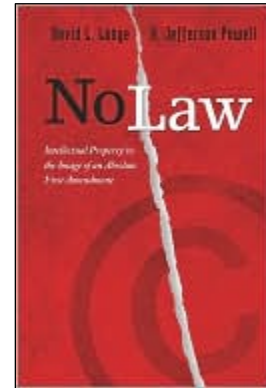


Lange, David L. and H. Jefferson Powell, **No Law: Intellectual Property in the Image of an Absolute First Amendment**, Stanford, California: Stanford Law Books, 2009, 456 pp., \$75.00 (hardcover), \$27.95 (paperback).

Reviewed by
Tabe Bergman
University of Illinois



There is something inspiring about two accomplished academics advancing a proposal that, however sensible, is destined not to be implemented. Lange and Powell, professors at the Law School of Duke University, spent years researching, writing and editing *No Law* all the time realizing full well that the solution they advocate for relieving the stark tension between intellectual property law, copyright in particular, and the First Amendment, stands little chance of becoming law. Their toil in the face of defeat only makes their case more forceful though, for it suggests that their argument springs not only from the mind, but also from the heart, and thus that it possesses intellectual integrity. The “tragedy” of this book can be summarized as follows: Lange and Powell offer a compelling solution to an important public issue, but simultaneously remove their proposal from serious consideration in the public arena, as their absolutist interpretation of the First Amendment, the linchpin of their proposal, amounts to “heresy” (their word) within the constitutional law community and beyond.

So predictable is the faith that will befall their efforts that the authors felt compelled, in the preface, to respond to Professor Paul J. Heald from the University of Georgia, who read the manuscript and praised it, but also called it a “legal fantasy.” The authors concede that this phrase “may very well capture the essence of it [the book] exactly.”

But fantasies are sometimes taken very seriously by those who entertain them and so it is with us. We do not reject our reviewer’s characterization, which seems fair enough in the face of it; but we would insist that what we have written has been written quite seriously nevertheless, in the thought not only that we are envisioning a legal regime that is consistent with a better interpretation of the American Constitution, but one that is also entirely plausible when looked at from within the matrix of American culture. (p. xi)

Of course, the authors do not want to dismiss completely the possibility that their vision will become reality.

Is it likely that Congress or the Supreme Court will embrace what we have suggested? Perhaps not, and almost certainly not in the near term. Old habits die hard. But then our collective political understanding of the First Amendment is still relatively young and

immature, while the intellectual property doctrines of concern to us have grown old and rigid and oppressive. (p. xi)

Indeed, their argument deserves to be taken seriously. At the very least it demands a rebuttal from the proponents of the dominant reading of the First Amendment. A pretty daunting task, for the authors' challenge to conventional thought regarding the First Amendment is lucidly argued. With this book, they have made an original contribution to the growing body of critical scholarship that exposes the (increasingly) central and detrimental role that intellectual property law plays in shaping U.S. society, especially since the advent of digital technologies.

The heart of this work is their case for an absolute reading of the First Amendment. The authors argue against the dominant "Holmesian" way of thinking about the First Amendment. Justice Oliver Wendell Holmes, Jr.'s way of approaching the First Amendment and law in general had a big impact on practitioners of constitutional law. He moved from the basic assumption that there are no absolutes in law. (Strictly speaking, this assumption disproved his position as it was an absolute itself: Claiming there are no absolutes is an absolute claim). In his eyes, it was the task of the courts to balance individual rights with the rights of government. In the famous Pentagon Papers case, for instance, in which the Supreme Court struck down the permanent prior restraint request by the Nixon Administration, Holmes sided with the majority because he felt that the government had not made a strong enough case that the national security interests outweighed the interests of a free press to publish documents pertaining to the Vietnam War. The crucial point in this context is that he did not oppose prior restraint in principle, as did his colleague Justice Hugo L. Black.

