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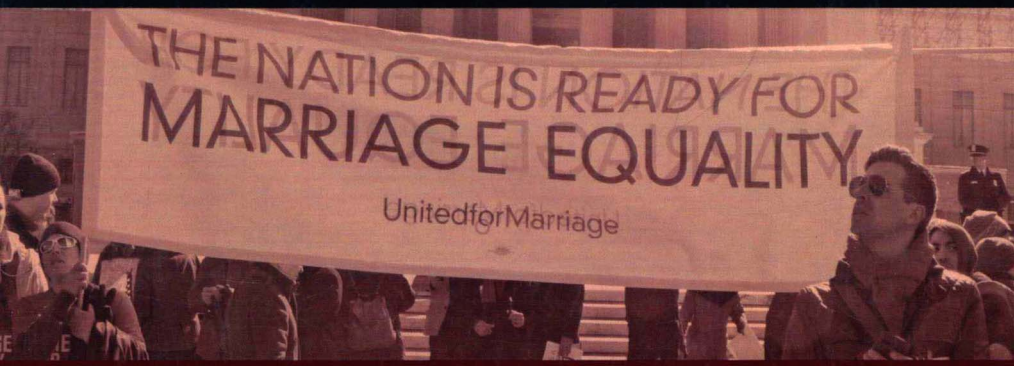
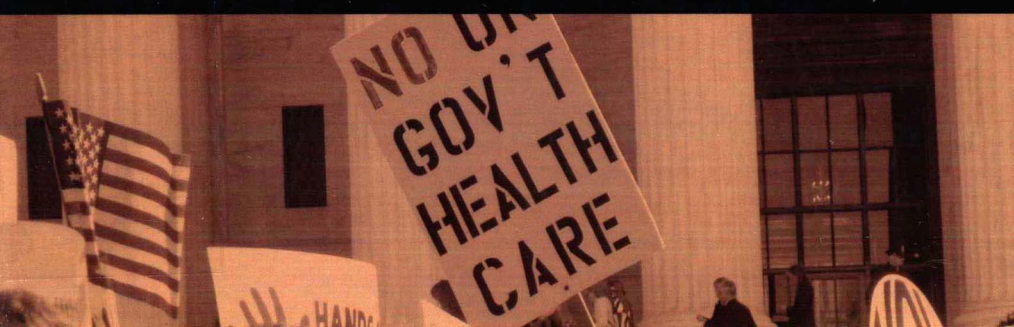


THE BLESSINGS OF LIBERTY

A Concise History of the Constitution of the United States

MICHAEL LES BENEDICT



The Blessings of Liberty

A Concise History of the Constitution of the United States

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Michael Les Benedict

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Preface

In *The Blessings of Liberty*, I have tried to provide a brief, accessible history of our fundamental constitutional commitments as a people. The book is appropriate for a one-semester course; however, it can also serve as the foundation for an extended course when used with readings or with an anthology of primary documents, such as Benedict, *Sources in American Constitutional History* (1995) or Urofsky and Finkelman, *Documents of American Constitutional and Legal History* (3rd edition, 2007).

I have sought to recreate the story of how a living idea has influenced the course of American history, rather than to compile an encyclopedia of statutes and court cases. Most studies of constitutional history recount how the formal institutions of American government developed, describe the relationship between the state and federal governments, and chronicle the Supreme Court's promulgation of constitutional law. But in recent years legal scholars have begun to stress the important role the American people themselves have played in defining the contours of the constitutional system. They speak of popular constitutionalism and constitutional politics, as well as constitutional law. *The Blessings of Liberty* reflects this insight. It covers the traditional subjects of constitutional history and also presents a history of American constitutionalism itself—the development and consequences of Americans' belief that they and their government are bound by fundamental law and guided by basic principles of rights and liberty. It discusses how Americans have applied those principles when making public policy, a process that forces them to think through what they mean. This is what we mean by constitutional politics. *The Blessing of Liberty* treats constitutional law as only a part of the story—the formal expression of popular understandings, strongly influenced by mingled or conflicting currents of popular thought.

