

Tulsa Law Review

Volume 34
Number 1 *Conference on the Rehnquist Court* Volume 34 | Number 1

Fall 1998

Errata / From The Editors

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Recommended Citation

Errata / From The Editors, 34 Tulsa L. J. xi (1998).

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TULSA LAW JOURNAL

Volume 34

Fall 1998

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ERRATA

Please take note of the following changes to Vol. 33, Nos. 3 & 4, Spring 1998:

Page 852, n.28: "The Radium daughter for Uranium"

Page 854, ¶ 2, line 7: "As discussed in part ~~IV~~ III"

Page 855, ¶ 1, line 5: ". . . on biological tissue than"

Page 861, ¶ 3, line 2: ". . . Mile Island and Chernobyl accidents"

Page 865, ¶ 2, line 10: "If driving a car is thought to be such a great risk"

Page 888: "~~VI~~ IV. CONCLUSION"

Page 888, ¶ 5, line 13: ". . . does not unfairly alter market forces"

Please take note of the following corrections to Vol. 34, No. 1, Fall 1998, which could not be incorporated at the time of printing:

Page 129, ¶ 1, line 4: ". . . Department, can ~~could~~ provide"

Page 129, ¶ 1, line 5: "The department can ~~could~~ also"

Page 165, ¶ 1, line 1: ". . . reasearchers"

Page 178, n.168: ". . . (preventing employment"

Note: Additions are marked with an underline, while deletions are marked with a ~~strike through~~.

FROM THE EDITORS . . .

The Honorable Stewart G. Pollock, Associate Justice of the Supreme Court of New Jersey, opens this issue with his remarks entitled, *Lawyers and Judges as Catchers in the Rye*. Justice Pollock uses the aspirations of Holden Caulfield, the young protagonist of J.D. Salinger's *Catcher in the Rye*, to illustrate "the crucial battle being waged for the soul of the legal profession" as the Justice discusses the relationship between the law and justice. Justice Pollock acknowledges the unique opportunity for attorneys to protect those in need of protection, "to catch everybody if they start to go over the cliff." Finally, Justice Pollock's remarks, delivered at the John W. Hager Lecture in March 1998, are an inspiring call to do good work. During a period known for its high billable hours and lack of civility, Justice Pollock urges his audience to contribute to the common good. Through a compelling list of examples, he demonstrates that we each have a role in serving the public interest.

In September, the University of Tulsa College of Law held the *Conference on the Rehnquist Court*. The third of the University of Tulsa's conferences on the Supreme Court, the conference examined the Rehnquist Court and its place in our law and life. Like those of its predecessors, this conference's papers will be published in a commemorative volume by Oxford University Press. This issue includes three of the remarks from the conference.

In *The Importance of Dialogue*, the Hon. Claire L'Heureux-Dubé, Puisne Justice of the Supreme Court of Canada, notes the "tremendous changes [which] have taken place in the world at large, and in the judicial world." In that context, Justice L'Heureux-Dubé remarks on "the role of the Rehnquist Court within the new global judicial community." Specifically, she notes that the Rehnquist Court is less influential than its predecessors, due not only to the changing dynamics within the global judicial community, but also to the Rehnquist Court itself. In her conclusion, Justice L'Heureux-Dubé encourages the Rehnquist Court to take part in the international dialogue by considering, in greater depth, the opinions of other high courts around the world.

The Hon. J. Harvie Wilkinson III, Chief Judge of the United States Court of Appeals for the Fourth Circuit, addresses the Rehnquist Court's decisions in the area of race relations in *The Rehnquist Court and the Search for Equal Justice*. He first notes that the Rehnquist Court has been guided by the non-discrimination principle: "All racial classifications, no matter which race is burdened or benefitted, are presumptively unconstitutional." Judge Wilkinson then discusses the controversy surrounding the Court's activism in support of that principle and asks whether the activism was justifiable. In the end, he suggests that, "it is inconceivable that a multiracial society could be constructed on anything other than transracial legal standards," and that multiculturalism "will justify the course of the Rehnquist Court in the eyes of history."

