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FALL 2011

*Democracy cannot be reconciled
with an Islamic state.*

*Religion can thrive in the politics of
a secular state.*

Making **constitutionalism**
work in Islamic countries



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About Emory Insights

Emory Insights is published twice a year by Emory University School of Law to highlight faculty scholarly research. It is produced by the Office of Marketing and Communications. For questions, email communications@law.emory.edu.

Cover illustration by Chris Silas Neal

Making Constitutionalism Work in Islamic Countries



Abdullahi Ahmed An-Na'im

Charles Howard Candler Professor of Law
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LLB, University of Khartoum, 1970
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 MA, University of Cambridge, 1973
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Scholarly interests: comparative constitutional law, Islamic law, and international human rights

An internationally recognized scholar of constitutionalism and Islamic law, Abdullahi An-Na'im has developed a theoretical framework as well as practical strategies for pursuing two inter-related goals: promoting the cultural and religious legitimacy of both *constitutionalism* and *human rights* in African and Islamic societies.

To those ends, An-Na'im emphasizes two main messages: Democracy cannot exist within an Islamic state, and a secular state is not hostile to religious freedom.

With his focus on developing an internal Islamic justification for the secular state in particular, An-Na'im has broken ground. "To the best of my knowledge, this argument has not been made in those terms by any other Muslim scholar," he says. "Scholars tend either to oppose the secular state or to argue for it from a secular perspective."

An-Na'im's book *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard 2008), also published in Arabic and Indonesian, analyzes the relationship of religion, state, and society in its specifically Islamic context, paying particular attention to the ongoing interpretation of ancient texts and the post-colonial condition of Islamic countries. Translations of this book in Bengali, Persian, Urdu, Turkish, and Russian also may be downloaded for free at <http://sharia.law.emory.edu/en/languages>. An earlier book, *African Constitutionalism and the Role of Islam* (University of Pennsylvania 2006), addresses the sometimes related challenges of implementing constitutionalized forms of government specific to Africa.

Other recent works include "The Compatibility Dialectic: Mediating the Legitimate Coexistence

"Instead of thinking of constitutionalism as an end that has either been achieved or not achieved, it is more useful to view it as a process that emerges through practice."

Excerpts: "Constitutionalism: A Process That Emerges Through Practice"

The basic understanding of constitutionalism I am working with here is premised on two propositions. First, various conceptions of constitutionalism should be seen as complementary approaches to an ideal, to be adapted to different conditions of time and place, rather than as representing sharp dichotomies or categorical choices. Whether based on a written document or not, the objective must always be to uphold the rule of law, enforce effective limitations on government powers, and protect fundamental rights.

Second, the construction of general principles (or universal features) of this concept should emphasize their role as means to the ends of successful and sustainable constitutional governance in country-specific contexts, while emphasizing the need for internal consistency of the relationship between ends and means. The ends of popular sovereignty and social justice, for instance, can only be achieved through the actual application of these principles, rather than by postponing application until "ideal" conditions for it have been established by some self-proclaimed ideological elite as has often happened in recent African experiences. Such conditions can only be realized through trial and error in the practical application of principles of popular sovereignty and social justice, provided society and its leaders are open to implementing the necessary correction of theory and modification of practice. ... In other words, the end of constitutional governance is realized through the means of empirical practical experience of constitutional principles in the specific context of each society.

... Put in elemental terms, therefore, constitutionalism is a framework for the mediation of certain unavoidable conflicts in the political, economic, and social fabric of every human society. This proposition assumes that conflict is a normal and permanent feature of human societies, and defines constitutionalism in terms of being a framework for mediation, rather than permanent or final resolution of such conflicts.

... But what is probably the most critical aspect of constitutionalism relates to subtle and rather mysterious psychological and sociological aspects of what I referred to earlier as sufficiently strong civic engagement by a critical mass of citizens. These aspects are difficult to quantify or verify, except perhaps in terms of outcomes that indicate the success or failure of constitutionalism in a given context. They include the motivation of citizens to keep themselves well-informed in public affairs, and to organize themselves in non-governmental organizations that can act on their behalf in effective

and sustainable ways. ... This is the practical and most foundational meaning of popular sovereignty, whereby a people can govern themselves through their own public officials and elected representatives.

... The premise of highlighting the possibilities of positive as well as negative relationship is that the attitudes of Muslims regarding constitutionalism are partly shaped by their understanding of Islam. This does not mean that Islam completely or exclusively determines the constitutional behavior of Muslims, as that is also influenced by a wide range of economic, political, and other factors, which is also true of the role of religion in other human societies in general. Nevertheless, the role of Islam is probably a major issue in many Islamic societies because of its widely perceived impact on the legitimacy of constitutional theory and practice, though that tends to vary in intensity and implications. In other words, Muslims may take a negative view of constitutionalism, even one hostile to some aspects of it, to the extent that they believe it to be inconsistent with their religious obligation to observe Shari'a.

... The view of constitutionalism as a contested concept and the contingent outcome of the experiences of African countries in the postcolonial context will be further explained and discussed in the following chapters. By representing and examining this concept as a site and product of the contestation and mediation of power, I am emphasizing that it should be seen and understood as a living and evolving process, as *practice*. As both the site and symbol of popular legitimacy, this concept can be a productive medium for transforming and transcending the post-colonial condition, a means as well as an end of self-determination and political independence. From this broader and deeper historical-political perspective, the success or failure of various constitutional experiences should be assessed as an incremental process, affected by external as well as internal factors and actors that have shaped the political history of postcolonial Africa.

... A key directive that follows from this perspective is to look closely at the internal dynamics and processes by which constitutionalism is effectively consolidated and established in *any* society. This requires combining a historical imagination with political and sociological analysis in assessing the relative "failure" or "success" of the concept in each setting. In other words, the failures or setbacks are as much a part of the evolution and establishment of the concept as are apparent successes in this regard. Instead of thinking
(continued on following page)

of constitutionalism as an end that has either been achieved or not achieved, it is more useful to view it as a *process* that emerges through *practice*.

—from *African Constitutionalism and the Role of Islam* (University of Pennsylvania 2006)

.....

