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## Original Constitutionalist: Reconstructing Richard S. Kay's Scholarship

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## **Introduction**

Original Constitutionalist: Reconstructing Richard S.  
Kay's Scholarship

YANIV ROZNAI



# Introduction

YANIV ROZNAI \*

“The fundamental principles of [a] society . . . are not the products of the law. They determine what the law is.”

Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 CONN. J. INT’L L. 445, 466 (1991).

## I.

I am more than thrilled to introduce this issue celebrating the work of Prof. Richard S. Kay, the Wallace Stevens Professor of Law at the University of Connecticut School of Law (UConn Law). Prof. Kay joined the Law School faculty after clerking on the Supreme Judicial Court of Massachusetts. He holds a B.A. from Brandeis University, an M.A. in economics from Yale University, and a J.D. from Harvard Law School. During his time at UConn Law, Prof. Kay has taught basic and advanced courses in constitutional law, comparative law, evidence, commercial law, and European Human Rights. From 2014 to 2016 he served as Associate Dean for Research and Faculty Development. He has held visiting professorships at Boston University School of Law, the University of Exeter, the University of San Diego School of Law, and Boston College Law School. Prof. Kay is an elected member of the International Academy of Comparative Law and is a past chair of the Constitutional Law Section of the Association of American Law Schools. Currently, he is the President of the American Society of Comparative Law.

Prof. Kay’s contribution to constitutional law is enormous and it would be an impossible task to summarize it in this brief introduction. He has written over 50 articles and 17 book reviews, co-edited (with Anthony W. Bradley and Law School colleague Mark Weston Janis) a textbook on *European Human Rights Law: Text and Materials* now in its third edition with Oxford University Press, and one edited collection on *Standing to Raise Constitutional Issues: Comparative Perspectives* published by Bruylant. He also authored an important monograph: *The Glorious*

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\* Associate Professor; Harry Radzyner Law School, Interdisciplinary Center Herzliya. I would like to take advantage of this star note and thank Rick Kay for his contribution, support, and inspiration.

*Revolution and the Continuity of Law*, published by the Catholic University of America Press, which is a historical study of the relationship between revolution and legality.<sup>1</sup>

Prof. Kay has greatly influenced, to my mind, constitutional law, constitutional theory, constitutional history, and comparative constitutional law, mainly in the areas of constitutional interpretation and the creation and change of constitutional orders.

## II.

In his many studies, Prof. Kay explores fundamental questions of constitutional theory: what are the foundations of constitutional orders, what is their source of authority, and how they change. Thus, for example, Prof. Kay examined the paradox of illegality that produced the foundation of American constitutional order, explaining that within this paradox there is no contradiction because:

[I]t is exactly its break with prior legality that invested the Constitution with the power it still exercises over us and with its, at least formal, primacy in our legal system. Moreover, this phenomenon is perfectly general. Every legal system is governed, at the end, by principles whose authority cannot be found in law.<sup>2</sup>

Indeed, this is not unique to the American story; the binding nature of the constitution does not derive from a higher positive law but must be found in a non-legal occurrence. Accordingly, such non-legal rule is described by Prof. Kay as the “preconstitutional” rule.<sup>3</sup> “At the end of the day,” Prof. Kay concluded one of his articles, “the authority of all law rests on a political foundation.”<sup>4</sup>

The “preconstitutional rule is always provisional, subject to change when social and political factors require it,” Prof. Kay writes, because the legitimacy of the constitution changes over time and “is always a current matter.”<sup>5</sup> Legitimacy changes over time because perceptions may change over time. And accordingly, the legitimacy of the constitutional authority itself may change over time:

Authority involves an evaluation of the rightness of the constituent events. In this way, it incorporates what may be properly called moral reasons. This does not make its

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<sup>1</sup> See his full publication list in the final section of this Introduction.

<sup>2</sup> Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 58 (1987).

<sup>3</sup> Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 189–90 (1981).

<sup>4</sup> Richard S. Kay, *Constitutional Change and Wade’s Ultimate Political Fact*, 35 U. QUEENSLAND L.J. 31, 46 (2016).

