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University of California, Davis
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California Law Review, Vol. 93, 2005
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N E W a n d F O R T H C O M I N G A r t i c l e s

"Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims"

Virginia Journal of International Law, Vol. 45, 2005

BY: ANDREA K BJORKLUND
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ABSTRACT:

International tribunals have traditionally employed ill-defined measures to ascertain whether a State's judicial practices with respect to aliens have resulted in a denial of justice under international law. Foreign investors with rights conferred by bilateral and multilateral investment agreements may challenge domestic court decisions, but may obtain relief only from an act that shocks the conscience or surprises a sense of judicial propriety. My hypothesis is that these imprecise standards are more likely to result in an unreasoned critique of a State's judicial processes than would more systematic and reasoned analysis of the judicial system's alleged shortcomings.

International tribunals have decided dozens of denial of justice cases in the last 130 years; many of them are characterized by disparity between rhetoric (high deference) and reality (poorly explained findings of denials of justice). These decisions advance the interests of neither sovereign States nor foreign investors, both of whom seek clear, predictable outcomes from national judicial systems and international tribunals. The challenge is to develop a denial of justice standard that maximizes the dispensation of justice to a particular investor while minimizing intrusion on the sovereignty of the State whose judicial system is questioned. The approach set forth below, sequential review, does just that. The first-order inquiry examines a particular court decision; the second-order inquiry, commenced only if the first fails to dispose of the claim in its

entirety, examines alleged inadequacies in the judicial system as a whole. By creating a coherent, well-reasoned body of jurisprudence, investment tribunals bolster their legitimacy, fulfill the goals of both investors and sovereign States, and enhance the dialogue between international and national courts.

Critics periodically draw public attention to the secret threat to democracy and popular sovereignty supposedly inherent in an international tribunal's purporting to pass judgment on a U.S. court decision or government regulation. Yet there is nothing secret about a nation's offering such a remedy to foreign investors, and a nation's conferring such authority on international tribunals is the very essence of a sovereign act.

"Law, Culture and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners"
Wake Forest Law Review, Forthcoming

BY: ROBERT WILLIAM HILLMAN
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ABSTRACT:

In important respects, contemporary partnerships are modifying the associational form under which they operate in ways that represent clear departures from the classic partnership model.

This article explores the mystique of partnership, the role of partnership in our culture, and how partnership law has evolved to encourage the structuring of relationships that bear little resemblance to the partnership model on which the law was developed (e.g., nonequity partners in professional services firms). It considers the implications of this change and questions whether long-standing assumptions concerning what it means to be a partner continue to hold.

"Maria and Joseph Plasencia's Lost Weekend: The Case of Landon v. Plasencia"

IMMIGRATION STORIES, David A. Martin, Peter H. Schuck, eds., Foundation Press, 2005

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ABSTRACT:

This is a chapter to a book, edited by David A. Martin and Peter H. Schuck, that includes chapters telling the stories of major U.S. immigration law cases. This chapter tells the human story of Maria and Joseph Plasencia behind the Supreme Court's decision in *Landon v. Plasencia* 459 U.S. 21 (1982). In an opinion written by Justice Sandra Day O'Connor, the Court held that the question whether Plasencia, a lawful permanent resident who was accused of being inadmissible because she was seeking to smuggle noncitizens into the country upon her return to a brief weekend trip to Mexico, could be determined in an exclusion (rather than a deportation) hearing, but also that this hearing must comport with due process. Prompted by *Landon v. Plasencia*, Congress in 1996 amended the immigration statute to provide that returning lawful permanent residents seeking to enter the country are generally not subject to the same procedures and inadmissibility grounds as first-time entrants. A beneficial dialogue between the Supreme Court in *Landon v. Plasencia* and Congress thus secured greater rights for lawful permanent residents and arguably made immigration procedures more consistent with mainstream constitutional norms.

The real life drama of Maria and Joseph Plasencia shows a rather ordinary couple - one an immigrant, the other a native-born U.S. citizen - caught up in larger national and international tides. Far from a passive observer, Maria Plasencia refused to concede removal but pressed her claim to return to her family in the United States. Legally, the Supreme Court decision in the case was a loss for Maria, but, released pending appeal and never pursued by the INS after the Supreme Court's decision, she returned to normal life in the United States with her family.

