Georgia Law Review

Volume 45 | Number 3 Article 1

2011

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GEORGIA LAW REVIEW

VOLUME 45 SPRING 2011 NUMBER 3

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Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms ..... *William N. Eskridge Jr.* 657

Today, many devout Christian fundamentalists support some state discrimination against gay people, on the ground that full equality for gays would mean fewer liberties for themselves. In its recent controversy with a public law school, the Christian Legal Society argued that it was entitled to state subsidies even though it violated the school's antidiscrimination policy. The Society said it excluded only "unrepentant homosexuals"—those gay persons whose "immoral" conduct and degraded status were directly linked to what the Society considered an anti-Christian message.

Professor Eskridge demonstrates that the same clash between equality for minorities and liberty for Christian fundamentalists played out in the context of race. Most of today's antigay denominations were generations earlier antiblack as a matter of faith. When people of color sought the end of slavery and, later, apartheid, they were met by arguments that more equal treatment for people of African descent would violate the liberties enjoyed by Christians of European descent.

Moreover, religion, society, and the state are mutually constitutive—each influences the others. Thus, advances in racial equality were accompanied and at the same time abetted by the abandonment of racist religious doctrines. Professor Eskridge argues that pro-tolerance religious persons and groups are critical players in the progress of society toward more equal treatment of sexual minorities in the future as well as racial minorities in the past.

The Political Economy of Criminal Procedure Litigation ..... *Anthony O'Rourke* 721

Criminal procedure has undergone several well-documented shifts in its doctrinal foundations since the Supreme Court first began to apply the Constitution's criminal procedure protections to the states. This Article examines the ways in which the political economy of criminal litigation—specifically, the material conditions that determine which litigants are able to raise criminal procedure claims, and which of those litigants' cases are appealed to the United States Supreme Court—has influenced these shifts. It offers a theoretical framework for understanding how the political economy of criminal litigation shapes constitutional doctrine, according to which increases in the number of indigent defense organizations expand the Supreme Court's freedom to select cases that frame constitutional issues in ways that conform to the ideological preferences of the Court's Justices.

This framework exposes a potential, but heretofore unidentified, link between the Warren Court's decision in Gideon v. Wainwright *and the relative conservatism of contemporary criminal procedure doctrine. Specifically, by mandating the creation of a vast number of state-subsidized organizations representing poor defendants, the Court's decision in* Gideon *weakened the power that such organizations once had to constrain the Supreme Court's criminal procedure agenda. This Article thus complicates the traditional narrative of constitutional criminal procedure's doctrinal shifts—a narrative in which the liberal innovations of the Warren Court were simply eclipsed by the decisions of later and more conservative Courts—by attending to the economic and institutional conditions that underpin those shifts.*

Complex Financial Institutions and Systemic Risk ..... *Manuel A. Utset* 779

Modern financial institutions are large, complex, and highly interconnected. In the wake of the financial crisis of 2007–2009, commentators and policymakers have given considerable attention to large institutions, particularly those that can become "too-big-to-fail." This Article takes

a novel approach to this general problem. It begins by asking a foundational question: given the extraordinary volume of transactions between large, complex institutions, what mechanisms do they use to protect themselves from the risks created by their complexity, and how do those mechanisms affect the stability of the financial system? To keep the problem manageable, the Article focuses on one type of transaction, albeit a critical one: collateralized loans.

The Article shows that in the period leading to the recent crisis, financial institutions dealt with complexity by transacting "blindly"—without acquiring any real information about the other party to the transaction. While this may appear counterintuitive, the Article develops a theory of "blind-debt" contracting that explains why willful ignorance makes sense, at least from an economic perspective. The Article also shows that while blind debt minimizes a lender's transactional risks, as the number of transactions increase, so does the risk the system will experience a "sudden switch" from a blind-debt equilibrium to one in which lenders value transparency. A number of features of the recent crisis provide support for the theory developed in the Article.

