

EMORY

insights

FALL 2010

Child welfare.
The financial crisis.
Election reform.
Religious strife.
The environment.

Emory Law faculty
engage the problems
of the day



Features

FEMINIST LEGAL THEORY/FAMILY LAW

- 2 A More Substantive Vision of Equality
- 4 A Robust Theory of Children's Rights

ELECTION REFORM

- 6 Election Law—Through the Lens of Political Science
- 8 Justice: For Sale to the Highest Bidder?

ENVIRONMENTAL LAW

- 10 The Complex Battlegrounds of Environmental Law
- 12 Beyond Our Borders: Whose Responsibility?

LAW AND RELIGION

- 13 Human Rights, Religion, and Secularism in Synergy
- 14 Opening Up New Dimensions of Understanding

Departments

- 1 From the Dean
- 16 Of Note

cover illustration by Chris Silas Neal

From the Dean

Welcome to the first issue of *Emory Insights*, a new publication highlighting some of the recent scholarship by the Emory Law faculty.

One of the hallmarks of Emory Law is the strength of our scholarly community. Our goal with this new publication is to share the work our faculty members are doing and provide *insights* into how this work impacts the legal world, both inside and outside of the academy.



My colleagues' interests, perspectives and methodologies are varied, but their commitment to excellence is steadfast.

Published twice each year in the fall and spring, *Insights* will spotlight the research and scholarship our faculty members are doing

on major and diverse issues, such as Martha A. Fineman's and Barbara Bennett Woodhouse's work in family law, as well as Michael Kang's and Joanna Shepherd Bailey's work in election reform, Bill Buzbee's work in environmental law and John Witte's work at the crossroads of law and religion as well on the pursuit of happiness.

Fineman is a leading authority on feminist jurisprudence and family law. One of our newest faculty members, Woodhouse is recognized as one of the United States' foremost experts on children's rights. Kang tackles fundamental questions in the field of election law while Bailey is working toward a better outcome in judicial elections to safeguard impartial justice.

Buzbee has worked on environmental cases before the U.S. Supreme Court and testified before Congress on environmental legislation. Witte, one of the world's foremost experts on law and religion, has delivered more than 300 major public lectures at universities throughout the world.

We hope you will enjoy this glimpse into the work our faculty members are doing, and I encourage you to learn more by reading the complete versions of the works mentioned inside these pages or by visiting our website at www.law.emory.edu/faculty.

The legal community continues to face myriad challenges, both economic and pedagogical. Our world dialogue is shaped by multiple voices with differing points of view. At Emory Law, we believe our collective voices can be a powerful force for constructive change.

A handwritten signature in black ink that reads "David F. Partlett". The signature is written in a cursive style with a horizontal line underneath the name.

David F. Partlett
Dean and Asa Griggs Candler
Professor of Law

A More Substantive Vision of Equality



Martha Albertson Fineman

Robert W. Woodruff Professor of Law

BA, Temple University, 1971
JD, University of Chicago, 1975

Scholarly Interests: legal regulation of family and intimacy, and societal implications of universal dependency and vulnerability

Martha Albertson Fineman's work challenges deeply held assumptions underlying the way our society is organized and the way it operates. Grounded in a feminist perspective, she raises provocative questions about the relationship between the changing nature of intimacy and the family and our public policies. For example, how would law change if we broadened our understanding of "family" beyond the traditional husband/wife/child grouping to include other combinations living together as a caregiving unit?

Internationally recognized for her scholarship in the law and society tradition, Fineman also is a leading authority on feminist jurisprudence and family law. Before coming to Emory, she served on the law faculties at the University of Wisconsin, Columbia University, and Cornell University, where she held the first endowed chair in the nation in feminist jurisprudence. She founded and directs the Feminism and Legal Theory Project and heads the Vulnerability and the Human Condition Initiative at Emory.

Fineman's publications include *The Autonomy Myth: A Theory of Dependency*; *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*; and *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*. Among her awards is the prestigious Harry J. Kalven Jr. Prize, given by the Law and Society Association for her intellectual leadership in the study of gender, law, and the family.

SELECTED PUBLICATIONS

Books

Transcending the Boundaries of Law: Generations of Feminism and Legal Theory (Routledge 2010)

Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations (Ashgate 2009) (with Jack E. Jackson & Adam P. Romero)

"Feminist theory predictably encounters resistance from those satisfied with the distribution of power, privilege, and authority."

EXCERPT: "THE VULNERABLE SUBJECT: ANCHORING EQUALITY IN THE HUMAN CONDITION"

Vulnerability is — and should be understood to be — universal and constant, inherent in the human condition. The vulnerability approach I propose is an alternative to traditional equal protection analysis; it is a “post-identity” inquiry in that it is not focused only on discrimination against defined groups, but is concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has established and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality.

To richly theorize a concept of vulnerability is to develop a complex subject around which to build social policy and law; this complex subject can be used to redefine and expand current ideas about state responsibility toward individuals and institutions. In fact, I argue that the “vulnerable subject” must replace the autonomous and independent subject asserted in the liberal tradition. Far more representative of actual lived experience and the human condition, the vulnerable subject should be at the

center of our political and theoretical endeavors. The vision of the state that would emerge in such an engagement would be both more responsive to and responsible for the vulnerable subject, a reimagining that is essential if we are to attain a more equal society than currently exists in the United States.

...

The vulnerable subject approach does what the one-dimensional liberal subject approach cannot: it embodies the fact that human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime. The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity. ... Constant and variable throughout life, individual vulnerability encompasses the reality that we are beings who live with the ever-present possibility that our needs and circumstances will change. On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe.

