
RECENT PUBLICATIONS

A PEOPLE'S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC. By Rohit De. Princeton, N.J.: Princeton University Press. 2018. Pp. ix, 296. \$45.00. The Constitution of the Republic of India, ratified in 1950, is often portrayed as a document shaped in text and meaning by the elite of Indian society. Professor Rohit De complicates this narrative by demonstrating multiple ways in which Indians of all demographic and professional backgrounds engaged in constitutional litigation in the years immediately following ratification. He presents four case studies of state actions that were vigorously contested by a wide range of actors on constitutional grounds: prohibition of liquor consumption, rationing of everyday commodities, restrictions on bovine slaughter, and criminalization of prostitution. These lawsuits were made possible by unusual procedural provisions in the Constitution that guaranteed all citizens the right to petition courts for writs against government actors. De's analysis is grounded in a close examination of the record of important constitutional law cases, a perspective that has largely been missing from Indian legal history. De is the first researcher to have worked with the sprawling underground archives of the Supreme Court of India (p. 16), and the stories he brings back present a complex and compelling account of "how the Constitution came to dominate, structure, frame, and constrain everyday life in India" (p. 4).

THE FREE SPEECH CENTURY. Edited by Lee C. Bollinger & Geoffrey R. Stone. New York, N.Y.: Oxford University Press. 2019. Pp. xvi, 356. \$99.00. In 1919, the Supreme Court decided its first major free speech cases. To commemorate this anniversary and build on Justice Holmes's famous conception of free speech as an "experiment," Professors Lee Bollinger and Geoffrey Stone have assembled a collection of essays exploring the current state and future prospects of free speech doctrine. In Part One, scholars address the origins of First Amendment jurisprudence, the early cases, and the jurists and groups who played a central role. Part Two focuses on controversial topics in First Amendment law, including *Citizens United* and political speech, free speech on university campuses, and speech and equality. Part Three takes an international perspective, examining the uniqueness of the American approach and the ways it has — and has not — been adopted abroad. In Part Four, the essays take a forward look at the impact of social media platforms on free speech, concluding with the provocatively titled "Is the First Amendment Obsolete?" by Professor Tim Wu. The book ends, as it begins, with a dialogue between Bollinger and Stone, discussing the lessons we can take from free speech's first century into its second.

KILLING WITH PREJUDICE: INSTITUTIONALIZED RACISM IN AMERICAN CAPITAL PUNISHMENT. By R.J. Maratea. New York, N.Y.: New York University Press. 2019. Pp. ix, 233. \$26.00. At first glance, Professor R.J. Maratea's book may seem like a treatise-length examination of *McCleskey v. Kemp*, the controversial 1987 case that affirmed an individual's death sentence — despite evidence of racially disparate impact — by pointing to the lack of racially discriminatory purpose. *Killing with Prejudice* certainly devotes many pages to the case that has been called the “*Dred Scott* decision of our time” (p. 17). However, Maratea's argument is broader and his ambition bigger. The book paints a picture of how capital punishment and the criminal justice system itself are institutionally biased against nonwhite people, and African Americans in particular. To make this case, Maratea moves across centuries, starting from slavery (and the Constitution's accommodations for it) to lynchings in the Jim Crow era to the recent deaths of Eric Garner and Philando Castille. He charts how the manifestations of institutionalized racism have evolved over the centuries but argues that they have merely disappeared from the text of the law into the impenetrable minds of actors enforcing the law. Maratea's conclusion, rigorously supported and unflinching, is that prosecutors, juries, and society generally need to overcome the unconscious biases they hold that end up disadvantaging people of color. The analysis in *Killing with Prejudice* may leave readers unconvinced that there are any easy fixes to this problem, but that is arguably Maratea's point.

