
RECENT PUBLICATIONS

THE ACTIVIST: JOHN MARSHALL, *MARBURY V. MADISON*, AND THE MYTH OF JUDICIAL REVIEW. By Lawrence Goldstone. New York, N.Y.: Walker & Co. 2008. Pp. viii, 294. \$26.00. *The Activist* begins with a telling quotation in which Justice Scalia concedes that the Supreme Court's power to pass judgment on the constitutionality of statutes was "made . . . up" (p. 1). Justice Scalia was referring to *Marbury v. Madison*, which Lawrence Goldstone offers as the "seminal case in American jurisprudence" (p. 2). Dr. Goldstone begins by sketching the background context of the Constitutional Convention of 1787 and the personal history of Chief Justice Marshall, whose opinion in *Marbury* is described as "perhaps the most adroit exhibition of judicial legerdemain by any judge in the nation's history" (p. 216). Dr. Goldstone then explicates *Marbury's* role in establishing the power of judicial review, asking whether the Founders would have intended the Court to enjoy the power it wields as the ultimate arbiter of constitutionality. He concludes that the answer is no — to him, the *Marbury* decision represented little more than "constitutional amendment by fiat, a *de facto* addition to Article III itself" (p. 224). Although its central claims break little new ground, *The Activist* presents a vivid account of a pivotal moment in American constitutional history.

CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN. By Jonathan R. Macey. Princeton, N.J.: Princeton University Press. 2008. Pp. viii, 334. \$35.00. In a time when it has become commonplace to criticize the governance of public corporations in the United States, Professor Jonathan Macey provides a much-needed examination of the efficacy of the most common mechanisms of corporate governance. The framework for this analysis is a view of corporate governance as centered around minimizing deviation by management from the objectives of shareholders and the promises made by the corporation in selling its shares. *Corporate Governance* uses this framework to evaluate the efficiency of corporate governance mechanisms, from independent boards of directors to whistleblowers. Professor Macey's discovery is that those mechanisms that are the most effective at ensuring that management keeps its promises to shareholders are the same mechanisms that are highly, and often inefficiently, regulated by the government. Thus, less regulation and more reliance on market forces yields corporations that operate in better accord with the interests of their shareholders. This readable book strikes a helpful balance between a theoretical insight that will interest corporate law scholars and a relevance to the current economic and political landscape that will hold the interest of any curious investor.

FREE SPEECH AND HUMAN DIGNITY. By Steven J. Heyman. New Haven, Conn.: Yale University Press. 2008. Pp. xi, 305. \$50.00. When courts adjudicate free speech issues, they typically weigh the social interests in regulation against the individual right to freedom of expression. To Professor Steven Heyman, however, social interests and individual rights are like the proverbial apples and oranges. In *Free Speech and Human Dignity*, Professor Heyman offers a new analysis of First Amendment history and doctrine, arguing that existing approaches have failed effectively to frame contemporary debates on freedom of speech. He argues that freedom of expression “is founded on respect for the autonomy and dignity of human beings” and thus “must be exercised with due regard for the rights of other individuals and the community as a whole” (pp. 2–3). In other words, courts should weigh rights against rights. Professor Heyman marshals significant evidence that this “natural rights” approach to regulating speech framed the debate over the First Amendment at the Founding (p. 14). Although such an approach is unlikely, for instance, to resolve the divergent perspectives of libertarians and radical feminists over the regulation of pornography, it might give them a common intellectual arena in which to argue (p. 185). If it can do even this much, Professor Heyman’s contribution will be significant indeed.

THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652–2000. By Jens Meierhenrich. New York, N.Y.: Cambridge University Press. 2008. Pp. xvii, 385. \$90.00. South Africa’s peaceful transition from apartheid to democracy has surprised many observers. In an innovative approach to this topic, Professor Jens Meierhenrich argues that existing legal norms and institutions have important structuring effects on transitions to democracy. He identifies the dichotomy between apartheid law’s rational formalism and its irrational substance and asserts that this body of law “was, in an important respect, necessary for making democracy work” (p. 3). *The Legacies of Law* begins with a theoretical framework describing the ways in which different ideal types of legal systems affect actors’ strategic behavior during periods of democratization. Professor Meierhenrich applies this framework to a historical analysis of South African law with an emphasis on apartheid’s endgame, then compares the experiences of Chile at the end of the Pinochet regime, concluding with a skeptical take on modern “rule of law” movements. *The Legacies of Law* offers an important account of the end of apartheid and expands the lessons of that experience to broader issues of democratization.

