

BREST
LEVINSON
BALKIN
AMAR
SIEGEL

PROCESSES OF
CONSTITUTIONAL
DECISIONMAKING
Cases and Materials

*Fifth
Edition*

ASPEN
PUBLISHERS

PROCESSES OF CONSTITUTIONAL DECISIONMAKING

Cases and Materials

Fifth Edition

Paul Brest

Professor, Stanford Law School
and President,
William and Flora Hewlett Foundation

Sanford Levinson

W. St. John Garwood & W. St. John Garwood, Jr.
Regents Chair in Law
University of Texas

Jack M. Balkin

Knight Professor of Constitutional Law
and the First Amendment
Yale Law School

Akhil Reed Amar

Southmayd Professor of Law
Yale Law School

Reva B. Siegel

Nicholas deB. Katzenbach Professor of Law
Yale Law School

PUBLISHERS

76 Ninth Avenue, New York, NY 10011
<http://lawschool.aspenpublishers.com>

© 2006 Aspen Publishers, Inc.
a Wolters Kluwer business
<http://lawschool.aspenpublishers.com>

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

Printed in the United States of America.

5 6 7 8 9 0

ISBN 0-7355-5062-X

Library of Congress Cataloging-in-Publication Data

Processes of constitutional decisionmaking : cases and materials / Paul Brest . . .
[et al.]. — 5th ed.

p. cm.

Includes bibliographical references and index.

ISBN 0-7355-5062-X (alk. paper)

1. Constitutional law—United States—Cases. 2. Judicial review—United States—Cases. 3. Separation of powers—United States—Cases. I. Brest, Paul.

KF4549.B74 2006

342.73—dc22

2006003927

PROCESSES OF CONSTITUTIONAL DECISIONMAKING

Will E. Beer
Edwin R. Scott Professor of
New York University School of Law

Erwin Chemerinsky
Allan K. Bird Professor of Law
Duke University School of Law

Richard A. Epstein
James Parker Hall Distinguished Service Professor of Law
Professor of Chicago Law School
Fellow and Kristen Bedford Senior Fellow
The Hoover Institution
Stanford University

Ronald J. Gilson
Charles J. Myers Professor of Law and Business
Stanford University
Alan and Isen Stein Professor of Law and Business
Columbia Law School

James E. Kirsh
Earl Warren Del and Professor of Law
The University of Michigan Law School

Richard H. Neumann, Jr.
Professor of Law
David Alan Sklansky
Florida University
Professor of Law

David Alan Sklansky
University of California at Berkeley
Professor of Law
Kent D. Szyverud
University of California

Dean and Edwin A. H. Shepley
Kent D. Szyverud
Washington University Law School
Professor

Richard A. Weisman
Leo G. Gault Professor of Law
Harvard Law School

EDITORIAL ADVISORS

Vicki Been

Elihu Root Professor of Law
New York University School of Law

Erwin Chemerinsky

Alston & Bird Professor of Law
Duke University School of Law

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law
University of Chicago Law School
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Stanford University

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law
Hofstra University School of Law

David Alan Sklansky

Professor of Law
University of California at Berkeley School of Law

Kent D. Syverud

Dean and Ethan A. H. Shepley University Professor
Washington University School of Law

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard Law School

About Aspen Publishers

Aspen Publishers, headquartered in New York City, is a leading information provider for attorneys, business professionals, and law students. Written by preeminent authorities, our products consist of analytical and practical information covering both U.S. and international topics. We publish in the full range of formats, including updated manuals, books, periodicals, CDs, and online products.

Our proprietary content is complemented by 2,500 legal databases, containing over 11 million documents, available through our Loislaw division. Aspen Publishers also offers a wide range of topical legal and business databases linked to Loislaw's primary material. Our mission is to provide accurate, timely, and authoritative content in easily accessible formats, supported by unmatched customer care.

To order any Aspen Publishers title, go to <http://lawschool.aspenpublishers.com> or call 1-800-638-8437.

