



VIRGINIA JOURNAL

ABRAMS
CHOI
JEFFRIES

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
VOLUME 17 2014



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FIGURE AT VIRGINIA LAW
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INTRODUCTION

Seventeen years ago, **JOHN JEFFRIES** became the first faculty editor of the newly created *Virginia Journal*. The publication represented something new and ambitious: an annual attempt to explore the intellectual contributions of three members of our faculty. The *Journal* would be written not by a communications officer but by a colleague. Few law schools could have pulled it off because few had an associate dean like John Jeffries who was willing to immerse himself in his colleagues' work and present a detailed analysis to an audience of peers. Since then the editorship has passed to a succession of academic associate deans (or vice deans in our current terminology), but John's vision for the publication has continued to guide it during his deanship and now into mine.

It is a special pleasure, then, that after John's time as associate dean and dean to finally have the opportunity to profile him in the publication he did so much to establish. John is one of the nation's most influential and clear-sighted scholars in the fields of criminal law, federal courts, and civil rights litigation. His work seeks to understand how seemingly disparate doctrines and practices cohere to create systems of social control. He typically sets out to show that existing positive explanations for a particular doctrine or set of doctrines are insufficient and to offer a substitute. The newly offered account is then used as a basis for normative critique. Both positive and normative analyses are written with confidence, flair, and a keen eye for previously overlooked details that make his work required reading for scholars and judges alike.

Nearly all lawyers are aware that, for example, the federal securities laws occupy territory that was previously the province of state corporate law. It is less well appreciated that federal immigration law increasingly regulates conduct that was traditionally thought to be governed by family law at the state level. To the extent that we now pay more attention to this phenomenon, it is in large part because **KERRY ABRAMS** has illuminated it for us. Informed by history and grounded in careful analysis of legal doctrine and social practices, Abrams' scholarship points out that immigration and family life are closely intertwined and that regulation of one inevitably becomes regulation of the other. Importantly,

she focuses attention on the normative assumptions underlying immigration law's concepts of sham marriages, parentage, and prostitution, among others.

ALBERT CHOI'S rigorous training in game theory enables him to uncover incentive structures embedded within legal rules and contractual conventions. Private information and non-verifiable actions are fundamental problems within many contractual relationships, particularly principal-agent relationships. Albert's work seeks to uncover non-obvious ways in which parties negotiating a contract or litigating a dispute attempt to overcome those problems. These are often counterintuitive: parties sometimes deliberately resort to contractual standards that are more rather than less costly to verify or introduce explicit liability provisions into long-term contractual relationships that are primarily standard-based rather than rule-based. But correctly understood, they help the parties address misaligned incentives.

Paul G. Mahoney
Dean



KERRY ABRAMS

INVESTIGATING THE INTERSECTION OF IMMIGRATION AND FAMILY LAW

RECENT EVENTS have brought widespread attention to both immigration law and family law, but very few scholars have considered how these two fields can interact in profound and unexpected ways. Professor Kerry Abrams has emerged as the country's leading voice on this interaction, and she is helping to establish an insightful and sustained conversation about the links between immigration law and family law. By examining the histories, synergies, conflicts, and inconsistencies of these fields, Abrams is also able to capture broader cultural themes and influences that shape the very personal decisions governed by these laws.

Most immigrants to the United States come because of family ties. Lawful immigrants use these ties to obtain sponsorship from a spouse, child, or parent. Unauthorized immigrants have family ties, too, and these relationships are often the predominant factor in a decision to hop a fence or overstay a visa. Despite the deep connections between immigration law and the family, most scholars of immigration law have focused on other aspects of it, such as the breadth of executive power, constitutional rights of immigrants, or labor economics. Family law scholars, in turn, virtually ignore immigration law. Abrams sees things differently. Her work explores the underappreciated links between family law and immigration law, showing how family norms become deeply embedded in immigration law and how immigration law in turn shapes and regulates the family.

Abrams' interest in family law and immigration law initially stemmed from her undergraduate work in English literature, religious studies, and gender. As an undergraduate, she studied literary and

religious texts with an eye for how gender norms influenced and shaped culture. Upon graduating from Swarthmore College with Highest Honors and a degree in English literature, she worked in academic publishing, and later attended Stanford Law School and practiced commercial litigation at Patterson, Belknap, Webb & Tyler in New York. When a position in the Lawyering Program at New York University became available, Abrams jumped at the opportunity to teach.

Her initial attempts to write about her areas of practice—intellectual property, false advertising, employment discrimination, and civil rights law—proved frustrating. “Litigating a case is one thing,” Abrams explained. “You have a client with a real, pressing need, and those needs were always interesting to me. But sitting alone at a computer, deciding what to write about when I could write about absolutely anything ... that required a complete mental shift.” Abrams ultimately returned to her undergraduate roots. “I asked myself, ‘Why are you interested in law as an academic matter?’” she explained. And the answer was “because I don’t think law controls everything. Law is in a constant dance with culture. It is shaped by culture, and helps create culture.” Abrams ultimately decided that there were two areas where the connection between law and culture was especially salient and vexed: immigration law and family law.

Abrams was not concerned that most scholars failed to see a connection between these two fields. In some ways, they couldn’t be more different. Immigration is federal; family law is largely state-based. Immigration law is highly statutory and regulatory; family law is much more about case-by-case judicial decision-making. Immigration law is full of bright-line tests; family law uses amorphous standards such as “the best interests of the child.” And immigration law deals with questions of national identity and belonging, whereas family law deals with people’s individual identities and personal relationships. What Abrams saw early on, however, was that at the level of the individual person, the species of law regulating that person is irrelevant. If a person seeks lawful permanent residence based on a marriage to a U.S. citizen and immigration law refuses to recognize that marriage, then the outcome is just as personal and local for those two people as a state’s decision to forbid their marrying in the first place. On the flip side, if states forbid certain types of marriages (say, for example, between two people of the same sex, or between more than two people), then the state-level deci-

sion to define marriage affects who can be included in the polity on a national level.

In one of her early law review articles, Abrams rigorously analyzed the ways in which immigration law functions as a form of family law. “Immigration Law and the Regulation of Marriage,” 91 *Minn. L. Rev.* 1625 (2007), begins by delineating four stages in which law could regulate marriage: courtship, the entry into marriage, the intact marriage, and divorce. Abrams observed that in state family law, regulation of courtship is nonexistent, regulation of marriage is light (a license, a ceremony, a certificate, a small fee, and limitations on who can marry), regulation of the intact marriage is, again, minimal, and regulation on divorce is extensive. In contrast, she showed that immigration law regulates heavily in all four stages.

Consider, for example, courtship. Under state family law, courtship is completely unregulated. A convicted felon who claims falsely that he has never been arrested and that instead he is a decorated military hero with an M.B.A. from a top-10 school and a large trust fund can lie with impunity to a prospective spouse with no legal consequences. If they marry and the unfortunate spouse discovers the lie, the only remedy is divorce—most states would not grant an annulment, nor would they entertain a lawsuit for fraud. In immigration law, by contrast, the government intervenes in the courtship process. If a U.S. citizen sponsors a fiancé for a temporary visa, he or she must demonstrate that they have met in person before but that they have not known each other for more than two years. They must marry within 90 days of the fiancé entering the United States. And the U.S. citizen must reveal to the U.S. government (and his fiancé) any criminal convictions, including convictions for offenses relating to alcohol or domestic violence. These differences are only the beginning of the many ways in which immigration law regulates some marriages much more extensively than family law does.

Abrams’ observation was not an indictment of the immigration law system. Rather, her article aimed to show that rigid definitions between doctrinal areas such as “family” and “immigration” law fail to capture how the law actually regulates real families. Immigration law does not only regulate immigrants—it also regulates the family members of immigrants if they seek to reunify. Much of this regulation is subtle but nevertheless real. One example Abrams pointed out in her article is the extensive detail in the Code of Federal Regulations telling

immigration officials what evidence of a “bona fide marriage” for immigration purposes should look like. The CFR lists many types of evidence that might be pertinent, including documentation of joint ownership of property, joint leases, joint bank accounts, birth certificates of children born to the marriage, and “other” documentation—often, in practice, pictures of vacations, weddings, or honeymoons. The logic behind these regulations is sound: it is more likely than not that someone who has a child with another person, or buys a house with them, or opens a joint bank account, really wants to be married to them and isn’t just doing it for a green card. But these regulations have the effect of encouraging particular behavior in people who already have bona fide marriages. A loving, married couple might open a joint bank account when they otherwise wouldn’t, hurry up and have children, or jointly buy a home when they otherwise would have lived with extended family. They may hold a wedding ceremony (perhaps involving customs they wouldn’t have chosen) or take a honeymoon that they can’t afford to develop the right documentary evidence of a “bona fide marriage.” For many immigrants, demonstrating a “bona fide marriage” is one of their first experiences of the coercive assimilation demands imposed on them by the law.

As Abrams continued to explore these connections, she quickly realized that the link between family law and immigration law is not new. Family-based migration has been going on since the dawn of time, and, as Abrams argued in several legal history articles, has shaped the development of U.S. immigration law. In “Polygamy, Prostitution, and the Federalization of Immigration Law,” 105 *Colum. L. Rev.* 641 (2005), Abrams revealed how the dominant story of the history of Chinese exclusion has missed an important component—the role marriage norms played in Chinese exclusion during the late nineteenth century. Many, many scholars had written extensively about the Chinese Exclusion Act, an 1882 federal law that barred Chinese laborers from entry into the United States. But most had ignored an earlier law—the Page Law of 1875. On its face, the Page Law looks narrow; it essentially excluded Chinese prostitutes from entering the country. But Abrams delved deeper, studying the enforcement of the law. She uncovered the trial transcript of the most important case involving Chinese women and read hundreds of pages of legislative history of the Page Law and other anti-Chinese legislation. What she found was that the term “prostitute,” while sometimes used accurately, was also used in a

much broader fashion than one might imagine. Most female Chinese immigrants in the nineteenth century were not first wives because a first wife would typically stay back in China to care for her husbands' parents. Instead, they were second wives, which immigration officials classed as prostitutes. Virtually every Chinese woman entering the Port of San Francisco was a prostitute under this definition.

Although the percentage of Chinese immigrants who were women was small, the effect of excluding virtually all Chinese women was enormous. Chinese immigrants were ineligible for U.S. citizenship, and could therefore be deported at the whim of the government. But a child of Chinese parents, born on American soil, was a U.S. citizen under the Fourteenth Amendment to the Constitution. Anti-miscegenation laws deterred Chinese men from reproducing with white women, but if Chinese women were allowed to live in the United States, there was a real possibility of a second generation of Chinese-Americans who were citizens. The Page Law prevented this from happening; it was not until the 1950s, after the various anti-Chinese acts and the bar to Asian citizenship were repealed, that the gender gap began to close and the Chinese population rapidly began to expand. Thus, Abrams discovered, the Page Law is a prime example of the complicated relationship between law and culture; the law responded to cultural differences in a way that further entrenched the very differences to which it was responding.