In order to be a Muslim by conviction and free choice, which is the only way one can be a Muslim, I need a secular state. By a secular state I mean one that is neutral regarding religious doctrine, one that does not claim or pretend to enforce Shari`a—the religious law of Islam—simply because compliance with Shari`a cannot be coerced by fear of state institutions or faked to appease their officials.

...

The state is a complex web of organs, institutions, and processes that are supposed to implement the policies adopted through the political process of each society. In this sense, the state should be the more settled and deliberate operational side of self-governance, while politics serves as the dynamic process of making choices among competing policy options.

...

The question should therefore be how to sustain the distinction between the state and politics, instead of ignoring the tension in the hope that it will somehow resolve itself. This necessary though

difficult distinction can be mediated through the principles and institutions of constitutionalism and the protection of the equal human rights of all citizens.

... Constitutionalism provides a legal and political framework for realizing and safeguarding equal dignity, human rights, and the well-being of all citizens. The standards of human rights, while authoritatively defined in international and regional treaties and customary international law, can be applied in practice through national constitutions, legal systems, and institutions. However, the effectiveness of national and international systems is dependent on the active participation of citizens acting individually and collectively to protect their own rights. At the same time, constitutional and human rights norms enable citizens to exchange information, organize and act individually and collectively to protect their own vision of the social good, and protect their rights. In other words, constitutionalism and human rights are necessary means to the end of upholding the dignity and rights of citizens, but that purpose can be realized only through the agency of citizens. Thus, these concepts and their related institutions are dependent on and must interact with each other in order for the purpose of each concept to be achieved.

—from *Islam and the Secular State: Negotiating the Future of Shari`a* (Harvard 2008)

of Islamic Law and State Law,” 73 *Modern Law Review* 1 (2010) as well as *Muslims and Global Justice* (University of Pennsylvania 2011), in which An-Na`im critically examines the role that Muslims must play in the development of a pragmatic, rights-based framework for justice.

Now under contract with Oxford University Press is a book with the working title *Beyond Minority Politics: American Muslims and Citizenship*, written during his tenure as a 2009 Carnegie Scholar of Islam. In this volume An-Na`im seeks to reframe the terms of discussion from “Muslim Americans as a minority” to “American citizens who happen to be Muslim.”

“My objective in this manuscript is twofold,” An-Na`im says. “First, I urge American Muslims to take a proactive, affirmative view of their citizenship in the United States, in order fully to realize their rights and fulfill their obligations in social and cultural terms, as well as in political and legal terms. My second objective is to explore and clarify the sort of strategies American Muslims might pursue in public discourse and

through the political and legal process to advance their priorities *on their own terms*, including what I call religious self-determination.”

How can — and should — Islamic law influence Islamic societies? An-Na`im asks that question repeatedly in multiple venues. Driven

“I urge American Muslims to take a proactive, affirmative view of their citizenship in the United States, in order to fully realize their rights and fulfill their obligations in social and cultural terms, as well as in political and legal terms.”

by his ongoing concern to reach and influence public opinion in Islamic and African societies at large, he travels widely within Africa and the Muslim world, debating and presenting his work. During a 2009 lecture tour, An-Na`im visited Lebanon, Canada, England, Italy, Germany, and

the Netherlands, speaking before university and governmental audiences. In the past three years alone, he has delivered more than 50 keynote addresses, panel presentations, and public and private lectures around the globe.

An-Na`im has served as a visiting professor at Georgetown University and as a senior visiting fellow at the Berkeley Center. From Atlanta he hosts live webcasts and, as a Senior Fellow at

“In the final analysis, the question is how to communicate and link the rationality of constitutional ideals with the economic, social, or contextual realities of the people concerned.”

Emory Law’s Center for the Study of Law and Religion, he has directed several research projects related to advocacy strategies for reform through internal cultural transformation: Women and Land in Africa, Islamic Family Law, and the Fellowship Program in Islam and Human Rights.

Forthcoming in *Tanner Lectures on Human Values*, is “Transcending Imperialism: Human Values and Global Citizenship,” a lecture An-Na`im delivered at the University of California-Berkeley in March 2010. His appointment to the annual nine-university Tanner Lecture Series recognizes his uncommon achievement and outstanding abilities in the field of human values — work that An-Na`im regards as an opportunity for which he is deeply grateful.

“Constitutionalism, as defined in the excerpt herein, is necessary for peace, political stability, economic development, and social justice everywhere in the world, but particularly in post-colonial African and Islamic societies,” An-Na`im says. “I hope to contribute to the ability of these societies to transcend the negative consequences of post-colonial dependency, build their own economies, promote political accountability, and achieve social justice.”

SELECTED PUBLICATIONS

Books

Muslims and Global Justice
(University of Pennsylvania 2011)

Islam and Human Rights: Selected Essays of Abdullahi An-Na`im (Mashood A. Baderin ed., 2010)

Islam and the Secular State: Negotiating the Future of Shari`a (Harvard 2008) (Indonesian translation 2007; Arabic translation 2010)

African Constitutionalism and the Role of Islam
(University of Pennsylvania 2006)

Human Rights Under African Constitutions: Realizing the Promise for Ourselves
(University of Pennsylvania 2003) (editor)

Cultural Transformation and Human Rights in Africa
(Zed 2002) (editor)

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Book Chapters

Beyond Dhimmihood: Citizenship and Human Rights, in *The New Cambridge History of Islam, Muslims and Modernity: Culture and Society Since 1800* 314 (Robert W. Hefner ed., 2010)

European Islam or Islamic Europe, in *Islam and Europe: Crises are Challenges* 85 (Marie-Claire Foblets & Jean-Yves Carlier eds., 2010)

Islam and Secularism, in *Comparative Secularisms in a Global Age* 217 (Linell Cady & Elizabeth Shakman Hurd eds., 2010)

Universality of Human Rights: Mediating Paradox to Enhance Practice, in *Human Rights Today—60 Years of the Universal Declaration* 29 (Miodrag Jovanovic & Ivana Krstic eds., 2010)

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Shari`a in the Secular State: A Paradox of Separation and Conflation, in *The Law Applied: Contextualizing the Islamic Shari`a* 321 (Peri Bearman, Wolfhart Heinrichs, & Bernard G. Weiss eds., 2008)

