
RECENT PUBLICATIONS

CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE. By Samuel Buell. New York, N.Y.: W.W. Norton & Company. 2016. Pp. xx, 296. \$27.95. For decades, Americans have consumed stories of corporate scandal and greed, often shaking our heads in disgust with the sense that such misconduct goes insufficiently punished. In *Capital Offenses*, Professor Samuel Buell maps our moral judgments of business crimes to the laws that regulate them, and explains why identifying and attributing criminal conduct within a corporation is more difficult than one might think. As he notes, “[t]he categories ‘bad’ and ‘illegal’ make a Venn diagram, especially in the business world. In a relatively narrow band where these two categories overlap, there are the things that the law calls crimes” (p. 108). *Capital Offenses* provides a clear and convincing account of how thin the line really is between a fraudster and a clever businessman, why a corporation is a tricky and ultimately unsatisfying prosecution target, and the pros and cons of settling a case against a business with a deferred prosecution agreement. Along the way, Buell provides ample illustrative and entertaining examples, contextualizing infamous corporate scandals — including the sagas of Enron, British Petroleum, General Motors, Walmart, and Lehman Brothers — in the nuts and bolts of the law. *Capital Offenses* is not preoccupied with attacking or defending the regulation and prosecution of business crimes; rather, its goal is to shed light on what the law currently is and what it could be. It does so admirably.

RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT — AND WHY WE NEED A MORE POWERFUL PRESIDENCY. By William G. Howell & Terry M. Moe. New York, N.Y.: Basic Books. 2016. Pp. xx, 233. \$26.99. Americans today often blame a dysfunctional Congress or President for our nation's social woes. Professors William Howell and Terry Moe make the provocative argument that we should instead blame our outdated “relic” of a Constitution. Originally designed for an eighteenth-century agrarian society, the Constitution sets out a government built on the separation of powers, with Congress in the driver's seat. Illustrating their claim with historical examples, Howell and Moe suggest that Congress, as envisioned by the Founders, simply cannot address social problems that confront modern America. Howell and Moe contend that members of Congress — perpetually concerned about reelection — are driven by short-term, local interests rather than by long-term, national interests. Challenging conventional notions on the sanctity of the Constitution, Howell and Moe propose a bold fix to our troubled political system: enact a constitutional amendment that puts the President in charge, not Congress. To support this proposal, Howell and Moe again draw on historical exam-

ples of Presidents who represented national interests and enacted social programs more effectively than Congress. With their fresh, daring take on America's age-old social and political problems, Howell and Moe challenge their readers to question the seemingly sanctified government set forth by the Constitution and to imagine a more effective government for the modern world.

EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED?. By Kent Greenawalt. Cambridge, Mass.: Harvard University Press. 2016. Pp. 276. \$49.95. Inspired by recent Supreme Court cases such as *Hobby Lobby* and *Obergefell*, Professor Kent Greenawalt in *Exemptions* undertakes a thorough analysis of the issues and controversies surrounding whether and when individuals and organizations should be exempt from generally applicable laws due to conflicting religious beliefs. Drawing from a range of contemporary controversial topics — doctors refusing to perform abortions, companies refusing to provide insurance for contraceptives, institutions not paying taxes, and individuals refusing to afford equal treatment to same-sex couples, among others — Greenawalt offers a balanced consideration of all sides in the debate. By emphasizing the competing concerns on each topic, Greenawalt highlights the challenges to deciding whether and when exemptions are warranted, such as questions over scope and limits, practical consequences for society, and the often-conflicting ideals of equity and religious freedom. Throughout the book, Greenawalt cautions against oversimplification and convincing ourselves that matters are one-sided, urging exemption proponents and opponents alike to reflect on their disagreement and to acknowledge the other side's position. Greenawalt's hope is that such reflection will ultimately lead to more civil and less divisive discussions about existing and proposed exemptions, a worthwhile goal artfully advanced by his book.

THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION. By Henry T. Greely. Cambridge, Mass.: Harvard University Press. 2016. Pp. 381. \$35.00. Professor Henry T. Greely imagines a world in which procreation begins not with a kiss, but with a catalogue. This world, Greely argues, is just two to four decades away. In *The End of Sex*, Greely posits the provocative notion of "easy PGD," a combination of improved preimplantation genetic diagnosis (PGD) and in vitro fertilization (IVF) that will turn sexless reproduction into a cheap, easy reality (p. 3). Easy PGD would enable prospective parents to select their progeny based on the traits of the child each embryo — formed from the parents' sperm and egg — might become. Greely begins with an animated explanation of this biological technology and continues to thoughtfully chart the path he believes this science will travel over the coming years. Greely makes a strong case for why — unlike the supersonic jetliner and rocket backpack, both of which are also *technologi-*

cally feasible — the widespread adoption of easy PGD is inevitable. But the real beauty of this book is in Greely's sophisticated engagement with the ethical, legal, and societal implications of what is, essentially, an inescapable transformation in our understanding of what it means to be human. After all, the first child born after PGD is already twenty-five years old; the transformation is well on its way.

THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY. Edited by Ken Gormley. New York, N.Y.: New York University Press. 2016. Pp. x, 701. \$45.00. "When it comes to the presidency, the Constitution of the United States is a document of remarkably few words" (p. 18), writes Professor Richard Ellis at the outset of *The Presidents and the Constitution*, an ambitious collection of forty-four essays. While the scholastic assortment ends up somewhat longer than the Framers' document, its length is every bit justified by its thoughtful analysis, surprising connections, and illuminating stories of how our Presidents have each shaped and been shaped by "[t]he executive Power" of Article II. Those who peruse this eminently readable book — each essay is approximately a dozen pages — will learn how President Ford's controversial pardon of his predecessor had its roots in President Wilson's failed attempt to outmaneuver a newspaper editor, why the constitutional legacy of the ill-fated President William Henry Harrison lives on today, and much more about the elite club of men who have occupied America's highest office and the Constitution that shaped their experiences and the nation's. *The Presidents and the Constitution* deftly weaves their stories into a single tale that is greater than the sum of its parts and is useful reading for students of constitutional law, executive branch mandarins, and — perhaps most especially — the forty-fifth President of the United States.

DIPLOMATIC INTERFERENCE AND THE LAW. By Paul Behrens. Portland, Or.: Hart Publishing. 2016. Pp. xli, 493. \$122.00. Existing law dictating the acceptable scope of diplomats' conduct — in areas ranging from criticism of host government policies, to meeting with leaders of domestic opposition to the granting of asylum on embassy premises — is often confused and controversial. In *Diplomatic Interference and the Law*, Professor Paul Behrens argues that treaty law, most notably the Vienna Convention on Diplomatic Relations, requires substantial supplementary examination before it can provide a consistent and adequately detailed doctrine on diplomatic interference. Behrens proposes an approach based primarily on customary international law, drawing on a broad set of examples from modern history to determine the types of diplomatic conduct that consistently draw state criticism or defense. In the first part of *Diplomatic Interference*, he sets out a general framework for analyzing interference, including what constitutes official state action, the balancing of competing state interests,

the application of related fields of law such as human rights, and the principle of proportionality. In the second part, he turns toward examining the particular customs that have grown up around specific types of possible diplomatic interference, including lobbying, funding, threats, and asylum, among others. Ultimately, Behrens' message is a hopeful one: in this complicated legal field, states should — and can — locate legitimate legal norms that contribute to more effective diplomacy and international relations.

THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS. By Julius G. Getman. Ithaca, N.Y.: Cornell University Press. 2016. Pp. xi, 227. \$29.95. Commentators have often noted that the Supreme Court has favored corporate interests in recent years, coming out on the side of big business in cases involving arbitration clauses, employment discrimination, and foreign human rights violations, among others. In *The Supreme Court on Unions*, Professor Julius Getman provides a historical survey of the Court's treatment of labor issues, which on the whole suggests that this pro-business disposition is not new to the institution. Getman, a leading labor law scholar, argues that since the Court began to take an active interest in labor issues in the 1950s, it has substantially weakened unions and undercut the purposes of the National Labor Relations Act. *The Supreme Court on Unions* examines decisions across a number of areas affecting organized labor — among them union organization, picketing as protected speech, and the right to strike — and concludes that the Court has persistently displayed both a bias against labor and "limited factual competence" when it comes to issues important to unions and the workers they represent (p. 192). Getman's work is comprehensive in scope, but remains readily accessible — a contribution likely to be of interest to scholars and members of the general public alike.

AMERICAN CONSERVATISM: NOMOS LVI. Edited by Sanford V. Levinson, Joel Parker & Melissa S. Williams. New York, N.Y.: New York University Press. 2016. Pp. xii, 446. \$65.00. Published during a period of rapid change on the American right, this collection of essays on the political and cultural tradition of conservatism in the United States is an opportune attempt to define — or perhaps discover — the essential characteristics of its eponym. When the American Society of Political and Legal Philosophy voted to publish the anthology in the middle years of the George W. Bush Administration, the story of the hour within the nation's cluster of conservative identities was the pervasive influence of neoconservatism on international affairs. In the years since, the meteoric rise of the Tea Party to national prominence, followed closely by the remarkable ascent of real estate mogul Donald Trump to the presidency, serves to underscore what the volume's edi-

tors term the “especially daunting problems” innate in any venture aimed at engaging with American conservatism as a whole (p. ix). Nevertheless, the editors of *American Conservatism* have managed to fashion an impressively articulate compilation of pieces discussing the historical place of economic, socio-religious, moral, institutional, constitutional, and traditionalist arguments in conservatism, as well as evaluating the legacies of luminaries such as William F. Buckley and Leo Strauss — in all, a timely and invaluable descriptive effort.