After exploring the Page Law, Abrams turned to the next logical question. "I wondered," she explained, "if Chinese women were excluded because they were the 'wrong' kind of wives, is there anyone who was included? Does the law include as well as exclude?" This question once again led Abrams to look beyond doctrinal boundaries for answers. Immigration law, by its very nature, is about exclusion. But other laws, such as the Homestead Act, which encouraged settlers to farm land in the territories, were "inclusive" in that they were intended to create incentives for migration. In "The Hidden Dimension of Nineteenth-Century Immigration Law," 62 *Vand. L. Rev.* 1353 (2009), Abrams argued that we should think of laws such as the Homestead Act as a type of inclusionary immigration law. And she found that the family also played an important role in this type of legal system. The Homestead Act, for example, did not only encourage male farmers to migrate. It gave twice as much land to men who brought wives.

The Homestead Act was just one example of how certain types of

migrants were encouraged to move west. Abrams' article also included an extended case study of the migration of white women to the Pacific Northwest in the 1860s. Male pioneers, she showed, were cohabiting with Native American women and adopting their customs. In an effort to counteract this trend and "civilize" the west, local governments and local leaders up and down the West Coast engaged in schemes to import white women from New England and Europe to be brides for the pioneers. The most famous of these expeditions was that of the "Mercer Girls," named for Asa Mercer, the man who organized their voyage. Abrams retold the history of the Mercer Girls, long a founding folk tale of Seattle, as a story about legal history. Categorically, the Mercer migrants resembled the Chinese women excluded by the Page Law. Yet at every point where government might have intervened—whether to protect the women or to prosecute them for prostitution—it failed to act. The perceived need for white women, Abrams argued, was too great. And in the public imagination, the women were already "brides," even though most of them had been recruited not with promises of husbands but with promises of jobs teaching school in the new towns of the West.

In more recent work, Abrams has expanded her research in several new directions. First, she has moved beyond analyzing marriage and immigration to consider marriage in general, including how it is treated under a variety of laws not traditionally considered "family law." "When I was writing about marriage and immigration, I noticed that the tests in family law were often very different from the tests adopted by immigration law," she explained. "I wondered, what about tax law? Social security law? Military benefits? There are all of these pockets of federal law that use marriage to determine whether a person should get a benefit or not. I wondered if there was any consistency across these fields." In "Marriage Fraud," 100 *Cal. L. Rev.* 1 (2012), Abrams canvassed the tests of what makes a "bona fide marriage" across these different doctrinal areas. In doing so, she noticed that in some circumstances, a marriage certificate is enough to get the benefit; spousal health insurance eligibility is a good example. She called these legal rules "formal marriage" tests. In other contexts, however, marriage standing alone isn't enough to get the benefit; the potential recipient also has to meet additional qualifications. For example, to be eligible for death-related Social Security benefits, a divorced person must demonstrate that the marriage upon which the benefits are based

lasted at least ten years. Abrams termed tests like these “marriage-plus” tests. A third type, the “functional” test, asks whether a couple is functioning as married partners, not whether they really are formally married. The infamous “man in the house” rules of welfare law are a good example; a sexual relationship with a man used to render a mother ineligible for welfare benefits, even if there was no evidence that he was financially supporting her. Finally, the most elaborate tests are “integrated,” combing elements of the other types. Immigration law is a prime example of the integrated test: to have a bona fide marriage, the couple must demonstrate not only that they are legally married (form), that their marriage meets another qualification (e.g., they must have been married for at least two years or undergo additional evidentiary hurdles—a “plus”), but also that they “plan to establish a life together” (function). Thus, the integrated test includes elements of all three of the other types.

In “Marriage Fraud,” Abrams ultimately argued that the type of test the law will impose is quite predictable. We live in a time when divorce is relatively easy to get, sex outside of marriage is not illegal (or even socially frowned upon) and extensive public benefits come with marriage. It is now possible for people to use marriage instrumentally, to get the benefits they want, and then discard the marriage once they have them. Abrams argues that we might expect tests to be more and more elaborate as two things increase: (1) the extent of the benefit, and (2) the ease with which one party can exit the marriage while still retaining the benefit. If the state can keep the test simple, it will, because it’s less expensive to monitor. A person is unlikely to marry a stranger just to get health insurance, for example, because for most people, insurance is prospective—you don’t know when you’ll need it. But even if someone did marry a stranger just to get health insurance, they would need to stay married to keep the policy, so the state has little to worry about in the long run. By contrast, immigration benefits—which provide the right to work and a path to citizenship—are of immediate and substantial value to the recipient, and outlast the marriage they were based on. So, Abrams argued, it makes sense that the law would only lightly police health-insurance marriage fraud but devote extraordinary resources to policing immigration marriage fraud.

Abrams extended some of these arguments with the article “What Makes the Family Special?” 80 *Chi. L. Rev.* 7 (2013). Most of her work thus far had taken family-based immigration as a given. Abrams was

now interested in determining the extent to which immigration law functioned as a form of family law. In this article, she asked something new: Why would a country like the United States want to privilege family members as immigrants in the first place? Is there something special about the family that makes family members better potential citizens? And if so, do our current system's family reunification categories use those advantages effectively?

Abrams argued that there are three broad reasons why a country of immigrants would prefer family members over other immigrants: integration, labor, and social engineering. Family members might be more likely than other immigrants to integrate quickly into American society, especially if they are children whose values and language skills are still developing. Family members might be better screeners than employers for labor migrants. Imagine, for example, a man with five brothers who can afford to sponsor only one. The man has inside information about which brother will be the most industrious, and, since he will be required to sign an affidavit promising to support his brother financially, he has an incentive to make sure he picks the right one. In contrast, an employer will have short-term needs but will not necessarily know which potential employees will make the best citizens in the long run. And, in a nod to her early article "Immigration Law and the Regulation of Marriage," Abrams argued that immigration law allows forms of social engineering that might otherwise be unconstitutional. Think back to the example of fiancée visas. It would likely be a violation of an individual's privacy and freedom of association to require a criminal background check before asking someone out on a date, but immigration law allows precisely this type of intervention. It can thus be a mechanism for intervening in individual relationships, and also for tinkering with all kinds of social characteristics of a large population—gender balance, child-rearing propensity, or attitudes toward marriage. Allowing family members access to the limited number of green cards available means that people who are married with children will be disproportionately represented. Because women receive fewer educational and skilled-work opportunities worldwide, family reunification also means that women will have more access to legal status than they would if immigration were purely skills-based. Once again, law responds to culture, but can also change it.

Abrams has also extended her work on immigration and family law into questions about parentage. Like marriage, parentage is regulated

by state family law. Similarly, parentage is also a status that conveys important benefits in immigration and citizenship law. “Immigration’s Family Values,” 100 *Va. L. Rev.* 629 (2014), co-authored with Abrams’ former student, 2012 graduate Kent Piacenti, broadened the arguments made in “Immigration Fraud and the Regulation of Marriage” and “Marriage Fraud” to explore differences in how these two areas of law treat parentage. Abrams and Piacenti argue that, rather than faulting immigration and citizenship law for deviating from family law, these areas should be evaluated on their own terms, with an understanding of their institutional roles and purposes—what they call “immigration’s family values.” Sometimes, they argue, immigration law may have very good reasons for deviating from family law principles in determining parentage, since the purpose of immigration law is not to protect children or privatize dependency but rather to admit immigrants who are likely to succeed as permanent residents or citizens of the United States. The authors criticize immigration law, however, for not taking one of its core values—family reunification—seriously enough. Because a core value of immigration law is to vindicate the rights of U.S. citizens, they argue, immigration law should do more than it currently does to reunify families, even if the families do not have genetic ties.

Abrams continues to write about the intersection of immigration and family law, even as she expands her scholarly approach into other topics. She has written on the rhetoric used by advocates for and against same-sex marriage, analyzed how marriage functions as a form of citizenship, and assessed changes in annulment law. Currently, Abrams is working on articles exploring such diverse areas as congressional regulation of genetic testing, the legalization of polygamy, families with three or more parents, and the evolution of domicile as a legal concept. She has also taken on a new leadership role within the University as Vice Provost for Faculty Affairs, a position that involves drafting policies affecting faculty. “It’s a big change from critiquing legal regulation to thinking about how to craft rules that work well for everyone,” she explained. “I have spent most of my scholarly career exploring how law and culture intersect; now I’m working to make sure that the rules that govern our scholarly community respect and reflect the cultures within that community.” As a leading scholar, popular teacher, and astute leader, Kerry Abrams is perfectly positioned to do exactly that.

EXCERPTS

**IMMIGRATION LAW
AND THE REGULATION OF MARRIAGE****91 *Minn. L. Rev.* 1625 (2007)**

Joe is single and looking for love. Frustrated with singles bars and blind dates, he does what millions of other people in his position do—he visits an Internet dating website where he meets Susanna. On their Internet profiles, both Susanna and Joe give inaccurate self-portraits. Susanna knocks ten pounds off her weight and omits her two kids by previous boyfriends. Joe adds two inches to his height, mentions that he never drinks, and fails to note that he is a recovering alcoholic with two DUI convictions. By the time they meet and discover these missing pieces of information, it doesn't matter. They have already fallen in love.

Susanna and Joe marry, and she and her two children move to Joe's hometown to be with him. Joe works construction, and Susanna stays home with the kids. About a year later, Susanna decides that the marriage isn't working and divorces Joe. The divorce court rules that the marriage was short-term and that, therefore, Susanna and Joe's separate property has not become "marital property"; the court essentially leaves each of them with the property they brought to the marriage. The court also rules against Susanna's request for alimony, noting that she is twenty-eight years old, has experience as a medical technician, and can easily find work. Susanna and Joe's marriage has a clean break—neither is required to provide for the other in the future.

If we change the facts slightly, however, the outcome changes dramatically. Imagine now that Susanna is not Susanna but instead Svetlana, an immigrant from Ukraine. She and Joe meet each other on an Internet dating website that enables American men to meet foreign women. Under U.S. immigration law, before the website can provide Joe with Svetlana's e-mail address, Joe has to disclose his criminal background (including his two DUIs), the number of minor children he has, any previous marriages, and a list of all states he has lived in since the age of eighteen. (He can still lie about his height.) Svetlana does

not have to disclose anything—including her two children.

Despite finding out about Joe's prior drinking problems, Svetlana falls for Joe. In order to qualify for a fiancé visa to come to the United States, Svetlana must meet Joe in person, so he makes an expensive trip to Ukraine for that purpose. They discover that they are as attracted to each other in person as they were over e-mail, and Joe also discovers that Svetlana has two children. In order to facilitate their living together, Joe sponsors Svetlana and her two kids on a fiancé visa; they come to the United States, and Joe and Svetlana marry less than three months later, as they must to prevent her deportation. When Svetlana applies to become a permanent resident, Joe files the required affidavit of support as her sponsor, attesting that his income is sufficient to support a wife and two children. The couple undergoes an interview in which they must prove to immigration officials that their marriage is *bona fide*—that they are marrying for love, and not just to obtain immigration status for Svetlana.

