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The Supreme Court Of The United States

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The Supreme Court of the United States

Carol Nackenoff

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Introduction

The Supreme Court of the United States as a subject offers many different choices of direction. Academics in law schools sometimes approach the court and its work in ways that are different from those of historians, sociologists, political scientists, economists, and philosophers. The court is an institution, it produces outputs (decisions) in a wide array of issue areas, and it consists of individual members whose decisions can be treated as votes; it is a set of practices, it interprets a written Constitution, it is located in a system of separated (and sometimes shared) powers, it is lodged in a system of courts, and it is located in a federal system of government. The US Supreme Court and what it does can be compared to other constitutional courts in democratic systems of government. There are vigorous debates about whether the Constitution it interprets has a fixed meaning that should not change without Article V amendments, but few believe that, for good or ill, the meaning of the Constitution and its clauses has actually remained static. The Supreme Court as a subject raises questions about the relationship between ordinary statute law and constitutions, about constitutionalism, about the proper scope for judicial review, and about judicial supremacy and whether the court is claiming more authority for itself than in the past. A number of these issues are introduced here along with alternative approaches to the study of the court. One way of introducing the court has not been chosen: by areas of case law and the scholarship focused on particular issues or constitutional moments. Histories, encyclopedias, and bibliographies included here can introduce some of these issues and moments. Greater emphasis is placed on scholarship in the past half century than on earlier classics.

General Works

Histories of the court and of changes in understandings of it in American politics are useful places to begin. The histories included here have broad historical sweep. The *Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (Katz 2006–) is the premier entry in the field, with rich and deep coverage of particular periods and the most to offer scholars and those chiefly interested in specific historical issues and moments. A number of one-volume works are good for introducing students to histories of the court, such as Schwartz 1993, or of the development of American law and legal culture, such as Hall and Karsten 2009. Friedman 2010, Horwitz 1977, and Horwitz 1992 are especially good at linking changes in law to the political and economic development of the nation, enlivening struggles between competing understandings of law. White 2012 provides a widely accessible revisionist history of law as a means of understanding American development. Hoffer, et al. 2007 is smartly organized, lures readers in with its lively writing, and offers a fine introduction to each specific court and its members and agenda, quoting from opinions and dissents with particular attention to struggles over race, gender, workers' rights, and key provisions of the Bill of Rights.

Friedman, Lawrence M. *A History of American Law*. 3d ed. New York: Simon and Schuster, 2010.

Now in a revised third edition (first published in 1973), Friedman's classic and engaging treatment links the development of law to political and economic developments in the United States. Friedman includes the growing practice of judicial review of state statutes and criticizes state courts' use of due process to protect private property rights.

Hall, Kermit L., and Peter Karsten. *The Magic Mirror: Law in American History*. 2d ed. New York: Oxford University Press, 2009.

Evolution of American legal culture and social, institutional foundations of American law; offers an extremely useful context for students. Includes 19th-century law of domestic relations; race and the law of personal status; property law, economic relations, industrialization. Law as a magic mirror allowing historians to explore moral imperatives and social choices of earlier generations. First edition published in 1989.

Hoffer, Peter Charles, Williamjames Hull Hoffer, and N. E. H. Hull. *The Supreme Court: An Essential History*. Lawrence: University Press of Kansas, 2007.

Historians, including the editors of the Landmark Law Cases and American Society series (Kansas), arrange this overview by court, situating members, issues, cases, and conflicts on and off the court in a highly readable, illustrated volume. Cases selected reflect ways each court understood law in relation to society and polity. Includes a bibliographic essay.

Horwitz, Morton J. *The Transformation of American Law, 1780–1860*. Cambridge, MA: Harvard University Press, 1977.

Horwitz links developments in law and legal culture to broader developments and struggles in the history of American politics, economy, and culture, focusing especially on how economic conflict helped transform antebellum law. Winner of the Bancroft Prize in American History.

Horwitz, Morton J. *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*. New York: Oxford University Press, 1992.

Linking developments in law and legal culture to broader developments and struggles in economy, polity, and society, this volume focuses on Progressive Era challenges to legal orthodoxy, the Lochner era, legal realism, and the enduring legacy of Progressive Era transformations.

Katz, Stanley N., ed. *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*. 12 vols. New York: Cambridge University Press, 2006–.

Each volume in this chronological treatment is written by one or two eminent constitutional historians specializing in the period. The series, not yet complete as of 2012, is designed to constitute a definitive history of the court, examines cases and major legal controversies of the era; sets the court agenda within a historical and political context. A number of volumes are organized by the justice who presided during the period.

Schwartz, Bernard. *A History of the Supreme Court*. New York: Oxford University Press, 1993.

Designed to serve as an authoritative one-volume history of the Supreme Court. Theme is that the court both reflects the development of society and helps move that society toward the felt necessities of the day. Sees law as a check on governmental power. Highly readable, with a focus on the John Marshall through the William Rehnquist courts, jurisprudence, and some prominent cases.

White, G. Edward. *Law in American History: From the Colonial Years through the Civil War*. New York: Oxford University Press, 2012.

First of three planned volumes situating US law and judicial history in a wider context. Law, broadly defined, codifies cultural norms and also influences culture. Considers interaction between European and Amerindian legal systems, the influence of state constitutions, the legal history of Confederate and Union governments during the Civil War; strong attention to African Americans, women, and Native Americans.

Reference Works

Electronic resources and simultaneous print and electronic reference works are outpacing quickly dated print materials in this field. Some university law libraries have available, though sometimes not up-to-date, online guides to reference sources; they are not included here. The many single-volume offerings of A–Z snippets on cases, justices, and issues (e.g., Schultz 2005) are merely starting points. Overviews of cases on the SCOTUSblog (cited under Databases and Electronic Resources) or wiki will be better starting places for serious students of the court. Hall, et al. 2005 remains one of the best single-volume, entry-by-entry treatment of court history, operations, personnel, cases, controversies, and justices, but a strong new entrant in this field is Ward, et al. 2015. Schultz 2005 serves a more general audience; both predate the John Roberts Court. Biskupic and Witt 1997 is likewise best suited for a general audience. Epstein, et al. 2015, which is frequently updated, is a good resource for chronological and historical statistics on the work of the Court and the voting behaviors of particular justices and is unique in this regard. The major reference entries are biased toward sources proven or likely to be durable because of mission or quality of entries. Whether or not one believes that justices must hew to some discoverable constitutional view of the framers, Kurland and Lerner 2000 serves as an excellent reference work for primary documents of the founding era. Levy and Karst 2000 offers substantial treatments of many important issues plus shorter entries defining terms. Tanenhaus 2008, a five-volume encyclopedia, is a high-quality reference work that should prove durable, and it is useful for professional and general readers. Whittington, et al. 2008 collects excellent entries reflecting diversity in early-21st-century scholarship on the political analysis of law and courts, chiefly serving other scholars and graduate students. The first entry in the multivolume venture on American constitutionalism, Gillman and Graber 2015 will set the standard for quality and extent of print and online documentation on constitutional development.

Biskupic, Joan, and Elder Witt. *Guide to the U.S. Supreme Court*. 3d ed. 2 vols. Washington, DC: Congressional Quarterly, 1997.

A resource best suited to undergraduates or possibly high school students. Includes brief biographies of justices, reference materials, illustrations, and a case index. Attention to historical periods and broad issue coverage; however, it reads like an extended textbook with text box inserts.

Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. *The Supreme Court Compendium: Data, Decisions, and Developments*. 6th ed. Washington, DC: Congressional Quarterly, 2015.

This single-volume treatment aims to be a comprehensive collection of relevant information and data about the court. Presents historical and statistical data in tabular form. Includes review process, caseload, cases, as well as background, nomination, confirmation, activities, voting behavior, and opinions of justices, public opinion, and more. Data have to largely speak for themselves.

Gillman, Howard, and Mark A. Graber. *The Complete American Constitutionalism*. Vol. 1, *Introduction and the Colonial Era*. Oxford and New York: Oxford University Press, 2015.

The first of what is projected as a ten-volume set designed to inform domestic and foreign readers about constitutional conflicts and debates shaping the American constitutional experience. Provides many resources, both in the volumes and through accompanying website, covering all important participants in these debates, an approach consistent with Gillman, et al. 2012–2013 (cited under Textbooks).

Hall, Kermit L., James W. Ely Jr., and Joel B. Grossman, eds. *The Oxford Companion to the Supreme Court of the United States*. 2d ed. New York: Oxford University Press, 2005.

The roughly 1,200 articles are written by many scholars of the court on court history, operations, personnel, cases, and justices and are long enough to be useful. There is some question how thoroughly entries were updated from the first edition (e.g., that on sovereign immunity), and there is little on post-9/11 detention or habeas issues. Case index and topical index.

Kurland, Philip B., and Ralph Lerner. *The Founders' Constitution*. 5 vols. Chicago: University of Chicago Press, 2000.

Primary sources are organized by article and clause; readers can explore the ideas behind particular constitutional provisions. Documents written by or known to the framers. Includes pre-Civil War constitutional amendments. An anthology of reasons and political arguments used by thoughtful men and women in support of arguments. Available online and on CD-ROM. Originally published in 1987. Published in cooperation with the Liberty Fund.

Levy, Leonard W., and Kenneth L. Karst, eds. *Encyclopedia of the American Constitution*. 2d ed. 6 vols. New York: Macmillan Reference USA-Gale, 2000.

Alphabetical entries by numerous scholars designed to bridge the disciplines of history, law, and political science in consideration of constitutional issues. Examines doctrinal concepts in constitutional law, people, judicial decisions, treaties and statutes, executive orders, and historical periods. Short bibliography for major articles; cross-referencing. Updates follow original articles rather than replaces them.

Schultz, David, ed. *Encyclopedia of the Supreme Court*. Library of American History. New York: Facts On File, 2005.

An A-Z one-volume treatment of cases, personalities, concepts, and issues designed to demystify the court and make its work understandable for the average citizen. Approximately four hundred entries by 150 contributors. Each entry helpfully offers several sources for further information.

Tanenhaus, David, ed. *Encyclopedia of the Supreme Court of the United States*. 5 vols. New York: Macmillan Reference USA, 2008.

Law and social issues approach recognizing that law is also shaped outside the court. The court developed into a commanding institutional presence through interaction with political and nonjudicial history. Includes 1,100 alphabetical, peer-reviewed entries covering cases, legal concepts, procedures, practices, theories of law and legal interpretation, chief justices and their courts, and court responses to controversies.

Ward, Artemus, Christopher Brough, and Robert Arnold. *Historical Dictionary of the U.S. Supreme Court*. Lanham, MD: Rowman and Littlefield, 2015.

More than seven hundred cross-referenced entries on Supreme Court history cover justices, major cases, issues, and judicial processes. Includes an introductory essay, chronology, substantial bibliography, and appendixes.

Whittington, Keith E., R. Daniel Kelemen, and Gregory A. Caldeira, eds. *The Oxford Handbook of Law and Politics*. Oxford Handbooks of Political Science. Oxford: Oxford University Press, 2008.

Excellent set of entries by prominent scholars exploring ways law is a product of politics. Reflects diversity in the political science treatment of the field. Includes political and policy environment of US courts, international and supranational law, interdisciplinary approaches to law and politics, empirical analysis of law and politics, comparative judicial politics, theories of jurisprudence.

Bibliographies

Any print bibliography of works on the history of the Supreme Court, legal doctrine, and legal culture is immediately dated. However, Kermit L. Hall's five-volume collection (Hall 1984) and two-volume supplement (Hall 1991) remain valuable. Martin and Goehlert 1990 is also comprehensive. The slim, one-volume Rutland 2006 is available in both print and online versions and is annotated. It is, however, of little value to scholars. Stephenson 1981 is a well-organized slim entry for annotations on some earlier and sometimes classic scholarship (and cases). A number of other texts, including McCloskey 2010 (cited under Textbooks), contain useful bibliographies or bibliographic essays. Bibliographic essays in particular works are probably more valuable to the user looking for guidance on a specific court-related topic.

Hall, Kermit L. *A Comprehensive Bibliography of American Constitutional and Legal History*. 5 vols. Millwood, NY: Kraus Thomson International, 1984.

An interdisciplinary bibliography on American legal culture drawing on books, journal articles, and doctoral dissertations in history published in the United States. It includes general surveys and texts, institutions of the law, constitutional doctrine, legal doctrine, biographical works, chronological treatments, and geographically specific treatments.

Hall, Kermit L. *A Comprehensive Bibliography of American Constitutional and Legal History. Supplement 1980-1987*. 2 vols. Millwood, NY: Kraus

International, 1991.

The bicentennial of the Constitution and of the Bill of Rights produced a great deal of new scholarship on the Constitution, American law, and constitutionalism. Hall surveys a broad range of newer work in law, political science, sociology, economics, criminal justice, and more, supplementing Hall 1984.

Martin, Fenton S., and Robert U. Goehlert. *The Supreme Court of the United States: A Bibliography*. 3d ed. Washington, DC: Congressional Quarterly, 1990.

Although dated, one of the most comprehensive bibliographies available. Covers development of the court, the court and the federal government, organization and work of the court, civil liberties, equal rights, due process, regulation, economic issues, education, liability, public opinion of the court, impact and implementation, membership, justices. Provides guidance on finding government publications and documents not included in the bibliography.