— from *The Vulnerable Subject*, 20 *Yale Journal of Law and Feminism* 1 (2008)

What Is Right for Children? The Competing Paradigms of Religion and Human Rights (Ashgate 2009) (with Karen Worthington 94L 06G)

The Autonomy Myth: A Theory of Dependency (New Press 2004) (Japanese translation, 2008)

Book Chapters

Equality: Still Illusive After All These Years, in *Gender Equality: Dimensions of Women's Equal Citizenship* 251 (Joanna Grossman & Linda McClain eds., 2009)

Dependency and Social Debt, in *Poverty and Inequality* 133 (David Grusky & Ravi Kanbur eds., 2005)

The Meaning of Marriage, in *Marriage Proposals: Questioning a Legal Status* 29 (Anita Bernstein ed., 2005)

Articles

Vulnerability and the Need for a Responsive State, 60 *Emory Law Journal* (forthcoming 2011)

Evolving Images of Gender and Equality: A Feminist Journey, 43 *New England Law Journal* 437 (2009)

ONGOING PROJECTS

Feminism and Legal Theory Project

The FLT Project, begun by Fineman in 1984 at Wisconsin, fosters interdisciplinary examinations of the ways that gender is structured in society through its law, social policies, and institutions. The project holds several workshops each year and hosts visiting scholars from around the world.

Vulnerability and the Human Condition Initiative

This interdisciplinary program is a “theme” for the James T. Laney School of Graduate Studies at Emory. The Initiative sponsors workshops and conferences, as well as a reading group and a works in-progress seminar for Emory faculty and graduate students interested in engaging the concepts of “vulnerability” and “resilience” from a theoretical perspective.

“Studying law opens up a window to understanding the world of power and politics. It also gives us the tools with which to challenge that world.”

A Robust Theory of Children's Rights



Barbara Bennett Woodhouse

L.Q.C. Lamar Professor of Law

Diploma Superiore, Università per Stranieri
(Perugia, Italy), 1965

BS, State University of New York, 1980

JD, Columbia University, 1983

Scholarly Interests: child law, child welfare, comparative and international family law, and constitutional law

“I hope to spark a serious debate about why we are so far behind peer nations,” says Barbara Bennett Woodhouse. One of the nation’s foremost experts on children’s rights, she has been a passionate advocate for U.S. ratification of the U.N. Convention on the Rights of the Child. At the Convention’s 20th anniversary in 2009, she addressed the United Nations on the topic “Children’s Rights: The Next Twenty Years.”

During her distinguished law career, Woodhouse has handled numerous appellate cases on adoption, custody, and juvenile justice and been named a Human Rights Hero by the American Bar Association’s *Journal on Human Rights*. As a professor of law at the University of Pennsylvania and then at the University of Florida, she co-founded the Center for Children’s Policy, Practice and Research and founded the Center on Children and Families, respectively. She now co-directs the Barton Child Law and Policy Center at Emory.

In 2009 her book *Hidden in Plain Sight* — widely used as an interdisciplinary textbook — won the American Political Science Association’s award for the best book on human rights. Now, under contract to New York University Press, Woodhouse is working on “The Ecology of Childhood: Building a World Fit for Children,” a comparative study of child and family policy in the United States and Italy. “I’m finding,” she says, “that to build a world fit for children, a robust theory of children’s rights is essential.”

SELECTED PUBLICATIONS

Books

Hidden in Plain Sight: The Tragedy of Children’s Rights from Ben Franklin to Lionel Tate (Princeton 2008)

“We are the only nation other than Somalia that has failed to ratify the U.N. Convention on the Rights of the Child. If children are our future, America’s future looks dark indeed.”

EXCERPT: "ECOGENERISM: AN ENVIRONMENTALIST APPROACH TO PROTECTING ENDANGERED CHILDREN"

I have come to believe that the very framework we legal scholars have used to analyze issues of state intervention in the family was partially at fault for obscuring a quest for effective solutions. In my recent writing, I have advocated reframing children's law by adopting what I have called an "environmentalist" or "ecogenerist" paradigm. I explore how a paradigm that focuses on the ecology of childhood might lead to better child protection laws and policies. I argue that looking at endangered children in an ecological context is an essential first step. Much as twentieth-century environmentalists forced a legal paradigm shift in response to crises threatening our natural world and resources, twenty-first century advocates for children must force a paradigm shift in response to forces that threaten the survival of children, our most precious human resources.

The notion of studying children through the lens of ecology is not new. This approach is widely accepted in the worlds of sociology and psychology and among those who study child development. An ecological theory envisions children at the center of concentric circles of human and natural systems. Rather than proposing normative principles such as rights and duties, an ecological theory is descriptive of the world as the child knows and experiences it. It does not examine the individuals in

isolation from their environment, but rather the nature and quality of the relationships and environments.

How does an ecological approach differ from a more traditional approach for analyzing problems facing children? An ecological model does not approach children, parents, and the government from the perspective of individual rights, or as separate autonomous actors, but rather as linked together, awash in a sea of culture. Legal doctrines envision the role of the law in family matters as a referee supervising the dissolution of families and as a last refuge for broken families. The ecological model modulates the distinctions between private and public by recognizing that all systems are inter-related and all systems, including the family, affect the public good. Measuring the health of these systems involves measuring the well-being of individuals within these systems. Like the miner's canary, which alerts miners of noxious gases before the miners themselves can detect them, children suffer first if a social environment is unhealthy, and their distress provides an early warning of an environment that is toxic to human life.

