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Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya

James Thuo Gathii, Albany Law School

This paper compares and contrasts constitution making in the Democratic Republic of the Congo and in Kenya. In doing so, it makes three primary claims. First, it shows that while there was more widespread public debate on constitutional reform in Kenya than in the Democratic Republic of Congo, in Kenya a draft Constitution was defeated in a referendum in November 2005. By contrast, in the Democratic Republic of Congo where there was much less public consultation and debate on a draft constitution, the constitution was overwhelmingly approved in a December 2005 referendum because it was seen as providing an exit to the wars in the Democratic Republic of Congo.

Second, the paper argues that these contrasting examples show that although participatory constitution making may give rise to a sense of ownership of a constitution, such participation is by no means a sine qua non to having
a constitution that has efficacy on the ground. In addition, these contrasting examples suggest that constitution making without a major crisis may not produce a new constitution. Thus before Kenya's post election violence in 2008, there was no crisis that provided an impetus for a new Constitution. The same was certainly not true of the Democratic Republic of Congo.

Finally, the paper shows how participatory constitution making in an ethnically divided country like Kenya left the country more ethnically divided than in the period immediately before the referendum on the Constitution. In addition, a post crisis constitution like that of the Democratic Republic of Congo gives parties with more political power to exercise punitive justice against their opponents. By contrast, in Kenya abandoning a form of revolutionary constitutionalism such as punitive justice was crucial to laying the foundation for a peaceful exit from power by President Daniel Arap Moi in 2002.

"John McLean: Moderate Abolitionist and Supreme Court Politician"  
Albany Law School Research Paper No. 09-02

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His thirty-two years on the Supreme Court put him among the top dozen of all justices for length of service. At the time of his death, he was the third longest serving Justice in the history of the Court, and he is sixth in length of service among all Justices who served before the twentieth century. He wrote about 240 majority opinions and another sixty or so separate, concurring, and dissenting opinions. And he is about as obscure a justice as we can find. Few Justices have worked so hard, for such a long period of time, and had so little impact on the Court. His importance is complicated by the fact that while on the Court he was constantly running for president, and was "in play" in every election but one from 1832 to 1860. McLean's most significant contributions on the Court involved economic issues, slavery, and the rights of free blacks. He provided a counter-balance to the pro-slavery jurisprudence of the Taney Court majority while also defending the nationalist economic jurisprudence of the Marshall Court in the face of the Taney majority's anti-nationalist economic jurisprudence.

"Insult to Injury: A Disability-Sensitive Response to Professor Smolensky's Call for Parental Tort Liability for Preimplantation Genetic Interventions"  
Albany Law School Research Paper No. 09-03

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In her article Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158631, Professor Kirsten Rabe Smolensky argues that children who were subject to preimplantation genetic manipulation should have the ability to sue their parents for damages when the parents "directly intervene in the child's DNA and consequently cause that child to suffer a disability which limits the child's right to an open future." This paper addresses the implications for people with disabilities of that argument. Specifically, it argues that limiting damages to cases in which a child is born with a disability unnecessarily and inaccurately devalues life with disability and leaves unprotected children whose DNA is shaped for traits other than disability at the request of their parents. It then suggests a disability-sensitive approach for delineating cognizable injury under which genetic modifications for disability are treated like other genetic modifications that shape a future child for cultural, aesthetic, or social reasons.

The article is one of three articles responding to "Creating Children with Disabilities" in a symposium edition of the Hastings Law Journal. The first critique is by Glenn I. Cohen from Harvard Law School. Professor's Cohen's piece, "Intentional Diminishment, the Non-Identity Problem, and Legal Liability" (http://ssrn.com/abstract=1330504), argues that distinctions I draw on the basis of the Non-Identity Problem are flawed. He then discusses several other possible approaches to finding legal liability.

Jaime S King, from Hastings Law School, writes the second critique, "Duty to the Unborn: A Response to Smolensky" (http://ssrn.com/abstract=1336375). In that article, Professor King agrees that parents making preimplantation reproductive decisions should act as reasonably prudent parents, but argues that a balancing test that considers both the benefits to children of growing up disabled and the additional risks of the reproductive technologies themselves should be applied. The article also argues that national regulation is a better social response to this problem than parental tort liability.

The symposium concludes with a brief response to each of the three critiques. The response, "Parental Tort Liability for Direct Preimplantation Genetic Interventions: Technological Harms, the Social Model of Disability, and Questions of Identity" (http://ssrn.com/abstract=1295426) addresses a central argument from each of the three critiques.

"Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations"
The opportunity to develop a Community Benefits Agreement (CBA) typically arises when a developer announces plans to construct a major project, such as a stadium or a theater complex. Local residents and business owners may often welcome these projects, but they may also have legitimate fears, such as: Will the project displace local residents and local businesses, either physically or through gentrification? Will it cause traffic problems and generate noise, pollution, or other nuisances? Will the economic development benefits espoused by the developer actually create jobs that pay a living wage and offer decent benefits for residents in the neighborhood or in a larger geographic community? Will the developer seek and/or welcome public participation in the project design and review of environmental and community impacts? In short, will the developer and the resulting built project be good neighbors?

