

## Part 7.

### VIII. American Constitutional Law:

#### Constitutional Law & Constitutional Development Syllabus: Part A: Constitutional Theory & Governmental Powers

##### A. Recommended texts / collected materials / treatises / casebooks / approaches:

- Abraham, H., Freedom & the Court (most recent ed.).  
Biskupic, J. & Witt, E., The Supreme Court & Individual Rights, 3d ed. (1997).  
Currie, D., The Constitution in the Supreme Court (2 vol., 1985, 1990).  
Currie, D., The Constitution in Congress (vol 1-4. 1997-2006)  
Epstein, L. & Walker, T., Constitutional Law for a Changing Am. (5th ed.) (undergrad.).  
Fisher, L., American Constitutional Law (2001) (undergrad.).  
Graber, M., "Constitutionalism & Pol. Sc.," 3 Perspectives on Politics 121 (2005).  
Gunther, G., Constitutional Law; Individual Rights in Constitutional Law (law school).  
Kelly, A., Harbison, W., & Belz, H., The Am. Constitution (7th ed. (1991)).  
Mason, A. T. & Stephenson, D. (Beane, W.) Am. Constitutional Law (the essays in the early editions - pre-1980 -of this book are a superior introduction to constitutional law).  
McGuire, K., Understanding the U. S. Supreme Court: Cases & Controversies, (2002).  
Murphy, W., Fleming, J., Barber, S., Am. Constitutional Interpretation (2d ed. 1995).  
O'Brien, D., Constitutional Law & Politics (1995) with yearly supplements (undergrad.).  
Pritchett, C., Constitutional Law of the Federal System; Constitution & Civil Liberties (1983).  
Swindler, W., Court & Constitution in the 20th Century (1969-72).  
Tomlins, C. Ed. The United States Sup. Ct. (2005).  
Tribe, L., Am. Constitutional Law (2d ed. 1989) (law school treatise)  
Tushnet, M., The Constitution of the United States of America: a Contextual Analysis (2009).

##### B. Reference Books:

- Epstein, L., Segal, J., Spaeth, H., & Walker, T., The Supreme Court Compendium (1996) (2d ed.).  
Friedman, L. & Israel, F. ed., Justices of the United States Supreme Court 5 vols. (1995).  
Hall, K. ed. Oxford Companion to the Supreme Court (1992).  
Hall, K. ed. The Oxford Guide to United States Supreme Court Decisions (1999).  
Hall, K., A Comprehensive Bibliography of Am. Constitutional & Legal History (5 vols.) (1984, & with 1990 supplement).  
Levy, L., Karst, K., & Mahoney, D., Encyclopedia of the Am. Constitution (1986).  
Veit, H. et al. Creating the Bill of Rights (1991) (documents)

##### C. Collections of case studies about the Court & its justices.

- Cannon, M. & O'Brien, D., ed. Views from the Bench (1985).  
Dunham, A., & Kurland, P. ed., Mr. Justice (rev. ed., 1964).  
Garraty, J., ed., Quarrels that Have Shaped the Constitution 2d ed. (1987).  
George, R. Edr. Great Cases in Constitutional Law (2000).  
Irons, P., Courage of their Convictions (1988)  
Spitzer, R. Ed. Politics & Constitutionalism: The Louis Fisher Connection (2000).  
Steiner, R., Chief Justice (1986).  
Westin, A., ed., The Supreme Court - Views from Inside (1961).  
White, G., The Am. Judicial Tradition (2d ed., 1988).

D. General histories of the Court & American Constitutionalism.

- History of the Supreme Court of the United States, multi vol., multi author.  
Farber, D. & Sherry, S. A History of the Am. Constitution (1990).  
Hoffer, P. Hoffer, W., Hull, N. The Sup. Ct.: An Essential History (2007)  
Irons, P. A People's History of the Supreme Court. (2000).  
Langran, R. The Supreme Court: a Concise History (2004.)  
McCloskey, R. The Am. Supreme Court (2d ed. 1994).  
Mason, A. ed. Free Govt. in the Making (1985 ed) (readings)  
Powe, L. The S.Ct. & the American Elite (2009).  
Schwartz, B. A History of the Supreme Court (1993).  
Semonche, J. Keeping The Faith: a Cultural History of The Supreme Court (1998)  
Urofsky, M. March of Liberty (1988).  
VanBurkleo, S., Hall, K., & Kaczorowski, R. Constitutionalism & American Culture (2002).  
Warren, C., The Supreme Court in United States History (1923).  
Wiecek, W., Liberty under Law (1988).