Therefore this book is about the interaction of Constitution and society. It proceeds from the conviction that constitutionalism has meaning only as it affects and is affected by practical political, social, and economic issues. This third edition of *The Blessings of Liberty* reflects new scholarship throughout. Earlier chapters are updated. To take into account developments since 2004, the final chapters of the second edition and a new chapter are added.

We have entered an era of intense political disagreement and partisanship. A good deal of the conflict is over what the Constitution commands and forbids. Many positions reflect considered interpretations of the meaning of the original text and the amendments to it, and of the spirit in which they were written and ratified. Some are based on misconceptions. I have tried not to insert my own views. But by its nature history stresses change over time. One can make compelling legal, political, and philosophical arguments that the best way to understand what the Constitution commands is to ask what it meant to those who ratified it and the amendments to it. Jurisprudents called this conviction "originalism." But a constitutional *history* must describe how and why understandings have changed over time.

As a history, the development of this book is chronological, from the English origins of American constitutional ideas to the present. But within the chronology, I have attempted to deal coherently with different themes. The individual chapters are focused and of manageable length. Each begins with an introductory summary and is then divided into discrete sections. A timeline at the end of each chapter indicates the most important events and gives brief descriptions of each. The further readings sections provide sources for exploring some topics more thoroughly. I have tried to cite the most seminal works as well as the most recent and accessible.

The Blessings of Liberty is the outgrowth of over thirty years of teaching American constitutional history. I owe whatever is good in it to the scholars from whose published research I have drawn; to the colleagues and graduate students who have analyzed and debated that work with me; and to the students who have taken my constitutional history survey classes, asking me new questions, challenging my interpretations, and contributing their own. I am grateful for the insightful, often trenchant comments of the reviewers who read the original manuscript, and to those who suggested changes incorporated into later editions. I owe thanks to the History Department of the Ohio State University, my academic home for nearly forty years; the Ohio State Moritz College of Law, where I have been adjunct professor and now am visiting scholar; and the University of Texas Law School, which has graciously appointed me visiting scholar during my yearly spring term visits. Finally, I owe more than I can ever repay to my wife Karen and to our dear friends, who have brought so much joy to our lives.

Introduction

The American Constitution and American Constitutional History

The Constitution of the United States was framed in 1787, ratified in 1788, and became operative in 1789. The text has changed only slightly since. The document is remarkably terse—far shorter than those of the individual states and perhaps the briefest written constitution in the world. The government structure it outlines seems simple, but the simplicity is illusory.

When they established the Constitution, its framers violated the basic rule that there must be a "sovereign" authority somewhere in every government—a final, indivisible authority that can make and enforce rules upon all other people and institutions and from which there is no appeal. Instead of establishing such a sovereign authority within the government, the Constitution's preamble recognized the sovereignty of the people of the United States. Through the Constitution, the people have established a government no part of which has final authority. The Constitution divides governmental power in many ways. A variety of government bodies have enough power to "check" and "balance" the others. Furthermore, the Constitution creates a "federal system" of government—a system in which a central government has final power over some matters and local governments have final power over others. Finally, to protect rights and to avoid collisions of power in certain areas, the Constitution specifically withholds various powers from the states, or the central government, or both.

The practical workings of the American government are even more complex than the system outlined in the Constitution. Americans have established governmental institutions not mentioned in the Constitution at all. The very brevity of the document has required Americans to interpret the meaning of many of its provisions. This has led to bitter disagreements over what the Constitution requires or permits. People often complain that some government activity is "unconstitutional"—that is, that it violates the rules set down in the Constitution. Sometimes these disputes have been settled through politics, other times by the courts, and sometimes by violence. Because Americans consider the Constitution

to be fundamental law, lawyers, judges, and courts have played a key role in interpreting and applying it. But for most of our history, constitutional issues have been important to ordinary Americans as well, and constitutional arguments have been a big part of public policy making. The Constitution is interpreted and applied through constitutional politics as well as constitutional law. The relationship between the two is complicated, and analysts are still trying to figure it out.