Joe and Svetlana are successful in demonstrating the *bona fides* of their marriage, and Svetlana obtains conditional permanent residency. Because she and Joe have been married for less than two years at the time of her immigration, she must wait two more years before achieving actual permanent residency (a green card). The marriage is rocky, and Svetlana suspects early on that it may have been a mistake. But she hopes for the best, and she wants that green card. So she does the things that her lawyer advises her to do to convince the immigration authorities that her marriage has been genuine from the beginning. (As it was—like most people, Svetlana thought her marriage was going to succeed when she entered into it.) She continues to live with Joe, opens joint bank accounts, and even becomes pregnant with his child. When the two years are up, Joe and Svetlana are interviewed again by immigration officials, who determine that their marriage is *bona fide*. Svetlana gets her green card, and within a few weeks files for divorce.

Along with the divorce papers, Svetlana files a lawsuit to enforce the affidavit of support that Joe filed to sponsor her as an immigrant. Despite the court's refusal to grant Svetlana alimony or a share of Joe's pre-marriage property, the court holds that Joe must pay Svetlana the amount of money per year that it would take to keep her and her two children above 125% of the poverty line: \$20,112 dollars in 2005, and likely more in future years. This obligation will end only when Svetlana becomes a citizen or has worked for forty Social Security quarters

(about ten years). Svetlana does neither, so Joe continues to support Svetlana and her children until his death.

Joe and Susanna's encounters with family law are fairly typical examples of how state law regulation of marriage currently operates. Marriage can be thought of as having four stages: the courtship stage, in which the couple meets and decides to marry; the entry stage, in which the couple undergoes whatever licensing and ceremonial requirements are necessary to achieve marital status; the intact marriage stage, in which the couple is legally married; and the exit stage, in which the couple divorces, has the marriage annulled, or one of the spouses dies. State marriage law today primarily regulates marriage only during the entry and exit stages, and even then, the regulation is very light.

Typically, the only requirements for getting married are reaching a certain age, not being already married, and finding a mate of the opposite sex who is not a close blood relative. Likewise, in the vast majority of jurisdictions, couples can get divorced for any reason or no reason at all. No matter whether one spouse is a liar, a cheat, a thief, a killer, or an addict—and no matter whether he lies to his prospective spouse about the fact that he is one of those things—if he can find someone to marry him, he can get married, and the state will have nothing to say about it. And if he wants a divorce, he can get one, even if he behaved very badly during the marriage and his spouse was a saint.

In contrast, immigration law regulates heavily all four stages of marriage. As shown through the story of Joe and Svetlana, immigration law permits government intervention at all points in a marriage, from the very early stages of courtship until "death do us part," even when the couple has already chosen to part by divorcing. And immigration law does not just affect the marriages of immigrants—it also affects the marriages of citizens like Joe, if they happen to marry foreigners. If family law is defined as any law that regulates "the creation and dissolution of legally recognized family relationships, and/or determines the legal rights and responsibilities of family members," then for people in Joe or Svetlana's position, federal immigration law is family law.

It should not be surprising that federal immigration law has a lot to say about marriage. Legal immigration status is a scarce resource: many people want it and Congress has made the decision to limit access to a select group of people—those who are family members of U.S. residents or citizens, those who are sponsored by U.S.-based employers, and those lucky few who win a diversity lottery and are randomly cho-

sen for admission. Because marriage is the most common legal mechanism for creating state-sanctioned couplehood, marriage is an important category for family-based regulation. In 2005 alone, nearly 300,000 immigrants were granted permanent residence as spouses of U.S. citizens or residents. Once Congress has decided to use marital status as a means of granting immigration status, it necessarily follows that Congress will define and interpret what marriage means and shape and regulate marriage through the immigration process.

...

This Article takes a first step toward mapping the architecture of marriage regulation in immigration law. It compares immigration law's regulation of marriage with that of traditional family law in each of the four stages of marriage and considers how immigration law might tell us something important about how Americans—or at least lawmakers—envision marriage today. The Article provides a taxonomy of reasons why Congress regulates marriage through immigration law and suggests how courts and scholars might determine the legitimacy of congressional action in this area.

POLYGAMY, PROSTITUTION, AND THE FEDERALIZATION OF IMMIGRATION LAW

105 *Colum. L. Rev.* 641 (2005)

In August 1874, the steamer *Japan*, sailing from Hong Kong, arrived in the port of San Francisco with five hundred passengers, eighty-nine of whom were women. The immigration commissioner for the State of California was Rudolph Korwin Piotrowski, a Polish immigrant who first came to California in 1849. When the *Japan* arrived in San Francisco, Piotrowski and his agents boarded the ship and examined each of the women, questioning them through an interpreter. Finding the testimony of twenty-two of the women to be “perfectly not satisfactory,” he concluded that they were lewd, debauched, or abandoned women within the meaning of the 1874 statute.

The questions Commissioner Piotrowski asked the women to determine whether they were lewd, debauched, or abandoned all cen-

tered on the validity of their marriages. When asked to summarize his line of questioning, he explained:

The questions which I gave them were generally where they were married; if they had any relatives or companions when they came here; or why & by what means they came. All of them answered that they were married. I asked "Where is your husband?" In California. When did he come? 3 years. How long have you been married? 4 years ago. How are you going to find him? We don't know. Have you any papers to show? They all said they were married; one of them said they were married in China; others say in California."

Women with children were permitted to land. Those without children, however, were suspect. Their lack of children, Piotrowski said, was "one of the principle reasons" he refused to let them land. Piotrowski ordered the ship's captain, John H. Freeman, to detain the twenty-two women whom he had deemed "lewd or debauched."

The detained women, through their lawyer, Leander Quint, petitioned the state district court for a writ of habeas corpus. The court issued the writ and transferred the case to the Fourth District Court in San Francisco. The lengthy transcript of the hearing is an important piece of the story of the shift from state to federal immigration, but it has been ignored by historians and legal scholars.

...

The transcript is also important because it shows us how California's strategy of state enforcement of immigration worked in practice. California immigration officials were primarily concerned with separating Chinese women into two categories: prostitutes and proper wives. California used two forms of evidence to make its case. First, through cross-examination of the women, its lawyers attempted to elicit testimony that would call into question the women's marital status. The women were not questioned about whether they were prostitutes or, more generally, whether they were "lewd or debauched." Rather, they were questioned about their marriages, and if their answers failed to satisfy the court, they were deemed "lewd or debauched." Second, lawyers for the state brought in witnesses to identify, through an analysis of the women's clothing and demeanor, whether the women were wives or prostitutes.

The assumption was that there was a strict dichotomy between wives and prostitutes—a dichotomy at variance with the more

nuanced reality of Chinese culture. Proper wives dressed, looked, and behaved in one way, “lewd” women in another, and these were the only options.

...

Although much contradictory testimony was elicited during the day-long hearing on a variety of topics, three general themes emerged. Most of the witnesses either supported (or refuted) the view that Chinese women who traveled without their husbands or a male relative chosen by their husbands were likely to be prostitutes, or supported (or refuted) the view that a Chinese prostitute was identifiable through her clothing, hair, and general demeanor. Finally, there was a surprising amount of testimony regarding the Chinese practice of polygamy, given that California’s law did not, on its face target polygamy.

Christian missionaries who had spent time in China tended to believe that a Chinese woman would never travel without her husband. Dr. Otis Gibson, for example, testified that “[i]t is not the custom at all for the wives to go away without their husbands.” Similarly, Ira M. Condit stated that in China, “respectable women travel very little. They are occupied at home. They have their o’n [sic] private apartments, & they leave them but very little. There is not much traveling of women; very little. I have seen but very little of it.” Some Chinese witnesses testified that respectable wives would only travel to the United States if they were accompanied by their husbands, or in rare circumstances, by a close friend or relative.

As for identifying a woman as a prostitute based on her dress, the missionaries once again provided testimony helpful to the state. Dr. Gibson stated that Chinese prostitutes usually wore bright-colored silk clothing underneath their dark outer clothing, “probably yellow or pink or red, & some figures on it of some kind.” The “figured flowered garments,” he said, “are not generally worn by wives.” Ira Condit testified that prostitutes generally wear “a gayer style of dress, a dress with yellow in it, & brighter colors.” Fang Hoy, a resident of San Francisco’s Chinatown, gave more specific testimony about differences in dress:

There is a distinction between whore & Chinese good woman . . . Chinese high class we call mandarin or rich folks. They dress in silk garments; common people dress in cotton or woolen. But the whore or prostitute, they have dresses just like rich folks . . . Wide sleeves, & have what we call a fancy border on the dress.

In its coverage of the hearing, the San Francisco Chronicle dubbed Fang Hoy's description of prostitutes' apparel "the badge of the scarlet sisterhood."

Several other Chinese men, however, testified that they could not tell the difference between a prostitute and a married woman by the way she dressed. Fun Pak explained:

If a woman is walking the streets you cannot tell whether she is a married woman; besides, because some of them married woman walk the streets; but there are a higher class of woman that are not going out walking around the streets; but some of a poorer class women walk around the street. Some of the whores or prostitutes may walk the streets, but you could not tell which is the prostitute or the family woman.

Ultimately, much of the testimony had the same "I know it when I see it" quality as the Supreme Court's obscenity jurisprudence nearly a century later. Ira Condit explained, "There is no definite dress which distinguishes them as such from the others. . . . It is more in their general character & appearance perhaps than anything else." Dr. Gibson identified one woman as a prostitute based on her clothing, but then had trouble explaining why he was so certain that the others were as well:

The flowers on that girl at the end, & her whole get up indicate without a doubt; the others haven't got that on. It is not discoverable in all of them as I look at them to-day. In half of their cases there is evidence to my mind that they belong to that class from the clothing they have on. I don't know only by that, and I know by the fact of their comming [sic] as they do here.

Thus, the hearing was devoted primarily to ferreting out women who were "lewd or debauched" from those who were married, even though the definition of "lewd or debauched," on its face, had nothing to do with marriage. This imposition of a strict marriage-prostitution dichotomy was typical of the times. It also foreshadowed the arguments presented by Horace Page to Congress several months later in support of the Page Law.

Also foreshadowing the Page Law was the emphasis on the Chinese practice of polygamy in the California hearings. In theory, polygamy had nothing to do with the hearings. The issue to be decid-

ed was whether the women had been improperly detained—whether or not they were, in fact, prostitutes. No one suggested at the hearing that a woman who was a second wife should be sent back to China because she was “lewd or debauched.” But an underlying theme of the hearing was that the Chinese had very odd marriage customs, and that Chinese women in general were untrustworthy and sexually aberrant. Chinese women in polygamous marriages seemed more akin to prostitutes than to proper wives. Accordingly, there were a significant number of witnesses who testified about the practice of polygamy, even if it was technically irrelevant.