<sup>5</sup> Kay, *The Illegality of the Constitution*, *supra* note 2, at 80.

existence any less a fact but it is a certain kind of fact, one that includes the collective critical judgments of some number of individuals in certain times and places. It is this continuing normative attitude that distinguishes constituent authority from simple constituent power.<sup>6</sup>

So, the idea (or the mere fact) of change is thus critical for the authority of the constitution and also to considerations of “constitutional fundamentals.”<sup>7</sup> Since the social and political ‘pre-legal’ sources upon which law is built change over time, such changes are also manifested in the application and interpretation of law.<sup>8</sup>

How constitutions endure and function over time is another (albeit related) question Prof. Kay has been exploring. He has written on the various mechanisms of constitutional change, such as formal mechanisms of constitution-making and constitution-amending, but also on informal mechanisms as constitutional interpretation.<sup>9</sup> For Prof. Kay, these routes result in a different understanding of constitutional rules; constitutional rules intentionally created through formal constitutional change are different than “the rules that are *attributed* to the Constitution by courts and other public actors.”<sup>10</sup> Prof. Kay’s scholarship thus deeply engages with the concept of time. He wrote of “Constitutional Chrononomy,” in which every constitution is forward-looking, in an attempt to guide and limit future governmental actions but also backward-looking, in order to comprehend the meaning and applicability of constitutional rules and limitations, mainly through courts’ interpretation, which is another major field of study by Prof. Kay.<sup>11</sup>

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<sup>6</sup> Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 721–22 (2011).

<sup>7</sup> Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 CONN. J. INT’L L. 445, 466 (1991).

<sup>8</sup> *Id.* at 447.

<sup>9</sup> See, e.g., Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 111 (1984) (comparing the process by which changes were made to the Canadian constitution in the 1980s with the institution of the United States constitution); Kay, *Constituent Authority*, *supra* note 6, at 117 (discussing the underlying authority for creating constitutions); Richard S. Kay, *Formal and Informal Amendment of the United States Constitution*, 66 AM. J. COMP. L. 243 (2018) (discussing formal and informal mechanisms for amending the United States Constitution).

<sup>10</sup> Richard S. Kay, *Updating the Constitution: Amending, Tinkering, Interpreting*, 67 DRAKE L. REV. 887, 888–89, 901–04 (2019). See also Richard S. Kay, *Two Ways to Rewrite the Constitution*, 2015 WIS. L. REV. ONLINE 25, 25 (exploring two methods for rewriting the Constitution; “adopt[ing] a new text from scratch” and “maintain[ing] the existing text but . . . reinterpret[ing] its rules so as to make it better fit with modern realities”).

<sup>11</sup> Richard S. Kay, *Constitutional Chrononomy*, 13 RATIO JURIS 31, 31–32 (2000).

## III.

Judicial interpretation has been a major focus of Prof. Kay's work,<sup>12</sup> particularly developing the now dominant constitutional approach (with its various streams) to constitutional interpretation—originalism.<sup>13</sup>

And Prof. Kay was described as “[t]he first academic defender of ‘originalism’” after Paul Brest published his now well-known critique of originalism.<sup>14</sup>

Prof. Kay is considered one of the most prominent and notable originalists, defending an original intention version of originalism, according to which (very simply put), judges should apply the rules of the Constitution “in the sense in which those rules were understood by the people who enacted them.”<sup>15</sup> According to Prof. Kay, whereas we never know with full certainty the original intentions of authors, “it is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgment about which result is more likely consistent with that intent.”<sup>16</sup>

Prof. Kay's seminal and widely cited article from 1988 on “Original Intentions in Constitutional Adjudication,”<sup>17</sup> is a must-read for anyone interested in constitutional interpretation. Lee J. Strang describes this work as a “significant scholarly contribution[] to originalist theory.”<sup>18</sup> Regarding this work, Randy E. Barnett wrote, “Richard Kay is one defender of originalism . . . who deserves special mention for the thoughtfulness and cogency of his analysis.”<sup>19</sup> Or as Lawrence Solum described it: “an eloquent and well reasoned defense of originalism.”<sup>20</sup> Further, Bret Boyce writes that “any consistent originalist theory must adopt something like

<sup>12</sup> See, e.g., Richard S. Kay, *Judicial Policy Making and the Peculiar Function of the Law*, 40 CONN. L. REV. 1261 (2008) (exploring “the extent to which judges apply policy already embedded in legal rules or make fresh policy judgments in the course of deciding cases”).