The Hon. Marie L. Garibaldi, Associate Justice of the Supreme Court of New Jersey, presented *The Rehnquist Court and State Constitutional Law*, in which she examines the response of the Rehnquist Court and state courts to the plain-statement requirement of *Michigan v. Long*. Justice Garibaldi focuses "specifically on the vexing problem of how a state court determines that its constitution provides greater protection of individual rights than are afforded under similar or identical federal constitutional provisions." She then suggests that the "criteria approach" used by the New Jersey Supreme Court best balances the concerns of a state court.

Ray Yasser, Professor of Law, and Samuel J. Schiller, Esq., contribute *Gender Equity in Interscholastic Sports: The Final Saga: The Fight for Attorneys' Fees*, the third in a series of articles documenting their efforts for gender equality. Their article focuses on the dispute over the calculation of the fees and the reasonableness of the costs incurred. Professor Yasser and Mr. Schiller offer their insights into the matter, because "[l]awyers who are confident they can take these cases, win them, and get fairly compensated are essential to the ultimate success in this battle."

Lisa K. Gold contributes *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's Not as Scary as It Sounds*. Ms. Gold's comment details the complicated, often harrowing procedure of intercountry adoption. Her comment discusses the difficulties in dealing with the current tripartite system which includes procedural hurdles at the foreign, federal, and state levels. Ms. Gold finds that the conflicting procedures of the three entities fail to serve the best interest of the child. Her comment argues that the United States Congress, through its interstate commerce power, has the power to federalize intercountry adoption. Ms. Gold states, "[b]ecause intercountry adoption involves the parents' obligation to care for, support, and rear the child, and traffic exists among more than one sovereign, the federal government has the power to regulate intercountry adoption through the Commerce Clause." She argues that a streamlined system between the federal government and the foreign sovereign would avoid the intercountry adoption concerns of baby brokering and dumping, while also eliminating needless emotional trauma, bureaucratic red tape, and waste of judicial resources. Moreover, Ms. Gold argues that federalizing intercountry adoption would serve all of society's greatest concern—the best interest of the child.

In *Oklahoma's New Adoption Code and Disclosure of Identifying information*, Mary L. Saenz Gutierrez, asks "[d]oes an adopted child's right to know her origins supersede the right of her birth parent not to tell?" In answering this question, Ms. Gutierrez discusses a brief history of adoption in the United States, and more specifically discusses the provisions of the newly enacted Oklahoma Adoption Code ("Code") relating to the disclosure of identifying information. In enacting the new Code, the Oklahoma legislature stated that adoption laws should be fair to all parties involved in the adoption process, while also promoting the best interest of the child and recognizing her right to information about her heritage. Ms. Gutierrez finds that in remaining true to the stated purposes, Oklahoma chose "the right combination of procedures: an affidavit of nondisclosure, enhanced medical and social histories, a statewide voluntary consent registry, and a confidential intermediary search program." However, her comment warns, without critical funding, the good faith effort to enact progressive and equitable disclosure programs will be for naught. In closing, she notes, the careful language of the Code, "delicately balances the interests of all the members of the adoption triangle—adoptees, birth parents, and adoptive parents—by providing all the legal protections and equitable options available today."

Kourtney L. Pickens submits, *Don't Judge Me by My Genes: A Survey of Federal Genetic Discrimination Legislation*. Ms. Pickens gives a detailed discussion of specific projects mapping human genes and the potential benefits of genetic testing resulting from those mapping projects. She outlines the many moral, legal, and ethical concerns arising not only out of the desire to detect and treat possible diseases, but also out of the rapidly increasing amount of genetic knowledge available. In

surveying various state law approaches and recent court cases, Ms. Pickens argues that state efforts to address genetic discrimination have proven inadequate and inconsistent. Additionally, she criticizes the many recent federal proposals aimed at genetic discrimination for their failure to provide a comprehensive solution. Moreover, Ms. Pickens asserts, “[u]ntil legislation is in place to protect people from the discrimination they fear, the possibility of developing treatments and finding cures to genetic diseases greatly diminishes.” To that end, Ms. Pickens proposes broad federal genetic discrimination legislation is needed both “for the future of genetics to yield promising results in treatment of disease and prevention” and “in order to protect an individual’s genetic information from misuse by employers, insurance companies, and in all other areas of daily life.”

