



EMORY
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FAMILY LAW

The “Divorce Bargain”

Deborah Dinner on Marriage, Equality,
and the Fathers’ Rights Movement



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"Firms can become 'too big to disclose' and, in a perfectly legal manner, take advantage of materiality to avoid the disclosure of important matters."

—George S. Georgiev



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About Emory Law Insights

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Recent Scholarship by New Faculty

This fall, Margo Bagley and George Georgiev join Emory Law, a reflection of the law school's focus on further building its already strong programs in patent and business law. Deborah Dinner, who joined the faculty in 2015, is an asset to the law school's well-regarded work in legal history, family law, and feminist theory. Fred Smith Jr. is in his second year as visiting professor and continues to produce pathbreaking work on constitutional law and federal jurisdiction.

This issue offers a preview of recent or forthcoming work by each of these recent additions to the Emory Law faculty.

Dinner is among the leading young legal historians in the country. In 2015, she received the William Nelson Cromwell Foundation Research Fellowship, which she used to conduct research for her forthcoming book, *Contested Labor: Social Reproduction, Work, and Law in the Neoliberal Age*.

In the work excerpted herein, Dinner explores a particular historical anomaly at the intersection of labor, women's rights, and divorce. Though equality was at the center of the women's rights movement, it didn't help women when it came to divorce, which came to be more socially accepted at just the time feminists started making headway in advancing equal rights and equal pay.

"By mandating formal equality in divorce laws, in the absence of a parallel transformation in the gendered division of labor within marriage, the divorce bargain deepened women's economic insecurity," Dinner writes.

That pattern affected society in other critical ways, too. Class now differentiates fatherhood, she finds. For middle-class fathers, the divorce bargain maintained filial relationships, even as it undermined those of fathers in low-income families, because of criminal penalties attached to the nonpayment of child support. Thus, private family law governs middle-class families, but a second system—"composed of welfare state policies created by legislatures and implemented via administrative agencies"—applies to most lower-income families.

Prior to joining Emory Law, Dinner was an associate professor at Washington University School of Law.

Smith examines a distinct population that also suffers from the unintended consequences of legal rules: victims of constitutional violations who are confronted with what is effectively a kind of local sovereign immunity against federal constitutional suits. The municipal causation requirement thus may protect local governments from accountability, even for conduct that violates state law.

"When this causation requirement interacts with other immunities that governmental officials receive, survivors of governmental abuse are often left with no defendant to sue at all," Smith writes.

He offers the disturbing example of John Thompson, who spent 14 years on death row in Louisiana for armed robbery and murder—after prosecutors failed to turn over physical exculpatory evidence at trial. After his exoneration and release, however, Thompson couldn't sue them because of prosecutorial immunity, so he instead sued the city of New Orleans. But the court rejected that claim as well, stating that Thompson didn't prove the district attorney's failure to train prosecutors constituted a policy of *deliberate* indifference, and even gross indifference does not rise to the level of an actionable municipal policy or custom.

Consider that gap in accountability, Smith says, against a backdrop of expanding local government power.

"Police gear and weaponry are increasingly militaristic, a topic that has especially captured America's attention in the post-Ferguson era," he says. "Local officers and prosecutors are on the front lines of a criminal justice system that incarcerates more people than at any point in history and any place in the world."

With power comes the risk of abuse, but current doctrine isn't equipped to address that. The idea that local governments are immune from federal constitutional suits also goes against conventional wisdom, Smith says.

"Is it possible to have a doctrine that increases accountability for local constitutional violations,"

he wonders, “while taking seriously the view that federal lawsuits represent a threat to federalism, autonomy, and representative government?”

Smith is currently an assistant professor of law at UC Berkeley School of Law, and is considering an offer to join the Emory Law faculty.

Georgiev, by contrast, explores the unexpected benefits big companies gain from the SEC’s regulatory framework for publicly traded firms. The stakes are tremendous: there are over 5,200 such firms with a total market capitalization of over \$25 trillion. The current rules, he suggests, give large firms a significant competitive advantage over smaller firms, and also enable large firms to hide important information from markets, investors, and the SEC. He argues for reform of the disclosure rules to provide better information for investors and to address the “regulatory subsidy for bigness” that is an unintended feature of the current SEC disclosure regime.

Securities disclosure rules established after the stock market crash of 1929 were designed to protect investors in public companies. Georgiev considers the materiality standard, a core element of the securities disclosure regime that is used in a number of disclosure rules. Materiality is designed to limit companies’ disclosure to information that would be of importance to investors, and to prevent the overproduction of information. But Georgiev argues that materiality can also lead to the underproduction of information when firms grow beyond a certain size, and that this can have a number of negative ramifications.

For example, when Microsoft acquired Skype in May 2011 for \$8.5 billion—at the time the largest deal in the company’s history—Microsoft didn’t report the key terms of the acquisition agreement and did not file its full text with the SEC. “Presumably, this is because Microsoft concluded that the agreement was not material,” Georgiev says. And given Microsoft’s size, it may have been entirely within its rights to do so. But the non-disclosure of the agreement may have prevented Microsoft investors from detecting problems with the transaction and it would have given Microsoft an advantage over a smaller

public firm that was also bidding for Skype.

Georgiev was previously a visiting assistant professor at UCLA School of Law and also spent nearly six years as a transactional corporate lawyer.

Bagley looks to a pair of Biblical parables to shed new light on a different question of corporate advantage: whether farmers will ever successfully challenge the Monsanto Company over relevant patents. The international giant has prevailed every single time a patent case has gone to trial, although settlement has also been quite common. Since 1997, Monsanto has filed suit against farmers 147 times. Of the nine cases that proceeded to trial, all were concluded in Monsanto’s favor.

Bagley argues farmers are dismayed by Monsanto’s advantage at both ends of the system. The company uses a problem it created—the contamination of non-GMO plants by the pollen drift of GMO crops—and then uses that evidence to prosecute the farmers whose plants are contaminated by the company’s patented GMO products. (Monsanto doesn’t allow farmers to save its patented seeds.)

“To add insult to injury,” she continues, “Monsanto, and other GM seed developers, have the *right* to sue farmers whose fields are contaminated by GM pollen and seeds, but not the *responsibility* to prevent such contamination, nor liability for any damage it causes.”

Perceiving that dynamic, Bagley suggests the Parable of the Wheat and the Tares and the Parable of the Persistent Widow may offer insight, respectively, into issues of seed contamination and into the persistent resistance of small farmers to Monsanto’s demands.

Teaching at Emory Law is a return home in several ways for Bagley. She was a Woodruff Scholar at Emory Law when she earned her JD in 1996. Prior to law school, she was a chemical engineer for both Coca-Cola and Procter & Gamble—where her work included the title of coinventor and patent holder. She also practiced law before joining Emory Law in 1999. Most recently, she taught for 10 years at the University of Virginia School of Law.

