SELECTED FACULTY SCHOLARSHIP

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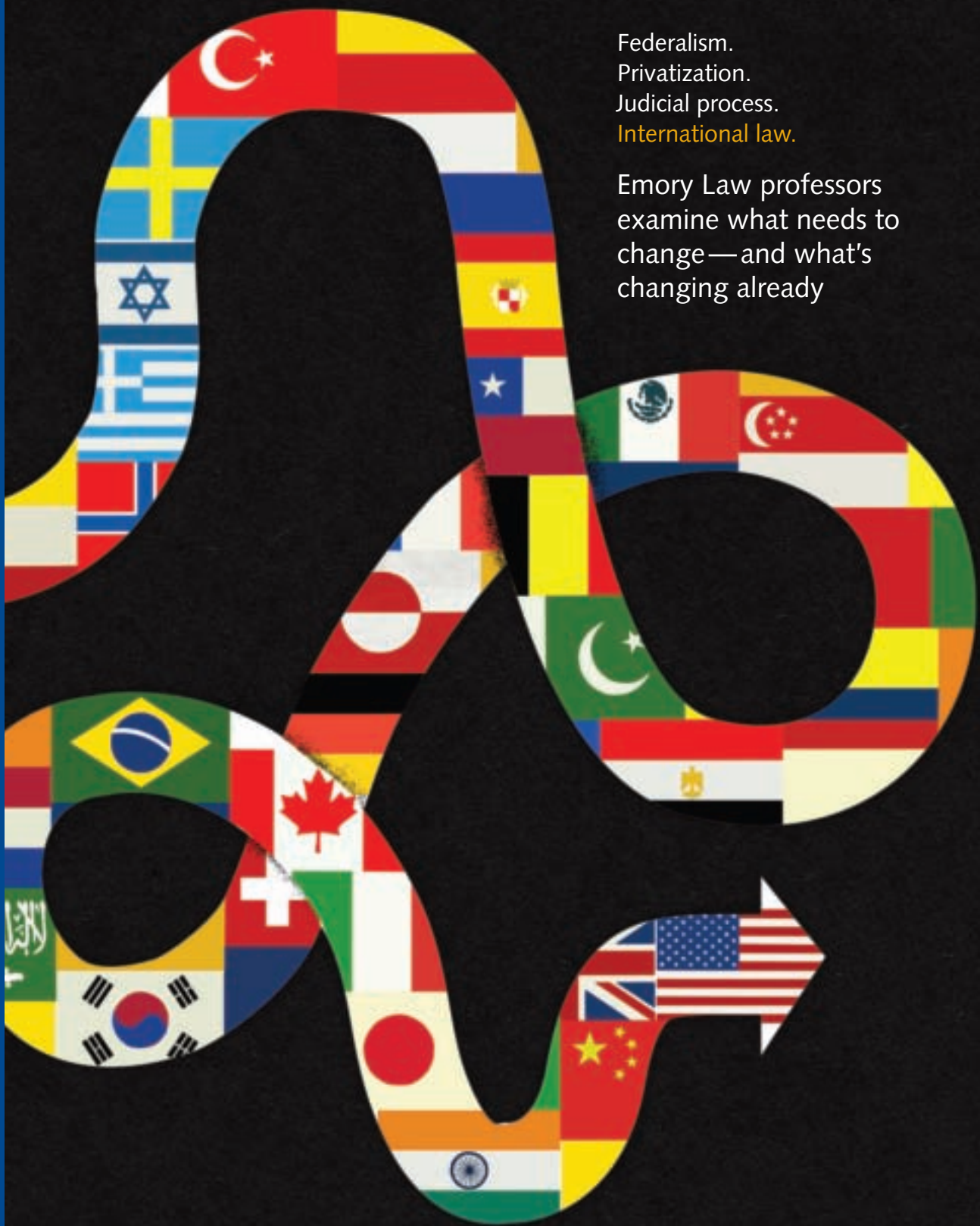

Federalism.
Privatization.
Judicial process.
International law.

Emory Law professors examine what needs to change—and what's changing already


SCHOOL OF LAW

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Globalization: Historical, Political and Legal Dimensions

"I am concerned that the institutions and process of international law are not keeping pace with the international community."

David J. Bederman
K.H. Gyr Professor in Private International Law

AB, Princeton University, 1983
MSc, London School of Economics, 1984
JD, University of Virginia, 1987
Diploma, The Hague Academy of International Law, 1989
PhD, University of London, 1996

Scholarly Interests: public international law, admiralty, constitutional law, legislation and regulation, legal theory, legal history

In the late 1990s, when David J. Bederman was participating in a number of university-wide faculty programs (both at Emory and elsewhere) that focused on globalization studies, he was surprised to see how little agreement there was about what "globalization" actually means.

"I also noticed," he says, "that there seemed to be strong objection from other fields as to whether law or legal studies had much to say on the subject. Many of the great debates on globalization have played out in arguments over the management of global common resources—the oceans, environment, and the Internet—and facilities, such as international trade and finance." The place of law, however, has been underappreciated.

Bederman realized immediately that a book was waiting to be written on international law and globalization.

Refining his ideas over the next decade, Bederman focused his globalization project on the needs and demands of policy-makers, especially the foreign relations arms of the United States (the State Department, U.S. Trade Representative, National Oceanic and Atmospheric Administration, and Congress), the nation's close allies, and major international organizations. In the final stages of writing and editing *Globalization and International Law* (Palgrave Macmillan 2008), he came to see his volume as a "briefing book" for the incoming administration. "I have been exceedingly pleased," he says, "with the reception it received."