Rutland, George H., ed. *The Supreme Court of the United States: A Bibliography with Indexes*. New York: Nova Science, 2006.

No organization of entries other than alphabetical, making this less useful than other volumes even if more recent. Skips many scholarly works in favor of film and television entries. An eight-page index is extremely cursory and rather idiosyncratic.

Stephenson, D. Grier, Jr. *The Supreme Court and the American Republic: An Annotated Bibliography*. New York: Garland, 1981.

Slim and dated, this volume is nevertheless nicely organized and helpful. Annotated entries begin by reviewing general works and concluding with biographical and autobiographical materials plus several appendixes. Sections on institutional development (organized by twenty-year intervals) and constitutional interpretation of a number of clauses annotate decisions, analyses, and other material.

The Justices

Included here are reference biographies of Supreme Court justices and their writings. Cushman 1995 is designed for a very young audience, while Friedman and Israel 1997 provides a substantial introduction to each justice through Stephen J. Breyer. Urofsky 2006 provides a good, short introduction, but solid online resources may offer as much or more. Short biographies of individual justices are readily available online and in some of the sources in Databases and Electronic Resources. Book-length biographies of individual justices are far too numerous to annotate here. The guides here are merely starting points for research.

Cushman, Clare, ed. *The Supreme Court Justices: Illustrated Biographies, 1789–1993*. Washington, DC: Congressional Quarterly, 1995.

Arranged chronologically. Richly illustrated biographies of each justice through Clarence Thomas, written by multiple authors, are designed for young readers and high school students. Bibliography includes additional sources on each justice.

Friedman, Leon, and Fred L. Israel, eds. *The Justices of the United States Supreme Court, 1789–1992: Their Lives and Major Opinions*. 5 vols. New York: Chelsea House, 1997.

Substantial entries examine biography, legal background, route to the court, and major decisions for justices through Stephen J. Breyer. Chronological arrangement with selected bibliography for each entry.

Urofsky, Melvin I., ed. *Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices*. Washington, DC: Congressional Quarterly, 2006.

Lives and legal philosophies of justices who have served on the court. Alphabetically arranged essays by numerous scholars profile each justice and assess his or her legal contributions. Updated from the 1994 edition to include justices through John Roberts and Samuel Alito.

Textbooks

This section focuses on valuable textbooks that take a range of approaches to the court. Some (such as Segal, et al. 2005) are more heavily oriented toward judicial attitudes and values as predictors of the court's decision making, and some (such as Dorf and Morrison 2010) are more focused on constitutional law and legal precedent. Some are especially good at locating the court in a system of separation of powers (Breyer 2010) and as a player in American political development (McCloskey 2010). Fallon 2013, somewhat like McCloskey 2010, finds that "*(o)ur Constitution is a dynamic document, which draws its meaning partly from evolving thinking and the pressure of events*" (p. 269; italics in original). Texts are aimed at different audiences, with O'Brien 2014 perhaps demanding less of students than Dorf and Morrison 2010 or Unah 2010. Justice Stephen J. Breyer (Breyer 2010) similarly assumes no prior knowledge of the court and is a lively, engaging read that considers particular cases and constructs an argument about the proper role of the court in a separation of powers. The Breyer volume would work best if supplemented with the perspective of a more originalist or textualist justice. McCloskey 2010 has already celebrated its fiftieth anniversary, but the original text has been augmented with two chapters and an updated epilogue by the author's former student Sanford Levinson; another update is anticipated. Dorf and Morrison 2010 is an especially nice way to introduce the Supreme Court for those who teach constitutional law. Baum 2015 is a very good general introduction, although its emphasis on judicial attitudes and

behavior (not as determined as Segal, et al. 2005) warrants complementing it with a historical institutionalist or American political development essay (see Anthologies). McGuire's 2012, an edited volume, is not solely focused on the highest court and is included because its strong coverage of an array of topics on the federal judiciary make it valuable for classroom use. Edited case law volumes are not included here, but Gillman, et al. 2012–2013 locates case law in a remarkable political and institutional exposition on constitutional development.

Baum, Lawrence. *The Supreme Court*. 12th ed. Washington, DC: Congressional Quarterly, 2015.

Baum contends that the court is part of the policy-making process. Decisions are affected by the state of the law, the values of justices, the interaction among justices, and the court's political and social environment. A strong chapter on implementation makes clear that although the court speaks, many other policymakers respond (or fail to respond) to its decisions.

Breyer, Stephen J. *Making Our Democracy Work: A Judge's View*. New York: Knopf, 2010.

The court's place in democratic governance. Author positions himself as a liberal advocate of judicial restraint. Contends that the people must understand what the court does; workable decisions must be widely acceptable ones. The court must respect other branches of government, must consider comparative specialization, and must be pragmatic. This book does not break new ground but is informative and will stimulate discussion.

Dorf, Michael C., and Trevor W. Morrison. *Constitutional Law*. Oxford Introductions to US Law. New York: Oxford University Press, 2010.

Provides an extremely useful overview of what the court produces—constitutional law. Key issue areas include equal protection, enumerated and unenumerated rights, separation of powers, and federalism; authors also explore debates over how decision-making authority is allocated. Judicial review, approaches to constitutional interpretation, and congressional enforcement of constitutional rights included.

Fallon, Richard. *The Dynamic Constitution: An Introduction to American Constitutional Law*. 2d ed. Cambridge, UK: Cambridge University Press, 2013.

How constitutional provisions likely to be of great interest to students have been interpreted by the court, with attention to the dynamic character of the Constitution. Widely accessible, highly readable, generous use of cases to illustrate claims. Locates modern constitutional doctrines in historical context; there are fewer fixed truths about the Constitution than many think. Should not become readily dated.

Gillman, Howard, Mark A. Graber, and Keith E. Whittington. *American Constitutionalism*. 2 vols. New York: Oxford University Press, 2012–2013.

Includes Vol. 1, *Structures of Government* (New York: Oxford University Press, 2012) and Vol. 2, *Rights and Liberties* (New York: Oxford University Press, 2013). Highly innovative text locates Court decisions in historical eras and surrounding context to reveal the role of different institutions and actors, federal and state, in shaping and developing the Constitution's meaning. Many documents beyond edited cases included, and supporting materials available to text's users on the web.

Gillman, Howard, Mark A. Graber, and Keith E. Whittington. *American Constitutionalism: Powers, Rights, and Liberties*. New York: Oxford University Press, 2015.

The one-volume version of Gillman, et al. 2012–2013. Identical historical organization; retains introductions to sections, headnotes to cases, and bulleted lists of major developments but edited court cases are accompanied by fewer other contemporaneous documents and readings.

McCloskey, Robert G. *The American Supreme Court*. Revised by Sanford Levinson. Chicago History of American Civilization. 5th ed. Chicago: University of Chicago Press, 2010.

The New Deal court was carrying out John Marshall's vision and serving as a primary agent in constitutional development, a view not quite as prevalent in early-21st-century scholarly opinion. McCloskey's court is sensitive to changes in public opinion. Levinson's chapters consider how the author might have viewed the court's role as protector of civil rights and civil liberties and its newer role as welfare state monitor.

McGuire, Kevin T., ed. *New Directions in Judicial Politics*. New York: Routledge, 2012.

High-quality chapters cover the federal court system from judicial selection and confirmation to decision implementation and impact. Includes trial courts, appellate courts, and courts in their political environments. Topics also include effect of campaign contributions on judicial decisions, effectiveness of litigation as a strategy, and public opinion as a constraint on judicial behavior.

O'Brien, David M. *Storm Center: The Supreme Court in American Politics*. 10th ed. New York: Norton, 2014.

The court plays an important role in the political process; author explores the court's connection to the political system and examines it as a political institution. From the appointment process and relations among members of the bench to deciding what to decide and writing opinions, O'Brien writes a lively introduction that includes anecdotes that engage (without heavily challenging) the average undergraduate.

Segal, Jeffrey A., Harold J. Spaeth, and Sara C. Benesh. *The Supreme Court in the American Legal System*. Cambridge, UK: Cambridge University Press, 2005.

Invested in the attitudinal model, this volume locates the Supreme Court in a legal system that includes the lower courts. It covers judicial policymaking, approaches to judicial decision making, the Supreme Court in American legal history, the judicial process, and the impact of courts.

Unah, Isaac. *The Supreme Court in American Politics*. New York: Palgrave Macmillan, 2010.

Unah's text is a very solid introduction to the court, including an introduction to legal, attitudinal, rational choice, and institutional approaches to the court in the process. Although it is not a particularly engaging read, it is a welcome addition to the literature on the court and the implementation of its decisions.

Anthologies

Included here are volumes in which a single scholar or group of scholars writes about a set of "great cases" in constitutional law. There are earlier and other volumes of this type, but the ones here are very good, more recent, or remain available. Also included are a few of the most recent and best volumes in which a group of legal scholars revisits and even reargues prominent cases (Balkin 2001, Balkin 2005, Tushnet 2005). Not included are single-authored volumes devoted to examining individual cases or several related cases; a high-quality ongoing series from the University Press of Kansas (Landmark Law Cases and American Society) fits this description. Explaining in different degrees the background and circumstances of the case, examining the constitutional issues and institutional conflicts, generating considerable drama, and relating outcomes for the parties, Garraty 2009, Irons 1990, Ivers and McGuire 2004, and Dorf 2009 are designed chiefly for the classroom. The human-interest dimension of these law stories often engages audiences in a way that reading cases does not. Garraty 2009 has valuable chapters contributed by scholars who have often written books on the case in question. As a single author, Peter Irons (Irons 1990) relates the stories of sixteen Americans whose civil rights and civil liberties battles landed them before the court. Ivers and McGuire 2004 is less focused on personages and more on analysis of the issues and institutional conflicts underlying the cases. Dorf 2009, in Foundation Press's law stories series, brings a number of legal scholars together to examine cases shaping constitutional structure, equality, and liberty. Generally the Foundation Press law stories series assumes more background than John A. Garraty or Irons do and tends to be targeted to a law school audience rather than undergraduates, but all are fine supplements to case-oriented courses, and many can be good reads on their own for a general audience. George 2000 is not designed to engage readers in the personages and events surrounding the cases; instead, it concentrates on cases in several important issue areas of constitutional law and uses a commentary-and-response format to offer contrasting scholarly views on the constitutional issue and case at hand. The single-case volumes (Balkin 2001, Balkin 2005, Tushnet 2005) feature legal scholars engaging their craft and do assume that the reader already knows the original case at hand. Readers of Balkin 2001 and Balkin 2005 have to be prepared to cast fresh eyes on what the justices might have responsibly said in 1954 or 1973. Mark Tushnet's readers must prepare to be more sophisticated about *Marbury v. Madison* than the average undergraduate reading the case for the first time.

Balkin, Jack, ed. *What Brown v. Board of Education Should Have Said: America's Top Legal Experts Rewrite America's Landmark Civil Rights Decision*. New York: New York University Press, 2001.

Nine prominent legal scholars review and rewrite what *Brown* should have said in 1954 knowing what they know now about the nation's history since then. Strong introductory essay on *Brown* as icon by Balkin distinguishes anticlassification readings from antisubordination readings. This sets the stage for controversies over what *Brown* did mean or should have meant that endure to this day.

Balkin, Jack, ed. *What Roe v. Wade Should Have Said: America's Top Legal Experts Rewrite America's Most Controversial Decision*. New York: New York University Press, 2005.

Following the same format as Balkin 2001, an introductory essay precedes eleven prominent constitutional scholars who support or oppose the establishment of a right to abortion and who revisit and rewrite *Roe* (1973) knowing what they know now about the history of the nation in the years since.

Dorf, Michael C., ed. *Constitutional Law Stories*. 2d ed. New York: Foundation, 2009.

Fifteen leading cases, from *Marbury v. Madison* to *Boerne v. Flores*, including important but poorly reasoned decisions, told by legal scholars, with somewhat greater emphasis on 20th-century stories. How questions get framed; the roles of lawyers, courts, and socioeconomic factors in cases. Part of a law stories series.

Garraty, John A., ed. *Quarrels That Have Shaped the Constitution*. Rev. and expanded ed. New York: Harper and Row, 2009.

Twenty chapters of almost uniformly high quality by legal scholars who have often written more extensively about each case, locating the drama in the political and historical as well as human contexts, making this a fine collection despite its age; will not include newest approaches to legal scholarship. Rich 19th-century coverage;

Roe v. Wade is last chronologically. First published in 1987.

George, Robert P., ed. *Great Cases in Constitutional Law*. Princeton, NJ: Princeton University Press, 2000.

A good set of essays on *Marbury v. Madison*, *Dred Scott*, *Lochner v. New York*, *Brown v. Board of Education*, and *Roe v. Wade* in which two prominent commentators from somewhat divergent perspectives (often centrist liberal to conservative) facilitate exploration of the legal controversies surrounding each of the five key cases as they lay out their own arguments.

Irons, Peter. *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*. New York: Penguin, 1990.

Focuses on cases involving religion, race, protest, and privacy and on litigants who shared a belief in a living Constitution. The stories are engaging and the messages relatively simple. For general audiences and students.

Ivers, Gregg, and Kevin T. McGuire, eds. *Creating Constitutional Change: Clashes over Power and Liberty in the Supreme Court*. Charlottesville: University of Virginia Press, 2004.

