

For me, however, this is not an argument for abandoning the move toward liberty altogether, but an argument that this move will not be a panacea. As noted, even liberty cases such as *Roe* or *Casey* underscored the equality concerns that were present in these decisions. I believe that if we keep those equality concerns steadily visible, we can also address the concerns about sex-based subordination described above.

A final objection to the move toward liberty is that it is a false rescue because it substitutes one slippery slope for another. Pluralism anxiety directs our attention to the group-based slippery slope. A movement from equality to liberty seems to solve this problem, as it focuses on rights that belong to all. However, an approach that foregrounds liberty raises a different question. It replaces the question of which groups should be protected with the question of which rights should be protected.

Some slopes, though, are more slippery than others. Here I intuit that the slope of rights is less slippery than the slope of groups. I say this because I have seen lists of rights that could be deemed fairly comprehensive. Martha Nussbaum, for instance, has created a list of 10 human “capabilities”—the kinds of activities in which individuals need to engage to have a chance at human flourishing. These rights seem relatively complete to me, as do the rights embodied in the Universal Declaration of Human Rights. I have never, however, seen a list of groups that felt even remotely exhaustive.

CONCLUSION

This article has made a strong positive claim and a weak normative one. The strong positive claim is that pluralism anxiety has driven the United States Supreme Court to shift from a group-based equality jurisprudence toward a universal human rights jurisprudence. The weak normative claim is that this shift is not just largely inevitable, but also probably desirable. Having the judiciary lead with claims that sound in universal human rights rather than group-based civil rights contributes to that unified sense of “we, the people” even as it extends those rights to groups that have historically been denied them. This is the new equal protection.

KENJI YOSHINO, *Chief Justice Earl Warren Professor of Constitutional Law*, specializes in constitutional law, antidiscrimination law, and law and literature. This excerpt is adapted from an article of the same title published in the January 2011 Harvard Law Review.

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Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct

EDITED BY ANTHONY S. BARKOW AND RACHEL E. BARKOW

New York University Press, 2011



Thus we have entered a new era in which prosecutors and firms have embraced ... regulation by prosecutors. Prosecutors have increasingly reached agreements with companies that allow the companies to avoid indictments so long as they meet the prosecutors' regulatory terms. The agreements go by different names. In the federal system, they consist of non-prosecution agreements and deferred prosecution agreements. In some states, they are known as settlement agreements. When the agreements require companies simply to obey the law or pay for prior bad acts, they are not particularly noteworthy because they are incidental to the traditional exercise of executive power.

But in many of these agreements, prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance. These dictates are often sweeping and some prosecutors have imposed them on industries, not just isolated companies. They resemble, in significant respects, the structural injunctions courts have imposed in areas like prison and school reform and the regulations promulgated by administrative agencies. ...

The practice of regulation by prosecutors thus raises a number of fundamental questions. Perhaps most fundamentally, there is the question of how the government should seek to deter corporate misconduct and the role of the criminal law in that endeavor. Relatedly, there is the question of prosecutorial competence and legitimacy to set regulatory terms. What is the comparative institutional competence of prosecutors to regulate as compared with traditional regulatory agencies like the SEC? Are there differences in the relative competence of state versus federal prosecutors in pursuing this kind of regulation? What factors—accountability, expertise, independence, ethical concerns, efficiency or lack thereof—make prosecutorial participation in the regulation desirable or undesirable? How could these factors be adjusted to improve the quality of that participation? What safeguards can promote good practices in prosecutorial involvement in corporate governance, and what measures can improve coordination and minimize collisions between prosecutors and regulatory agencies? How much power should corporate monitors have, and by what process should they be appointed? These questions motivate the authors who have contributed to this volume.

This book is a compilation of papers presented at the Center on the Administration of Criminal Law's inaugural conference, “Regulation by Prosecutors.”



