
RECENT PUBLICATIONS

RELIGION AND THE STATE IN AMERICAN LAW. By Boris I. Bittker, Scott C. Idleman, & Frank S. Ravitch. New York, N.Y.: Cambridge University Press. 2015. Pp. xviii, 982. \$125.00. The product of years of research, this comprehensive treatise explores the ways that American law interacts with religion. Religion, of course, colors many fields of law, including contract, taxation, land use, tort, criminal, and family law. And religion raises special legal questions in government spaces such as schools, prisons, and the military. Surveying the relationship between church and state from the colonies to today's closely held corporations, this hefty volume situates modern controversies in their historical contexts. In addition to offering a thorough discussion of the First Amendment, Professors Boris Bittker, Scott Idleman, and Frank Ravitch cover statutes, regulations, and common-law developments at both the state and federal levels. Their book is a valuable resource for anyone who seeks an in-depth understanding of the unique American relationship between law and religion. This treatise was Bittker's brainchild, but he sadly did not live to see its completion. What Idleman and Ravitch have together finished is a fitting tribute to Bittker's vision — a thorough, modern overview of a legal tension that is as old as America itself.

DEATH ON DEMAND: JACK KEVORKIAN AND THE RIGHT-TO-DIE MOVEMENT. By Michael DeCesare. Lanham, Md.: Rowman & Littlefield. 2015. Pp. ix, 236. \$36.00. In the 1990s, there were few more publically recognized activists than Dr. Jack Kevorkian, the face of the controversial right-to-die movement. *Death on Demand* recounts the life of Dr. Kevorkian, starting with his time in medical school, through his criminal trials, and ending with his release from jail and subsequent death in 2011. Professor Michael DeCesare relies on interviews and other published works to provide a fascinating account of the doctor's time in the media limelight. In addition, *Death on Demand* narrates Kevorkian's important historical role as the "lightning rod throughout most of the stormiest decade in the history of the right-to-die movement" (p. 5). Assisting more than 100 suicides, Kevorkian was the face of the right-to-die movement in the 1990s. DeCesare makes a convincing case that the movement itself "[r]ose on the basis of [this] one person" only to fall "on the basis of that same person's disappearance from the public spotlight" (p. 180). For those who are interested in the right-to-die movement or the controversial figure nicknamed Doctor Death, this new book is an essential read.

CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY. By Aaron A. Dhir. New York, N.Y.: Cambridge University Press. 2015. Pp. xiv, 315. \$99.99. One does not have to be an expert in corporate governance to be aware of the all-too-common lack of gender parity that exists in corporate leadership (and the scope of the disparity therein). Also not surprising is the fact that policymakers have long wrestled with this issue — both in terms of possible solutions and why it continues to persist. In *Challenging Boardroom Homogeneity*, Professor Aaron Dhir takes an empirical approach to this inquiry and examines two different regulatory models aimed at addressing this issue — the Norwegian “quota” model and the American “disclosure” model. After explaining the quota-based approach, which prevails in several European countries, Dhir presents data supplemented by interviews with Norwegian corporate directors who gained their appointments as a result of quota mandates. This format provides a glimpse into the practical effects of a mature quota regime and highlights the tangible benefits diversity can have for corporate governance. He then turns to the American “disclosure” system, which affords firms a great deal of discretion in diversity efforts, and highlights the downsides to such uncabined discretion to define “diversity.” Through his analysis, Dhir demonstrates the profound effects that legal regimes can have on boardroom gender dynamics and the amount of work that remains to be done.