**E. Constitutional law syllabus, Part A: Constitutional Theory & Governmental Powers.**

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I. The Constitution: Its Objectives & Philosophy of Politics.

A. General studies of American political & legal philosophy: Constitutive themes & their Identification.

- Ackerman, B. We, the People 2 v.  
Ackerman, B. The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy (2005).  
  
Boorstin, D. The Genius of Am. Pol. (1953).  
Cornell, S., "Moving Beyond the Canon of Traditional Constitutional History," 12 Law & History Rev. 1 (1994).  
Curti, M. Growth of Am. Thought (1943).  
Devins, N. & Fisher, L. The Democratic Constitution (2004)  
Diggins, J., The Lost Soul of Am. Politics (1984).  
Elkin, S. Reconstructing the Commercial Republic: Constitutional Design after Madison (2006)  
Genovese, E. The Southern Tradition (1994).  
Hanson, R., The Democratic Imagination in Am.(1986).  
Hartz, L., The Liberal Tradition in Am.(1954).  
Hofstadter, R. The Am. Pol. Tradition (1948).  
Levin, D. Representing Popular Sovereignty: The Constitution in American Political Culture (1999).  
McWilliams, W.C., The Idea of Fraternity in Am.(1973).  
Miller, P., The Life of the Mind in Am.(1965).  
Nedelsky, J. Private Property & the Limits of Am. Constitutionalism (1990)  
Orren, K. "Officers' Rights: Toward a Unified Field Theory of American Constitutional Development," 34 L&SR 873 (2000).  
Parrington, V. Main Currents in Am. Thought (1954-58).  
Scheiber, H. "Amer. Constitutional History & the New Legal History," 68 J. Am. Hist. 337 (1981).  
Smith, R. "Beyond Tocqueville, Myrdal, & Hartz," 87 APSR 549 (1993).  
Smith, R. Civic Ideals (1997).  
Strauber, I. Neglected Policies: Constitutional & Legal Commentary as Civic Education 2002.  
Tocqueville, A., Democracy in Am.(1835).

Wright, B. Am. Interpretations of Natural Law (1931).  
Young, J. Reconsidering Am. Liberalism (1996).

B. The Atlantic Republican Tradition, 1500-1775.

Bilder, M. The Transatlantic Constitution: Colonial Legal Culture and the Empire (2004).  
Boorstin, D. Mysterious Science of the Law (1942).  
Calvin, J. Institutes of the Christian Religion  
Colborne, T. Lamp of Experience (1965).  
Dunn, J. Pol. Thought of John Locke (1969).  
Dunn, J. Locke (1984).  
Ferguson, A. Essay on the History of Civil Society  
Hirschman, A. The Passions & the Interests (1977).  
Hulsebosch, D. Constituting Empire (2005).  
Hume, D. An Enquiry Concerning the Principles of Morals  
Hume, D. Political Essays  
Hutcheson, F. Essay on the Conduct of Passions & Affections (1742).  
Locke, J. Two Treatises on Government (1689) (Laslett, P. ed.);  
Locke, J. Essay On Human Understanding.  
MacPherson, C. Pol. Theory of Possessive Individualism (1962).  
Mandeville, B. The Fable of the Bees  
Mayer, D. "English Radical Whig Origins of Am. Constitutionalism," 70 Wash U. L.Q. 389  
(1992).  
Montesquieu, C. Spirit of the Laws (1745).  
Pocock, J., Ancient Constitution & the Feudal Law (1967).  
Pocock, J., Machiavellian Moment (1975).  
Riley, P. Will & Legitimacy (1982).  
Robbins, C., The Eighteenth Century Commonwealthmen (1959).  
Sellers, M. The Sacred Fire of Liberty: Republicanism, Liberalism, & the Law (1998).  
Smith, A. Theory of the Moral Sentiments (1759).  
Smith, A. Inquiry into the Nature & Causes of the Wealth of Nations (1776).  
Smith, A. Lectures on Jurisprudence  
Steuart, J. Inquiry into Principles of Political Economy  
Trenchard, J. & Gordon, T. Cato's Letters (1720-23).  
Wolin, S. Politics & Vision (1960), last 2 Chaps.  
Yolton, J. ed. John Locke (1969).

