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CITIZENSHIP AND IMMIGRATION LAW

## Citizens of No Nation

Polly Price examines  
'*Jus Soli* and Statelessness'



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- **Robert Ahdieh** seeks to bridge administrative law, financial regulation
- **Richard Freer** laments the slow death of federal civil litigation
- **Jonathan Nash** examines the problems of uncooperative federalism



"Migration, displacement, and poor administrative reach in rural areas in the Americas counter much of the benefit of a common reliance on *jus soli* to assign nationality at birth. 'Effective statelessness' is a hidden problem in the Americas that the shared tradition of *jus soli* in the region does not prevent."

—Polly J. Price, Asa Griggs Candler Professor of Law



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# Examining Citizenship, Arbitration, Federalism and Academic Divides

**A**sa Griggs Candler Professor of Law **Polly Price** allows it's fairly unusual in North America for someone to be born in the backseat of a van, and further, for it to affect their privileges as an American citizen. But as recently as 2011, that child who was born in transit had to sue in federal court to receive documentation from the State Department to establish her citizenship. That's one of the cases Price uses to show the problems of statelessness among an increasingly mobile global populace. "Such instances illustrate the many evidentiary problems associated with proof of citizenship, even with comparatively well-organized systems for recording births," Price writes.

In the United States, *jus soli*, right of the soil, says if you're born within our borders, you're a citizen. But that's not a global rule. *Jus sanguinis*, or rights acquired by bloodline, requires more. Considering the amount of data in the public realm, it would seem the path to proving one's heritage would be wide and well traveled. That's not always true, and differing standards can lead to prickly international questions—e.g., when the US decides to invoke deportation proceedings, but the reciprocal country doesn't acknowledge them.

Robert Howell Hall Professor of Law **Jonathan Nash** writes about the spheres in which state and federal laws bump against each other, and how a state law can affect international treaties. For instance, when a state decides to legalize marijuana, he says, it flouts federal law upon which the country has built global law enforcement agreements.

"I coin the term 'doubly uncooperative federalism' to refer to the state's exercise of its freedom to resist compliance with a treaty duly ratified by the federal government," Nash writes.

Charles Howard Candler Professor of Law **Richard Freer** notes that "the primacy of contract" is one driver of the exodus from federal civil litigation. What he finds particularly distressing is "the court's treatment of cases combining an arbitration clause with a provision that forbids consumers from arbitrating en masse." He outlines why the rise of contractually

mandated arbitration has hurt Americans in ways they're just starting to notice.

"Arbitration fails to provide social ordering, nor does it reflect the norms underlying court litigation," Freer writes. "Because no part of arbitration is open to the public, it fails to inform people of potential harms. There is no jury. Arbitration does not result in the reasoned application of fact to law. Indeed, because of limited judicial oversight, arbitration does not even affirm the rule of law."

K. H. Gyr Professor of Private International Law **Robert Ahdieh** argues we should find ways to bridge the divide between administrative law and financial regulation.

"For all the proximity in their interests, targets of study, and even analytical tools, scholars of administrative law and of financial regulation (including securities regulation, in particular) have shown strikingly little interest in one another," he writes. He argues there are innumerable areas in which the advances of one field might ease the evolution of the other.

But he also recognizes that the nature of the thing governed affects its regulation—money, for example, is a mercurial asset.

"In many—if not most—of the areas in which administrative law has been applied, the entities and assets subject to regulation are not capable of rapid relocation. Railroads, for example, are literally nailed to the ground," Ahdieh writes. "By contrast, money is highly mobile—and even fungible. That is in its very nature. It is even more true today, however, as a result of fast-moving—even instantaneous—trading technologies."

*Look for a companion email, arriving soon, with faculty video interviews, more news about Emory Law research, and expanded profiles of this issue's authors and their work.*

## Statelessness: *Jus Soli* versus *Jus Sanguinis*



### Polly J. Price

Asa Griggs Candler Professor of Law,  
Professor of Global Health

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

**Scholarly interests:** immigration and citizenship, legal history, legislation and regulation, public health law

This year, Professor Price was named one of 35 Andrew Carnegie Fellows. The program recognizes exceptional scholarship in the social sciences and humanities, and aims to strengthen US democracy. Price intends to write a book on how governments confront the challenge of contagious disease.

Price previously received a grant from the Robert Wood Johnson Foundation for her work in public health law. In 2013, she received the Ben F. Johnson Faculty Excellence Award. Price teaches citizenship and immigration law, legislation and regulation, American legal history, and global public health law.

She is the author of two books and many articles on citizenship, immigration, public health law, and the judiciary. Her book, *Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench*, includes a foreword by Justice Ruth Bader Ginsburg.

Prior to joining the faculty in 1995, Price clerked for Judge Arnold at the Eighth US Circuit Court of Appeals. She practiced law for several years at King & Spalding in Atlanta and Washington, DC.

