Volume 2, No. 2 (spring 2013)

Christopher M. Bruner, brunerc@wlu.edu

Washington and Lee University School of Law

Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power

Cambridge University Press (2013)

Book available at: http://www.cambridge.org/us/knowledge/isbn/item7127684/Corporate%20Governance%20in%20the%20Common-Law%20World/?site_locale=en_US; http://www.amazon.com/Corporate-Governance-Common-Law-World-Foundations/dp/1107013291; Introduction and Overview available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239916

Abstract (from the book jacket): The corporate governance systems of Australia, Canada, the United Kingdom, and the United States are often characterized as a single "Anglo-American" system prioritizing shareholders' interests over those of other corporate stakeholders. Such generalizations, however, obscure substantial differences across the common-law world. Contrary to popular belief, shareholders in the United Kingdom and jurisdictions following its lead are far more powerful and central to the aims of the corporation than are shareholders in the United States.
This book presents a new comparative theory to explain this divergence and explores the theory's ramifications for law and public policy. Christopher M. Bruner argues that regulatory structures affecting other stakeholders' interests – notably differing degrees of social welfare protection for employees – have decisively impacted the degree of political opposition to shareholder-centric policies across the common-law world. These dynamics remain powerful forces today, and understanding them will be vital as postcrisis reforms continue to take shape.

Moeen Cheema, CheemaM@law.anu.edu.au

Australian National University College of Law

Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law

60 American Journal of Comparative Law 875 (2012)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211329

Abstract: The discourse on the “Islamization” of laws in the legal systems of post-colonial Muslim states is dominated by two conflicting narratives. The dominant Western narrative views the Islamization of laws as the re-incarnation of narrow and archaic laws embodied in discriminatory statutes. In contrast, the dominant narrative of political Islam deems it as the cure-all for a range of social, political and economic ills afflicting that particular Muslim state. This Paper presents a deeper insight into the Islamization of Pakistan’s law. Pakistan has three decades of experience with incorporating shari’a law into its common law system, an experience which has been characterized by a constant struggle between the dominant Western and Islamist narratives. Pakistan's experience helps us deconstruct the narratives and discourses surrounding Islamization and understand that the project of incorporating Islamic laws in a modern Muslim society must be based upon indigenous demands and undertaken in accordance with the organically evolving norms of recognition, interpretation, modification and enforcement in that society. Furthermore, substantive law cannot be understood or enforced outside of a legal system, its legal culture(s) and professional discourse(s), and of the broader socio-political dialectics that give context and relevance to it. Therefore, we need to shift focus to the systemic problems deeply ingrained in Pakistan’s legal system that allow law and legal processes to be used to prolong disputes and cause harassment. Islamic legality can, in fact, play a significant role in breaking down the resistance that vested interests may offer to such a restructuring of the legal system along more egalitarian lines.

Martin Gelter, mgelter@law.fordham.edu & Mathias M. Siems, siems@fulbrightmail.org
Fordham University School of Law & Durham University
Language, Legal Origins, and Culture before the Courts: Cross-Citations between Supreme Courts in Europe
forthcoming in 21 SUP. CT. ECON. REV. (2013)
Working Paper available at http://ssrn.com/abstract=1719183
In this paper and within the larger research project from which it has developed, we study the dialogue between different European supreme courts quantitatively. Using legal databases in Austria, Belgium, England and Wales, France, Germany, Ireland, Italy, the Netherlands, Spain, and Switzerland, we have hand-collected a dataset of transnational citations between the highest courts of these countries, in total searching 636,172 decisions decided between 2000 and 2007. In the present paper we show that citation of foreign law by supreme courts is not an isolated phenomenon in Europe, but happens on a regular basis. We found 1,426 instances in which these courts have cited the supreme courts of the other nine countries. The majority (1,077) of these citations have been made for purely comparative reasons. We also undertook regression analysis in order to understand the differences between the cross-citations. Whether such citations take place and in what quantity depends on the particular legal culture and its relationship to others. Austria and Ireland, which stand in an asymmetric relationship with Germany and England respectively, seem to be particularly receptive

to foreign influence on their legal systems. But even controlling for these outliers, we have been able to identify that the population of the cited country and a low level of corruption, native languages and language skills, legal origins and families, and cultural and political factors all matter for which courts are likely to be cited.

