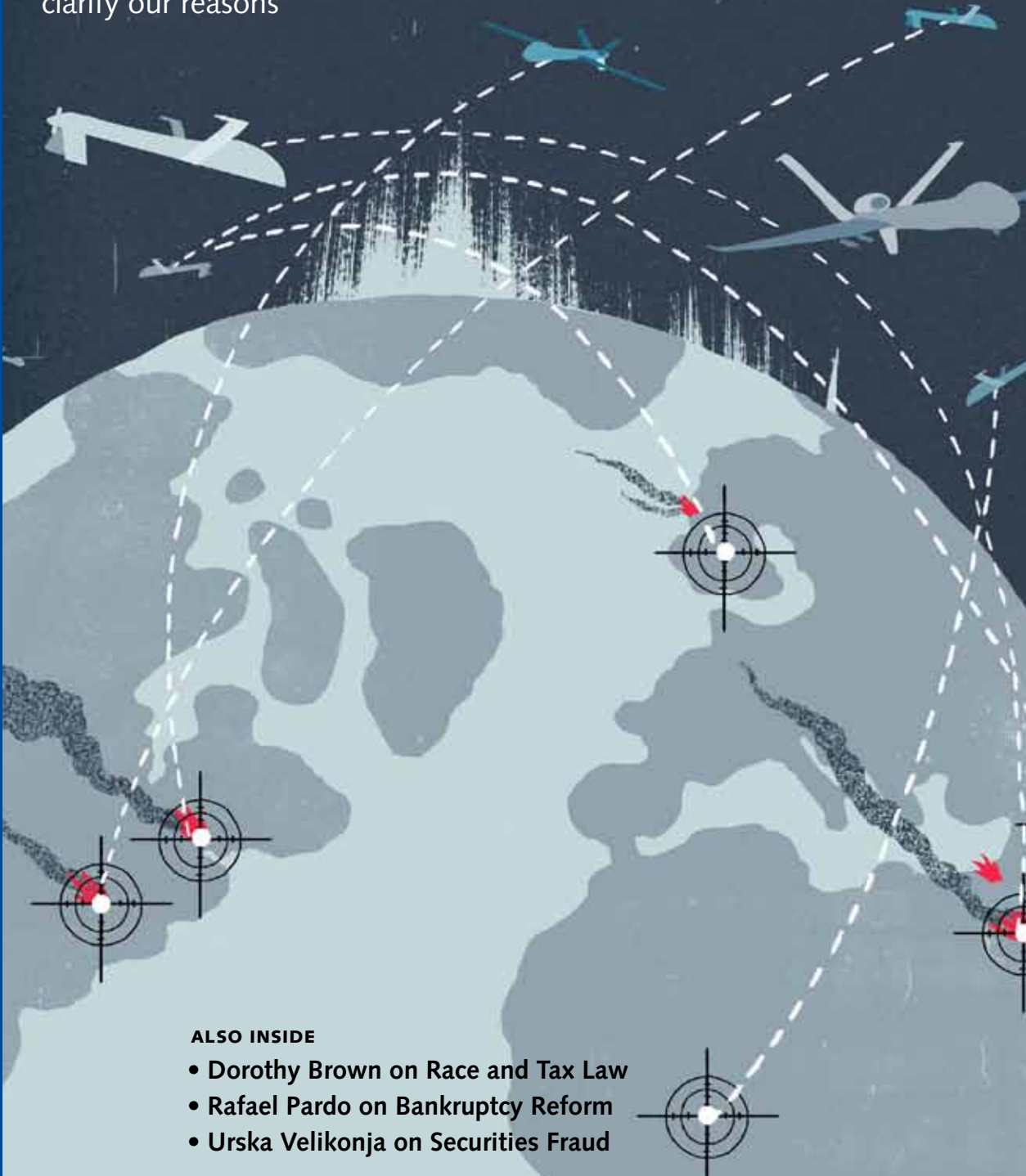


Justifying targeted strikes

Laurie Blank suggests we need to clarify our reasons

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- Urska Velikonja on Securities Fraud





"The laws of war protect innocent people who are not involved in the fighting. They protect those who are fighting from being harmed if they are captured. And they protect the fighters from the moral corrosiveness of fighting without any limits."

—Laurie Blank, clinical professor of law and director,
International Humanitarian Law Clinic

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About Emory Insights

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Bringing Law to War



Laurie Blank

Clinical Professor of Law and Director, International Humanitarian Law Clinic

AB, Princeton University, 1993

MA, Johns Hopkins School of Advanced International Studies, 1995

JD, New York University School of Law, 1998

Scholarly interests: law of war, international humanitarian law, human rights

Shakespeare led Laurie Blank to her area of specialty. While a student at the New York University School of Law, she worked as a fellow for Professor Theodor Meron, one of the foremost authorities on the law of war. Meron was writing a book on Shakespeare and the law of war, and he assigned his young fellow to do the legwork.

“I remember thinking, ‘Shakespeare? Really?’,” Blank says.

For two years she delved into law of war treatises dating back to the Middle Ages and compared them with the Bard’s interpretations in his plays.

“The correlation was astounding,” she says. “He was clearly very familiar with the main writings on the law of war. It turned out to be a lot of fun, and I was hooked.”

Today Blank is the director of the Emory International Humanitarian Law Clinic, where she teaches international humanitarian law and works directly with students who provide assistance to international tribunals, the U.S. military, and nongovernmental organizations around the world. She recently coauthored a casebook on the law of war entitled *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (with Gregory Noone, Aspen Publishing 2013).

Most civilians aren’t aware that the law of war exists, but Blank points out that it dates back to antiquity.

“The law of war has been around forever,” she says. “As far back as you can go, you’ll find regulation about how fighting should be conducted. It’s in the Old Testament. You’ll find it in all cultures in all ages.” It exists to minimize the suffering that is inherent with armed conflict.

“The law of war has been around forever. As far back as you can go, you’ll find regulation about how fighting should be conducted.”