Twenty-four scholars relate stories behind major decisions, with emphasis on the latter half of the 20th century, locating issues in broader social and political contexts. Covers many issue areas in constitutional law. Analytic but very accessible.

Tushnet, Mark. *Arguing Marbury v. Madison*. Stanford, CA: Stanford University Press, 2005.

A smartly envisioned and challenging collection that combines the transcript of the oral argument with a set of fresh perspectives on *Marbury* and its meaning by noted legal scholars. Covers intellectual background, myths of *Marbury*, and judicial review in a democracy of rights.

Databases and Electronic Resources

The databases and electronic resources reviewed in this section include some providing easy, comprehensive access to recent and historical case law, often with simplified reviews and analysis of cases and previews of upcoming ones. Justia.com US Supreme Court Center, Legal Information Institute at Cornell University Law School, and the official website of the Supreme Court of the United States all offer access to the text of recent decisions; the official Supreme Court website has access to bound volumes of the US Reports dating to the 1991 term (volume 502). The Legal Information Institute offers the most user-friendly display of and access to historical syllabus and opinions, though searchability by year, as offered by Justia.com US Supreme Court Center, would be nice. Justia.com US Supreme Court Center full case access is not as pleasant or easy to read. There are other ways to access full cases online; some require a paid subscription. Oyez is building a complete archive of all audio recordings of the Supreme Court from 1955 forward and offers audio access to oral arguments and decisions, complementing these with one-paragraph summaries of case holdings, lineups of voting, and links to full texts of case. Two blogs are included: Balkinization, created by Yale law professor Jack Balkin and friends, offers high-level reflections on recent and upcoming court decisions and issues in law, polity, and society; and SCOTUSblog, created by a law firm specializing in Supreme Court work, previews upcoming cases and analysis and provides commentary on recent decisions and issues likely to come before the court. First Amendment Center is included because of wide public interest in First Amendment issues and intense court attention to this amendment for nearly seventy-five years. There are other worthy websites covering other perspectives, but space does not permit their inclusion. The Supreme Court Database is a different kind of resource designed primarily for scholars and of great value to those interested in conducting empirical research on the Supreme Court.

Balkin, Jack. Balkinization.

Balkin, Knight Professor of Constitutional Law and the First Amendment and director of the Information Society Project at Yale Law School, began this rich and wide-ranging blog on law, the court, culture, and society and has been joined by a long list of prominent legal scholars. Will interest an educated audience as well as students of law and courts.

First Amendment Center.

Advocacy center based at the Newseum and Vanderbilt University that offers news, information, free electronic and print publications, lesson plans, sponsorship of an annual moot court, commentary, book reviews, and archives on all aspects of First Amendment law and policy. Searching a bit awkward compared to some other sites reviewed.

Justia.com US Supreme Court Center.

One good way to access electronic full-text versions of Supreme Court cases from 1791. Can access newsletters and free opinion summaries. Directs users to a number of other valuable electronic resources on the Supreme Court.

Legal Information Institute. Cornell University Law School.

Easy-to-use database that is especially strong for cases from 1992 onward with decisions, orders, case updates, and previews. Searchable by topic, author, and party. Links to oral arguments, briefs, court calendar and rules, press releases, and more. Historical archives searchable by case or party name, topic, or authorship but not by year of decision.

Oyez. Chicago-Kent College of Law, Illinois Institute of Technology.

Multimedia archive of the Supreme Court designed to make the court accessible through audio, video, text, and images. Most famous for audio access to oral arguments and decisions, Oyez is working to complete access to all audio since equipment was installed in the court in 1955. Includes capsule statements of issues, holdings, votes. Other useful links to full cases and more for users of all types.

SCOTUSblog.

The Supreme Court of the United States blog, established by Tom Goldstein and Amy Howe in 2002, is a source for analysis, commentary, plain English statements of recent holdings, and previews by lawyers and law students. Includes search options, statistics by term, educational resources, links to cases.

Spaeth, Harold, Lee Epstein, Ted Ruger, Keith Whittington, and Andrew D. Martin. The Supreme Court Database.

Designed as the definitive court database, this frequently updated site includes each case decided in the 1953 through 2010 terms; approximately two hundred pieces of information per case. Especially valuable for scholars and researchers performing quantitative court research; database can be uploaded into statistical packages for advanced calculations. Includes legal provisions involved in the case, votes of justices, court whose decision is reviewed, parties to the suit, codebook, and instructions.

Supreme Court of the United States.

Excellent source for tracking recent or upcoming cases. Docket, oral argument calendar, orders, official minutes of the court, slip opinions and recent decisions, information on where to find merit briefs, court rules. For the general audience, includes nice movable timeline of court justices, biographies, and information on court traditions, the institution, traditions, photos.

Journals

Selected here are a number of journals that provide especially good, broad coverage of the court, represent approaches or organizations that have been particularly influential in legal or academic scholarship, or represent broad issue areas. Vital journals published by individual law schools are not covered here if they are the primary journal of the institution, and many specialized law reviews (e.g., *American Indian Law Review*) that are important in their fields are not covered. A vast array of law reviews is available to subscribers through Lexis Academic, at least going back to 1980; prior to that, a number of law reviews are available, also by subscription, through Jstor. The *Supreme Court Review* performs at a high level, as it reviews and critiques the work, decisions, and trajectory of the Supreme Court. The *Journal of Supreme Court History*, from the Supreme Court Historical Society, is designed to reach a wide, well-read audience. The *Harvard Law Review's* November issue offers an especially good review of the Supreme Court term immediately past. While the *Harvard Civil Rights–Civil Liberties Law Review* covers a subset of constitutional law issues as well, its scope is quite broad. Also included here is a prominent journal of conservative and libertarian legal scholarship, the *Harvard Journal of Law and Public Policy*, linked approvingly from the website of the Federalist Society for Law and Public Policy Studies (cited under the Modern Conservative Legal Movement), perhaps the most important organization of the late 20th and early 21st centuries in efforts to educate a conservative generation of legal scholars, judges, and activists. The *Law and Society Review*, since 1966 a publication of scholars who know the court and the law are about more than what law professors generally examine, has been an influential journal in the social sciences. A newer entrant aimed at a wide scholarly audience, especially political scientists and legal scholars, is the *Journal of Law and Courts*.

***Harvard Civil Rights–Civil Liberties Law Review.* 1966–.**

Published semiannually since 1966 by Harvard Law School. Student-run journal billing itself as the nation's premier progressive law journal. Given the court's attention to civil rights and civil liberties cases, this is an important source, especially for liberals. From the rights of the accused and racial equality to same-sex marriage, a timely journal.

***Harvard Journal of Law and Public Policy.* 1978–.**

Published three times a year by Harvard Law School. Designed to publish a wide range of legal scholarship identified as conservative and includes contributions by well-established legal scholars.

***Journal of Law and Courts.* 2013–.**

Published semiannually by the University of Chicago for the Law and Courts Section of the American Political Science Association. Purposefully cross-disciplinary and directed to a wide scholarly audience, the journal is open to theoretical and empirical scholarship and to various methods. Articles focus on legal actors, institutions, processes, and policies in the United States, abroad, and comparatively.

***Journal of Supreme Court History.* 1976–**

First published as *Yearbook Supreme Court Historical Society*, the current title dates from 1990. Electronic journal of the Supreme Court Historical Society focused on the history of the court; aimed at making important topics accessible to a broad audience. Wide-ranging articles by legal scholars and social scientists may consider the origins of the court, the first generation of female attorneys, tributes to retiring justices, wartime civil liberties, Abraham Lincoln and the Constitution, and a reexamination of specific decisions. Published three times per year by Wiley-Blackwell and edited in 2012 by Melvin I. Urofsky.

***Law and Society Review.* 1966–.**

Published quarterly since 1966, now by Wiley-Blackwell, for the Law and Society Association, an organization that has had a major impact on the study of law and courts. Journal is devoted to the study of law in social, political, economic, and cultural life. Publishes theoretical and empirical work, sociolegal studies, and research from across the social sciences.

***Supreme Court Review.* 1960–.**

Annual published by the University of Chicago Law School that provides strong interdisciplinary treatments of the significance of the court's most recent decisions. The high-quality contributions in these volumes are rich in interpretation, analysis, and criticism. Articles are written by and for legal academics, judges, social scientists, and journalists.

Justices Reflect on Their Craft

The single best collection of writings by justices on their craft is O'Brien 2008, which includes a nice bibliography of additional commentaries by judges in the federal system. Also selected here are writings by some Supreme Court justices who represent particularly important or divergent perspectives on interpreting the Constitution or on what constitutes judicial activism or restraint. Originalism is perhaps best represented by Black 1968, written by a justice who served on the court from 1937 to 1971 and who played an important role in the controversy over how much of the Bill of Rights applied to the states and why. Justice Hugo Black disagreed with his companion on the court, Justice Benjamin N. Cardozo (Cardozo 1921), on this matter. Another form of fidelity to the text of the framers, textualism, is represented by Justice Antonin Scalia (Scalia 1997), who insists that formalism and textualism guarantee more restraint and greater deference to democratically elected decision makers than any other approach to constitutional interpretation. Another originalist judge, never confirmed as a Supreme Court nominee, is Robert H. Bork (Bork 1990, cited under the Modern Conservative Legal Movement). Justice Stephen J. Breyer (Breyer 2005) writes to counter the views of Scalia 1997 (as well as Scalia's bench opinions, concurrences, and dissents) and considers his own approach to adjudication more restrained and more deferential to democratically elected bodies. Stevens 2014 does not so much reflect on his approach to judging as on current constitutional problems that, in his view, require constitutional amendments to remedy. Edited collections on Oliver Wendell Holmes (Collins 2010) and Louis D. Brandeis (Strum 1995) are included as good compilations of speeches, writings, cases, and sustained commentary by the editors on important aspects of the thinking of these two major jurists on free speech and democracy. Felix Frankfurter's approach to judicial restraint, often articulated in opinions, concurrences, and dissents, warrants the inclusion of Kurland 1970, a collection of his off-the-bench writings.

Black, Hugo. *A Constitutional Faith.* New York: Knopf, 1968.

Originally delivered as the James S. Carpentier Lectures at Columbia University. Very short volume in which a noted originalist articulates in simple terms his views of constitutional interpretation, free speech, and due process of law. Language and history are key to interpreting the Constitution, not desirability. Opposes substantive due process.

Breyer, Stephen J. *Active Liberty: Interpreting Our Democratic Constitution.* New York: Knopf, 2005.

Seeks to establish that the Constitution aims at maximizing liberty: its efforts to create democratic political institutions will succeed only if the public actively participates in the nation's political life. Citizens share in sovereign authority; the Constitution adapts to changing circumstances. Counters Antonin Scalia's *A Matter of Interpretation* (Scalia 1997). Also see *Making Our Democracy Work: A Judge's View* (Breyer 2010, cited under Textbooks).

Cardozo, Benjamin N. *The Nature of the Judicial Process.* New Haven, CT: Yale University Press, 1921.

The Yale Storrs Lectures delivered a decade before Justice Cardozo joined the Supreme Court. Reflects on the processes by which a judge decides a case, including notions of social utility. The justice who weighed whether a right was "of the very essence of a scheme of ordered liberty" (*Palko v. Connecticut*, 302 US 319, 1937) played an important role in the process of incorporating the Bill of Rights against states.

Collins, Ronald K. L., ed. *The Fundamental Holmes: A Free Speech Chronicle and Reader.* Cambridge, UK: Cambridge University Press, 2010.

Collins, an expert in free speech law and a fellow at the First Amendment Center, provides guidance through essays, notes, and commentaries to this important collection of Holmes's views on free speech, including speech in wartime. Primary documents include letters, speeches, opinions, books, and articles by this key contributor to early-20th-century free speech law.

Kurland, Philip B., ed. *Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution*. Cambridge, MA: Belknap, 1970.

Justice Frankfurter was interested in interpreting the work of the court to those who ought to care, and many pieces here were prepared for popular journals. He was a proponent of judicial restraint and a major figure in decisions about federal-state relations. Some essays are on specific justices. The editor's hand is present only in the addition of a few scholarly footnotes.

O'Brien, David M. ed. *Judges on Judging: Views from the Bench*. 3d ed. Washington, DC: Congressional Quarterly, 2008.

An outstanding selection of thirty-four off-bench writings by Supreme Court justices and other federal court judges plus a bibliography of off-the-bench commentaries. Topics include judicial review, judicial process, the judiciary and the Constitution, judiciary and federal regulation, and the Bill of Rights and the states.

Scalia, Antonin. *A Matter of Interpretation*. Edited by Amy Gutmann. Princeton, NJ: Princeton University Press, 1997.

Justice Scalia's Tanner Lectures at Princeton University with commentary and criticism as delivered at the time by Gordon Wood, Ronald Dworkin, Mary Ann Glendon, and Laurence Tribe. Justice Scalia defends textualism but not original intent originalism and decries the conflation of common-law methods and constitutional interpretation.

Stevens, John Paul. *Six Amendments: How and Why We Should Change the Constitution*. Boston: Little Brown, 2014.

Useful review of how judge-made rules have come to pervert sensible constitutional meaning in several arenas: anti-commandeering rule, state sovereign immunity, political gerrymandering, and campaign finance. Proposes constitutional amendments that would also help eliminate the death penalty and restrict the Second Amendment.

Strum, Philippa, ed. *Brandeis on Democracy*. Lawrence: University Press of Kansas, 1995.

