

Summer 2010

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### Recommended Citation

Carol Nackenoff, *Landmarks, Portents, or Just Curves in the Road*, 45 *Tulsa L. Rev.* 659 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol45/iss4/8>

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# LANDMARKS, PORTENTS, OR JUST CURVES IN THE ROAD?\*

Carol Nackenoff\*\*

Barbara A. Perry, *The Michigan Affirmative Action Cases* (U. Press Kan. 2007). Pp. 210. \$35.00.

David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas* (U. Press Kan. 2009). Pp. 214. \$16.95.

David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (U. Press Kan. 2010). Pp. 144. \$29.95.

The Landmark Law Cases and American Society series from the University Press of Kansas has been offering high-quality materials designed for classroom use and for general audiences since 1997.<sup>1</sup> Beginning with volumes on gender-based affirmative action in hiring and on a pair of cases that helped determine the legal status of rebellious southern states and legal rights of former slaves following the Civil War and continuing to the most recent volumes, among which are *Capital Punishment on Trial*<sup>2</sup> and *Fugitive Slave on Trial: The Anthony Burns Case and Abolitionist Outrage*,<sup>3</sup> these texts take up many contentious legal issues and political controversies that shaped law and politics and impacted American political development. The series received the Scribes Award in 2008 from the American Society of Writers on Legal Subjects.

The format of each series volume is the same, including a useful chronology, case list, and a bibliographic essay. The decision, presumably made by series editors Peter Charles Hoffer and N.E.H. Hull, to use a bibliographic essay rather than footnotes or endnotes is not the strongest suit of these treatments; while a bibliographic essay provides some introduction to different themes and issues, it makes it nearly impossible to use the book to follow up specific points or claims. Strong, curious undergraduates and general readers wanting to dig deeper could have gotten more out of these volumes if they had been documented in a more traditional scholarly manner. Such documentation

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\* The author would like to thank Kelly Schoolmeester, Swarthmore College class of 2010, for assistance on this project.

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1. The first volumes in the series were Melvin I. Urofsky, *Affirmative Action on Trial: Sex Discrimination in Johnson v. Santa Clara* (U. Press Kan. 1997), and Harold M. Hyman, *The Reconstruction Justice of Salmon P. Chase: In Re Turner and Texas v. White* (U. Press Kan. 1997).

2. David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (U. Press Kan. 2010).

3. Earl Maltz, *Fugitive Slave on Trial: The Anthony Burns Case and Abolitionist Outrage* (U. Press Kan. 2010).

would have made it possible to determine who is contesting what or engaging whom in debate. The volumes are, however, engaging and valuable. Generally, no prior knowledge of the cases, the doctrines and tests employed by the Court, or the constitutional controversies in which these cases are rooted is required, although there is some variation on this point among the three texts reviewed.

The recent volumes considered here invite the consideration: What makes a landmark case? A case may become the focus of unusual historical interest; it may indeed mark some sort of turning point in the development of the law (or of a political controversy); it may illustrate in a particularly vivid manner a continuing controversy; or it may be a vehicle to highlight the heroic stance or constitutional vision of a specific pivotal Justice (a role Sandra Day O'Connor performs in Barbara Perry's treatment of *Grutter v. Bollinger*<sup>4</sup>). But a case or cluster of cases identified for "landmark" treatment may not function like an edifice or geological formation that the traveler can count on with certainty to guide the way. Indeed, some "landmark" cases, decided by a narrowly divided Court, may stand only a short while. Some leave relatively weak legacies but encourage aspirations as *Furman v. Georgia*<sup>5</sup> might serve for opponents of the death penalty. Sometimes, "landmark" cases teeter on a precipice, decided by the narrowest margin, and possibly representing a 'last hurrah' for a particular constitutional vision, as might arguably be the case with *Grutter*. After all, with Justice Samuel Alito replacing Justice O'Connor as the swing vote in the next round of diversity-as-compelling-state-interest-in-education issues, President Obama's new Court appointments are unlikely to matter. Cases identified by their admirers as landmarks may, then, even be unstable more like sandcastles at the beach than geological formations that will remain recognizable and reliable markers for long periods.