<sup>13</sup> On the rise of originalism and its various streams, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 462–69 (2013); Joel Alica, *Forty Years of Originalism*, 173 POL'Y. REV. 69, 69–76 (2012).

<sup>14</sup> Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9 n.30 (2018) (referring to Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)).

<sup>15</sup> Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1987-1988). Kay's defense of ‘original intention constitutional interpretation’ was elaborated and repeated in other publications, such as Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).

<sup>16</sup> Kay, *Adherence to the Original Intentions*, *supra* note 15, at 244.

<sup>17</sup> *Id.*

<sup>18</sup> Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 874 n.7 (2011).

<sup>19</sup> Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 n.9 (1999).

<sup>20</sup> Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1610 n.42 (1988-1989).

Kay's approach."<sup>21</sup> As Michael Perry concludes, when addressing the questions "[w]hat is originalism?" and "[w]hat is the best originalist approach?", one can "hardly do better than to follow the lead of Richard Kay."<sup>22</sup> Accordingly, as elaborated below, we dedicate a substantive part of this special issue to the question of originalism and constitutional interpretation.

#### IV.

Finally, there is Prof. Kay's contribution to comparative constitutional law. In 1976, Donald Kommers remarked that "comparative constitutional law . . . hardly exists as a taught discipline in the United States. . . . The state of affairs of comparative constitutional law is beginning to change, however."<sup>23</sup>

Indeed, nowadays, as part of 'the renaissance of comparative constitutional law' and its appearance as "the new frontier of constitutional law scholarship,"<sup>24</sup> the place of comparative constitutional law in the United States is completely different from what Kommers described. Much of this, I believe, is thanks to scholars such as Richard Kay. Writing on issues and jurisdictions beyond the American constitutional landscape, including the United Kingdom, Canada, Australia, Ireland, European Union, Hong Kong, and more, Kay's scholarship was a refreshing voice, and one that influenced and inspired generations of scholars. Following in his footsteps, we aimed to include in this symposium comparativist constitutional law scholars from different jurisdictions who write in the tradition of Prof. Kay.

#### V.

The Issue includes contributions from various authors who are friends, colleagues, co-authors, students, or simply scholars admiring the work of Prof. Kay. It is structured as follows:

The first section, includes articles that focus on the substantive themes related to Prof. Kay's work. Starting, first, on questions surrounding

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<sup>21</sup> Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 954 (1998).

<sup>22</sup> Michael J. Perry, *Normative Indeterminacy and the Problem of Judicial Role*, 19 HARV. J. L. & PUB. POL'Y 375, 375 (1996) (referring to Richard S. Kay, "Originalist" Values and Constitutional Interpretation, 19 HARV. J. L. & PUB. POL'Y 335 (1996)).

<sup>23</sup> Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 685-86 (1976). On the disappearance of comparative constitutional law in American Law Schools after its rise in the first few decades after World War II, see David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 3 (2011).

<sup>24</sup> RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 19 (2014).



constitution-making and constitutional change, **Mikołaj Barczentewicz** opens this section with his article *Constituent Power and Constituent Authority* that explores the relationship between Kay's constituent authority, constituent power, and Hartian rules of recognition. **Joel I. Colón-Ríos** follows with *Of Omnipotent Things*, an article that develops a distinction between 'constituent authority' and 'sovereignty,' and applies these concepts to constituent assemblies. Then, in his *Facts, Fictions and Other Artifices: "Constituent Authority" as the Work of Imagination*, **Zoran Oklopcic** explores the relationship between constituent authority, beliefs, and fictions. Still on the question of constituent authority, **Yaniv Roznai** explores possible limitations on constitution-making power in his article *The Boundaries of Constituent Authority*.

Moving to more comparative perspectives, in her article *Ad Hoc Constitutional Reform in the UK*, **Alison Young** explores the various constitutional changes that are taking place in the United Kingdom's constitutional order. From a Canadian perspective, **Warren J. Newman** writes on *Constitutional Chronometry, Legal Continuity, Stability and the Rule of Law: A Canadian Perspective on Aspects of Richard Kay's Scholarship*.