Bederman's scholarship illuminates the extent to which international law practically impacts our everyday lives. He observes that we take for granted many contemporary aspects of global

EXCERPT: "GLOBALIZATION AND INTERNATIONAL LAW"

Globalization has come to mean all things to all people. Globalization is not just about international dynamics of society and culture, or even of economics (which it is most often associated with), but also has definitive historical, political, and, yes, legal, aspects that need to be fully explored if a complete picture of contemporary international relations is to be appreciated.

The concept of international law—the norms, rules, and institutions that govern the relations among States and the conduct of actors, transactions, and relationships across national borders—is somewhat less contested than the idea of globalization in contemporary discourse. I approach both subjects from the dual perspective of an international historian and an academic international lawyer. My goal is to chart the routes to, and boundaries of, a *terra incognitae*: a newly emerging body of global rules of political, social, and economic interaction that can rightly be called "world law."

Let me be clear here: I carry no brief for the idea that contemporary globalization should lead inevitably and invariably to some form of world government. Instead, I see the concept of world law as an evolution of previous versions of transnational governance—whether called the "law of nations," "international law," or "transnational law."

If anything, I am deeply skeptical about the validity of three central tenets for the legal bases of globalization. The first two propositions are historical in character. It has been consistently contended that the current period of globalization we are experiencing is utterly unique and unprecedented, and, therefore, previous approaches to world legal order can have no relevance to present times. This is altogether fallacious. Human history has seen at least three extraordinary epochs of globalization before now. Each of these earlier eras of globalization featured significant bodies of world law. In short, globalization is not a new concept. Some of its current manifestations may be novel, but that does not make contemporary globalization legally unprecedented.

The second major fallacy is that the globalizing trends we are experiencing today are inexorable and inevitable. Yet globalization has proceeded through a series of historical cycles. Within those periods of globalizing activity, distinctive trends toward world legal order occurred. But it is also true that human history has witnessed as many (if not more) periods of *de*-globalization, of a definitive reversal of fortunes for these trends and patterns. So, if globalization has been a cyclical phenomenon, it also follows that it is not inevitable, and also quite reversible. This has vitally important implications for designing and structuring international legal systems and regimes that are the product of (or at least associated with) globalizing moves.

That leaves the last, widely held postulate of contemporary globalization: that globalizing trends invariably result in positive changes for the world legal order. As the world becomes more closely knit together, so this theory holds, the legal relationships among international actors will become more clearly defined and regulated. I think this may be profoundly misguided.

I do so not because I believe that law is "epiphenomenal" or irrelevant for international relations. Rather, I am concerned that the institutions and process of international law are not keeping pace with the international community. As we come to a new paradigm of world law, one can legitimately wonder what will be the central legal values and principles for the next era of globalization. In short, I believe that international law has a special, but limited, role to play in many of the key policy debates about the impacts of globalization today.

—adapted from *Globalization and International Law* (Palgrave Macmillan 2008)

living—easy travel and communications, diverse food and entertainment options, frictionless trade and finance—yet fail to understand how legal rules underpin our ability to use and enjoy these features of globalization. "The density and detail of the international legal regimes that support our contemporary lives can be incredibly complex," he says, "and they have profound synergistic effects on our domestic legal institutions: legislation, administrative bodies, and courts."

Enriching Bederman's work in international law is his longstanding interest in the historical analysis of legal institutions and doctrines. Bederman sees history as an important guidepost for current experience: "It is not to be followed slavishly, but to be examined carefully for enduring truths."

As Emory's K.H. Gyr Professor in Private International Law, Bederman teaches public international law, legislation and regulation, admiralty, international institutions, law of international common spaces, and Roman law, as well as seminars on international environmental law and foreign relations power.

Before coming to Emory, Bederman practiced law in Washington, D.C., with Covington & Burling and worked as a legal advisor at the Iran-United States Claims Tribunal at The Hague. In 2009, he won by a 6–3 decision in his most recent U.S. Supreme Court case, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, in which he represented the Iranian Ministry. Perhaps uniquely trusted by both the U.S. and Iranian governments, Bederman received a special license from the U.S. Treasury Department to try the case.

"International law has a special, but limited, role to play in many of the key policy debates about the impacts of globalization today."

In a body of work that has been described as "astonishingly broad and deep," Bederman continues to explore the intersections of legal history and theory, international law, and U.S. constitutional law. Some of his other books investigating these themes include *Custom as a Source of Law* (Cambridge 2010); *The Classical Foundations of the American Constitution* (Cambridge 2008), winner of the 2009 Outstanding Academic Title from CHOICE Reviews; and *The Spirit of International Law* (University of Georgia 2006). He also has written pieces about the changing status of international law in U.S. law, especially as reflected in decisions of the U.S. Supreme Court.

Bederman's themes for upcoming work center on the intellectual history of international law, including treaty-application and the law of the sea.

SELECTED PUBLICATIONS

Books

Custom as a Source of Law (Cambridge 2010)

International Law Frameworks (3rd ed., Foundation 2010)

The Classical Foundations of the American Constitution (Cambridge 2008)

Globalization and International Law (Palgrave Macmillan 2008)

International Law in Antiquity (Cambridge 2007)

The Spirit of International Law (University of Georgia 2006)

Admiralty Cases and Materials (LexisNexis 2004) (with Robert M. Jarvis et al.)

