
RECENT PUBLICATIONS

RELIGIOUS FREEDOM AND THE CONSTITUTION. By Christopher L. Eisgruber and Lawrence G. Sager. Cambridge, Mass.: Harvard University Press. 2007. Pp. 333. \$28.95. In an era when the proper role of religion in the public sphere is fiercely debated, Professor Christopher Eisgruber and Dean Lawrence Sager argue that religious institutions and practitioners have a right to be free from governmental discrimination on account of religious beliefs but have no right to be exempt from generally applicable laws on account of religious beliefs. While seemingly intuitive, this result is actually the converse of current First Amendment jurisprudence, which guarantees religions special rights under the Free Exercise Clause while starving religions of public funding (among other benefits) under the Establishment Clause. The authors criticize the prevailing jurisprudence for its inconsistency and synthesize the Religion Clauses with the rest of the First Amendment, the Fourteenth Amendment, and federal antidiscrimination legislation. Far from being an abstract exercise, *Religious Freedom and the Constitution* offers satisfying answers to some of the most vexing questions on religion facing the Constitution, including religious public displays, school prayer, and the Pledge of Allegiance.

THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR. By Daniel W. Hamilton. Chicago: University of Chicago Press. 2007. Pp. vii, 231. \$39.00. The Civil War brought greater conflict, uncertainty, and fundamental change than perhaps any other era in American history. In a focused and detailed analysis of confiscation by Union and Confederacy governments, Professor Daniel Hamilton reveals the underexplored effects of this dynamic epoch on constitutional understandings of property. The Confederate practice of aggressively confiscating enemy property, together with a clash of factions in Congress over whether the Union should engage in this same endeavor, placed considerable stress on antebellum notions about government's ability to take property. The victory of a moderate coalition in Congress, which relied on the Constitution as a barrier between private property and the state, along with the Supreme Court's successive affirmation of this liberal constitutionalist view, ultimately ensured that although "[c]onfiscation entered the nineteenth century as a controversial practice," it "left the nineteenth century as a relic" (p. 171). *The Limits of Sovereignty* is an accessible and compact book that offers valuable insight into the Civil War era and will be appealing to anyone interested in the story of property under the Constitution.

THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES. By Kent Greenfield. Chicago: University of Chicago Press. 2006. Pp. xi, 288. \$45.00. In this challenge to the law-and-economics view of corporations, Professor Kent Greenfield taps into a growing progressive unease among corporate law scholars. While other scholars have aimed to dethrone mainstream corporate law theory, Professor Greenfield purportedly offers the first comprehensive alternative theory from the stakeholder's perspective. Part I of *The Failure of Corporate Law* provides a historically grounded account of the fundamental flaws of contemporary corporate structure: the fixation on profits, the propensity to externalize costs, and the aversion to government regulation. Ultimately, it aims to recast corporate law as a public rather than private law. In Part II, Professor Greenfield rolls out sophisticated proposals that go beyond those debated on the opinion pages of newspapers. He pushes for an antifraud law (designed to ensure employer truthfulness) and a new model for corporate rational decisionmaking supported by historical literature and philosophy. Throughout the book, Professor Greenfield's audience is legal scholars, but in the end, he steps outside the bounds of academia and calls for a multipartisan, populist challenge to the "ademocratic" corporate structure. For the sympathetic reader, Professor Greenfield's book is heartening. For the unsympathetic reader, it offers a worthy target.

REPARATIONS: PRO & CON. By Alfred L. Brophy. New York: Oxford University Press. 2006. Pp. xviii, 289. \$29.95. In this comprehensive discussion of the reparations debate in the United States, Professor Alfred Brophy uses historical data, academic scholarship, and legislative documents to detail the development and likely future of the reparations debate and the results it has produced. In the process, he shows that the reparations debate is anything but dormant. In addition to providing fascinating examples of legislative, judicial, and community-based reparations programs since the Salem Witch Trials, Professor Brophy exposes the many arguments within and between the reparations proponent camp and the skeptic camp, and provides a framework within which both sides can work to advance the discussion into a concrete plan. While Professor Brophy's casual, precise prose is enough to entice the reader, his use of commentary from prominent activists, scholars, and political leaders make the text particularly compelling. The appendix and bibliography — with mines of documents and sources on a host of reparations-related issues — are invaluable tools for future researchers. *Reparations* is a must-read for anyone who wants to understand the ins and outs of the debate about "building something better for the future by correcting for past injustice" (p. 7).

RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868. By Andrew E. Taslitz. New York: New York University Press. 2006. Pp. xi, 363. \$50.00. State control of violence to enforce laws is a precondition to social stability, but it is also a cause of concern for all individuals. In the first part of this book, Professor Andrew Taslitz reviews and recasts the origins of the Fourth Amendment as an effort to tame state violence and to ensure that justice was individualized and respectful of human dignity. In light of this history, Professor Taslitz suggests a series of changes in law and policy to “give the People a voice in creating search and seizure policy” (p. 55) and to ensure that courts recognize the importance of avoiding stigma and promoting individualized justice in interpreting precedent. Professor Taslitz then explores why “minority communities experience rage at certain police search and seizure practices involving their communities’ members” (p. 6). Professor Taslitz’s hypothesis, again drawing on his view of the Amendment’s history, is that the reduction of the Fourth Amendment to a “technicality” has resulted in the loss of respectful interaction between the police and minority communities. Ultimately, the book’s goal is to resurrect a “jurisprudence of respect . . . to restore the Fourth Amendment as a means for strengthening the ties of peoplehood” (p. 277).

DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA. By James Green. New York: Pantheon Books. 2006. Pp. ix, 383. \$26.95. Professor James Green writes of the development of Chicago’s labor movement from the Civil War, through the great fire, to the evening of May 4, 1886, when, during a tense labor rally, a dynamite bomb was thrown from among the dwindling crowds into the advancing companies of police. Gunfire followed the explosion, and eleven people were killed. Professor Green details the police searches, the sensational trial, and the four hangings that followed. He sets this judicial drama, and the resulting crisis within the Chicago labor movement, against the wider repercussions of the bombing, both for the national debate on the social questions of immigration and labor and for the worldwide labor movement, for whom the “Chicago martyrs” became a potent symbol. Professor Green argues the Haymarket Riots led to more than the temporary defeat of the eight-hour day and the polarization of class relations in Chicago — though the effects cannot be precisely traced, these riots both demonstrated and ensured the labor movement would *not* evolve into a cooperative national enterprise. Instead, Professor Green argues, the Haymarket Riots indicated that industrial relations would be conflicted, sometimes radicalized, often antagonistic, and surprisingly violent.

FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA. Edited by Charles J. Ogletree, Jr. and Austin Sarat. New York: New York University Press. 2006. Pp. ix, 309. \$22.00. For decades, social science studies of capital punishment documented the influence of race on the sentencing process yet generated little dialogue or action in Congress and the Supreme Court. In this probing series of essays, Professors Charles Ogletree and Austin Sarat gather an impressive lineup of scholars to delineate and draw attention to the longstanding linkage between racial politics in America and the killing of African-Americans. Some pieces — notably, Professor Timothy Kaufman-Osborn's assessment of the death penalty as the modern analogue to southern lynchings — adopt a historical lens to demonstrate how meanings of race have been constructed and reinforced by our practices of punishment. Others marshal statistics, juror narratives, and psychology to examine how race impacts the decisions of actors inside the courtroom. The book concludes with rousing reflections on how to understand and combat racialization in a reconsideration of capital punishment. Coming at an important time in the national conversation about capital punishment, this provocative and wide-ranging collection is a bold reminder of the stakes of the debate.

THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT. Edited by Ronald Kahn and Ken I. Kersch. Lawrence, Kan.: University Press of Kansas. 2006. Pp. x, 494. \$19.95. This compilation of essays brings together the work of authors who have analyzed the role and decisions of the Supreme Court through the lens of American political development scholarship. Underlying each piece is the premise that the Court is, in its unique way, a political body, influenced by internal factors, such as precedent, judicial norms, and external factors, such as the relative power of political parties, opinions expressed in the media that only together can explain the changes in its jurisprudence over time. The book uses particular cases and historical examples to address the myriad influences on judicial decision making, the Court's role in impacting the larger political order, how the Court arrives at interpretations of constitutional text, and how marginalized and elite groups achieve inclusion in the Court's constitutional decisions. The essays provide multifaceted, insightful analyses of the complexities of the history and future of the Supreme Court.

