Law & Social Inquiry
Volume 44, Issue 4, 1241–1250, November 2019

Law&
Social
Inquiry

Symposium on Legal Endogeneity

Let's Talk: What FinReg Can Learn from New Governance (and Vice Versa)

Kimberly D. Krawiec

Edelman, Lauren B. *Working Law: Courts, Corporation, and Symbolic Civil Rights*. Chicago: The University of Chicago Press, 2016.

Lauren Edelman's Working Law: Courts, Corporation, and Symbolic Civil Rights *(2016) is remarkably relevant to the study of financial regulation. In particular, three factors that Edelman identifies as contributing to legal endogeneity and symbolic compliance—ambiguous law, a lack of clear outcome measures, and the presence of legal intermediaries—are especially salient in this context. It has long been recognized that powerful financial institutions and the lawyers, lobbyists, and other agents who serve them have the ability to influence the law ex ante, through political lobbying. Edelman's work reinforces the point that they may also do so ex post through an endogenous process of interpretation, implementation, and, ultimately, enshrinement of symbolic compliance with ambiguous law.*

INTRODUCTION: COMPLIANCE AND THE "NEW GOVERNANCE" DEBATE

The notion that business organizations should be enlisted in their own regulation dates back at least to the 1980s. Influential research by scholars such as Robert Kagan and John Braithwaite, among others, emphasized perceived pathologies in regulation stemming from inflexibility in enforcement and an unnecessary attachment to formal rules (Ayres and Braithwaite 1992; Bardach and Kagan 2002; Braithwaite 2002; Kagan 2009). This stringent application of rules and regulations without regard to the compliance history of the regulated entity, they argued, was not only inefficient but created a backlash or resistance among well-intentioned regulated entities. As a result, such formalistic and adversarial regulation was ultimately less effective than a more cooperative approach. Nonetheless, some entities and individuals are likely to remain bad actors under any regulatory regime. Accordingly, more coercive regulatory approaches remain necessary, but only for a subset of organizations that prove unresponsive to more cooperative methods (Bardach and Kagan 2002; Ayres and Braithwaite 1992).

Kimberly D. Krawiec Duke University School of Law, 210 Science Drive, Box 90360, Durham, NC 27708-0360, Phone: (919) 613-7197, Fax: (919) 613-7231. Email: krawiec@law.duke.edu.
Kimberly D. Krawiec is the Kathrine Robinson Everett Professor of Law at Duke University School of Law and a Senior Fellow at the Kenan Institute for Ethics. She can be reached at krawiec@law.duke.edu.

© 2019 American Bar Foundation.

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

More recently, "new governance" scholars have extended these ideas to argue for a more robust role for regulated entities in their own compliance. Although there are a variety of new governance approaches that differ in their particulars, all share a common theme: given the vast variation in the stakeholder makeup, business environment, and other factors affecting business organizations, regulated entities are themselves often in the best position to define the most effective and efficient path to compliance with legal rules. As a result, new governance theorists reject "command and control" regulation in favor of more flexible, open-ended legal rules that leave discretion to regulated entities about how to comply with legal mandates (Lobel 2004; Trubek and Trubek 2005; Holley, Gunningham, and Shearing 2013).

These ideas have enjoyed broad support among researchers across disciplines and are now reflected in legal regimes across nearly every subject matter area (Langevoort 2017). Nonetheless, skeptics remain. First, as an empirical matter, some new governance devices have failed to withstand empirical scrutiny (Dobbin, Schrage, and Kalev 2015; Gunningham and Sinclair 2017). In addition, some worry that new governance advocates underestimate the possibility of strategic behavior by regulated entities, as well as the information asymmetries and other factors that may prevent courts and regulators from controlling that strategic behavior (Laufer and Strudler 2007; Krawiec 2009). Finally, the effectiveness of new governance regimes appears highly context dependent and determined by a number of factors, including the specific set of incentives and penalties provided by the government, the nature of the problem the regulation is designed to address, the specific characteristics of the regulated firms, and other factors (Coglianese and Nash 2006).