### SELECTED PUBLICATIONS

#### Book Chapters

*Jus Soli* and Statelessness: A Comparative Perspective from the Americas, in *Citizenship in Question: Evidentiary Birthright and Statelessness* (Benjamin N. Lawrance and Jacqueline Stevens eds., 2017)

#### Articles

Epidemics, Outsiders, and Local Protection: Federalism Theater in the Era of the Shotgun Quarantine, 19 *University of Pennsylvania Journal of Constitutional Law* 369 (2016)

Quarantines and Liability in the Context of Ebola, 131(3) *Public Health Reports* 500 (2016)

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Public Health Control Measures in Response to Global Pandemics and Drug Resistance, 43 *The Journal of Law, Medicine & Ethics* 49 (2015)

Sovereignty, Citizenship, and Public Health in the United States, 17 *New York University Journal of Legislation and Public Policy* 919 (2014)

Toward Proportional Deportation, 63 *Emory Law Journal Online* (2014)

## Excerpt: *Jus Soli* and Statelessness: A Comparative Perspective from the Americas

Polly J. Price

A striking feature of citizenship practices in the Americas is the near uniformity of reliance on *jus soli*. The New World is comparatively generous in the provision of citizenship to all persons born within national boundaries, including the children of undocumented persons and temporary visitors. Indeed, the *jus soli* principle “has primarily become a Western Hemisphere tradition.”

The predominance of *jus soli* is said to account for the relatively low rate of statelessness in the Americas compared to other parts of the world. “Stateless” as defined in international law, however, is an inadequate measure of the actuality of a person’s political, civic, and economic status.

While the Western Hemisphere is recognized as “indisputably the region with the fewest people affected by statelessness,” ineffective citizenship is of much greater concern. In the Americas, a substantial number of persons entitled to citizenship cannot prove it, or such proof is disregarded by government officials. These persons do not qualify for protection under international law because they are not considered to be “stateless” under the formal definition.

“Effective statelessness” occurs when an individual is either unable to prove his citizenship, or his country of origin refuses to recognize his citizenship, a result of poor documentation of births and administrative ineptitude as well as intentional discrimination. In the Americas, including the United States, the predominant reasons for effective statelessness include inability to prove nationality as well as the failure of countries to document or recognize their own citizens. Evidentiary issues become the centerpiece of disputes about the nationality of individuals, especially with respect to the practical problems presented by persons who lack documentation or the means to obtain it.

Throughout the Americas, examples of “effective statelessness” include individuals who lack any documentation to prove the location of their birth, and those who migrate to or seek refuge in another country that does not recognize them. For example, several hundred thousand persons in Bolivia lack citizenship documents, preventing them from obtaining international travel documents and accessing other government services. And in Nicaragua, an estimated 250,000 children and adolescents lack legal documentation.

In Mexico, nongovernmental organizations estimate that up to 30 percent of children are unregistered, with one group estimating the total number of unregistered persons at more than 10 million. When these children grow up, the lack of citizenship or identity documents prevent them

as adults from obtaining a driver’s license or voter registration documents, opening bank accounts, or even registering the birth of their own children. This problem becomes compounded when the unregistered travel to the United States and become “doubly undocumented.” Once in the US, they are ineligible for a Mexican *matricula consular* or US identification. In effect, they are invisible to both the United States and Mexico.

In the United States, as well, it is sometimes difficult to prove one’s citizenship or the location of one’s birth. Such instances illustrate the many evidentiary problems associated with proof of citizenship, even with comparatively well-organized systems for recording births.

Although failure to register births is not common in the United States, it does happen. In 2011, for example, two sisters in Kentucky sued in federal court over eligibility for Social Security, resulting in a settlement in which the sisters were issued documentation by the State Department to establish their citizenship. One sister was born at a home in Kentucky, and the other was delivered in the back of a van in Alabama. The births were recorded in a family Bible but were otherwise not documented. Proof of citizenship for Social Security benefits, in fact, is a fertile area of litigation.

Another manifestation of effective statelessness is the existence of a US population of migrants whom the United States is unable to deport. Deportation requires the agreement of the recipient country to accept the person, along with issuance of travel documents by that country prior to deportation. But in recent years, the United States has been confronted by hundreds of cases of aliens with final orders of removal for whom deportation is not possible due to failure to obtain agreement with a recipient country. In some instances, it may be that repatriation is refused on a specious ground of lack of nationality because the deportee is deemed undesirable by that nation. An unknown but likely substantial percentage is due to disputed nationality.

Failing resolution at the diplomatic level, an investigation abroad becomes necessary to determine the validity of the claim that a deportee is not a citizen of that country. In *jus soli* regimes, a birth record will suffice. In *jus sanguinis* regimes, the inquiry is more complicated, as proof of location of birth in that country is generally insufficient to establish citizenship. Furthermore, the deportee may not have lived in his alleged country of citizenship for many years, making it less likely that country would have evidence of citizenship such as a passport application.

From 2001–2004, the Department of Homeland Security reported that nearly 134,000 immigrants with final orders of removal instead had been released because of the inability of the US government to repatriate them to their alleged countries of origin. Thus, we have reason to believe that the technical citizenship of some portion of the US population of migrants is obstructed by both documentary and political issues that originate elsewhere.

There are two other ways that nationality laws in the region contribute to effective statelessness, by complicating documentation efforts even when the home country is willing to do so.

First, with restrictions on *jus sanguinis* in many countries in the region, it is possible for second-generation emigrants to lack citizenship in the parents' country, even if the parents' citizenship status there is secure. Thus, the issue of statelessness concerns not only parents who would have difficulty proving their own nationality, but also the laws of other nations with respect to awarding citizenship to children born abroad.