To reinstate your manual update service, call 1-800-638-8437.

For more information on Loislaw products, go to www.loislaw.com or call 1-800-364-2512.

For Customer Care issues, e-mail CustomerCare@aspenpublishers.com; call 1-800-234-1660; or fax 1-800-901-9075.

Aspen Publishers
a Wolters Kluwer business

To Iris, Hilary, and Jeremy
for the countless hours discussing
the issues in this book — P.B.

To Robert G. McCloskey,
a wonderful teacher and mentor many years ago;
to my colleagues and friends for the past two decades
at the University of Texas Law School;
and to the members of various Internet listservs
who constantly remind me
of the complexities of constitutional analysis — S.L.

To my parents,
Bernard and Bettie Balkin,
who gave me their love
and an education in the law — J.B.

To my students for their inspiration
and to my family — Vinita and Vikram, mom and dad,
mummy and poppa, brothers and sisters —
for their sustenance — A.R.A.

To Yale, my nephew and my students,
in the belief that possibility lives in memory — R.S.

Preface

Our fifth edition brings many changes, among which the most important is the addition of a new editor, Reva Siegel. Paul Brest, the Founding Father of this particular exercise in constitutionalism, retired from active participation in the casebook after the third edition, but he deserves full credit for the remarkable innovativeness of his original 1975 edition and for helping maintain its adventurous and innovative spirit over the years. All of us acknowledge the importance of his example, and we have worked hard to preserve that spirit in what is now the casebook's fifth—quite revised and quite different—edition.

Every casebook involves the construction of a canon—a set of materials and approaches that the editors believe that every student who wishes to master the subject should know. This casebook is no exception. Indeed, we have been particularly conscious of the existing canons of constitutional thought and the kinds of choices that are involved both in the materials presented and in their editing, order, and arrangement. The history of this casebook has been a series of continuing attempts to rethink the existing canon of constitutional law and present a better one. This edition represents our latest views on the subject.

The history of this casebook

The first edition of *Processes of Constitutional Decisionmaking*, published in 1975, was born out of personal frustration with the existing methods of teaching constitutional law. Invariably beginning with *Marbury v. Madison* and introductory sections on judicial review, most casebooks proceeded to examine bodies of substantive doctrine, subject by subject. The question of *how* the courts arrived at their decisions continually arose but was not systematically examined. Nor did casebooks explore the role that legislatures, the executive, and other political institutions (for example, political parties and social movements) played in constitutional decisionmaking. The unspoken and repeated message was that the Constitution was largely what the Supreme Court said it was, and if that Court had not spoken on a particular subject, there was no constitutional law on the question at all.

The first edition, therefore, focused on the methodology of decisionmaking and constitutional interpretation that different actors in the system employed and on the different processes through which constitutional doctrine was created. Although much has changed in the book's coverage over the years, this basic focus on the methods of constitutional interpretation and on the multiple groups and institutions that participate in the creation of constitutional meaning has remained a constant.

The second edition, published in 1983, reflected the lessons learned from teaching the first edition as well as the interests of its new co-editor, Sanford Levinson. As

before, the casebook continued to focus on constitutional law and constitutional interpretations made by nonjudicial institutions. However, beginning with the second edition, the opening half of the book has been explicitly organized on historical-chronological lines, so that students would confront the legal consciousness of a particular period in the context of several different constitutional doctrines. The third edition, published in 1992, added chapters and sections that were organized functionally (e.g., The Constitution in Time of War, Representation Within a Republican Polity, The Constitution in the Welfare State), as well as chapters that reflected traditional doctrinal categories (e.g., Classifications Based on Sex). The fourth edition, published in 2000, consolidated this basic approach.

The organization of the casebook

In this, the fifth edition, we have continued to benefit from classroom experience. The book is divided into two parts. Part One is organized historically according to periods—The Marshall Court, the Taney Court and the Civil War, and the age of industrialization running from Reconstruction to the New Deal. Part One examines recurring constitutional issues of federalism, property rights, racial and sexual equality, governmental (and, more particularly, presidential) authority in time of war, treatment of “subversive” speech, and judicial review.