One long-standing new governance skeptic is Lauren Edelman, whose *Working Law* synthesizes and extends a lifetime of research on compliance in the area of employment law (Edelman, Uggen, and Erlanger 1999; Edelman 2016). Edelman questions the extent to which organizations can effectively self-regulate, arguing that law is often endogenous and reflects management interests. According to Edelman:

> [O]rganizations respond to ambiguous law by creating a variety of policies and programs designed to symbolize attention to law. As these policies and programs become commonplace . . . legal actors, as well as organizational actors, understand compliance in terms of the presence or absence of these structures and thus fail to scrutinize their effectiveness. (Edelman 2016, 12)

The result can be what might be termed symbolic, or cosmetic, compliance that signals conformity with legal mandates without adequately addressing the underlying behavior that prompted regulation to begin with (Krawiec 2003). Edelman suggests that an important reason for the limited success of employment and antidiscrimination law in reducing some forms of workplace bias and inequality is judicial and, to a lesser extent, EEOC deference to organizations' symbolic structures, even when those structures are ineffective. Of particular concern to Edelman are antiharassment and antidiscrimination policies, grievance procedures, and diversity programs, all of which are widely present in most organizations (Edelman 2016).

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

NEW GOVERNANCE AND FINANCIAL REGULATION

These new governance debates have played a surprisingly minor role in financial regulation circles, considering the ubiquity of new governance (and, particularly, internal compliance and disclosure-based) regulation in that field. As just one example, the Securities Act of 1933, the expansive federal statute that regulates the public offering of securities, rejects government review of the substantive merits of investments in favor of a disclosure-based regime (Securities Act of 1933). For this reason, the 1933 Act is often referred to as the "truth in securities" law (U.S. Securities and Exchange Commission 2013). The most controversial provision of the Sarbanes-Oxley Act of 2002, section 404, provides another example. Section 404 requires officers of all reporting companies to disclose "material weaknesses" in their firm's internal control system and requires that outside auditors attest to those disclosures. These requirements have significantly increased firms' costs of internal controls (Sarbanes-Oxley Act 2002 §404; Coates 2007).

This is not to suggest that financial regulation scholars ignore internal compliance. To the contrary, numerous articles discuss the technical aspects of financial institution internal compliance, including what the law requires, what constitute industry best practices and new developments, and specific cases of compliance failures (Murphy 2011; Simons 2013). In addition, some scholars of financial regulation, most notably Donald Langevoort, have made important contributions in the compliance area, drawing from a variety of disciplines, including psychology, sociology, and economics (Langevoort 2017; Langevoort 2018). Finally, scholars of white-collar crime have engaged with and contributed to the empirical literature on internal compliance (Arlen 2012; Hess 2016). But with some exceptions (Black 1997; Ford 2008; Riles 2011), these debates have largely paralleled, rather than directly engaged—or been directly engaged by—the most prominent new governance scholars.

Nonetheless, financial regulation may be a particularly ripe area for the type of legal endogeneity documented by Edelman in the employment context. Specifically, three important factors identified by Edelman as contributing to legal endogeneity and symbolic compliance are particularly relevant in the context of financial regulation—legal ambiguity, a lack of outcome measures, and the presence of legal intermediaries (Edelman 2016).

THE PROBLEM WITH AMBIGUITY

Working Law seeks to offer a comprehensive theory of the symbiotic relationship between law and organizations by specifying the mechanisms through which law becomes endogenous. The ambiguity of law plays an important part in this theory. According to Edelman, primarily for political reasons, "social reform laws tend to be ambiguous and legal ambiguity leaves organizations wide latitude to construct the meaning of law and compliance with law" (Edelman 2016, 14).

Financial regulation is also often characterized as notably ambiguous. In thinking about why this might be so, it is worth recalling some of the most common sources of intentional legal ambiguity. As noted by Edelman, ambiguous law may occur for

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

political reasons, as when lawmakers are unable to agree on more precise language, but can muster consensus on broad outlines. Relatedly, ambiguous language may facilitate strategic lawmaking that attempts to hide specific interest group transfers (Epstein and O'Halloran 1999). Ambiguous law may also provide the flexibility to adapt to changing circumstances or allow inexpert lawmakers to delegate to expert administrative agencies the ability to more precisely define the scope of legal obligations (Baker and Krawiec 2003).

The political stakes of financial regulation are often high, with a variety of well-funded and politically astute actors (including lawyers, financial institutions, issuers, and large investors) having a stake in the outcome. These conditions are ripe for political and strategic legal ambiguity, as suggested by reviews of the legislative history surrounding major pieces of financial reform (Grundfest and Pritchard 2002; Krawiec 2013).