Marriage, Equality, and the “Divorce Bargain”



Deborah Dinner
Associate Professor of Law

BA, Yale College, 1999
JD, Yale Law School, 2005
MPhil, Yale University, 2007
PhD, Yale University, 2012

Scholarly interests: employment discrimination, family law, legal history, property

Professor Dinner is a legal historian who examines the interaction between social movements, political culture, and legal change. Her research focuses on how law responds to vulnerabilities that arise from familial and employment relationships. Dinner’s forthcoming book, *Contested Labor: Social Reproduction, Work, and Law in the Neoliberal Age*, examines the meaning of sex equality in the late 20th century. The book details the legal and societal forces that hampered feminists’ efforts to achieve greater state protection of workers and caregivers, even as women made significant strides toward equal employment opportunity. Dinner joined Emory Law in 2015 after serving as an associate professor at Washington University School of Law in St. Louis. Following law school, she clerked for Judge Karen Nelson Moore of the US Court of Appeals for the Sixth Circuit and served as the Raoul Berger–Mark DeWolfe Howe Legal History Fellow at Harvard University and the Samuel I. Golieb Fellow in Legal History at New York University School of Law.

SELECTED PUBLICATIONS

Book Chapters

Equal by What Measure? The Lost Struggle for Universal State Protective Labor Standards, in *Vulnerability, Employment and Labor* (Martha Albertson Fineman & Jonathan Fineman eds., forthcoming 2016)

Law and Labor in the 19th and 20th Centuries, in *A Companion to American Legal History* (Sally E. Hadden & Alfred L. Brophy eds., 2013)

Articles

Beyond “Best Practices”: Employment Discrimination Law in the Neoliberal Era, 92 *Indiana Law Journal* (forthcoming 2017)

Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law, 91 *Washington University Law Review* 453 (2014)

The Costs of Reproduction: History and the Legal Construction of Sex Equality, 46 *Harvard Civil Rights-Civil Liberties Law Review* 415 (2011)

Recovering the LaFleur Doctrine, 22 *Yale Journal of Law and Feminism* 343 (2010)

The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974, 28 *Law and History Review* 577 (2010)

Excerpt: The Divorce Bargain and The Fathers' Rights Movement

Deborah Dinner

A burgeoning literature examines how feminists and gay rights activists fought to dismantle or to reconfigure marriage in the late 20th century. We know little, however, about how heterosexual men shaped and were shaped by changing gender norms and family structures. This article chronicles one important chapter of this missing history. It analyzes how middle-class white men responded to rising divorce rates by pursuing reform of divorce laws and welfare policies. This history helps to explain how keystones of gender and class inequality—the gendered division of labor and privatization of dependency—persisted despite the advent of formal equality and sex neutrality within family law.

Through the mid-20th century, marriage structured middle-class men's relationship to the state as well as to their wives. Men supported dependent children and wives in exchange for legal protection of familial authority. The precise contours of this marital bargain had evolved over time. . . . The marital bargain, however, remained fundamentally intact into the mid-20th century. Men continued to enjoy many of its socioeconomic rewards including, in particular, an unequal division of caregiving labor within marriage.

In the late 20th century, rising divorce rates and the no-fault revolution in divorce laws threatened the demise of the marital bargain. Its erosion posed dilemmas for fathers and the state as well as for women. Divorce deprived the state of a stable mechanism for privatizing children's dependence. Divorce also rendered men bereft of the socioeconomic rewards that had accompanied their marital status. Three possible solutions existed. First, the state could place the burden of support wholly on custodial parents (overwhelmingly mothers). For divorced men, this solution offered liberation from paternal financial responsibilities, but also denied them a potential mechanism by which to gain paternal visitation and custody rights. Second, the state could augment public support for children and caregiving parents. Fathers' rights activists, however, perceived this solution as a threat to marriage because it obviated the male breadwinner role entirely. Third, the state could coerce noncustodial parents (usually fathers) to provide support for children; it could achieve this objective via a stick—the child support enforcement apparatus—and a carrot—enhanced custody rights.

Beginning in the 1960s, fathers' rights activists, women's rights advocates, and federal and state legislators negotiated which of these legal arrangements to implement. By the mid-1980s,

they had forged a new political compromise. Fathers' rights activists conceded ongoing child support obligations in exchange for greater protection of the father-child relationship upon divorce. This "divorce bargain" played a significant part in ending private family law's assignment of familial functions on the basis of sex. It facilitated shifts from sex-based alimony to sex-neutral spousal maintenance awards and from common law presumptions favoring maternal custody to state statutes recognizing joint custody. The divorce bargain simultaneously entrenched private rather than public responsibility for dependent children living within nonmarital families.

The history uncovered in this article offers a novel analysis of what scholars call the dual family law system. The "private" family law system includes laws created and administered by courts that govern marital formation, parental obligations, and divorce. Because marriage tracks class lines, however, private family law largely regulates middle-class families. A second, "public" family law system is composed of welfare state policies created by legislatures and implemented via administrative agencies. The current literature assumes that the private and public family law systems operate in parallel. This article challenges that assumption, showing instead that the private and public family law systems share intertwined historical trajectories. In the late 20th century, the liberalization of private family law was inextricable from the neoliberal restructuring of the welfare state.

This article's original historical contribution provides insight into how the advent of sex neutrality within private family law has reinforced gender and class inequalities. Fathers' rights activists advocated formal equality in divorce and child custody laws, yet never wholly relinquished their ideal of a marital bargain premised upon gender differentiation and hierarchy. They refrained from joining feminists or pro-feminist men's groups advocating an equal distribution of caregiving labor within marriage. Elements of the fathers' rights movement, moreover, actively opposed women's liberation from subordination within the family. By mandating formal equality in divorce laws, in the absence of a parallel transformation in the gendered division of labor within marriage, the divorce bargain deepened women's economic insecurity. The legal history of the fathers' rights movement thus contributes to scholarship exposing the limits of sex neutrality under law as a means to realize substantive gender equality.

In addition, this history shows that gender norms—specifically, nostalgia for the marital

bargain—were salient within ideological opposition to state support for mothers and children. Like other liberal welfare states, the United States tilts strongly in the direction of private responsibility for social reproduction: the biological reproduction of the next generation along with the subsistence, socialization, education, and caregiving of existing generations. In the '70s and '80s, the advent of neoliberal politics further undermined welfare state supports for families. The history of the fathers' rights movement helps to show that the privatization of dependency was neither natural nor the result of economic imperatives alone. Instead, it derived political legitimacy from middle-class men's stake in legal regimes that made the provider role the mechanism by which these men enjoyed state protection for family relationships.