This brings me to teleology. For some of the recent authors in the University Press of Kansas series, the cases about which they write are situated in linear and often progressive narratives. Or they represent heroic saves of some principle or ideal, owing to the mettle of a specific (and highly admired) Justice. This is a kind of popular constitutional history, to be sure, but it often suffers from what has been called a "Whiggish narrative."<sup>6</sup> As the winners of constitutional battles seek to enshrine their triumphant vision of constitutional principles and rights as the just, principled evolution of the law, democratically supported and girded with near-holy momentum, stories about where the Nation has been and where it is going are forged. The New Deal era Court has been lionized, Ken Kersch argues, for expanding individual rights and liberties and for prying the Nation loose from antiquated economic doctrines.<sup>7</sup> Contemporary constitutional liberalism is seen as the apotheosis of legal development; we only need to perfect this constitutional revolution.<sup>8</sup> In the liberal narrative, the Court plays a vital role in forging and legitimating progressive victories in law and polity. However, since at least the Reagan years, a regime change has been in the making, with efforts to rewrite

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4. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

5. *Furman v. Ga.*, 408 U.S. 238 (1972).

6. Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law 2-5* (Cambridge U. Press 2004).

7. *Id.*

8. *Id.* at 4-5.

our constitutional narrative however much liberal legal theorists would seek to deny its legitimacy.<sup>9</sup> Steven Teles has explored the conservative mobilization in law schools through organizations that include the Olin Foundation, the Federalist Society, the Center for Individual Rights, and in the judiciary, making clear how challenging it has been for conservatives to make inroads into the dominant liberal paradigm.<sup>10</sup> While simple, teleological narratives are attractive to students and to those coming fresh to legal issues, it is important to encourage these very constituencies to think critically about, and at least pose some questions to, dominant constitutional narratives. Otherwise, battles - which all of these constitutional controversies are - can be one sided. This is an issue, although in widely varying degrees, for these three treatments of “landmark” cases.

The Landmark Law Cases series seeks out good storytelling and is very successful in achieving that goal. The human dimension and the *dramatis personae* are foregrounded. Storytelling draws in students and general readers, and these volumes usually succeed in having audiences realize that the issues at hand are far richer and more complex than they had imagined. But storytelling simplifies, and these volumes all make some decisions about how to simplify. From the perspective of someone who wants students to understand developments and complexities in constitutional law, I find some of these decisions more successful than others. Storytelling can also stand in tension with a goal of problematizing dominant narratives.

Some other narrative treatments designed for the classroom have done a very nice job of exposing students to the case while telling complex legal stories. Gregg Ivers and Kevin T. McGuire edited a nice volume, *Creating Constitutional Change*,<sup>11</sup> in which each short chapter, written by a different legal scholar, combines storytelling with skillful teaching. Using a similar format, the Foundation Press (Thomson-West) Law Stories series edited by Paul Caron, focused on leading cases in important areas of the law, goes beyond parties and disputes to the legal and historical context of cases and the impact and lasting importance of each case. Individual volumes cover a number of cases in a specific area of law. The one I have used in the classroom, *Environmental Law Stories*,<sup>12</sup> is pitched for an audience that is somewhat more sophisticated than the intended audience for the Kansas series - an audience with some background in law and courts and perhaps even some exposure to law school. The chapters were tough reads for students with modest training in American politics, policy, and law, but the narratives can be read, even by good undergraduates, alongside other materials that treat the legal and policy issues in a more introductory fashion. They strike a different balance between human interest, narrative, and explanation of legal controversies and issues than does the Kansas series.

Other conceptions for bringing cases alive in the classroom, such as the two edited

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9. *Id.* at 5-11 (He takes especial aim at John Rawls, Ronald Dworkin, and Bruce Ackerman.).

10. Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton U. Press 2008). See also Amanda Hollis-Brusky, *The Federalist Society and the Unitary Executive: An Epistemic Community at Work* (U. Cal. Berkeley Inst. Govtl. Stud. Working Paper Series, Sept. 3, 2009) (available at <http://ssrn.com/abstract=1456598>).

11. *Creating Constitutional Change: Clashes over Power and Liberty in the Supreme Court* (Gregg Ivers & Kevin T. McGuire eds., U. Va. Press 2004) (a volume in the Constitutionalism and Democracy series).