International Law: A Handbook for Judges (American Society of International Law 2003) (with Christopher J. Borgen & David A. Martin)

Classical Canons: Classicism, Rhetoric and Treaty Interpretation (Ashgate 2001)

Articles

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Recent Scholarship

An-Na'im

Hay

Ruskola

van der Vyver

Varady

Abdullahi Ahmed An-Na'im

Charles Howard Candler Professor of Law

Books

Muslims and Global Justice (University of Pennsylvania 2010)

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

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Peter Hay

L.Q.C. Lamar Professor of Law

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Teemu Ruskola

Professor of Law

Books

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Johan D. van der Vyver

I.T. Cohen Professor of International Law and Human Rights

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Tibor Varady

Professor of Law

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Proving the Assumptions Wrong

"Privatization may plausibly be harnessed as a means not only to improve quality but also to improve accountability, rights, and democratic values."

Alexander Volokh
Assistant Professor of Law

BS, University of California, Los Angeles, 1993
JD, Harvard University, 2003
PhD, Harvard University, 2004

Scholarly Interests: law and economics, administrative law, privatization

Alexander "Sasha" Volokh doesn't mince words.

"It's often assumed," he says, "that if 'the era of big government is over,' privatization is a natural way to reduce the size of government. This is wrong."

Volokh explains that "privatization," as the term is commonly used, includes many activities that don't imply a shrinking state at all. If the government has private corporations rather than government employees running prisons, but still sends the same number of people to prison and still pays for incarceration using tax revenue, has the government really shrunk?

Then he tackles another assumption. "Conversely," he states, "it's also often assumed that those who don't share a small-government normative view should be suspicious of privatization. This is wrong, too."

Volokh's argument follows a straightforward logic: If privatization doesn't necessarily shrink the state, there may be no connection between privatization and small government. If privatization improves the quality of a government service—as is theoretically and empirically plausible, though not necessary or universal—privatization can be a way to deliver a high level of government-funded services.

"And let's be realistic," he adds, "about how bad many government-provided services are, not only in quality but also in accountability; prisons are a prime example. Privatization may plausibly be harnessed as a means not only to improve quality but also to improve accountability, rights, and democratic values."

Formerly having clerked for Judge Alex Kozinski of the 9th Circuit and for Supreme Court Justices Sandra Day O'Connor and Samuel Alito, then having served as a visiting associate professor at Georgetown University Law Center

EXCERPT: "PRIVATIZATION AND THE LAW AND ECONOMICS OF POLITICAL ADVOCACY"

Private prison firms are often accused of lobbying for incarceration because, like a hotel, they have "a strong economic incentive to book every available room and encourage every guest to stay as long as possible."

... I conclude that, in the prison context, there is at present no reason to credit the argument. At worst, the political influence argument is exactly backwards, by which I mean that privatization will in fact decrease prison providers' pro-incarceration influence; at best, the argument is dubious, by which I mean that its accuracy depends on facts that proponents of the argument have not developed. ...

First, self-interested pro-incarceration advocacy is already common in the public sector—chiefly from public-sector corrections officers unions. For instance, the most active corrections officers union, the California Correctional Peace Officers Association, has contributed massively in support of tough-on-crime positions on voter initiatives and has given money to crime victims' groups, and public corrections officers unions in other states have endorsed candidates for their tough-on-crime positions. Private firms would thus enter, and partly displace, some of the actors in a heavily populated field.

Second, there is little reason to believe that increasing privatization would increase the amount of self-interested pro-incarceration advocacy. In fact, it is even possible that increasing privatization would reduce such advocacy. The intuition for this perhaps surprising result comes from the economic theory of public goods and collective action.

The political benefits that flow from prison providers' pro-incarceration advocacy are what economists call a "public good," because any prison provider's advocacy, to the extent it is effective, helps every other prison provider. ... When individual actors capture less of the benefit of their expenditures on a public good, they spend less on that good; and the "smaller" actors, who benefit less from the public good, free-ride off the expenditures of the "largest" actor.

In today's world, the largest actor—that is, the actor that profits the most from the system—tends to be the public-sector union, since the public sector still provides the lion's share of prison services, and public-sector corrections officers benefit from wages significantly higher than their private-sector counterparts'. The smaller actor is the private prison industry, which not only has a smaller proportion of the industry but also does not make particularly high profits.

By breaking up the government's monopoly of prison provision and awarding part of the industry to private firms, therefore, privatization can reduce the industry's advocacy by introducing a collective action problem. The public-sector unions will spend less because under privatization they experience less of the benefit of their advocacy, while the private firms will tend to free ride off the public sector's advocacy. This collective action problem is fortunate for the critics of pro-incarceration advocacy—a happy, usually unintended side effect of privatization. One might even say that prison providers under privatization are led by an invisible hand to promote an end which was no part of their intention. ...

There is thus no reason to believe an argument against prison privatization based on the possibility of self-interested pro-incarceration advocacy—unless the argument takes a position on how lobbying, political contributions, and advocacy work, and why (for instance) any increase in private-sector advocacy would outweigh the decrease in public-sector advocacy. Either this argument against prison privatization is clearly false, or it is only true under certain conditions that the critics of privatization have not shown exist.

—from Privatization and the Law and Economics of Political Advocacy, 60 *Stanford Law Review* 1997 (2008)

and a visiting assistant professor at University of Houston Law Center, Volokh brought his incisive questioning to Emory in 2009.