Ending this section with a more intellectual history scholarship, **Peter Oliver** writes on *RTE Latham and Change in the Ultimate Rules of a Legal System*. And in his article *Institutional Change and the Continuity of Law: An Essay in Tribute to Rick Kay*, **Peter L. Lindseth** draws mainly on the work of the famous French institutionalist Maurice Hauriou.

The next group of articles focuses on questions of legal and constitutional interpretation. **Laurence Claus** opens with *Authority and Meaning*, emphasizing the connection between legal meaning and legal status. Addressing the foundations of legal systems and legal interpretation, **Larry Alexander** writes on *Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay*. **James Allan** continues with *The Special Kay Defence of Non-Originalist Judges: A Serial with an Unhealthy Final Ingredient*. **Jeffrey Goldsworthy** then analyzes *Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism*. And writing on the challenges of interpreting constitutional provisions in light of original intentions or expectations, **Mark Graber's** *Original Expectations* concludes this group of articles. Still in the realm of judicial review, **Michael J. Perry's** *Two Constitutional Rights, Two Constitutional Controversies*, explores judicial controversies surrounding equal protection and the right to privacy. This section ends with **Carol Weisbrod's** *Brahmin Connections: A Note on the Vocation of the Law Professor*.

The second section includes a book review of *The Glorious Revolution and the Continuity of Law* (2014, The Catholic University of America Press), by **Anthony W Bradley**.

The third section includes a selection of shorter essays. This section opens with **Aviam Soifer**, with his article *The Paradox of Texts and Constitutional Authority: For Rick Kay, Wallace Stevens Professor*. It is then followed with **Mark Weston Janis**, *Connecticut 1818: From Theocracy to Toleration*. The final article: *Rick Kay: And Now for the Rest of the Story* by **Richard D. Pomp**—a long-time colleague of Prof. Kay at UConn Law—concludes this section with a personal view of Prof. Kay’s career.

Finally, in section four, we have the privilege to include brief responses and thoughts by **Richard S. Kay** himself.

Before ending, I wish to thank then Dean Timothy Fisher and Associate Deans Peter Siegelman and Leslie Levin for their support in organizing this special issue and the conference surrounding it, and Zitmarie Mestre and Deborah King for their organization of a successful academic event. And, above all, I wish to thank the wonderful editorial board of the *Connecticut Law Review* (Volume 52)—especially Editor-in-Chief Alexandria Madjeric, Managing Editor Adam J. Kuegler, and Assistant Managing Editor Hannah F. Kalichman, for their hard and dedicated work on this Issue. In the conference held at UConn School of Law on September 13, 2019 celebrating the work of Prof. Kay, he told the audience:

The process of scholarship to me has been like writing notes, and then putting them in a bottle and sealing the bottle and tossing it over the side into the sea, in the hope, usually the vain hope, that someone somewhere will find that bottle, open it up and read what I said.

He then thanked those in attendance for “noticing those bottles on the beach, picking them up, and taking a look.” Well, we thank you, Rick, for writing these notes and tossing these bottles. All the participants in this special issue, and many others, are grateful that we had the opportunity to learn from you and we are honored to pay tribute to one of the giants in our field.

## VI. PROF. RICHARD S. KAY’S PUBLICATION

### A. *Books*

THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW (2014).

EUROPEAN HUMAN RIGHTS LAW (3d ed. 2008) (with Anthony W. Bradley and Mark Janis).

STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES (2005) (with International Academy of Comparative Law).