Excerpt: “Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications”

Targeted strikes—predominantly using drones—have become the operational counterterrorism tool of choice for the United States over the past few years. Beginning in the mid-2000s, the U.S. has engaged in target-specific drone airstrikes against Taliban and al-Qaeda militants in Pakistan, al-Qaeda operatives in Yemen and al-Shabab militants in Somalia. In the first such targeted killing after September 11, a CIA drone launched a Hellfire missile and killed six suspected al Qaeda members traveling in a car in southern Yemen in November 2002, including the man believed to be responsible for the bombing of the USS Cole. U.S. targeted strikes began in Pakistan in 2004, and have increased dramatically in the past few years. In 2009, the U.S. launched fifty-three strikes—a rate of one drone strike per week—before increasing to 118 strikes in 2010, and had launched over seventy by November 2011. In Somalia, as early as 2007, the U.S. launched attacks against al Qaeda members suspected of involvement in the 1998 Embassy bombings. After multiple attempts to target Saleh Ali Saleh Nabhan, the al Qaeda militant suspected of masterminding the 2002 attack on the Paradise Hotel in Mombasa, Kenya, the U.S. launched a commando raid in broad daylight, killing Nabhan and at least eight others. Israel has used targeted killing extensively and openly for over a decade, targeting Hamas militants in Gaza and the West Bank.

Targeted killing can be defined as “the use of lethal forces attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.” Targeted killing can be used both within armed conflict and in the absence of armed conflict, as a means of self-defense, usually as operational counterterrorism. Indeed, this duality lies at the heart of the U.S. justifications for drone strikes from Afghanistan to Somalia. Within armed conflict, parties to the conflict have the right to use lethal force in the first resort against enemy forces, which includes, as detailed below, members of the regular armed forces, members of organized armed groups or civilians directly participating in hostilities. International law also recognizes the right of states to use force in self-defense in certain circumscribed circumstances.

For the past several years, the U.S. has relied on both armed conflict and self-defense as legal justifications for targeted strikes outside of the zone of active combat in Afghanistan. A host of interesting questions arise from both the use of targeted strikes and the expansive U.S. justifications for such strikes, including the use of force in self-defense against nonstate actors, the use of force across state

boundaries, the nature and content of state consent to such operations, the use of targeted killing as a lawful and effective counterterrorism measure and others. Furthermore, each of the justifications—armed conflict and self-defense—raises its own challenging questions regarding the appropriate application of the law and the parameters of the legal paradigm at issue. For example, if the existence of an armed conflict is the justification for certain targeted strikes, the immediate follow-on questions include the determination of a legitimate target within an armed conflict with a terrorist group and the geography of the battlefield. Within the self-defense paradigm, key questions include the very contours of the right to use force in self-defense against individuals and the implementation of the concepts of necessity and imminence, among many others.

However, equally fundamental questions arise from the use of both justifications at the same time, without careful distinction delimiting the boundaries between when one applies and when the other applies. From the perspective of the policymaker, the use of both justifications without further distinction surely offers greater flexibility and potential for action in a range of circumstances. To the extent such flexibility does not impact the implementation of the relevant law or hinder the development and enforcement of that law in the future, it may well be an acceptable goal. In the case of targeted strikes in the current international environment of armed conflict and counterterrorism operations occurring at the same time, however, the mixing of legal justifications raises significant concerns about both current implementation and future development of the law.

One overarching concern is the conflation in general of *jus ad bellum* and *jus in bello*. The former is the law governing the resort to force—sometimes called the law of self-defense—and the latter is the law regulating the conduct of hostilities and the protection of persons in conflict—generally called the law of war, the law of armed conflict or international humanitarian law. International law reinforces a strict separation between the two bodies of law, ensuring that all parties have the same obligations and rights during armed conflict to ensure that all persons and property benefit from the protection of the laws of war. For example, the Nuremberg Tribunal repeatedly held that Germany’s crime of aggression neither rendered all German acts unlawful nor prevented German soldiers from benefitting from the protections of the *jus in bello*. More recently, the Special Court for Sierra Leone refused to reduce the sentences of Civil Defense Forces fighters on the grounds that
(continued on following page)

they fought in a “legitimate war” to protect the government against the rebels. The basic principle that the rights and obligations of *jus in bello* apply regardless of the justness or unjustness of the overall military operation thus remains firmly entrenched. Indeed, if the cause at arms influenced a state’s obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons *hors de combat*, states would justify all departures from *jus in bello* with reference to the purported justness of their cause. The result: an invitation to unregulated warfare.

This article [focuses] on the consequences of the U.S. consistently blurring the lines between the armed conflict paradigm and the self-defense paradigm as justifications for the use of force against designated individuals.... In particular, this blurring undermines efforts to fulfill the core purposes of the law, whether the law of armed conflict or the law governing the resort to force, hinders the development and implementation of the law going forward, and risks complicating or even weakening enforcement of the law.

Over the past two years, we have seen increasing calls for greater transparency from the U.S. government and intelligence agencies regarding the decision-making process for targeted killing, both the placing of individuals on a “kill list” and the actual decision to operationalize that decision with a targeted strike. Additional information about the key indicators the U.S. views as critical to targeting determinations would certainly provide greater clarity for legal analysis of any given targeted strike. Much of the information sought, of course, is classified, making further detailed analysis difficult and, potentially, unlikely in the near future. However, the instant analysis offers an alternative approach both to understanding the effect of the existing U.S. framework for targeted strikes and, more importantly, for analyzing the consequences for implementation and

enforcement of the law overall—now and in the future.

... The nature of the terrorist threat the U.S. and other states face does indeed raise the possibility that both the armed conflict and the self-defense paradigms are relevant to the use of targeted strikes overall. The U.S. has maintained for the past ten years that it is engaged in an armed conflict with al Qaeda and, notwithstanding continued resistance to the notion of an armed conflict between a state and a transnational terrorist group in certain quarters, there is general acceptance that the scope of armed conflict can indeed encompass such a state versus nonstate conflict. Not all U.S. counterterrorism measures fit within the confines of this armed conflict, however, with the result that many of the U.S. targeted strikes over the past several years may well fit more appropriately within the self-defense paradigm. The existence of both paradigms as relevant to targeted strikes is not inherently problematic. It is the United States’ insistence on using reference to both paradigms as justification for individual attacks and the broader program of targeted strikes that raises significant concerns for the use of international law and the protection of individuals by blurring the lines between the key parameters of the two paradigms.