Reviewing another misconception about privatization, Volokh mentions recent dissatisfaction with the Transportation Security Administration. He notes that after Sept. 11, in the belief that private airport security was providing insufficient screening, Congress created a government agency to handle airport screening. "But 'insufficient screening,' he observes, has no necessary connection to 'government provision.'" As an alternative, why not mandate, through regulation, that the *private sector* provide more intensive screening?

He points out, too, that privatization raises many questions beyond that of merit (*Does it really save money? Will quality improve or suffer?*). Lawyers, for instance, may ask questions of constitutional government (*Does privatization disrupt the separation of powers?*), questions of rights (*Does privatization bypass constitutional protections like due process or equal protection?*), questions of democracy (*Does privatization create interest groups that lobby to distort the*

substantive law?), questions of political theory (*Does privatization allow the private sector to perform inherently governmental functions?*), and questions of administrative law (*Does privatization make government less accountable?*).

Volokh's research addresses many of these questions. He has created a course on Current Issues in Privatization, covering constitutional, economic, and political theory questions using both theoretical materials and case studies of actual privatization. Several of his articles focus on private prisons as a principal example of "the privatization of force."

"Government now relies on the private sector to do more and more work, whether through public-private partnerships, contracting out, issuing vouchers redeemable with private providers, or just disengaging itself from certain activities entirely. As these activities have increased, law scholars have taken more and more of an interest."

Volokh also asks readers what a voucher system would look like as applied to prisons; examines the constitutional and empirical issues surrounding faith-based prisons; and connects the literature on prison program effectiveness to the literature on the effectiveness of private and Catholic schools.

His assumption-busting work includes "The Effect of Privatization on Public and Private Prison 'Lobbies,'" in *Prison Privatization: The Many Facets of a Controversial Industry* (forthcoming 2012); "Privatization, Free-Riding, and Industry-Expanding Lobbying" (*International Review of Law & Economics* 2010); and "Privatization and the Law and Economics of Political Advocacy" (*Stanford Law Review* 2008).

SELECTED PUBLICATIONS

Book Chapters

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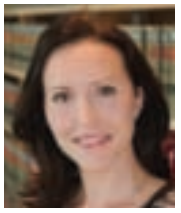
Recent Scholarship

Ahdieh



Bailey

Carney

Rubin

Shepherd

Vertinsky

Robert B. Ahdieh

Associate Dean of Faculty and Professor of Law

Articles

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

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

Joanna Shepherd Bailey

Associate Professor of Law

Articles

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William J. Carney

Charles Howard Candler Professor of Law

Books

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Articles

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Paul H. Rubin

Professor of Economics and Law

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Articles

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George B. Shepherd

Professor of Law

Books

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Articles

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Liza Vertinsky

Assistant Professor of Law

Articles

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Responding to the Challenges of "Against Intellectual Monopoly," 5 *Review of Law & Economics* (2009)

Judicial Federalism: The Changing Dynamic

Richard D. Freer
Robert Howell Hall Professor of Law

BA, University of California, San Diego, 1975
JD, University of California, Los Angeles, 1978

Scholarly Interests: civil procedure, complex litigation, business associations

"For a federal court to entertain a matter not within its judicial power is not simply a mistake—it is an unconstitutional usurpation of power belonging to another sovereign."

This year marks the 25th anniversary of Richard D. Freer's first publication, an article in the *NYU Law Review* about compulsory joinder of parties in civil cases.

Now, dozens of articles and 12 books later, his scholarship extends to an array of topics: efficient "packaging" of litigation, jurisdiction, the *Erie* doctrine, judicial selection, recusal of judges, statutory interpretation, the 11th Amendment, civil rights cases under Section 1983, *forum non conveniens*, and arbitration.

After clerkships on both the U.S. District Court and U.S. Court of Appeals, Freer litigated with the Los Angeles firm of Gibson, Dunn & Crutcher and joined the Emory faculty in 1983.

Freer's published work has appeared in a remarkable array of media, from scholarly articles to casebooks, and from hornbooks to multi-volume treatises. It is united, however, by two broad themes: judicial federalism and the separation of powers.

His earliest work about the packaging of litigation made him a leading voice in favor of giving courts the authority to override plaintiffs choices about where litigation should take place. "The public pays for the courts," Freer says, "and has a right to demand that litigation be structured to avoid duplicative adjudication." Repeated litigation of the same issues not only wastes public resources but increases the risk of inconsistent outcomes, eroding public confidence in the judicial system.

Perhaps the only professor in the country to have written casebooks in three fields—civil procedure, complex litigation and business associations—Freer finds particular pleasure in his work on several academic treatises. "Treatise work is especially challenging, because you must be encyclopedic," he explains. "In an article, you can set boundaries of inquiry and leave related

EXCERPT: "UNDERSTANDING ERIE"

Byrd v. Blue Ridge Rural Electric Cooperative, Inc. is the Rodney Dangerfield of the *Erie* doctrine. The case was decided in 1958 and has never gotten its due. In *Hanna v. Plumer*, it was relegated to a perfunctory citation without discussion. Worse, *Hanna* provided an alternative analysis—the "modified outcome" or "twin aims of *Erie*" test—to which the Supreme Court of the United States appears devoted. By contrast, the Court has discussed *Byrd* only once. That discussion, in *Gasperini v. Center for Humanities, Inc.*, by the lights of many, was confused and confusing, and did not leave *Byrd* on firm footing.