Constitutional controversies are not merely matters of theory. Few people would expend the resources, and even blood, that Americans have spent over constitutional issues if they did not involve important material interests. Nonetheless, commitment to abstract constitutional principles is a crucial element in the making of public policy in the United States. In the American constitutional system, a claim of a *right* has precedence over the claim of a mere interest.

Take, for example, the issue of censoring the press in order to promote decency and morality. In our system, the constitutional *right* to freedom of the press takes precedence over society's *interest* in maintaining public order or good morals. Naturally, authors, editors, publishers, broadcasters, internet providers, and bloggers claim the right to freedom of the press energetically, because they have a special interest in being able to decide freely what to publish, broadcast, and post online. But some people may be personally offended by the language or images appearing in the media. They may resent insults aimed at particular groups and beliefs. They may believe that some expressions undermine the moral and material well-being of society. They may argue strenuously for some degree of censorship in various circumstances. But they must reconcile their demand with the Constitution's explicit protection of freedom of the press. The Constitution provides a powerful weapon with which authors, publishers, bloggers, and broadcasters can appeal for the support of Americans who do not share their material interest in maximum freedom of the press. Even those most sympathetic to imposing some limitations might feel a conflict between their desire to promote civility, order, and morality and their own commitment to freedom of the press.

Material issues are also affected by the federal system. The balance of power among competing interest groups often is different within individual states from what it is in the nation as a whole. Therefore, a state may establish a completely different policy to deal with some problem than the federal government would establish if it had the authority to do so. Throughout American history, different groups have tended to support or oppose "broad construction" of national power depending on whether they thought the national government or the state governments would be more likely to promote their interests. If they control state governments, those who oppose national policies can do a great deal to obstruct their administration.

The same is true of the separation of powers that the Constitution establishes among the branches of the federal government. Different constituencies have different degrees of influence in Congress, the executive branch, and the courts. The shape of public policy on any subject will depend on which branch of

government can claim the most authority to establish it. Therefore, people with different interests have often urged greater legislative, executive, or judicial power depending upon which forum is most likely to promote the policies they want. These constitutional questions add an important element to debates over policy, as those without material interests at stake make their decisions at least in part based on their philosophies of federalism and separation of powers. Like federalism, separation of powers enables those who dissent from public policies to try to obstruct them. Sometimes such obstructionism leads to outright gridlock.

A textbook on constitutional history must address the social, economic, and political issues that have precipitated constitutional disputes, and the way constitutional principles have affected their outcomes. One cannot understand how deeply held constitutional principles led to the American Revolution without understanding the practical interests at stake. One cannot comprehend how the conflict over slavery led to secession and Civil War unless one studies both the material and the constitutional issues. People do not expend blood and treasure on constitutional abstractions. But neither do they do so over material interests alone. During and after the revolution, Americans paid more in taxes than the British had ever hoped to collect. But they paid those taxes to governments that had the *right* to levy them. In 1861 Southerners had cheaper and safer alternatives than secession to protect their interest in slavery. But they believed with profound conviction that federal policies inhibiting slavery violated their constitutional *right* to maintain and promote it. They could not be expected to surrender their constitutional rights to satisfy what they regarded as Northerners' mere prejudices on the issue.

Because Americans conceive their Constitution to be law, the American constitutional system gives the courts an important influence over public policy. Judges are affected by their own material interests and their political, economic, and social philosophies. But they are also strongly influenced by their legal training and their commitment to legal reasoning. Moreover, federal judges and, to a large degree, state judges are insulated from the immediate political pressure imposed by popular elections. They have held policies with powerful political support to be unconstitutional, profoundly affecting the course of American history. But the courts are also part of a larger dialogue about what the Constitution means and how to put those meanings into practice. The judges and justices are not only influenced indirectly by those discussions but are bombarded by formal efforts to bring those ideas to bear through lawsuits brought for that very purpose, with attendant briefs and oral arguments. Courts, and especially the Supreme Court, become the focal points of a much broader contest.