In addition, modern financial markets and products are extraordinarily complex and ever-changing, as are the laws and regulations that seek to govern them. It is thus frequently argued that, due to the complexity, importance, and dynamic nature of financial markets, financial regulation must be more open ended and less rigid (Black 2008; Baxter 2016; Claessens and Kodres 2017).[1]

A few examples will help illustrate these points. The Private Securities Litigation Reform Act (PSLRA), part of a more general plan of Republican tort reform, arose in response to concerns over frivolous securities fraud suits. The Act strengthens pleading requirements by forcing plaintiffs in securities fraud actions to "state with particularity the facts giving rise to a strong inference that the defendant acted with the requisite state of mind" (PSLRA 1995). The statute, however, does not define either the "requisite state of mind" or the types of facts that would give "rise to a strong inference" that the defendant acted with that state of mind. This is despite congressional awareness that these terms were politically contested, with two important interest groups—trial lawyers and securities issuers—taking opposing sides on the issue. Moreover, as Congress was aware, these terms had been given inconsistent and conflicting interpretations by federal courts for many years prior to PSLRA passage (Baker and Krawiec 2003). Importantly, an analysis of the PSLRA's legislative history by Grundfest and Pritchard (2002) suggests that this ambiguity was necessary to garner the supermajority of votes necessary to pass the PSLRA over President Clinton's veto.[2] This ambiguity plagued courts for many years after PSLRA passage and, indeed, continues to do so.

The Dodd-Frank Act, the most sweeping piece of financial reform in generations, also provides a good example of purposely open-ended legislation. The statute's ambiguous nature has been noted by nearly every commentator—popular, practitioner, and academic—to consider it (Appelbaum 2010; Davis Polk & Wardwell LLP 2010; Wilmarth 2010). Some of those ambiguities would be resolved during the regulatory process. Others, however, would not. An analysis of the statute's

1. It should be noted that some scholars, most notably John Braithwaite, contend that such an open-ended approach results in less, rather than more, uncertainty under some conditions (Braithwaite 2002).

2. Trial lawyers, who opposed the legislation, were important Clinton supporters and generous donors (Frantz 1996).

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

legislative history suggests that both political disagreements and the complexity of the subject matter contributed to a notoriously vague statute (Krawiec 2013).

Finally, operational risk—the risk of loss from "inadequate or failed internal processes, people and systems or from external events"—under the Basel II Capital Accord provides a good example of ambiguity stemming from issue complexity and the desire to provide flexibility and encourage innovation.[3] Although the Basel II Accord requires banks to protect against operational risk by holding capital specifically allocated for that purpose, it does not mandate how banks should measure that risk, instead allowing banks to choose their own methodology for assessing operational risk. According to the Basel Committee, this approach was necessary because operational risk measurement and management techniques were still relatively crude and underdeveloped (Basel Committee on Banking Supervision 2002, 7).

Recognizing this challenge, the Committee allowed financial institutions meeting certain criteria to use their own risk metrics in calculating the operational risk capital requirement. As discussed below, this has led to a number of problems in operational risk regulation and calls to abandon or substantially revise the Basel II operational risk framework.

In sum, Edelman argues that legal ambiguity is conducive to legal endogeneity, and there is no shortage of that ambiguity in financial regulation. Instead, the high stakes, political disagreements, powerful interest groups, difficult subject matter, and quickly changing nature of financial markets and products ensure some level of ambiguity—often, pervasive ambiguity—even (or, perhaps, particularly) in the most important pieces of legislation.

LACK OF OUTCOME MEASURES

Ambiguous laws need not lead to legal endogeneity and cosmetic compliance, however. When courts and regulators apply clear outcome measures to determine compliance with the law, there is less room for managerial interpretations to take hold (Edelman 2016).