C. Colonial Order & Revolutionary Ideology. The Evolution of Political Ideas, 1700-1785.

Adams, W., The First Am. Constitutions (1980).  
Bailyn, B., The Ideological Origins of the Am. Revolution (1967).  
Bailyn, B. Origins of Am. Politics  
Becker, C. The Declaration of Independence (1958).  
Bercovitch, S. Am. Jeremiad (1978).  
Breen, T. The Character of the Good Leader (1970).  
Bushman, R. Puritan to Yankee (1967).  
Corwin, E., The Higher Law Background of Am. Constitutional Law (1928-1929, reprint 1955).  
Corwin, E., "The Progress of Constitutional Theory between the Declaration of Independence & the Meeting of the Philadelphia Convention," 30 Am. Hist. Rev. 511-36 (1925).  
Crowley, J. This Sheba, Self (1974).  
Fiering, N. Jonathan Edwards's Moral Thought & Its British Context (1981).  
Greene, J. The Quest for Power (1972).  
Greene, J. & J.R. Pole, eds. Colonial British Am. (1984).

Hartog, H. "Property as Government in 18th century Am.," 10 J. Legal Stud. 293 (1981).

Hartog, H. Law in the Am. Revolution & the Revolution in Am. Law (1987).

Heimert, A. Religion & the Amer. Mind (1966).

Hatch, N. Sacred Cause of Liberty (1977).

Hoffer, P., Law & People in Colonial Am.(1992).

Isaac, R. The Transformation of Virginia, 1740-1790 (1982).

Jefferson, T. Political Writings

Jefferson, T. Notes on the State of Va.

Kammen, M. Deputyes & Libertyes (1969).

Katz, S. "Thomas Jefferson & the Right to Property in Colonial America," 19 J. Law & Econ. 467 (1976).

Kloppenber, J. "Virtues of Liberalism," 74 J. Am. Hist. 9 (1987).

Lipset, M. The First New Nation (1967).

Lutz, D., Popular Control & Popular Consent (1980).

Lutz, D., The Origins of Am. Constitutionalism (1988).

Konig, D., "A Summary View of the Law of British America," 50 Wm. & Mary Q. 42-50 (1993).

May, H. The Enlightenment in Am. (1976).

Miller, P. Err& into the Wilderness (1956).

Miller, P. The New England Mind (1961).

Miller, P. Roger Williams (1962).

Morgan, E. Am. Slavery, Am. Freedom (1975).

Murrin, J., "The Myth of Colonial Democracy & Royal Decline," 5 Cithara 53 (1965).

Nash, G. Urban Crucible (1979).

Paine, T., Common Sense (1776).

Reid, J. In a Defiant Stance (1977).

Reid, J. In a Rebellious Spirit (1978).

Reid, J. In Defiance of the Law (1981).

Reid, J. Concept of Liberty in the Age of the Am. Revolution (1988).

Reid, J. Concept of Representation in the Age of the Am. Revolution (1989).

Reid, J. Constitutional History of the Am Revolution (1992).

Rossiter, C., Seedtime of the Republic (1953).

Smith, J. Appeals to the Privy Council from the Am. Plantations (1950).

White, M. Philosophy of the Am. Revolution (1978).

Wills, G. Inventing Am.(1979).

Wood, G., The Creation of the Am. Republic (1969).

Wood, G. The Radicalism of the A. Revolution (1992).

#### D. The Convention of 1787.

##### 1. Original Materials & Documents on the Constitution & the Convention of 1787.

U.S. Constitution, Annotated. The U.S. Government's official version. It includes Supreme Court interpretations of the document.

Emerson, T., Haber, & Dorsen, N., Political & Civil Rights in the U.S. (1976, with supplements).

The Federalist (1787).

Farrand, M., Records of the Federal Convention of 1787 (1911 with supplements).

Jensen, M., Kaminski, J. & Saladino, G. Documentary History of the Ratification of the Constitution & the Bill of Rights (1976 -).

Kurland, P. & Lerner, R., The Founder's Constitution (1987).

Madison, J. Papers (1962-)

Paine, T. Rights of Man (1792).  
Smith, P., The Constitution (1975).

