RECENT PUBLICATIONS

THE EXCHANGE ORDER: PROPERTY AND LIABILITY AS AN ECONOMIC SYSTEM. By Richard Adelstein. New York, N.Y.: Oxford University Press. 2017. Pp. xxiv, 264. $74.00. As a young college graduate, Professor Richard Adelstein taught in prisons for a year. This experience prompted the question: what is "all that suffering and all that money buying[?]" (p. ix). This idea, that consequences of the legal system are analogous to costs in the free market, grew into *The Exchange Order*. Adelstein employs his impressive breadth of knowledge in philosophy, economics, history, and law to elucidate how the traditional understanding of property uses the same economic principles as our society's treatment of liability and guilt in the civil and criminal systems. After carefully explaining the law-and-economics approach to property, *The Exchange Order* maps that understanding onto our criminal and tort systems, developing a surprising and compelling account of how market forces affect the design of these systems. Adelstein's topics — from the class action (pp. 135–41) to the plea bargain (pp. 211–18) — lead to uncomfortable yet important conclusions, like the insight that "[b]uying and selling lie at the core of . . . exchange between offenders and prosecutors" in criminal systems around the world (p. 231). Adelstein ends with a novel takeaway: instead of analyzing law-and-economics systems through the cold, scientific lenses of analytics and models, we should strive to inject organic and human methods of inquiry.

LAW IN POPULAR BELIEF. Edited by Anthony Amatrudo and Regina Rauxloh. Manchester, U.K.: Manchester University Press. 2017. Pp. xii, 206. $110.00. Although made amid the marbled halls of government and critiqued atop the ivory towers of academia, law is most commonly absorbed in a little-structured environment: the unpredictable province of the public square. In *Law and Popular Belief*, Professors Anthony Amatrudo and Regina Rauxloh offer a disciplined look inside the puzzling phenomenon of public legal consumption and interpretation, focusing not only on how citizens arrive at their beliefs about the law but also on how those beliefs come to shape the law itself. Through a collection of ten essays written by scholars and practitioners on a diverse array of legal topics, *Law in Popular Belief* forces the reader to confront a provocative truth: the law does not just create public myth; it is also altered and sustained by it. If the book's underlying premise — that law "has reality only in the form in which it is understood by the person who is applying or subject to it" (p. 11) — has any semblance of truth, then *Law in Popular Belief* is an important step toward understanding the legal reality of our time.

THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE. By Roy L. Brooks. New Haven, Conn.: Yale University Press. 2017. Pp. xi, 240. $35.00. Professor Roy Brooks shines a light on a topic that he says academic circles have heretofore given scant attention: racial subordination. As Brooks defines it, "racial subordination" occurs when a person neglects to further racial advancement and instead elects to promote another, competing nonracial ideal (p. 4). Brooks offers three essential tenets about the racial subordination that pervades society and hinders racial equality. First, racial subordination is distinct from, and subtler than, overt racism. Understanding this distinction, and the complexity surrounding racial subordination, will be important in achieving racial advancement. Second, racial subordination damages our society in insidious and complex ways. Accordingly, it functions to create a racial glass ceiling, and refusing to address it is bad social policy. Third, even the most successful, established black Americans are racially vulnerable. Racial subordination has a well-documented socioeconomic dimension, but legal and cultural dimensions also function to hinder progress toward racial equality. Brooks surveys these latter two dimensions in great depth, examining how "juridicial subordination" through Supreme Court decisions and cultural values like the assimilationist idea that "race no longer matters" (p. 107) have worked to harm racial advancement. Finally, Brooks calls for prioritizing racial equality to break the racial glass ceiling.

THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY. By Cara H. Drinan. New York, N.Y.: Oxford University Press. 2017. Pp. xi, 224. $27.95. The United States was once a pioneer in juvenile justice, as one of the first countries to develop courts specifically tailored to juvenile defendants. Today, however, it is in many ways an outlier in the other direction in many ways — for example, as the only country to allow juveniles to be sentenced to life without parole. Professor Cara Drinan thoughtfully examines the legal and policy factors that have made America's juvenile justice system as deeply flawed as it is. Even though, in a series of decisions, including *Graham v. Florida* and *Miller v. Alabama*, the Supreme Court mandated that juvenile defendants be treated differently from adult defendants, state systems' treatment and mistreatment of juveniles remains a prominent source of concern. Drinan vividly depicts the real-life import of these issues by incorporating first-hand accounts from individuals incarcerated for crimes they committed as minors, including Terrence Graham himself. After assessing the many problems of the juvenile justice system, Drinan presents concrete long- and short-term policy proposals to solve them — including ending solitary confinement and ultimately rethinking "our concept of youth incarceration altogether" (p. 146). This engaging, accessible work looks to the past and scrutinizes the present before developing a vision of a more promising future.