The materials within each of these periods cover different subjects and doctrines but together reflect the constitutional regimes and political realities that underlie virtually all important constitutional questions in a given era. Thus, for example, we think it is impossible to understand the *Lochner* era’s substantive due process decisions apart from its decisions about the commerce power or the taxing and spending powers. Nor can one understand the nineteenth century’s treatment of women’s rights apart from its understandings about race, or either apart from that era’s understanding of federalism and national power.

The book’s historical organization in Part One ends with the pivotal year of 1937, which marks the boundary that inaugurates the “modern” period in American constitutional law. In the chapters covering material after 1937—which constitute Part Two of the casebook—our organization is topical and doctrinal in a more conventional sense. Chapter 5 begins with an essay on the Bill of Rights and the controversies over its incorporation, including an extended discussion of the Second Amendment. Chapter 5 also features sections on modern economic regulation, the taxing and spending powers, Congressional power under the Civil War amendments, federalism, and separation of powers, including expanded coverage of war and executive power. Chapter 6 covers racial equality, Chapter 7 sex equality, and Chapter 8 implied fundamental rights (including abortion, sexual autonomy, sexual orientation, and medical decisionmaking).

The next chapter (Chapter 9) on The Constitution in the Welfare State retains the more functional approach of previous editions. It covers the problem of procedural due process, affirmative liberties (like education and the rights of the poor), and the problem of conditional subsidies, sometimes called the problem of “unconstitutional conditions.” Chapter 9 is organized in this way because we think that it is important for students to understand the welfare state as a central constitutional structure of our own era that transcends traditional doctrinal categories. For the fifth edition we have moved the materials on alienage from Chapter 9 to the

chapter on racial equality, in part because historically the government's treatment of aliens has often been intertwined with its treatment of race and national origin.

Our organization in this edition marks a division between pre-1937 constitutional law, historically organized, and post-1937, or "modern," constitutional law, organized by doctrinal topic. Nevertheless, we predict that the period we now call "modern" will, in time, be recognized as having a similar unity to previous periods, and that someday it too may deserve a historical treatment. Already the innovations of the Warren Court, the Civil Rights movement, and the second wave of American feminism in the 1970s seem distant to most law students; they have become historical artifacts, much like the struggle over the New Deal seemed to the generation that came of age in the 1960s and 1970s. In particular, we have noted how the legal consciousness that underlies much of the Supreme Court's work following 1937 has slowly given way to new conceptions of federal power, race relations, and civil liberties. The rise of conservative social movements in the 1970s and 1980s, and the dominance of the Republican Party that they helped engender, have had multiple effects in constitutional law, perhaps in no small part because of a series of Republican appointments to the Supreme Court and the lower federal courts. Many have speculated that the September 11 attacks and the War on Terror they inaugurated will have far-reaching effects on the Constitution, civil liberties, and the scope of executive power. Only time will tell, of course; we will not understand the full ramifications of these changes until long after this edition is published. Nevertheless, we have deliberately structured this casebook with an eye to placing contemporary events in their historical perspective, continually asking the student to compare them to constitutional transformations and upheavals of the past. This basic strategy, we hope, will help students take the longer view of the ebb and flow of American constitutional culture, as well as the key role that social movements and political parties play in shaping that culture.

Our historical approach

Although we have worked to make the present edition compatible with many different ways of organizing a basic course in constitutional law, we nevertheless retain a strong commitment to a historical sensibility. Even in materials that are doctrinally organized, we have tried to highlight the social and political context in which constitutional decisionmaking occurs. A historical approach, we believe, has virtues that are lost in a purely clause-bound approach to constitutional law.