Strum, an authority on Brandeis, has put together an excellent edited collection of Brandeis's letters, speeches, interviews, cases, and other writings on various topics associated with his views on democracy. The editor guides the reader with an introductory essay, a chronology, and short introductions to chapters and selections.

Getting onto the Bench

Who is selected to serve on the Supreme Court, and what does the nomination and confirmation process reveal about the types of appointments that succeed or fail? Is it true that the appointment process has become significantly more politicized in the late 20th and early 21st centuries, and do politicized battles over nominations undermine the court's legitimacy? With length of tenure, do justices become less reflective of the political preferences of presidents who nominate them? Abraham 2008 focuses on judicial appointments and also wants to classify the quality of these appointments; while the scheme for doing so dates to 1978, the quality of the classifications it provides is considered by some scholars to be idiosyncratic. With illustrations, text boxes, and graphs, Epstein and Segal 2005 is highly appropriate for an undergraduate audience, though it has not been updated to consider subsequent appointments. Likewise, Silverstein 2007 is updated chiefly through the Ruth Bader Ginsburg and Stephen J. Breyer appointments and is suitable for undergraduate readers. Maltese 1995 remains valuable for tracing changes not in the politicization of the selection process but in the range of actors in this process and the techniques used, including "selling" of nominees by the White House. Yalof 1999 is uniquely concerned with why modern presidents pick the nominees they do and the factors influencing selection. Gibson and Caldeira 2009 takes a different perspective and examines a different problem from any of the other sources included here. Choosing the Samuel Alito nomination, it examines the effect of battles and campaigns for and against nominees on public perceptions of the court as an institution. No discussion of the selection of judicial nominees would be complete without the inclusion of the pioneering work Goldman 1997, although its focus is on lower court judges. Sheldon Goldman has been researching and publishing on judicial backgrounds and selection criteria since the 1960s, exploring changes and the slow diversification of the federal courts from Roosevelt through Ronald Reagan. Because an eleven-year period during which membership on the court was completely stable came to an end in 2005, sources considering these questions that include appointments of the late 20th and early 21st centuries are represented chiefly by articles. Stone 2010 offers a strong data-rich exploration of factors shaping the modern Supreme Court confirmation process, including polarization, media, politics, competence, ideology, and ethics. This work argues that it is not difficult to envision a much better confirmation process.

Abraham, Henry Julian. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5th ed. Lanham, MD: Rowman and Littlefield, 2008.

More than two hundred years of presidential appointments to the Supreme Court with an attempt to classify them by quality, from great to failure, borrowing a classification scheme designed by Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices* (Hamden, CT: Archon, 1978) to conduct statistical studies on the court. The author's views on how the Bill of Rights should be interpreted play a key role in often contested ratings.

Epstein, Lee, and Jeffrey A. Segal. *Advice and Consent: The Politics of Judicial Appointments*. Oxford: Oxford University Press, 2005.

A comprehensive treatment of the nomination and confirmation process, including the roles of presidents, the Judiciary Committee, the American Bar Association, the media, and special interest groups. Appointment of justices and judges has always been highly contentious, driven largely by concerns of party and ideology. Examines whether presidents succeed in appointing judges to carry their philosophies into the future.

Gibson, James L., and Gregory A. Caldeira. *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People*. Princeton, NJ: Princeton University Press, 2009.

Focused on the Samuel Alito confirmation battle, the authors draw on a national public opinion survey to examine attitudes about the court, testing the hypothesis that confirmation hearings do not hurt the institution. The court enjoys considerable legitimacy; while public attitudes generally are not poisoned by political polarization, those exposed to pro- and anti-Alito advertisements were less likely to see the court as deserving of respect.

Goldman, Sheldon. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, CT: Yale University Press, 1997.

Useful to scholars and a broader audience, this is a culmination of years of research and writing on identification, appointment, and confirmation of federal judges. Extensive data collection and use of multiple methods, including interviews. Presidential agendas and judicial selection are intimately tied; appointment of women and racial minorities changed very slowly. Considers possible improvements in the selection process.

Maltese, John Anthony. *The Selling of Supreme Court Nominees*. Baltimore: Johns Hopkins University Press, 1995.

If the confirmation process is flawed, it is an old problem. Conflict and partisanship can be found from the early years. Since the Civil War, the process has become more open with more publicity. The rise of the institutional presidency, election of senators, growth of interest group power brought other changes. Explores when and how the White House began to "sell" nominees.

Silverstein, Mark. *Judicious Choices: The New Politics of Supreme Court Confirmations*. 2d ed. New York: Norton, 2007.

Argues that the confirmation process has changed since 1968, partly with the expansion of judicial power, partly with changes to the Senate as an institution; modern judicial activism has a direct impact on the confirmation process. Sees change as one from a politics of acquiescence to a politics of confrontation. Qualitative rather than data-driven investigation.

Stone, Geoffrey R. "Understanding Supreme Court Confirmations." *Supreme Court Review* (2010): 381–467.

Current confirmation process is chaotic, divisive, arbitrary, damaging to the public's confidence in the Senate and the judiciary. Democratic presidents were more moderate in selecting nominees than their Republican counterparts; ideological clashes on the court are useful. Significant return toward a more independent-minded Senate; rejection of nominees on ideological grounds acceptable. Modest suggestions for reform.

Yalof, David Alistair. *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. Chicago: University of Chicago Press, 1999.

Interviews and presidential papers are used to examine the process of presidential selection of court nominees. Considers open selection, single candidate, and criteria-driven frameworks for choosing all nominees from Roosevelt through Bill Clinton. Disputes the claim that nominees are selected chiefly to influence future court decisions. What happens before the confirmation process is important to its outcome.

On the Exercise of Judicial Review

When, why, and under what conditions should the court exercise judicial review? Is it warranted by the text of the Constitution, and was it envisioned by the framers? Included here are some classic and more recent influential contributions to debates over the exercise of judicial review and its role and scope in the American constitutional order.

Early Classics

Thayer 1893, embraced and immortalized by Progressive Era justices, reflects on when and whether judges of that era should defer to elective bodies, arguing against aggressive judicial intervention in some legislative reform efforts. Hand 1964, by a judge sometimes thought to be the most impressive one who was not elevated to the Supreme Court, famously claims to find no textual warrant in the Constitution for judicial review. Bickel 1986 (cited under Countermajoritarianism and the Court) is concerned that a democratic system is incompatible with an overactive court and urges restraint. Wechsler 1959 accepts judicial review but suggests there is a way to constrain justices so they would not simply implement their policy preferences—find and stick to neutral principles. Rostow 1952 finds a robust place for judicial review in a democracy, since it protects the will of the people enshrined in the Constitution from the will of temporary majorities; this work makes a simple but not especially closely examined claim that the founders intended for the court to protect minorities from majorities.

Hand, Learned. *The Bill of Rights. Oliver Wendell Holmes Lectures.* New York: Atheneum, 1964.

Originally published in 1958 (Cambridge, MA: Harvard University Press). The judge who some claim to be the ablest never to sit on the Supreme Court finds no textual warrant for judicial supremacy (judicial review of actions of coequal branches or of state laws) in the Constitution. It may have greater practical warrant. However, via judicial review, the court quite often establishes itself as a third legislative chamber.

Rostow, Eugene V. "The Democratic Character of Judicial Review." *Harvard Law Review* 66 (1952): 193–224.

Judicial review is hardly antidemocratic, because in exercising it the court respects the will of the people as enshrined in the Constitution against the temporary passions of legislative assemblies. The court serves too as a guardian of minority rights. A concise and classic statement of this position.

Thayer, James Bradley. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7 (November 1893): 129–156.

Classic essay on the origin and scope of judicial review embraced by Progressive Era legal scholars who read it to urge judicial deference toward social and economic legislation. Thayer traces and justifies its exercise over federal legislation and over state legislation under the supremacy clause; this does not warrant rampant activism. Courts cannot long save a people from ruin.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73 (1959): 1–35.

Oliver Wendell Holmes Lecture, Harvard University, 1959. Classic essay that argues that discovery of a single meaning for the Constitution or its clauses is impossible; the way to avoid preference-driven decision making is for judges to select their neutral principles and abide by them wherever they lead in particular cases. At least individual judges can then be principled—though critics have pointed out many difficulties with Wechsler's assumptions.

More Recent Treatments

When is the court's warrant strongest for exercising judicial review? Considering the court's efforts to protect minorities during the 1960s and 1970s especially, a number of scholars have sought to justify these interventions. Ely 1980 famously argues that the strongest warrant for judicial review is in areas where discrete and insular minorities are unable to achieve equality because of failures of the political process. Choper 1980 believes that the strongest warrant for limited judicial review lies in the arena of individual rights. Perry 1994 contends that judicial review is necessary to protect rights of minorities and elaborates a fresh, interesting argument that originalism, as the author (and not Robert H. Bork or Antonin Scalia) understands it, can produce a progressive constitutionalism that includes judicial review. Balkin 2011 embraces a kind of liberal originalism that includes actors beyond the court to engage in constitutional construction. Sunstein 1999 is happy to have the court engage in judicial review but believes it is best exercised when it leaves many things indeterminate, to be worked out elsewhere in the political process; decisions are often best when they are narrow, shallow, and incremental. While Waldron 2006 thinks judicial review is not constitutionally warranted, the author also believes it has not done a great deal to protect minority rights. On this latter point, Tushnet 1999 concurs: liberals have gotten little out of the court even in the best of times, and perhaps it is time to take the Constitution (judicial review) away from the court. While most scholars argue that judicial review has a practical value and many argue it is constitutionally warranted, there is concern that the Earl Warren court and its successors, whether liberal or conservative, have claimed more for judicial review than John Marshall ever did in *Marbury v. Madison* (1803), insisting that the court was not only the final arbiter of constitutional meaning, but also the only arbiter. This is often referred to as "judicial supremacy." Whittington 2007, no fan of claims of judicial supremacy, examines when and how it arose and how other branches have been complicit in that development.

Balkin, Jack M. *Living Originalism.* Cambridge, MA: Belknap, 2011.

An argument for an expansive originalism that includes text and principles, and a process of constitutional construction that includes social movements and citizens. Examining the commerce clause and the Fourteenth Amendment equal protection and privileges/immunities clauses, Balkin finds warrant for broad legislative power. The text constrains but there is a living constitution as well.

Choper, Jesse H. *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court.* Chicago: University of Chicago Press, 1980.

While judicial review is incompatible with majority rule, it is important in the case of individual rights, which are not adequately represented in the political process. Even here the court's political capital is limited and should be expended only when its voice is most needed. In matters of separation of powers and federalism, however, there is much less warrant, and the court should refrain from its exercise.

Ely, John Hart. *Democracy and Distrust.* Cambridge, MA: Harvard University Press, 1980.

Extremely influential with a generation of liberal legal scholars, this work argues for a textual constitutional commitment to democracy and claims that judicial review is most appropriately exercised when discrete and insular minorities have been systematically excluded from access to the political process for redress of grievances.

Perry, Michael. *The Constitution in the Courts: Law or Politics?* New York: Oxford University Press, 1994.

Is judicial review a practice Americans should support? Judicial review is a legitimate enforcement mechanism for the distrust the founders had that democratic majorities would protect rights. Perry makes an argument for an originalism that includes judicial review and not of Cass R. Sunstein's minimalist sort.

Sunstein, Cass R. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge, MA: Harvard University Press, 1999.

Judicial restraint and sound constitutional decision making take place by small, incremental steps rather than by broad and deeply reasoned holdings. Justices who can agree on outcomes but not on reasoning can produce "minimalist" decisions that better promote democracy and deliberation.

Tushnet, Mark. *Taking the Constitution Away from the Court*. Princeton, NJ: Princeton University Press, 1999.

Given how little minorities—and liberals—have gotten from even the most liberal courts, Tushnet asks whether taking the power of judicial review from the court would do any harm. Indeed, perhaps the meaning of the Constitution would be deliberated more vigorously without it. Thin constitutionalism is preferred to thick constitutionalism.

Waldron, Jeremy. "The Core of the Case against Judicial Review." *Yale Law Journal* 115 (April 2006): 1346–1406.

There is no reason to believe rights are better protected via judicial review than by democratically elected legislatures, and regardless of the outcomes generated, judicial review is democratically illegitimate. Introduces conditions under which judicial review might be legitimate, but these are not fulfilled in his view.

Whittington, Keith E. *Political Foundations of Judicial Supremacy*. Princeton, NJ: Princeton University Press, 2007.

Conditions under which the court's claims for ultimate authority to interpret the Constitution are accepted by other branches; exploration of why what the court says is treated as equivalent to what the Constitution says. Jeffersonian departmentalism is more comfortable for the author, with a claim that each branch has equal authority to interpret the Constitution for itself.