HOT NEWS IN THE AGE OF BIG DATA: A LEGAL HISTORY OF THE HOT NEWS DOCTRINE AND IMPLICATIONS FOR THE DIGITAL AGE. By Victoria Smith Ekstrand. El Paso, Tex.: LFB Scholarly Publishing LLC. 2015. Pp. x, 213. \$32.95. The hot news doctrine — which provides that a news source can sue those that appropriate its scoops — is now nearly one hundred years old. But will it last the next hundred? In her recent book, Professor Victoria Smith Ekstrand provides a robust defense of the doctrine’s continued usefulness in an era defined by the prevalence of “instantaneous information” (p. 1). Delving extensively into the record of *International News Service v. Associated Press*, the case that birthed the doctrine, Ekstrand makes a persuasive argument that the decision is best understood as a product of its time: a response to then-prevailing “historical, technological and social forces” (p. 181). Tracing the subsequent development of the hot news doctrine, Ekstrand notes that courts have taken divergent views as to its scope and application but contends that this same flexibility is one of the doctrine’s “great strengths” (p. 184). Ekstrand’s observations are timely: regulators continue to grapple with the proper degree of protection for creators of time-sensitive information. Hers is a valuable contribution to the debate.

FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS. By James E. Fleming. New York, N.Y.: Oxford University Press. 2015. Pp. xv, 243. \$75.00. For many, constitutional theory centers around the debate between two schools of thought: originalism and living constitutionalism. In *Fidelity to Our Imperfect Constitution*, Professor James Fleming casts a moral reading of the Constitution and a philosophic approach to constitutional interpretation as distinct from living constitutionalism and as an important rival to originalism. Fleming offers a sustained critique of originalism in its many forms and puts forward his philosophic approach as superior to both living constitutionalism and originalism, however conceived. He begins by tracing the evolution of originalism and identifying the many versions of originalism at large now. Next, he describes his moral reading or philosophic approach to constitutional interpretation. Fleming conceives of the Constitution as embodying abstract moral and political principles that require normative judgments as to how they are best understood. He argues that this moral reading best represents fidelity to the Constitution because it honors our commitments to aspirational principles. Finally, Fleming rejects arguments in favor of rewriting the Constitution, making the case instead for applying a Constitution-perfecting theory (such as the moral reading) with an attitude of fidelity to our imperfect Constitution.

BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT. By Michael Javen Fortner. Cambridge, Mass.: Harvard University Press. 2015. Pp. xii, 350. \$29.95. Recent events have shed new light on racial issues in American culture and law, including the problem of mass incarceration — an issue that disproportionately affects African-American communities. In this book, Professor Michael Fortner sets out to complicate the dominant narrative that portrays African Americans simply as victims of this situation by unearthing the role that African Americans played in its creation. Fortner traces current drug policy back to a controversial set of “tough on crime” laws pushed in the 1970s by New York Governor Nelson Rockefeller. At this time, New York faced skyrocketing rates of crime and addiction on top of economic difficulties. Rockefeller’s response was to crack down on drug dealers and users. Fortner makes the case here that these draconian policies enjoyed overwhelming support from working- and middle-class African Americans seeking to fight disorder in their own communities and increase their respectability. Thus, Fortner argues provocatively that America’s drug policies, while often viewed as a product of conservative political forces, are also attributable to black America’s desire to tackle criminal behavior.

THE DEVIL IS HERE IN THESE HILLS: WEST VIRGINIA'S COAL MINERS AND THEIR BATTLE FOR FREEDOM. By James Green. New York, N.Y.: Atlantic Monthly Press. 2015. Pp. viii, 440. \$28.00. Professor James Green shines a light deep into the coal mines of West Virginia and onto a forty year struggle of social, political, and legal significance. Beginning with the 1890s and ending in the 1930s, Professor Green traces the struggle of underpaid mine workers for a living wage, safer working conditions, and basic freedom of speech and association. A largely forgotten part of American history, the industrial wars of West Virginia — for war is the only appropriate way to describe them — involved violent clashes between miners and mine ownership. Martial law was imposed repeatedly, the National Guard was sent in under two different Presidents, and ultimately at least seventy-nine people lost their lives. This thoroughly researched book is brought to life through the stories of ordinary people accomplishing extraordinary things, including Mother Jones, the “angel of the miners,” who did “more than the nation’s top union leaders to alert reformers to the suppression of civil liberties in industrial America” (p. 145). By the end of this book, you will curse and celebrate the legacy of another four-letter word: coal.

