



# Law & Courts

NEWSLETTER OF THE LAW & COURTS SECTION OF  
THE AMERICAN POLITICAL SCIENCE ASSOCIATION

## A Letter from the Section Chair

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December 8, 2010



During the past academic year, AY 09-10, a number of universities closed Legal Studies departments and programs, notably the two oldest in the United States—the University of California-Santa Barbara and the University of Massachusetts-Amherst. These closings, along with a significant drop in tenure-track faculty hiring in our sub-field, are no doubt related to the current, severe and ongoing economic recession. However, initial findings from the new Section **Committee on the Status of the Profession**, chaired by [Mark Graber](#) (former Section chair), suggest that adjuncts and instructors may be replacing more Public Law positions than positions in other sub-fields. The 2010 APSA Executive Committee decided in September to make this committee one of our standing, or regular, committees so that, among other things, we will be able to track hiring-trends by type of institution over time. I encourage all Members of the Section to provide information

to this Committee about how your department's staffing and hiring approach is impacting our sub-field.

We made significant progress this past year on developing a well-laid plan for the Section's first journal, the *Journal of Law & Courts*. In the next *Newsletter*, look forward to hearing from [Melinda Gann Hall](#) (Section Chair for the 2011 APSA meetings) about the search underway for the first editor(s).

This issue of the *Law and Courts Newsletter* will be [Art Ward's](#) last issue. Along with the members of the Editorial Advisory Board, Art has done a fantastic job assembling intellectually engaging symposiums and articles. A big "thank you" goes out to Art. And now, a big "welcome" goes out to the next *Law and Courts Newsletter* Editor, [Kirk Randazzo](#), who begins his term as Editor with the Winter 2011 issue. Please note that all issues of the *Newsletter* (current and back issues) are available on the [Law and Courts Website](#).

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## Instructions To Contributors

### General Information

**Law and Courts** publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer).

Contributions to **Law and Courts** should be sent to the editor:

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### Articles, Notes, and Commentary

We will be glad to consider articles and notes concerning matters of interest to readers of **Law and Courts**. Research findings, teaching innovations, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review*. Please submit your manuscript electronically in MS Word (.doc) or Rich Text Format (.rtf). Contact the editor or assistant editor if you wish to submit in a different format. Graphics are best submitted as separate files. In addition to bibliography and notes, a listing of website addresses cited in the article with the accompanying page number should be included.

### Symposia

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

### Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when possible. Finally, authors should notify **BOOKS TO WATCH FOR EDITOR**: Drew Lanier, [dlanier@mail.ucf.edu](mailto:dlanier@mail.ucf.edu) of publication of manuscripts or works soon to be completed.

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Soon the new **Section Website** will be unveiled in its new location. By purchasing a web-domain, the Section Website will move off of university-based servers, which will make the transfer from one Web-Person to the next more efficient and flexible. I will be passing this job on to [Art Ward](#) who is currently setting up the new site. Stay tuned for the grand opening.

In closing, I want to say “thanks” to everyone who worked so hard on building new ventures for the Section this year and to all Members of the Section for bringing in new Members. It has been fun to work with new scholars in the field and those whom I have known for decades on exploring ways to strengthen what APSA leadership has called a “model section”— **Law and Courts**.

I also want to say “congratulation from the Section” to [Michael McCann](#), who is now President-Elect of the [Law & Society Association](#), and will preside over the 2011 (San Francisco) and 2012 (Honolulu) meetings. Members of the Law and Courts Section are vital contributors to the intellectual formation of this multidisciplinary association, and it is our cross-membership that strengthens the work of both scholarly communities.

Good-bye, So long,

[Christine Harrington](#)

## **Symposium: *A Tribute to Sandy Levinson***

### **Sandy Levinson: Enthusiast And Friend**

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Professor Sandy Levinson’s friends and admirers were thrilled that he won the Lifetime Achievement Award for the Law and Courts Section of the American Political Science Association (APSA). We were even more thrilled that the award was given at the APSA meeting that broke past attendance records and in a large ballroom where his numerous fans could sing his praises. We might debate which of the very distinguished winners of the Lifetime Achievement Award might have had the most distinguished career. The essays that follow might be read as making the case for Sandy Levinson. Little debate exists over which award winner was most loved by law and courts scholars. The law and courts section needed a big room at a well attended APSA convention to host the lifetime achievement award for Sandy Levinson.

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Sandy Levinson is loved because he is an enthusiast and friend. He is enthusiastic on almost every subject known to mankind, from the virtues of his daughters to the barbecue he had yesterday to the novel he read on the plane. He describes the most recent show he saw as "extraordinary" and carries you with him with this enthusiasm. The most recent book he read is a "masterpiece," which will delight you for days should you choose to share that reading venture. Of course, as with all enthusiasts, one sometimes hears the other side of the coin. These include posts on Balkinization describing Supreme Court decisions as "lunatic" and the Constitution of the United States and "indefensible." On a scale of 1-10, one sometimes wonders whether Sandy was ever taught the digits 3-7. These enthusiasms make Sandy more fun to be with than any six people you might know.

Sandy Levinson is also an enthusiast in his political science legal scholarship. His most fundamental works take the form, "scholars ought to be interested in this." Unlike most scholars, his writing tends not to defend particular propositions such as "the First Amendment should be interpreted to protect flag-burning," "the constitution is best interpreted in light of such-and-such a theory," or the "following variable best explains judicial decision-making." Such scholarship seeks converts. Sandy's enthusiasms seek friends. His works point to subjects, heretofore ignored or discounted, that are, in fact, extremely important to understanding the constitutional project. These subjects are as diverse as law and literature, performing arts, religious exegeses and constitutional interpretation, monuments, guns, the constitutions in the territories, torture, executive power, the undemocratic nature of the American constitution and, most recently, state constitutionalism. The scholar as enthusiast has a different relationship with peers than the scholar as priest, whether the priesthood be dedicated to defending *Roe v. Wade*, originalism, or the attitudinal model. The enthusiast seeks communities. The priest seeks disciplines. Unsurprisingly, Professor Levinson has more friends and fewer disciples than almost any other distinguished scholar of political science. He revels when we show interest in his enthusiasms, even when we dispute his particular conclusions. What matters is the quality of our constitutional conversations.

Most important, Sandy Levinson is an enthusiast about his friends. He is enthusiastic about us. When conversing with Sandy, inevitably he mentions a new book or article by a young scholar that we "have to read." He has brought more talented young persons (many of whom are now over 50!) to the attention of the law and political science community than any other scholar in the field. Sandy Levinson serves as unofficial publicity manager to every contributor to this symposium, many of the scholars who attended the lifetime achievement panel and, I suspect, a high percentage of the people reading this tribute. He could add about fifty pages to his resume by including all the blurbs he has contributed to books or recommendations he has written on our behalf. Jack Balkin's contribution to this seminar points out that much of contemporary constitutional scholarship is a footnote to Sandy Levinson. Given his contributions, Sandy is also the silent second author on most classics of contemporary constitutional law.

Scholars are judged by the scholarship they do and the scholarship they make possible. Sandy Levinson richly deserves the lifetime achievement award of the Law and Courts Section because of the scholarship he has done. He even more richly deserves our respect and affection because of the scholarship that both as a scholar and a friend he has made possible.



## Sanford Levinson – Lifetime Achievement Award (APSA 2010)

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The signal achievement of Sandy's career in Public Law is his contribution to the intellectual vitality of the sub-field. Now of course all previous recipients of the award have made contributions that can be described in this way; in Sandy's case, however, the vitality I'm referring to is experienced by people whose interests in Public Law are as diverse as the field itself. A glance at his publications will underscore the sense one gets from having observed Sandy in his countless interventions at scholarly meetings, namely that there is hardly a substantive issue of consequence that he has not addressed, and invariably by leaving the reader (or listener) saying, "Gee, I hadn't thought of that."

Sandy's most distinctive attribute is his insatiable and infectious intellectual curiosity. Although hardly shy about his own views, it is hard to think of anyone more generous and welcoming of scholars with whom he disagrees. He is not merely polite, but truly interested in the wide array of argument and activity that characterizes the Law and Courts section and law and politics more generally. Sandy has absorbed, discussed, disseminated and delighted in much of our work and that engagement has helped many of us think through our projects and make them known to others. It is altogether appropriate for the Section to repay him with this award.

While there are others here who have been there, I am the one panelist currently at the University of Texas – Sandy's home institution – and you should know, but not be surprised to hear, that what I've just said is especially felt down in Austin. Though he's located in the law school, Sandy's contributions to the Government Department and its Public Law program are many, deep, and appreciated. And of course since the notoriety he triggered by writing so provocatively about the right to bear arms, he's an even bigger hit in the wider Texas community.

As for the substantive scholarly output, there are several notable books – and of course the articles, some 200 of them (but, as they say, who's counting?)! Some of these should be acknowledged as among the most influential articles written in the last few decades. My own top five candidates for this recognition would be: "The Specious Morality of Law," "The 'Constitution' in American Civil Religion," "The Embarrassing Second Amendment," "A Multiple Choice Test: How Many Times has the U. S. Constitution Been Amended?," and "The Canons of Constitutional Law." Others who check Sandy's long list of writings will no doubt come up with a different grouping of favorites; the only safe guess is that nobody will have read all of his articles, although anyone exposed to some of them will wish they had.

I once expressed to Sandy my surprise and delight in the fact of the many articles and essays he had produced. His response was interesting: "Yes, and none of them were published in a refereed journal." I'm not sure that's entirely true, but I want to think that it is, which would then lead me to say that it is a tribute to the Law & Courts Section, and also perhaps a hopeful sign more generally, that someone is being recognized for the highest possible achievement in our discipline despite not having been certified in accordance with all of the standard markers of academic success. Where one publishes is not unimportant, but surely not as important as the quality of the stuff one publishes. Sandy's stuff is very good.

What are its principal themes? Let me suggest five major contributions: 1) What we now refer to as American constitutional development is traceable to Robert McCloskey, one of its principal sources of intellectual inspiration. Much of Sandy's work has carried on this tradition and illuminated the historical treatment of constitutional issues. Very few scholars have done as much as he in demonstrating the contemporary implications of constitutional history. 2) For several decades Sandy has, in his writings and in other venues, been a sort of gadfly in influencing the way scholars think about the canon of constitutional law. He has, for example, been a leader in putting the constitutional issues related to slavery front and center for students of the Constitution. Less successful has been his effort to marginalize *Marbury v. Madison*; although the provocative case he makes for doing so is typical of so much of his work: it stimulates one to

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consider the ways in which conventional opinions can be given an entirely new way of being understood. 3) Sandy was among the first scholars in the past century to emphasize constitutional interpretation outside of the courts. This development is now so settled among students of American political development that one sometimes forgets that Sandy was pushing this issue a long time ago. 4) Running through his body of work is an irreverent interpretive orientation that should be recognized for its impact within the sub-field even by those who are skeptical of a self-consciously critical approach to constitutional studies. Sandy's writing is a model for demonstrating how a critical deconstructive methodology can be placed in the service of positive constitutionalism; in other words, demonstrating that critique need not be an end in itself. There is courage here too. Lord Mansfield said, "Consider what you think justice requires, and decide accordingly. But never give your reasons, for your judgment will probably be right, but your reasons will certainly be wrong." I'll let you decide whether Levinson proves Mansfield correct, but no one has ever accused Sandy of withholding the reasons for the judgments he makes. 5) Most recently, Sandy has drawn our attention to the "hard-wiring" issues of constitutional analysis and debate. In this he has shown how the preponderant consideration of interpretive questions has come at the expense of rigorous consideration of design and implementation issues. He looks at an institution like the Senate the way Bagehot wrote of George III, as a "consecrated obstruction." Some people of course admire their obstructions, and the more consecrated the better. But I'm reminded of the wag who said, in speaking of the House of Lords, "The cure for admiring it was to go and look at it." That's Sandy's approach too, and, frankly, more of political science should emulate it.

Whether or not one agrees with Sandy's sharp assessments of American constitutional structures – and I often do not – his deeply thoughtful critiques of institutional failures are returning significant dividends. One that I particularly value is the turn to comparative constitutional inquiry, a turn that is in effect mandated by his conclusion that we are so insufficiently democratic and woefully dysfunctional that we'd be better off scrapping the whole deal. And so, like the framers, we must look elsewhere for examples of what works. But like them, too, the exploration must be taken cautiously. The comparative approach often humbles us, making us skeptical of the claims made on behalf of American constitutionalism. That same skepticism should accompany our curiosity about the designs and experience of others. More often than not a close look at it will – or should – disappoint us, for the apparent virtues we see may not translate well across constitutional boundaries, or may not even address very well the needs of the people for whom they are intended. Sandy of course knows all this, but a reminder from time to time surely can't hurt.

Sandy wants his readers to rally around a Constitutional Convention. I'd be satisfied if they followed the logic of his recent work and became comparativists. Who knows, they might even end up persuading him to expand his own horizons. To wit: in *Constitutional Faith* he famously considered the parallels between religion and constitutional interpretation, and we were all witnesses to the spectacle of this Jewish academic trying to figure out whether he was a Protestant or a Catholic or some combination of the two. But once we get beyond the familiar, which the comparative move impels us to do, it becomes clear that Sandy is really a Hindu; indeed, as religion scholar Arvind Sharma has pointed out, "The concept of the 'chosen people' is turned, in the plastic hands of Hinduism, into the 'choosing people.'" And so Hindus "choose the gods they worship." You can choose many or few, male or female; there are, as we know, as many Hinduisms as there are Hindus. But even though there are in this system a multiplicity of names and faces, in fact there is only one reality.

For Sandy this reality is democracy. Such, he believes, is its current dismal state that it has led him to despair over its future in this constitutional order. I don't think it will lift his spirits very much if I assure him that in his next life things will be better. It's not likely to change his mind about withholding his signature from the Constitution, which he now insists is required by the hopelessly undemocratic structural provisions of the document. But as one of the choosing people – particularly one with famously imaginative skills – Sandy should reconsider his position. I want to close these remarks by asking him to do so. There are multiple paths to the reality he seeks – a Constitutional Convention may be one – but there are others as well, and they are likely to be more successful. So Sandy: you should get on with this important work, and let this richly earned lifetime achievement award be a milestone on the way to yet greater achievements.

## Tribute to Sandy Levinson

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I wish to first echo what all of the other participants have said. Our field would be many times poorer without the extraordinary contributions Sandy has made over the years. Without Sandy, our field would be like an American flag that has had the color drained away. With Sandy, our flag has bright colors and stands out.

Sandy Levinson's scholarship is essential to understanding contemporary American constitutionalism. He asks questions that no one else asks. He poses issues that people don't wish to confront – although in the nicest possible way, of course. No doubt many would cite his work on the Second Amendment or his most recent book on the undemocratic Constitution.

For me, his seminal essay remains the first article I read, the classic “The Specious Morality of the Law,” which appeared in the May 1977 issue of *Harper's*. I'm sure of this because I still have the photocopy I made at the time, complete with my 1977 undergraduate underlining. Unfortunately, given my later interests, I was not a political science major. But I was interested in questions of constitutional law. What I remember is that I was basking, like much of America at the time, in the post-Watergate, post-bicentennial consensus that the constitutional system worked well in getting rid of President Nixon, a constitutional wrongdoer on a colossal scale.