B. *Articles*

1. *Response to the Contributors*, 52 CONN. L. REV. 1719–61 (2021).
2. *Updating the Constitution: Amending, Tinkering, Interpreting*, 67 DRAKE L. REV. 887–907 (2019).
3. *Democracy, Mixed Government and Judicial Review*, in LAW UNDER A DEMOCRATIC CONSTITUTION: ESSAYS IN HONOUR OF JEFFREY GOLDSWORTHY 199–226 (Lisa Burton Crawford, Patrick Emerton & Dale Smith eds., 2019).
4. *Formal and Informal Amendment of the United States Constitution*, 66 AM. J. COMP. L. 243–68 (2018).
5. *Examining Constitutional Transitions*, 37 NAT’L J. CONST. L. (CAN.) 35–41 (2017).
6. *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1–25 (2017).
7. *Constitutional Change and Wade’s Ultimate Political Fact*, 35 U. QUEENSLAND L.J. 31–46 (2016).
8. *Two Ways to Rewrite the Constitution*, 2015 WIS. L. REV. ONLINE 25–30.
9. *Retroactivity and Prospectivity of Judgments in American Law*, in EVA STEINER, COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS 209–46 (2015) (abridged version published at 62 AM. J. COMP. L. 37–68 (2014)).
10. *Changing the United Kingdom Constitution: The Blind Sovereign*, in SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN AND INTERNATIONAL PERSPECTIVES 98 (Richard Rawlings et al. eds., 2013).
11. *Constituent Authority*, 59 AM. J. COMP. L. 715 (2011) (Turkish translation in CONSTITUTION MAKING AND CONSTITUTIONAL CHANGE: PROSPECTS FOR CONSTITUTIONAL CHANGE IN TURKEY 49 (O. Ergül ed., 2011)).
12. *Constitutional Courts as “Positive Legislators” in the United States*, 58 AM. J. COMP. L. 479–504 (2010) (with Laurence Claus).
13. *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).
14. *Judicial Policy Making and the Peculiar Function of Law*, 26 U. QUEENSLAND L.J. 237 (2007), revised in 40 CONN. L. REV. 1261 (2008).
15. *Causing Death for Compassionate Reasons in American Law*, 54 AM. J. COMP. L. 693 (2006), reprinted in EUTHANASIA IN INTERNATIONAL AND COMPARATIVE PERSPECTIVE 257–83 (M. Groenhuijsen & F. van Laanen eds., 2006), and in RIGHT TO LIFE AND RIGHT TO DEATH: A STUDY (A. Menon ed., 2007).
16. *Canada’s Constitutional Cul de Sac*, 35 AM. REV. CAN. STUD. 705 (2005).

17. *Standing to Raise Constitutional Issues: A Comparative Analysis*, in *STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES 1* (R. Kay ed., 2005), reprinted in *CONVERGENCE OF LEGAL SYSTEMS IN THE 21ST CENTURY* (2006).
18. *The European Convention on Human Rights and the Control of Private Law*, 5 *EUR. HUM. RTS. L. REV.* 466 (2006).
19. *Michael Perry's Right to Religious Freedom*, 10 *ROGER WILLIAMS L. REV.* 427 (2005).
20. *Sir Thomas Jenner (1638–1707)*, *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004).
21. *William Oldys (1636–1708)*, *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (2004).
22. *Rights, Rules and Democracy*, in *PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS* 117–34 (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., 2003). A revised version was published at 13 *ESPAÇO JURÍDICO* 151, 151–67 (2012).
23. *The Secession Reference and the Limits of Law*, 10 *OTAGO L. REV.* 327, 327–44 (2003).
24. *The European Human Rights System as a System of Law*, 6 *COLUM. J. EUR. L.* 55, 55–71 (2000).
25. *William III and the Legalist Revolution*, 32 *CONN. L. REV.* 1645, 1645–64 (2000).
26. *Constitutional Chrononomy*, 13 *RATIO JURIS* 31, 31–48 (2000).
27. William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 *AM. J. COMP. L.* 437, 437–62 (Supp. 1998).
28. *American Constitutionalism*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16–63 (Larry Alexander ed., 1998).
29. *Sovereignty in the New Hong Kong*, 114 *LAW Q. REV.* 189, 189–93 (1998).
30. *The Creation of a Legal System: European Human Rights*, in *MEMORY, HISTORY AND CRITIQUE: EUROPEAN IDENTITY AT THE MILLENNIUM: PROCEEDINGS OF THE FIFTH CONFERENCE OF THE INTERNATIONAL SOCIETY FOR THE STUDY OF EUROPEAN IDEAS AT THE UNIVERSITY FOR HUMANIST STUDIES, UTRECHT, THE NETHERLANDS, AUGUST 19–24, 1996* (F. Brinkhuis & E. Talmor eds., 1998).
31. *Legal Rhetoric and Revolutionary Change*, 7 *CARIBBEAN L. REV.* 161, 161–210 (1997).
32. *Jus Tertii Standing and Constitutional Review in Canada*, 7 *NAT'L J. CONST. L.* 129, 129–69 (1997).
33. "Originalist" Values and Constitutional Interpretation, 19 *HARV. J. L. & PUB. POL'Y* 335, 335–41 (1996).