—from *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 *Virginia Journal of Social Policy and the Law* 409 (2005)

Book Chapters

Cleaning Up Toxic Violence: An EcoGenerist Paradigm, in *Handbook of Children, Culture & Violence* 415 (Nancy E. Dowd et al. eds., 2006)

Revisioning Rights for Children, in *Rethinking Childhood* 229 (Peter B. Pufall et al. eds., 2004)

Children's Rights in Gay and Lesbian Families: A Child-Centered Perspective, in *Child, Family & State* 273 (Stephen Macedo et al. eds., 2003)

Articles

The Courage of Innocence: Children as Heroes in the Struggle for Justice, 2009 *Illinois Law Review* 1576 (2009)

A World Fit for Children is a World Fit for Everyone: Ecogenerism, Feminism and Vulnerability, 46 *Houston Law Review* 817 (2009)

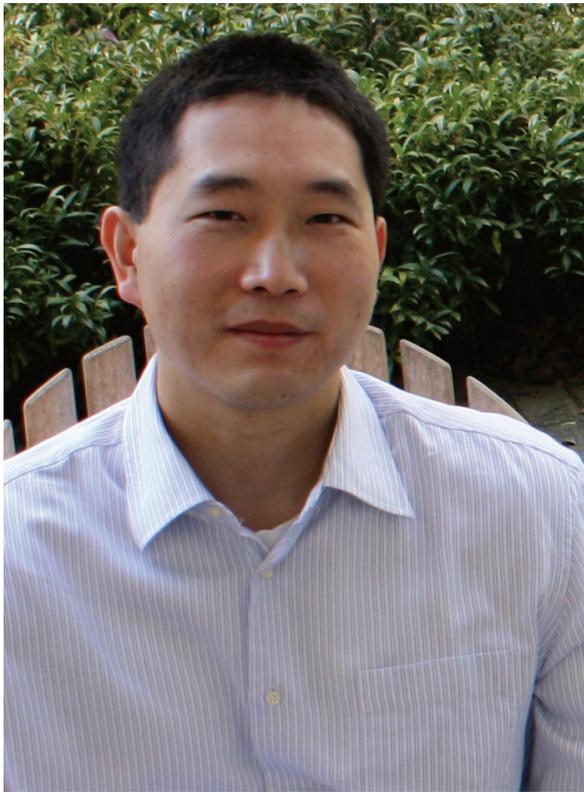
Individualism and Early Childhood in the U.S.: How Culture and Tradition Have Impeded Evidence-Based Reform, 8 *Journal of Korean Law* 97 (2008)

Waiting for Loving: The Child's Fundamental Right to Adoption, 34 *Capital University Law Review* 297 (2005)

Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm, 2004 *Chicago Law Forum* 85 (2004)

"What drew me to Emory was the synergy among the Barton Child Law and Policy Center, the Feminism and Legal Theory Project, the Vulnerability Initiative, and the Center for International and Comparative Law. It is a wonderful environment for cutting-edge interdisciplinary scholarship."

Election Law—Through the Lens of Political Science



Michael S. Kang

Associate Professor of Law

BA, University of Chicago, 1993

MA, University of Illinois, 1996

JD, University of Chicago, 1999

PhD, Harvard University, 2009

Scholarly Interests: voting, race, election law, and political science

Michael Kang draws on his backgrounds in law and political science to tackle the most fundamental questions of democratic theory, government, constitutional law — and, in particular, election law: a relatively new field both to courts and to scholars.

Documenting Kang’s approach in this growing field is a steady series of articles, including “Race and Democratic Contestation” (*Yale Law Journal*, 2008); “To Here From Theory in Election Law” (*Texas Law Review*, 2009); “Voting as Veto” (*Michigan Law Review*, 2010); and “The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions,” forthcoming in the *New York University Law Review*. He also is co-editing the book series *Cambridge Studies in Electoral Law and Democracy* for Cambridge University Press, with Guy-Uriel Charles and Heather Gerken.

“Election law is an area where doctrinal theory and institutional solutions in law should be tightly linked with our empirical understandings from political science about how politics work,” Kang comments. “In my view, it’s the most exciting area of law, because it offers a great deal of intellectual opportunity to be creative and relevant at the same time.”

SELECTED PUBLICATIONS

Books

Race, Reform, and Regulation of the Electoral Process (Cambridge 2011, forthcoming) (with Heather K. Gerken & Guy-Uriel E. Charles)

Book Chapters

An Institutional Turn in Election Law Scholarship, in *Race, Reform, and Regulation of the Electoral Process* (with Heather K. Gerken)

“In today’s hypercompetitive politics, there is more pressure than ever on election law to come up with the right answers and channel that competition in the right directions.”

EXCERPT: "RACE AND DEMOCRATIC CONTESTATION"

Particularly since the South has developed two-party competition that resembles what many view as "normal politics," the establishment of safe majority-minority districts under the Voting Rights Act (VRA) clashes with the normative priority of electoral competition for an increasing number of commentators and courts. Many commentators argue that safe majority-minority districts under the VRA reduce electoral competition and thus may run counter to the VRA's purposes today.

However, electoral competition is only one form of political competition. Electoral competition should be judged with reference to the ultimate ends it is intended to produce — more democratic debate, greater civic engagement and participation, and richer political discourse — all of which are implicated by a deeper notion of political competition among political leaders that I term "democratic contestation." Electoral competition serves only as a proxy, a means to these greater democratic ends.

I offer democratic contestation as a basic value to be pursued in the law of democracy and the foundation for a theory that helps sort through and reconcile approaches to race, representation, and political competition under the VRA. Democratic contestation represents the deliberative competition among political leaders to shape and frame the public's understandings about elective politics, public policy, and civic affairs. The process by which the community

entertains and confronts choices about how to define its politics is a crucial function of democracy, justly celebrated by democratic theory. Although electoral competition generally coincides with democratic contestation, it also diverges in instances that inform the way that the law of democracy should develop, particularly under the VRA.

Once viewed through a theory of democratic contestation, the VRA can be seen as procompetitive in the broader sense of democratic contestation. The VRA applies most forcefully under conditions of racial polarization where white and minority voters are locked into opposed voting blocs along the dominant axis of race. By breaking this racial stasis and carving out safe majority-minority districts, the VRA releases both groups from the overriding pressure, imposed by racial polarization, to maintain racial in-group cohesion and to avoid exploring concerns that may divide them along nonracial lines. For this reason, the majority-minority district can facilitate fraternal competition within the minority group and encourage engagement in an internal discourse that would be impossible, or at least inadvisable, in the face of racially polarized opposition. Majority-minority districting basically removes race from intradistrict politics, counterintuitively, by districting with race as the primary consideration.