Martin Gelter, mgelter@law.fordham.edu

Fordham University School of Law

Shareholder-Stakeholder Debates: From Institutional Theories to Private Pensions

forthcoming in COMPANY LAW AND CSR: CONVERGENCE OR DIVERGENCE? A COMPARATIVE APPROACH ABOUT THE NEW CHALLENGE OF LAW (Ivan Tchoutourian ed. 2013).
not available online

The objective of this chapter is to show that the focus of modern corporate law theory on the concerns of shareholders is historically and geographically contingent by tracing shareholder-stakeholder debates through the 20th century. The most obvious example is the simple recognition in comparative corporate law scholarship that the majority-minority agency problem is more prevalent then the shareholder-manager one in countries where concentrated ownership dominates. However, the focus on these two issues in contemporary debates has clouded the fact that other conflicts of interests. I argue that it is equally important to realize how corporate governance structures relate to how firms interact with other constituencies. The chapter focuses on the development of 20th century shareholder-stakeholder debates. Traditional debates (pre-1970s) and the current situation that has its roots in changes that began in the 1970s. The 1970s and 1980s resulted in an economic and political realignment in US corporate governance that changed the dominant coalition and resulted in the current situation where managerial agency problems are so strongly emphasized. Changes in the pension system that began to turn workers into capitalists through their pension holdings were a catalyst for this change, particularly in the US. In Continental Europe, the 1990s and early 2000s saw an incipient realignment that seemed to resemble that in the US, although it is not yet clear whether a permanent trend toward convergence in corporate governance was set into motion, or whether the financial crisis has turned the tide.

Martin Gelter, mgelter@law.fordham.edu

Fordham University School of Law

La doctrine française de l'entreprise d'un point de vue comparé

in L'ENTREPRISE DANS LA SOCIÉTÉ DU 21E SIÈCLE 85-99 (Claude Champaud ed., 2013).

Dans le cadre de cette contribution, j'essaie de donner des « regards étrangers sur la doctrine de l'entreprise » sur la base de l'intérêt que je porte aux théories correspondant à la doctrine française de l'entreprise dans divers pays et dont j'ai

discuté dans un article récent. La théorie française de l'entreprise n'est malheureusement pas bien connue en pays anglophones ou germanophones. Il existe quelques articles en anglais qui font référence à la doctrine de l'intérêt social dans le droit de la société anonyme française, cet intérêt étant entendu comme un intérêt institutionnel comprenant non seulement les intérêts des actionnaires, mais aussi ceux des autres stakeholders, comme par exemple les salariés. Dans cette contribution, je souhaite me concentrer sur les théories et débats en Allemagne et aux États-Unis qui peuvent se comparer à la doctrine française de l'entreprise. Il me semble qu'il y a plusieurs parallèles qui pourraient amener à un débat transnational et auquel la doctrine française pourrait bien contribuer.

Martin Gelter, mgelter@law.fordham.edu

Fordham University School of Law

Why do Shareholder Derivative Suits Remain Rare in Continental Europe?

37 BROOK. J. INT'L L. 843-892 (2012).
http://ssrn.com/abstract=2000814
This article explores why shareholder derivative suits are rare in Continental Europe, while they are the central mechanisms of corporate governance enforcement in the United States. I focus on Germany, France and Italy, and provide more limited references regarding derivative suits in Austria, Belgium, the Netherlands, Spain, and Switzerland. Only the US and Japan seem to "get it right" with respect to all necessary criteria to make derivative litigation an attractive model for shareholders. In other words, no single factor suffices to explain the scarcity of derivative litigation in Continental Europe. Each country fails the test with respect to at least one criterion, most fail with respect to several. I survey the available explanations and additional ones, focusing on minimum share ownership requirements, the allocation of litigation risk, access to information, and limitations regarding potential defendants. Nevertheless, I suggest that that there is a significant degree of corporate law enforcement in Continental Europe because shareholders resort to other enforcement mechanisms. I therefore address other ways in which shareholders can seek judicial recourse that do not take the shape of derivative litigation, namely rescission suits, which are common in several countries, but subject to a particularly intense debate in Germany; criminal enforcement, on which shareholders are able to "piggyback" e.g. in France; and the Dutch model of judicial "inquiry proceedings." Each of these provides makes it easier for shareholders to seek redress than derivative suits, who are likely to seek the "path of least resistance" in litigation.