This article offers an analysis of legal and policy issues surrounding the development, implementation and enforcement of CBAs. Part II offers a general explanation of CBAs - what they are, what types of benefits they commonly include, and how they are negotiated and finalized. Part III briefly discusses the reasons behind the popularity of CBAs, and explains how they have been tied to smart growth and other social justice issues. Part IV reviews select CBAs from various cities, offering examples of successful models as well as discussing more controversial efforts. These case studies not only assist in understanding the dynamics of the CBA negotiating process, but also they illustrate some of the practical difficulties associated with the CBA model. These problems are discussed in greater depth in Part V. Part VI presents the legal issues surrounding CBAs, including questions of enforceability and validity. Finally, Part VII offers a checklist of items to be considered by developers, communities and municipalities before and during negotiations.

"Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits"


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Like any policy tool, litigation has strengths and weaknesses, and it performs better in some contexts than in others. This article offers a theoretical framework for evaluating the influence of tort litigation on regulatory policy making. The framework has three parts. First, using two examples - gun-industry and clergy-sexual-abuse litigation - the article highlights six distinct ways in which litigation influences policy making: (1) framing issues in terms of institutional failure and the need for institutional reform, (2) generating policy-relevant information, (3) placing issues on the agendas of policy-making institutions, (4) filling gaps in statutory or administrative regulatory schemes, (5) encouraging self-regulation, and (6) allowing for diverse regulatory approaches in different jurisdictions. Second, the article suggests empirical measures for assessing the extent to which litigation influences policy making in these six ways. Third, the article compares the relative success of gun-industry and clergy-sexual-abuse litigation to identify conditions that favor the use of litigation as a policy tool.

This framework can be applied more generally to other examples of regulation through litigation. In this article, I use it to suggest how we might evaluate lawsuits against producers of greenhouse-gas emissions as a means of addressing climate change. Proponents of climate-change litigation assert that it enhances policy making in all of the ways suggested above. They claim that it frames the issue of climate change in ways that favor policy reforms, generates policy-relevant information, places the issue on the agendas of policy-making institutions, fills a regulatory gap created by federal resistance to addressing the issue, encourages voluntary self-regulation by industry, and allows for diverse regulatory approaches in different regions. Critics argue that climate-change litigation is doctrinally unsound, costly, unlikely to reduce greenhouse-gas emissions, and may even be counterproductive. The framework presented in this article offers tools with which to advance this debate. The framework suggests how to define and measure success and how to explain the litigation's degree of success or failure by reference to the larger context in which it is situated. The framework offers guidance for evaluating both the achievements and shortcomings of climate-change litigation so far, as well as its future prospects.

"The Kelo Effect in New York, New Jersey and Pennsylvania: Assessing the Impact of Kelo in the Tri-State Region"

Policy Research Institute for the Region, Woodrow Wilson School of Public & International Affairs, Princeton University, Forthcoming

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Although the U.S. Supreme Court decision in Kelo v. City of New London did not change the federal law with respect to the ability of governments to exercise the power of eminent domain for economic or redevelopment projects, the public backlash from the opinion resulted in more than 600 proposed pieces of legislation, the establishment of task forces and study commissions across the country, and increased public awareness and scrutiny of proposed condemnations. This paper examines the state constitutional and statutory frameworks in the tri-state region both pre- and post-Kelo. It discusses the NYS Bar Association Task Force on Eminent Domain, the reports from the New Jersey Public Advocate, and a new 2006 law from Pennsylvania. In addition, the paper examines state court decisions post-Kelo in New York and New Jersey. The use of eminent domain post-Kelo is examined through a series of case studies including: Atlantic Yards in Brooklyn, NY; Long Branch, NJ; Ardmore, PA; and Vineland, New Jersey. The paper concludes by advocating for reforms to government procurement/contracting laws, ethics laws and campaign finance laws to address recent allegations of potential improprieties in some redevelopment projects.

"Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein"

U of Penn, Inst for Law & Econ Research Paper No. 09-06
Albany Law School Research Paper No. 09-07

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This essay critically evaluates Richard Thaler and Cass Sunstein's proposal to allow patients to prospectively waive their rights to bring a malpractice claim, presented in their recent, much acclaimed book, Nudge: Improving Decisions about Health, Wealth and Happiness. We show that the behavioral insights that undergird Nudge do not support the waiver proposal. In addition, we demonstrate that Thaler and Sunstein have not provided a persuasive cost-benefit justification for the proposal. Finally, we argue that their liberty-based defense of waivers rests on misleading analogies and polemical rhetoric that ignore the liberty and other interests served by patients' tort law rights. There are many ways in which nudges could be part of reforming medical malpractice litigation and improving the quality of medical care. Thaler and Sunstein's use of behavioral economics to explore new ways of addressing persistent problems is an invitation to innovative and meaningful policy reform. Our criticisms of their medical malpractice waiver proposal are designed not to disparage this effort, but to remind policymakers of the importance of careful consideration of the facts before choosing a path for change.

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