

SPECIAL REPORT

Private governance and rules for a flat world

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Abstract In *Rules for a Flat World*, Hadfield argues that although the world is becoming increasingly connected and faster paced due to leaps in technological innovation, the prevailing legal systems — established by governments and run almost exclusively by lawyers — have not kept pace. They are increasingly proving ill-suited for and counterproductive to the evolving economic environment. Although coming from a different perspective, Hadfield’s encouragement of market-based solutions is highly consonant with those of classical liberals who advocate privatizing all government.

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Video Interview with Edward Stringham (1:17): “Right now, law is heavily bureaucratic; it’s done from the top down” <https://youtu.be/ivLokAx6LgQ>

Governance and rules in society are important. They help provide stable, tacitly agreed-upon parameters for interaction, lowering the incidence of conflict in a world of scarcity and inevitable rivalry. But where does governance come from and who should control it? Most people are what Oliver Williamson (1996) and Robert Ellickson (1994) would label “legal centralists” and attribute order in society to a centralized state. To legal centralists, lawmakers and the legal system create the conditions for society to flourish.

In *Rules for a Flat World*, Gillian Hadfield (2016) challenges us to introduce more market arrangements into the structure of our current legal system. She describes the legal system, accurately in our opinion, as heavily bureaucratic and designed by lawyers for their own benefit and for government and regulatory agencies to exercise control. At the end of the day, the legal system is inaccessible and unhelpful to most people. Although Hadfield is not an ideological classical liberal or libertarian, we believe her book may particularly appeal to people with such leanings as it both explicitly implicitly recognizes the power of emergent orders. Her book will also interest anyone who recognizes that our legal system is failing many people and not keeping up with the times. Hadfield (2016) describes how “half the planet lives outside of any formal legal framework. The other half operates inside frameworks that have stagnated in the twentieth century.” (p. 3) The world is becoming increasingly connected and complex, and we are living with a top down, centrally planned legal system that is slow to adapt and unequipped to deal with the modern world owing largely to deeply entrenched interests with virtually no incentive to improve it.

The title of Hadfield’s book references Thomas Friedman’s 2005 bestseller *The World Is Flat*. Friedman portrays a world increasingly interconnected by transactions, interactions, and commercial engagements that cross (and sometimes redefine) previously impregnable or near-impregnable political, economic, and social boundaries. The fall of the Berlin Wall with the attendant end of the Soviet Bloc, fiber optics, the internet-driven facilitation of corporate force multipliers such as outsourcing and supply chain management, and other “flatteners,” Friedman

contends, are fostering never-before-seen levels of global competition alongside tremendous economic and social synergies.

The “rulebooks” — which is to say, the majority of legal systems around the world today — remain much as they have been since the Industrial Revolution. They are politically anchored in nation-states and inevitably reflect most of the same shortcomings of the states that administer them: they are slow, inflexible, costly, and altogether ill-suited for an accelerating, increasingly seamless world.

Expert information can now be disseminated more widely and quickly than ever before, which brings enormous benefits and savings — and often increased risk. Consider telemedicine: health care providers do not need to be in the same room, state, or country as the patients they examine and diagnose; uncommon and even unseen medical afflictions can, via the internet, be brought to the attention of far-flung experts. Yet standards of care differ globally, as do the thresholds of liability and medical malpractice. Should care be withheld because of complicated and occasionally impenetrable legal entanglements?

More important than the insufficiency of existing legal frameworks to address the needs of an increasingly interconnected and complex world, though, are more fundamental inadequacies: the inability to dynamically change current legal frameworks when they become outmoded and an incapacity to create ad hoc legal regimes for exigent circumstances. An example of this is pervasive lack of resources available to assist individuals in diagnosing and addressing their own legal problems. Although it has been a problem for many decades, it is only recently that certain jurisdictions began employing technology to facilitate dispute resolution in simple matters — formally eliminating the prejudice often associated with self-representation, reducing backlogged dockets, and freeing both attorneys and judges to focus on more complex or pressing cases.

Fortunately, as Hadfield points out, many of the forces bringing about Friedman’s flattening not only demand new legal frameworks but can provide them. For example, the pervasive influence of the internet has, among uncountable other effects, resulted in a winnowing of the once-stark boundaries of the firm: once solitary manufacturing interests, for example, now effectively sit within an international network of horizontally- and vertically-integrated suppliers, wholesalers, financial intermediaries, and other organizations — each of which is, in turn, subject to bespoke legal, regulatory, and policy regimes. Yet the internet, which has facilitated this kind of hyper-connected, interdependent commercial association also permits for near real-time coordination of activity, including but not limited to legal and regulatory conflicts which may arise. The pivotal question becomes not which laws or regulations should be changed, but rather how to create a framework within which some elements of existing law can stand side by side with new and different legal regimes — and how entrepreneurs and venture capitalists can be engaged globally to address and remedy the shortcomings of our prevailing antiquarian legal systems.

