RECENT PUBLICATIONS

BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY. By Sonu Bedi. New York, N.Y.: Cambridge University Press. 2013. Pp. x, 281. $99.00. When deciding cases under the Equal Protection Clause, courts look to whether the law burdens a suspect class in order to determine what level of scrutiny to apply. In *Beyond Race, Sex, and Sexual Orientation*, Professor Sonu Bedi seeks to reconceptualize the Fourteenth Amendment by eschewing the use of suspect classifications and levels of scrutiny. Arguing that the traditional, identity-based model exacerbates the countermajoritarian difficulty and potentially "justifies" racism, Bedi suggests instead that the Equal Protection Clause should act as a limit on the state's power to enact laws based on particular conceptions of morality. In making this argument, Bedi claims that the identity-based framework causes harm by stigmatizing certain groups, forcing courts to focus on group differences rather than on neutral principles. In Part I, Bedi advocates a reading of the Fourteenth Amendment that prevents the state from acting on justifications that invoke the good life, that are based on animus, or that are proffered in bad faith. In Parts II and III, Bedi examines the jurisprudence regarding race, sex, and sexual orientation, demonstrating how the proposed powers-based review would avoid many of the problems extant in current doctrine.

PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT. Edited by Daniel Carpenter & David A. Moss. New York, N.Y.: Cambridge University Press. 2014. Pp. xxviii, 501. $70.00. Regulatory capture — industry's direction of regulation away from the public interest and toward self-serving ends — is often thought pervasive and inevitable. *Preventing Regulatory Capture* gathers interdisciplinary contributors to argue that this consensus is wrong, and that the phenomenon is both "misdiagnosed and mistreated" (p. 3). Charging previous work with relying on weak causal inferences and trafficking too heavily in assumptions, this collection attempts a more analytically rigorous evaluation. The project's central theses: capture is misdiagnosed as more ubiquitous and less soluble than it actually is; deregulation is not always the best policy response to capture, and is often the goal that industry seeks; and capture is a problem to be ameliorated rather than the regulatory state's fatal flaw. The volume's first half critically assesses the existing literature, then explores the means by which entities seek to influence their regulators. Next, case studies demonstrate that capture is less prevalent than the existing literature suggests, highlighting the various ways in which regulators limit industry influence. A final section focuses on existing and innovative methods for preventing capture. *Pre-*

venting Regulatory Capture renews scholarly attention on an important phenomenon and challenges a number of long-held but insufficiently examined axioms of regulatory governance.

STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD. By Kevin M. Clermont. Durham, N.C.: Carolina Academic Press. 2013. Pp. xi, 285. $45.00. Legal decisionmaking requires judicial actors to decide cases despite inherent uncertainty. Although this practice is ubiquitous, the standards for how certain a decisionmaker must be to render a decision have gone underexplored. In *Standards of Decision in Law*, Professor Kevin M. Clermont presents a comprehensive examination of the topic, employing empirical research, cognitive psychology, and logic to explain why certain standards are suitable to certain contexts. First, the book offers a taxonomy of the standards used in rendering original and appellate decisions, identifying a pattern of usage that can be explained through cognitive psychology. Clermont then focuses specifically on standards of proof — from a preponderance of the evidence to reasonable doubt — to provide a new understanding of how factfinders translate their "fuzzy" beliefs about the facts of a case into a legal outcome by "subjecting their fuzzy beliefs to a standard of proof in order to come to an unambiguous output" (p. 208). *Standards of Decision in Law* offers much-needed insight into the rationale behind different standards of proof, concluding that, although "room for reform exists," our current probabilistic standards are most appropriate given the cognitive limitations of decisionmakers (p. 282).