This article draws upon previously unexamined sources to analyze the ideology, grassroots organization, and legal advocacy of the fathers' rights movement. . . . The narrative begins in the 1960s, when an incipient men's rights movement emerged in response to threats to the marital bargain. Part I discusses how men's rights theorists and activists sought to restore the marital bargain by reshaping both the private and public family law systems. Groups that called for divorce law reforms in the hope of rescuing faltering marriages formed the precursors to later fathers' rights groups. These early family law reformers also opposed welfare-state supports for poor mothers and children that they believed undermined marriage.

In the 1970s, fathers' rights groups emerged to challenge perceived biases within divorce and child custody laws. As the hope of restoring the marital bargain receded further into the distance, the fathers' rights movement began to argue that divorce should liberate men from the obligations of that earlier bargain. During this period, as part II examines, fathers' rights groups proliferated at the local and state levels and began to shape legal contests in courts and state legislatures. The fathers' rights movement adopted liberal legal frames that became hegemonic in the late civil rights era—sex discrimination, sex neutrality, and equal treatment—to argue for the elimination of women's legal entitlements upon divorce. They challenged women's entitlement to alimony as well as common law doctrines that favored maternal custody. The turn to sex equality as a legal frame, however, catalyzed fault lines within the movement, generating disputes about the relationship of fathers' rights to the women's rights and men's rights movements.

Part III examines the role that the fathers' rights movement played in consolidating the divorce bargain during the 1980s. An increasingly coercive federal-state legal apparatus imposed child support obligations on divorced and never-married fathers.

Fathers' rights activists contested this enforcement apparatus, but also used the state's interest in privatizing children's dependency to advance divorced men's custody rights. Activists reframed paternal custody rights as an incentive for men to pay child support. They forged alliances with sympathetic politicians, introducing and lobbying for state legislation that advanced their vision of the divorce bargain. This part examines how fathers' rights activists campaigned for an early joint custody statute in California, which proved influential in catalyzing a joint custody revolution nationwide.

Part IV explores the legacies of the divorce bargain for gender and class relations today. The divorce bargain helped to catalyze an incomplete revolution in gender roles within middle-class families. The divorce bargain transformed middle-class divorced mothers into breadwinners and middle-class divorced fathers into caregivers. The bargain broadened the range of identities open to middle-class white men, from authoritarian patriarchs, to loving fathers, to diaper-toting daddies. Yet fathers' rights activists, in the 1980s and beyond, continued to debate the extent to which these new constructions of fatherhood should transform masculinity. Their ambivalence highlights both the potential and the limits for active fathering and equal custody rights to disrupt gender roles.

The divorce bargain, furthermore, contributed to class-differentiated experiences of fatherhood. The bargain supported father-child relationships within middle-class families but undermined these relationships within low-income families. Because low-income men are often financially incapable of meeting child support obligations, the legal enforcement of such obligations—backed by criminal penalties—drives these men away from their children. Furthermore, child support debt contributes to the disproportionate incarceration of low-income men of color, depriving these fathers and their children of the opportunity for close relationships.

The history of the fathers' rights movement is at once a liberation narrative and a story about the preservation of patriarchy within the family and the welfare state. It shows how middle-class men pursued a new bargain with the state that liberalized conceptions of middle-class fatherhood under law, while deepening women's economic insecurity upon divorce and jeopardizing father-child relationships within poor families. The history of fathers' rights advocacy for the divorce bargain, therefore, reminds us not to confuse liberalism with equality.

—from *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 *Virginia Law Review* 79 (2016)

Reconsidering Local Sovereign Immunity



Fred Smith Jr.
Visiting Professor of Law

BA, Harvard College, 2004
JD, Stanford Law School, 2007

Scholarly interests: constitutional law, constitutional litigation, federal courts

Smith is an assistant professor at UC Berkeley School of Law. At Emory Law, he teaches Federal Courts, Constitutional Law, and Constitutional Litigation. Smith clerked for Judge Myron Thompson of the Middle District of Alabama, Judge Barrington D. Parker Jr. of the US Court of Appeals for the Second Circuit, and Justice Sonia Sotomayor of the United States Supreme Court. Before joining the Berkeley faculty, he worked as a fellow at Bondurant, Mixson & Elmore LLP in Atlanta. Smith's research examines state sovereignty and representative government, and his work has appeared in the *Columbia Law Review*, *New York University Law Review*, *Stanford Law Review*, and *Fordham Law Review*. As a Stanford Law student, Smith was a member of the Supreme Court Litigation Clinic and also, president of the Black Law Students Association. He was a finalist in both the Kirkwood Moot Court Competition and the American Constitution Society's national Moot Court Competition.

SELECTED PUBLICATIONS

Books

Constitutional Torts (4th ed., 2014) (with Sheldon H. Nahmod, Tom Eaton & Michael L. Wells)

Articles

Local Sovereign Immunity, 116 *Columbia Law Review* 409 (2016)

Due Process, Republicanism, and Direct Democracy, 89 *New York University Law Review* 582 (2014)

Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment, 80 *Fordham Law Review* 1941 (2012)

Crawford's Aftershock: Aligning the Regulation of Non-Testimonial Hearsay with the Purposes and History of the Confrontation Clause, 60 *Stanford Law Review* 1497 (2008)

Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?, 57 *Stanford Law Review* 2087 (2005)

Excerpt: Local Sovereign Immunity

Fred Smith Jr.

Constitutional torts take many forms. Sometimes the victim is an innocent person formerly on death row, convicted after a team of local prosecutors has illegally withheld exonerating evidence. Far more often, the aggrieved is a person who was unjustifiably and excessively beaten, tasered, or shot in violation of the Fourth Amendment's command against unreasonable seizures. Such individuals often file federal suits, relying on the broad promise of 42 U.S.C. § 1983, which creates a private cause of action against state and local actors who violate federal rights. But these victims of lawless conduct often find that even when they properly allege violations of federal rights, and even when they produce evidence of government abuse, they are left with no one to hold accountable in federal court.

Federal courts have drawn in part upon principles of sovereignty and federalism to provide broad protection to local governments and their agents. With few exceptions, local governments are not liable for the federal constitutional violations committed by their agents. Further, governmental actors serving in a prosecutorial, judicial, or legislative function are absolutely immune from suit in their individual capacities. Like state and federal officials, other local governmental actors are also often immune from suit under a concept called "qualified immunity." This stands in contrast to common law suits against local governments, where state courts and legislatures have often shed or softened these municipal immunities in favor of increased government accountability. This article argues that the local inoculation from legal accountability for federal constitutional violations is a consequential, de facto form of "local sovereign immunity."