THE BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE. By John D. Bessler. Durham, N.C.: Carolina Academic Press. 2019. Pp. xlix, 539. \$65.00. Criminal justice reform has become a hotly debated topic in recent years. In a time devoid of clear solutions, Professor John Bessler suggests going back to basics — all the way back to the Enlightenment. Pulling from such thinkers as Montesquieu and Cesare Beccaria, Bessler examines American punishment within the context that the Founders envisioned it. Our theory of punishment, Bessler argues, should be grounded in Enlightenment principles — those holding that any specific punishment is proper only if absolutely necessary. Anything more than that would be tyrannical. After building this concept, the text delves into the implications of incorporating it into today's criminal justice system. What is the role of various legal actors in reverting to these principles? How do we determine what is absolutely necessary? This discussion encompasses not only what is an unusual punishment — as many scholars analyze in their Eighth Amendment studies — but also what would constitute a *usual* one. By offering an extensive historical analysis into the Founders' theoretical inspirations, Bessler provides a compelling thesis of what American punishment should be and how we might get there.

PRIVATIZATION. Edited by Jack Knight & Melissa Schwartzberg. New York, N.Y.: New York University Press. 2019. Pp. xii, 328. \$65.00. *Privatization* marks the latest installment in the NOMOS series, the annually published volume of the American Society for Political and Legal Philosophy. This collection of essays and commentaries tackles an ever-relevant subject in American legal and political thought: the transfer of traditionally public goods to ownership by private parties. The topic is timely, no doubt, thanks in part to continued efforts to convert state-owned services, like President Trump's recent plan to privatize air traffic controllers. But the collection does not simply offer cogent commentary on the day's events. In two parts, it tackles broader philosophical, legal, and practical implications involved in privatization. Part One examines the moral dimensions of privatization and features thinkers who argue both sides — some suggest privatization breaks bonds between citizens and government, while others argue that equality and fairness may be realized better by privately owned enterprises. Part Two looks to effects and asks how privatization impacts the state itself. Throughout, the collection of essays examines fundamental tensions in the debate over state-provided services. Professor Alon Harel forcefully argues that “[m]assive privatization transforms our political system and public culture, replacing robust shared responsibility and political engagement with fragmentation and sectarianism” (p. 69). The clash between inherent values, consequences, and the future of the public good plays out in this compelling and thoughtful installment of the NOMOS series.

JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW. By T. Leigh Anenson. New York, N.Y.: Cambridge University Press. 2019. Pp. xiv, 222. \$110.00. When America's courts of law and equity began to unify in the last century, the study of equity — and of equitable defenses in particular — fell out of fashion. With this book, Professor T. Leigh Anenson aims to “reduc[e] the size of the substantial gap in our understanding of modern American equity” (p. 8), with a particular focus on the equitable defense of unclean hands. This defense rests on the principle that a plaintiff should not be able to profit from his or her own wrongdoing and gives judges the discretion to avoid such an outcome. Anenson provides an account of the defense's origins and its benefits both to individual litigants and to institutions, placing the defense within the larger context of the fusion of law and equity. She writes of the adoption of the unclean-hands defense by many modern state and federal courts as a bar to legal relief, including the award of damages, and calls on other courts to follow suit. To that end, Anenson sets forth a new, process-based framework of unclean hands, aimed at helping courts determine whether to apply the defense in a given case.

THE NEW STOCK MARKET: LAW, ECONOMICS, AND POLICY. By Merritt B. Fox, Lawrence R. Glosten & Gabriel V. Rauterberg. New York, N.Y.: Columbia University Press. 2019. Pp. viii, 395. \$65.00. In *The New Stock Market*, Professors Merritt Fox, Lawrence Glosten, and Gabriel Rauterberg attempt to identify and characterize recent developments in capital equity markets — developments including controversial practices, such as short selling and high-frequency trading, and institutions, such as dark pools. Combining legal analysis with microstructure and financial economics, the authors also describe the economic and regulatory contexts in which these phenomena operate, at times raising questions or prescribing ideas for policy reform. Intended to be accessible, the book is aimed at two principal audiences: nonexperts seeking an overview of the most pressing issues concerning the regulation of capital markets, and experts seeking further insight into the operation and regulation of such markets. To that end, the book includes three introductory chapters that describe the institutional framework, social functions, and economics of capital markets. In each subsequent chapter, the authors analyze and critique a nascent market phenomenon that has presented regulatory questions or challenges. In *The New Stock Market*, readers will find a comprehensive, rigorous, and critical account of the equity market's current economic and regulatory architecture.

THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT. By Neal Devins & Lawrence Baum. New York, N.Y.: Oxford University Press. 2019. Pp. xxi, 235. \$29.95. Supreme Court Justices are frequently dismissed in popular discourse as politicians in robes. Drawing on the methodologies of social psychology and political science, Professors Neal Devins and Lawrence Baum argue that the ideological stances of Supreme Court Justices are informed by a more subtle force than party loyalty or changing public norms: the desire for approval from close-knit networks of academic, political, media, and social elites. Using the schismatic appointment of Justice Kavanaugh as a framing device, Devins and Baum attribute the increasingly evident partisan polarization on the nation's highest court to shifts in the structure and composition of elite legal networks. The ever-rising prominence of the Federalist Society has played a key role in this transformation, especially as liberal networks have sought to close ranks in response. Judges, like all decisionmakers, are influenced by “impression management” (that is, the desire to control how one is perceived by others) and by a desire to influence others (p. 53). Because social and political elites are the Court's main audience, the ideology of those elites is a key driver of influence for the Justices. Rather than framing the judiciary as politicians in robes, Devins and Baum's analysis seeks to expose the Justices of the Supreme Court as something perhaps more sinister — that is, as humans seeking validation.

GLOBAL ALGORITHMIC CAPITAL MARKETS: HIGH FREQUENCY TRADING, DARK POOLS, AND REGULATORY CHALLENGES. Edited by Walter Mattli. New York, N.Y.: Oxford University Press. 2019. Pp. xii, 372. \$59.00. For decades, frenzied traders in colorful jackets were the quintessential representation of securities trading. In recent years, however, the madness of the trading floor has been superseded by powerful supercomputers and complex algorithms trading and competing based on mountains of data and unimaginably fast communications. This anthology presents an introduction to this opaque world of high-frequency trading (HFT), accessible to both laypeople and specialists alike. The collection begins with a look into the strategies and abuses of HFT, such as manipulating trading speeds and order types, as well as the conflicts of interest presented by the fragmentation of American equity markets. The second half of the book turns to regulatory approaches in the face of such challenges. Jurists will find particularly pertinent Chapters 9 and 10, which discuss how automated trading challenges traditional legal concepts such as foreseeability, strict liability, and fraud, and how such notions may be accounted for under this new paradigm. The book closes with reflections from Australian, European Union, and Canadian securities regulators on their agencies' and markets' regulatory approaches and achievements. The wisdom and insights collected in this volume contribute to a better understanding of the challenges posed by HFT and suggest approaches and solutions for the American regulatory landscape.

SEPARATE: THE STORY OF *PLESSY V. FERGUSON*, AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION. By Steve Luxenberg. New York, N.Y.: W.W. Norton & Company. 2019. Pp. xix, 600. \$35.00. *Plessy v. Ferguson* has long been rightly recognized as a blemish on the Supreme Court's record, infamous for its endorsement of the separate-but-equal doctrine. In *Separate*, Steve Luxenberg digs beneath the case's mythology to tell its full story — the sprawling cast of advocates behind the case, the Supreme Court Justices who heard it, and its reverberations that echo today. Spanning the nineteenth century, the book is a fast-paced history of segregation in America and the Supreme Court's role in legitimizing that separation. It is a story of people: of Justice Billings, the opinion's author; of Justice Harlan, son of a slave-trader and the opinion's lone dissenter; of Albion Tourgée, famed advocate of equal rights and architect of the case; of Homer Plessy himself, hand-picked by Tourgée and the Citizens' Committee to Test the Constitutionality of the Separate Car Law for his light skin; and many more. *Separate* is a deeply human account, told through the eyes of its victims and perpetrators, of America's racial divide, of how the Court endorsed that divide, and of how that endorsement continues to shape America's racial landscape today.