At the hearings, Dr. Gibson distinguished between proper, monogamous wives, and wives in polygamous marriages. When questioned about the number of Chinese in San Francisco who were married, Dr. Gibson volunteered that even those women who were married were not really proper wives:

Q: What proportion of the Chinese women coming to this country are married? Could you say from you [sic] own knowledge of the Chinese here?

A: I don't suppose there are in this city to-day perhaps 100 married women. . . . There may be that I don't know of, but I don't think think [sic] there are 20 first wives in this city. . . . I think not, unless you call it married where they have second wives. They, some of them, take this class of women for a second wife, & leave them with the family when they leave here, & somebody else take' [sic] them.

Indeed, one witness had accompanied his second wife to San Francisco aboard the Japan. While his wife's status as a second wife was legally irrelevant, he was nevertheless questioned at length about the details of his marriage customs:

Q: Are you a married or a single man?

A: He has a wife.

Q: Where is your wife living?

A: He says, my wife is living at home in China, & the other wife, or the other concubine or second wife is here.

Q: Then you have two wives [sic], one living here and the other in China, have you?

A: Yes, sir; the older or principal wife is in China, & this secured wife is here.

This series of questions was an early example of what would become a common theme in courts and legislatures in the decades to come: the scandalous practice of polygamy as practiced by the Chinese. Although it does not appear that second wives were excluded through enforcement of these early California statutes, once immigration law became federalized, polygamy became grounds for exclusion.

MARRIAGE FRAUD

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The mere fact that marriage can be used instrumentally, however, does not mean that the government should waste resources preventing people from doing so. After all, people enter into relationships all the time for instrumental reasons, such as when they enter into employment contracts to earn money. What makes marriage fraud different from some other instrumental uses of institutions is its harm to the state, or at least lawmakers' perception of this harm. The intensity of the (perceived) harm must vary, because of the wide range of responses, from simple formal marriage rules to highly intrusive, and expensive to administer, integrated rules such as the "establish a life" test. What follows is an analysis of the potential harms to the state and why the tests vary as much as they do.

1. THE CONCEPT OF HARM: FRAUD ON THE MARKET

A first step to understanding why the state feels harmed by marriage fraud is to understand marriage fraud not as private contractual fraud, but as fraud on the public. In contractual annulment-for-fraud cases, identifying the victim was easy—so easy, in fact, that the fraud made the marriage voidable but not void. The victimized spouse, and only the spouse, could end the marriage, but the victim's family members, community, the public at large, and the state had no standing to challenge the validity of the marriage if the victim was content to remain married. In the public benefits marriage fraud cases, harm to one of the spouses suddenly becomes irrelevant, or, at most, only part of the problem.

Instead, the harm is to the public at large or even to the state itself. In this respect, the new marriage fraud doctrines resemble another body of twentieth-century law, the federal criminal law that established new crimes, including financial fraud. As William Stuntz observed, the old canard that “ordinary lying is not a crime” is no longer true: “a good deal of ordinary lying fits within the definition of one or another federal felony.” Criminal financial fraud, like marriage fraud, no longer requires an individual victim. In fact, in many cases the person who normally would be in the place of “victim” may have benefited from the fraud. Just as two people might collude in marriage fraud to seek the benefits of marriage, the shareholders of a particular corporation might benefit from fraud that enhances the corporation’s stock prices even if the fraud harmed the public by distorting the market.

The financial fraud context offers a preliminary answer to the question of how the public can be a victim. Altering the functioning of the market could harm everyone, because participants in the market rely on the “integrity” of the market price, which is in turn set by the millions of exchanges occurring on the market every day. This “fraud on the market” theory is useful for thinking about marriage fraud because it recognizes that the harms of fraud might be diffuse and difficult to quantify and nevertheless cause genuine harm. The analogy also suggests that marriage fraud will be difficult to police and require ever-changing methods as defrauders develop new techniques for working the system.

2. HARMS TO THE PUBLIC IN MARRIAGE FRAUD CASES

Marriage fraud, like financial fraud, might impose diffuse harms on the public. Hence, even without individual, identifiable victims, lawmakers appear to have a strong hunch that they must do something to prevent the instrumental use of marriage. Although marriage fraud does not distort stock prices, it could entail significant harm to the public, both financial and expressive.

A. FINANCIAL HARMS

First, marriage fraud might harm the public by costing it money. If the evil-doers did not commit fraud to gain access to benefits, then society could better spend the money somewhere else. Social security

benefits given to a spouse could instead go back into the social security system to be spent on someone else. If the entity giving the benefit is a private employer, as with health insurance, employer-sponsored pensions, or even gym memberships, the harm to the public is less direct but still present—the fraud will cost the employer money, and the employer will pass on these costs to consumers, that is, the public. The employer may also pass the costs on to other insureds in the pool—other employees of that particular employer, or other employees who use the same services.

But in the case of marriage, a problem lurks behind this theory of harm. What if the couple had a bona fide marriage and not a “fake” one? Then, presumably, they would be entitled to claim the benefit. In theory, each “ideal worker” is entitled to include one spouse as a beneficiary on his insurance policy, as a beneficiary for social security purposes and as a dependent for tax purposes. It is not as if we ration marriage licenses because we cannot afford to have everyone in society marry. Why should the public care how successful, honest, or satisfying his marriage is, so long as he is not claiming benefits for more than one spouse?

Perhaps the answer lies in the structure of the benefits markets themselves. On their surface, these markets appear to assume that benefits should be freely allocated to ideal workers, their spouses, and their children. In reality, however, the system operates on the tacit assumption that not everyone has a spouse. Single workers effectively subsidize health insurance for their married co-workers’ spouses. Similarly, in the context of immigration, U.S. citizens are entitled to sponsor an immigrant spouse, but the system assumes that most citizens will marry other citizens so that the number of citizens sponsoring immigrant spouses will remain low as a percentage of the total population. And we could even think of the federal tax system as burdening some types of couples to benefit others: the total cost of the marriage “bonus” given to some couples is largely offset by the marriage penalty imposed on others.

If we understand marriage benefits as subsidized by those who do not use them (or, in the case of the marriage bonus and penalty, subsidized by those who do not perform marriage in a traditional breadwinner/homemaker fashion), the “marriage-plus” rules and functional tests suddenly look not only like fraud prevention mechanisms but also like methods for cabining the definition of marriage.

This limitation ensures that not everyone can claim marital benefits and enough benefits will remain for those who conform to the privileged definition. The contractual system of marriage as privatized welfare worked best when everyone was married; the more recent system of using marriage as a proxy for entitlement to benefits works best if not everyone can qualify.

This theory of harm may partially explain the myriad cases involving gay people who, helped by their friends, engage in marriage fraud in order to be with, or obtain benefits for, their partners who are ineligible because of the different-sex requirement discussed previously. Numerous immigration and military benefits cases, for example, involve a U.S. citizen marrying the partner of a gay friend so that he can be reunited with his partner. In these cases, the fraud does not result from too many immigrants being sponsored but rather from the wrong person sponsoring the immigrant. The U.S. citizen sponsor is not sponsoring a second spouse; he is merely using his ability to sponsor a spouse, which would otherwise go unused, to help a friend. Nor is the “real” husband—the gay U.S. citizen—sponsoring anyone at all; in fact, he is forgoing his ability to sponsor a spouse and instead allowing a friend to do it for him. The harm, then, is not that an “extra” person obtained a status—both U.S. citizens were, in fact, entitled to sponsor someone for that status. Instead, the harm is that the system is simply not designed to allow everyone to claim a spouse, and someone whom the system has excluded is nevertheless attempting to claim the benefit.

A slight twist on this theory is the theory that marriage fraud robs insurers, both private and public, of their ability to adequately predict the payouts they must make. Health insurance and life insurance companies, for example, set rates and make predictions based on actuarial tables showing the statistical likelihood of death at given ages; insurance companies and public insurance programs, such as social security, make similar predictions about the likelihood of a person having a disability, being married, or having other dependents. The harm to the public if someone claims a spouse who is not “really” his or her spouse is not only that the state is forced to pay for someone it did not anticipate having to pay for, but that the claimant has robbed the state of its ability to make predictions about the number of claimants and ensure that its programs are adequately funded.

B. EXPRESSIVE HARMS

So marriage fraud might be expensive for the state. Might it also result in expressive harms? Many of the antifraud pronouncements Congress has made involve not expense but concern about protecting marriage itself. As Representative Barney Frank put it during hearings on the IMFA, “[m]arriage is a very important and a very sacred institution, and we should not stand by while people trifle with it to get into the country.” This kind of expressive harm might be thought of not as fraud on the market, but as fraud on the voters. Voters elect legislators who put a certain kind of public benefits program in place, which rewards certain kinds of marriages—that is, heterosexual and gender-traditional. Use of marriage fraud to obtain the benefit without conforming to the statutorily imposed definition of marriage denies voters and the citizenry their public policy preferences as expressed in voting practices.

Anxiety about harm to marriage as an institution could also justify the “establish a life” test. The logic goes something like this: if a couple is willing to marry and to live so as to create the appearance of sincere companionship, then their private motives for marrying will not damage the institution. Put differently, their willingness to embrace the “stick” aspects of marriage—commitment, mutual support, and conjugality—justifies their interest in a particular “carrot.” But if they are unwilling to embrace the stick, the institution might crumble.

According to some critics, the instrumental use of marriage does not just cheapen marriage. It also undermines marriage from within by de-gendering the institution. In this view, the fact that public benefits are structured to encourage traditional breadwinner/homemaker gender roles cuts in favor of maintaining them. Individuals who are not willing to take on these roles but want the benefits anyway threaten the institution by making it less about civilizing men, protecting against female dependency, and nurturing children. Instead, for couples unwilling to conform to traditional marriage roles, marriage is about the two individuals who make up the marital unit and their autonomous needs. With this theory in mind, we can read Boyter, the “divorce fraud” tax case, as punishing a couple for having the audacity to create a dual-breadwinner family. Marriage in this view is not an equal institution, but instead a status that shapes behavior along gendered lines to produce societally beneficial results.

A similar critique underlies the common charge that same-sex marriages are “counterfeit” or “fake.” Since same-sex couples cannot procreate with each other without outside help, some scholars have accused them of seeking “marriages of convenience entered into primarily for the tangible benefits.” A “real” marriage, on this theory, would be one in which the couple engaged in procreative sex. To return to the example mentioned in the financial harms section above, a person who uses a fraudulent immigration marriage to a third party to facilitate reunification with that party’s same-sex partner might be understood as harming the public financially by taking a spot that would not otherwise have been used. But such a marriage also alters marriage itself by introducing an alternative model that involves neither gendered roles nor procreative sex.

A problem with both of these critiques is that they make assumptions about what marriage is that may simply be untrue for many people. In order to identify an expressive harm to marriage, we must identify what marriage is, and how exactly the expression of a different vision dilutes, misrepresents, or destroys it. But there seems to be little cultural consensus on what marriage is today. The greater harm to marriage may occur not from opening it up to more types of people, but from insisting that it is a coercive, gendered institution, one that many people might find unappealing.