Robert Spoo offers *Fair Use of Unpublished Works: Scholarly Research and Copyright Case Law Since 1992*. Mr. Spoo discusses the importance of the fair use doctrine as applied to unpublished works. His comment reviews the effect of the codification of the fair use doctrine in the Copyright Act of 1976 (“1976 Act”) and subsequent judicial interpretations “that threatened to discourage scholars and researchers from making *any* use, fair or foul, of unpublished materials.” Mr. Spoo argues that while a 1992 amendment to 1976 Act served to remind the courts that the fair use doctrine should be equitably applied to unpublished works, “the reluctance of many publishers and editors to stand behind their authors’ fair use privilege” remained. This reluctance, despite the statutory and judicial support for fair use of unpublished works, Mr. Spoo asserts, threatens the “creative ecosystem in which rights, privileges, and incentives coexist and works beget works.” Thus, Mr. Spoo argues that “Anglo-American copyright jurisprudence requires the larger collaboration of forces for the full realization of culture.” Without such cooperation from the suprallegal system, Mr. Spoo writes, “[t]he immediate sufferers will be historians, biographers, scholars, and journalists; the ultimate victim will be society itself.”

This issue is the product of countless hours of work by our editors and staff. Their commitment to excellence and willingness to contribute substantial time allowed us to rapidly offer the remarks from the Hager Lecture and the Rehnquist Court Conference to the legal community. We thank you. We also thank Larry Catà Backer, our faculty advisor, for his insights and direction.

Taiawagi Helton and Suzanne E. Schreiber

FROM THE EDITORS . . .

We proudly present the *Practitioner's Guide to the October 1997 Term of the United States Supreme Court*, the Tulsa Law Journal's fourth annual Supreme Court review. As in previous years, Judge Sven Erik Holmes honored us by introducing the symposium, held at the University of Tulsa College of Law on December 11, 1998.

In his introduction, Judge Holmes suggests that the Supreme Court's primary function is not its role as the Nation's final appellate court. Rather, "the role of the Supreme Court is to articulate fundamental principles of law," and "to provide guidance to government actors." For its 1997-98 Term, Judge Holmes gives the Court high marks for meeting those responsibilities. In support of his assessment, Judge Holmes notes the clear guidance provided by the Court on issues of sexual harassment, disabilities, and other areas.

In *Sticking to Business: A Review of Business-Related Cases in the 1997-98 Supreme Court Term*, Professor Barbara K. Bucholtz observes two notable characteristics from the Term's business-related cases. First, "the Court as a whole evinced a marked preference for conservatism, sticking to the business of judicial restraint," so that most of those cases "read like methodical exercises in statutory construction." Second, "the decisions likely to have the most significant impact on the business community were not, strictly speaking, business law cases."

Professor Gary D. Allison contributes *The Cultural War over NEA Funding: Illogical Statutory Deconstruction Erodes Expressive Freedom*, in which he criticizes the Court for failing "to establish a clear cut patronage exception precedent" in *NEA v. Finley*. Instead, the Court "left in place discriminatory viewpoint selection criteria that give the NEA unbridled discretion to reject funding applications because of the viewpoints expressed in the applicants' artistic endeavors."

Professor Melissa L. Koehn offers *And the Word for Today is "Immunity": A Look at Selected Criminal Procedure and § 1983 Cases from the Supreme Court's 1997-98 Term*. As the title suggests, Professor Koehn reviews the Court's immunity jurisprudence, noting that "[w]hile the Supreme Court did not issue any earthshaking immunity decisions this term, it did reiterate a number of important rulings." Koehn observes that the Court's decisions are not surprising (or at most, only mildly surprising), but that many do "have a great deal of practical significance."

