CONSTITUTIONALIZING ECONOMIC GLOBALIZATION

Are foreign investors the privileged citizens of a new constitutional order that guarantees rates of return on investment interests? David Schneiderman explores the linkages between a new investment rules regime and state constitutions – between a constitution-like regime for the protection of foreign investment and the constitutional projects of national states. The investment rules regime, as in classical accounts of constitutionalism, considers democratically authorized state action as inherently suspect. Despite the myriad purposes served by constitutionalism, the investment rules regime aims solely to enforce limits, both inside and outside of national constitutional systems, beyond which citizen-driven politics will be disabled. Drawing on contemporary and historical case studies, the author argues that any transnational regime should encourage innovation, experimentation, and the capacity to imagine alternative futures for managing the relationship between politics and markets. These objectives have been best accomplished via democratic institutions operating at national, sub-national, and local levels.

DAVID SCHNEIDERMAN is professor of law and political science at the University of Toronto.
CAMBRIDGE STUDIES IN LAW AND SOCIETY

Cambridge Studies in Law and Society aims to publish the best scholarly work on legal discourse and practice in its social and institutional contexts, combining theoretical insights and empirical research.

The fields that it covers are: studies of law in action; the sociology of law; the anthropology of law; cultural studies of law, including the role of legal discourses in social formations; law and economics; law and politics; and studies of governance. The books consider all forms of legal discourse across societies, rather than being limited to lawyers’ discourses alone.

The series editors come from a range of disciplines: academic law, sociolegal studies, sociology, and anthropology. All have been actively involved in teaching and writing about law in context.

Series editors

Chris Arup
Victoria University, Melbourne
Martin Chanock
La Trobe University, Melbourne
Pat O’Malley
University of Sydney, Australia
Sally Engle Merry
New York University
Susan Silbey
Massachusetts Institute of Technology

Books in the series

The Politics of Truth and Reconciliation in South Africa
Legitimating the Post-Apartheid State
Richard A. Wilson
Modernism and the Grounds of Law
Peter Fitzpatrick
Unemployment and Government
Genealogies of the Social
William Walters
Autonomy and Ethnicity
Negotiating Competing Claims in Multi-Ethnic States
Yash Ghai
Constituting Democracy
Law, Globalism and South Africa's Political Reconstruction
Heinz Klug

The New World Trade Organization Agreements
Globalizing Law through Services and Intellectual Property
Christopher Arup

The Ritual of Rights in Japan
Law, Society, and Health Policy
Eric A. Feldman

The Invention of the Passport
Surveillance, Citizenship and the State
John Torpey

Governing Morals
A Social History of Moral Regulation
Alan Hunt

The Colonies of Law
Colonialism, Zionism and Law in Early Mandate Palestine
Ronen Shamir

Law and Nature
David Delaney

Social Citizenship and Workfare in the United States and Western Europe
The Paradox of Inclusion
Joel F. Handler

Law, Anthropology and the Constitution of the Social
Making Persons and Things
Edited by Alain Pottage and Martha Mundy

Judicial Review and Bureaucratic Impact
International and Interdisciplinary Perspectives
Edited by Marc Hertogh and Simon Halliday

Immigrants at the Margins
Law, Race, and Exclusion in Southern Europe
Kitty Calavita

Lawyers and Regulation
The Politics of the Administrative Process
Patrick Schmidt

Law and Globalization from Below
Toward a Cosmopolitan Legality
Edited by Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito
Public Accountability
Designs, Dilemmas and Experiences
Edited by Michael W. Dowdle

Law, Violence and Sovereignty among West Bank Palestinians
Tobias Kelly

Legal Reform and Administrative Detention Powers in China
Sarah Biddulph

The Practice of Human Rights
Tracking Law between the Global and the Local
Edited by Mark Goodale and Sally Engle Merry

Paths to International Justice
Social and Legal Perspectives
Edited by Marie-Bénédicte Dembour and Tobias Kelly

Law and Society in Vietnam
The Transition from Socialism in Comparative Perspective
Mark Sidel

Constitutionalizing Economic Globalization
Investment Rules and Democracy's Promise
David Schneiderman
CONSTITUTIONALIZING ECONOMIC GLOBALIZATION

Investment Rules and Democracy’s Promise

David Schneiderman
To my mother, Rose Schneiderman, and to the memory of my father, Joshua Schneiderman, who experienced both the peril and promise of constitutional democracy.
CONTENTS