Countermajoritarianism and the Court

The theme that the court is rarely a major force in national policymaking and that it generally endorses the views of the dominant political coalition is articulated in Dahl 1957 in this rediscovered classic. Rosenberg 1991 follows this line of argument to claim that, empirically and contrary to the liberal mystique, even in the cases most frequently cited for the proposition that the court moved the nation, the court is rarely an agent of social change. Hall 2011, however, effectively demonstrates the court is powerful, especially when implementation is through courts. Dahl 1957 and Rosenberg 1991 were a kind of response to the famous countermajoritarian difficulty problem in Bickel 1986, wherein the basically unaccountable court should intervene very sparingly against democratically elected decision makers. Gerald N. Rosenberg's challenge to those who assert the court's power brought forth a number of critiques. Schultz 1998 raises a number of good ones, including David A. Schultz's and Stephen E. Gottlieb's attacks on methodology and measures. The Klarman 2004 legal history of the era of segregation and its dismantling makes a strong case for a subtler version of the argument that the court does not often deserve credit for advancing minority rights or promoting social change. Indeed, decisions can produce backlash that retards the desired change. A special issue of the *Virginia Law Review* in 1994 (McCurdy 1994) first lays out Michael J. Klarman's argument and presents a vigorous critique from several other legal scholars. Graber 1993 finds that the court is most likely to exercise judicial review when a majoritarian position is lacking, and thus the court is nonmajoritarian rather than countermajoritarian. Whittington 2005 examines the court's exercise of judicial review historically, finding that the court is far more friendly to dominant political coalitions than usually thought; when it appears to defy majority coalitions, the court may well be acting with the permission or encouragement of other branches. Engel 2011 and McMahon 2011 both focus on interbranch relations; Engel's historical institutionalist approach explores how the court grows in authority even when opponents seek to curb it, while McMahon finds Nixon using court appointments strategically for electoral coalition-building more than to achieve specific policy results. Christenson and Glick 2015 generates an innovative design to examine how support for and legitimacy of the court varies (or remains stable) with a particular controversial decision that may have involved strategic motives.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. With a new forward by Harry Wellington. New Haven, CT: Yale University Press, 1986.

Writing at the time of *Baker v. Carr*, Bickel coined the term "countermajoritarian difficulty" to explain why there was only narrow warrant for the exercise of judicial review in a majoritarian polity. Since "no good society can be unprincipled; and no viable society can be principle-ridden" (p. 64), this classic argues for the "passive virtues" or formal techniques for avoiding court decision making. First published in 1962.

Christenson, Dino P., and David M. Glick. "Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy." *American Journal of Political Science* 59.2 (2015): 403–460.

How do public views of the Court respond to high-profile decisions? Authors find the court is expected to behave differently from other branches. Using waves of panel data and an experiment wherein some respondents read news that Roberts had strategic motives on health care, authors discover sources of stability in views of court and also that prior ideological alignment matters.

Dahl, Robert A. "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6 (1957): 279–295.

The court rarely takes stances that are at odds with the governing political majority; its holdings tend to consolidate rights of traditional elites and confer legitimacy on legislative and executive actions. Assumes sufficient turnover on the court for judges to be relatively in tune with the dominant political alliance; antimajoritarianism is rarely a problem. By itself the court is rarely an important factor in national policymaking.

Engel, Stephen M. *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power*. Cambridge, UK: Cambridge University Press, 2011.

Through case studies involving interaction between the court and the rest of the political system, author explores how political efforts to control judicial power change over time. Seeks a historical institutionalist explanation of the puzzle that anti-judicial animus recurs even while judicial authority becomes more established; courts are a powerful tool for serving the policy goals of politicians.

Graber, Mark A. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7 (1993): 35–73.

Historically, justices are more likely to exercise—and be invited by other branches to exercise—judicial review to overturn legislation or actions by other branches when there is no clear dominant national coalition or no majority is willing to step in to act definitively on a national dispute. Judicial review is not countermajoritarian but nonmajoritarian.

Hall, Matthew E. K. *The Nature of Supreme Court Power*. Cambridge, UK: Cambridge University Press, 2011.

The court exercises power most successfully when lower courts can implement its rulings (vertical issues); when relying on noncourt actors (vertical issues), success depends on popularity of decisions. Contrary to Rosenberg 1991, the court has great power over state and private actors. Employs longitudinal studies and quantitative measures of behavior outcomes across issue areas.

Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.

Provocative, superb, accessible legal history of constitutional law on race from the 1890s to the 1960s; thinks about *Brown v. Board of Education* in the context of whether the court has been critical to advancing minority rights. Subtle work that argues that it often is not but considers political conditions affecting its efficacy. The court rarely moves until public opinion has shifted in the direction of the judgment. This thesis sparks continuing controversy.

McCurdy, Charles W., ed. *Special Issue: Twentieth-Century Constitutional History*. *Virginia Law Review* 80 (February 1994).

This important special issue of *Virginia Law Review* contains Michael J. Klarman's highly controversial article, "Brown, Racial Change, and the Civil Rights Movement" (pp. 7–150), with a series of articles criticizing and commenting by David J. Garrow, Gerald Rosenberg, Mark Tushnet, and others. Klarman believes backlash mobilization against the court can undermine the effectiveness of *Brown v. Board of Education* and other decisions. Elaboration of Klarman's thesis in *From Jim Crow to Civil Rights* (Klarman 2004).

McMahon, Kevin J. *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences*. Chicago: University of Chicago Press, 2011.

Study of the relationship between the judiciary and the presidency demonstrating how Nixon did not lead a failed counterrevolution against the Warren Court but strategized to build a winning Republican electoral coalition using conservative (defined shallowly and broadly) judicial appointments. Nixon blamed the court for unpopular decisions while enforcing them, making gains and an eventual shift toward law and order.

Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: University of Chicago Press, 1991.

Turning to the Supreme Court to achieve social change is a mistake. Rarely is the court effective and never without the active participation of other branches. Change is more likely from social movement pressure on legislatures. A rather rigid causal model: only change occurring in a relatively short span of time, traceable to court initiative, is counted. Challenges those who think the court matters to demonstrate it.

Schultz, David A., ed. *Leveraging the Law: Using the Courts to Achieve Social Change*. Teaching Texts in Law and Politics 3. New York: Peter Lang, 1998.

Excellent set of critiques of Gerald N. Rosenberg's thesis, including strong methodological criticism by Schultz and Gottlieb and a response by Rosenberg. Essays using various methodological perspectives and focusing on case studies examine the relationship among the court, political mobilization, and social change.

Whittington, Keith. “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court.” *American Political Science Review* 99.4 (November 2005): 583–596.

Argument, using historical data, that the court rarely overturns important pieces of legislation. The court is relatively friendly to dominant coalitions, is often invited to exercise constitutional review, and strikes down relatively old and unimportant legislation. When acting contrary to the dominant coalition, it is often because the court, as in the early New Deal, has not yet been realigned via appointments.

Judicial Review beyond the American Case and Judicialization of Political Conflict

So much attention to judicial review has been directed to the American case that until the late 20th and early 21st centuries the comparative study of judicial review and of patterns in the constitutionalization of political conflict have been neglected. Hirschl 2004 takes an important step in rectifying that situation, coining the term “juristocracy” to examine trends in the judiciary’s assumption of the powers of representative institutions, constitutionalizing normal political controversies. Does judicial review mark a shift of power from legislative to judicial institutions that has been taking place globally (see Tate and Vallinder 1995) or in particular types of regimes (see Tate and Vallinder 1995, Hirschl 2004)? Does the growth and expansion of judicial review mark a decline of popular governance and a development welcomed by elites to better control democratic movements, as both Hirschl 2004 and Smith 2009 suggest, or how should the judicialization of political conflict in nations that are democratizing be understood? Smith 2009 points out that judiciaries are relatively insulated from popular pressures and suggests that elites may deliberately encourage judicialization of conflict to protect themselves. Does the spread of judicial review to new democracies actually strengthen the forces of democracy, as suggested in Ginsburg 2003? Ginsburg argues that judicial review may be a countermajoritarian institution but it is not counterdemocratic and serves to enhance constitutional dialogue. Indeed, judicial review supports a vibrant democracy and may spread as an institution when diffuse political forces are present at the time of constitutional design and seek the insurance of an alternative forum for challenging government action. The comparative study Tushnet 2008 argues that only weak forms of judicial review tend to comport with majoritarianism and to promote legislative efforts to protect social welfare rights. Tushnet expressed his concerns about the value and wisdom of strong forms of judicial review in Tushnet 1999 (cited under More Recent Treatments). While comparative constitutional law is a rapidly growing field, the works cited here are concerned with the question of migration of constitutional ideas (Choudhry 2006) and of judicial review. Goldsworthy 2006, an edited volume, sets up comparisons of constitutional and interpretive philosophies and judicial responses to similar problems in six federal or quasi-federal systems. The question has been hotly debated in the United States, where the Supreme Court has increasingly made reference to international law when considering such matters as the death penalty. Do such references undermine sovereignty or cultural and institutional particularity?

Choudhry, Sujit, ed. *The Migration of Constitutional Ideas*. Cambridge, UK: Cambridge University Press, 2006.

Referencing foreign constitutional ideas by the US Supreme Court is part of a broader pattern of migration of constitutional ideas. Here prominent scholars examine empirical and normative dimensions of this development. Specific arenas include rights, marriage, antiterrorism and emergency measures in the aftermath of 9/11, treaties, supranational systems, and control systems.

Ginsburg, Tom. *Judicial Review in New Democracies*. New York: Cambridge University Press, 2003.

Judicial review as a form of “cheap minoritarianism” that strengthens transitional democracies and enhances constitutional dialogue. Studies three Asian democracies that transitioned from authoritarian regimes in the 1980s and 1990s (Taiwan, Mongolia, and South Korea). Judicial review is a political tool employed as insurance by risk-averse parties to constitution framing in the face of potentially worsening electoral fortunes.

Goldsworthy, Jeffrey, ed. *Interpreting Constitutions: A Comparative Study*. Oxford: Oxford University Press, 2006.

Court-focused comparison of constitutional interpretive methods and philosophies in six federal or quasi-federal nations (Australia, Canada, Germany, India, South Africa, the United States) allowing comparison of judicial responses to similar and dissimilar challenges in different contexts. Finds substantive differences in legalism, what the rule of law means, use of precedent, reference to other nations.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, 2004.

Four common law polities (Canada, Israel, South Africa, New Zealand) are explored to trace global expansion of “juristocracy”—judiciary’s assumption of the power of representative institutions to secure the political objectives of elites. Common-law democracies with longstanding sociopolitical divisions are ripe territory for judicial involvement; constitutional revolutions stem from political elites vying for power, not rights-conscious popular movements.

Smith, Rogers. “The Supreme Court and the Idea of Democracy: A Machiavellian View.” In *The Supreme Court and the Idea of Constitutionalism*. Edited by Steven Kautz, Arthur Melzer, Jerry Weinberger, and M. Richard Zinman, 199–217. Philadelphia: University of Pennsylvania Press, 2009.

Core elite interests may be better protected in democratized regimes by strengthening judicial power, as courts are relatively insulated political institutions. Judicialization of conflict is seen as a strategic attempt to delimit and contain political debate within channels that are relatively safe for elites as democratization expands; it may allow elites to preserve and promote wealth acquisition.

Tate, C. Neal, and Torbjörn Vallinder, eds. *The Global Expansion of Judicial Power*. New York: New York University Press, 1995.

Expansion of judicial power and judicial decision making into political arenas is an important global trend. Notes the appearance of quasi-judicial procedures in nonjudicial decision making and negotiating arenas, also expanding in many democracies. Essays explore judicialization in English-speaking democracies, European democracies, postcommunist nations, and a few additional democracies; some comparisons.

Tushnet, Mark V. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton, NJ: Princeton University Press, 2008.

A narrow and weak form of judicial review (wherein legislatures and executives may overcome constitutional rulings by the judiciary) may cause the least strain to the principle of majority rule, allow for strong social rights protections, and encourage legislatures to enforce constitutional norms. Compares the United States, the United Kingdom, Canada, and other nations that institutionalize judicial review.

Constitutionalism

This is but a brief introduction to a huge body of literature. Many questions can be examined under the rubric of "constitutionalism": what constitutes a constitution, a written constitution's relationship to statute law, where the authority to interpret comes from and to whom it belongs, whether the text is fixed or dynamic, and the relationship between constitutionalism and democracy. Constitutionalism is examined by philosophers, historians, and empirical social scientists. The term itself was quite in vogue during the mid-20th century, and McIlwain 2008 is a revived classic from the eve of World War II appealing especially to moderate and conservative scholars. Pennock and Chapman 1979 collects the views of a number of legal and political theorists to think about a range of issues associated with constitutionalism; the volume notes that the term "constitutionalism" was not frequently used at that time. Renewed recent attention derives, in part, from studies of comparative constitutionalism and also from concerns about how constitutions do or do not function well in the face of diversity. Graber 2013 is a good example of this renewed attention, thinking comparatively and working in the historical institutionalist tradition. Recent contributions include several very good edited volumes. Alexander 1998 gathers some outstanding contributors to examine the philosophical foundations of constitutionalism, and Kautz, et al. 2009 focuses on the relation between the court and constitutionalism in the American case, with contributors including a number of political philosophers. Written by a law professor, Griffin 1996 is a monograph on constitutionalism in America drawing on both law and political science to examine its dynamic practice. Levinson 2011, a brilliant essay, takes seriously the idea of the American Constitution as civil religion. Sanford Levinson demonstrates the ambiguities of constitutional faith and how different permutations of "Catholic" and "Protestant" beliefs about the written text and the locus of the authority to read, interpret, and own the Constitution can lead to very different constitutional results. Balkin 2011, dedicated to Levinson, argues that belief in the legitimacy of the US Constitution is premised on faith in completion of its (variously envisioned) projects.