## 2. Secondary studies.

For an overview, Gibson, A. Interpreting the Founding (2006).  
Adair, D., Fame & the Founding Fathers (1974).  
Ball, T. & J. Pocock, J. eds. Conceptual Change & the Constitution (1988).  
Banning, L. The Sacred Fire of Liberty (1995).  
Beard, C. An Economic Interpretation of the Constitution (1913).  
Beeman, R., S. Botwin, & E. Carter, eds. Beyond Confederation (1987).  
Bernstein, R. The Founding Fathers Reconsidered (2009).  
Conrad, S. "Metaphor & Imagination in James Wilson's Theory of Federal Union," 13 L&SI 1 (1988).  
Epstein, D., Political Theory of the Federalist (1984).  
Farrand, M. Framing the Constitution (1913).  
Gibson, A. Understanding the Founding: the Crucial Questions (2007).  
Jillson, C. Constitution Making (1988).  
McDonald, F., Novus Ordo Seclorum (1985).  
McDonald, F., We, The People (1958).  
McLaughlin, A., The Confederation & the Constitution (1905).  
Mason, A.T., "The Federalist--A Split Personality," Am. Hist. Rev. (1952).  
Matthews, R. If Men Were Angels (1995).  
Meyers, M. ed. Mind of the Founder (1981) (Madison).  
Riemer, N., James Madison (1986).  
Roche, J. "The Founding Fathers: A Reform Caucus in Action," 55 APSR 816 (1961).  
Shalhope, R., "Toward a Republican Synthesis," 29 William & Mary Q. 49-80 (1972); "Republicanism & Early Am. Historiography," 39 William & Mary Q. 334-52 (1982).  
Sheldon, G. The Political Philosophy of James Madison (2001).  
Stourzeh, G., Alexander Hamilton & the Idea of Republican Government (1970).  
Thomas, G. The Madisonian Constitution (2008).  
Van Doren, C., The Great Rehearsal (1948).  
Wills, G. Explaining Am. (1981).  
Wood, G.L., The Creation of the Am. Republic (1969).  
Yarbrough, J. "Republicanism Reconsidered," 41 Rev. of Pol. 61 (1979).

## E. The Problem of Representation.

Dippel, H. "The Changing Idea of Popular Sovereignty...", 16 J. Early Republic 21 (1996)  
Pitkin, H., The Concept of Representation (1967).  
Pole, J., Political Representation in England & the Origins of the Am. Republic (1966).

## F. Auxiliary Precautions, Federalism & Separated Powers

Federalist # 39, 45, 51.  
Gwyn, W., Meaning of Separation of Powers (1965).  
Mason, A.T., The State's Rights Debate (2nd ed., 1972).

## G. Ratification, & the Antifederalists.

Howe, D., et al., "Symposium on the Anti-Federalist/Federalist Dialogue," 84 Northwestern U. L. Rev. 1 (1989). In. arts by S. Conrad, W. McWilliams, S. Presser, C. Rose

Hutson, J., "Country, Court, & Constitution," William & Mary Q. 337-68 (1981).  
Kenyon, C., The Anti-Federalists (1966).  
Storing, H. (ed.), The Complete Antifederalist (1981). 7 vols.

#### H. One Nation, Indivisible: The Revocation, Amendment, or Expansion of the Constitution

##### a. Cases on Amendment, Article V.

Texas v. White (1869)  
National Prohibition Cases (1920)  
Leser v. Garnett (1922)

##### b. Commentary on Amendment.

Bernstein, R. Amending Am. (1993).  
Kyvig, D. Explicit & Authentic Acts (199 ).  
Lash, K. "Rejecting Conventional Wisdom," 38 Am. J. Legal Hist. 117 (1994).  
Leibinger, S. "James Madison & Amendments to the Constitution," 59 J. So. Hist. 441 (1993).  
Levinson, S. ed. Responding to Imperfection (1995)  
Vile, J. "Am. Views of the Constitutional Amending Process," 35 Am. J. Legal Hist. 44 (1989).  
Vose, C. Constitutional Change (1972).

##### c. Cases on Article IV sec. 3.

DeLima v. Bidwell (1903)  
Gonzales v. Williams (1904)

##### d. Commentary on the Constitution and the Territories: Article IV sec. 3.

Lawson, G. & Seidman, G. Constitution of Empire (2004)  
Sparrow, B. the Insular Cases and the Emergence of American Empire (2006).