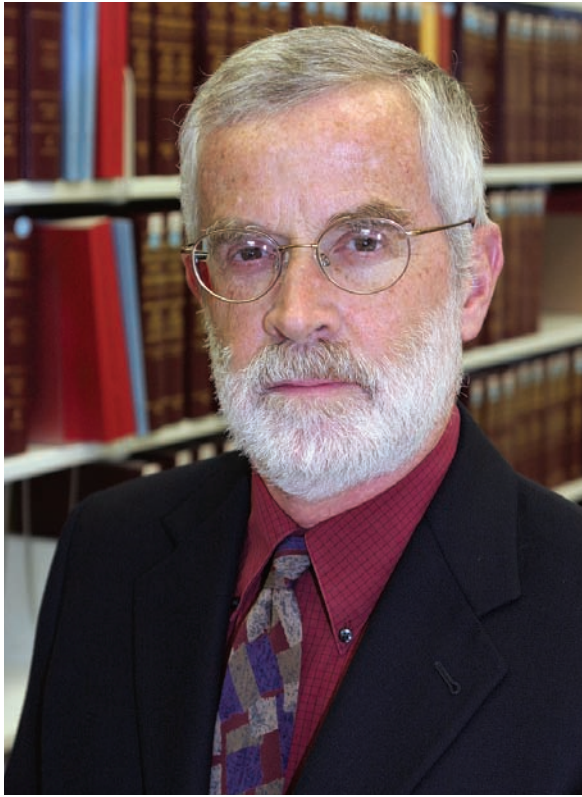
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Articles

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Religion, the State and Constitutionalism in Islamic and Comparative Perspectives, 57 *Drake Law Review* 829 (2009)

Assessing Fundamental Questions of Law and Morality



Michael J. Perry

Robert W. Woodruff Professor of Law

AB, Georgetown University, 1968

JD, Columbia University, 1973

LLD (honoris causa), St. John's University (Minnesota), 1999

Scholarly interests: constitutional law, law and religion, law and morality, human rights

“Ever since my first class in constitutional law,” Michael Perry says, “I’ve been most deeply engaged intellectually by questions concerning the relationship of morality to law — specifically, as that relationship plays out in the context of the constitutional law of the United States.”

That deep interest led Perry to international renown as a scholar of constitutional law, religion, and the intersection between them. Having held distinguished chairs at Northwestern University and Wake Forest University, he holds a Robert W. Woodruff Professorship, Emory’s highest honor for a faculty member. He also is a Senior Fellow at the Center for the Study of Law and Religion at Emory Law.

In his 12 books and in more than 75 articles and essays, Perry has written on the most contentious issues of American law and politics. His scholarship extends to two broad areas: constitutional theory and human rights theory, which, he says, are intimately related.

Perry’s work in human rights theory addresses *What is a “human right”?* and *What are the grounds of human rights?* He asks, further, *What is the right to religious and moral freedom, and what are the implications of that right for the controversies over same-sex marriage and abortion?*

“My work in constitutional theory, too, addresses questions about certain basic human rights, namely, the human rights that are entrenched in the constitutional law of the United States,” Perry says. “But it also poses the fundamental question of American constitutional theory: *What is the proper role of the courts — especially of the Supreme Court of the United States — in resolving constitutional controversies?*”

The constitutional controversies forming the principal context for Perry’s writings about the

“What is the right to religious and moral freedom? What are the implications of that right for the controversies over same-sex marriage and abortion?”

Excerpt: “Violating the Political Morality of a Liberal Democracy: A Case in Point”

In November 2008, a few weeks after the election of Barack Obama to the presidency of the United States, Cyndy S. Lederman, a Florida judge, decided an adoption case: *In the Matter of the Adoption of John Doe and James Doe*. When I read Judge Lederman’s opinion in the case, I was struck by the fact that she was addressing, both explicitly and implicitly, some of the very issues at the heart of this book.

A Florida law, enacted in 1977 during Anita Bryant’s successful campaign to repeal a gay rights ordinance that had recently been adopted by Dade County (Miami), declares that no one otherwise eligible to adopt under Florida law “may adopt if that person is a homosexual.” That a state refuses to create civil unions for same-sex couples—or that a state creates such unions but refuses to recognize them as “marriages”—does not prevent a same-sex couple from being a couple and living together as such and, along with their families, friends, and community, recognizing their union as a marriage. But the Florida adoption law prevents gays and lesbians from becoming adoptive parents—and, so, imposes a much more severe hardship on gays and lesbians, it effects a more grievous assault on gays and lesbians, than does a state’s refusal to create civil unions for same-sex couples.

Judge Lederman concluded that the Florida law violates the Florida Constitution’s guarantee of equal protection. As I write this conclusion, the attorney general of Florida has filed an appeal in the case, and by the time this book has been published, Judge Lederman’s ruling may have been—or may be on its way to being—reversed. Nonetheless, her ruling is correct as a matter of the political morality of liberal democracy. And because the relevant part of that morality—the right to moral equality—is embedded in the constitutional law of Florida (in the guise of the right to equal protection), Judge Lederman’s ruling is also correct as a matter of Florida constitutional law. Because the right to moral equality is also embedded in the constitutional law of the United States (in the guise of the right to equal protection), the Florida law invalidated by Judge Lederman also violates U.S. constitutional law. (As I read her opinion, Judge Lederman ruled only as to Florida constitutional law.)

The Florida law clearly implicates the right to moral equality: There is undeniably a serious question whether the law is based on the view that homosexuals are inferior—second-class, or worse—human beings: that they do not have equal inherent dignity; that their well-being does not merit the same respect and concern as the well-being of some other human beings. Answering that question—and thereby deciding whether the law not only

implicates but violates the right to moral equality—requires answering this question: Is the Florida law—specifically, the singling out of homosexuals and treating them less well—necessary to serve a legitimate (and sufficiently weighty) governmental interest?

Judge Lederman’s opinion patiently and thoroughly explained that the evidence presented to the court demonstrates a robust social scientific consensus to the effect that parenting by homosexuals, whether as biological, foster, or adoptive parents, is no less healthy for children—no less in the “best interests” of children—than parenting by heterosexuals. The sole interest the Florida law succeeds in serving, then, is the interest in affirming the traditional moral view that homosexual sexual conduct is immoral. As I explained in Chapter 8, however, that interest is not a legitimate governmental interest.

