

Conservative and Libertarian Legal Scholarship: An Annotated Bibliography

Originally Prepared by

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Foreword

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At no other point in American history has so much legal commentary been published each year. There are more than 400 student-edited law journals and, last year alone, several thousand articles were published. The sheer mass of legal writings makes it quite difficult for lawyers, and particularly law students, to identify conservative and libertarian legal writings that may be of interest. And, significantly, law students often are not directed toward conservative and libertarian scholarship. Casebooks and other materials used in law school courses most often identify (and praise) those works that advocate various aspects of orthodox liberal ideology.

The purpose of this bibliography is simple but ambitious. It is to pull together the legal commentary—principally books and law review articles—that best present conservative and libertarian perspectives. The idea is to make this scholarship more accessible and thereby foster more serious, balanced debate about legal ideas.

The difficulty of the enterprise is obvious. Not only are there a wide variety of legal subject areas and a proliferation of commentary on them, but there are obvious difficulties in defining what is "conservative" or "libertarian," let alone what is "best."

We concede at the outset the difficulty of this task, but it seems to us that the perfect ought not be the enemy of the good. That is, even an attempt that would make no one completely happy would still perform a great service by filling a substantial void. If it prompts others to add or subtract titles from the list for future versions, or to inspire someone else to redo the list entirely, this initial compilation will make a significant contribution.

As to what is "conservative" or "libertarian," we relied most heavily on the Founders' ideals for guidance. With respect to constitutional law, for example, we searched for works that endeavored to interpret the Constitution according to its text and original meaning. In other areas of the law (e.g., torts, contracts, corporations, etc.), we looked for scholarship that embraced the Framers' ideals, which include: limited government, representative democracy, free markets, individual freedom, and personal responsibility. Commentary demonstrating a due regard for our original constitutional structure—federalism, separation of powers, and a judicial enterprise that says what the law is, not what it should be—obviously received high marks. That said, we have tried to err on the side of inclusiveness—to include, for example, some works that are originalist in method but that are not necessarily consistent with what one might view as a "conservative" or "libertarian" legal policy result. Indeed, the bibliography even includes a few works that we thought to be particularly trenchant critiques of originalism or of other conservative and libertarian approaches to legal analysis.

For the most part, the bibliography is arranged by legal subject-matter area, with the areas arranged alphabetically. The common law and constitutional law sections appear first, however, because they are the foundation for so many other areas of the law. As to the individual works, we have generally put symposia first, then books, then articles. And within each of those categories, we have tried to arrange the pieces in a logical sequence for someone doing research—with older, more general, and more revered works usually coming first.

Readers should also know that there are a variety of journals which regularly publish work of direct or indirect interest to conservative and libertarian lawyers. Happily, this number is growing; unhappily, this means that listing them risks omitting one or more. Nonetheless, it is important to provide such a list (for interested law students especially), and so we apologize ahead of time for any omissions and hope that they will be brought to our attention for future versions.

Several law journals are now devoted to publishing conservative and libertarian scholarship—the *Harvard Journal of Law and Public Policy*, the *Public Interest Law Review*, the *Michigan Law and Policy Review*, the *Texas Review of Law and Politics*, the *NYU Journal of Law & Liberty*, and the *Georgetown Journal of Law & Public Policy*. There are also some non-law journals that contain much of interest to conservative and libertarian lawyers on law-related matters. For instance, *Regulation* magazine, published by the Cato Institute, covers regulatory issues from a libertarian perspective; *Commentary* is a leading neoconservative journal of social commentary; the flagship publication of the conservative Hoover Institution is *Policy Review*—the Winter 1994 issue of which, incidentally, contained the reading list for pre-law students ("Pre-Law Prerequisites") out of which this monograph arose.

Conservative and libertarian organizations in addition to those already mentioned that frequently publish work of interest to lawyers include the American Enterprise Institute, Center for the Study of American Business, Citizens for a Sound Economy, Competitive Enterprise Institute, Center for Equal Opportunity, Free Congress Foundation, Hudson Institute, Individual Rights Foundation, Institute for Justice, Manhattan Institute, Pacific Legal Foundation, Pacific Research Institute, Progress and Freedom Foundation, and Washington Legal Foundation. Finally, many state-level policy organizations have been established in recent years and frequently publish law-related articles.

Most of the works listed here should be available in law school libraries, and many of the law review articles are also available on electronic databases. Those books published by nonprofit organizations are often available at no charge or at a discount for students.

Without the encouragement and support of Leonard Leo and Lee Liberman Otis of the Federalist Society, this publication would not have been possible. And, if it had been published, it would have been much less comprehensive without their intelligence and scholarship in its editing. In preparing this bibliography, we received suggestions from more law school professors and others than we can list, but we nonetheless wish to express our gratitude to them.

We would gratefully receive any suggestions for improving this compilation. Additional copies of this bibliography, or of previous Federalist Society publications—*A Debate on Critical Legal Studies at the Harvard Law School*; *The Great Debate: Interpreting Our Written Constitution*; *Who Speaks for the Constitution? The Debate Over Interpretive Authority*; and *The ABA in Law and Social Policy: What Role?*—are available from the national office of the Federalist Society.

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I. The Common Law Foundation: Overview

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Richard Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555 (1991). Professor Epstein maintains that “a few core principles are sufficient to organize our understanding of both private and public law.” In this article, Epstein elaborates on this view by explaining that the traditional rules of property, contract, and tort law are based upon two assumptions which hold across a wide range of circumstances and cases. The two assumptions are: 1) resources are scarce, and 2) human behavior is usually self-interested. “On this view of the world,” according to Epstein, “the central task is to figure out how sound legal institutions can harness that self-interest to produce desirable social outcomes.” In this regard, “any legal system must discharge three distinct tasks. The first . . . is to determine an initial set of property rights from which subsequent bargains can go forward at reasonably low cost. The second mission is to insure that these entitlements once established are protected against various forms of theft—the office of the law of crime and tort. The third mission of the law is to facilitate the voluntary exchanges of property rights—the law of contracts.” An interesting interview of Epstein appeared in the April 1995 issue of Reason magazine, available on-line at <http://www.reasonmag.com/9504/epstein.apr.html>.

Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). Professor Coase, a British economist who has spent roughly half of his professional career at the University of Chicago Law School, received the Nobel Prize in economics in 1991 for his contributions to the economic analysis of law and legal institutions. His 1960 article has been cited more often in the law review literature than any other article ever written, and can be said to be the founding document of the “law and economics” movement. The article raises a number of questions that even the astute student will have difficulty answering in the first instance, and to which he will return again and again. To what extent does the law affect human behavior? To what extent can we expect people to “contract around”—and thus circumvent—legal rules they do not wish to follow? To what extent do the costs of transacting with one another deter the successful negotiation of private agreements? Coase’s analysis—labeled by others the “Coase Theorem”—is the cornerstone of the economic analysis of law. It is also somewhat counterintuitive. Do not be discouraged if you fail to grasp the importance of the article on your first reading (it is very unlikely that you will). Since the Coase Theorem turns up repeatedly throughout the law school curriculum, you will have ample opportunity to become familiar with it. In time, you should find that the article is the gateway to the field of “law and economics.” For an interview of Coase, see the January 1997 issue of Reason magazine, available on-line at <http://www.reasonmag.com/9701/int.coase.html>.

FREDERIC BASTIAT, *THE LAW* (Foundation for Economic Education ed. 1950). In his brief but powerful book, first published as a pamphlet in 1850, Bastiat lamented the decline of the rule of law in France. Instead of defending property rights, Bastiat argues, French law had become an instrument of “legal plunder” in which “the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong.” Bastiat identified “tariffs, protection, benefits, subsidies, encouragements, progressive taxation, public schools, guaranteed jobs, guaranteed profits, minimum wages, a right to relief, a right to the tools of labor, [and] free credit” as forms of “legal plunder.” For Bastiat, traditional concepts of property, contract, and tort law were vitally important in the safeguarding of human freedom. *The Law* -- Available on-line at <http://www.constitution.org/law/bastiat.htm> and at <http://www.jim.com/jamesd/bastiat.htm>.

J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (4th ed., 2005). A very readable introduction to the history of the common law by a British law professor.

ARTHUR R. HOGUE, THE ORIGINS OF THE COMMON LAW (1966, 1985). Another good introductory text, by an American author.

Internet resources: Humorist P.J. O'Rourke is a deft critic of meddling government and defender of freedom. We recommend two of his speeches available on-line: "The Liberty Manifesto" (1993), <http://www.cato.org/speeches/sp-orourke.html>, and "Closing the Wealth Gap" (1997), <http://www.cato.org/speeches/sp-pjo061897.html>.

II. Property

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(See also Section XV on Intellectual Property)

Foundational Materials

ROBERT C. ELLICKSON, CAROL MARGUERITE ROSE, & BRUCE A. ACKERMAN, *PERSPECTIVES ON PROPERTY LAW* (2d ed., 1995) is a useful collection of readings.

JAMES A. DORN & HENRY G. MANNE, *ECONOMIC LIBERTIES AND THE JUDICIARY* (1987). A thorough collection of articles on the judicial treatment of property and other economic rights. For an overview of the law and economics literature on various aspects of property law, consult Chapter 3 of Richard Posner, *ECONOMIC ANALYSIS OF LAW*.

Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781 (2005). A systematic examination of the historical right to destroy in Roman and English legal traditions, along with a critique of courts' justifications for refusing to enforce the right to destroy based on waste prevention reasons. Prof. Strahilevitz argues that court refusal to enforce the right has led to decreased social utility through loss of open space, privacy, and risk-taking, and argues for a qualified right to destroy along with a safe harbor that testators can use to enforce their will post-death

Property in its Common Law Context

Lee Anne Fennell, *Property and Half-Torts*, 116 *YALE L.J.* 1400 (2007). This article argues that property scholars have failed to recognize the analytical distinction between risk and harm that is common in torts law. Professor Fennell brings that distinction into property law through the example of pollution and finds that the distinction renders conclusions that sit more comfortably with moral intuitions.

Henry E. Smith, *Property and Property Rules*, 79 *N.Y.U.L. REV.* 1719 (2004). This article argues for the superiority of property rules over liability rules based on informational advantages, the natural pairing between property rules and owners' rights to exclude others from their property, and the traditional notion of *in rem* rights over property.

Theory and History

ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (2005). Contains interesting contemporary examples of how property rights are developed and enforced through community custom and without recourse to formal rules or courts.

James Madison, *Essay on Property*, *THE NATIONAL GAZETTE*, March 27, 1792, reprinted in 14 *THE PAPERS OF JAMES MADISON* 266 (Robert A. Rutland et al. eds., 1983). Probably the best definition of what constitutes property. For Madison, property includes not only land and chattels, but also

one's conscience and the free use of one's faculties. Madison, in other words, bridges the modern gap between economic and personal liberties, so-called.

Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). A noted legal philosopher examines “the nature of property, its justification, and the ultimate meaning of the policies based on it.” While Cohen shows himself more of a statist than the average member of the Federalist Society, his discussion of the philosophical defenses of property rights is nonetheless enlightening.

Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001). An argument that law and economics scholars have ignored *in rem*, the critical characteristic of property rights, which is fundamental for rights holders' security and the basis for long-term societal planning.

Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954). A Socratic dialogue ranging over a multitude of philosophical questions about property.

Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967). A landmark contribution to our understanding of the origin of property rights systems.

Terry L. Anderson & Peter J. Hill, *The Race for Property Rights*, 33 J. L. & ECON. 177 (1990); Douglas W. Allen, *Homesteading and Property Rights or How the West Was Really Won*, 34 J. L. & ECON. 1 (1991). These articles trace the development of property rights systems in the nineteenth century American West.

Thomas Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985). A comparison of trespass and nuisance, the two primary doctrines available to protect property ownership interests.

Zoning and other Land Use Regulation

WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985). A non-technical examination of land use controls and their ultimate effects by an influential academic economist.

Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004). An essay that rebuts the popular academic critique of the Takings Clause jurisprudence as incoherent. Prof. Sterk argues that the jurisprudence is coherent when examined from a federalist perspective that recognizes the primacy of states in determining property rules and applies categorical rules that reduce the incentives for states to single out particular landowners for a taking. See also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process* in 95 COLUM. L. REV. 798 (1995). For more readings on the constitutional questions related to property rights, please see the entries on the Takings Clause and Economic Liberties in Section V, Constitutional Law.

Bernard H. Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71 (1970). A landmark study of land use patterns in Houston, which was at the time the only major U.S. city without zoning laws. Professor Siegan concludes that Houston's land use patterns—including the segregation of “incompatible uses”—were roughly the same as those in cities with zoning laws. See also his book, *LAND USE WITHOUT ZONING* (1972).

Edward L. Glaeser, Joseph Gyourko, and Raven Saks, *Why is Manhattan so Expensive? Regulation and the Rise in Housing Prices*, 48 J. LAW & ECON. 331 (2005). This article questions why housing prices have soared in certain communities by examining both the supply and demand sides of the equation. The authors conclude that the rise in housing prices is directly tied to a constrained supply imposed by zoning rules.

Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). An important review of more narrowly tailored substitutes for traditional zoning regulation.

Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977). A useful demonstration that the “law of unintended consequences” is alive and well in land use regulation.

Robert C. Ellickson, *The Irony of 'Inclusionary' Zoning*, 54 S. CAL. L. REV. 1167 (1981). Argues that this governmental effort to manipulate land use to benefit the low- and moderate-income person is misguided and likely to aggravate the problems it was ostensibly designed to help solve.

Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905 (1999). Professor Eagle examines whether a privatized, non-unanimous system of zoning that allows decisions to be made by local neighborhood associations is efficient and furthers individual liberty. He concludes that a devolved, privatized system of zoning is impossible since the government cannot sell its police power and would still exert significant control over zoning decisions made by the local associations.

Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000). This article analyzes the principle of Numerus Clausus, which requires that legally enforceable claims in property law are finite, in sharp contrast to the infinitely customizable forms in contract law. The authors find several advantages to the finite nature of property law—such as the changes to the forms, which necessarily originate in the legislative branch rather than through judicial entrepreneurship, and the low information-costs inherent in a finite universe—and conclude that property law tends toward the optimal standardization of forms over time.

Landlord-Tenant Law

Richard A. Epstein, *Rent Controls and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741 (1988). Argues that all rent control statutes are per se unconstitutional and that the usual defenses of rent control are “only disguised pleas for privilege and special interests.” Critical commentary follows, as does Richard A. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, *id.* at 1281 (1989).

Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982). The author argues that the recent trend in residential landlord-tenant law has been from private law to regulatory (consumer protection) law, rather than a move from one area of private law (traditional property law’s landlord-tenant doctrines) to another (contract doctrines). Glendon further argues that the new regulatory standards applied to residential leases raise “serious questions regarding the future supply and quality of rental housing.”

Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984). An extensive review and evaluation of the dramatic changes in such areas as implied warranty of habitability, rent control, landlord tort liability, eviction, and the like, that began in the 1960s. Concludes that the revolution produced mixed results. Followed by a number of interesting responses by other scholars, and the transcript of the Liberty Fund conference where Rabin’s paper was the centerpiece.

III. Contracts

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Foundational Materials

Useful collections of readings on contract law include: FOUNDATIONS OF CONTRACT LAW (Richard Craswell & Alan Schwartz, eds., 1994); CONTRACT THEORY (Randy E. Barnett, ed., 1995); READINGS IN THE ECONOMICS CONTRACT LAW (Victor Goldberg, ed., 1989); and THE ECONOMICS OF CONTRACT LAW (Anthony T. Kronman & Richard A. Posner, eds., 1979).

For an overview of the law and economics literature on various aspects of contract, consult Chapter 4 of RICHARD POSNER, ECONOMIC ANALYSIS OF LAW. For a contrast of Posner's strong defense freedom of contracting with Cardozo's more fluid contracting doctrine, see, Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM AND MARY L. REV. 1379 (1995).

E. ALLAN FARNSWORTH, WILLIAM F. YOUNG, AND CAROL SANGER, CONTRACTS: CASES AND MATERIALS (6th ed. 2001). The standard one-volume law student reference work on the subject. For a highly accessible treatise, which can be used as a starting point for further research in any area of contract law, see FARNSWORTH ON CONTRACTS (4th ed. 2004). Professor Farnsworth has a particularly keen appreciation for freedom of contract, and is considered the preeminent living contracts authority, whose work has sought to develop a coherent theory across the field of contract law. See, e.g., E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987) (arguing that existing doctrines of contractual interpretation, imaginatively applied, may resolve problems of fair dealing, lost expenses, and lost opportunities that arise in complex modern business negotiations); E. Allan Farnsworth *'Meaning' in the Law of Contracts*, 76 YALE L. J. 939 (1967) (analyzing errors made by courts in interpreting contractual language, and offering suggestions for change).

RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW (3d ed. 2005). Casebook by one of the nation's foremost libertarian thinkers.

MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS (4th ed. 2001). A good, one-volume student text. Chirelstein's analysis is crisp and concise.

Theoretical Models of Contract

ROBERT S. SUMMERS, LON L. FULLER (1984). This biography offers a good discussion of the noted legal philosopher's view of contract, which included due regard for freedom, responsibility, and the value of preserving expectation interests.

CHARLES FRIED, *CONTRACT AS PROMISE* (1981). This ambitious book seeks “to show how a complex legal institution, contract, can be traced to and is determined by a small number of basic moral principles. . . .” In spinning his moral theory of contract—in which the enforcement of a contract flows from a party’s obligation to keep his promise—Professor Fried finds himself at odds with the law-and-economics view of the subject at several points. For a concise (12-page) libertarian critique of the “promise” theory of contracts, see Randy E. Barnett, *Some Problems with Contract as Promise*, 77 *CORNELL L. REV.* 1022 (1982). Amongst Professor Barnett’s criticisms is the fact that a moral theory of promising alone would have courts enforcing purely moral commitments, “which is tantamount to legislating virtue.” In contrast, Professor Barnett’s “consent theory” of contract premises enforceability upon a party’s objectively manifested consent to the transfer of his rights. See Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269 (1986).

GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). In this short book, Professor Gilmore made the case that “‘contract’ is being reabsorbed into the mainstream of ‘tort.’” Many writers took issue with Gilmore’s diagnosis, and indeed his death certificate for contract now looks to have been signed all too soon. However, for evidence that all is not well along the contract-tort boundary, see Walter Olson, *Tortification of Contract Law: Displacing Consent and Agreement*, 77 *CORNELL L. REV.* 1043 (1992). For a fascinating discussion of the book, see *Symposium: Reconsidering Grant Gilmore’s The Death of Contract*, 90 *NW. U. L. REV.* 1 (1995).

Readings on Individual Topics Within Contract Law

MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993). The best-known Canadian practitioner of law and economics examines such topics as externalities, coercion, information failures, paternalism, and discrimination, and their implications for free contract.

Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 2003 *YALE L.J.* 829 (2003). An argument that although economic analysis provided clarity to earlier contractual concepts, it is unlikely to produce an “economic theory” of contract law. Moreover, economics cannot explain contract law and does not provide the normative grounding for a reform of contract law either. For a partial response to E. Posner, consult, Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 *COLUM. L. REV.* 496 (2004), which examines contract interpretation approaches and makes recommendations for private actors on how to make practical use of economic analysis in contract law.

Stewart Macaulay, *An Empirical View of Contract*, 1985 *WIS. L. REV.* 465. In 1963 Professor Macaulay called into question the real-world importance of formal contract terms and contract law in his landmark article *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963). The 1985 article offers his more mature thoughts on the subject, as well as a synopsis of his 1963 article.

A large literature is devoted to the question of what circumstances justify a court in refusing to enforce a contractual agreement. Three particularly good discussions of this subject are Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293 (1973); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); and Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). For an argument against judicial “gap-filling” in cases of mistake or frustration, see Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 (1991). For an assessment of the frequency of paternalistic contract decisions, see E. Allan Farnsworth, *Developments in Contract Law During the 1980s: The Top Ten*, 41 CASE W. RES. L. REV. 203 (1990).

Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1434 (1985). A thorough discussion of different contract remedies, including an economic analysis of them.

Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000). Critique by a leading scholar of the traditional tripartite classification of damages – expectation, reliance, and restitution – and a proposal for a modern classification of damages into: remedies above expectation, remedies that approximate expectation, and remedies below expectation.

Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985). A useful examination of claims for payment made by providers of non-bargained benefits to silent or disclaiming recipients.

Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996). Examination of certain instances when promissory estoppel can be economically efficient and recommendations for regulators on how to apply the doctrine to create optimal reliance by parties intending to contract.

Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829 (2004). Exploration of the mutual assent doctrine as an all-or-nothing approach to contract formation, and a contrasting proposal for an alternative doctrine of “no-retraction” that provides ever-greater contractual liability as consensus between parties nears.

Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006). Analysis of when parties would prefer specific performance over damages in a breach of contract situation, with a conclusion that they will prefer specific performance for conveyance of existing goods and that they will prefer damages for production of goods or services.

Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003). A powerful normative argument that contract theory should be used exclusively to allow

contracting parties to maximize their joint gains from transactions. Profs. Schwartz and Scott argue against the UCC and much modern scholarship and find that the best way to achieve such maximization is through a textual approach to contract interpretation.

Mark L. Movsesian, *Rediscovering Williston*, 62 Wash. & Lee L. Rev. 207 (2005). A favorable reexamination of the writings of contracts scholar Samuel Williston. Prof. Movsesian argues that much of Williston's work – his insistence that doctrine must be justified by real-world consequences, his assertion that rules carry only presumptive weight, and his institutional reasons for judicial restraint – finds common ground with the new formalist movement and can even be considered pragmatic when understood in the context of Williston's goals and intended audience.

IV. Torts

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Foundational Materials

FOUNDATIONS OF TORT LAW (Saul Levmore, ed., 1993); PERSPECTIVES ON TORT LAW (Robert L. Rabin, ed., 1995); RICHARD EPSTEIN, TORTS (*Introduction to Law Series*, 1999). These are useful collections of classic articles in the field, edited for beginning students.

Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). This landmark article discusses three types of legal rules—identified in the title—that can be used by a society to protect rights (“entitlements”). It asks (and answers) why a society would ever choose a liability rule (i.e., tort law) rather than a property rule to allocate resources. (Hint: The answer has to do with the concept of “market failure.”) The article also contains a good explanation of the Coase Theorem and of Calabresi’s views on the role of transactions costs in economic efficiency analysis (as he set out more fully in *THE COSTS OF ACCIDENTS* (1970)). The article concludes by applying the three-rule framework to pollution control and criminal law. Michael I. Krauss, *Property Rules vs Liability Rules*, ENCYCLOPEDIA OF LAW AND ECONOMICS, (B. Bouckaert & G. De Geest, eds., 1999). This chapter explicates the significance of the Calabresi-Melamed contribution to conservative and libertarian tort theory.

Economic Theory of Tort Law

For an overview of the law and economics literature on various aspects of tort law, consult Chapter 6 of RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (see *infra* p. 73).

WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987). These two books present an extensive economic analysis of tort law. Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988), is a very good review essay that discusses both these books. Coleman provides additional, interesting points of his own.

RICHARD POSNER, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) is a self-conscious defense of Kaldor-Hicks efficiency as a normative basis for tort adjudication. *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David Owen, ed., 1995) contains several powerful rebuttals including Dworkin’s classical response.

Theoretical Models of Tort

John C.P. Goldberg, *Symposium: Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003). An argument that tort law is a divided field with no unifying theory and only loose connectedness between five

principal theories: traditional account, compensation-deterrence, enterprise liability, economic deterrence, and social justice.

Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979). Professor Epstein explains his theory of tort liability (“corrective justice”) and addresses criticisms of that theory. He engages in a detailed discussion of the causation element present in all tort theories.

Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623 (1991). A searching examination of the common-law moral foundations of both contract and tort law which explains why both are vital in a free society. After identifying the property-rights justifications for both forms of law, Professor Krauss proceeds to explain how contemporary tort law has abandoned its moral underpinnings by attenuating the requirements of legal fault and true proximate causation. The result, argues Krauss, is a legal system that eschews the traditional function of tort law (compensating the victim of another’s morally culpable behavior) in favor of a system that serves as a tool for social engineering and redistribution of wealth. Modern American tort law prohibits parties from voluntarily assuming risks *ex ante*, instead always allocating the risk to one party. Krauss concludes that this coerced “insurance” against injuries is both economically stifling and morally vacuous.

Products Liability

PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988). Traces the intellectual history of the transformation of products liability law over the last half-century and critiques the workings of the current doctrines in the area.

Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193 (1989). An excellent historical account of the rise of strict product liability law and an accessible explanation of the anti-contractual, economically inefficient effects of modern products law. Epstein also discusses the prospects for legislative reform of products law, concluding that the future appears dim for product manufacturers and consumers alike.

H.E. Frech III, *State-Dependent Utility and the Tort System as Insurance: Strict Liability versus Negligence*, 14 INT’L REV. L. & ECON. 261 (1994). Explores the “insurance” function of strict products liability, and concludes that using tort liability as insurance is economically inefficient, because it ignores consumer preferences and forces overinsurance. Professor Frech concludes that a negligence standard would be a better solution, if not a perfect one.

Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609 (1995). After surveying the development of strict products liability law in the past few decades, this article turns to a thorough discussion of the “risk/utility” test frequently used in design defect cases. Professor Green presents two versions of the risk/utility test: the rigorous economics-based

approach and the looser, “reasonableness” approach. Green carefully explains the benefits and problems associated with the economic approach, concluding that it is the superior one.

Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 B.Y.U. L. REV. 759 (2002). An argument that the expansion of product liability arises from the manifestation of a Prisoner’s Dilemma between local plaintiffs suing out-of-state defendants. However, Prof. Krauss argues against a uniform national standard as the best resolution and favors a “state of first retail sale” rule that incorporates both federalist and game theory considerations in its conclusion.

James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990). Explores what the authors call the “lawless discretion” given to juries in failure-to-warn products cases. The authors discuss several inherent problems with failure-to-warn cases, not the least of which is establishing causation. The authors then call for reform of the failure-to-warn jurisprudence, to place some measure of control on failure-to-warn cases and to give manufacturers some guidance in product labeling.

Damages

PAUL H. RUBIN, *TORT REFORM BY CONTRACT* (1993). Makes the case that buyers and sellers should be permitted “to specify contractually the level or type of damages that will be paid if any accident occurs.” Argues that both buyers and sellers have an incentive to agree to reduce the size of possible damage payments, and that such contracts would solve many of the problems now ascribed to the tort system.

Edward J. McCaffrey, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995). An empirical and experimental investigation of how juries approach the compensation decision in tort lawsuits. “Does it matter whether juries are made to view the situation of a plaintiff in a personal injury action from an ex ante or an ex post perspective, relative to the injury? Do juries conceptualize the loss of free will associated with being injured as part of the damages . . . ? How do actual jury instructions account for the inevitable choice of perspective in these matters?” The authors’ basic conclusion is that “framing effects do indeed have large impacts on non-pecuniary damage awards.” For example, “[a]n ex ante/selling price perspective at least doubles awards compared to an ex post/making whole baseline.”

Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U.L. REV. 87 (2006). A critique of the dominant four approaches to treating pain-and-suffering damages and a new proposal entitled Non-binding Age-Adjusted Multipliers that provides a reasonable benchmark for juries when deciding awards, but

allows juries to determine awards based on unique circumstances, and would likely narrow award deviations on the majority of cases.

Readings on Other Individual Topics in Tort Law

Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992). Examines Learned Hand's famous admiralty decision, The T.J. Hooper, and its importance to all areas of tort law—from malpractice to products liability. Professor Epstein argues that industry custom should be much more respected by courts, because that custom is implicitly incorporated into consensual agreements between market participants. Ignoring industry custom, according to Epstein, results in inefficient recoveries by plaintiffs who have knowingly assumed the risk of their injuries.

David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653 (2006). The first empirical work on the duty to rescue, a topic that has long invited theories and strong convictions by law professors, which finds that in the real world, rescue is the rule – even if it is not in the law.

George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DEN. U.L. REV. 115 (1993). Analyzes the impact of tort law on the American economy, and offers three specific suggestions for tort reform that will promote economic growth and U.S. trade competitiveness.

George L. Priest, “The Culture of Modern Tort Law,” 34 Val. U. L. Rev. 573 (2000). An argument that a major cultural change has occurred in the last twenty years that is shifting torts jurisprudence from the predominant negligence standard of much of the twentieth century to an accepted strict liability standard. The shift has vastly expanded legal liability and has the danger of converting the United States into a more redistributive, less productive society.

George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987). Argues that the mid-1980s upheaval in the insurance markets was largely the result of “judicial compulsion of greater and greater levels of provider third-party insurance for victims.” This trend, by “systematically undermin[ing] insurance markets” has the following paradoxical effect: “continued expansion of tort liability on insurance grounds leads to a reduction in total insurance coverage available to the society, rather than to an increase.” In addition, “the parties most drastically affected . . . are the low-income and the poor, exactly the parties that courts had hoped most to aid” in expanding tort liability. For a broader historical and philosophical perspective see George L. Priest & David G. Owen, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 Cornell L. REV. 313 (1990). Examines the issue of whether tort liability insurance promotes or frustrates the goals of tort law. Professor Schwartz examines three possible goals of tort law, and discusses the effects of insurance on these ethical and economic goals. He concludes that insurance may or may not be economically efficient, but that its availability is justified because it furthers the most important goal of tort law: victim compensation. Schwartz argues that insurance allows an injured victim to receive more compensation for his injuries than the defendant could provide, and that premiums responsive to risky behavior also serve tort law's deterrence rationale.

Joel D. Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975). In this historical review of defamation law, Eaton surveys the development of libel actions in the United States. Drawing a line of demarcation at the Gertz case, the author discusses how the Supreme Court redrew the existing libel landscape in 1964. He makes no value judgments about the efficacy of the Gertz ruling, seeking instead to survey the "definitional, procedural, and doctrinal" issues stemming from the Court's decision on that day.

V. Constitutional Law

Last updated October 2011

Note: The Heritage Foundation has published a comprehensive Guide to the Constitution (2005), which provides a line-by-line analysis of the complete Constitution by more than 100 legal scholars, including notes on further reading. (Select sections of the Guide are available for download here:

<http://www.heritage.org/about/bookstore/constitutionguide.cfm>). The Guide is so useful and concise a resource for understanding conservative and libertarian constitutional thinking that we have cited relevant pages throughout this section, in addition to other articles.

The Founding

Original Sources

THE FEDERALIST. The versions edited respectively by Clinton Rossiter and Jacob E. Cooke, along with their introductions, are the best. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., 1911) (3 vols.). Professor Farrand scrupulously collected the notes kept at the Constitutional Convention, starting, of course, with James Madison's. JONATHAN ELLIOTT, DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1845, republished in 1937 & 1968). The views of the state ratifying conventions are of great importance, and this is the indispensable collection. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Johnson, ed., 1976) (16 vols.) is 150 years more recent and more comprehensive, but it is only partly completed.