RIGHTS DELAYED: THE AMERICAN STATE AND THE DEFEAT OF PROGRESSIVE UNIONS, 1935–1950. By Charles W. Romney. New York, N.Y.: Oxford University Press. 2016. Pp. viii, 271. \$74.00. Progressive unions flourished in 1930s America, but met their decline a few decades later. The traditional account of twentieth-century organized labor attributes their wane to anticommunist sentiments and the influence of Southern conservatives in Congress. In *Rights Delayed*, Professor Charles Romney argues instead that the focus on legal procedure under the New Deal state was the main reason for progressive unions’ demise. Using the historical context of the Pacific fish cannery industry, Romney traces the trajectory of progressive unions. *Rights Delayed* describes how left-leaning unions initially were able to work with the government and with the procedural rules of the National Labor Relations Board; however, the “architecture, culture, and pace of the procedural state” (p. 209) imposed enormous costs on unions and encumbered the federal state, which became too slow to fight collusion between employers and the conservative unions. Ultimately, the author argues, the defeat of left-led unions contributed to the failure of progressive politics in mid-century America, leaving us with “a conservative order that continues to shape law, labor, and the state” (p. 212). Romney’s careful and enlightening scholarship shines fresh light on a foundational period of American labor history, and raises a tension between the value of procedure and the fair adjudication of rights.

STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972. By Karen M. Tani. New York, N.Y.: Cambridge University Press. 2016. Pp. xiii, 427. \$99.99. How did the pauper become the plaintiff? In *States of Dependency*, Professor Karen Tani seeks the answer as she examines welfare in the critical period between the promulgation of the Social Security Act’s grants-in-aid and the Supreme Court’s rejection of a constitutionally guaranteed minimum income. She tells the story of middle management — the agency lawyers, bureaucrats, and state aid workers — whose interpretation of the Social Security Act first changed the discourse from one rooted in benevolence to one grounded in rights, and who then changed the landscape by inserting themselves into an arena previous-

ly dominated by local government. Matching federal grants to states not only expanded the federal bureaucracy, but also spurred states to do the same — and changed poor-relief programs into a rational, and above all legalized, administrative process. This focus gives context to the success of welfare rights litigation, which “articulate[d] a set of governing principles that had in fact already gained much ground within the world of federal-state welfare administration” (p. 153). Local government’s resistance toward centralization failed, but, starting in the 1950s, newly empowered states succeeded. Poor-relief programs, Tani argues, are ultimately about citizenship. While modern citizenship has come far in acknowledging entitlements to procedure, Tani shows the hollowness of those entitlements, and how much welfare depends not on substantive rights, but on contingent interpretations by state and federal agencies.

EQUITY AND ADMINISTRATION. Edited by P.G. Turner. New York, N.Y.: Cambridge University Press. 2016. Pp. lix, 540. \$120.00. “Equity” conjures visions of legal antiquity: the Chancellor, vested with the King’s authority, dispensing justice when the law courts could not. But concepts from the balance of the equities to equitable subordination reveal the Chancellor’s continued presence in the law today. *Equity and Administration*, edited by P.G. Turner, examines modern equity’s impact on both private and public administration. Thirteen essays and accompanying commentaries — composed by scholars, practitioners, and jurists from across the former British Empire — reveal modern equity’s distinguishing characteristic: its “facilitative nature” (p. 2). Ranging from the management of trusts to the implementation of legislation, the essays cover topics as far-flung as their authors. Justice Guy Newey examines equity’s role in constraining the decision-making of trustees; as administrators of estates, trustees wield large discretion that equity facilitates and channels. Former Justice J.D. Heydon articulates the symbiosis between equity and statute, advancing a vision of their “harmonious operation” (p. 247) if each is permitted to develop in its proper realm. In one of the collection’s finest pieces, Professor Henry E. Smith frames equity as anti-opportunism, arguing that U.S. administrative agencies are both practitioners of such equity and policed by it. All told, *Equity and Administration* offers something for everyone: for fiduciaries and commissioners alike, equity has a role to play.

DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION. By Louis J. Virelli III. Lawrence, Kan.: University Press of Kansas. 2016. Pp. xviii, 275. \$39.95. To ensure judicial fairness and legitimacy, Supreme Court Justices recuse themselves from cases in which they have, or appear to have, a bias or conflict of interest. But who gets to decide when recusal is appropriate?

In *Disqualifying the High Court*, Professor Louis Virelli embarks on a comprehensive exploration of the historical and constitutional backdrop to this question and ultimately concludes that Justices themselves, guided by the Due Process Clause and the First Amendment, should decide questions of recusal. In making his argument, Virelli effectively weaves in historical examples of recusal — taken from such varied sources as Roman law, early Jewish law, English common law, and the Supreme Court’s own history — and later draws on these examples to build his constitutional analysis of recusal. Along the way, Virelli also delves into fascinating discussions about the separation-of-powers doctrine to argue that Congress does not have the constitutional power to set mandatory recusal standards for the Justices. All in all, Virelli’s thorough investigation into Supreme Court recusal provides much-needed insight into an underexamined field of legal study, and sheds light on important questions of constitutional law and structure.