THE RIGHT TO DO WRONG: MORALITY AND THE LIMITS OF LAW. By Mark Osiel. Cambridge, Mass.: Harvard University Press. 2019. Pp. 502. \$45.00. When a dying person's suffering becomes almost more than they can bear, why do family members and loved ones pressure them to continue their treatment, even when a person is legally permitted to refuse it? In *The Right to Do Wrong*, Professor Mark Osiel tackles this weighty question — and many more — by examining the tension and interplay between morality and law. Beginning with an overview of the various ways society has viewed morality over the years, the author then examines how factors like stigma and shame can, in some cases, be much more effective than the law in deterring action that humanity deems immoral. Osiel, in support of his thesis, weaves a patchwork of case studies, historical anecdotes, and social science research into a compelling narrative that leaves readers questioning their previous conceptions of societal norms, and even pondering how they themselves have deployed “shame and stigma to restrain the exercise of disfavored legal rights” (p. 310) by others. In thorough fashion, *The Right to Do Wrong* takes no assumptions for granted, offering readers a peek behind the curtain at the frameworks underpinning morality and law.

CANADA IN THE WORLD: COMPARATIVE PERSPECTIVES ON THE CANADIAN CONSTITUTION. Edited by Richard Albert and David R. Cameron. New York, N.Y.: Cambridge University Press. 2018. Pp. xii, 470. \$41.99. In light of the U.S. Constitution's declining international influence, the Canadian Constitution has become a leading subject of comparative public law. Celebrating the 150th anniversary of Canadian Confederation, Professors Richard Albert and David Cameron have assembled seventeen ambitious essays from leading scholars and jurists on Canadian constitutionalism and its international impact. The first six essays deal with Canada's approach to federalism as it facilitates diversity and pluralism. The Supreme Court of Canada's role and conduct concern the next set of six essays. Rounding out the triptych are five essays that each examine the influence of Canadian constitutionalism on the constitutional experience of other countries. What comes across most is the evolution of Canadian constitutionalism — as a document, as an international model, and as a “living tree” of doctrines (p. 183). Sometimes that evolution has been positive, and sometimes a branch has bowed to the winds; hardly enchanted by the sesquicentennial occasion, the volume analyzes Canadian constitutionalism in its many forms. A stunning compilation, *Canada in the World* grapples with the three themes of Canadian constitutionalism — “democracy, federalism and respect for diversity and difference” (p. 16) — and contributes meaningfully to comparative constitutional scholarship.

THE SEARCH FOR JUSTICE: LAWYERS IN THE CIVIL RIGHTS REVOLUTION, 1950–1975. By Peter Charles Hoffer. Chicago, Ill.: University of Chicago Press. 2019. Pp. viii, 200. \$27.50. The fourth in a series on the role of lawyers in America, *The Search for Justice* tells the story of lawyers during the civil rights era. The narrative focuses on the NAACP Legal Defense Fund's (LDF) school segregation litigation, described in the context of the "simmering unrest" (p. 1) of the era. The book self-consciously mirrors the alternating presentation of plaintiffs' and defendants' cases in litigation: First, Professor Peter Hoffer describes the efforts of LDF's attorneys, such as later-Justice Thurgood Marshall and Robert L. Carter, to challenge segregation in graduate and elementary schools. Hoffer then turns to the southern lawyers who defended segregation, such as Florida Attorney General Richard Ervin and Georgia Governor Richard Russell, author of the "Southern Manifesto" against desegregation. The book describes personal background and legal argumentation in equal measure, bringing to life the individual players behind well-known cases such as *Sweatt v. Painter* and *Brown v. Board of Education*. Hoffer also extends this analysis to judges: as he puts it, "[b]iography — personality and personal experience — may not dictate judicial views, but it certainly has an influence on them" (p. 41). The book concludes with an examination of the effects of civil rights lawyering — on the practice of law, on legal teaching, on the role of the courts, and on the distinction between law and politics. All told, "civil rights lawyering transformed a nation" (p. 196).