In particular, we think it is important for students to recognize that notions of what constitutes a good or persuasive constitutional argument have changed and will continue to change over time. Arguments that might have seemed perfectly reasonable for well-trained lawyers in one period can seem bizarre or "off-the-wall" in earlier or later periods. Arguments that seem to have been written off for good (like the compact theory of state sovereignty) uncannily reemerge in new guises a century later. Visionary claims of social movements that would be rejected by all right-thinking lawyers of the period become the accepted orthodoxy of later eras. The ideological valance of arguments—as "liberal" or "conservative," moderate or radical—also drifts as arguments are introduced or repeated in new social and legal contexts. Finally, the popularity and persuasiveness of different styles of constitutional argument—for example, textualism or originalism—wax and wane with historical and social change and with concomitant changes in the legal profession.

There is, in short, no transhistorical criterion for “thinking like a constitutional lawyer,” other than an abiding faith in the basic constitutional enterprise. There is no better way to demonstrate this, we think, than to let students confront the actual texts produced in different periods and study closely the “common sense” and authoritative legal arguments of the past, witnessing both their strangeness and their resemblance to the constitutional common sense of our own day.

One of the reasons why constitutional argument changes as it does is that the practice of constitutional reasoning is deeply connected to changes in political and social life. Although courts play a central role in the history of constitutional law, other parties play roles equally important in shaping constitutional meaning. Our understandings of the American Constitution would have been very different without Jacksonianism, abolitionism, the Civil War, the feminist movement, the New Deal, the Civil Rights movement, and the Religious Right. For this reason, we have included constitutional arguments from the executive and legislative branches of government, as well as constitutional interpretations offered by representatives of important social movements in the country’s history, and the groups that mobilized against them. And we have repeatedly tried to stress the connections between what occurs in the language of court opinions and the political and social events that surround those decisions.

Finally, we continue to emphasize a historical approach to understand our debt to the past, both in terms of our moral successes and our moral failures. From the second edition on, *Processes of Constitutional Decisionmaking* has contained far more sustained coverage of chattel slavery than any other casebook. We think that, as a doctrinal matter, the question of slavery haunts the whole of antebellum constitutional law and that the legacy of slavery affects the great issues of federalism and equality that came later. But we think it is equally important for law students to confront slavery precisely because everyone now recognizes it to have been a great evil. It was a great evil that was sustained and perpetuated through law and, in particular, through constitutional law as interpreted by the finest legal minds America had to offer. Law students must come to understand how well-trained lawyers acting in good faith could have participated in such a system and rationalized it according to well-accepted modes of legal argument, justifying their work in the name of America’s great charter of democracy, liberty, and equality. We think that if they can recognize this use of law in America’s constitutional past, they will be better equipped to ask themselves the much more difficult question of whether well-trained lawyers in our own era could be similarly engaged in the rationalization of great injustices in the name of our Constitution, even though there may be great disagreement about what these are. The goal of a historically informed approach is not merely to see the achievements and injustices of the past through our own eyes, but to remind us to consider how our present interpretations of the Constitution might look to future generations.

Constructing the constitutional canon

Our commitment to a historical approach is joined to an equally strong commitment to rethinking the canons of constitutional law—the materials, issues, and problems that law students are exposed to and that law professors write and theorize about. To this end, we have added materials on the Progressive Era amendments, the

constitutional controversy surrounding the adoption of paper money, the procedural irregularities surrounding the adoption of the Fourteenth Amendment, America's constitutional treatment of Native Americans, and America's role as a colonial power. We have expanded coverage of the history of the women's movement and the constitutional treatment of women from the antebellum era to the adoption of the Nineteenth Amendment to the struggles over the Equal Rights Amendment and beyond. We think that these additions will give students a richer and fuller vision of constitutional history. They also pose genuine and interesting challenges for constitutional theorists who have neglected important aspects of constitutional interpretation and constitutional decisionmaking because traditional approaches offer much too narrow a view of the relevant materials that must be explained and justified.