Alexander, Larry, ed. *Constitutionalism: Philosophical Foundations*. Cambridge Studies in Philosophy and Law. Cambridge, UK: Cambridge University Press, 1998.

Distinguished legal theorists with diverse perspectives consider matters of constitutional legitimacy and interpretation. What is a constitution? Who can be considered its authors? What makes for authoritative interpretations? A broad and important set of philosophical investigations.

Balkin, Jack M. *Constitutional Redemption: Political Faith in an Unjust World*. Cambridge, MA: Harvard University Press, 2011.

A living originalist argues the Constitution's legitimacy depends on public faith in a constitutional project that includes its future trajectory. Constitutions are always backed by stories about the people to whom it belongs. The faith of Americans in constitutional redemption entails their right to decide for themselves what it means; thus, constitutional principles change over time.

Graber, Mark A. *A New Introduction to American Constitutionalism*. New York: Oxford University Press, 2013.

A superb reintroduction to American constitutionalism for the post–New Deal constitutional order, blending historical institutionalism, politics, and history with legal scholarship. Considers constitutions comparatively with attention to intersections with international law. Examines what constitutions do and how they work. Rather than constrain government action, constitutions structure politics and create and order preferences.

Griffin, Stephen. *American Constitutionalism: From Theory to Politics*. Princeton, NJ: Princeton University Press, 1996.

To understand the Constitution and American constitutional tradition, study the idea of constitutionalism as a somewhat implausible political, dynamic practice. Blends constitutional theory in law and political science; relates the state, institutions, and behaviorist research to constitutional theory. Key questions for contemporary constitutionalism: constitutional powers, representation, and legitimacy.

Kautz, Steven, Arthur Melzer, Jerry Weinberger, and M. Richard Zinman, eds. *The Supreme Court and the Idea of Constitutionalism*. Philadelphia: University of Pennsylvania Press, 2009.

Consideration of the place of the court in our constitutional order from a number of disciplinary and methodological perspectives with scholars spanning the political spectrum. Philosophical and historical origins of constitutionalism, theories of constitutionalism in American history, comparative analyses. Some strong contributions.

Levinson, Sanford. *Constitutional Faith*. Princeton, NJ: Princeton University Press, 2011.

Levinson uses religious analogies for understanding "Catholic" and "Protestant" strains of constitutional interpretation. Produces differences in belief about the exclusivity of written scripture versus the legitimacy of unwritten tradition and in the authority of a single institution to give binding interpretation versus the legitimacy of a nonhierarchical interpretation. Afterword faults constitutional worshippers for failure to link current political dysfunctions to constitutional causes. Includes a new afterword by the author.

McIlwain, Charles Howard. *Constitutionalism: Ancient and Modern*. Indianapolis: Liberty Fund, 2008.

Originally delivered as Cornell University lectures on the eve of World War II and first published in 1940, this grand historical investigation of constitutionalism and constitutional history argues, in a manner appealing to constitutional conservatives and moderates, for balance between *jurisdictio* and *gubernaculum*. Reformers and constitutionalists must both moderate. Available at The Online Library of Liberty.

Pennock, J. Roland, and John W. Chapman, eds. *Constitutionalism*. Nomos: Yearbook of the American Society for Political and Legal Philosophy 20. New York: New York University Press, 1979.

Political and legal philosophers consider the meaning of constitutionalism and the fact that constitutionalism seems to have dropped out of scholarship in the 1970s, with reflections on the work of Carl Friedrich. Essays range from 16th-century France to contemporary Nigeria; includes comments and critiques of some essays.

Constitutional Moments, Constitutional Transformations, and Popular Constitutionalism

The Constitution is dynamic, and struggles reshape it. Sometimes transformation comes by Article V amendment, but are there other kinds of authoritative constitutional amendments? The enormously influential works Ackerman 1991, Ackerman 1998, and now (although in somewhat revised form) Ackerman 2014 answer "yes": normal politics differs from constitutional politics; the latter arises in extraordinary periods, when the people mobilize, speak authoritatively through new legislation, and create a new constitutional order to protect rights and liberties. Bruce Ackerman's New Deal has a particular normative claim: there have been three foundings—the founding of 1787, the Constitution of the Civil War amendments and Reconstruction, and the New Deal Constitution. Amar 1998 also maintains that popular understandings of the Constitution change; in the case of the Civil War amendments, those new popular understandings were enshrined in our core document only to be recast by an unsympathetic Supreme Court that simply did not "get it right." Amar 1998 is chiefly concerned with the transformation of the Constitution from a majoritarian document to one that placed more emphasis on individual rights and curbs on state power between the founding and the late 19th century. Kahn 1994 finds the court increasingly rights protective, but differences between justices in how they weigh and balance polity and rights principles explain their decision making. Graber 2006 presents an original argument about what constitutions do and how constitutional compromises that place certain moral issues off the table are often required for people with deeply held beliefs to live together. By the 1850s changes in population and congressional representation seriously undercut the bargain, precipitating a constitutional crisis the court did not create. Kersch 2004 dismisses Ackerman's (and mainstream legal liberalism's) "Whiggish narrative" that treats the New Deal as the apex of American political development and that attempts to delegitimize changes wrought by the William Rehnquist court. Change often substitutes one set of rights (and victors) for another in this innovative reexamination of several early- to mid-20th-century issues in law and politics. Ackerman 1991 and Ackerman 1998, which stress revolution from below, and Kramer 2004 emphasize the popular role in determining the Constitution's meaning. For Kramer, this power was given to the people by the framers, though the court has been trying to eliminate this power with assertions of judicial supremacy. Smith 1997 offers an influential multiple traditions approach to explore American political development. Elites mobilize liberal, ascriptive, and republican strains in our political tradition to move law and politics in particular directions; the court is located in this narrative.

Ackerman, Bruce. *We the People: Foundations*. Cambridge, MA: Belknap, 1991.

In an argument that has been embraced by liberal constitutional scholars, Ackerman argues for a kind of dualism in which some legislation is ordinary and some, embodying a revolutionary consciousness, in fact amends the Constitution without the use of Article V. The New Deal Constitution achieves the status of a third foundational moment (the second being the Civil War amendments and Reconstruction).

Ackerman, Bruce. *We the People: Transformations*. Cambridge, MA: Belknap, 1998.

In Volume 2 of *We the People*, Ackerman offers historical evidence for his claim that the people have mobilized to produce constitutional change during three constitutional moments. Court resistance helped shape emphatic political responses in dialectical fashion. A dynamic of legitimate constitutional change challenges formalists and court-centered understandings of change.

Ackerman, Bruce. *We the People: The Civil Rights Revolution.* Cambridge, MA: Belknap, 2014.

Volume 3 examines the status of civil rights era constitutional transformations. A longer constitutional moment than those non-Article V amendments from earlier volumes, the civil rights revolution institutionalizes smaller changes within an existing regime. The court signals changes with *Brown*, but landmark statutes are critical to entrenching constitutional principles and transformation.

Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction.* New Haven, CT: Yale University Press, 1998.

A sophisticated if idiosyncratic originalist reads meaning from how the structure of the Bill of Rights maps onto the structure of the 1787 Constitution. The pre-Civil War Constitution focused on rights retained by the people collectively, while the Civil War amendments ratified changes in popular understanding and remade the Constitution, shifting it more toward individual rights. Develops the notion of refined incorporation of the Bill of Rights.

Graber, Mark A. *Dred Scott and the Problem of Constitutional Evil.* Cambridge, UK: Cambridge University Press, 2006.

With a focus on one of the court's most reviled cases, Graber argues that constitutions are designed to set conditions under which people with irreconcilable moral views can live together; they function best when they create conditions under which political order can be preserved. An important rereading that concludes slavery had to be kept off the table; *Dred Scott* was a plausible decision constitutionally.

Kahn, Ronald F. *The Supreme Court and Constitutional Theory, 1953–1993.* Lawrence: University Press of Kansas, 1994.

Justices use polity and rights principles to reach different but principled decisions within a liberal tradition. Polity principles concern strongly held ideas about where decision-making power should lie when deciding questions of constitutional significance; rights principles involve views of legally enforceable individual power or immunities. Argues against the view that judges follow their own political preferences and predilections when deciding (see *Judicial Behavior and the Attitudinal Model*). See also Louis Hartz's *The Liberal Tradition in America* (New York: Harcourt, Brace, 1955).

Kersch, Ken I. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law.* Cambridge, UK: Cambridge University Press, 2004.

Attacks the conventional narrative about the court's role in expanding rights and lionization of the New Deal court, demonstrating that new conceptions of rights displace older ones, producing winners and losers. Privacy and criminal process, education, and labor case studies lead to an alternative explanation of constitutional development.

Kramer, Larry D. *The People Themselves: Popular Constitutionalism and Judicial Review.* New York: Oxford University Press, 2004.

Americans in the founding era exercised active, popular sovereignty over the Constitution and its interpretation; the framers were not antidemocratic. Historical evidence shows how ordinary citizens have struggled to maintain their authority over the Constitution. The court has been able to get away with a great deal; Kramer urges an end to judicial supremacy while defending departmentalist judicial review.

Smith, Rogers M. *Civic Ideals: Conflicting Visions of Citizenship in US History.* New Haven, CT: Yale University Press, 1997.

A scholar of political thought and institutional development focuses a good deal of attention on constitutional interpretation and the court to argue that America has multiple traditions—liberal, ascriptive, and republican; all remain viable, and outcomes are not presumptively liberal. Elites mobilize these traditions in the service of their own goals.

New Institutionalism, New Historical Institutionalism, and the Court

Beginning around the 1990s, new historical institutionalism began to take aim at scholars who contend that the court is merely a collection of individuals attempting to maximize their policy preferences (see *Judicial Behavior and the Attitudinal Model*). Scholars in this field conceptualize court decision making in relationship to broader political processes while maintaining that the court as an institution has rules, norms, and principles of its own that are predictive of its decisions. The court is not, then, unprincipled, and it often requires historically grounded scholarship to discover and explain those principles. New institutionalist scholarship is also directed toward explaining doctrinal development and change within this framework. Smith 1988 is one of the earliest essays that influenced the development of new institutionalism on the court. Gillman 1993 is an early and important New Historical institutionalist examination of the principled nature of *Lochner v. New York* era court decision making, refuting the claim (indeed Oliver Wendell Holmes's claim in dissent from *Lochner* itself, which found its way into orthodoxy) that members of the court were merely enforcing their own extraconstitutional economic theories. Clayton and Gillman 1999 provides a very rich and valuable collection of essays on institutionalism and new institutionalist approaches to the court. Gillman 1993 and Gillman and Clayton 1999 are wide-ranging collections on the relationship between institutional structure and judicial behavior. Novkov 2001, building on Howard Gillman's rereading of the *Lochner* era, demonstrates the essential role of gender in the development of new legal doctrine concerning labor and posits that in moments of intense conflict, undertheorized court decisions open opportunities for activists outside the court to participate in change and development. Orren and Skowronek 2004 has exerted a massive influence on American political development scholarship, including studies of the court, by positing institutional mismatches in the development of American institutions, opening opportunities for contestation and change. Kahn and Kersch 2006 assembles a

series of essays exploring the relationship between factors “inside” the court and factors “outside” the court in thinking about the court’s role in American political development. Graber 2006 (cited under Constitutional Moments, Constitutional Transformations, and Popular Constitutionalism) is likewise interested in the conditions underpinning constitutional crisis and change in this work on *Dred Scott*. Whittington 2007 finds that institutional relations between branches of government and indeed the type of presidency (as classified by Stephen Skowronek in *The Politics Presidents Make*, rev. ed. [Cambridge, MA: Harvard University Press, 2000]) are predictive of behavior of the court, its willingness to strike down laws, and its assertions of judicial supremacy.

Clayton, Cornell W., and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press, 1999.

Offers many excellent essays on what new institutionalism is, on what institutional approaches to the court do, and on legal norms and internal structure as factors in decision making plus a section on extrajudicial influences by scholars less regularly associated with new institutionalism.

Gillman, Howard. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham, NC: Duke University Press, 1993.

Attacking the view that the *Lochner* court was unprincipled, Gillman demonstrates that the court was applying enduring 19th-century principles, such as “no class legislation,” at a time when economic and social changes made such principles less viable. Important rereading of the substantive due process era.

Gillman, Howard, and Cornell Clayton, eds. *The Supreme Court in American Politics: New Institutional Interpretations*. Lawrence: University Press of Kansas, 1999.

An array of scholars focus on how distinct institutional characteristics of the court are essential to an adequate understanding of Supreme Court politics and examine the role that institutional structures play in motivating and giving direction to judicial behavior.

Kahn, Ronald, and Ken I. Kersch, eds. *The Supreme Court and American Political Development*. Lawrence: University Press of Kansas, 2006.

Well-structured historical institutionalist anthology on understanding the court’s place in saying what the law is, on the relationship between factors internal to the court (principles, precedent), and on factors external to the court (organized interests, the legal community) in explaining the court’s role in political development. Includes some case studies.

Novkov, Julie. *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years*. Ann Arbor: University of Michigan Press, 2001.

Production of constitutional doctrine occurs when highly contested issues reach the court, decisions employ undertheorized legal concepts and language, and those outside the court in the interpretive community use and appropriate those concepts and language. While generally following the Gillman 1993 lead, gender is central in understanding constitutional change 1873–1937.

