RECENT PUBLICATIONS

IN HOFFA’S SHADOW: A STEPFATHER, A DISAPPEARANCE IN DETROIT, AND MY SEARCH FOR THE TRUTH. By Jack Goldsmith. New York, N.Y.: Farrar, Straus & Giroux. 2019. Pp. 354. $28.00. Memoir, historiography, true-crime thriller: Professor Jack Goldsmith’s In Hoffa’s Shadow defies categorization. The stepson of a leading suspect in Jimmy Hoffa’s disappearance, Goldsmith weaves legal, historical, and personal narratives into a riveting account of the Hoffa mystery and the era in which it happened. Goldsmith analyzes the extralegal surveillance tactics the Department of Justice used to target Hoffa and explores how “the imperative to defeat the enemy skewed the government’s understanding of the proper limits on its actions” (p. 121). He traces that thinking from the twentieth century into the twenty-first, drawing on his experience challenging the Stellarwind warrantless surveillance program in the Bush Administration to examine how well-meaning government lawyers can find themselves tempted to cut legal corners. In Hoffa’s Shadow offers a heartfelt exploration of the human narratives behind the law — the zealous Attorney General, the dynamic labor boss, the trusted associate, and the ambitious young lawyer turned Harvard Law School professor whose stories illuminate the course of American legal history.

THE ESSENTIAL GUIDE TO INTELLECTUAL PROPERTY. By Aram Sinnreich. New Haven, Conn.: Yale University Press. 2019. Pp. xiv, 283. $25.00. Intellectual property can be a complex, and at times confusing, area of law. Professor Aram Sinnreich draws on his rich experience and research to provide clarity in The Essential Guide to Intellectual Property. This book offers insights into everything from “the prehistory of intellectual property to the backroom politics behind our laws and treaties to the front lines of the ‘copyfight’ on streets and servers around the globe” (p. 225). As the chapters unfold, the author’s focus deftly moves from clear, comprehensive overviews of intellectual property doctrine to pithy, entertaining details, such as patents for cat exercises and comb-over techniques (p. 11). After detailing the origins and limitations of intellectual property law to lay the groundwork for readers, the book dynamically shifts to examining how intellectual property relates to industry, cultural expression, and politics. The author then widens the aperture of analysis to include a global perspective. While Sinnreich discusses with clarity what’s driving current debates for copyrights, patents, and trademarks, he also grippingly engages the “Thorny Questions from the Bleeding Edge” of the intellectual property field (p. 240). A contribution outside the “partisanship of advocacy books and the clinical aridity of legal textbooks” (p. 3), Sinnreich’s guide to intellectual property is, well, essential.
WAR AND THE ROGUE PRESIDENCY: RESTORING THE REPUBLIC AFTER CONGRESSIONAL FAILURE. By Ivan Eland. Oakland, Cal.: Independent Institute. 2019. Pp. xiii, 330. $27.95. When the President can unilaterally start wars, extrajudicially kill people overseas, and dominate federal fiscal policy debates, something is deeply wrong. Ivan Eland has identified the culprit: “congressional abdication” (p. 251) of its constitutional powers, especially during wartime. His book chronicles the tug-of-war between the legislature and the executive from President Washington to President Trump. Until President Truman, Congress would generally permit presidential aggrandizement during wartime but claw back (most of) its constitutional powers once the threat passed. Now, however, perpetual wars — such as the Cold War and the War on Terror — have calcified what should have been a temporary tilt towards the executive. Eland weaves a scathing critique of the “imperial presidency” (p. 1) into his historical account — not only is it pragmatically harmful and inherently undemocratic, but presidential aggrandizement defies our Constitution by removing and redistributing congressional power. After cataloguing wartime executive expansions, Eland concludes by encouraging Congress to reclaim its constitutional prerogatives by further centralizing power in the hands of congressional leaders, repealing legislation like the War Powers Act, and reasserting itself in key areas like foreign policy. In an age when presidential politics dominate the nation’s political consciousness, Eland rejuvenates an alternative vision.

FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION. By Lawrence Lessig. New York, N.Y.: Oxford University Press. 2019. Pp. vii, 552. $29.95. Can one interpretive model account for two hundred years of constitutional interpretation by the Supreme Court? Professor Lawrence Lessig believes so. In sketching out such a model, Lessig explains the interpretive process of translation, or “rendering a text in a target context [in a way] that preserves the meaning of the source text in the source context” (p. 56), and he explores the history of that practice on both the right and the left. On the left, translation is easy to identify, for example, in Supreme Court decisions relating to privacy and equality. On the right, translation can be found in decisions that constrain governmental power in order to preserve economic liberty. In both cases, two “fidelities” animate the practice of translation: fidelity to meaning and fidelity to role. At times, these two fidelities constrain translation. At times, they enable it. Together, their application constitutes the historical practice of constitutional interpretation by the Supreme Court. With this understanding, Lessig turns to the more difficult, and perhaps more important, question: is such a practice justified?
RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING. By Andrew Coan. Cambridge, Mass.: Harvard University Press. 2019. Pp. viii, 265. $39.95. The Supreme Court’s ability to rule on issues of constitutional magnitude is popularly perceived as a momentous power to overturn democratic majorities and reshape American life in a single ruling. *Rationing the Constitution* argues that this conception of the Supreme Court gives it too much credit. Professor Andrew Coan explores the persistent structural limitations on the Supreme Court’s ability to issue constitutional decisions and argues that these limits impact the types of decisions it issues when it does address constitutional questions. Through a rigorous historical analysis, Coan demonstrates how the Court’s constrained ability to hear cases forces it to make limited interventions by favoring clear rules instead of fuzzy standards and deferring to the political process. These inferences build a predictive model of judicial decisionmaking to determine when the Court is more likely to adopt limited interventions. Coan tests this model through a series of case studies examining some of the Court’s most controversial rulings, including those involving the Affordable Care Act, the nondelegation doctrine, and regulatory takings. Through a detailed examination of the Court’s jurisprudential responses to its limited institutional capacity, Coan offers a roadmap for practitioners, academics, and activists to understand how the Court will respond to future constitutional issues.

COPYRIGHT’S HIGHWAY: FROM THE PRINTING PRESS TO THE CLOUD. By Paul Goldstein. Second Edition. Stanford, Cal.: Stanford University Press. 2019. Pp. ix, 230. $85.00. In this updated version of the 1994 first edition, Professor Paul Goldstein examines the history of copyright law in the United States (with the occasional detour into European copyright law) and considers its potential expansion. Two major themes permeate this work. The first theme is that the development of copyright law has been shaped by the tension between “copyright optimists,” who think that copyright is rooted in natural justice and that authors are entitled to full economic rights, and “copyright pessimists,” who support a greater balance between authors’ control over their copies and “the general freedom of everyone to write and say what they please” (p. 9). The second theme, examined through chapters that discuss the emergence of the printing press, the VCR, software, the digital age, and artificial intelligence, is that new technologies have always played a role in the development of copyright law and will continue to do so. Goldstein’s prose is clear, and the work is accessible to law students, faculty, and practitioners. The book serves as a meditation on where copyright law began, where it is now, and where it might go in the future.
DEMOCRACY AND DYSFUNCTION. By Sanford Levinson and Jack M. Balkin. Chicago, Ill.: University of Chicago Press. 2019. Pp. 217. $25.00. The American political system is deeply dysfunctional. Gridlock, corruption, and a general lack of faith in government are the hallmarks of the era. In Democracy and Dysfunction, Professors Sanford Levinson and Jack Balkin — constitutional law scholars and longtime collaborators — seek to make sense of this mess. Their exchange takes the form of a series of letters written over a two-year period in which they debate this dysfunction’s root causes and potential remedies. Levinson traces the current upheaval to the Constitution itself, arguing that structural provisions such as the Senate, the Electoral College, and the amendment process have “imprisoned [us] within one of the worst electoral systems in the world” and inhibited opportunities for meaningful reform (p. 177). As such, he favors a bracing remedy: a new constitutional convention to put power back in the hands of “We the People.” Balkin takes a less radical view. He sees the current era as one of “constitutional rot” which will eventually birth a “renaissance of political reforms” (p. 197). Thus, in his view, constitutional reform is sufficient to right the ship. Neither scholar clearly prevails in this vigorous but friendly debate. The only true winner is the reader, who is left with a thought-provoking epistolary exchange — one given urgency by the current political moment, but grounded in timeless reflections about the underpinnings of American democracy.

A PRIMER ON AMERICAN LABOR LAW. Edited by William B. Gould IV. Sixth Edition. New York, N.Y.: Cambridge University Press. 2019. Pp. xxxv, 550. $130.00. The landscape of American labor law has changed drastically in the mere six years since the Primer’s last edition in 2013. The sixth edition of this practitioner-focused guide updates its overview of labor and employment doctrine to reflect these recent developments, including the Supreme Court’s landmark decisions in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), and Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018); the tide of state-level “right to work” legislation; and the “Fight for $15” workers’ rights movement. Intended as a handbook for labor and employment attorneys, union representatives, and management alike, the Primer summarizes the lay of American labor law from its historical background to its modern foundations in the National Labor Relations Act and subsequent legislation. It then explores current issues like mediation and arbitration and labor practices in professional sports. Professor William Gould’s comprehensive and penetrating treatment of these major doctrines operates on a level of discourse accessible to nonlawyers and newcomers to the field, which makes the Primer an ideal reference manual for all who navigate labor disputes within the nation’s current labor and employment law paradigm.
CONFORMITY. By Cass R. Sunstein. New York, N.Y.: New York University Press. 2019. Pp. xiii, 183. $19.95. The explosion of fake news, ideological echo chambers, and ever-increasing political polarization has placed a spotlight on the human tendency to follow the crowd. In fewer than 200 accessibly written pages, Professor Cass Sunstein employs a range of sociological studies and observations to illustrate how and why individuals conform to others’ views, even at the expense of their private beliefs. After offering a descriptive account of what motivates (and mitigates) conformity, Sunstein discusses two variations on that theme: social cascades (the process by which ideas spread, sometimes causing societal shifts) and group polarization (when a group, after deliberation, moves toward a more extreme position in line with its collective tendencies). Striking legal examples are woven in throughout, including an examination of the cascade effect among courts of appeals (p. 42), and an exposition of polarization effects within juries and judicial panels (pp. 82, 124). Sunstein draws on these observations to propose dissent as a check on conformity’s tendency to let “ill-considered judgments” slip by (p. 117). The book concludes by addressing several issues of contemporary relevance, including the political composition of courts and affirmative action. If a strong antidote to the potentially deleterious effects of social conformity is open disagreement, Sunstein prods, might we benefit from more heavily valuing diverse viewpoints in federal courts (p. 134) and classrooms (p. 146)? Conformity makes a strong case that we would.