—from *Race and Democratic Contestation*, 117 *Yale Law Journal* 734 (2008)

Articles

Sore Loser Laws and Democratic Contestation, 99 *Georgetown Law Journal* (forthcoming 2011)

The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions, 86 *New York University Law Review* (forthcoming 2011) (with Joanna Shepherd Bailey)

Voting as Veto, 108 *Michigan Law Review* 1221 (2010)

To Here From Theory in Election Law, 87 *Texas Law Review* 787 (2009)

De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform, 84 *Washington University Law Review* 667 (2006)

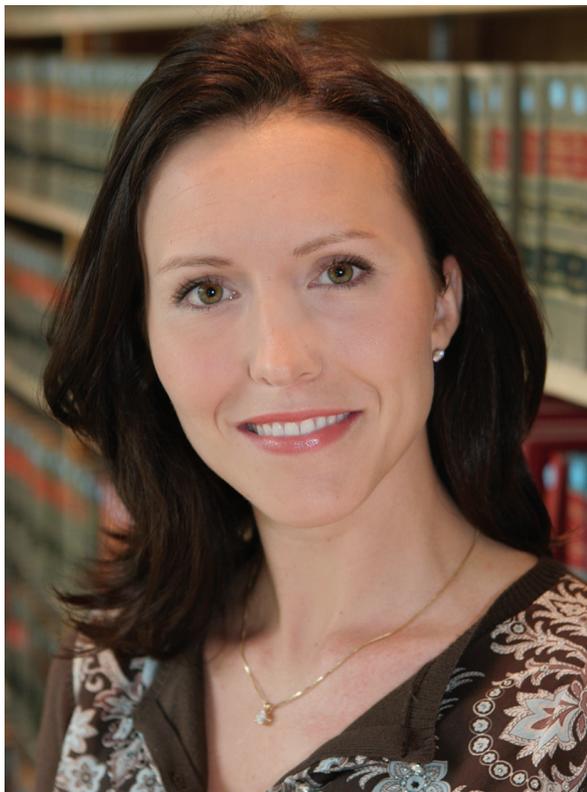
From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law, 73 *George Washington Law Review* 1070 (2005)

The Hydraulics and Politics of Party Regulation, 91 *Iowa Law Review* 131 (2005)

Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and 'Disclosure Plus,' 50 *UCLA Law Review* 1141 (2003)

"Campaign contributions from business groups are associated with an increase in the probability that elected judges who receive them will vote in favor of business litigants. Strikingly, however, this is true only for judges elected in partisan elections, not nonpartisan ones."

Justice: For Sale to the Highest Bidder?



Joanna Shepherd Bailey

Associate Professor of Law

BBA, Baylor University, 1997

PhD, Emory University (Law and Economics, and Econometrics), 2002

Scholarly Interests: law and economics, empirical analyses of legal changes and legal institutions

Business interests and lawyer groups account for nearly two-thirds of all contributions to state Supreme Court candidates — in totals that rise high into the millions. Moreover, a recent U.S. Supreme Court decision, *Citizens United v. FEC*, opens the door to expanded corporate spending in judicial races. And Joanna Shepherd Bailey wants the nation to take note.

“The ever-increasing importance of money in judicial elections has given wealthy interest groups an opportunity to shape the judiciary,” Bailey says. Her broadly visible scholarship in law and economics spans articles including “The Partisan Price of Justice” (*New York University Law Review*, forthcoming 2011) and “Money, Politics, and Impartial Justice” (*Duke Law Journal*, 2009); testimony before the U.S. House of Representatives’ Judiciary Committee and the National Academy of Sciences; and presentations at leading law schools throughout the United States, including Stanford, Chicago, NYU, Michigan, Northwestern, Duke, Georgetown, and USC.

Ultimately, will the highest bidder determine judicial decisions and who makes them? Bailey is working toward a better outcome: “I hope my research demonstrates that reforms to judicial elections are necessary both to ease this public concern and to safeguard impartial justice.”

SELECTED PUBLICATIONS

Articles

The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions, 86 *New York University Law Review* (forthcoming 2011) (with Michael S. Kang)

Judicial Opposition as Politics, 166 *Journal of Institutional & Theoretical Economics* 88 (2010)

Are Appointed Judges Strategic Too?, 58 *Duke Law Journal* 1589 (2009)

“Empirical evidence shows that in recent years, the ability of judges to remain impartial has been jeopardized by the increasing influence of money in judicial elections.”

EXCERPT: "MONEY, POLITICS, AND IMPARTIAL JUSTICE"

Centuries-old debate asks whether judicial elections are inconsistent with impartial justice. For many academics, elite lawyers, and federal judges, it is an assumed truth that judges should be protected completely from public influence. Judicial elections, they argue, turn judges into politicians, at the expense of judicial independence.

Despite the dislike that many have for judicial elections, approximately nine in ten state-court judges currently face the voters in some type of election. Moreover, surveys reveal that over 75 percent of the U.S. public prefers elections over appointments for selecting judges.

The debate over the best methods of judicial selection and retention in the U.S. states is especially important because more than 90 percent of the nation's judicial business is handled by state courts. Yet despite centuries of controversy about judicial elections, there is a dearth of empirical evidence addressing one of the significant issues in the controversy: the degree to which the political preferences of both voters and campaign contributors influence judges' decisions.

In a recent study, I endeavored to fill the gap by analyzing virtually all state supreme court decisions from 1995 to 1998 to see if there was any evidence that judges adjust their rulings to attract votes and campaign contributions. I found that judges who must be reelected by Republican voters, especially in partisan elections, tend to decide cases in accord with standard Republican policy: they are more likely to

vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases and torts cases generally, and against criminals in criminal appeals. Judicial behavior is correspondingly liberal for judges facing reelection by Democrats. Moreover, I found evidence that judges change their rulings when the political preferences of the voters change. In addition, my analysis found a strong relationship between campaign contributions and judges' rulings. Contributions from pro-business groups, pro-labor groups, doctor groups, insurance companies, and lawyer groups increase the probability that judges will vote for the litigants favored by those interest groups.