Orren, Karen, and Stephen Skowronek. *The Search for American Political Development*. New York: Cambridge University Press, 2004.

American political development scholars posit that political institutions that develop at different times can be mismatched, with overlapping processes and lacunae producing opportunities for political dynamism. Conflict between institutions and policies drives political development. Helps readers think about the court’s place in development.

Smith, Rogers M. “Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law.” *American Political Science Review* 82.1 (1988): 89–108.

An influential reconsideration of the role of normative ideas in law with a view to generating empirical agendas for scholars dissatisfied with attitudinal and rational choice scholarship on the court. Ideational “stickiness” can be important to understanding change. Contributed to the growth of the field.

Whittington, Keith E. *Political Foundations of Judicial Supremacy*. Princeton, NJ: Princeton University Press, 2007.

Why and under what conditions have Americans come to accept judicial supremacy? Continuing the argument from his *Constitutional Construction* (Cambridge, MA: Harvard University Press, 1999) that different branches struggle for authority to interpret the Constitution, he draws on Stephen Skowronek’s typology in *The Politics Presidents Make*, rev. ed. (Cambridge, MA: Harvard University Press, 2000) to examine conditions under which other branches might choose to defer to the judiciary.

Judicial Behavior and the Attitudinal Model

Empirical, quantitative scholarship on the Supreme Court presumes that law, precedent, and distinctive institutional norms and constraints matter little when compared with the ideological and policy preferences of those serving on the court. Scholars seek to demonstrate the predictive power of their explanatory framework, often with elaborate models. Influenced by legal realism, economic rational choice scholarship, and behavioralism of the 1960s, several approaches have emerged in the literature. Schubert 1974, a pioneering work first published in the mid-1960s, and Segal and Spaeth 2002 focus on the ideological preferences of individual justices. Those who

focus on attitudes generally try to locate an individual justice's ideology in issue space and to measure particular decisions against that locus. Some scholars believe a strategic approach is necessary, since voting his or her actual preferences may not advance an individual justice's policy goals. Using a formal model of Supreme Court certiorari decisions, Caldeira, et al. 1999 finds individual justices to be sophisticated voters who base their actions on expectations and desires about decisions on the merits. Epstein and Knight 1998 and Maltzman, et al. 2000 develop complex explanations of voting behavior. Rational actors seeking to realize their preferences have to take many other factors into consideration, both inside and outside the institution of the court. In these two works ideological proclivities of individual justices, then, fail to explain strategic behavior on the court. Baum 2006 adds another consideration, looking at judges' desire for esteem in making their choices; they derive little benefit from policy maximization, and it is not sufficient to motivate them. All, however, share the view that judges do not simply discover and apply the law. Lauderdale and Clark 2012 makes an important contribution by demonstrating that justices are not neatly aligned on a single continuum across issue areas, developing a new method to study voting patterns and median justices. Maveety 2003 offers a very useful collection on the pioneers of attitudinalism, strategic choice, and historical institutionalism in the context of the field of political science at the time.

Baum, Lawrence. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton, NJ: Princeton University Press, 2006.

Drawing on social psychology, Baum seeks to demonstrate the value of considering judges' sensitivity to the esteem of various audiences that may be important to them as a means of understanding judges' choices. They are not simply motivated by desire to achieve their policy goals. Chapter 1 has a valuable review of the literature on models and approaches to judicial behavior.

Caldeira, Gregory A., John R. Wright, and Christopher J. W. Zorn. "Sophisticated Voting and Gate-Keeping in the Supreme Court." *Journal of Law, Economics, and Organization* 15.3 (1999): 549–572.

Using data from the October 1982 term, authors develop and test a formal model, determining that justices are sophisticated voters acting with the potential outcome of a decision on the merits in mind when deciding whether to grant certiorari.

Epstein, Lee, and Jack Knight. *The Choices Justices Make*. Washington, DC: Congressional Quarterly, 1998.

Drawing on rational choice approaches, the authors argue that judges pursue policy goals but have to be strategic actors to do so. A richer portrait of the ways policy preferences matter on the court than many other accounts, relying on more than ideology. This requires bargaining and sometimes forgoing their most preferred positions.

Lauderdale, Benjamin E., and Tom S. Clark. "The Supreme Court's Many Median Justices." *American Political Science Review* 106.4 (2012): 847–865.

Extant one-dimensional spatial models fail to adequately capture judicial preferences. New approach, using multiple indexes of substantive similarity among cases, allows judicial preferences to vary across substantive legal issues over time. During all periods of the modern court, there is substantial variation in identity of median justice, not a simple left-right classification.

Maltzman, Forrest, James F. Spriggs II, and Paul J. Wahlbeck. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press, 2000.

Justices seeking to achieve their own policy goals must interact with other court colleagues when crafting opinions; institutional framework matters. Drawing on the Warren Burger court opinion database, authors claim that justices attempt to secure opinions that approximate their policy positions while basing their decisions in part on the actions and positions of their colleagues.

Maveety, Nancy, ed. *The Pioneers of Judicial Behavior*. Ann Arbor: University of Michigan Press, 2003.

Individually authored chapters provide perspectives on the work of early practitioners of the field of judicial behavior, including C. Herman Pritchett, Glendon Schubert, Harold J. Spaeth, and Walter Murphy. The introduction on approaches to judicial behavior and the section on historical-institutionalist pioneers convey a good sense of the directions in which the field has developed.

Schubert, Glendon A. *The Judicial Mind Revisited*. New York: Oxford University Press, 1974.

Known for developing the attitudinal model of decision making on the court. Developed a scale to locate justices in ideological space based on justices' values and case stimuli. This is an updated version of *The Judicial Mind* (Evanston, IL: Northwestern University Press, 1965).

Segal, Jeffrey A., and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press, 2002.

Uses the Supreme Court Database (cited under Databases and Electronic Resources), justices' private papers, and more to analyze the appointment process, granting of certiorari, opinion assignments, decisions on the merits, and opinion coalitions on the court. Criticizes legal and rational choice models. Update of the original 1993 publication.

The Modern Conservative Legal Movement

The revival of judicial conservatism since the 1970s is an important development in the legal academy, among activists, and now on the court. Primary and secondary sources that help one understand this emerging movement are included here. Important works by conservative and libertarian scholars who have influenced judicial conservatism include Barnett 2013, Bork 1990, and Epstein 1985. The defeat of Robert H. Bork's nomination to the court in the second Ronald Reagan administration galvanized conservative and originalist legal scholars, and Bork 1990 is an early rallying cry. Epstein 1985, by a prominent critic of the New Deal expansion of the power of the federal government, focuses here on the takings clause of the Fifth Amendment, arguing for much more stringent protection of fundamental property rights. Barnett 2013 is a more recent voice in the conservative legal circles but highly effective in arguing that the New Deal commerce clause has been the engine for improper expansion of the federal government but arguing at the same time for libertarian fundamental rights. The Federalist Society for Law and Public Policy Studies is the most prominent organization of legal scholars committed to building the intellectual infrastructure for the movement, though this is hardly the only organization. Hollis-Brusky 2015 examines means by which the Federalist Society became so influential. Teles 2008 does a good job of examining various conservative organizations with a legal agenda; see also Southworth 2008. Kersch 2011, whose author has a larger project underway on the emergence of modern constitutional conservatism, examines the development of thought in one prominent conservative magazine. O'Neill 2005 does a very nice job of situating the rise of modern originalist thinking in the context of the decline of earlier versions during the early to mid-20th century, examining ideas and theorists in the context of responses to particular judicial decisions.

Barnett, Randy E. *Restoring the Lost Constitution: The Presumption of Liberty*. Princeton, NJ: Princeton University Press, 2013.

Originally published in 2004. One of the more subtle and elegant libertarian voices argues that natural rights precede the Constitution. Instead of islands of power in a sea of liberty, he argues we now have islands of liberty in a sea of power. Supports some of the liberal court's rights agenda but not the New Deal interpretation of the commerce clause. Includes a new afterword by the author.

Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. New York: Free Press, 1990.

Judge of the US Court of Appeals and the District of Columbia Circuit and a former Yale law faculty member whose nomination to the Supreme Court by Reagan was blocked by liberals, Bork argues that adherence to the original understanding of the Constitution would eliminate the judicial aristocracy that has substituted their own (liberal) views for those of the framers. Active in the Federalist Society for Law and Public Policy Studies.

Epstein, Richard. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, MA: Harvard University Press, 1985.

While the focus on takings would appear narrow, the emphasis on private property rights leads Epstein to a frontal attack on the New Deal, on the court's reading of the commerce clause, and on the regulatory state. While Epstein has published a number of later books, this one has galvanized the property rights movement.

The Federalist Society for Law and Public Policy Studies.

Comprised of conservatives and libertarians determined to break the grasp of liberal orthodoxy on the nation's law schools and judges. Judges should say what the law is, not what they want it to be. Advanced the names of Justices John Roberts and Samuel Alito for the court. Sponsors journals, conferences, and resources for activists.

Hollis-Brusky, Amanda. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. New York: Oxford University Press, 2015.

Examination of how the Federalist Society exerts influence over the judiciary and jurisprudence since its founding in 1982. Draws upon interviews, documents, and transcripts to trace how a loosely organized network of activists became a powerful force in reshaping the meaning of the Constitution in response to liberalism.

Kersch, Ken I. "Ecumenicalism through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review*, 1955–1980." *Studies in American Political Development* 25.1 (Spring 2011): 86–116.

Part of a historical research project to examine how contemporary constitutional conservatism was forged and disseminated, with different strands coming together and eventually mounting a shared populist critique of judicial power as ideologically driven, antidemocratic, and elitist, posing a challenge to the New Deal constitutional order. Examines a premier conservative postwar magazine.

O'Neill, Johnathan. *Originalism in American Law and Politics: A Constitutional History*. Baltimore: Johns Hopkins University Press, 2005.

How originalism developed beginning in the 1960s and 1970s into an increasingly cogent way of evaluating court decisions and constitutional theories. With some attention to foundations, the bulk of the book is devoted to New Deal marginalization of formalism and post-*Brown v. Board of Education* factors leading to the flourishing of originalism into the 1990s.

Southworth, Ann. *Lawyers of the Right: Professionalizing the Conservative Coalition*. Chicago: University of Chicago Press, 2008.

Exploration of what divides social conservatives, business interests, and libertarians who have come to support the Republican Party. Based on interviews with lawyers representing these conservative organizations, Southworth finds the tensions between elite and populist elements in these organizations to be serious.

Teles, Steven M. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law.* Princeton Studies in American Politics. Princeton, NJ: Princeton University Press, 2008.

The challenge to liberal domination of legal institutions that began in the 1970s has been only partly successful. Draws on inside materials from the Olin Foundation, the Federalist Society for Law and Public Policy Studies, the Institute for Justice, the Law and Economics Center, and the Center for Individual Rights to examine how organization, networking, and institution building are essential to movement success.

Law and Society

"Law and Society" is originally a movement, an organization, and an approach to law that believes it is best understood through social scientific inquiry; it links to the sociology of law. Multidisciplinary and diverse in methods, these scholars examine law and legal institutions in their social contexts. Beginning in 1966, the movement began its own journal, *Law and Society Review*, which has published a large number of influential articles. Frequently empirical, the movement has a significant connection to Judicial Behavior and the Attitudinal Model; it is frequently critical of existing inequalities, and there has been some connection to critical legal studies. Abel 1980 looks at some of the early areas of concern of law and society scholarship. Friedman 1986 provides a short but excellent treatment of the origins and early years of the movement. Silbey 2002 also looks back on its history and development in a very short treatment designed for a less sophisticated audience. Also included are works that have been widely cited in the field, such as Galantner 1974, which reflects the progressive orientation found in parts of the movement. Felstiner, et al. 1980–1981 has also been recognized for its influence and examines how injuries and conflicts do or do not become the fodder for legal disputes. Brigham 1987 offers a broad and influential examination of what the court is, as a set of practices, and how the cult of the court has allowed it to monopolize constitutional interpretation. Sarat 2004 is an important collection of postrealist law and society scholarship reflecting declining confidence in the political utility of social knowledge, new interdisciplinary ventures, and exploration of how law performs in various social domains.

Abel, Richard. "Redirecting Social Studies of Law." *Law and Society Review* 14.3 (1980): 805–829.

A former editor of *Law and Society Review* examines the kind of work being done in three areas—functions of law, legal institutions, and values served by law—and interrelations and overlap among these categories.

Brigham, John. *The Cult of the Court.* Philadelphia: Temple University Press, 1987.

What the court is rather than what it does. What the court says has become the Constitution through a "cult" of the court. The court as an institution is a set of practices; monopoly on interpretation has developed through these practices. An innovative and critical examination of the court from a law and society perspective.

Felstiner, William L. F., Richard L. Abel, and Austin Sarat. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming." In *Special Issue: Dispute Processing and Civil Litigation.* Edited by Joel B. Grossman and David M. Trubek. *Law and Society Review* 15.3–4 (1980–1981): 631–654.

Examines the emergence and transformation of disputes before they enter the legal system. How are injurious incidents perceived, transformed (or not) into grievances and disputes? An important, understudied issue in sociology of law. Recognized for its lasting contribution to the law and society field.

Friedman, Lawrence M. "The Law and Society Movement." *Stanford Law Review* 38 (February 1986): 763–780.

