
RECENT PUBLICATIONS

THE *DESHANEY* CASE: CHILD ABUSE, FAMILY RIGHTS, AND THE DILEMMA OF STATE INTERVENTION. By Lynne Curry. Lawrence, Kan.: University Press of Kansas. 2007. Pp. xii, 164. \$29.95. When the opinion in *DeShaney v. Winnebago County Department of Social Services* was issued by the Supreme Court in 1989, it was immediately the focus of intense debate. Professor Lynne Curry takes the reader on a voyage through the numerous narratives involved in the case — the life of the five-year old who was beaten and killed, the history of child-protective services in the United States in the nineteenth and twentieth centuries, Randy DeShaney's criminal trial, and the path of the case to the Supreme Court. Professor Curry's project is to reveal how the "genuine concern for the plight of abused children has always been filtered through the prism of other values [the American public] holds dear" (p. 61), and the American focus on the private family and an inexpensive welfare state may contain the seeds of the tragedies in the *DeShaney* case. However, Professor Curry never loses sight of the human dimension of the case, noting at the end of the book that while everyone continues to debate the significance of the case, "Joshua DeShaney remains in a group home for severely disabled adults in central Wisconsin" (p. 144). Full of rich storytelling and legal analysis, this book will be of special interest to legal historians and child-welfare specialists.

THE TRIAL IN AMERICAN LIFE. By Robert A. Ferguson. Chicago: University of Chicago Press. 2007. Pp. xiii, 400. \$29.00. The significance of a verdict in a high-profile American trial often extends beyond its legal value to its social and political implications. Through case studies of famous trials, including those of John Brown and O.J. Simpson, Professor Robert Ferguson considers the importance of the highly publicized trial as a focal point of democratic discussion. He contends that public fascination with trials reflects their function as fora for resolving divisive public issues, even though the strictures of courtroom procedure — storytelling rather than presentation of facts, endless repetition, arguing in the alternative, oversimplification, limitation of evidence to specifically defined issues, and melodrama — do not facilitate the full discussion and resolution of an issue in a way that could yield national catharsis. Instead, trials often become contests in which intensely invested, polarized groups identify with each of the parties and continue the debate outside the courtroom. Nevertheless, Professor Ferguson argues that the trial serves the valuable communal function of informing the citizenry, and he advocates that, in the modern era of courtroom television, media coverage must be protected because of the increasingly important role it plays in ensuring that justice is seen.

AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE. By Bernard E. Harcourt. Chicago: University of Chicago Press. 2007. Pp. viii, 336. \$25.00. Criminal law in the United States is increasingly relying on predictive — or actuarial — methods of allocating enforcement and punishment resources, and most people welcome this development. In his new book, Professor Bernard Harcourt offers a powerful critique of this conventional wisdom, arguing that in embracing predictive criminal law, society overlooks the impact that this approach has on the distribution of “the costs of the penal system along troubling lines such as race, gender, [and] class,” (p. 237), and the ways in which it biases “our conception of just punishment,” (p. 3). The core of Professor Harcourt’s case engages supporters of prediction on their own terms and argues that profiling is likely to *increase* crime. Using both intuitive examples such as IRS audit policies and rigorous mathematical modeling, Professor Harcourt demonstrates that profiling makes it easier and more worthwhile for rational, nontargeted-class members to commit crimes. Society should instead return to its “most central intuition of just punishment: the idea that any person committing a criminal offense should have the same probability of being apprehended as similarly situated offenders” (p. 238). This essentially backward-looking ideal is a breath of fresh air in a literature seduced by the false hope that technical social science can answer our deepest normative questions.

HISTORY AND THE CONSTITUTION: COLLECTED ESSAYS. By G. Edward White. Durham, N.C.: Carolina Academic Press. 2007. Pp. xi, 503. \$65.00. Over the past twenty-five years, historical analysis has increasingly informed constitutional interpretation. Advocates of interpreting the Constitution according to its original understanding and proponents of clarifying vague constitutional provisions by analyzing evolving historical trends have each deployed the tool of historical analysis in their constitutional methodologies. In this diverse collection of essays, Professor G. Edward White considers from several perspectives the relationship between history and constitutional law. The first set of essays describes the development of historically oriented jurisprudence and includes essays tracing the evolution of the understanding of *Marbury v. Madison* and the “tiered” system of judicial scrutiny. Next, Professor White discusses international law, exploring the historical development of deference to the Executive in foreign affairs and situating the modern problem of developing a customary international law of torts in historical context. Finally, Professor White applies historical analysis to the Rehnquist Court, describing the evolving notion of “centrist” Justices, historical changes in the Chief Justice’s role, and the Rehnquist Court’s jurisprudence. This multifaceted work effectively demonstrates the manifold ways in which constitutional law can be studied through a historical lens.

ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR. By Angela J. Davis. New York: Oxford University Press. 2007. Pp. ix, 248. \$29.95. In her latest work, Professor Angela Davis draws on her personal experiences as a public defender and on narratives of defendants and prisoners to reveal how prosecutorial discretion precipitates and perpetuates grave injustices in our criminal justice system. Professor Davis's concise and accessible overview discusses charging, plea bargaining, victim issues, and the death penalty. Well-intentioned prosecutors, who seek to enforce the law in ways that will produce justice in the communities they serve, "engage in widely accepted practices that produce unfair results for victims, criminal defendants, and the entire justice system" (p. 17). Other prosecutors intentionally break rules, and the "absence of meaningful punishment . . . may foster and encourage a continuing climate of misconduct" (p. 163). Professor Davis underscores special concerns about federal prosecutors: the "extraordinary number of federal criminal laws" in the past few decades has given federal prosecutors even more power and control than state prosecutors (p. 93), yet federal prosecutors, unlike their state counterparts, are less accountable because they are appointed, not elected. Professor Davis concludes with an agenda to eliminate systemic injustice: external reform efforts from the legal community, strengthening the disciplinary process and the electoral and appointments processes to ensure accountability to constituents and the interests of justice, and legislation to implement review boards and racial impact studies.

ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS. By Rebecca E. Zietlow. New York: New York University Press. 2006. Pp. xi, 265. \$45.00. The federal courts have acquired the honored distinction — at least among constitutional law students and scholars — of being the primary guarantors of individual rights, while Congress, representing majoritarian will, is not generally regarded as a great protector of minority interests. It is this standard account that Professor Rebecca Zietlow seeks to challenge in this insightful and readable book. Focusing on what she terms "rights of belonging," Professor Zietlow explores the development of those rights throughout Reconstruction, the New Deal, and the Civil Rights Movement, effectively demonstrating that Congress took a leading role in protecting those rights during all three periods. Moving beyond this descriptive assessment, Professor Zietlow argues that, as a normative matter, Congress *should* have the primary responsibility for protecting rights of belonging because it "enjoys significant institutional strengths that make it more effective than courts" (p. 145). Among those institutional advantages are Congress's legitimacy as a democratic institution, its capacity for flexible and creative remediation, and its transparency and resultant accountability to the

American people. Linking rights of belonging to the broader values of our national democracy, Professor Zeitlow concludes that litigation “is simply no substitute” for the political process in enforcing minority rights (p. 168). This book breaks new ground in the study of equality rights in America and will interest any reader seeking more than the conventional wisdom.

THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM. By Yochai Benkler. New Haven, Conn.: Yale University Press. 2006. Pp. xii, 515. \$40.00. You thought the Internet Revolution had come and gone? On the contrary, argues Professor Yochai Benkler, the *real* revolution is just beginning, and on the eve of that awesome event we have some crucial choices to make. For Professor Benkler, the emergence of a networked information economy — that is, an economy in which information technology allows decentralized individuals to wield the kind of influence once reserved for rich, highly organized firms — is important primarily because it vastly increases the potential scope of nonmarket social production. Typified by the remarkable cooperative efforts behind Linux, Wikipedia, and SETI@home, social production is more than a curiosity or passing fad; indeed, it represents a powerful alternative to property- and market-based modes of production. If nurtured and wisely developed, social production could enhance individual freedom, democratic deliberation, and global economic development. But that outcome is far from certain. The emergence of the networked information economy foreshadows a battle between liberal reformers and the “industrial giants of yore” (like Hollywood, the recording industry, and telecommunications firms) over the “institutional ecology of the digital environment” (p. 23). Professor Benkler argues that a complete victory for the industrial giants would be disastrous because they favor policies that would tamp down social production and thereby frustrate its transformative potential. Erudite, passionate, and economically sophisticated, Professor Benkler’s new book is required reading for anyone interested in the democratic (and not-so-democratic) vistas of the Internet age.

POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY. By Keith E. Whittington. Princeton, N.J.: Princeton University Press. 2007. Pp. xii, 303. \$35.00. The legal arguments in favor of and against judicial review have been debated since the Founding, but the political dimensions of the decision to let the courts “say what the law is” have been less fully explored — until now. In his comprehensive and captivating new book, Professor Keith E. Whittington argues that presidential challenges to judicial review “can be better understood if they are placed within their particu-

lar political context” (p. 49). Professor Whittington traces the politics of judicial review from Jefferson’s struggle with Marshall through the conflicts between Lincoln and Taney and the Reagan administration’s war on the Supreme Court’s abortion jurisprudence. This historical overview reveals a complicated dance between the branches over who has the final say concerning the Constitution. Professor Whittington demonstrates not only how Presidents have used the Supreme Court as a foil in order to “reconstruct the inherited constitutional regime” according to their views (p. 82), but also how Congress and the President have actually encouraged judicial review as part of a broader electoral strategy. Filled with numerous examples and insightful analysis, *Political Foundations of Judicial Supremacy* offers a fascinating behind-the-scenes guide to the politics of judicial review that is impressive in both scope and depth.

STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH. By Christine L. Nemacheck. Charlottesville, Va.: University of Virginia Press. 2007. Pp. xi, 187. \$35.00. The politics of Supreme Court nominations is a subject of great interest to students of both law and government, and the question of why some presidential selections succeed and others fail is widely debated in the scholarly literature as well as the popular press. In a concise yet information-packed new book, Professor Christine Nemacheck asks a different question: what causes Presidents to pick the nominees that they do? Challenging the conventional view that Presidents’ Supreme Court selections are idiosyncratic (p. 81), Professor Nemacheck applies the tools of quantitative political science to discover patterns in who gets put on the “short list” of candidates and who on the list gets nominated. Among her findings are the following: First, a President who is popular or has a filibuster-proof Senate majority is less likely to short-list candidates suggested by members of Congress (pp. 79–80). Second, a President is more likely to centralize nomination deliberations in the White House when the partisan composition of the Senate is relatively even (pp. 104–05). Third, in his final decision, a President is likely — especially when his party controls the Senate — to choose a candidate from his short list who is most “ideologically compatible” with him (pp. 127–28). Drawing from these and other conclusions reached through modeling and analysis, Professor Nemacheck convincingly argues that Presidents act strategically in making what are often the most enduring decisions of their tenures.