Now the Supreme Court re-enters the thicket in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* Typically, *Byrd* merits only a fleeting citation in the concurring opinion of a single justice. Nonetheless, *Byrd* remains the Court's most comprehensive and cogent effort in vertical choice of law, and actually explains the results in cases in which the Court did not cite it. Indeed, at the end of the day, though it gets no respect, the stamp of *Byrd* is clear. Each of the three opinions in *Shady Grove* reflects its influence, if not its command….

Shady Grove features three opinions. Justice Scalia is joined by the chief justice and Justices Thomas and Sotomayor. Justice Stevens concurs with him, to create a majority, in concluding that Federal Rule of Civil Procedure 23 covers the issue in dispute and that it is valid under the Rules Enabling Act (REA). Justice Stevens disagreed with Justice Scalia, however, on how to assess the validity of a Rule under the REA. Justice Ginsburg is joined in dissent by Justices Kennedy, Breyer and Alito, and concludes that Rule 23 does not cover the issue in dispute. To the dissenters, the case is not governed by the REA, but by the Rules of Decision Act (RDA). Under *Erie*, Justice Ginsburg finds that New York law governs and thus that the case cannot be maintained as a class action. At first blush, a 4-1-4 split would seem to give little hope of forging a sensible approach to things. But each of the opinions offers something important to the discussion and, together, they energize the themes seen in *Byrd*. …

Byrd, alone among *Erie* cases, sets out the core policies that must be balanced, at least implicitly, in every vertical choice of law case. As a result, only *Byrd*'s analysis can account for the results in RDA cases, like *Walker*, where *Hanna*'s modified outcome/twin aims test fails to capture state substantive interests, and like *Gasperini*, where competing federal procedural interests, also left out of the *Hanna* test, are threatened. The competing *Byrd* factors are also relevant to the key decision whether federal directives directly conflict with state law and thus invoke the REA prong of the *Erie* analysis. Finally, the "bound up" concept enunciated in *Byrd* is highly relevant to the appropriate construction of Section 2072(b)'s limitation on the federal rulemaking power, as Justice Stevens argues in his separate opinion in *Shady Grove*.

Yet *Byrd* is hardly mentioned by the Court in RDA cases, and never in REA cases, at least before *Shady Grove*. Perhaps this is because of Byrd's supposed shortcomings as a legal test. As multiple commentators have pointed out, *Byrd* does not teach how to weight the competing interests, nor does it define and thus delimit the "bound up" concept. But this is true of all new tests requiring the balancing of competing interests and, as we have seen, there are competing interests in every difficult *Erie* case. The better course is to admit the complexity of the problem, forthrightly balance the interests and, hopefully, refine and clarify the analysis over time. This process could have started in *Hanna* itself. The twin aims dictum, while inadequate as a legal rule, prescribes a workable means of weighting the uniformity interest if in a particular case the disuniformity from not following state law would not be likely to induce forum shopping or perceptions of unfair treatment of litigants, then the interest in uniformity of results is not a weighty one in that case. In the more than fifty years since *Byrd* was decided, many more *Erie* issues have been resolved by the federal courts, and for the most part resolved satisfactorily. Thus there is now a substantial body of precedent that sheds light on proper balance of the core *Erie* interests. From these materials the Supreme Court and lower courts could refine the *Byrd* analysis to craft more workable and transparent legal rules for all three *Erie* inquiries.

—from The Irrepressible Influence of *Byrd*, 44 *Creighton Law Review* 61 (2010) (with Thomas C. Arthur)

questions for another day. But in a treatise, there is no opting out."

Freer's one-volume work on civil procedure, in Aspen Publishing's Treatise Series, now is in its second edition and has been well received nationally. It is being translated into Chinese and marketed in China, and has been used to teach U.S. civil procedure at law schools in Brazil and Hungary.

His most ambitious treatise work, however, is for both of the iconic multi-volume series dedicated to federal jurisdiction and process:

Moore's Federal Practice and *Wright & Miller's Federal Practice and Procedure*.

Freer is the only person to write for both of these standard works—which are relied upon daily in federal courts and litigation firms around the country. In the 1990s, he wrote four volumes of *Moore's*. In 2009, he published two new volumes of *Federal Practice and Procedure*, comprising nearly 1,400 pages of original material and addressing a broad sweep of topics relating to federal judicial power.

Writing in different forms, Freer posits, helps to sharpen his scholarship. His articles on supplemental jurisdiction and the U.S. Supreme Court's treatment of "federal question" jurisdiction in 2007 thus provided direction for hundreds of pages of his treatment of those issues in *Wright & Miller's Federal Practice and Procedure*.

Writing for the encyclopedic treatise, meanwhile, required Freer to explain jurisdictional grants under the Federal Arbitration Act. This, in turn, led to his chapter contribution to a book on international dispute resolution, concerning the Supreme Court's role in articulating the policies underlying that legislation.

To Freer, "[s]tudying the ongoing dynamic between the federal and state governments and between the legislative and judicial branches is a great privilege." He remains centrally concerned with the allocation of judicial power between federal and state governments.