"Undoubtedly, it is in the area of impeachment in which the Supreme Court should find a political question precluding judicial review," states Martin H. Belsky, Dean and Professor of Law, in *Investigating the President: The Supreme Court and the Impeachment Process*. Nonetheless, through a series of decisions dating back to the Richard M. Nixon impeachment, "the Supreme Court has significantly, but indirectly, gotten involved in the impeachment process." Consistently minimizing Presidential immunities, the Supreme Court supports the broad power of the courts to "judicially supervise investigations of Presidential conduct," which "have become the modern mechanism for pre-impeachment Congressional review."

In *Significant Employment Law Decisions in the 1997-98 Term: A Clarification of Sexual Harassment and a Broad Definition of Disability*, Professor Vicki J. Limas determines the Court's most significant contribution to employment law is in the area of nondiscrimination. Specifically, Professor Limas discusses "the Court's clarification of sexual harassment law with respect to hostile environment cases and employer liability for harassment by supervisors, along with its expansive definition of 'disability' under the ADA."

We are pleased to include a new and important addition to the Supreme Court

Review: Professor Judith V. Royster's analysis of the Court's Indian law cases. In *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, Professor Royster notes the complexity of federal Indian law, which "cannot be understood apart from the history of federal-tribal relations. Indian law is, above all, deeply contextualized." Nevertheless, the Court is distorting federal Indian law by oversimplifying complex and demanding issues. "Increasingly, the Court has shunned the difficult and detailed analysis that the issues demand and the tribes deserve. Instead, it has begun taking principles that were previously developed in context, and disengaging them from that context, generally to the serious disadvantage of tribes."

The 1997-98 Term may at first appear less interesting than those past, "at least from the perspective of the development of grand theory," but Professor Larry Catá Backer notes its importance in *A Cobbler's Court, a Practitioner's Court: The Rehnquist Court Finds Its "Groove"*. Not only did the Court provide guidance in specific areas of law, but according to Professor Backer, it revealed its own identity, equilibrium, and mission. "This past Term reveals a Court most productive and at its best . . . when it eschews grand theory and instructs in the everyday application of the myriad of mundane obligations imposed upon people by court and legislature. This is a practitioner's court, a cobbler's court—and many should be happy for it."

Beginning the note and comment section, Margaret Cain offers *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*. After an overview of the violence against women in America, Ms. Cain asserts that states' responses have been largely inadequate, she demonstrates the economic impact of violence against women, and recognizes the need for a civil remedy. In her discussion of the Violence Against Women Act ("VAWA"), Ms. Cain details the legislative history of the act, its arduous passage under the Commerce Clause, and describes constitutional challenges to VAWA despite congressional findings of a substantial economic impact on women victims. Ms. Cain finally concludes that VAWA will withstand these challenges.

In *If There Is No Rate, You Must Rebate: Oklahoma's Usurious Small Loan Law*, Suzanne Schreiber challenges Okla. Stat. tit. § 3-508B governing small loans in Oklahoma. Ms. Schreiber asserts that because the "B" loan provision does not set a maximum rate of interest, the charges allowable on such loans are usurious and as such, violate Article XIV § 2 of the Oklahoma Constitution. After detailing the plight of the small loan borrower, the growth of the small loan industry, and the Oklahoma legislature's repeated refusal to govern the small loan industry, Ms. Schreiber ultimately finds § 3-508B unconstitutional under the Oklahoma constitutional usury provision.

Peer to Peer Sexual Harassment Under Title IX: A Discussion of Liability Standards From Doe v. Londonderry, by Julie Doss, analyzes a recent court decision applying Title IX to student-peer harassment and the extent of school district liability. Ms. Doss offers a detailed discussion of the case while applying a sampling of the many different standards of liability. In Ms. Doss' alternative analysis of the case, she argues that school and school district liability should occur where there was knowledge of the harassment and failure to provide a reasonable remedy. The Supreme Court will take up the issue this spring, and Ms. Doss urges the Court to hold school and school district's liable under this alternative standard.