34. *The Legitimacy of the Constitutional Judge and Theories of Interpretation in the United States*, 42 AM. J. COMP. L. 517–53 (1994) (with William B. Fisch).
35. *The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329–60 (1993).
36. *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT’L L. 217–25 (1993).
37. *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361–71 (1992).
38. *Comparative Constitutional Fundamentals*, 6 CONN. J. INT’L L. 445–75 (1991).
39. *Substance and Structure as Constitutional Protections: Centennial Comparisons*, 1989 PUB. L. 428–39.
40. *Original Intentions, Standard Meanings and the Legal Character of the Constitution*, 6 CONST. COMMENT. 39–50 (1989).
41. *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226–92 (1988).
42. *The Illegality of the Constitution*, 4 CONST. COMMENT. 57–80 (1987).
43. *Fairness and Function in the New York Tax Appeal System: Proposals for Reform*, 49 ALB. L. REV. 352–402 (1985) (with Richard Pomp and Robert Plattner).
44. *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667–80 (1984).
45. *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111–63 (1984).
46. *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. 23–41 (1982).
47. *Preconstitutional Rule*, 42 OHIO ST. L.J. 187–207 (1981).
48. *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667–725 (1980).
49. *Property Tax Exemptions and Alternatives: Constitutional Considerations*, in GREATER HARTFORD CHAMBER OF COMMERCE, PROPERTY TAX EXEMPTIONS FOR NON-PROFIT INSTITUTIONS: PROBLEMS AND PROPOSALS (Richard D. Pomp ed., 1978).
50. *Making Sense of the Prejudgment Seizure Cases*, 64 KY. L.J. 705–27 (1976) (with Harold Lubin).
51. *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1–43 (1975).
52. *Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401–24 (1973) (with Daniel Segal).

C. *Book Reviews*

1. *Book Review on Frankenberg, Comparative Constitutional Studies: Between Magic and Deceit (2018)*, 67 AM. J. COMP. L. 694–99 (2018).
2. *Book Review on Rawls, The Law of Peoples (1999)*, 7 EUR. LEGACY 247–48 (2002).
3. *Book Review on McAfee, The Written Constitution and Popular Sovereignty: The Founders' Understanding (2000)*, 44 AM. J. LEGAL HIST. 430–32 (2000).
4. *Book Review on Elazar, Covenant and Constitutionalism: The Great Frontier and the Matrix of Federal Democracy (1998)*, 5 EUR. LEGACY 305–06 (2000).
5. *Book Review on Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism (1993)*, 23 AM. REV. CAN. STUD. 624–27 (1993).
6. *Book Review*, 59 J. S. HIST. 349 (1993) (reviewing 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993)).
7. *Book Review*, 22 AM. REV. CAN. STUD. 619 (1992) (reviewing DAVID A.A. STAGER, LAWYERS IN CANADA (1990)).
8. *Book Review*, 8 CONST. COMMENT. 515 (1991) (reviewing CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787 (1988)).
9. *Book Review*, 7 CONST. COMMENT. 434 (1990) (reviewing RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1990)).
10. *The Bork Nomination and the Definition of "The Constitution"*, 84 NW. U. L. REV. 1190 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA (1990)).
11. *Constitutional Cultures: Constitutional Law*, 57 U. CHI. L. REV. 311 (1990) (reviewing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989)).
12. *Moral Knowledge and Constitutional Adjudication*, 63 TUL. L. REV. 1501 (1989) (reviewing MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988)).
13. *Book Review*, 4 CONN. J. INT'L L. 239 (1988) (reviewing DAVID B. SWINFEN, IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVY COUNCIL, 1833-1986 (1987)).
14. *Book Review*, 18 CONN. L. REV. 207 (1985) (reviewing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985)).
15. *Book Review*, 13 CONN. L. REV. 203 (1980) (reviewing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)).

16. Book Review, 10 CONN. L. REV. 801 (1978) (reviewing RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977)).
17. Book Review, 12 HARV. C.R.-C.L. L. REV. 219 (1977) (reviewing ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975)).