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ALBERT H. CHOI

BRIDGING THEORY AND PRACTICE IN COMPLEX CONTRACTING

ALBERT CHOI, now entering his second decade on the Virginia Law faculty, is one of the leading young scholars in the field of law and economics. Much of his work focuses on contract law and corporate law, but Choi has written broadly—tackling topics as diverse as litigation strategy, products liability, and nonprofit activity. In all of these areas, Choi seeks to refine sweeping legal theories by conducting a nuanced analysis of real-world activity and incentives. By observing and explaining how parties actually behave, he is able to transform broad-brushed theories and models into a more accurate understanding of how our laws shape complex economic activity.

Choi's interest in this work began with graduate training in both law and economics. While pursuing his Ph.D. in economics at the Massachusetts Institute of Technology—where he was a National Science Foundation's graduate fellow—Choi was drawn to contract theory and game theory. "What made the study of contract theory so interesting to me was that it was not just about examining bilateral commercial relationships, but also about analyzing other fascinating issues like choice between markets versus hierarchies and organizational structure," Choi explained. And when he was at Yale Law School to earn his juris doctorate, Choi naturally gravitated toward courses in contract and corporate law. At Yale, he began exploring the relationship between economic contract theory and contract law, earning the John M. Olin best paper prize (awarded for work in the field of law and economics) and several research scholarships.

Much of Choi's scholarship has continued to examine this relationship between economic contract theory and contract law. Choi has, in particular, focused on problems related to incomplete contracting and

verifiability. According to the theory, efficient contracting is not feasible when it is difficult or impossible for a non-contracting party, including the court, to verify whether a relevant event in an agreement has taken place. Scholars have argued that when efficient contracting is not possible, contracting parties are likely to adopt other methods in organizing economic activities, for instance, through allocation of residual control rights or through relational sanctions. The theory has had much influence not just in thinking about corporate hierarchies but also on contract law, leading some scholars to argue that the courts should be more formalistic in their interpretation of commercial contracts.

Notwithstanding the influence that the incomplete contract theory has had on contract law, Choi recognized that there are certain limitations on how the theory can explain real-world contracting behavior. In a series of influential articles, Choi introduced a richer notion of verifiability to better bridge the theory and practice. For instance, even among sophisticated commercial entities, contracts containing open-ended, vague language, such as “best efforts” and “material adverse change,” are quite common. If the events such as whether a contracting party put in “best efforts” or whether a “materially adverse” event has taken place are difficult or impossible to verify in court, how do we explain the common presence of such vague language in commercial contracts? Choi recognized that part of the disconnect between the theory and the practice stems from the fact that existing notions of verifiability are too simplified. Theorists had modeled verification like an on-off switch: either the underlying event is fully verifiable or impossible to verify. The real world, of course, is much more complicated.

In “Completing Contracts in the Shadow of Costly Verification,” 37 *J. Legal Stud.* 503 (2008), written with George Triantis, Choi introduced a richer notion of verifiability and demonstrated the role played by costly verification—which includes both the cost of adjudication and adjudication error—in optimal contract design. When contracting parties realize that proof of verification may involve expenses and even court error, they will seek to harness that cost to their advantage by designing a better incentive system *ex ante*. Choi argued that parties will incorporate both verifiable measures (such as pay-for-performance) and measures that are more difficult to verify (such as “commercially reasonable efforts”). Further, he offered an explanation for why the parties might actually prefer a regime where some measures

are more, rather than less, costly to verify. “Litigation expenses can function as a powerful deterrent against misbehavior, when properly tailored damages can screen non-meritorious suits from meritorious ones,” Choi explained. The first conclusion helps us understand why many commercial contracts, including executive employment and franchise contracts, contain both incentive terms based on verifiable measures (such as stock options or revenue sharing) as well as other provisions that are more difficult to verify (such as obligation to put in “best efforts” or to maintain the property in conformity with franchisor’s “high standards and public image”). Similarly, the second conclusion offers a solution to the puzzle of why commercial entities often contractually agree to litigate, rather than arbitrate, their cases, even though arbitration is often perceived to be a cheaper and more accurate dispute resolution mechanism.

Choi continues to develop and expand this theory of costly verification in a follow-up article titled “Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions,” 119 *Yale L.J.* 848 (2010). The paper, written again with George Triantis, was selected by the Corporate Practice Commentator as one of the Top 10 Corporate and Securities Articles of 2010. It attempts to tackle the puzzle over the common presence of vague clauses, such as “material adverse change,” or MAC, conditions in mergers and acquisitions agreements. As the name suggests, a MAC condition allows a buyer to walk away from the deal when a significant adverse event occurs to the seller after an agreement is signed but before closing. Given the high-stakes nature of M&A agreements, most contracts contain highly sophisticated and carefully thought-out terms and conditions, often with clear, accounting-based thresholds. What advantage does such an ambiguous MAC condition confer? Choi again took up the concept of costly verification to show how an ambiguous condition can actually be beneficial to the contracting parties. The article shows that by appropriately tailoring the termination fee, the “strategically vague” MAC condition can better help the parties in achieving three goals: providing a stronger pre-closing incentive to the seller to preserve the value of the assets; allowing the seller to better signal the value of the assets to the buyer; and more successfully renegotiating the deal when completing the deal no longer remains in both parties’ interests.

Thinking more carefully about issues of verification and incomplete contracts has also led Choi into the world of relational contract-

ing. Over the past forty years, many scholars have observed and emphasized that parties in long-term contractual relationships rely primarily (or even exclusively) on informal, relational sanctions, such as suspension or termination of the relationship, rather than formal contractual enforcement through litigation. This has led to the emergence of the “relational contract” theory, the focus of which is to examine the informal relationships between parties and also to argue for more minimal involvement of the court in long-term relationships. What the existing scholarship has been unable to explain, however, is the fact that commercial parties in long-term relationships still execute a detailed contract or establish a formal dispute resolution mechanism. Why bother with all that formal contracting if the relational sanctions and not the formal sanctions will be the primary deterrent?

In “Contract’s Role in Relational Contract,” written with Scott Baker and forthcoming in the *Virginia Law Review*, Choi attempts to answer this question, and also more broadly examines the relationship between formal and informal sanctions. The article argues that there are two important benefits that formal, contract-based sanctions possess that relational sanctions often lack. First is the flexibility of the parties to decouple the benefit of deterrence from the cost of providing that deterrence. By using privately stipulated damages, while containing the dispute resolution cost through various procedural mechanisms (including arbitration), formal sanctions can maximize the deterrence bang-for-the-buck. For relational sanctions, on the other hand, because sanctions require undertaking some inefficient behavior (such as suspension or termination of a productive relationship), the deterrence bang-for-the-buck is close to one: the larger the future benefits, the larger the deterrence value, but also the larger the cost of carrying out that threat. “If you threaten to terminate a relationship after a poor outcome, for instance, while the threat could be a strong deterrent against misbehavior, carrying out that threat can also impose a lot of cost on you, especially when the relationship has much productive potential for both parties,” Choi explained.

Second, formal adjudication can provide valuable information for the contracting partners and other third parties related to the alleged misbehavior. This information can, in turn, enable the parties to better tailor relational sanctions. For instance, these benefits can explain why parties in long-term relationships often include fault-based liability standards, such as “best efforts” and “good faith.” It is an empirically

well-documented fact that a company that experiences a liability judgment against it also suffers a market sanction, usually evidenced by a drop in stock price, and the size of the market sanctions tend to be larger when the court determines that the company was at fault. Choi explains that this empiricism is quite consistent with how the markets process information generated through litigation. The article goes on to demonstrate that when both types of sanctions are costly, the optimal regime will often combine both formal and informal dispute resolution mechanisms, which is, of course, what we typically observe in the real world.

In addition to closely examining the incomplete contract theory and the notions of verifiability, a separate line of research Choi has undertaken over the years examines how a contractual relationship between two parties can directly or indirectly affect third parties (a phenomenon known as “contractual externality”). Unlike conventional externalities, such as environmental pollution, a contractual externality is created through a contracting relationship. In “Allocating Settlement Authority under a Contingent Fee Arrangement,” 2 *J. Legal Stud.* 585 (2003), Choi examines the effect that a contingency fee contract between a plaintiff-client and her attorney has on the settlement bargaining outcome with the defendant in litigation. The article highlights an important tradeoff: when the client attempts to minimize the rent captured by the attorney and retain more of the surplus for herself, she may become more vulnerable to rent extraction from the counterparty, particularly when she has relatively weak bargaining posture against the defendant. In such circumstances, she may want to (de facto) delegate the settlement authority to her lawyer and allow her lawyer-agent to capture a larger rent to maximize her own return from litigation. Leaving a larger rent to the lawyer can actually benefit the plaintiff-client.

In “Golden Parachute as a Compensation Shifting Mechanism,” 20 *J. L. Econ. & Org.* 170 (2004), Choi examines the contractual externality mechanism in a corporate takeover setting. Large severance payments to executives that are triggered by a takeover, often called golden parachutes, have generated enormous controversy among practitioners, scholars, and lawmakers. What makes a golden parachute payment different from other types of executive compensation, however, is that there usually is a third party with a direct or indirect interest: the buyer attempting to purchase the corporation. Choi analyzes how

golden parachutes can be strategically used by target shareholders in shifting the compensation burden to the prospective buyer, increasing the takeover premium, and maximizing the target shareholders' return. Choi argues that this can explain why golden parachutes are adopted early, even in the absence of any takeover attempt, and as a part of the overall compensation package.

While the themes of incomplete contracts and contractual externality have remained two important strands in Choi's scholarship, he has also written in many other diverse topics in contract law, products liability, and litigation strategy. Choi has examined, for instance, what impact the allocation of bargaining power or surrounding market conditions have on non-price terms of a contract. In "The Effect of Bargaining Power on Contract Design," 8 *Va. L. Rev.* 1665 (2012), Choi and Triantis tackle the conventional law and economics argument that the allocation of bargaining power should be irrelevant in determining non-price terms of a contract. The so-called "irrelevance proposition" has been used most heavily in the context of the unconscionability doctrine. The article shows that the conventional argument relies on a set of strong assumptions and in more complex, realistic informational settings, lopsided bargaining power can lead to inefficient, one-sided non-price terms even when the actors are assumed to be fully rational.

Similarly, in "Market Conditions and Contract Design: Variations in Debt Contracting," 88 *N.Y.U. L. Rev.* 51 (2013), Choi and Triantis show why non-price terms in debt contracts, such as business covenants, tend to fluctuate (leading to "covenant-lite" or "covenant-heavy" deals) with changing market conditions. Applying the concepts of moral hazard and adverse selection, Choi demonstrates how changes in market conditions affect the severity of the moral hazard and adverse selection problems which, in turn, necessitate adjustments on non-price terms in the debt contract. Finally, in "Should Consumers Be Permitted to Waive Products Liability? Product Safety, Private Contracts, and Adverse Selection," co-authored with Kathy Spier and forthcoming in the *Journal of Law, Economics, and Organization*, Choi demonstrates the desirability of mandatory products liability when manufacturers of potentially hazardous products have an incentive to chisel on product quality and reduce the price to attract safer consumers.