The notion that local governments are "immune" from federal constitutional suits defies long-held conventional wisdom. As early as four years after the American Constitution was born, Chief Justice John Jay invoked the presumed absence of local sovereign immunity as a basis for questioning the wisdom of state sovereign immunity: "Will it be said, that the 50 odd thousand citizens in Delaware ... stand in a rank so superior to the 40 odd thousand of Philadelphia?" In that case, *Chisholm v. Georgia*, Chief Justice Jay and the majority of the court ultimately concluded that states were not immune from suit in federal court. It has been said that *Chisholm* "shocked the Nation," inspiring a swift reaction in the form of the Eleventh Amendment. Under that amendment, federal judicial power "shall not be construed" to permit suits against states initiated by private citizens of another state. The text of the Eleventh

Amendment, however, says nothing about local governments.

The doctrine that has emanated from the Eleventh Amendment purports to reaffirm the idea that local governments do not receive sovereign immunity. Despite significant shifts in sovereign immunity doctrine, courts have continued to assert that local governments are not immune from federal suits. As the Supreme Court reasoned in 1980, by making cities amenable to suit under § 1983, Congress abrogated or dissolved any claim a municipality could have to the principle of sovereign immunity. Or as the court explained more recently in 2006, when rejecting a county's claim of sovereign immunity, "only States and arms of the State possess immunity from suits authorized by federal law."

It is difficult to reconcile these pronouncements with the broad protections local governmental defendants receive from constitutional suit. These protections are, after all, expressly rooted in background principles of sovereignty and generally untethered from the language of any particular constitutional or statutory provision. This immunity comes primarily by way of a causation requirement that sounds deceptively simple to establish. Plaintiffs suing cities for violations of federal constitutional rights must prove that a city's policy or custom caused a constitutional violation. The court made clear in *Monell v. Department of Social Services* and its progeny that unlike in the case of most torts, it is insufficient to establish municipal causation on the predominant theory that the principal is responsible for the torts of her agent. The court has not only repeatedly affirmed this rejection, but has emboldened it by narrowly interpreting the term "policy." "A lesser standard of fault would," the court has explained, "implicate serious questions of federalism."

It has been roughly three decades since the court has ruled that a municipal policy caused a constitutional violation. And in the post-*Monell* era, the court has never found that a municipal custom caused a constitutional violation. While the outcome in lower courts is more mixed, the municipal causation requirement nonetheless often inoculates local governments from accountability, including for conduct that would render them liable for violations of state law. When this causation requirement interacts with other immunities that governmental officials receive, survivors of governmental abuse are often left with no defendant to sue at all.

Determined in a case retired Justice John Paul Stevens recently called a "manifest injustice," the fate

of John Thompson exemplifies the consequences of local immunity. Thompson is a New Orleanian who was wrongly convicted of armed robbery and murder. During his initial trial, prosecutors refused to turn over exculpatory physical evidence that would have saved him from 18 years in prison, 14 of which were spent languishing on death row. The district attorney's office never trained these prosecutors about the unconstitutionality of withholding exonerating evidence.

When Thompson was finally released, he sued New Orleans under § 1983. He could not maintain a suit against the local prosecutors, however, because they were protected by the doctrine of prosecutorial immunity. Further, the Supreme Court ruled that Thompson could not receive a judgment against New Orleans for these unconstitutional acts despite the absence of local training. According to the court, Thompson failed to show that the district attorney's failure to train prosecutors constituted a *policy* of deliberate indifference. Negligence, even gross negligence, is not enough to constitute an actionable municipal "policy" or "custom." A standard less than deliberate indifference, Justice Antonin Scalia reasoned, "would 'engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,' thereby diminishing the autonomy of state and local governments." . . .

Together, the stringent causation requirement and the individualized immunities of the type that protected Thompson's prosecutors are best understood as constituent parts of local sovereign immunity. This does *not* mean that the form of sovereign immunity possessed by local governments is the same as state sovereign immunity. Instead "local sovereign immunity," as used here, means two things. First, as a descriptive matter, the municipal causation requirement shares core ideological and methodological features with state sovereignty doctrines. To be sure, "political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities." Still, cities have often been seen both as instrumentalities for sovereign states to carry out functions and as instruments for another sovereign, the people, to express their will. The court has often drawn on a hybrid of these views—which I call "republican sovereignty"—in crafting the contours and content of the municipal causation requirement.

Second, as a functional matter, the municipal causation requirement and the individual immunities that local officers receive render specific classes of governmental defendants unsusceptible to suit, even when there is a determination that a government's agent has violated constitutional rights. That is what immunity *is*.

State sovereign immunity is an important topic in federal courts scholarship. Scholars have interrogated the meaning of the Eleventh Amendment, investigated whether sovereign immunity bars suits beyond the text of that amendment, and canvassed the policy goals sovereign immunity does and should serve. *Monell*, a case that has been called an "accidental landmark," is also an important topic in federal courts. Scholars have (with remarkable unity) criticized the *Monell* court's misuse of legislative history and scrutinized the policy concerns at issue in municipal suits.

An important topic, however, has generally escaped scholarly and jurisprudential attention: Is this doctrinal shield from municipal liability a form of sovereign immunity? And if so, what can this teach us? . . .

As local governments have taken on traditional state sovereign functions in areas like public safety and education, a doctrine of local sovereign immunity is not entirely illogical. But the doctrine, as currently constituted, raises serious questions about accountability, representative government, and the rule of law. With some regularity, federal courts are powerless to hold local abusers of the public trust liable for violations of the Constitution—despite the contrary promise of a duly enacted legislative statute.

In the aftermath of the Civil War, Congress made clear its intention to eradicate instances in which remedies for constitutional violations were available in theory, but not available in practice. In the shadow of that history, the version of federalism that the court cites in support of local sovereign immunity is, as Professor Norman Spaulding once said of the court's federalism jurisprudence, "chillingly amnesic." Ironically, it is also chillingly shortsighted, as the scope of local government power continues to expand. Police gear and weaponry are increasingly militaristic, a topic that has especially captured America's attention in the post-Ferguson era. Some local school districts are exploring ways to equip teachers with guns. Local officers and prosecutors are on the front lines of a criminal justice system that incarcerates more people than at any point in history and any place in the world. Major American cities are experimenting with unmanned drone technology to surveil Americans from the skies, a development that recently drew a note of concern about privacy from a sitting United States Supreme Court justice.

This power carries risks of abuse—abuse that the current doctrine is ill-equipped to correct. Is it possible to have a doctrine that increases accountability for local constitutional violations, while taking seriously the view that federal lawsuits represent a threat to federalism, autonomy, and representative government?