Acknowledgments xi

Introduction: The New Constitutional Order 1

Part One: Rules 23

1 The Investment Rules Regime 25
2 The Takings Rule 46
3 Investment Rules in Action 69

Part Two: Projects 109

4 Health and the Environment 111
5 Land and Empowerment 135
6 Privatization and Democratization 158

Part Three: Resistance 183

7 Citizenship 185
8 The Rule of Law 205
9 Conclusion: A World of Possibilities 223

Notes 238
Bibliography 254
Index 313
ACKNOWLEDGMENTS

In the course of toiling over this book over a number of years, I have accumulated many debts. My initial interest in the intersection between constitutionalism, markets, and economic globalization was prompted in the early 1990s while undertaking graduate work at Queen's University under the supervision of John Whyte. Returning to my post as executive director of the Centre for Constitutional Studies at the University of Alberta provided me with the institutional space to pursue further my interest in the topic. I am grateful to my colleagues at the centre, particularly Bruce Elman (now dean of law at the University of Windsor), for supporting me in these endeavors. A large measure of thanks is owed to Ron Daniels, who welcomed me into the community of scholars that is the Faculty of Law at the University of Toronto. Though he has since left the deanship, Ron built at the law school an intellectual hothouse of teaching and research. It is a delight and a privilege to be a part of this community of higher learning. I was able to make great strides in my research and writing during two terms of teaching relief that the Faculty of Law provided to me. A Canada–U.S. Fulbright Visiting Scholar Award assisted greatly during one of those terms, in the spring of 2001, enabling me to bring previously written parts of the book together as well as to wholly revise and write new chapters. The Fulbright Award also facilitated my association with two venerable New York institutions: The New School for Social Research and Columbia University. I am grateful to Sondra Farganis at the New School and to Michael Dorf at Columbia Law School for providing the institutional support which allowed me to substantially complete the book. In the book’s later stages, I was fortunate to be Visiting Sabbatical Scholar and then Visiting Professor at Georgetown University Law Center. I am grateful to Dean Alex Aleinikoff and his colleagues for the congenial environment within which I was able to put the finishing touches to the book. Funding for the project also was provided by the Social Sciences and Humanities Research Council of
Canada under an MCRI grant to the Globalism Project. I am indebted to SSHRC for funding this and other of my research endeavors.

Working on globalization and investment rules from a critical angle within the legal academy is often a lonely enterprise. I am grateful, therefore, for having had the opportunity to present some of this work early on to different audiences, including associates in the Globalism Project and to researchers involved in the Consortium on Globalization, Law and Society (CONGLAS). Some of the work was also presented at seminars and conferences at Brock University, Carleton University, Georgetown University Law Center, Harvard University, New York University, Strathclyde University, the University of British Columbia, University of Toronto, and a joint Duke University-University of Geneva-University of Alberta conference on privatization.

This is a book which ranges over different disciplines and constitutional systems. I make no apologies for the fact that, methodologically, the book is eclectic in its sources and style, ranging from political theory and history to social theory and international political economy. This eclecticism is largely driven by the book's subject matter. Mapping linkages between economic globalization and constitutionalism demands a measure of interdisciplinarity that exceeds, admittedly, the bounds of any one person's expertise. The book's comparative dimension adds further layers of complexity. In my view, too much current work on economic globalization draws conclusions from impressionistic accounts of the world situation. By contrast, I endeavor here to move beyond conventional understandings and to locate how economic globalization is being made through constitution-like rules over time and in very specific locales. This requires that various constitutional systems get taken up for discussion. To the extent that this comparative endeavour is successful, it is because I have benefited from the advice of some local informants, such as Heinz Klug, Diego López-Medina, and Luz Nagle, though none should be held responsible for what appears in print. I am also pleased to acknowledge the able students who assisted with the translation of texts or otherwise with various dimensions of this research project: Rodrigo Garcia Golindo, Kyle Gooch, Moira Gracey, Mark Grzeskowiak, Ian Richler, and Mauricio Salcedo. Deborah Bays of Georgetown University Law Center provided superb secretarial assistance in the final stages.

As this is no defense of the current legal order of economic globalization, the book likely will attract the ire of economic globalization's defenders. This is because work in this area is inevitably assimilated
into the political contest which currently is being played out on a global scale. It is fair to say that the investment rules regime has proved to be a flash point for some of the debate around economic globalization. As I have developed and presented the arguments in the book, I have heard supporters of the regime argue that it is continually improving and that, usually, its most recent iteration solves many of the problems critics have noted. It is true that there are continual developments in this area, such as new treaty language and recent arbitral jurisprudence. I have tried to attend to these developments in the course of my argument, though I make no claim of having reviewed all of the issues and cases that arise within the field. Readers seeking out more definitive statements of the law are advised to seek out publications by the United Nations Commission on Trade and Development as well as recent volumes on the topic (too often, regrettably, in a format which speaks only to specialists) (Bishop et al. 2005; Rubins and Kinsella 2005; Weiler 2004; 2005).

It remains to thank those who have read all or parts of the book. They include Richard Bauman, Stephen Clarkson, Kevin Davis, Andrew Green, Donna Greschner, Robert Howse, Heinz Klug, Patrick Macklem, Luke Eric Peterson, Pratima Rao, William Scheuerman, Vicki Jackson, and Bruce Ziff in addition to anonymous reviewers who provided their insights and made a number of helpful suggestions. A special note of thanks is due to colleagues who are working on somewhat similar terrain and from whom I have learned a great deal: Harry Arthurs, Stephen Clarkson, Stephen Gill, and M. Sornarajah.

Though the chapters have been substantially revised, earlier versions of some of the chapters appeared in the journals Law and Social Inquiry, Constellations, Law and Contemporary Problems, Citizenship Studies, and the University of Toronto Law Journal, and in the books Governance on the Edge: Semi-Peripheral States and the Challenge of Globalization edited by Marjorie Cohen and Stephen Clarkson and The Migration of Constitutional Ideas edited by Sujit Choudhry. I am very grateful to Finola O’Sullivan at Cambridge University Press and to the editors of the series for their expressions of enthusiasm and also to the able staff at Cambridge who helped to facilitate production of the book.

It would be an understatement to say that Pratima Rao has been a constant source of support and guidance, both intellectual and emotional. In addition to encouraging me to enter this field early on, she has helped me along at every step. The arrival of Joshua Kiran as I was
about to submit the final version of the book may have delayed matters a little, but Kiku has provided his share of support at home with his laughter and love.

The book is dedicated to my parents, Rose and the late Joshua Schneiderman. They experienced more than their fair share of adversity in mid-twentieth century Europe. Though this book does not bear directly on that experience, the currents of their travails run deep throughout. It is my modest hope that the book will hold out some promise today for those experiencing hardship in other parts of the world.

March 2007
Washington, D.C.