Many substantive areas of law naturally lend themselves to outcome measures of this type. Food and drug safety, as well as environmental regulations that depend on emissions limits or effluent levels are common examples (Magat and Viscusi 1990; U.S. Food & Drug Administration 2017). But financial regulation often is not susceptible to these types of outcome measures. To be sure, outcome measures are not wholly absent from financial regulation—stress tests, capital requirements, and some risk limits strive for objective criteria to determine compliance. But this is not representative of most financial regulation, which, by necessity, must rely on policies, programs, and procedures to judge compliance. And even objective outcome tests in the financial arena frequently rely on data, information, or algorithms supplied by the regulated entity itself. Indeed, a number of high-profile cases of massive

3. Although the Basel Accords are not themselves legally binding under US law, federal regulators typically adopt implementing rules consistent with them (Getter 2014).

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

financial institution losses (such as the United Kingdom's Barings Bank and France's Société Générale, among others) involved the falsifying of data and records provided to financial institution management and/or regulators (Krawiec 2009). The result is that, too often, the effectiveness of any given financial regulation will be unknown until it becomes clear that it has failed, as was the case in the 2008 global financial crisis (Claessens and Kodres 2017).

Returning to the example of operational risk under Basel II, recall that large banks are permitted to rely on internally generated data, models, and methodologies in determining the proper capital set-aside. As stated by the Basel Committee:

> Under the [AMA], banks will be permitted to choose their own methodology for assessing operational risk .... The extent of detailed standards and criteria for use of the AMA are minimal in an effort to spur the development of innovative approaches. (Basel Committee on Banking Supervision, 2002, 7–8)

For a variety of reasons, however, this self-regulatory approach has been ill-suited to operational risk, as exemplified by a variety of high-profile operational losses in the United States and abroad, including the largest rogue trading loss in history—over $7 billion by Jerome Kerviel of the French Bank, Société Générale (Krawiec 2009; Sands, Liao, and Ma 2018). Systematic reviews also indicate great variability in the manner by which different institutions account for operational risk and a lack of comparability across institutions, making oversight difficult (Sands, Liao, and Ma 2018). In the case of rogue traders, in particular, oversight efforts have been thwarted by a falsifying of the data and records used to perform oversight functions (Krawiec 2009). Critics also have argued that operational risk standards are subjective and prone to gaming by financial institutions, and that banks may spend large sums on operational risk compliance, without addressing material risks (Moosa 2008). These problems have resulted in numerous calls to alter the current approach to operational risk regulation.

LEGAL INTERMEDIARIES AND LEGAL DEFERENCE

In the final step of legal endogeneity, various actors (which I refer to in prior work as "legal intermediaries") both outside and within the regulated entity are left to interpret and implement ambiguous law and are likely to do so in a manner that advances their own interests. As a result, the meaning of law tends to be heavily influenced by the very entities and individuals it is meant to control (Edelman 2016).

The financial industry has a wealth of legal intermediaries with a credible claim of expertise in interpreting and implementing ambiguous law, including lawyers and consultants, compliance officers, accountants (with a claim of expertise in internal controls), and risk management experts (with a claim of expertise in risk measurement and modeling). Each of these legal intermediaries has an incentive to emphasize—or overemphasize—both the extent of legal risk and their ability to contain it. Meanwhile, senior management of regulated financial institutions has an incentive

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

to signal compliance with the new legal rules, while containing costs and disrupting existing business practices as little as possible (Krawiec 2009).

As Edelman notes, courts and regulatory agencies theoretically retain the power to reject these programs, policies, and procedures as insufficient compliance with legal obligations. But legal actors (and courts, in particular) have limited time, expertise, and incentives to differentiate self-serving or inefficient interpretations from those that show a genuine commitment to legal ideals. And once particular policies, programs, and practices have gained legitimacy as "best practices" among the regulated group, it is tempting for courts and regulatory bodies to measure compliance with the law against the industry standard, with limited inquiry into the role played by the regulated group and other self-interested actors in establishing those standards or, as documented by Edelman, into the effectiveness of these mechanisms in deterring prohibited conduct.

Returning a final time to operational risk will help illustrate this point. As previously noted, the Basel II requirements prompted a new focus on and importance of operational risk management. Experts rushed to fill the ensuing void, creating an operational risk management industry where none had previously existed (Power 2006). In fact, the very lack of an existing consensus on modeling, measurement, and control increased the scope for competing and entrepreneurial solutions that catered to specific groups' expertise. Accountants, for example, sought to define operational risk as unsusceptible to quantification and, therefore, primarily addressable through internal controls. Lawyers sought to define operational risk primarily in compliance and organizational governance terms. Risk management experts, trained in financial economics and possessing quantitative and modeling skills and training, packaged operational risk as amenable to measuring, modeling, and testing. As a result, operational risk management is today a briskly growing multi-billion-dollar industry (Krawiec 2009).

