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TRIBUTES

Dedication to Jeffrey D. Jones, 1968–2020
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ARTICLES

John Marshall's Constitution: Methodological Pluralism and Second-Order *Ipse Dixit* in Constitutional Adjudication
D.A. Jeremy Telman.....1151

This Article provides a comprehensive treatment of the constitutional jurisprudence of the Marshall Court (1801–1835), addressing its relationship to contemporary originalism. Until recently, there seemed to be no need for such a study. With the move from intentionalism to textualism in the 1980s, originalists came to understand their movement as an innovation and a reaction against the perceived excesses of the Warren and Burger Courts. Originalists did not claim that originalist methodology informed nineteenth-century constitutional adjudication.

Recently, however, originalists have made claims that constitutional adjudication in the United States has always been originalist. This Article maintains that such claims are doubly misleading. First, the Marshall Court invoked the Framers' intentions but never undertook any investigation into those intentions. Second, this rhetorical intentionalism by no means predominated as the Marshall Court's governing interpretive approach. Rather, that approach was pluralist. Historical reasoning, common law precedent, and what I call second-order *ipse dixit* pronouncements featured prominently in the constitutional adjudication of the Marshall Court.

The constitutional text rarely provided clear constraints on the Marshall Court's discretion because, to borrow language from New Originalists, their cases arose in the "zone of construction" where original meaning "runs out." Justices chose among plausible arguments about the Constitution's meaning. At key points, the Justices simply declared what the law was, not without justification, but also not based on evidence of the Framers' intent or the original meaning of the constitutional text.

The "Free Market" for Marijuana: A Sober, Clear-Eyed Analysis of Marijuana Policy
H. Justin Pace 1219

Federal law prohibits the possession and sale of marijuana. At the same time, states are not only decriminalizing marijuana but also attempting to provide a regulatory apparatus for its sale. This has created a unique business environment. In some ways, there is a true "free market" for marijuana in states that have legalized it—free, that is, of the legal and financial infrastructure available to fully licit businesses in America.

Contracts may not be enforceable because they lack a legal purpose. Relief in bankruptcy court may not be available, either as a debtor or as a creditor. Use of a legal entity to limit liability and take advantage of entity personhood may be impracticable. Federal money laundering and other laws effectively restrict access to the banking system, forcing marijuana businesses to operate as purely cash businesses. The U.S. Patent and Trademark Office refuses to register federal marks related to marijuana. Marijuana businesses face challenges in obtaining competent legal counsel to guide them through a market free on one hand and regulated on the other.

The odd legal posture has implications for considering marijuana policy through an economic lens. Any analysis of marijuana externalities should consider the additional externalities created by that odd legal posture. An analysis of policy options for mitigating negative externalities should also factor in the additional costs for marijuana businesses due to this "free market." The uncertainty, from a policy perspective, counsels in favor of applying heuristics when considering policy options: this Article offers three and applies each.

This Article is the first to use this situation to examine the value offered by our legal and financial infrastructure. An inability to use it hurts marijuana businesses in very real ways. But, nonetheless, marijuana businesses are able to operate—to thrive even. That infrastructure is both more and less valuable than is appreciated, and in surprising ways. Ultimately, this Article advocates federal action that facilitates a continued incremental, state-by-state approach to marijuana reform.

Discarded Loyalty: The Deportation of Immigrant Veterans
Deenesh Sohoni & Yosselin Turcios 1285

The United States has a long history of using the foreign born to meet its military demands. For many immigrants, military service served both as a way to demonstrate loyalty to their adopted country, and to facilitate their naturalization process. However, over the past several decades an increasing number of foreign-born veterans have found themselves being deported, despite their honorable service, for having committed criminal acts. In many cases, these veterans were never given a chance to contest their deportations due to their status as non-citizens. This Article compares the deportation of non-citizen veterans today, with the failure by the United States government to grant citizenship to Asian-American military veterans in the first half of the twentieth century, as a means to explore the role of the legal system in adjudicating between two competing views regarding immigration. The first view sees immigrants as potential contributors to American society, and seeks to attract those deemed necessary, beneficial, or worthy of becoming Americans, and

facilitate their social/legal incorporation into the United States. The second view sees immigrants as a threat to national cohesiveness, and seeks to identify and remove those seen as problematic or dangerous. This Article argues that despite the United States' professed belief in the importance of patriotism for national belonging, support for granting citizenship to foreign-born veterans has frequently given way to broader racialized restrictionist tendencies which manifest explicitly and implicitly within the legal system.

Retribution as Ancient Artifact and Modern Malady
Molly J. Walker Wilson 1339

One of the oldest and most entrenched goals of punishment is retribution, which is the idea that inflicting pain on someone who has committed a wrong is a worthwhile goal, regardless of any other benefits or harms that may result. Retribution has been the justification for increasingly punitive policies in the United States, the effect of which has decimated communities of color, strapped taxpayers with huge associated costs, and increased crime rates. It is difficult to understand why we perpetuate harmful policies based on "just deserts" until we consider that the foundation of these policies is moral outrage—a powerful, automatic, compelling response to witnessing social transgressions. Evidence from evolutionary biology, brain science, psychology, and anthropology has revealed the role of moral outrage in promoting social cooperation among early humans as social groups expanded. Moral outrage shares commonalities with other cognitive heuristics, or mental shortcuts that behavioral scientists have identified as leading humans to behave irrationally. While these automatic responses have historically served an adaptive function, they can lead to poor judgment in contemporary society. This Article employs scientific findings and theory from several disciplines to explore the origin and function of moral outrage, before examining the maladaptive consequences of retributivist objectives in modern times. Ultimately, all evidence suggests that retribution is an ancient artifact of human evolution only serving to create a foundation for harmful policies. As such, retribution should no longer be considered a legitimate punishment goal.