Currently, Choi is working on several research projects that focus

on mergers and acquisitions, non-profit organizations, and class action litigation. In “Facilitating Mergers and Acquisitions with Earnouts and Purchase Price Adjustments,” he analyzes the role played by post-closing contingent payment arrangements, such as earnouts and purchase price adjustments, in allowing the transacting parties to better avoid bargaining failure and successfully close a deal. In “Relational Sanctions against Non-Profit Organizations: Why a Selfish Entrepreneur Would Organize a Non-Profit Enterprise,” Choi takes on the influential theory that non-profit organizations are chosen as a commitment to (or signal of) providing high quality when quality is non-verifiable and examines how introducing market-based sanctions (such as relational sanctions) can affect the organizational choice. Lastly, Choi is working on a project that analyzes the welfare implications of class action (or class arbitration) waiver provisions, an important issue that has received much attention recently due to the U.S. Supreme Court’s rulings in *AT&T Mobility* and *American Express*. In all of these endeavors, his focus is again on gathering insights from real-world contracting to shape and refine generalized legal theory.

Not surprisingly, Choi is also quite active within the law and economics research community. From 2005 to 2008, Choi directed the John M. Olin Program in Law and Economics, which fosters law and economics research at the law school by both students and faculty. Over the years, Choi has given numerous talks at seminars and conferences around the world. He has presented papers at every American Law and Economics Association Annual Conference since 2002, and he serves as a referee for many peer-review journals, both in law and economics and in economics. Since 2012 and 2013, respectively, Choi has served as an associate editor for two prestigious law and economics peer-review journals, the *International Review of Law and Economics* and the *American Law and Economics Review*. And in 2011, Choi was nominated and elected to serve, for a three-year term, as a member of the board of directors for the American Law and Economics Association.

Overall, Choi’s scholarship reflects his desire to better understand real-world contracting behavior and to bridge the gap between the existing theory and practice. He is intrigued by how the previous generation of law and economics scholarship has much influenced the debate, particularly in the areas of contract and corporate laws, and how shedding new light on the earlier findings could lead to a more nuanced understanding of the world. So far, this has led him to make

fresh contributions on long-standing debates and has made him a promising scholar in the field of law and economics.

STRATEGIC VAGUENESS IN CONTRACT DESIGN: THE CASE OF CORPORATE ACQUISITIONS

(WITH GEORGE TRIANTIS) 119 *Yale L.J.* 848 (2010)

The unprecedented and unanticipated economic and financial shocks of the past couple of years have profoundly altered expected payoffs from executory contracts. Credit markets have frozen, common stock prices have plummeted, and commodities prices have swung wildly. A variety of excuse, or walk-away, provisions such as closing conditions, force majeure clauses, and termination or cancellation rights are being triggered either to cancel the deal at a fee set by liquidated damages or even at no cost. The current economic conditions provide plausible grounds for excuse in a wide range of contracts, so these provisions are currently being actively tested, in court and in renegotiations. The invocation of material adverse event (MAE) or material adverse change (MAC) clauses in corporate acquisition agreements and lending commitments have been particularly noteworthy, as a number of multibillion dollar deals have fallen through. The parties in these deals have been engaged in litigation over the interpretation of these terms and in renegotiation of their agreements. The outcomes should be of great interest to contract scholars and are likely to lead to significant revision or redrafting of these provisions in the next generation of contracts.

Although the interpretation of these provisions has a significant financial effect on the parties to these broken deals, it has an even greater *ex ante* impact on the contract design of future deals. The contractual allocation of risks plays a role well beyond the simple transfer of risk to the superior risk bearer. It is an essential tool in addressing the goals of contract in a world of asymmetric information. First, it provides incentives for that party to take measures to minimize the risk (*efficient investment*). Second, a party's agreement to assume a risk signals private information about the probability and severity of the risk, and thereby promotes efficient decisions to contract (*efficient decision to contract*). Third, the parties may be asymmetrically informed as to whether the risk in fact materialized, and that information can be elicited through the assignment of risk to the party who is likely to be better informed *ex*

post. This promotes efficient decisions whether to execute the transaction (*efficient trade*). Thus, much more is at stake in the design of contract terms that allocate risks than simply exploiting differential risk preferences.

The optimal allocation of risks is complicated further by the presence of transaction costs, both at the drafting and enforcement stages of the contractual relationship. Transaction costs explain why contracts are incomplete and fail to specify fully the optimal obligations in each possible future state of the world. One cause of incompleteness is the cost of litigating and enforcing contracts. Contract theorists focus on the costs of verifying facts and typically posit that parties avoid terms that are costly to verify. Vague contract provisions fall in this category because of the cost and uncertainty of judicial interpretation. Yet, drawing on the line of scholarship that analyzes the rules-standards dichotomy in the design of legal rules, recent work frames the choice between vague and precise contract terms as a tradeoff in information costs: precise contract provisions raise contracting costs on the front end, but reduce enforcement costs at the back end. If a provision matters only in remote contingencies, for instance, then the back-end costs should be discounted by that remote probability, and it may be correspondingly efficient to save front-end costs by using a standard (or vague term) rather than a rule. In some cases, however, this benefit can be outweighed by the cost of protracted adversarial litigation, even if discounted by the low probabilities of the remote contingencies. The choice of precise rules over standards may also be driven by the fact that courts (the back-end decision makers) are usually less informed than the parties themselves (the front-end deciders). This raises the prospect of costly judicial error on the back end.

In a recent article, we departed from this tradeoff between drafting and enforcement costs, and focused on the effect of differing litigation costs on performance incentives under precise and vague contractual obligations. In the analysis, the prospect of verification or litigation costs may be beneficial to contracting, in addition to the front-end contracting cost savings. We thereby offered a distinct explanation for the use of vague terms and a different approach to incomplete contracting. A contract will very rarely be able to include terms that invoke perfect and costless signals of desired performance. A challenge of contract design is to choose among signals that vary in

their information content and litigation costs. We suggested that parties may choose a vague standard (such as “best efforts”) that invites costly and error-prone judicial proceedings over a precise proxy that is both less noisy and less costly to litigate. We demonstrated that litigation costs may be beneficial as a screen on the promisee’s incentive to sue and as an effective sanction against the breaching promisor. Without the benefit of this screen, a noisy proxy that is costless to verify raises the possibilities of false positives and false negatives, which, in turn, undermine incentives. So long as the court’s judgment is correlated with the promisor’s actual behavior, the parties can combine a vague term, such as best efforts, with a set of prices (including liquidated damages), so as to provide additional incentive to the promisor through an off-the-equilibrium, credible litigation threat. Indeed, litigation costs may in fact never be incurred when either they encourage settlement or they are harnessed through appropriate contract design to assure contractual performance.

This Article applies and extends significantly our analysis of litigation costs to show that they contribute broadly to the three contracting goals listed above: efficient investment, efficient decisions to contract, and efficient trade under conditions of imperfect information. In other words, we look at problems of adverse selection as well as the moral hazard analyzed in our previous work. Our analysis applies to a wide range of commercial contracts and contexts, but we adopt as our application the design of corporate acquisition agreements, for several reasons. First, these contracts involve sophisticated parties and large financial stakes. Vague clauses, such as MAC conditions, are among the most heavily negotiated nonprice terms and appear to have a significant effect on the level of acquisition premiums. Second, signaling and efficient investment incentives are likely to be important in these transactions because the seller has significant private information. Third, the collapse of financial markets and of corporate earnings over the past two years has put considerable stress on acquisitions: deals are breaking up and buyers (and their lenders) are invoking termination rights and contract conditions, particularly MACs, as the basis for walking away.

MAC conditions permit the buyer to avoid the closing of the deal if a material change has occurred in the financial condition, assets, liabilities, business, or operations of the target firm. We choose to focus on MACs in particular because, at least since the economic

shock following 9/11, commentators have urged greater precision in the language of MACs, including the use of quantitative thresholds. Yet, the typical MAC provision is not quantitative and remains remarkably vague. Vague contract terms invite self-interested and conflicting interpretations. As a result, they fuel disputes, as well as costly and uncertain litigation. Even where MAC provisions have some precision, they nevertheless give rise to substantial litigation costs if the pertinent factors are costly to verify. The uncertainty in MAC application, as well as the considerable resources that are invested in these disputes, prompts commentators to predict that future MAC provisions will be much more precise and simple. In particular, they suggest that future MAC clauses will adopt thresholds in readily proven quantitative measures (which we call “proxies”), such as revenues, customer or employee retention, earnings and stock price.

These sentiments are understandable as *ex post* reactions to the dissolution of deals in the current environment. We argue, however, that the *ex ante* case for vague provisions is underappreciated and parties should be cautious in substituting precise quantitative thresholds. The conventional analysis posits that vague terms are justified only when the expected larger litigation costs are outweighed by savings on the front end, in lower drafting costs. In acquisition agreements, this would suggest that vague MAC clauses yield benefits only by reducing the *ex ante* cost of providing for excuse conditions based on easily verifiable proxies. In contrast, our analysis demonstrates that the existence of litigation costs may in fact improve contracting by operating as a screen on the seller’s decision to sue. The litigation mechanism elicits the seller’s private information about the truth because the court’s judgment will be correlated (albeit imperfectly) with the truth and the seller must choose to invest in the litigation in order to reveal the court’s judgment. This screen facilitates the allocation of risk *ex ante* and thereby improves the signaling and incentive attributes of the acquisition agreement. Thus, when faced with a choice among noisy indicators, a vaguely phrased MAC may be valuable, whether in combination with verifiable proxies or on its own. Increased accuracy in judicial determinations is a good thing, but our analysis suggests counterintuitively that this may not be so when it decreases the cost of litigation.

CONTRACT'S ROLE IN RELATIONAL CONTRACT

(WITH SCOTT BAKER) *Va. L. Rev.* (FORTHCOMING)

A long line of legal scholarship has emphasized the prevalence and importance of using non-legal, informal sanctions to deter misbehavior and maintain cooperation among private entities. Celebrated examples include the ranchers in Shasta County, the whalers of New England, the cotton traders in the South, the diamond merchants in New York, and even sophisticated commercial entities. Particularly with respect to the last group, Professor Stuart Macaulay famously posed the question: “What is the point of written agreements in a world of long-term relationships?” Based on surveys of corporate executives, he found that commercial parties in long-term relationships rarely relied on, or even looked at, the written agreement. Instead, according to the survey respondents, they performed obligations out of the need to preserve a reputation as a good business partner; someone who could be trusted with future deals. Inspired by such observations, research by several influential scholars led to the birth of what is known as the “relational contract” theory, which fundamentally questions what role, if any, contract law plays in promoting and maintaining trade.