TULSA LAW JOURNAL

Volume 34

Winter 1999

Number 2

ERRATA

Please take note of the following changes to Vol. 33, Nos. 3 & 4, Spring 1998:

Pages 15 & 67, n.*:

The footnotes incorrectly state, "Copyright © THE REHNQUIST COURT: FAREWELL TO THE OLD ORDER IN THE COURT? (Bernard Schwartz, ed. Oxford University Press, 1999 forthcoming). This remark is a revised and expanded version of the presentation, delivered at the Rehnquist Court Conference"

The proper cite follows: "Copyright © THE REHNQUIST COURT: FAREWELL TO THE OLD ORDER IN THE COURT? (Martin H. Belsky, ed. Oxford University Press, 1999 forthcoming). This remark is a revised and expanded version of the presentation, delivered at the Rehnquist Court Conference"

We sincerely apologize for this oversight.

FROM THE EDITORS . . .

The *Tulsa Law Journal* proudly presents a Symposium in tribute to the life and legacy of Bernard Schwartz, inaugural Chapman Distinguished Professor of Law at the University of Tulsa College of Law.

We are greatly indebted to all the authors for their contributions to this important issue of the *Tulsa Law Journal*. Each of them honors the legacy of Professor Schwartz and his scholarship in Constitutional and Administrative Law. It is that scholarship which fuels the ever-growing legend of Professor Schwartz, for legendary best describes his status among our student body. Our favorite Bernard Schwartz story comes from his first year with our faculty. A fellow faculty member once introduced him as a man who had read and remembered every Constitutional Law decision ever rendered by the United States Supreme Court. Professor Schwartz replied, modestly, that while he did not know them all, "I do know most of them."

Seven of the preeminent legal minds in the world join this issue to add to the legend: The Right Honourable The Lord Woolf, Master of the Rolls of Great Britain, presents *The Atlantic Divide*; Erwin Chemerinsky, Sydney M. Irmas Professor of Law and Political Science at the University of Southern California Law School, and Catherine Fisk, Professor of Law and William Rains Fellow at Loyola Law School, co-author *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*; Elizabeth Garrett, Assistant Professor of Law at the University of Chicago, presents *Legal Scholarship in the Age of Legislation*; Marianne Wesson, Wolf-Nichol Fellow and President's Teaching Scholar at the University of Colorado, contributes *Three's a Crowd: Law Literature, and Truth*. The Honorable Robert H. Henry, former Attorney General of Oklahoma and Dean of the Oklahoma City University College of Law, and current Judge for the United States Court of Appeals for the Tenth Circuit, introduces the Symposium. These authors represent the fellow travelers of Bernard Schwartz, his colleagues and admirers, and we thank them for their participation.

Lakshman Guruswamy, Director of the National Energy-Environmental Law and Policy Institute and Professor of Law, served on the faculty of the University of Tulsa College of Law with Professor Schwartz, and contributes with Jason C. Roberts and Catina Drywater *Protecting the Cultural and Natural Heritage: Finding Common Ground*. The authors warn that irreplaceable cultural treasures face destruction and call on the nations of the world to protect cultural resources: "The modern international community should address the problems confronting cultural resources law similar to the manner in which it dealt with the problems of global warming and the depletion of biological diversity."

Sean Baker presents *The Casey Martin Case: Its Possible Effects on Professional Sports*. Mr. Baker examines the procedural history of the litigation launched by Casey Martin, an aspiring professional golfer, in his bid to receive use of a golf cart in competition to facilitate his circulatory disorder. Mr. Baker analyses the application of the Americans with Disabilities Act to professional sports, and calls upon the Professional Golfers Association to modify its policies on disabilities.