Julie Grisé, Legal Counsel with the Connecticut House Republican Office,
Martin Gelter, mgelter@law.fordham.edu, Fordham University School of Law
Robert Whitman, robert.whitman@law.uconn.edu, University of Connecticut School of Law
Rudolf von Jhering's Influence on Karl Llewellyn

48 TULSA L. REV. 93-116 (2012).
http://0-www.heinonline.org/HOL/Page?handle=hein.journals/tlj48&id=93&collection=journals&index=journals/tlj
Karl Llewellyn is today considered one of the most prominent representatives of the American Legal Realist School. Although American legal realism is no longer the predominant school of jurisprudence in the United States, it still plays an important role in the formation of our legal traditions. Several of Llewellyn's contemporaries in the American legal academy, including Arthur Corbin, Jerome Frank and Roscoe Pound have been cited as influences on his thinking. Given his significant links with the German legal academy, it is not surprising that Llewellyn's work appears also to have benefited from his acquaintance with the work of German-speaking contemporaries and predecessors. In particular, Llewellyn's debt to the work of Rudolf von Jhering deserves exploration. The purpose of this Article is to shed light on the influence of Rudolf von Jhering on Karl Llewellyn. It gives a general account of the influence of German jurisprudence on American jurisprudential theory and thought. Finally, the article surveys the recognized influence from German jurisprudence on Llewellyn's work and examines Jhering's influence in particular, with an emphasis on how Jhering may have affected Llewellyn's work on the Uniform Commercial Code.

Virginia Harper Ho, vharperho@ku.edu

Associate Professor, University of Kansas School of Law

Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?

56 Colum. J. Transnat'l L. __ (forthcoming 2013)

http://ssrn.com/abstract=2233166 or http://dx.doi.org/10.2139/ssrn.2233166.

Abstract: In recent years, a number of international and cross-sectoral initiatives have attempted to respond to the human rights impacts of corporations. Foremost among these is the United Nations' 2008 "Protect, Respect, and Remedy" Framework and its Guiding Principles on Business and Human Rights, adopted in March, 2011. The Framework is noteworthy, in part, because it considers the potential intersections of corporate law and human rights. Conventional wisdom, however, maintains that corporate law is largely irrelevant to questions of human rights. It is generally viewed to be enabling, rather than prescriptive, and concerned with private contracting rather than the public interest. From a practical standpoint, human rights impacts often involve conduct by remote affiliates and business partners of vast multinational corporate organizations. Corporate law, in contrast, governs the "internal affairs" of discrete legal entities within a given jurisdiction, each protected by a limited liability shield. Questions of global corporate accountability for human rights practices have therefore been viewed as beyond its reach.

This Article challenges this accepted wisdom by exploring the extent to which corporate law reaches the multinational enterprise. It argues that notwithstanding the centrality of entity-level principles within corporate law, some dimensions of corporate law in fact extend across the formal internal legal boundaries of the multinational corporation. Although corporate law enforcement mechanisms do not offer direct remedies for victims of human rights violations, corporate law is nonetheless an integral part of the emerging institutional infrastructure supporting the human rights responsibilities of corporations.

Virginia Harper Ho, vharperho@ku.edu

Associate Professor, University of Kansas School of Law

Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility & The Law in China

46 Vanderbilt Transnat'l L. J. 375 (2013),

http://ssrn.com/abstract=1983659 or http://dx.doi.org/10.2139/ssrn.1983659.

Abstract: Corporate social responsibility (CSR) is often understood as voluntary actions firms take beyond legal compliance. However, in recent years, governments around the world have also begun to actively promote CSR, reflecting broader governance trends that embrace "soft law," voluntary standards, and other novel incentive structures to move companies toward and beyond minimum regulatory goals. Comparative legal scholarship has only recently begun to consider the intersections of such mechanisms with positive law, formal institutions, and traditional regulatory enforcement structures. The adoption of these policies in historically weak regulatory environments raises particularly puzzling questions about their motivation, scope, and potential.

As a leader among emerging markets, China offers an important context to consider state CSR policies and the role of alternative regulatory tools in legal implementation. This article adopts a comparative perspective to examine how national and subnational governments in China advance CSR. Based on primary interview data, it develops a state-centric model of corporate social responsibility that contrasts with both the market-based model adopted by U.S. governments and the relational model advanced by European Union member states. This article concludes by considering the implications of state-centric corporate social responsibility initiatives for norm creation and legal implementation. It contributes to the growing comparative literature on the role of governments in advancing CSR and to the regulatory literature examining the intersections of law and alternative accountability mechanisms in shaping corporate behavior.

Virginia Harper Ho, vharperho@ku.edu

Associate Professor, University of Kansas School of Law

Corporate Governance as Risk Regulation in China: A Comparative View of Risk Oversight, Risk Management, and Accountability

4 Eur. J. Risk Reg. 463 (2012) (Special Issue: "Comparing Risk Regulation in China and Europe") http://ssrn.com/abstract=2137715

Abstract: Risk management and oversight have long been recognized as core corporate governance issues and have gained renewed attention in the wake of the financial crisis. Following global trends, recent corporate governance reforms in China also focus on risk oversight and risk management. This article is the first to examine the intersections between corporate governance and risk regulation in China from a comparative perspective. It surveys corporate governance tools that have been adopted by Chinese regulators and firms to motivate effective risk oversight and risk management across the corporate enterprise, focusing on China's regulation of internal controls and risk management systems. These internal mechanisms are particularly important given the widely recognized limits of external monitoring and enforcement mechanisms within China.