Despite increased scholarly attention to the ways in which the other branches of government and the people themselves influence constitutional interpretation, most Americans nowadays regard the courts, especially the Supreme Court of the United States, as the final authority upon the constitutionality of state and national laws. For that reason some people think that American constitutional history is nothing more than the history of a series of court cases. But court deci-

sions have authority because the American people are committed to adhering to the rules that the Constitution imposes, and because they have concluded that judges are particularly suited to divine what those rules are.

Yet there are limits to how far judges can go in deciding contests over the meaning of the Constitution. Americans rarely defy judicial decisions interpreting the Constitution outright. But if the underlying issue remains contested, dissenters may take private and legislative action that saps much of their effect. There is always the potential of tension between judicial interpretation and popular constitutionalism. Judicial awareness of that potential has often tempered court action.

Americans' commitment to obeying basic rules of government is called "constitutionalism." It is an application to a constitutional system of the principle of "the rule of law." Without it, there is no way to enforce constitutional rules, and constitutions become meaningless scraps of paper. That is why there are more constitutions in the world than there are actual constitutional governments. American constitutional history attends not only to constitutional law as expounded by courts but to public understandings of the meaning of the Constitution and public commitment to constitutionalism.

This textbook attempts to convey the history of this complex system of constitutional government, as well as its interaction with social and economic institutions, in a relatively small number of pages. It can only provide an overview. Each chapter begins with a brief summary and then discusses specific topics. The list of further readings that follows this introduction includes works that provide more detailed descriptions of American constitutional history. Neither this discussion nor those that follow each chapter is meant to be comprehensive. The suggested books and articles are either especially important or particularly accessible to the non-specialist. Subtitles are omitted unless necessary to explain the subject.

As this book goes to press, Americans face challenges that test our fidelity to constitutionalism and the rule of law. Deep divisions within our society have eroded political civility and respect for the democratic process. Deeply committed partisans claim that they alone are faithful to the Constitution and summarily dismiss rival understandings. Thoughtful observers worry that the Supreme Court has become disrespectful of the other institutions of government. The threat of terrorism forces us to ask how far we should go to limit freedom at home and tempts us to bend the rules of international law abroad.

We have faced similar challenges in the past. Crises have sometimes led us to drift from our constitutional moorings. But in the end these challenges have served to strengthen Americans' commitment to our fundamental principles, as we have reconsidered decisions made under stress and vowed to do better. Knowing where our ideas of liberty and government came from, how we have fought over them, what we have achieved, and where we have failed seems more important than ever. No textbook can resolve the constitutional controversies now before the American people, but perhaps historical perspective will help us find the answers.

FURTHER READING

Readers who need a more comprehensive American constitutional history textbook should consult Melvin I. Urofsky and Paul Finkelman, *A March of Liberty* (3rd ed., 2011) or Edgar J. McManus and Tara Helfman, *Liberty and Union* (2013). Detailed indexes, tables of cases, and bibliographies make these texts useful for initial research on particular subjects or cases. The *Encyclopedia of the American Constitution*, edited by Leonard W. Levy et al. (2nd ed., 2000) includes many historical entries, as do the *Encyclopedia of American Civil Rights and Liberties*, edited by Otis H. Stephens Jr. et al. (2006) and the *Oxford Handbook of the U.S. Constitution*, edited by Mark Tushnet et al. (2015). In *Constitutional Law Stories*, edited by Michael C. Dorf (2nd ed., 2009), law professors and political scientists offer essays on fifteen of the most important Supreme Court cases in American history. Those seeking a more scholarly introduction to aspects of constitutional history might consult David J. Bodenhamer's essays in *The Revolutionary Constitution* (2012) and the essays in *Constitutionalism and American Culture*, edited by Sandra VanBurkleo et al. (2002). As the titles indicate, the authors are careful to link American constitutional development to social, cultural, and other changes. The American Historical Association continues to publish an excellent series of concise *New Essays on American Constitutional History* that also go beyond mere court cases. The University Press of Kansas continues to publish a series of Landmark Law Cases and American Society, which, as its title indicates, place federal courtroom controversies in their political and social context. John J. Dinan establishes the importance to American history of constitutionalism at the state level in *The American State Constitutional Tradition* (2006).