—from *Local Sovereign Immunity*, 116 *Columbia Law Review* 409 (2016)

Too Big to Disclose: Firm Size and Materiality Blindspots



George S. Georgiev
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BA, Colgate University, 2002
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Scholarly interests: corporate law, corporate governance, securities regulation, comparative business law

Professor Georgiev joined Emory Law this year from UCLA School of Law, where he was a visiting assistant professor. At Emory, he will teach Business Associations, Securities Regulation, and Corporate Governance. Georgiev's research and teaching are informed by his experience as a transactional corporate lawyer with Sullivan & Cromwell LLP and Clifford Chance LLP, where he worked on a number of landmark transactions related to the global financial crisis and the Eurozone crisis. He has also worked at the European Commission's antitrust division in Brussels and the European Court of Justice in Luxembourg. Georgiev's research appears in the *Yale Journal on Regulation*, *UCLA Law Review*, *Utah Law Review*, *Minnesota Law Review Headnotes*, and *Yale Journal of International Law*, among others. He has been quoted in various media outlets, including the BBC, *Los Angeles Times*, *Globe and Mail*, *Baltimore Sun*, and *Bloomberg BNA*. His current projects examine the design and performance of the SEC's regulatory regime for public companies and the nexus between securities regulation and entrepreneurship.

SELECTED PUBLICATIONS

Articles

- Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation, 64 *UCLA Law Review* 1 (2016)
- Paying High for Low Performance, 100 *Minnesota Law Review Headnotes* 14 (2016) (with Steven A. Bank)
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Excerpt: Too Big to Disclose: Materiality Blindspots in Securities Regulation

George S. Georgiev

The United States has the world's deepest and most-developed capital markets, which are home to over 5,200 publicly traded companies with a total market capitalization of over \$25 trillion. This collective wealth comprises the investments of pension funds, mutual funds, hedge funds, university endowments, other institutional investors, sovereign wealth funds, and individual investors.

Public companies enjoy the advantage of being able to raise capital quickly and efficiently; in return, they are required to provide investors and the Securities and Exchange Commission with information, known as disclosure, about their activities on a regular basis. This includes information about a company's financial condition, results of operations, trends and risks affecting its business, significant contracts, pending litigation, and commitments to future projects, to name a few. The primary purpose of this information is to enable investors to evaluate a company's prospects, compare it with other companies, and, ultimately, decide whether to buy, sell, or hold its securities. A collateral benefit is that this information often gives society at large a rare glimpse into the activities of powerful corporate entities.

The content and format of the information companies are required to release are governed by the securities disclosure regime, a complex set of detailed and prescriptive rules established by Congress and the SEC. The disclosure regime traces its origins to the New Deal and is tasked with protecting investors from the kinds of abuses that led to the stock market crash of 1929; it is one of the primary tools of securities regulation.

This article argues that the securities disclosure regime contains previously unexamined structural deficiencies, which pertain to the disclosures provided by the largest public companies. These deficiencies arise from the operation of the materiality standard, a core element of the securities disclosure regime that is used in a number of disclosure rules. Materiality is designed to limit companies' disclosure to information that would be of importance to investors, and to prevent the overproduction of information. I argue, however, that materiality can also lead to the underproduction of information—or to “materiality blindspots”—when firms grow beyond a certain size. Since the threshold for what is material increases as firms get bigger, at the very largest firms even matters that are significant and sizeable in absolute terms may be deemed immaterial and remain undisclosed. In other words, firms can become “too big to disclose” and, in a perfectly legal manner, take advantage of materiality to avoid the disclosure of important matters.

Consider the following examples:

(1) The SEC requires companies to release information about material contracts, including the key terms of any “material definitive agreement,” and the full text of “any material plan of acquisition” of a business. In May 2011, Microsoft announced that it had entered into an agreement to acquire Skype, an Internet telecommunications company, for \$8.5 billion. Microsoft was the third-largest US public company at the time, and this was the largest-ever deal in its 36-year history. Yet, Microsoft did not report the key terms of the acquisition agreement and did not file its full text with the SEC. Presumably, this is because Microsoft concluded that the agreement was not material.

(2) The SEC also requires public companies to disclose historical information about individual capital expenditures and operating expenses that materially affect their financial condition and results of operations (including, for example, expenses on R&D). Google (recently reorganized as Alphabet) is the second-largest US public company and derives the vast majority of its revenues from its Internet search technology and advertising business. Google, however, is known to make substantial investments in a wide variety of other projects with transformative potential in fields as diverse as biotechnology, consumer electronics, and transportation. As in prior years, Google's 2014 annual report disclosed heavy aggregate spending on capital projects and R&D, in the amount of \$11 billion and \$9.8 billion, respectively. The company, however, did not disclose information about the specific projects to which this spending was directed, presumably because the individual amounts were not material to the tech giant's financial condition or results of operations.

Under the Supreme Court's definition of materiality, information is material if a reasonable investor would consider it important in making an investment decision or if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” The matters discussed in the preceding examples are significant and sizeable in absolute terms, and they could entail corporate waste or poor decision-making that would also be substantial in absolute terms. But these matters have been deemed immaterial because the public companies to which they relate are so big that disclosure arguably would not alter the “total mix” of information made available to investors. The larger the company, then, the less likely it is that any individual acquisition or investment project, however

substantial, would be material in the context of the total informational mix. Such large and significant—but undisclosed—matters constitute materiality blindspots: pieces of information that remain hidden due to the operation of the materiality standard in the context of large firm disclosures.

I identify two sets of potential harms caused by the interaction between materiality and firm size. First, materiality blindspots may diminish aggregate investor welfare and undermine corporate governance by exacerbating agency cost problems within the corporation (i.e., suboptimal or illegal practices by management or the board at the expense of shareholders). What is more, the absence of disclosure can also prevent the detection of such practices. Even when fraud or waste is small—and immaterial—in the context of an individual company, the resulting losses are amplified across the market because investors as a whole are exposed disproportionately to the securities of large firms. For example, the combined market capitalization of the 100 largest firms (only 2 percent of all US public companies) accounts for approximately 63 percent of the total market capitalization of the S&P 500 index, and approximately 49 percent of all available market capitalization in the United States. Median investors in particular are even more likely to be exposed to large firms. Such investors often hold funds linked to indexes such as the S&P 500, which are weighted by market capitalization, focus only on large firms, or both. Perversely, the disclosure regime's reliance on materiality in the context of large firm disclosures may serve to undermine investor protection, the key goal of securities regulation.

Second, materiality can lead to market distortions and provide advantages to large firms simply due to their size. Because they have the ability to avoid the disclosure of matters such as acquisition agreements, legal proceedings, and business projects, large firms can gain an advantage over smaller competitors facing the same issues. For example, a large firm's ability to acquire a private company and avoid disclosure of the acquisition agreement (which often contains sensitive information) can give it an advantage over a smaller public bidder that, due to materiality, would be required to make the disclosure. Similarly, the ability to invest significant resources into capital projects and R&D without disclosing the nature of the projects—in other words, to operate in secrecy—gives large firms a potential competitive advantage over smaller public firms, which would be required to develop similar projects under the direct scrutiny of investors and competitors. As a result, materiality blindspots can distort product markets as well as capital markets to the advantage of large firms. I suggest that, in the aggregate, the securities disclosure regime's current approach to large firm disclosures—and the resulting

materiality blindspots—confer a regulatory subsidy upon large firms.