This path to effective statelessness is in consequence of *jus sanguinis* rules of other nations that already fail to provide a fallback nationality at birth. All states incorporate at least some form of *jus sanguinis* into their citizenship rules. Most nations have generational limits and registration requirements for the transmission of nationality by descent to persons born outside of that country. In Peru, for example, children born to Peruvian parents outside of the country must be registered by their parents by age 18 in order for the child to obtain citizenship. While some of these registration requirements direct the parents to the nearest consulate or embassy for the citizenship to be recognized, others must travel to the home country in order to register the birth.

In some countries, a child born abroad must return in order to maintain citizenship. Colombia requires that a child born abroad must establish residency in Colombia for citizenship by descent. Ecuador allows the children born abroad to a native-born Ecuadorian father or mother to become citizens only if the child becomes a resident of that country. Most nations also have complicated rules to determine nationality for out-of-wedlock births abroad, particularly to establish paternity.

Several nations in the Western Hemisphere—including Mexico and Canada—have tightened *jus sanguinis* rules for children born outside of those nations. By constitutional amendment in 1997, Mexico limited the award of its nationality to the first generation born abroad. Similarly, Canada amended its citizenship laws to limit citizenship by descent to one generation born outside Canada.

While Mexico has generational limits on citizenship, it is otherwise relatively generous with respect to awarding Mexican citizenship to the first

generation born abroad. A parent who is a native-born or naturalized Mexican is required to register the child at the nearest Mexican consulate, followed by a birth registration in Mexico. Proving paternity to satisfy Mexican nationality law, however, remains a complicated issue, both legally and because of the relative scarcity of paternity evidentiary tests. It is also unclear how many parents can themselves prove Mexican nationality. Undocumented Mexican immigrants may have arrived in the US without proof of any nationality.

A second problem for documenting citizenship lies in residency requirements that might terminate the citizenship of the parent, or terminate the conditional citizenship of the child born in another nation. Some nations terminate citizenship following residency outside the country for a period of time. Naturalized Canadians formerly were subject to a one-year limit on residency in the US before losing Canadian citizenship. Canadian law now provides for involuntary loss of citizenship for any naturalized citizen who has spent more than 10 years outside of Canada.

In the United States, extended residence abroad can mean the inability to pass on US citizenship to children. Under US law, in order for the child to acquire citizenship, the citizen parent must have been physically present in the United States for a specified period prior to the child's birth. Thus, it is possible for the children of US citizen parents to be stateless at birth if born in a country that relies upon *jus sanguinis* for citizenship.

The pure form of *jus soli* in theory minimizes statelessness. This is because the location of one's birth is generally easier to prove than is the nationality of one's parents (and with the latter, often the need to prove the nationality of a parent of a parent).

*Jus soli* is also democratically superior because it creates the presumption that populations living within a nation's borders are members of the political community, absent proof of nonmembership by birth elsewhere. Place of birth is a burden of proof issue that should be relatively easy to resolve. Yet it is not, and the blame lies with poor government structures, political inattention, and all too often, intentional discrimination against vulnerable groups.

Migration, displacement, and poor administrative reach in rural areas in the Americas counter much of the benefit of a common reliance on *jus soli* to assign nationality at birth. "Effective statelessness" is a hidden problem in the Americas that the shared tradition of *jus soli* in the region does not prevent.

— adapted from *Jus Soli and Statelessness: A Comparative Perspective from the Americas*, in *Citizenship In Question: Evidentiary Birthright And Statelessness* (Duke University Press 2017)

## On the Border of Administrative Law and Financial Regulation



**Robert B. Ahdieh**

K. H. Gyr Professor of Private International Law

AB, Princeton University, 1994

JD, Yale University, 1997

**Scholarly interests:** administrative law, comparative law, contracts, corporate law, emerging markets law, federalism, financial regulation, international trade law, Russian law

In his work, Robert Ahdieh seeks to bridge the divide between scholars of administrative law and of corporate law and financial regulation. Contrary to the limited academic engagement across that divide today, Ahdieh sees much to be learned from the intersections between the modern administrative state and the present-day regulation of our corporate, financial, and economic life. From the implications of federalism in corporate law to the use of cost-benefit analysis, and from the operation of the Federal Reserve Bank to the role of transnational regulatory networks in the financial markets, Ahdieh's scholarship has sought to identify lessons each discipline might teach the other.

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#### Book Chapters

Agency Coordination as Agency Action, in *Developments in Agency Procedure* (Russell L. Weaver et al. eds., forthcoming 2017)

Varieties of Corporate Law-Making: Competition, Preemption, and Federalism, in *Research Handbook on the Economics of Corporate Law* (Claire A. Hill & Brett H. McDonnell eds., 2012)

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Notes from the Border: Writing Across the Administrative Law/Financial Regulation Divide, 66 *Journal of Legal Education* 64 (2016)

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Coordination and Conflict: The Persistent Relevance of Networks in International Financial Regulation, 78 *Law and Contemporary Problems* 75 (2015)

Enter the Fox—Lumping and Splitting in the Study of Transnational Networks: A Response to Stavros Gadinis, 109 *American Journal of International Law Unbound* 29 (2015)

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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)

## Excerpt: Writing Across the Administrative Law/Financial Regulation Divide

Robert B. Ahdieh

A central feature—if not the central feature—of legal scholarship today is analysis across divides.