NOTES

Grossly Disproportional to Whose Offense?
Why the (Mis)Application of Constitutional
Jurisprudence on Proceeds Forfeiture
Matters ..... *Amanda Seals Bersinger* 841

To pass constitutional muster, fines—of which punitive forfeitures are one type—must not be grossly disproportional to the gravity of the offense from which they arise. Currently, the United States Courts of Appeals exhibit a split in their treatment of forfeiture of proceeds acquired incident to a criminal enterprise. A majority of courts to address the issue have held that proceeds forfeitures are not punitive fines and thus escape constitutional scrutiny. Other courts, including the Fourth Circuit in the recent case United States v. Jalaram, Inc., *have concluded that proceeds forfeiture, like*

that of instrumentalities of a crime, is punitive and therefore subject to constitutional analysis.

This Note argues that the conclusion that proceeds forfeiture is proportional has compelled, in some courts, a misstated conclusion that it is also nonpunitive and therefore beyond the reaches of the Eighth Amendment's Excessive Fines Clause. Courts finding proceeds forfeitures necessarily nonpunitive because they are proportional conflate two conceptually separate constitutional requirements: that punitive forfeitures be subject to the Excessive Fines Clause and that, in accordance with that Clause, forfeitures not be grossly disproportional to the offense.

In most cases, this imprecise application of Eighth Amendment jurisprudence will be inconsequential. However, this Note illustrates the necessity of the two-prong approach in cases of joint and several liability, where the misapplication could have grave consequences.

Vesting Title in a Murderer: Where Is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in *Levenson*?.....*Mark Adam Silver* 877

The recent Georgia Supreme Court ruling in Levenson v. Word *exposes difficult interpretative and equitable questions posed by Georgia's slayer statute. The case began after Debra Post inherited her husband's estate but was then arrested for his murder. She used her husband's life insurance proceeds and the real property she acquired through the murder to pay two law firms to defend her in the murder trial before pleading guilty.*

The court-appointed administrator of the estate sued the law firms for conversion for not returning these illegally and immorally acquired funds. Under the Georgia slayer statute, a murderer forfeits the right to serve as the administrator of an estate and any rights to recover by will or intestacy. However, interpreting the statute, the Georgia Supreme Court held that title vests out of the murderer only upon finalization of judicial condemnation proceedings. Thus, a murderer can legally transfer inherited property until the second before conviction, notwithstanding the possible bad faith of the third party receiving the property.

This Note argues that to uphold common law values and equitable principles, courts in future cases should employ the constructive trust remedy. Thus, if a bad faith purchaser receives the decedent's property, this third party would be required to return it to the party retaining equitable title—here the deceased's estate. This remedy avoids inequitable rulings that are sure to result from Levenson.

Foreign States Are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause ..... *Frederick Watson Vaughan* 913

If foreign states are not "persons" under the Due Process Clause, do foreign state-owned corporations still enjoy the same protections as their privately owned counterparts? This is an important question because state-owned entities are a prevalent fixture in an increasingly global economy. Courts confronted with the issue, however, have attempted to resolve it by resorting to a policy-based analysis. In doing so, they have distorted fundamental constitutional principles.

This Note explains this distortion by discussing the trend among leading courts of not recognizing states as "persons" under the Due Process Clause and by examining the meaning of "foreign state" under the Constitution and the history of the foreign sovereign immunity doctrine. Scholars who have addressed the issue take the position that if a state-owned corporation behaves as an independent juridical entity it should be treated as its private counterpart for due process purposes. This Note explains that, although such a position makes sense for policy purposes, all *state-owned corporations are indistinguishable from their state owner for constitutional purposes. As a result, if foreign states are not "persons," neither are the entities they own, regardless of how they behave. The remedy, therefore, lies not through the Judiciary but through legislative amendment of the Foreign Sovereign Immunities Act.*

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GEORGIA LAW REVIEW ASSOCIATION, INC.