Yet here was an article that challenged that consensus and some of my most basic beliefs about the constitutional system (although in the nicest possible way). For the article is a critique of the rule of law itself. Sandy began with a widely noticed statement made by Representative Barbara Jordan during the Nixon impeachment hearings: “My faith in the Constitution is whole, it is complete, it is total, and I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.” Followers of Sandy's work over the years will notice the theme of constitutional faith, a topic of one of his many books. But the purpose of this article was demolition, not exploration.

Sandy was after our tendency to criticize and explain away perceived deviations from the Constitution as failures to respect the “rule of law.” He was sharply critical: “All of these calls for renewed faith, and, the rush to embrace the rule of law as an answer to the problems of modern governance, reveal what can only be described as an intellectual failure of nerve, where ritualistic incantation is substituted for the painful process of rigorous examination.” We should feel a sense of recognition in reading this 33-year old critique today. Haven't we recently been through another period in which the constitutional deviations of the Bush II administration were denounced as departures from the rule of law? Sandy was telling us that this kind of critique lets both the Bush administration and especially ourselves off too easily.

In order for us to embrace the rule of law, Sandy told us we must be able to answer these questions: “Are the law and Constitution necessarily linked to enduring moral norms? Is there any reason to believe that fidelity to the Constitution would serve to prevent vast political evil?” These are not only good questions, they hint at later research programs. But here is where Sandy really hit my 1970s preconceptions. He continued: “Finally, can one speak of an enduring, timeless Constitution and, therefore, of its violation? If the Constitution has in fact changed radically over time, can we speak of its ‘subversion’?” In other words, if we believe in the “living Constitution,” then doesn't the rule of law itself change? And if this is true, don't we then lack a firm base on which to rest claims about departures from the rule of law? Perhaps those who appear to be departing from the rule of law are simply doing their part to help the Constitution evolve in new and unexpected ways.

This led to what for me at the time was the most subversive point of the essay. Sandy juxtaposed the evil President Nixon to the good President Lincoln. I recall the sense of shock I felt at the time. How could *anyone* compare Nixon to



Lincoln? Sandy again: “Was Nixon’s offense his disobedience of the law or, rather, his failure to present a plausible case for his violations of law as necessary to ‘national security’? Would we really have cared about his illegalities had we been persuaded that he, like Lincoln, was simply sacrificing the equivalent of one law for the sake of the national good?” So perhaps Nixon was simply a poor communicator with respect to the direction he wanted the living Constitution to go. Otherwise, we might have accepted his constitutional innovations as necessary to national security.

Sandy was not about to reject the living Constitution: “It is obvious that the meaning of the Constitution has changed over time, and only rarely because of explicit amendment.” But he urged a better understanding of *how* it had changed and so gave me my own research program on constitutional change. He saw clearly what would happen to anyone who tried to preserve their constitutional faith by ignoring the reality of historical change: “A faith [in the Constitution] whose premises change radically over time is scarcely the rock upon which to rely for support, and the denial that premises have changed makes much of the American past incomprehensible.”

Over the years, I kept going back to this essay for inspiration until roughly ten years later I was able to set my own thoughts concerning constitutional change in order. Sandy saw value in my efforts and generously published my attempt in his book on constitutional amendment *Responding to Imperfection*. I was grateful for the chance but I am more grateful simply for the questions Sandy has asked. This was a well deserved award.

#### Footnotes

<sup>1</sup> Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane Law School. Note: Unlike the other participants, I did not speak from a prepared text. So the following is a reconstruction of what I said.

**Tribute to Sanford Victor Levinson  
Lifetime Achievement Award, Section on Law and Courts,  
American Political Science Association  
September 2010**

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It is an incredible delight to honor Sanford Victor Levinson as he wins the Lifetime Achievement Award of the Law and Courts Section of the American Political Science Association. Many of us, upon hearing that Sandy had received the award said, “Of course!” Sandy might have been the only one to be truly surprised. He has long wondered whether political scientists saw him as an insider or an outsider. And he has long opined to his friends that he never really had a coherent academic research agenda as he imagined a serious scholar should have. Instead, as he has recalled somewhat wistfully, his writing career has been constructed from accepting offers to speak, to attend conferences, to think about topics that came up along the way. He has been moved to write by the frequency of invitations and by the relentless novelty of current events – both in the constitutional world and in our profession. Most of his writing has therefore been, by his own account, “reactive.” He has always felt a little embarrassed at not being driven more systematically by a clearly defined, cumulative and internally coherent agenda.

Well, Sandy, the Lifetime Achievement Award means that you can stop worrying.

In my comments today on Sandy’s work and impact, I want to explore the idea of a reactive research agenda, not just in reaction (!) to Sandy’s award, but because I think Sandy’s style of work provides a worthy model for us all to follow as a

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first preference strategy. Moreover, I want to argue that a reactive research agenda *is* a committed and coherent intellectual position, at least as committed and coherent as more conventional research agendas. This event, honoring a Lifetime of Sandy's Achievement, is a vindication of the reactive research agenda.

First, an overview of the man we honor today.

In four decades of wide-ranging publications, Sandy Levinson's personal passion has been to critically question the American Constitution and to actively defend small-c constitutionalism. To do this, he was one of the first kids on the block with a joint degree, having received his PhD from the Government Department of Harvard University in 1969 and his law degree from Stanford Law School in 1973. He taught in the Politics Department at Princeton University before moving to the University of Texas, where he is now the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law and Professor of Government. In the last ten years, he has also been a regular visitor at both Harvard and Yale law schools. And he has attended so many academic conferences and workshops that his on-the-road gigs should count as another academic appointment. I hereby propose that Sanford Victor Levinson be named the inaugural occupant of the "Have Constitution, Will Travel" Chair of Academic Schmoozing.

Sandy has written early and he has written often. His c.v. has on it so many articles – including dozens of classic ones – that they are impossible to count without losing track. He has written multiple books – from the classic *Constitutional Faith* about strategies of constitutional interpretation, to my personal favorite *Written in Stone* about public monuments, to *Wrestling with Diversity* which doubts the value of that value, to his blockbuster, bestseller, talk-show-noticed 2006 book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People can Correct It)*.

And then there is the famous casebook, *Processes of Constitutional Decisionmaking*, originally co-authored with Paul Brest and now co-authored with Jack Balkin, Akhil Amar and Reva Siegel. This is not just a casebook, but a "way of being" in the field of constitutional law. The Levinson, Balkin, Amar and Siegel casebook treats constitutional law as a historical subject – taking the Constitution's evolutionary development, its twists and turns and (because this is the APSA, after all) its *path dependence* seriously, which is precisely *not* doing Grand Theory that assumes that the Constitution has an imminent value that can be teased from the text. The casebook is also precisely *not* doing originalism, which is also historical but usually designed to freeze the Constitution in some magical moment. I must admit to thinking when I was in my heyday of addiction to Grand Theory, that this casebook was not *theoretical* enough. But now, after *Bush v. Gore*, I think it's the only way to teach the subject without getting cynical. Sandy and Company were way out ahead of the rest of those of us on the Left in seeing that one day constitutional law was bound to become so disappointing that we would have to use historical bracketing to recover why we once thought it was worth devoting our lives to. It also must have given hope to those on the Right that their time would once again come. The Levinson et al. casebook provides a reminder that what history giveth, history also taketh away.

And then there are a whole passel of edited collections on topics ranging from literature to torture, from constitutional stupidity to legal canons. Sandy's anthologies (often co-edited) are not merely good collections of nice papers. Like the statues and memorials he discusses in his book *Written in Stone*, his anthologies are monuments to public events. They capture an intellectual moment and memorialize a field of argument. These anthologies outlast the moments in which they are written because they come to stand for those moments.

All of this looks like a highly organized research agenda, when seen from the near distance. Sandy has tackled a huge range of important constitutional topics over a highly productive career. He has generally taken history seriously, found interpretive variation inevitable and seen the Constitution as both more and less than it purports to be. Nonetheless, constitutionalism in Sandy's writings is always a set of values worth fighting for. On every topic, Sandy brings his own sense of intellectual honesty and impish playfulness to bear. He starts with questions that are in the air when he writes, and yet he often comes up with answers that surprise even himself. For example, in his work on the Second Amendment to the American Constitution, Sandy came out in favor of a personal right to own guns, much to the surprise of his liberal admirers. And in his most recent work on diversity and the Fourteenth Amendment, Sandy has broken away from mere platitudes about the subject to show how appeals to diversity in a diverse array of settings in contemporary America has itself neutralized and perhaps inverted the meaning of the concept. On every subject that Sandy Levinson touches, his new insights have sent out sparks.

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Why, then, does Sandy see what he does as primarily reactive? Much of what he has written he has written because someone asked him to. And he has confused the fact that he's so good at writing on deadline for the absence of a theoretical agenda. Perhaps this is because the view from the inside of a life is often very different from the view one would have on the outside of that life. Still, Sandy's understanding of himself as a reactive writer captures one reason why his work is so good.

A reactive research agenda works from a set of priorities that is purposefully open-ended and open-minded. Instead of having a set of books and major articles lined up in one's mind like planes waiting to land at a major airport determined by a schedule set far in advance, a reactive writer flies primarily in response to the call of his/her own immediate intellectual and political surroundings. What, the reactive writer asks, is happening *now*? What does it mean? What are people who think only about "now" to learn from "then"? What are people who think only about "here" to notice about "there"? By contrast with the researchers whose major projects are stacked like metaphorical jets waiting for a landing slot, a reactive researcher arrives by metaphorical Medivac helicopter – entering the scene often in response to a distress call, ready to treat the injured parties in an academic battle with strategic interventions.

I have been an eyewitness to a number of Sandy's intellectual Medivac appearances, where he has dropped into the middle of a heated argument and provided a perspective that cured some of the pathologies of the debate. I'll just mention three of them.

First: Sandy and I were on the Academic Advisory Panel for the National Constitution Center when it was being constructed in the mid-1990s. The Academic Advisory Board was supposed to decide what should be put in a museum about the American Constitution. After the folks at Disney had set the initial tone and before our group had been convened, the architect had designed a Signers' Hall at the end of the exhibit, where constitutionally enthused museum goers could sign their name to The Text after walking among life-sized bronze statues of The Framers.

Sandy immediately raised awkward questions. Would the National Constitution Center really want people to sign the 1787 text – without amendments? With only the first ten amendments? Would the Constitution on offer have to include the Reconstruction Amendments? And which ones after that? Could someone object to any or all of the Constitution's parts? What if someone decided as a matter of principle *not* to sign?

Our discussion to that point had been about how to organize people to sign the Constitution. Sandy changed the topic to *whether* people should sign. In doing so, he moved the discussion from logistics to theory: better make sure that people don't sign frivolously because endorsing a Constitution is a serious act of political allegiance. By having the option to *not* sign, people would be made aware of the non-inevitability of the US Constitution.

By the time we had worked through this issue in our group, Sandy had decided he was one of the non-signers, even of the current text. If you go to the National Constitution Center now, you will see that there is a "dissenters' table" at the back of the Signers' Hall – where the members of the Philadelphia Convention who refused to sign the Constitution stand looking over a book that lies ready to receive amendments. I always think of this table as Sandy's legacy in America's constitutional museum.

As you can imagine, this episode over constitutional signing got Sandy thinking about just what was wrong with the US Constitution. Over the next decade he sharpened his critique – and what eventually emerged from this line of thinking was *Our Undemocratic Constitution*. Of course, everyone now knows that Sandy thinks America's highly revered Constitution, the oldest functioning national constitution on earth, is highly flawed. And he wants a new constituent assembly to rewrite it. Like the small-d democrat that he is, Sandy fears the outcome of such a process far less than many of his friends.

Sandy's sense that people should be able to reclaim their constitution brings me to my second Sandy Medivac moment where he entered a debate to provide first aid.

Sandy had been writing about theories of legal interpretation – *Constitutional Faith* had just come out – when history

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threw a curveball and knocked down the Berlin Wall. Suddenly, constitutional drafting was going on all over the former Second World and people in those places started asking American political scientists and law professors how to write constitutions. Lots of people were attracted to the consulting gigs that opened up in that space, but Sandy was not one for casual tourism. Instead of jetting off to write the new Bulgarian Constitution (or maybe that was the Romanian one), Sandy started thinking about whether any of us constitutional experts had relevant knowledge to contribute to the task. The result has been a collection of thoughtful essays about constitutional design up through and including the book-length version in *Our Undemocratic Constitution*.

But Sandy's trips to Eastern Europe in those early days of transition also produced *Written in Stone: Public Monuments in Changing Societies*. In Eastern Europe, Sandy learned how to read history off the statues in the public squares. Watching the transformation of the Millennium Monument in Budapest and the disappearance of statues of Lenin all around the region, Sandy realized that at times of rapid political change the physical landscape is altered to match the political once. And then he realized that the statues and monuments closer to home in the US deserved a rethink. So, the monuments to both sides of the Civil War and to other divisive episodes in American history became the focus of a thoughtful and lyrical meditation on what societies honor and how they change their minds about what is worth honoring. Constitutions may be written in words and may therefore be amended to reflect new ideas, but historical events are written in stones which are recast and sometimes cast out when history changes its mind. If you understand what is happening with the stones, you'll better understand what is happening with texts.

My final Sandy Medivac story of the day takes place after 9/11. Sandy was one of the first people to write in reaction to the anti-terrorism campaign of the Bush Administration. Sandy noted the historical parallels between George W. Bush's America and Weimar Germany, between the emergency powers claimed by the Bush Administration and Carl Schmitt's theory of the exception. When many writers were tempted to think of 9/11 as a one-off event and George Bush as a singular President, Sandy, often writing with Jack Balkin, brought historical knowledge to bear in a set of essays on constitutional crisis and constitutional dictatorship. As they have showed, what happened after 9/11 was crucially foreshadowed by episodes of national crisis in American constitutional history. And the post-9/11 reactions can be situated both in a landscape of different sorts of emergencies and against the background of the historical appeal of dictatorship. While much of the post-9/11 writing in our field has tended to focus only on the present challenges, Sandy's writing, together with Jack's, have put these events into a perspective from which the post-9/11 responses can be seen both as members of a well-known set, and yet at the extreme end of the range.

So, perhaps Sandy is right that his research agenda has been reactive. He has reacted to the challenge of building a museum to a constitution, to the historical blockbuster event of the end of the Cold War, to the constitutional catastrophe that is called 9/11. And more. He has a tendency to move with the flow of ideas, of trends in scholarship and of big historical events. And yet, he is not a follower. He approaches each new topic with fresh eyes, and generally starts with a challenge to received wisdom.

Throughout this substantial body of work, Sandy Levinson has kept his eye always on the central questions of the field of constitutional law. How can reasonable people disagree about what the constitution says, and yet still believe that the constitution is something that unites us all in a common American citizenship? How can the constitution provide the framework for political debate without becoming "merely political" in the process? Are there limits on the way the constitution can be amended before it becomes something else? Do we really have to live with the uncomfortable bits of the text without trying to wish them away (for example – the Second Amendment for liberals and the Fourteenth for conservatives)? How much of our understanding of the constitution comes from our history as an expansionist power on the continent of North America? And to what extent has our constitutional order been fundamentally remade over the past two centuries so that the constitution we are living with today is the same text in name only?