The Anti-Federalist Papers in BERNARD BAILYN, DEBATES ON THE CONSTITUTION (1993). Although their opposition to ratifying the Constitution failed, the Anti-Federalists' ideas were—and remain—influential. See also THE ANTI-FEDERALIST (Herbert Storing, ed., 1985).

Letters of Pacificus. Hamilton's essays under this pseudonym defended President Washington's Neutrality Proclamation of 1793. They contain an important statement of the President's foreign policy powers and duties. Some of the essays are collected in, for example, SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON (Morton J. Frisch, ed., 1985) at 396-407. All are available in PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1961-87) (27 vols.).

AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805 (Charles S. Hyneman & Donald S. Lutz, eds., 1983) (2 vols.). This is an interesting compilation of essays, articles, speeches, sermons, and other works on a wide range of political subjects by a variety of authors—some famous, others obscure, anonymous, or pseudonymous. The political thought of the time was also reflected in the contemporaneous laws, some of the most important of which are collected in BENJAMIN

PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (1878) (2 vols.).

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (St. George Tucker, ed., 1803). Some slightly earlier versions of this classic work were among the leading legal reference works when the Framers studied law. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833, reprinted with an introduction by Ronald D. Rotunda and John E. Nowak in 1987). Justice Story cannot be considered a Founder (he was born in 1779), but his treatise—first published in 1833—is among the earliest and most influential in American constitutional law. As Professors Rotunda and Nowak say at the beginning of their interesting introduction to the one-volume edition (the original version had three volumes), “Joseph Story lived at an ideal time and under ideal circumstances to reflect upon the nature of our constitutional system of government.”

JACK P. GREENE, COLONIES TO NATION, A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION (1975). A collection of historical documents ranging from government papers and pamphlets to diaries and personal letters.

The Framers relied on the work of many political philosophers in their own thinking and writing, including: Aristotle (*Politics*) <http://classics.mit.edu/Aristotle/politics.html> , Machiavelli (*Discourses*) <http://www.constitution.org/mac/disclivv.htm> , Hobbes (*Leviathan*) <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html> , Locke (*Two Treatises of Government, An Essay Concerning Human Understanding*) <http://onlinebooks.library.upenn.edu/webbin/book/search?amode=start&author=Locke,%20John> , Montesquieu (*The Spirit of the Laws*) <http://www.constitution.org/cm/sol.htm> , Hume (Essays, *A Treatise of Human Nature*) <http://www.class.uidaho.edu/mickelsen/ToC/hume%20treatise%20ToC.htm> , and Adam Smith (*The Wealth of Nations, The Theory of Moral Sentiments*) <http://www.bibliomania.com/NonFiction/Smith/Wealth/index.html>.

Internet resources: All four of the following sites offer on-line versions of the Declaration of Independence, the U.S. Constitution, and the Federalist Papers -- and *a lot* more.

“Founding.com” sponsored by the Claremont Institute, <http://www.founding.com> (especially the “Founders Library”), “Constitution Society,” <http://www.constitution.org> (especially the “Basic Principles,” “Founding Documents,” and “Liberty Library of Constitutional Classics” pages), “Avalon Project at the Yale Law School,” <http://www.yale.edu/lawweb/avalon/avalon.htm> (“Documents in Law, History, and Government”), and the University of Oklahoma Law Center, “A Chronology of U.S. Historical Documents,” <http://www.law.ou.edu/hist>

Secondary Sources

The Legacy of the Federalist Papers, 16 HARV. J.L. & PUB. POL'Y 1 (1993). This Federalist Society symposium features panels on The Federalist's philosophical foundations; its vision of representative democracy, liberty, and constitutional structure; and its relevance to current debates regarding federalism, term limits, and judicial overreaching. There is also much commentary on the Anti-Federalists. Participants included James Buckley, Charles Cooper, David Epstein, Richard Epstein, Mary Ann Glendon, Lino Graglia, William Kristol, and Geoffrey Miller. The essay on the Tenth Amendment by Pete DuPont—which follows the published proceedings of the symposium—also is worth reading.

GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969). This classic work of intellectual history discusses how, between the Declaration of Independence and the framing of the Constitution, American political thought was fundamentally transformed.

HERBERT STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981). The Anti-Federalists, Storing reminds us, were our Founding Fathers, too; their debate with the Federalists will never be finally resolved, and it was largely through their efforts that the Bill of Rights was added to the Constitution. Storing explains their principles and arguments, many of which are just as applicable today.

DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984). In the Straussian tradition, this is a close and deep reading of a classic political text. Epstein also discusses some of the contributions of Hobbes, Locke, Hume, Montesquieu, and Adam Smith to the Framers' thought.

THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988). Here is another Straussian book centered on *The Federalist*, but Professor Pangle also considers other statements by Hamilton, Madison, and Jay, as well as the views of other Founders, especially Franklin, Jefferson, and Wilson. As the title suggests, he concludes that the works of John Locke greatly illuminate the Framers' vision.

HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* (1991). Yet another Straussian, Professor Mansfield provides in his book a collection of essays all loosely related to “set[ting] forth a constitutional view of American politics.” Four focus on federal elections in the 1980s; others on affirmative action, religion, and separation of powers, among other issues. The last part is devoted to “constitutional forms.” As Professor Mansfield concludes in his prolegomenon, “Forms matter: let that suffice for a preface.”

Epstein, Pangle, and Mansfield, as well as other distinguished scholars, contribute essays to *CONFRONTING THE CONSTITUTION* (Allan Bloom, ed., 1990), an impressive collection published by the American Enterprise Institute on “the challenge to Locke, Montesquieu, Jefferson, and the Federalists from utilitarianism, historicism, Marxism, Freudianism, pragmatism, [and] existentialism . . .”

MARTIN DIAMOND, *AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT* (1992). These essays, collected and edited by William A. Schambra after Professor Diamond’s death, focus primarily on *The Federalist* and the framing. The essays are grouped by themes, which include “Foundations: The Democratic Republic” and “Decentralist Federalism and Republican Virtue.”

FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985). Professor McDonald is one of our greatest historians. This is his (entirely successful) undertaking “to make a reasonably comprehensive survey of the complex body of political thought (including history and law and political economy) that went into the framing of the Constitution . . .”

THURSTON GREENE, *THE LANGUAGE OF THE CONSTITUTION: A SOURCEBOOK AND GUIDE TO THE IDEAS, TERMS, AND VOCABULARY USED BY THE FRAMERS OF THE UNITED STATES CONSTITUTION* (1991). As the preface says, this ingenious book takes the words of the original Constitution and the Bill of Rights and provides “an alphabetical index to contemporaneous and antecedent sources expanded to such an extent that a lexicographer could use them to create a dictionary, without going further afield.” In other words, it tells what the Constitution’s words commonly meant at the time of the Founding.

DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (2001). An argument that the U.S. Constitution is not a pro-slavery document, despite later policies supporting the institution.

JOHN E. NOVAK AND RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* (2004). A constitutional treatise providing a guide as to how judges and practitioners apply constitutional principles in the real world.

For additional reading see Heritage Guide at 446-447.

Interpretive Theory

THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (1986); *WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY* (1992). These two monographs are handy compilations by the Federalist Society of the thoughts of various prominent experts on two of the most fundamental questions in constitutional law. *The Great Debate* discusses whether the

Constitution ought to be interpreted according to its original meaning or, instead, some other principle or set of principles. *Who Speaks for the Constitution?* considers how the branches of the federal government ought to resolve their inevitable disagreements over constitutional meaning and application. On this issue, see also JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984). The first monograph collects speeches by President Reagan, Robert Bork, Edwin Meese, and Justices Brennan and Stevens; the second includes twenty works from the Founding to the present day.

JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Ely argues that the constitution should be interpreted so as to reinforce democratic processes and popular self-government, by ensuring equal representation in the political branches, and that the Constitution's unenumerated rights (such as the 9th Amendment or the Privileges and Immunities clause) are procedural, not substantive, and thus protect only rights to democratic processes.

KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (2001) and *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999). Two excellent books on the constitution by one of the field's most prominent proponents of original intent: the theory that the intent of the author of words or language determines the meaning of those words. For another seminal defense of original intent see Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. L. REV. 226 (1988).

Lawrence B. Solum, *Semantic Originalism at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. Professor Solum is a prominent adherent to the original public meaning theory of constitutional interpretation, according to which the text of the Constitution ought to be interpreted as it would have been understood by a competent speaker of the language at the time of its enactment, as opposed to the intention of the author himself (or themselves). See also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Gary Lawson & Guy Seidman, *Originalism as Legal Enterprise*, 23 CONST. COMMENT. 47, 64 (2006).

RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2003). Professor Barnett argues that courts, especially since the 1930's, have been misconstruing the Constitution to eliminate the parts that protect individuals from government power. In this clear, engaging book, Barnett establishes the original meaning of these lost clauses and argues for a "presumption of liberty" in constitutional interpretation, to give the benefit of the doubt to citizens when laws restrict their exercises of liberty.

John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism*, 98 Geo. L. J. ___ (2010). An argument that originalist interpretation of constitutional provisions is more likely to yield substantively superior consequences, because the strict supermajority under which the clauses were originally enacted was likely to have resulted in the most desirable provisions.

Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENTARY 291 (2007). Professor Balkin argues that Constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text, but not to original expected application of those rules to the document by interpreters.

DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* (1990) (2 vols.). Professor Currie read every constitutional decision issued by the Supreme Court and provides an evaluation from a lawyer's perspective. Professor Currie's *THE CONSTITUTION OF THE UNITED STATES: A PRIMER FOR THE PEOPLE* (1988) is only 88 pages of text, but also very good.

ALEXANDER M. BICKEL, *MORALITY OF CONSENT* (1975). When Alexander Bickel, a professor at Yale Law School, died in 1974, he was eulogized by George Will as "the keenest public philosopher of our time" and by Robert Bork as a friend who "can be called, without hesitation or embarrassment, a great man." He became more conservative over the course of his distinguished and too brief career, and *The Morality of Consent*, based on a series of lectures at Yale the year before he died and containing the core of his still-developing political and legal philosophy, is well worth reading. Professor Bickel's first book was the classic *THE LEAST DANGEROUS BRANCH* (1962).

WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987). Professor Berns is one of our foremost constitutional scholars, and this book-written for the Constitution's bicentennial-is, Dr. Berns says, "an explanation of the Constitution by reference to the Declaration of Independence, the first of our founding documents." Needless to say, it contains an impressive wealth of historical and constitutional scholarship.

STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED* (1994). This wide-ranging book addresses the connections between religion, morality, and law, and advocates a more active role for natural law in legal reasoning. Professor Presser proposes three constitutional amendments-authorizing school prayer, requiring government "colorblindness," and returning the abortion issue to the states-and suggests that the Supreme Court be reduced to five, six, or seven Justices.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Edward S. Corwin, ed., 1953). This "annotated Constitution" is a treasure trove of information about the Constitution and the Supreme Court cases interpreting it. The later, post-Corwin editions are still useful, but are less objective. THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* (Legal Classics Lib. ed. 1987). This 1866 classic, by a leading scholar on state constitutional law, reminds us that this area is an important one for those who take federalism seriously.

Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 *GEO. WASH. L. REV.* 50 (1987). Professor Macey is a prolific writer on economics-related legal issues. In this article, he uses a "public choice" analysis to "argue that the Constitution is a profoundly economic document in the most fundamental sense," but that its purpose was to ensure that special-interest attempts at wealth transfers were thwarted, not facilitated. This article is part of a seminar on "The Constitution as an Economic Document," which also included papers by Richard Epstein and Richard Posner.

ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1998). Justice Scalia's famous explication of his text-based mode of statutory interpretation, which he extends and applies to constitutional interpretation.

Separation of Powers

Douglas Ginsburg, *Legislative Vesting Clause*, Heritage Guide at 46 (*available at http://www.heritage.org/About/Bookstore/upload/85015_1.pdf*)

David Engdahl, *Necessary and Proper Clause*, Heritage Guide at 146.

Douglas Cox, *Inferior Officers*, Heritage Guide at 213.

The Presidency and Congress: Constitutionally Separated and Shared Powers, 68 WASH. U. L.Q. 485 (1990).

This Federalist Society symposium included panels on agency autonomy and the unitary executive, presidential lawmaking powers, congressional control of the administration of government, the appropriations power and the Necessary and Proper Clause, and the role of the courts in separation of powers disputes. Participants included William Barr, Griffin Bell, Robert Bork, Stephen Carter, Richard Cheney, Gordon Crovitz, Frank Easterbrook, Terry Eastland, Boyden Gray, Geoffrey Miller, David Schoenbrod, Laurence Silberman, and Richard Thornburgh.

Geoffrey P. Miller, *Independent Agencies*, 1986 S. CT. REV. 41. Are independent agencies constitutional? Professor Miller concludes that they are not: “Congress may not constitutionally deny the President the power to remove a policy-making official who has refused an order of the President to take an action within the officer’s statutory authority.” Thus, “[t]he independent agency is a constitutional sport, an anomalous institution created without regard to the basic principle of separation of powers upon which our government was founded.” He reaches this conclusion by painstakingly but incisively considering arguments pro and con from constitutional text and structure, history, function, prescription, the practical effects of declaring independent agencies unconstitutional, and case law.

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). This article begins, “The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” After this equivocal start, Professor Lawson explains why the administrative state violates principles of separation of powers, among other things, and sadly concludes that “the seemingly irrevocable entrenchment of the post-New Deal structure of national governance raises serious doubts about the utility of constitutional discourse.”

Steven Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). This article explores the relationship between the Article II “unitary executive” and the Article III “jurisdiction stripping” debates. It concludes that theories of broad congressional power to restrict federal court jurisdiction strongly suggest limited congressional

power to restructure the executive, and that theories of limited congressional jurisdiction-stripping power compel a unitary executive under Article II.

Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989). This article argues that *Morrison* can be justified on neither “functionalist” nor “formalist” grounds. The author provides a very useful summary of competing theories respecting the scope of separation of powers principles.

Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 479 (1998). Professor Gerhardt argues that the confirmation process serves also as an important forum for dialogue between the President and the Senate on constitutional and policy matters related to the nominations of particular candidates.

Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In this groundbreaking article, Professor Rosenkranz proposes a new mode of constitutional analysis. Just as the Constitution prohibits not objects but actions--and just as actions require actors--so every constitutional inquiry, Rosenkranz argues, should first ask "who" violated the Constitution and "when" the violation took place. The answers to these questions, he contends, dictate the proper structure of judicial review, which in turn informs the scope of substantive rights and powers in dispute.

Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011). This sequel continues the analysis begun in *The Subjects of the Constitution*. Although judges often describe "statutes" as violating the Constitution, the true "violation," Professor Rosenkranz notes, is not the law itself but rather the legislature that passed it or the executive who applied it--and review of executive action proceeds differently from review of legislative action. Identifying the proper actors or "subjects," Rosenkranz explains, enables us to discern the corresponding "objects" in the Bill of Rights and other provisions of the Constitution. Taken together, these subjects and objects shed new light on the structure of the Constitution.

Federalism

Charles J. Cooper, *Reserved Powers of the States*, Heritage Guide at 371.

A Symposium on Federalism, 6 HARV. J.L. & PUB. POL’Y 1 (1982). This Federalist Society symposium includes papers by Paul Bator, Walter Berns, Michael McConnell, John Noonan, Theodore Olson, Richard Posner, Antonin Scalia, Ralph Winter, and many others.

Reinventing Self-Government: Can We Still Have Limits on National Power?, 4 CORNELL J.L. & PUB. POL’Y 415 (1995). As its title suggests, this Federalist Society symposium was less about federalism per se, as it is now usually and narrowly understood, and more about limiting the federal government to its

enumerated powers. Panels included “National Power and Health Care,” “Limits on National Power and Unconstitutional Conditions,” “The Federal Judiciary and Self-Government,” and “National Power and Crime.” Participants included George Allen, Richard Armev, Frank Easterbrook, Richard Epstein, Alan Keyes, Charles Murray, William Van Alstyne, and Malcolm Wallop.

RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987). This short book (192 pages of text, heavily footnoted) addresses much more than just federalism, narrowly understood: it includes much on the Framers’ desire for a limited federal government, objections to judicial overreaching, imperatives of originalism, and other conservative themes. For a conservative critique of the book, see Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987).

A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM (Robert A. Goldwin, ed., 1974). This impressive collection of essays provides some interesting perspectives on federalism. Contributors include Martin Diamond (“What the Framers Meant by Federalism”), Russell Kirk (“The Prospects for Territorial Democracy in America”), Herbert J. Storing (“The Problem of Big Government”), and Walter Berns (“The Meaning of the Tenth Amendment”). John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943 (1963), and *The Bill of Rights and the Constitution*, 50 A.B.A. J. 918 (1964). These two speeches by Justice Harlan discuss the importance of federalism as a guardian of individual rights.

Henry M. Hart, Jr., *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). Here is the blueprint for Hart and Wechsler’s influential casebook, *FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988), discussing federalism at the legal and technical level. Nearby in the same law review volume is the similarly influential and brilliant (but heterodox) article by Hart’s partner, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). In Wechsler’s view, the role of the states in our constitutional structure is necessarily powerful, and the Supreme Court “is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.” This approach is strongly criticized in William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

Charles J. Cooper, *The Demise of Federalism*, 20 URB. LAW. 239 (1988). This article describes the “nationalization of state sovereignty” by Congress and the President, aided and abetted by the federal judiciary. It provides a comprehensive accounting of the doctrines used or abused to achieve this end, with an emphasis on Supreme Court decisions.

Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011). This sequel continues the analysis begun in *The Subjects of the Constitution*. Although judges often describe “statutes” as violating the Constitution, the true “violator,” Professor Rosenkranz notes, is not the

law itself but rather the legislature that passed it or the executive who applied it--and review of executive action proceeds differently from review of legislative action. Identifying the proper actors or "subjects," Rosenkranz explains, enables us to discern the corresponding "objects" in the Bill of Rights and other provisions of the Constitution. Taken together, these subjects and objects shed new light on the structure of the Constitution.

Commerce Clause

David E. Forte, *Commerce Among the States*, Heritage Guide at 101.

Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Professor Epstein maintains that the text, structure, and history of the Commerce Clause cannot be squared with what the courts have done with it, especially the expansive construction of the Clause accepted by the New Deal Supreme Court. This article appeared to be hopelessly idealistic when written, but the recent decision by the Court in *United States v. Lopez*--and especially Justice Thomas's concurrence in that case--make Professor Epstein's arguments less quixotic. See also Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 801 (1995). Conversely, Professor Epstein discusses federalism as a check on the monopoly power of state and local governments in *Exit Rights under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992). From the standpoint of intellectual history, an interesting book on Commerce Clause jurisprudence is EDWARD S. CORWIN, *COMMERCE POWER VERSUS STATES RIGHTS* (1962), written in 1936.

Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. Federal courts have argued that the Commerce Clause, by empowering Congress to regulate interstate commerce, also prohibits states from passing laws which "burden" interstate commerce. This article argues that there is no textual basis for this "dormant Commerce Clause" doctrine, that its nontextual rationales are also flawed, that the doctrine actually undermines the Constitution's carefully structured federal-state balance, and that a text-based jurisprudence could deal effectively with state laws that discriminate against out-of-state commerce.

Michael DeBow, *Codifying the Dormant Commerce Clause*, 1995 PUB. INTEREST L. REV. 69. After reviewing the state of the Supreme Court's jurisprudence on the dormant Commerce Clause, and briefly recounting why many commentators, most prominently Justice Scalia, have concluded that this case law is intellectually bankrupt, Professor DeBow proposes a simple solution: Congress should use its affirmative power under the Commerce Clause to codify the holdings that make policy sense (principally those that prohibit any state from discriminating against out-of-state business), and overturn those holdings that do not.

BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998). Cushman argues that the shift in commerce clause doctrine effected by the

New Deal Court was less the result of external political pressures than the product of doctrinal development.

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001). Professor Barnett conducts a survey of all uses of the word “commerce” in the Constitutional Convention, ratification debates, and Federalist Papers and finds no evidence that such usage supports a broad reading of the commerce clause as permitting Congress to regulate “any gainful activity,” in contrast to (as Justice Thomas argues) merely the trade and exchange of goods between the states and transportation for this purpose. See also Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003). Professor Denning argues that the substitution of the Privileges and Immunities Clause for the dormant Commerce Clause (DCCD), as critics of the latter have urged, would sacrifice substantial protection for interstate commerce against state discrimination, because the Privileges and Immunities Clause does not apply to corporations and would not invalidate facially-neutral state statutes that nevertheless discriminate in their effects, and that the unavailability, under the Privileges and Immunities Clause, of certain exceptions to the DCCD would limit states and Congress to a greater degree than does the DCCD.

Role of the Judiciary

Article III, Heritage Guide at 231-266. Containing analyses of all Article III clauses by Robert J. Pushaw, Jr., Bradley C.S. Watson, Jonathan Turley, Loren Smith, Gary Lawson, Arthur Hellman, Dennis Arrow, David Forte, Paul Rosenzweig, Ernest A. Young, Terence Pell, John Eastman, Paul Verkuil, Andrew Gold, and Rachel E. Barkow.

Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law, 17 HARV. J.L. & PUB. POL’Y 1 (1994). This Federalist Society symposium presented panels on “The Enterprise of Judging,” “Stare Decisis and Constitutional Meaning,” “Text and History in Statutory Construction,” and “Non-Legal Theory in Judicial Decisionmaking,” as well as a roundtable on “The Supreme Court as a Political Institution.” Twenty papers were presented, by, among others, Lillian BeVier, Charles Fried, William Kristol, Gary Lawson, Raymond Randolph, Martin Shapiro, and Stephen Williams.

ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). This book is divided into three parts, each valuable. The first recounts the history of judicial overreaching; the second critiques the leading theories of constitutional interpretation; and the third is a memoir of Judge Bork’s nomination to the Supreme Court. None of the three parts has a happy ending.

LOUIS LUSKY, *BY WHAT RIGHT: A COMMENT ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975). This underread classic was written by one of Justice Stone's former clerks, who probably worked on the well-known footnote 4 in *Carolene Products*. In this book, however, he repudiates judicial overreaching. (For an entertaining history of the *Carolene Products* case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S. CT. REV. 397 (“*Carolene’s* legacy is not only *Brown v. Board of Education*; it is also the unrivaled primacy of interest groups in American politics of the last half-century.”)).

William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). In this much-cited article, the Chief Justice briefly but thoughtfully makes the case for originalism.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989), and *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). These two articles provide an excellent introduction to Justice Scalia's judicial philosophy: originalism, textualism, bright lines, and an abhorrence of “balancing tests.”

Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992). This article addresses the perennial and difficult problem of “levels of generality in constitutional interpretation”—that is, how do we decide how broadly to interpret a textual guarantee (or prohibition) of the Constitution?

Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990). This piece is a highly critical but interesting discussion of the originalism espoused in Robert Bork's *The Tempting of America*. In turn, Bork is defended and Posner attacked in Lino A. Graglia, *Interpreting' the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019 (1992).

Michael Stokes Paulsen, *The Many Faces of Judicial Restraint?*, 1993 PUB. INTEREST L. REV. 3. Professor Paulsen divides the “conservatives” on the Supreme Court into three categories and defines the jurisprudence of each camp: “‘interpretivist’ conservatives who accord primacy to the text, history, and structure of the document being interpreted, ‘majoritarians’ who vindicate legislative choices, and ‘incrementalist’ conservatives who are committed to gradualist approaches to change in the state of the law, giving due weight to stare decisis and ‘settled doctrine.’” Stephen J.

Markman, *A Poor Choice of Words: Careless Rhetoric about the Constitution*, 1991 DET. C.L. REV. 1325, is an excellent discussion of both nomenclature and the proper judicial role in constitutional decisionmaking. Originalism is defended (albeit with a new definition and qualifications some conservatives have rejected) as a means to liberal ends in MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994).

James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Professor Henry Monaghan called this “the most influential essay ever written on American constitutional law.” It was the first systematic exposition of the idea that the judiciary should defer

to the political branches unless the legislation under review is clearly unconstitutional, and was an acknowledged major influence on Justices Holmes, Brandeis, and Frankfurter. It continues to influence—see, e.g., *David P. Bryden, Politics, the Constitution, and the New Formalism*, 3 CONST. COMM. 415 (1986). Thayer also wrote a biography of Chief Justice Marshall, which contains a particularly interesting discussion of judicial review. Thayer’s work was commemorated at a recent symposium: *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993). Participants at the symposium included Steven Calabresi, Gary Lawson, Jonathan Macey, Thomas Merrill, Stephen Presser, Martin Redish, and Steven Smith.

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). This classic paper, delivered as the 1959 Oliver Wendell Holmes Lecture at Harvard Law School, is divided into two parts. The first argues (contrary to Judge Learned Hand’s position) that courts are obliged to decide all constitutional cases in which the jurisdictional and procedural requirements are met. The second discusses the “neutral principles” that courts are obliged to use in such decisions—principles that rest on reasoning and analysis and that thereby transcend the judges’ value preferences. Judge Hand’s lecture from the same rostrum the previous year, in which he articulated his very cautious philosophy of judicial intervention, was also published. See LEARNED HAND, THE BILL OF RIGHTS (1958). (Earlier speeches and writings of Judge Hand are collected in *Learned Hand, THE SPIRIT OF LIBERTY* (1952).)

William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. This article reexamines *Marbury v. Madison* in its historical context and analyzes the opinion in terms of the various alternative approaches that might have been taken by Chief Justice Marshall. The specific holding of the case is isolated—in contrast to the later interpretation given it—and historical materials are provided to illuminate the constitutional viewpoints of the period.

Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993), and *Constitutional Theory: The Attempted Justification for the Supreme Court’s Liberal Political Program*, 65 TEX. L. REV. 789 (1987). These are two short and entertaining attacks on judicial overreaching by a leading conservative scholar. Professor Graglia explicitly addresses Justice Brennan’s critique of originalism in his (Graglia’s) article, *How the Constitution Disappeared*, in *INTERPRETING THE CONSTITUTION* (Jack N. Rakove, ed., 1990).

John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). This frequently cited article provides a “nonpartisan” critique of *Roe*, finding it to be, among other things, even more dangerously activist than *Lochner v. New York*.

Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). Professor Kay defends originalism against its three common objections: that it is impossible to ascertain (or at least too hard), self-contradictory (the Framers

didn't intend it), and morally indefensible (it makes bad government and bad law). On the other hand, for a thoughtful critique and spoof of originalism, respectively, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980), and Boris J. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 (1989).

HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* (5th ed., 1986). There are courts besides the Supreme Court—not only lower federal courts, but state courts, and even courts in foreign countries. Professor Abraham's classic volume provides a useful tour of them all, including their staffing and procedures, the nature and kinds of law, and the different types of judicial review, concluding with his "Sixteen Great Maxims of Judicial Self-Restraint."

Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In this groundbreaking article, Professor Rosenkranz proposes a new mode of constitutional analysis. Just as the Constitution prohibits not objects but actions—and just as actions require actors—so every constitutional inquiry, Rosenkranz argues, should first ask "who" violated the Constitution and "when" the violation took place. The answers to these questions, he contends, dictate the proper structure of judicial review, which in turn informs the scope of substantive rights and powers in dispute.

Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011). This sequel continues the analysis begun in *The Subjects of the Constitution*. Although judges often describe "statutes" as violating the Constitution, the true "violation," Professor Rosenkranz notes, is not the law itself but rather the legislature that passed it or the executive who applied it—and review of executive action proceeds differently from review of legislative action. Identifying the proper actors or "subjects," Rosenkranz explains, enables us to discern the corresponding "objects" in the Bill of Rights and other provisions of the Constitution. Taken together, these subjects and objects shed new light on the structure of the Constitution.

Role of the President

Article II, Heritage Guide at 179-231. Containing analyses of all Article II clauses by Sai Prakash, David Forte, Einer Elhauge, Tadahisa Kuroda, James Ho, John Feerick, Robert Delahunty, Vasan Kesavan, John Yoo, Todd Gaziano, James Pfiffner, Michael D. Ramsey, John McGinnis, Douglas Cox, Michael Carrier, Matthew Spalding, J. Gregory Sidak, Michael Frank, Trent England, Stephen Presser, and Michael Uhlmann. Professor McGinnis' analysis of the Appointments Clause is available for download here: http://www.heritage.org/About/Bookstore/upload/85012_1.pdf.

Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts, 43 U. MIAMI L. REV. 1 (1988). Although, as its title indicates, this Federalist Society symposium discusses all three branches, the focus is heavily on the executive. There were twenty-five participants, including Arthur

B. Culvahouse, Jr., Orrin Hatch, Irving Kristol, Geoffrey Miller, John Norton Moore, Richard Perle, Joseph Rees, Eugene V. Rostow, Gordon Tullock, William Webster, and Richard Willard.

THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin, eds., 1989). This book, published by the American Enterprise Institute, covers a wide range of executive-branch issues by collecting the views of an impressive array of experts, many of them former federal policymakers. Included are Elliott Abrams, Paul Bator, Suzanne Garment, Boyden Gray, Alan Keyes, Jeane Kirkpatrick, Richard Perle, Eugene Rostow, Loren Smith, William French Smith, and Caspar Weinberger. The Foreword is by Robert Bork.

Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L.J. 541 (1994). Professors Calabresi and Prakash analyze the Constitution's text, review its history, and conclude: "The Framers and ratifiers consciously and deliberately chose to put one person in charge of executing all federal laws." This means, among other things, that there cannot be a "headless fourth branch of government," namely so-called independent agencies.

Steven G. Calabresi, *Some Normative Arguments for a Unitary Executive*, 48 ARK. L. REV. 23 (1995). Professor Calabresi discusses the Framers' reasons for creating a strong and unitary (that is, headed by a single person) executive branch, why unitariness remains as important as strength, and why the New Deal expansion of federal power makes a strongly unitary executive even more essential.

Eugene V. Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986). This article makes the historical and legal case for a strong President in the foreign affairs arena and against limitations on his authority, such as the War Powers Resolution.

LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d. ed., 2004). Fisher presents historic and constitutional arguments against a broad understanding of presidential war powers.

Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002). An exploration of the eighteenth century use of the phrase "declare war," finding it had a broader meaning than commonly supposed, suggesting that Congress' power to declare war broadly encompasses the power to initiate warfare. Ramsey goes on to argue, however, that Presidential actions that do not create a state of war, even if they involve military force or create a likelihood of war, do not require authorization.

Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994). This article discusses the constitutional problems raised by another congressional incursion on executive branch authority, namely the Federal Advisory Committee Act, which limits the terms on which the President can acquire information from nongovernmental advisory committees.

Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS L.J. 791 (1999). Goldstein provides a survey of the President's constitutional role in protecting and observing the Rule of Law, challenging the notion of the Supreme Court as exclusive or ultimate interpreter of the Constitution.

Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). A discussion of the framework for foreign affairs discernable from the text of the Constitution, in which the authors also demonstrate that eighteenth-century political theory included foreign affairs powers as part of the executive power.

Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000). Bradley and Goldsmith challenge the conventional wisdom that human rights reservations, understandings and declarations (RUDs) are invalid under international and U.S. law and detrimental to human rights causes. The authors argue that the RUDs serve as a bridge between isolationists who want to preserve the United States' sovereign prerogatives, and internationalists who want the United States to increase its involvement in international institutions, and that they help reconcile fundamental changes in international law with the requirements of the U.S. constitutional system.

Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In this groundbreaking article, Professor Rosenkranz proposes a new mode of constitutional analysis. Just as the Constitution prohibits not objects but actions--and just as actions require actors--so every constitutional inquiry, Rosenkranz argues, should first ask "who" violated the Constitution and "when" the violation took place. The answers to these questions, he contends, dictate the proper structure of judicial review, which in turn informs the scope of substantive rights and powers in dispute.

Role of Congress

Article I, Heritage Guide at 46-178. Containing analyses of all Article I clauses by a number of scholars. Analyses available for download include: Legislative Vesting Clause, Douglas Ginsburg (http://www.heritage.org/About/Bookstore/upload/85015_1.pdf), Obligation of Contract, Richard Epstein (http://www.heritage.org/About/Bookstore/upload/85010_1.pdf), and Compact Clause, Michael S. Greve (http://www.heritage.org/About/Bookstore/upload/85010_1.pdf).

The Congress: Representation, Accountability and the Rule of Law, 23 CUMB. L. REV. 1 (1993). This Federalist Society symposium included panels on the legislative role in the American Republic, incumbency advantage and congressional accountability, the administrative state, and term limits, as well as a keynote address by then-Vice President Quayle and other addresses by Boyden Gray and Laurence Silberman. Other contributors to the symposium included Walter Berns, Christopher Cox,

Michael Horowitz, Alan Keyes, Gary Lawson, Jonathan Macey, Theodore Olson, Martin Redish, and William Bradford Reynolds.

Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). The issue described by the title of this article is a perennial one, never resolved in the courts or in the literature, and arising whenever judicial decisions are unpopular enough to provoke Congress to talk about taking direct action against the judiciary. Professor Gunther carefully considers the Constitution's text and discusses why Congress's power in this area is indeed broad, although it may be unwise to exercise it. See also Raoul Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801; Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965). One conservative scholar has argued that, rather than limiting appellate jurisdiction, the better approach is for Congress to spell out "the various procedural arrangements that serve to guide and hem in the exercise of substantive judicial power" (i.e., standing, class actions, intervention, consent decrees, and declaratory and equitable relief). GARY L. MCDOWELL, *CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER* (1988).

Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). The "Sweeping Clause" is how Alexander Hamilton in *The Federalist* referred to what is now more commonly called the "Necessary and Proper Clause" of Article I, Section 8 of the Constitution. The authors' thesis is that the words "and proper" have been unjustly neglected, and that they are, and were intended to be, "a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights." Herman Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B. J. 102, 223, 319 (1949). This three-part article makes a strong case for the executive branch's authority to withhold papers sought by congressional committees. Note the date: at the time, this principle was being invoked to resist the investigative activities of Congress relating to domestic Communist activity. Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575 (1987), is a more recent discussion of Congress's infringements in a variety of ways on the executive's rightful authorities; this article also provides a good general discussion of separation of powers.

Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501 (2002). Professor Vermeule takes up the question of which branch or institution, in a system of separation of powers, should decide how officials are compensated for their services. He examines a range of constitutional texts and precedents and describes these rules as responses to the constitutional-design tradeoff between promoting institutional independence and minimizing institutional conflicts of interest. In that light he evaluates their costs and benefits and proposes doctrinal adjustments intended to improve the constitutional law of official compensation.

John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997). A constitutional and historical defense of the House rule, adopted in 1995, that that requires a three-fifths majority of those voting to pass an increase in income tax rates.

Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002). Professor Lawson argues that the doctrine of non-delegation, though now essentially a dead letter in the case law, flows directly from the doctrine of enumerated powers: the executive and judiciary have no enumerated power to make law, and Congress has no enumerated power to constitute them as lawmakers.

Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003). Professor Natelson examines the original understanding of the “General Welfare Clause”—the Constitutional clause generally held to support federal spending programs and their associated requirements. Natelson rejects, as textually and/or historically flawed, the understandings of the Clause as a plenary grant of regulatory and spending power, a plenary grant of spending power only, or as a mere “non-grant” of spending power. He argues the clause, in fact, was a sweeping *denial* of power, intended to impose on Congress a standard of impartiality borrowed from the law of trusts, thereby limiting the legislature’s capacity to “play favorites” with federal tax money.

John C. Eastman, *Restoring ‘General’ to the General Welfare Clause*, 4 CHAPMAN L. REV. 63 (2001). An examination of the original understanding of the Spending Clause (giving Congress the power to tax for the common defense and general welfare) and the competing interpretations of it offered by Alexander Hamilton, on the one hand, and James Madison and Thomas Jefferson, on the other.

Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000). Professors Heald and Sherry argue that the language of Article I, Section 8, Clause 8, the Intellectual Property Clause, absolutely constrains Congress’s legislative power under certain circumstances, and distill four principles of constitutional weight - the Suspect Grant Principle, the Quid Pro Quo Principle, the Authorship Principle, and the Public Domain Principle, which inform the Court’s jurisprudence in cases involving the Intellectual Property Clause, acting as implied and absolute limits on Congress’s exercise of its legislative power.

Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004). Professor Nachbar asks whether Congress can avoid the restrictions on its intellectual property power (such as the “limited Times” requirement or the prohibition against protecting facts and, consequently, electronic databases) by resorting instead to other Article I powers, such as the commerce power. He concludes that it can, there being no generally applicable constitutional norm derivable from the limits expressed in the intellectual property clause.

Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997). Professor Barnett challenges the conventional wisdom concerning the necessary and proper clause as conferring broad legislative authority upon Congress, arguing instead that it mandates robust inquiry as to whether a law is in fact both “necessary” and “proper.”

Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). Noting that American courts have no uniform, generally accepted theory of statutory interpretation, Professor Rosenkranz observes that the result is a “cacophony” of competing academic and judicial interpretive theories. He argues that Congress can and should, consistent with its constitutional powers, impose a measure of order by crafting federal rules of statutory interpretation. This outcome, Rosenkranz concludes, is both constitutionally sound and desirable as a policy matter.

Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In this groundbreaking article, Professor Rosenkranz proposes a new mode of constitutional analysis. Just as the Constitution prohibits not objects but actions--and just as actions require actors--so every constitutional inquiry, Rosenkranz argues, should first ask “who” violated the Constitution and “when” the violation took place. The answers to these questions, he contends, dictate the proper structure of judicial review, which in turn informs the scope of substantive rights and powers in dispute.

Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011). This sequel continues the analysis begun in *The Subjects of the Constitution*. Although judges often describe “statutes” as violating the Constitution, the true “violation,” Professor Rosenkranz notes, is not the law itself but rather the legislature that passed it or the executive who applied it--and review of executive action proceeds differently from review of legislative action. Identifying the proper actors or “subjects,” Rosenkranz explains, enables us to discern the corresponding “objects” in the Bill of Rights and other provisions of the Constitution. Taken together, these subjects and objects shed new light on the structure of the Constitution.

See also suggested readings in Commerce Clause section, *supra*.

The Bill of Rights

The Bill of Rights after 200 Years, 15 HARV. J.L. & PUB. POL’Y 1 (1992). This Federalist Society symposium included panels on: “Should the Bill of Rights Fully Protect Fundamental Freedoms?,” “How Effective Are Bills of Rights in Protecting Freedom and Civil Liberties?,” “The Bill of Rights and Governmental Structure: Republicanism and Mediating Institutions,” and “Judicial Interpretation of the Bill of Rights.” More than twenty papers were presented, and the authors include William Barr, Walter Berns, Stephen Carter, Frank Easterbrook, Richard Epstein, John Harrison, Gary Lawson, Thomas Merrill, Theodore Olson, Nadine Strossen, and Ralph Winter.

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). In this article, Professor Amar breaks with the modern practice by which the Bill of Rights “has been chopped up into discrete chunks of text, with each bit examined in isolation.” Instead, he “offer[s] an integrated overview of the Bill of Rights as originally conceived, . . . illustrat[ing] how its myriad provisions related to each other and to those of the original Constitution.” Especially interesting is his argument that it is best understood not simply or even primarily as a list of individual rights protected against any government intrusion, but as a more complex arrangement for deploying rights and responsibilities—among federal and state governments; mediating institutions such as churches, militias, and juries; and individuals—“not to impede popular majorities, but to empower them.” For an expanded treatment by Professor Amar, see THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000). Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. PHIL. & POL’Y 196 (1991), takes a similarly comprehensive approach to the Bill of Rights and its relationship to the original Constitution, arguing that the first ten amendments should be understood not only as a denial of power to the federal government, but also as a grant of power to the Supreme Court at the expense of the other branches of the national government.

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Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In this groundbreaking article, Professor Rosenkranz proposes a new mode of constitutional analysis. Just as the Constitution prohibits not objects but actions—and just as actions require actors—so every constitutional inquiry, Rosenkranz argues, should first ask “who” violated the Constitution and “when” the violation took place. The answers to these questions, he contends, dictate the proper structure of judicial review, which in turn informs the scope of substantive rights and powers in dispute.

Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011). This sequel continues the analysis begun in *The Subjects of the Constitution*. Although judges often describe “statutes” as violating the Constitution, the true “violator,” Professor Rosenkranz notes, is not the law itself but rather the legislature that passed it or the executive who applied it—and review of executive action proceeds differently from review of legislative action. Identifying the proper actors or “subjects,” Rosenkranz explains, enables us to discern the corresponding “objects” in the Bill of Rights and other provisions of the Constitution. Taken together, these subjects and objects shed new light on the structure of the Constitution.

First Amendment

Amendment 1, Heritage Guide at 302-318. Contains analyses of all First Amendment Clauses by John Baker, Thomas Berg, Eugene Volokh, and David Bernstein.

A Symposium on the First Amendment, 10 HARV. J.L. PUB. POL'Y 1 (1987). This 1986 symposium contains sixteen papers on a wide range of First Amendment issues, including the free exercise of religion, the Establishment Clause, free speech, and associational rights. Authors include Randy Barnett, Paul Bator, Lillian BeVier, Frank Easterbrook, Milton Friedman, Henry Mark Holzer, and Michael McConnell.

WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976). Professor Berns carefully analyzes the history of the First Amendment (both regarding the Religion Clauses and freedom of speech) and critiques the Supreme Court's interpretation of them. In his analysis of how all this relates to "the future of American democracy," Berns quotes Tocqueville "frequently," since "he was and remains democracy's best teacher."

Religion Clauses

RELIGIOUS LIBERTY IN THE SUPREME COURT (Terry Eastland, ed., 1993). This is best described as a specialized case book. It includes the twenty-five Religion Clauses cases decided from 1940-92 that probably have had the most doctrinal significance, along with contemporaneous editorial responses to those decisions. There are three concluding essays-by Mary Ann Glendon of Harvard Law School, Michael Sandel of Harvard University, and Michael McConnell of the University of Chicago Law School-criticizing the Supreme Court's jurisprudence.

GERARD BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987). Although the Supreme Court and many commentators have asserted that the Framers intended "the relegation and isolation of religion," Professor Bradley attempts to prove false "these counterintuitive judicial commandments" by careful attention to the Establishment Clause's text and history. "[T]he intuitively plausible conclusion-that government interaction with religion be conditioned on a neutrality among sects-is the historically demonstrable meaning of nonestablishment, and represents the fundamental alternative to what the Court has wrought."

PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002). Professor Hamburger argues that the separation of church and state has no historical foundation in the First Amendment. Through an examination of historical evidence, he attempts to show that eighteenth-century Americans almost never invoked this principle and that, although Thomas Jefferson and others retrospectively claimed that the First Amendment separated church and state, separation became part of American constitutional law only much later, in part as a result of fear and prejudice.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). In this article, Professor McConnell critiques the Religion Clauses jurisprudence of the Warren, Burger, and Rehnquist Courts, and then "suggest[s] how a proper jurisprudence of the Religion Clauses should look," arguing that their purpose "is to protect the religious lives of the people from unnecessary

intrusions of government, whether promoting or hindering religion.” More specialized articles by Professor McConnell on Establishment Clause issues include *Accommodation of Religion*, 1985 S. CT. REV. 1, and *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 109 (1987).

William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause*, 90 W. VA. L. REV. 109 (1987). This article is an interesting attempt to “focus[] on the plain meaning of the [establishment] clause” and suggests a general principle of “even-handedness in all governmental action toward religious activities”

Steven D. Smith, *Separation and the ‘Secular’: Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989). This article maintains that institutional separation of church and state was intended by the Establishment Clause-but that modern interpreters have confused “separation” with “secularism,” and that governmental secularism is not what the Framers had in mind.

Douglas Laycock, *‘Nonpreferential’ Aid to Religion: A False Claim about Original Intent*, 27 WM. & MARY L. REV. 875 (1985-86). Professor Laycock concludes that the Framers did not mean to permit government aid to religion, even where that aid does not prefer one religion over others. Robert Cord, *Church-State Separation: Restoring the ‘No Preference’ Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL’Y 129 (1986). The Supreme Court’s 1947 decision in *Everson v. Board of Education* begins the modern era of Establishment Clause jurisprudence. Professor Cord argues that the Court got off on the wrong foot in *Everson*, that the Establishment Clause was intended to achieve only the limited purpose of prohibiting the federal government from preferential treatment for any particular religious denomination, and that some more recent opinions indicate a willingness to redirect the Court’s jurisprudence. For a more extensive discussion of Professor Cord’s views on the Establishment Clause, see ROBERT CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); and Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991). Professor McConnell’s article in the Harvard Law Review is his most definitive discussion of the original meaning of the Free Exercise Clause. As it went to press, however, the Supreme Court handed down its 1990 decision in *Employment Division v. Smith*, ruling that the government need not create exemptions for religious practice from neutral and generally applicable prohibitions. This decision has split conservatives. McConnell’s findings are inconsistent with *Smith*, as he elaborates in *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Hamburger and Bradley maintain that *Smith* is consistent with the Free Exercise Clause’s original meaning.

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003). The first of a two-part historical inquiry into the debates surrounding establishment and disestablishment in the United States. This first part provides a legal history of established religion in England, the colonies, and the early states; catalogs the laws and practices that constituted an establishment; and sets forth the principal (and competing) rationales for the establishment. The second part, on disestablishment, is forthcoming.

Free Speech

Eugene Volokh, *Amendment 1-Freedom of Speech and of the Press*, Heritage Guide at 311 (available at: http://www.heritage.org/About/Bookstore/upload/85009_1.pdf).

John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996). Professor McGinnis argues for a return to James Madison's conception of the First Amendment as establishing a property right for individuals in their ideas and opinions, rather than the New Deal's understanding of it as "an essential social instrument through which citizens could rationally and collectively plan for a better world." The article focuses in particular on the benefits of the Madisonian approach in the telecommunications context.

Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The first half of this article builds on Herbert Wechsler's call for "neutral principles" in Supreme Court adjudication (see *supra* p. 25), extending the doctrine to the definition and derivation of principles as well as their application. The Court is found lacking. Judge Bork then attempts to derive some neutral principles in the free speech area, concluding that "[c]onstitutional protection should be accorded only to speech that is explicitly political" and excepting speech that advocates the overthrow of government or other violations of the law.

LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1964). "This book presents a revisionist interpretation of the origins and original understanding of the First Amendment's clause on freedom of speech and press," begins the preface. Professor Levy writes that he is "reluctantly forced to conclude that the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics." For an originalist critique of Levy's work, see William T. Mayton, *From a Legacy of Suppression to the 'Metaphor of the Fourth Estate'*, 39 STAN. L. REV. 139 (1986). See also Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985).

Henry Mark Holzer, *Sauce for the Goose: The Left, the Right, and Free Speech*, 1995 PUB. INTEREST L. REV. 1. This libertarian article condemns Left and Right alike for their willingness to suppress speech—the Left targeting "hate speech," abortion protests, and the like; the Right, pornography. See also

Michael S. Greve, *Civil Rights and Uncivil Speech*, 1994 PUB. INTEREST L. REV. 1 (also discussing “hate speech”).

RICHARD E. WILEY, ET AL., COMMERCIAL SPEECH AND THE FIRST AMENDMENT (1994) (National Legal Center for the Public Interest white paper). The Supreme Court has drawn a distinction between “commercial” speech and other speech, affording the former less constitutional protection under the First Amendment. This white paper suggests why, in historical context, this distinction would have baffled the Framers: commercial speech was inextricably intertwined with other text in colonial newspapers. But some money-making activities may not be entitled to First Amendment protection, as discussed in Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993).

Lillian BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994). In this article, Professor BeVier critically assesses the justifications that have been offered in support of campaign finance reform. She also considers the debate regarding the intensity of judicial review of campaign finance legislation.

Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). A thorough analysis of how current Title VII harassment law-and especially hostile environment standards-affect First Amendment freedoms. See also Kingsley Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 488 (1991), and, for a civil liberties spin on the subject, Chapter 7 of NADINE STROSSEN, DEFENDING PORNOGRAPHY (1995).

MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” (2000). A history of popular demand for freedom of speech, stretching back to the eighteenth century. Professor Curtis denies the common notion that modern ideas about freedom of speech derived from twentieth century Supreme Court cases.

Second Amendment

Nelson Lund, *To Keep and Bear Arms*, Heritage Guide at 318-322.

Randy E. Barnett & Don B. Kates, *Under Fire: the New Consensus on the Second Amendment*, 45 EMORY L. J. 1139 (1996). A defense of the individual right interpretation of the Second Amendment and the scholarly consensus in support of it, including textual, structural, historical, and criminological evidence.

Nelson Lund, *The Past and Future of the Individual’s Right to Bear Arms*, 31 GA. L. REV. 1 (1996). In addition to a comprehensive textual argument in favor of the individual right interpretation, this article discusses the problems of applying the right to contemporary technology, and in the face of Fourteenth Amendment incorporation requirements.

Eugene Volokh, *The Commonplace Second Amendment*, 73 NYU L. REV. 793 (1998). Professor Volokh's influential article, cited in the Supreme Court's seminal 2008 decision in *District of Columbia vs. Heller*, points out that the structure of the Second Amendment was commonplace in American constitutions of the Framing era: State Bills of Rights contained justification clauses for many of the rights they secured. Looking at these state provisions, he suggests, can shed light on how the similarly structured Second Amendment should be interpreted. In particular, the provisions show that constitutional rights will often -- and for good reason -- be written in ways that are to some extent overinclusive and to some extent underinclusive with respect to their stated justifications.

Ninth Amendment

Thomas B. McAfee, *Rights Retained by the People*, Heritage Guide at 366 (available at <http://www.heritage.org/about/bookstore/upload/AmendmentIX.pdf>).

Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988), and Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990). The Ninth Amendment provides, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Barnett article argues that this means there are such things as "unenumerated rights," and then discusses principled ways in which they might be enumerated without writing a blank check to the judiciary. The McAfee article counters that, rather than writing unenumerated rights into the Constitution, the Ninth Amendment simply confirms the structural guarantees for individual rights provided by the doctrine of enumerated powers and the rest of the Constitution. The McAfee approach finds support in Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. L. & POL. 63 (1987). Professor Barnett later expands on this defense of the people's rights in *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004). In this book Barnett adopts a "presumption of liberty," to give the benefit of the doubt to citizens when laws restrict their rightful exercises of liberty and provides a theory of constitutional legitimacy that justifies both interpreting the Constitution according to its original meaning and, where that meaning is vague or open-ended, construing it so as to better protect the rights retained by the people.

Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) and *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005). In his first article, Professor Lash presents new evidence regarding the original meaning of the Ninth Amendment, the roots of which, he argues, can be found in the state ratification convention demands for a constitutional amendment prohibiting the constructive enlargement of federal power. In his second article, Professor Lash argues that, contrary to the assumption that the Ninth Amendment was not revived until the 1965 case *Griswold v. Connecticut*, the Amendment in fact played a significant role in constitutional disputes throughout history, including the scope of exclusive versus concurrent

federal power, the authority of the federal government to regulate slavery, the right of the states to secede from the Union, the constitutionality of the New Deal, and the legitimacy and scope of incorporation of the Bill of Rights into the Fourteenth Amendment.

Fourteenth Amendment

Amendment XIV, Heritage Guide at 384-409. Includes analyses of all clauses of the Fourteenth Amendment by Edward Erler, Patrick Kelley, Calvin Massey, James W. Ely, Jr., David Smolin, Paul Moreno, and Roger Clegg.

RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997). This book attacks the Supreme Court's "continuing revision of the [Fourteenth Amendment] under the guise of interpretation." The first part of the book provides the history of the amendment's enactment, and the second part the critical account of its interpretation by the Court.

EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990). While acknowledging in the preface that "[o]riginalism is currently unfashionable in the academic world," Professor Maltz asserts that "the search for the original understanding of the drafters of the Reconstruction amendments . . . [is] critical to proper constitutional analysis." He then proceeds with that search, not only for the original understanding of the Fourteenth Amendment, but for the Thirteenth and Fifteenth Amendments as well.

Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 *STAN. L. REV.* 5 (1949). Professor Fairman answers "no" to the question posed by his article's title, and painstakingly collects and recounts the historical evidence. In some respects his scholarship has been superseded and his conclusions questioned, but his article is nonetheless an indispensable classic on the original understanding of the Fourteenth Amendment.

Michael McConnell, *Originalism and the Desegregation Decisions*, 81 *VA. L. REV.* 947 (1995). Professor McConnell begins by noting the scholarly consensus, across the ideological spectrum, that *Brown v. Board of Education* cannot be squared with the original meaning of the Fourteenth Amendment, but then proceeds to challenge that consensus. The *Virginia Law Review* subsequently printed a response and reply: Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 *VA. L. REV.* 1881 (1995), and Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman* 81 *VA. L. REV.* 1937 (1995).

Equal Protection Clause

The Future of Civil Rights Law, 14 *HARV. J.L. & PUB. POL'Y* 1 (1991). This Federalist Society symposium includes panels on the definition of civil rights, the role of government in closing the

socioeconomic gap for minorities, the “effects test” for determining the presence of discrimination, limits on judicial remedial authority, and the increasing tension between civil rights claims and free speech. Participants included Hadley Arkes, Clint Bolick, Jennifer Roback, Charles Shanor, R. Gaull Silberman, and Lawrence Siskind. An earlier Federalist Society symposium on Equality and the Law appears in 9 HARV. J.L. & PUB. POL’Y 1 (1986), with papers by Paul Bator, Charles Cooper, Robert Destro, Thomas Gee, Lino Graglia, Orrin Hatch, Harry Jaffa, William Kristol, Henry Manne, William Bradford Reynolds, Antonin Scalia, Gordon Tullock, and Ralph Winter.

Lino A. Graglia, *The ‘Remedy’ Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK L. REV. 569 (1988).

Professor Graglia is a vigorous and entertaining writer, especially on issues of judicial overreaching and civil rights, and this article is one of his best. In it, he chronicles “[t]he Court’s relentless march through the various titles of the 1964 Civil Rights Act, converting them from prohibitions to approvals of racial discrimination,” in the Swann (school desegregation), Bakke (college admissions), and Weber (employment discrimination) decisions. For detailed accounts of the Supreme Court’s school desegregation decisions, see LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976), and J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978* (1979). For analysis of the social science evidence on school desegregation by a leading expert, and discussion of the relevant case law as well, see DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995).

ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987). This book argues that, starting in the late sixties and early seventies, the Voting Rights Act was transmogrified by bureaucrats, civil rights activists, and courts into a powerful engine for quotas and guaranteed results (versus equal opportunity), racially gerrymandered “safe seats” for minority representatives, and racial balkanization.

John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMM. 243 (1999). Professor Harrison argues that and if the Fourteenth Amendment does indeed yield some kind of ban on race discrimination, its text is most plausibly read as a ban on all such distinctions, with no exception for symmetrical discrimination (that is, Jim Crow segregation).

As the Jim Crow era recedes into the past, the remedial justification for racial preferences becomes more untenable, and the substitute justification of benefits from “diversity” are relied on; the Supreme Court accepted such benefits as “compelling” in *Grutter v. Bollinger* (2003), to the dismay of those opposing such preferences. For a discussion of how to attack that decision, and a review of an important book that criticizes the diversity concept more broadly, see Roger Clegg, *Attacking ‘Diversity’: A Review of Peter Wood’s Diversity: the Invention of a Concept*, 31 J.C. & U.L. 417 (2005).

For a discussion of the Supreme Court's recent equal protection jurisprudence generally, including the *Grutter* decision, see Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U.L. REV. 249 (2004).

The point that there is no "diversity" exception to Title VII is made by Professor Kingsley R. Browne in *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 21 LABOR LAWYER 451, 461-472 (1997). In addition, Professor Nelson Lund has argued that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected even the remedial justification for an exception to Title VII. Nelson Lund, *The Law of Affirmative Action in an After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87 (1997).

A useful anthology of leading conservatives' writing on a variety of civil rights issues is *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* (Abigail & Stephen Thernstrom, eds., 2002).

The "disparate impact" theory of liability drives employers and others to adopt surreptitious quotas and abandon perfectly legitimate selection criteria. The approach is criticized in Roger Clegg, *DISPARATE IMPACT IN THE PRIVATE SECTOR: A THEORY GOING HAYWIRE* (2001) (National Legal Center for the Public Interest monograph). An earlier version is Roger Clegg, *The Bad Law of 'Disparate Impact'*, PUBLIC INTEREST, Winter 2000, at 79. A critique in a specific but important context is Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111 (2002).

Two important law review articles discuss how racial preferences actually harm the intended beneficiaries, specifically in the context of law schools and law firms. Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

For a general criticism of the Americans with Disabilities Act, see Roger Clegg, *The Costly Compassion of the ADA*, PUBLIC INTEREST, Summer 1999, at 100.

As attacks on overt racial preferences in university admissions continue to mount and, often, succeed, some schools are chosen deliberately to ensure some degree of racial and ethnic diversity in the student body; it is not clear, however, that such measures are legal either. Brian T. Fitzpatrick has written two good articles here (one about Texas, applying the Equal Protection Clause; the other about Michigan, where the legal objection would be under a recently passed referendum that bans racial preferences): *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001); *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?* 13 MICH. J. RACE & LAW 277 (2007).

Privileges or Immunities Clause

John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). According to Professor Harrison, it is the Fourteenth Amendment's Privileges or Immunities Clause, and not (as the courts and commentators have almost uniformly concluded) the Equal Protection Clause, that performed the main work of Section 1 of the Fourteenth Amendment—namely abolishing the “black codes” enacted by Southern states during Reconstruction. The article reaches this conclusion by taking the constitutional text seriously and considering its historical context carefully.

JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND RATIFICATION OF THE FOURTEENTH AMENDMENT* (1997). A comprehensive study of the Southern ratification debate over the Fourteenth Amendment, collecting information from official reports, party platforms and campaign speeches, resolutions from meetings, rallies, and conventions, editorials and letters to the editor, and private diaries and personal correspondence. Much of the documentary evidence in this book was published for the first time.

Economic Liberties

Symposium: Constitutional Protections of Economic Activity: How They Promote Individual Freedom, 11 GEO. MASON U. L. REV. 1 (1988). This Federalist Society symposium includes papers on the Takings and Contract Clauses, the First Amendment and economic activity, federal spending and the deficit as constitutional issues, and the privatization movement. Authors include Akhil Amar, Kenneth Cribb, Frank Easterbrook, Robert Ellickson, Richard Epstein, Gary Lawson, Leonard Liggio, Gale Norton, and Roger Pilon. For evidence that conservatives do not speak with a single voice in this area, compare the contributions by Epstein and Pilon (who lament the collapse of constitutional protections for economic liberties) with the article by Easterbrook (who declares that the current state of affairs “is fine”).

BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980). This provocative book argues for an interpretation of constitutional provisions dealing with economic liberties that would necessitate a much greater judicial role in the area than now exists. The book describes and defends the substantive due process doctrines that developed between 1897 and 1937, and chronicles the post-1937 fall of economic substantive due process and the concurrent rise of the new substantive due process in such areas as privacy rights. It then attacks the current distinction in constitutional law between economic rights and other personal liberties and the lesser protection accorded the former. For a good critique of the Siegan approach, see Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998). This is an excellent short history of the development of the

American system of property rights from colonial days through the present, emphasizing the relationship between private property and political liberty.

Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267 (1988). Why did the Framers of the original Constitution and the Bill of Rights apply the Contract Clause only to state governments and the Takings Clause only to the federal government? In answering this question, Professor McConnell argues that constitutional interpretation should extend beyond the substantive principles expressed in the Constitution to the structural and institutional choices made by the Framers.

Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917 (1999). This article describes and evaluates what Professor Phillips describes as “economic substantive due process’s slow but steady comeback,” a reappearance he states began during the late 1970s and early 1980s. He discusses the many decisions striking down government action on economic substantive due process grounds and tries to defend these decisions against the standard charges that have long beset economic substantive due process, and to suggest ways in which the doctrine might profitably evolve.

See also AKHIL REED AMAR: *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

Substantive Due Process

James W. Ely, Jr.: *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315 (1999). This article considers the origins of substantive due process, suggesting the concept of due process evolved as a restraint on government in American jurisprudence before the Civil War. Professor Ely argues that due process was fashioned in part to protect the rights of property owners, and that judicial decisions placing property in a subordinate constitutional category are historically unsound.

John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997). Professor Harrison illuminates the constitutional textual problems inherent in the doctrine of substantive due process and urges a reassessment of the matter.

Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004). A scathing critique of the Supreme Court’s decision in *Lawrence v. Texas*, striking down a Texas law against sodomy as a violation of substantive due process. Of the Court’s extension of due process doctrine in this opinion, the authors state: “The *Lawrence* opinion is a tissue of sophistries embroidered with a bit of sophomoric philosophizing. It is a serious matter when the Supreme Court descends to the level of analysis displayed in this opinion, especially in a high-visibility case that all but promises future adventurism unconstrained by anything but the will of the judicial

majority. This performance deserves to be condemned rather than celebrated, even by those - like us - who have no sympathy for the statute that the Court struck down.”

Contract Clause

Richard Epstein, *Obligation of Contract*, Heritage Guide at 171-175 (available at http://www.heritage.org/About/Bookstore/upload/85010_1.pdf).

Symposium, 55 BROOKLYN L. REV. 763 (1989). Article I, Section 10, of the Constitution provides in part: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts” This law and economics conference featured papers on the Contract Clause by Henry Butler and Larry Ribstein, William Cuddy, Richard Langlois, and Ronald Rotunda. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984). Professor Epstein argues that the Supreme Court’s recent jurisprudence under the Contract Clause can be squared with neither the Framers’ intent nor with sound economic theory (most of the discussion is of the latter).

Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525 (1987). The authors trace the origins of the Contract Clause and chronicle how, until recently, it had fallen into desuetude before the Supreme Court. The article argues for reviving the Clause in its original, intended scope-but does not support prospective as well as retrospective application (as advocated by Professor Epstein). One of the sources cited by Professors Kmiec and McGinnis is BENJAMIN WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938), which reviews the Supreme Court’s changing interpretation of the Clause through the 1930s.

Takings Clause

Douglas W. Kmiec, “Takings Clause,” Heritage Guide at 341-345 (available at http://www.heritage.org/About/Bookstore/upload/85011_1.pdf).

RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). *Takings* argues that the Fifth Amendment’s text-”nor shall private property be taken for public use, without just compensation”-applies to a wide variety of government actions, the Supreme Court’s decisions to the contrary notwithstanding. Thus, it concludes that the Takings Clause constrains government with respect to zoning, tort law, taxation, and much other regulation. This book was the subject of a symposium soon after its publication, the proceedings of which were published in 41 MIAMI L. REV. 1 (1986). For an interesting review of the book, see Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561 (1986). A subsequent article by Professor Epstein on a recent and important decision by the Supreme Court in this area is *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993). Epstein

criticizes Lucas as not going far enough; for a more positive view of the case, see Douglas W. Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995).

Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531 (1995). The Supreme Court has fashioned a three-part balancing test for determining when government actions-especially regulatory actions-that diminish the value of private property constitute a compensable "taking." This article explains which elements of this test can and which cannot be reconciled with the text of the Takings Clause, discusses more generally the application of the text to "regulatory takings," and calls for a "rule" rather than a "balancing" approach.

Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967). Concludes that the line drawn between compensable and noncompensable takings diverges from what considerations of fairness and utility would suggest, but that it may be the best the judiciary can do.

Matthew P. Harrington, *'Public Use' and the Original Understanding of the So-Called 'Takings' Clause*, 53 HASTINGS L.J. 1245 (2002). Professor Harrington attempts to show that efforts to find a "public use" limitation on the power of expropriation are a relatively recent misreading of the constitutional history and text.

Miscellaneous

Are There Unenumerated Constitutional Rights?, 12 HARV. J.L. & PUB. POL'Y 1 (1989). Fifteen papers were presented at this Federalist Society symposium, addressing the Ninth Amendment, the Privileges or Immunities Clause of the Fourteenth Amendment, the right of privacy, and other issues. Authors include Kenneth Cribb, Stephen Markman, Ronald Rotunda, Antonin Scalia, Clarence Thomas, and J. Harvie Wilkinson. See also *THE FRAMERS AND FUNDAMENTAL RIGHTS* (Robert A. Licht, ed., 1991); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 (1993). This article proposes a "formalistic" interpretation of the Constitution's Article V. According to Professor Paulsen, one apparent consequence of this approach is that state ratifications of proposed amendments and applications for a Constitutional Convention can accumulate over extended periods of time. The article thus draws two surprising (to some) conclusions: the Twenty-Seventh Amendment, sent to the states by Congress in 1789 but not ratified by three-fourths of the states until 1992, is now unquestionably part of the Constitution; and Congress is obliged now to call a Constitutional Convention, unlimited in the subjects it may consider for proposed amendments, because two-thirds of the states are on record as applying to Congress for one.

VI. Administrative and Regulatory Practice

Last updated October 2010

Introductory Materials

PETER SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* (2003) is a useful collection of articles in this field covering a number of subtopics, including the theory and history of administrative law, the Administrative Procedure Act, theories of administrative agency behavior, and the problem of administrative discretion.

Two student course books in administrative law deserve special mention, since they seem more attuned to the shortcomings of regulation than most such texts. The preface to ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* (1993), includes an acknowledgement by Mayton of an intellectual debt to Hayek. RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* (4th ed. 2004), contrasts the “public interest” and “public choice” explanations for regulation in chapter 1.

Peter Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J. L. & POL. 247 (1990). A clear statement of some core ideas in regulatory law: the welfare economics case for regulation, the public choice case against it, and the phenomenon of deregulation (which causes some problems for both the welfare economics and the public choice positions). A good introduction to the relevant literature.

Robert W. Hahn, *Regulation: Past, Present, and Future*, 13 HARV. J.L. & PUB. POL’Y 167 (1990). Provides an overview of (mostly federal) regulation, a description of some efforts at regulatory

reform, and a call for new approaches to regulation in particular industries. A good introduction to the field.

The Purposes and Critiques of Regulation

RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* (4th 1999), contains a good, short discussion of relevant economic concepts and a good discussion of the reasons most often offered for regulating business. For an overview of the law and economics literature on administrative law, consult chapters 12, 13, and 22 of Richard Posner, *Economic Analysis of Law*.

STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982). This book contains a very useful explanation of the classic arguments in favor of regulation (market failure), along with an extensive diagnosis of the shortcomings of various forms of regulation (government failure). For a precis of the book, see Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979).

STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993). Justice Breyer identifies three systemic faults in the government's efforts to regulate risky behavior—namely bureaucrats' "tunnel vision," "random agenda selection," and "inconsistency." But he then proposes to solve these flaws by deputizing a small office within the Office of Management and Budget to reform and rationalize risk assessment throughout the federal government. For trenchant critiques, see Stephen F. Williams, *Risk Regulation and Its Hazards*, 93 MICH. L. REV. 1498 (1995), and James L. Huffman, *Justice Breyer's Case for Centralized Executive Government*, 1995 PUB. INTEREST L. REV. 167. See also W. KIP VISCUSI, *FATAL TRADE-OFFS* (1992).

DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993). Explains why Congress wants to avoid responsibility for the regulatory decisions of the federal government, and how Congress gets away with passing on the task to bureaucrats. Professor Schoenbrod concludes that this delegation of legislative authority—made possible by the impotence of the nondelegation doctrine, at least since the time of the New Deal—attenuates Congress's accountability and thereby contributes to the alienation and frustration felt by the public.

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). To begin any study of administrative/regulatory law, it helps to understand something about the seriousness with which many scholars view the shortcomings and pitfalls of this field. For example, in this article Professor Lawson declares "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." He does not offer any "quick fixes" for this condition. Consider also Richard Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990). Stewart argues that "the demands for national regulatory

and spending programs have outstripped the capacity of the national legislative process to make decisions that are accountable and politically responsive to the general interest.” The result is “Madison’s Nightmare: a faction-ridden maze of fragmented and often irresponsible micropolitics within the government.” Stewart criticizes the policy instruments chosen by the government to implement its regulatory schemes: “The same problems that have plagued the Soviet efforts at central management of the economy hamper American efforts to plan selected aspects of the economy through centralized regulations.” A bit more optimistic than Lawson, Stewart offers a blueprint for “reconstitutive law” to address these shortcomings of the regulatory system.

Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986). Traces the history of the federal regulatory regime from the Populist Era to what Rabin calls the “Public Interest Era,” saying relatively little about the changes wrought by President Reagan. Concludes that the regulatory system “has grown by leaps and bounds, yet remains devoid of any coherent ideological framework.” Also, the courts have failed to develop “a consistent approach to controlling agency discretion.” While Professor Rabin is, arguably, rather too sanguine about this lack of coherence and consistency—he hails the regime’s “pragmatism and flexibility”—his history is nonetheless useful, particularly in its weaving together regulatory policy decisions by Congress and the agencies with changes in administrative law dictated by the courts.

Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990). A good treatment of regulatory failures and an account of some reforms that might lead to a more efficient administrative state.

Richard, Epstein, Why the Modern Administrative State is Inconsistent with the Rule of Law, 3 NYU J. L & LIBERTY 491 (2008). Epstein outlines his disagreement with the assumption that administrative state officials armed with technical expertise and acting in good faith to advance the public interest can systematically outperform any system of limited government whose major function is to support and protect market institutions. Not only is technical expertise an overrated virtue, but the administrative state gives rise to a peculiar blend of bureaucratic rule and discretion that does not comport with the historical conception of a rule of law, and its central concern with the control of arbitrary power.

Administrative Law and the Courts

JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989). This book presents the argument against judicial oversight of administrative agency decisions, which, according to Rabkin, frustrates the ideal of “energy in the Executive” and often leads to incoherent and inflexible policy.

Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. L. REV. 297 (2004). A look at the Rehnquist Court’s jurisprudence through the lens of administrative law. Prof. Herz argues that the Rehnquist Court is more deferential than its critics and supporters believe, particularly to the

executive branch and in fields such as administrative law where the division between law and politics can be more clearly drawn.

Stephen F. Williams, *Background Norms in the Regulatory State*, 58 U. CHI. L. REV. 419 (1991). An enlightening discussion of the differences between the common law and the regulatory state is contained in this review of CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

The Supreme Court's 1984 Chevron decision redefined the courts' relation to administrative agencies with respect to questions of law, and triggered a flood of commentary. See *Kenneth W. Starr, Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Laurence Silberman, *Chevron-The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821 (1990). For a later reflection on Chevron, see Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). Professor Merrill argues that the predicted dramatic effects from Chevron have, for the most part, not come to pass, and offers an alternative to what he terms the decision's "draconian implications."

Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009). Bressman argues that the Chevron Doctrine functions based on a flawed presumption of legislative specific meaning. The presumption of a specific meaning does not match the reality of how Congress designs regulatory statutes. Congress is more likely to eschew specificity in favor of agency delegation under certain circumstances-- for example, if an issue is complex and if legislators can monitor subsequent agency interpretations through administrative procedures. Although Chevron recognizes such "delegating" factors, it fails to sufficiently credit them. This Article imagines what interpretive theory would look like for regulatory statutes if it actually incorporated realistic assumptions about legislative behavior. The theory would engage factors such as the complexity of the issue and the existence of administrative procedures as indications of interpretive delegation more satisfactorily than existing law does. In the process, it would produce a better role for courts in overseeing the delegation of authority to agencies.

Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006). An examination of how legislators delegate their power, whether to an administrative agency or to the courts, and what factors influence them in making that choice. Prof. Stephenson stresses that agency decisions are more ideologically consistent during a time period but fluctuate more across time, and that court decisions are more consistent over time, even though they are more ideologically diverse during any given time period.

Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). One of the most obvious drawbacks of the administrative state is that government agencies are not politically accountable for their exercise of the powers delegated to them by Congress. Indeed,

perhaps the central problem of administrative law can be stated as “How do we control agency discretion?” Traditional administrative law relied principally on judicial review of agency decisions for this control. But by the mid-1970s a string of judicial decisions required that public “participation” in agency decision making processes be promoted so as to better control agency discretion. Professor Stewart’s article attacks this transformation of administrative law, arguing that the administrative process cannot practically be made into a “surrogate political process.” Accordingly, the involvement of interest groups in agency proceedings ultimately fails as a general legitimating structure for agencies’ discretionary actions.

Richard A. Epstein, *No New Property*, 56 BROOKLYN L. REV. 747 (1990). Challenging *Goldberg v. Kelly*, and its academic precursor, Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975). Judge Friendly’s article provides some very pragmatic suggestions about how to deal with the Supreme Court’s expansion of due process rights in the early 1970s.

Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007). Prof. Nelson examines the history of “the judicial Power of the United States” from Article III of the Constitution and concludes that “judicial power” was not coterminous with adjudicative authority. Instead, “judicial power” related only to protected rights, in contrast to more general privileges that could still be adjudicated outside the ring of “judicial power.”

Thomas Miles and Cass Sunstein, *Do Judges Make Regulatory Policy: An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006). Miles and Sunstein present voting data from the Supreme Court and courts of appeals showing that the application of the Chevron framework is greatly affected by the judges’ own convictions. Whatever Chevron may say about a judge’s duty to defer to an agency interpretation, the data reveal a strong relationship between the justices’ ideological predispositions and the probability that they will validate agency determinations. In *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 2008. The authors aim to correct the lack of scholarly literature on the hard look doctrine and do so through an analysis of a large data set of all published appellate rulings from 1996 to 2006 involving review of decisions of the EPA and review of NLRB decisions either for arbitrariness or for lack of substantial evidence. The authors conclude that just like Chevron review, the hard look doctrine produces highly political outcomes. The findings offer a clear prediction for the future: when a judiciary consisting mostly of Democratic appointees confronts a conservative executive branch, the rate of invalidations will be unusually high, and so too when a judiciary consisting mostly of Republican appointees confronts a liberal executive branch.

John Manning, *Textualism as a Non-Delegation Doctrine*, 97 COLUM. L. REV. 673 (1997). This article critically analyzes the textualist judges’ objections to legislative history and rationally textualism as a special application of the nondelegation doctrine. Some judges routinely rely on a variety of

extrinsic sources (agency rules, treatises, judicial opinions, etc.) to interpret ambiguous statutes, even though these sources do not reflect genuine congressional intent and are not subject to bicameralism and presentment. The article seeks to resolve this apparent problem by arguing that interpretive reliance on legislative history creates an opportunity for legislative self-delegation, contrary to the clear assumptions of the constitutional structure. This conflation of lawmaking and law declaration functions makes it far too attractive for Congress to bypass bicameralism and presentment, assigning the specification of legislative detail to committees and sponsors. Accordingly, this Article concludes that courts should not impute a committee's or sponsor's declaration of intent to Congress as a whole.

Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997). Merrill sets out to explain the rise and fall of activist judicial control over the administrative state, focusing heavily on judicial assertiveness between 1967 and 1983. Merrill characterizes modern judicial deference as a product of a deeper and more generalized pessimism about the administrative state, and in particular, of a spreading disenchantment with all forms of activist government. The contemporary attitude seems to be that if nothing good can be expected to come from government, then perhaps the best we can do is to avoid wasting resources debating the rules. Thus, modern administrative common law often seems committed to making the rules as simple, mechanical, and common-law like as possible, in the hope that this will minimize the temptation to seek strategic advantage through further changes in the rules, and the deadweight loss that such a process of "rule churning" likely entails.

Administrative Law and Executive Power

Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986). A defense of the unitary Executive as manifested in White House oversight of federal agency rulemaking through the review processes of the Office of Management and Budget.

Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989). While this article is critical of the unitary-Executive view, which questions the constitutional validity of the administrative state, it is one of the few recent critiques that seeks to state its case with a due regard for originalist methods of interpretation.

Thomas Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). Merrill discusses the two postulates that underlie the legislative vesting clause of the Constitution. The first is the nondelegation doctrine, which says that Congress may not delegate legislative power. The second is the exclusive delegation doctrine, which says that only Congress may delegate legislative power. This Article explores the textual, historical, and judicial support for these two readings of Article I, Section 1, as well as the practical consequences of starting from one postulate as opposed to the other. The Article concludes that exclusive delegation is superior to the non-delegation doctrine, either in its present unenforced version, or if it were enforced more strictly. The exclusive delegation doctrine would reorient understanding of the allocation of legislative power

in a way that provides a better fit with institutional realities, and yet would also preserve an important measure of exclusive power to Congress as the first branch of our national government.

Case Studies in Regulation

Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83 (1989). For seventy-five years, dairy interests sought government protection from the competitive threat posed by oleomargarine. Professor Miller chronicles the first battle in this early rent-seeking war, which resulted in the passage of the federal Oleomargarine Act of 1886. A wonderful case study, and a good example of the explanatory power of public choice theory.

JONATHAN R. MACEY & GEOFFREY P. MILLER, Bank Failures, Risk Monitoring, and the Market for Bank Control,” 88 Colum. L. Rev. 1153 (1988). States the case for curbing management self-dealing and excessive risk-taking through the market for corporate control rather than through government regulation. Professors Macey and Miller also state the case for bank liquidation as opposed to other forms of regulatory intervention in cases of bank failure.

Dara K. Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673 (2006). The professors offer insight into how agencies interpret their legal mandates and use their administrative discretion through the example of the creation of the Department of Homeland Security.

Miscellaneous

Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009). Vermeule draws from Carl Schmitt’s thoughts on emergencies and legal black holes to draw insights into American administrative law. Part I gives background on Carl Schmitt and his thought. Part II suggests that administrative law is Schmittian, in the sense that it is built around a series of black holes and grey holes that are integral to its structure. Part III suggests that for practical and institutional reasons, administrative law cannot realistically be otherwise. These claims require clarification.

Internet resources: The federal Administrative Procedure Act is available through Cornell’s Legal Information Institute at <http://www.law.cornell.edu/uscode/5/ch5.html>. The ABA’s administrative procedure database is available at <http://www.law.fsu.edu/library/admin>.

Both the Code of Federal Regulations and the Federal Register are available on-line at the Government Printing Office homepage, <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>. The current Executive Order (12,866, signed September 30, 1993) providing for regulatory review by the Office of Management & Budget is available at <http://www.whitehouse.gov/omb/inforeg/riaguide.html>. For a database of recent economic analysis by federal agencies, see <http://www.reginfo.gov/public/do/eoPackageMain>.

VII. Antitrust Law

Last updated November 2010

ECONOMIC ANALYSIS AND ANTITRUST LAW (Terry Calvani & John J. Siegfried, eds., 1988), is a useful collection of readings.

ERNEST GELLHORN, WILLIAM E. KOVACIC, AND STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL (2004). A very good summary of the field by three noted scholars.

ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978, 1993). Judge Bork's early writings in antitrust were a major contribution to the development of the "Chicago School" of antitrust analysis. This book is a summary and extension of his earlier work, and a trenchant critique of the antitrust jurisprudence of the Warren Court. Since the original publication of the book in 1978, the Chicago School view of antitrust gained influence with federal judges and was very important in setting the agenda for the Justice Department and the Federal Trade Commission during the Reagan administration. For an overview of the law and economics literature on antitrust, consult chapters 9 and 10 of RICHARD POSNER, ECONOMIC ANALYSIS OF LAW.

RICHARD A. POSNER, ANTITRUST LAW (2001). A substantial rewriting of Posner's 1976 book, *Antitrust Law: An Economic Perspective*, which compiled his early writings on antitrust law, the 2001 edition extends his thinking to the economic developments of the 21st century, including the "new economy" and new industries such as software, Internet service providers, and communications.

William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust*, 60 TEX. L. REV. 661 (1982). The first person to head the Antitrust Division of the Justice Department during the Reagan administration, Professor Baxter here sets out his views on the proper functioning of the federal antitrust enforcement agencies.

Frank Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986). Offers a set of "filters" for use in evaluating firm behavior and in setting goals for the antitrust enforcement agencies.

Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401 (2003). Examination of the historical purposes of antitrust, with an argument that the economic justification has won. Additionally, a survey of the current competition within antitrust enforcement, both among American enforcers and between American and EU enforcers.

Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (2003). Critique of the modern Rule of Reason as biased against nonstandard agreements and argument in favor of a transaction cost model similar to the test that the Supreme Court embraces in determining whether a contract is unlawful per se.

THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II, eds., 1995), and DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (1982). While some antitrust liberals continue to attack the Chicago School view from the left, there are some critics of Chicago from the right. These two works are book-length treatments of this criticism.

COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Richard Epstein & Michael Greve, eds., 2004). Leading experts explore routes to a new and better institutional design for global antitrust in the national and international contexts. While the authors all start from the premise that legal rules--substantive and procedural--should seek to maximize aggregate social welfare, many of them disagree on the suitable jurisdictional arrangements. On the domestic front, most authors opt for a sharper distinction between national and local responsibilities. At the international level, the authors' preferences range from a thoroughgoing harmonization of antitrust law to an antidiscrimination regime under WTO auspices to a defense of the existing, near-anarchic regime.

Richard Epstein, *Monopolization Follies: The Danger of Structural Remedies under Section 2 of the Sherman Act*, 76 ANTITRUST L.J. 205 (2009). Epstein discusses the interplay between innovation and monopolization enforcement. The monopoly produces some deadweight loss, but it also produces extensive producer surplus and some consumer surplus as well. The basic conclusion that follows from the case studies that Epstein presents is that the antitrust law treads on dangerous ground when it aggressively pursues structural remedies without any clear knowledge of how technological forces will dictate changes in market structure. A more modest approach that favors conduct remedies tailored to particular abusive practices is likely to yield a higher return at lower cost.

Richard Epstein, *Monopoly Dominance or Level Playing Field: The New Antitrust Paradox* 72 U. CHI. L. REV. 49 (2005). In Part I, Epstein argues that the wisest course of action is to confine the operation of antitrust law to cartels and mergers that have the consequence of raising prices and restricting output, while allowing less restrictive treatment for unilateral actions. In Part II, Epstein examines in some greater detail the controversial decision in *LePage's Inc v 3M* in order to show the deleterious consequences that flow from the aggressive condemnation of unilateral practices. The general conclusion is that antitrust law should abandon its attack on these unilateral practices altogether, or at least sharply circumscribe their use.

Richard Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229 (2005). Posner briefly discusses important antitrust cases such as *Standard Fashion* and *LePage's Inc. v. 3M* to illustrate the relationship between exclusive dealing, tying, bundling and loyalty rebates. He concludes that the proper antitrust stance toward vertical restraints may be procedural and institutional as much as it is analytical: how to enforce antitrust against practices that we are not prepared to treat as entirely lacking in possible redeeming economic virtues. The rule of reason may be a chimera, placing on courts analytical and evidentiary burdens that they cannot sustain.

Richard Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5 (2004). Posner first offers an economic analysis of federalism and then applies it to two related questions. The first is whether state attorneys general should be permitted, as they are under existing law, to enforce federal antitrust laws in suits brought on behalf of the state's residents. The second is whether they should be permitted, as they also are under existing law, to enact and enforce their own state antitrust laws. Posner answers both questions in the negative. Although the analysis is primarily theoretical, the Appendix reports the results of a limited empirical study conducted by Posner.

Alan Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 (1999). Part I reviews the classical ideology that dominated nineteenth-century thought about the appropriate limits on state regulation of private economic activity, as well as the liberty of contract jurisprudence that this ideology spawned. Part II reviews and analyzes formative era attempts by federal courts to reconcile the apparent conflict between liberty of contract, on the one hand, and the newly-passed Sherman Act, on the other. Part III addresses the role that liberty of contract played in the interpretation of state antitrust laws, in the federal and state courts. Part IV examines the implications of formative era case law for the modern controversy over how to interpret the Sherman Act.

VIII. Civil Procedure

Last updated October 2008

The Role of the Federal Judge

Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). This article contains the most exhaustive analysis of the Judiciary Act of 1789 undertaken up to its writing. The author exposes the existence of primary documents which, had they been known to Justice Story, might well have caused him to reverse his decision in *Swift v. Tyson*. Warren's exhaustive research eventually helped to provide the intellectual underpinnings for the Supreme Court's *Erie* decision in 1938.

Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003). An argument in favor of judges adhering to the traditional passive role of adjudicating based on institutional competence, constitutional structure, and respect for historical precedent.

The Adversarial Process

WALTER OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991). A journalistic account of how "we changed the rules in our courtrooms to encourage citizens to sue each other." For a thoughtful review, see Douglas H. Ginsburg, *Law's Paradise Lost?*, 90 MICH. L. REV. 1609 (1992).

William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, U. PITT. L. REV. 703 (1989). Judge Schwarzer suggests a reconsideration of the use of the adversarial process in civil discovery. He maintains that while the adversarial process was designed to allow litigants to have exclusive control over the preparation and presentation of a case, the rationale for allowing litigants to have such control over the proceedings is undermined in a system where the majority of cases never reach trial. To remedy this problem Schwarzer recommends the adoption of mandatory disclosure provisions. The Supreme Court has since adopted mandatory disclosure (1993), but the discovery vs. disclosure debate is far from over. For a dissenting view, see the opinion authored by Justice Scalia and joined by Justices Thomas and Souter in 146 F.R.D. 507 (1993).

PETER HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991). In this well-documented book, Huber examines the decline of the Frye test-which allowed "expert" testimony only from those who employed the theories, methods, and procedures "generally accepted" by the relevant scientific community, and considers the impact this decline has had upon the fate of science in the courtroom. After cataloguing the abuses resulting from the acceptance of nonscience by our legal system, Huber ultimately suggests a return to a fortified Frye test.

Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994). Develops a theory of settlement based on three psychological precepts, including the “framing” phenomenon: “People avoid risk when they choose between options they understand as gains, but they prefer risk when they select between choices viewed as losses.” Reports that a series of psychological experiments-involving nearly 450 subjects “substantiate the basic hypothesis that non-value-maximizing considerations can affect [settlement] decisions. . . .”

Class Action Law

For an overview of the landscape of securities class action law, in the wake of both the Private Securities Litigation Reform Act (PSLRA) and Sarbanes-Oxley, see Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U. L. REV. 1239 (2003). In setting up her argument against the position that judges in such cases owe fiduciary duties to absent class members, Casey provides a comprehensive overview of the criticisms and merits of class actions under the current regime generally. For other proposals to reform securities litigation, see John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Implementation*, 106 COLUM. L. REV. 1534 (2006); A.C. Pritchard, *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.: The Political Economy of Securities Class Action Reform*, CATO SUP. CT. REV. (forthcoming, 2008).

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991). This widely read article disputes the notion that all settlements are voluntary and instead provides evidence which indicates that the “structural characteristics common to securities class actions . . . combine to produce outcomes that are not a function of the substantive merits of the case.” To combat this problem, Cooper suggests several reforms including changes in the method for calculating attorney fees, limits on director liability, and an alteration of the structure of insurance coverage.

Jonathan Macey & Geoffrey Miller, *The Plaintiff’s Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). Explores the implications of poor “client monitoring” of plaintiffs’ class action attorneys, and the imperfections of the current set of rules in place to regulate abusive behavior by class action attorneys. Proposes a number of reforms “to control agency costs with sensible rules that take into account the fact that the plaintiffs’ attorney-not the client-controls the litigation.”

For a useful collection of notable securities class action settlements and related documents, see the Stanford Law School Securities Class Action Clearinghouse, at <http://securities.stanford.edu>.

Jurisdiction

Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002). An argument that the current understanding of sovereign immunity is ambiguous because it confuses subject-matter jurisdiction with personal jurisdiction, whereas the Framers intended sovereign immunity to apply only to personal jurisdiction.

Douglas D. MacFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B. U. L. REV. 491 (2004). Provides a history of how courts decided to stretch their enumerated-acts long-arm statutes (which allow state courts to assert jurisdiction over nonresidents) to the limits of what the constitution permits.

Law & Economics Approaches to Civil Procedure

Symposium: Economic Analysis of Civil Procedure, 23 J. LEGAL STUD. 303 (1994). Contains a number of papers on a broad range of topics, including discovery, settlement under joint and several liability, and the judiciary's role in promulgating rules of procedure, among others. The papers are summarized in Geoffrey P. Miller, *Introduction: Economic Analysis of Civil Procedure*, id. at 303.

For an overview of the law and economics literature on civil procedure, consult Chapter 21 of RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed., 2007).

Early landmark studies that applied economic concepts to litigation and the court system include William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971), Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973), and John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

Internet resources: A gigantic database on some 3.7 million federal district court civil cases is maintained by the Administrative Office of U.S. Courts, the Federal Judicial Center, and the Inter-university Consortium for Political and Social Research, at <http://pacer.psc.uscourts.gov/>, <http://www.fjc.gov/>, and <http://www.icpsr.umich.edu/access/index.html>.

Some of the most important empirical research on America's civil justice system has been conducted by the RAND Corporation's Institute for Civil Justice. Some of its publications, and an explanation of its current research agenda, can be found on its web page, <http://www.rand.org/centers/icj>. For insight into the collective mind of the plaintiffs' bar, check the home page of the American Associate for Justice, formerly the Association of Trial Lawyers of America, <http://www.atlanet.org/>.

IX. Commercial & Bankruptcy Law

Last updated 1996

Commercial Law

JONATHAN MACEY & GEOFFREY MILLER, *BANKING LAW & REGULATION* (3rd ed., 2001). This casebook deals with a fair range of regulatory issues in the banking area, often providing the law and economics rationale for deregulation.

Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989). Professor Benson, an economist, traces the development of the law merchant in medieval Europe as an example of the spontaneous development of private law, without the aid of government. This is an enormously important concept for the student to appreciate, and Benson does an excellent job in developing it.

Frank H. Easterbrook, *Symposium: Regulation and Responsibility: A Note on Banking*, 77 CORNELL L. REV. 1079 (1992). A proposal for banking reform that calls for overhauling FDIC-insured financial institutions and allowing market competition to regulate which financial institutions thrive and which fail.

Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 SW. U. L. REV. 443 (1994). Discusses the “new law merchant” that is being generated privately by actors in specialized business communities. Professor Cooter argues that lawmakers should show the same kind of deference to this private lawmaking as English common-law courts showed the old law merchant: “The English judges did not know enough about . . . specialized businesses to evaluate alternative rules. Instead of imposing rules, . . . English judges tried to find out what practices already existed among the merchants and enforce them.” Cooter argues that “as economies become more complex, efficiency demands more decentralized lawmaking, not less.” For a more technical version of this argument, see Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215 (1994).

Internet resources: A very useful “Uniform Commercial Code Locator” *is available at* <http://www.law.cornell.edu/uniform/ucc.html>.

Bankruptcy Law

DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* (1992). A clear, concise text, written primarily for law student use.

THOMAS JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986). An ambitious book, now the standard work on the subject. Argues that “Bankruptcy law, at its core, is debt-collection law.” As such, it is said to possess an intellectual coherence that should be understood and then applied “to a variety of issues while testing the current provisions of the Bankruptcy Code against them.” Professor Jackson argues against alternative, ad hoc approaches to the subject.

Douglas G. Baird, *Bankruptcy’s Uncontested Axioms*, 108 *YALE L.J.* 573 (1998). An exploration of the underlying rationales for bankruptcy law that divide bankruptcy scholars into two camps: traditionalists and proceduralists. Baird takes a pessimistic view that further empirical work will bridge the divide between the two camps of bankruptcy scholars, but concludes that both camps generally agree that current bankruptcy law consists of sound policy.

Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 *U. CHI. L. REV.* 425 (1993). An introduction to municipal bankruptcy law with recommendations for decentralizing the current federal legislation. The article nicely demonstrates the incompatible goals of bankruptcy by questioning what remedies are available to creditors against an insolvent municipality.

Kevin A. Kordana & Eric A. Posner, *A Positive Theory of Chapter 11*, 74 *N.Y.U.L.REV.* 161 (1999). A seminal work of economic analysis on bankruptcy. The current Chapter 11 bankruptcy rules are compared unfavorably to alternative auctions from an economic efficiency perspective, even as the Professors caution that the Chapter 11 rules may have benefits not yet determinable within economic analysis.

Todd Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 *NW. U.L. REV.* 1463 (2005); Todd Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 *WASH & LEE L. REV.* 1071 (2005). Two articles critiquing the current state of bankruptcy and proposing an alternative. The first examines the trend of the previous 25 years whereby consumers no longer generally treat bankruptcy as a last-resort option, and the second proposes an alternative bankruptcy system based on economic analysis principles.

Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 *MICH. L. REV.* 336 (1993). Professor Warren takes issue with the vision of bankruptcy law announced by Professors Baird and Jackson, *supra*. These two articles contain much of her critique, and her competing views of bankruptcy’s proper goals.

DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2003). Skeel’s book examines the political economy of bankruptcy legislation in America, focusing particularly on the interactions between the three forces that he sees as animating the path of bankruptcy legislation in American history: (1) creditors, (2) the organized bankruptcy bar, and (3)

ideology, particularly a longstanding pro-debtor ideology in the American ethos. Historically, these forces have interacted to create the most debtor-friendly bankruptcy regime (for both consumer and corporate bankruptcy) in the world. In a book review, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016 (2003), Todd Zywicki applies Skeel's framework to the politics surrounding the efforts to reform the bankruptcy laws in the mid-2000s, exploring how Skeel's framework can explain the scaling back of the bankruptcy code's generosity in that law.

Keith Sharfman, *Derivative Suits in Bankruptcy*, 10 STAN. J. OF LAW, BUS. & FIN. 1 (2004). This article addresses whether creditors have or should have standing to bring lawsuits derivatively on behalf of a bankruptcy estate. It argues that such suits are neither authorized by the Bankruptcy Code, nor reflected in recent pre-Code practice, nor necessarily wise to allow as a matter of bankruptcy policy.

Stephen J. Ware, *Security Interests, Repossessed Collateral, and Turnover of Property to the Bankruptcy Estate*, 2002 UTAH L. REV. 775. This article discusses the relevance of two different conceptualizations of "property"—as either a thing that is owned by someone or as a bundle of rights held against people with respect to things—and their relevance to the interpretation of the law governing secured transactions in bankruptcy. Prof. Ware argues that courts have been led astray from the attempt to properly construe Section 542(a) of the federal Bankruptcy Code by why variations in state law, which he argues are not relevant to bankruptcy cases of goods that have been repossessed but not yet sold at foreclosure

Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L. J. 227 (2000). This article discusses the "market for deadbeats" by considering how variations in law can facilitate exit strategies for certain kinds of debtors.

For an overview of the law and economics literature on lending law and bankruptcy, consult chapter 14 of RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (see *infra* p. 73).

Internet resources: A very useful "Uniform Commercial Code Locator" is available at <http://www.law.cornell.edu/uniform/ucc.html>.

X. Corporate Law

Last updated 1996

Foundational Materials

FOUNDATIONS OF CORPORATE LAW (Roberta Romano, ed., 1993), and ECONOMICS OF CORPORATE LAW AND SECURITIES REGULATION (Richard A. Posner & Kenneth E. Scott, eds., 1980). These are useful collections of readings. For an overview of the law and economics literature on corporate law and finance, consult Chapters 14 and 15 of RICHARD POSNER, ECONOMIC ANALYSIS OF LAW.

WILLIAM A. KLEIN & JOHN L. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE (6th ed., 1996) is a very good reference book for students—particularly those with little or no exposure to business concepts.

FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). This is the most comprehensive application of the “contractual” understanding of corporations and other business organizations available. It includes chapters on the corporation as a nexus of contracts, limited liability, shareholder voting, fiduciary duties, corporate control transactions, the appraisal remedy, tender offers, antitakeover statutes, close corporations, insider trading, mandatory disclosure under the securities law, and securities litigation.

PAUL H. RUBIN, MANAGING BUSINESS TRANSACTIONS: CONTROLLING THE COST OF COORDINATING, COMMUNICATING, AND DECISION-MAKING (1990). A very useful intertwining of legal and economic/business concepts, as applied to real-world business problems such as the “make or buy” decision, employment and franchise contracts, and the promotion and protection of a business firm’s reputation. Professor Rubin, an economist, suggests that, “for a lawyer, the book will help him understand what his business clients want to accomplish when they specify certain goals in their contracts.”

The Contractual Theory of the Corporation

Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99 (Summer 1989). This is the best short introduction and overview of the contractual theory of the corporation, which “views the corporation as founded in private contract, where the role of the state is limited to enforcing contracts.” As Professor Butler explains, this view “is in stark contrast to the legal concept of the corporation as an entity created by the state. The entity theory supports state intervention [in the corporation’s affairs] . . . on the ground that the state created the corporation by granting it a charter.” This article also provides a survey of the major contributions to the contractual theory.

Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989). Another good statement of the contractual view of the corporation, this article is drawn from a

symposium on Contractual Freedom in Corporate Law, and appears in slightly altered form as chapter 1 of the Easterbrook and Fischel treatise noted just above.

Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990). A stiff rejoinder to certain critics of the contractual view.

Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990). Carrying the contractual view of the corporation to its logical end, Black concludes that the answer to the question posed by his title is, essentially, “Yes.”

Robert B. Thompson, *The Law’s Limits on Contracts in a Corporation*, 15 J. CORP. L. 377 (1990). While Thompson does not display an ideological opposition to the contractual view of corporations, he does argue that there are some areas of corporate law that remain mandatory-and rightly so. He also discusses differences between publicly held and closely held corporations with respect to the need for mandatory rules.

The Role of Fiduciary Duty

Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991). The concept of fiduciary duties lies at the heart of much corporate and partnership law. This is a useful exposition of the concept, using economic analysis.

Douglas G. Baird & M. Todd Henderson, *Other People’s Money*, 60 STAN. L. REV. 1309 (2008). An argument that directors’ duties are too narrowly conceived in corporate law since they are based on an outdated notion of capital structure that prioritizes the interests of equity-holders over debt-holders and other corporate interests.

Shareholder Control and Shareholder Litigation

Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601 (2006). A forceful argument that the U.S. economy outperforms its global peers not in spite of the separation of ownership and control, but because of that separation. Prof. Bainbridge suggests that further reforms to the corporate system should be incremental, rather than radical shifts from the traditional system of corporate governance that separates ownership from control.

Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J. L. ECON. & ORGANIZATION 55 (1991). Professor Romano’s study of 139 shareholder suits filed from the late 1960s through 1987 leads her to conclude that “shareholder litigation is a weak, if not ineffective, instrument of corporate governance.”

Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005). A forceful argument to reconsider the allocation of power between management and shareholders. Prof. Bebchuk argues for allowing greater shareholder power in certain rules-of-the-game decision scenarios that affect management, which traditionally have been decided by management. In

Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment, 119 HARV. L. REV. 833 (2005), Stepehn Bainbridge takes issue with Bebchuk's thesis, arguing that that the market for corporate securities takes into account corporate governance structures, and those firms with ineffective governance will see the price of their securities fall and that, while corporate shareholders are "rationally apathetic," their apathy is cured by director primacy.

Federalism and Corporate Law

ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993). The "genius" of the title inheres in the federal structure of American corporate law: each state can offer the privilege of incorporation to all comers. Because corporations are free to choose to incorporate (or reincorporate) in any one of the fifty states, the states compete for incorporation "business" and the contours of corporation law are defined by this competition. As a result, corporate law in America is said to be "enabling" rather than regulatory. If, as reformers have urged for years, a national incorporation statute were passed, consumers and investors would lose the benefits of this competition among the states and corporate law would likely become yet another regulatory code. Professor Romano's book is an important contribution to the current debate about our system of corporate law.

Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). In this classic article, Judge (then-Professor) Winter argues forcefully against the "race to the bottom" view of interstate competition for corporate chartering, which holds that the result of interstate competition is a diminution in corporate law's solicitude for shareholder interests. Prof. William Cary advanced the original "race to the bottom" argument that provoked Prof. Winter's response with his classic work on Delaware corporate governance. *Cary, Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

Jonathan Macey & Geoffrey Miller, *Toward an Interest-Group Theory of American Corporate Law*, 65 TEX. L. REV. 469 (1987). Develops an extensive model of Delaware corporate law formation to account for the fact of Delaware's long-standing dominance of the market for corporate charters. Concludes, among other things, that "Delaware law reflects a political equilibrium among the various interest groups within the state in which the lawyers enjoy a dominant position."

Mark J. Roe, *Delaware's Competition* 117 HARV. L. REV. 588 (2003). An argument that the theoretical debate of race-to-the-top vs. race-to-the-bottom is misconceived since Delaware's primary competition comes from the federal government, not from other states. Prof. Roe contends that when a corporate issue becomes too big, the federal government steps in (as in the case of Enron & Sarbanes-Oxley), so Delaware controls only that which the federal government allows it to control.

Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991). Explores the connection between American populism and federal regulation of the securities markets and stock ownership. Argues that this connection best explains the differences between the American system on the one hand, and the German and Japanese systems, on the other. Roe's book on this

subject, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994), is the subject of a lengthy review by Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671 (1995).

Todd Henderson, *Beyond the Races: Re-examining the Relationship between Federalism and Corporate Governance*, 77 GEO. WASH. L. REV. 708 (2009). Henderson criticizes Robert Ahdieh's argument that corporate governance law is determined by markets not by state law, and therefore worries about a "race to the bottom" are misplaced. Henderson points out that while the market for corporate control disciplines managers, it is competition among states that disciplines states from distorting the market for corporate control. Part III of the article reframes the "race to the bottom" vs. "race to the top" debate by drawing on Thomas Sowell's *A Conflict of Visions* and concludes that the policy debate is really about a conflict of worldviews instead of the merits of corporate law. Henderson argues that scholars in the field of corporate law are not just reaching different conclusions; they are arguing on entirely different grounds. Henderson concludes by urging corporate law scholars to follow the lead of antitrust law by defining what a successful market for corporate law would look like, and then addressing the question of whether the market is working against that metric.

The Involvement of Federal Regulation: Sarbanes-Oxley and Beyond

Richard Epstein, *Is the U.S. Legal Regime Undermining U.S. Competitiveness?: The Danger of Investor Protection in Securities Markets*, 12 TEX. REV. LAW & POL. 411 (2008). Epstein begins by noting four misconceptions of oversight of securities regulation. First, securities regulations, unlike other legal rules such as Statute of Frauds, lose their value over time and thus are subject to regulatory depreciation. Second, lawmakers too readily assume an inelastic private response to new regulations, and this leads to far more extensive systems of regulation than will prove in practice to be sustainable in the long term. Third, given the lack of constitutional protections against regulation or taxation, regulated entities anticipate new regulations in ways which lawmakers cannot predict. The fourth common mistake of regulators is to assume that the indirect consequences of regulation are small and can therefore be safely ignored. The indirect consequences of regulation are likely to undermine the efforts of regulators to confine the private responses to some narrow domain. Moving beyond the four misconceptions of regulators, Epstein highlights the unfortunate feedback loop between the level of judicial review in the post-Chevron era and the declining quality of regulations.

For critiques of the Sarbanes-Oxley regime enacted in 2003 in response to the Enron scandal, see Stephen Bainbridge, *Sarbanes-Oxley: Legislating in Haste, Repenting in Leisure*, 2 CORP. GOV. L. REV. 69 (2006); Jonathan Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficiency of Mandatory Versus Enabling Rules*, 81 WASH. U. L. Q. 329 (2003).

Mergers and Acquisitions

Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). A remarkably influential statement of the disciplining effects that the possibility of a hostile takeover can have on

incumbent managers. Henry Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967). Another landmark study explaining the differences between the theory of classical corporation law and the realities of corporate life.

Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. ON REG. 119 (1992). Surveys the huge literature on mergers and acquisitions. Since “[t]he empirical evidence is most consistent with value-maximizing, efficiency-based explanations of takeovers,” Professor Romano argues that “much of the takeover regulatory apparatus [which seeks to “thwart and burden takeovers”] is misconceived and poor public policy.”

Executive Compensation

Todd Henderson, *Executive Compensation in Bankruptcy: Paying CEOs when Agency Costs are Low*, 101 NW. U.L. REV. 1543 (2007). According to Professor Henderson’s study of financially distressed firms, while the managerial power theory suggests that the increased monitoring typical in Chapter 11 cases should lead to lower levels or different types of compensation, or both, what happened instead was that no firm dramatically altered its compensation methods despite the reduction in agency costs.

Randall S. Thomas, *Explaining the International CEO Pay Gap: Board Capture or Market Driven?*, 57 VAND. L. REV. 1171 (2004). Professor Thomas’ article offers five alternatives to the Board Capture Theory that justify higher pay for American CEOs than for foreign top executives. It argues that each one of these theories - Marginal Revenue Product Theory, Tournament Theory, Opportunity Cost Theory, Bargaining Theory, and Risk Adjustment Theory - present better explanations for the international CEO pay gap than Board Capture Theory.

Richard Posner, *Are American CEOs Overpaid, and, If So, What If Anything Should Be Done about It?* 58 DUKE L.J. 1013 (2009). Posner notes that American CEO’s are on average paid about twice as much as their counterparts in other countries. This is the case even though American CEO’s have lower average salaries because bonuses and stock options are much more prevalent in the U.S. Posner argues that in large corporations in which ownership is widely dispersed, incentive based compensation is necessary to address the high agency costs faced by owners. Posner casts blame on directors for failing to limit CEO compensation due to conflicts of interest and “mutual back scratching.” Having concluded that CEO’s are overpaid, Posner discusses social costs arising from overcompensation such as investors choosing less valuable investments to avoid overcompensating firms, and talent diversion to industries in which overcompensation is most frequent. Posner gives four major solutions to the problem of excessive CEO pay: (1) greater disclosure to investors regarding pay, (2) backloaded executive compensation to tie pay to future firm performance, (3) steeply increased marginal income tax rate of persons with high incomes, (4) more contentious proxy fights between competing slates of directors.

Miscellaneous

Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984). The author asserts that “what business lawyers do has value only if the transaction on which the lawyer works is more valuable as a result [of his participation].” Gilson explores the idea of business lawyers as “transaction cost engineers,” and briefly discusses the changes in legal education necessary for an increased focus on training lawyers to promote “private ordering.” For more material in this vein, see Symposium: *Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1 (1995).

Frank Easterbrook, *Derivative Securities and Corporate Governance*, 69 U. CHI. L. REV. 733 (2002). Easterbrook sets out to shed light on the overlooked relationship between derivative instruments and the corporations whose securities are the physical assets on which the derivatives depend. He argues that derivatives overcome many obstacles to accurate pricing of corporate securities and hence to the design of optimal corporate charter terms. Investors can use derivative trading, which is less costly and more efficient than trading in corporate shares, to make it clear to entrepreneurs which governance devices are most highly valued.

Internet resources: Information on Delaware corporation law is provided by the Delaware Secretary of State’s office on-line at <http://corp.delaware.gov/>. The EDGAR database, maintained by the Securities & Exchange Commission, is a treasure trove of corporate information, <http://www.sec.gov/edgarhp.htm>. For a gateway to the growing literature on unincorporated business associations, see Professor Larry Ribstein’s personal website <http://home.law.uiuc.edu/~ribstein/>.

XI. Criminal Law & Procedure

Last updated September 2009

Criminality and Responsibility

Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 168 (1968). A landmark article, modeling criminal behavior as a matter of rational choices.

JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (4 vols., 1984-88). A legal philosopher's attempt to answer the question: "What sorts of conduct may the state rightly make criminal?"

JAMES Q. WILSON, *THINKING ABOUT CRIME* (3d rev. ed., 1985). This classic work is about the sociology of crime, not criminal law, but it is indispensable to anyone analyzing criminal justice issues. Wilson concludes that "rehabilitation has not yet been shown to be a promising method for dealing with serious offenders, broad-gauge investments in social progress have little near-term effect on crime rates, punishment is not an unworthy objective for the criminal justice system of a free and liberal society to pursue, the evidence supports (though cannot conclusively prove) the view that deterrence and incapacitation work, and new crime-control techniques ought to be tried in a frankly experimental manner with a heavy emphasis on objective evaluation." An interesting interview of Wilson appeared in the February 1995 issue of *Reason* magazine, available on-line at <http://www.reasonmag.com/9502/fe.WILSONinter.text.html>.

Individual Responsibility and the Law, 77 CORNELL L. REV. 955 (1992). The panel on "Personal Responsibility in Criminal Law" at this Federalist Society conference included presentations by Joseph Grano, Norval Morris, and Adam Walinsky.

Clarence Thomas, *Personal Responsibility and Criminal Law*, THE FEDERALIST PAPER, February 1995 (The Federalist Society). This Federalist Society address chronicles how the criminal law lost sight of the ideal of personal responsibility. The address maintains that an individual cannot truly attain human dignity without being held accountable for the harmful consequences of his acts. This speech was part of a Federalist Society symposium on "The Due Process Revolution and America's Urban Poor: Victims or Beneficiaries?," published in the 1996 volume of the *Michigan Law and Policy Review*.

Stephen Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251 (2000). An argument against the deterministic critique of personal responsibility and its role in the criminal law, from a psychological perspective.

Theories of Punishment

Herbert Morris, *Persons and Punishment*, in *ON GUILT AND INNOCENCE* (1976). An explication of the justness of retributive punishment.

ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL*

QUESTION (1991); WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1991). These leading works consider the questions raised by punishment. There is much discussion about the retributive aim of punishment.

Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NORTHWESTERN LAW REVIEW 453 (1997). An argument that retributive systems of punishment—when based upon general societal views of desert—have the utilitarian benefit of fostering respect for and adherence to the criminal law.

Michael S. Moore, *The Moral Worth of Retribution*, in FOUNDATIONS OF CRIMINAL LAW, (Katz et al eds., 1999). A discussion of the interplay between human guilt emotions and the appropriateness of retribution as a goal of punishment. See also Gerard Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J. OF LAW & PUB. POL'Y 19 (2003).

Criminal Law & Economics

Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983). Explains that the discretion currently found in criminal procedure—in prosecutorial discretion, plea bargaining, and sentencing discretion—strongly resembles “the rules that would be desirable in a system constructed to produce deterrence with minimum allocative deficiency.”

Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985). Argues that “the substantive doctrines of the criminal law, as of the common law in general, can be given an economic meaning and can indeed be shown to promote efficiency.” Judge Posner’s primary claim is that “[t]he major function of criminal law in a capitalist society is to prevent people from bypassing . . . the ‘market,’ explicit or implicit—in situations where . . . the market is a more efficient method of allocating resources than forced exchange.” For an overview of the law and economics literature on criminal law and procedure, consult chapters 7, 21, and 22 of RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*.

Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435 (1990). Discusses why the punishment of unsuccessful attempts at unlawful acts is justified and develops a model for calculating the magnitude of the sanctions.

Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993). Attempts to reconcile the *mens rea* doctrine with the “optimal enforcement” theory generated by the economic analysis of criminal law. Parker concludes that, at least with respect to *mens rea*, “economics can provide an explicit and precise explanation for the moral element in criminal law.”

Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299 (1996). Using efficiency as its normative benchmark, this article argues for a victim-centered perspective in the specific area of criminal attempt. The authors focus on the role of the victim in pre-crime settings and the possible protections that can be taken by the victim to prevent the crime from occurring and argue that the victim-centered approach can be expanded to other areas of criminal law as well.

Richard McAdams & Douglas Ulen, *Behavioral Criminal Law and Economics*, working paper, (Nov. 11, 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299963. Considers the effect of cognitive biases, prospect theory, hedonic adaptation, hyperbolic discounting, fairness preferences, and other deviations from standard economic assumptions on the optimal rules for deterring potential offenders and for regulating (or motivating) potential crime victims, legislators, police, prosecutors, judges, and juries.

Victims' Rights Literature

FRANK G. CARRINGTON, *THE VICTIMS* (1975). This book added an important perspective to the critique of the Warren Court's criminal justice rulings, namely the victim's. Nine years later, the author and another leader in the "victims' movement" reviewed the movement's successes. See Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984) (introducing a symposium on legal rights of crime victims).

PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982). In 1982, President Reagan established a task force to study and make recommendations with respect to the treatment of victims of crime. The task force's report made legislative proposals for both federal and state governments, and made other recommendations for police, prosecutors, judges, parole boards, hospitals, schools, the ministry, the bar, the mental health community, and the private sector. It also proposed that this sentence be added to the Sixth Amendment: "Likewise, the victim, in every criminal prosecution, shall have the right to be present and to be heard at all critical stages of judicial proceedings." The report has been used as a blueprint for numerous reforms at the state level.

Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835 (2005). An argument by one of the rising stars in legal scholarship that victims should be made participants in the federal criminal process along with one possible method for including victims in the process.

Constitutional Criminal Procedure

"*Truth in Criminal Justice*" Series, *Office of Legal Policy*, 22 U. MICH. J. L. REFORM 393 (1989). This special issue reprints eight studies conducted in the mid-1980s by the Office of Legal Policy of the U.S. Department of Justice about various aspects of criminal procedure. This is a very useful source for those interested in pretrial interrogation (the "*Miranda* rule"), the exclusionary rule, the Sixth Amendment right to counsel, the admission of criminal histories at trial, the judiciary's ability to control federal law enforcement activity, double jeopardy, federal habeas corpus review of state judgments, and adverse inference from silence. The introduction by Professor Joseph Grano briefly recaps the recent history of the law of criminal procedure.

The Constitution and Federal Criminal Law, 26 AM. CRIM. L. REV. 1659 (1989). Papers from a Federalist Society conference on a wide range of topics, including the death penalty, criminal sentencing, the proper goals of punishment, federalism and federal criminal law, and drug policy. Contributors include Walter Berns, Charles Fried, Joseph Grano, Edwin Meese, President Reagan, David Sentelle, and Ernest van den Haag.

Fourth Amendment

Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). In this classic article, Professor Oaks marshals logical and empirical arguments against the exclusionary rule. He “concludes with a polemic argument for abolishing the exclusionary rule as to evidence obtained by searches and seizures, and replacing it with a practical tort remedy against the offending officers or their employers.”

Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). This article gives careful attention to the text, structure, and history of the Fourth Amendment and criticizes the Supreme Court’s failure to do so. As usual, Professor Amar is creative in exploring the interrelationship between various constitutional protections.

Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. REV. 1443 (2000). An economic analysis of the costs and benefits of the exclusionary rule, suggesting that damages as a remedy for police misconduct are at least as good as the exclusionary rule in meeting the stated social objectives, and in fact are probably better, offering a more refined solution to the perpetual problem of constraining police behavior.

Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003). This article argues for a reappraisal of the concept of probable cause through an actual example of the pre-9/11 search of Zacharias Moussaoui’s laptop. Prof. Lerner analyzes the question of whether the standard of probable cause should fluctuate based on the seriousness of the suspected crime and proposes an alternative approach that factors in a suspected crime’s gravity when determining probable cause.

David Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005-06 CATO SUP. CT. REV. 283 (2005/2006). A libertarian scholar discusses the significance of *Hudson v. Michigan*, in which the exclusionary rule was abolished for knock-and-announce cases.

Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007). This article explains why no one test can accurately and consistently distinguish less troublesome police practices that do not require Fourth Amendment oversight from more troublesome police practices that are reasonable only if the police have a warrant or compelling circumstance and argues that the Supreme Court uses four different tests at the same time: a probabilistic model, a private facts model, a positive law model, and a policy model. Kerr contends that the use of multiple models is preferable to a singular approach, as it allows the courts to use whichever approach can most accurately and consistently identify practices that need Fourth Amendment regulation.

Fifth Amendment

SIDNEY HOOK, *COMMON SENSE AND THE FIFTH AMENDMENT* (1957). Professor Hook was an important anticommunist intellectual throughout the Cold War, including its early days when the Fifth Amendment privilege against self-incrimination was frequently invoked by those testifying before congressional committees. Such is the explicit backdrop for this 1957 book, in which Hook invokes Bentham, Mill, Cardozo, and Wigmore, among others, in discussing the limits that ought to be placed on the privilege.

Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). In this classic article, Judge Friendly critiques the Supreme Court's jurisprudence on the Self-Incrimination Clause of the Fifth Amendment. He concludes with specific recommendations for a constitutional amendment limiting the Clause's scope. For a reexamination of whether a constitutional amendment is really required, see Yale Kamisar, *Can (Did) Congress 'Overrule' Miranda?*, 85 CORNELL L. REV. 883 (2000).

JOSEPH GRANO, *CONFESSIONS, TRUTH AND THE LAW* (1993). A comprehensive treatment of the *Miranda* decision and its impact on law enforcement. For an interesting review, see Michael Chertoff, *Chopping Miranda Down to Size*, 93 MICH. L. REV. 1713 (1995).

Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995). This article gives careful attention to the text, structure, and history of the Fifth Amendment's Self-Incrimination Clause, and criticizes the Supreme Court's failure to do so.

Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996). Meticulously assesses the evidence available on how many confessions police never obtain because of *Miranda*. This evidence "suggests that each year *Miranda* results in lost cases against roughly 28,000 serious violent offenders and 79,000 property offenders and in plea bargains to reduced charges in almost the same number of cases." Professor Cassell concludes that those costs "are unacceptably high, particularly because alternatives such as videotaping of police interrogations can more effectively prevent coercion while reducing *Miranda's* harms to society."

Alex Stein & Daniel J. Seidmann, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000). This article argues that the right to silence can help fact-finders distinguish between innocent and guilty suspects. Using empirical data and game theory analysis, the authors argue that the right to silence is superior to the alternative, which would result in guilty defendants lying and becoming pooled together with innocent defendants.

Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078 (2006). A defense of the Rehnquist Court's Fifth Amendment jurisprudence, observing that the Court retreated from both the expansive rationales and results that reached well beyond the Fifth Amendment's text and history, leaving in place *Miranda's* warnings but restricting its exclusionary rule and largely declining to extend it, leaving rules clear and narrow enough to guide law enforcement without unduly constraining it.

Habeas Corpus

Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Classic treatment of the subject. Outlines the traditional justification for federal courts' taking jurisdiction where a prisoner challenges the adequacy of the state courts' process to decide federal questions. Argues that this traditional justification is not clearly present in cases where the prisoner's challenge is not to the state courts' decisional process, but rather to the correctness of the results of the trial.

Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). Argues that "with a few important exceptions, [state] convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence." Predicts that failure to limit collateral attack in this way will lead to "abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts."

Death Penalty/ Eighth Amendment

RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982). Marshaling a convincing array of historical evidence, Berger demonstrates that the Supreme Court's decisions under the Eighth Amendment's Cruel and Unusual Punishments Clause impose the Justices' moral views upon society rather than seriously apply constitutional norms. The effect of the Court's decisions is to amend the Constitution by changing the clearly established meaning of the Clause, which allowed the states wide discretion in imposing death penalties in appropriate cases. The book is valuable not only for its insight into specific questions of Eighth Amendment jurisprudence but more generally for its methodology in demonstrating that the original understanding of the Framers of the Constitution can be ascertained, even for purportedly open-ended clauses like the Cruel and Unusual Punishments Clause.

Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). The 1987 Bedau-Radelet study purported to show that 350 people had been wrongly convicted of capital or "potentially capital" crimes in the United States during this century, that 23 innocent persons had actually been executed, and that the use of capital punishment therefore entails an intolerable risk of mistaken executions. In their response, however, Judge Markman and Professor Cassell critique the study's methodology and current relevance; in their concluding section, they also argue that Bedau and Radelet "undervalue[] the important reason why the great majority of Americans" support capital punishment, namely "to save lives."

Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required?*, working paper, (March 2005) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691447. Discusses recent evidence in support of the deterrence effect of the death penalty, and makes the argument that the failure to appreciate the life-life tradeoffs involved in capital punishment may depend on cognitive processes that fail to treat "statistical lives" with the seriousness that they deserve.

John Stinneford, *The Original Meaning of "Unusual": the Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739 (2008). An originalist analysis of the Eighth Amendment, arguing that the

Framers understood the word “unusual” to mean “contrary to long usage” and that recognition of the word’s original meaning will invert the “evolving standards of decency” test and ask the Court to compare challenged punishments with the longstanding principles and precedents of the common law, rather than notions of “societal consensus” and contemporary “standards of decency.”

O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, working paper, (Sept. 4, 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965837. A critique of the use of cognitive neuroscience to discredit the retributive rationale for the death penalty, concluding that the effort would produce a death penalty regime that is even more draconian and less humane than the flawed framework currently in place.

Sentencing

Jeffrey S. Parker, “*Rules Without . . .*”: *Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397 (1993). In the 1980s, the call for reform of federal criminal sentencing resulted in the creation of the U.S. Sentencing Commission, and its promulgation of sentencing guidelines that constrain federal judges, to some degree, in their sentencing of federal criminal defendants. Parker critiques that portion of the sentencing guidelines that deals with corporate defendants. He argues that these guidelines have no basis in sentencing theory, past sentencing practice, or statutory warrant, and that they raise serious constitutional problems as well. He concludes that they are “a disaster for sentencing policy, and another blow to the American economy.”

Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). An examination of the reasons for public resistance to alternative sanctions, which concludes that traditional alternatives to imprisonment lack expressive societal condemnation. Professor Kahan then advocates using shaming penalties as a better alternative to imprisonment because shaming penalties express condemnation and are still a feasible alternative to prison for many crimes.

Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003). This article argues for the imposition of collective sanctions as an indirect way of controlling individual wrongdoers by expanding the economic theory of vicarious liability to include the internal dynamics of collective action.

Paul Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

In the landmark 2005 case *United States v. Booker*, the Supreme Court struck down the Federal Sentencing Guidelines as unconstitutional, holding that the Sixth Amendment requires a jury to decide, beyond a reasonable doubt, any fact that increases the sentence of a defendant in a federal criminal case over the high end of the range provided by the Guidelines. The following articles discuss and critique the ramifications of *Booker*:

Jeffrey Standen, *The New Importance of Maximum Penalties*, 53 DRAKE L. REV. 575 (2005).

Stephanos Bibas, *White Collar Plea Bargaining and Sentencing After Booker*, 47 WILL. & MARY L. REV. 721 (2005). This symposium essay speculates about how *Booker*'s loosening of the Federal Sentencing Guidelines is likely to affect white-collar plea bargaining and sentencing, suggesting that the Sentencing Commission revise its loss-computation rules, calibrate white-collar sentences to their core purpose of expressing condemnation, and add shaming punishments and apologies to give moderate prison sentences more bite.

J.J. Prescott and Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301 (2006).

Stephanos Bibas, Max M. Schanzenbach & Emerson Tiller, *Policing Politics at Sentencing*, 103 NW. U. L. REV. (forthcoming spring 2009) Argues that binding sentencing guidelines are necessary to constrain trial-court discretion and permit meaningful appellate review and that in *Booker* and its progeny the Supreme Court has taken too rosy a view of trial-court sentencing discretion, undervaluing appellate review as a check on policy and ideological variations.

John Pfaff, "The Future of Appellate Sentencing Review: *Booker* in the States," 93 MARQUETTE L. REV. __ (forthcoming 2009).

Miscellaneous

Sara Sun Beale, *Reconsidering Supervisory Powers in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984). The Supreme Court has relied on its "supervisory authority over the administration of criminal justice in the federal courts" for more than forty years. This article concludes that the sources for this authority are actually quite limited and that "the concept of supervisory power should be abandoned in favor of identifying more specifically the constitutional or statutory power being employed."

Richard A. Bierschbach and Alex Stein, *Overenforcement*, 93 GEO. L. J. 1743 (2005). A seminal work on the understudied area of overenforcement, which argues that overenforcement of the law is widespread and unavoidable, but that the legal system can counteract the effects of overenforcement by adjusting evidentiary and procedural rules to make liability less likely while still creating balanced incentives for individuals.