#### II. The Separation of Powers and Checks and Balances: Judicial Powers.

##### A. How the Supreme Court Operates:

###### 1. Cases.

U.S. Reports; Supreme Court Reporter; U.S. Reports, Lawyers Edition. Opinions & other decisions of the Supreme Court.  
Federal Reporter. Opinions of Courts of Appeals.

###### 2. Descriptive/Historical Studies of Process.

Conzine, D. "Emergence of Written Appellate Briefs in 19th Century U.S.," 38 Am. J. Legal Hist. 482 (1994).  
Gerber, S. Seriatim: the Supreme Court Before John Marshall (1998).  
O'Brien, D. Storm Center (3d ed. 1996).  
Stern, R. & Gressman, E., Supreme Court Practice (most recent ed.).

##### B. Judicial Review.

1. The Nature of Judicial Review.

a. Original Materials.

Federalist #78, #80, #81, #84.  
Marbury v. Madison\_ (1803)

b. Secondary works (use with caution).

Beard, C.A., "The Supreme Court - Usurper or Grantee?," 27 Pol. Sci. Q 1 (1912).  
Berger, R., Congress v. The Supreme Court (1969).  
Carrese, P. The Cloaking of Power: Montesquieu, Blackstone, & the Rise of Judicial Activism (2003).  
Clinton, Marbury v. Madison & Jud. Review (1989).  
Corwin, E., The Doctrine of Judicial Review & Other Essays (1914).  
Crosskey, W., Politics & the Constitution ... (3 vol., 1953ff).  
Engdahl, D. "John Marshall's Jeffersonian Concept of Jud. Rev.," 42 Duke L.J. (1992).  
Graber, M. "Establishing Jud. Review?" 51 WPQ 221 (1998).  
Kahn, P. The Reign of Law (1997).  
Martens, A. "Reconsidering Jud. Supremacy," 5 Perspectives on Politics 447 (2007).  
Nelson, W. Marbury v. Madison: The Origins & Legacy of Judicial Review (2000).  
O'Fallon, J. "Marbury," 44 Stanford L. Rev. 219 (1992).  
Reid, J. "Another Origin of Jud. Rev.," 64 N.Y.U. L. Rev. 963 (1990).  
Snowiss, S., Judicial Review & the Law of the Constitution (1990).  
Tushnet, M. Ed. Arguing Marbury v. Madison (2005).  
Van Alstyne, W. "A Critical Guide to Marbury v. Madison," Duke L.J. 1 (1969).

2. "Judicial Supremacy?" Normative commentary on judicial review.

a. The "supremacy" idea in the work of Corwin & Mason.

Mason A.T. & Stephenson, D. Am. Const. Law, any early ed. intro, to Chap. 2.  
Whittington, K. "The Road Not Taken: Dred Scott, Jud. Authority, & Pol. Q.," 63 JoP 365 (2001).  
Whittington, K. Political Foundations of Judicial Supremacy: the Presidency, the Supreme Court, and Constitutional Leadership in U.s. History (2007).  
Eakin v. Raub (1825) (Gibson, J., dissenting)  
Dred Scott v. Sanford (1857)

b. Law vs. Natural Justice & the Use of Judicial Review & Judicial Power.

1. Cases

Calder v. Bull (1798)  
The Antelope (1825)  
In re Debs (1895).  
Griswold v. Conn. (1965)

2. Commentary.

Allen, A. The Origins of the Dred Scott Case (2006).  
 Graber, M. Dred Scott and the Problem of Constitutional Evil (2006).  
 Maltz, E. Dred Scott and the Politics of Slavery (2007).  
 Noonan, J. The Antelope  
 Papke, D. The Pullman Case (1999).

c. How representative is the judiciary? Is judicial review counter-majoritarian? The law school professors at war on the issue of constitutional interpretation, with some allies in political science.