I can anticipate a response along these lines: “Although the right to moral equality (in the guise of the right to equal protection) is part of the constitutional law both of Florida and of the United States, a court should adopt a deferential stance—a Thayerian stance—in enforcing the right. And this Judge Lederman did not do.” I argued in Chapter 9 that a court should *not* adopt a Thayerian stance in enforcing the right to moral equality if there is good reason for the court to suspect that the challenged law is based on the view that those whom the law treats differently and less well are morally inferior. Put that point aside, however. The fact remains that Judge Lederman, constrained by established judicial precedent, *did* adopt a Thayerian stance: She did not ask whether in her own judgment the Florida law served a legitimate governmental interest; instead, she asked whether a lawmaker could plausibly think that the law served a legitimate governmental interest. (In the parlance of constitutional law, she asked whether the Florida law had a “rational basis.”) Judge Lederman’s answer, which was no, was more than amply supported—indeed, it was overdetermined—by the social-scientific evidence presented to the court.

The Florida law not only violates the political morality of liberal democracy. The law—according to which, again, no one otherwise eligible to adopt under Florida law “may adopt if that person is a homosexual”—is unconstitutional. The law is unconstitutional even from the perspective of Thayerian deference: Given the robust social-scientific consensus that has emerged to the effect that parenting by homosexuals is no less healthy for children—no less in the “best interests” of children—*(continued on following page)*

than parenting by heterosexuals, Judge Lederman was right to conclude that no lawmaker could any longer plausibly think that the Florida law serves a legitimate governmental interest.

Sometimes a court's rejection of a constitutional challenge to a law is not merely incorrect; sometimes it is shameful. So shameful as to later warrant both embarrassment and apology. Two infamous examples:

1. In *Plessy v. Ferguson* (1896), the U.S. Supreme Court's rejection of a constitutional challenge to a law requiring racially segregated ("separate but equal") railroad accommodations.

2. In *Korematsu v. United States* (1944), the Court's rejection of a constitutional challenge to the

forced relocation of persons of Japanese ancestry, many of whom were American citizens, from their homes on the west coast of the United States to internment camps, during World War II.

By the time this book has been published, Judge Lederman's constitutional ruling may have been reversed by the Florida Supreme Court. If so, that reversal—that rejection of the constitutional challenge to the Florida adoption law—will not merely be incorrect; it will be shameful. So shameful as to later warrant both embarrassment and apology.

—from *The Political Morality of Liberal Democracy* (Cambridge 2010)

proper judicial role are those that track gravely divisive moral controversies, such as capital punishment, same-sex marriage, and abortion.

Within Perry's long list of major university press titles, recent books include *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge 2007) and *The Political Morality of Liberal Democracy* (Cambridge 2010). Two new books are under way: *The Morality and Law of International Human Rights: Introduction and Overview* and *The Constitutional Morality of the United States: Democracy, Human Rights, and Judicial Review*.

"In the United States, the great — and greatly divisive — moral and political controversies seem inevitably to become greatly divisive constitutional controversies," Perry says. "We need to understand more fully the various dimensions of the controversies; we need to understand what, exactly, is at stake."

Perry continues to raise questions and propose answers, nationally and beyond. He has served as a visiting professor at a number of law schools, including Yale, Tulane, and the University of Tokyo, and is now the Distinguished Visiting Professor in Law and Peace Studies at the University of San Diego.

Among Perry's recent presentations are a plenary session at the annual Judicial Conference of the U.S. Court of Appeals for the 2nd Circuit, a lecture at Fordham University's interdisciplinary conference on Moral Outrage and Moral Repair, and a paper at a conference on Religious Law and State Affairs, sponsored by the Bar Ilan University Faculty of Law in Tel Aviv, Israel.

In March, Perry will present the annual Currie Lecture at Emory Law's Center for the Study of Law and Religion, speaking on "Freedom of Religion, Same-Sex Marriage, and the Catholic Church."

"If my work succeeds in deepening our understanding of the divisive moral and constitutional controversies," Perry says, "the potential beneficiaries include not just lawyers, judges, law professors, and law students, but every citizen who cares about the profound issues of morality and law."

SELECTED PUBLICATIONS

Books

The Political Morality of Liberal Democracy (Cambridge 2010)

Constitutional Rights, Moral Controversy, and the Supreme Court (Cambridge 2009)

Toward a Theory of Human Rights: Religion, Law, Courts (Cambridge 2007)

Under God? Religious Faith and Liberal Democracy (Cambridge 2003)

We the People: The Fourteenth Amendment and the Supreme Court (Oxford 1999)

Book Chapters

The Grounds of Human Rights, in *Human Rights: Critical Dialogues* (Mark Goodale ed., Oxford, forthcoming 2012)

The Right to Religious and Moral Freedom, in *Religion and Human Rights* (John Witte Jr. & M. Christian Green eds., Oxford, forthcoming 2011)

Articles

From Religious Freedom to Moral Freedom, 47 *San Diego Law Review* 993 (2010)

A Religious Basis of Liberal Democracy, 41 *George Washington International Law Review* 923 (2010)

Liberal Democracy and the Right to Religious Freedom, 71 *Review of Politics* 1 (2009)

Religion as a Basis of Lawmaking? Herein of the Nonestablishment of Religion, 35 *Philosophy & Social Criticism* 105 (2009)

Recent Scholarship



Blank

Laurie R. Blank

Director,
International Humanitarian Law Clinic

Book Chapters

Rules of Engagement: Law, Strategy and Leadership, in *Aspects of Leadership: Ethics, Law and Spirituality* (Marine Corps University, forthcoming 2012)

Articles

A Square Peg in a Round Hole: Stretching Law of War Detention Too Far, 64 *Rutgers Law Review* (forthcoming 2011)

Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare, 1 *Harvard National Security Journal* 45 (2010) (with Amos Guiora)



Mayton

William T. Mayton

Thomas J. Simmons Professor of Law

Books

Sustainers: The Natural-Born Citizens of the United States (forthcoming 2012)

Administrative Law (3rd ed., West, forthcoming 2012) (with Alfred C. Aman)