... Using both the armed conflict and self-defense justifications for all targeted strikes, whether in Pakistan, Yemen, Somalia, or elsewhere, may be an easy way to communicate to the public that the state is using force to eliminate “bad guys.” It certainly adds a great degree of flexibility to policymaking and decisionmaking, which is highly valuable from the perspective of political leaders. The costs of allowing the lines between legal regimes and paradigms to become blurred, however, are far too great.

—from Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, 38 *William Mitchell Law Review* 1655 (2012)

“These laws protect innocent people who are not involved in the fighting,” says Blank. “They protect those who are fighting from being harmed if they are captured. And they protect the fighters from the moral corrosiveness of fighting without any limits.”

Within this broad body of law, Blank concentrates on practical applications. For example, she has been looking at the consequences of the United States having put forth two different justifications for the drone strikes in Afghanistan—one, the argument that we are at war with al Qaeda and two, as an effort at self-defense.

“Legally those are two different reasons that have different sets of parameters for how far you can go,” says Blank. “In war, for example, you can kill the enemy as a first resort. If you are not at war, however, you can only use deadly force as an absolute last resort. If we continue to use these two reasons together, will we stop being able to understand when it’s OK to use force as a first resort and when it’s not? So I write to promote clarity and effectiveness in the law, because that will help the law to do its job.”

Blank’s study of the law and policy governing drone strikes is complemented by the related work

of her Emory Law colleagues, on the current and historical law of warfare and national security. Professor Mary Dudziak's scholarship on the president's role as commander in chief, the legality of the United States' extensive use of drones, and other topics, as well as Professor Charlie Shanor's work on counterterrorism law, have made Emory an ideal home for Blank's scholarly pursuits.

"Emory offers a perfect environment to study the issues of greatest interest to me," says Blank.

Blank had been drawn to law, specifically international relations, since she was an undergraduate. She graduated cum laude from Princeton University with a degree in political science and got her master's in international relations from

Blank has been looking at the consequences of the United States having put forth two different justifications for the drone strikes in Afghanistan—one, the argument that we are at war with al Qaeda and two, as an effort at self-defense.

Johns Hopkins University's Paul H. Nitze School of Advanced International Studies.

Following a one-year stint at a large New York law firm, Blank signed on at the U.S. Institute of Peace. An independent federal research institute created by congressional statute in 1984, the institute focuses on research, training and education in the areas of conflict resolution and peace building. During her three years there, Blank worked in the Rule of Law program and focused on international humanitarian law and transitional justice. The latter focuses on the mechanisms and principles through which countries transition from war or repressive regimes to what comes afterward.

After taking some time off when she had her three children, Blank returned to work part-time with Professor Shanor, thanks to an introduction by her sister, Julie Schwartz, a professor in Emory's legal writing program. After three semesters, Shanor began talking to Blank about what else she could do at the law school.

Blank pitched the idea of the International Humanitarian Law Clinic, and she and Shanor saw it to fruition. Blank connects students with humanitarian organizations, government agencies, the military, and others, and oversees their work. Her students have worked with international tribunals for Sierra Leone and Lebanon, with lawyers representing Guantanamo detainees, and

with the Marine Corps University, and the U.S. Naval War College.

"Unlike other areas of law, there is no straight path that leads directly to careers in international law," says Blank. "It can be very difficult for students to get an idea of what they would actually do. So the idea behind the clinic was to give students an opportunity to actually get their hands dirty, to do some real lawyering work in the field of international humanitarian law. On the flip side, of course, they are helping some of the organizations around the world that are working to combat the effects of conflict, to hold people accountable, and to help countries deal with the aftermath of conflict."

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Books

War Crimes: Accountability in Armed Conflict (Carolina Academic Press, forthcoming 2014) (with Geoffrey S. Corn, Rachel VanLandingham & Christopher Jenks)

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Recent Scholarship



An-Na'im

Abdullahi A. An-Na'im

Charles Howard Candler Professor of Law

Books

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Muslims and Global Justice (University of Pennsylvania 2011)

Book Chapters

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Islam and Human Rights, in *Religion and Human Rights*, (John Witte Jr. & M. Christian Green, eds., 2012)

Articles

Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective, 39 *Pepperdine Law Review* 1231 (2013)

Mary Dudziak

Asa Griggs Candler Professor of Law

Books

Going to War: An American History (Oxford University Press, forthcoming 2014)

War Time: An Idea, Its History, Its Consequences (paperback ed., Oxford University Press 2013)

Cold War Civil Rights: Race and the Image of American Democracy (2nd ed., Princeton University Press 2011)

Articles

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Martha Albertson Fineman

Robert W. Woodruff Professor of Law

Books

Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice (Intersentia Publishing 2013) (with Estelle Zinsstag)

What is Right for Children: The Competing Paradigms of Religion and Human Rights (Ashgate 2009) (with Karen Worthington)



Dudziak



Fineman



Ruskola



van der Vyver



Woodhouse

Teemu Ruskola

Professor of Law

Books

Legal Orientalism: China, the United States, and Modern Law (Harvard University Press 2013)

Journals

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Johan van der Vyver

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

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Barbara Bennett Woodhouse

L.Q.C. Lamar Professor of Law

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Rights of Parents and Children in Juvenile Justice and Child Abuse Investigation, in *International Survey of Family Law* (William Atkin, ed., 2012)

Reforming Tax Theory—and Practice



Dorothy A. Brown

Vice Provost for Academic Affairs and Professor of Law

BS, Fordham University, 1980

JD, Georgetown University Law Center, 1983

LLM, New York University School of Law, 1984

Scholarly interests: federal income tax, critical race theory, corporate tax, tax policy

Professor Dorothy Brown recalls the day she did her parents' taxes as one that still informs her work. Brown, an expert in tax law and critical race theory, grew up in the south Bronx. Her father was a plumber, her mother a nurse.

Because her parents' incomes were nearly equal, the tax code imposed a heavy marriage penalty on them, Brown noticed. What didn't occur to her then was that race might have something to do with it.