12. *Environmental Law Stories* (Richard J. Lazarus & Oliver A. Houck eds., Found. Press 2005).

by Jack M. Balkin for New York University Press, assume student familiarity with and interest in the case but model for students what it means to problematize various strands of legal reasoning.<sup>13</sup> *What Brown v. Board of Education Should Have Said* contains some outstanding chapters; while I do not teach them all, students will get a first-rate exposure to the ways that prominent contemporary legal scholars think about the meaning and relevance of *Brown*<sup>14</sup> (and constitutional theory more broadly).<sup>15</sup> Most of the chapters are accessible to a broad audience. The highly lucid, provocative introductory chapter by Balkin, “*Brown as Icon*,” is required reading even in my introductory American Politics class.<sup>16</sup> Balkin’s *What Roe v. Wade Should Have Said* does the same for another landmark.<sup>17</sup>

Mark Tushnet edited a superb reassessment of *Marbury* on the occasion of its 200th anniversary,<sup>18</sup> *Arguing Marbury v. Madison*, beginning with the device of rearguing the case before the bench (including a chapter by *Marbury*’s 2003 counsel), and continuing with perspectives on *Marbury* from prominent contemporary legal scholars.<sup>19</sup> It, too, is a very useful classroom volume, though again, pitched at a higher level of sophistication than is intended by the Kansas series. While there are many more volumes and even series (e.g. the Bedford Series in History and Culture) that treat individual cases or a number of “greatest hits” by the Court, I point only to these specific recent efforts to bring cases and controversies to life in the classroom.

Authors of the three Landmark Law Cases volumes discussed in this article have differing degrees of personal and professional engagement with the case histories they examine. David Oshinsky, Jack S. Blanton Chair in History at the University of Texas and winner of the Pulitzer Prize for *Polio: An American Story*,<sup>20</sup> is an author of wide-ranging interests and award-winning books, including *Worse Than Slavery*<sup>21</sup> and *A Conspiracy So Immense: The World of Joe McCarthy*.<sup>22</sup> Oshinsky appears to have had no particular engagement with the death-penalty issue prior to writing *Capital Punishment on Trial*, but with his writings on race and the Constitution, political and cultural conflicts in American politics, and his gift for reaching wide audiences, he was asked to undertake the *Furman* study by the series editors. Barbara Perry, who sat in the front row of the Supreme Court when the *Grutter* and *Gratz*<sup>23</sup> decisions were announced, is a Senior Fellow at the University of Virginia Miller Center. Author of a number of

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13. See *What Roe v. Wade Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Decision* (Jack M. Balkin ed., N.Y.U. Press 2005) [hereinafter *What Roe v. Wade Should Have Said*]; *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision* (Jack M. Balkin ed., N.Y.U. Press 2001) [hereinafter *What Brown v. Board of Education Should Have Said*].

14. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

15. *What Brown v. Board of Education Should Have Said*, *supra* n. 13.

16. See *id.* at 3-28.

17. *What Roe v. Wade Should Have Said*, *supra* n. 13. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

18. *Marbury v. Madison*, 5 U.S. 137 (1803).

19. *Arguing Marbury v. Madison* (Mark Tushnet ed., Stan. U. Press 2005).

20. David M. Oshinsky, *Polio: An American Story* (Oxford U. Press 2005).

21. David M. Oshinsky, “*Worse Than Slavery*”: *Parchman Farm and the Ordeal of Jim Crow Justice* (Free Press 1996).

22. David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (Free Press 1983).

23. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

books and articles on “the Supremes” and on civil rights and liberties,<sup>24</sup> and coauthor with Henry J. Abraham of *Freedom and the Court: Civil Rights and Liberties in the United States*,<sup>25</sup> now in its eighth edition, Perry is also a natural to tell the story of *Grutter and Gratz*. David A. J. Richards, Edwin D. Webb Professor of Law at New York University School of Law, has been a longtime advocate for tolerance and rights for gay and lesbian Americans. With his previous publications, *Toleration and the Constitution*<sup>26</sup> and *Women, Gays, and the Constitution*,<sup>27</sup> recent work (with Carol Gilligan) on *The Deepening Darkness: Patriarchy, Resistance, and Democracy’s Future*,<sup>28</sup> and a recently released project on fundamentalism in American religion and law,<sup>29</sup> Richards is well-placed to narrate the story of *Bowers*<sup>30</sup> and *Lawrence*.<sup>31</sup>