AMERICAN STATES OF NATURE: THE ORIGINS OF INDEPENDENCE, 1761–1775. By Mark Somos. N.Y.: Oxford University Press. 2019. Pp. xiii, 406. \$49.95. Property and liberty are commonly recognized as foundational concepts in America's founding. A less widely acknowledged concept in America's birth is the "state of nature," yet there is good reason for more scholarly attention. John Adams described a speech by James Otis, Jr., in 1761 as "the beginning of the Revolution" (p. 53) and a "dissertation on the rights of man in a state of nature" (p. 55). In 1775, on the second day of the First Continental Congress, Patrick Henry claimed the colonies were in the state of nature. Between 1761 and 1775, the term was used thousands of times in primary sources, including legal handbooks, pamphlets, criminal cases, newspapers, and political sermons. Through close textual analysis of primary sources, Professor Mark Somos explores the evolution of the concept in his new book and argues that a distinctively American understanding of the "state of nature" emerged in the 1760s and proved foundational to the American Revolution. Somos concludes that "[n]o constitutional history of the American Revolution can be written without it" (p. 338), considering it as important as well-known formulations of liberty and property in justifying America's fight for independence.

DRUGS, MONEY, AND SECRET HANDSHAKES: THE UNSTOPPABLE GROWTH OF PRESCRIPTION DRUG PRICES. By Robin Feldman. New York, N.Y.: Cambridge University Press. 2019. Pp. xiv, 186. \$29.95. As prescription drug prices continue to rise, drug companies are banking on the idea that money is no object to consumers of prescription drugs. And, empirically, they may be right — prescription drug prices appear to defy ordinary market dynamics and continue to rise at unprecedented rates. Professor Robin Feldman analyzes this problem both descriptively and normatively. She argues that there are no constraints on pharmaceutical companies' behaviors and that they have incentives to keep drug prices high and increasing. Using innovative, interdisciplinary, and original research, she also brings out a novel dynamic in the literature and commentary on this topic: the powerful role pharmacy benefit managers play in setting and raising drug prices and in deciding who gets reimbursed (and how much). Feldman closes with an extensive list of suggestions to address the problem, which will surely be useful to policymakers. This compact book on an important topic, written for both the casual reader and the expert in the field, will be a useful contribution that moves us closer to addressing this pressing societal problem.

MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER. Edited by Heidi M. Hurd. New York, N.Y.: Cambridge University Press. 2019. Pp. xxvi, 463. \$110.00. Professor Larry Alexander's work defies characterization, sprawling across vast domains of law and philosophy. Part tribute and part dialogue, this collection of essays brings together an eclectic cast of academics to engage with different aspects of Alexander's provocative contributions. A small sample reveals the breadth of issues discussed: In Part I, devoted to criminal law, Professor Antony Duff responds to Alexander's counterintuitive argument that the success or failure of a criminal attempt has no bearing on culpability. In Part II, devoted to constitutional law, Professor Frederick Schauer adds nuance to Alexander's unabashed intentionalism, arguing that intentions are vital to understanding free speech principles, but do not bear on legal interpretation. In Part III, devoted to jurisprudence, Professor William Baude points out tensions between Alexander's originalism and his positivist defense of judicial supremacy. In Part IV, devoted to moral philosophy, Professor Kasper Lippert-Rasmussen challenges Alexander's controversial argument that the wrongfulness of discrimination is grounded in the perpetrator's disrespect, instead of the victim's harm. Finally, in closing, Alexander himself comprehensively replies to each of the twenty-two essays, making this collection an invaluable guide not only to Alexander's thought, but also to discourse on the frontiers of law and philosophy generally.