If there is one theme that runs through this book, it is that the Supreme Court is not the only interpreter of the Constitution, even if it is surely the most obvious and important one for most lawyers. This view is clearly reflected in our construction of the canon. Throughout the book, we take seriously constitutional decisionmaking by nonjudicial institutions by including materials ranging from resolutions by the Kentucky and Virginia legislatures in the late eighteenth century, to constitutional interpretations by the President and Congress of the United States, to constitutional assertions by social movements, such as the Seneca Falls Declaration of 1848, to constitutional arguments by particular individuals such as senatorial candidates Abraham Lincoln and Stephen Douglas, the noted abolitionist Frederick Douglass, and civil rights pioneer Pauli Murray. Indeed, far from being the only source of constitutional law, the Supreme Court is not even the only judicial source. In this edition we have included more constitutional arguments by lower federal courts, by state supreme courts (often interpreting analogous provisions of state constitutions), and even a few references to the constitutions of other countries.

Among the most important elements of the Constitution are structural features that are rarely litigated, including, among others, bicameralism, equal voting power in the Senate, and the presidential veto. Lawyers pay little attention to them because they are rarely litigated and so little judicial doctrine has developed around them. Nevertheless, these choices are crucial features of constitutional design and the political science literature that studies their consequences is considerable. We have tried to raise a few issues of constitutional design where appropriate, but given the natural focus of a law school casebook, we can do no more than hint at some of the more important questions these provisions raise.

Just as any construction of a constitutional canon involves incorporation and inclusion of some materials, it must also include selection and exclusion of others. As constitutional law has grown in richness and complexity over the years, it has become increasingly difficult to do justice to the field within the pages of a single casebook. Fortunately, new technologies increasingly allow us to escape the limitations of traditional forms of publication. Thus, we have placed parts of our teaching materials on a special Web site, <http://www.conlaw.net>. There readers will find special topics and materials that they can download and use to supplement the materials found in the casebook. Through this combination of Web site and traditional text, we hope to create a flexible set of teaching materials that can respond better to future changes in the field.

The organization of any casebook is inevitably ideological, especially in a subject as fraught with ideology as constitutional law. No approach to the study of constitutional law is independent of the instructors' or casebook editors' more general

intellectual and political interests. For example, we have already noted the amount of space devoted to the question of slavery, which reflects our view that the question of slavery pervaded American law before the Civil War and that its aftermath set the stage for epic social and constitutional struggles that show no signs of abating to this day. We have also emphasized the role of textual and structural argument in constitutional interpretation, as well as the centrality of social movements and political parties as engines of constitutional change.

The first edition of *Processes of Constitutional Decisionmaking* explicitly adopted the ideology of the legal process tradition identified with Albert Sacks and Henry Hart, who were especially influential teachers at the Harvard Law School following World War II (and with whom Paul Brest studied during the early 1960s). Hart and Sacks argued that there existed apolitical decisionmaking procedures, adherence to which could provide substantively acceptable and politically legitimate decisions. Although the validity of this hypothesis remains a central concern of this book—for it is a crucial matter about which every student must come to his or her own judgment—the second edition (and its successors) manifested considerable skepticism about the legitimating power of process divorced from larger substantive political values. Nothing that has happened since 1981, when the second edition was prepared, has lessened our skepticism.

The Constitution does not belong to the lawyers, to the politicians, or even to the judges. It belongs to everyone. And the Constitution matters and should matter to everyone, even if arguments about the Constitution are not always phrased in the proper constitutional grammar recognized by legal professionals. Our era, like those before it, is a time of vigorous debate about the central constitutional issues of American life. In this book we have tried to bring out the political and social assumptions of contemporary constitutional discourse and contemporary constitutional decisionmaking. We have tried to show where these assumptions originated and how they have been transformed through time. But, of course, for every assumption that is consciously illuminated, others remain hidden in the shadows. You will get the most out of a course taught from this casebook if you take its agendas seriously while keeping a sharp eye out for its unstated assumptions. For our part, the student we seek is not one who necessarily agrees with us, but one who is willing to engage critically with us and, in the process, to learn and grow.