Sandy is a scholar who aspires to be and succeeds in being a public intellectual. He is relentlessly engaged in contemporary constitutional issues, and brings to their understanding a fierce sense of their historical connections. Sandy's voice in current debates has been evident in his torrent of writing, in his frequent blogposts at Balkinization, in a string of op-ed pieces and in his regular contributions to various listservs, including the one for our section on law and courts. He may be reacting to events, but that does not lessen the scholarship. In fact, his scholarship always remains lively, thoughtful and relevant by its engagement with the crises of our time.

Constitutional theory is a field that has produced a lot of big-think scholars who have a Theory of Everything. Sandy is much more pragmatic, eschewing grand theory. If Ronald Dworkin is the John Rawls of constitutional theory, then Sandy Levinson is its Isaiah Berlin – a remarkable essayist whose insights have the force of truth precisely because they are skeptical in the end about grand strategy in intellectual life. In what might be interpreted as a defense of a reactive research agenda, Isaiah Berlin wrote in a letter to his friend Joseph Alsop on January 15, 1976: “Long runs are made of short runs – to ignore the latter is very foolish.” But the closer tie that Sandy shares with Isaiah Berlin is in his basic intellectual orientation, suspicious of overly coherent intellectual visions:

Happy are those who live under a discipline which they accept without question, who freely obey the orders of leaders, spiritual or temporal, whose word is fully accepted as unbreakable law; or those who have, by their own methods, arrived at clear and unshakeable convictions about what to do and what to be that brook no possible doubt. I can only say that those who rest on such comfortable beds of dogma are victims of forms of self-induced myopia, blinkers that may make for contentment, but not for understanding of what it is to be human.

Today, we honor Sandy Levinson for bringing to our field of constitutional politics original thought, skepticism about dogma, and a deep understanding of what it means to be human.

## **Protestant Constitutionalism: A Series of Footnotes to Sandy Levinson**

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Alfred North Whitehead once said that philosophy is a series of footnotes to Plato. There is a pretty good argument that modern American constitutional theory is a series of footnotes to Sandy Levinson. Examine the many issues roiling constitutional law faculties today, and you will discover that Sandy discussed them years before they became popular. The Second Amendment? Sandy explained why liberals needed to take it seriously back in 1989. Torture and national security? Presidential dictatorship? Constitutional amendments outside of Article V? Sandy focused on all of these ideas before they were widely taken up.

Wall Street investors are divided into two categories: growth investors, who chase the currently hot stocks, and value investors, who look for beaten-down issues that nobody wants but that may do better in the future. Sandy Levinson is perhaps the greatest intellectual value investor in the American legal academy. He is the Warren Buffett of investing in ideas about constitutional law. Every time Sandy discovered a new obsession, whether it be guns, or torture, or our defective Constitution, it was time to buy stock in it, because you could be certain that everyone else would end up talking about it, sometimes ten to twenty years later. Time after time, Sandy has been there first, buying low and selling high.

One of Sandy's most fruitful ideas is constitutional protestantism, the idea that each citizen has the right to decide for him or herself what the Constitution means. Sandy stated this idea prominently in an article in the *Tulane Law Review* in 1987, noting the importance of Attorney General Edwin Meese's arguments that the decisions of the Supreme Court bind only the parties before the court. Sandy offered these views in the middle of the 1980s, at a time, I should point out, when few liberal constitutional scholars wanted anything to do with Edwin Meese.

The idea is developed more fully in Sandy's great 1988 book, *Constitutional Faith*, in which he distinguishes between constitutional protestantism and constitutional catholicism. Constitutional catholicism stands for the view that a certain

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group of professional or learned authorities has the last word on interpretation, while protestantism, as we have seen, invites all believers to offer their views on the meaning of scripture. Sandy gives both positions their due, but he is essentially a constitutional protestant. Just as protestant believers must figure out what the Bible means for themselves in order to achieve salvation, so too individual members of the political community must decide for themselves what the Constitution means in order to go forward with the constitutional project.

Many of the big trends and movements in modern American constitutional theory flow from the idea of constitutional protestantism. Sandy's book anticipates Mark Tushnet's populist constitutionalism, developed in his 1999 book, *Taking the Constitution Away from the Courts*, popular constitutionalism, articulated in Larry Kramer's important 2004 history, *The People Themselves: Popular Constitutionalism and Judicial Review*, and a wide range of people writing in the genre of what is now called "the Constitution outside the courts."

Protestant constitutionalism leads almost inevitably to the study of social organization and culture. Once you acknowledge that many individuals have different views about the Constitution, you must also acknowledge that these individuals, like good protestants, do not simply keep to themselves. They create congregations. They form groups of like-minded believers and go out into the world and try to convert others. Thus, a focus on protestant constitutionalism leads naturally to a focus on social movements and political parties as engines of constitutional change. Thus many scholars, like my colleague Reva Siegel, have emphasized how constitutional meaning gets produced by successive mobilizations and counter-mobilizations of groups in civil society. The idea of a community of protestant constitutionalists eventually leads to the notion of a constitutional culture, as described by my colleague and dean, Robert Post; and to Post and Siegel's idea of a democratic constitutionalism.

The work of the judiciary looks quite different from this perspective. We interpret what judges do in terms of their relationship to shifts in constitutional culture, to the work of political parties, and to the evolution of popular ideas about the Constitution. We find similar ideas in Levinson's and my theory of partisan entrenchment, in Barry Friedman's recent history of the Supreme Court, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009), and in Scot Powe's two great legal realist histories, *The Warren Court in American Politics* (2000) and *The Supreme Court and the American Elite* (2009).

Each of these approaches are branches on the tree of protestant constitutionalism; and each has something else in common: Liberal academics offered them as a way of articulating the idea of a living Constitution in a way quite different from the living constitutionalism of earlier scholars. In the work of the previous generation, symbolized by scholars like Laurence Tribe or Owen Fiss, living constitutionalism is largely the product of legal professionals – lawyers, scholars, and members of the federal judiciary – who work out and develop the meaning of doctrinal ideas and public values. Through their efforts – in litigation, scholarship and judicial decision – the Constitution progresses and stays in touch with the times.

By contrast, the next generation of living constitutionalists, influenced by various versions of protestant constitutionalism, argued that the views of ordinary citizens, social movements, and political parties were the drivers of constitutional change. Thus, Sandy's idea of protestant constitutionalism, announced in the 1980s, was the forerunner of most of the modern strands of living constitutionalism today.

The other major trend in constitutional theory today is originalism. Sandy is not himself an originalist, and I have no reason to believe that he strongly influenced modern conservative originalism. Nevertheless, the idea of a protestant constitutionalism sheds important light on the modern conservative movement's embrace of originalist rhetoric.

One important consequence of a protestant theology is schism. Once individuals get to decide for themselves what the Bible means, they reject centralized authority and split off into different sects and groups. The most obvious symbol of centralized interpretive authority is the United States Supreme Court. Ed Meese, of course, was only one of many modern conservatives who rejected judicial authority, and for decades now, the conservative movement has pitted itself against federal judges and particularly the "liberal activist" Supreme Court, even when that Court was stocked almost entirely by appointees of Republican Presidents.



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Protestant constitutionalism also suggests the tropes of restoration and return, which is a familiar theme of political conservative ideas about the Constitution; today's Tea Parties are only the most recent example.

A final feature of protestant constitutionalism is textualism. One restores or redeems the real Constitution by returning to the constitutional text. Not surprisingly, many conservative originalists have also been textualists; so too was the great liberal originalist of an earlier generation, Hugo Black. This is also the reason why I became an originalist beginning in 2005. I am a protestant constitutionalist, and ultimately I became convinced that the interpretive theory that best captured my views about constitutional change was a textualist theory, one that offered the text's original meaning as a framework for constitutional redemption.

Because constitutional protestantism leads to perpetual calls for return, restoration and redemption among different groups, all of whom disagree with each other, their various mobilizations lead to constitutional change. Mobilized social movements, sure of what the Constitution means, and seeking to restore it to match their political vision, often change its practical meaning over time. Thus modern conservative originalism – the constitutional theory embraced by the conservative movement – is yet another form of living constitutionalism, although, to be sure, it does not understand itself in this way.

Thus, the idea of protestant constitutionalism helps us understand both modern liberal living constitutionalism and modern conservative originalism. It is indeed a most powerful idea.

One reason why protestant constitutionalism develops this way in the United States is that, as Stephen Griffin has pointed out, the Constitution is ultimately self-enforcing. It relies on different actors, with different interests and values checking each other. If other people aren't doing things the way you want them to do it, you will insist that they do things your way; that is, you will engage in schism and demand return, restoration and redemption of the true Constitution. Thus, a self-enforcing Constitution produces a wide variety of forms of protestant constitutionalism.

In sum, a self-enforcing Constitution in a political culture like that of the United States will likely produce (1) perpetual constitutional dissensus, and thus various forms of protestant constitutionalism on the left and the right; (2) perpetual changes in the Constitution-in-practice caused by mobilizations and counter-mobilizations, and thus various forms of living constitutionalism; and (3) perpetual calls by various parties to return, restore and redeem the Constitution, and thus various forms of originalism.

Finally, protestant constitutionalism, like its namesake, Christian Protestantism, is a form of faith. Sandy called his 1989 book *Constitutional Faith*, an allusion to Hugo Black's 1968 book, *A Constitutional Faith*. Justice Black's title, "A Constitutional Faith," singled out one faith as the true faith, whereas Sandy is far more agnostic, suggesting that perhaps there are many different forms of constitutional faith.

A person's constitutional faith is what he or she believes about the Constitution. For example, like the abolitionist Frederick Douglass, you might identify the Constitution with its text, and believe that the text should always be interpreted in its best light. Hugo Black's constitutional faith was faith in a written Constitution authored by the framers that protected We the People's liberties. Both of these are protestant ideas. In fact, the text serves many functions in people's constitutional faith: The text is a symbol of popular sovereignty, a symbol of a Constitution that belongs to We the People and not to the judges. The text is also a powerful and convenient symbol of what you seek to restore or redeem.

In the last chapter of *Constitutional Faith*, Sandy asks whether or not he should sign a copy of the 1787 Constitution (i.e., one without the Bill of Rights or the Reconstruction Amendments) at a bicentennial exhibit in Philadelphia. Ultimately he decides to sign the document, but he does not sign because he has any faith in the text. Rather, he signs it because he has faith in what he calls an ongoing conversation about the Constitution and politics that the American constitutional project makes possible. Sandy assumes, like a good Rortyan, (as he said in his 1982 essay, *Law as Literature*), that you can take the text and beat it into any shape you want. What's really important, then, is not the content of the text; it is the development of the conversation.

By 2006, in his book *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People*

*Can Correct It*), Sandy has become a born-again textualist. And, ironically, his textualism causes him to lose his faith. He has lost faith in the Constitution because he believes that the hard-wired features of the Constitution, imposed by and controlled by the text, are bad for democracy. But has he lost faith altogether? No, Sandy is a man of faith, whether or not he believes in God. What, then, does he believe in?

I think Sandy believes in what he has always believed in. Sandy is a people person: He believes in people, both individually and collectively. He believes in the American people. That's why Sandy thinks it is a good idea for Americans to have a new constitutional convention. Together We the People will produce a better constitution. Sandy doesn't believe this because the Constitution as it exists is particularly good. Rather, it must be because he believes that the people are good. People will do the right thing if you give them the opportunity. (Although he would be amused at the comparison, this makes Sandy a little like Sarah Palin. Like Palin, he believes in the "real" America, and what real Americans can do if we give them the chance.)

I for one feel good knowing that Sandy has such faith in us, individually and collectively. Perhaps many constitutional scholars, in these troubled, times, full of anger and unrest, demagoguery and outright stupidity in public life, have lost faith in the American people. But Sandy Levinson has not. He believes – to quote those immortal poets, the Who – that the kids are alright: that the American people, despite their disagreements, will find the right path, and that things will ultimately work out ok.

In the meantime, Sandy, everyone in the academy is waiting for the next thing you will write about because it is what we will be writing about ten or twenty years from now. And I know as well that I speak for all of your many friends and colleagues when I wish you a thousand years of love, happiness and scholarship. Perhaps in such a wish we might hope to return to you just a little of what you have given each of us, with wisdom, grace and good humor, year after year, in abundance.

## An Embarrassing Second Amendment: A Proud Daughter Belatedly (1) Recognizes and (2) Celebrates her Father's Influence on her Life and Work

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I have been my father's unwitting – and often recalcitrant – student since the day I was born, I suppose, although I confess I can't remember that far back. Until the wonderfully moving lifetime achievement panel at APSA, I have been most aware of our intellectual divergences. His fascination with the constitution, for example, always perplexed me; why would one spend so much time studying a single, historically instantiated and deeply flawed document as opposed to engaging in normative theory to figure out what is truly right and just? I gladly studied philosophy in college and earned a doctorate in political theory, but I steadfastly refused to follow my father, sister, or many close friends to law school. I was far too impatient with the particularities of both legal and constitutional doctrine. No subjugation to the peccadilloes and idiocies of the Founders or legislators for me! Little did I realize, of course, how transparently my father must have influenced my supposedly independent views. I grew up skeptical of the constitution, the laws, and the courts not *despite* my father the law professor, but *because* of my father the political scientist, editor of *Constitutional Stupidities*, and future author of *Our Undemocratic Constitution*. So much for youthful rebellion.

In the same clueless spirit, I have also thought myself to be relatively indifferent to the practical implications for civic education of hard-wired structures of government or state constitutions, two of my father's more recent enthusiasms. I

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was a public school teacher for eight years, and I taught eighth grade civics in particular for two of those years. As a teacher of mostly low-income students of color growing up in politically and economically marginalized communities, I believed strongly that my responsibility as a civics teacher was to enable my students to seize and use political power. My goal was to empower young people by teaching them how to use civic and political levers to improve their lives and enact more just public policies. Because this kind of work is often intensely local and personal, I was skeptical about the value of teaching students the strengths and weaknesses of state and federal political structures. Given a short period of time with kids, I preferred to help them select a problem that matters to them and identify the public policy tools they may use to address their concern. I didn't want to take that time to explain why Montanans are outrageously over-represented in the Senate, say, or why and how the Constitution has been virtually amended hundreds of times despite its merely 27 official amendments.

Again, however, I was brought up short in listening to my father's friends and colleagues summarize and interpret his life's work during the APSA panel. I realized that I was hearing an account of a career that illuminates the importance of politics and in particular of power in areas that are not typically recognized to be avenues for (dis)empowerment. In illuminating how supposedly abstract and principled theories of interpretation are fundamentally political tools for reshaping government and hence people's lives, and similarly in illuminating how apparently neutral institutional structures profoundly shape who can access and use political power, my father has revealed the importance of politics and power in ways that I can only hope to emulate. His work reveals how theory has been used to mask politics. It also uses theory to illuminate politics – and even to create a new kind of politics. My father's work interweaves theoretical and political analyses of religion, interpretation, identity, deep structure, and memory, helping to create both new theories and new possibilities for political relationships and political action in the process. Although this has been embarrassingly unconscious thus far, I now realize that my own work both as a teacher and as a scholar of civic education is in many ways a pale model of his own, and at its best may constitute an attempt to extend his insights into the realm of K-12 schooling. I have had the niggling thought for the past couple of years that my father and I should try to coauthor a paper on what it would mean and look like to teach a middle or high school civics course that focused on comparative structures of government – i.e., that privileges neither constitutional nor bicameral democracy, and that focuses not only on international comparisons but yes, even on state comparisons. It may be time to convert this pesky intuition into a joint writing project.