SECULAR GOVERNMENT, RELIGIOUS PEOPLE. By Ira C. Lupu & Robert W. Tuttle. Grand Rapids, Mich.: William B. Eerdmans Publishing Co. 2014. Pp. viii, 271. \$25.00. Often, points of tension between the religious and the secular in our democracy appear intractable. Consider, for example, prayers at city council meetings: while advocates insist on a right to religious participation in public life, secularists claim an incompatible right to inhabit a religiously neutral public sphere. Each side sees either the Constitution’s Establishment or Free Exercise Clause as protecting its competing freedom. But in a path-breaking new book, Professors Ira C. Lupu and Robert W. Tuttle argue that this conceptualization fundamentally misunderstands the Constitution. Blending historical and jurisprudential analysis, the authors interpret the Establishment and Free Exercise Clauses as jurisdictional limits on a strictly secular government. The book begins by tracing first the historical forces that gave rise to the popular rights-based view of those clauses and then the history of the authors’ own jurisdictional view. The heart of the book explores some of the implications of the authors’ position in concrete settings: from religion in public schools and government-funded religious displays, to military chaplaincy and the question of whether the state has a duty to “facilitate voluntary private religious exercise” (p. 39). Lupu and Tuttle’s book will, therefore, be of interest to legal scholars and historians spanning the secular-religious divide.

PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA. By Pedro J. Martinez-Fraga & C. Ryan Reetz. New York, N.Y.: Cambridge University Press. 2015. Pp. xvi, 453. \$124.99. When drafting and executing foreign investment agreements, nations must strike a balance between preserving regulatory sovereignty and honoring commitments to foreign investors. *Public Purpose in International Law* challenges the traditional means of striking that balance. Veteran international lawyers Pedro J. Martinez-Fraga and C. Ryan Reetz investigate the public-purpose exception in treaties, customary international law, and other forms of international and domestic law. Their investigation finds little evidence of objective criteria for the exception's application or of the subject matter to which it pertains. Instead, the exception is "accorded an intuitive, self-evident status" that leaves countries broad, subjective authority to decide when and where to apply it (p. 53). That authority has increased as countries have brought sustainable-development and natural-resource sovereignty considerations within the exception's ambit. The authors believe that policymakers must address this proregulatory sovereignty imbalance to protect investor rights, and they propose several reforms to the exception. This well-researched book contributes a valuable perspective to the ongoing debate over sovereignty and investor rights in an increasingly internationalized economy.

THE CONSTITUTION: AN INTRODUCTION. By Michael Stokes Paulsen & Luke Paulsen. New York, N.Y.: Basic Books. 2015. Pp. xvi, 346. \$29.99. This engaging and accessible work brings fresh vigor to the most heavily contested ground in American law: the text and interpretation of the United States Constitution. The father and son pairing of Professor Michael Stokes Paulsen and Luke Paulsen retraces the history of this document from its source to the present day. Their learned commentary is enlivened and enriched by the interruptions of pithy biographies profiling key figures in constitutional history, from Framers and Presidents to Dred Scott, Fred Korematsu, and other ordinary Americans catapulted into celebrity as the namesakes of landmark decisions. While striving to dispel popular myths and to clear up persistent confusion surrounding their subject, the authors also display an admirable determination not to shy away from controversy, bringing hard-hitting analysis to bear on judges, decisions, and schools of constitutional interpretation that they consider misguided. Paulsen and Paulsen stand out in a crowded field for their singular combination of earnest erudition and a sincere desire to uncover the lost truths of American constitutional history for the educated public.

THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY. Edited by Austin Sarat. Tuscaloosa, Ala.: The University of Alabama Press. 2014. Pp. ix, 186. \$29.95. Through its collection of six articles by well-respected scholars, *The Punitive Imagination* offers nuanced justifications and provocative indictments of criminal punishment in America. Professor Carol Steiker examines punishment through a moral framework, arguing that certain punishments violate our collective human dignity as punishers, while Professor Stephen Garvey focuses on distributional considerations. For Garvey, the state has forfeited its authority to punish citizens it treats as second class because the state has diminished individual responsibility for crimes by eroding capacities for self-control. Professor Caleb Smith analyzes mass incarceration through a different lens, the concept of “social space” (p. 90). Smith argues that incapacitation has become the dominant justification for punishment, and, as such, functions as “a policy for the management of social instability” (p. 90). The remaining authors grapple with questions that follow from such a system. How can we hold anyone responsible given the concerns of Steiker, Garvey, and Smith? Is the punitive imagination destined to quash all but the most artificial forms of empathy? Is the punishing state’s greatest danger really its suppression of temporality and imagination? *The Punitive Imagination* is sure to inspire fresh approaches to these profoundly important questions.

A WORLD WITHOUT PRIVACY: WHAT LAW CAN AND SHOULD DO? Edited by Austin Sarat. New York, N.Y.: Cambridge University Press. 2015. Pp. vii, 280. \$99.00. We increasingly rely on technology to engage with society and to perform life’s basic tasks. In this digital age, companies gather and sell Internet browsing information for targeted advertising, and the government conducts massive data grabs. Do these developments sound the death knell for privacy? Do people who turn every intimate detail of their lives into a Facebook status update even care about privacy anymore? And if they do, how are they to defend it against simultaneous encroachments by corporations and the government? *A World Without Privacy* engages these and other pressing questions about privacy in the modern age. In this collection of essays, scholars present several conceptions of privacy, examine the challenges presented by the digital age, and ask whether and how law can respond effectively to threats to privacy. The book’s thorough and cogent analysis of the future of this vital right is both accessible to the average Facebook user and thought provoking for the privacy law scholar.

THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY: CONSTITUTING THE AMERICAN MIND. By George Thomas. New York, N.Y.: Cambridge University Press. 2015. Pp. x, 241. \$95.00. What does it take to build a constitutional order? There is, of course, the act of instituting a constitutional text. But that, argues Professor George Thomas, is only the beginning. In *The Founders and the Idea of a National University*, Thomas analyzes the Founders' idea of establishing a national university, demonstrating how the leading statesmen and thinkers of the founding generation, from George Washington to Thomas Jefferson, believed that maintaining a constitutional order required cultivating within the polity certain fundamental values and beliefs, particularly through a national university. In this incisive work, Thomas explores the place of a national university in the Founders' constitutional theory, illustrating how the idea, frequently debated and revisited at various points in American history, reflected and shaped American constitutional thought relating to the balance between nationalism and sectionalism, the distinction between public and private education, and the separation of church and state. The national university never became a reality; nonetheless, Thomas contends, its history remains relevant today as we, like the Founders, grapple with how best to preserve our constitutional society for generations to come.

LAW, PSYCHOLOGY, AND MORALITY: THE ROLE OF LOSS AVERSION. By Eyal Zamir. New York, N.Y.: Oxford University Press. 2015. Pp. xviii, 258. \$79.95. The well-known rational choice theory of behavior — that people make choices in order to maximize their own well-being — was challenged in 1979 by Daniel Kahneman and Amos Tversky with their competing prospect theory, positing that people perceive outcomes in terms of gain or loss relative to their own reference point, generally acting in a loss-averse manner. Building on many years of Professor Eyal Zamir's prior work, *Law, Psychology, and Morality* applies the concept of loss aversion to the law's domain. Loss aversion provides a new way to analyze nearly every facet of the law, from consumer behavior, the legal services market, litigation, and settlement to distinct legal fields themselves and the actors who shape them. Zamir's work offers unique insight into the significance of framing effects upon both insiders and outsiders of the system, showing the susceptibility of both types to biases stemming from loss aversion. By exposing these effects, Zamir encourages a rethinking of many aspects of our legal system.