

E. GARY SPITKO

Presidential Professor of Ethics and the Common Good and Professor of Law
Santa Clara University School of Law
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PRIMARY RESEARCH INTERESTS:

Arbitration, donative transfers, employment discrimination, and employment law

EDUCATION:

Duke University School of Law, J.D., with high honors (May 1991)
Honors: Order of the Coif, American Jurisprudence Awards in Constitutional
Law and Civil Procedure, Class Rank – 6 of 187
Activities: *Duke Law Journal*, Editorial Board; *Duke Environmental Law &
Policy Forum*, Co-founder, Executive Editor; Moot Court Board

Cornell University, A.B., with distinction in all subjects (May 1987)
Major: Psychology
Honors: Psi Chi (National Honor Society in Psychology), Dean's List

JUDICIAL CLERKSHIP:

Honorable Gerald Bard Tjoflat, Chief Judge, U.S. Court of Appeals for the Eleventh
Circuit
Judicial Law Clerk (August 1991 to August 1992)

ACADEMIC APPOINTMENTS:

Santa Clara University School of Law
Associate Dean for Research (January 2019 to January 2021)
Presidential Professor of Ethics and the Common Good (August 2016 to present)
Faculty Director, Conflict Resolution Program (March 2017 to January 2020)
Professor of Law (August 2005 to present)
Associate Professor of Law (with tenure) (January 2002 to August 2005)
Visiting Associate Professor of Law (Fall 2001 semester)
Courses taught: Arbitration Law and Practice, Mediation: Theory and
Practice, Alternative Dispute Resolution, Employment Discrimination,
Employment Law, Wills and Trusts, Family Law, and Adoption and
Assisted Reproduction
Honors: 2017 University Award for Recent Achievement in Scholarship
(given annually to only one faculty member across the university)

University of California College of the Law, San Francisco
Visiting Professor of Law (Fall 2022 semester)

Ohio State University Moritz College of Law
Visiting Associate Professor of Law (Spring 2001 semester)

Indiana University McKinney School of Law
Associate Professor of Law (July 2000 to January 2002)
Assistant Professor of Law (August 1997 to June 2000)
Honors: “Best New Professor” Award, 1997-1998 (presented by the
Student Bar Association)

PUBLICATIONS:

Books:

ANTIGAY BIAS IN ROLE-MODEL OCCUPATIONS (University of Pennsylvania Press
2017).

WILLS, TRUSTS, AND ESTATES: EXAM PRO (Thomson West 2006) (with Patricia A.
Cain).

CALIFORNIA AND UNIFORM TRUST AND ESTATE STATUTES: SELECTED PROVISIONS
(Thomson West 2004-05 through 2007-08 editions) (compiled and edited with Lawrence
W. Waggoner).

Law Review Articles, Essays, and Book Chapters:

For Employment Arbitration: Thoughts on Saturns for Rickshaws (working title)
(solicited for DISCUSSIONS IN DISPUTE RESOLUTION: THE NEXT GENERATION (Oxford
University Press) (in progress).

Workplace AI and Human Flourishing (in progress).

Arbitration Secrecy, 108 CORNELL LAW REVIEW 1729-1792 (2023).

Integrated Nonmarital Property Rights, 75 SMU LAW REVIEW 151-186 (2022).

How Should Non-Probate Transfers Matter in Intestacy?, 53 U.C. DAVIS LAW REVIEW
2207-2268 (2020) (Symposium on Empirical Analysis of Wealth Transfer Law) (with
Mary Louise Fellows).

Reputation Systems Bias in the Platform Workplace, 2019 BYU LAW REVIEW 1271-1332
(2020).

*Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law
Reform from the Scottish Experience*, 103 IOWA LAW REVIEW 2175-2203 (2018)
(Symposium on Wealth Transfer Law in Comparative and International Perspective).

A Structural-Purposive Interpretation of “Employment” in the Platform Economy, 70
FLORIDA LAW REVIEW 409-446 (2018).