This article observes that recent guidelines on enterprise risk management (ERM) and internal controls reflect international corporate governance standards, and that China adopts a broad perspective on risk oversight that extends to both financial and non-financial risks. China's adoption of international models offers a new opportunity to reexamine long-standing debates on the potential for global corporate governance convergence. This article argues that China has adopted a regulatory approach to internal risk oversight and management that is consistent with its historical law reform trajectory, the reality of China's state-dominated equity markets, and the continued influence of the state on firm management. Its conclusions support the literature on the path dependency of corporate governance systems and prior comparative studies of corporate governance in China that find convergence of form but divergence of function.

Dr. Flora Xiao Huang

University of Hull, United Kingdom

x.huang@hull.ac.uk

Dr. Horace Yeung

University of Leicester, United Kingdom

horace.yeung@le.ac.uk

Regulatory Cooperation between Securities Commissions: A Reflection from Hong Kong

Chinese Journal of Comparative Law (2013) 1 (1): 112-157.

http://cjcl.oxfordjournals.org/content/1/1/112.full.pdf+html

Abstract: A domestic securities regulator, which is equipped with investigatory and enforcement powers conferred by statutes, should, in theory, be capable of regulating most securities-related activities. However, in the event of any disputes and/or frauds, the long arm of the law may not be capable of reaching other jurisdictions. This possibility is imminent in the context of Hong Kong, given that there is a high concentration of listed companies domiciled in China. This article seeks to explore how the regulatory cooperation of securities commissions through bilateral and multilateral agreements can be a solution to the cross-border enforcement problem. A notable product of this joint effort is a comprehensive regulatory framework for the Chinese companies listed on the Hong Kong Stock Exchange. In Hong Kong, Chapter 19A of the Rules and Guidance on Listing Matters is used exclusively for Chinese issuers. In China, the Special Regulations and the Mandatory Provisions outline the general principles and specific requirements in relation to overseas listings. Although this comprehensive framework of regulation is arguably a successful one, making Hong Kong a leading fund-raising center, the concession provided in Chapter 19A can be a concern from an investor-protection perspective. There is a question of whether the Chinese issuers are genuinely committed to high standards. This article aims to examine the cooperation between Hong Kong and China in practice, discuss the problems, and reflect on how the Hong Kong case can be a lesson to other financial centers.

Jodie Kirshner, jk441@cam.ac.uk

University of Cambridge, Faculty of Law (UK)
THE INDIAN ANOMALY: Rethinking Credit Agency Regulation from the Economic Perspective of Hyman Minsky
Columbia Journal of Asian Law
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160857
Abstract: Policymakers have blamed the credit rating agencies for the recent financial crisis - but they could be wrong. India can aid in understanding whether the agencies can still be relied upon as private "gatekeepers" in financial markets, or whether public institutions must take primary responsibility. The economist, Hyman Minsky, advocated for robust public regulation and a limited role for private actors. India can be seen as an example of his theories. If India's agencies cannot prevent speculative credit from causing future economic problems, the problems could suggest that more structural measures are necessary to counter instability, as Minsky predicted.

Analyzing India and the credit ratings agencies through the frame of Minsky's economic theories offers insights into how best to reform financial regulation to prevent future economic collapse.

Name, email address: David Kosař, David.Kosar@law.muni.cz

Institutional Affiliation: Masaryk University

Title of paper: The Least Accountable Branch (review essay)

Publication outlet (if known): 11 International Journal of Constitutional Law 234 (2013)

Website where paper can be downloaded (ssrn, etc.): http://globallawbooks.org/reviews/detail.asp?id=774

Abstract (not exceeding 250 words):

This review essay engages with three books that deal with judicial accountability. The first, Independence, Accountability, and the Judiciary edited by Guy Canivet, Mads Andenas, and Duncan Fairgrieve, is a bilingual collection of essays which addresses various facets of judicial independence and accountability. Most essays focus on the French and British judiciaries, but the volume also includes chapters on Canada, Germany, South Africa, and Spain. The second book, Transitional Justice, Judicial Accountability and the Rule of Law by Hakeem Yusuf, discusses (the lack of) holding Nigerian judges to account during the era of Nigerian transition from military rule to democracy. Finally, Daniela Piana in Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice looks at judicial accountabilities in five post-communist countries in Central and Eastern Europe (Bulgaria, the Czech Republic, Hungary, Poland, and Romania).