It is perhaps surprising, then, how little has been written across the seemingly thin divide that separates administrative law and financial regulation. To be sure, the cross-fertilization of administrative law and financial regulation scholarship and practice is not without its challenges—including a number grounded in the self-reinforcing norms and expectations of legal academia. Such norms can change, however, and they should. . . .

For all the proximity in their interests, targets of study, and even analytical tools, however, scholars of administrative law and of financial regulation (including securities regulation, in particular) have shown strikingly little interest in one another. Analysis across this narrow divide has been all but nonexistent; scholars of each discipline rarely read one another, cite one another, or even talk to one another.

To engage this peculiar lacuna in the legal literature, this essay proceeds in four stages. First, I review the history of the divide, as well as recent efforts to bridge it. Second, I outline core characteristics of the divide: the two fields' distinct motivations, divergent assumptions about the market, and particular limitations. With a clearer picture of the nature of the divide, I suggest some of the insights that might be gained from engagement across it. Finally, I conclude by acknowledging the challenges attendant to writing across the administrative law/financial regulation divide—while also highlighting the need to overcome those challenges. . . .

### **Nature of the Administrative Law/Financial Regulation Divide**

Whatever the historical origins and future of the administrative law/financial regulation divide, it is useful to understand its key characteristics today. Consider three critical points of differentiation: First, what motivates each field of law—and the scholarly analysis thereof? Second, what are the assumptions about the market against which each field operates? Finally, what constraints does the regulatory project face in each field? However much our answers might change over time, significant differences might be identified today, across each of these areas.

### **Motivations/Goals**

Central to the project of administrative law are the intertwined goals of transparency and accountability. With the delegation of significant regulatory, adjudicatory, and enforcement authority to unelected agency officials, the Administrative Procedure Act, the jurisprudence that has emerged around it, and the associated scholarly literature have sought to define

appropriate limitations on agency power. In particular, Congress, the judiciary, and the academy have called for significant transparency in agencies' procedures and sought to hold them accountable for their actions through both judicial and political review—the former imposed explicitly and the latter encouraged and facilitated, including by way of enhanced transparency. . . .

The primary focus of financial regulation, instead, is on two other goals—and on achieving an appropriate equilibrium between them: namely, the protection of shareholders and investors more generally, and the raising of capital via efficient markets. As the Securities and Exchange Commission summarizes its mission, it seeks “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”

One can see echoes of transparency and accountability in that mandate, of course. As suggested above, however, the goals of investor protection and market efficiency may—perhaps as often as not—best be secured by *reduced* transparency, and even diminished accountability. Even where transparency or accountability is the goal, meanwhile, financial regulation might well pursue that goal in ways distinct from those demanded by administrative law.

### **Distinct Assumptions About the Market**

Distinct assumptions about the market also contribute to the divide between the study/practice of administrative law and financial regulation. In administrative law, the market represents the structure to be policed by way of effective regulation. Much of the work of administrative agencies can thus be understood as responses to perceived market failures.

Financial regulation, by contrast, engages the market as something to be facilitated—even encouraged. Of course, regulation must ensure efficiency of the market. That caveat aside, however, a role for regulation in facilitating markets differs markedly from the project of correcting market inefficiencies.

This distinctive attitude of each field toward the market should not be exaggerated, of course. Financial regulation places significant limitations on markets as well, from disclosure requirements and anti-fraud regulation to capitalization requirements and licensure rules. Certain other fields, meanwhile, also embrace a role for agencies in market facilitation. Aspects of telecommunications regulation—and government standard-setting generally—can be understood in that light. Certain aspects of natural resource management and energy policy are to similar

effect. Nowhere is the task of market facilitation and encouragement as direct, however, as in financial regulation.

### **Constraints on Regulatory Process and Design**

The divide between the study/practice of administrative law and financial regulation also turns on distinct constraints on the effective application of each body of law. A number of such limitations might be highlighted, but let me emphasize just two—time and space—that can be expected to impact each field in significantly different ways.

Consider time: In questioning the viability of any convergence—or even meaningful engagement—of administrative law and financial regulation, Tom Merrill calls attention to the capacity for quick exit in the financial markets. In many—if not most—of the areas in which administrative law has been applied, the entities and assets subject to regulation are not capable of rapid relocation. Railroads, for example, are literally nailed to the ground.

By contrast, money is highly mobile—and even fungible. That is in its very nature. It is even more true today, however, as a result of fast-moving—even instantaneous—trading technologies. Increasingly globalized capital markets further ease exit, as do sophisticated financial instruments, including ever-changing synthetic products not susceptible to sustained regulation.

Given as much, Merrill suggests the deliberative and intentionally slow-moving processes at the heart of administrative law are likely to have little to offer in financial regulation. Between the rapidity of capital movement and the pace of innovation, the market can be expected to get ahead of almost any potential regulatory intervention—let alone one that emerges with the methodical pace required by administrative law. . . .

### **Learning Across the Divide**

There exists, then, a real—if perhaps shifting—divide in the study/practice of administrative law and financial regulation. Might it be useful to bridge that divide? What might we learn from scholarly engagement across it?

Before suggesting a handful of particular opportunities for learning across the administrative law/financial regulation divide, it may be useful to return to where we started. How should we understand the benefits of other analyses across divides—interdisciplinary scholarship, comparative legal analysis, legal history, and engagement across distinct legal disciplines, from torts and criminal law to antitrust and consumer protection?