Articles

Birtright Citizenship and the Civic Minimum, 22 *Georgetown Immigration Law Journal* 221 (2008)



Schapiro

Robert A. Schapiro

Interim Dean and Professor of Law

Books

Polyphonic Federalism: Toward the Protection of Fundamental Rights (University of Chicago 2009)

Book Chapters

Interjurisdictional Enforcement of Rights in a Post-Erie World, in *New Frontiers of State Constitutional Law: Dual Enforcement of Norms* (James A Gardner & Jim Rossi eds., 2011)

Articles

Not Old or Borrowed: The Truly New Blue Federalism, 3 *Harvard Law & Policy Review* 33 (2009)

Monophonic Preemption, 102 *Northwestern Law Review* 811 (2008)



Seaman

Julie Seaman

Associate Professor of Law

Articles

Black Boxes, 58 *Emory Law Journal* 428 (2008)

Hate Speech and Identity Politics: A Situationalist Proposal, 36 *Florida State University Law Review* 99 (2008)

Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony, 96 *Georgetown Law Journal* 827 (2008)

Charles A. Shanor

Professor of Law

Books

Counterterrorism Law: Cases and Materials (Foundation 2011) (with Teacher's Manual)

American Constitutional Law: Structure and Reconstruction (4th ed., West 2009) (with Teacher's Manual)

Articles

Terrorism, Historical Analogies, and Modern Choices, 24 *Emory International Law Review* 591 (2010)

Three Campaigns in the Disparate Impact/Equal Protection War, 25 *ABA Journal of Labor and Employment Law* (2009)



Shanor

John Witte Jr.

Jonas Robitscher Professor of Law
Alonzo L. McDonald Distinguished Service Professor

Books

No Establishment of Religion: America's Original Contribution to Religious Liberty (Oxford, forthcoming 2012) (with T. Jeremy Gunn)

Religion and Human Rights: An Introduction (Oxford, forthcoming 2011) (with M. Christian Green)

The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism (Cambridge 2007) (Chinese translation 2010; Italian translation 2011)

Religion and the American Constitutional Experiment (3rd ed., Westview 2011) (with Joel A. Nichols) (Chinese translation 2011)



Witte

Challenging the Corporate Wisdom



Robert B. Ahdieh

Vice Dean and Professor of Law
Director, Center on Federalism and
Intersystemic Governance

AB, Princeton University, 1994

JD, Yale University, 1997

Scholarly interests: contracts, corporate & securities law, federalism, international trade & finance, Russian law

Widely recognized as a scholar, teacher, presenter, and innovative thinker, Robert B. Ahdieh makes a habit of challenging our conventional assumptions in corporate and securities law. That’s what happens, he suggests, when we ask first questions: *Why do we regulate? Given that, how should we do so? And when? Who, finally, should be allowed to regulate — and who should decide who’s allowed?*

“As scholars, we have the luxury — and perhaps an obligation — to question the received wisdom, perhaps especially on issues of longstanding debate,” Ahdieh says. “The wisdom, and the utility, of our conventional assumptions may thus turn out to be more complicated than we assume.”

In the study of corporate and securities law, this mindset has taken Ahdieh’s work down two distinct but related paths. Early on, in his articles “Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets” and “Law’s Signal: A Cueing Theory of Law in Market Transition” (*Southern California Law Review* 2003, 2004), he considered ways in which regulators might significantly impact the design and ultimate success of securities markets — but without resort to familiar tools of command-and-control regulation. As he demonstrated in that work — and in more recent expansions on it — in certain settings we need to acknowledge the critical task of regulation as one of *coordination*.

In another strand of his work, Ahdieh has explored the allocation of regulatory authority between subnational, national, and international authorities. Conventionally, we have approached this question with an eye to minimizing overlap in the authority of independent jurisdictions — whether federal and state, state and local, or otherwise. In Ahdieh’s view, however, this approach ignores the potential utility of such

“Scholars have long debated whether state competition drives a ‘race to the bottom’ or a ‘race to the top’ in corporate governance. Actually, it does neither.”

Excerpt: “The (Misunderstood) Genius of American Corporate Law”

The study of corporate law is trapped in a metaphor. For thirty years, it has taken its cue from the purported debate between William Cary and Ralph Winter over a “race to the bottom” versus a “race to the top” in corporate governance. As commonly recounted, Cary initiated the debate, condemning the nature of corporate law as state law. Because of the latter, he argued, states have joined in a “race for the bottom” in the protection of shareholders against managerial abuse. Winter’s response is put to service in support of the opposite conclusion: state law offers precisely what shareholders want. Rather than a race to the bottom in the quality of corporate governance, federalism in corporate law—and resulting state competition—fosters a “race to the top.”

In reality, Cary and Winter agreed on far more than they disagreed. To date, however, a distorted account of their differences—and the “race” metaphor said to capture their respective positions—continues to provide the starting point for the study of corporate law. The existence, direction, and speed of the supposed race among states in corporate governance thus remain foundational questions of the corporate law literature.

But the discourse of a “race” in corporate governance—like many a misplaced metaphor—turns out to have obscured at least as much as it revealed. At once, it has caused us to overstate the centrality of state competition to efficient corporate governance and to understate the distinct normative ends that state competition promotes.

Rather than the singular dynamic of state competition emphasized by the supposed “race debate,” we do better to understand Cary and Winter as having highlighted two distinct patterns of competition in the operation and regulation of the modern public corporation. The first, of course, is the competition among states to attract corporate charters. A distinct dynamic of competition also plays out among managers, however, for scarce investment capital.

In the corporate literature’s emphasis on a race among states, these two competitions have been merged into one. More significantly, in the standard account of corporate scholars today—i.e., a belief in some movement toward the top, if not necessarily a high-speed race that actually gets there—the distinct normative ends served by state and managerial competition have been collapsed. If states are competing in ways that advance the interests of managers, and managers are competing in ways that advance the interests of shareholders, the standard account implicitly suggests, we can simply drop managers out of the middle. With this bit of New Math, we arrive at the conventional wisdom of the

modern literature, in which states compete in ways that advance the interests of shareholders.