1. Political overviews of constitutional jurisprudence & interpretive practice.

Barber, S. & Fleming, J. Constitutional Interpretation (2007).  
 Bobbitt, P., Constitutional Fate (1982).  
 Bobbitt, P. Constitutional Interpretation (1994).  
 Brandon, M. Free in the World (1998).  
 Dahl, "Decision-Making in a Democracy," 6 J. Public Law 284 (1957)  
 Ducat, C., Modes of Constitutional Interpretation (1978).  
 Edelman, M., Democratic Theories & the Constitution (1984).  
 Fleming, J. Securing Constitutional Democracy: The Case of Autonomy (2006).  
 Gillman, H. "Collapse of Constitutional Originalism & Rise of the Notion of a Living Constitution," 11 Stud. Am. Pol. Dev. 191 (1997).  
 Graber, M. "The Non-Majoritarian Difficulty," 7 Studies in Am. Pol. Development 35 (1993).  
 Griffin, S. Am. Constitutionalism (1996).  
 Halpern, S., & Lamb, C. ed. Supreme Court Activism & Restraint (1983).  
 Harris, W. The Interpretable Constitution (1993).  
 Kahn, R., The Supreme Court & Constitutional Theory 1953-1993 (1994).  
 Kalman, L. The Strange Career of Liberal Legalism (1995).  
 Kautz, S. et al. ed. The Sup. Ct. & the Idea of Constitutionalism (2009).  
 Keck, T. "Party, Policy, or Duty: Why Does the Supreme Ct. Invalidate Federal Statutes?" 101 APSR 321 (2007).  
 Levin, D. "Federalists in the Attic: Original Intent, the Heritage Movement, & Democratic Theory," 29 L&SInq 105 (2004).  
 Levy, L., Original Intent & the Framers' Constitution (1988).  
 Lewis, F. The Context of Judicial Activism: the Endurance of the Warren Court Legacy in a Conservative Age (1999)  
 Miller, C., The Supreme Court & the Uses of History (1968).  
 Murphy, W., Harris, R., & Fleming, J. American Constitutional Interpretation  
 Murphy, W. Constitutional Democracy: Creating and Maintaining a Just Political Order (2007).  
 Pickerill, J. M. Constitutional Deliberation in Congress: the Impact of Judicial Review in a Separated System (2004).  
 Powell, T., Vagaries & Varieties of Constitutional Interpretation (1956).  
 Purcell, E. Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry (2007).

Rakove, J., ed., Interpreting the Constitution (1991).  
 Smith, R., Liberalism & Am. Constitutional Law (1984).  
 Sptizer, R. Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning (2008)  
 Ward, K. & Castillo, C. (eds) The Judiciary and American Democracy: Alexander Bickel the Countermajoritarian Difficulty and Contemporary Contemporary Constitutional Theory (2005).  
 Whittington, K. Constitutional Construction (1999).  
 Whittington, K. Constitutional Interpretation: Textual Meaning, Original Intent, & Judicial Review (1999). See commentary by Burgess, 35 L&SR 931 (2001)  
 Whittington, K. "The Road Not Taken," 63 JoP 365 (2001)  
 Whittington, K. "Legislative Sanctions & the Strategic Environment of Jud. Rev." 1 Int'l J. Of Con. Law 446 (2003)  
 Whittington, K. "Interpose Your Friendly Hand: Pol. Support for the Exercise of Jud. Rev. By the US Sup. Ct." 99 APSR 583 (2005).  
 Whittington, K. Pol. Foundations of Jud. Supremacy (2007).

2. Prescriptive arguments for constrained uses of judicial review, including "legal process" & "originalist approaches."

Agresto, J. The Sup. Ct. & Constitutional Democracy (1984).  
 Berns, W. Taking the Constitution Seriously (1987).  
 Bickel, A., The Least Dangerous Branch (1962).  
 Bickel, A. The Morality of Consent (1984).  
 Bork, R. Tradition & Morality in Constitutional Law (1984).  
 Bork, R., The Tempting of Am.(1990).  
 Choper, J., The Supreme Court & the National Political Process (1980).  
 Cox, A. The Warren Court (1968).  
 Easterbrook, F. "Ways of Criticizing the Court," 95 Harv. L. Rev. 802 (1982).  
 Ely, R., Democracy & Distrust (1980).  
 Ely, J. On Constitutional Ground (1996).  
 Farber, D. & Sherry, S. Desperately Seeking Certainty (2002)  
 Faulkner, R. "Bickel's Constitution," 72 APSR 925 (1978).  
 Freund, P., The Supreme Court of the United States (1961).  
 Hand, L., The Bill of Rights (1958).  
 Jacobson, G. Pragmatism, Statesmanship, & the Sup. Ct. (1977).  
 Jacobsohn, G. "Modern Jurisprudence & the Transvaluation of Liberal Constitutionalism," 47 JoP 405 (1985).  
 Nagel, R. Constitutional Cultures (1989).  
 O'Neill, J. Originalism in American Law and Politics: A Constitutional History (2005).  
 Posner, R. "A Political Court," 119 Harv. L. Rev. 31 (2005).  
 Rehnquist, W. "The Notion of a Living Constitution," 54 Texas L. Rev. 693 (1977).  
 Scalia, A. "Originalism," 57 Cincinnati L. Rev. 849 (1989).  
 Thayer, J., "The Origin & Scope of the Am. Doctrine of Judicial Review," 7 Harv L. Rev. 129 (1893).  
 Wechsler, H., "Toward Neutral Principles on Constitutional Law," 73 Harv. L. Rev. 1 (1959).  
 Wellington, H. Interpreting the Constitution (1991)