Name, email address: David Kosař, David.Kosar@law.muni.cz

Institutional Affiliation: Masaryk University

Title of paper: Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say

Publication outlet (if known): 25 International Journal of Refugee Law (2013) forthcoming

Website where paper can be downloaded (ssrn, etc.):

Abstract (not exceeding 250 words):

The question whether the assessment of the inclusion clause must precede the application of the exclusion clauses under the 1951 Convention relating to the Status of Refugees (CSR51) is a recurring theme in many jurisdictions. This article shows that the jurisprudence of the top national courts shifted decisively in favour of the 'exclusion before inclusion' position. Subsequently, this article looks for guidance at the Qualification and Procedures Directives. It claims that although it is generally assumed that the European Asylum Acquis left this issue untouched, it endorses the 'exclusion before inclusion' position and it does so even more overtly than the CSR51. However, this article also puts forth the argument that the Qualification Directive taken in conjunction with the Procedures Directive creates an obligation for the EU Member States that goes beyond the CSR51, namely to address inclusion in the interview with the applicant even in cases when the refugee adjudicators plan to apply the exclusion clause.

Vanessa MacDonnell, vmacdonn@uottawa.ca

University of Ottawa Faculty of Law (Common Law Section)

The Constitution as Framework for Governance

University of Toronto Law Journal (forthcoming, 2013)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202922

Abstract: Since the entrenchment of the Canadian Charter of Rights and Freedoms, there has been a tendency to view the judiciary as the primary institution responsible for securing constitutional rights and values. Very little attention has been paid to what role the executive and, to a lesser extent, the legislature, might have in this regard. In this paper I develop a preliminary theory of the government's role in constitutional implementation. Following Robert Alexy, I suggest that, guided by the "framework" established by the constitution, government can be understood to play a central role in securing constitutional rights and values. If the constitution imposes explicit limits on state power as well as certain affirmative obligations, then the government's role in constitutional implementation is much greater than is generally acknowledged. Once this role is better understood, certain deficiencies in the conventional account of Canadian constitutional law become clear, particularly insofar as this account conceptualizes the Charter as comprising a series of limits on government power and imagines government as a potential rights-infringer to be reined in by the courts.

Leonardo Pierdominici, leonardo.pierdominici@eui.eu

European University Institute
Constitutional Adjudication and the 'Dimensions' of Judicial Activism: Comparative Legal and Institutional Heuristics,

3 Transnational Legal Theory 207 (2013)

http://dx.doi.org/10.5235/20414005.3.3.207
Abstract: The dominant approach to constitutional law, and even more so to constitutional theory, has historically been judicial review-centred. Constitutional scholarship has often seemed 'strong on positions and weak on analysis', based on 'foundationalist'/organic theories of judicial review, trying to justify or to reject the practice in toto and dictating its parameters. Behind such strong positions, and behind the search for 'first-best principles' of legitimacy, one can see a series of latent and intractable tensions, inherent in traditional constitutional theories of interpretation and adjudication: these tensions are the consequences of the unavoidably creative function of the judicial role. A pragmatic, second-best inquiry must probe the degree of such creativity, focusing on the questions of mode, limits, level of acceptability of law-making through the courts, and issues of institutional performance and systemic effects of adjudication. In light of all this, the paper will provide a taxonomy of the different types of criticisms that constitutional theories have raised regarding what we can broadly describe as the democratic legitimacy concerns of constitutional review. These are often lumped together, in different contexts, under the concept of 'judicial activism', ranging from the very existence of judicial review, to the different forms of conceptualising the proper role of judicial interventions and the different modalities of constitutional adjudication. The paper will deal, in comparative perspective, with both American and Continental historical constitutional theories as well as the most recent trends of Institutional Analysis. The objective is to sketch a useful framework and some heuristic devices for the study of courts, different kinds of constitutional adjudication, and the spaces of discretion that are thereby implied.

Shruti Rana, srana@law.umaryland.edu

University of Maryland Francis King Carey School of Law

Title: China's New Copyright Reforms: A Comparative Perspective, 53 Santa Clara Law Review (Forthcoming 2013) (with Garland Rowland)

Address where piece is available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189182

Abstract:

Nations and businesses around the globe have been battling over copyright protection rules, with industrialized nations pressuring developing nations to adopt Western-style copyright regimes. These battles have escalated as copyright piracy grows and developing nations struggle to formulate laws that will protect their own intellectual properties as well as those of industrialized nations.

