
RECENT PUBLICATIONS

THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE. By Peter Baldwin. Princeton, N.J.: Princeton University Press. 2014. Pp. 535. \$35.00. Modern market dominance of easily replicated digital content has led to a grand “copyright war” as content creators, content owners, consumers, and activists fight for changes to the intellectual property regime. But, as Professor Peter Baldwin shows in *The Copyright Wars*, this round of copyright contestation is but the latest iteration of a much older dispute between Anglo-American and Continental intellectual property ideologies. The book focuses on two questions: “How have the owners of intellectual property massively enhanced their rights over the past three centuries? And how did trans-Atlantic differences arise over the claims that authors could stake to their works and the access that audiences could demand to their patrimony?” (p. 9). Professor Baldwin demonstrates how competing Anglo-American and Continental ideologies of copy protection developed from common eighteenth-century origins, radically departed in the twentieth-century, and finally converged in transnational intellectual property regimes. Despite this reconvergence, the different ideological traditions are reflected in arguments today over the proper scope of copy protection. This account of copyright’s history provides a useful backdrop to our present battle in the “copyright wars.”

REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY. By David Boies and Theodore B. Olson. New York, N.Y.: Viking Penguin. 2014. Pp. 310. \$28.95. Six months after the California Supreme Court upheld the rights of gays and lesbians to marry, California voters took this right away by amending the state constitution through Proposition 8. Shocked supporters of marriage equality turned to two of the nation’s preeminent lawyers: David Boies and Theodore Olson. *Redeeming the Dream* tells the story of two close friends who, despite having faced off in *Bush v. Gore*, together accepted a truly difficult and profoundly important challenge. In an op-ed piece for the *Wall Street Journal*, Boies wrote: “We acted together because of our mutual commitment to the importance of this cause, and to emphasize that this is not a Republican or Democratic issue, not a liberal or conservative issue, but an issue of enforcing our Constitution’s guarantee of equal protection and due process to all citizens” (p. 88). *Redeeming the Dream* tells the tale behind these words with its gripping and personal account of the behind-the-scenes planning, the key legal issues, and the real challenges of the five-year fight to overturn Proposition 8.

THE CASE AGAINST THE SUPREME COURT. By Erwin Chemerinsky. New York, N.Y.: Viking Penguin. 2014. Pp. 386. \$30.00. A string of sharply divided Supreme Court decisions in recent years has renewed debate about the proper role of the Court. In his new book, Dean Erwin Chemerinsky puts the Supreme Court itself on trial, evaluating two centuries of its history to answer the question: Has the Supreme Court fulfilled its constitutional purpose? Dean Chemerinsky identifies that purpose as both protecting the rights of minorities who cannot rely on the political process and upholding the Constitution in times of crisis. In gripping narrative, Dean Chemerinsky takes readers through the stories of some of the Court's worst decisions — from *Dred Scott* to *Korematsu* — to demonstrate how the Court has failed in critical moments throughout its history. And in a close evaluation of both the Warren Court and the Roberts Court, Dean Chemerinsky concludes that the Supreme Court has additionally failed the American people over and over by siding with the powerful — government and business — over the weak. In the final chapter, Dean Chemerinsky proposes changes to how Justices are selected, hear arguments, communicate their decisions, and leave office. Dean Chemerinsky's book is a provocative read for lawyers and non-lawyers alike.

OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS. By Marianne Constable. Stanford, Cal.: Stanford University Press. 2014. Pp. xi, 217. \$27.95. In the 1950s, philosopher J.L. Austin theorized performative utterances (like "I promise" or "I do") in a series of lectures that would become the iconic monograph *How to Do Things with Words*. Professor Marianne Constable's new work builds on this Austinian tradition, portraying law as ineluctably connected to such performative speech acts. Drawing on a range of theorists from linguistics and philosophy, including Nietzsche, Derrida, and Heidegger, Professor Constable argues that thinking of law as performative escapes the reductionist extremes of locating law either in doctrinal categories or in social effects. Most compellingly, Professor Constable encourages legal theorists to attend to the imperfection of legal speech acts, such as in law's inability to control language norms or in the fallibility of human promises. A key example of such imperfection is provided in President Barack Obama's 2009 inaugural oath, which was readministered after the single word "faithfully" was recited in the wrong place. Professor Constable offers a quick and enjoyable read, accessible to the lay reader and full of examples from the law of marriage, evidence, criminal procedure, tort, and contract.

TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940. By Daniel R. Ernst. New York, N.Y.: Oxford University Press. 2014. Pp. ix, 226. \$39.95. In the 1830s, the French aristocrat Alexis de Tocqueville applauded America's lack of a centralized administrative state and cautioned against its formation. *Tocqueville's Nightmare* links this concern to the present-day Tea Party's fear that America's administrative state is the nightmarish result of foreign, socialist influences, and explains that the American administrative state was, in fact, created by employing the American rule-of-law tradition to protect smaller government and individual rights. Professor Daniel Ernst recounts the rejection of twentieth-century scholar Ernst Freund's attempts to transplant the European *Rechtsstaat* tradition to America and describes the struggles of Felix Frankfurter, Charles Evan Hughes, and Roscoe Pound in determining the proper role of courts in agency decisions. Eventually, against the backdrop of the New Deal, they converged on a solution requiring agencies to undertake the procedure of courts of law and freeing courts of the obligation to decide administrative decisions anew. By balancing due process with the efficiency of administrative discretion, they created a fundamentally American administrative state.

WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW. By Liam Murphy. New York, N.Y.: Cambridge University Press. 2014. Pp. xii, 208. \$29.99. *What Makes Law* introduces and analyzes two central questions in legal philosophy. The first question is how we determine the content of the law in force. On the one hand, argues Professor Liam Murphy, the law's content matters because we cannot talk about important practical issues — like what judges should do — without agreeing about what the law is. On the other hand, opposing views about the grounds for law — exemplified by debates between those who believe moral considerations are always relevant to figuring out the content of law and those who deny that categorical relevance — seem irreconcilable. *What Makes Law* unravels the tension between the importance of the content of law and the difficulty of discerning that content. Second, the book discusses what makes law law rather than something else. The focus is on international law and whether it qualifies as a legal system rather than, for instance, conventional morality among global actors. In probing these two questions, *What Makes Law* steps back from seemingly insoluble debates to frame the bigger picture and to suggest a way forward.

CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION. By Robert C. Post. Cambridge, Mass.: Harvard University Press. 2014. Pp. viii, 254. \$29.95. The Supreme Court's 2010 decision in *Citizens United v. FEC* has begun to reshape American electoral politics. In his 2013 Tanner Lectures on Human Values delivered at Harvard University, Robert Post, the Dean of Yale Law School, reflected on the decision and proposed his own framework for First Amendment and campaign finance jurisprudence. *Citizens Divided* compiles Dean Post's two lectures as well as four responses from political theorist Nadia Urbinati and constitutional law scholars Professor Pamela Karlan, Professor Frank Michelman, and Professor Lawrence Lessig, respectively. Professor Lessig has recently emerged as a leading campaign finance reformer and here challenges Dean Post for neglecting an analysis of the concept of corruption. Dean Post takes a historical approach, considering what representative democracy entailed during different eras in American history, and argues that First Amendment jurisprudence stands, in part, for what he terms America's "discursive democracy" (p. 6). He carries this theme through the second lecture, where he reconciles the First Amendment's protection of discursive democracy with the goal of institutional integrity that he believes is at the heart of campaign finance reform efforts.

THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD. By Jeffrey Shulman. New Haven, Conn.: Yale University Press. 2014. Pp. x, 345. \$40.00. The conventional view, consistently affirmed by the courts, holds that parents enjoy wide-ranging rights in raising their children. In *The Constitutional Parent*, Professor Jeffrey Shulman disputes this perspective of fundamental parental rights by reconsidering the precedents deployed to support it. Notably, Professor Shulman argues that the law views parents as holding a "sacred trust" (p. 4). This trust recognizes authority in exchange for a commitment to ably guide children toward adulthood. By looking at parental custody, the state regulation of education, religion and parental rights, and nonparental third-party rights, he tracks the varying threads of the parental trust and unilateral parental-rights doctrines. Professor Shulman makes a forceful case that the idea of parental rights severed from parental responsibilities is neither a necessary consequence of key decisions nor normatively desirable. The well-being of the child should be the paramount consideration. He argues that "[t]he law represents what we think it means to love and to take care of our children" and that, as a result, parental law should be reexamined, even if it means dispensing with fundamental parental rights (p. 226).

MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA. By Jonathan Simon. New York, N.Y.: The New Press. 2014. Pp. ix, 209. \$26.95. In its 2011 decision *Brown v. Plata*, the Supreme Court held that the Eighth Amendment required a reduction in California's prison overcrowding due to the state's inadequate provision of mental and physical health care to prisoners. *Mass Incarceration on Trial* uses the series of cases culminating in *Plata* to argue that prisoners' human dignity cannot be respected in a system of mass incarceration. When prisons are overcrowded — the California prisons were packed to over double normal capacity — prisoner safety decreases, chronic health conditions go untreated, and emergencies are unresolved. Professor Jonathan Simon believes *Plata* may be the beginning of a “dignity cascade,” the first step in realizing that mass incarceration is fundamentally incompatible with respect for human dignity and the Eighth Amendment (p. 137). He hopes that the decision will prompt legislatures and courts across the country to issue sentencing reforms, including the adoption of alternatives to incarceration for less serious crimes. At the very least, *Plata* may force society to consider the deleterious effects of mass incarceration on both the individuals it directly affects and the nation as a whole.

THE COSMOPOLITAN CONSTITUTION. By Alexander Somek. New York, N.Y.: Oxford University Press. 2014. Pp. xii, 291. \$98.50. The modern constitution is, in Professor Alexander Somek's view, a project of emancipation. In *The Cosmopolitan Constitution*, Professor Somek retraces the story of that project through two important paradigm shifts. The first shift occurred after World War II, when the understanding of the constitution as liberty based on social contract gave way to one of dignity arising from the recognition and protection of fundamental human rights. But because human rights transcend sovereign authority, yet depend on such authority for their realization, a second shift occurred: nations looked to their peers to evaluate their own performance. This third paradigm is “the cosmopolitan constitution,” which reaches beyond its national bounds and displays both political and administrative faces. With a cosmopolitan gaze, Professor Somek examines these shifts as they have occurred in the United States and abroad, and in the process he illuminates how the cosmopolitan constitution has led to many features of the United States' current national structure, including a strong administrative state. Professor Somek's sharp insights into the three-part development of modern constitutionalism mark a fascinating examination of how the constitutional project of emancipation stands today.