LIVING THE POLICY PROCESS. By Philip B. Heymann. New York, N.Y.: Oxford University Press. 2008. Pp. xviii, 410. \$24.95. Let the new presidential administration take note: getting things done in Washington is not always straightforward. Bearing this in mind, January's migration of fresh-faced bureaucrats would do well to consult *Living the Policy Process*, Professor Philip B. Heymann's new book on executive decisionmaking. Professor Heymann illustrates his lessons with rich case studies drawn from the last thirty years of political victories and defeats. Among the most memorable is that of the CIA's covert provision of Stinger missiles to the *mujahideen*, during which mid-level Defense official Michael Pillsbury (the archetypical "policy entrepreneur" (p. 100)) deftly sequenced his pitches to disparate policymakers to ultimately push through an idea that most of the government had opposed outright. Later sections focus on the unspoken rules that govern the interactions between managers and staff, as well as the role of Congress and the courts in executive decisionmaking. Professor Heymann closes with an account of the Office of Legal Counsel and the "torture memos," emphasizing the need for competence and foresight as well as loyalty in staffing and using institutional decisionmaking processes. He concludes on a cautionary note: the simple fact that policymakers often can evade the "official" decision-making processes does not mean they always should (p. 342).

THE MADISONIAN CONSTITUTION. By George Thomas. Baltimore, Md.: The Johns Hopkins University Press. 2008. Pp. xi, 248. \$50.00. Pointing to *Marbury v. Madison*, most lawyers would consider the Supreme Court the sole interpreter of the Constitution. Professor George Thomas argues this view is "profoundly at odds with James Madison's separation of powers" (p. 15). Instead, Madison intended all three branches to interpret the Constitution and welcomed the possibility of conflict. In separate chapters, Professor Thomas fits four moments of constitutional conflict into this Madisonian framework: Reconstruction and the Civil War Amendments, the early Progressive era, the New Deal's expansion of the administrative state, and the Reagan Revolution. Each chapter examines the role of all three branches in constitutional development, challenging the "persistent and romantic view of the Court as the lone guardian of the Constitution" (p. 154), and concluding that such conflict is typical of how American constitutionalism has worked in practice. Professor Thomas argues that interbranch constitutional conflict itself is "a virtue in sustaining the Constitution" (p. 169), even suggesting that we should ignore the Court "if we think it has misinterpreted or distorted the Constitution" (p. 168). By departing from traditional perspectives on judicial review, Professor Thomas provides an unconventional, yet refreshing and historically grounded, view of how historical constitutional conflicts have fallen squarely within Madison's vision.

SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING. By Robert J. Spitzer. New York, N.Y.: Cambridge University Press. 2008. Pp. ix, 195. \$27.99. In *Saving the Constitution from Lawyers*, political scientist Robert J. Spitzer presents a sharp critique of the “wayward constitutional theorizing” (p. 177) published in law journals, tracing the origin of the poor quality of some constitutional scholarship to advocacy-based training in law schools and to student leadership of law journals. Professor Spitzer argues that the degree of legitimacy afforded such literature may allow “defective theories” to “distort academic debate and popular understanding” of the Constitution and produce flawed public policy (p. 4). To illustrate this mechanism, the author probes the influence of law review literature on the development of three constitutional issues — the debate over the existence of a presidential item veto power, the “unitary theory” of the President’s power as commander-in-chief, and the individualist view of the right to bear arms under the Second Amendment. Although law professors and many law students may find that the broad critiques of scholarly training and law reviews cover familiar ground, Professor Spitzer contributes detailed case studies showing that a lack of rigor in law schools turned laughably bad arguments into law — “and no one is laughing now” (p. 128).

SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS. By Anne Proffitt Dupre. Cambridge, Mass.: Harvard University Press. 2009. Pp. 289. \$29.95. Legal commentators have often noted that many of the Supreme Court’s most important First Amendment decisions concern speech and religious liberty in the context of education. In her new book, Professor Anne Proffitt Dupre, a former schoolteacher, methodically describes the Court’s school speech jurisprudence. Through this exercise, she demonstrates that the “school speech story is one that plumbs the soul of the nation” (p. 258). Indeed, the book illustrates how school speech cases have constituted significant parts of many important debates both popular, like that over the Vietnam War (pp. 11–23), and legal, like those over incorporation (pp. 171–74) and methods of constitutional interpretation (pp. 245–47). Furthermore, Professor Dupre tracks the doctrinal evolution of individual Justices across time and subject matter. For readers looking for a primer on the Court’s school speech cases, Professor Dupre gives a clear, cogent account of often incoherent developments: school prayer, banning library books, student newspapers, speech codes, and teachers’ speech each receive a chapter’s worth of attention. In the end, Professor Dupre admits her book “presents no concrete solution” (p. 258) to issues of school speech. Still, *Speaking Up* speaks compellingly on this ever-evolving arena of constitutional controversy.

THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS. By George C. Thomas III. Ann Arbor, Mich.: The University of Michigan Press. 2008. Pp. x, 307. \$29.95. In this biting critique of America's criminal justice system, Professor George Thomas argues that the high number of wrongful convictions in America results from the primacy the Supreme Court has given to a set of procedural rules that protect "fairness, privacy, and autonomy" at the expense of truth and justice (p. 52). This focus on following rules as opposed to finding truth generates a number of systematic problems, among them prosecutors driven by an interest in "winning the case rather than achieving justice" (p. 29). However, Professor Thomas offers more than simple criticism. After looking comparatively at the French criminal justice system, he makes a number of proposals for reform, ranging from the creation of a group of "criminal law specialists," who would both prosecute and defend those accused of crimes (p. 190), to the use of more robust pre-trial judicial review. Though his work is steeped in thoughtful historical and legal analysis, Professor Thomas's book is not aimed only at scholars. He conceives of his audience as the "fifty state legislatures," to whom he offers a ringing indictment of the criminal justice system and ideas for reform that "protect innocence at a reasonable cost" (p. 185).

THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL*. By Paul A. Lombardo. Baltimore, Md.: The Johns Hopkins University Press. 2008. Pp. xiv, 365. \$29.95. In 1927, in *Buck v. Bell*, the Supreme Court upheld a Virginia involuntary sterilization law, famously declaring that "[t]hree generations of imbeciles are enough" (p. 169). Eighty-one years later, Professor Paul Lombardo has published this compelling and well-researched book, delving deeply into material not presented at trial to show factual and legal flaws in the outcome. Professor Lombardo demonstrates how eugenics advocates "designed *Buck* to create a legal record that would be reviewed by appellate judges" so those judges could then "provide a lasting endorsement for . . . sterilization law[s]" (p. 151). Among other criticisms, Professor Lombardo notes that *Buck's* own lawyer at trial "had no intention of defending her" (p. xi), as he was a strong supporter of sterilization. He goes on to suggest similarities between the case and Nazi eugenics programs (pp. 199–214). Although later cases struck down eugenics-inspired laws, *Buck* has never been overturned and many states still have laws allowing involuntary sterilization of the mentally impaired, with varying degrees of procedural safeguards (p. 267). *Three Generations, No Imbeciles* gives Carrie *Buck's* long-untold story the attention it deserves.

UNDERSTANDING PRIVACY. By Daniel J. Solove. Cambridge, Mass.: Harvard University Press. 2008. Pp. x, 257. \$45.00. Professor Daniel J. Solove's *Understanding Privacy* is a thoughtful and engaging effort to navigate the "conceptual jungle that has entangled law and policy and prevented them from effectively addressing privacy problems" (p. 196). Eschewing existing attempts to characterize privacy according to a unified set of core attributes, Professor Solove advocates a contextual and pluralistic understanding of privacy based on the idea of family resemblances. According to his account, privacy should not be seen merely as an individual right to be balanced against the greater social good; rather the value of privacy emerges from the benefits it confers upon society. The heart of *Understanding Privacy*, though, lies in the rich taxonomy it develops to classify a diverse and comprehensive set of privacy problems. The framework both accepts and bridges cultural and societal differences, providing a flexible tool for identifying and understanding issues of privacy in whatever context they emerge. Professor Solove's book is a concrete intellectual step forward — a practical guide for practitioners, theorists, and inquisitive laymen alike, as they attempt to address the multitude of perplexing, yet important, issues surrounding privacy.

WHEN IS DISCRIMINATION WRONG? By Deborah Hellman. Cambridge, Mass.: Harvard University Press. 2008. Pp. 205. \$39.95. Acknowledging that the word "discrimination" has fallen on hard times, Professor Deborah Hellman, in this absorbing book, seeks out the criteria that separate wrongful discrimination from morally acceptable efforts to distinguish among people based on individual traits. Professor Hellman rejects three potential criteria for separating morally justified from unjustified discrimination: whether distinctions are made based on merit, whether the distinctions are arbitrary or inaccurate, and whether the intention of the person discriminating is wrongful. Instead, she posits that because all persons are of equal moral worth, to discriminate is morally impermissible "when doing so demeans any of the people affected" (p. 7). What is demeaning rests heavily on context and culture — an order to sit in the back of the bus is demeaning in modern American culture, even though "[t]eenagers covet that spot" (p. 27), and without the history of racial connotations there is nothing inherently inferior about the back. It is the order's power to demean in context of a history of troubled race relations that is important. Professor Hellman's attempt to solve the "discrimination puzzle" (p. 169) is rigorous and often surprising, and has implications for many diverse contexts.