
RECENT PUBLICATIONS

BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY. By Mary Ziegler. Cambridge, Mass.: Harvard University Press. 2018. Pp. 383. \$45.00. *Roe v. Wade* is synonymous with abortion to many Americans today. Professor Mary Ziegler at once challenges and enriches this simple narrative by focusing on the underlying nature of the right to privacy in the *Roe* decision and chronicling several other movements that sought to use and shape the conception of privacy as articulated in *Roe*. Using internal documents and oral histories from those social movements, she discusses efforts to equate privacy with sexual freedom and the attempt to use this idea to unify disparate movements. She traces the history of efforts to reform treatment of mental illness and establish a right to refuse treatment as well as to alternative treatment. Related but very different was the quest to use the rights established in *Roe* to move toward removing government regulation of health care. Other advocates engaged in debates about control of medical records and reform efforts surrounding assisted suicide. Lastly, Ziegler traces the move toward understanding *Roe* as an example of judicial overreach and the partisan split on this point. Her book presents the argument that *Roe* once stood for — and perhaps still could stand for — far more than the simple partisan divide it now represents.

DISCRIMINATION AND DISPARITIES. By Thomas Sowell. New York, N.Y.: Basic Books. 2018. Pp. vii, 179. \$28.00. In this concise and thought-provoking monograph, Professor Thomas Sowell dissects and eventually rejects the idea that disparities in our society must be attributable either to genetic differences between groups of people or animus targeted at certain groups of people. He begins by noting that many social outcomes — wealth, professional success, and so on — are the result of a complex interaction of several personality traits, and that large levels of disparity should be expected. Next, he provides a thorough treatment of the various types of discrimination that exist (distinguishing, for example, between discrimination against groups based on stereotypes and discrimination against the same groups based on empirical evidence). He then observes that some disparate outcomes can be attributed to private choices of individual people. Finally, he argues that much of the statistical evidence that exists about discrimination is the result of flawed statistical analysis. Sowell concludes by acknowledging that he has no “solutions” to the many problems related to discrimination in our society. “The hope here is that clarification is less perishable,” he writes, “and can be applied to both existing issues related to economic and social disparities and to new issues . . . that are sure to arise” (p. 100).

UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE. By Paul Tucker. Princeton, N.J.: Princeton University Press. 2018. Pp. xii, 642. \$35.00. Constitutionalists are well acquainted with two heads of unelected state power: the countermajoritarian judiciary and the juggernaut military. To this mix Paul Tucker adds a third: central bankers. Set against the antitechnocratic unrest following the financial crisis, *Unelected Power* lays out principles for how central banks — and independent administrative agencies generally — can be designed and managed to increase their legitimacy. Traditional sources of independent administrative legitimacy (bare legality, expertise, and judicial review) are no longer enough. For instance, Tucker argues, administrative independence must be recast as “instrument independence but not goal independence” (p. 112), meaning that while independent agencies ought to have a choice of means, the value judgments driving regulatory policy must be made by political bodies. Only when elected power maintains substantive direction over unelected power does the public know “who to blame for what” (p. 119). Principles like these are especially salient for central banks, which have accrued fiscal, monetary, regulatory, and emergency powers. In each of these domains, the unelected policymakers in charge must act in democratic “values-compatible” ways (p. 20), lest they become “overmighty citizens” (p. 22). Administrativists everywhere should heed Tucker’s account.

AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD. By Sebastian Edwards. Princeton, N.J.: Princeton University Press. 2018. Pp. xxxiii, 252. \$29.95. In 1933, the Roosevelt Administration passed legislation that retroactively abrogated so-called “gold clauses” from all existing private and public contracts. These clauses secured debt with gold, and abrogating them effectively wiped out forty percent of all debt in the nation. Surprisingly, the details of this saga are elided in the works of economic historians. Surveying memoirs, presidential archives, and Depression-era financial data, Professor Sebastian Edwards fills this void, chronicling the events from the executive orders forcing citizens to sell their gold to the government to the Supreme Court decisions on the constitutionality of the retroactive abrogation. The first half of the book contextualizes these developments within the Roosevelt Administration’s battle with the Great Depression. The second half tackles the nuances of the Supreme Court decisions that, in effect, upheld this retroactive rewriting of contracts. Notably, Edwards supplements legal analysis with financial data on the decisions’ impact, offering a fascinating case study of the relationship between the Court and the markets. The book closes by exploring the potential for similar events in countries like Argentina and Greece, illustrating that

America's gold saga, far from a historical oddity, bears significantly on the economic policies of developing nations today.