When we maintain the distinction between state and managerial competition lost in the prevailing metaphor of a “race,” however, we see a very different picture. If corporate scholars are right to embrace Winter’s account of managerial competition—and the efficient capital markets that stand behind it—state competition’s implications for corporate governance prove quite limited. Federalism, and resulting state competition, should not be expected to generate any enhancement in the substantive quality of corporate governance, beyond that dictated by the operation of efficient capital markets.

To be more precise: If the capital markets work, competition among states should not be expected to alter the balance of power (and resources) between shareholders and managers that is dictated by competition among managers. Federalism cannot, in a sense, get ahead of the market. In fact, it has no reason to do so. Properly understood, state competition is entirely agnostic as to the ends it advances in corporate governance; it can facilitate managerial rent extractions as effectively as it can increase shareholder power. Whatever substantive efficiency is to be found in American corporate governance, then, is properly traced to managerial competition for capital, rather than state competition for corporate charters.

Federalism does not, as such, speak to the allocation of corporate surplus between shareholders and managers—the internal division of the corporate pie. Simply put, it is not about the separation of ownership and control. Rather, it is directed to the distinct possibility of regulatory failure—what might be thought of as the perfect counterpoise to the concerns that famously motivated Berle and Means.

For the majority of corporate law scholars, who see corporate governance as generally efficient—in the sense that it rests on some gradual advance in the direction of the top—this conclusion emphasizes that it is not federalism and state competition that deserve credit for that result, but efficient capital markets and the resulting pressure on managers to compete. State competition may well enhance the facial quality of corporate law—the quality of the rules as rules—but it cannot improve the substantive quality of corporate governance. Implications likewise follow for those scholars who question the quality of modern corporate governance. For such dissenters from the conventional wisdom, the crucial targets for critique are not the standard bogeymen of federalism and state corporate law. Rather, it is the efficiency (*continued on following page*)

of the capital markets to which their challenge must primarily run.

More broadly, by attending to distinct patterns of state and managerial competition, the role of federalism in corporate law becomes something worth talking about. In the prevailing account of the literature, deviations from state competition are presumptively suboptimal. There is little need to evaluate the precise contents of the Sarbanes-Oxley Act of 2002, for example. It is enough to know that it was adopted by Congress, rather than the State of Delaware.

Properly understood, however, federalism is

no more than an institutional design choice, to be assessed like any other. The choice of federalism and state competition may well be justified in some—and perhaps even most—cases, by comparison with the obvious alternative of national rules. But that choice—like the contrary choice to adopt national rules in a given sphere of corporate law—should enjoy no fixed presumption. It should be evaluated and rationalized within the distinct political economy surrounding any given question of corporate law.

—from *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 *George Washington Law Review* 255 (2009)

overlap — from its “fail-safe” functions to its potential to foster regulatory innovation and salutary integration.

Considering the implications of this approach in corporate law, Ahdieh has explored the widespread embrace of federalism as a tool of efficiency in corporate governance. Challenging this conventional view, Ahdieh’s articles “Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance” and “The (Misunderstood) Genius of American Corporate Law” (*George Washington Law Review* 2009) argue that federalism and resulting state competition have little to do with corporate governance. By asking first questions, he suggests, we can see that federalism actually serves an entirely different function in corporate law.

Institutionalizing this second strand of his scholarship, Ahdieh — together with co-directors William Buzbee and Robert Schapiro — founded Emory Law’s Center on Federalism and Intersystemic Governance. Through the center, the directors hope that a distinct perspective on federalism, and on the benefits of overlapping regulatory authority, can be brought to the table.

“The whole argument that we make, and that I’ve made in my own work in corporate and securities law,” Ahdieh says, “is that our conventional mindset may sometimes be wrong. It may be a good thing to have multiple regulators with authority over a given issue, because they may learn from one another.”

Ahdieh’s honors in recent years include visiting professorships at Columbia, Georgetown, and Princeton — where he spent a year as the Microsoft/LAPA Fellow in the Program in Law and Public Affairs. He also has been a visiting scholar at the Institute for Advanced Study and a lecturer at numerous universities overseas, including

Bergen University in Norway, Goethe University in Germany, the Interdisciplinary Center in Israel, and Singapore Management University.

Ahdieh hopes his work will help to open new lines of inquiry in corporate and securities law, as well as on the nature and role of law and regulation more generally. “A better understanding of why, how, and when we regulate,” he says, “is likely to have far-reaching implications for our economic, social, and political life.”

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Articles

Beyond Individualism in Law and Economics, 91 *Boston University Law Review* 43 (2011)

The Visible Hand: Coordination Functions of the Regulatory State, 95 *Minnesota Law Review* 578 (2010)

The (Misunderstood) Genius of American Corporate Law, 77 *George Washington Law Review* 730 (2009)

Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance, 77 *George Washington Law Review* 255 (2009)

The Dialectical Regulation of Rule 14a-8: Intersystemic Governance in Corporate Law, 2 *Journal of Business and Technology Law* 165 (2007) (reprinted in 40 *Securities Law Review* 408 (2008))

The Strategy of Boilerplate, 104 *Michigan Law Review* 1033 (2006)

From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes-Oxley, 53 *Buffalo Law Review* 721 (2005) (reprinted in 38 *Securities Law Review* 293 (2006) and 48 *Corporate Practice Commentator* 91 (2006))

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Law’s Signal: A Cueing Theory of Law in Market Transition, 77 *Southern California Law Review* 215 (2004)

Weighing Jurisdictional Competition in Corporate Law



William J. Carney

Charles Howard Candler Professor of Law

BA, Yale University, 1959
LLB, Yale University, 1962

Scholarly interests: business associations, securities regulation, corporate law

Continuing Emory's tradition of law and economics scholarship in corporate law, William J. Carney has produced more than 50 articles and book chapters, several books, and two market-leading casebooks. *Corporate Finance: Principles and Practice* is in its second edition (Foundation 2010); this year saw the third edition of *Mergers and Acquisitions: Cases and Materials* (Foundation 2011).

As reporter for the Corporate Code Revision Committee of the State Bar of Georgia, Carney realized that corporate laws were essentially uniform across the United States. Studying the process of making corporate laws throughout the nation, however, he wondered why U.S. laws differ so much from their more restrictive European counterparts.