Having undertaken to re-write two further volumes of the Wright & Miller treatise, Freer is at work on the third edition of his treatise on civil procedure. With co-author Wendy Perdue of Georgetown, he also is preparing the sixth edition of their widely adopted *Civil Procedure* casebook. His latest article, meanwhile, written with Thomas C. Arthur, L.Q.C. Lamar Professor of Law, and on the subject of the *Erie* doctrine, will appear this year. Freer intends to expand his comparative work on the exercise of personal jurisdiction via Internet contact, and is engaged in ongoing empirical work on appeals of class certification orders.

Through this broad array of work, Freer says, "I will continue to study judicial federalism and to place blame where I think it belongs."

"It is Congress's job ... to determine what cases will be heard by the federal courts. What right has the judicial branch to ignore the legislative directive?"

SELECTED PUBLICATIONS

Books

Business Structures (3rd ed., West 2010) (with David G. Epstein, Michael Roberts & George B. Shepherd)

Civil Procedure (2nd ed., Aspen 2009)

Complex Litigation (LexisNexis 2009) (with Thomas Sullivan et al.)

13 *Wright & Miller's Federal Practice and Procedure* (3rd ed., West 2009)

13D *Wright & Miller's Federal Practice and Procedure* (3rd ed., West 2009)

Civil Procedure: Cases, Materials, and Questions (5th ed., LexisNexis 2008) (with Wendy C. Perdue)

Book Chapters

Forging American Arbitration Policy: Judicial Interpretation of the Federal Arbitration Act, in *Resolving International Conflicts: Liber Amicorum Tibor Varady* 101 (Peter Hay et al. eds., 2009)

American and European Approaches to Personal Jurisdiction and the Internet, in *Selected Essays on Current Legal Issues* 203 (David A. Frenkel & Carsten Gerner-Beuerle eds., 2008)

Articles

The Irrepressible Influence of *Byrd*, 44 *Creighton Law Review* 61 (2010) (with Thomas C. Arthur) (invited symposium piece on Supreme Court's *Shady Grove* decision) (2010)

Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience, 35 *Western State University Law Review* 13 (2007)

Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case, 2007 *Brigham Young Law Review* 959

Of Rules and Standards: Reconciling the Statutory Limitations on "Arising Under" Jurisdiction, 82 *Indiana Law Journal* 309 (2007)

Windows Into Judicial Process

"Many issues in law—both public and private—are better informed by historical perspective, which can be a critical component to understanding contemporary debates."

Polly J. Price 86C 86G
Professor of Law

BA, Emory University, 1986
MA, Emory University, 1986
JD, Harvard University, 1989

Scholarly Interests: torts, American legal history, Latin American law, immigration and citizenship, property

Understandably, the U.S. Supreme Court draws the attention of legal scholars. Although it hears only 100 or so cases each year—less than 1 percent of the cases originating in the federal courts—the Supreme Court makes history. It has the final word.

Meanwhile, in the U.S. Court of Appeals, almost 200 judges spread geographically throughout the nation decide thousands of cases. Their work comprises nearly all civil disputes and criminal prosecutions that enter the federal court system.

Polly J. Price 86C 86G has opened a window into this "other court" via a rare and intriguing format: a judicial biography.

Titled *Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench* (Prometheus 2009), the biography features a foreword by Justice Ruth Bader Ginsburg and has attracted widespread commendation. Price's presentation about the book for C-SPAN's Book TV, recorded at the Clinton Presidential Library, is available on the Book TV website, *www.booktv.org/Watch/10549/Judge+Richard+S+Arnold.aspx*.

"Richard Arnold was one of the leading judges in the U.S. Court of Appeals until his death in 2004," Price says. "As his law clerk a number of years ago, I earned sufficient trust that Judge Arnold, before he died, made his papers available to me—including court memoranda and other documents not accessible by the public as well as a rare treasure: the diary that he kept during his clerkship for Justice William Brennan."

In connection with the publication of *Judge Richard S. Arnold*, Price, who practiced law at King & Spalding in Atlanta and Washington, D.C., before coming to Emory, has spoken at the D.C. Circuit and 8th Circuit judicial conferences and also before other groups of state and federal judges.

EXCERPT: "AN UNDERGROUND BODY OF LAW"

One theme of [Judge Richard] Arnold's years on the bench was his concern for transparency and public accountability in the judiciary. He knew that most of the work of federal courts occurred out of the press spotlight, and it was this work, he said, that "affects the public more than they know."

One practice bothered Arnold in particular. Federal courts of appeal issue over eighty percent of their decisions in what they term "unpublished" form. Often these opinions are unsigned ("per curiam") and relatively short. In some instances, the decision is merely one word: "Affirmed." These opinions seldom contain an extensive recitation of facts or analysis of the applicable law.

Defenders of the practice—almost all of them federal appellate judges—say that it is necessary because the federal judiciary could otherwise not cope with the case load. Unpublished, non-precedential opinions are reserved for cases in which the judges agree that no new issues are presented. The decisions are merely uncontroversial applications of established legal doctrine that do not make new law. Dealing with such cases in an abbreviated opinion that does not form precedent for future cases, the argument goes, frees judges to devote more time to matters of greater legal urgency.

The federal courts of appeal increased their use of this practice in the closing decades of the twentieth century (from 37 percent of all cases decided in 1977, to over 80 percent by 2000). This dramatic rise brought with it increasingly vocal discontent from outside the judiciary. Federal courts now dispensed "justice in the dark," a journalist charged. "Judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings."