Wolfe, C. The Rise of Modern Judicial Review (1986).

3. Structuralism, pragmatic legal liberalism, & other prescriptive arguments in support of assertions of judicial review of legislation.

Barber, S. On What the Constitution Means (1984).

Barber, S. The Constitution of Judicial Power (1993).

Barber, S. Welfare and the Constitution (2004).

Black, C., The People & the Court (1960).

Black, C., Structure & Relationship in Constitutional Law (1969).

Brest, P., "Misconceived Quest for Original Understanding," 60 Boston Univ. L. Rev. 204 (1980).

Carter, L., Contemporary Constitutional Lawmaking (1985).

Deutsch, J. "Neutrality, Legitimacy, & the Sup. Ct.," 29 Stanford L. Rev. 169 (1968).

Dworkin, R., Taking Rights Seriously (1977).

Dworkin, R. Law's Empire (1986).

Fleming, J. Securing Constitutional Democracy (2006).

Grey, T. "Do We Have an Unwritten Constitution?," 27 Stanford L. Rev. 703 (1975).

Gunther G. "Subtle Vices of the Passive Virtues," 64 Columbia L. Rev. 1 (1964).

Hirsch, H. A Theory of Liberty (1992).

Mason, A., "Judicial Activism - Old & New," 55 Va. L. Rev. 385 (1969).

Miller, A., & Howell, R., "Myth of Neutrality in Const. Adjudication," 28 Univ. Chicago L. Rev. 661 (1960).

Peretti, T. In Defense of a Political Court. (1999).

Posner, R. Law, Pragmatism, & Democracy (2003)

Powell, H., "The Original Understanding of Original Intent," 98 Harv. L. Rev. 886 (1985).

Powell, H. Constitutional Conscience: the Moral Dimension of Judicial Decision (2008).

Rosen, J. The Most Democratic Branch: How the Courts Serve America (2006)

Rostow, E., "The Democratic Character of Judicial Review," 66 Harv. L. Rev. 193 (1952).

Sunstein, C. The Partial Constitution (1993).

Tribe, L. Constitutional Choices (1985).

Tribe, L. The Invisible Constitution (2008).

Wright, J., "Professor Bickel, the Scholarly Tradition, & the Supreme Court," 84 Harv. L. Rev. 769 (1971).

Yackle, L. Regulatory Rights: Supreme Court Activism, the Public Interest, and the Making of Constitutional Law (2007).

4. Alternative theoretical approaches to judicial review: Natural law, communitarian, political, libertarian, hermeneutical, republican, etc. & related commentary. Also see Part I. II. B. "Liberal" legality. The constitutive jurisprudential ideology of Western law.

Arkes, H., Beyond the Constitution (1990).

Arthur, J. Words that Bind (1996).

Barnett, R. Restoring the Lost Constitution: The Presumption of

Liberty (2003).

- Breslin, B. The Communitarian Constitution (2004).  
Carter, L. Contemporary Constitutional Lawmaking (1985).  
Fisher, L., Constitutional Dialogues (1988).  
Garvey, J. What Are Freedoms For? (1996).  
Glendon, M. Rights Talk (1991).  
Kramer, L. The People Themselves: Popular Constitutionalism and Jud. Rev. (2004).  
LaRue, L. Constitutional Law as Fiction (1995).  
Lipkin, R. Constitutional Revolutions: Pragmatism & the Role of Judicial Review in American Constitutionalism (2000).  
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