The three volumes of Bruce Ackerman's *We the People*, titled *Foundations* (1991), *Transformations* (1998), and *The Rights Revolution* (2014), broke new ground in integrating American constitutional history and constitutional theory. The introduction to *The Rights Revolution* is a must-read for understanding the role the American people play in changing constitutional regimes. No one has integrated constitutional history and constitutional theory more eloquently or elegantly than Ackerman's student Akhil Amar. Read his big, complementary volumes *America's Constitution: A Biography* (2006) and *America's Unwritten Constitution* (2012). Augment them with his *The Bill of Rights: Creation and Reconstruction* (1998).

Michael Kammen has written perceptively about the general place of constitutionalism in American culture in *A Machine That Would Go of Itself* (1986). Legal scholars are beginning to attend to constitutional controversy outside the courts. David P. Currie shows the centrality of constitutional arguments in pre–Civil War congressional debates in the volumes of his *The Constitution in Congress* (1997–2005). Constitutional theorist H. Jefferson Powell grapples with the relationship between political and constitutional argument in *A Community Built on Words* (2002). David Cole demonstrates how constitutional politics changes constitutional law in *Engines of Liberty* (2016). Larry D. Kramer recovers the popular basis of American constitutionalism in *The People Themselves* (2004). Constitutional jurisprudents are still trying to work out the interaction among popular constitutionalism, constitutional politics, and constitutional law. For efforts to do so in the context of particular events and issues, see the essays in *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch (2006). In a dense and difficult book, *Constructing Civil Liberties* (2004), Kersch tries to undermine what he calls "the Whiggish" interpretation of American constitutional history that limns a progressive unfolding of American constitutionalism centered on the Supreme Court. His stress on the multiple sources of American constitutionalism coincide with the approach of this textbook, but the textbook is still "Whiggish" in the sense that it does offer a chronicle of unfolding ideas. One of historians' most essential commitments is to explain how were got to where we are from where we were. This commitment inevitably means stressing the events that describe the progression,

A number of works provide overviews of the constitutional history of specific constitutional institutions. Sidney M. Milkis and Michael Nelson, *The American President* (6th ed., 2012) is a standard account of the institutional growth of the executive branch. Michael P. Riccards, *The Ferocious Engine of Democracy* (1995) is an excellent historical study of the presidency, with consistent attention to constitutional aspects of the office and the issues. Richard J. Ellis's *The Development of the American Presidency* (2012) takes an explicitly constitutional approach. John Yoo's history of executive power from Washington to the second President Bush, *Crisis and Command* (2012) is a historical brief for a strong presidency. Louis Fisher vehemently disagrees in *Constitutional Conflicts between Congress and the President* (6th ed., 2014). The essays in *The Presidents and the Constitution*, edited by Kenneth Gormley (2016), concentrate on how individual presidents confronted constitutional issues. Michael Gerhardt goes into more detail when describing the constitutional legacies of *The Forgotten Presidents* (2013). Harold H. Bruff describes how presidents have interpreted the Constitution in *Untrodden Ground* (2015).

Richard A. Baker's somewhat dated bicentennial history *The Senate of the United States* (1988) provides a good overview. Supplement it with Neil MacNeil and Richard A. Baker, *The American Senate* (2013), which takes a thematic approach to the Senate's history to the present day, or Lewis L. Gould's *The Most Exclusive Club* (2005). Robert V. Remini, *The House* (2007), describes institutional developments but concentrates more on contemporaneous political issues. Donald C. Bacon et al. (eds.), *The Encyclopedia of the United States Congress* (1995) contains general, chronological essays on the history of Congress, biographical articles, and essays on specific congressional events and issues. One should consult the *Encyclopedia of the United States Congress* (2007), edited by Robert E. Dewhirst, but it is not an adequate replacement.

The classic history of the Supreme Court through the Progressive Era is Charles Warren's three-volume *The Supreme Court in United States History* (1924). Although dated, it is unrivaled for locating the Court's first century of decisions in contemporary politics. The individually authored volumes of *The History of the United States Supreme Court* (1971–), published by the Oliver Wendell Holmes Devise, are full of detailed information but best used as reference works. David P. Currie, *The Constitution in the Supreme Court* (1985–1986), is an encyclopedic chronicle of Supreme Court constitutional decisions. The best recent scholarship on the Supreme Court is in the essays included in *The United States Supreme Court* (2005), edited by Christopher Tomlins, but some of them are hard going.