"The Return of the Ring"
California Law Review, Vol. 93, 2005

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ABSTRACT:

In 1996, the United States Congress began its imposition of a marital solution to poverty when it enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). Nearly ten years later, Congress has strengthened its commitment to marriage as a cure for welfare dependency with proposals such as the Personal Responsibility, Work, and Family Promotion Act of 2005. If passed, this bill would provide 1.5 billion dollars for pro-marriage programs and require each state to explain how its welfare program will encourage marriage for single mothers who receive public aid. With these proposals, Congress has continued to construct poverty as a private rather than public problem. These programs, designed to move poor individuals into the husband-wife, normatively heterosexual dyad, are part of a long-term plan for privatizing economic responsibility for children in impoverished households.

This Article situates recent welfare debates concerning the Temporary Assistance to Needy Families ("TANF") program, in particular those debates concerning the proposal of the "marriage cure," within a post-colonial context and examines, both historically and currently, how the law of marriage has been used in the United States as a tool for "civilizing"

outsiders. Part I analyzes how marriage laws were used in the post-bellum period as a means of minimizing states' economic responsibility to provide for newly-emancipated Blacks, especially former slave children. Part II scrutinizes the racialization of welfare recipients in the United States in recent history and dissects current and proposed TANF marriage-promotion provisions to reveal how marriage and law are again being operated as tools for domesticating welfare queens.

Finally, this Article concludes by exploring alternatives to this proposed marriage cure to poverty.

"Enlightened Constitutionalism"

Connecticut Law Review, Vol. 37, 2005

BY: MADHAVI SUNDER
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ABSTRACT:

In his important new essay, "Imposed Constitutionalism," Noah Feldman shares his dilemma as an American constitutional advisor to the fledgling democracy in Iraq: How can we Western outsiders exercise influence in constitutional processes without undermining local autonomy and democracy itself? His answer: We cannot. Ironically, the conclusion of his "insider's" account is that political "outsiders" ought to take no part in - indeed, they ought not even to influence - the constitutions of new democracies. Western influence is imposition.

It is brave of Feldman to describe the very actions that brought him fame as problematic. And it is rare to see a person with real power to affect a country's constitution graciously make the case for abdicating that power. But Westerners'

deference to local elites and our elision of internal traditions of dissent for equality within new Islamic democracies has the perverse effect of buttressing local fundamentalists' claims that equality is "Western" and anathema to Islam. The problem is that while Feldman sees democracy in the Muslim world as homegrown, he seems to imagine egalitarianism as largely exogenous to Islamic democracy. Thus, egalitarianism becomes "imposed" by Westerners in ways that undermine democratic self-determination. But as my own research has shown, Islamic communities increasingly demonstrate endogenous commitments to equality. These commitments are evident especially in the challenges posed by Islamic women reformers to traditions of patriarchy offered under a religious guise. Depicting equality claims as "imposed" works against the claims of internal reformers who would seek to reconcile Islam and equality and who desire affirmation of their views from a sympathetic global public. The unintended consequence of Feldman's proposal is that we side with the fundamentalists instead of the egalitarian reformers.

I suggest instead that now is the time for active engagement - for throwing our lot in with those who seek an Islamic democracy that is respectful of women's equality and fundamental rights to open debate and critical reason. An enlightened constitutionalism, in contrast to an imposed constitutionalism, recognizes that modern nations are much more heterogeneous and porous than previously imagined. Enlightened constitutionalism would not shut down the channels of transnational dialogue in the name of facilitating self-determination, because it understands that external influence on the internal is inevitable - that deference is inevitably choice. Furthermore, it sees cross-cultural discourse and dissent as important goods in themselves - for example, as sources of support for internal reformers and as potential inspiration for new ideas. In the end, the commitment of enlightened constitutionalism to embrace dialogue even in the face of postcolonial and neocolonial power turns on a particular understanding of human beings themselves.

Enlightened constitutionalism reflects the cosmopolitan constitution of us all: the inspiring human ability to create ourselves as historical beings, selecting and modifying diverse traditions to suit our changing needs and aspirations in modernity.

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