

RECENT PUBLICATIONS

UNCOMMON SENSE: ECONOMIC INSIGHTS, FROM MARRIAGE TO TERRORISM. By Gary S. Becker and Richard A. Posner. Chicago, Ill.: University of Chicago Press. 2009. Pp. 373. \$29.00. In this refreshingly accessible work, Professor Gary Becker and Judge Richard Posner reproduce a selection of provocative online postings from their highly acclaimed “Becker-Posner Blog,” supplemented by “Afterthought” sections in which the authors update the analysis and respond to online comments. This compendium of postings uses simple economic insights to analyze — and offer solutions to — contemporary policy issues as wide-ranging as “Fat Tax” (p. 133), “Doping Athletes” (p. 263), and “Ethnic Profiling” (p. 285). In a discussion of internet gambling, for example, Judge Posner invokes behavioral economics to tackle the conundrum of why “most gamblers probably have health, homeowners, and other forms of insurance [that] demonstrate risk aversion” even though “only risk preferrers should derive net expected utility from gambling” (p. 278). And in a discussion of drunk drivers, Professor Becker uses the lens of behavioral economics to analyze a number of incentive-based solutions that might reduce drunk-driving fatalities (pp. 269–72). In short, *Uncommon Sense* is an enjoyable and thought-provoking read that offers unconventional analysis of some of the most pressing political puzzles of the day.

THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT. By Dan L. Burk & Mark A. Lemley. Chicago, Ill.: University of Chicago Press. 2009. Pp. viii, 220. \$45.00. The pharmaceutical industry’s need for tougher patent laws and the information technology industry’s desire for limited damages have rendered a unitary patent system ineffective in promoting innovation across both industries. In response to the crisis facing the patent industry, Professors Dan Burk and Mark Lemley apply lessons learned from patent reform efforts to develop a court-oriented solution to the patent crisis. They resist the conclusion that legislating different patent statutes for each industry is an appropriate solution to the patent crisis. Instead they argue that “courts can and do apply a nominally unitary patent system with sensitivity to the needs and characteristics of different industries” (p. 130). Rather than opening the door to a new round of industry lobbying, they suggest that the courts are well equipped to interpret current patent regulations utilizing twelve policy levers already in use and several new common law levers that are available to the courts. Professors Burk and Lemley point to these levers as proof that the courts already have the discretion to formalize technology-specific patent regulations and that — perhaps with a nod from Congress — the courts are well situated to take over patent regulation.

MEANING IN LAW: A THEORY OF SPEECH. By Charles W. Collier. New York, N.Y.: Oxford University Press. 2009. Pp. ix, 194. \$35.00. First Amendment jurisprudence has developed by an ever-expanding sea of imprecise doctrinal distinctions and balancing tests, without a coherent theoretical framework for what constitutes “speech” in the first instance. In his engaging new book, Professor Charles Collier develops such a theory by exploring the contours of “symbolic speech” and redefining the proper boundaries of legal protection when conduct and communication meet. He grounds his argument not in legal doctrine, but by drawing on philosophy and linguistics to develop an “intention-based theory of speech” (p. 115), which he demonstrates through application to controversial cases of symbolic speech, from flag burning to nude dancing. While this intentionalist approach implies that a creative “speaker” could make almost any conduct communicative, Professor Collier concludes with an incisive account of what speech should receive First Amendment protection, shifting focus from intention to description: expressive activity may be regulated “so long as there is *also* a way to describe [the activity] that has nothing to do with speech” (p. 148). Whimsically written and filled with provocative anecdotes, the book is an illuminating and enjoyable read for First Amendment scholars both novice and advanced.

THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT. By Heather K. Gerken. Princeton, N.J.: Princeton University Press. 2009. Pp. x, 181. \$24.95. Despite sporadic election crises demonstrating systemic problems in the American election system, reforms that would appear to elicit popular support have failed to be realized. Professor Heather Gerken provides an account of the shortcomings of the American election system and a provocative proposal for how we should change the process through which election law is reformed. She shows that two characteristics of the American election system — partisanship and localism — impede reform by discouraging a change in the status quo, limiting available resources, and undermining professionalism. To solve these problems, she proposes a Democracy Index — a ranking of states’ election systems based on their performance of basic functions that affect the voting experience for members of the general public, such as the length of lines and the counting of each ballot cast. Through this “data-driven, market-oriented approach” (p. 135), she argues, partisanship and localism will drive reform, as politicians and officials, who care about the opinions of their peers and voters, engage in a race to the top. The Democracy Index is “a modest reform that can make bigger, better reform possible” (p. 138).

THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906. By Bruce A. Kimball. Chapel Hill, N.C.: University of North Carolina Press. 2009. Pp. xiii, 429. \$60.00. The professional school owes its modern incarnation in large part to one man: Christopher Columbus Langdell. In this highly readable biography, Professor Bruce Kimball gives us both Langdell's life and the story of the changes he brought to professional education. Raised in poverty and without the Brahmin connections of many of his peers, Langdell brought to Harvard Law School during his tenure as dean (1870–1895) what he conceived of as an academically meritocratic system of admissions and grading, which “applied disinterested, objective standards through neutral, impersonal policies in order to identify and rank meritorious students” (p. 232). This system spread until, by the early twentieth century, it reigned in law, medical, and business schools across the nation. But Professor Kimball does not only detail Langdell's successes. He also describes how he and his fellow “meritocrats” betrayed their ideal by declining to apply it to certain classes of people — notably women and graduates of Catholic universities. Yet, despite this failing, Langdell's influence has been deep and abiding, and professors and professionals who want to understand the contours of their world will find Professor Kimball's account of C.C. Langdell illuminating.

THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER. By Benjamin A. Kleinerman. Lawrence, Kan.: University Press of Kansas. 2009. Pp. xv, 322. \$34.95. Over the course of George W. Bush's presidency, the American people at first emphatically embraced and then grew deeply uncomfortable with an unusually powerful executive branch. Through the prism of the ideas of Locke, Hobbes, and America's founders, Professor Benjamin A. Kleinerman's new book explores the tension between the desirability of executive discretion when faced with “the devastating and asymmetric threat of terrorism” (p. 90) on the one hand, and the danger of failing to “restor[e] . . . the constitutional order” (p. 75) on the other. Professor Kleinerman ultimately argues in favor of Lincoln's dualist view that “constitutionalism is both, when necessary, something more than adherence to legalistic forms and, when unnecessary, precisely such adherence” (p. 186). But he concludes that Congress and the public “must be taught to judge the constitutionality of the executive[']s . . . actions” (p. 217) in order to hold the president accountable. Although this book will primarily appeal to students of law and political science, Professor Kleinerman's lucid style should attract anyone interested in a nuanced and scholarly examination of the underpinnings of — and objections to — the unitary executive.

VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE. By Dawn C. Nunziato. Stanford, Cal.: Stanford University Press. 2009. Pp. xv, 194. \$22.95. Is the internet the “functional equivalent of the public town square” (p. 85)? Is Comcast a state actor? Professor Dawn Nunziato answers yes, embracing an affirmative conception of the First Amendment that would forbid powerful private actors like Comcast from restricting online expression. Justifying her concerns with a parade of alarming examples of private online censorship and distortion, Professor Nunziato argues that we should ensure the neutrality of private broadband providers by reinvigorating the affirmative First Amendment state action, public forum, and fairness doctrines. She explains that these doctrines have been wrongly contracted by the Supreme Court’s recent embrace of the “negative” First Amendment, which bars only the state’s abridgment of free speech. Because the “right [of individuals] to engage in the exchange of information and ideas . . . is essential to our form of self-government” (p. 84), and because any interest broadband providers have in controlling the content they serve “is overwhelmingly outweighed by the interests of those seeking to communicate via their pipes” (p. 105), Professor Nunziato insists that regulation is justified whenever necessary “to facilitate a diverse range of speech” (p. 32). Whether sympathetic to net neutrality or not, readers will find *Virtual Freedom* a commanding argument for affirmative free speech rights online.

THE PERILS OF GLOBAL LEGALISM. By Eric A. Posner. Chicago, Ill.: University of Chicago Press. 2009. Pp. xvii, 266. \$29.00. The steady march of international law appears to be unstoppable. Professor Eric A. Posner warns in this timely new book, however, that it is naïve and dangerous to believe that international law can be effective in the absence of legitimate institutions of governance. Professor Posner first traces the history of the concept of global legalism before explaining why the ideas that the concept relies on — such as sovereign equality — are illusions. In his view, international law will always be “weak, limited, malleable, and vulnerable” so long as the state system prevails, as “[l]aw cannot solve problems without institutional support” and people will not obey global laws without a global government (p. 128). Professor Posner draws on examples such as NATO’s air assault on Serbia to illustrate that in times of crisis, states will disregard international law to pursue their own interests. Professor Posner disputes the idea that a system of international law will ever replace the realist vision of states acting in their own self-interest, and concludes that those who expect otherwise will “continue to be unprepared” for international relations in the real world (p. 228).

WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT. By Martin H. Redish. Stanford, Cal.: Stanford University Press. 2009. Pp. x, 317. \$27.95. Using constitutional and political perspectives unique within the extensive body of literature on class action lawsuits, Professor Martin Redish highlights new problems with this controversial procedural mechanism and sheds light on the ways it can be used to manipulate substantive law. *Wholesale Justice* describes in engaging fashion the rise of “faux” class actions, wherein “bounty hunter” attorneys exploit the class action vehicle and deceive the electorate. With a focus that will appeal to legal and political science scholars alike, Professor Redish goes on to analyze the constitutional consequences of the “democratic difficulty inherent in the Rules Enabling Act’s vesting of rule-making power in the Supreme Court’s hands” (p. 65). Taking a political theory approach, he stresses the “tension between a collectivist procedural device and an adversarial system premised on notions of process-based individual autonomy” (p. 134). With an innovative framework and readable style, Professor Redish has produced a book that will undoubtedly restructure the nature of the class action debate such that it will more fully account for the “procedure’s impact on the nation’s political and constitutional foundations” (p. 228).

THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY. By Ayelet Shachar. Cambridge, Mass.: Harvard University Press. 2009. Pp. xiii, 273. \$39.95. Opportunity, security, and well-being are strongly linked to citizenship in a particular nation-state. In her new book, Professor Ayelet Shachar examines the moral implications of an international system that invariably links citizenship to circumstances of birth, either parentage or birthplace. She uses the law of property to compare the bestowal of citizenship to the “fee tail” in property law, which is now typically disfavored as an archaic, inefficient, and immoral concept. Professor Shachar proposes that inheritors of such a windfall who are unwilling to change their citizenship laws should be obligated to make monetary contributions to improve the well-being of those born in less affluent nation-states. Domestically, she is concerned that the ideals of choice and consent are disregarded in the current birthright regime, despite their centrality to liberal, democratic theory. Professor Shachar proposes that the current system should be modified towards a “genuine-connection principle of citizenship acquisition” (p. 165). Legal formalism should give way to an analysis of actual interaction with the nation-state, which will eliminate problems of overinclusion and underinclusion. Professor Shachar provides an original, accessible analysis of contemporary citizenship law that challenges readers to rethink the morality of our current regime and makes thoughtful proposals to address the concerns raised by her analysis.

I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS. By Steve Sheppard. New York, N.Y.: Cambridge University Press. 2009. Pp. xxviii, 276. \$29.99. Should legal officials base their actions on sources other than blackletter law? According to Professor Steve Sheppard's thought-provoking new book, the answer is a resounding "Yes." Starting from the premise that "[o]fficials must be moral, not just legal" (p. xv), *I Do Solemnly Swear* unfolds as a progression of seven questions, the answers to which elaborate on the link between public office and moral obligation. Using a mix of case law, history, and theory, Professor Sheppard details how, from the oath of office to our decentralized decisionmaking process, "the very nature of the law demands that the individual act from a moral foundation beyond the law itself" (p. 102). Professor Sheppard's meditations on law and morality draw on a wide range of sources — including Cicero, Sir Edward Coke, and *To Kill a Mockingbird* — before building to the ultimate conclusion that the "personal obligation to moral action in each official is the true meaning of justice" (p. 265). Of interest to both students of legal philosophy and more casual readers, this engaging and informative work makes a compelling argument that the responsibilities of legal officials extend much further than many currently believe.

AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY. By Jeannie Suk. New Haven, Conn.: Yale University Press. 2009. Pp. xi, 204. \$55.00. The concept of "home" has taken on a variety of different meanings throughout history, first as "a man's castle" and more recently as "a woman's prison" (p. 3). Professor Jeannie Suk's insightful new book, *At Home in the Law*, chronicles the way feminist ideas about the home as a legal institution have altered "the relationship between the state and private space" (p. 6). Professor Suk analyzes an array of common law cases, Supreme Court opinions, and criminal court practices to build a persuasive case that the concept of the home as a place of violence has degraded personal autonomy for both men and women. In each chapter, Professor Suk explores a different area of the law (ranging from burglary to property rights), demonstrating the myriad ways in which the "[l]aw makes and unmakes the home" (p. 105). An expertly written and thought-provoking read, *At Home in the Law* is an unflinching account of the unintended consequences of legal reform and the power of the law to undermine the most private of spaces.