Finally, I thought that I diverged from my father in being perennially unsure of the value of devoting one's life to scholarship, at least if one is not John Rawls or John Stuart Mill. My father takes enormous pleasure in reading (ditto for me), writing (as painful and slow for me as it is flowing for him), schmoozing (lots of fun, I agree), and living in a world of ideas (such a self-indulgence that I find it morally suspect). For many years, I suspected it was impossible to live a life as an academic that was also fully attentive to the human condition. This partly accounts for my spending close to a decade as a public school teacher rather than as a professor. But again, I realize that I must credit him with providing a model that has helped draw me back into the academy, and that in particular demonstrates the potential for marrying a deeply intellectual and richly personal life in a way that enhances both enormously. I will be lucky indeed if 40 years from now, I have the range of friends, colleagues, collaborators, and intellectual thought-partners that my father has assembled and nurtured over the years. Thank you to the Law and Courts section for helping me to realize that in ways both intellectual and personal, I have been attempting to emulate my father, Sanford Levinson, for many years – and that nothing could make me prouder.

# Remarks Prepared for Lifetime Achievement Award Panel, Washington D.C., Sept. 3, 2010

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First things first: I want to express my utter delight for receiving this great honor and my gratitude not only to everyone who participated on a perfectly splendid panel, but also those who spoke from the floor. It was truly an occasion that I (and my family) shall never forget.

As some of you may know, I have increasingly described myself, especially over the past decade or so, as having strongly returned my initial identity as a political scientist. This is reflected, perhaps, in my own turn from the quintessential law professor's issue – "constitutional interpretation" – to a subject far closer to classic political science, indeed going all the way back to Aristotle – "constitutional design." And I confess that it feels wonderful to have one's work validated by one's own reference group. I have no illusions, incidentally, that each and every member of our large and variegated section has the same esteem for that body of work, but I also accept this award as evidence of the genuine – and highly desirable – pluralism that now typifies the American Political Science Association in general and the Law and Courts section in particular.

When Bob Axelrod and I, some 43 years ago, co-signed a one-page statement suggesting that others dissatisfied with the existing APSA might want to meet to discuss the possibilities of reform, which became the Caucus for a New Political Science, the concerns were less simply methodological, as illustrated, presumably, by the fact that Bob and I were two of the three signatories, than about what appeared to be the hegemony of what we were learning to call the existing paradigm. That paradigm included a systematic unwillingness to talk about the truly "political" dimensions that led many of us to want to become political scientists in the first place. When I went to law school, in 1970, I assumed I was leaving political science, not least because I was altogether uncertain whether the discipline as it then existed had a place for me. I would not have predicted that I would, within the end of that decade, start participating regularly in the APSA conventions and, as I've already suggested, ultimately look to the APSA, and members of this section, as my primary reference group.

But, as I hope is also clear, I regard it as a great strength of our section that it is so genuinely pluralistic. Some of my recent work has happily cited both rational choice and empirical judicial behavior literature. I don't see myself as having to declare firm loyalties to only one perspective; perhaps that's because I am indeed ensconced primarily in a law school, which traditionally has served as a base from which to engage in raids of other disciplines and approaches (in part because it's nearly impossible to take seriously the claims of legal education to rest on a truly autonomous method of analysis). I would hope, though, that that will become increasingly true of those located within political science departments as well. If it is important, as I believe it is, to be knowledgeable about American political history, I also believe it is important to know how structures do indeed generate particular incentives, sometimes perverse, with regard to their institutional inhabitants; how multi-member decision-making bodies actually work with regard, say, to agenda-setting or achieving necessary compromises; or, obviously, important for all of us, the extent to which "law," however defined, does in fact constrain those who take an oath to be guided by legal norms. And, of course, I would add, in our own time, the importance of knowledge of other political and legal systems across the globe. But I would also emphasize – indeed, this is probably my latest hobbyhorse – that "comparative" study should include much more than is now the case close attention to the 50 other "American constitutions" besides the national one. State constitutions and their operation constitute a treasure trove of material for all of us, whatever our primary methodological commitments. One of my fondest hopes is that even within my own inevitably brief lifetime it will become impossible to refer to "the American constitutional tradition" as if the only data point is the often remarkably atypical United States Constitution.

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And I do believe, also, that it continues to be important to recognize the “political” dimensions of our work; I must say that I’m still not satisfied that we do this with adequate self-consciousness.

But there are some other things I want to say as well. Freud once pointed out that the two most important things in life are love and work, and I have been blessed in both. It is obvious that the first is not an “individual” accomplishment. My greatest lifetime achievement is, without doubt, having maintained a rich and productive marriage for 44 years and achieving a genuinely deep and wonderful relationship with our two daughters. None of this was “inevitable.” Though I am Jewish, my basic theology may be more Protestant, indeed Calvinist. Any glance around us will readily reveal that wonderful things can happen to dreadful people, and awful things to splendid people. I regard these relationships – and much else besides – as deep manifestations of unmerited grace, for which I hope I am suitably grateful every single moment.

But love and work are often conjoined. I must say that three of the most truly satisfying things I have written were collaborations with my wife and my two daughters. Thus my book *Wrestling With Diversity* contains one essay written with my older daughter Meira and another co-authored with Rachel (who probably should have been given primary credit inasmuch as it began as a paper she wrote at the University of Chicago Law School). My wife Cynthia is a talented writer of non-fiction for children, and we worked together on an article in the children’s magazine *Cobblestone*, in an issue devoted entirely to the U.S. Constitution that, because of her, I was invited to guest edit. Our essay, for which Cynthia unsuccessfully suggested to the magazine the title “We Were Framed,” tried to suggest, however gently, that our young readers should not accept the United States Constitution as a necessarily good thing in all respects. In many ways, I think it may be the most important article I have worked on, inasmuch as I am often in despair about the veneration directed at our national constitution, not least because of the way it is taught to youngsters before they ever reach us in college or, even more certainly, law school or graduate school. I believe the Constitution contributes centrally to the awfulness that has become contemporary American politics – not to mention, of course, as Mark Graber has taught us, the conflagration of Civil War 150 years ago. Our emphasis on “leadership” (usually of presidents) or the villainy of our political opponents deflects us, I fear, from a more structural analysis that would find many of our ills rooted in our thoughtless embrace in the 21<sup>st</sup> century of political forms created in the 18<sup>th</sup> century under a set of long-outmoded assumptions. But this is not the occasion for an extended presentation of any such argument, however much I assure you it is heartfelt.

There are many more people who deserve thanks as part of the community that contributed to my work life and such achievements as have occurred. This award, of course, was offered for the first time only in 1993, a full 24 years after Robert McCloskey’s premature death, at the age of 53, in 1969. I have stated in print that I am positive that I had the happiest experience of any graduate student ever thrown into the often icy lake of Harvard, and the reason was to a substantial measure that truly wonderful man and mentor. I can recognize in my own work and interests so many aspects of his own, including, most obviously, its historical dimension and insistence on viewing courts as part of the overall political system, and I happily accept the award in his name, as a small token not only of my own appreciation, but of the fact that he did not live long enough to accept in his own name what would have been a highly deserved award.

Nor, I am certain, would I be here today were it not for my friendship and collaboration with Jack Balkin, another example of the interplay of love and work. We have worked together now for almost two decades on a constitutional law casebook and co-authored at least 18 articles. He has become the sibling I never had. Working with Jack has been an unalloyed joy, not least because we so often get into long discussions about particular points on which we might not always agree. It took, for example, at least two weeks of discussions to decide how best to present in our casebook the facts surrounding *Korematsu*, and all of our articles have been occasions for extended dialogue and, from my side, at least, edification.

Although I know there are scholars who work in splendid isolation, I cannot myself imagine doing that. For me it has always been essential to know that I can send whatever I am working on to a community of readers who have adopted what my friend Martin Sherwin once defined as the highest duty of an academic friend, which is to tell you before publication all of the potential problems and then, after publication, how good it is. It would take far too much time – and I would invariably engage in embarrassing omissions – to go through the list of persons who deserve mention as what might be termed “Sherwinian friends,” many of whom are here today, but I must single out one more, besides Jack, and

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that is Mark Graber. I think it is safe to say that I have helped Mark to acknowledge his inner “Burke” and “Madison,” as he has so often asked probing and critical questions about how far down the Jeffersonian path I really wanted to go – or would be good for the body politic in general – with regard to my own ever-increasing dislike for the U.S. Constitution and a concomitant continuing faith in “We the People” necessary to support the call for a new constitutional convention. Neither, of course, is a “self-evident proposition,” though I suspect there may be more people willing to acknowledge problems with the Constitution than there are who are not basically terrified of popular sovereignty. (I continue to be perplexed, however, as to how any significant “reform” movement can achieve any significant success without persuading our fellow citizens – and not only fellow academics – of its necessity. Surely the response to the “Tea Party” cannot only be the expression of disdain for any kind of populist politics.)

Finally, I must mention the primary institutions that formed and nurtured me. I have already evoked one, the Harvard Government Department of the 1960s, and I must select out not only Robert McCloskey, but also Judith Shklar, Louis Hartz, Michael Walzer, and Harvey Mansfield, not to mention a plethora of wonderful graduate school colleagues who made those years so memorable and generative. The Stanford Law School, where I was supported by the Russell Sage Foundation, made possible, among other things, my collaboration with Paul Brest on his seminal casebook, which has been an essential part of my life in every respect, including setting the agenda for much of my scholarship. The Princeton Department of Politics later provided a rich array of colleagues and students, including, most obviously, Walter Murphy, who, fortunately, did live long enough to receive, in 1995, the Lifetime Achievement Award and whose death this past spring we continue to mourn. Last, but certainly not least, there are the University of Texas Law School and the Department of Government. I have flourished at the University of Texas in a way, frankly, that I doubt would have been the case had I been elsewhere. Whether or not I am a “true Texan,” I am extremely grateful for the homes I have made within the University of Texas. I am also truly grateful for the temporary homes that a variety of other institutions have given me during “visits.” Nothing is more persuasive as to the importance of comparative study of our subject than even a week spent in, say, New Zealand, which seems to operate quite well with unicameral House of Representatives and without judicial review.

Again, I view these gifts that have been granted me throughout my personal and professional life as matters of grace rather than desert. Putting the exigencies of purely personal life to one side, I know all too well of many extremely talented scholars who do not have the professional opportunities I have had because they are located in less supportive – and, to be candid, less wealthy – institutions. Our own discipline is no doubt full of “mute, inglorious Miltons” who will go to their eternal rest without the recognition you have been kind enough to bestow on me simply because they will have not been so lucky as I have consistently been. So I thank you once more for this truly gracious act, which I accept



## Expecting Justice and Hoping for Empathy

*Gauging views of the American people on Supreme Court justices suggests that while empathy is in the eye of the beholder, it's a value most people favor on the bench.*

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The sitting Supreme Court justices. Empathy is in the eye of the beholder, but it appears to be a value most people favor on the bench. (Wikipedia.org)

What kind of justices do the American people want on the U.S. Supreme Court? As Justice Elena Kagan replaces Justice John Paul Stevens on the nation's highest court, discussions about the desirable attributes of judges have been reignited.

This debate is particularly important at this point in history because the justices of the U.S. Supreme Court have become an unusually homogeneous [bunch](#). Hailing from Harvard or Yale, having served on the lower federal judiciary, but also having precious little experience in any politics but the politics of the judiciary, and even sharing in their religious beliefs, the current U.S. Supreme Court certainly does not mirror the characteristics of their constituents, the American people.

In connection with the Sonia Sotomayor nomination, President Obama started a public conversation on the desirable attributes of Supreme Court justices, focusing on the expectations the president and others hold for judges. Quickly sensing the political dangers of opening a debate on this issue, the president and his nominee retreated, to the point that the nominee failed to stand by her assertion that having a "[wise Latina](#)" on the bench would be good for the Supreme Court.

Indeed, so radical was Sotomayor's shift from the wise Latina theory of judging to a mechanical view of judging that many scholars of the courts – left and right – have accused her of being disingenuous in her testimony before the Senate,

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or worse.

Despite the importance of the issue, debates about what the American people want in their Supreme Court justices are practically never guided by systematic evidence. Consequently, with the support of the [Murray Weidenbaum Center on the Economy, Government, and Public Policy](#) at Washington University in St. Louis, I conducted a survey of a random sample of the American people in the summer of 2009, before the confirmation of Sotomayor to a seat on the Supreme Court. The survey specifically sought to determine the characteristics Americans want in those who are elevated to the high bench. In addition, I attempted to ascertain whether views of good judging – like everything else in the polarized politics of contemporary American politics – are connected to partisanship and ideology.

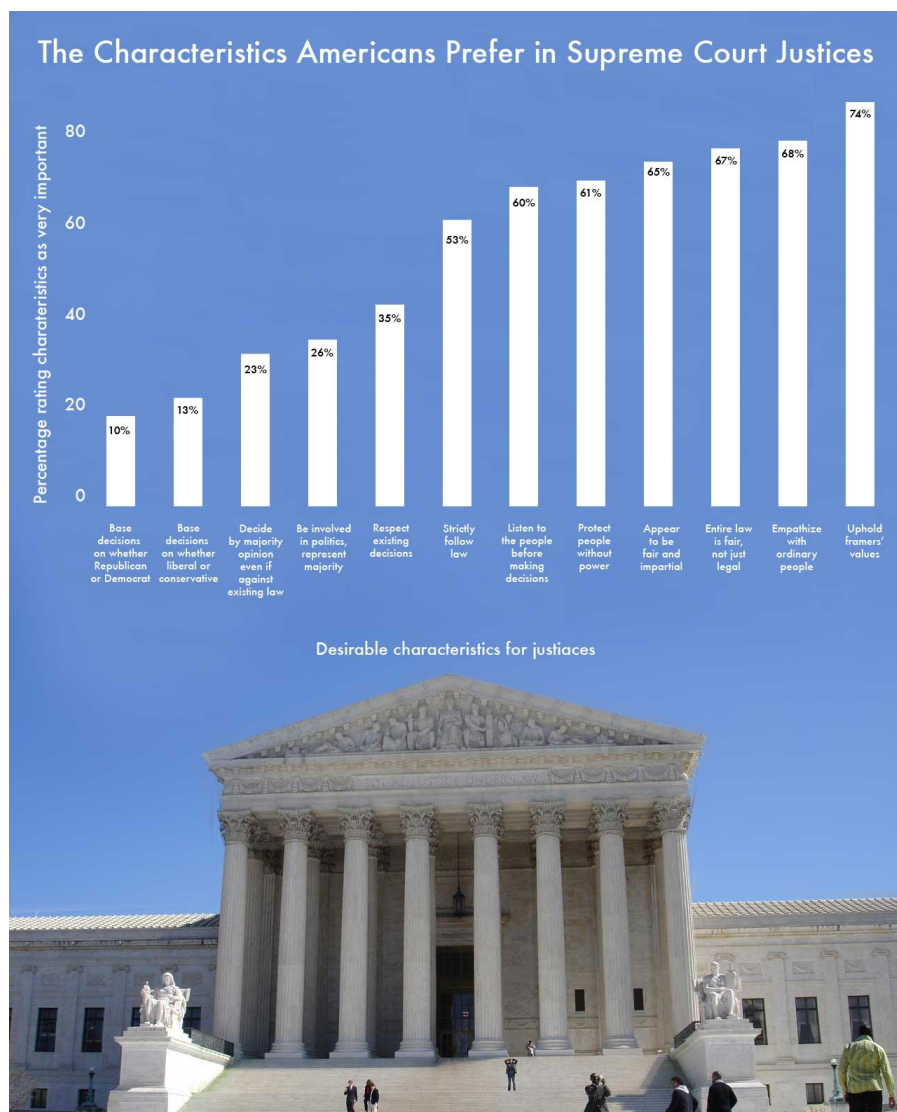
In 2007, even before he was president, Barack Obama began the debate by [declaring](#): “We need somebody who’s got the heart, the empathy to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African American or gay or disabled or old – and that’s the criterion by which I’ll be selecting my judges.” Thus, his first nomination stimulated widespread debate about what constitutes a good Supreme Court justice.