CONCLUSION

Lauren Edelman's *Working Law* is remarkably relevant to the study of financial regulation. In particular, three factors that Edelman identifies as specifically contributing to legal endogeneity and symbolic compliance—ambiguous law, a lack of clear outcome measures, and the presence of legal intermediaries—are especially salient in the context of financial regulation.

Financial regulation is complicated and frequently opaque, as is the behavior it is meant to control. Often, the general public, courts, and lawmakers have only a limited understanding of the regulated behavior. Although financial regulators are generally presumed to possess more expertise, they nonetheless operate at an informational disadvantage relative to regulated entities and, moreover, suffer from limited time, constrained budgets, and political pressures.

Finally, many of the benefits of financial regulation—reduced systemic risk and increased financial stability and liquidity—are widely dispersed, while the costs are borne by an increasingly concentrated financial industry. Those institutions (along with their lobbyists, lawyers, consultants, and other advisors) have not only the incentive,

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

but also the power and resources, to shape the law to their benefit. It has long been recognized that this occurs ex ante, through political lobbying. Edelman's work reinforces the point that it may also happen ex post through an endogenous process of interpretation, implementation, and, ultimately, enshrinement of symbolic compliance with ambiguous law.

REFERENCES

Appelbaum, Binyamin. "On Finance Bill, Lobbying Shifts to Regulations." *New York Times*, June 27, 2010.

Arlen, Jennifer H. "The Failure of the Organizational Sentencing Guidelines." *University of Miami Law Review* 66, no. 3 (2012): 321–62.

Ayres, Ian, and John Braithwaite. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press, 1992.

Baker, Scott, and Kimberly D. Krawiec. "The Penalty Default Canon." *George Washington Law Review* 72, no. 4 (2003): 663–723.

Bardach, Eugene, and Robert Allen Kagan. *Going by the Book: The Problem of Regulatory Unreasonableness*. 2d ed. New Brunswick, NJ: Transaction Publishers, 2002.

——.*Overview Paper for the Impact Study*. Basel, Switzerland: Bank for International Settlements, 2002.

Baxter, Lawrence G. "Adaptive Financial Regulation and RegTech: A Concept Article on Realistic Protection for Victims of Bank Failures." *Duke Law Journal* 66, no. 3 (2016): 567–604.

Black, Julia. *Rules and Regulators*. Oxford, UK: Clarendon Press, 1997.

——. "Forms and Paradoxes of Principles-Based Regulation." *Capital Markets Law Journal* 3, no. 4 (2008): 425–57.

Braithwaite, John. "Rules and Principles: A Theory of Legal Certainty." *Australian Journal of Legal Philosophy* 27 (2002): 47–82.

Claessens, Stijn, and Laura E. Kodres. "The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions." In *Policy Shock: Recalibrating Risk and Regulation after Oil Spills, Nuclear Accidents and Financial Crises*, edited by Edward Balleisen, Lori S. Bennear, Kimberly D. Krawiec, and Jonathan B. Wiener, 435–84. Cambridge, UK: Cambridge University Press, 2017.

Coates IV, John C. "The Goals and Promise of the Sarbanes-Oxley Act." *Journal of Economic Perspectives* 21, no. 1 (2007): 91–116.

Coglianese, Cary, and Jennifer Nash. "Management-Based Strategies: An Emerging Approach to Environmental Protection." In *Leveraging the Private Sector: Management-Based Strategies for Improving Private Sector Environmental Performance*, edited by Cary Coglianese and Jennifer Nash, 3–30. Washington, DC: Resources for the Future, 2006.

Davis Polk & Wardwell LLP. "Memorandum to Clients and Friends: Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010." July 21, 2010.

Dobbin, Frank, Daniel Schrage, and Alexandra Kalev. "Rage against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity." *American Sociological Review* 80, no. 5 (2015): 1014–44.

Edelman, Lauren B. *Working Law: Courts, Corporations, and Symbolic Civil Rights*. Chicago: University of Chicago Press, 2016.

Edelman, Lauren B., Christopher Uggen, and Howard S. Erlanger. "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth." *American Journal of Sociology* 105, no. 2 (1999): 406–54.