While the relational contract theory has had much influence on the legal scholarship over the past fifty years, one important question has remained unanswered. If the parties perform obligations, or fulfill their promises, out of the fear of reputational or relational sanctions, why do they bother to write enforceable formal contracts in the first place? Why do they often set up a private dispute resolution mechanisms with bells and whistles that resemble those of court-based litigation? After all, writing a long-term commercial agreement or setting up a dispute resolution system isn't free. The parties haggle over terms and procedures; they hire lawyers; they send multiple drafts back and forth. That is a lot of trouble if, in fact, the formal contract or the dispute resolution process won't be used or will be used rarely. What role does the formal contract and the accompanying dispute resolution mechanism play in an “informal” relationship? What is the relationship between the formal sanctions available under the contract and the informal sanctions that are utilized outside the dispute resolution system?

This paper attempts to answer some of these puzzles with the help of simple, repeated game theory. Contracting parties in a long term arrangement need a mechanism to control opportunism. Imagine a buyer and a seller engaged in a sale of goods transaction. Both the buyer and the seller fear that the other will take the benefit of the exchange and, then, not live up to her end of the bargain. The seller might take the buyer's cash and provide a sub-standard product or service in return. The buyer might take delivery on credit and subsequently not pay on time, perhaps arguing opportunistically that the delivered good is non-conforming. To assuage these fears and thereby promote a mutually beneficial relationship in the long run, both the buyer and seller must anticipate and suffer negative consequences for a decision not to honor commitments.

In a long-term relationship, these negative consequences could flow from (1) formal or legal sanctions, such as monetary damages imposed by court or arbitrator following a lawsuit; (2) informal or relational sanctions, such as suspension or termination of trade, or (3) a combination of the two. To make the analysis interesting and realistic, we consider settings where both legal and relational sanctions are costly to impose. Legal sanctions, on the one hand, require spending resources, including time, money, and opportunity cost on dispute resolution. Relational sanctions, on the other hand, involve failure or refusal to trade even when trade may be beneficial. Indeed, imposing relational sanctions often means switching contracting partners and incurring the start-up costs of a new relationship. In theory, parties would desire a system that deters opportunistic conduct at the lowest possible cost, understanding that neither sanction is free. When both types of sanctions are costly, it is a priori unclear which sanctions the parties will rely on more heavily in a given relationship.

Notwithstanding the theoretical indeterminacy, this paper shows that legal sanctions have two benefits relational sanctions often lack. First, parties can decouple the deterrence benefit of a legal sanction from its execution cost. Relational sanctions deter misconduct largely by taking away (or threatening to take away) the benefits or the surplus from future transactions: parties behave because they don't want to lose future business. The larger the value of the future business, the more the threat to take it away will cause a party to think twice about renegeing. At the same time, however, following

through on that threat means that the parties will have to forgo a larger potential surplus from a productive relationship. The larger the value of the future transactions between the two parties, the higher the cost the parties suffer by stopping or suspending that relationship. In short, the deterrence benefit and the imposition cost of informal sanctions are closely intertwined.

The story, however, differs for legal or formal sanctions. When the parties adopt monetary damages as formal sanctions, for instance, the amount of deterrence is largely dictated by the size of the damages that the losing party has to pay. At the same time, the dispute resolution cost incurred by the parties will often be smaller than the damages. This will be particularly true since litigation is usually brought when the size of the (expected) recovery is larger than the (expected) cost of litigation. Furthermore, parties in a long-term relationship can successfully contain the cost of dispute resolution, for instance, through arbitration and through tailoring of rules on procedure and evidence, while keeping the size of monetary damages sufficiently large. Through proper tailoring of monetary recovery (e.g., liquidated damages) and successful control of dispute resolution cost (e.g., arbitration), formal sanctions can deter contractual opportunism at a lower cost.

Second, through the dispute resolution process, legal sanctions allow the parties to uncover relevant information that enables them to better tailor relational sanctions. One reason that relational sanctions are costly is that they can misfire. In an ideal world, transacting parties would be fully aware of one another's behavior and the relational sanctions will get carried out only when one misbehaves. In fact, termination of the relationship would never happen since, with sufficient deterrence, no one misbehaves in equilibrium. Unfortunately, knowledge and monitoring are imperfect in reality. Parties have to rely on indicators—rather than perfect knowledge—of misbehavior in imposing relational sanctions and with imperfect indicators, relational sanctions will sometimes misfire. Examples are easy to find. A shoddy product by a manufacturer or an unsatisfactory experience at a restaurant is not necessarily the result of negligence or lack of care but can nevertheless lead to a decrease in demand or a cessation of customer traffic.

Given the tendency of relational sanctions to misfire, transacting parties will naturally want to increase the reliability of any indicators

of poor performance. A formal dispute resolution helps by allowing them to uncover relevant evidence of true behavior and to condition relational sanctions on more accurate indicators. For instance, instead of using poor quality as the only signal of misbehavior, the parties or other market actors might impose relational sanctions upon observing both poor quality and a finding of insufficient effort or bad faith. To the extent that the adjudicator's finding is correlated with the true behavior, relational sanctions misfire less frequently and become a more effective deterrence. In fact, parties can require the judge or arbitrator to make findings about behavior by conditioning liability on fault-based standards, such as "best efforts" and "good faith" in performance of a contract. While such vague standards have generated substantial amount of controversy among scholars and practitioners, in a long-term relationship, such terms can improve the performance of relational sanctions.

Although we emphasize these two important benefits provided by legal sanctions, there are, of course, costs to harnessing these advantages. Larger damages will likely induce larger litigation expenditure, either due to more suits being filed or because parties spending more in a given suit. It may very well be the case that providing \$100 of deterrence through damages might actually require litigation expenditures of more than \$100. In such cases, the parties will be better off relying more on relational sanctions. Similarly, adopting a fault-based and open-ended standard, such as "best efforts," could also lead to additional expenditure in dispute resolution, as parties will have to litigate over what the standard means and whether one or both parties have abided by that standard. This will induce the parties to think more carefully about the tradeoff between the informational benefit and the additional cost of dispute resolution, leading them, on occasion, to adopt no-fault (strict liability) standard rather than fault-based (negligence) standard.

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JOHN C. JEFFRIES JR.

A CENTRAL FIGURE AT VIRGINIA LAW

BY PAUL G. MAHONEY

ENTERING HIS 40th year on the Virginia faculty, John Jeffries is one of its central figures. A former dean and an alumnus, the most renowned teacher on a faculty known for outstanding teaching, and one of our most visible scholars, he is a substantial reason for our success as a scholarly community.

Jeffries' scholarship defies easy categorization. It is doctrinal in the sense that its starting point is what courts say and do. But it pursues an objective more often associated with social science and law, that of understanding how the law affects primary behavior. This pragmatic, functional orientation helps explain why Jeffries is one of the most frequently cited scholars on the Virginia faculty.

But it is not the full explanation. Reading Jeffries' scholarship is a pleasure, not a chore. His style is Churchillian: sophisticated, but free from jargon; elegant, but with a persistent undercurrent of irreverence. This style was visible even in his student note, which carefully analyzed the situations in which foster children and others not formally adopted are nevertheless allowed to inherit from an intestate guardian. The note's title, "Equitable Adoption: They Took Him Into Their Home and Called Him Fred," 58 *Va. L. Rev.* 727 (1972), served notice of Jeffries' ability to write with style and wit but without pretense.

That ability is evident in his most influential works, including one article he wrote early in his career, "Legality, Vagueness, and the Construction of Penal Statutes," 71 *Va. L. Rev.* 189 (1985). The article looks at three foundational doctrines of criminal law: the principle of legality, which rejects judicial rather than legislative definition of crimes; the vagueness doctrine, which forbids excessive legislative delegation to courts in the criminal area; and the rule of strict construc-

tion, which orders courts to resolve interpretive ambiguity in favor of the accused.

The article observes that these doctrines were born of particular historical circumstances that may be no longer relevant. Modern scholars have offered theories to justify their continued existence, but Jeffries finds these explanations either too abstract to provide predictive power or simply implausible in light of the practical reality of criminal adjudication. Jeffries then identifies three kernels of practical concern that should undergird these doctrines and define their scope. One is a fundamental rule of fairness: criminal law should avoid unfair surprise in the sense that an ordinary, law-abiding person should be aware that her activity is criminal. Jeffries contrasts this rule to “lawyers’ notice,” which exists when an informed review of the relevant primary legal materials would support the imposition of criminal liability. The second concern is certainty, or a preference for interpretations that close off potential avenues of ambiguity rather than opening new ones. The final concern, and also the most original and penetrating, is impersonality. Courts interpreting penal statutes should adopt the meaning that offers the fewest opportunities for enforcement authorities to pursue idiosyncratic agendas or vendettas. Impersonality’s centrality and importance may have been only dimly visible at the time of the article’s publication, but no one could fail to grasp the point today.

The article concludes with an application of its framework to *United States v. Margiotta*,¹ a case involving the “honest services” theory of liability under the federal mail fraud statute. Jeffries notes that despite the novelty of the prosecution’s theory under which a political party operative who was not a public official could be prosecuted for intangible-rights violations, Margiotta could not reasonably have believed his activities were legally unproblematic. The issue, as Jeffries sees it, is not unfair surprise, but the creation of uncertainty and wide prosecutorial discretion—concerns also visible in Judge Winter’s dissent in the case.

The subsequent history of the honest services doctrine vindicated Jeffries’ view. The Supreme Court took up the doctrine in *McNally v. United States*,² another case involving a defendant who was not a public official. Rather than focus on the concerns Jeffries identified, the Court

¹ 43 *Law & Contemp. Probs.* 7 (1980).

² 483 U.S. 350 (1987).

employed the standard, under-theorized version of the strict construction doctrine and concluded that in the face of uncertainty, the “less harsh” reading must be adopted. The Court therefore limited the reach of the mail fraud statute to deprivations of property rights. Congress almost immediately rejected this narrow reading by adopting an explicit “honest services” clause in 18 U.S.C. §1346, creating further interpretive disputes. While we can’t know with certainty whether Congress would have rejected a decision simply declaring that only public officials could commit honest services fraud, it seems quite plausible that the current landscape is more uncertain and gives greater scope for prosecutorial discretion in politically charged situations than would have been true under Jeffries’ analysis.

Jeffries’ determination to see legal rules as part of an integrated system of social control rather than as individual units of analysis was even more evident in “In Praise of the Eleventh Amendment and Section 1983,” 84 *Va. L. Rev.* 47 (1998). The article responds to the common view that jurisprudence under the Eleventh Amendment is an incoherent mess. While that may be so, Jeffries points out that in practice it matters very little because the jurisprudence itself matters very little. In most cases in which the Eleventh Amendment bars direct recovery against a state, the same plaintiff can pursue the same recovery, from the same ultimate source, through the indirect means of a Section 1983 suit against a state or local officer. Jeffries notes that as a practical matter, indemnification for officials sued under §1983 is nearly universal. Thus, “[t]he real role of the Eleventh Amendment is not to bar redress for constitutional violations by states but to force plaintiffs to resort to Section 1983.” At a functional level, this means that liability for constitutional violations is usually fault-based. While one could find that result normatively appealing (as does Jeffries) or objectionable (as some others do), it can hardly be called incoherent.