"But as it turns out, Census Bureau data showed that married black couples were more likely to earn roughly equal amounts than married white couples," Brown says. The marriage penalty consequently hits black families much more than white families.

As in the case of the marriage penalty, Brown examines how race and class skew tax law. For example, while income taxes are popularly viewed as a common, shared misery for all Americans, she finds otherwise.

Her ultimate goal is to change the way the American public thinks about tax policy, and not just once a year, in mid-April.

"I think my work sheds light on a complicated issue and makes it accessible," Brown says. "Most people don't understand taxes—they're complicated and boring. And talking heads on television generally don't explain things in English. So the public is turned off, except during tax time."

The current system, while labeled progressive, is stacked to benefit those who have the most, Brown says.

One of the ways the rich are favored is that capital gains income is taxed at a fraction of the rate of income earned through wages. Also, the higher one's income, the more one benefits from itemized deductions. Since two-thirds of Americans don't itemize, Brown argues a lower overall tax

Brown has called for publication of "The 535 Report"—by which members of Congress would make their tax returns available to the public.

Excerpt: “The 535 Report: A Pathway to Fundamental Tax Reform”

Most Americans lose under the current [tax] system, yet the system continues. What would it take for change to occur? Have the highest income Americans so “influenced” Congress with their campaign contributions that Congress mindlessly does their bidding? I believe the explanation is more complicated than that. I argue that the people who benefit most from our current tax policies are members of Congress. I suspect that members of Congress are disproportionate beneficiaries of the choices they enact into law. I don’t know this for a fact, because members of Congress are not required by law to release their tax returns and very few do. Therefore, the first step toward meaningful tax reform will be for the Internal Revenue Service (IRS) to issue a report on the 535 tax returns of every member of Congress. Bold reform that eliminates loopholes, deductions, and special deals as a means of lowering tax rates in general would help the majority of taxpayers—white and nonwhite alike.

A blueprint for such reform already exists.... In December 2010, the bipartisan National Commission on Fiscal Responsibility and Reform (Simpson–Bowles) issued a report showing how tax rates could be cut by roughly 10 percentage points for all but the lowest income bracket if (1) taxable income were viewed more broadly, (2) there was no preferential rate for capital gains, and (3) deductions were significantly modified or eliminated. However, one tax break I would retain is the earned income tax credit (EITC), which lifts millions of Americans and children out of poverty. Meaningful reform would require Congress to stop making choices that favor their wallets over the wallets of most Americans.

[T]his essay considers the tax exclusion from gross income for employer or union-provided pensions. The estimated revenue loss in 2013 from those wages and earnings not currently being taxed is projected to be \$147 billion. The data for private sector workers show that most Asian-Americans, blacks, Latinos, and whites do not receive this benefit.... Thus, most workers do not benefit from this tax break.... [I go] further than Simpson–Bowles by arguing for the repeal of this exclusion. Wages placed in employer-provided pensions should be included in the employee’s gross income when earned and should be currently taxed.

[This essay also] considers the congressional decision to tax income from stock at a preferential rate compared to that applied to wages. Less than one in ten Americans of color own stock in a way that makes them eligible for the low preferential rate. Less than two in ten white Americans own stock in a

way that makes them eligible for the preferential rate. This tax break is projected to cost \$110 billion in lost revenue this year.... The majority of Americans never pay the low preferential rate associated with stock ownership. Simpson–Bowles shows that marginal tax rates can be lowest if income from stock is taxed at the same rate as income from wages. [A]ll income should be subject to the same tax rates.

[This essay also] considers the congressional decision to allow a tax deduction for mortgage interest. For 2013, the estimated revenue loss caused by this deduction is expected to be almost \$90 billion.... Though the majority of whites and Asian-Americans are homeowners, the majority of all Americans, regardless of race, never receive the benefit of this deduction: a recent study showed that only 29 percent of returns claimed a mortgage interest deduction. While Simpson–Bowles argues for converting the mortgage interest deduction into a credit, I argue for its repeal.

[This essay also] points out a possible political path toward achieving my vision of tax reform, which would broaden the base of taxable income while lowering tax rates in order to benefit the majority of Americans. Simpson–Bowles is the least we should be able to accomplish. The recent fiscal cliff deal did little to change the status quo. If Congress passes tax laws that benefit the rich because the rich are the primary source of their campaign contributions, then we should never expect change. We have a classic collective action problem.

The rich are a relatively small yet highly motivated group when compared with the general public—who are diffuse and not engaged. What will change the dynamic will be something that political scientists call a “focusing event.” That focusing event will be the issuance of and the media coverage surrounding “The 535 Report.”

The 535 Report will be a study of congressional tax returns undertaken by the IRS in order to identify the tax laws utilized by each member of Congress.... [W]ith this study we will be able to compare the percent of congressional beneficiaries with the percent of ordinary Americans who benefit from various loopholes, special tax rates, and deductions. I predict that after The 535 Report is released, the public will get angry and Congress—ever more concerned about retention issues and primary challengers—will embrace tax reform that is good for most Americans, even if it is bad for them.

—from *The 535 Report: A Pathway to Fundamental Tax Reform*, 40 *Pepperdine Law Review* 5 (2013)

rate structure coupled with a repeal of most itemized deductions would be far more equitable.

Brown also views the mortgage interest deduction as a \$200 billion-a-year subsidy that doesn't meaningfully benefit homeowners or encourage home buying. It penalizes the one-third of Americans who rent—including the majority of blacks and Latinos.

While race's impact on law is typically viewed in the sense of civil rights and overt discrimination, Brown's 2003 text, *Critical Race Theory: Cases, Materials and Problems*, examines racism that is more subtle and difficult to prove, administered via law that is neither blind nor fair.

Derrick Bell, the first black tenured professor at Harvard Law School, is considered the father of critical race theory. In 2007, he wrote the foreword to the second edition of Brown's book. That happened after Bell, while speaking at a law symposium, unexpectedly took the occasion to praise her book.

"I was quite taken aback," Brown said. "It was flattering and humbling. We started a friendship at that panel that continued until his death."