Epstein, David, and Sharyn O'Halloran. *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge, UK: Cambridge University Press, 1999.

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

Ford, Cristie L. "New Governance, Compliance, and Principles-Based Securities Regulation." *American Business Law Journal* 45, no. 1 (2008): 1–60.

Frantz, Douglas. "Trial Lawyers, Their Money and Their Influence Have Become Issues in the Campaign." *New York Times*, October 13, 1996.

Getter, Darryl E. Congressional Research Service: U.S. Implementation of the Basel Capital Regulatory Framework, 2014.

Grundfest, Joseph A., and Adam C. Pritchard. "Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation." *Stanford Law Review* 54, no. 4 (2002): 627–736.

Gunningham, Neil, and Darren Sinclair. *Leaders and Laggards: Next-Generation Environmental Regulation*. New York: Routledge, 2017.

Hess, David. "Ethical Infrastructure and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence." *New York Journal of Law & Business* 12, no. 2 (2016): 317–68.

Holley, Cameron, Neil Gunningham, and Clifford Shearing. *The New Environmental Governance*. New York: Routledge, 2013.

——. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press, 2009.

Krawiec, Kimberly D. "Cosmetic Compliance and the Failure of Negotiated Governance." *Washington University Law Quarterly* 81, no. 2 (2003): 487–544.

——. "The Return of the Rogue." *Arizona Law Review* 51, no. 1 (2009): 127–74.

——. "Don't 'Screw Joe the Plummer': The Sausage-Making of Financial Reform." *Arizona Law Review* 55, no. 1 (2013): 53–103.

Langevoort, Donald C. "Cultures of Compliance." *American Criminal Law Review* 54 (2017): 933–77.

——. "Behavioral Ethics, Behavioral Compliance." In *Research Handbook on Corporate Crime and Financial Misdealing*, edited by Jennifer Arlen, 263–81. Northampton, MA: Edward Elgar Publishing, 2018.

Laufer, William S., and Alan Strudler. "Corporate Crime and Making Amends." *American Criminal Law Review* 44, no. 4 (2007): 1307–18.

Lobel, Orly. "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought." *Minnesota Law Review* 89 (2004): 342–470.

Magat, Wesley A., and W. Kip Viscusi. "Effectiveness of the EPA's Regulatory Enforcement: The Case of Industrial Effluent Standards." *Journal of Law and Economics* 33, no. 2 (1990): 331–60.

Moosa, Imad. *Quantification of Operational Risk under Basel II: the Good, Bad and Ugly*. London: Palgrave Macmillan, 2008.

Murphy, Michael E. "Assuring Responsible Risk Management in Banking: The Corporate Governance Dimension." *Delaware Journal of Corporate Law* 36, no. 1 (2011): 121–64.

Power, Michael. "The Invention of Operational Risk." *Review of International Political Economy* 12, no. 4 (2006): 577–99.

Riles, Annelise. *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*. Chicago: University of Chicago Press, 2011.

Sands, Peter, Gordon Liao, and Yueran Ma. "Rethinking Operational Risk Capital Requirements." *Journal of Financial Regulation* 4, no. 1 (2018): 1–34.

Simons IV, Ernest L. "Anti-Money Laundering Compliance: Only Mega Banks Need Apply." *North Carolina Banking Institute Journal* 17, no. 1 (2013): 249–74.

Trubek, David M., and Louise G. Trubek. "Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination." *European Law Journal* 11, no. 3 (2005): 343–64.

U.S. Food & Drug Administration. Drug Quality Sampling and Testing Programs, https://www.fda.gov/drugs/scienceresearch/ucm407277.htm, 2017.

U.S. Securities & Exchange Commission. The Laws that Govern the Securities Industry, https://www.sec.gov/answers/about-lawsshtml.html, modified 2013.

Wilmarth Jr., Arthur E. "The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem." *Oregon Law Review* 89, no. 3 (2010): 951–1057.

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press

STATUTES CITED

Private Securities Litigation Reform Act (PSLRA), Pub. L. 104–67, 109 Stat. 737 (1995).
Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002).
Securities Act of 1933, 15 U.S.C. §77a et seq. (1933).

https://doi.org/10.1017/lsi.2019.54 Published online by Cambridge University Press