In addition to taking separate doctrines and institutional arrangements and presenting them as a coordinated and logical whole, the article has the virtue of not overselling its points. Jeffries is scrupulous in identifying the small gaps that §1983 does not cover, gaps where Eleventh Amendment immunity is indeed absolute. He also notes that at a strictly doctrinal level, liability for constitutional torts is not invariably fault-based. But he presents a detailed and compelling argument that in the vast majority of cases, the Eleventh Amendment, §1983, and typical indemnification arrangements coalesce into a rational and nor-

matively attractive system of liability for constitutional violations.

Jeffries also presents a penetrating treatment of the shifting and confusing law of aid to religious schools in “A Political History of the Establishment Clause,” 100 *Mich. L. Rev.* 279 (2001), written with our then-colleague and education law expert Jim Ryan, now dean of Harvard’s Graduate School of Education. The article observes that the Establishment Clause began to function in the Court’s eyes as a “wall of separation” between the state and religious instruction at the rather late date of 1947 with the decision in *Everson v. Board of Education*.³ For fifty years thereafter, the Court struck down most forms of state aid to secular schools, although it permitted a few. Beginning in 1997, however, the Court began to express doubt about the doctrine and subsequently permitted forms of aid that would have been forbidden just a few years before.

One could of course argue that this apparent shift is just par for the course in an area that even the justices admit has not been a model of analytical clarity and consistency. Alternatively, one could attribute it to a change in the Court’s ideological composition. Jeffries and Ryan do neither. Instead, they argue that the evolution of Establishment Clause jurisprudence reflects the evolution of the politics of religious education in America. That focus on social beliefs outside the courtroom echoes the work of another former Virginia colleague, Mike Klarman, who has prominently cataloged the shift in racial attitudes in the years after World War II that powerfully contributed to *Brown v. Board of Education*.

Jeffries and Ryan demonstrate that the *Everson* Court’s purported grounding of the wall of separation in original intent is highly questionable. As they put it, “Both majority and dissent treated the history of the United States as if it were the history of Virginia.” At the time of the Founding, most other states in fact had an established church. Akhil Amar has noted the incongruity of reading the Fourteenth Amendment to deny the states the right to establish a church—a right that the Establishment Clause clearly reserved to the states while denying to Congress.

Jeffries and Ryan therefore argue that one cannot understand *Everson* without understanding the political history of religion in the public schools. They recount that Protestant denominations in the nineteenth century compromised with one another to create a system

3 330 U.S. 1 (1947).

of public education that was non-sectarian but distinctly Protestant. This was not hospitable to Catholics, who in large numbers opted out of public schools and created parochial schools. Soon the question of public support for these schools arose. Protestants drew a line between “non-sectarian” public education, which could and did include teaching the (King James) Bible and (Protestant) religious doctrine, and “sectarian” education, which in principle could have meant Baptist or Methodist instruction but in practice meant Catholic schools. They made the self-interested argument that only the latter, not the former, were constitutionally problematic.

This line was ultimately enshrined in law; states adopted constitutional provisions forbidding public support for sectarian education. As Catholic voting strength grew in the Northeastern cities, however, Catholics struck back by pressuring school districts to ban (Protestant) religious instruction in the public schools. The pattern of barring religion from public schools and barring state aid for sectarian schools therefore began to take shape as a result not of the Establishment Clause but of political maneuvering born of mutual antagonism between Protestants and Catholics.

As Catholic political power continued to grow in the early twentieth century, Catholics became increasingly aggressive in pursuing state aid to parochial schools. By the time *Everson* was decided, the political tide had turned and Protestants, as well as the growing Jewish community, turned to the courts to stop public funding for Catholic education. This dynamic, and not a Founding-era tradition that was demonstrably inapplicable outside Virginia, led to *Everson*.

But the resulting political equilibrium lasted only half a century. As Jeffries and Ryan note, by the late twentieth century, evangelical and fundamentalist Protestant sects became as unhappy as their Catholic counterparts with the “wall of separation” as applied to primary and secondary education. Thus, a growing number of Protestants have unexpectedly allied with Catholics in support of public aid to sectarian schools. This dynamic, and not the changing makeup of the Court, best explains recent leaks in the wall of separation.

The article is a *tour de force* that meticulously describes the evolution of religious instruction in both public and private schools and the resulting legal disputes. To carry its points, the article simultaneously analyzes cultural, ecclesiastical, legislative, and state and federal constitutional developments.

In addition to his strictly academic work, Jeffries wrote the 1994 biography *Justice Lewis F. Powell, Jr.*—published two decades after Jeffries clerked for Powell at the Supreme Court of the United States. In a *New York Times* book review, Professor Vince Blasi described the book as “one of the finest judicial biographies ever written.” It is a traditional biography pitched to a generalist reader but illuminating for a legal academic audience. Simultaneously sympathetic and analytical, it is a model of the genre.

Jeffries’ scholarly impact is a function not only of his own academic output, but of his many former students who have themselves become prominent scholars. He has co-authored with several, including Daryl Levinson, Jim Ryan, Paul Stephan, and Bill Stuntz. As a teacher, mentor, dean, and scholar, Jeffries’ influence has been extraordinarily wide. His post-decanal work has returned to the liability and remedial systems for constitutional torts. His most recent article, “The Liability Rule for Constitutional Torts,” 99 *Va. L. Rev.* 207 (2013), takes an explicitly normative turn and suggests ways to align liability, remedy, and policy. Both courts and scholars would be wise to pay attention.

EXCERPTS

BAKKE REVISITED

2003 *Sup. Ct. Rev.* 1

In 2004, the Supreme Court, to the surprise of many, reaffirmed the validity of affirmative action in higher education and did so along lines that closely tracked Lewis Powell's deciding opinion, for himself alone, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). At the invitation of the Supreme Court Review, Jeffries commented on those decisions, concluding with an avowedly "personal" endorsement of Powell's position:

I have come—slowly—to the view that Powell in *Bakke* was exactly right. He was right to allow racial preferences *and* also right to deploy the Constitution against their formalization and entrenchment. Moreover, the reasons for thinking Powell right [today] are essentially the same as those he would have given in 1978—namely, the unacceptability of the alternatives. If all consideration of race were squeezed out of admissions decisions, the prospects of white and Asian applicants would be marginally improved (owing to the impact of a few additional places on their greater numbers), but the prospects of African-American applicants (and certain other minorities) would be drastically reduced. A sharp cutback in African-American enrollment would hurt the law schools and hurt the nation. It would exacerbate a sense of grievance that already has more than adequate foundation. It would deprive the African-American community of a cadre of potential leaders. And it would make it that much harder for minorities to maintain a full commitment to our common future as Americans.

Additionally, rigorous color-blindness would deprive nonminority students of the personal, professional, and educational advantages of living and learning with minorities. This last point is sometimes dismissed by those who are far away from educational institutions, but I believe it is keenly felt by those who work and study in them... Under current conditions, strict color-blindness, if unambiguously adopted and rigorously enforced, would impair the quality of the edu-

cation of all law students.

Perhaps less obviously, I think we would also have come to rue the more generous approach advocated [in *Bakke*] by Brennan, White, Marshall, and Blackmun. Racial set-asides in higher education, which they were prepared to tolerate, would have been the most efficient way to achieve diversity in the classroom, but they would have proved corrosive. Any allocation of spaces on the basis of race or ethnicity would have been challenged as conditions changed, and those challenges would have been anything but edifying. Imagine the questions that would have been triggered by the growth of the Latino population. ... If the number of Latino spaces increased, would the additions come from other ethnic minorities with their own claims for special treatment? From African-Americans? From capping the growing Asian population? Or would the category of undifferentiated “whites” become the universal donor for ever-increasing commitments elsewhere?

These are not pretty questions, and the debates occasioned by them could scarcely fail to divide and wound. ... Whatever allocations were made on day one would quickly come to feel like permanent entitlements to those who benefited from them, and whatever adjustments were not made on day two would as quickly become sources of grievance to those who did not prosper. The prospect of perpetual competition over racial and ethnic allocations is one that none should welcome, yet it is hard to see how approval of [racial set-asides] could have led anywhere else.

It is against this prospect that the uses of ambiguity come to the fore. ... If the advantages accorded racial and ethnic minorities are not explicitly stated, they need not be explicitly undone. If adjustments are not announced and contested, a steady progression of divisive debates can perhaps be avoided. The burying of racial preferences in “plus” factors for certain individuals obscures and softens the sense of injury that even the most dedicated proponents of affirmative action must acknowledge will be felt by those who are disadvantaged for reasons they cannot control. Law schools will be better, happier, and more productive places if the lines separating the students who inhabit them are not harshly drawn.

...

Racial preferences in admissions may be justified, as I believe, by pressing necessity, but they are not something to which we should

readily become accustomed. They are desirable only in the limited sense that, under current conditions, living with them is better than living without them. As conditions change, we should be alert to the necessity to change with them and to curtail or eliminate racial “plus” factors as soon as possible. This inchoate future negative, the preservation of doctrinal objections and normative understandings that call for racial preferences to end, is also part of Powell’s legacy. It is as important—and as valuable—as his willingness to allow racial preferences in the interim.

THE LIABILITY RULE FOR CONSTITUTIONAL TORTS

99 *Va. L. Rev.* 207 (2013)

Jeffries has written several articles on constitutional tort law. His farewell to the field came in 2013. The opening paragraphs of that most recent article describe the disorder he sought to remedy and illustrate the approach of his scholarship.

There is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other. The choice among them does not depend, as the proverbial Martian might expect, on the role of money damages in enforcing particular rights. The right being enforced is irrelevant to constitutional tort doctrine. What matters instead is the identity of the defendant or the act she performs. States and state agencies are absolutely immune from damages liability, no matter how egregious their conduct may be. The same is true for those who perform legislative, judicial, and certain prosecutorial actions. In contrast, local governments are strictly liable for constitutional violations committed pursuant to official policy or custom, even if the right found to have been violated was first recognized after the conduct triggering liability. Most defendants—including federal, state, and local officers—are neither absolutely immune nor strictly liable. Instead, they are protected by qualified immunity, a fault-based standard approximating negligence as to illegality.

This fracturing of constitutional torts into disparate liability rules does not reflect any plausible conception of policy. Although the Court occasionally makes functional arguments about one or another corner of this landscape, it has never attempted to justify the overall structure in those terms. Nor could it. The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible.

...

This Article attempts a unified theory of constitutional torts. Less grandly, it offers a comprehensive normative guide to the award of damages for violation of constitutional rights. It seems generally to align the damages remedy on *one* liability rule, a modified form of qualified immunity with limited deviations justified on functional

grounds and constrained by the reach of those functional justifications. As this analysis is explicitly normative, it will not be persuasive to all. That is especially true, given that the analysis is normative in a lawyerly way. It does not assume a blank state in the law of constitutional remedies, but takes existing doctrine as the place to start and seeks to propose changes to the landscape that we know rather than to substitute a world we can only imagine.

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