CONGRESS AND THE FOURTEENTH AMENDMENT: ENFORCING LIBERTY AND EQUALITY IN THE STATES. By William B. Glidden. Lanham, Md.: Lexington Books. 2013. Pp. x, 177. $80.00. In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court struck down the formula Congress adopted in the Voting Rights Act of 1965 to determine which jurisdictions required approval from the federal government before changing their voting laws. In *Congress and the Fourteenth Amendment* — published two months after *Shelby County* — William Glidden suggests that the Supreme Court's narrow approach to Congress's enforcement power under section 5 of the Fourteenth Amendment continues to distort the Amendment's original purpose. Taking a position the Supreme Court has long rejected, he argues that the Fourteenth Amendment was originally intended to empower Congress to energetically regulate state and private conduct through its section 5 enforcement power. This expansive interpretation of Congress's power under the Fourteenth Amendment cuts against the conventional view that the Supreme Court, not Congress,

is the primary guarantor of due process and equal protection under the Fourteenth Amendment. The book not only seeks to revise the interpretation of the Amendment's original ambition but also advocates that "[t]his historical truth should be recognized, recovered, and restored" on policy grounds as well as originalist ones (p. 135).

SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW. By Ryan Goodman & Derek Jinks. New York, N.Y.: Oxford University Press. 2013. Pp. ix, 240. $29.95. How can the international legal regime promote state compliance with human rights? *Socializing States* identifies three specific mechanisms that influence state practice: material inducement, persuasion, and acculturation. Professors Ryan Goodman and Derek Jinks argue that the last mechanism — acculturation — is an overlooked yet important determinant of national decisionmaking. In reaching this conclusion, the authors draw on extensive theoretical and empirical research concerning the pervasive causal effects of social and cognitive forces such as mimicry, status maximization, prestige, and identification. The analysis refines — and sometimes challenges — existing human rights scholarship in order to advance a new conceptual framework for how international law influences state actors to improve human rights conditions. *Socializing States* offers fresh insights for the design and operation of the international human rights regime, exposing new frontiers in normative and empirical human rights scholarship.

TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING. By Orly Lobel. New Haven, Conn.: Yale University Press. 2013. Pp. x, 278. $35.00. In our competitive era of technological innovation, employers increasingly seek to guard their employees' ideas and restrict their movement through employment contracts, noncompete clauses, and intellectual property rights. This "talent war" is exemplified by the heated competition between Silicon Valley giants Facebook and Google, who attempt to attract top talent while limiting their employees' freedom for competitive reasons. In *Talent Wants to Be Free*, Professor Orly Lobel combines empirical research with insights from law, economics, psychology, and business to challenge conventional corporate methods of governing human capital. She argues that common control tactics stifle innovation by decreasing employee motivation and performance. According to Lobel, in order to promote innovation, companies must relinquish their "archaic control mentality" (p. 4) and allow free interaction of their employees and employees' ideas, even if that means losing employees to competitors. *Talent Wants to Be Free* proposes a series of pragmatic policy changes for lawmakers and corporate boards seeking to maximize innovation.

ORIGINALISM AND THE GOOD CONSTITUTION. By John O. McGinnis & Michael B. Rappaport. Cambridge, Mass.: Harvard University Press. 2013. Pp. i, 298. $39.95. Over the past three decades, originalism has ascended to a place of prominence in U.S. constitutional interpretation. In *Originalism and the Good Constitution*, Professors John O. McGinnis and Michael B. Rappaport offer a new defense of originalism. They argue that the Constitution and its amendments are inherently "good" because they were approved by supermajorities, and so the Constitution must be interpreted based on the original meaning that those supermajorities considered when adopting it. Passage by a supermajority produces the best possible constitutional provisions, McGinnis and Rappaport contend, because such passage ensures that the law reflects the will of the people and not of legal elites. Their approach therefore "defends the quality of constitutional provisions largely by reference to the likely consequences flowing from the process that created them" (p. 11), striking a middle ground between purely formal defenses of originalism and wholly subjective evaluations of "good" law. McGinnis and Rappaport justify originalism on this ground while acknowledging and addressing flaws in the supermajoritarian process — namely, that constituencies such as African Americans and women were neglected in the constitutional drafting and ratification processes. Ultimately, they argue that originalism holds the potential not only to produce better law, but also to breathe life into the underused Article V amendment process.

TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT. By Clark M. Neily III. New York, N.Y.: Encounter Books. 2013. Pp. xii, 219. $23.99. Today's government is large, powerful, and meddlesome, Clark M. Neily III argues, but no one is keeping it in check. The Constitution promises to shield individuals from the tyranny of unbridled government power, but this promise is toothless because judges have largely abandoned their responsibility to enforce constitutional protections. Neily argues that we live in an era of "judicial abdication": courts engage in real judging only when government action implicates a handful of rights to which the Supreme Court has attached the label "fundamental." In all other cases, covering vast areas of constitutional law, courts rubber-stamp government action without making any serious effort to enforce the Constitution. Through compelling examples and sharp yet accessible legal analysis, Neily shows that judicial abdication is a real phenomenon and proposes "judicial engagement" as a way to revive the judiciary's role in our tripartite system of government. Neily calls on judges to resign from the business of handpicking constitutional rights that deserve mean-

ingful protection and to engage in genuine review in all cases. *Terms of Engagement* is a provocative book that welcomes readers who care about their constitutional liberties and how those liberties are enforced.

THE CLIMATE CASINO: RISK, UNCERTAINTY, AND ECONOMICS FOR A WARMING WORLD. By William Nordhaus. New Haven, Conn.: Yale University Press. 2013. Pp. xiii, 378. $30.00. What are the dangers of global warming, and how do we combat them? In *The Climate Casino*, Professor William Nordhaus answers these questions with a combination of science, economics, and politics. Nordhaus begins by explaining the causes of global warming in clear, understandable terms, going on to project further temperature increases in the coming decades. He then explains the harmful impact of these changes, particularly in "tipping points" — arenas in which climate change would be irreversible. Nordhaus argues that the best way to stem global warming is to increase the price of carbon, such that the market price takes into account the negative externalities of carbon emissions. Acknowledging that nationalist tendencies and generational freeriding hinder global attempts to implement effective policies, Nordhaus provides a roadmap for change: people must accept global warming's impact, establish coordinated global policies to raise the cost of fossil fuel emissions, and develop new low-carbon technologies to reduce the cost of achieving climate goals. While we may already be rolling the climate dice, Nordhaus's proposals could allow us to leave the climate casino and avoid potential catastrophe.

POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE. By Martha C. Nussbaum. Cambridge, Mass.: Harvard University Press. 2013. Pp. viii, 457. $35.00. In this wide-ranging work, Professor Martha C. Nussbaum addresses one of the crucial questions of political theory: what is the proper role of political emotion in a liberal society? Philosophers from Rousseau to Rawls have struggled to explain how liberal societies can and do use moral psychology to advance their values without contradicting their principles. President Abraham Lincoln and Mahatma Gandhi, among others, recognized that love could compel citizens to overcome myopic, destructive divisions wrought by natural human tendencies toward fear, shame, and disgust. Nussbaum takes up this challenge, arguing that love and compassion are necessary emotions for a stable and vibrant culture. After reviewing past approaches to political emotions, Nussbaum identifies collective normative commitments and offers a subtle explanation for how love and compassion promote those commitments in modern democracies. This engaging book draws from American and international political theory, philosophy, social psychology, art, music, and literature to show that a just society must be founded on love, rather than "cold

and inert" respect (p. 380). The provocative lesson of *Political Emotions* is a practical one: healthy societies need political institutions and economic policy, but they also need political emotions. Love has pushed citizens and societies to be better for centuries, and it continues to do so today.

BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM. By Eric W. Orts. Oxford, U.K.: Oxford University Press. 2013. Pp. xxi, 304. $65.00. The Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), has sparked public debate over the status of corporate firms in our legal system. Are corporations people? For Professor Eric W. Orts, it is not that simple. Finding the current political debate "falsely dichotomous" and the Justices' own opinions in *Citizens United* "radically undertheorized" (p. xv), Orts seeks to cut back the "overgrowth of economic theory" that has obscured the "legal roots" of the firm (p. xviii). Orts challenges the law and economics shibboleth that corporate entities must have profit maximization as their sole focus: disciplines beyond economics — including not only law but also history, political theory, and sociology — have normative and predictive insights to offer on firm behavior, and firms operate within a web of competing values. Orts is agnostic on which of these values should predominate, but his outlook is fundamentally optimistic. If we return to an essentially legal understanding of the firm, Orts argues, it is within the power of law — and our political system — to reimagine the firm, and to give life to "a broader range of potential business practices and policy prescriptions" than is dreamt of in the philosophy of law and economics (p. 7).