WHEN FREE EXERCISE AND NONESTABLISHMENT CONFLICT. By Kent Greenawalt. Cambridge, Mass.: Harvard University Press. 2017. Pp. 1, 293. $39.95. Religion. It is a topic you may want to avoid at the dinner table, but one you will want to read about in Professor Kent Greenawalt's recent book exploring the tensions between the Establishment Clause — "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I — and the Free Exercise Clause — "or prohibiting the free exercise thereof," *id*. For example, the United States has a long history of beginning legislative sessions with prayer; is this an example of free exercise, or is it an establishment of a religion? Examples abound: Can government workers decline to issue same-sex marriage licenses? How should religion be taught in schools? Throughout this book, Greenawalt employs case law, constitutional interpretation, and historical context to describe the various circumstances in which tensions arise and to suggest how best to resolve them. Ultimately, careful consideration of both clauses can help us create a society more "tolerating [of] the conflicting views of other sincere fellow citizens" (p. 249).

HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE. By Roger C. Hartley. Nashville, Tenn.: Vanderbilt University Press. 2017. Pp. ix, 253. $69.95. The typical understanding of Article V of the Constitution reduces Article V to a means to amend the Constitution. *Failed Attempts* proposes a different understanding: Article V as an avenue for movement building, expression of dissent, and promotion of deliberation. Professor Roger Hartley looks at twenty-five case studies that demonstrate the political advantages that proposing and defending an amendment can bring to a cause, even if the amendment fails. First, Hartley draws parallels between litigation and amendment proposals as "resource[s] for movement building" (p. 10). He distills the history of the Equal Rights Amendment to show how the failed proposal mobilized support for the women's rights movement and influenced Supreme Court's treatment of sex discrimination. Next, Hartley examines the effect of amendment proposals on congressional politics, explaining how even a failed call for a constitutional convention could generate congressional action. Hartley walks us through centuries of examples of how failure to ratify does not preclude political change. Indeed, constitutional changes need not be written in the Constitution because the mere "option to propose amendments" alone can provide important political opportunities (p. 162).

HOW TO DO THINGS WITH INTERNATIONAL LAW. By Ian Hurd. Princeton, N.J.: Princeton University Press. 2017. Pp. ix, 187. $29.95. In *How to Do Things with International Law,* Professor Ian Hurd seeks to complicate the conventional wisdom that the "rule of law" in international politics is a self-evident good. On the traditional account, international law operates just as a counterweight to state power and a constraint on its abuse. It dulls the worst impulses of states and creates the necessary prerequisites of peace: political order and stability. To Hurd, that account is incomplete. By foregrounding an investigation of power and politics in the international sphere, Hurd illustrates the malleability of the international rule of law. Indeed, state power itself *shapes* international law as much as it is shaped *by* it. To demonstrate this point, Hurd turns our attention to a series of case studies that examines the legal discourse over and about war, drones, and torture to show that international law operates as powerfully to legitimate state action — including violence and torture — as it does to limit it. On this understanding, the law can no longer be uncritically imagined as an impartial referee. The book's title is illustrative. *How to Do Things with International Law* sheds new light on how states use international law to pursue their often-divergent goals.

PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES. Edited by Vicki C. Jackson & Mark Tushnet. New York, N.Y.: Cambridge University Press. 2017. Pp. viii, 343. $125.00. The proportionality framework, as practiced in courts worldwide, provides a comprehensive approach to judicial rights protection via a tripartite inquiry: rationality, necessity, and proportionality. This important collection gathers under one roof nearly all the leading scholars on the constitutional doctrine of proportionality from across the globe. The ensuing discussion, as Professors Vicki Jackson and Mark Tushnet describe it, is "both a stock-taking and an effort to understand next chapters in the rise — or fall — of proportionality analysis" (pp. 1–2). Professor Frank Michelman offers a fascinating vision of proportionality analysis in the political realm far outside the courtroom, while Professor David Beatty sketches a sweeping application of proportionality across a range of issues: capital punishment, gay marriage, female priests, multiculturalism, and the idea of self-government. Five separate articles deal with the puzzle of proportionality's striking absence in U.S. constitutional law. Why has the United States splintered from the so-called Global Model of constitutionalism? And could proportionality analysis traverse the Atlantic or, for that matter, the border with Canada? The authors probe these questions and suggest answers reflecting an array of methodologies. Their takes on this divergence are sure to interest students of U.S. and global constitutionalism alike.