Points to diversity within the movement and its commitment to study law with tools from outside the law itself. Commitment to scientific method but without seeking a science of law; non-normative; law is not sacred. Excellent brief introduction and overview from one of the movement's founders who has written other influential works in the field.

Galantner, Marc. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9 (Autumn 1974): 95–160.

An influential exploration of how the basic architecture of the legal system limits the ability to use the system to bring about redistributive (more egalitarian) change. An elegant examination of rule-making and rules that bring the "haves" out ahead.

***Law and Society Review.* 1966–.**

Official publication of the Law and Society Association. One can look at several sample issues online, including the most recent. High-quality articles.

Sarat, Austin, ed. *Blackwell Companion to Law and Society.* Blackwell Companions to Sociology. Malden, MA: Blackwell, 2004.

An elegant attempt to map out the shared conversations in the law and society field and in this sense to establish its minimum grammar rather than to focus on shared methods. Assembled by a major contributor to law and society scholarship.

Silbey, Susan S. "Law and Society Movement." In *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia*. Vol. 2. Edited by Herbert M. Kritzer, 860–863. Santa Barbara, CA: ABC-CLIO, 2002.

Succinct overview of the movement locating it amid scholarly traditions in the study of law and courts and providing some suggestions for further reading.

Critical Legal Scholarship

Critical legal theory and critical race theory have developed important critiques of mainstream analysis of law and courts. Critical theory is often influenced by Marxian class analysis and seeks to demystify law as part of a project of social change. Both critical legal theory and critical race theory challenge the notion that law is neutral or objective; it is the result instead of power struggles, and law "sees" through the eyes of victors in these struggles. Whose experiences count? Law seems neutral only to those who are in a privileged position. Critical legal studies (CLS) as a movement and critical race theory as a movement are each annotated in this section. Most CLS scholars were not particularly quick to integrate gender or race into accounts of domination.

Critical Legal Studies

Unger 1986, written by a leader in the critical legal studies movement, sees law as an expression of the institutions that underlie it, and working for greater democracy within the existing framework is inadequate to address domination; institutions must change. Tushnet 1983 provides a strong example of how a critical legal studies scholar sought to dismantle conservative and moderate interpretive approaches of the day. Hutchinson 1989 is a good anthology of critical legal studies work collected ten years after the movement began, and it explains that by unmasking how law works as ideology, it is possible to subvert the political and philosophical authority of law. A number of essays in Hutchinson 1989 and in Kairys 1998 are valuable in offering students schooled in more conventional approaches to law a different perspective. Kelman 1987 offers an accessible intellectual history of the movement and of the schools of thought it critiqued. MacKinnon 1993, by an author who has written importantly on sexual harassment, integrates gender into the analysis, finding that pornography harms and discriminates against women. There are many more feminist, progressive, and post-structural volumes on law, but the texts in this subsection are more directly rooted in the critique developed by critical legal theorists.

Hutchinson, Allan C., ed. *Critical Legal Studies*. Totowa, NJ: Rowman and Littlefield, 1989.

A very good anthology of critical legal studies work ten years after its inception, covering theory, history, contradictions in law and interpretation, ideology, and critical practice. Diverse pieces share the contention that law operates as ideology, affording the appearance of legitimacy and inevitability to social structures.

Kairys, David, ed. *The Politics of Law: A Progressive Critique*. 3d ed. New York: Basic Books, 1998.

A number of Marxist or progressive legal scholars (not as explicitly CLS) write accessible and often very good essays about topics in liberty, equality, labor, social welfare, property, crime and justice, structure of government, and more, concluding with a section on progressive approaches to law. Retains classroom appeal.

Kelman, Mark. *A Guide to Critical Legal Studies*. Cambridge, MA: Harvard University Press, 1987.

Reflective examination by a partisan of the movement's history, discussing where it stands in relation to other approaches to law at the time and the targets of its critiques and examining some key texts of the movement.

MacKinnon, Catharine A. *Only Words*. Cambridge, MA: Harvard University Press, 1993.

While her stance on pornography is frequently criticized, MacKinnon here distinguishes between obscenity (speech) and pornography (subjection of women, discrimination). The feminist scholar and activist who was instrumental in getting the court to see the victim's perspective in sexual harassment argues that pornography is discrimination and defamation. A short, forceful argument.

Tushnet, Mark V. "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles." *Harvard Law Review* 96 (February 1983): 781–827.

A hard-hitting, effective, and efficient attack by a CLS founding member on attempts to discover the meaning of the Constitution (originalism, interpretivism) and Herbert Wechsler's neutral principles. These are based in communitarian assumptions of conservative social thought. Constitutional meaning is far more open-ended.

Unger, Roberto Mangabeira. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press, 1986.

A key player in the early critical legal studies movement states the case against formalism and objectivity. While certain rights claims fail to threaten established power relations, there can also be destabilization rights.

Critical Race Theory

Critical race theory emerged as a number of scholars saw that critical legal theorists were not theorizing issues of race and racism at law. The work goes well beyond discussions of affirmative action and equal protection at law to theorize from positions of marginality. It shares a number of premises about legal objectivity, formalism, and neutrality with critical legal theory but adds a sense of alienation from the voice in which the law speaks. Kimberlé Crenshaw has written a number of important essays on the intersectionality of race and gender at law. Crenshaw, et al. 1995 presents a number of formative writings during roughly the first decade of critical race theory. Matsuda, et al. 1993 focuses specifically on hate speech as it harms and marginalizes. In the liberal orthodoxy of free speech law, more speech is better; critical theorists represented in Matsuda, et al. 1993 argue that it asks those who have historically been victims to bear the brunt of the free speech of others. While difficult to categorize, as she herself states, the work of the law professor Patricia J. Williams (e.g., Williams 1991) displays the influence of critical race theory by focusing on voice and experience, invisibility at law, and intersectionalities of race and gender. At the beginning of a new century, Valdes, et al. 2002 collects a wide variety of scholars to think about the past, present, and future of critical race theory during a period of legal retrenchment.

Crenshaw, Kimberlé, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. *Critical Race Theory: The Key Writings That Formed the Movement*. New York: New Press, 1995.

Collection of writings by those who confronted the relative silence of critical legal studies writers on race and racism, demonstrating how experiences of alienation and subordination in law and the legal academy can be confronted.

Matsuda, Mari J., Charles R. Lawrence III, Richard Delgado, and Kimberlé Crenshaw. *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. Boulder, CO: Westview, 1993.

Hate speech silences, harms, and marginalizes racial minorities. Substantial essays consider what kinds of hate speech should be proscribable and under what circumstances along with what constitutional doctrines and tests might be available to get there. Considers campus hate speech codes, face-to-face insults, segregation, and more.

Valdes, Francisco, Jerome McCristal Culp, and Angela P. Harris, eds. *Crossroads, Directions, and a New Critical Race Theory*. Philadelphia: Temple University Press, 2002.

Thirty-one scholars present original essays on ideas and methods of critical race theory and on its past, present, and future. Drawing on many techniques, including biography, they examine how race continues to permeate America's consciousness. A good, wide-ranging discussion.

Williams, Patricia J. *The Alchemy of Race and Rights*. Cambridge, MA: Harvard University Press, 1991.

A set of creative, important reflections about how law sees or fails to see race, legal objectivity, and why rights-based advocacy is important for those who have not historically had rights, even as feminists sometimes downplay the importance of working for rights.

Feminist Legal Theory, Queer Legal Theory

Feminist legal theory and scholarship tends to range from liberal to Marxist and more recently deconstructionist and post-structuralist. The peak period for production of this scholarship was arguably the 1970s to the 1990s, aligning with the Equal Rights Amendment campaign and with new court decisions considering sex discrimination under Title VII of the Civil Rights Act and the Fourteenth Amendment. Much has been written on the merits of sameness or difference as approaches to equal protection; sections of Weisberg 1993 examine this debate. Some feminist scholars, however, believe that engagement with the law and its legal categories eschews opportunities for more substantial, radical change. Brown 1995, by a political theorist influenced by post-structuralism, embraces this argument, cautioning against rights obsession, identity politics, and turning to courts and other institutions to advance democracy. Brown and Halley 2002 draws on feminist theory, critical legal theory, and queer theory to question whether progressives gain or lose by engaging liberal legality. Williams 1991 (cited under Critical Race Theory) challenges feminists who make the argument that attention to rights is misplaced, especially in the case of African Americans. Baer 1999 also insists that feminist theory and liberal legal discourse must engage each other, deploring the direction much feminist legal scholarship had taken by the 1980s. MacKinnon 1987 seriously engages law to try to effect change (sexual harassment, pornography) while developing powerful criticism of the ways law maintains gendered power relations. By an influential feminist legal scholar, Cornell 1995 moves beyond liberal legality, employing feminist legal and political theory and psychoanalysis to consider the minimum conditions for gender equality at law. Bedi 2013 urges a move away from the court's classification framework for race, gender, and sexual orientation in order to achieve progress on equality. Queer theory continues to develop. A number of gay and lesbian legal scholars have focused their attention on the battle over gay marriage, incurring criticism from other queer theorists for a limiting and conservative focus that asks society merely to treat gay unions just like other marriages rather than using queer theory to challenge the way law sees. Koppelman 2002 has some (prescient) faith that the liberal constitutional order can address discrimination against gays and that gay marriage may be forthcoming; court imposition of an array of gay rights risks resistance and backlash. Eskridge 1999, by a premier legal theorist and courtroom activist, offers a history of same-sex intimate relations in the United States and in the court. Burgess 2008 makes innovative use of queer theory to argue that equality requires destabilization and defamiliarization of legal discourse.

Baer, Judith A. *Our Lives before the Law: Constructing a Feminist Jurisprudence*. Princeton, NJ: Princeton University Press, 1999.

Seeking to reconnect feminist legal scholarship to concrete problems with the liberal legal system, Baer seeks to recenter discourse around male domination and female subordination (not gender difference) and individual rights that are not simply male rights. Feminists must confront mainstream discourse; mainstream discourse must confront feminism.

Bedi, Sonu. *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity*. New York: Cambridge University Press, 2013.

Dealing with race, sex, and sexual orientation, Bedi rejects the court's current tiered approach to equal protection, including suspect classification. There are limited reasons government can invoke to treat individuals unequally; laws embodying moral or religious conceptions of the good life fail. Unacceptable motives readable from statutes include animus (e.g., *Romer*, *Lawrence*).

Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity*. Princeton, NJ: Princeton University Press, 1995.

While not strictly focused on the court, Brown effectively skewers the argument in *MacKinnon 1987* about pornography and argues that a victim perspective undermines agency. Identity politics have translated grievances into rights claims, which hampers democratic change and places too much power in the hands of courts.

Brown, Wendy, and Janet Halley, eds. *Left Legalism/Left Critique*. Durham, NC: Duke University Press, 2002.

A collection that engages progressive feminists, critical legal theorists, and queer theorists, offering a Left critique of liberal legalism and skepticism about the value of engaging the law; many of the essays were previously published.

Burgess, Susan. *The Founding Fathers, Pop Culture, and Constitutional Law: Who's Your Daddy?* Burlington, VT: Ashgate, 2008.

Extremely fresh, creative reflections on moving beyond the founders, who were patriarchal and unconcerned about many inequalities. Narrative analysis, pop culture, parody, and queer theory are used to perform a way to democratize and destabilize constitutional discourse, reconstitute politics, and uncouple judicial review from the intent of the framers. Works with cases from the late 20th and early 21st centuries and three prominent constitutional theorists.

Cornell, Drucilla. *The Imaginary Domain: Abortion, Pornography, and Sexual Harassment*. New York: Routledge, 1995.

Feminism, legal and political theory, and psychoanalysis conjoined in an original work on the minimal conditions necessary for women to individuate themselves so they can become equal citizens at law. Includes the right to bodily integrity and to an "imaginary domain" wherein there is opportunity for free play of one's sexuality. Draws on John Rawls and Jacques Lacan.

Eskridge, William N., Jr. *Gaylaw: Challenging the Apartheid of the Closet*. Cambridge, MA: Harvard University Press, 1999.

A law professor, courtroom activist, and author of a casebook and numerous works on gay rights examines the history of same-sex intimacy, drawing on law, feminist, queer, and Foucauldian theories. Subtle analysis of late-20th-century case law (through *Romer v. Evans* [1996]) and legal struggles.

Koppelman, Andrew. *The Gay Rights Question in Contemporary American Law*. Chicago: University of Chicago Press, 2002.

Exploration of moral and constitutional questions raised by discrimination against gays. While gay marriage and gay equality find constitutional defense, Koppelman argues that courts should not be the ones to impose it.

MacKinnon, Catharine A. *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press, 1987.

A classic, influential, forceful collection of essays and talks by a prominent feminist legal theorist on what is wrong with privacy law, how the law treats women as demanding special privileges, the gendered nature of law, domination, pornography, abortion, rape, and sexual harassment. See also MacKinnon's *Only Words* (MacKinnon 1993, cited under Critical Legal Studies).

Weisberg, D. Kelly, ed. *Feminist Legal Theory: Foundations*. Philadelphia: Temple University Press, 1993.

Issues in feminist legal theory and methods are explored well by thirty-eight legal scholars. Highly useful guide to varieties of feminist legal thought as of the early 1990s, including essays on sameness and difference, the meaning of equal protection, essentialism, intersections of race and gender.

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