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## RECENT PUBLICATIONS

PEOPLING THE CONSTITUTION. By John E. Finn. Lawrence, Kan.: University Press of Kansas. 2014. Pp. xv, 350. \$39.95. The Constitution has for too long been viewed strictly as a legal document, its interpretation monopolized by lawyers and judges. Professor John Finn argues that citizens should also adopt a view of the document as a “Civic Constitution” — that is, as a document that provides a touchstone for how Americans should constitute a political community (p. 1). In three essays, Professor Finn explores the implications of this dichotomous approach to the Constitution: the Constitution is not only a set of rules but also a call for an ongoing dialogue among citizens that is required to maintain a constitutional way of life. Indeed, we face a crisis of citizenship in this country — what Professor Finn calls “constitutional rot” — in the sense that our most important constitutional questions are answered by lawyers looking at rules and not by We the People engaging in dialogue with each other (p. 188). Professor Finn sees signs of rot in the rise of the post-9/11 security state “governed by our fear instead of our reason,” and he calls on all citizens to renew their commitment to the Civic Constitution (p. 218).

A MERE MACHINE: THE SUPREME COURT, CONGRESS, AND AMERICAN DEMOCRACY. By Anna Harvey. New Haven, Conn.: Yale University Press. 2013. Pp. xvii, 366. \$55.00. Americans have long exalted the independent judiciary as central to protecting individual rights and liberties. But in *A Mere Machine*, Professor Anna Harvey suggests that the U.S. Supreme Court may not be independent of the elected branches of government. She contends that, over the last six decades, the Justices appear to have “systematically defer[red] to the preferences of House majorities in their constitutional rulings on federal statutes” (p. xiii). While some studies have indicated that the Court is unresponsive to congressional preferences, Professor Harvey reports that when Court judgments are coded objectively, “we in fact observe considerable judicial deference to elected branch preferences from the Warren through the Rehnquist Courts” (p. 14). What is more, Professor Harvey proposes, this deference may actually *protect* individual rights because democratic accountability generally leads to greater provision of public goods. Analyzing data from the United States and other countries, Professor Harvey concludes that non-deferential judicial review may reduce, rather than enhance, protection of individual rights because “courts can more easily respond to elective majorities’ preferences to repeal previously enacted public goods than to their preferences to enact new public goods” (p. 292). *A Mere Machine* asks provocative questions about the judiciary’s design and marks an important contribution to the judicial review literature.

THE LEGAL PROFESSION: WHAT IS WRONG AND HOW TO FIX IT. By Sheldon Krantz. New Providence, N.J.: LexisNexis. 2013. Pp. xii, 132. \$29.00. In this short book, Professor Sheldon Krantz draws on over fifty years of experience in private practice, government, and academia to diagnose the problems afflicting the legal profession today and offers solutions “to make the profession the noble calling it should be” (p. 5). He begins by describing the current state of the legal profession — including legal education, employment prospects, and a variety of practice settings — and juxtaposes it with the current state of access to justice, finding both to be unsatisfactory for lawyers as well as potential clients in need of assistance. He then proposes the creation of an American Legal Profession Institute to implement a detailed agenda that promises to make the legal profession more responsive to client needs, improve access to justice, and involve law schools in reform. Professor Krantz concludes by identifying several promising developments that are already underway. This concise yet detailed book provides an engaging overview that will be valuable for anyone concerned about the state of the legal profession, from nonlawyers to law students to experienced practitioners.

UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION. By Ralph A. Rossum. Lawrence, Kan.: University Press of Kansas. 2014. Pp. viii, 295. \$34.95. The popular media has likely spilled more ink and megabytes psychoanalyzing Justice Clarence Thomas than on anyone else currently sitting on the Supreme Court. Rather than playing this game, Professor Ralph Rossum allows Justice Thomas to speak for himself by analyzing his opinions in order to discern his constitutional theory and by turning to the Justice’s speeches, memoirs, and other writings for additional support. Through this project of recovery, Professor Rossum ably documents the Justice’s efforts to remove the “excrescence” of the Court’s jurisprudence in an effort to restore the Constitution to its original general meaning as the Framers and ratifiers understood it (p. 12). Professor Rossum also carefully distinguishes Justice Thomas’s originalism from that of Justice Scalia by showing how Justice Thomas uses a variety of Founding-era documents to aid in his interpretation. In *Understanding Clarence Thomas*, Professor Rossum performs an act of restoration, stripping away the layers of Justice Thomas’s public persona to show how the Justice’s own writings provide a complete, nuanced picture of the man.

CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS. Edited by Austin Sarat. New York, N.Y.: Cambridge University Press. 2014. Pp. xi, 252. \$95.00. Professor Austin Sarat gathers several scholars’ views on the ever-timely problem of racial discord, which to-

day “is as vexing as it has ever been” (p. 3). In different ways, all five essays (and the brief commentaries that follow each one) contribute to what one author calls a “counter-narrative to the story of ‘progress’ in America with respect to race and civil rights” (p. 65). A major theme is that race-blind policies do not go far enough; race-conscious policies are still needed. One of the essays reviews decades of case law to reach this conclusion. Another shows how the rules of evidence, while “*facially* one of the most neutral and broadly applicable” bodies of law (p. 66), nevertheless often “operate in a racially biased manner” (p. 76). Other essays discuss the shortcomings of a purely litigation-based civil rights strategy and the dangers of accepting the “Whiggish narrative of progress” of the civil rights struggle (p. 194). For those who believe that we live in a postracial era, there is much here to contemplate and confront.

**THE CONSTITUTION OF RISK.** By Adrian Vermeule. New York, N.Y.: Cambridge University Press. 2014. Pp. v, 200. \$32.99. Conventional wisdom holds that because angels do not govern men, internal and external controls are necessary to protect against government abuse. Professor Adrian Vermeule complicates this assumption by suggesting that constitutions are best understood not as devices for restraining government — at least not always — but rather as mechanisms for regulating and managing political risks. Moreover, eschewing “precautionary constitutionalism” that fixates on risks associated with abuse of power, Professor Vermeule advocates for more well-rounded, case-by-case consideration of both these target risks as well as countervailing risks that constitutional precautions engender — an approach he calls “optimizing constitutionalism” (p. 13). Applying his theory to case studies ranging from constitutional structure to particular constitutional rules, Professor Vermeule explores the disadvantages and benefits of the familiar model of government distrust as compared with his approach’s focus on second-order risks. Finally, he discusses the role of the administrative state’s experts in this framework for risk regulation. *The Constitution of Risk* reimagines what constitutions do and makes a strong case for constitutional rulemaking “without a style” (p. 191) — that is, without privileging concerns regarding worst-case abuses of official power over other risks.

**THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT.** By David Weil. Cambridge, Mass.: Harvard University Press. 2014. Pp. viii, 410. \$29.95. In earlier eras, we might have safely assumed that the companies that we paid for services employed the workers with whom we interacted. But due to a “fundamental restructuring of employment in many parts of the economy” (p. 3), this assumption is now far

from safe. In *The Fissured Workplace*, Professor David Weil draws on case studies and empirical data to explore the nature of this transformation and its consequences for American workers. At its core, the book tells a story about the splintering relationship between employer and employee. According to Professor Weil, businesses' understandable desire to focus on their core competencies and to cut peripheral costs has resulted in increased outsourcing of operations and attendant employment, through mechanisms such as subcontracting, franchising, and supply chain structures. The problem pinpointed by Professor Weil is that the outsourcing of employment is often coupled with the abdication of basic responsibilities toward employees, such as compliance with workplace laws or provision of traditional benefits. By identifying this trend and the shortcomings in our public policies that allow it to persist, Professor Weil is able to provide a series of practical solutions to the troubling issues facing American workers in the modern economy.

THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES. By Timothy Zick. New York, N.Y.: Cambridge University Press. 2014. Pp. ix, 449. \$115.00. Fast travel, the Internet, and growing wealth have made communities more international and interconnected than ever before. Speech originating in one place can instantaneously proliferate anywhere else, making debates in which Americans are engaged global ones. These new realities will place stress on First Amendment doctrine, forcing a reconsideration of the territorial limits and international applications of the First Amendment. Professor Timothy Zick's new book suggests that we should finally move beyond the "provincial First Amendment," whose purview is limited by U.S. territorial boundaries. Rather, he presents the "cosmopolitan First Amendment," which "rejects the idea that expressive and religious liberties are strictly or narrowly determined by territorial borders" (p. 16). Professor Zick begins by introducing the reader to a set of real-life characters — including a Swiss philosopher excluded from the United States on the basis of his supposedly pro-terrorism scholarship, an obscure Southern pastor whose decision to hold a "trial" of the Koran led to riots abroad and the federal government's intervention at home, and others — who dramatize the new global frontiers of the First Amendment. From there, Professor Zick traces a possible future for the cosmopolitan First Amendment, inviting reconsideration of the role that First Amendment liberties play in U.S. policymaking and legal doctrine.