DEFENDING THE PUBLIC’S ENEMY: THE LIFE AND LEGACY OF RAMSEY CLARK. By Lonnie T. Brown, Jr. Stanford, Cal.: Stanford University Press. 2019. Pp. 312. $35.00. The life of Ramsey Clark presents a puzzle — how does a former Attorney General become the defender of America’s most detested enemies? Professor Lonnie Brown sets out to answer this question by providing the first comprehensive account of Clark’s impactful and often-enigmatic life. The son of a Supreme Court Justice, Clark dedicated his life to public service and eventually rose to the position of Attorney General. During his government service, the perplexing nature of Clark’s legacy began to take shape: he championed civil rights causes like school desegregation and voting rights, but also oversaw the widely publicized prosecution of Vietnam draft resisters. After leaving government, Clark became a harsh critic of what he perceived to be injustices committed by the U.S. government both at home and abroad. Clark also began taking on some of the world’s most reviled individuals as clients: war criminals, purported terrorists, and dictators. Many of Clark’s critics have characterized him as traitorous, yet Clark has long asserted that he loves America deeply. In the end, the puzzle posed by Brown has no answer: what one thinks about Clark’s legacy is inextricably bound up with one’s own views about what justice, integrity, and patriotism look like.
OUR NON-CHRISTIAN NATION: HOW ATHEISTS, SATANISTS, PAGANS, AND OTHERS ARE DEMANDING THEIR RIGHTFUL PLACE IN PUBLIC LIFE. By Jay Wexler. Stanford, Cal.: Stanford University Press. 2019. Pp. 203. $25.00. Despite the bedrock American principle of the separation of church and state, Supreme Court decisions interpreting the Establishment Clause of the First Amendment have increasingly made room for religion in public spaces — a trend of which Christians have taken advantage, even as their demographic share declines. While some argue that there should be a completely secular public square, Professor Jay Wexler contends that America is now a post-separationist nation and the best response is for minority religious groups to demand full participation in public life alongside Christians. In six descriptive accounts drawn from reporting and his own interviews with key figures, Wexler chronicles attempts to give atheist invocations before town meetings alongside Christian prayer, mark Wiccan veterans’ gravestones with pentacles, install a Satanist monument on public grounds, and obtain public funding for Muslim schools, among other instances of advocacy. Communities sometimes respond by shutting down all religious expression, including Christian expression, but other times they allow for a cacophony of voices to prevail. Either situation is preferable, Wexler maintains, to permitting one religion to dominate; indeed, increased pluralism of religions may lead to other normative benefits including empowering minority groups and increasing tolerance of diverse viewpoints.

INDUSTRY OF ANONYMITY: INSIDE THE BUSINESS OF CYBERCRIME. By Jonathan Lusthaus. Cambridge, Mass.: Harvard University Press. 2018. Pp. 289. $39.95. When many people think of cybercriminals, they picture a teenager in his mother’s basement. In Industry of Anonymity, Jonathan Lusthaus tries to dispel this myth: “Cybercrime,” he explains, “has matured into a large, profit-driven industry” (p. 3). To understand how this evolution has taken place, Lusthaus traces the history of profit-driven crime, explaining how single-man operations soon turned into elaborate, organized criminal enterprises. He then explores various aspects of the anonymity inherent in cybercrime. How can anonymous criminals trust other anonymous criminals? Why do they do so? And, further, how do they operate when their activities must be taken offline? Rooting his analysis in seven years of fieldwork involving over 200 interviews, Lusthaus helps demystify the often murky and misunderstood world of cybercrime and argues convincingly that instead of viewing cybercrime as a “new plane of sorcery that is hidden and beyond comprehension,” we should instead recognize that, at bottom, cybercrime looks a lot like ordinary organized crime (p. 194). Thus, he finds “little to justify the development of new theoretical frameworks” about it (p. 194).