"Our jurisdictional competition explained the difference," Carney says. "To attract chartering business and the resulting franchise taxes, a state had to provide laws attractive to investors. European laws, without jurisdictional competition, included provisions apparently influenced by political pressures from labor unions and creditors. Jurisdictional competition, far from being a race to the bottom, is much more efficient than lawmaking by a single monopolistic legislator, subject to interest group pressures."

American corporate law, however, hasn't won Carney's unqualified approval. In other work, including his 2010 article "Delaware Corporate Law: Failing Law, Failing Markets" (with Emory Law colleagues Joanna Shepherd Bailey and George Shepherd), Carney has shown how American interjurisdictional competition sometimes has fallen short, resulting in suboptimal corporate law.

Exploring why Delaware continues to dominate the competition for chartering business, the three authors focused on lawyers who advise on these choices: "Our study showed that lawyers suffer from bounded rationality," Carney says. "All they know is Delaware law and their own state's law."

"Jurisdictional competition, far from being a race to the bottom, is much more efficient than lawmaking by a single monopolistic legislator, subject to interest group pressures."

Excerpt: “Why Delaware Continues to Dominate the Competition for Chartering Business”

Two of us have previously reviewed the history of the competition for corporate chartering business. This competition was possible because virtually all American states followed the English choice of law rule, the “Internal Affairs Rule,” which applies the law of the incorporating jurisdiction to the governance of the corporation, rather than Europe’s “Real Seat Rule,” which required incorporation at the location of the corporation’s real headquarters.

When New Jersey, the first mover in the American chartering competition, relinquished its advantage in a misguided movement at law reform in 1911, Delaware became the favored state for incorporation.

...

One author characterized Delaware’s preeminence as stemming from the “combination of its flexible corporate code, the responsiveness of its legislature, the wealth of legal precedent, its efficient and knowledgeable court system, and its business-like Secretary of State’s office.” Our previous work challenged the benefits of its corporate code, its legal precedent, and its court system. We argue that the principal feature of an efficient corporate law is to reduce transaction costs of organizing and operating a business entity. Romano’s pioneering work identified this as the primary motivator of changes in states of incorporation. Thus, from the perspective of corporate managers, this characteristic is the mark of good corporate law.

Our view of the statistical evidence of Delaware law’s superiority is that it is currently unpersuasive about the quality of law issues identified by Romano as critical. We agree with former Chancellor William Allen that “[b]y intruding on the protected space that the business judgment rule accords such decisions, courts create disincentives for businesses to engage in the risk-taking that is fundamental to a capitalist economy. Such intrusiveness also prolongs litigation without offsetting social utility.”

...

All of the preceding [empirical] literature, with minor exceptions, treats corporate law as a black box that generates more or less efficient outcomes for firms and investors. Lawyers have quite another perspective—that content, detail, and certainty are important. We offer another explanation that attempts to synthesize Subramanian’s work and Romano’s earlier results: reincorporations of public companies occur when management is contemplating a major transaction, where litigation costs and uncertainty become important. If managers and their advisors are aware of the present difficulties with Delaware law governing important transactions, that may influence a move to other states. The

rush to Delaware for IPOs during the same period becomes more puzzling in view of the evidence of its less dominant performance in the market for reincorporations. One possible explanation borrows from Coates’ observations about adoption of antitakeover defenses by IPO firms. It may be that at least some groups of lawyers advising issuers on IPOs are less familiar with the difficulties of Delaware law involving mergers and acquisitions, if they are not specialists in those areas. We explore the evidence in Parts IV and V.

Delaware’s Indeterminacy Problem

There is much about Delaware corporate law that is efficient and attractive. Corporate law is largely about default rules, and in that sense can be considered trivial. All other state laws share very much the same sets of rules, and we do not propose to discuss them here. The interesting rules, from our perspective are the mandatory rules, mostly involving fiduciary duties, that seem difficult if not impossible to contract around. The dominant phenomenon present in recent Delaware judicial decisions is loss of the faith of the courts in the good faith of directors and a significant erosion of the deference formerly granted under the business judgment rule. Thus the set of decisions now contestable in the Delaware courts has grown exponentially. This is not to say that directors’ risk of personal liability has increased at the same rate, because most if not all Delaware corporations have availed themselves of the liability shield offered by Section 102(b)(7). It was only after the first intrusion into the directors’ domain, and a dramatic reaction in insurance markets and the market for directors that the Delaware legislature felt compelled to adopt this statute and provide liability protection against unpredictable intrusions into directors’ judgments. But since that adoption the Delaware courts have recharacterized some director actions that one would have thought of as involving protected breaches of the duty of care as breaches of the duty of good faith, for which neither exculpation nor indemnification is available. The first two cases involved charges that directors had failed to create adequate systems to monitor lower-level employees for illegal activities, and since the directors won both cases, created only minor concerns about personal liability. But recently a vice chancellor characterized a board’s acceptance of an attractive purchase offer that was on a take-it-or-leave-it basis as a breach of the duty of good faith, because the board neither shopped for alternatives in the seven days it was given to accept, nor reserved the right to test the market after signing the agreement, over the absolute refusal of the buyer to grant such a right. While the Delaware Supreme

Court has taken the extraordinary step of granting an interlocutory appeal on this issue, it illustrates the uncertainty and potentially enormous increase in director liability possible under Delaware law.

One of the notable features of Delaware law has been its respect for the bright lines between separate sections of the statute, a rule of "independent legal significance." This allowed managers to choose the most advantageous method for accomplishing a desired result without worrying about complying with another and more restrictive statutory provision that would also allow one to reach the same result. Recent commentators have noted the gradual erosion of the doctrine of independent legal significance over the past ten years. These authors note that the courts have attempted to distinguish the cases disregarding the doctrine by claiming that it only "applies to exercise of legal power. It does not apply to fiduciary review." Unfortunately, that rationalization does not apply to the Chancellor's most recent departure, which only involved the availability of appraisal rights, which did not address breaches of fiduciary duties. There the Chancellor recharacterized a planned dividend as part of the consideration for a merger, thus subjecting the transaction to different rules.