In each analysis, we gain something from studying the distinct motivations, assumptions, and modes of thinking of the “other.” Economic analysis may help us better evaluate the efficacy of damages versus specific performance as a remedy in contract law. German civil

procedure may suggest the limitations of an adversarial approach to expert testimony. An awareness of the origins of the hearsay rule may clarify its appropriate application today. And our understanding of culpability in criminal law may be enriched by studying the principles of liability in tort law.

Something similar might be expected across the gap that divides the study of administrative law and financial regulation. Consider, once again, questions of secrecy and confidentiality. As described above, financial regulators must necessarily proceed with secrecy in placing a bank or other systemically important financial institution into receivership. The same is true of their interest-rate setting decisions, as well as their response to nonroutine incidents of financial panic. Even fairly mundane regulatory and adjudicatory tasks may require confidentiality where proprietary business data must be evaluated.

Such pressures are less likely to be present—at least ordinarily—in administrative law. On the other hand, administrative law has had the benefit of decades of experience navigating the trade-off between transparency and efficiency. In fostering the efficacy of agencies’ regulatory undertakings, thus, administrative law scholars have been forced to grapple with just the question faced by students of financial regulation: the appropriate limits of transparency. Scholars of financial regulation would do well, as such, to engage the principles of transparency developed in administrative law.

Financial regulation scholars might also learn something from administrative law, practice, and scholarship as they seek to promote increased regularity in relevant decision-making procedures. Elements of the administrative law framework of external accountability may thus offer insight into procedures for the generation of internally oriented guidance and interpretations—which play a relatively more central role in financial regulation, for the reasons of secrecy outlined above. . . .

### **Conclusion**

As the impact and influence of interdisciplinary scholarship, comparative legal studies, legal history, scholarly work across other distinct legal fields, and perhaps even the common law method make clear, legal analysis across divides has the potential to offer us significant insight. Across methods and even fields, there is much to be gained from the effort. Whatever the challenges, thus, scholars of administrative law and financial regulation do well to engage one another more actively. As the early shoots of such engagement begin to emerge, we would be wise to nurture and encourage them.

—from Notes from the Border: Writing Across the Administrative Law/Financial Regulation Divide, 66 *Journal of Legal Education* 64 (2016)

# A Requiem for Federal Civil Litigation



## Richard D. Freer

Charles Howard Candler Professor of Law

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

**Scholarly interests:** civil procedure, federal jurisdiction, aggregate litigation, multidistrict litigation, politics of judicial selection, business organizations and management

Professor Freer is the only academic to serve as a contributing author to both of the standard multivolume treatises on federal jurisdiction and practice: Moore's *Federal Practice* and Wright & Miller's *Federal Practice and Procedure*. He is author or co-author of 17 books, including widely adopted casebooks in civil procedure and business associations. His articles have appeared in leading journals, including *NYU Law Review*, *Northwestern University Law Review*, *Duke Law Journal*, and the *Texas Law Review*. He has been named Most Outstanding Professor at Emory Law nine times, most recently in 2017. He has received Emory University's highest teaching award as well as the University's Scholar/Teacher Award. Freer has served as the University's vice provost for academic affairs, associate dean of the law school, and as a member of the University Senate, the Faculty Council, and the President's Advisory Committee. Freer is a life member of the American Law Institute and a national bar review lecturer whose lectures are seen each year by thousands of bar applicants.

## SELECTED PUBLICATIONS

### Casebooks

*Hay, Borchers & Freer, Conflict of Laws* (15th ed., 2017)

*Freer & Perdue, Civil Procedure: Cases, Materials, and Questions* (7th ed., 2016)

*Epstein, Freer, Roberts & Shepherd, Business Structures* (4th ed., 2015)

### Articles

Exodus from, and Transformation of, American Civil Litigation, 65 *Emory Law Journal* 1491 (2016)

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*Doernberg, Freer & Redish, Federal Courts* (4th ed., 2017)

*Freer, Civil Procedure* (4th ed., 2017)

*Freer & Moll, Principles of Business Organizations* (2nd ed., forthcoming 2017)

## Excerpt: Exodus from, and Transformation of, American Civil Litigation

Richard D. Freer

**T**he story of American federal civil litigation over the past half century is one of exodus and transformation—exodus from, and transformation of, the traditional model of public dispute resolution. That traditional model envisions that what we will call “court litigation” does much more than resolve disputes. Civil court litigation is a form of social ordering, of governing and regulating the relations among people.

This vision is supported by normative values. Court litigation is public, transparent, and governed by the rule of law. It informs people about events that may affect their lives, such as faulty products or fraudulent activities. Public access allows the citizenry to monitor the political legitimacy of the judicial system. The centerpiece of the system is the public trial, in which the jury reflects democratic values. The process is overseen by a neutral, generalist trial judge, charged with applying the rule of law. The adjudicated case ends with entry of the court’s judgment, a public document announcing the outcome. The right of appeal ensures fidelity to the rule of law.