XII. Environmental Law

Last updated October 2008

Topical Overviews

RICHARD L. REVESZ, *FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY* (1996). An accessible overview of environmental law with articles written by the scholarly giants in the field.

JONATHAN H. ADLER, *ECOLOGY, LIBERTY, & PROPERTY: A FREE MARKET ENVIRONMENTAL READER* (2000). A collection of works seeking to answer the question of whether free markets can be reconciled with environmental protection. Essays explore the market institutions of private property, voluntary exchange, common law liability standards, and the rule of law.

WILLIAM F. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974). A short, readable introduction to the idea that environmental quality is but one of a set of laudable human goals. Discusses the kinds of compromises and trade-offs that a rational environmental policy will involve.

The Debate Between Regulatory Versus Free-Market Frameworks

The Environment and the Law, 21 *ECOLOGY L.Q.* 243 (1994). This symposium, sponsored by the Federalist Society, treats a number of interesting theoretical issues regarding the proper nature and function of environmentalism and federal environmental law. Participants included Douglas Ginsburg, Orrin Hatch, Peter Huber, Alex Kozinski, Edwin Meese, Thomas Merrill, Raymond Randolph, Richard Stewart, and Stephen Williams. A variety of viewpoints are presented in the roundtable on “Science, Environment, and the Law,” with Edward W. Warren making a particularly interesting presentation. He focuses on the appropriate role of the courts: What should conservatives seek—judicial deference to the political branches (including the regulatory bureaucracy) or aggressive protection of economic liberty and rigorous science? These themes are further discussed in Edward W. Warren & Gary E. Marchant, “*More Good Than Harm*”: *A First Principle for Environmental Agencies and Reviewing Courts*, 20 *ECOLOGY L.Q.* 379 (1993).

Symposium-Free Market Environmentalism: The Role of the Market in Environmental Protection, 15 *Harv. J.L. & Pub. Pol’y* 297 (1992). Papers presented at this conference focused on Terry L. Anderson & Donald R. Leal, *Free Market Environmentalism* (1991). As Anderson and Leal put it, free-market environmentalism “considers the potential for market solutions [to environmental questions] and the problems with political ones.” The responses range from strongly critical to stoutly supportive. One of the longer articles, *Escaping Environmental Feudalism*, by economist Bruce Yandle, *id.* at 517, is

particularly thought-provoking. It argues that “The domain for contractual solutions to environmental use is vanishing, even though market-like instruments emerge occasionally.”

ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr., eds., 1994). This collection of essays argues that special interests have played a major role in the inefficiency of environmental regulation. The book includes seven case studies that challenge and confound the benign “public interest” view of policy making by analyzing the role of interest groups and regulators in a broad range of policy disputes. James Q. Wilson wrote the Foreword.

Bruce Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985). Makes the case that environmental policies should be reformed so as to “set intelligent priorities, make maximum use of the resources devoted to improving environmental quality, encourage environmentally superior technologies, and avoid unneeded penalties on innovation and investment.”

Richard B. Stewart, *Controlling Environmental Risks through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153 (1988). Stewart characterizes the current environmental regulatory regime as “nothing less than a massive effort at Soviet-style central planning of the economy to achieve environmental goals.” He sketches the command-and-control approach currently in use, and explains how economic incentives (such as pollution charges and transferable pollution permits) would improve the effectiveness and lower the costs of this area of regulation. See also Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U.L. REV. 21 (2001) for a more recent survey of the command approach and its possible substitutes, calling for solid empirical and analytical work to be done to provide a basis for reform.

Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999). An examination of the specific industries and special interest groups that benefit from environmental regulation at the federal level, which challenges the conventional idea of a dichotomous tension between industry polluters who disfavor regulation and the public that favors regulation.

Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). A systematic and empirical critique of the various arguments advanced in favor of environmental regulation by the federal government.

Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988). Maintains that economic incentives ought to replace the “best available technology” requirements of environmental law. Such reform would be more effective in protecting the environment and less costly than the alternatives.

Jonathan H. Adler, *Free & Given: A New Approach to Environmental Protection*, 24 HARV. J. L. & PUB. POL'Y 653 (2001). An argument that existing centralized environmental law has generated enormous costs and diverted resources that would otherwise have better protected the environment. Professor Adler outlines an alternative environmental policy based on market institutions, property rights, and enforcement through traditional tort principles.

Specific Statutory Regimes Discussed:

NATURAL RESOURCE DAMAGES: A LEGAL, ECONOMIC, AND POLICY ANALYSIS (Richard B. Stewart, ed., 1995). "Natural resource damages" is a novel form of liability established by Superfund and other recent statutes. This book supplies a comprehensive critique of the current statutory and regulatory schemes, with contributions from a variety of lawyers, economists, and other environmental experts.

For a recent argument that the statute of limitations of the Superfund Amendments preclude the Government's practice of delaying the time within which it must bring removal and remedial actions against owners of Superfund sites, see Alfred Light, "CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?" (2008), available at: http://works.bepress.com/alfred_light/1. In addition to his statutory argument, Professor Light's article contains a useful, up-to-date history of CERCLA and its construing opinions.

The Environment and Regulatory Takings:

JERRY ELLIG, THE ECONOMICS OF REGULATORY TAKINGS, IN REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS (Roger Clegg, ed., 1994). Ronald Coase and the Takings Clause are brooding omnipresences in the environmental law area. This jargon-free piece by Professor Jerry Ellig, a public-choice economist, does an excellent job of synthesizing the two.

Jonathan H. Adler & Ilya Somin, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. (2006), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894693. An argument that economic development takings, such as those upheld by the Supreme Court in *Kelo v. City of New London*, both cause environmental harm and reduce economic growth by transferring land to inefficient development projects.

Lomborg's Skeptical Environmentalism:

In his highly controversial book THE SKEPTICAL ENVIRONMENTALIST, Danish environmentalist Bjorn Lomborg argued that many claims of environmental scientists concerning overpopulation, declining energy resources, species loss, water shortages, deforestation, and aspects of global

warming are not in fact supported by empirical data. Lomborg's book, though a work of social science, needless to say has great relevance to the choice of legal remedy to environmental problems, and served as a touchstone for discussion amongst environmental law academics.

In a symposium on Lomborg's book, Todd J. Zywicki, presented the article *Baptists? The Political Economy of Environmental Interest Groups*, 53 CASE W. RES. 315 (2002), arguing that the public interest or "civic republican" explanations for the activities of environmental interest group fail, and that their activities can be understood simply as the desire to use the coercive power of government to subsidize their personal desires for greater environmental protection, and to redistribute wealth and power to themselves.

See also David Schoenbrod & Christi Wilson, *What Happened to the Skeptical Environmentalist?*, available at: <http://ssrn.com/abstract=352500>, for law-of-evidence argument that Lomborg's arguments should be dealt with on the merits, rather than dismissed summarily by the scientific community.

International Environmentalism:

The global environmental accord, such as the Kyoto protocol, has become an increasingly popular vehicle for promotion of environmental interests. For a comparison of global multilateralism in the trade context, with other agreements such as environmental accords, see John O. McGinnis, *AEI Conference: Trends in Global Governance: Do they Threaten American Sovereignty? Article and Response: The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381 (2000). Professor McGinnis argues that the enthusiasm of many conservatives for multilateral trade agreements, in contrast to their skepticism of environmental and human rights accords, military pacts, and international criminal courts, is rooted in more than just political reflex. He makes the case that trade multilateralism is the best form of global multilateralism because "it can extend exchange by sustaining a global market" and "promotes the rule of nations by their encompassing interests." He argues that interest group capture and the reduction of regulatory competition, already problems in domestic regulatory regimes such as environmental regimes, are likely to be more severe at the global level, and that "regulatory regimes liable to be influenced by special interests create a tragedy of the commons problem similar in its structure to that caused by externalities of productive activity," but without the benefits.

No survey of the literature in the area of environmental law would be complete without considering scholarship in the areas of the Takings Clause, administrative law, and economic liberties. The reader therefore should consult both the Constitutional Law section and the Administrative & Regulatory Practice section of this bibliography as well.

XIII. Family Law

Last updated October 2008

Philosophical Underpinnings

Individual Responsibility and the Law, 77 CORNELL L. REV. 955 (1992). This Federalist Society symposium featured a panel on family law. Participants included Steven Calabresi, Gary Lawson, Elizabeth Fox-Genovese, Jane Larson, Phyllis Schlafly, and Karl Zinsmeister.

MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989). Traces the effects of family law's "increasing emphasis on the individual." Professor Glendon shows that this new, individualistic streak creates stresses in family law, which has been traditionally marriage- and family-centered, and remains so (to some extent) even today.

Feminism, Sexual Distinctions, and the Law, 18 HARV. J. L. & PUB. POL'Y 321 (1995). This Federalist Society symposium featured a panel on "Feminism, Children, and the Family," which included presentations by Elizabeth Fox-Genovese, Carolyn Graglia, Daniel Ortiz, and Daniel Polsby. See also Jennifer Roback Morse, *Beyond "Having It All"*, *id.* at 565.

GARY S. BECKER, *A TREATISE ON THE FAMILY* (enlarged ed. 1991). Becker, the 1992 Nobel laureate in economics, analyzes a number of topics in this area with his "human capital" approach (in which he quantifies the skills and knowledge embodied in human labor).

RICHARD A. POSNER, *SEX AND REASON* (1992). A remarkably wide-ranging discussion of human sexuality and the legal system's various attempts to regulate it through marriage and divorce law, abortion law, and the like.

ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2002). In Chapter 5, Posner analyzes the effect of social norms within the context of Family Law, arguing that the interconnections between law and social norms are a double-edged sword and that a degree of regulation is required to guide the law toward productive social norms.

The Nature of Marriage

LINDA WAITE AND MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2001). A short book that finds empirical evidence for benefits generated through marriage in a number of facets of daily life: better wages, higher libidos, longer life expectancy and greater overall happiness.

John J. Coughlin, *Natural Law, Marriage, and the Thought of Karol Wojtyła*, 28 FORDHAM URB. L.J. 1771 (2001). Coughlin argues that the loss of the natural law perspective from legal theory has had a negative effect on clients in marriages who seek legal advice. He outlines two of Karol Wojtyła's major tenets – that marriage and family are the fundamental human community and that marriage is a virtuous relationship – and concludes with practical suggestions for legal practitioners.

Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998). A lengthy discussion and modeling of the legal treatment of marriage as a social and relational norm to promote cooperation and enforce intramarital promises.

KAY S. HYMOWITZ. MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE (2006). Focuses on the disastrous effects of separating marriage from child-rearing.

For a review of the evidence that there is a more equal division of leisure time between husbands and wives when women work in the home than when they work for wages in addition to working in the home, see Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 519 (1998).

Definition of Marriage

Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221 (2005). A piece advocating a constitutional amendment to define marriage as between a man and a woman based on two reasons: marriage as an institution protects against tyranny and federalism, the traditional constitutional protection of family law and marriage, is being eroded by the judiciary, which is usurping the right of the people to define marriage.

J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545 (2006). A conservative voice criticizing a constitutional amendment to define marriage as between a man and a woman, due to the severe consequences of politicizing the United States Constitution.

Amy L. Wax, *Same-Sex Couples and the 'Exclusive Commitment': Untangling the Issues and Consequences: Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377 (2007). An opponent of same-sex marriage examines the approach to social institutions that underlies the debate between pluralists and traditionalists on the subject, concluding that, although "recent developments have vindicated the wisdom of many traditionalist commitments and assumptions," because people are increasingly ambivalent about those assumptions, same-sex marriage is likely to become adopted democratically. See also Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change,*

and Same-Sex Marriage, 42 SAN DIEGO L. REV. 1059 (2005) (attempting to provide a systematic, secular exposition of the anti-gay-marriage position, drawing on the work of Burke, Hayek, and Michael Oakeshott.)

Family Law in the Medical Context

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997). A review of the Supreme Court cases dealing with the right to die and a conclusion that the Supreme Court in *Washington v. Glucksberg* reversed a noted tendency to insert itself in controversial family issues. See also Yale Kamisar, *Can Glucksberg survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453 (2008) (examining the continued force of *Glucksberg* in the wake of *Lawrence v. Texas*).

Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003). An economic defense of commodification of the parenthood market, dealing with transactions for alternative insemination, adoption, and other reproductive technologies. See also Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978).

Divorce and Marital Disintegration

Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). The authors argue that the “primary function of contemporary divorce law [is] not [to] impos[e] order from above,” but rather to promote “private ordering” by providing a “framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.”

Daniel Polsby, *Suppressing Domestic Violence with Law Reforms*, 83 J. CRIM. L. 250 (1992). Considers the role of deterrence and law enforcement in addressing intrafamily abuse. Suggests that creating a broader self-help defense might be a worthwhile method of combatting abuse.

MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987). Compares changes in abortion and divorce law in the United States and in Western Europe with an eye toward explaining why the American experience has been more controversial than that which the Europeans have faced in the struggle to change their laws.

Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 NYU L. REV. 631 (2006). Professor Volokh argues that injunctions imposed by divorce court judges on parents’ criticisms of their child’s other parent, and on religious speech when inconsistent with the religious education provided by the custodial parent, violate the First Amendment.

XIV. Federal Courts

Last updated October 2011

HENRY HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed., 2009). This is one of the leading casebooks dealing with the jurisdiction of the federal courts. The authors examine the voluminous literature on the subject and provide a detailed and useful analysis of the role of the federal courts and the appropriate scope of their authority under Article III. Chapters 2 and 14 are particularly instructive.

RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1999). A substantially revised edition of his 1985 book, the author presents a detailed discussion of the current stresses on the federal judiciary, including the “caseload explosion” it has absorbed. Offers a wealth of statistical information, and a series of reforms designed to improve the performance of federal judges.

MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* (1991). This book applies two principles of American political theory to the subject of federal court jurisdiction: the “representational” principle (“that, within constitutionally established boundaries, the representative branches of government may make policy decisions”) and the “countermajoritarian” principle (that it is the job of the judiciary to adjudicate challenges to the political branches). It suggests that various federal jurisdictional doctrines be modified in light of the representational principle, and considers the impact of the countermajoritarian principle on the classic justiciability doctrines.

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). A leading article in support of an active judicial role in public law litigation, Chayes’ piece provides an interesting contrast between the “received tradition” of the adversarial system and his own model of adjudication. Under the Chayes model, judges would play a more active role in the shaping of claims, discovery, inter-party negotiations, the issuance of decrees, and the monitoring of litigants’ compliance with the court’s orders. Chayes argues for nothing short of a wholesale reevaluation of the adversarial system. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983). This review serves as an antidote to the reasoning of Abram Chayes and his vision of the judicial role in public law litigation. Horowitz examines the unintended consequences of the judiciary’s attempt to manage public institutions, and also sheds light on the institutional and ideological changes that led to the dramatic shift towards court reform in this area.

Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006). This article flushes out how courts have defined “judicially manageable standards,” which result in nonjusticiable political questions. Professor Fallon then identifies a series of criteria that guide courts, but concludes that the ultimate test is so discretionary that it could be considered judicially unmanageable.

Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233 (1990). In this article, Professor Bator critiques the “Simple Model” of judicial power, which views federal courts as having exclusive authority to adjudicate the types of cases enumerated under Article III. He also assesses various interpretive models for justifying the creation of legislative and administrative courts. In part, the article calls into question the idea that the powers of the Legislative, Executive, and Judicial Departments are readily ascertainable and distinct. Though some will no doubt disagree with Bator’s conclusions, the analysis of Article III is informative, thoughtful, and balanced.

Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003). An examination of the practice of state certification of decisions by federal courts. Prof. Nash argues that the certification process, despite its longstanding popularity and recognized benefits, likely exceeds the constitutional limits on federal jurisdiction.

Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988). This article rejects the seemingly dominant view that the political question doctrine is an inappropriate abdication of judicial power. Professor Mulhern asserts that each department of the federal government has the prerogative (and, indeed, an obligation) to interpret the Constitution when acting within its own sphere of authority. The article has a slight twist, though—Mulhern applies Ronald Dworkin’s “two-dimensional model of interpretation” in assessing the arguments against the political question doctrine.

David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985). In this article, Professor Shapiro takes issue with the idea that federal courts betray their mission when they are presented with a case within their Article III powers but refrain from hearing it for prudential reasons. For a similar, though broader critique, see: Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121 (2005).

Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928). In this leading review of diversity jurisdiction, Henry Friendly examines materials from the Constitutional Convention and the ratification debates, as well as Supreme Court decisions from the Republic’s early years, and ultimately calls the historical basis of diversity jurisdiction into question. This is an excellent excursus into the debate over diversity. For a similar view, see David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968).

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983). Justice (then-Judge) Scalia argues that standing is a “crucial and inseparable element” of the Constitution’s separation of powers, and that judicial relaxation of the standing requirement “will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.”

MICHAEL SOLIMINE & JAMES WALKER. RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM (1999). Solimine and Walker provide a comprehensive examination of major

issues revolving around judicial federalism. They make the case that the existence and operation of this system is healthy for the development of law and the protection of liberty. This theme is developed through a discussion of the major issues in the literature of judicial federalism: federalism and rights, the parity of the state and federal courts, the civil litigation system, state court interpretations of their own constitutions, and the relationship of ideology to judicial federalism. Recognizing that there are and always have been serious shortcomings in this system, the authors point out that these problem areas can be remedied; the start of this remedial process necessitates a respect for the judicial institutions of the state.

John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997). This article presents a reading of the Article III vesting clause proposed by Akil Amar and complements an earlier critique of Amar's position by Daniel Meltzer. Meltzer focuses especially on the Federal Convention and the first Congress and takes issue with Amar's historical claims concerning the understanding of Article III around the time of the framing. Harrison then discusses the constitutional structure--the sum of all the texts--to which Amar also appeals.

John Harrison, *Federal Appellate Jurisdiction over Questions of State Law in State Courts*, 7 GREEN BAG 2d 353 (2004). In a short essay, Professor Harrison addresses whether in cases that involve contested federal elections, Congress may and should authorize the federal courts to exercise appellate jurisdiction over state courts that extends to questions of state law that are not entwined with questions of federal law. He argues that with respect to cases otherwise within the Article III jurisdiction, Congress may do so. He also suggests that there is good reason to believe that all cases involving federal office are within the Article III jurisdiction.

Jonathan Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975 (2004). This article examines the propriety of having federal courts afford deference to state law interpretations reached by lower federal court judges. Two Supreme Court decisions from the 1990s seemed substantially to circumscribe such deference. But in fact subsequent Court cases continue to afford deference. Moreover, such deference can be normatively valuable. This article argues in favor of the use of deference in appropriate circumstances, including situations where the district court and court of appeals agree on the proper interpretation of state law, and where answers to state law questions are obtained through an intrafederal certification regime.

Understanding the Federal Courts, Administrative Office of the U.S. Courts, 2003. Introduction to the federal judicial system, its organization and administration, and its relationship to the legislative and executive branches of the government. The brochure is available at:

<http://www.uscourts.gov/understand03/>.

DEPARTMENT OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (February 19, 1988). This is a very useful reference guide for those examining the jurisdiction and authority of the federal courts. Topics covered include: judiciability, exhaustion, guidelines for statutory interpretation, and

guidelines for litigation involving individual liberties or the limited power of the federal government. The Guidelines are available online at <http://www.ialsnet.org/documents/Patersonmaterials2.pdf>.

Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010). In this groundbreaking article, Professor Rosenkranz proposes a new mode of constitutional analysis. Just as the Constitution prohibits not objects but actions--and just as actions require actors--so every constitutional inquiry, Rosenkranz argues, should first ask "who" violated the Constitution and "when" the violation took place. The answers to these questions, he contends, dictate the proper structure of judicial review, which in turn informs the scope of substantive rights and powers in dispute.

XV. Intellectual Property

Last updated December 2010

(See also Section II on Property)

Foundational Materials

WILLIAM M. LANDES AND RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003). A recent book by two of the leading scholars on how IP law does and should work according to an economic analysis lens.

PETER A. ALCES & HAROLD F. SEE, *THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY* (1994). An extensive treatise that describes the “confluence of commercial law and intellectual property.” The authors devote considerable space to sales and leases of intellectual property.

The Nature of Intellectual Property

Frank Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J. L. AND PUB. POL’Y 108 (1990). A concise argument that physical and intellectual property should be treated identically under the law.

F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2000). This paper explores the theoretical basis for the present system of enforcing patents with a strong property rule -- as distinct from a liability rule -- and shows why at least the option of a property right that would allow its owner to exclude use may actually avoid a socially suboptimal level of use and is therefore preferable to only government grants, tax credits, or other regulatory approaches to innovation.

Henry Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L. J. 1742 (2007). An argument that intellectual property’s close relationship to property stems from the role that information costs play in the delineation and enforcement of exclusion rights.

Adam Mossoff, *Is Copyright Property?* 42 SAN DIEGO L. REV. 29 (2005). A historical treatment of the question posed in the title, laying out the differences between the utilitarian and natural rights justifications for copyright as property, and the arguments of the camp that views it as a regulatory entitlement, in the context of the contemporary internet revolution.

Sabrina Safrin, *Chain Reaction: How Property Begets Property*, 82 NOTRE DAME L. REV. 1917 (2007). An argument that the recognition of property rights does not necessarily mean a more efficient regime, as unproductive new property rights can follow from pre-existing property rights in a chain reaction. Prof. Safrin explores three reasons for the chain reaction phenomenon using – group behavior theory, a breach of cooperation norm, and the right of exclusion – and concludes with a cautionary tale against blindly accepting new property rights without regard for their utility.

The Economics of IP Law

Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 14 (1969). In the context of a larger debate relating to intangible assets between proponents of property rights and proponents of regulation, this paper reminds those who would use law and economics tools to only point out problems with property rights regimes that they run the risk of engaging in a “nirvana” approach rather than the preferred comparative institutional approach.

Edmund W. Kitch, *Patents: Monopolies or Property Rights?*, 8 RES. L. & ECON. 31 (1986). This paper explores in some depth the many competitive forces a patentee may face including those from prior technologies, alternative non-infringing substitute technologies, and potential and actual future technologies, and the combined impact of these pressures in mitigating a monopoly power of a patentee.

Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727 (2000). This paper explores a number of errors in the literature relating to the economics of intellectual property including the view that intellectual property rights are monopolies, the view that such rights should be analyzed individually rather than as a system, the failure to consider the downstream contracting over such rights, and the failure to consider other possibilities.

Harvey S. Perlman, *Taking the Protection-Access Tradeoff Seriously*, 53 VAND. L. REV. 1831 (2000). This paper provides a review of the literature that argues an intellectual property right to exclude use may lead to a socially suboptimal level of use.

Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465 (2004). An examination of the relationship between protected intellectual goods and differences between patent and copyright law in which Prof. Long argues that the differences reflect substantive differences and cautions against the importation of traits found in patent law into copyright law, and vice versa.

Stan J. Liebowitz, *Economists' Topsy Turvey View of Piracy*, 2 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 5 (2005). A critique of the popular economic position that copying leads to gains for the copyright owner, showing how such gains are grossly exaggerated, emphasizing the often overlooked role of institutional and behavioral details of individual markets.

F. Scott Kieff & Troy A Paredes, *The Basics Matter: At the Periphery of Intellectual Property*, 73 GEO. WASH. L. REV. 174 (2004). This article explores the law and economics of the interface IP law shares with other areas of law such as contracts and antitrust and shows how a more simple decisional framework can be used to decide what otherwise seem to be tough cases and the importance of such a framework for providing appropriate ex ante incentives.

Issues in Patent Law

DONALD S. CHISUM, CRAIG ALLEN NARD, HERBERT F. SCHWARTZ, PAULINE NEWMAN, & F. SCOTT KIEFF, *PRINCIPLES OF PATENT LAW* (3d ed. 2004). A patent textbook by several of the leading authors on the subject.

Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977). A landmark analysis of patents and patent law. Professor Kitch argues that the presence of law increases “the output from resources used for technological innovation.”

Kenneth W. Dam, *The Economic Underpinnings of Patent Law*, 23 J.L. STUD. 247 (1994). This article provides an overview of the economic underpinnings of patent law in general and in particular is often cited for pointing out the important distinction between what may be covered by a given patent and what may be properly characterized as a distinct “market,” thereby reminding that patents are often not monopolies.

F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*, 45 B.C. L. REV. 55 (2003). This article explores the law and economics of the positive law rules for obtaining patents and points out new insights on the putative clash between flexibility and certainty regarding claim scope and the doctrine of equivalents and on the role of fee-shifting provisions as dealt with in cases such as Knorr-Bremse.

John R. Allison, Mark A. Lemley, Kimberly A. Moore, and R. Derek Trunkey, *Valuable Patents*, 92 GEO. L. J. 435 (2004). This paper argues for a new patent structure based on an understanding of how patents work in practice. The authors argue that valuable patents are those that are litigated and that the reason that 99% of patents are never enforced is that the patents themselves are not valuable and that patent law should take into account these factors in achieving the ultimate goal of encouraging innovation.

Issues in Copyright Law

Richard A. Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005). An examination of the philosophical underpinnings of copyright law in which Prof. Epstein argues that there exists an irresolvable tension in copyright law between liberty and property, both of which have costs and involve significant trade-offs, but that once the costs are recognized, copyright does a fairly good job of navigating the trade-offs.

William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003). An article that attacks the assumption that economic efficiency requires limited durations of copyright protection through empirical evidence, which demonstrates that indefinitely renewable copyrights would not starve innovation in the public domain. See also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

Issues in Trademark Law

William M. Landes and Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 304 (1987). This paper explores the economics of trademark law and shows why if appropriation is forbidden by a property rule, the benefits of a trademark's popularization will be internalized to mark owners and the amount of investing in potentially famous marks will rise.

William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987). In this work, the authors assert that current trademark law "can best be explained on the hypothesis that the law is trying to promote economic efficiency."

IP and the Common Law

Edmund W. Kitch, *Intellectual Property and the Common Law*, 78 VA. L. REV. 293 (1992). Included in a symposium on The Law and Economics of Intellectual Property, this selection discusses the possibility of a common law system of intellectual and industrial property, but recognizes that "the contours of such a common law system are unknowable because the judges have used the limits of the statutory systems to define the limits of the common law system."

Richard Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992). Analyzes this key 1918 Supreme Court case in terms of first principles of property rights, concluding that the case is "justly celebrated" and "will remain one of the enduring monuments of the common law." Part of a symposium on the law and economics of intellectual property.

The Role of Norms in an IP Regime

Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007). An analysis of IP-related norms and the impact that custom has on IP rights that sharply critiques the incorporation of customs into IP law as flowing from early court decisions, rather than from a bottom-up systemic ordering that would produce beneficial and efficient rules. For a response to Professor Rothman see Richard Epstein, *Some Reflections on Custom in the IP Universe*, 93 VA. L. REV. IN BRIEF 223 (2008).

Mark F. Schultz, *Copynorms: Copyright Law and Social Norms* in INTELLECTUAL PROPERTY AND INFORMATION WEALTH (Peter Yu, ed., 2007). A case for the importance of norms in the copyright context, applying social norms literature to copyright.

F. Scott Kieff, *Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science - A Response to Rai & Eisenberg*, 95 NW. U. L. REV. 691, 705 (2001). This paper engages in a comparative institutional analysis in the field of basic biological research between a world with the market for academic kudos and the world with the market for academic kudos plus cash and shows why despite

the problems identified by patent opponents the option of strong property rights is still the preferred approach in this area.

RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* (2007). This short, easy-to-read book makes the case that plagiarism is an “embarrassingly second-rate” offense, which is better punished through social admonition than by legal remedies.

Licensing versus Private Ordering

There have been numerous calls to collectively administer rights via forms of compulsory licenses to overcome alleged “anti-commons” problems and other problems caused by transaction costs. Some scholars have proposed general blanket licenses of content via rights to fileshare compensated through a revenue pool derived from taxes. Many have proposed some sort of legislative action to solve the transaction cost problem that Google Books sought to address, and has now attempted to address via a class action settlement. For an argument that, in the digital realm, the influence costs associated with compulsory licensing schemes make them a more expansive mechanism for setting prices than are private negotiations see Robert Merges, *Compulsory Licensing vs. the Three ‘Golden Oldies’: Property Rights, Contracts, and Markets*, 508 *CATO POLICY REVIEW* 1 (Jan. 2004).

For an analysis of the Google books settlement and the four ways in which it differed from the predicted “fair use” outcome, see Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual* 55 *N.Y.L.S. L. REV.* __ (2010).

F. Scott Kieff & Troy A Paredes, *Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem*, 47 *B.C. L. REV.* 111 (2007). This paper offers a solution to the anticommons problem that businesses face when multiple IP rights cover a single good or service, and prevent or retard the provision of that good or service. Through the use of a concrete example (DNA-on-a chip technology) Profs. Kieff and Paredes argue for a private ordering solution that combines the use of a limited liability entity and certain constraints on IP owners, in order to provide IP owners with a financial stake in the company while discouraging IP owners from holding out opportunistically.

XVI. International Law & Transactions

Last updated October 2011

EMER DE Vattel, *THE LAW OF NATIONS* (1758) (Liberty Fund ed.). A classic work by the Swiss natural law theorist whose ideas were extremely influential for the American Founders. In this text Vattel explores the application of natural law to the conduct of states and sovereigns, including the rights and obligations of the state itself, those of the sovereign power, the nature of good government, the right of the people to secession or rebellion, and the proper relations between sovereign states, including international commerce, international legal agreements, and treaties.

MARK. W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (4th ed., 2003) is a widely-used student text on public international law. Another useful survey is LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* (2d ed., 2000).

JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL RELATIONS* (2d. ed., 1997). One of the leading reference works on trade laws and policy.

The Authority of International Law

Symposium: May the President Violate International Law?, 80 AM. J. INT'L L. 973 (1986). In relevant part, this collection of short essays raises the question of whether international law is a part of our domestic law. One of the participants, Professor Jonathan Charnuy, maintains that international law is not binding on the Executive. Other participants include Michael Glennon and Louis Henkin.

ERIC POSNER & JACK GOLDSMITH, *THE LIMITS OF INTERNATIONAL LAW* (2005). The authors argue that international law is really just a product of states pursuing their respective interests and does not pull states towards compliance contrary to their interests. Thus the possibilities for what international law can achieve are limited and many global problems are unsolvable.

JEREMY RABKIN, *LAW WITHOUT NATIONS: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005). Professor Rabkin traces concerns over U.S. participation in international agreements and institutions such as the ICC and the Kyoto Protocol back to a central concern that motivated the Founders: the idea that only a sovereign state can make and enforce law in a reliable way and thereby protect the rights of its citizens. Rabkin cautions that we should therefore weigh the value to be derived from international agreements against the threat they pose to liberties protected by strong national authority and institutions.

Eric Posner & Cass Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2008). The authors conclude that standard arguments from distributive and corrective justice fail to provide strong justifications for imposing special obligations for greenhouse gas reductions on the United States.

Richard Posner, *Some Economics of International Law: Comment on Conference Papers*, 31 J. LEGAL STUD. 321 (2002). Judge Posner offers economic perspectives on a wide range of issues in international law as part of a legal symposium.