Workforce Housing and Housing Preference Policies Under the Fair Housing Act
Jeffrey D. Jones 1413

The workforce housing movement grew out of two urgent realities. First, the lack of affordable housing near where workers are employed has a substantial impact on local economies and local business. Second, the lack of affordable housing near where workers live undermines the twin goals of inclusive communities and reversing historical patterns of segregation. The latter remains a primary obstacle to equality of opportunity throughout the United States. There is no one definition of "workforce housing." The leading definition of workforce housing is provided by the influential Urban Land Institute (ULI). The ULI defines workforce housing as housing that is affordable to households earning 60%–120% of the area median income. This Article examines workforce housing under the federal Fair Housing Act (FHA) and Oregon fair housing law. Section I details the need for affordable housing. Section II explains how housing preference policies can run afoul of the FHA and Oregon law. Section III summarizes the relatively sparse FHA case law on housing preference policies and the lessons that can be learned from it. Section IV explains how demographics present challenges to housing preference policies. The Conclusion

offers guidance for housing providers interested in workforce housing or other housing preference policies.

Shadow Credit and the Devolution of Consumer Credit Regulation
Nathalie Martin & Lydia Pizzonia 1439

Shadow credit is trending. Shadow credit has all the essential attributes of regular credit except that it is unregulated. It operates in a world in which products and services that look, act, and feel like credit products are deemed to be something that is not actually credit. This legal sidestep is accomplished either by passing industry-friendly legislation or by tweaking the shadow credit product just enough to not be defined as credit, but "something else." That "something else" is often called a "lease," an "advance," or in the case of Afterpay, simply a "service." At its essence, however, it is still credit. More and more shadow credit products are popping up to take the place of actual credit products.

The purpose of avoiding being "credit" is to avoid consumer credit regulation. We see this trend among purveyors of rent-to-own household goods, rent-to-own real estate, employer payday advances, buy-now-pay-later services like Afterpay, income sharing agreements in higher education finance, and even bail bonds, all of which seek to avoid complying with usury laws or interest rate caps, Article 9 of the Uniform Commercial Code (U.C.C.), the federal Truth in Lending Act, and all other consumer credit protection laws.

While some of these products are helpful to consumers, or at least not particularly harmful, some are deeply predatory. They can operate outside the law. For example, classic rent-to-own contracts that were historically used for household goods are now being used in housing contracts in vulnerable Native American communities.

Emerging shadow credit products are testing the limits of what should be permitted in rent-to-own contracts and similar financing tools. The trend toward shadow credit has the capacity to derail our entire consumer credit regulation system.

NOTES & COMMENTS

Credit Rating Agencies: Regulation and Liability
Colin Bradshaw.....1489

In 2007, the economy crashed because of credit rating agency misconduct. Through the early 2000s, credit raters' reckless pursuit of profits facilitated the enormous real estate and structured finance bubble that eventually burst in 2007. This Article examines the ratings industry and its institutions, their role in the crash, the regulation that led to their dominance in the markets, how that regulation changed in the wake of the economic crisis, and how they can be held liable today for present and future misconduct.

Section I describes what credit rating agencies (CRAs) are and what they do. Understanding the function of these institutions is critical to understanding how they operated before and after the crash, and why they should not be shielded

from liability. Section II explains the role of the rating agencies in the financial crash of 2007, and how falsely high ratings for very risky instruments helped grow the immense real estate and credit bubble. Section III explains the history of credit rating regulation before the crisis and establishes how the agencies came to occupy such an enormous and important role in financial markets. Section IV details the reactive legislation that came after the financial crisis and explains its effect—or lack thereof—on ratings regulation. Substantial regulatory reliance persists in spite of the Act's overt goals, which means that CRAs still occupy a powerful quasi-governmental position in the economy. This Section also adds a current analysis (as of January 2020) of the Office of Credit Ratings, which is a subdivision of the SEC created by the Dodd-Frank Act. Section V outlines theories of liability for credit raters. If oversight of the rating agencies continues to be ineffective, then litigation on statutory, tort, or criminal grounds must be employed to deter misconduct and market manipulation and to punish bad actors. Increasing CRA liability will more effectively combat the conflicts of interest that persist in the industry by deterring risky and fraudulent conduct, and by encouraging due diligence and substantial investment in accurate economic models.

A Return to the Traditional Use of the Writ of Mandamus

Audrey Davis.....1527

A litigant filing a petition for a writ of mandamus takes a gamble. If unsuccessful, the petitioner risks not only wasting time and effort but also insulting the district court judge by calling into question his or her ability to carry out the basic duties of a judge. And even if successful, the petitioner still faces the risk of returning to the district court on less-than-friendly terms. More than anything, however, the writ of mandamus poses such risks because appellate courts have employed widely varying approaches in developing a standard for granting the writ. In order to offer greater predictability to litigants and foster district courts' ease of administration of their cases, appellate courts should adhere to the relatively strict standard set by the history of the writ in England and later endorsed by the U.S. Supreme Court and Congress.

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