This model was subjected to great strain by the “litigation explosion” of the 1970s to the 1990s. A series of factors led to markedly increased filings. The Supreme Court’s invigoration of civil rights in the 1960s, congressional creation of rights, and innovative tort theories all created new cases. Centralization of the economy made it possible for a single defective product or fraudulent statement to injure thousands. Congress expressly embraced private civil litigation to enforce the law. The promulgation of the modern class action provision in 1966 created a powerful tool for enforcing rights.

Increases in the number of judgeships did not keep pace with the increased caseload. Case queues and backlogs swelled, prompting Congress to require federal judges to account for timeliness of resolution. One way to cope with the increased pressure would be to channel cases out of the federal courts. Hence, the exodus.

The exodus from court litigation has taken various paths. Innumerable claims are channeled to legislative tribunals, and courts frequently require litigants to submit to court-annexed alternative dispute resolution. The most profound path of exodus, however, has been to contractual arbitration. The Federal Arbitration Act (FAA) was passed in 1925 to facilitate enforcement of commercial arbitration clauses. The Supreme Court has interpreted it expansively, to apply to contracts of adhesion and even to the adjudication of federal rights (which once commanded resolution by a court). Today, then,

arbitration is the principal forum not just for disputes between businesses, but for claims by consumers and employees.

In part, the court has justified its expansive interpretation of the FAA by asserting that disputants are not giving up much when they leave court for arbitration; court litigation and arbitration are essentially fungible. This is true, however, only if we value nothing more than the dispute resolution function. Arbitration fails to provide social ordering, nor does it reflect the norms underlying court litigation. Because no part of arbitration is open to the public, it fails to inform people of potential harms. There is no jury. Arbitration does not result in the reasoned application of fact to law. Indeed, because of limited judicial oversight, arbitration does not even affirm the rule of law.

Accordingly, commentators argue that a massive exodus to arbitration robs the courts of their law-giving function and impoverishes the democratic values underlying the court litigation model. The argument is strong, at least when arbitration is compared to our traditional model. But when compared to reality, the argument is weak.

Why? Because meanwhile, back at the courthouse, we have seen a startling transformation of litigation. It, like the exodus, is blamed on the need to process too many cases. A judicial “settlement culture” pervades in court today. The Federal Rules reflect an embarrassing minimization of traditional judicial functions; judges are not to “adjudicate” or even “resolve” cases, but to “assist in the resolution” of cases. A procedural system that used to focus on readying cases for adjudication at trial now promotes processing them without trial, either through settlement or pretrial resolution on the pleadings or through summary judgment. The focus on pretrial adjudication and conciliation is so strong that some judges consider a case’s going to trial as a systemic “failure.” Not surprisingly, then, we find that fewer than 2 percent of cases filed will be tried.

This reality strays far from our model of public engagement, the crucible of trial, and the application and explication of the law. Courts have become monuments to mediation. Accordingly, fears that the exodus to arbitration will impoverish our civil justice system are overblown precisely because that system itself is impoverished. And, as with the exodus, the transformation is rooted in, or at least justified by, the narrative of the caseload crisis.

There is another theme underlying the exodus and the transformation: the primacy of contract. This leads us to a contemporary development that I find particularly distressing: the court’s treatment of cases

combining an arbitration clause with a provision that forbids consumers from arbitrating en masse (a “class action waiver”).

In *AT&T Mobility LLC v. Concepcion* (2011), one million cellphone customers each had a state consumer-protection claim for \$30. This is a classic “negative value” claim: the cost of pursuing the claim individually will exceed the recovery. Unless consumers can arbitrate together, the claims likely will not be pursued. Recognizing this, state law provided that aggregate procedure was indispensable to the private enforcement of the claim; thus, under state law, the class action ban was unenforceable. The adhesion contract can require arbitration, but cannot compel consumers to arbitrate alone.

## Because no part of arbitration is open to the public, it fails to inform people of potential harms.

The Supreme Court held that the FAA preempted the state law; both the arbitration clause and class waiver were enforced. (The court was not much concerned about the federalism issue presented by the fact that the state that created the claim considered aggregate assertion essential to its enforcement.) On the facts, the court noted that the terms of the arbitration agreement were so “consumer-friendly” (e.g., requiring the company to pay all costs) that individual claims were in fact likely viable. A different case might be presented, the court recognized, if class bans would not allow “effective vindication” of the plaintiffs’ rights.

The court faced such a case in *American Express Co. v. Italian Colors Restaurant* (2013). There, merchants asserted federal antitrust claims (which were negative-value because of the expense of expert testimony required to prove the claims). The agreements required arbitration and forbade aggregation. The court was willing to accept that individual litigation would be not be economically feasible. Still, *Concepcion* governed. The fact that it will not be worth the expense of proving the claim individually “does not constitute the elimination of the right to pursue that remedy.” In short, “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”

The message of these cases is clear: astute businesses will impose arbitration clauses coupled with class “waivers,” perhaps sweetened by some “consumer-friendly” provisions that arguably make individual arbitration effective (though whether it is in fact effective may not matter much). The result, in many negative-value cases (which includes most

consumer claims), will be that the defendant will never be held to account in any forum.

Again, this result is accomplished by relying upon the theme of the primacy of contract. First, contract enables the parties to opt out of litigation and go to arbitration. Second, contract enables the parties to transform the rules of their engagement—for example, by agreeing to forgo aggregate resolution.