Of the numerous one-volume histories of the Supreme Court, William Wiecek's *Liberty under Law: The Supreme Court in American Life* (1988) remains the best modern overview, but it must be augmented by more recently published accounts. The fifth edition of Robert G. McCloskey, *The American Supreme Court* (2010), brings a concise, readable, thoughtful old standard up to the present. Lucas A. Powe Jr.'s *The Supreme Court and the American Elite* (2009) is also a readable survey that, like McCloskey's work, does not take judicial supremacy for granted. Powe observes that the court was at its most effective—and powerful—when it acted with rather than against the dominant political forces of the time. Jeffrey Rosen takes the same view in his very readable *The Most Democratic Branch* (2006). Peter Hoffer et al., *The Supreme Court* (2007), and Edward F. Maninno, *Shaping America* (2009), are straightforward, informative accounts. The *ABC-CLIO Supreme Court Handbooks*, organized by tenure of chief justices, provides useful information on each court, its personnel, and its decisions, as well as thoughtful essays on the general historical context in which it deliberated and its legacy. For a nicely written history of the federal courts in general, see Peter Hoffer et al., *The Federal Courts* (2016).

The most complete account of the history of American federalism is in Peter A. Zavodnyik's two volumes *The Age of Strict Construction* (2007) and *The Rise of the Federal Colossus* (2011), which ends with the close of the Herbert Hoover presidential administration in 1933. Michael C. Remington's *Federalism and the Constitution* (2002) is a very concise chronological survey. David Brian Robertson provides a historical overview of *Federalism and the Making of America* (2012) from the perspective of a political scientist. Elvin T. Lim's *The Lovers' Quarrel* (2014) is a brilliant argument that the Constitution represented the temporary triumph of a federalist, consoli-

dationist view of the United States that did not extirpate the rival confederationalist, state-rights view. Lim chronicles how American politics has revolved around the controversy ever since. In a compelling analysis aimed at sophisticated readers, *Originalism, Federalism, and the American Constitutional Enterprise* (2007), Edward A. Purcell shows how the ambiguities inherent in federalism at the founding has led to multiple conflicts over the relationship between state, local, and national power. The essays in *Union and State's Rights* (2014) focus on interposition, nullification, and secession from the framing to the present.

The chronological essays in *Government and the American Economy* (2007), edited by Price Fishback, emphasize the role of the Constitution, courts, and the federal system in American economic development. Donald J. Pisani, "Promotion and Regulation: Constitutionalism and the American Economy," in *The Constitution and American Life*, edited by David P. Thelen (1987), provides an insightful overview of how constitutional commitments affected American economic development to the late twentieth century. See also Harry N. Scheiber's classic "Federalism and the Economic Order, 1789–1910," *Law and Society* 10 (Fall 1975). Stuart Banner, *American Property* (2011) is a free-ranging, well-written discussion of changing definitions of property and property rights. James W. Ely's concise *The Guardian of Every Other Right* (2nd ed., 2008) is a more traditional history.

James McGregor Burns and Stewart Burns provide a broad political history of civil rights and liberty in the United States in *A People's Charter: The Pursuit of Rights in America* (1991). Eric Foner's *The Story of American Freedom* (1998) studies freedom broadly defined. Michael Kammen's *Spheres of Liberty* (1986) is a cultural history of the subject. Akhil Amar offers a brilliantly insightful history of *The Bill of Rights* (1998).