Brown pursued teaching after serving as associate deputy general counsel to then-Secretary of Housing and Urban Development Jack Kemp, and spending nearly two years in municipal finance at Drexel Burnham Lambert.

Brown views the mortgage interest deduction as a \$200 billion-a-year subsidy that doesn't meaningfully benefit homeowners or encourage home buying. It penalizes the one-third of Americans who rent—including the majority of blacks and Latinos.

Analysis and criticism from academia can be a powerful weapon for reform, Brown says. The reason we have a glimpse into how the wealthiest Americans take advantage of what tax loopholes have to offer is because a professor lobbied for that information, she points out. The IRS began publishing "The 400 report," an annual release of income and taxes paid by the top 400 wealthiest Americans, at the urging of an economics professor, Joel Slemrod. Started during the Clinton Administration, its publication was discontinued under President George W. Bush, but reinstated by President Barack Obama.

Brown has issued a call for "The 535 Report" as well—which would require members of

Congress to make their tax returns available to the public.

She believes revealing the disparity between what constituents and their elected officials pay could be the catalyst that causes Congress "to embrace tax reform that is good for most Americans, even if it is bad for them."

This fall, Brown will serve as Emory University's vice provost for academic affairs. She'll work on the university's promotion and tenure practices and policies that affect faculty life and careers. Brown will have oversight of the Center for Faculty Development and Excellence and in her new role, she'll work with the Academic Affairs Committee of the Emory Board of Trustees, the Faculty Council, and University Senate.

SELECTED PUBLICATIONS

Book Chapters

Taxing the Body, in *The Global Body Market: Altruism's Limits* (Michele B. Goodwin, ed., 2013)

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Restructuring Bankruptcy Law



Rafael Pardo

Robert T. Thompson Professor of Law

BA, Yale University, 1998

JD, New York University School of Law, 2001

Scholarly interests: bankruptcy, commercial law

While Professor Rafael Pardo's scholarship includes broad empirical studies about the way bankruptcy law is administered, he's also spent a lot of time working with people for whom debt is not an academic question, but a life-crushing challenge.

A lack of effective representation affects all areas of the law, but is a particularly cruel irony for Americans facing bankruptcy, Pardo says. When you're in acute financial distress, it's difficult to find money to hire a lawyer.

As a result, those with the most dire need for relief may have difficulty obtaining it or even pursuing it at all, he says.

"As a society, we all agree that individuals, under certain circumstances, should have their debts forgiven," Pardo says. However, "it's an incredibly complex system that's difficult to navigate unless you're represented. So if you're going to try and navigate the system and not be subject to the technicalities and pitfalls of the system, you need a lawyer—but lawyers cost money."

"Bankruptcy law reflects our beliefs regarding what motivates and underlies financial failure," Pardo says. "Economic failure is often just a symptom of institutional failure."

Consider the case of student loan debt: Education is often cast as an investment in one's economic future. Many, however, view private and federal student loan programs as heavily weighted in favor of financial institutions.

Pardo was called as a bankruptcy expert to testify before Congress in support of amending the Bankruptcy Code, to broaden the relief available to student-loan debtors.

Since the 1970s, Congress has increasingly tightened the terms under which student loans may be forgiven. If students get in over their heads, both public and private loans for college are much harder to discharge than debts such as property loans or credit card bills.

Today, students seeking discharge must litigate their cases under the standard of "undue

"Bankruptcy law reflects our beliefs regarding what motivates and underlies financial failure. Economic failure is often just a symptom of institutional failure."

Excerpt: “The Structural Exceptionalism of Bankruptcy Administration”

Our current system of bankruptcy administration is highly anomalous. The Bankruptcy Code is one of the few major federal civil statutory regimes administered almost exclusively through adjudication in the courts—not through a federal regulatory agency. This means that rather than fitting bankruptcy into a regulatory model—as the U.S. Congress has done, for example, with the securities laws administered by the SEC or the tax laws administered by the IRS—Congress chose to delegate administration of the Bankruptcy Code to the courts, with little input from federal administrative agencies....

The historical record reveals that, from the earliest days of the Republic and with every iteration of the bankruptcy laws, Congress tasked the federal courts with administration of the bankruptcy system—in all likelihood due to the seemingly private nature of individual disputes between debtors and creditors and the manner in which such disputes translate into competing claims to payment from a debtor’s estate.... Thus, the congressional blueprint prior to the current bankruptcy system had always been—as it remains today—a court-centered model in which non–Article III adjuncts assisted the Article III court in administering bankruptcy estates.

Importantly, the Bankruptcy Act of 1898 marked a significant shift in the orientation of the bankruptcy system from a creditor collection device to a forum for effectuating substantive relief for debtors. Moreover, the 1898 Act marked the start of what would become an increasingly powerful role for the non–Article III adjunct in bankruptcy matters. With these changes, there ostensibly existed an opportunity for Congress to reconceptualize bankruptcy administration—specifically, by charging an administrative agency with responsibility for the system. Perhaps because of path dependencies, however, Congress chose to follow the court-centered tradition. With this institutional inertia, the bankruptcy system continued its inexorable march down the path of judicial administration, even as the modern administrative state emerged and other areas of law turned toward agency administration.

What is perhaps most interesting about this focus on court-centered administration is that, during the time period spanning enactment of the 1898 Act and passage of the Bankruptcy Code in 1978, reformers were dissatisfied with the adjuncts’ manner of managing bankruptcy cases and repeatedly sought to create an agency within the bankruptcy system. The reformers were not concerned with whether to locate bankruptcy policymaking in the courts or in an agency; rather, their proposals—which ultimately were quelled by bankruptcy professionals whose

economic self-interest motivated them to stave off institutional redesign—were motivated largely by a perceived need for independent oversight that would safeguard against abuses in the managerial and ministerial administration of bankruptcy cases.

Federal agencies come in many different shapes and sizes, and a new federal bankruptcy agency designed to engage in bankruptcy policymaking could take many different forms.... Perhaps the most minimalist way of enabling an agency to engage in setting substantive bankruptcy policy would be to give the Executive Office of the U.S. Trustee (EOUST) broad rule-making powers while simultaneously leaving intact the current court system for handling bankruptcy matters.... [T]his approach effectively hybridizes bankruptcy administration between two entities: the EOUST and the courts....