In light of the potential costs of materiality blindspots, I argue that we should reconsider our exclusive reliance on materiality in formulating certain large firm disclosure requirements. I propose to supplement disclosure requirements that currently incorporate materiality with targeted rules that use specific numerical thresholds (for example, dollar thresholds) to trigger the disclosure of additional information by large firms in areas of particular importance. These rules would serve as a safety net—requiring the disclosure of information that is significant and sizeable in absolute terms (as determined by the SEC), but that may not be material to a large firm. To enhance the effectiveness of such rules, the SEC should accelerate efforts to streamline the disclosure framework by removing duplicative disclosures and improving the usability of information provided by all firms. This disclosure-based solution has the advantage of addressing both sets of problems caused by materiality: It would supply additional information that could enhance investor welfare and corporate governance, and it would address the regulatory subsidy for bigness and contribute to size-neutrality within the disclosure regime. Other approaches to solving the problems identified in this article are also possible and they can be used either individually or in combination with the headline proposal. These include providing further disclosure relief to smaller firms (instead of requiring additional disclosure of large firms), and changing the definition of materiality in ways that take into account the size effects described here.

This article engages with several scholarly and policy debates. First, what is the appropriate design of the public company disclosure regime in light of significant changes in the structure of securities markets and recent reforms such as the Dodd-Frank Act of 2010 and the JOBS Act of 2012? Second, how much reliance should the securities disclosure regime place upon the materiality standard, and how should the standard be defined? Finally, does the materiality standard provide yet another advantage to large firms? In recent years, scholars have associated large companies with problems such as “too big to fail,” “too big to jail,” structural corporate degradation, and empire building, to name but a few, and have also observed a shift in the role (and power) of large companies in society. As policymakers and regulators grapple with these problems, addressing the materiality blindspots phenomenon identified in this article should also be part of the reform agenda.

—from *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 *UCLA Law Review* 1 (2016)

Lessons for Farmers Who Take on Monsanto



Margo A. Bagley

Professor of Law (chaired position, pending board approval)

BS, University of Wisconsin-Madison, 1986
JD, Emory University School of Law, 1996

Scholarly interests: biotechnology, intellectual property, patent law

Prior to earning her JD at Emory Law in 1996, Professor Bagley was an engineer and a research analyst, bringing to her practice, teaching, and scholarship a deep interest in the nature and pursuit of innovation. Bagley has brought that insight to students, scholars, and policymakers around the world, including engagements in China, Cuba, Israel, Germany, and Singapore. She has served as a committee member for both the National Academy of Sciences and the European Policy on Intellectual Property Conference. She is also an expert technical advisor to the government of Mozambique. She recently returned to Emory Law after 10 years as a professor at the University of Virginia School of Law, where she was the Hardy Cross Dillard Professor of Law and the Joseph C. Carter Jr. Research Professor of Law. Bagley's scholarship focuses on the comparative analysis of issues relating to patents and biotechnology, pharmaceuticals, and technology transfer.

SELECTED PUBLICATIONS

Books

Patent Law in Global Perspective (Oxford University Press 2014) (with Ruth Okediji)

International Patent Law and Policy (West Academic Publishing 2013) (with Ruth Okediji & Jay Erstling)

Book Chapters

Patent Barbarians at the Gate: The Who, What, When, Where, Why and How of US Patent Subject Matter Eligibility Disputes, in *Patent Law in Global Perspective* (Ruth L. Okediji & Margo Bagley eds., 2014)

Patent Term Restoration and Non-Patent Exclusivity in the US, in *Pharmaceutical Innovation, Competition and Patent Law: A Trilateral Perspective* (Josef Drexler & Nari Lee eds., 2013)

Articles

The Wheat and the (GM) Tares: Lessons for Plant Patent Litigation from the Parables of Christ, 10 *University of St. Thomas Law Journal* 683 (2013)

The New Invention Creation Activity Boundary in Patent Law, 51 *William & Mary Law Review* 577 (2009)

Academic Discourse and Proprietary Rights: Putting Patents in Their Proper Place, 47 *Boston College Law Review* 217 (2006)

Patently Unconstitutional: The Geographical Limitation on Prior Art in a Small World, 87 *Minnesota Law Review* 679 (2003)

Excerpt: “Grant Me Justice Against My Adversary”: Farmers and Monsanto

Margo A. Bagley

God, the creator of all kinds of diversity, through the Holy Bible, has provided humans with a vast array of counsel on how to live fruitful, abundant, and peaceable lives here on Earth, and steward the resources He has provided. . . . But can the Bible, God’s word to mankind, teach us anything about patent cases involving biological material such as plants? In the New Testament, Jesus Christ used short stories, called parables, to teach timeless truths about both living on Earth and a future life in His coming kingdom. Two of Christ’s parables share striking parallels with a recent declaratory judgment action involving biotech patents and civil society plaintiffs, and yield what I believe are helpful insights regarding the nature of the plaintiffs’ concerns and their ramifications for society at large. Part II of this Chapter explores similarities between the Parable of the Wheat and the Tares and the *Organic Seed Growers and Trade Association v. Monsanto Co.* case involving genetically modified seed contamination issues, while part III considers the Parable of the Persistent Widow in conjunction with the same case, but focused on the standing challenges the plaintiffs face. . . .

On March 29, 2011, the Organic Seed Growers and Trade Association, along with more than 80 organic and conventional farmers, seed businesses, and other organic agricultural organizations (over 300 total individuals), represented by the Public Patent Foundation, sued the Monsanto Company seeking a declaratory judgment of non-infringement if their fields are contaminated by Monsanto’s [genetically modified (GM)] crops. As discussed below, suits between Monsanto and farmers are not unusual; what was different about the *Organic Seed Growers* case is that this time, the farmers preemptively sued Monsanto.

Monsanto is the largest biotechnology seed company in the world. It has one of the largest agricultural patent portfolios, it has aggressively enforced its patents against farmers and against other companies, and it has been involved in some of the most fascinating plant patent cases. . . . The company is a global powerhouse, with \$14.9 billion in net sales and \$2.5 billion in profits in 2013. . . . According to data compiled by the Center for Food Safety, as of November 28, 2012, Monsanto had filed 142 lawsuits involving 410 farmers and 56 small farm businesses for violating its technology license agreements and/or GM plant patents, and had won damages of more than \$23 million in total from these cases. Perhaps more importantly, Monsanto also investigates roughly 500 farmers each year and has negotiated hundreds, if not thousands of settlements garnering the company an additional \$80 million to \$160 million.

