
RECENT PUBLICATIONS

ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION. By Tom Baker & Sean J. Griffith. Chicago, Ill.: The University of Chicago Press. 2010. Pp. viii, 285. \$45.00. The goal of shareholder litigation, it is said, is to properly incentivize the directors and officers of corporations. Directors' and officers' liability insurance, however, intuitively seems to undercut that goal. In *Ensuring Corporate Misconduct*, Professors Tom Baker and Sean J. Griffith reach this same conclusion, presenting the results of countless interviews with individuals involved in every facet of the corporate insurance industry to support the finding that corporate insurance undermines the incentives of directors and officers, thereby "mut[ing] the regulatory effect of shareholder litigation" (p. 200). In light of this finding, the authors set forth three policy recommendations: increase disclosure requirements, eliminate corporate coverage for insurance policies, and make the merits of a dispute matter more in settlement. By analyzing the incentive-distorting effects of corporate liability insurance from an empirical perspective, Professors Baker and Griffith offer a timely contribution to the ongoing debate over regulatory reforms in the wake of the recent financial crisis.

CUSTOM AS A SOURCE OF LAW. By David J. Bederman. New York, N.Y.: Cambridge University Press. 2010. Pp. xiv, 266. \$29.99. In this ambitious account of the role of custom in both domestic and international legal systems, Professor David Bederman examines not only why unenacted norms endure as a source of obligation, but also whether that endurance is desirable. Professor Bederman's approach is sweeping; he examines the importance of custom in contexts that are both predictable (public international law) and unfamiliar (South African family law). In comparing these diverse areas of law, this rich study draws on an impressive array of methodologies and disciplines, including anthropology, history, psychology, and economics. Although Professor Bederman's vision of custom is familiar in many ways — he adheres to the traditional view that custom involves both objective and subjective components — his contribution is nonetheless significant in its delineation of the jurisprudential and practical factors that explain custom's staying power. Particularly interesting in this regard is his discussion of legal pluralism, which he describes as a means by which custom can flourish alongside other sources of obligation. As for custom's role in modern legal systems, Professor Bederman concludes that as a form of "bottom-up" lawmaking it offers important democratic benefits, even for sophisticated legal cultures such as that of the United States.

UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY. By Lee C. Bollinger. New York, N.Y.: Oxford University Press. 2010. Pp. xiv, 210. \$21.95. As globalization expands the need for an independent press and new communication technologies expand the press's reach, the press nonetheless finds its existence in jeopardy. *Uninhibited, Robust, and Wide-Open* confronts this problem as it explores how "a press weakened by a lack of stable funding and forced to navigate through a bewildering landscape" of differing laws can survive in a world that, ironically, increasingly needs it (p. 5). With a view toward creating a viable free press in the twenty-first century, Lee C. Bollinger, the president of Columbia University, argues that much now stands in the way of a free and independent press, including profound challenges to the traditional press business model. In turn, Mr. Bollinger urges the Supreme Court to play an active role in eliminating these barriers. He advocates better public funding for the press and greater reliance on international human rights laws, compliance with which might be achieved through the threat of trade sanctions. Mr. Bollinger concludes that a robust press can survive in this new century "only if we make it a central priority" (p. 161).

THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. By Sean Farhang. Princeton, N.J.: Princeton University Press. 2010. Pp. 302. \$27.95. In *The Litigation State*, Professor Sean Farhang examines the history and theory behind the explosion of the private enforcement of regulatory statutes through litigation that began with the private cause of action created by the Civil Rights Act of 1964. Professor Farhang makes the novel claim that the Congressional choice to enforce many of the statutes it passes through private litigation is a result of the ever-present struggle between the executive and legislative branches over the bureaucracy — a struggle that has only deepened over the past fifty years as American politics has become more polarized. Professor Farhang argues that through private litigation, Congress takes the enforcement of its statutes outside of the discretion of the executive and places it instead in the hands of private litigants and the judiciary. Moreover, private enforcement is also used by Congress as a method of overcoming legislative inertia in passing and adapting regulatory statutes. Building on theories in political science, Professor Farhang uses both rigorous statistical data and in-depth historical analysis to trace the development and eventual dominance of the private enforcement of regulatory statutes, as well as to support his theses explaining Congress's dramatic choice to ensure the effectiveness of its statutes by enlisting the citizenry to implement them.

THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION. By John Gastil, E. Pierre Deess, Philip J. Weiser, and Cindy Simmons. New York, N.Y.: Oxford University Press. 2010. Pp. xvii, 267. \$24.95. From Alexis de Tocqueville to Justice Anthony Kennedy, many writers on American law have posited that jury service plays an important role in increasing jurors' civic engagement. Using an extensive dataset of jury and voting records from across the United States, Professor John Gastil et al. test this claim empirically. Their most remarkable contribution is the finding that service on a criminal jury significantly increases a juror's likelihood of voting in subsequent elections. From there, the authors use survey data from thousands of jurors in King County, Washington to explore in detail the causal relationships between jurors' individual jury experiences and their civic engagement. They paint a picture of serious and committed citizens whose service had a generally positive and long-lasting impact on their views of political society and their roles within it. Written in engaging prose without sacrificing analytical rigor, this book is a must-read for scholars and students of the American jury system, as well as anyone interested in the effect that citizen participation in government institutions has on the strength of a democratic society.

THE REAL WORLD OF DEMOCRATIC THEORY. By Ian Shapiro. Princeton, N.J.: Princeton University Press. 2011. Pp. x, 291. \$24.95. Events of the past three years, including a worldwide global recession and a wave of revolutions in the Middle East, pose urgent questions about both the limitations and the prospects of modern democracy. Professor Ian Shapiro's insightful new book draws together eight discrete essays on the subject, and, as a result, roves broadly. Professor Shapiro revisits Locke and Madison, finding there fresh theoretical defenses against democracy's most trenchant critics, who complain of its endemic irrationality. Elsewhere, Professor Shapiro mines lessons from the recent history of South Africa, Northern Ireland, and the Middle East for insights into how stable democracies need be established both from the top-down and the ground-up. Still elsewhere, Professor Shapiro considers the imperfect connection between democracy and justice, via extended analyses of the estate tax and abortion debates in American politics. Throughout, Professor Shapiro demonstrates a sharp understanding of a wide variety of topics, effortlessly shifting registers among political theory, economic policy, foreign relations, and constitutional law. While Professor Shapiro will not quell every critic of democracy in this volume, his observations go a long way to pressing the argument not only that democracy's foundations are legitimate, but also that it is still urgently needed to combat forms of domination throughout the world.

THE LIVING CONSTITUTION. By David A. Strauss. New York, N.Y.: Oxford University Press. 2010. Pp. xviii, 150. \$21.95. As “originalist” theory has become increasingly influential both in judicial opinions and in legal scholarship, the debate over whether the Constitution is a dynamic or static document — whether it is “living” or “dead” — has become increasingly important. In this timely and important new book, Professor David A. Strauss argues that the Constitution is indeed a “living” document; that ours is a “common law constitution” (p. 3) built on precedents and not on an original understanding. Positing that originalism is “no longer a natural way to interpret” constitutional provisions (p. 30), Professor Strauss puts forth a theory of common law constitutionalism that can serve as an intellectual competitor to the theory of originalism. Through the lens of free speech and racial segregation, Professor Strauss demonstrates how the “most important developments” in the American constitutional system were the result not of originalism, but of a common law approach of the type his book propounds (pp. 4–5). *The Living Constitution* is a novel and creative contribution to the ongoing debate about the nature of the U.S. Constitution, and will influence the dialogue for years to come.

FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD. By Robert R. M. Verchick. Cambridge, Mass.: Harvard University Press. 2010. Pp. x, 322. \$45.00. In the wake of Hurricane Katrina, it is clear that U.S. disaster policy is in desperate need of substantial reform. Drawing on examples of recent natural disasters, and on insight from social science and natural science, Professor Robert R. M. Verchick sets forth three important “lessons of environmental protection” that can guide disaster law and policy reform — “Go Green; Be Fair; and Keep Safe” (p. 3). “Go Green” — preserve and utilize natural buffers to minimize exposure to hazards. “Be Fair” — acknowledge and address the personal and social vulnerabilities of the groups that suffer the most in the aftermath of disaster. “Keep Safe” — take a precautionary approach when assessing disaster risk and uncertainty. Throughout the book, Professor Verchick argues that the “[g]overnment must assume a stronger regulatory role where natural infrastructure, distributional fairness, and managing risk are concerned” (p. 5) and offers a variety of his own policy proposals about how this can be done so that the United States and the international community are prepared for the next, big natural disaster. Professor Verchick’s well-written arguments and thought-provoking ideas make this book a worthwhile read for policymakers, lawyers, and laymen alike.