A much more robust—and more radical—approach would be to eliminate the current bankruptcy court system and the [Bankruptcy Administrator] and [U.S. Trustee] Programs entirely, thereby enabling the creation of a brand new federal bankruptcy agency charged with both adjudicatory and rule-making functions. In other words, bankruptcy administration would move from the courts to a traditional regulatory model....

Such a bold move—which would necessitate the creation of a new agency and rewriting major portions of the Bankruptcy Code—would obviously face significant political hurdles. Bankruptcy judges, private trustees, and others whose economic interests align them with the current court-centered system of bankruptcy administration would likely object. In addition, the new agency’s institutional design would remain a question. For example, should it be structured as an independent agency insulated from presidential removal powers (as many financial regulatory agencies are), or as an executive agency subject to direct presidential control? Should it be single-headed or multi-membered? ... Should the agency be subject to normal congressional appropriations processes, or should the agency be self-funded ...? Should there be restrictions on the agency’s personnel in terms of initial hiring requirements designed to reduce partisan decision making? ...

In light of the many unanswered questions of institutional design, any attempt to create a robust bankruptcy agency vested with both rule-making and adjudicatory powers would likely engender heated political debates about the virtues and vices of different agency structures....

Our current court-centered system of bankruptcy administration is truly exceptional in many ways. Two federal administrative agencies, which split their
(continued on following page)

authority along geographic lines, operate within the bankruptcy sphere but lack the authority to set policy at the heart of the Bankruptcy Code. Moreover, Congress has delegated to the courts, rather than either administrative agency, the power to fill gaps in the Code and thus to set bankruptcy policy. Additionally, the polyphonic nature of the current court-centered model often fails to yield uniform answers, causing confusion for litigants and courts alike.

Our goal ... has been to question whether bankruptcy administration should continue to be exceptional. We have made the case—grounded in

both constitutional and policy-driven rationales—for moving bankruptcy administration toward a more traditional agency model. We recognize that such a move would be paradigm shifting for the bankruptcy field and might well face significant political hurdles, but we believe such a move is nonetheless advisable to bring greater expertise, accountability, uniformity, accessibility, transparency, prospective clarity, and flexibility to policymaking in the bankruptcy arena.

—from *The Structural Exceptionalism of Bankruptcy Administration*, 60 *UCLA Law Review* 384 (2012) (with Kathryn A. Watts)

hardship,” which Congress established for the discharge of student loans—but did not define, instead leaving that task to courts.

As Pardo told *The New York Times* in 2012, he would not have a problem with the government making money on student loans, if there were a lower barrier to debt forgiveness. Or, the government could maintain its high standard for discharging student debt, if it offered lower interest rates.

“But you can’t be hitting them on the front end and on the back end,” he said.

Congress established the first permanent bankruptcy law in 1898. But unlike many other important areas of federal law, there is no agency with rule-making or adjudicatory power in bankruptcy, which means that most policymaking emerges from the courts, Pardo says.

In his work, Pardo highlights the consequences that this choice to delegate policymaking to the courts has had on the development of bankruptcy law, and for participants in the system. In recent work, he suggests the importance of structuring the system “in ways that folks who need access can get it in a cost-effective manner.”

Pardo was a history major at Yale University, and some of the stories he found most interesting were those about social justice—for example, the influence of progressive priests, such as Ernesto Cardenal, during the ’70s Nicaraguan revolution.

Pardo says the law’s power to help others is the reason he earned his juris doctor at NYU Law instead of pursuing a doctorate in history. “My view was that as a lawyer, I could effectuate change immediately in someone’s life,” he said.

Pardo consistently dedicated time for pro bono work while serving on the faculties at Tulane University Law School, Seattle University School

of Law, and the University of Washington School of Law. Just before joining Emory in 2012, Pardo was recognized as Pro Bono Faculty Member of the Year at the University of Washington School of Law. At Emory, he serves as one of the faculty advisors to the *Emory Bankruptcy Developments Journal*, as well as the *Emory Law Journal*.

“There are just a lot of unmet needs for legal services. I think lawyers occupy a position of privilege and power in this country,” he says. “With that power and privilege we have a responsibility to help people who are less fortunate. I think all lawyers need to try and do everything they can to pay it back to the community, and I’ve tried to live by that.”

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An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, 61 *Vanderbilt Law Review* 1745 (2008) (with Jonathan R. Nash)

Rethinking the Shareholders of Corporate Governance



Urska Velikonja

Assistant Professor of Law

LLB, University of Ljubljana, School of Law, 2002

LLM, Harvard Law School, 2003

JD, Harvard Law School, 2009

Scholarly interests: securities regulation, corporate law, corporate governance

Urska Velikonja came of age in Slovenia, watching her country make the often-rocky transition from communism to a free-market economy. Like many countries trying to privatize formerly state-owned enterprises, Slovenia looked to the U.S. as a model.

But in the early 2000s, while Velikonja was working toward her law degree, that model seemed to lose its moral compass. Enron Corporation, WorldCom and a slew of others grabbed national headlines with multibillion-dollar accounting scandals.

“To people in newly independent countries like Slovenia, watching Enron and WorldCom happen in the U.S. flipped everything upside down,” she says. “What fascinated me was the reaction to those scandals. It focused solely on the harm done to shareholders and ignored the harm to anyone else. What about employees who not only lost their jobs but now had the black mark of Enron on their resume? What about competitors and suppliers that made decisions based on inflated earnings reports? These stakeholders seemed to be invisible.”

That interest in corporate governance and securities regulation would eventually shape Velikonja’s career path, but not right away. After graduating first in her class from the University of Ljubljana School of Law, she enrolled in Harvard Law School to get her LLM.

“The whole point of getting an LLM is to go back to your home country and do good work,” says Velikonja. “I had planned to practice for a bit, but I ultimately wanted to teach law at my alma mater in Slovenia.”