Early on, the Court of Appeals for the Federal Circuit, which hears appeals in all US patent cases, upheld Monsanto’s right to prohibit farmers from saving seed for replanting, despite the fact that farmers have engaged in this practice since Adam and Eve were ejected from the Garden of Eden. The court’s decisions have been based on the notion of “absolute product protection,” the idea that an item infringes if it contains a patented component; in this case, the plants and seeds contain the patented chimeric gene.

This broad view of infringement is problematic in the context of GM traits in seeds and plants because the chimeric genes do not stay in one place—they spread. The spread of GM traits occurs through a variety of mechanisms including being carried by animals across fields and deposited in droppings, comingling in trucks that are used to transport both GM and non-GM seeds and other equipment, and the spread of pollen, which can fly in the breeze and pollinate plants miles away. . . . Today, Monsanto’s GM products alone are planted on more than 380 million acres in the United States comprising 40 percent of all US crop acres. Thus the spread of GM traits is inevitable.

Farmers in the *Organic Seed Growers* case do not want to be sued by Monsanto when (not if) their fields are contaminated by GM seed, and they believe they have good reason for concern. . . . As Professors Heald and Smith note “Monsanto is in the unique position of being able to take a problem that it created—the contamination of non-GMO plants by pollen drift from GMO plants—and use it to its advantage by prosecuting those bystander farmers whose crops become contaminated.” To add insult to injury, Monsanto, and other GM seed developers, have the *right* to sue farmers whose fields are contaminated by GM pollen and seeds, but not the *responsibility* to prevent such contamination, nor liability for any damage it causes. . . .

The Parable of the Persistent Widow

One of the unusual features of the Parable of the Persistent Widow is that we are told why Jesus shared this parable with His disciples. The parable, found in Luke 18:1–8, comes after Christ has been warning his disciples about how bad things will be at the end of time before His second coming:

One day Jesus told his disciples a story to show that they should always pray and never give up. “There was a judge in a certain city,” he said, “who neither feared God nor cared about people. A widow of that city came to

him repeatedly, saying, 'Give me justice in this dispute with my enemy.' The judge ignored her for a while, but finally he said to himself, 'I don't fear God or care about people, but this woman is driving me crazy. I'm going to see that she gets justice, because she is wearing me out with her constant requests!'" Then the Lord said, "Learn a lesson from this unjust judge. Even he rendered a just decision in the end. So don't you think God will surely give justice to his chosen people who cry out to him day and night? Will he keep putting them off? I tell you, he will grant justice to them quickly! But when the Son of Man returns, how many will he find on the earth who have faith?"

In scripture, widows are portrayed as helpless and indeed the objects of God's care and concern. Messing with widows in the Bible is a no-no. . . . And yet the unjust judge does not vindicate the widow because he fears God or has compassion on her, but rather because she is wearing him down or, according to some interpretations, may cause him to look bad. In the parable, the widow is like Christ's followers who long for His appearing. But He makes clear that God is unlike the unjust judge. Again, Professor [John Mark] Hicks:

Jesus seeks to encourage and warn his disciples. He encourages them by noting that even though there may be a delay in his coming, God will certainly vindicate his elect (the eschatological people of God). . . . On the other hand, the parable serves as a warning to the disciples that they must be faithful (persistent) in their prayers. . . . Jesus focuses on the judge, since God's compassion and love for his [followers] are seen in contrast to the judge's apathy for the condition of the widow. Will not God vindicate his own people if this unrighteous judge vindicates the widow? While it may seem as though God has forgotten his people, he will act on their behalf when the time comes. There is certainty with respect to God's ultimate victory in the coming of the Son of Man. However, uncertainty lies in whether the disciples will be as persistent as the widow was. Though God is an absolute contrast of the judge, will the disciples follow the example of the widow? Will the Son of Man, when he comes, find faith upon the earth?

There are clear parallels between the characters in the parable and the parties in the *Organic Seed Growers* litigation. The plaintiffs in the *Organic Seed Growers* case are in some ways like the persistent widow, as they have repeatedly, in their initial complaint and in appeals to the Court of Appeals for the Federal Circuit and a petition for certiorari to the United States Supreme Court, requested justice in

their dispute with their likely perceived "enemy," the Monsanto Company. Of course, the judges in the US federal court system bear some similarity to the judge in the parable, as federal judges are expected to render impartial decisions without regard to personal religious belief or personal relationships with/or characteristics of, the parties in cases over which they preside. Moreover, the plaintiffs certainly see the decisions of the three courts they have petitioned to date as "unjust" rulings. As one of the plaintiffs, Dave Murphy, founder and executive director of Food Democracy Now! stated after the Supreme Court refused the certiorari petition, "Once again, America's farmers have been denied justice, while Monsanto's reign of intimidation is allowed to continue in rural America."

As noted earlier, the "justice" the plaintiffs were seeking was a declaration that they would not be liable for patent infringement if their fields were inadvertently contaminated with GM traits, as well as the invalidation of claims in certain Monsanto patents. . . . The [Federal Circuit] even admitted that its stringent reading of the infringement statute in past cases suggested that merely selling trace amounts of a patented seed without authorization could be infringement; acknowledging, amazingly, that such a reading could "place potential infringers in the untenable position of never knowing whether their product infringes." . . .

Because none of the plaintiffs alleged a contamination level greater than 1 percent, the Federal Circuit affirmed the dismissal for lack of standing, as the dispute did not display "sufficient immediacy" to support declaratory judgment jurisdiction. Nevertheless, the court certainly could have chosen a broader view of the very real controversy at issue and accepted jurisdiction over the case. The court could have recognized the "untenable" position of the plaintiffs: determining and admitting to a level of contamination higher than 1 percent could constitute willful infringement, exposing the farmer to possible treble damages, and could close non-GM friendly markets (e.g., Europe) to the farmer's crops. . . . Unfortunately, the plaintiffs must now decide whether to make the hypothetical situation a reality by testing their crops. Then if the plaintiffs wish, like the persistent widow, to continue petitioning the courts for justice, they face the unappealing prospect of having to admit to having such a level of contamination or risk the suit being dismissed for lack of standing.