At the center of the debate over the characteristics of judges was the meaning of “empathy.” President Obama asserted that he sought judges who could empathize with ordinary people; much debate about this trait ensued, with conservatives charging that empathy was nothing more than a synonym for their much-hated “liberal activism.” Despite the politics, the discussion of empathy revealed important and meaningful differences in how people viewed the process of judging on the U.S. Supreme Court.

In my 2009 survey, the respondents were asked a set of questions about the desirable attributes of Supreme Court justices. The question stem read: “We have spoken about the U.S. Supreme Court during this interview. Thinking about the characteristics of a good Supreme Court judge, how important would you say it is for a good Supreme Court judge to . . .” The attributes about which we asked are:

- Strictly follow the law no matter what people in the country may want.
- Be especially concerned about protecting people without power from people and groups with power.
- Be involved in politics, since ultimately they should represent the majority.
- Respect existing Supreme Court decisions by changing the law as little as possible.
- Listen to the people before making decisions that affect the country as a whole.
- Try to maintain the appearance of being fair and impartial no matter what the cost.
- Ensure that the law is fair, not just legal.
- Uphold the values of those who wrote the U.S. constitution long ago.
- Base their decisions on whether they are a Republican or a Democrat.
- Decide cases the way the majority of the people in the country prefer, even if that goes against existing laws.
- Base their decisions on whether they are a liberal or a conservative.
- Be able to empathize with ordinary people – that is, to be able understand how the law hurts or helps the people.

The percentages of respondents rating the characteristics as “very important” (the highest point in the offered response set) are shown [here](#).



The most commonly expected characteristic for Supreme Court justices is that they “uphold the values of those who wrote the U.S. Constitution long ago,” endorsed by approximately three-fourths of the respondents. The least important attribute is that justices “base their decisions on whether they are a Republican or a Democrat,” rated as very important by only 10 percent of the respondents. Despite the consensus at the extreme, the rest of the characteristics draw divided responses from the American people.

Perhaps the most significant conclusion from this figure, however, is that the American people are divided in regard to what they want from judges on the Supreme Court. Consider the characteristic of being “involved in politics, since ultimately they should represent the majority.” About a fourth of the respondents rate this as very important, but a third rate it as not very important at all (data not shown). Clearly, different people have fairly different conceptions of judging floating around in their minds, with a sizeable minority embracing a fairly politicized view of judging.

One of the expectations refers to being “able to empathize with ordinary people – that is, to be able to understand how the law hurts or helps the people.” A substantial proportion of the American people – about two-thirds – agree with President Obama on this attribute in assigning it the highest degree of importance. Only 8 percent rate empathy as entirely unimportant (data not shown). Most Americans want Supreme Court justices who are able to empathize with ordinary people.

But what does “empathy” actually mean when it comes to judging? One way to answer this question with the data at

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hand is to determine what additional characteristics, if any, are associated with assigning a high value to empathy.

In terms of the other expectations about which we asked, strong correlations are observed between the empathy expectation and the items about protecting people without power, listening to people when making decisions and making fair, not just legal, decisions. Clearly, these expectations reflect a contextualized view of judging, one in which strict legality is expected to take a back seat to fairness.

As the same time, however, “empathy” seems not to be a code word for any sort of reckless disregard of the law. Those who emphasize empathy as a judicial characteristic are no more and no less likely to expect that judges should uphold the framers’ values, respect existing decisions, bring partisanship to judging or strictly follow the law. From the point of view of the American people, empathy most likely means to exercise the discretion available within law – discretion that is often quite broad – in favor of fairness for ordinary people. I would not be surprised if President Obama held a similar view of empathy.

Interestingly, those more knowledgeable about the Supreme Court (a six-item index) are more likely to emphasize empathy, so this view of judging is not confined to the know-nothing segment of the American people. Those more knowledgeable about the Supreme Court are also less likely to emphasize legalistic decision making (strictly following existing law). The traditional view that judges can or should merely “implement the law” is unpersuasive to those understanding the most about the Court. Thus, Obama’s view of judging resonates with a considerable proportion – but not all – of the American people, and that portion is comprised more of informed rather than less informed citizens.

But is empathy nothing more than a “Democratic” or “liberal” view of judging?

Seemingly not. These data do show that self-identified Democrats are more likely than Republicans to assign a high value to empathy. However, the percentage of Democrats rating empathy as “very important” is 77. This contrasts to 63 percent among the Republicans – a healthy majority of the GOP. (Among those who think of themselves as independents, the figure is 72 percent.) Partisan differences exist, but only within the context of widespread agreement that Supreme Court justices should be able to empathize with ordinary people.

A similar finding emerges from analyzing the views of liberals and conservatives. Liberals are indeed more likely than conservatives to value judicial empathy. But 64 percent of those describing themselves as extremely conservative assign the highest value to empathy, and this figure climbs to 69 percent of those who call themselves somewhat conservative. The percentages for liberals are higher, in the 70s. But these data show that the dominant view among liberals and conservatives alike is to value empathy as a characteristic of Supreme Court justices.

I do not deny (and have no ability to analyze) the possibility that liberal/Democrats and conservatives/Republicans differ on who “the people” are that must be empathized with. I would not be surprised to learn that both groups want justices who empathize with people sharing their values and ideologies. Indeed, I find at least a weak tendency for those who rate empathy highly to also expect that judges should base their decisions on their ideologies. Most likely, empathy means that judges should make fair, not just legal, decisions, but that liberal fairness and conservative fairness are often quite different beasts.

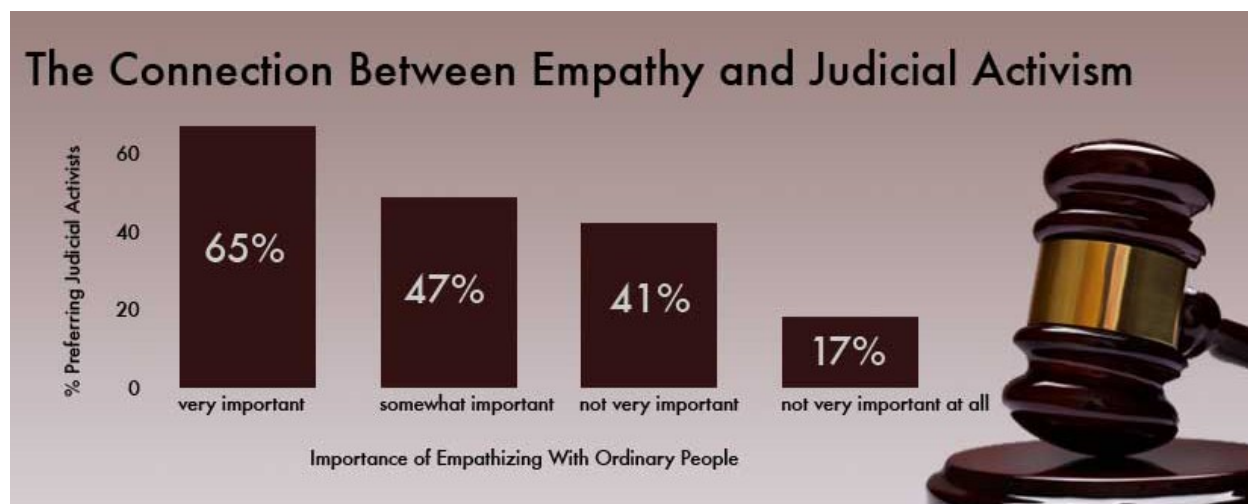
Finally, the survey also asked the respondents their views about “judicial activism” with a question reading: “In general, would you strongly prefer that activists be on the Supreme Court, prefer that activists be on the Supreme Court, prefer that strict [constructionists](#) be on the Supreme Court, strongly prefer that strict constructionists be on the Supreme Court?”

As I have reported here [before](#) support for judicial activism – understood as meaning “that judges rely on their own judgments of what is fair in the case rather than allowing the Constitution, the legislature or prior court decisions to dictate what the outcome of the case will be” – is considerably more widespread than most imagine. In the 2009 survey, 40 percent of the respondents preferred or strongly preferred that judicial activists be on the bench, compared to 30 percent preferring strict constructionists (and 30 percent not knowing their own preferences). Among those holding a view on



activism, 57 percent prefer activist judges over constructionist judges. For most Americans, “activist” when applied to judges is not an epithet.

Analysis of the data reveals a strong connection between preferring empathetic judges and attitudes toward judicial activism. As shown in the graph below (which reports the views of those holding a preference regarding activism versus constructionism), those expecting empathetic judges are far more likely to endorse judicial activism. The figure indicates that 65 percent of those rating judicial empathy as very important also favor judicial activism. As the importance of empathy declines to “not very important at all,” the percentage preferring judicial activists plummets to 17 percent. Critics who equate judicial empathy with judicial activism are not far off the mark, at least according to these data.



[http://www.miller-mccune.com/wp-content/uploads/2010/06/mmw\\_supremecourtgraphic2.jpg](http://www.miller-mccune.com/wp-content/uploads/2010/06/mmw_supremecourtgraphic2.jpg)

In making nominations to the U.S. Supreme Court, President Obama must balance a variety of expectations, many of which may conflict. In addition, given the bias toward minoritarianism in the rules of the Senate, Obama may well have to shoot for 60 votes, not a simple majority, in favor of his nominee. These various considerations make his decisions on nominations complicated and uncertain.

But if President Obama cares about what the American people want on the nation’s highest bench, he should return to the criterion of empathy. The strict, formal and knee-jerk application of law to the kinds of issues that reach the U.S. Supreme Court is unlikely to generate just outcomes, at least in the views of the American people. At present, many good legal technicians sit on Supreme Court.

But what seem to be missing from the institution are judges with common sense. I realize that common sense is often not very common and on occasion doesn’t have much sense, but in the instance of the Supreme Court, common sense means using the law, where discretion is available, to protect the interests of ordinary people. My survey reveals wide support for this view of judging.

That support extends across the partisan and ideological continua, and indeed, fear of judicial elitism (and of all forms of elitism in American politics) may actually have increased since the time of my survey. The president will surely take some heat from the far right if he nominates an empathetic judge. But the evidence of this survey is that he can rely on the American people to support judges who would add a strong dose of empathy to their judging.

# The Canon of Constitutional Law in 2010

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If there is one thing that constitutional law professors can agree on – no matter their ideological methodological, or institutional distinctions – it is that there is no shortage of textbook options for the teaching of this subject. This is the case even though for the most part, there is a significant degree of consensus on which cases are the “most important.”

What follows is the result of a study of eighteen leading constitutional law textbooks, designed either for law school courses or for undergraduate courses (a full list of the books in this study appears at the end). Each textbook has a current edition dated no earlier than 2006; twelve of the eighteen have current editions released in 2009 or 2010.

The study tracks which cases are excerpted in the textbooks as “major” cases; cases that are set off from the regular text of the book with their title and citation in a bold heading. The designation of a case as major by the authors of each textbook is a qualitative editorial decision, communicating to the reader that a given case has a special importance in the field.

So, what comprises the canon of constitutional law in 2010?

There are eight cases which are excerpted as major cases in every single textbook in this study:

*Brown v. Board of Education I*  
*Griswold v. Connecticut*  
*Lawrence v. Texas*  
*Lochner v. New York*  
*McCulloch v. Maryland*  
*Planned Parenthood of SE Pennsylvania v. Casey*  
*Roe v. Wade*  
*Youngstown Sheet & Tube Co. v. Sawyer*

There are eight other cases which are excerpted as major cases in 17 out of the 18 textbooks:

*Boerne v. Flores*  
*Employment Division v. Smith*  
*Gibbons v. Ogden*  
*INS v. Chadha*  
*Marbury v. Madison*  
*Morrison v. Olson*  
*Plessy v. Ferguson*  
*Romer v. Evans*

If analysis expands to cases which are excerpted as major cases in at least  $\frac{3}{4}$  of the textbooks in this study (14 out of 18 books), the list is as follows:



## THE MOST-EXCERPTED CASES (AT LEAST 14 OF 18 TEXTBOOKS)

BO OKS	CASE NAME	YEAR	AUTHOR
15	BAKER v. CARR	1962	BRENNAN
17	BOERNE v. FLORES	1997	KENNEDY
15	BRANDENBURG v. OHIO	1969	per curiam
18	BROWN v. BOARD OF EDUCATION 1	1954	WARREN
15	BUSH v. GORE	2000	REHNQUIST
14	THE CIVIL RIGHTS CASES	1883	BRADLEY
14	COHEN v. CALIFORNIA	1971	HARLAN 2
14	COOLEY v. BOARD OF WARDENS OF PHILADELPHIA	1852	CURTIS
15	CRAIG v. BOREN	1976	BRENNAN
17	EMPLOYMENT DIVISION v. SMITH	1990	SCALIA
17	GIBBONS v. OGDEN	1824	MARSHALL J
18	GRISWOLD v. CONNECTICUT	1965	DOUGLAS
16	GRUTTER v. BOLLINGER	2003	O'CONNOR
15	HAMDI v. RUMSFELD	2004	O'CONNOR
14	HAMMER v. DAGENHART	1918	DAY
14	HEART OF ATLANTA MOTEL v. UNITED STATES	1964	CLARK
14	HOME BUILDING AND LOAN ASSOCIATION v. BLAISDELL	1934	HUGHES
17	INS v. CHADHA	1983	BURGER
14	KELO v. NEW LONDON	2005	STEVENS
14	KOREMATSU v. UNITED STATES	1944	BLACK
18	LAWRENCE v. TEXAS	2003	KENNEDY
18	LOCHNER v. NEW YORK	1905	PECKHAM
17	MARBURY v. MADISON	1803	MARSHALL J
14	EX PARTE McCARDLE	1869	CHASE SL
18	McCULLOCH v. MARYLAND	1819	MARSHALL J
17	MORRISON v. OLSON	1988	REHNQUIST
16	NEW YORK TIMES v. SULLIVAN	1964	BRENNAN
15	NEW YORK TIMES v. UNITED STATES	1971	per curiam
14	PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE	2007	ROBERTS J
18	PLANNED PARENTHOOD OF SE PENNSYLVANIA v. CASEY	1992	KENNEDY O'CONNOR SOUTER
17	PLESSY v. FERGUSON	1896	BROWN
15	R.A.V. v. CITY OF ST. PAUL	1992	SCALIA
15	REYNOLDS v. SIMS	1964	WARREN
18	ROE v. WADE	1973	BLACKMUN
17	ROMER v. EVANS	1996	KENNEDY
16	SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ	1973	POWELL
16	THE SLAUGHTER-HOUSE CASES	1873	MILLER
15	TEXAS v. JOHNSON	1989	BRENNAN
16	UNITED STATES v. LOPEZ	1995	REHNQUIST
15	UNITED STATES v. MORRISON	2000	REHNQUIST
16	UNITED STATES v. NIXON	1974	BURGER
16	UNITED STATES v. VIRGINIA	1996	GINSBURG
15	WASHINGTON v. GLUCKSBERG	1997	REHNQUIST
18	YOUNGSTOWN SHEET & TUBE CO. v. SAWYER	1952	BLACK
15	ZELMAN v. SIMMONS-HARRIS	2002	REHNQUIST

This is a total of 45 cases. The average year for these cases is 1955; the median year is 1973.

