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ARTICLES

The Same Side of Two Coins: The Peculiar Phenomenon of Bet-Hedging in Campaign Finance

Jason Cohen 271

This paper addresses the propensity of large donors to make financial contributions to competing candidates or party organizations during the same election cycle—for example, giving money to both Bush and Kerry during the 2004 presidential race. This practice, here termed “bet-hedging,” is analyzed in strategic and game-theoretic terms. The paper explores the prevalence of bet-hedging, the possible motivations behind the practice, and the informational concerns surrounding it. Bet-hedging, above all other donation practices, carries a unique implication of ex post favor-seeking. A donor who prefers one side over the other at least partially cancels out its own contribution by hedging its bets. The generosity of a donor who has no preference can only be motivated by a desire for increased influence over the winning party or, at a minimum, the hope of escaping retaliation for failing to support the eventual victor. The paper thus contends that bet-hedging can (constitutionally) and, though it is a tougher question, should (normatively) be regulated under the Buckley v. Valeo and McConnell v. FEC frameworks.

Opening the Flood Gates: *Rasul v. Bush* and the Federal Court’s New World-Wide Habeas Corpus Jurisdiction

Joseph Pope 331

*This article discusses the Supreme Court’s controversial *Rasul v. Bush* decision—a case dealing with the ability of the federal courts to entertain the habeas petitions filed by terrorist suspects detained at Guantanamo Bay, Cuba. The article seeks to make four contributions. First, it argues that the Supreme Court has misinterpreted its own precedent in its interpretation of the territorial reach of the habeas corpus statute. Secondly, it argues that the Court misread the historical record pertaining to the territorial reach of the writ of habeas corpus—which antedated the adoption of the Constitution and was explicitly engrafted into the text of the Constitution. Thirdly, it argues that the implications of the decision are to impede unnecessarily the ability of the military to prosecute the war on terrorism, and promote forum shopping. Lastly, it proffers several statutory “fixes” to ameliorate the consequences of the *Rasul* decision. The principal thesis of the work is that federal courts must strictly construe the limits of their jurisdiction and that the province of expanding (or contracting) that jurisdiction lies with Congress. In addition, the article also criticizes the court for its implicit reliance upon*

international norms in order to arrive at a politically expedient conclusion that is in conflict with established domestic precedent and historical understanding of the ancient writ. I hope that this article will stimulate debate on this issue and also draw attention to the oblique reasoning employed by the Court and the potential damage that the overly broad decision will have on the United States' ability to hold enemy combatants and prosecute the war on terrorism.

COMMENTS

Don't take your organs to heaven. . . . Heaven knows we need them here: Another Look at the Required Response System

Abena Richards 365

This comment examines the constitutional and practical efficacy of the required response system to increasing the number of organs donated for transplantation each year. The required response system has been proposed by several organizations and authors as an effective method to increasing organ donation in the United States. The author asserts that the proposal for a national required response system has not received the attention it deserves, given the potential this system has for relieving the chronic shortage of transplantable organs. This comment discusses the practical problems experienced with the current opt-in system, the constitutional issues associated with the opt-out system, and the ways in which the required response system can alleviate these problems.

Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps

Carrie Lynn Vine..... 413

This article examines the history of damage caps as a means of tort reform and their effect on past medical malpractice crises. The article then proposes alternative solutions for future reform. Statistical evidence is presented demonstrating that damage caps are an ineffective means of reducing malpractice insurance premiums because they do not address the underlying causes of rising premiums. "Malpractice crises" correlate with market fluctuations and changes in the supply and demand of malpractice insurance, rather than with any increase in malpractice litigation or verdicts. In order to address the economic source of malpractice crises, the author proposes two alternative means of reform. First, malpractice insurance should be merit-rated, meaning that statistical information regarding a physician's payout history should be used to assess his or her individual risk of incurring future malpractice payouts, and premium prices set according to that risk. Second, in the event that damage caps are inevitable, a system should be devised in which the severity of the plaintiff's injury is assessed and damages calculated according to an established sliding scale. The article concludes by advocating an economic approach to tort reform, and suggests that legislators study the precise economic causes of malpractice crises in order to devise effective solutions.