The results suggest that recent trends in judicial elections — elections becoming more contested, competitive, and expensive — threaten judicial independence. However, numerous reforms could reduce the intense pressure on judges to vote in a way that attracts votes and campaign contributions. For example, granting permanent tenure to state judges, eliminating partisan elections, moving to a system of public financing of judicial elections, voluntary spending limits on campaign spending, and stricter recusal rules for judges could reduce the pressure on judges. Until reforms are enacted, however, the application of impartial justice is at risk.

—from *Money, Politics, and Impartial Justice*, 58 *Duke Law Journal* 623 (2009)

The Influence of Retention Politics on Judges' Voting, 38 *Journal of Legal Studies* 169 (2009)

The Demographics of Tort Reform, 4 *Review of Law & Economics* 591 (2008) (with Paul H. Rubin)

Tort Reform's Winners and Losers: The Competing Effects of Care and Activity Levels, 55 *UCLA Law Review* 905 (2008)

Blakely's Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime, 58 *Hastings Law Journal* 533 (2007)

Tort Reform and Accidental Deaths, 50 *Journal of Law & Economics* 221 (2007) (with Paul H. Rubin)

Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States, 104 *Michigan Law Review* 203 (2005)

"Through my research, I want to inform the debates over the best methods for selecting judges and the appropriate role of money and politics in judicial elections."

The Complex Battlegrounds of Environmental Law



William W. Buzbee

Professor of Law

BA, Amherst College, 1983

JD, Columbia Law School, 1986

Scholarly Interests: environmental law, administrative law, and regulatory federalism and design issues

“These have become hot-button issues — before Congress, before agencies, and especially in intertwined lines of cases before the Supreme Court.” That’s how environmental law expert William Buzbee describes the ongoing debates over regulatory federalism and citizens’ roles in environmental protection and other fields of regulation. He continues, “Whether the U.S. retains state, local, and citizens’ roles could prove critical to achievement of climate change goals and to U.S. credibility abroad.”

Buzbee has worked on environmental cases taken up by the U.S. Supreme Court, has testified before Congress on environmental legislation and court decisions, and has written extensively about topics such as state and federal roles in protecting the environment, the Clean Air Act and Clean Water Act, hazardous waste and spill law, federalism and preemption battles, and citizen “standing” to bring environmental law cases against polluters and the government.

Of particular note are his work (as editor and contributor) on *Preemption Choice: The Theory, Law & Reality of Federalism’s Core Question* (Cambridge University Press 2009) and his article *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, published in the *New York University Law Review*. The sixth edition of his casebook, *Environmental Protection: Law and Policy*, is forthcoming in 2011, and among his many articles, three have been named among the ten best environmental or land use law articles of their year and republished in the *Land Use and Environmental Law Review*.

SELECTED PUBLICATIONS

Books

Environmental Protection: Law and Policy (6th ed., Aspen 2011, forthcoming) (with Robert L. Glicksman, David L. Markell, Daniel R. Mandelker & A. Dan Tarlock)

“The long-enduring political preference for retaining multilayered and interactive regulatory roles, especially in our nation’s environmental laws, actually makes great sense.”

EXCERPT: "PREEMPTION HARD LOOK REVIEW, REGULATORY INTERACTION, AND THE QUEST FOR STEWARDSHIP AND INTERGENERATIONAL EQUITY"

Preemptive action can have its place, especially with design mandates or to create benefits of economies of scale. More interactive, multiactor regulatory strategies, however, greatly reduce several pervasive sources of regulatory risk and also improve the odds of superior regulatory outcomes.

First, if all regulatory power is handed to one actor, all is dependent on the initial regulatory judgment being right. If it falls short, or is imprudent at the moment of creation, the absence of other actors or regulatory venues to reconsider that judgment can freeze the law. Not only will no better approach be tested or revealed, but incentives to critique the status quo will exist only if that single actor is amenable to persuasion. When one factors in reluctance to engage in self-criticism, giving sole regulatory turf to one actor is risky.

Second, structures that retain concurrent and overlapping actors and turfs provide unavoidable opportunities for mutual learning and adjustment. Politicians and regulators will have incentives and opportunities to improve on others' regulatory efforts. Stakeholders can point to others' better efforts to advocate change. And in settings such as climate change policy, where basic regulatory design choices and future repercussions of accumulating greenhouse gases remain uncertain, allowing multiple actors to retain roles reduces the risk of a single actor monopolizing the regulatory

field without opportunities for dynamic learning.

The idea that open, deliberative, interactive and transparent legal and political process fosters better decision making is found across a wide range of legal doctrine. A core argument for federalist systems is to preserve states as laboratories of democracy. Environmental laws themselves use many cooperative and interactive structures that are open and provide room for pragmatic adjustment. The prevailing political choice to preserve common law regimes in tandem with regulatory schemes provides latitude for interactive learning and regulatory "feedback," with regulators learning from common law litigation and vice versa.

A growing strain in Supreme Court jurisprudence is similarly rooted in the belief that open and deliberative regulatory process should be rewarded when judicially reviewed. Several important recent cases calibrate the amount of deference to the amount of agency deliberative process preceding the challenged action. With less or absent process, the level of deference drops. This strain is important to the argument for preemption hard look review due to how it supports more rigorous review of agency actions taken without preceding open and deliberative process.

—from *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 *George Washington Law Review* 1521 (2009)

Preemption Choice: The Theory, Law & Reality of Federalism's Core Question (Cambridge 2009)

Book Chapters

Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity, in *Preemption Choice: The Theory, Law & Reality of Federalism's Core Question* 98 (William W. Buzbee ed., 2009)

Articles

State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword, 1 *San Diego Journal of Climate and Energy Law* 23 (2010)

Adjudicatory Triggers of Enhanced Ambient Environment Information, 83 *Indiana Law Journal* 583 (2008)

Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction, 82 *New York University Law Review* 1547 (2007)

"As an environmental law scholar with substantial immersion in administrative law and constitutional law, I've long been fascinated by how federal, state, and local governments interact, and also by how citizens' distinctive and powerful regulatory roles in the United States shape our environmental laws."