The Justices who are responsible for the cases in “the canon” are a diverse group, both in terms of their jurisprudential philosophies as well as their historical reputations:

AUTHOR OF MAIN OPINION	# OF MAIN OPINIONS
HUGO BLACK	2
HARRY BLACKMUN	1
JOSEPHY BRADLEY	1
WILLIAM BRENNAN	4
HENRY BROWN	1
WARREN BURGER	2
SALMON CHASE	1
TOM CLARK	1
BENJAMIN CURTIS	1
WILLIAM DAY	1
WILLIAM O. DOUGLAS	1
RUTH BADER GINSBURG	1
JOHN HARLAN “the younger”	1
CHARLES EVANS HUGHES	1
ANTHONY KENNEDY *	4
JOHN MARSHALL	3
SAMUEL MILLER	1
SANDRA DAY O’CONNOR *	3
RUFUS PECKHAM	1
LEWIS POWELL	1
WILLIAM REHNQUIST	6
JOHN ROBERTS	1
ANTONIN SCALIA	2
DAVID SOUTER *	1
JOHN PAUL STEVENS	2
EARL WARREN	2
<i>per curiam</i>	2

*\* Kennedy, O’Connor, and Souter are each credited with authorship of Planned Parenthood of SE Pennsylvania v. Casey.*

One striking feature of this list is the Justices who do not appear on it. In just about every survey identifying the “greatest” Justices of all time, Oliver Wendell Holmes and Louis Brandeis are ranked in the top five (John Marshall is typically ranked first). Yet neither of them wrote any of the most-commonly-excerpted major cases.

Perhaps an even more startling omission is Roger Taney. The surprise factor in Taney’s absence is not a function of Taney being as highly-regarded as Holmes and Brandeis (he is not, though it should be noted that Taney usually appears in the upper reaches of “greatest ever” surveys). Rather, Taney’s absence indicates that one of the most famous – and infamous – cases in Supreme Court history is not excerpted nearly as often as might have been expected. *Dred Scott v. Sandford* is only excerpted as a major case in 12 of the 18 textbooks in this study.

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Of course, several of the Justices who are responsible for cases in “the canon” find themselves in the bottom reaches of most surveys ranking of the Justices ... invariably because of their authorship of a prominent and reviled case which is still widely-taught: Rufus Peckham, author of *Lochner v. New York*; William Day, author of *Hammer v. Dagenhart*; Henry Brown, author of *Plessy v. Ferguson*.

It is also worth examining the legal issues at the center of the cases in this list. If the cases are grouped along a few broad subject-matter categories, they break down as follows:

**CIVIL LIBERTIES (RELIGION, SPEECH/PRESS, PRIVACY): 12**

*Brandenburg, Casey, Cohen, Employment Div. v. Smith, Glucksberg, Griswold, Lawrence, NY Times v. Sullivan, NY Times v. US, R.A.V., Roe, Texas v. Johnson*

**EQUAL PROTECTION: 11**

*Brown, Civil Rights Cases, Craig v. Boren, Grutter, P.I.C.S. v. Seattle, Plessy, Romer, SAISD v. Rodriguez, Slaughter-House, US v. Virginia, Zelman*

**INSTITUTIONAL POWERS: 9**

*Boerne, Chadha, Hamdi, Korematsu, Marbury, McCardle, Morrison v. Olson, Nixon, Youngstown*

**FEDERALISM: 4**

*Gibbons, Lopez, McCulloch, US v. Morrison*

**COMMERCE CLAUSE: 3**

*Cooley, Hammer, Heart of Atlanta Motel*

**VOTING AND REPRESENTATION: 3**

*Baker, Bush v. Gore, Reynolds*

**CONTRACTS CLAUSE: 1**

*Blaisdell*

**DUE PROCESS / STATE POWERS: 1**

*Lochner*

**EMINENT DOMAIN: 1**

*Kelo*

Both *Heart of Atlanta Motel* and *Korematsu*, of course, have Equal Protection dimensions to them.

The paucity of consensus cases on freedom of religion is surprising; only one religion case, *Employment Division v. Smith*, makes the list. Even cases which provide longstanding methodological rubrics for deciding other religion cases are not excerpted on a consistent basis; *Lemon v. Kurtzman*, for example, is excerpted in only half of the textbooks. Given the Supreme Court’s notorious dithering on religion issues, however, the lack of consensus on which cases “ought” to be taught is perhaps understandable. It may be that selected recent hot-button religion cases such as *Pleasant Grove v. Summum* or *Salazar v. Buono* will find their way into a high percentage of future editions of these textbooks.

One final series of absences is in fact not surprising at all. There are no cases in the broad category of criminal procedure on the list, but there is a logical explanation for this. Law schools offer criminal procedure as an entirely separate course, which means that law school constitutional law courses do not cover these cases (and, consequently, law school constitutional law textbooks tend to omit them). Since 12 of the textbooks in this study are geared for law schools, this in turn means that key criminal procedure precedents will not feature often.

That is not to say, though, that renowned criminal procedure cases are being ignored by the textbooks in this study which are geared for undergraduate constitutional law courses. Indeed, as this selected list shows, certain criminal procedure cases are showing up on a near-constant basis in the undergraduate constitutional law textbooks

<b>CRIMINAL PROCEDURE CASE</b>	<b># OF UNDERGRADUATE TEXTBOOK EXCERPTS (out of 6)</b>
<i>Gideon v. Wainwright</i> (1963)	6
<i>Katz v. United States</i> (1967)	6
<i>Mapp v. Ohio</i> (1961)	6
<i>Gregg v. Georgia</i> (1976)	5
<i>Miranda v. Arizona</i> (1966)	5
<i>Olmstead v. United States</i> (1928)	5
<i>Powell v. Alabama</i> (1932)	5
<i>United States v. Leon</i> (1984)	5

The foregoing is, of course, hardly an exact science. This portion of the textbook study does not purport to measure “greatness” among Supreme Court Justices (although a more detailed analysis, tracking how often individual Justices are excerpted, and which also factors in the excerpting of concurrences and dissents, may shed new light onto that question). But it is an interesting snapshot of contemporary constitutional law pedagogy.

#### **NOTE:**

The eighteen textbooks used in this study are as follows:

- Barnett, Randy, *Constitutional Law* (Aspen, 2008)
- Brest, Paul; Sanford Levinson; Jack M. Balkin; Akhil Reed Amar; and Reva B. Siegel, *Processes of Constitutional Decisionmaking*, 5<sup>th</sup> ed. (Aspen, 2006)
- Chemerinsky, Erwin, *Constitutional Law*, 3<sup>rd</sup> ed. (Aspen, 2009)
- Choper, Jesse H.; Richard Fallon, Jr.; Yale Kamisar; and Steven H. Shiffrin, *Constitutional Law*, 10<sup>th</sup> ed. (West, 2006)
- Epstein, Lee; and Thomas G. Walker, *Constitutional Law for a Changing America*, 7<sup>th</sup> ed., (CQ Press, 2010)
- Farber, Daniel A.; William N. Eskridge, Jr.; and Philip P. Frickey, *Constitutional Law*, 4<sup>th</sup> ed. (West, 2009)
- Fisher, Louis; and Katy J. Harriger, *American Constitutional Law*, 8<sup>th</sup> ed., (Carolina Academic Press, 2009)
- Maggs, Gregory E.; and Peter J. Smith, *Constitutional Law: A Contemporary Approach* (West, 2009)
- Mason, Alpheus Thomas; and Donald Grier Stephenson, *American Constitutional Law*, 15<sup>th</sup> ed. (Pearson, 2007)
- Murphy, Walter F.; James E. Fleming; Sotirios A. Barber; and Stephen Macedo, *American Constitutional Interpretation*, 4<sup>th</sup> ed. (Foundation Press, 2008)
- O’Brien, David M. *Constitutional Law and Politics*, 7<sup>th</sup> ed. (Norton, 2008)
- Paulsen, Michael Stokes; Steven G. Calabresi; Michael W. McConnell; and Samuel L. Bray, *The Constitution of the United States* (Foundation Press, 2010)
- Rossum, Ralph A.; and G. Tarr, *American Constitutional Law*, 8<sup>th</sup> ed. (Westview Press, 2009)
- Rotunda, Ronald D., *Modern Constitutional Law*, 9<sup>th</sup> ed. (West, 2009)
- Schultz, David; John R. Vile; and Michelle D. Deardorff, *Constitutional Law in Contemporary America*, (Oxford University Press, 2010)
- Stone, Geoffrey R; Louis Michael Seidman; Cass R. Sunstein; Mark V. Tushnet; and Pamela S. Karlan, *Constitutional Law*, 6<sup>th</sup> ed. (Aspen 2009)
- Sullivan, Kathleen M.; and Gerald Gunther, *Constitutional Law*, 17<sup>th</sup> ed. (Foundation Press, 2010)
- Varat, Jonathan D; William Cohen; and Vikram D. Amar, *Constitutional Law*, 13<sup>th</sup> ed. (Foundation Press, 2009)

Six of these texts are designed for undergraduate constitutional law courses: Epstein/Walker, Fisher/Harriger, Mason/Stephenson, O’Brien, Rossum/Tarr, and Schultz/Vile/Deardorff. Five of these six texts are two-volume sets, geared towards the typical collegiate constitutional law regimen of separate semester classes in civil liberties and governmental powers/structure. Only the Mason/Stephenson text is a single volume designed for undergraduate courses.

The other twelve texts are law school casebooks.

# Images of APSA 2010

## 2010 ANNUAL MEETING & EXHIBITION SEPTEMBER 2-5, 2010 WASHINGTON, DC **THE POLITICS OF HARD TIMES:** CITIZENS, NATIONS, AND THE INTERNATIONAL SYSTEM UNDER ECONOMIC STRESS



Standing ovation (l-r): Mark Graber, Gary Jacobsohn, Jack Balkin, Kim Lane Scheppele, Stephen M. Griffin, and the Lifetime Achievement Award honoree Sandy Levinson.

Section President Christine Harrington opens the law and courts business meeting.



Law & Courts section executive committee meeting (l-r): James Stoner, Bob Howard, Melinda Gann Hall, Nancy Maveety, Wayne McIntosh, Kirk Randazzo, Christine Harrington, Pam Corley.



# 2010 APSA Awards

## *The Law & Courts Section Best Graduate Student Paper Award*

The Law & Courts Section Best Graduate Student Paper Award (formerly the CQ Press Award) is given annually for the best paper on law and courts written by a graduate student. To be eligible the nominated paper must have been written by a full-time graduate student. Single- and co-authored papers are eligible. In the case of co-authored papers, each author must have been a full-time graduate student at the time the paper was written. Papers may have been written for any purpose (e.g., seminars, scholarly meetings, potential publication in scholarly journals). This is not a thesis or dissertation competition. Papers may be nominated by faculty members or by the students themselves. The papers must have been written during the twelve months previous to the nomination deadline. The award carries a cash prize of \$200.

### **THE 2010 BEST GRADUATE STUDENT PAPER AWARD COMMITTEE**

PAMELA BRANDWEIN (CHAIR), University of Michigan  
KRISTIN BUMILLER, Amherst College  
LIEF CARTER, Colorado College  
LAURA HATCHER, Southern Illinois University  
TONY SMITH, University of California-Irvine

## *The 2010 Best Graduate Student Paper Award Winners*

**SHAUHIN TALESH**  
**UNIVERSITY OF CALIFORNIA AT BERKELEY**

“Bargaining in the Shadow of “Shadow Law”: An Ethnography of How Business Organizations Shape the Meaning of Law”

Public law political scientists have long been interested in the rise of Alternative Dispute Resolution and its implications for formal courts and the quality of justice. In a fascinating analysis that makes both methodological and substantive contributions, Shauhin Talesh explores the process by which business organizations shape the meaning of the law and, indeed for all practical purposes, come to be delegated public responsibility for both making the law and adjudicating disputes under this law. Using an ethnographic approach that draws on the classic argument by Mnookin and Kornhauser, Talesh shows that in California consumer disputes, the state has delegated public law making and adjudication functions to private organizations that are parties to the controversies rather than to neutral third (private) parties. Providing a grounded and careful examination of the process by which private law is created and the ways that third party "alternative dispute resolvers" are actually parties to the controversies themselves, Talesh offers a new angle of vision on the ADR movement and raises important new questions about business-government relations.

**SHELLEY MURPHEY**  
**NORTHWESTERN UNIVERSITY**

“Going Procedural: Conflict Avoidance and Agenda Control in the Lower Federal Courts”

In his classic work, Alexander Bickel suggested that judges sometimes avoid substantive issues and practice a form of judicial minimalism. Bringing sophisticated methodological skills to bear, Shelley Murphey now demonstrates that



judges avoid substantive issues and revert to procedural matters when their colleagues or their superiors have divergent ideological viewpoints. Carefully situated in the literature on strategic judicial decision-making, Murphey's study empirically demonstrates both horizontal and vertical constraints on judges, making an important methodological contribution to the study of judicial behavior. On appellate panels with a wide range of ideological views and on district courts where judges hold views at odds with their appellate court, procedural opinions are more likely to emerge. This observed trend, indeed, is consistent across different areas of law. In showing that judges side step conflict by relying on procedural law, the paper reconsiders the role of procedural law, suggesting that it helps to ensure a more functional judiciary by giving judges a measure of agenda control.

### *The Law & Courts Section Best Conference Paper Award*

The Law & Courts Best Conference Paper Award (formerly the American Judicature Society Award) is given annually for the best paper on law and courts presented at the previous year's meeting of the American, Midwest, Northeastern, Southern, Southwestern, or Western Political Science Association. Single- and co-authored papers, written by political scientists, are eligible. Papers may be nominated by any member of the Section.