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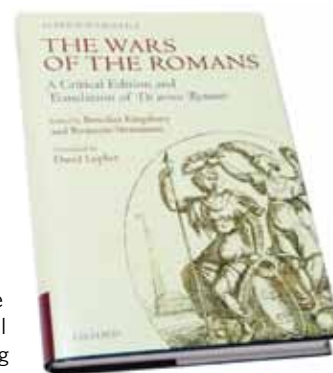
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The Wars of the Romans: A Critical Edition and Translation of *De armis Romanis*

EDITED BY BENEDICT KINGSBURY AND
BENJAMIN STRAUMANN

Oxford University Press, 2011



“How can questions concerning imperial expansion be addressed from the perspective of justice? To what extent does law provide a satisfactory way of making assessments of the justice or rectitude of imperial wars, imperial conquests, and governance within a far-flung empire? How does the law concerning relations within and between empires overlap or differ from the law concerning interstate relations? To what extent are specific practices and legal principles of the Roman empire instantiations of arguments about universal moral principles of justice in imperial and interstate relations applicable also to other contexts?”

In *The Wars of the Romans*, first published in its complete form by Wilhelm Anton in Hanau-am-Main in 1599, the Italian jurist Alberico Gentili explicitly deals with the military expansion of the Roman empire from the perspectives of law and justice....

The Wars of the Romans can thus be seen as an attempt to justify a legal order, introduced by Roman imperialism into a situation in which only an under-specified body of natural law applied. Rather than lending support to the empires of Gentili's own day, *The Wars of the Romans* focuses on the Roman empire of classical antiquity, its justification, and its legal legacy. The rules and norms developed by the Romans were apt, in Gentili's analysis, to guide and justify some imperial conduct, but also to constrain early modern empires and emerging sovereign states. Indeed, Gentili is critical of the Spanish and Ottoman empires of the late sixteenth century, and far from enthusiastic about the Holy Roman Empire. While he does not deny a certain continuity between the latter and the ancient Roman empire, his argument in *The Wars of the Romans* clearly does not rest on an analogy between the two. Rather, the Holy Roman Empire of his own day appears in his thought as but one polity among many, all of which are susceptible to being judged according to the principles of law established in the ancient and enduring Roman legal order.

This excerpt comes from the introduction to this edition of Alberico Gentili's 16th-century work, which was translated into English by David Lupher.

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A Thousand Times More Fair: What Shakespeare's Plays Teach Us About Justice

BY KENJI YOSHINO
HarperCollins Publishers, 2011

“ We live in a time when human factfinding has triumphed decisively over supernatural factfinding: we trust judges or juries to find the facts rather than requiring parties to carry hot coals or to battle their accusers. I therefore ask whether a tragedy like *Othello's* could happen in our time. Of course it can and does.

To show this, I compare *Othello* and the 1995 trial of O. J. Simpson. The analogy has little to do with race. It relies instead on the ability of ocular proof—hard physical evidence—to overwhelm all other forms of evidence. In the Simpson trial, the distracting object was not Desdemona's white handkerchief “spotted with strawberries,” but a black glove spotted with blood. By exonerating Simpson, the jury showed that even collective human factfinding is vulnerable to what I will call ocular proof bias.

This vulnerability raises the question of whether the jury is really as much of an antidote to such ocular proof bias as it seems to be. Recently, much has been made of the putative “*CSI* [*Crime Scene Investigation*] effect,” in which forensic science television shows like *CSI* ostensibly cause juries to fixate obsessively on physical evidence. Although both the cause and extent of the *CSI* effect have been questioned, juries do seem at least as susceptible as ever to ocular proof bias.

My point is not that we should abandon the jury system, but that we should understand better why we continue to use it. As legal historian George Fisher points out, we use the jury not because it is an infallible factfinder, but because it gives us closure in a world in which infallible factfinders do not exist. The jury permits us to evade the inherent difficulties of factfinding, because, like God, the jury need not respond to questions or justify its results. But if so, we have not traveled as far from the supernatural proofs as we may think. *Othello* helps us grapple with the question of whether human factfinding is a triumphal step away from supernatural factfinding, or simply a different way of letting an inscrutable but definitive authority help us negotiate a world that is, and will remain, largely opaque to human apprehension.

