



# The Resource Page



## NEW BOOKS

WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION. Foundation Press, 2000. (\$24.95). 383 pp.

Most judges interpret statutes of one kind or another most every day. Such tasks can become so commonplace that we might lose track of the overall picture. That's easy to do in statutory construction, as normal forms of legal research provide ready rules that can easily lead to a desired result. But most of the canons of construction have a counterpart leading in a different direction, and the policies at issue in statutory construction are not always self-evident. Eskridge, Frickey, and Garrett, who are now on the third edition of their law school casebook, have prepared an excellent one-volume book for the use of law students, lawyers, and judges. In addition to a thorough review of the legislative process, they provide a comprehensive overview of the theories of statutory interpretation, the role of both text and precedent in interpreting statutes, and the use of extrinsic sources in statutory interpretation. Whether to consider legislative history, as well as what should be consulted if one decides such materials may be used, is thoroughly reviewed. The authors suggest what they describe as a moderate position: that legislative history be consulted only if it is readily available to the average lawyer, relevant to the precise interpretive question, and reliable evidence of consensus within the legislature that can be routinely discerned at reasonable cost. They note the value and usefulness of the canons of construction, but also describe how they are rooted in assumptions about the normal usage of language, the proper relationship between legislatures and courts, and

other basic, systemic values. So rooted, the canons can lead to more predictable results. The authors also suggest, however, that the canons of construction not be used as a crutch to avoid discussion of the value choices actually at issue. The book includes an appendix stating in clear language the canons of construction used by the Rehnquist Court, including the "dog didn't bark" canon—the presumption that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in it.

SCOTT DOUGLAS GERBER (ED.), *SERIAM: THE SUPREME COURT BEFORE JOHN MARSHALL*. New York Univ. Press, 2000. (\$22.50). 349 pp.

This book contains a series of essays on ten justices who served on the United States Supreme Court before John Marshall. The book's editor, Scott Douglas Gerber, is a law professor and the author of a book on a more recent Supreme Court Justice, *First Principles: The Jurisprudence of Clarence Thomas*. For this collection, Gerber recruited law, history, and political science professors familiar with the early court to write separately about each of the ten justices, providing both basic biographical information and commentary on each justice's judicial philosophy. Gerber's point in putting together the book appears to have been two-fold: first, in his own words, "to dispel the myth that the early Court became significant only when Marshall arrived," and second, to provide a good, three-dimensional portrait of each of the justices included. The book succeeds on both fronts, including a spirited presentation of the ways in which these justices—well before *Marbury v. Madison*—practiced and championed judicial review. Originally issued in a more-expensive hardbound version, this paperback edition is well worth its purchase price.



## USEFUL WEBSITES

**Brennan Center for Justice**  
<http://www.brennancenter.org>

Every judge who is interested in how the judiciary is depicted in the media should go to this website and sign up for its e-mail updates on judicial independence. You will receive regular, usually twice-weekly, summaries of news stories and editorials related to the independence of judges and the courts, including material attacking, defending, or just concerning the judiciary. And, whenever the material cited is available online, a convenient link is provided so that you can easily read the actual story or editorial.

The Brennan Center is a part of the New York University School of Law and, according to its recent press releases, it "develops and implements a nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms." Named in honor of the late Justice William J. Brennan, Jr., the Brennan Center litigates cases, files amicus briefs, drafts legislation and action plans, and publishes books and articles, focusing on areas such as judicial independence, campaign finance reform, and access to justice. Its website has an excellent resource page on judicial independence.

## FOCUS ON THE MICROSOFT CASE

The Resource Page presents excerpts of the *Microsoft* antitrust case appeal briefs regarding the conduct of the trial judge in making public comments about the case-vis-à-vis a judge's ethical duties at page 34.