Acknowledgments

Sanford Levinson wishes to express his continued gratitude to his University of Texas Law School colleagues, including Philip Bobbitt, Doug Laycock, Scot Powe, and Jordan Steiker. Deans Michael Sharlot and William Powers have also continued the tradition of providing the author with ample support to attend conferences and other events necessary to thinking and rethinking about what ought to be covered in a basic casebook. Levinson also wishes to emphasize the continued help given, now over many years, by his superb secretary Cheryl Harris. He also acknowledges the contributions of Mark Tushnet, not only for his stimulating scholarship but, just as importantly in this context, for his organization over a decade ago of what is affectionately known as the “Georgetown Schmooze,” which has provided a principal venue for testing new ideas and receiving the wisdom of others. Similarly, Eugene Volokh deserves special mention for his indefatigable energy in organizing Internet discussion groups, the results of which are reflected in several explicit discussion notes, not to mention the far wider impact of the day-by-day discussions with a marvelously diverse group of people whom the author is especially pleased to recognize in the dedication.

Jack Balkin wishes to thank Bruce Ackerman, Lisa Cardyn, Michael Kavey, Christina Rodriguez, Bill Rubenstein, Teemu Ruskola, Reva Siegel, and Kenji Yoshino for their help and suggestions.

Akhil Amar wishes to thank Bruce Ackerman, Vikram David Amar, Neal Kumar Katyal, and Jed Rubenfeld for their comments and Lisa Berman and Josh Chafetz for their research assistance.

Reva Siegel wishes to thank Jack Balkin, Cary Franklin, Abigail Horn, Serena Mayeri, Robert Post, Alan Schoenfeld, David Tannenbaum, and Nels Ylitello for their help and suggestions.

All of the authors have also benefited from the responses of a number of friends at other institutions. They include, especially, Milner Ball (who pressed the claims of Native Americans to be treated as an important part of the American constitutional narrative), Walter Dellinger (who initially suggested including material from the Lincoln-Douglas debates), Paul Finkelman, Lewis LaRue, Peter Linzer, Robert Post, and Stephen Siegel.

Amar, Akhil Reed, *Intratextualism*, 112 Harv. L. Rev. 747 (1999). Copyright © 1999 by the Harvard Law Review Association. Reprinted by permission.

Amar, Akhil Reed, *Second Thoughts*, *The New Republic Mag.* (July 12, 1999). Reprinted by permission.

Anderson, David, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455 (1983).