Velikonja did return to her home country in 2003. Her future husband, an American who is also a lawyer, moved back with her. Velikonja practiced for three years with an Austrian firm doing international banking work in Slovenia, but her husband could not find permanent work.

“To people in newly independent countries like Slovenia, watching Enron and WorldCom happen in the U.S. flipped everything upside down.”

Excerpt: “The Cost of Securities Fraud”

On June 25, 2002, WorldCom announced that its financial disclosures were fiction. Accounting fraud at WorldCom ultimately destroyed tens of billions of dollars in investors' equity and pushed the firm into bankruptcy. When it emerged two years later as MCI, Inc., it had shed 33,000 employees, more than a third of its workforce. Its general unsecured creditors ultimately received only thirty-six cents on the dollar. While WorldCom was fabricating its financials, its rivals, Sprint and AT&T, made business decisions believing that WorldCom's success was real. Under pressure from its own shareholders, AT&T cut \$7.5 billion in costs and laid off 20,000 employees. Still unable to compete with WorldCom's imaginary figures, AT&T split itself into three units, which were sold individually—a decision then, and now, widely viewed as value destroying. In fact, during the fraud, WorldCom's true costs were higher than AT&T's. Telecommunications equipment manufacturers, including Lucent Technologies and Nortel Networks, initially benefitted from WorldCom's apparent success but suffered when the industry retrenched after the fraud was revealed. Both suppliers fired workers and saw their equity shrink. In the aftermath of the WorldCom fraud, the telecommunications industry as a whole lost a quarter of its jobs: 300,000. WorldCom's share price, the usual yardstick for measuring harm from securities fraud, captured none of these losses.

WorldCom might be a bit of an outlier, but it is hardly unique. By misreporting their firm's financial results and prospects, managers credibly communicate to markets that the firm is more profitable and, importantly, less risky than it in fact is. Managers sell the lie by increasing hiring and investment, and cutting prices. Relying on false information, lenders underprice credit, employees make career and retirement decisions based on a false picture of their firm's prosperity, and rivals make business decisions on a distorted playing field. Honest firms face the obverse side of fraud and cannot fund and employ workers for valuable projects, producing additional deadweight losses borne by all workers, primary-market investors, and beyond.

If fraud is caught, fraudulent firms spend substantial resources on investigation, litigation, damages, and fines. Many file for bankruptcy that could have been avoided in the absence of fraud, or make costly adjustments that they often shift to employees, creditors, suppliers, customers, and the government as the insurer of last resort. Rivals face doubts about their own financial reporting, which increases their cost of capital and further depresses

hiring in the industry. The ripple effects are felt throughout the economy and, once aggregated, exceed the harms to defrauded shareholders by a substantial margin....

Not only are investors not the only victims of securities fraud, the Article contends that they are in the best position to reduce their exposure to fraud. They can eliminate firm-specific risk through diversification. Diversification cannot eliminate undiversifiable or market risk of fraud, but investors demand a fraud discount when purchasing securities as *ex ante* compensation. While investors as a group benefit if the prevalence of fraud decreases, they are indifferent to securities fraud if its impact remains stable. Those supplying labor, on the other hand, cannot diversify their human capital at all, and are exposed to the risk that securities fraud by their employer will eliminate their job and impair their earning potential.

Surprisingly, the recognition that investors do not bear the full cost of securities fraud is largely missing from our securities laws, from statutes to rulemaking, enforcement decisions to judicial opinions, policy debates to academic analysis. Corporate governance reforms adopted in the Sarbanes-Oxley Act after the rash of accounting scandals in 2001-02 were widely criticized because of their purportedly high cost for investors. One of the critics' recent successes is the JOBS Act which relaxed reporting and audit requirements for newly public firms on the supposition that lower cost of compliance must necessarily lead to job creation. Another success is the D.C. Circuit's decision in *Business Roundtable v. SEC* which requires the SEC to demonstrate that the rules it proposes “increase shareholder value.” That decision has brought to a standstill financial reform rulemaking, authorized by the Dodd-Frank Act—the Act that was adopted in the wake of a financial crisis that caused widely dispersed economic pain....

With all costs included and tallied, the following conclusions are inescapable: (1) false disclosures affect financial markets as well as markets for inputs, labor and credit, and product markets; (2) framing financial statement fraud as fraud against investors understates the harm it causes; and (3) regulation and enforcement predicated on the assumption that securities fraud does not impose substantial negative externalities on nonshareholders leads to underregulation and underdeterrence of fraud and offers remedies that do not redress the injury.

—from *The Cost of Securities Fraud*, 54 *William and Mary Law Review* 1887 (2013)

Velikonja's academic aspirations were also stifled there. "The way academia works in Slovenia is quite different than in the U.S.," she says. "There, current professors pick professors to groom, like an apprenticeship. The professor that wanted to work with me taught Roman law. I just wasn't sure that was the topic I wanted to teach."

So Velikonja moved back to the States, where she again enrolled in Harvard Law, this time to earn her JD. With her sights still set on academia, she knew what she had to do—get some experience teaching, graduate near the top of her class and get a reputable clerkship under her belt. She did all three.

While a law student, Velikonja taught a course in international corporate governance, twice receiving the Harvard University teaching award.

"I was so nervous standing up before my first class, and it started out as badly as I feared it would," she says. "But I quickly warmed up to it, and by the time that first class was over I knew teaching was what I wanted to do."

After graduating magna cum laude in 2009, she taught corporate governance for a year at Arizona State University's Sandra Day O'Connor College of Law. She then clerked for Judge Stephen F. Williams at the U.S. Court of Appeals for the D.C. Circuit. She spent the next two years teaching securities regulation and corporate governance at the University of Maryland Francis King Carey School of Law before joining Emory in July.

Velikonja teaches securities regulation, mergers and acquisitions, and corporate governance. Her research focuses on the same issues that captured her interest as a law student watching Enron implode. That fascination remains relevant, since the basic assumptions underlying securities regulation have not changed.

"In its regulation, the SEC still looks at the costs and benefits to investors only," says Velikonja. "It doesn't recognize that the labor market, capital market, and product market are all related and what happens in one spreads out like a wave to the others."