Of course, enforcing agreements is an important societal norm. But in adhesion contracts “the parties” are not agreeing on arbitration and class waiver. The powerful party is imposing those terms. It is one thing (and perhaps not a wise one) to interpret the FAA to apply to adhesion contracts. It is another to let companies use that extension to bootstrap the obviation of procedural tools, like the class action rule, that allow the effective pursuit of claims.

I am not blind to problems presented by class treatment (in court or in arbitration) of cases like *Concepcion*. Aggregation will create litigation that otherwise would not be filed, which is rarely to be favored. Promoting proceedings in these cases also seems inconsistent with the maxim *de minimis non curat lex*, which counsels that we occasionally have to take our lumps for \$30. And, as a factual matter, negative-value class actions (in court or in arbitration) have proved “quite poor” as vehicles for distributing money to victims.

On the other hand, litigation and arbitration are means of private enforcement of the law. If no one will file a claim, and if the state does not act, the law will not be enforced. If it is not enforced, it may have no deterrent effect. In this way, forcing plaintiffs into arbitration and forbidding aggregation can exculpate defendants, at least as to claims that *de facto* will not be pursued individually. The negative-value class action thus poses a profound fundamental question. If the goal of litigation and arbitration is compensation, it may not work very well. If the goal is law enforcement and deterrence, it may be indispensable, especially in an era of weak public enforcement.

The exodus and transformation are part of the realm of the law of procedure, which is the domain of lawyers and judges, not consumers and employees. The public is not likely to notice the channeling of cases to arbitration or the transformation of things like pleading standards and pretrial practice. But Americans have an underlying sense of fairness and a sense that the courts should be there when they need them. Though they may not notice changes in the way courts do what they do, they may well notice when, with increasing frequency, the courthouse door has effectively been closed.

—adapted from: Exodus from, and Transformation of, American Civil Litigation, 65 *Emory Law Journal* 1491 (2016)

# The Effects of Doubly Uncooperative Federalism



## Jonathan R. Nash

Robert Howell Hall Professor of Law

BA, Columbia University, 1988  
 JD, New York University School of Law, 1992  
 LLM, Harvard Law School, 1999

**Scholarly interests:** administrative law, civil procedure, courts and judges, environmental law, federal courts, law and economics, legislation and regulation, property law

Professor Nash specializes in federal courts and jurisdiction, the study of courts and judges, and environmental law (both domestic and international). He was previously the Robert C. Cudd Professor of Environmental Law at Tulane University. Nash has also served as visiting professor at University of Chicago Law School and Hofstra University School of Law, and as a visiting scholar at Columbia Law School. A prolific scholar, Nash's work has been published in *Columbia Law Review*, *Cornell Law Review*, *Iowa Law Review*, *Journal of Empirical Legal Studies*, *Michigan Law Review*, *NYU Law Review*, *Northwestern University Law Review*, *Notre Dame Law Review*, *Stanford Law Review*, *Southern California Law Review*, *Vanderbilt Law Review*, and *Virginia Law Review*, among other leading journals. His scholarship has been cited by numerous courts, including the United States Courts of Appeals for the Sixth, Eighth, and Ninth Circuits. He is also a regular contributor to leading news sites, where he examines current legal issues.

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## Excerpt: Doubly Uncooperative Federalism and US Treaty Compliance

Jonathan R. Nash

Commentators recognize that states can play a critical role in determining whether a national government will be in compliance with, or in breach of, a governing treaty. Nevertheless, most academic commentary discussing the role of states in treaty compliance is focused on settings where states take a cooperative posture toward an international treaty.

Consider first the paradigmatic setting where the federal government ratifies a treaty, and the states cooperate in its execution and enforcement. Subfederal units may enact their own laws and implement their own policies that aid in US treaty compliance. The setting does not suffer from lack of scholarly study.

Another setting finds states going beyond what the federal government calls for. A state might abide by the terms of a treaty even where the federal government has decided against ratification. Here, the state's behavior is somewhat uncooperative, in that it takes a position at odds with the federal government's; still, the state can be seen as cooperating with the international regime. Once again, this setting has received its share of scholarly attention: commentators have documented how subnational actors—including states—sometimes voluntarily comply with international treaties, even those into which the national government has not entered.

The bulk of existing commentary glosses over settings where states work in opposition to the federal government's treaty obligations. International law's doctrine of state responsibility holds a national federal government responsible for violations of a duly ratified treaty resulting from actions (or omissions) of a subfederal government. Thus, the federal government may find itself in breach of a treaty by virtue of state action (or inaction). The US Constitution—as well as practical considerations—limits the federal government's ability to compel states and other subfederal units into treaty compliance. In short, if—at an extreme—the states can render the national government *de facto* in compliance with the terms of a treaty into which the national government has not entered, so too can the states render the national government in breach of treaties into which the national government *has* entered. And, states often have incentives to engage in behavior that is inconsistent with a duly ratified treaty.

Doubly uncooperative federalism dates back to the Articles of Confederation, and was a substantial motivation underlying the drafting and ratification of the Constitution. Yet doubly uncooperative

federalism persisted under the new Constitution, with the Supreme Court confronting the issue in the early years of the Republic in the context of state efforts to undermine the peace treaty with Great Britain.

Recent years have seen doubly uncooperative federalism arise again with renewed vigor. One current example is state legalization of marijuana that arguably puts the United States in breach of an international narcotics treaty to which it is a party. Another example is the failure of states to provide arrested foreign nationals with notification of their rights under a treaty to contact their home nations' consular offices.