Beyond Our Borders: Whose Responsibility?

Jonathan Nash

Professor of Law

BA, Columbia College, 1988

JD, New York University School of Law, 1992

LLM, Harvard Law School, 1999

Scholarly Interests: environmental law, property law, civil procedure, and courts and judges



A prolific scholar publishing in many top-ranked law journals, Jonathan Nash came to Emory after serving as the Robert C. Cudd Professor of Environmental Law at Tulane University Law School. He has been a

visiting professor at University of Chicago Law School and Hofstra University School of Law, as well as a visiting scholar at Columbia Law School.

“Governments are realizing that environmental problems can become massive if left unattended, yet domestic environmental laws remain lax in many countries,” Nash states. “The temptation is to rely upon another country’s environmental laws. Such an approach, however, implicates concerns of sovereignty, which are of great importance on the international stage.”

SELECTED PUBLICATIONS

Articles

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

The Institutional Dynamics of Transition Relief, 85 *New York University Law Review* 391 (2010) (with Jonathan S. Masur)

Null Preemption, 85 *Notre Dame Law Review* 1015 (2010)

Property Frames, 87 *Washington University Law Review* 449 (2010) (with Stephanie M. Stern)

Allocation and Uncertainty: Strategic Responses to Environmental Grandfathering, 36 *Ecology Law Quarterly* 809 (2009)

Packaging Property: The Effect of Paradigmatic Framing of Property Rights, 83 *Tulane Law Review* 691 (2009)

EXCERPT: “THE CURIOUS LEGAL LANDSCAPE OF THE EXTRATERRITORIALITY OF U.S. ENVIRONMENTAL LAWS”

One might expect domestic environmental laws to apply extraterritorially. While the Supreme Court has indicated that statutes should be read with a presumption against extraterritorial reach, a robust “effects” exception to the presumption has arisen. Further, international law is clear that sovereign states must not allow polluting activities that have adverse effects in other sovereign states. Therefore, one might expect courts to interpret U.S. environmental laws to apply extraterritorially when the effects of an activity are felt domestically.

Domestic jurisprudence does not conform to these expectations. The few courts that have recognized extraterritorial applications of domestic environmental statutes either uphold extraterritorial applications only in settings governed as a global commons, where no sovereign asserts exclusive jurisdiction, or they characterize what seems to be a plainly extraterritorial application of a statute as a purely domestic one.

I offer four explanations for this divergence between the expectations and reality of extraterritorial environmental law jurisprudence: the importance of reciprocity in international environmental law; the potentially massive scope of extraterritorial application of domestic environmental laws; standing doctrine’s limitations on private litigants’ ability to invoke domestic environmental laws; and misguided attempts by courts to frame cases so as to confine their holdings on extraterritoriality.

—from *The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws*, 50 *Virginia Journal of International Law* 997 (2010)

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

Human Rights, Religion, and Secularism in Synergy

Abdullahi An-Na'im

Charles Howard Candler Professor of Law

LLB, University of Khartoum, 1970

LLB, University of Cambridge, 1973

MA, University of Cambridge, 1973

PhD, University of Edinburgh, 1976

Scholarly Interests: human rights, comparative law, and Islamic law



Abdullahi An-Na'im affirms, "I believe in the power of ideas to inspire and guide action that can transform the world." An internationally acknowledged scholar of Islam and human rights as well as human rights in cross-cultural perspectives, he

acts on his convictions. Throughout his work, he argues that incompatibility among human rights, religion, and secularism can be replaced by synergy and interdependence.

An-Na'im's books, within an overarching focus on the relationship between Islamic law and modern legal systems around the world, include *Islam and the Secular State*, *African Constitutionalism and the Role of Islam*, and, forthcoming in 2011, *Muslims and Global Justice*. In 2010, An-Na'im presented the Tanner Lectures on Human Values at the University of California–Berkeley. He also directs Emory's Center for International and Comparative Law.

SELECTED PUBLICATIONS

Books

Muslims and Global Justice (University of Pennsylvania 2011, forthcoming)

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

Cultural Transformation and Human Rights in Africa (Zed 2002)

Islamic Family Law in a Changing World: A Global Resource Book (Zed 2002)

EXCERPT: "ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A"

My purpose is to affirm that the secular state, as defined in this book [neutral regarding all religion], is more consistent with the inherent nature of Shari'a and the history of Islamic societies than are false and counterproductive assertions of a so-called Islamic state or the alleged enforcement of Shari'a as state law.

...

My core proposition for the future of Shari'a rests on the separation of Islam and the state, accompanied by the nurture and regulation of the organic relationship between Islam and politics. It is not possible, nor desirable in my view, for people of any society to keep their religious beliefs, commitments, and concerns out of their political choices and decisions. Recognizing and regulating the role of religion as a legitimate source of guidance for political decisions is healthier and more practical than forcing religious reasoning into the domain of fugitive politics. It also is necessary, I believe, to challenge the superiority of an abstract notion of a purely secular rationale to a religious rationale, where the latter is presumed to be a less valid form of argument.

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

Book Chapters

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

A Theory of Islam, State and Society, in *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* 145 (Kari Vogt et al. eds., 2009)

Articles

The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law, 73 *Modern Law Review* 1 (2010)

Opening Up New Dimensions of Understanding



John Witte Jr.

Jonas Robitscher Professor of Law

Alonzo L. McDonald Distinguished Service Professor

BA, Calvin College, 1982

JD, Harvard University, 1985

Scholarly Interests: legal history, religious liberty, marriage and family law, and human rights

Law. Religion. What links them? To John Witte Jr., “Law and religion are universal solvents of human living; they’re also volatile compounds that can come together in explosive ways.” From that point of tension, Witte has produced award-winning scholarship that marks him as a world authority on legal history, marriage law, and religious liberty. He also directs Emory’s interdisciplinary Center for the Study of Law and Religion, which — with a global reach — forecasts and explores fundamental questions about how religion interacts with law, politics, and society.