THE CANON OF AMERICAN LEGAL THOUGHT. Edited by David Kennedy and William W. Fisher III. Princeton, N.J.: Princeton University Press. 2006. Pp. ix, 925. \$35.00. What is legal reasoning, and how has it changed in the past century? This is the motivating question of two Harvard Law professors' attempt to bring together the twenty most important works of legal scholarship since 1890. From Oliver Wendell Holmes to the Critical Race theorists via Herbert

Wechsler and Ronald Coase, the works collected in this volume represent the arc of modern legal thinking, which the editors separate into three broad eras: the attack on the “old order” of formalism, the rise of the “new order” of legal process, and the modern emergence of “eclecticism” — a path the authors describe as “the fall, rise, and fall of methodological consensus” (p. 8). The editors provide an introduction to each article, making the sophisticated scholarship more accessible and highlighting connections among articles whose subjects range from contracts to republican theory. While not everyone will agree with the editors’ selections, Professors David Kennedy and William Fisher have undeniably performed a valuable service to scholars and students and have provided an important baseline for understanding legal thought.

PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW. By John Fabian Witt. Cambridge, Mass.: Harvard University Press. 2007. Pp. 406. \$29.95. Legal historians have long debated the relationship between America’s origins as a constitutional state founded upon a legal text and its history as a nation-state animated by a pluralism of cultures and traditions. In this elegant and arresting new book, Professor John Witt describes how this interaction explains the “bounded contingency” of American legal development, which emphasizes the “the many possible paths open to legal and constitutional development” and “the many possible national identities open to self-described Americans” that are bounded by “American nationhood” (pp. 6–7). Professor Witt’s project charts a new course in American legal historiography by focusing on the ways in which America channeled and transformed global influences during critical periods in the nation’s history such as Reconstruction and the birth of modern civil liberties during and after World War I. *Patriots and Cosmopolitans* tells the stories of five pivotal historical figures who have largely been overlooked or misunderstood by existing literature, and it uses their aspirations and struggles to illuminate “the power and the tragedy of the national frame” — its capacity to “mobiliz[e] highly laudable ideals” (p. 284) and its propensity to limit their achievement.

CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES. By Benjamin Wittes. Lanham, Md.: Rowman & Littlefield Publishers, Inc. 2006. Pp. 168. \$22.95. In this slim volume, *Washington Post* editorialist Benjamin Wittes targets what he sees as an increasingly contentious judicial confirmation process. Arguing that recent presidents are having greater difficulty winning confirmation for their nominees, Wittes worries that the combination of aggressive questioning by Senators and reticence from nominees may signal a breakdown in the separation of the judicial and legislative powers. Drawing upon his deep knowledge of Washington politics, Wittes proposes several structural solutions to confirmation partisanship, includ-

ing abandoning nominee testimony and focusing Senators' attention on the nominee's record. Though some may find these suggestions radical, Wittes's practical, readable text represents a serious effort to cure a process that troubles many Americans.

OF WAR AND LAW. By David Kennedy. Princeton, N.J.: Princeton University Press. 2006. Pp. xi, 191. \$18.95. From the trial of Saddam Hussein to the Supreme Court's recent decision in *Hamdan v. Rumsfeld*, law's pervasive influence on war is clearly, and often dramatically, evident. In this provocative and timely book, Professor David Kennedy probes the relationship between war and law, incisively unraveling two concepts that have become increasingly intertwined since the Second World War. Professor Kennedy begins with a study of the political context that has given rise to the "merger of law and war" (p. 7), and then explores the historical development of these two institutions. This background sets the stage for a thoughtful analysis of the opportunities afforded — and the dangers created — by the "legalization of warfare" (p. 12). Although reshaping war as a legal institution has allowed for regulation that serves humanitarian ends, doing so also diverts attention from questions of morality and responsibility in favor of legal focal points. This book exposes "what can go wrong when humanitarian and military planners share the same legal strategic vocabulary" (p. 12), offering lessons for politicians and citizens alike.

THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS. Edited by Jack M. Balkin and Beth Simone Noveck. New York: New York University Press. 2006. Pp. viii, 304. \$24.00. Virtual worlds are increasingly real. Millions of people participate in multiplayer online role-playing games, inhabiting these simulated environments not to escape but to experience the complexities of organized society. In a provocative collection of essays, Professors Jack Balkin and Beth Noveck enlist an impressive roster of scholars and designers to explore the legal questions raised by the proliferation of virtual worlds. What is the balance of rights between game players and game owners? When should the state regulate the virtual-world industry? What is the nature of property in virtual worlds, and is it possible for virtual-world inhabitants to violate real-world duties? What privacy rights does a person relinquish upon entering a virtual world? Moreover, what can virtual worlds teach us about how real-world societies ought to be structured? Novices will find these essays to be an accessible introduction to virtual worlds; experts will appreciate the diversity of insights regarding the legal implications of digital societies.