#### **THE 2010 BEST CONFERENCE PAPER AWARD COMMITTEE**

THOMAS KECK (CHAIR), Syracuse University

RENEE CRAMER, Drake University

KATHLEEN MOORE, University of California-Santa Barbara

HOWARD SCHWEBER, University of Wisconsin-Madison

DAVID YALOF, University of Connecticut



### *The 2010 Best Conference Paper Award Winners*

**SARAH STASZAK  
PRINCETON UNIVERSITY**

"Institutions, Rulemaking, and the Politics of Judicial Retrenchment: The Federal Rules of Civil Procedure"

Presented at the 2009 American Political Science Association Conference

This paper centers on a great empirical story—one that is both substantively important and significantly under-examined (at least by political scientists)—and it also elaborates a promising theoretical framework that has not much been applied to the realm of law and courts.

The empirical narrative examines the development and evolution of the Federal Rules of Civil Procedure, with particular attention to post-1973 efforts to reform those rules. The rules governing access to federal courts have always had important political effects and, in the past forty years or so, have become the object of significant political controversy. They are of obvious significance to judicial politics scholars, and Staszak makes a strong case for their significance to students of state development and public policy as well. But most members of these three overlapping scholarly communities have ignored them. As such, the manuscript's rich and engaging narrative, detailing the shifting coalitions of Democratic and Republican members of Congress, interest groups, lawyers, and judges that have sought to revise these rules since

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the mid-1970s, is of significant value. As with some related areas of policy change-deregulation and criminal sentencing reform come to mind-the ideological and partisan composition of the reform coalition transformed significantly over time. And as with these other areas of policy change, the mixed pattern of incremental successes and failures has produced a policy landscape that is characterized by noticeable change in a particular direction but also significant areas of stasis and noteworthy unintended consequences.

The theoretical contribution of Staszak's paper is to adapt and apply the theory of policy retrenchment to the law-and-courts context. Initially developed by Paul Pierson and others seeking to explain the limited success of twentieth-century conservative movements in dismantling the welfare state, retrenchment theory seeks to illuminate the fact that (and the ways in which) dismantling a set of policies or institutions involves distinctive political dynamics; the process is not simply the mirror image of creating a set of policies or institutions. As Staszak develops the concept here, "judicial retrenchment" refers to "efforts to 1) constrict access to the courts; 2) restructure the division of power between the courts and other institutional actors; and/or 3) consolidate judicial autonomy and power" (8). Applying the concept to the arena of civil justice reform, Staszak details the variety of political actors-both inside and outside the federal judiciary, acting on both partisan and non-partisan motives-who have significantly reshaped the civil justice system over the past forty years.

*Honorable Mention*

**Michael McCann**  
**UNIVERSITY OF WASHINGTON**

**William Haltom**  
**UNIVERSITY OF PUGET SOUND**

**Shauna Fisher**  
**UNIVERSITY OF WASHINGTON**

“Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States”  
Presented at the 2009 Western Political Science Association Conference

*The Law & Courts Section*  
*Best Journal Article Award*

The Law & Courts Section Best Journal Article Award (formerly the Houghton-Mifflin Award) recognizes the best journal article on law and courts written by a political scientist and published during the previous calendar year. Articles published in all refereed journals and in law reviews are eligible, but book reviews, review essays, and chapters published in edited volumes are not eligible. Journal editors and members of the Section may nominate articles.

**THE 2010 BEST JOURNAL ARTICLE AWARD COMMITTEE**

SUSAN LAWRENCE (CHAIR), Rutgers University-New Brunswick  
TOM GINSBURG, University of Chicago  
HARRY HIRSCH, Oberlin College  
KRISTIN KELLY, University of Connecticut  
MICHAEL MCCANN, University of Washington

*The 2010 Best Journal Article Award Winner*

**Steven Teles**  
**JOHNS HOPKINS UNIVERSITY**

*Studies in American Political Development* 23: 61-83 (2009)

Steven Teles' article transforms our understanding of the deployment of bureaucratic power to materially reshape the conditions of future political conflict. Through an in-depth investigation of the Meese-Regan Department of Justice, Teles turns the New Institutionalism causal arrow around to show that not only do non-state actors provide a crucial supplement to electoral support in effecting policy change, but once in office, elected officials can invest the considerable resources of the state to modify political constraints, create additional non-state actors, and reconfigure the range of choices in ways that allow continued electoral and policy success long after their term of office ends. Particularly important in Teles' story is the role of Meese and DOJ in legitimizing the language of originalism and in grooming a young generation of ideologically committed conservative lawyers for future positions, before and on the bench and in and out of government. Both show the value of treating time horizons as a continuous variable and recognizing networks, rather than individuals, as the unit of analysis when positing rational actors.

Among a universally impressive and methodologically diverse field of entries, Steven Teles' "Transformative Bureaucracy" stood out as adding both empirically and conceptually to what we know while being rich and theoretically generative in its elaboration of the notion of political investment. We are happy to recognize this work with the Law and Courts Section Best Journal Article Award.

*The Law & Courts Section  
C. Herman Pritchett Award*

The C. Herman Pritchett Award is given annually for the best book on law and courts written by a political scientist and published the previous year. Case books and edited books are not eligible. Books may be nominated by publishers or by members of the Section. The award carries a cash prize of \$250.

**THE 2010 C. HERMAN PRITCHETT AWARD COMMITTEE**

SHELDON GOLDMAN (CHAIR), University of Massachusetts-Amherst  
HOWARD GILLMAN, University of Southern California  
LISA MILLER, Rutgers University-New Brunswick  
REGINALD SHEEHAN, Michigan State University  
HELENA SILVERSTEIN, Lafayette College



*The 2010 C. Herman Pritchett Award Winners*

Eileen Braman  
**UNIVERSITY OF INDIANA**

*Law Politics, & Perception: How Policy Preferences Influence  
Legal Reasoning*  
(University of Virginia Press)

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Eileen Braman's book is a theoretically sophisticated exploration of the missing link between attitude/preference and judicial voting behavior. Professor Braman's distinctly original work draws on cognitive psychology and utilizes an imaginative experimental design working with undergraduate and law school student subjects. Armed with her results, she makes a persuasive argument that legal reasoning is influenced by policy preferences (motivated reasoning). In so doing, her work, merging judicial behavior with legal philosophy and a law and courts focus, offers what is perhaps the most nuanced and satisfying explanation of judicial behavior to be found in the law and courts literature.

Gordon Silverstein  
**UNIVERSITY OF CALIFORNIA AT BERKELEY**

*Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*  
(Cambridge University Press)

Gordon Silverstein's book is a well written, accessible, and trenchant analysis of why courts have increasingly played a crucial role in the setting of public policy, that is, why American politics has increasingly become juridified. Professor Silverstein carefully traces the transformation of the Court's role from the Warren Court to the present and demonstrates laws allure in a series of case studies that demonstrate the impact of juridification in a variety of circumstances and contexts. He provides an analytical framework for better understanding the work of the Supreme Court and the shaping of public policy. His many insights inform us why judicial selection and confirmation have become so contentious and high stakes.

*Honorable Mention*

John Brigham  
**UNIVERSITY OF MASSACHUSETTS, AMHERST**

*Material Law: A Jurisprudence of What's Real*  
(Temple University Press)

John Brigham's book is an innovative and expansive examination of law in its everyday practices, uses, constraints, and possibilities. His unorthodox take on "material law," his constitutive perspective, spans such diverse topics as court-house architecture, medical technology, and the creation of things. As Professor Brigham tells us and then amply demonstrates throughout his book the constitutive perspective draws attention to law as a force in the construction of material life. At one and the same time theoretically innovative and autobiographical, John Brigham draws a fascinating portrait of law "in" society that broadens our understanding of law and ultimately of what courts do.

### *The Law & Courts Section* *Lasting Contribution Award*

The Law & Courts Lasting Contribution Award (previously the Wadsworth Publishing Award) is given annually for a book or journal article, 10 years or older, that has made a lasting impression on the field of law and courts. Only books and articles written by political scientists are eligible; single-authored works produced by winners of the Lifetime Achievement Award are not eligible. Any member of the Section may submit a nomination.

#### **THE 2010 LASTING CONTRIBUTION AWARD COMMITTEE**

SUSAN BURGESS (CHAIR) Ohio University  
SEAN FARHANG, University of California at Berkeley  
WILLIAM HALTOM, University of Puget Sound  
CAROL NACKENOFF, Swarthmore College  
AUSTIN SARAT, Amherst College



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*The 2010 Law & Courts Section  
Lasting Contribution Award Winners*

**Lee Epstein**  
NORTHWESTERN UNIVERSITY

**Jack Knight**  
DUKE UNIVERSITY

*The Choices Judges Make*  
(CQ Press)

This year's Lasting Contribution Award goes to Lee Epstein and Jack Knight for their work *The Choices Judges Make*. This book took a traditional focus of law and courts, namely, the strategic behavior of Supreme Court justices, and provided a sophisticated understanding of its complexity and importance. In this work, Epstein and Knight used a variety of data sources, supplementing judicial votes with an analysis of the justices' papers, grounding theory in empirical decision making, and revealing the complex intersections of law and politics in judicial behavior. Political scientists as well as legal scholars have grappled with *The Choices Judges Make* since its initial publication in 1997 and judging from recent citation counts will continue to do so for years to come. Congratulations to Lee Epstein and Jack Knight for producing a creative and provocative work that has distinctly affected the shape of our field, making a lasting contribution to Law and Courts scholarship.

*The Law & Courts Section  
Teaching & Mentoring Award*

The Teaching & Mentoring Award recognizes innovative teaching and instructional methods and materials in law and courts. The Teaching and Mentoring Award recognizes innovation in instruction in law and courts. Examples of innovations that might be recognized by this award include (but are not limited to) outstanding textbooks, web sites, classroom exercises, syllabi, or other devices designed to enhance the transmission of knowledge about law and courts to undergraduate or graduate students. Any member of the Section may make a nomination for the Teaching & Mentoring Award.

**THE 2010 TEACHING & MENTORING AWARD COMMITTEE**

LESLIE GOLDSTEIN (CHAIR), University of Delaware

ERIN ACKERMAN, John Jay College-CUNY

JOHN BARNES, University of Southern California

DION FARGANIS, Bowling Green State University

IZA HUSSIN, University of Massachusetts

*The 2010 Law & Courts Section  
Teaching & Mentoring Award Winner*

**LIEF CARTER**  
COLORADO COLLEGE



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Lief has contributed to law and courts pedagogy in countless ways. We name here but a few:

He has produced leading textbooks, which have gone through several editions, for two different subfields in our field: *Administrative Law and Politics* (co-authored with Christine Harrington) and *Reason and Law*. Both of these have by now been read by thousands of students in administrative law and/or in judicial process/jurisprudence courses.

He has produced a legacy of a numerous grateful students who testify to his contagious enthusiasm and passion for his subject. They note that it is impossible to go through one of his courses without changing the way one thinks about “the law and life.”

He has integrated into his courses material from every imaginable discipline: art, history, philosophy, science, politics, literature, and music.

He has won several university, college and departmental teaching awards, and was the first at Georgia to TWICE win the prestigious university-wide award.

He co-designed, and then taught with a professor of Philosophy, a DVD/web interactive course on “Art as Politics/Politics as Art.”

He directed the APSA project collecting and making available course syllabi in Public Law.

His innovations in pedagogy include everything from leading play readings to having students stand on their desks and stand “Row, Row, Row Your Boat,: as a round.

His former students write with enthusiasm of his impact on their lives, whether it was influencing them to join the Peace Corps, or go on to graduate school or to law school, or just to think in fundamentally new ways..

It gives us great pleasure to be able to honor such a worthy recipient of this award.

### *The Law & Courts Section Lifetime Achievement Award*

The Lifetime Achievement Award honors a distinguished career of scholarly achievement and service to the law and courts field. Nominees must be political scientists who are at least 65 years of age or who have been active in the field for at least 25 years. Nominations from previous competitions will be carried forward to the current year's competition. The committee will retain nominations for 3 years, but one may re-nominate an individual and renew the materials in the file. Committee members may not make nominations for this award.

Previous winners of the award are:

HENRY ABRAHAM  
WALTER MURPHY  
HAROLD SPAETH  
SAM KRISLOV  
GLENDON SCHUBERT  
BEVERLY BLAIR COOK  
MARTIN SHAPIRO  
WALTER BERNIS  
SIDNEY ULMER  
STUART SCHEINGOLD  
JOEL GROSSMAN  
SHELDON GOLDMAN  
SAUL BRENNER  
J. WOODFORD HOWARD  
DAVID J. DANIELSKI

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**THE 2010 LIFETIME ACHIEVEMENT AWARD COMMITTEE**

R. SHEP MELNICK (CHAIR) Boston College

JENNIFER CULBERT, Johns Hopkins University

TRACEY GEORGE, Vanderbilt University

DOUGLAS REED, Georgetown University

GORDON SILVERSTEIN, University of California at Berkeley



*The 2010 Law & Courts Section  
Lifetime Achievement Award Winner*

**SANDY LEVINSON**

**THE UNIVERSITY OF TEXAS SCHOOL OF LAW**

The recipient of the Law and Courts Section's 2010 Lifetime Achievement Award is Professor Sanford Levinson of the University of Texas. Over the past four decades, few scholars have done as much to bridge the gap between the study of law and the study of politics as Sandy Levinson. Armed with both a Ph.D. in Political Science and a law degree, Levinson has produced a remarkable number of influential books and articles on politically important topics. His topics range from the place of the Constitution in America's civic religion to constitutional "stupidities" and "tragedies," from law and literature to torture and the war on terror, from sweeping constitutional history to stinging critiques of the established legal "canon," from the "embarrassing" Second Amendment to the "undemocratic" structure of our governing institutions. A tireless organizer of and enthusiastic participants in American Political Science Association panels, he has often led the way in the study of American constitutional development, the interpretation of the Constitution outside the courtroom, and constitutional constraints on American foreign policy. Ever the iconoclast and gadfly, Levinson has forced us to think more clearly about topics as diverse as the Second Amendment, lifetime tenure for judges, constitutional amendments, and the role of *Marbury v. Madison* within the canons of constitutional law. The thread that runs through Sanford Levinson's impressive opus is not devotion to a particular methodology or ideology, but an enduring (and at times mischievous) curiosity about perennial questions of law and politics. As a result he has served as a mentor and an inspiration to several generations of young scholars in both law school and political science.



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# Fellowship Announcements

## Law and Society Post-Doctoral

**One-year fellowship for early-career scholars who work in the "law and society" tradition and who will be competing for university-level teaching jobs in the U.S. market.**

**For 2011-12 academic year, apply by 1/7/11.**

**Complete information and application instructions can be found at:**

**<http://law.wisc.edu/ils/lawandsocietyfellowship.html>**

The Institute for Legal Studies of the University of Wisconsin Law School will appoint a post-doctoral fellow for the 2010-11 academic year. We invite applications from scholars who are in the early (pre-tenure) stage of their career or whose careers have been interrupted or delayed. Eligibility is limited to humanities or social science scholars who work in the law and society tradition, for example, anthropologists, economists, historians, political scientists, and sociologists. Advanced ABD graduate students may apply, but the PhD must be completed before beginning the fellowship. The stipend will be \$25,000, plus a research allowance of \$5,000 and benefits that include health insurance.