...
Delaware law is so indeterminate that Delaware appellate and trial judges disagree on its application with relative frequency, their specialized expertise notwithstanding. In some cases the appellate decisions are sufficiently surprising that they generate considerable commentary by both academics and

practitioners. Many of these decisions involved changes in Delaware's law, and they occurred in areas involving review of important transactions, such as mergers and acquisitions. The important observation here is not that the rules are difficult to discern once announced, but that new rules have been announced with remarkable regularity. These rules represent surprises for those who have recently completed transactions that are now subject to challenge in an unexpected way, and new risks of liability for participants. To the extent they are fact-intensive, they make prediction more difficult for planners of transactions. They have been characterized as standards, and in one sense the notions of care, good faith and loyalty covered by fiduciary obligations are that, but they have devolved into a series of mini-standards that could fairly be described as rules, as we shall demonstrate. The frequency of litigation in Delaware, often described as a blessing, might as easily be a handicap. As with viruses, the frequency of their replication creates the probability of every possible mutation occurring within a day, increasing the probability that some mutations will be drug resistant. So in Delaware, multiple decisions involving closely related fact patterns can lead to unfortunate results.

—from Delaware Corporate Law: Failing Law, Failing Markets, in *The Law and Economics of Corporate Governance: Changing Perspectives* (Alessio M. Paces ed.) (Elsevier 2010) (with Joanna Shepherd Bailey & George B. Shepherd)

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Books

Mergers and Acquisitions: Cases and Materials (3rd ed., Foundation 2011)

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Abrams

Howard E. Abrams

Professor of Law

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Bailey

Joanna Shepherd Bailey

Associate Professor of Law

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Dorothy A. Brown

Professor of Law

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Brown



Shepherd

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Why the Obamas Paid Too Much in Taxes, 127 *Tax Notes* 805 (2010)

Race, Class and the Obama Tax Plan, 86 *Denver Law Review* 575 (2009)

Shades of the American Dream, 87 *Washington University Law Review* 329 (2009)

Jeffrey N. Pennell

Richard H. Clark Professor of Law

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Special Needs Trusts: Reflections on Common Boilerplate Provisions, 6 *NAELA Journal* 89 (2010)

Wealth Transfer Taxation: "Transfer" Defined, 128 *Tax Notes* 615 (2010)

George B. Shepherd

Professor of Law

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Lawyers, Ignorance, and the Dominance of Delaware Corporate Law, *Harvard Business Law Review* (forthcoming 2011) (with Carney & Bailey)

The Mystery of Delaware Law's Continuing Success, 2009 *University of Illinois Law Review* 1 (with William J. Carney)

Selected Faculty Authors

Michael J. Broyde

Professor of Law

*Contending with Catastrophe:
Jewish Perspectives on September 11th*
K'hal Publishing, 2011



In this collection of essays, writers from the Jewish tradition consider the response to disaster in light of Jewish law, ethics, and theology.

The first section, editor Michael Broyde writes, focuses on “a particular tragedy in a particular area of family law—the problem of the many individuals who went missing” because of 9/11, and on

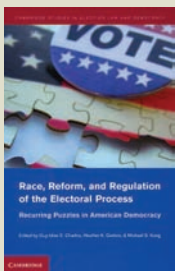
the ways Judaism as a religious legal system addressed resulting cases.

Reflections in the second section speak to ethical and theological responses, among them these words of the late Orthodox Rabbi Joseph Soloveitchik: “Suffering, in the opinion of Judaism, must not be purposeless, wasted. Out of suffering must emerge the ethical norm, the call for repentance, for self-elevation. Judaism wants to convert the passionate frustrating experience into an integrating, cleansing, and redeeming factor.”

Michael S. Kang

Associate Dean of Faculty
Professor of Law

Race, Reform, and Regulation of the Electoral Process
Cambridge University Press, 2011



Representing leading voices in election law and social science, this new volume explores three interlocking themes: the relationship between race and politics; the performance and reform of election systems; and the role of courts in regulating the political process.

Michael Kang and co-editors Guy-Uriel E. Charles and Heather

K. Gerken write, “Because most of the democratic reform during the 20th century has related to the central subject of race, election law and reform have been framed largely in rights-based terms. However, American democracy has matured and racial politics have evolved. ... As we move away from the civil-rights paradigm and regulation centered largely around race, we may find that courts should play a less central role in regulating politics, something that would require us to develop new regulatory strategies and institutions for policing our democracy.”

Richard D. Freer

Robert Howell Hall Professor of Law

Civil Procedure, Second Edition
Aspen Publishers, 2009
Chinese translation, 2011



Xiamen University Press, sensing a market for American civil procedure in China, has chosen to produce a Chinese translation of Richard Freer's *Civil Procedure, Second Edition*. Aimed at judges and lawyers as well as students, the 820-page treatise is part of the new Aspen Treatise Series, which also

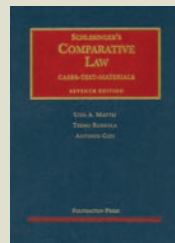
features titles by Richard Epstein, Erwin Chemerinsky, and Martha Chamalla. Freer, the Robert Howell Hall Professor of Law at Emory and a national bar review lecturer, specializes in civil procedure, complex litigation, and business associations.

Updated throughout, the book includes the restyled Federal Rules of Civil Procedure, commentary on case law concerning discovery of electronically stored information, and discussion of the Class Action Fairness Act, plus new material on specific cases.

Teemu Ruskola

Professor of Law

Schlesinger's Comparative Law, 7th Edition
Foundation Press, 2009



For more than 60 years, *Schlesinger's Comparative Law* (originally published by Rudolf Schlesinger, 1950) has been the leading title in comparative law. With co-authors Ugo Mattei and Antonio Gidi, Teemu Ruskola has delivered a fully revised edition, enlarging the perspective of

comparative law to include the experiences of the non-Western world, which, Ruskola says, “increasingly occupies center stage in a global approach to the law.”

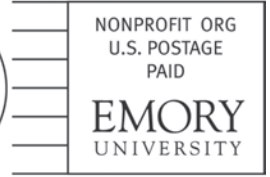
This edition incorporates diverse legal materials from Asia, Africa, and Latin America. It includes a greatly enhanced methodological discussion, with updated material from the latest debates in the field.

At the same time, it situates the study of comparative law in the larger context of globalization and the post-Cold War emergence of rule-of-law as a major Western export item.



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