Copyright © 1983 by the Regents of the University of California. All rights

- reserved. Reprinted by permission of the UCLA Law Review and Fred B. Rothman and Co.
- Balkin, J.M., *The Constitution of Status*, 106 Yale L.J. 2313 (1997). Reprinted by permission of the Yale Law Review.
- Balkin, J.M., *Tradition, Betrayal, and the Politics of Deconstruction*. This article appeared in 11 Cardozo L. Rev. 1613 (July/Aug. 1990). Reprinted by permission of the author and Cardozo Law Review.
- Balkin, J.M., *Roe v. Wade: An Engine of Controversy*, in Jack M. Balkin, ed., *What Roe v. Wade Should Have Said*, N.Y.U. Press 2001. Reprinted by permission of the author.
- Bell, Derrick, *Introduction: Awakening after Bakke*, 14 Harv. C.P.-C.L. L. Rev. 1 (1979). Copyright © 1979 by the President and Fellows of Harvard College. Reprinted by permission of the Harvard Civil Rights-Civil Liberties Law Review.
- Bickel, Alexander, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955). Copyright © 1955 by the Harvard Law Review Association. Reprinted by permission.
- Bickel, Alexander, *The Least Dangerous Branch*. Copyright © 1962 by Bobbs-Merrill Company, Inc. Reprinted by permission of the Bobbs-Merrill Co.
- Black, Charles, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960). Copyright © 1959. Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman and Co.
- Brest, Paul, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980). Copyright © 1980. Reprinted by permission of the Boston University Law Review.
- Brest, Paul, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95. Copyright © 1971 by the University of Chicago. Reprinted by permission of The University of Chicago Press.
- Colker, Ruth, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986). Copyright © 1986. Reprinted by permission of the New York University Law Review.
- Cox, Archibald, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971). Reprinted by permission of Archibald Cox.
- Dahl, Robert, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. Pub. L. 279 (1957). Copyright © 1957. Reprinted by permission of the Journal of Public Law of Emory University School of Law.
- Ely, John, *Democracy and Distrust: A Theory of Judicial Review*, from *Democracy and Distrust: A Theory of Judicial Review* by John Hart Ely, pp. 164-170, Cambridge, Mass.: Harvard University Press. Copyright © 1980 by the President and Fellows of Harvard College. Reprinted by permission of the publisher.
- Fine, Sidney, *Laissez Faire and the General Welfare State* (1956). Copyright © 1956. Reprinted by permission of the University of Michigan Press.
- Fuchs Epstein, Cynthia, *Multiple Myths and Outcomes of Sex Segregation*, 14 N.Y. L. Sch. J. Hum. Rts. 185 (1997). Reprinted by permission.
- Grey, Robert, *Procedural Fairness and Substantive Rights*, from *Due Process (Nomos XVIII)* (1977). Copyright © 1977 by the New York University. Reprinted by permission of New York University Press.
- Gunther, Gerald, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975). Copyright © 1975 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission of the author and Fred B. Rothman and Co.

- Jacobs, James, *Race Relations and the Prison Subculture*, in *1 Crime and Justice: An Annual Review of Research*. Copyright © 1979 by The University of Chicago. Reprinted by permission of the University of Chicago Press.
- Jensen, Merrill, 75 *Harv. L. Rev.* 456 (1961). Copyright © 1961. Reprinted by permission of the Harvard Law Review.
- Jones, Pamela R., Note: *Women in the Crossfire: Should the Court Allow It?* 78 *Cornell L. Rev.* 252 (1993). Reprinted by permission of the Cornell Law Review.
- Kelly, Alfred, *The School Desegregation Case*, in *Quarrels That Have Shaped the Constitution* (John A. Garraty ed.). Copyright © 1987 by Harper & Row, Publishers, Inc. Reprinted by permission of HarperCollins Publishers.
- Kennedy, David, *Freedom from Fear: An American People in Depression and War*, Oxford University Press (1999). Used by permission of Oxford University Press, Inc.
- Koppelman, Andrew, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 *N.Y.U. L. Rev.* 197 (1994). Reprinted by permission.
- Krieger, Linda, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995). Reprinted by permission.
- Lawrence, Charles R., III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987). Copyright © 1987 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission of the Stanford Law Review and Fred B. Rothman and Co.
- Laycock, Douglas, *A Survey of Religious Liberty in the United States*, 47 *Ohio St. L.J.* 409 (1986). Copyright © 1986. Reprinted by permission of the author and the Ohio State Law Journal.
- Laycock, Douglas, *Due Process and Separation of Powers: The Efforts to Make the Due Process Clauses Nonjusticiable*, 60 *Tex. L. Rev.* 875 (1982). Copyright © 1982 by the Texas Law Review Association. Reprinted by permission.
- Levy, Leonard W., *Freedom of Speech and Press in Early American History: Legacy of Suppression*. Copyright © 1960. Reprinted by permission.
- Littleton, Christine, *Reconstructing Sexual Equality*, 75 *Cal. L. Rev.* 1279 (1986). Copyright © 1986. Reprinted by permission of the California Law Review.
- MacKinnon, Catherine A., *Toward a Feminist Theory of the State*, Chapter 12 (1989). Copyright © 1989 by Catherine A. MacKinnon. Reprinted by permission of Catherine A. MacKinnon.
- MacKinnon, Catherine A., *Unthinking ERA Thinking*, 54 *U. Chi. L. Rev.* 759 (1987). Reprinted by permission.
- McCloskey, Robert, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *Sup. Ct. Rev.* 34. Copyright © 1969 by The University of Chicago. Reprinted by permission of the University of Chicago Press.
- McCloskey, Robert, *The American Supreme Court*. Copyright © 1960 by The University of Chicago. Reprinted by permission of the University of Chicago Press.
- McConnell, Michael, *Originalism and the Desegregation Decisions*, 81 *Va. L. Rev.* 947 (1995). Reprinted by permission of the Virginia Law Review and the author.
- McConnell, Michael, *The Originalist Justification for Brown*, 81 *Va. L. Rev.* 1937 (1995). Reprinted by permission of the Virginia Law Review and the author.
- McConnell, Michael, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *Yale L.J.* 1501 (1989). Copyright © 1989. Reprinted by

