

RECENT PUBLICATIONS

THE TORTURE DEBATE IN AMERICA. Edited by Karen J. Greenberg. New York: Cambridge University Press. 2006. Pp. xviii, 414. \$18.99. This collection of essays and documents aims to remedy a disconnect between the public view of torture and the thoughtful but rather self-contained specialists' debate over the issue. The lawyers, policymakers, and intellectuals who contribute to the book examine torture from a variety of angles. Some, including Professors David Luban and Stephen Holmes, lament the ethical implications of torture for a liberal democracy. Others consider the legal aspects of the debate, urging Americans to have "a long and informed talk about the Geneva Conventions" and their efficacy (p. 203). Others, such as Heather MacDonald, consider the utility of coercive interrogation and attempt to clarify the facts surrounding the debate. And still others examine the responsibilities of the government lawyers and advisors who shape the nation's policy on torture. The collection closes with a useful set of primary documents, ranging from the government memos circulated post-9/11 to a 1920 report by Roscoe Pound, Felix Frankfurter, and others, expressing concern about the Justice Department's practices at the time. This wide-ranging work serves to complicate one's understanding of a difficult and very relevant issue.

INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM. By James A. Gardner. Chicago: The University of Chicago Press. 2005. Pp. xii, 311. \$45.00. When the Supreme Judicial Court of Massachusetts ruled that the Massachusetts Constitution's guarantee of equal protection required the state to grant marriage licenses to homosexual couples, it touched off a debate not only about gay marriage, but also about the role of state courts in a federal system. Professor James Gardner proposes a functionalist jurisprudence that both encourages and enables state courts to expand the rights and liberties guaranteed by their states' constitutions. He argues that state courts, as components of independent state governments, have an institutional role in checking abuses of national power, including the Supreme Court's narrow readings of federal constitutional rights. According to Professor Gardner, state courts are proponents of federalism, not judicial activism, when they reject the relevance of Supreme Court rulings to the interpretation of similar state constitutional provisions. In addition to a theoretical framework, the book also provides practical guidance and will be a valuable resource for scholars, judges, and advocates concerned with the role state constitutions have to play in protecting substantive rights.

REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW. By Jed Rubenfeld. Cambridge, Mass.: Harvard University Press. 2005. Pp. ix, 241. \$39.95. The text of the Constitution rarely changes, yet the Supreme Court radically reinterprets constitutional provisions on a regular basis. How do we determine which doctrinal revisions are legitimate? Rejecting both originalism and ahistorical moralism, Professor Jed Rubenfeld responds to this question with a simple but profound theory of constitutional structure. He argues that there are two types of understandings concerning constitutional rights and powers: first, understandings about which laws would violate a given constitutional provision (for instance, the Framers intent for the Establishment Clause to forbid the creation of a national church), and second, understandings about what laws would not be covered by the provision (for instance, their obvious belief that the Clause did not bar mandatory school prayer). Because the first set of understandings represents *commitments* — which Professor Rubenfeld argues are integral to democratic self-government — they command special respect and are almost never reneged. Understandings of the second type, however, are merely *intentions*, which may be properly overruled by reasoning from paradigmatic cases. Witty and clearly written, and adjoining an ambitious theory of constitutional interpretation to a trenchant critique of the “anti-anti-discrimination” decisions of the Rehnquist Court, *Revolution by Judiciary* is sure to provoke much discussion among both constitutional theorists and Court-watchers.

DEFENDING RIGHTS IN RUSSIA: LAWYERS, THE STATE, AND LEGAL REFORM IN THE POST-SOVIET ERA. By Pamela A. Jordan. Vancouver, Canada: UBC Press. 2005. Pp. x, 285. \$29.95. “You must rule advocates with an iron hand and place them in a state of siege, for this intelligentsia scum often plays dirty,” Lenin wrote in 1905 (p. 19). Given these sentiments, it is unsurprising that the Russian bar (the *advokatura*) was a politically powerless appendage of the Communist administrative state for most of the twentieth century. In her book, Professor Pamela Jordan employs the analytical framework of historical institutionalism to ask whether the Russian bar has established an autonomous societal position in the post-Soviet era. Her answer is yes, but only to a point. While Professor Jordan argues that the Russian bar has gained more autonomy from the state and has helped advance constitutional rights in important ways, these gains have come haltingly, and the Putin government’s focus on maintaining order and centralizing power threatens to extinguish the liberalization before it really takes root. For students of legal history and comparative law, this book offers a thorough account of the role an independently functioning bar can play in the evolution of a democracy.

CLOSING ARGUMENTS: CLARENCE DARROW ON RELIGION, LAW, AND SOCIETY. Edited by S.T. Joshi. Athens, Ohio: Ohio University Press. 2005. Pp. xxi, 268. \$39.95. Clarence Darrow earned the reputation of “America’s greatest lawyer” (p. xi) on account of his representation of myriad defendants ranging from radical socialist leader Eugene V. Debs to “Monkey Trial” schoolteacher John Thomas. But Darrow’s aspirations extended far beyond the courtroom, and he longed for literary and philosophical recognition. In this fascinating collection of essays compiled from Darrow’s writings, lectures, and debates, S.T. Doshi presents Darrow’s most thoughtful and provocative insights into such topics as religious philosophy, determinism, capital punishment, and criminal psychology. The collection, compiled more than seven decades after Darrow’s death, is strikingly relevant to some of the most complicated issues of our time, such as religious fundamentalism and criminal punishment. Darrow characterizes religious attempts to interfere with the teaching of science as the most “brazen and dangerous attempt to control thought [that] can be found anywhere in history” (p. 22). Darrow also offers insight into how society should confront the problem of crime, arguing against harsh forms of punishment, including the death penalty: “To use violence and force upon the vicious . . . must produce the evil that it gives” (p. 85). This captivating compilation of Darrow’s greatest works will engage those interested in religion and science, philosophy, and crime and punishment, or simply those interested in learning more about “The Great Defender” himself.

REGULATORY BARGAINING & PUBLIC LAW. By Jim Rossi. New York: Cambridge University Press. 2005. Pp. xiii, 274. \$60.00. After fifty million Americans lost electric power in the summer of 2003, many fingers were pointed at private actors’ greed-driven abuse of deregulated electricity markets. Professor Jim Rossi takes a more nuanced approach in his examination of public law and institutional governance in deregulated industries, explaining that whether or not private greed contributes to deregulation’s weakness, “it is not the full story” (p. 5). Professor Rossi’s “government relations bargaining” account highlights the fault borne by governmental institutions themselves, especially in the electricity markets context, by examining “private interactions with governmental bodies and interactions between governmental bodies” (p. 8). Professor Rossi also provides a normative treatment of public law’s role in deregulated markets. Departing from more conventional “legalistic” prescriptions, Professor Rossi favors a “modest” approach for the judiciary in which courts apply default rules that will facilitate appropriate bargaining in the regulatory process (p. 239). This work teaches that “regulatory law in a deregulatory era” is not a contradiction, but rather a model to be studied and improved upon (p. 14).