“Undemocratic” Trusts and the Numerus Clausus Principle, 43 ACTEC LAW JOURNAL 325-331 (2018) (solicited review essay).

A Critique of the American Arbitration Association’s Efforts to Facilitate Arbitration of Internal Trust Disputes, in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW (Oxford University Press 2016) (S.I. Strong, ed.).

California Dreamin’: The Rise of the Iskanian Exception and the Fall of the State Effective-Vindication Exception to Federal Arbitration Act Preemption of State Employment Arbitration Doctrine, in PROCEEDINGS OF THE SIXTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (Bloomberg BNA 2016) (Katherine J. Thompson, ed.).

The Will as an Implied Unilateral Arbitration Contract, 68 FLORIDA LAW REVIEW 49-99 (2016).

A Reform Agenda Premised Upon the Reciprocal Relationship Between Anti-LGBT Bias in Role Model Occupations and the Bullying of LGBT Youth, 48 CONNECTICUT LAW REVIEW 71-117 (2015).

Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight, 20 HARVARD NEGOTIATION LAW REVIEW 1-60 (2015).

Don’t Ask, Don’t Tell: Employment Discrimination As a Means for Social Cleansing, 16 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 179-209 (2012) (Symposium on the Workplace Law Agenda of the Obama Administration).

An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes, 85 INDIANA LAW JOURNAL 409-448 (2010) (with Mary Louise Fellows and Charles Q. Strohm).

Exempting High-Level Employees and Small Employers from Legislation Invalidating Pre-dispute Employment Arbitration Agreements, 43 U.C. DAVIS LAW REVIEW 591-653 (2009).

Open Adoption, Inheritance, and the “Uncleing” Principle, 48 SANTA CLARA LAW REVIEW 765-804 (2008) (Symposium on Legal Repercussions and Comparative Perspectives on the Transforming Structure of American Households).

The Constitutional Function of Biological Paternity: Evidence of the Biological Mother’s Consent to the Biological Father’s Co-Parenting of Her Child, 48 ARIZONA LAW REVIEW 97-147 (2006).

Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities, 76 UNIVERSITY OF COLORADO LAW REVIEW 599-652 (2005) (with Ronald J. Krotoszynski, Jr.).

From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity, 24 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 195-220 (2005) (Symposium on the Legal Issues of Sexual Orientation).

Arbitration and the Batson Principle, 38 GEORGIA LAW REVIEW 1145-1240 (2004) (with Sarah Rudolph Cole).

An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners, 81 OREGON LAW REVIEW 255-349 (2002).

Reclaiming the “Creatures of the State”: Contracting for Child Custody Decisionmaking in the Best Interests of the Family, 57 WASHINGTON AND LEE LAW REVIEW 1139-1212 (2000).

Judge Not: In Defense of Minority-Culture Arbitration, 77 WASHINGTON UNIVERSITY LAW QUARTERLY 1065-1085 (1999).

The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion, 41 ARIZONA LAW REVIEW 1063-1107 (1999).

Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE WESTERN RESERVE LAW REVIEW 275-314 (1999).

He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the “Reasonable Heterosexist” Standard, 18 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 56-97 (1997).

A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process, 18 UNIVERSITY OF HAWAI’I LAW REVIEW 571-622 (1996).

Note, *A Critique of Justice Antonin Scalia’s Approach to Fundamental Rights Adjudication*, 1990 DUKE LAW JOURNAL 1337-1360.

Other Publications:

Workplace Speech Protections and the NFL Player National Anthem Protests, MARKKULA CTR. FOR APPLIED ETHICS (Sept. 7, 2018), <https://www.scu.edu/ethics/all-about-ethics/workplace-speech-protections-and-the-nfl-player-national-anthem-protests> [https://perma.cc/4KZ3-7HML].

