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THE OTHER SAME-SEX MARRIAGE DEBATE *Jane S. Schacter* 379

The high profile contemporary controversy about whether to allow same-sex couples to marry has obscured an earlier debate about same-sex marriage. This previous debate took place inside the LGBT movement, where equality advocates faced off about whether marriage equality ought, as a normative matter, to be pursued. With few exceptions, this internal critique of LGBT marriage has receded. In this article, Professor Schacter revisits the earlier debate, considers why pro-equality marriage skepticism faded, reflects on how the public debate about same-sex marriage today might have unfolded differently had the marriage skeptics within the LGBT community held more sway, and suggests ways in which the largely-forgotten internal debate has relevance in the contemporary context.

THE "ACCIDENTAL PROCREATION" ARGUMENT FOR WITHHOLDING LEGAL RECOGNITION FOR SAME-SEX RELATIONSHIPS *Edward Stein* 403

For many years, a common argument made by opponents of same-sex marriage was that marriage crucially involves procreation and, because couples consisting of two people of the same sex simply cannot procreate, therefore, same-sex couples should not be able to marry. While this argument is now widely seen as weak, in its place, a new argument that also involves procreation has emerged that focuses on the claim that different-sex—but *not* same-sex—couples, can *accidentally procreate*. Because of this risk of accidental procreation and the associated risk of harm to children who result from accidental procreation, proponents of this argument conclude that it is permissible for the state to provide different-sex

couples with the opportunity to marry without providing the same opportunity to same-sex couples. Several courts have embraced this argument against same-sex marriage. This paper shows that the accidental procreation argument against same-sex marriage has the same infirmities as prior arguments against same-sex marriage that concern procreation. Both arguments have problems with under- and over-inclusiveness and both embrace an overly narrow account of the role of marriage. The accidental procreation argument should, like previous arguments from procreation, eventually wither under both empirical and logical analysis, and subsequently, be rejected by states as plausible justifications for prohibiting same-sex marriages and rejected by courts as not satisfying rational review.

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This article takes a critical, historical view of the LGBT rights movement in three related areas: marriage equality; injury to same-sex relationships in tort law; and the creation and enforcement of private contractual agreements between same-sex partners. The period surveyed covers the early 1970's through late 2008. Through examination of case law, legislation and legislative history, and the increasing visibility of the LGBT community during the period in question, *Marriage, Tort, and Private Ordering: Rhetoric and Reality in LGBT Rights* argues that, during the 1970's, the socially enforced invisibility of gay lives and relationships translated into an inability to regard "gay marriage" as anything but an oxymoron. Moreover, inasmuch as marriage was also seen as required for relationship validity, tort claims also met with failure when the intimate lives of gay and lesbian couples came into view. Over time, though, both visibility and the vocabulary needed to describe it have moved same-sex couples ever closer to formal, legal equality. Private arrangements by same-sex couples, by contrast, have long enjoyed greater recognition, in part because courts have been able to focus on economic understandings and the law of contract.

DOMA AND THE INTERNAL REVENUE CODE *Patricia A. Cain* 481

The Defense of Marriage Act (DOMA) prohibits the recognition of same-sex marriages for any purpose under federal tax law. The primary justification for this rule is that tax benefits should be preserved for opposite-sex married couples. This article points out the absurdity of such a rule, given that tax law is not intended to privilege married couples, but instead is intended to measure their taxable income fairly on the basis of their status as related parties. The article then considers other justifications for applying DOMA to federal tax law and concludes that none of them meet minimal levels of rationality to support retaining the DOMA ban in the year 2009. Because the justifications fail, DOMA, as applied to federal tax law, is unconstitutional.

EXORCISING THE GHOSTS OF *BOWERS V. HARDWICK*: UPROOTING INVALID PRECEDENTS *Arthur S. Leonard* 519

After the Supreme Court rejected a constitutional challenge to criminal sodomy laws in *Bowers v. Hardwick* (1986), lower federal courts almost invariably took the position that gay litigants could not prevail in challenging governmental discrimination on the basis of sexual orientation, reasoning that if conduct that "defined the class" was not constitutionally protected, government discrimination against the class should not be considered presumptively unconstitutional. Such logic should have been discarded after the Supreme Court's decision in *Romer v. Evans* (1996), and certainly after *Lawrence v. Texas* (2003), in which the Court expressly overruled *Bowers v. Hardwick*. But lower federal courts have persisted in rejecting gay equal protection claims, frequently relying on pre-*Romer* circuit

court of appeals decisions that cited *Bowers* as controlling precedent. These discredited but still influential precedents are the "ghosts" of *Bowers v. Hardwick*. Now that *Bowers* has been overruled, it is past time for the lower federal courts to "exorcise" these ghosts by thinking anew the doctrinal issues raised by gay equal protection claims, which should lead to heightened scrutiny of policies and practices that discriminate against gay people.