Lange and Powell's position is close to that of Black's, who believed that the First Amendment categorically prohibited the government from being granted a prior restraint order (p. 258). He acknowledged no exceptions, for he read the First Amendment literally: "Congress shall make no law abridging . . . the freedom of the press." As Lange and Powell write, "No law simply means no law" (p. 313). These days, U.S. law often permits prior restraint in the case of intellectual property.

The authors build an impressive case for their absolutist reading of the First Amendment. Firstly, they argue that there is no reason not to regard certain provisions of the Constitution as absolutes. They point out that in a number of court decisions over the last 10 years concerning the law of the 11th Amendment most of the judges have persistently taken an absolutist position by claiming that "the powers delegated to Congress by Article I are absolutely limited by the Constitution's denial of any power to subject a state to lawsuits brought by individuals without the state's consent" (p. 271). Secondly, they suggest — and here they disagree with Black (and again with Holmes) — that the First Amendment should primarily be read as a check on the power of government and only secondly as a guarantor of individual rights. They maintain that this interpretation is consistent with that of most commentators in the founding era. Although the First Amendment mentions only Congress and not the states, the authors nevertheless feel that an absolute reading would apply equally to state governments, as they see no "modern rationale" to revert back to the original limitation (p. 300).

Thirdly, the authors point out that modern First Amendment law, a reaction to the Espionage Act of 1917, has unjustly ignored the debate on its meaning in the founding era. Holmes and “his contemporaries thus built a First Amendment in their own image” (p. 231). That is to say, Holmes interpreted it as first and foremost a guarantee of individual rights, which necessarily needed to be balanced against the interest of the government. The problem the authors have with the balancing approach is that it puts the courts in the position of having to make decisions that are essentially political in nature.

Lange and Powell consider the early debate on the First Amendment relevant to the present because it shows “the importance of creativity and innovation in the interpretation of the First Amendment” (p. 279). Nowadays, the Holmesian interpretation is so dominant, that it is difficult to even conceive of the possibility that there might be a plausible counter-interpretation. It is, of course, a crucial part of the authors’ argument that other approaches are possible and that times of crises require new, innovative ways of thinking about the First Amendment. They contend that Holmes himself did this, too. “The lesson of the First Amendment’s history is that the floor is, or ought to be, open to creative responses to this crisis.” By “this crisis,” the authors refer to the stranglehold that intellectual property law has on freedom of expression (p. 282).

What does the intellectual property law that Lange and Powell would like to see implemented look like? Perhaps surprisingly, they claim that intellectual property doctrines restricted by an absolute First Amendment “retain (or can retain) their present shape to a remarkable degree” (p. 306). The most far-reaching change is that exclusivity in expression will be strictly curtailed. Appropriation, for both non-commercial and commercial usage, will be allowed, in the former case without a license or payment. In the latter instance, Lange and Powell suggest that Congress could make mandatory “an equitable apportionment of net revenues according to the value of the appropriated work in the commercial setting.” They also point out that all the implications of their scheme will need to be worked out on the go, so to speak; that future Court decisions will fill out the details.

Although Lange and Powell envision a reading of the First Amendment that is absolute, they do not propose that it be unlimited (p. 313). Thus, invasions of privacy would still be punishable by law; contractual obligations concerning secrecy of any kind would still have to be honored (for instance, government officials could still be prosecuted for divulging state secrets); the theft of physical copies of creative works would still be punishable; forms of expression that have not been released into the public sphere (for instance, an unpublished manuscript) could not legally be brought into the open; and it would still be illegal to record a movie or concert in a theater.

No Law has everything that makes a book valuable. It is clearly written, makes an original argument based on exhaustive research and challenges conventional thinking. Moreover, it offers a possible solution to a pressing social question. But, as already mentioned, its strength is partly its weakness. In its wholesale rejection of Holmesian thinking about the First Amendment, it proposes to do away with nearly a century of legal commentary and jurisprudence. It doesn’t help that the intellectual climate in general is uncomfortable with advocating “absolutes.” The chance that the authors will see their sensible suggestions taken up by a considerable number of scholars and others is therefore remote. But

hopefully their imagination will turn out to be the breeding ground for another great book in the future. Dream on.