**I coin the term “doubly uncooperative federalism” to refer to the state's exercise of its freedom to resist compliance with a treaty duly ratified by the federal government.**

What then explains commentators' tendency to view subnational governments as actors who tend to cooperate with international legal treaties? The question echoes one asked by Professors Jessica Bulman-Pozen and Heather Gerken with respect to commentators' tendency to focus on the cooperative relationship between the federal and state governments in the administration of federal programs. Professors Bulman-Pozen and Gerken observe that commentators who see states as dissenting from and acting contrary to the federal government's preferences generally perceive of states as autonomous sovereigns, distinct from the federal government, with the federal and state governments operating in distinct spheres. They highlight the common, but understudied, phenomenon of “uncooperative federalism”—where states dissent from and act contrary to the federal government's preferences when called upon to participate in the administration of a federal program.

The setting of joint federal-state administration of a federal program studied by Professors Bulman-Pozen and Gerken bears strong similarities to the setting of compliance with a duly ratified international treaty. The combination of (i) the doctrine of state responsibility imputing—for international law

purposes—to the national government treaty breaches resulting from state action (or inaction), and (ii) legal and practical limitations on the federal government's ability to preclude such breach-inducing actions (and inactions) by states, conspire to provide states with an unavoidable, critical role in national government compliance with many treaties. Involvement of the states in treaty compliance can thus come to resemble the role of states in the administration of a joint federal-state program.

I coin the term “doubly uncooperative federalism” to refer to the state's exercise of its freedom to resist compliance with a treaty duly ratified by the federal government, and it is to that undertheorized and understudied practice that I turn my attention. What makes the state's behavior *doubly uncooperative* is the fact that the state government stands alone in opposition to both the federal government and the international treaty. I make four broad contributions.

## Recent years have seen doubly uncooperative federalism arise again with renewed vigor.

First, I elucidate the undertheorized and understudied concept of doubly uncooperative federalism as a species of federal-state interaction in the context of treaty compliance. I situate doubly uncooperative federalism within the broader swath of federal-state relations in the context of treaty compliance. It identifies the features of international and constitutional law that provide a space for doubly uncooperative federalism. And it elucidates current examples of doubly uncooperative federalism in practice.

Second, I highlight the myriad, yet underappreciated, ways—both legal and practical—in which the federal government is impotent in the face of state action (or inaction) resulting in noncompliance. I also elucidate the uncertainty and high costs that dog theoretically viable ways that the national government might try to compel state compliance. While others have explained how domestic law provides opportunity for, and limitations on, the enforcement of international law, this article surveys this territory with a focus on how the law effectively protects state dissent on treaty compliance.

Third, I discuss limitations that inhere in alternatives to attempts at legal compulsion. I address the possibility of creating incentives for states, and exhorting states, not to engage in doubly uncooperative federalism. I also discuss “workarounds” that the national government has used to try to minimize the mismatch between the

international doctrine and US federalism. It explores the use of “carve-outs”—that is, treaty provisions, and reservations, understandings, or declarations that the government made when it entered into the treaty that purport to limit the scope of the doctrine of state responsibility—and “breach-curing treaty provisions”—that is, the attempt to apply “liability rules” to discharge treaty breaches by subfederal governmental units.

I identify problems with each of these approaches. Incentives may not discourage states from engaging in doubly uncooperative federalism, and beyond that may encourage states that otherwise would not have engaged in doubly uncooperative federalism to do so (in order to receive a benefit). Exhortation is likely to be similarly unavailing. Treaty provisions and reservations, understandings, and declarations are unreliable, and may end up obscuring exactly when the treaty applies. Finally, breach-curing treaty provisions that try to “solve” treaty breaches by offering payments of money by the federal government are also problematic: (i) money payments may not offer a sufficient disincentive against treaty noncompliance, but even granting that they might under ordinary circumstances and (ii) the fact that the government that makes the payments (i.e., the federal government) is not the government that is choosing noncompliance (i.e., the state government) undermines any incentive effect.

Fourth, I highlight possible consequences of a state's choice to engage in doubly uncooperative federalism. For one thing, the United States may find itself in breach of its treaty obligations with the opportunity for correction beyond its reach. Indeed, the obstacles facing the federal government as it tries to get states to comply with international obligations may effectively render some treaty obligations nearly, or even entirely, unfulfilled. Beyond that, doubly uncooperative federalism may breed uncertainty as to whether the United States is in fact in compliance with a treaty. Indeed, to the extent that courts are called upon to rule on treaty compliance, a federal court may find no treaty violation (under domestic law) notwithstanding an international tribunal finding of a treaty breach. Such an outcome is both unseemly and destabilizing to international law. Finally, doubly uncooperative federalism empowers states to affect the treaties, and the interpretation of treaties, to which the federal government has subscribed. I explain how these consequences, often viewed as quite negative, may not be significantly negative and may even include effects that might be considered to be beneficial.

—from *Doubly Uncooperative Federalism and the Challenge of US Treaty Compliance*, 55 *Columbia Journal of Transnational Law* 3 (2016)

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EMORY  
LAW

Office of Marketing and  
Communications  
Emory University School of Law  
1301 Clifton Road NE  
Atlanta GA 30322-2770



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