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This article summarizes social science data published during the past decade documenting discrimination against lesbian, gay, bisexual, and transgender (LGBT) people in employment. Over the last ten years, many researchers have conducted studies to find out whether LGBT people face sexual orientation discrimination in the workplace. These studies include surveys of LGBT individuals' workplace experiences, wage comparisons between lesbian, gay, and bisexual (LGB) and heterosexual persons, analyses of discrimination complaints filed with administrative agencies, and testing studies and controlled experiments.

MADISONIAN PORNOGRAPHY OR, THE IMPORTANCE OF JEFFREY SHERMAN *Andrew Koppelman* 597

James Madison's classic attack on the Sedition Act shows how free speech protection is vital to the functioning of democracy. His argument reaches toward, but does not fully defend, a right to pornography. Jeffrey Sherman's work, which shows that gay pornography played a significant role in the genesis of the gay rights movement, completes the Madisonian argument. The more general lesson is that speech consisting of claims about what goods are worth pursuing—such as pornography, which implicitly contains claims about what sexual goods are worth pursuing—should always be understood to be part of protected public discourses.

THE KENNETH M. PIPER LECTURE

CORPORATE SELF-REGULATION AND THE FUTURE OF WORKPLACE GOVERNANCE *Cynthia Estlund* 617

American labor law has largely failed to deliver a viable mechanism for employee representation in workplace governance, while the ever-expanding body of employment law does not even attempt to do so. The resulting "democratic deficit" in the workplace is a problem in part because, without employee representation, the rights and labor standards mandated by employment law are widely under-enforced. But that very problem could point toward a solution. For while employment law does not aim to give employees a role in workplace governance, it has in fact fostered the growth of new governance mechanisms within firms in the form of internal compliance programs that capitalize on and develop firms' own regulatory capabilities. The law has encouraged this development in part by conferring regulatory advantages on firms that maintain "effective" self-regulatory structures. Missing, however, is the recognition that, for self-regulation to be effective in the realm of employment law, it must include an organized institutional voice for employees. In other words, there should be no self-regulation, and no self-regulatory privileges, without employee representation. These same mechanisms of "regulated self-regulation" and employee representation, coupled with an appropriately broad definition of employer liability, could also help to address the

problem of widespread noncompliance with labor standards among the small contractors that supply labor to more visible and capable organizations. In short, existing developments within and among firms could and should be steered toward creating new mechanisms for collective employee participation in workplace governance.

STUDENT NOTES AND COMMENTS

FRENZY-FREE FUNERALS: THE LEAST AMERICA OWES ITS FALLEN HEROES — *Robert J. Grindle* — 637

Frenzy-Free Funerals: The Least America Owes its Fallen Heroes analyzes the constitutionality of the Respect for America's Fallen Heroes Act (RAFHA). After detailing relevant First Amendment cases, the note examines court treatment of funerals and death-related issues. The history and purpose of funerals is examined from a psychological and sociological perspective, including a funeral's significance to individuals and society at-large. Finally, the note concludes that the RAFHA is constitutional under the First Amendment, given the relevant test, court cases, and societal norms.

THE MEDICAL MONITORING REMEDY: ONGOING CONTROVERSY AND A PROPOSED SOLUTION — *Adam P. Joffe* — 663

Prior to the mid-1980s, tort law adhered to the traditional notion that the threat of future harm was not an adequate ground to pursue a claim in tort. However, in *Friends for All Children v. Lockheed Aircraft Corp.*, the United States Court of Appeals for the District of Columbia awarded a group of plaintiffs the cost of future medical examinations aimed at detecting whether the plaintiffs suffered from a particular neurological impairment. This new remedy became known as "medical monitoring."

Since *Friends for All Children v. Lockheed Aircraft Corp.*, the medical monitoring remedy has attracted controversy and has resulted in widely diverging views among various jurisdictions. This note will discuss the history of the medical monitoring remedy, including common criticisms of the remedy. The note will propose a strict standard that must be met before medical monitoring is awarded in the future and will propose a method for disbursing medical monitoring awards when they are deemed appropriate.

RIGHTING THE NOTICE PLEADING SHIP: HOW *ERICKSON V. PARDUS* SOLIDIFIES THE MODERN SUPREME COURT TREND OF NOTICE-GIVING IN LIGHT OF *BELL ATLANTIC CORPORATION V. TWOMBLY* — *Jeremy D. Kerman* — 691

This note traces the history of pleading in the United States from the adoption of the Federal Rules in 1938 through the *Twombly* and *Erickson* decisions in the summer of 2007. Specifically, this note examines the *Twombly* decision and its effects on the trend the Supreme Court has established over the last half-century concerning the notice pleading standard of Rule 8(a)(2). This note also suggests that the *Twombly* Court effectively created a heightened pleading standard for antitrust cases, even though it specifically denied doing so. I then analyze the *Erickson* decision and how the timing and direct nature of *Erickson* suggests that the Court's decision in *Twombly* does not extend beyond *Twombly* itself. Ultimately this note argues that while *Twombly* departed from the modern trend of simple notice pleading in response to concerns with the ever-increasing costs of discovery in federal litigation, *Erickson* demonstrates the Court's desire to isolate *Twombly*

as an outlier and reinforce the modern trend in which Rule 8(a)(2) does not require a heightened pleading standard.

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