Stephen M. Feldman's *Free Expression and Democracy in America* (2008) is a weighty tome chronicling the relationship among America's traditions of free dissent, its suppression, and formal constitutional law. Christopher M. Finan's *From the Palmer Raids to the Patriot Act* (2007) is an engagingly written history of freedom of expression from the perspective of a thoughtful civil libertarian. In *Religion and the American Constitutional Experiment* (2nd ed., 2005), John Witte Jr. describes the origins of the principles that characterize American religious liberty and then assesses America's effort to live up to them. Philip Hamburger's *Separation of Church and State* (2002) is a detailed history of the subject. James F. Harris's more concise *The Serpentine Wall* (2013) is somewhat scattershot in its approach. Edwin S. Gaustad's *Proclaim Liberty throughout All the Land* (2003) is a concise history of the Supreme Court's First Amendment religion-clause decisions. Melvin I. Urofsky's *Religious Freedom* (2002) is another concise survey, with documents, also attending mainly to Supreme Court cases. Louis Fisher's *Religious Liberty in America* (2002) argues that Americans have protected religious liberty primarily through the political rather than the judicial process.

Lawrence M. Friedman's magisterial *Crime and Punishment in American History* (1993) goes far beyond the development of law enforcement institutions, criminal procedure, and defendants' constitutional rights. He portrays the relationship among crime, punishment, society, and culture. Samuel Walker's *Popular Justice* (2nd ed., 1998) is shorter, well written, and informative. Herbert Johnson et al., *History of Criminal Justice* (4th ed., 2008), ranges from ancient origins through modern America with remarkable compression. Even more concise is Elizabeth Dale's survey *Criminal Justice in the United States, 1789–1939* (2011), which describes the transition from local, popular, relatively informal justice to a centralized, formalized, court-based system. David J. Bodenhamer, *Fair Trial: Rights of the Accused in American History* (1992) is a good survey. Rhodri Jeffrey-Jones offers an insightful, balanced history of *The FBI* (2007).

John Hope Franklin and Alfred A. Moss's scholarly *From Slavery to Freedom* (8th ed., 2000) has long been the standard history of African Americans and their struggle for racial justice. Robert Cottrol's remarkable comparative history of race and law in the Americas, *The Long, Lingering Shadow* (2013), is well worth reading. Henry Louis Gates Jr. and Donald Yacovone, *The African Americans*, is an engaging survey aimed at a more general audience, rich with anecdotes and telling sketches of black lives. Donald G. Nieman's *Promises to Keep: African-Americans and the Constitutional Order* (1991) is an outstanding synthesis that must be supplemented by Adam Fairclough's excellent *Better Day Coming: Blacks and Equality, 1890–2000* (2001). In *Unfinished Business* (2007) Michael Klarman

scouts "naïve" histories that attribute racial progress partly to empathy or constitutional convictions on the part of white Americans. Stephen Tuck challenges many interpretive orthodoxies in chronicling the African American struggle for power in *We Ain't What We Ought to Be* (2010). In her beautifully written *A Dreadful Deceit* (2013), Jacqueline Jones spans American history to argue that race has been significant only as one of the many ways the powerful exploit those without power. William McKee Evans couldn't disagree more. His *Open Wound: The Long View of Race* (2014), a capacious overview, sees race as the quintessential mode of domination in America.

For the history of women's rights, see Sandra VanBurkleo's comprehensive synthesis *"Belonging to the World": Women's Rights and American Culture* (2001). Linda K. Kerber stresses how relieving women of constitutional obligations undermined their constitutional status in *No Constitutional Right to Be Ladies* (1998). Dorothy Sue Cobble, et al., *Feminism Unfinished* (2014) stresses the role working-class women played in promoting a social justice-oriented feminism. Joan Hoff 's legal history of American women is a trenchant account of *Law, Gender, and Injustice* (1991). John R. Wunder tells the story of Native Americans and the Constitution in *"Retained by the People"* (1994). Frank Pommershein is more analytic and prescriptive in his version of the story, *Broken Landscape* (2009). Rogers M. Smith's *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997) is an influential general assessment of traditions of inclusion and exclusion in the American community. Judith N. Shklar's *American Citizenship: The Quest for Inclusion* (1991) is a briefer assessment based on a series of lectures. Alexander Keyssar's *The Right to Vote* (revised ed., 2009) covers this important aspect of citizenship and belonging. Aristide Zolberg's *A Nation by Design* (2006) and Kunal M. Parker, *Making Foreigners* (2015) discuss immigration and American constitutional policy, with special emphasis on American efforts to distinguish insider from outsider.