Public choice theorists will readily identify with the history that Hadfield outlines. Throughout the late nineteenth century, attorneys sought to create a guild-like system in which they arrogated the regulation of how and by whom law could be practiced. In the modern day, the idea that anyone with substantial experience and expertise could practice law without a degree or professional credit seems benighted; but as with medicine and a handful of other professions, that was once the case. The professional protectionism that masquerades as consumer protection is a major factor in the rigidity of legal practice and institutions today. Professional credentials — not only a degree from an accredited law school but passing of a particular state’s bar exam — are required to practice law. Like any other form of occupational licensing, barriers to entering the legal profession artificially limit supply and thus raise the prices which consumers of legal services pay. The financial trajectory of any profession enjoying a de facto monopoly on its services is sufficient to dissuade innovation, as the recent settlement between legal document provider LegalZoom and the North Carolina Bar Association makes clear. After refusing to allow the company to offer its services within the

state, an antitrust settlement saw the NC Bar Association ultimately agree to allow LegalZoom to practice business within the state, provided – among other things – the company allow North Carolina attorneys to review each template offered and inform every customer that a document isn't a substitute for a licensed and accredited attorney.

Two aspects of Hadfield's analysis are especially inspiring. First, it comes from an indisputable authority on jurisprudence and practice. Second, she promotes the classical liberal perspective: that markets can and should play a role in promoting rapid, use-tailored innovation in an area long considered a quintessential public good (and accordingly, nonprovisionable by the private sector).

Classical liberals or libertarians have, like most people, determinedly promoted or blasted specific laws and regulations, but where the issue of an overarching legal framework to ensure consistency and predictability has come up, only a handful of solutions has been proposed. These include Hayek's *Law, Legislation and Liberty* (1973), Rothbard's *The Ethics of Liberty* (1982), and Stringham's *Private Governance* (2015). Stringham, for example, documents that advanced financial markets have been evolving for hundreds of years and law never was at the forefront. (p. 76 – 78) Instead, markets innovated and created advanced financial contracts even though government would not enforce them. Officials viewed most advanced contracts in stock markets as forms of gambling, so they did not enforce them. Government courts existed but were not what made these advanced markets possible; instead, it was exchanges (and other marketplaces) competing on a for-profit basis to attract listings, create new financial products, increase liquidity, and offer consistent, predictable self-regulatory oversight which led to innovation and the adoption of best practices.

While Hadfield's concept dovetails nicely with libertarian conceptions regarding private, for-profit provisioning of legal services and infrastructure, she ultimately views the role of government as shifting rather than being supplanted. Governments would shift to "meta" roles, overseeing subordinate legal regimes as "super regulators" of sorts, intervening when dire circumstances or egregious situations required it and also charting an overall direction in terms of ensuring adherence to articulated public goals. Her proposal is somewhat similar to the ideal limited government Nozick proposes in the third section of *Anarchy, State, and Utopia* (1974), where people can opt into different communities with different rules and government's only role is to secure the framework that makes this possible.

John Hasnas (2003) extends that argument and argues that advocates of government can accept a system of predominantly private law enforcement and ask the government only to ensure that providers of private law enforcement refrain from colluding or violating a few very basic, fundamental precepts, other than in the most extreme situations: precepts which would include observing the sanctity of life, respecting the right of private property, and upholding due process. Hasnas ultimately does not support that proposal, calling such a setup a remedial state. This structure resembles our current system of self-regulatory organizations such as stock exchanges that are ultimately subject to government approval and oversight. In recent years, government regulators have gotten far into the weeds of stock exchanges' business, but theoretically they could just approve which stock exchanges are permitted to exist and then give them broad authority to regulate themselves.

The unapologetically libertarian view, which we espouse, would tend toward finding this new meta role for the state as superfluous at best or more likely harmful. Central planning, including central planning of legal systems, does not work; they are readily captured, and ultimately promote special political or commercial interests at the expense of the public. They also tend to be inefficiently administered and costly, facing no (or few) competitive economic forces. Additionally, top-down organizational structures characteristically fail to aggregate and process disparate information in a sound and timely manner. Given that people use the state and its legal system to control others, we question whether what Hasnas calls the remedial state would want to stay so limited in its powers. We expect that government would expand and become controlling, not because we asked it to, but because over time states tend to expand in

both size and scope. A system of competition and private governance can more effectively help foster innovation and positive change.

Despite this key disagreement with Hadfield, our criticism amounts to a quibble when considering the scope of her work. Overall, her project has many parallels with the bottom-up policy prescriptions of libertarian legal theories: employing markets and entrepreneurialism to replace what is now handled by centrally planned law.

Hadfield concludes by advocating an overhaul of how we think about law and says we cannot leave legal reform to the lawyers. Instead, she calls for philanthropists and social impact investors to help us change the conversation and states that “disrupting our taken-for-granted approaches to delivering the legal tools a robust and fair economy needs may be the most important contribution to innovation than anyone can make” (2016, p. 354). With bold but pragmatic recommendations — changing the way we think about law, breaking lawyers’ stranglehold on the legal profession and infrastructure, and encouraging market-fostered innovation — *Rules for a Flat World* is an outstanding book. Central planning, whether of industry, natural resources, or the legal system, is doomed to failure. A system of competition and private governance can far more effectively help foster innovation and positive change.

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