More Free Speech for Government Employees, LOS ANGELES DAILY JOURNAL, April 29, 2014, at 1 (reprinted in SAN FRANCISCO DAILY JOURNAL, April 29, 2014; PHOENIX RECORD REPORTER, April 30, 2014 as *SCOTUS to Decide Whether Government Can Fire Employee for Testimony*).

Arbitration in the Non-Union Workplace, Publication No. 95-2860 by the Institute of Continuing Legal Education in Georgia (1995) (with Weyman T. Johnson).

SELECTED ACADEMIC PRESENTATIONS:

“Workplace AI and Human Flourishing,” SMU Dedman School of Law, Dallas, TX, October 2023.

“Arbitration Secrecy,” University of California College of the Law, San Francisco, November 2022.

Moderator and Speaker, Santa Clara Law-Stanford Law Conflict Resolution Workshop on “The Best Beloved Thing is Justice: The Life of Dorothy Wright Nelson,” Santa Clara University School of Law, Santa Clara, CA, April 2022.

Speaker, “Legal Issues Regarding Workplace COVID-19 Vaccine Mandates,” Markkula Center for Applied Ethics, Santa Clara University, Santa Clara, CA, October 2021.

Panelist, “SCOTUS Review Forum on LGBT Discrimination after *Bostock v. Clayton County, Georgia*,” August 2020 (online).

Presenter, “A Qualitative Study of How Best to Integrate Non-Probate Transfers into an Intestacy Scheme,” U.C. Davis Law Review/ACTEC Foundation Symposium on “Empirical Analysis of Wealth Transfer Law,” U.C. Davis School of Law, Davis, CA, October 2019.

Panelist, Panel on “Learning Styles and Pedagogy in Dispute Resolution,” “Appreciating Our Legacy and Engaging the Future: A Conference for Dispute Resolution Teachers, Scholars and Leaders,” Pepperdine University, Malibu, CA, June 2019.

Presenter, “Inheritance Reform for Unmarried Committed Partners,” American College of Trust and Estate Counsel Annual Conference, Legal Education Section, La Quinta, CA, March 2019.

Presenter, “Nonmarital Property Rights at Dissolution and at Death,” Roundtable on Nonmarriage and the Law, Arizona State University Sandra Day O’Connor College of Law and the ASU Law Project on Sexuality, Gender, and Law, Phoenix, AZ, March 2019.

“Reputation Systems Bias in the Platform Workplace,” Santa Clara University School of Law, Santa Clara, CA, October 2018.

Presenter, Panel on “Freedom of Speech in the Workplace,” Markkula Center for Applied Ethics Conference on “Workplace Diversity Dialogues: Exploring Systemic Change,” Santa Clara University, Santa Clara, CA, November 2017.

Presenter, “Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience,” Iowa Law Review/ACTEC Foundation Symposium on “Wealth Transfer Law in Comparative and International Perspective,” University of Iowa College of Law, Iowa City, IA, September 2017.

Speaker, Law School Convocation, Installation as Santa Clara University Presidential Professor of Ethics and the Common Good, Santa Clara University School of Law, Santa Clara, CA, August 2016.

Speaker, “What the Marriage of Lucy Stone and Richard B. Blackwell Can Teach Us About Minority-Culture Arbitration,” Colloquium on Religious Arbitration, Santa Clara University School of Law, Santa Clara, CA, April 2016.

Presenter, “Antigay Bias in Role-Model Occupations,” Panel on “LGBT Discrimination,” 2016 Idaho Law Review Symposium on “Equality in Employment,” University of Idaho College of Law, Boise, ID, April 2016.

“Antigay Bias in Role-Model Occupations,” University of San Francisco School of Law, San Francisco, CA, March 2016.

Conference Co-Chair, Northern California ADR Faculty Conference, Co-Sponsored by Stanford Law School Gould Center for Conflict Resolution, UC Hastings Center for Negotiation and Dispute Resolution, and Santa Clara University School of Law, Santa Clara, CA, February 2016.