—from "Grant Me Justice Against My Adversary": What Parables Can Teach Us About *Organic Seed Growers & Trade Assoc. v. Monsanto Co.*, in *Diversity in Intellectual Property: Identities, Interests, and Intersections* (Irene Calboli & Srividhya Ragavan eds., 2015)

Scholarly Recognition



Domingo

This spring, **Rafael Domingo**, Francisco de Vitoria Senior Fellow at the Center for the Study of Law and Religion, received an honorary doctorate from Saint Ignatius of Loyola University. Past recipients of the honor include Mario Vargas Llosa, winner of the 2010 Nobel Prize in Literature, and José María Aznar, former president of Spain, among others. Separately, Domingo received an honorary diploma from the Peruvian Congress for his contributions to law and legal science. He was also inducted into the Inter-Academy of International and Comparative Law at the Palace of the Peruvian Bar Association, and the National University of Saint Mark awarded him the Jose Barandiaran Medal of Honor.



Dudziak

Asa Griggs Candler Professor of Law **Mary L. Dudziak** was elected vice president of the Society for Historians of American Foreign Relations. The vice president is selected in a competitive election, after which he or she runs unopposed for president the following year. Dudziak founded and directs Emory Law's Project on War and Security in Law, Culture, and Society.



Fineman

In a recent analysis, Robert W. Woodruff Professor of Law **Martha Albertson Fineman** was identified as the most cited professor on the subject of family law. Fineman's scholarship was cited 580 times between 2010 and 2014, according to Brian Leiter of the University of Chicago Law School. Professor Fineman founded the Feminism and Legal Theory Project more than 30 years ago and is also founding director of the Vulnerability and the Human Condition Initiative, both based at Emory Law. In 2015–2016, Fineman served as William Allan Neilson Professor at Smith College. This summer, she collaborated with Leeds University School of Law's Centre for Law and Social Justice on "Vulnerability and Social Justice," a workshop that drew more than 70 international delegates.



Nash

In June, Emory Law Professors **Jonathan R. Nash** and **Ani B. Satz** were elected to membership in the American Law Institute, among a select group of 43 scholars from across the country.

Nash specializes in federal jurisdiction, the study of courts and judges, and environmental law (both domestic and international). Before coming to Emory Law, Professor Nash served as the Robert C. Cudd Professor of Environmental Law at Tulane University. Nash's scholarship has been cited by numerous courts, including the US Courts of Appeals for the Sixth, Eighth, and Ninth Circuits.

Satz is a regulatory health lawyer and philosopher who teaches torts, health law, disability law, animal law, genetics and the law, law and vulnerability, and business ethics. Her research focuses on the legal response to vulnerability and the appropriate scope of governmental obligations. She holds a faculty appointment at the Rollins School of Public Health, is a senior faculty fellow at the Center for Ethics, and is an affiliated professor at Emory's Goizueta Business School.



Satz

John Witte Jr., Robert W. Woodruff Professor of Law, McDonald Distinguished Professor, and director of the Center for the Study of Law and Religion, received the James W. C. Pennington Award in June from the Heidelberg Center for American Studies and the Department of Theology at the University of Heidelberg. The award honors a former slave who escaped his abusive master and became the first African American to attend Yale University. Witte's public lecture was titled "Religion and Human Rights: What James Pennington Still Teaches Us," given during a two-week stay as part of the James W. C. Pennington Distinguished Fellowship.



Witte

Brief Excerpts from New Work

Michael S. Kang and Joanna M. Shepherd

The Long Shadow of *Bush v. Gore*: Judicial Partisanship in Election Cases, 68 *Stanford Law Review* 1411 (2016)

Bush v. Gore decided a presidential election and is the most dramatic election case in our lifetime, but cases like it are decided every year at the state level. Ordinary state courts regularly decide questions of election rules and administration that effectively determine electoral outcomes hanging immediately in the balance. Election cases like *Bush v. Gore* embody a fundamental worry with judicial intervention into the political process: outcome-driven, partisan judicial decisionmaking. The article investigates whether judges decide cases, particularly politically sensitive ones, based on their partisan loyalties more than the legal merits of the cases. It presents a novel method to isolate the raw partisan motivations of judges and identifies their partisan loyalty, as opposed to their ideology, by studying a special category of cases: candidate-litigated election disputes. The article finds that Republican judges display greater partisan loyalty than Democratic judges in election cases where ideology is not a significant consideration. This result is not a function of selection methods, with both elected and appointed judges behaving similarly, but is partially a function of party campaign finance for Republican elected judges, with party loyalty increasing with party money received. However, the effect of party money disappears for more visible election cases and for retiring judges in their final term. What is more, partisan loyalty diminishes when state supreme court elections feature more campaign attack advertising. These findings give reason to rethink judicial resolution of election disputes that require impartial, nonpartisan settlement and offer new insight into judicial partisanship as a more general matter. . . .



Kang



Shepherd

Determining whether judicial decisionmaking is driven by partisanship, however, presents a vexing methodological problem. It is nearly impossible to disentangle partisanship from simple ideology in most cases of judicial decisionmaking. Given that parties organize along ideological lines, the partisan affiliation of a judge on one hand, and his or her judicial ideology on the other hand, are closely linked and difficult to isolate from one another.

Robert B. Ahdieh

From FedSpeak to Forward Guidance: Regulatory Dimensions of Central Bank Communications, 50 *Georgia Law Review* 213 (2015) (emphasis added)

In late 2008, as the full impact the Global Financial Crisis would have on the United States economy remained painfully unclear, the Board of Governors of the Federal Reserve System faced a difficult dilemma. The economy was continuing to contract at a dizzying pace. . . . Yet the Fed's primary—if not exclusive—tool for intervention was no longer available to it. The Fed had already reduced its target for the federal funds rate to zero, and further opportunity for monetary stimulus seemed out of reach.

At that moment, however, the Fed . . . embraced two important new tools of monetary policy. The first—the Federal Reserve Board's purchase of a massive volume



Ahdieh

of Treasury and mortgage-backed debt—received substantial public attention. . . . I explore the Fed's other tool of monetary policy, which has received far less attention but may be no less important, both as a tool of monetary policy and as a window into the growing complexity of administrative agency interventions in the modern economy. That the Fed's second new tool of monetary policy received less attention should perhaps come as no surprise, however, given its nature as nothing more than *talk*. Alongside its absorption of a mind-boggling amount of debt, the Fed found significant utility in . . . more effectively *communicating* both its decision-making framework for setting short-term rate targets and its expectations for what adjustments might result over the medium term . . .

From this significant change in the Federal Reserve Board's communication policy and practice we may gain insight into what we should understand to constitute "regulatory action" by administrative agencies. While far from the type of coercive constraint that regulatory agencies commonly impose, the Fed's systematic use of communication as a tool in the pursuit of its statutory mandate might be understood to have something of a regulatory quality to it. Talk may be cheap. But might it also be a kind of regulation?



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ALSO INSIDE

“Victims of lawless conduct often find that even when they properly allege violations of federal rights and evidence of government abuse, they are left with no one to hold accountable in federal court.”

— Fred Smith Jr.