To date, Witte’s publications comprise 180 articles, 12 journal symposia, and 24 books, including six recent titles with Cambridge University Press: *Law and Protestantism* (2002); *To Have and to Hold* (2007); *The Reformation of Rights* (2007); *Christianity and Law* (2008); *The Sins of the Fathers* (2009); and *Christianity and Human Rights* (2010). His writings have appeared in ten languages, and he has delivered more than 300 public lectures at major universities throughout the world.

Professor Witte has directed fifteen international research projects on “Religion and Human Rights”; “Marriage, Family, and Children”; and “Christian Legal Studies” (collectively yielding some 160 new volumes and 270 public forums), and he edits two major book series: “Studies in Law and Religion” and “Religion, Marriage and Family.” A gifted classroom teacher, Witte has won ten Most Outstanding Professor awards from Emory Law along with two Silver Apple Awards, the Emory Williams Award, and the University Scholar-Teacher Award from Emory University.

“Think about science: the human genome project, designer babies, cloning creatures, environmentalism. These issues will become more deeply contested, and both law and religion will need to weigh in on them.”

EXCERPT: "RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT"

The civic catechisms and canticles of our day still celebrate Thomas Jefferson's experiment in religious liberty. To end a millennium of repressive religious establishments, we are taught, Jefferson sought liberty in the twin formulas of privatizing religion and secularizing politics. Religion must be "a concern purely between our God and our consciences," he wrote. Politics must be conducted with "a wall of separation between church and state." "Public religion" is a threat to private religion, and must thus be discouraged. "Political ministry" is a menace to political integrity and must thus be outlawed.

These Jeffersonian maxims remain for many today the cardinal axioms of a unique American logic of religious freedom to which every patriotic citizen and church must yield. Every American public school student learns the virtues of keeping his Bible at home and her prayers in the closet. Every church knows the tax law advantages of high cultural conformity and low political temperature. Every politician understands the calculus of courting religious favors without subverting religious causes. Religious privatization is the bargain we must strike to attain religious freedom for all. A wall of separation is the barrier we must build to contain religious bigotry for good.

Separation of church and state was certainly

part of American law when many of today's public opinion-makers were in grade school. But strict separation is no longer the law of the land. In the past twenty-five years, the Supreme Court has abandoned much of its earlier separationism and reversed several of its harshest precedents on point. In a dozen cases, the Court has upheld government policies that support the equal access and public activities of religious groups — so long as these religious groups are voluntary and so long as nonreligious groups are treated the same way. So: religious counselors could be funded as part of a broader federal family counseling program. Religious groups could have the same access to public facilities and forums that were open to other civic groups. Religious students were just as entitled to public school classrooms and publication funds as those of nonreligious student groups. Religious schools were just as entitled to participate in a state-sponsored school voucher program as other private schools. Peaceable public expressions of religion now enjoy full constitutional protection, even on governmental land. Equal treatment has replaced strict separation as the first principle of religious liberty.

from *Religion and the American Constitutional Experiment* (3d ed., Westview 2010) (with Joel A. Nichols 00L 00T)

SELECTED PUBLICATIONS

Books

Religion and Human Rights (Oxford 2011, forthcoming) (with M. Christian Green 95L 95T)

Sex, Marriage and Family in John Calvin's Geneva (Eerdmans 2011, forthcoming) (with Robert M. Kingdon)

The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered (Cambridge 2009)

Christianity and Law: An Introduction (Cambridge 2008) (with Frank S. Alexander)

Modern Christian Teachings on Law, Politics, and Human Nature (two volumes) (Columbia 2007) (with Frank S. Alexander)

The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism (Cambridge 2007)

To Have and to Hold: Marriage and its Documentation in Western Christendom (Cambridge 2007)

God's Joust, God's Justice: Law and Religion in the Western Tradition (Eerdmans 2006)

Sex, Marriage, and Family in World Religions (Columbia 2006)

Law and Protestantism: The Legal Teachings of the Lutheran Reformation (Cambridge 2002) (German translation 2011; Chinese translation 2010)

"The Center for the Study of Law and Religion has been a wonderful laboratory for the University to explore its distinctive interdisciplinary vision involving religion, to sponsor work that is viewed as controversial, cutting edge, even dangerous at times, and to see that it can work."

Robert Ahdieh

Associate Dean of Faculty and Professor of Law

AB, Princeton University, 1994
JD, Yale University, 1997

FINANCIAL CRISIS AND REFORM



“The financial crisis has arguably been the most significant social, economic, and political event of our time.” Across an array of settings — from international trade and finance, to

federal-state interaction in the making of corporate and securities law — Robert Ahdieh has explored the dynamics of coordination at work in the engagement of regulatory institutions across jurisdictional lines, and in the design of regulation suited to the changing nature of the social and economic order. Of late, he has brought this framework to bear in the study of the global financial crisis. Drawing on game theory, Ahdieh points to failures of coordination as the root cause of the crisis, and plays out the implications of this conclusion for the form and function of relevant regulation.