SET IN STONE: AMERICA'S EMBRACE OF THE TEN COMMANDMENTS. By Jenna Weissman Joselit. New York, N.Y.: Oxford University Press. 2017. Pp. 221. $29.95. The Ten Commandments have evolved from a unifying force in the nation's development of a Judeo-Christian identity to a source of controversy in light of America's modern-day secularism. Hailing the potency of the commandments — a synthesis of "the rule of law, the word of God, and the promise of singularity" (p. 24) — Professor Jenna Weissman Joselit tracks their history in the United States from the nineteenth century onward. In that time, the American public regarded the Decalogue with frequent approval and occasional scorn, but always with deep fascination. Joselit recounts the trail of its influence, from a hoax discovery of the tablets in Newark, Ohio, to the set of Cecile DeMille's 1923 blockbuster film on the story of Moses, and to recent Supreme Court headliners determining the constitutionality of public religious displays. Even in the relatively irreligious atmosphere of twenty-first-century America, the Ten Commandments pervade popular culture, inspiring the ubiquitous "top-ten" list and the popularity of self-help literature. What explains the Decalogue's enduring eminence? Among Moses action figures, comic books, and billboards, Joselit finds her answer: "the Ten Commandments furnished America with a pedigree" (p. 159).

SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT. By Randy J. Kozel. New York, N.Y..: Cambridge University Press. 2017. Pp. x, 180. $34.99. Complicating the doctrine of stare decisis is the fundamental tension between keeping the law settled and getting the law right, as described by Justice Brandeis almost a century ago. *Settled Versus Right* argues that, save for exceptional circumstances, the interest in keeping the law settled should prevail. Strong deference to precedent protects the impersonality and reliability of the law from shifts based on individual judges' preferences. Professor Randy Kozel presents a thought-provoking framework for amending how stare decisis functions in constitutional law to promote greater continuity. Recognizing that "American constitutional practice is awash with interpretive disagreements" (p. 94), he argues that an approach to stare decisis that assumes interpretive agreement is improper. Instead, Kozel's "second-best stare decisis" (p. 15) accepts interpretive pluralism and instructs judges, when determining whether to overturn a precedent, to disregard considerations that depend heavily on interpretive philosophies and normative priorities. This approach allows for meaningful stare decisis by forcing judges from all schools of interpretive thought — from originalism to living constitutionalism — to subordinate their personal proclivities to their shared dedication to precedent.

THE POLICY STATE: AN AMERICAN PREDICAMENT. By Karen Orren & Stephen Skowronek. Cambridge, Mass.: Harvard University Press. 2017. Pp. viii, 253. $25.95. Policy is crucial to the government's ability to adapt to changing times. But historically, policy was not the only way America was governed. Throughout the twentieth century, the role of policy in American government became more expansive as the demands for novel change grew exponentially. In *The Policy State*, Professors Karen Orren and Stephen Skowronek take on the challenging task of analyzing the significance of this collective problem solving. Instead of examining specific policies, they assess the impact on law and politics of repeated use of policy as a remedy. As policy began to dominate government work, an expansive transformation occurred in American politics, which contributed to political polarization and public distrust of institutions. The prevalence of policy as imperative also shaped legal rights and restructured the government's form. But, "[t]he more creatively [America's policy state] stretches to accommodate change, the more awkwardly it strains to conform to its set design" (p. 91). In the wake of the new "policy state," rights and structure doff their unique attributes and don policy features. In this sharp book, Orren and Skowronek address modern political controversies and weigh the adaptive benefits of policy against their impact on law, politics, and the government's structure.

MAINTENANCE IN MEDIEVAL ENGLAND. By Jonathan Rose. New York, N.Y.: Cambridge University Press. 2017. Pp. xv, 409. $110.00. One of the most-levied complaints about our legal system: too often it is a bully's tool, misused and abused by the powerful and well connected. Such criticisms, it turns out, are as old as the Anglo-American legal system itself. Since the thirteenth century, observers have considered "maintenance" — officious intermeddling in another person's litigation — a significant social and legal problem. While the role of maintenance in medieval legal history has long been known to scholars, no author has undertaken a comprehensive exploration of the topic. In *Maintenance in Medieval England*, Professor Jonathan Rose fills this void. Rose deeply examines many primary sources, revealing for the first time what actually happened in maintenance litigation. This study yields two major findings. First, judges played a larger role in defining illegal maintenance than previously understood. Second, medieval statutes aimed at restricting maintenance largely failed; in many cases, parties actually used the laws to improperly harass adversaries. Rose's treatment sheds important historical light on the tradeoffs present in the still-roiling debate over how best to provide access to justice while curbing abusive litigation.