She points to recent financial reform statutes—the JOBS Act and the Dodd-Frank Act—as well as the 2011 D.C. Circuit decision in *Business Roundtable v. SEC* as evidence that the worldview of fraud fallout hasn't changed.

"The way markets are regulated today, the cost of fraud to shareholders is overstated and the cost to other stakeholders is understated," she says. That's because the price paid for stocks is already discounted to reflect the inherent risk of fraud.

Shareholders can also minimize risk by diversifying their portfolio.

"Some companies you invest in will not commit fraud, while others will," she says. "And you'll buy some securities at an inflated price because the firm is lying, but you'll also sell some at an inflated price because the firm is lying. It zeros out over time."

When shareholders suffer losses from fraud, they can sue the firm for damages and the SEC can establish a fair fund to compensate them. Other stakeholders, by contrast, have no legal recourse for compensation. "We assume the costs to others are zero, but they are not," Velikonja says. "They are often considerable."

For example, employees suffer, and not just those employed by the fraud-committing company. Fraudulent revenue reporting at WorldCom resulted in over-investment by the entire telecommunications industry. Employment in the industry increased to 1.3 million during WorldCom's heyday but fell 25 percent after the fraud was revealed.

Suppliers suffer as well. Entire firms may emerge to deliver specialized products only to find the market for them evaporate. Rivals also suffer. AT&T, for example, responded to WorldCom's seeming cost cutting by letting go some 20,000 employees and splitting up the company. "Those decisions—based on fraudulent information—turned out not to be good for AT&T," says Velikonja.

Velikonja believes other stakeholders need to be given the same legal rights as those of shareholders. "We don't need more regulation, just different regulation," she says. "The ultimate goal of my work is to regulate business as if all the people mattered, not just the shareholders."

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Recent Scholarship



Ahdieh

Robert B. Ahdieh

Vice Dean and Professor of Law

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Richard Freer

Robert Howell Hall Professor of Law

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Peter Hay

L. Q. C. Lamar Professor Emeritus of Law

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Michael S. Kang

Professor of Law

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Sue Payne

Professor in the Practice of Law and Director, Center for Transactional Law and Practice

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George Shepherd

Professor of Law

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Freer



Hay



Kang



Payne

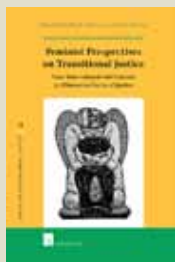


Shepherd

Selected Faculty Authors

Martha Albertson Fineman

Robert W. Woodruff Professor of Law



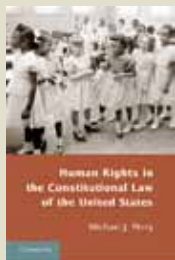
Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice (Intersentia Publishing 2013) (with Estelle Zinsstag)

Truth-seeking mechanisms, international criminal law developments, and other forms of transitional justice have become

ubiquitous in societies emerging from long years of conflict, instability and oppression and moving into a post-conflict, more peaceful era. In practice, both top-down and bottom-up approaches to transitional justice are being formally and informally developed in places such as South Africa, Liberia, Peru, Chile, the Democratic Republic of Congo, Sierra Leone, Rwanda, the former Yugoslavia, and Northern Ireland. Many have addressed these developments and provided elaboration of theories relating to transition justice generally. This book offers some insights into women's perspectives and feminist views on the topic of transitional justice or "justice in transition."

Michael J. Perry

Robert W. Woodruff Professor of Law



Human Rights in the Constitutional Law of the United States (Cambridge University Press 2013)

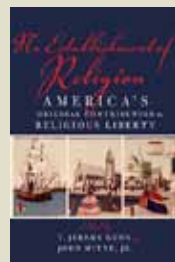
In the period since the end of World War II, there has emerged what never before existed: a truly global morality. Some of that morality—the morality of human rights—has become entrenched in the constitutional law of the United

States. This book explicates the morality of human rights and elaborates three internationally recognized human rights that are embedded in U.S. constitutional law: the right not to be subjected to cruel, inhuman, or degrading punishment; the right to moral equality; and the right to religious and moral freedom. The implications of one or more of these rights for three great constitutional controversies—capital punishment, same-sex marriage, and abortion—are discussed in depth. Along the way, Professor Perry addresses the question of the proper role of the Supreme Court of the United States in adjudicating these controversies.

John Witte Jr.

Jonas Robitscher Professor of Law

Alonzo L. McDonald Distinguished Professor



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

The focus of the volume is the historical background and meaning of the Establishment Clause of the First Amendment of the Constitution, from the seventeenth century to the present. The text

does not emphasize modern jurisprudence or current court decisions or current law, but the historical meaning of terms and concepts such as "religious freedom," "separation of church and state," "original intent," "federalism," "establishment of religion," and "disestablishment." The individual chapters approach their subjects from a variety of ideological and historical perspectives. Several chapters include discussions of the role of the 1947 Supreme Court decision *Everson v. Board of Education* in launching the modern debate about the historical meaning of the Establishment Clause. The contributions of figures from the founding period (James Madison, Thomas Jefferson, and George Washington) are particularly scrutinized.

Paul J. Zwier II

Professor of Law



Principled Negotiation and Mediation in the International Arena: Talking With Evil (Cambridge University Press 2013)

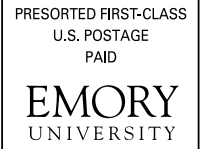
This book argues that it can be beneficial for the United States to talk with "evil"—that is, terrorists and other bad actors—if it uses a strategy that engages a mediator who both shares the United

States' principles and is pragmatic. The project shows how the United States can make better foreign policy decisions and demonstrate its integrity for promoting democracy and human rights if it employs a mediator who facilitates disputes between international actors by moving them along a continuum of principles, as political parties act for a country's citizens. This is the first book to integrate theories of rule-of-law development with conflict resolution methods, as it examines ongoing disputes in the Middle East, North Korea, South America, and Africa (including Uganda, Sudan, Kenya, and Liberia).



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FEATURED SCHOLAR

With the American public weary of U.S. troop deployment, targeted drone strikes have become the counterterrorism tool of choice. But we need to clarify who we target and why, **Laurie Blank** argues.