RECENT WORK

Book Chapters

Varieties of Corporate Law-Making: Competition, Preemption, and Federalism, in *Research Handbook on the Economics of Corporate Law* (Claire A. Hill & Brett McDonnell eds., forthcoming 2011)

Articles

Beyond Individualism in Law and Economics, 90 *Boston University Law Review* (forthcoming 2010)

Imperfect Alternatives: Networks, Salience, and Institutional Design in Financial Crisis, 79 *Cincinnati Law Review* (forthcoming 2010)

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

The Fog of Certainty, 119 *Yale Law Journal Online* 41 (2009)

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

Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination, 73 *Missouri Law Review* 1185 (2008)

Timothy Holbrook

Professor of Law

BS, North Carolina State University, 1993
JD, Yale University, 1996

INTELLECTUAL PROPERTY LAW



RECENT WORK

Books

Patent Litigation and Strategy (3d 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 & Technology* 1 (2009)

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

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

Robert Schapiro

Professor of Law

BA, Yale University, 1984
MA, Stanford University, 1986
JD, Yale University, 1990

FEDERALISM/CONSTITUTIONAL LAW

RECENT WORK

Books

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

Book Chapters

The Varieties of Federalisms, in *Climate Change and Federalism: Beyond National Policy* (Marc Miller & Edella Schlager eds., forthcoming 2011)

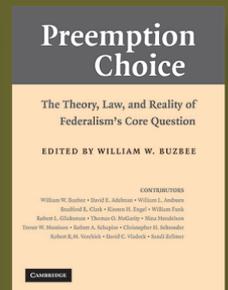
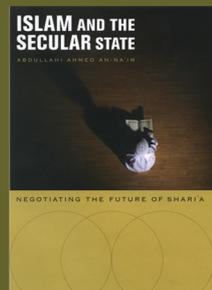
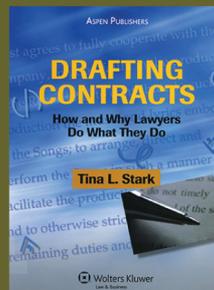
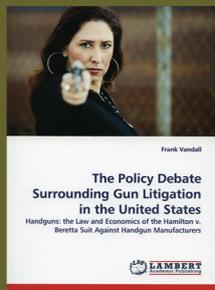
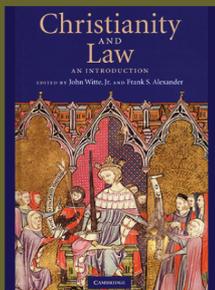
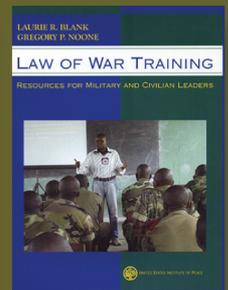
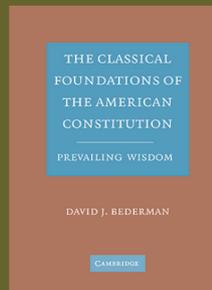
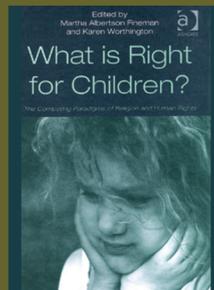
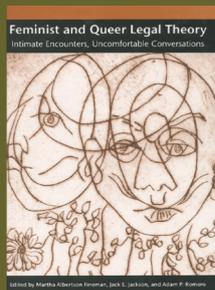
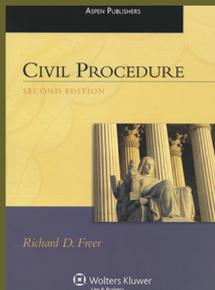
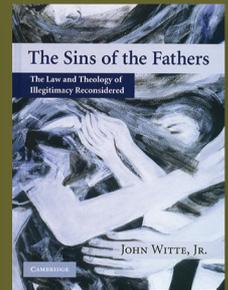
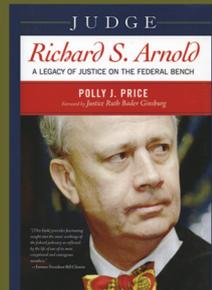
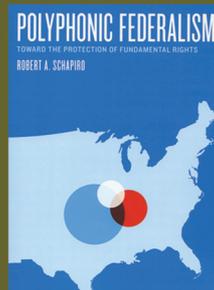
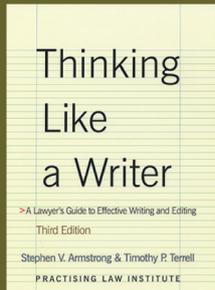
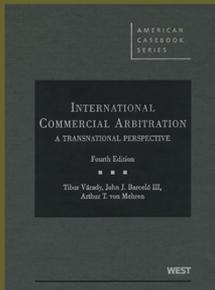
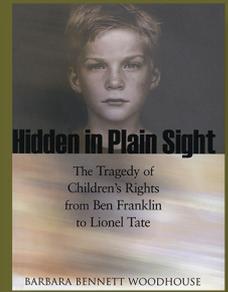
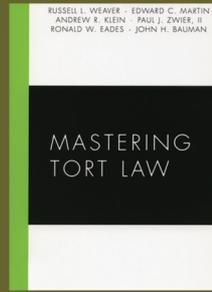
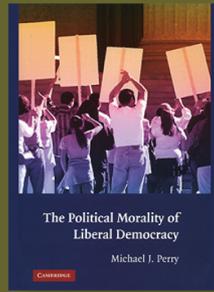
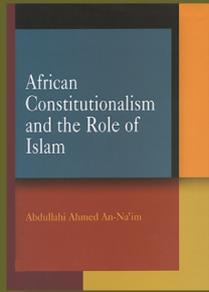
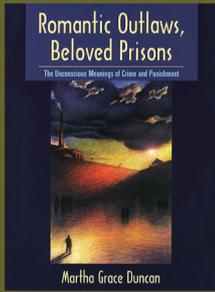
Articles

Not Old or Borrowed: The Truly New Blue Federalism, 3 *Harvard Law & 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)

From the Bookshelf: Recently Published Faculty Books

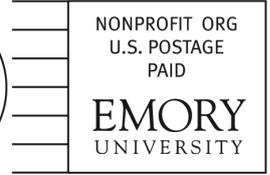




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INSIDE THIS ISSUE

- **Martha Albertson Fineman** on Equality
- **Barbara Bennett Woodhouse** on Children's Rights
- **Michael Kang** and **Joanna Shepherd Bailey** on Election Reform
- **Bill Buzbee** and **Jonathan Nash** on Environmental Law
- **Abdullahi An-Nai'im** on Human Rights and Religion
- **John Witte** on Law and Religion