China is at the cutting edge of these debates; in the summer of 2012, China released transformative new proposals to modify its copyright rules. This Article, which we believe is the first in-depth academic piece analyzing China's new reforms, critiques China's new proposals and argues that China must develop a hybrid system of copyright protection that explicitly protects both foreign and Chinese intellectual property. In particular, we argue that China should expand public awareness of copyright rules and their functions as well as tighten its copyrights laws to establish a more effective copyright regime. We conduct a comparative analysis of copyright regimes in the United States, the European Union, Japan, and Taiwan, and argue that China should adopt the approach of its Eastern neighbors while strengthening its current copyright rules, which were originally transplanted from the West. We propose recommendations for reform of China's copyright system that are tailored to China's societal norms for protection of intellectual property as well as China's particular cultural and legal context.

Our recommendations also seek to bridge the gap between Eastern and Western copyright rules, and are therefore of great importance not just to China, but also to the U.S. and Western governments and companies. Our ultimate goals are to enhance public awareness of copyright rules and to lay the groundwork for a hybrid East/West approach to copyright protection that is appropriate to a globalized world composed of individual nations, each with their own historical and legal contexts.

Shruti Rana, srana@law.umaryland.edu

University of Maryland Francis King Carey School of Law

Title: Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship

Publication Outlet: 64 Alabama Law Review (Forthcoming 2013)

Address where piece is available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213349

Abstract:

Each generation creates its own philanthropic bodies, with novel structures promising both increased sustainability and efficiency. From the seventeenth-century financial

imperialists to today's internet entrepreneurs, innovation, wealth, and philanthropy have moved in tandem, shaping one another and resulting in new philanthropic forms.

The most recent of these emerging entities is the "for-profit charity," which relies on market profits and market principles to replace donations and to maximize its impact. Current philanthropic literature praises these market-based structures as revolutionary innovations that enhance long-term sustainability, and the focus of legal reforms falls along these lines. Yet the legal literature fails to fully appreciate the lessons of history. Although state after state is authorizing or fostering the growth of such hybrid entities, and although these entities do have the potential to contribute to philanthropy in novel ways, without a broader set of legal and regulatory reforms, the new philanthropic entities now emerging will be unable to meaningfully harness market forces to enhance their philanthropic endeavors.

This Article argues that the key philanthropic innovation transforming society today is not the public-private hybrid model. An examination of the history of philanthropic innovation in the U.S. and in other nations exposes what the current literature largely overlooks. That is, a historical and comparative analysis reveals that meaningful and lasting philanthropic change arises when philanthropic entities are able to capture and utilize the market innovations that are transforming society and leading to bursts of industrial or technological progress. Thus, groundbreaking philanthropic change comes when charitable entities can harness such transformative commercial and technological developments towards charitable ends.

In this light, the most critical philanthropic innovation transforming society today is not the public-private hybrid idea, but rather the little studied phenomenon of firms applying to philanthropy the ideas that made them successful in the marketplace. Understanding this under-appreciated nexus between business and philanthropy is vital for harnessing the larger potential of the new philanthropy, as well as for promoting regulatory action that can enhance both business and philanthropic innovation. Recognizing philanthropic entrepreneurialism as a reflection of, and reaction to, commercial innovations such as the development of capital pooling models or internet social networks is imperative for the design of a more proactive and efficient regulatory regime.

Shruti Rana, srana@law.umaryland.edu

University of Maryland Francis King Carey School of Law

Title: Teaching Amidst Transformation, 8 Journal of Business And Technology Law 101 (2013) (Essay)

Address where piece is available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187567

Abstract:

Teaching during tumultuous times requires creativity, but the lessons that emerge during times of crisis can also enrich classroom discussion by underscoring different perspectives and potential solutions to traditional classroom problems. This essay describes some methods for using examples from the recent financial crisis in the classroom, with the aim of enhancing comparative analyses and tying traditional financial concepts to broader themes stemming from the financial crisis.

Yaniv Roznai, y.roznai@lse.ac.uk

London School of Economics and Political Science
Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea

61(3) American Journal of Comparative Law (forthcoming 2013).
Abstract: Can a constitutional amendment be unconstitutional? Prima facie, this seems like a paradox. This vexing issue has attracted increased attention in recent years. This Article aims to trace the migration of limited amendment power and of judicial review of constitutional amendments through different jurisdictions, and to paint a broad pattern of "constitutional behavior." It appears that the global trend is moving towards accepting the idea of limitations – explicit or implicit – on constitutional amendment power. Bearing in mind the difficulties of borrowing (or transplanting) constitutional ideas from different jurisdictions into other legal cultures, this Article claims that limitations upon the amendment power is just one example of the larger phenomenon of the migration of legal ideas. At times, the notion of limited amendment power migrated intact into other jurisdictions, but on other occasions it also absorbed local content, primarily to acknowledge prior events and past experiences. The fact that this concept traveled across continents and entered different legal systems shows that borrowing a constitutional idea can be successful, even within very dissimilar legal systems. This comparative investigation into the origins and the migration of the idea of limits to the amending power will highlight the uniqueness of each legal system and unravel the conundrum of unconstitutional constitutional amendments itself.