Speaker, Bar Association of San Francisco, Labor and Employment Law Section, Annual Supreme Court Roundup: Review of Labor and Employment Cases from the 2014-2015 Term, San Francisco, CA, September 2015.

Presenter, Invited paper session, “Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight,” National Academy of Arbitrators 68th Annual Meeting, San Francisco, CA, May 2015.

Speaker, “Class Action and Collective Arbitration Waivers,” 2015 California Appellate Judicial Attorneys Institute, given by the Center for Judiciary Education and Research of the Administrative Office of the Courts, San Francisco, CA, April 2015.

“The Will as an Implied Unilateral Arbitration Contract,” Santa Clara University School of Law, Santa Clara, CA, March 2015.

Speaker, “The Enforceability of Arbitration Agreements After *AT&T Mobility v. Concepcion*,” 2013 California Appellate Judicial Attorneys Institute, given by the Center for Judiciary Education and Research of the Administrative Office of the Courts, Santa Clara, CA, May 2013.

Moderator, Panel on “Families and Youth: Conflicts Across Difference,” Conference on “Race, Sexuality, and Social Justice,” Center for Social Justice and Public Service, Santa Clara University School of Law, Santa Clara, CA, April 2012.

Presenter, Panel on “Impact of Recent Uniform Law Developments on Teaching Trusts and Estates,” Southeastern Association of Law Schools Annual Conference, Palm Beach, FL, August 2010.

Presenter, Panel on “Mandatory Arbitration of Statutory Claims and Other Workplace Disputes: Enforceable/Desirable?,” Labor and Employment Relations Association 61st Annual Meeting, San Francisco, CA, January 2009.

Chair, Presenter, Panel on “Creating New Knowledge and Exploring New Approaches in the Law of Donative Transfers,” Joint Annual Conference of the Law and Society Association and the Canadian Law and Society Association, Montreal, Quebec, Canada, May 2008.

Presenter, “Open Adoption, Inheritance, and the “Uncleing” Principle,” Santa Clara Law Review Symposium on “When Change Comes Home: Legal Repercussions and Comparative Perspectives on the Transforming Structure of American Households,” Santa Clara University School of Law, Santa Clara, CA, February 2008.

Presenter, Panel on “New Research in Trusts and Estates,” Association of American Law Schools Annual Meeting (session of section on donative transfers, fiduciaries and estate planning), New York, NY, January 2008.

“Integrating Will Substitute Beneficiary Designations into the Intestacy Scheme,” University of San Francisco School of Law, San Francisco, CA, November 2006.

“Integrating Will Substitute Beneficiary Designations into the Intestacy Scheme,” Santa Clara University School of Law, Santa Clara, CA, October 2006.

Program Chair, Moderator, Panel on “Inheritance Law and the Empirical Scholar,” Association of American Law Schools Annual Meeting (session of section on donative transfers, fiduciaries and estate planning), Washington, D.C., January 2006.

“The Constitutional Function of Biological Paternity,” University of North Carolina School of Law, Chapel Hill, NC, December 2005.

Presenter, Panel on “Contemporary Perspectives on Fundamental Issues in Constitutional Law and Theory,” Law and Society Association Annual Meeting, Las Vegas, NV, June 2005.

Speaker, “Lesbian, Gay, Bisexual, and Transgender Legal Representation and Domestic Partnerships,” Santa Clara University School of Law, Santa Clara, CA, February 2004.

“Arbitration and the *Batson* Principle,” Public Interest and Social Justice Workshop, Santa Clara University School of Law, Santa Clara, CA, December 2003.

Presenter, Conference on “Theory Meets Practice: A Conversation Between Practitioners Who Represent Lesbian and Gay Parents and Academics Who Write About Legal Issues Relevant to Their Work,” American University Washington College of Law, Washington, D.C., October 2003.