The Nature and Function of International Institutions

John Harrison, *International Adjudicators and Judicial Independence*, 30 HARV. J.L. & PUB. POL'Y 127 (2006). An argument that that adjudicatory tribunal decisions including, for example, those of the International Court of Justice have, of their own force, no effect in domestic law, even when they are made pursuant to international agreements to which the United States is a party.

Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003). Professor Goldsmith argues that the International Criminal Court is at least a partial failure as it neither facilitates self-enforcing behavior nor makes it easier for powerful nations to coerce weaker nations into action and will therefore lead to less, rather than more, punishment for human rights abuses.

John McGinnis, *Medellín and the Future of International Delegation*, 118 YALE L.J. 1712 (2009). In this article (written in the wake of *Medellin*, in which the Supreme Court announced the requirement of a clear statement in U.S. law before giving domestic effect to the decision of an international agent) Professor McGinnis considers the implications of four models - the administrative law model, the categorical constraint model, the categorical permission model, and the treaty model - for the policing of international delegations domestically and the improvement of such delegations internationally. McGinnis suggests that the treaty model - one by which the President and the Senate must authorize such delegations by treaty - may best reflect the original meaning of the Constitution, and that the Treaty Clause's requirement that such delegations be approved by a supermajority *ex ante* may also help address their *ex post* agency costs and democratic deficit.

The Role of Foreign Law in American Domestic Jurisprudence

Frank Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223 (2006). In this conference address Judge Easterbrook contends that foreign laws may make strong political or moral claims that sovereigns should take into account but that the question of whether these moral norms govern is merely one of political suasion.

Anthony J. Bellia & Bradford R. Clark, *The Federal Common Law*, 109 COLUM. L. REV. 1 (2009). A comprehensive examination of how federal courts have treated the law of nations throughout history, concluding that, rather than viewing enforcement of the law of nations as an Article III power to fashion federal common law, courts have instead applied rules derived from the law of nations as a way to implement the political branches' Article I and Article II powers to recognize foreign nations, conduct foreign relations, and decide questions of war and peace.

For a spirited debate between Justices Breyer and Scalia on the constitutional relevance of foreign court decisions, visit <http://www.freerepublic.com/focus/news/1352357/posts>.

John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?* in 59 STAN. L. REV. 1175 (2007). The authors argue that, due to a lack of endorsement from democratic political processes, international law should not displace domestic law, thereby providing a new justification for “dualism” (the proposition that international and domestic law control only their respective legal spheres). They also make the case that, because American law derives from a political process and geopolitical position that is likely to benefit both Americans and foreigners more than raw international law, strict dualism is particularly suitable for the legal regime of a modern democratic superpower.

Steven G. Calabresi, *“A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006). Professor Calabresi brings a wide range of political science, historical, and sociological scholarship on the ideology of American exceptionalism and the centrality of the Constitution to this creed to bear on the question of the Supreme Court’s longstanding reliance on foreign law. He concludes that “to control the meaning of the Constitution is nothing less than to control America’s exceptional mission in the world” and that scholars of the common law ought give more weight to populist tradition as opposed to Supreme Court precedent.

Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005). Professor Rosenkranz argues that, contrary to the logic of the Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), the treaty power cannot expand the legislative authority of Congress beyond the limits fixed by the Constitution.

International Trade

JAMES BOVARD, *THE FAIR TRADE FRAUD* (1991). A vigorous attack on U.S. protectionist laws and policies.

Orrin Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT’L L.J. 178 (1989). A very good overview of the Berne Convention and a critique of the moral rights theory of copyright protection.

John McGinnis, *The World Trade Organization as a Structure of Liberty* in 28 HARV. J.L. & PUB. POL’Y 81 (2004). Professor McGinnis that the structural similarities between the World Trade Organization (“WTO”) and the U.S. Constitution suggest that the former can become a force for limited government in our day, and that, “just as the Constitution was a great charter for economic growth in the United States by promoting a beneficial regulatory competition among states, so the WTO can be a great charter for international economic growth by promoting beneficial jurisdictional competition among nation states.”

Internet resources: Material promoting worldwide free trade can be found at the web site of the Institute for International Economics, <http://www.iie.com/>. The Internet Law Library is a large links page devoted to treaties and other public international law materials,

<http://www.lawmoose.com/internetlawlib/89.htm>. The Washburn Law Library offers a “Foreign and International Law Web” at <http://www.washlaw.edu/forint>.

XVII. Jurisprudence

Last updated April 2011

(See also the selections on interpretive theory in Section V – Constitutional Law)

Introductory Materials and the Nature of Law

EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949). A classic exposition of common law judging.

H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994). An enormously influential attempt to answer the question, “What is law?” More specifically, Hart addresses “three recurrent issues: How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?”

JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* (rev. ed. 1990). This widely admired introductory text discusses timeless questions regarding the nature of law, the relation between law and morals, and crime and punishment. It also treats the philosophy of private law and law and economics.

FRIEDRICH A. HAYEK, *LAW, LEGISLATION & LIBERTY* (3 vols., 1973-79); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960). Hayek, the 1974 Nobel laureate in economics, was one of the most important social theorists of the twentieth century. For law students, Hayek’s work on the nature and importance of the rule of law and the concept of “spontaneous order” are perhaps his most important contributions. Two of Hayek’s most influential articles are available on-line at <http://www.virtualschool.edu/mon/Economics>. For an interesting interview of Hayek see the July 1992 issue of *Reason* magazine, available on-line at <http://www.reasonmag.com/hayekint.html>. See also Richard Posner, *Hayek, Law, and Cognition*, 1 *NYU J. L. & LIBERTY* 147 (2005) (describing and evaluating Hayek’s theory of law and relating it to his theory of cognition, which provides the basis of his entwined legal and economic theories).

Michael W. McConnell, *Four Faces of Conservative Legal Thought*, 34 *L. SCH. RECORD* 12 (1988); Mary E. Becker, *Four Faces of Liberal Legal Thought*, 34 *L. SCH. RECORD* 14 (1988). These two essays, which appeared in the alumni magazine of the University of Chicago Law School, provide a brief introduction to schools of thought currently represented in the legal academy. Professor McConnell describes traditional conservatism, libertarianism, law and economics, and social conservatism. Professor Becker treats traditional liberalism and constitutional interpretation, republicanism, critical legal studies, and feminism.

FREDERICK POLLICK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* (2 vols., reissued 1978). The classic work of English legal history, “Before the Time of Edward I” (1272-1307).

C.H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT* (1949); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956). Two other standard reference works in English legal history. Richard A. Posner, *Blackstone and Bentham*, 19 J. L. & ECON. 569 (1976). A defense of William Blackstone’s *COMMENTARIES ON THE LAWS OF ENGLAND* (1765-69) against the critique of Jeremy Bentham.

Symposium: The Crisis in Legal Theory and the Revival of Classical Jurisprudence, 73 CORNELL L. REV. 281 (1988). This Federalist Society symposium featured panel discussions on the classical legal tradition, legal realism, originalist theories of constitutional interpretation, coordinate branch construction, and stare decisis. Participants included Raoul Berger, Lea Brilmayer, Richard Epstein, Charles Fried, John Harrison, Patrick Higginbotham, Michael Moore, and Burt Neuborne.

JULES COLEMAN, *RISKS AND WRONGS* (1992). A rethinking of the jurisprudential foundations of contract and tort. For extensive commentary on this book, see *Symposium on Risks and Wrongs*, 15 HARV. J.L. & PUB. POL’Y 621 (1992).

Internet resources: There is a great deal of information on philosophy, generally speaking, available on the Internet, although remarkably little on jurisprudence or philosophy of law in particular. Good collections of general philosophy materials are found through the home page of the American Philosophical Association <http://www.apaonline.org>. Also useful are the “Stanford Encyclopedia of Philosophy,” <http://plato.stanford.edu>, the “Internet Encyclopedia of Philosophy,” <http://www.iep.utm.edu>, and “A Dictionary of Philosophical Terms and Names,” <http://www.philosophypages.com/dy>.

Judicial Behavior

Symposium-Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law, 17 HARV. J.L. & PUB. POL’Y 1 (1994). This Federalist Society symposium included panels on the enterprise of judging, stare decisis and the Constitution, text and history in statutory construction, non-legal theory in judicial decisionmaking, and the Supreme Court as a political institution. Authors featured here include Lillian BeVier, Frank Easterbrook, Lino Graglia, William Kristol, Gary Lawson, Jonathan Macey, Thomas Merrill, Russell Osgood, Raymond Randolph, and Stephen Williams. Richard Epstein, *Simple Rules for a Complex World* (1995). Professor Epstein specifies six “simple rules” for the satisfactory operation of a legal system: “self-ownership, or autonomy; first possession; voluntary exchange; protection against aggression; limited privilege for cases of necessity; and takings of property for public use on payment of just compensation.” He argues that these rules “have the virtue of offering solutions for 90 to 95 percent of all possible situations. Never ask for more from a legal system. The effort to clean up the last five percent of the cases leads to an unraveling of the legal system insofar as it governs the previous 95 percent.” Epstein then analyzes a

number of areas of common law and regulatory law using these “simple rules.” Students can benefit greatly from Epstein’s chapters on particular subject areas, and will find his critique of the desire for “perfect justice” a refreshing change from the utopian ruminations of the classroom.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). In his 1989 Holmes Lecture at Harvard, Justice Scalia offered a thought-provoking exploration of the “dichotomy between ‘general rule of law’ and ‘personal discretion to do justice.’” But see Frank Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?* 73 U. COLO. L. REV. 1401 (2002). In this conference address Judge Easterbrook presents data he collected demonstrating that all nine of the justices on the Supreme Court as then constituted meet his definition of “activist,” particularly insofar as they use the canon of construction against reading a statute as unconstitutional to promote their own policy preferences.

Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decisionmaking*, 26 LOY. L.A. L. REV. 993 (1993). In this brief essay, Judge Kozinski critiques “legal realism” and offers his own explanation of judicial behavior. Given Kozinski’s wry wit (example: “as far back as I can remember in law school, the notion was advanced with some vigor that judicial decision making is a farce”), his writings are generally quite entertaining.

Judicial Review as a Defense Against Federal Power

In recent years—particularly after the decisions of the Rehnquist Court in *Lopez* and *Morrison*—the concept of judicial review of the constitutionality of federal statutes has come under attack. Some useful analyses of the nature of judicial review include:

Bradford Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003). Professor Clark argues that, given the Founders’ understanding of the source of individual rights vis-a-vis the federal government, courts should take a unitary approach to judicial review under the Supremacy Clause and enforce both the Bill of Rights and the limits of federal power.

Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003). A defense of the authority of the courts to ignore unconstitutional legislation, based upon constitutional text and structure and collateral historical evidence.

PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008). Professor Hamburger marshals historical evidence to argue that what we call “judicial review” is no more than a long-understood duty of judges to decide a matter in accordance with the law of the land.

ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007). Posner and Vermeule argue that courts should engage in the degree of deference to executive actions traditionally observed during times of crisis, rather than follow the libertarian argument that courts should strike down measures threatening to civil liberties with the same degree of scrutiny they would apply under normal circumstances. See also Gary Lawson, *Ordinary Power in*

Extraordinary Times, 87 B. U. L. REV. 289 (2007) (agreeing that Posner and Vermeule are correct on policy grounds and contending further that their position is consistent with the original meaning of the Constitution).

Originalist Jurisprudence

Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993). According to Roger Pilon, “[t]he idea that the purpose of government is to solve the private problems of the living has always been with us, but never have political and cultural conditions so encouraged it.” Because of this lamentable state of affairs, Pilon suggests that we return to our Founding principles in order to rediscover the “connection between freedom and personal responsibility.”

Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988). Rotunda offers a thoughtful defense of the imperative that courts follow the intent of the framers of the Constitution, and further argues that “[w]hen we talk about the framers’ intent, we really ought to be more precise and refer to the ratifiers’ intent”

Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007). A readable guide to the Federalist Papers along with an informed discussion of their context and use by generations of judges and legal scholars.

John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 Geo. L. J. 1693 (2010). An argument that originalist interpretation of constitutional provisions is more likely to yield substantively superior consequences, because the strict supermajority under which the clauses were originally enacted was likely to have resulted in the most desirable provisions.

Randy Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 724 (2006). Professor Barnett argues that Scalia’s shift from basing constitutional interpretation on the intent of the framers to relying instead on the original public meaning of the text allows him to escape originalist results that he finds to be objectionable under three circumstances: (1) when the text is insufficiently rule-like, (2) when precedent has deviated from original meaning and (3) when he chooses to ignore originalism to avoid sufficiently objectionable results. Barnett contends that Scalia is not an originalist at all.

John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL’Y 473 (2008). Professor Harrison refutes the position, held by Judge Bork, that originalism has the capacity to restrain interpreters from simply deciding cases according to what they think is the good.

Natural Law Jurisprudence

ROBERT GEORGE, IN *DEFENSE OF NATURAL LAW* (2001). One of the greatest contemporary scholars of natural law, Professor George seeks to show how contemporary natural law theory

provides a superior way of thinking about basic problems of justice and political morality. See also ROBERT GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1995) (a critique of modern liberal jurisprudence arguing that criminal prohibition of “victimless” moral crimes can play a legitimate role in maintaining a moral environment conducive to virtue and inhospitable to at least some forms of vice.)

JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (1998). A review of Thomas Aquinas’ thought on morality, politics, law, and method in social science, with discussion of his contribution to the jurisprudential debates of today.

William Wagner, *Christianity and the Civil Law: Secularity, Privacy, and the Status of Objective Moral Norms*, 71 ST. JOHN’S L. REV. 515 (1997). A review of the thought of Aquinas and Augustine concluding that, while the objective moral norm leading the Church to call for the legal prohibition of abortion is that of justice, the Church’s position flows not only from concern for the unborn child, but for the ramifications of abortion on demand for the fundamental legitimacy of the civil law.

Charles Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539 (1989). Professor Rice discusses, among other defenses, the “protective” function of natural law against the imposition of unjust laws.

Phillip Johnson, *Some Thoughts on Natural Law*, 75 CALIF. L. REV. 217 (1987). A very informative explanation and defense of natural law reasoning. Suggests that there are serious problems with basing legal rules and institutions on modern philosophical theories, which stress wealth maximization, moral relativism, or wealth redistribution.

The Interaction Between Law and Ideology

Feminism, Sexual Distinctions, and the Law, 18 HARV. J.L. & PUB. POL’Y 321 (1995). This Federalist Society symposium examined the impact of feminist theory on various areas of law and policy. Articles by Akhil Amar, Lillian BeVier, Richard Epstein, Elizabeth Fox-Genovese, Carolyn Graglia, Gary Lawson, Daniel Polsby, Jennifer Roback, Carol Rose and J. Harvie Wilkinson, among others.

THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* (1987). In this short, thoughtful book Sowell contrasts “constrained” and “unconstrained” views of human nature, and explains how these differing views of the world generate political differences. The observant student will see many examples of this same dichotomy in the legal realm. Sowell’s web site contains his recent speeches and links to many of his columns for *Forbes* magazine, <http://www.tsowell.com/>.

J. Harvie Wilkinson III, *Why Conservative Jurisprudence is Compassionate*, 89 VA. L. REV. 753 (2003). A spirited defense of the conservative movement as a compassionate movement by one of the country’s leading jurists who identifies the two principal developments that led to conservatives being labeled “uncompassionate” as: the rise of law-and-economics, and the fondness for bright-line rules.

DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* (1990). Hailed by one reviewer as “one of the most ambitious works of legal history to appear in living memory.” James Q. Whitman, *Law and the Pre-Modern Mind*, 44 *STAN. L. REV.* 205 (1991). As Whitman puts it, Kelley explores “how [continental] lawyers perceived the human world during the many centuries before the work of perceiving the human world became the preserve of social scientists.”

Critiques of Critical Legal Studies

THE FEDERALIST SOCIETY, *A DISCUSSION ON CRITICAL LEGAL STUDIES AT THE HARVARD LAW SCHOOL* (1985). Taken from a 1985 symposium that included Harvard professors Robert Clark, Duncan Kennedy, Paul Bator, and Abram Chayes, this monograph features a worthwhile exchange on the influence of the Critical Legal Studies movement at Harvard.

John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument*, 45 *DUKE L.J.* 84 (1995). Argues that the Crits’ argument that the law is (often? always?) “indeterminate” leads, logically, not to nihilism but to “the unfinished project of the legal realists,” which is today being pursued by “public choice scholars.”

Ernest van den Haag, *Politics against Law*, 82 *MICH. L. REV.* 988 (1984) (reviewing *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys, ed., 1982)). Members of the Critical Legal Studies movement say that law legitimates the existing social order. Professor van den Haag says, in effect, “So this is a surprise?”

Paul D. Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222 (1984). A blistering attack on the Critical Legal Studies movement by the then-dean of the Duke Law School. Carrington argues that Crits, by virtue of their belief that law is a mirage, are under “an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.” For a look at the controversy this article ignited, see the exchange of correspondence in “*Of Law and the River*,” and *of Nihilism and Academic Freedom*, 35 *J. LEGAL EDUC.* 1 (1985).

Phillip E. Johnson, *Do You Sincerely Want To Be Radical?*, 36 *STAN. L. REV.* 247 (1984). A searching critique of the philosophical claims of Critical Legal Studies, as well as its inability to articulate a radical “alternative to a way of thought [i.e., liberalism] that they decisively reject.”

Institutional Design and the Legal System

GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). A critique of social engineering by the courts, focusing on the areas of civil rights and abortion. For a treatment of the limits of social policy making via litigation and judicial decrees, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978). This well-known essay, compiled from Professor Fuller’s class materials and copious personal notes, addresses the

limited utility of judicial resolution of controversies. The article presents an overview of the proper role of judges and lawyers, and the legitimate scope of the court's jurisdiction. Fuller questions judicial efforts to resolve complex "polycentric" cases, and he calls for more negotiation among private parties and less reliance on the litigation process.

HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). A landmark work of legal history scholarship, ably reviewed in Mirjan R. Damaska, *How Did It All Begin?*, 94 *YALE L.J.* 1807 (1985). Damaska provides a good overview of Berman's core thesis "that distinctively Western legal institutions came to life about nine centuries ago in a violent upheaval of revolution, in which the Church of Rome established its independence from domination by emperors, kings, and feudal lords." Damaska's bottom line is that Berman's book is "indispensable to anyone who wishes to understand the distinctive features of Western civilization."

NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994). How should society choose which institutions—courts, legislatures, agencies, the market—will answer questions of right and entitlement? Put differently, how are we to assess the "institutional competence" of these alternatives? This problem fascinated the Legal Process scholars of the 1950s—notably Henry Hart and Albert Sachs. However, the Hart and Sachs approach to this question was influenced by the more sanguine understanding of government power dominant at the time. In his recent book, Professor Komesar in effect updates the Legal Process approach by recognizing more fully the imperfections of government action. Komesar offers a framework for conducting serious comparative analyses of the strengths and weaknesses of politics (i.e., the legislative and executive branches), the courts, and the free market. Reviewed in Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 *WIS. L. REV.* 463. For another good treatment, see CHARLES WOLF, JR., *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* (2d ed. 1993).

Clarence Thomas, *Victims and Heroes in the Benevolent State*, 19 *HARV. J.L. & PUB. POL'Y* 671 (1996). This address offers an intellectual history of the current preoccupation with "group rights" and "victim status." According to Justice Thomas, the rise of "radical egalitarianism" and the "ideal of the benevolent state" are responsible for our culture's failure to appreciate the power of the individual human spirit to overcome injustice, adversity, and misfortune without the need of government intervention or special entitlements. This address identifies trends that clearly are present in the law, and it is therefore a worthwhile guidepost for law students assessing the impact of our legal institutions on civil society. Indeed, Justice Thomas calls upon the legal profession to "pare back the victimology that pervades our law, and thereby encourage a new generation of heroes to flourish." The address was part of a Federalist Society symposium on *Group Rights, Victim Status, and the Law*, 19 *HARV. J.L. & PUB. POL'Y* 645 (1996).

Alex Kozinski, *The Dark Lessons of Utopia*, 58 *U. CHI. L. REV.* 575 (1991). An interesting meditation on the collapse of the former Soviet empire and its meaning for those of us in the West with respect

to our own governments. Judge Kozinski, a Romanian emigre, notes the dark irony of the fact that “Even as peoples of Eastern Europe strive to establish free market economies, implement private property rights, and diminish the role of government, the United States continues on a path headed in the opposite direction.” See also Alex Kozinski & David M. Schizer, *Echoes of Tomorrow: The Road to Serfdom Revisited*, 23 SW. U.L. REV. 429 (1994) (part of a symposium on F.A. Hayek and Contemporary Legal Thought, on the occasion of the fiftieth anniversary of the publication of Hayek’s *THE ROAD TO SERFDOM* (1944), with other principal papers by Robert Cooter, Bernard Siegan, Leonard Liggio, and Bruce Johnson).

Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567 (1993). A very entertaining demonstration of the author’s claim that the same conditions necessary for a lasting democracy are the same necessary for the security of property and contract rights that generate economic growth.

Internet resources: There is much legal history on the web. The American Society for Legal History maintains a large site, <http://www.h-net.msu.edu/~law>. Have any doubts as to the relationship between economic freedom and growth, or between economic freedom and political freedom? For ample empirical verification of your gut instincts on this question, see Bryan T. Johnson, Kim R. Holmes & Melanie Kirkpatrick, The Heritage Foundation’s Index of Economic Freedom <http://www.heritage.org/Index>.

Law and Economics

Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). An early attempt to explain why and how the common-law system abandons “inefficient” legal rules.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998). Judge Posner’s treatise is an encyclopedic overview of the law and economics literature. It includes chapters on most areas of the law. In addition, his chapters on “The Common Law, Legal History, and Jurisprudence” and “The Choice Between Regulation and Common Law” are quite provocative.

HENRY HAZLITT, *ECONOMICS IN ONE LESSON* (1946); JAMES D. GWARTNEY & RICHARD L. STROUP, *WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND PROSPERITY* (1993). Law students with little or no background in economics should not despair. The level of familiarity with economic principles necessary to understand the basics of the law and economics approach is easily within your reach. These are two good short treatments of the core ideas of economics that involve very little in the way of graphs and math. The Henry Hazlitt Foundation offers information and texts on-line at <http://www.hazlitt.org/>. The Gwartney & Stroup book may be ordered from the James Madison Institute of Tallahassee, Florida, <http://www.jamesmadison.org/>.

A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989). This short, readable text uses basic microeconomics to illustrate the core ideas of the property, contract, and tort law, and the legal system. It does not use any mathematics beyond simple arithmetic.

ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (2d ed. 1997). A good textbook treatment of the economic approach to law.

DOUGLAS BAIRD, ROBERT GERTNER & RANDAL PICKER, *GAME THEORY AND THE LAW* (1994). The authors have expressed the hope that their text, which applies concepts from the branch of economics concerned with the strategic interaction of noncooperative parties, will usher in a “second generation” of law and economics scholarship. Only time will tell. For a brief look at their analysis, see Randal Picker, *Law and Economics: Intellectual Arbitrage*, 27 *LOY. L.A. L. REV.* 127 (1993). Students interested in game theory can consult numerous web sites devoted to the subject. For starters, we suggest “Al Roth’s Game Theory and Experimental Economics Page,” <http://kuznets.fas.harvard.edu/~aroth/alroth.html> and “Prisoners’ Dilemma,” <http://www.constitution.org/pd/pd.htm>.

Jonathan R. Macey, *The Pervasive Influence of Economic Analysis on Legal Decisionmaking*, 17 *HARV. J.L. & PUB. POL’Y* 107 (1994). Attempts to explain why law and economics seems to have “had little effect on the methodology by which cases are decided.” Argues that traditional legal analysis “provides a more efficient method for deciding cases than does modern economic analysis” and that in any event “traditional legal analysis in many areas of the law is not appreciably different from economic reasoning,” although the rhetoric is different.

Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 *J. LEGAL STUD.* 67 (1987). Ellickson criticizes the “law and economics” and the “law and society” movements. He argues that the former tends to overestimate the importance of law and underappreciate the role that “nonlegal systems play in achieving the social order.” The latter tends to commit the converse error, and has not contributed much to our understanding of the content of nonlegal “norms.” For another of Ellickson’s critiques, see his *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *CHI.-KENT L. REV.* 23 (1989). In short, Ellickson would like to see law and economics scholars incorporate insights from psychology and sociology.

Michael E. DeBow, *Markets, Government Intervention, and the Role of Information: An “Austrian School” Perspective, with an Application to Merger Regulation*, 14 *GEO. MASON U.L. REV.* 31 (1989). Offers a brief introduction to “Austrian economics,” contrasts it with Chicago School microeconomics, and suggests ways in which an Austrian attitude helps one evaluate regulatory policies. One of the precepts of the Austrian School is known as “methodological individualism,” the idea that the individual and his or her actions are the only basis for economic analysis. This idea is rather seriously at odds with the familiar invocation of “social welfare” by many social scientists. For a very clearheaded discussion of the implications of methodological individualism for law and economics scholarship, see Gary Lawson, *Efficiency and Individualism*, 42 *DUKE L.J.* 53 (1992).

Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 *U. CHI. L. REV.* 1225 (1997). An interesting exercise into how norms affect behavior using computer modeling. Professor Picker examines how competing norms interact and finds that sometimes the

two norms co-exist, whereas in other instances, one norm drives out the other. He concludes that the policy lesson to be learned is that large norm-intervention is inefficient, but that small-scale norm perturbation is appropriate to reach the efficient result.

Internet resources: The FindLaw Law & Economics page <http://lawecon.findlaw.com/index.html> contains a wealth of information on this subdiscipline, including a link to the “Encyclopedia of Law and Economics,” a large reference site under construction. On his home page economist-law professor David Friedman offers web versions of his writings and other useful information for students, <http://www.daviddfriedman.com/>.

Students interested in learning about economics more broadly can avail themselves of a wealth of information on-line. For starters, consult “Capitalism: Frequently Asked Questions,” <http://www.capitalism.org/faq>. Other user-friendly sites particularly useful for beginning students of economics include “Amos Web,” http://www.amosweb.com/cgi-bin/awb_nav.pl?s=awb and the edited “Your Mining Co. Guide to Economics,” <http://economics.miningco.com>. For the complete listing of the Austrian School of economic analysis, see the listing maintained at the Mises Institute web site, <http://mises.org/literature.aspx>. Another good site is the “History of Economic Thought” found at <http://cepa.newschool.edu/het>. For an HTML version of Adam Smith’s “The Wealth of Nations,” check <http://www.bibliomania.com/NonFiction/Smith/Wealth/index.html>.

Public Choice

WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FUTURE OF BUREAUCRACY* (1994). A good introduction to public choice theory, i.e., the application of economic reasoning to political and governmental institutions. Mitchell and Simmons do a particularly good job explaining “government failure” (as opposed to the “market failure” justifications for government intervention).

RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993). Explores the problems raised when the state attempts to regulate behavior by attaching conditions to government spending programs, government contracts, and the like, particularly where the government could not constitutionally require the behavior it is, in effect, bargaining for. Epstein develops an expansive view of the “unconstitutional conditions” doctrine that would limit the federal government’s ability to engage in such horse-trading with its citizens.

JAMES D. GWARTNEY & RICHARD L. STROUP, *ECONOMICS: PRIVATE & PUBLIC CHOICE* (6th ed. 1992). This widely-used introductory text displays more of an affinity for markets and more skepticism toward government processes than most economics textbooks.

DAVID FRIEDMAN, *PRICE THEORY: AN INTERMEDIATE TEXT* (2nd ed. 1990). This text, written for upper-level economics undergraduates, is quite good and is also considerably more fun to read than its competitors. It also embodies a strong preference for the marketplace over the political/governmental arena..

RICHARD E. WAGNER, *TO PROMOTE THE GENERAL WELFARE: MARKET PROCESSES VS. POLITICAL TRANSFERS* (1989). A thorough discussion of how government policies towards the poor often have unforeseen and unwanted effects. Gary S. Becker, *Competition and Democracy*, 1 J. L. & ECON. 105 (1958). This early contribution to the economic analysis of politics by a Nobel prize-winning economist considers the similarities between and differences in political and economic processes.

Dwight Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191 (1988). A defense of public choice theory against common criticisms. This article appears in a Symposium on Public Choice that also includes papers by public choice adherents Geoffrey Brennan and James Buchanan (the 1986 Nobel laureate in economics), Robert Tollison, William Riker and Barry Weingast, and Jonathan Macey, as well as articles critical of the use of public choice theory in debates about law.

Symposium on Public Choice and the Judiciary, 1990 B.Y.U. L. REV. 729 (1990). An introductory essay by William Mitchell and Randy Simmons contains a brief history of the public choice movement. Peter Aranson's contribution is largely optimistic about the explanatory power of public choice in assessing judicial behavior, while Richard Epstein's contribution is largely skeptical about the theory when applied to the judiciary.

Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994). Treats lawyers as an interest group active in legal change, paying particular attention to the history and structure of the American Trial Lawyers Association. Finds evidence that lawyers have benefited from increased uncertainty in products liability law. More broadly, the authors conclude that "Rent seeking by lawyers seems to take the form of undermining those legal institutions that provide stability and clear rights for citizens. In particular, rent seeking by lawyers seems to undermine the foundations of free contract."

Internet resources: Professor Patrick Gunning has made selective chapters of his survey text, "Understanding Democracy: An Introduction to Public Choice," available on-line at http://nomadpress.com/public_choice. For a good introduction to the field of public choice, see the Center for Study of Public Choice housed at the James Buchanan Center for Political Economy at <http://www.gmu.edu/centers/publicchoice>.

Issues in Legal Studies

Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). In this article, Judge Posner asks whether law is really a separate field of inquiry, or whether it is better viewed as a vector of a number of social forces which can best be studied using the tools of various social sciences, including economics. The article also offers an interesting history of American law and the legal profession since the early 1960s. Two chapters in RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* are particularly relevant here as well: chapter 19 ("The Market, the Adversary System, and the Legislative Process as Methods of Resource Allocation") and chapter 20 ("The Process of Legal Rulemaking").

Emerson H. Tiller and Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U.L. REV. 517 (2006). A timely call for greater attention to legal doctrine by lawyers and social scientists alike. The professors argue that more attention to the core elements of legal analysis will advance research and create additional quantitative research dimensions that will increase inter-disciplinary knowledge.

XVIII. Labor & Employment Law

Last updated April 2011

GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971). This landmark study demonstrates that discriminatory employers raise their own labor costs by discriminating, while benefiting non-discriminatory competitors at the same time. The bottom line, according to Professor Becker, is that economic forces will eventually drive discriminatory firms out of business, as more efficient nondiscriminatory firms out-compete them.