Yaniv Roznai y.roznai@lse.ac.uk

London School of Economics and Political Science
The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments
62(3) International & Comparative Law Quarterly (forthcoming 2013).
Abstract: This article examines whether there are any limitations on constitutional

amendment powers that are external to the constitutional system and above it – 'supra-constitutional' limits. It considers the theory and practice of the relationship between natural law, international law or other supranational law, and domestic constitutional law in a comparative prism. After considering the alleged supremacy of supranational law over constitutional amendments, the author explores the problem of the relationship between the different legal orders in the external/internal juridical spheres, and the important potential and actual role of national courts in 'domesticating' supranational law and enforcing its supremacy. It is claimed that despite the growing influence of supranational law, state practice demonstrates that constitutional law is still generally superior to international law, and even when the normative hierarchical superiority of supranational law is recognized within the domestic legal order, this supremacy derives not from supranational law as a separate legal order, but rather from the constitution itself. Therefore, it is claimed that existing practice regarding arguments of 'supra-constitutional' limitations are better described by explicit or implicit limitations within the constitution itself, through which supranational standards can be infused to serve as valid limitations on constitutional amendment powers.

Yaniv Roznai, y.roznai@lse.ac.uk

London School of Economics and Political Science

Revolutionary Lawyering? On Lawyer's Social Responsibility and Roles during a Democratic Revolution

22(2) Southern California Interdisciplinary Law Journal 353-384 (2013).

Abstract: Do lawyers have any social responsibilities during a revolution? If so, what are they? Does the lawyer hold any special roles in revolutionary times? According to the article, revolutions in the Western world and the legal profession are linked. Therefore, the article describes the historical role lawyers have played in the great revolutions which have created stable liberal traditions based on the idea of "rights": The Glorious, American and French Revolutions. The article deliberates on the characteristics of lawyers which support conservatism and oppose revolutions and vice versa. It then presents the conflicting duties which are imposed upon lawyers during revolutions. On the one hand, the lawyer has an obligation to preserve the legal order and the rule of law. This obligation may entail a duty to act in a counter-revolutionary manner. On the other hand, the lawyer has obligations to improve the legal system and to promote the rule of law. These may entail actions which support the revolutionary values or goals, especially in a democratic revolution. Lastly, the article considers the practical role of lawyers during a revolution, inter alia, in public speaking and assisting in drafting the basic documents of the new legal order. In times of revolutions that seek to collapse the existing legal order, the revolutionary lawyer can play a significant role in preserving and creating the temporary, transitional and new legal orders.

Nicholas Stephanopoulos, nsteph@uchicago.edu
University of Chicago Law School
The Consequences of Consequentialist Criteria

U.C. Irvine Law Review (forthcoming 2013)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230955
Abstract: The two most significant approaches to redistricting to emerge in the last generation are both consequentialist. That is, they both urge authorities to design — and courts to evaluate — district plans on the basis of the plans' likely electoral consequences. According to the partisan fairness approach, plans should treat the major parties symmetrically in terms of the conversion of votes to seats. According to the competitiveness approach, districts should be as electorally competitive as is feasible.
Unnoticed by the literature, a substantial number of jurisdictions, in both America and Australia, have heeded these calls from the academy. In sum, consequentialist criteria have been used to shape the district plans for close to three hundred elections over the last four decades. In this paper, I provide an initial assessment of the record of these criteria. The record, for the most part, is mediocre. Controlling for other relevant factors, partisan fairness requirements have not made district plans more symmetric in their treatment of the major parties. Nor have competitiveness requirements made elections more competitive. The likely explanations are the poor drafting, low prioritization, and need for unrealistically accurate electoral forecasts of most consequentialist criteria.
However, other common proposals for redistricting reform — in particular, the use of neutral institutions such as commissions — have performed much better. Elections in Australia, all of which rely on commissions, are much fairer and more competitive than their American counterparts. In the United States, commission usage increases both partisan fairness in state legislative elections and competitiveness in congressional elections, even controlling for an array of other variables. Ironically, it seems that consequentialist criteria cannot achieve their own desired consequences — but that non-consequentialist approaches can.