But what Arnold really objected to was the rule followed in most federal courts preventing parties from citing to unpublished opinions. From nearly the moment Arnold joined the Eighth Circuit, he sought to change the court's rule on non-precedential opinions. Beginning in 1983, Arnold raised the issue before the Eighth Circuit judges by way of a motion to change the rule in order to allow the parties to cite such opinions. His motions never received a second.

Arnold told a journalist of participating in a court session where more than 50 cases were decided in two hours. "We heard many, many cases with no opinions or unpublished opinions," Arnold said. "It was a betrayal of the judicial ethos."

Unpublished opinions create an underground body of law. Arnold seems to have been looking for a case to make precisely this point. In the early months of 2000, he found it, in a small tax case known as *Anastasoff v. United States*.

. . .

In 2006 the Supreme Court mandated a rule change for all federal appellate courts, requiring that they allow citation of unpublished opinions issued after January 1, 2007. Tony Mauro of the *Legal Times* attributed the new rule to Arnold: "Though the propriety of an essentially secret judicial process has been debated for years, the catalyst for change was Judge Richard Arnold's opinion in *Anastasoff*."

Arnold died in 2004, three years before the Supreme Court's rule change went into effect. But he knew the debate had continued. The Department of Justice had recommended in 2003 the enactment of a rule to allow lawyers to cite unpublished opinions in all appeals courts. The House Judiciary Committee held oversight hearings on the question, and in the interim, several circuits modified their own rules. As these developments were underway, the *National Law Journal* acknowledged Richard Arnold's opinion in *Anastasoff* had "pushed the judiciary toward a rule change," an article Arnold carefully preserved in a scrapbook.

—adapted from *Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench* (Prometheus 2009)

Price's additional work related to federal courts covers such topics as school desegregation, interpretation of the U.S. Constitution's full faith and credit clause, an equal protection case about high school girls basketball, and the unpublished opinions debate.

While much of her scholarship focuses on the judicial process, both state and federal, Price considers her meta-genre to be legal history.

"This is one thread that ties together my choice of subjects and the questions I ask about them," she says. "Many contemporary issues in law—both public and private—are better informed by historical perspective, which can be a critical component to understanding contemporary debates. Comparative legal history enriches understanding of the judicial process by revealing alternatives and framework pressures."

Representative research from Price addresses the development of contemporary views of property rights and "takings" in *Property Rights: Rights and Liberties Under the Law* (ABC-Clio 2003); and historical perspectives on "health federalism"—the interaction between local, state, and federal governments on public health issues. Her article on malaria in the South,

"Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State" (60 *Emory Law Journal* 2 (2011)), illustrates an administrative innovation by the federal government that eventually resulted in the establishment of the federal Centers for Disease Control and Prevention in Atlanta.

"[This book] provides fascinating insight into the inner workings of the federal judiciary as reflected by the life of one of its most exceptional and courageous members."

—Former President Bill Clinton, on *Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench*, by Polly J. Price

In several earlier articles, Price joined the debate on birthright citizenship in the United States—whether to alter the rule that anyone born on U.S. soil automatically becomes a citizen of this country, even if the parents are in the country illegally. Her most recent comments on this question led to an op-ed piece published in the *Atlanta Journal-Constitution* ("Should U.S. Deny Citizenship to Children of Illegal Immigrants? Two Views," June 7, 2009), an appearance on Minnesota Public Radio ("What does the 14th Amendment Mean for Us Today?", broadcast Aug. 12, 2010), and, also in 2010, interviews by *Mundo Hispánico* and *Deutsche Welle World*.

SELECTED PUBLICATIONS

Books

Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench (Prometheus 2009)

Property Rights: Rights and Liberties Under the Law (ABC-Clio 2003)

Book Chapters

Stability and Change in Antebellum Property Law: Stare Decisis in Judicial Rhetoric, in *The Transformation of Legal History: Essays in Honor of Professor Morton J. Horwitz* (Alfred L. Brophy and Daniel W. Hamilton eds., 2008)

A Constitutional Significance for Precedent, in *Judicial Precedent: Theory and Practice* (Asifa Begum ed., 2008)

Articles

Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State, 60 *Emory Law Journal 2* (2011)

Mapp v. Ohio Revisited: A Law Clerk's Diary, 35 *Journal of Supreme Court History* 54 (2010)

The Little Rock School Desegregation Cases in Richard Arnold's Court, 58 *Arkansas Law Review* 611 (2005)

Recent Scholarship

Holbrook

Nash

Schapiro

Zwier

Timothy Holbrook

Professor of Law

Books

Patent Litigation and Strategy (3rd ed., Thomson-West 2008) (with Kimberly A. Moore & Paul R. Michel)

Articles

Patents, Presumptions, and Public Notice, 86 *Indiana Law Journal* (forthcoming 2011)

Equivalency and Patent Law's Possession Paradox, 23 *Harvard Journal of Law and Technology* 1 (2009)

Extraterritoriality in U.S. Patent Law, 49 *William & Mary Law Review* 2119 (2008)

The Return of the Supreme Court to Patent Law, 1 *Akron International Property Journal* 1 (2007)

The Expressive Impact of Patents, 84 *Washington University Law Review* 573 (2006)

Jonathan Nash

Professor of Law

Articles

Prosecuting Federal Crimes in State Courts, 97 *Virginia Law Review* (forthcoming 2011) (with Michael Collins)

Identitarian Anxieties and the Nature of Inter-Tribunal Deliberations, 9 *Chicago Journal of International Law* 613 (2009) (with Adeno Addis)