The Civil Rights Act of 1991: A Symposium, 54 LA. L. REV. 1459 (1994). This symposium by the National Legal Center for the Public Interest focused on the controversial legislation that amended Title VII of the 1964 Civil Rights Act after a series of 1989 Supreme Court decisions that angered the civil rights lobby. Articles were contributed by Roger Clegg, Boyden Gray, Nelson Lund, John McGinnis, Glen Nager, and Rosalie Silberman.

RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992). Like Becker, Professor Epstein concludes that the free market imposes severe penalties on employment discrimination. Epstein also argues that employment discrimination laws are economically inefficient because they forbid people from associating with the persons they prefer, and because the laws forbid employers from making rational economic decisions. In addition, Epstein argues that employment discrimination laws are an unjustified intrusion into individual liberty.

Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980). Argues forcefully that the Weber case was wrongly decided. For another trenchant criticism of the ways in which the Court has misread the Civil Rights Act of 1964, see Lino A. Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK L. REV. 569 (1988).

Michael Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Reverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985). Perhaps the most problematic aspect of antidiscrimination legislation is the way it has been interpreted to ban not only intentional discrimination but also practices that have a disproportionate impact on certain groups, whether intended or not. This article critiques that doctrine.

Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987). Argues that employment discrimination laws are economically inefficient, because they disallow employers from making rational economic decisions about hiring and firing employees. Judge Posner also notes that employment discrimination laws impose huge costs on society, largely stemming from the large number of employment discrimination cases litigated each year. In addition, Posner argues that employment discrimination laws do not actually help the minority groups they are intended to benefit; rather, by making it more costly for employers to hire, retain, and fire minority workers, the employment discrimination laws actually give employers a strong incentive to avoid hiring minority

workers altogether. Hence, Posner concludes that the massive costs generated by Title VII are a “dead weight loss” to society. For an overview of the law and economics literature on the regulation of employment, consult chapter 11 of RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*.

Thomas J. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299 (1984). Analyzes the use of statistics in Title VII “disparate impact” cases. Professor Campbell examines two fundamental errors in the manner in which courts routinely use statistical data in discrimination cases, and demonstrates that misuse of statistics by a court can easily result in a finding of discrimination when none in fact exists.

Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983). Argues that the New Deal labor relations statutes constitute “a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law.”

Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). Examines employment contracts at will “in light of the three dominant standards that have emerged as the test of the soundness of any legal doctrine: intrinsic fairness, effects upon utility or wealth, and distributional consequences.” Concludes that “the first two tests point strongly to the maintenance of the at will rule, while the third, if it offers any guidance at all, points in the same direction.”

Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963). This article explores the economic and legal-policy consequences of applying the antitrust laws to a variety of union activities.

In 2009 the proposed Employee Free Choice Act was introduced to Congress, intended to amend the National Labor Relations Act in three ways: first, by allowing unions to opt for recognition through a card check instead of the secret ballot currently required under the NLRA; second, by instituting a regime, if the parties do not reach an agreement within 130 days after the union is recognized, of compulsory arbitration and arbitrator-imposed requirements and restrictions, binding for a two-year period; and, third, by increasing the current sanctions for unfair labor practices committed by employers during an organizational campaign.

For an argument that that all of these changes are unwise deviations from the status quo that would introduce unwise dislocations in labor markets that are not justified by the claim that the decline of unionization in the private sector is largely attributable to improper employer intransigence see Richard Epstein, *The Case Against the Employee Free Choice Act* (February 3, 2009). U of Chicago Law & Economics, Olin Working Paper No. 452. Available at SSRN:

<http://ssrn.com/abstract=1337185>. See also Harry Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369 (2010) (deploying Critical Race Reformist theory, economics and apartheid-era South African labor history in order to show that rather than embracing freedom for workers, eliminating poverty, and expanding opportunities for all, this proposal would likely invert such goals and instead operate consistently with the record of exclusion and subordination tied to American Progressivism and the labor movement).

For some preliminary empirical analysis and suggestions for further inquiry on the question of employment arbitration generally, see David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Empirical Case for Employment Arbitration*, 57 STAN. L. REV. 1557 (2005).

Keith Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685 (2003). Professor Hylton argues that the change in the public-versus-private composition will lead unions to pursue legislative strategies that will further reduce the share of the private-sector workforce in unions and that a law reform program that has any chance of success in reversing the decline of private-sector unions will have to aim to reduce the competitive disadvantage to firms from unionization. As solutions he proposes 1) making labor law more predictable and 2) removing the National Labor Relations Board (NLRB or Board) from regulating the substantive terms of labor contracts.

Harry Hutchison, *Reclaiming The First Amendment Through Union Dues Restrictions?*, 10 PENN. J. BUS. & EMP. L. 663 (2008). Professor Hutchison makes the pessimistic argument that First Amendment rights of expression and association cannot be recaptured from the current labor regime, despite the Supreme Court's decision in *Davenport* upholding Washington State's restriction of the extraction of union dues for political purposes.

Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. L. UNIV. L. REV. 415 (2010) (arguing that, largely in response to the deepening of competitive forces in private markets in the U.S. - from deregulation, changing technology and the opening up of global labor and product markets - organized labor increasingly will function predominantly as a political organization).

Internet resources: The Heritage Foundation's "Labor Home Page" contains a lot of policy-oriented material, <http://www.heritage.org/issues/labor>.

XIX. Legal Profession

Last updated October 2008

The Federalist Society, *THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE?* (1994). This book surveys the history of the American Bar Association, focusing on its increased tendency to stake out positions on political and social issues. The foreword raises a number of questions respecting whether the ABA is now just another special interest group.

MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). As Michael Uhlmann pointed out in a review, both these books reach similar conclusions: “[T]he [legal] profession is now at sea without a rudder or compass. Its myths have lost the capacity to nourish, its heroes are hard to find and rarely celebrated, its goals can no longer be easily stated. Its training schools seem to teach cynicism and self-interest more effectively than they do prudence or professionalism; its judges are increasingly mired in their own bureaucracies (Kronman) or prone to second-guess the political branches (Glendon); its private practitioners seem preoccupied with material rewards, celebrity, and the trappings of power.” Michael Uhlmann, *The Once and Future Legal Profession*, (Book Review), 1995 PUB. INT. L. REV. 173.

RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* (2007). This treatise analyzes all aspects of the ABA Model Rules of Professional Conduct and the ABA Model Code of Judicial Conduct. In the course of covering the case law and the legislative developments, the authors analyze the economic costs and implications of the various rules and how they often protect lawyers from competition from each other and from related professions such as accounting.

Clarence Thomas, *Cordell Hull Speakers Forum*, 25 CUMB. L. REV. 611 (1994-95). In this address, Justice Thomas touched upon three important professional responsibility themes: first, the ideal of law as a “public service”; second, the need for legal education to focus more intensely on legal reasoning and legal method; and third, the definition of “ethics.” His discussion of ethics is especially insightful. This general treatment of these subjects raises a number of thought-provoking issues, and the accompanying footnotes will lead the reader to other worthwhile works.

Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998). An argument that the legal profession is schizophrenic, with a sharp divide between academics and practicing lawyers. Professor Schiltz criticizes the single-mindedness of both groups – academics on scholarship and practicing lawyers

on financial gain – and concludes that both groups are inadvertently sacrificing their most essential lawyerly role: mentoring young attorneys in becoming ethical attorneys.

Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993). Judge Posner views the legal profession through the lens of cartel theory, and develops a provocative explanation of the changes that have swept through law and the legal profession since, roughly, 1960, as a function of the weakening of the cartel-like aspects of the legal profession.

Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371 (1998). Professor Rao explores the importance of philosophy in the legal profession through an analysis of the Supreme Court's use of philosophy in its decisions. She determines that the Court frequently uses nonlegal texts to broaden the scope of its decisions for policy reasons, which she argues undermines Court legitimacy and legal persuasiveness.

James P. Beckwith, Jr., *What Should Lawyers Do?: An Essay on Lawyers, The Free Economy, Redistribution, and Democratic Legitimacy*, 16 N.C. CEN. L.J. 1 (1986). Based on a paper given to the Mont Pelerin Society, this article discusses the ethical aspects of legal practice in an economy that contains a substantial rent-seeking component.

Jonathan R. Macey, *Mandatory Pro Bono: Collective Discharge of Duty or Compelled Free Service?*, 77 CORN. L. REV. 1115 (1992). Argues that to compel lawyers personally to provide free legal services to the poor is “odious and unethical” and should be rejected in favor of providing lump sum transfers to the poor—a policy that would “make both lawyers and the poor better off.”

Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995). An examination of the legal implications of an education for a republican nation and an argument that the answer to the current failure of the education system lies in returning to the individualistic roots of the United States.

Richard A. Posner, *Law, Knowledge, and the Academy: Legal Scholarship Today*, 115 HARV. L. REV. 1314 (2002). A critique of the legal community's embrace of modern interdisciplinary scholarship. Posner argues that, despite the necessity of specialization in complex systems, the focus on interdisciplinary and “breakthrough” scholarship has had several adverse consequences, including: a lack of scholarly critical mass which can adequately assess new publications; political uniformity that breeds dogmatism when lacking serious counterpoints; and scholarship directed at an insular community of academics, not at the legal profession at large.

Marshall Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282. 324 (1982). An argument that Legal Services lawyers tend to take on only those clients whose cases match the

lawyers' own ideological biases, paying little attention to or altogether ignoring other potential clients.

John P. Heinz, Anthony Palk, & Ann Southworth, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5 (2003).

XX. Legislation

Last updated October 2010

BRUNO LEONI, *FREEDOM AND THE LAW* (3d ed. 1991). A powerful critique of the tendency in modern society to subject more and more of life to “inflated legislation” designed to benefit a particular interest group, rather than relying on “the spontaneous application of nonlegislated rules of behavior” that benefit the public as a whole. Written by an Italian scholar and first published in 1961-six years before Leoni’s untimely death-the book deserves a larger American audience.

U.S. DEPARTMENT OF JUSTICE, *USING AND MISUSING LEGISLATIVE HISTORY: A REEVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* (1989). An exceptional study canvassing recent thought on legislative history. For a more recent survey which supports the adoption of the “plain meaning rule,” see Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INTEREST L. REV. 57. Professor Maggs chronicles the numerous opinions of Justice Scalia, which provide a blueprint for conventional plain-meaning analysis.

WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994). Professor Eskridge, one of the most prolific authors in the field, has developed an interpretive theory he calls “dynamic statutory interpretation.” Eskridge argues that courts can and should take into account changes in society that arise after the passage of a statute in interpreting that statute. Thus, for example, Eskridge has argued that it is legitimate for a court to consider post-1964 developments in race relations when interpreting the Civil Rights Act of 1964. One reviewer has raised the interesting and somewhat amusing question of how the courts-on Eskridge’s view-should treat the results of the 1994 Congressional elections in interpreting statutes passed by earlier Democratic Congresses. John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 (1995).

Steven D. Smith, *Law without Mind*, 88 MICH. L. REV. 104 (1989). In this excellent, short essay, Professor Smith critiques “present-oriented interpretation”-that is, interpreting statutes not as originally understood, but “in a way that will render law ‘the best it can be’ in light of present needs and values.” He concludes, “Present-oriented interpretation not only cuts the connection between text and political authority; it severs the link between text and mind.”

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* (1967). These are among the leading defenses of using legislative history in statutory construction.

Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988). A survey of the literature propounding the “economic theory of legislation.” Part of a symposium issue on public choice theory.

Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991). Addresses the limitations of public choice theory in statutory interpretation.

Tom Ginsburg, *The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139 (2002). This article considers the role of public choice in legal scholarship along with some of the criticisms of public choice. It begins with a review of the main propositions of public choice and summarizes the empirical literature testing them. The evidence shows that the criticism that public choice lacked empirical support was partly correct, and that the negative implications drawn from public choice theory have not been supported by empirical testing. Rather than abandon the theory, scholars refined their propositions to reflect experimental results and have more explanatory power. These modifications of public choice propositions have very different implications for the prospect of democratic government than the traditional theory. After discussing some of these implications, the article concludes with a discussion of the roles of theory and empiricism in legal scholarship.

Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992). A very readable discussion of the recent intellectual ferment in legislative theory which acknowledges that the courts have largely ignored it all. Inasmuch as the fancy new theories of interpretation tend to be nontextual, most readers of this volume will applaud the courts' lack of interest in these "theoretical" developments.

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Justice Breyer's defense of the use of legislative history by judges.

Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI-KENT L. REV. 441 (1990); and Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. PUB. POL'Y 87 (1984). In these articles, Judge Easterbrook makes three important points: first, the plain-meaning rule begs the central question of meaning; second, legislative history cannot be escaped insofar as it shows the extent of agreement; and third, legislative history should not be used to fill textual gaps or to shift the level of a statute's generality.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Argues that courts should read statutes much as they read contracts, and "give" an interest group seeking to expand the domain of a statute that confers a benefit on its members "no more and no less" than they bargained for with the legislature.

Jonathan Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). Argues for courts to place increased emphasis on those portions of a statute that sound as if the public's interest—rather than the interest of some narrow private group—will be advanced by the statute.

Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992). Professors Macey and Miller argue that Karl Llewellyn's famous critique of the canons of construction is largely irrelevant to an understanding of judicial behavior. They offer three reasons why judges continue to invoke the canons: they permit judges to specialize in certain areas of law, they allow judges to reduce the expected costs of mistaken decisions, and they provide judges who have no particular view on an issue a tool for interpretation.

Frank Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004). Easterbrook addresses the question of what is the right level of generality at which a federal judge should read a statute? Easterbrook argues that the identity of the interpreter affects the means of interpretation, and thus the meaning, of a statute. This explains why textualist or plain meaning interpretations are not inherently conservative methods.

THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE (Wintgens, Luc, ed., 2005). This work provides a rational framework for legislation. The unifying premise behind the essays is that, although legislation and regulation are the result of a political process, legislation and regulation can be the object of theoretical study. The volume focuses on problems that are common to most European legal systems and the approach involves applying to legislative problems the tools of legal theory - hence 'legisprudence'. Whereas traditional legal theory deals predominantly with the application of law by the judge, legisprudence enlarges the field of study so as to include the creation of law by the legislator.

Adrian Vermuele, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000). In this Article, Professor Vermeule argues that scholarship to date has overlooked the central dilemma of interpretive choice: 'The empirical assessments needed to translate theories of statutes' authority into operative doctrine frequently exceed the judiciary's capacity. Judges faced with problems of interpretive choice must therefore apply standard decisionmaking strategies of choice under irreducible empirical uncertainty, strategies derived from decision theory, rhetoric, and other disciplines. Vermuele concludes that judges should exclude legislative history, should pick between canons rather than debating their relative merits, and should observe an absolute rule of statutory stare decisis. In short, judges should embrace a formalist approach to statutory interpretation, one that uses a minimalist set of cheap and inflexible interpretive sources.

John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). Part I of this article examines the traditional theory behind the absurdity doctrine and explores the conceptual difficulties with justifying that doctrine as a means of implementing legislative "intent." Part II discusses structural constitutional considerations, original and modern, that counsel against continued adherence to the absurdity doctrine in its conventional form. Finally, Part III suggests that a contextual interpretation of statutory texts and a principled exercise of judicial review are more appropriate means to handle many of the problems otherwise subject to the absurdity doctrine.

Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). This article concludes that Congress has constitutional power to codify some tools of statutory interpretation. Congress has used this power in the past, but only sporadically and unselfconsciously, at the periphery of the United States Code. Used wisely, congressional power to legislate interpretive strategies may improve legislative-judicial communication and thus bring our legal system closer to its democratic ideal. Rosenkranz tentatively recommends a few illustrative interpretive statutes, though these specific prescriptions are secondary to the more general point: some interpretive statutes would be constitutional and wise. He also argues that the ideal implementation of an interpretive regime would be as a set of federal rules: the Federal Rules of Statutory Interpretation.

John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005). Manning outlines the distinctive conception of legislative intent that follows from textualist judges' bedrock assumptions

about the legislative process. Part I lays the groundwork by examining the modern textualists' underlying skepticism of intent. Part II examines the distinction between rules and standards relied upon by other professors in their critical writings about the textual method. Although textualists may in practice have a predilection for rules, Manning suggests that the key to understanding textualism is not such a preference; rather, textualism rests on a straightforward conviction that faithful agents must treat rules as rules and standards as standards.

Internet resources: The most comprehensive site on Federal legislation is the “Thomas” (as in Jefferson) site maintained by the Library of Congress, <http://thomas.loc.gov/>. Included in the Thomas site are fairly lengthy essays by the House and Senate Parliamentarians on “how a bill becomes a law.” For an on-line “how to” guide to researching Federal legislative histories, see <http://www.lib.umich.edu/libhome/Documents.center/legishis.html>.

For information on state legislatures, visit the address [http://www.legislature.state.\[insert state's 2-letter abbreviation here\].us](http://www.legislature.state.[insert state's 2-letter abbreviation here].us)

XXI. Securities Law

Last updated March 2010

The Form and Function of the SEC

Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984). Questions the traditional justifications for the federal securities laws. Part of a symposium marking the fiftieth anniversary of federal securities regulation.

Jonathan Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909 (1994). Argues for the abolition of the SEC, in part on the theory that the agency is now a trough at which businesses seek regulations in an effort to harm competitors. Ten years later, Professor Macey returns to the same topic, focusing on the federalist competition over corporate regulation that exists between State Attorneys General and the Federal SEC. Jonathan R. Macey, *The SEC at 70: Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951 (2005).

Jonathan R. Macey and Maureen O'Hara, *From Markets to Venues: Securities Regulation in an Evolving World*, 58 STAN. L. REV. 563 (2005). An exploration of the change of stock exchanges from the central market to one of many venues trading securities, along with the change's implications for securities regulation. The professors recognize the troubled history of self-regulation in the United States, but make a forceful recommendation for separating out regulation of internal operations of securities trading from regulation of the overall market, whereby exchanges would regulate internal operations and the SEC would focus on regulation of the overall market.

Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975 (2006). A key piece of scholarship by an SEC Chairman on SEC decision-making using the example of the requirement of hedge fund managers to register under the Investment Advisers Act. Prof. Paredes favors using default rules over mandatory rules and emphasizes the potential benefit of a lighter touch by the SEC.

The Role of Markets

Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984). Explains the ways in which real-world markets operate in such a way as to vindicate the "efficient capital market hypothesis."

Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L. J. 2359 (1998). A proposal for a market-oriented approach of competitive federalism, which would expand

the role of the states in securities regulation and fundamentally reconceptualize the regulatory scheme.

Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394 (2004). An argument that market forces should fix the lack of confidence in capital markets in the post-Enron world, rather than government regulation attempting to fix the crisis in confidence. Prof. Macey contends that government regulation will only exacerbate the problem, leading to an increase in convoluted and bewildering disclosure instead of clear, informative disclosure that the market requires for efficient functioning.

Sarbanes-Oxley

Stephen Bainbridge, *Sarbanes-Oxley: Legislating in Haste, Repenting in Leisure*, 2 CORPORATE GOVERNANCE L. REV. 69 (2006). Professor Bainbridge's critique of the Sarbanes-Oxley Act, passed immediately in the wake of the Enron scandal. He argues that the Act has failed in three respects: first because the legal ethics rules added to the Act have proven incapable of dealing with the incentives that condition lawyers to turn a blind eye to client misconduct; second, because the structure Congress chose for the Public Company Accounting Oversight Board (PCAOB), the accounting oversight board created by SOX, turns out to have serious constitutional defects; and third, because corporate compliance costs have gone up far more and for far longer than anyone anticipated.

Insider Trading

HENRY MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966). This seminal work calls into question the securities laws' prohibition on "insider trading."

Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727 (1988). Jonathan R. Macey, *Ethics, Economics, and Insider Trading: Ayn Rand Meets the Theory of the Firm*, 11 HARV. J.L. & PUB. POL'Y 785 (1988). Professor Lawson tentatively advances a novel moral justification for the laws against insider trading: such trading is immoral in such cases where the trader makes use of someone else's information without his consent. Professor Macey concludes that Lawson has failed to enhance the moral arguments against insider trading. Macey then suggests alternative "socio-biological" and economic explanations for the persistence of insider trading laws, in spite of the absence of a firm moral foundation for such a prohibition.

Shareholder Class Actions

Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The SEC's Authority*, 107 HARV. L. REV. 961 (1994). Argues that the SEC should exercise its rulemaking authority to curb private rights of action under Rule 10b-5. Although Professor Grundfest's argument has been made less urgent by the passage in late 1995 of the Private Securities Litigation

Reform Act, his discussion of “implied” rights of action and the scope of the SEC’s rulemaking powers remain very timely.

John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 Colum. L. Rev. 1534 (2006). An argument by one of the leading securities scholars that securities class actions benefit corporate insiders and plaintiff attorneys, but do not benefit investors, along with a series of recommendations to mitigate this problem involving settlements and attorneys’ fees.

A.C. Pritchard, *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.: The Political Economy of Securities Class Action Reform*, CATO SUP. CT. REV. (2008). An argument that corporate shareholders, rather than institutional actors, should remedy the abuses of the current flawed class action regime by amending corporate articles to waive compensatory damages in lawsuits relying on the “fraud on the market” theory.

Richard A. Booth, *The Paulson Report Reconsidered: How to Fix Securities Litigation by Converting Class Actions into Issuer Actions* (January 2008). In this working paper Professor Booth argues that courts could rectify the harm to investors caused by stock-drop class actions by deeming such actions under the 1934 Act and Rule 10b-5 to be derivative actions rather than direct (class) actions.

Internet resources: “The Securities Lawyer’s Deskbook,” maintained by the Center for Corporate Law at the University of Cincinnati, <http://www.law.uc.edu/CCL/>, contains the full text of the 1933 and 1934 acts and their associated regulations and forms.

XXII. Taxation

Last updated April 2011

MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* (9th ed. 2002). A very good one-volume student text that provides a readable explanation of basic tax code issues.

WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953). The classic investigation of the weaknesses in the idea of progressive tax rate structures. This work appears under the same title at 19 U. CHI. L. REV. 417 (1952). For a recent survey of the literature in this area, see Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739 (1995). For a contrasting position see Mark Hoose, *The Conservative Case for Progressive Taxation*, 40 NEW ENG. L. REV. 69 (2005).

ALVIN RABUSHKA, *THE FLAT TAX* (1985). The economic manifesto for those who wish to scrap the progressive income tax.

David A. Weisbrach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004). An argument for a new theory of analyzing tax expenditures that reframes how to analyze the tax policy from one that focuses entirely on the tax code to a broader approach that analyzes how government implements policy, both within the tax code and through other policy mechanisms. The professors argue that it is a mistake to focus entirely on the tax code for a theory of tax expenditures as overall government policy is implemented through various channels.

CHARLES ADAMS, *FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION* (1993). An attempt at a world history of taxation, with an emphasis on the tendency of taxing authorities to run amok.

Lily L. Batchelder, Fred T. Goldberg, Jr., and Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23 (2006). An examination of the enormous amount of tax incentives provided by the federal government, and an argument for refundable tax credits to incentivize positive household behavior and guard against macroeconomic shocks.

Symposium: Tax Policy as the Twenty-First Century Approaches, 50 WASH. & LEE L. REV. 439 (1993). Contains a number of tax policy articles. Two broad overviews of the field are particularly useful: Bernard M. Shapiro, *Presidential Politics and Deficit Reduction: The Landscape of Tax Policy in the 1980s and 1990s*, *id.* at 441, and John E. Chaptoun, *The Clinton Tax Plan: The Tax Policy Pendulum Swings Back*, *id.* at 449, both argue that spending cuts are more important in deficit reduction than changes in the tax laws.

Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990). A history of tax “reform” legislation in the 1980s

with an emphasis on the 1986 Act, combined with an argument that neither public choice theory nor conventional political science models can adequately explain or predict such complex phenomena.

Julie Roin, *The Consequences of Undoing the Federal Income Tax*, 70 U. CHI. L. REV. 319 (2003). A brief discussion of the probable effects of the repeal of the federal income tax, along with an argument that a repeal of the income tax would likely not reduce the size of the federal government.

Bradford Anderson, *Welcome to My Flipperhood: A Call to Repair the Residential Real Estate Tax Swindle*, 7 GEO. J. L. & PUB. POL'Y 415 (2009). A proposal for a revocation of tax-free treatment of residential housing capital gains as an appropriate long-term solution to the problem of residential housing speculation.

Richard Epstein, *Taxation with Representation: Or, the Libertarian Dilemma*, 18 CAN. J. L. & JURIS. 7 (2005). Professor Epstein, writing from a libertarian perspective, defends the institution of taxation against “full frontal” libertarian attacks, saying that “the case against redistribution through state power cannot be made on the grounds that all forms of taxation are off-limits to the well-run state.”

Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000). Professor Posner argues that tax compliance is not a function only of the expected legal sanction, but of reputation, and reputation can be understood in terms of signaling of discount rates and that “increased enforcement can result in greater compliance in some communities, and less compliance in other communities, depending on the extent to which tax compliance is a signal (a costly action recognized as such by those who observe them, with the function of disclosing information about the person who sends the signal).

Henry E. Smith, *Ambiguous Quality Changes from Taxes and Legal Rules*, 67 U. CHI. L. REV. 647 (2000). Professor Smith explores the consequences for legal rules from dropping the neoclassical assumption that the mix of attributes within commodities is either fixed or costlessly measured, extending models of quality under commodity-excite taxes to the more complex case of legal rules mandating product enhancements (such as nondisclaimable warranties) and to rules aimed at pricing external harms (such as pollution taxes). He shows that the range of possible quality effects, direct and indirect, of legal rules is greater than that in the case of excise taxation and that quality changes present issues of measurement cost that have been overlooked.

David Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549 (1998). Dean Schizer defends the deferral of tax consequences of a gain or loss until the realization of the same on the theory that it is a beneficial subsidy for private savings and investment.

Michael Powers, David Schizer, & Martin Shubik, *Market Bubbles and Wasteful Avoidance: Tax and Regulatory Constraints on Short Sales*, 47 TAX L. REV. 233 (2004). A critique of the tax constraints on short sales, concluding that, first, short sales play a valuable role in the financial markets but are subject to uniquely poorly tailored regulation; second, investor self-help can ease some of the harm

from this poor tailoring, but at a cost; and, third, relatively straightforward reforms can eliminate the need for self-help while accommodating legitimate regulatory goals.

For an overview of the law and economics literature on taxation, see chapter 17 of RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*. Chapter 18 deals with estate taxation.

Internet resources: Tax resources on-line include the “Federal Tax Law” links page, <http://www.taxsites.com/federal.html> and the policy-oriented tax page from the Heritage Foundation, <http://www.heritage.org/issues/taxes>.

XXIII. Telecommunication

Last updated December 2010

MICHAEL KELLOGG, JOHN THORNE & PETER HUBER, *FEDERAL TELECOMMUNICATIONS LAW* (2d ed., 1999). A thorough and easily readable examination of the regulatory regime in this area. Contains many important insights regarding the benefits of deregulation.

R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959). Traces the development of government regulation, its clash with the First Amendment, and its relationship to principles of private property.

ADAM D. THIERER, *A POLICY MAKER'S GUIDE TO DEREGULATING TELECOMMUNICATIONS* (1994-95) (The Heritage Foundation). A five-part Heritage Foundation study that outlines the current state of telecommunications regulation. In pertinent part, Mr. Thierer critically assesses various entry barriers, price regulation, and restrictions on foreign ownership.

Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 Wash. U. L. Q. 1 (2003). An examination of the regulation created by the 1996 Telecommunications Act, which promised a telecom revolution that never materialized. Professor Dibadj provides a cautionary tale of the pitfalls of regulation, which can occur even when the statute is well-written and the courts perform well.

Richard Epstein, *Justified Monopolies: Regulating Pharmaceuticals and Telecommunications*, 56 CASE W. RES. L. REV. 103 (2005). In this lecture Professor Epstein argues that the pharmaceutical and telecommunications industries constitute exceptions to the general assumption against monopoly and provides technical analysis of how such monopolies must work in each case.

Stuart Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007 (2003). An argument against the efficiency of government creation of abundant networks (his term for a refined form of spectrum commons) in favor of allowing private entities to choose whether to create them and to bear the risk of their failure.

Thomas Hazlett & Evan Leon, *The Case for Liberal Spectrum Licenses: a Technical and Economic Perspective* BERKELEY TECH. L. J. (forthcoming 2011), available at http://www.law.gmu.edu/assets/files/publications/working_papers/1019CaseforLiberalSpectrumLicenses20100412.pdf. A response to the argument that spectrum sharing technologies have become cheap and easy to deploy, mitigating airwave scarcity and, therefore, the utility of exclusive rights demonstrating that costly conflicts over airwave use not only continue, but have intensified with scientific advances, and that exclusive ownership rights help direct spectrum inputs to where they deliver the highest social gains, making exclusive property rules relatively *more* socially valuable.

Internet resources:

The Information Economy Project at George Mason Law School collects a wealth of economically rigorous scholarship on all aspects of telecommunications law, including broadband regulation, spectrum allocation, and more: <http://iep.gmu.edu/papers>.

XIV. Trusts & Estates

Last updated January 2009

LAWRENCE W. WAGGONER, *ESTATES IN LAND AND FUTURE INTERESTS IN A NUTSHELL* (2d ed. 1993). A very clear and concise explanation of concepts that often prove difficult for the student new to the subject.

Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004). A seminal work of economic analysis on trust law from Prof. Sitkoff, a young expert in the field who argues that the law should minimize agency costs to the extent possible given the settlor's instructions.

John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995). Argues that the "conventional account of the trust that we find in the second Restatement and in the treatises simply does not give due weight to the bedrock elements of contractarian principle that inform the norms of trust law, namely, consensual formation and consensual terms." Explains how a trust law that took due recognition of these elements would be preferable to the status quo.

John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005). Argues that trustees should act in the best interest of their beneficiaries, not necessarily in the sole interest of beneficiaries, which is an outmoded legal rule from an era in which fact-finding was inadequate and ineffective.

John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). Discusses the eclipse of probate by non-probate institutions (life insurance and pension plan operators, banks, investment companies, and the like) in transferring wealth at death, and the desirability of a unified approach to construing wills and will substitutes.

Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000). An examination of the recent trend to create trusts in domestic and offshore trust havens, in which trusts are designed to protect assets from creditors while simultaneously allowing substantial benefit for the trustee. Prof. Sterk argues that criminal penalties might be the best remedy for countering the trend toward protecting assets in offshore trusts since civil liability is only effective when barriers to trust establishment are high, and those barriers are falling in the race to the bottom of trusts.

Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005). The first empirical study of competition among states for trust funds that finds strong evidence of a national trust market in which the abolishment of the rule of perpetuities causes trusts to relocate to states that have abolished the rule.

John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988). Traces the implications of the fact that “Fundamental changes in the very nature of wealth have radically altered traditional patterns of family wealth transmission, increasing the importance of lifetime transfers and decreasing the importance of wealth transfer on death.”

Max M. Schanzenbach & Robert H. Sitkoff, *Symposium: Trust Law in the 21st Century: Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006). A convincing argument that the rise of trusts in the late 20th century is a direct response to the generation-skipping tax instituted in the 1986 reform.