The fellowship is designed to support a scholar at an early stage in his or her career when, under prevailing circumstances, career pressures or teaching responsibilities might divert the individual away from research. At the Institute, the Fellow will be able to devote most of his or her time to research and writing and will find a sympathetic and critical audience to support that work. Fellows are expected to be in full-time residence in Madison, to organize and lead a colloquium for graduate students, and to participate in the intellectual life of the Institute, which includes lectures, workshops, and conferences.

This fellowship is intended for early career social science and humanities scholars whose research contains a strong legal component and who plan to compete for a University teaching position in the U.S. market. Non-US citizens may apply, but must meet the stated criteria.

## Hurst Summer Institute in Legal History at Wisconsin

**Next two week biennial session will take place in June 2011; apply by 1/15/11.**

**Complete information and application instructions can be found at**

**[http://law.wisc.edu/ils/hurst\\_institute.htm](http://law.wisc.edu/ils/hurst_institute.htm)**

The Hurst Summer Institute in Legal History is a biennial event sponsored by the Institute for Legal Studies at the University of Wisconsin Law School in conjunction with the American Society for Legal History (ASLH). A committee appointed by the ASLH reviews applications from early-career faculty members, doctoral students with completed or nearly completed dissertations, and recent J.D. graduates demonstrating interest in an academic career with a focus on legal history, and selects 12 promising scholars as Institute Fellows. The Fellows come to Madison for two weeks in June to participate in daily seminars, meet other legal historians, and analyze and discuss each others work. Each biennial Institute is organized and chaired by senior legal historians and includes visiting scholars who lead specialized sessions.

The purpose of the Hurst Summer Institute is to advance the approach to legal scholarship fostered by J. Willard Hurst in his teaching, mentoring, and scholarship. The Hurst Summer Institute assists scholars from law, history, and other disciplines in pursuing research in legal history. It also develops teaching skills by deepening the understanding of legal history and developing methods for incorporating it into the law school and undergraduate history curriculum. More importantly, it provides junior faculty a unique opportunity to work closely over an extended period of time with distinguished senior faculty and thus continue the tradition of excellence in research, teaching, and mentoring others. Finally, the Hurst Institute establishes relationships and cultivates a network of scholars for mutual support throughout their careers.

## BOOKS TO WATCH FOR

Bruce Peabody  
*Fairleigh Dickinson University*  
[bgpeabody@msn.com](mailto:bgpeabody@msn.com)

**Larry Baum** (Ohio State University) has written **Specializing the Courts** (Princeton University Press). The book examines the extent to which courts and judges have become specialized, the sources of that specialization, and its consequences for judicial policy. The author argues that specialization in multiple forms has risen to a substantial level in the federal and state judicial systems. The growth of specialization is best understood as a byproduct of specific decisions by legislatures and courts rather than a deliberate choice. But this growth is consequential, the book contends, because specialization can have fundamental effects on court policies.

**Richard A. Brisbin, Jr.** (West Virginia University) is the author of **A Strike like No Other Strike: Law and Resistance during the Pittston Coal Strike of 1989–1990** (West Virginia University Press). In this work, the author considers the legal significance of a miners' strike against Pittston Coal, a movement which spread throughout southwestern Virginia, southern West Virginia, and eastern Kentucky. The book considers whether even extreme transgression or resistance can fracture the "imagined coherence of the law" and shows how each party in the strike invoked the law to justify its actions, while attacking those of the other side as unlawful. Even though the U.S. Supreme Court ultimately ruled in favor of the union, the author argues that both sides lost in this conflict, since most of the strikers faced elimination of their jobs and an ongoing struggle for pensions and health benefits.

**Tom Clark's** (Emory University) book **The Limits of Judicial Independence** (Cambridge University Press) investigates the causes and consequences of congressional attacks on the U.S. Supreme Court, arguing that the extent of public support constitutes the practical limit of judicial independence. The book first presents a historical overview of Court-curbing proposals in Congress. Then, building on existing research and interviews with Supreme Court justices, members of Congress, and judicial and legislative staffers, the book theorizes that congressional attacks are driven by public discontent with the Court. From this theoretical model, the author offers predictions about the decision to engage in Court-curbing, and judicial responsiveness to this activity by Congress. This book concludes that Court-curbing is driven primarily by public opposition to the Court, and that the Court responds to those proposals by engaging in self-restraint and moderating its decisions.

**William T. Coleman** (O'Melveny and Myers LLP) and **Donald T. Bliss** (O'Melveny and Myers LLP) have written **Counsel for the Situation: Shaping the Law to Realize America's Promise** (Brookings Institution Press), a chronicle of Coleman's life and legal career. The author was a senior counsel to the Warren Commission, an attorney who worked with Thurgood Marshall's NAACP Legal Defense Fund, and a former Secretary of Transportation under President Ford. But, despite graduating first in his class at Harvard Law and clerking for Supreme Court Justice Felix Frankfurter, Coleman was initially shut out of major East Coast law firms on account of racial prejudice. Ultimately, however, the author

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writes, the law gave him distinct opportunities in the court room, the board room, and the corridors of power. More broadly, the book discusses the legal profession's responsibilities in a democratic society and free economy.

**Delegating Rights Protection** (Oxford University Press) by **David Erdos** (University of Oxford) examines the rise of bills of rights in the “Westminster” countries of Canada, New Zealand, the United Kingdom and Australia. The book’s comparative analysis suggests that the historic absence of a bill of rights in these nations is best explained by the absence of a clear political transition as well as their strong British constitutional heritage. However, according to the author, postmaterialist socio-economic changes have resulted in a growing emphasis on legal formalization, codified civil liberties, and social equality, increasing pressure for a bill of rights. Nevertheless, the emergence of bills of rights has also required a political trigger which provides an immediate rationale for change. In the concluding section of the book, the author develops this Postmaterialist Trigger Thesis (PTT) by using it to explain the origins of bills of rights in other internally stable, advanced democracies, notably the Israeli Basic Laws on human rights.

In January 2002 the Olympic Torch Relay visited Alaska on its way to the Winter Games. When the relay runner and accompanying camera cars passed Juneau-Douglas High School, senior Joseph Frederick and several friends unfurled a fourteen-foot banner reading “BONG HiTS 4 JESUS.” **James C. Foster** (Oregon State University-Cascades) examines Frederick’s subsequent suspension and the resulting legal struggle in **BONG HiTS 4 JESUS: A Perfect Constitutional Storm in Alaska’s Capital** (University of Alaska Press). More broadly, this book considers the boundaries of student rights and speech within the context of a public high school.

From the 1798 Sedition Act to the war on terror, numerous presidents, members of Congress, Supreme Court justices, and local officials have endorsed the silencing of free expression. But if the connection between democracy and the freedom of speech is as vital as many contend, why would so many governmental leaders seek to quiet their citizens? In **Free Expression and Democracy in America: A History** (University of Chicago Press), **Stephen M. Feldman** (University of Wyoming) explores this question by tracing two rival traditions in American culture—suppression of speech and dissent as a form of speech—to provide an overview of the law, history, and politics of individual rights in the United States. The author argues that our level of freedom is determined not only by the Supreme Court, but also by cultural, social, and economic forces, and especially, in the free speech context, by the struggles of excluded groups: women, African Americans, and laborers.

In **A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787** (Oxford University Press) **Scott Douglas Gerber** (Ohio Northern University) provides a critical analysis of the origins of judicial independence in the United States. In the first part of this book, the author examines the political theory of an independent judiciary. The second portion chronicles how each of the original thirteen states and their colonial antecedents treated their respective judiciaries between 1606 and 1787. In the author's concluding discussion, he explores the influence the colonial and early state experiences had on the federal model that followed, and on the nature of the new constitutional regime. The book also explains how the principle of judicial independence ultimately embodied in Article III made the doctrine of judicial review possible, and committed that doctrine to the protection of individual rights.

More than five decades after being handed down, what is the legacy of *Brown vs. Board of Education*? In the volume **In Brown's Wake: Legacies of America's Educational Landmark** (Oxford University Press) **Martha Minow** (Harvard Law School) examines the way that *Brown* continues to reverberate over a wide-spectrum of equality issues in public and school choice programs. Though the original promise of *Brown* remains more symbolic than effective, the author argues for the power of its vision in the struggles for equal education regardless of students' social identity in both the United States and internationally. Further, she urges renewed commitment to the project of social integration even while identifying the complex routes necessary to achieve it. In sum, this book explores the widespread effects of one of the most important Supreme Court decisions of the century.

Despite the constitutional promise that “Congress shall make no law...abridging the freedom of speech, or of the press,” Congress and the states have sought repeatedly to curb these freedoms. In **Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the U.S. Supreme Court** (Rowman & Littlefield) **David M. O'Brien** (University of Virginia) traces how the Supreme Court gradually expanded protection for freedom of expression but also defined certain categories of expression as constitutionally unprotected. From the Alien and Sedition Act of 1798 to the

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most recent cases coming before the Court, this book examines these exceptions to the absolute command of the First Amendment, providing a history of each category of unprotected speech and putting into bold relief the larger questions of what kinds of expression should (and should not) receive constitutional protection.

In **Last Call: The Rise and Fall of Prohibition** (Simon & Schuster) **Daniel Okrent** (Kennedy School of Government) explains what life under Prohibition was like, and how this era's unprecedented degree of government interference in the private lives of Americans changed the country forever. The author discusses how the Prohibition period marked a confluence of diverse forces: growing political power of the women's suffrage movement, which allied itself with the anti-liquor campaign, fear of small-town, native-stock Protestants that they were losing control of their country to the immigrants of the large cities, anti-German sentiment stoked by World War I, and a variety of other factors (ranging from the rise of the automobile to the advent of the income tax). Law and courts scholars may be particularly interested in the book's discussion of the legal, political and judicial battles surrounding the 18th Amendment to the Constitution and its repeal.

**Michael Perino** (St. John's University School of Law) has written **The Hellhound of Wall Street: How Ferdinand Pecora's Investigation of the Great Crash Forever Changed American Finance** (Penguin Press). The book chronicles the Senate hearings in 1933-34 that laid the foundation for passage of the first federal securities laws and major reforms in banking, such as the Glass-Steagall Act and federal deposit insurance. According to the author, by creating the sensational headlines that galvanized public opinion for reform, the Pecora hearings spurred Congress to take unprecedented steps to rein in the banking industry and led directly to the New Deal's landmark economic reforms.

**Kirk A. Randazzo's** (University of South Carolina) book **Defenders of Liberty or Champions of Security? Federal Courts, the Hierarchy of Justice, and U.S. Foreign Policy** (SUNY Press) explores some of the important questions that have been raised about civil liberties and courts as a result of the terrorist attacks of September 11, 2001. Specifically, the book considers the extent to which federal judges defend liberty or champion security when adjudicating disputes, and how the hierarchal structure of the federal judiciary influences decisions by lower court judges. The author argues that there are indications that the federal judiciary as a whole is not a particularly robust defender of liberty. Furthermore, he contends that lower court judges strategically anticipate the decisions of higher courts and constrain their behavior to avoid reversal.

According to **Thomas Scheffer** (Humboldt University) cases are not objects at hand for legal decision-making nor are they echoes from a past crime. In **Adversarial Case-Making. An Ethnography of English Crown Court Procedure** (Brill), the author's socio-legal ethnography of the legal production of cases examines various sites of adversarial case-making: law firms, barristers' chambers, and Crown Courts. The book considers the role and dynamics of client-lawyer meetings, pre-trial hearings, plea bargaining sessions, and jury trials. Scheffer focuses on the lawyers' case-making activities, their procedural contexts, and the resulting cases, adopting a "trans-sequential" perspective on case-making that attempts to move us past "talk-bias" and "text-bias." This work includes case studies on alibi, guilt, legal care, procedural infrastructure, and the case system in the common law tradition.

**Seth Stern** (Congressional Quarterly) and **Stephen Wermiel** (American University Washington College of Law) have written **Justice Brennan: Liberal Champion** (Houghton Mifflin Harcourt) a biography of arguably the most influential liberal Supreme Court justice in history. During 34 years on the court, Brennan formed alliances with other justices resulting in majority opinions in such seminal cases as *Roe v. Wade* and *Baker v. Carr*. The book draws on Brennan's private case notes (which are closed to the public until 2017) and dozens of interviews with Brennan himself, providing a detailed account of how the Supreme Court functioned during Brennan's long tenure (from 1956 to 1990).

**David Strauss** (University of Chicago Law School) argues that the concept of a living Constitution that evolves over time is not a formula for untethered judicial activism but a necessary and venerable, mode of interpretation. The author's new work, **The Living Constitution** (Oxford University Press), includes a sustained attack on "originalist" theories of constitutional law and argues instead for a living constitutionalism that follows a tacit common-law approach focused less on the text than on judicial precedent and changing notions of fairness and sound policy.

Constitutional democracy is at once a flourishing idea filled with optimism and promise--and an enterprise fraught with limitations. **Jeffrey K. Tulis** (University of Texas at Austin) and **Stephen Macedo** (Princeton University) have edited and contributed to **The Limits of Constitutional Democracy** (Princeton University Press), a new book that probes the reasons for this ambivalence as well as basic questions about constitutional democracy and its future. The book examines themes such as constitutional failure, various problems associated with the exercise of emergency powers, and whether constitutions can adapt to such globalization challenges as immigration, religious resurgence, and nuclear arms proliferation. In addition to the editors, the contributors are Sotirios Barber, Joseph Bessette, Mark Brandon, Daniel Deudney, Christopher Eisgruber, James Fleming, William Harris II, Ran Hirschl, Gary Jacobsohn, Benjamin Kleinerman, Jan-Werner Müller, Kim Scheppele, Rogers Smith, Adrian Vermeule, and Mariah Zeisberg.

**Essential Supreme Court Decisions: Summaries of Leading Cases in U.S. Constitutional Law** (Rowman & Littlefield) by **John R. Vile** (Middle Tennessee State University) is now in its fifteenth edition as a reference work with concise summaries of important U.S. Supreme Court cases. The guide is organized both topically and chronologically within chapters so that readers can understand how cases fit into a historical context. Each of the over 400 case summaries outlines the legal question at issue, the decision and the reason behind it, votes of the justices, pertinent corollary cases, and notes offering further information on the subject.

## Upcoming Conferences

### **Southern Political Science Association 82nd Annual Meeting**

<http://www.spsa.net/>

**Dates:** January 6-8, 2011

**Location:** Hotel InterContinental, New Orleans, Louisiana

**Proposal deadline:** August 9, 2010

### **Southwestern Political Science Association**

<http://www.sssaonline.org/index.php/annual-meeting>

**Dates:** March 16-19, 2011

**Location:** Las Vegas, Nevada

**Proposal Deadline:** October 15, 2010

### **Midwest Political Science Association (MPSA) Conference**

<http://www.mpsanet.org>

**Dates:** March 31-April 3, 2011

**Location:** Chicago, IL

**Proposals Deadline:** October 8, 2010

### **Western Political Science Association Annual Meeting**

[www.csus.edu/org/wpsa/index.stm](http://www.csus.edu/org/wpsa/index.stm)

**Dates:** April 21-23, 2011

**Location:** Hyatt Regency, River Walk, San Antonio, TX

**Proposals deadline:** September 24, 2010

### **2011 NEPSA Annual Meeting**

<http://www.northeastern.edu/nepsa/>

**Dates:** April 28 - 29

**Location:** Hartford, Connecticut

**Proposal Deadline:** November, 15 2010