- permission of the Yale Law Journal Company and Fred B. Rothman and Co. from *The Yale Law Journal*, Vol. 98, pp. 1501-1543.
- Michelman, Frank, *On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7 (1969). Copyright © 1969 by the Harvard Law Review Association. Reprinted by permission.
- Minkowitz, Donna, *On Trial: Gay? Straight? Boy? Girl? Sex? Rape?*, *Out Mag.* 99 (Oct. 1995). Reprinted by permission.
- Monaghan, Henry, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723 (1988). Copyright © 1988 by the Directors of the Columbia Law Review Association, Inc. All rights reserved. Reprinted by permission.
- Moskos, Charles, *Army Women*, *The Atlantic*, Aug. 1990, at 71. Copyright © 1990. Reprinted by permission of the author.
- Neuman, Gerald L., *Strangers to the Constitution* (1996). Copyright © 1996 by PUP. Reprinted by permission of Princeton University Press.
- New York Times*, *Transcript of Frost-Nixon Interview*, May 20, 1977, at A16. Copyright © 1977 by the New York Times Company. Reprinted by permission.
- Olsen, Frances, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *Tex. L. Rev.* 387 (1984). Copyright © 1984 by the Texas Law Review Association. Reprinted by permission.
- Post, Robert C., *Subsidized Speech*, 106 *Yale L.J.* 151 (1996). Reprinted by permission of Robert C. Post.
- Powell, H. Jefferson, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885 (1985). Copyright © 1985. Reprinted by permission of the Harvard Law Review.
- Prakash, Saikrishna Bangalore, *Field Office Federalism*, 79 *Va. L. Rev.* 1957 (1993). Reprinted by permission of the Virginia Law Review.
- Richards, David, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L. Rev.* 957 (1979). Copyright © 1979. Reprinted by permission of the Hastings Law Journal.
- Richards, David A.J., *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. Pa. L. Rev.* 45 (1974). Copyright © 1974 by the University of Pennsylvania Law Review. Reprinted by permission.
- Roberts, Dorothy E., *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *Harv. L. Rev.* 1419 (1991). Copyright © by the Harvard Law Review Association. Reprinted by permission.
- Rubinfeld, Jed, *Usings*, 102 *Yale L.J.* 1077 (1993). Reprinted by permission.
- Rubinfeld, Jed, *The Right of Privacy*, 102 *Harvard L. Rev.* 737 (1989). Copyright © by the Harvard Law Review Association. Reprinted by permission.
- Schnapper, Eric, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *Va. L. Rev.* 753 (1985). Reprinted by permission of the Virginia Law Review.
- Siegel, Reva, *Collective Memory and the Nineteenth Amendment: Reasoning about "the Woman Question" in the Discourse of Sex Discrimination*, in *History, Memory, and the Law* (Austin Sarat and Thomas Kearns eds., 1999). Reprinted by permission.
- Siegel, Reva, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 111 (1997). Reprinted by permission.
- Siegel, Reva, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261 (1992). Reprinted by permission.