
RECENT PUBLICATIONS

COPYRIGHT'S PARADOX. By Neil Weinstock Netanel. New York, N.Y.: Oxford University Press. 2008. Pp. ix, 274. \$34.95. Copyright's simultaneous potential to promote and constrain speech is the tension at the heart of Professor Neil Weinstock Netanel's challenge to the increasingly broad sweep of modern copyright law. Professor Netanel tracks copyright's recent transformation from a limited grant intended to promote expression into an increasingly "rotund, Blackstonian property right" (p. 80), and analyzes the implications of this shift with an emphasis on First Amendment values. *Copyright's Paradox* fluently examines an array of recent copyright controversies, highlighting the problematic free speech implications of an ever-expanding copyright regime. Although quick to acknowledge copyright's vital role in incentivizing expressive speech, Professor Netanel persuasively argues that copyright conflicts with First Amendment principles when it is treated as a broad property right that bars derivative forms of expression. The book's proposals for judicial reform of copyright call upon judges to invoke the First Amendment to delimit copyright holders' privileges and allow greater latitude for uses of copyrighted materials. Likewise, Professor Netanel advocates for legislative reforms aimed at softening American copyright law's more aggressive edges. Professor Netanel's incisive examination of his subject through a First Amendment lens helps illuminate some of the issue's critical cultural and constitutional dimensions.

ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY. By Erwin Chemerinsky. Stanford, Cal.: Stanford University Press. 2008. Pp. ix, 299. \$19.95. In the last decade of the Rehnquist Court, issues of federalism loomed especially large. Federal laws were often held to exceed federal power, whereas state laws were declared to be preempted by federal action. Dean Erwin Chemerinsky argues that "using federalism to limit state and federal power" in this way "prevents government from successfully acting to deal with social problems" (p. 159). Dean Chemerinsky puts forward an alternate conception of the doctrine: "federalism as empowerment, not limits" (p. 9). Placing his faith in the power of the political process to check overreaching and the ability of the courts to protect liberties, Dean Chemerinsky lays an intellectual foundation for expanded government action. Federalism as empowerment would return to a broad understanding of the Commerce Clause, embrace an expansive definition of congressional power under the post-Civil War amendments, reject the view of the Tenth Amendment as a separate restraint on Congress, and narrowly define the circumstances under which federal action would preempt state law. Dean Chemerinsky argues that his approach to federalism would "ensure that all levels of government have the au-

thority needed to deal with society's most grave problems" (p. 247). But he may have to wait for a Court more receptive to this aim.

HOW JUDGES THINK. By Richard A. Posner. Cambridge, Mass.: Harvard University Press. 2008. Pp. 387. \$29.95. In his most recent publication, Judge Richard Posner attempts to "part[] the curtains" surrounding judicial decisionmaking and explain the process to non-judges (p. 2). Judge Posner argues that judges have a large amount of discretion, but this discretion is an "*involuntary* freedom" due to the indeterminacy of the law in many cases (p. 9). He rejects the most common models of judging, arguing that none of these theories have an "account of how judges actually arrive at their decisions in non-routine cases" (p. 19). Instead, drawing on labor economics and psychology, he crafts a theory of judging, which posits that judges are "occasional legislators," influenced subconsciously by their personal preconceptions, but also (somewhat) constrained by external forces, such as the possibility of promotion for lower court judges, and internal constraints in the form of "judicial method[s]" (p. 12). *How Judges Think* provides a lively and thorough insider's narrative of judicial decision making, which is sure to engage both the general public and lawyers.

I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES. Edited by Mark Tushnet. Boston, Mass.: Beacon Press. 2008. Pp. xxvi, 229. \$16.00. At a time when the Supreme Court stands starkly divided over many major issues, Professor Mark Tushnet's presentation and analysis of some of the Court's best-known dissents is especially resonant. Professor Tushnet includes excerpts from sixteen different "dissents" — a category encompassing concurrences, presidential vetoes, and memoranda — in cases ranging from *Marbury v. Madison* to *Lawrence v. Texas*. He also provides succinct but thorough context for each excerpt. In developing a theory of the value of dissents, Professor Tushnet suggests that dissents may be both an outgrowth of and a spur to popular constitutional interpretation. He neatly illustrates this point by presenting dissents that have been, or may yet be, vindicated by history, urging that the process of how such dissents "gradually bec[o]me the law may be one of the best ways of seeing the connections between constitutional law resulting from the interplay of law, economics, politics, and society generally" (p. xxiv). Nonetheless, he cautions against judicial arrogance, warning that judges may be best served by thinking "only about what the Constitution, as they understand it, means, rather than about what is happening in the society as a whole" (p. 190).

THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS. By James A. Brundage. Chicago, Ill.: University of Chicago Press. 2008. Pp. xvii, 607. \$49.00. In this wide-ranging and ambitious account of the origins of the legal profession, historian James A. Brundage documents how a professional class of lawyers emerged in the High Middle Ages for the first time since the decline of the Western Roman Empire. Professor Brundage devotes much of his work to tracing the evolution of the characteristics he sees as defining a profession “in the strict sense of the term” — among them the systematic education of students under specialized faculties and the requirement that practitioners observe a body of ethical rules more demanding than those falling upon the community at large (p. 283). He argues that although trained jurists were appearing in courts in the West by the mid-twelfth century — a time when elements of Roman and canon law were amalgamated into an *ius commune* — it was in the mid-thirteenth century that medieval law practice had truly become a profession. Professor Brundage offers his “provisional account” to fellow legal historians as an outline for further research (p. 8), but the breadth and richness of *The Medieval Origins of the Legal Profession* makes it an equally valuable resource for those seeking a survey of early legal practice in the West.

THE POWER OF PRECEDENT. By Michael J. Gerhardt. New York, N.Y.: Oxford University Press. 2008. Pp. 340. \$45.00. In stark contrast to recent empirical and normative critiques that suggest precedent is less significant than once thought, Professor Michael J. Gerhardt’s *The Power of Precedent* provides a positive account of the reasons why the Supreme Court’s prior decisions and nonjudicial norms, practices, and traditions still matter. After exhaustively surveying Supreme Court decisions that revisit precedents and studying what the Justices have said about the weight of precedent, Professor Gerhardt formulates his own “golden rule” to explain why the Justices generally will recognize the value, utility, and authority of precedent: they must “treat others’ precedents as they would like their own to be treated or risk their preferred precedents being treated with the same kind of disdain they show others’” (p. 4). Adherence to precedent serves other important functions too: it ensures that the Court’s decisions usually stand the test of time, and provides a constraint through which the Justices can reduce their reliance on personal preferences. Professor Gerhardt’s most controversial claim is that certain “super precedents” embedded into our law and culture are practically immune from being overturned (p. 177). Whether or not readers agree with Professor Gerhardt’s particular claims (for instance, that *Miranda* qualifies as a super precedent, whereas *Roe* does not), *The Power of Precedent* is sure to spur the debate over why and how the jurisprudence of those long gone continues to govern us today.