SMARTER GROWTH: ACTIVISM AND ENVIRONMENTAL POLICY IN METROPOLITAN WASHINGTON. By John H. Spiers. Philadelphia, Pa.: University of Pennsylvania Press. 2018. Pp. viii, 248. \$59.95. What does it look like to pursue economic growth while still remaining prudent about environmental concerns? Activists and citizens have been struggling with this question since the late twentieth century, after witnessing the rapid postwar expansion of suburban sprawl. While most of the relevant literature focuses on environmental advocacy and policymaking on the national level, author John Spiers examines how community environmental efforts unfold on the local scale. Spiers narrates six case studies offering rare perspectives into the effects of grassroots advocacy on proposed developments in the metropolitan Washington, D.C., area. From a proposed cross-country highway to rural land preservation, Spiers chronicles the struggles of environmentalists confronting the reality of both the effects of federal regulation and local political and economic forces. The book pays particular attention to the effects of socioeconomic differences between communities: a proposed waterfront development in a majority–African American area, historically lacking in upscale development, ultimately succeeded, while a similar plan in a majority-white neighborhood was ultimately defeated. Spiers's carefully narrated account challenges citizens and advocates to consider the long-term impact of development plans while engaging local communities in working toward smarter, more equitable growth.

PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES. By Woodrow Hartzog. Cambridge, Mass.: Harvard University Press. 2018. Pp. x, 366. \$35.00. Privacy law in the United States is “basically a kludge” (p. 56) that focuses on costly ex post facto remedies. Professor Woodrow Hartzog’s proposed reform aims to preempt privacy issues by regulating the design of consumer and surveillance technologies. Lawmakers have overlooked the importance of design due to misconceptions that users control what they share online and that “there are no bad technologies, only bad users” (p. 5). Hartzog counters that privacy law must regulate design because design influences human behavior. Bad design, for example, can provide false signals to innocent users and lower transaction costs for bad users. Hartzog’s blueprint first proposes three guiding values for privacy law: trust, obscurity, and autonomy. He contrasts these values with control, secrecy, and shallow forms of consent. Second, his blueprint establishes boundaries — deception, abuse, and danger — in order to identify why certain designs are harmful. Third, Hartzog offers tools for enforcement ranging from soft responses, such as funding research for privacy-

protective technologies, to robust responses, such as imposing liability for dangerous designs. *Privacy's Blueprint* is an optimistic exhortation to incentivize better information technologies at a time when tech design is pervasive, powerful, and political.

ROBOTICA: SPEECH RIGHTS & ARTIFICIAL INTELLIGENCE. By Ronald K.L. Collins & David M. Skover. New York, N.Y.: Cambridge University Press. 2018. Pp. xii, 166. \$24.99. Advancements in communications technology have often prompted new forms of official censorship. Anticipating the next iteration of this pattern, Professors Ronald Collins and David Skover present a First Amendment theory for robotic expression. Collins and Skover begin by reviewing the history of communications developments, from oral tradition, to the written word, to print and electronic communications. The authors explain how these inventions initially prompted censorship but ultimately survived because of their social utility. Drawing on these lessons, Collins and Skover then survey scholarly discourse on the First Amendment value of robot-generated speech. The authors argue that the First Amendment ought to cover robotic speech in any instance in which a reasonable receiver understands the transmission to be meaningful expression. They further propose that the degree of First Amendment protection should be determined by the utility of the robotic expression. Professors Ryan Calo, Jane Bambauer, James Grimmelmann, Bruce Johnson, and Helen Norton respond to these proposals in a Commentaries section, exploring alternate conceptualizations of robotic speech. Collins and Skover conclude with a reflection on the urgency of forming a First Amendment theory of artificial intelligence, reminding us that “[i]f an idea does not evolve, it will not endure” (p. 121).

BORROWED JUDGES: VISITORS IN THE U.S. COURTS OF APPEALS. By Stephen L. Wasby. New Orleans, La.: Quid Pro Books. 2018. Pp. vii, 299. \$49.99. The prototypical panel in a federal court of appeals consists of three active-duty judges appointed to sit in that particular circuit. But, straining under the heavy weight of increasing caseloads, federal courts have expanded their reliance on three categories of “borrowed” judges: judges visiting from other circuits, in-circuit district judges, and the courts’ own senior judges. Professor Stephen Wasby presents a detailed examination of this understudied phenomenon. Drawing on a rich array of interviews and empirical data, he describes the varied use of borrowed judges across circuits and the nuanced views of the judges themselves. His account is both carefully researched and charmingly human, as he reveals the tensions, rivalries, and occasional awkwardness that can result when newcomers sit on an unfamiliar panel. Wasby also explores the surprisingly consequential role that borrowed judges play in shaping circuit law when they cast dispositive votes and author precedential opinions. By providing a window into a

little-known aspect of the day-to-day operation of the federal courts, Wasby illustrates the adaptability of a system facing significant resource constraints and the dedication of the judges that serve within it.

THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY. Edited by Susanna Mancini & Michel Rosenfeld. New York, N.Y.: Cambridge University Press. 2018. Pp. xx, 493. \$110.00. Professors Susanna Mancini and Michel Rosenfeld survey the legal, political, and cultural landscape of conscientious objection in the twenty-first century. The first six essays cover the theoretical framework of conscientious objection in constitutional democracies, including a survey of Western intellectual and religious history, the doctrine's philosophical underpinnings, a look at how the burdens of objection fall, and whether a legal and moral right to conscientious objection exists. The second group addresses how the discourse over objection has changed. The authors analyze how conscience has been subsumed into the culture wars, compare American and European experiences, and survey geopolitical and conflicting rights concerns. The third section examines the problem of balancing equality and freedom. The first essay creates a model for addressing conflicts between rights, the second looks at how the European Court of Human Rights has adjudicated religious exception claims, and the third assesses the burdens of religious accommodations on other people. The fourth section examines in four essays the impact of conscience and accommodation on children, women, and sexual minorities. The fifth section concludes the book with essays by Professors Stanley Fish and Robert Post, offering their perspectives on both conscience accommodation and the views expressed within the volume.

THE YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY. By John B. Nann & Morris L. Cohen. New Haven, Conn.: Yale University Press. 2018. Pp. ix, 349. \$35.00. Librarian John Nann and the late Professor Morris Cohen provide a comprehensive and practical roadmap to orient students, scholars, and practitioners alike in the modern landscape of research in American legal history. Employing a chronological approach, this reference book explores methodologies for researching topics ranging from English law antecedents of the American common law system to the federal Constitutional Convention to modern administrative law. Within each chapter, the authors describe the legal milieu of the time period, examine the types of sources relevant to finding legal materials from that era, provide a practical research example, and outline a compendium of sources for further reading and research. Beyond serving as a comprehensive how-to for the modern legal researcher, this book is replete with interesting historical tidbits, from the intricacies of colonial court records to the tireless efforts of one Frank Shepard, who helped lawyers in 1870s

Chicago understand the ways in which cases were treated by subsequent courts. In providing a methodological roadmap for researchers of American legal history, this book also paints a marvelous kaleidoscopic portrait of the development of American law itself.

THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD. By Jennifer E. Rothman. Cambridge, Mass.: Harvard University Press. 2018. Pp. 240. \$39.95. The internet age has thrust our private lives into the public eye. Fortunately, the law provides some redress: under the right of publicity, a person has a right to control commercial uses of her name, likeness, or voice. Professor Jennifer Rothman recognizes the importance of protecting one's financial and personal interests, but argues that the right of publicity serves those purposes poorly. The right is both over- and underinclusive: celebrities can invoke it to stifle free speech and artistic expression, for example, but not to reclaim nude photos that they never consented to sell (p. 121). Where did the doctrine go wrong? Rothman answers that question from a historical perspective: in the twentieth century, courts departed from the longstanding right of *privacy* (which was intended to protect everyone) and created a separate right of *publicity* (which was intended to protect public figures). Since then, the right of publicity has expanded and the right of privacy has shrunk, creating a divergence that "we ignore . . . at our peril" (p. 117). In response to this problem, Rothman proposes a solution: everyone should have limited but *equal* protection from unwanted publicity — shy people and showmen alike.

GUN CONTROL IN NAZI-OCCUPIED FRANCE: TYRANNY AND RESISTANCE. By Stephen P. Halbrook. Oakland, Cal.: Independent Institute. 2018. Pp. xix, 242. \$28.95. The unending debate over gun control generally revolves around the events most recent in the public's mind. *Gun Control in Nazi-Occupied France*, however, arms its readers with historical perspective by meticulously chronicling the disastrous consequences of France's 1935 gun registration law. Beginning with an account of the social and political tensions that resulted in the creation of a national database of gun owners in France, prominent Second Amendment attorney Stephen Halbrook proceeds to outline the steps that occupying Nazi forces took to track down registered gun owners and summarily execute those who refused to hand over their firearms. Backed by exhaustive research gleaned from German military archives, the book ends with an account of the underground resistance movement, which was filled with French citizens who had refused to comply with the 1935 mandate. The author expressly avoids drawing any parallels to contemporary gun control movements — his goal here is to inform, rather than persuade.

AMITY AND PROSPERITY: ONE FAMILY AND THE FRACTURING OF AMERICA. By Eliza Griswold. New York, N.Y.: Farrar, Straus and Giroux. 2018. Pp. xii, 318. \$27.00. In *Amity and Prosperity*, poet and journalist Eliza Griswold sheds light on the human cost of energy. By 2008, hydraulic fracturing — “fracking” — had arrived in Amity, Pennsylvania. For Stacey Haney, the money fracking companies offered to access her land was “a rare win in a place that had been losing for generations” (p. 20). Then Stacey’s son grew sick and skeletal; toxins hung on the air; animals died; headaches and ulcers became omnipresent. Tests confirmed chemical waste had contaminated the Haneys’ water well, poisoning the Haneys with arsenic. But when the fracking companies and Pennsylvania’s Department of Environmental Protection rejected the tests, Stacey began a years-long legal battle that turned a small-town nurse into a whistleblower, bent on uncovering the companies’ wrongdoing and compelling the state to protect citizens’ right to clean water. The product of seven years’ reporting, Griswold’s book is a narrative force demonstrating how “[e]xploring energy often involves exploiting people” (p. 5). It is a story “of those Americans who’ve wrestled with the price their communities have long paid so the rest of us can plug in our phones” (p. 308).