Presenter, Panel on “Legal Regulation and Construction of the Parameters of Kinship Structures: New Critiques and New Approaches,” Joint Annual Conference of the Law and Society Association and the Canadian Law and Society Association, Vancouver, British Columbia, Canada, May 2002.

“An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners,” Bay Area Junior Law Faculty Workshop, Palo Alto, CA, February 2002.

Discussion Leader, Workshop on “Property, Wealth, and Inequality,” Association of American Law Schools Annual Meeting, San Francisco, CA, January 2001.

Chair, Presenter, Panel on “Functional Families, Dysfunctional Law,” Law and Society Association Annual Meeting, Miami, FL, May 2000.

Presenter, Panel on “Alternative Dispute Resolution in Probate Disputes,” Association of American Law Schools Annual Meeting (joint session of sections on alternative dispute resolution and donative transfers, fiduciaries, and estate planning), Washington, D.C., January 2000.

Presenter, Panel on “The Social Construction of Rights,” Law and Society Association Annual Meeting, Chicago, IL, May 1999.

LEGAL PRACTICE EXPERIENCE:

Conflict Resolution Neutral (April 2011 to present)

Mediator and arbitrator in employment cases. Mediator on the roster of the California Court of Appeal for the Sixth Appellate District focusing on employment cases (April 2023 to present); Arbitrator on the employment roster of the American Arbitration Association (April 2011 to present). Has served as the arbitrator in more than sixty employment arbitrations. Issues in cases mediated or arbitrated include wrongful termination; race, national origin, sex, pregnancy, age, and disability discrimination; sexual, racial, and disability-based harassment; failure to prevent customer harassment; failure to accommodate disability; failure to engage in the interactive process; retaliation; constructive termination; whistleblower harassment and retaliation; worker misclassification; incentive compensation and wage-hour issues; unfair competition; breach of contract; promissory estoppel; breach of covenant of good faith and fair dealing; defamation; fraud; intentional infliction of emotional distress; and personal injury.

Paul, Hastings, Janofsky & Walker, Atlanta, GA

Employment Law Associate (May 1994 to June 1997)

Represented private employers in various aspects of employment law, including race, national origin, sex, religion, age, and disability discrimination. Areas of emphasis included individual and class action employment and civil rights litigation, alternative dispute resolution (including participating in arbitration hearings, mediations, and settlement negotiations), OSHA issues, and Office of Federal Contract Compliance Programs debarment proceedings.

Covington & Burling, Washington, D.C.

Associate (Sept. 1992 to April 1994), Paralegal (July 1987 to July 1988)

Focused on various litigation matters including employment discrimination, civil rights, unfair competition, and class action securities litigation; also advised on a wide range of communications law matters.

Summer Associate Positions

Morgan, Lewis & Bockius, Philadelphia, PA

Summer 1991

Williams & Connolly, Washington, D.C.

Summer 1990

Alston & Bird, Atlanta, GA

Summer 1990

Hoyle, Morris & Kerr, Philadelphia, PA

Summer 1989

PROFESSIONAL AFFILIATIONS:

- Faculty Scholar, Markkula Center for Applied Ethics (2017-present)
- Academic Fellow, American College of Trust and Estate Counsel (elected 2016)
- Executive Committee, Association of American Law Schools, Section on Dispute Resolution (2015-2018)
- Faculty Director, Santa Clara University School of Law Study Abroad Program, University of Oxford (Magdalen College), Oxford, U.K. (2016); University of Technology Sydney, Sydney, Australia (2006 and 2007)
- Chair (2006), Program Chair (2005), Executive Committee (2003-2008), Association of American Law Schools, Section on Donative Transfers, Fiduciaries and Estate Planning
- Member, State Bar of California (inactive, admitted 2018)
- Member, State Bar of Georgia (resigned 2023, admitted 1994)
- Member, District of Columbia Bar (resigned 2023, admitted 1992)
- Member, Bar of the Commonwealth of Pennsylvania (inactive, admitted 1992)