Dr Jack Tsen-Ta Lee, jacklee@smu.edu.sg

Assistant Professor of Law, School of Law, Singapore Management University

Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore

[2012] Singapore Journal of Legal Studies 298–330

http://works.bepress.com/jacklee/37/, http://ssrn.com/abstract=2236053

Abstract: This article aims to assess the role played by the rule of law in discourse by critics of the Singapore Government's policies and in the Government's responses to such criticisms. It argues that in the past the two narratives clashed over conceptions of the rule of law, but there is now evidence of convergence of thinking as regards the need to protect human rights, though not necessarily as to how the balance between rights and other public interests should be struck. The article also examines why the rule of law must be regarded as a constitutional doctrine in Singapore, the legal implications of this fact, and how useful the doctrine is in fostering greater solicitude for human rights.

Ilias Trispiotis, i.trispiotis@ucl.ac.uk

University College London and Harvard Law School

The Duty to Respect Religious Beliefs: Insights from European Human Rights Law

19(3) Columbia Journal of European Law (Summer 2013)

Abstract: This Article examines the issue of religiously offensive speech regulation in human rights theory and practice. It proposes a new theoretical framework to understand offensive speech, and challenges the European approach, which is based on a balancing test involving freedom of expression and freedom of religion in cases of religiously offensive speech. Perceiving offensive speech cases as a balancing exercise obfuscates different types of justification for free speech, affords weak protection to forms of expression deviating from the State sanctioned orthodoxy, and blurs the lines between blasphemy, group defamation and hate speech. The proposed framework suggests that justifying protection of free speech on public interest grounds fits the value framework of the European Convention on Human Rights and is congenial to the latest Council of Europe and UN initiatives. In an increasingly more religiously diverse Europe, robust protection of free speech is important – both substantively and symbolically – to secure fair democracy and social cohesion.

Ozan Varol

Lewis & Clark Law School

Temporary Constitutions

102 California Law Review (forthcoming 2014)

http://ssrn.com/abstract=2258188

The prevailing conceptions of constitutions ordinarily characterize them as rigid and long-enduring, if not permanent, documents. This Article challenges that prevailing wisdom on both descriptive and normative grounds by providing the first systematic examination of temporary constitutions, exploring their costs and benefits, and providing prescriptions for their optimal use. A temporary constitution or constitutional provision, as this Article defines it, limits its own term and lapses at its expiration date unless reenacted through regular constitutional amendment procedures. Although underexplored and undertheorized, temporary constitutions have extensive historical pedigree and neglected benefits for constitutionalism. Temporary constitutions can reduce error costs associated with entrenching a norm in a durable constitution and promote incrementalism and experimentation in constitutional design by allowing constitutional drafters to consider a greater quality and quantity of information about the empirical effects of their constitutional choices. The use of temporary constitutions can also reduce cognitive biases that tend to predominate in constitutional moments and promote consensus building among constitutional designers by lowering the decision costs involved in negotiating and reaching a constitutional bargain. Finally, temporary constitutionalism can respond to the central critique of durable constitutions by easing the "dead hand" problem, which refers to the ability of the constitutional founders to entrench norms that bind future generations.

Ozan Varol

Lewis & Clark Law School

The Turkish "Model" of Civil-Military Relations

11 International Journal of Constitutional Law (I-CON) (forthcoming 2013)

http://ssrn.com/abstract=2258196

As Egypt underwent a tumultuous military-led transition from autocracy to democracy beginning in 2011, a chorus of commentators advocated a "Turkish model" for civil-military relations in Egypt's nascent democracy. That term is frequently invoked in both popular and academic discourse, but rarely defined. This Article takes up the task of giving content to that elusive phrase. It begins by analyzing the composition, structure, and objectives of the Turkish military beginning with the Ottoman Empire. It then turns to May 1960, when the Turkish military staged its first direct intervention in republican politics by toppling an authoritarian government and installing democratically elected leaders after seventeen months of interim military rule. The Article shows that the military played a crucial role in Turkish modernization and democratization during the coup and in its immediate aftermath—a role that has been largely obscured by the current portrayal of the Turkish military as a hegemonic and

repressive institution. The Article discusses why, following its initial democratization role after the 1960 coup, the military failed to retreat to the barracks and began to present impediments to democracy. The Article then explains the recent exodus of the Turkish military from politics with the ascension to power of stable civilian governments and Turkey's accession process to the European Union. It concludes by offering observations and lessons for other nations seeking to normalize their civil-military relations.