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1
English Origins of American Constitutionalism

Understanding the origins of the American constitutional system requires knowledge of its English background. Especially significant are the "common law" of England and the bitter constitutional struggle of the seventeenth century that shaped English and American understandings of British liberty and the British constitution. By the seventeenth century, when most of the North American colonies were established, English people had come to see themselves as entitled to liberty. Liberty meant freedom from arbitrary power and governance under the rule of law. The rule of law required that laws be publicly known, that no one was above the law, and that all were equal before it. They identified liberty with the common law, which resolved private disputes according to known principles and precluded the king from infringing on subjects' rights without getting the consent of their representatives in Parliament.

During the seventeenth century, liberty and the rule of law were threatened. Both Parliament and the king claimed larger areas of power, leading to a bitter conflict between them. If the king won, English liberty might give way to royal absolutism, as happened in much of Europe. The liberty that Englishmen were so proud of meant much more to the elite than to most English people, who still lived in poverty and ignorance in the countryside and in the teeming slums of London. It was enjoyed by men, and only in a limited way by women. But the conflict was real. Its outcome was crucial to the constitutional history of both England and America.

The Common Law and the Rights of Englishmen

The settlers who colonized British North America during the 1600s and 1700s, displacing Native Americans through war and disease, came from many nations. Tens of thousands had been torn from Africa and imported as slaves. Most had come from Europe. Some arrived from Germany, the Netherlands, and Scandinavia, others from France, Ireland, and Scotland. By far the largest number came from England. Because the colonies were British possessions and because most of the settlers shared an English heritage, English cultural institutions

predominated. English settlers insistently claimed the rights of Englishmen, in part because their king ruled over a variety of realms—England, Scotland, Ireland, and various "plantations"—and accorded his subjects fewer rights in some than in others.

Nearly all Americans lived under an essentially English legal system. Early American law, established in the first colonies in the early 1600s, was strongly influenced by the customs of local English courts. In Puritan New England, the Bible was another important source of law, although not of procedure. New Englanders also seem to have adopted many of the ideas of Puritan legal reformers, simplifying procedures and reducing the number of crimes punishable by death. But the greatest influence on American law was the "common law" of England. This body of rules had developed over the centuries in the royal courts known as the King's Bench, which dealt with crimes; the Court of Common Pleas, which dealt with disputes over property and personal injuries; and the Court of Exchequer, which had jurisdiction over disputes arising out of tax collection. These courts maintained records of their procedures and decisions; judges treated these records as establishing the rules for deciding similar later cases. The origins of some of the procedures of the common law courts, such as jury trials and the right to call witnesses, dated to the 1300s. Others had developed more recently. Although they often complained about them, Englishmen saw these royal, common law courts as a source of government protection against the encroachments of the rich and powerful.

Of particular importance to English people was the common law's use of juries in cases involving property or serious criminal offenses. Less serious criminal cases were generally tried before justices of the peace, influential local figures who received royal commissions to act as magistrates and county administrators. In serious criminal cases one generally had to be indicted by a grand jury before being brought to trial. At the trial itself, a petit jury determined guilt or innocence. Although one had to possess a certain amount of property to sit on a jury, the requirement was set at a level that permitted farmers, tradesmen, and craftsmen to serve. In a nation where only a small minority was entitled to vote, the jury enabled ordinary people to participate in governance. Juries traditionally could modify law enforcement by finding defendants guilty of lesser crimes than charged or by acquitting them altogether. In extreme cases, the jury system enabled ordinary people to obstruct the enforcement of unpopular laws. But most of all, courts were popular places, frequented by a remarkably litigious people, relying on relatively ordinary people to resolve their disputes, which was seen as the prime function of government.

The common law—the law of most of the royal courts—was not England's only legal system. There were other courts. Local courts on manors and in other localities handled minor disputes. English kings issued special charters to various towns, groups, and institutions authorizing them to establish courts to enforce their own rules. Other royal courts served special purposes, with jurisdiction sometimes overlapping that of the common law courts. The Courts of Chancery,