankruptcy. Finally, this note proposes a solution that seeks to address specific concerns raised by the In re* Salvino *court, while ensuring that bankruptcy courts engage in a meaningful inquiry into the deliberateness of a debtor's injury-causing conduct, thus effectuating the Bankruptcy Code's underlying policy of limiting discharge to only honest but unfortunate debtors.*