The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements, 58 *Emory Law Journal* 831 (2009)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, 61 *Vanderbilt Law Review* 1745 (2008) (with Rafael Pardo)

Standing and the Precautionary Principle, 108 *Columbia Law Review* 494 (2008)

The Uneasy Case for Transjurisdictional Adjudication, 94 *Virginia Law Review* 1869 (2008)

Prejudging Judges, 106 *Columbia Law Review* 2168 (2006)

Robert Schapiro

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 *Dual Enforcement of Constitutional Norms: New Frontiers of State Constitutional Law* (Jim Gardner & Jim Rossi eds., 2011)

Articles

Intersystemic Remedies for Governmental Wrongs, 41 *University of Toledo Law Review* 153 (2009)

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

In the Twilight of the Nation-State: Subnational Constitutions in the New World Order, 39 *Rutgers Law Journal* 801 (2008)

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

Paul J. Zwier II

Professor of Law

Books

Principled Pragmatism in the Shadow of International Law (Cambridge, forthcoming 2011)

Trial Advocacy: A Normative Approach (NITA, forthcoming 2011) (with David M. Malone et al.)

Torts: Cases, Problems, and Exercises (3rd ed., LexisNexis 2009) (with Russell L. Weaver et al.)

Book Chapters

Applied Advanced Legal Strategy in Court: The Example of the International Criminal Court, in *Legal Strategies: How Corporations Use Law to Improve Performance* 441 (Antoine Masson & Mary J. Shariff eds., 2010) (with Deanne C. Siemer)

Articles

The Utility of a Nonconsequentialist Rationale for Civil Jury Awarded Punitive Damages, 54 *Kansas Law Review* 403 (2006)

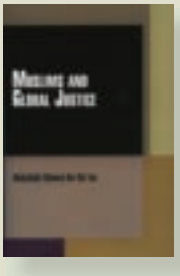
FROM THE BOOKSHELF

Selected Faculty Authors

Abdullahi Ahmed An-Na'im

Charles Howard Candler Professor of Law

Muslims and Global Justice
University of Pennsylvania Press, 2011



In this collection of essays, An-Na'im examines the role Muslims must play in the development of a pragmatic, rights-based framework for justice.

He opens with a chapter on Islamic ambivalence toward political violence, showing how Muslims began grappling with this problem long before the 9/11 attacks. Other essays highlight the need to improve the cultural legitimacy of human rights in the Muslim world. For a commitment to human rights to become truly universal, An-Na'im argues, we must learn to accommodate a range of different reasons for belief in those rights.

Building a human rights framework for global justice, he writes, requires a people-centered approach: "The right and ability of individual persons to strive, in solidarity with others, for achieving and sustaining their own conception of justice is integral to that end."

Martha Albertson Fineman

Robert W. Woodruff Professor of Law

Transcending the Boundaries of Law
Routledge-Cavendish, 2010

Transcending the Boundaries of Law, a new anthology looking both backward and forward, celebrates the 25th anniversary of the Feminism and Legal Theory Project.

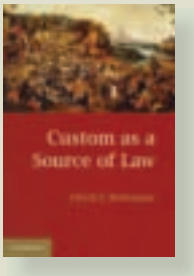
Fineman, FLT Project founder and director and editor of this collection, dedicates the book "to future generations of feminist students curious about the interweaving of gender, law, power, and society. It is hoped that they will be interested in learning the stories of those of us who went before them."

In the book, three generations of feminist legal theorists engage with key feminist themes, including equality, embodiment, identity, intimacy, and politics. This ground-breaking collection provides a "retrospective" on feminist legal scholarship, as well as suggesting directions for future inquiry, including that we move beyond gender to consider the theoretical and political implications of the vulnerability that is both a universal and a constant part of the human condition.

David J. Bederman

K.H. Gyr Professor in Private International Law

Custom as a Source of Law
Cambridge University Press, 2010



A central puzzle in jurisprudence is the role of custom—the practices and usages of distinctive communities. *Are such customs legally binding? Can custom be law, even before it is recognized by authoritative legislation or precedent? Is custom a source of law that we should embrace in modern, sophisticated legal systems, or is the notion of law from below outdated, or even dangerous, today?* Bederman answers such questions through a rigorous multidisciplinary look at custom's enduring place in both domestic and international law.

"One peculiarity of the modern law school curriculum," Bederman observes, "is that we do not give much reflection now to the sources of law in contemporary legal culture. ... In short, we implicitly train law students ... that law is a 'top-down' social construct." His book reminds future lawyers and leaders that "law is as much made from the 'bottom up' by relevant communities."

Frank J. Vandall

Professor of Law

A History of Civil Litigation: Political and Economic Perspectives
Oxford University Press, 2011

Frank Vandall's new volume studies the expansion of civil liability from 1466 to 1980 (the year it ceased to grow). He also evaluates the creation of tort causes of action from 1400 to 1980, with particular attention to the re-evaluation and limitation of those developments from 1980 to the present.

Vandall argues civil justice no longer rests on historic foundations, such as precedent, fairness and impartiality, but has shifted to power and influence. "Many of the laws today are designed and implemented by corporations and large interest groups," he writes. "If we live under a rule of law, the rule involving financial matters was likely lobbied for by a powerful interest with a substantial stake in the outcome. This conclusion extends to courts, legislatures, and agencies at both the state and federal levels. Rule by the powerful, not by the people, is neither a flaw nor an accident—it is intended by functional design."

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