Richards’s posture as an engaged and passionate advocate in the struggle he chronicles, however, comes through clearly in his volume, which makes *The Sodomy Cases*<sup>32</sup> a different kind of read than the other two Landmark Law Cases volumes reviewed here. Regardless of sympathies (and contemporary students tend to be quite sympathetic to the cause of gay marriage), this is the volume that most subscribes to the Whiggish narrative: we (and the Court) are progressively getting it. To be fair, of the three issues enjoined in these volumes, the case law on same-sex privacy rights, liberty interests, and possibly even equal protections<sup>33</sup> fits more readily into a narrative of unfolding rights protection. The ability of employers, schools, or the government to recognize race for purposes of remedying past inequalities has been severely curtailed and arguably brought to a halt.<sup>34</sup> And no sense of an “evolving standard of decency” or vision of equal protection has eliminated capital punishment as a prerogative of states or the federal government.<sup>35</sup> Nevertheless, David Richards’s stance gives the narrative of *Bowers v. Hardwick* and *Lawrence v. Texas* the feel of the inexorable unfolding of a rights revolution nearing its apotheosis. While the sense of struggle is lively, competing constitutional visions are not quite as well presented as in the other volumes.

Students learn best when they are engaged, and all of these treatments are likely to get them to care. *Capital Punishment on Trial* stands out for its readability; students will

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24. See Barbara A. Perry, *“The Supremes”’: An Introduction to the U.S. Supreme Court Justices* (2d ed., Peter Lang Publ. 2009).

25. Henry J. Abraham & Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (8th ed., Oxford U. Press 1967).

26. David A. J. Richards, *Toleration and the Constitution* (Oxford U. Press 1986).

27. David A. J. Richards, *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (U. Chi. Press 1998).

28. Carol Gilligan & David A. J. Richards, *The Deepening Darkness: Patriarchy, Resistance, and Democracy’s Future* (Cambridge U. Press 2008).

29. David A. J. Richards, *Fundamentalism in American Religion and Law: Obama’s Challenge to Patriarchy’s Threat to Democracy* (Cambridge U. Press 2010).

30. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

31. *Lawrence v. Tex.*, 539 U.S. 558 (2003).

32. David A. J. Richards, *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas* (U. Press Kan. 2009).

33. See *Romer v. Evans*, 517 U.S. 620 (1996).

34. See e.g. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

35. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

find it engaging, informative, and easy to follow.<sup>36</sup> Oshinsky is particularly compelling as he examines the history of the death penalty in America and its popularity in the South as a tool of racial control. The book, too, conveys a very lively sense of death penalty activism, litigation strategy, and the politicization of the death penalty in electoral politics. Readers have a vivid sense not only of the views of individual Justices but how the death penalty issue impacted relations among the Justices. The author works carefully as he introduces concepts, defines terms, and presents core legal issues. The text assumes very little knowledge of the Supreme Court or of the criminal justice system on the part of its readers. While this makes following the narrative about those on trial for capital murder easy, the human dimensions do not pack a great deal of explanatory power—that is, narratives about personal histories do not help students understand the Court's decisions. The extensive, careful consideration of *Furman*, *Gregg*,<sup>37</sup> and some of the earlier cases in this narrative are not as well matched by what follows from *McCleskey*<sup>38</sup> forward.

What more might one want to see in and from *Capital Punishment on Trial*? These are designed to be compact treatments; the longest of these is 184 pages of text (not including the chronology, bibliographic essay, and index) and the shortest is 125 pages. Nevertheless, there are a few things that would have made this volume even better. While mentioning the Baldus study, Oshinsky does not discuss the Court's treatment of statistics, patterned outcomes, and disparate impact analysis in Equal Protection adjudication.<sup>39</sup> It could also be clearer whether and how disagreements about the constitutionality of the death penalty figured—or did not figure—in battles over nominations to the Supreme Court. One might also wish that Oshinsky had explained a bit more about appeals and the appellate process. Finally, although Oshinsky continues his narrative through *Baze v. Rees*,<sup>40</sup> the 2008 ruling on whether lethal injection constitutes cruel and unusual punishment, the treatment of post-*McCleskey* case law is a bit disappointing. It is not as full as one would like if students are to understand the state of the law up to the present time. Were any topics to be added for brief coverage, my vote would have been for recent case law from *Walton*,<sup>41</sup> *Apprendi*,<sup>42</sup> and *Ring*<sup>43</sup> through *Blakely*<sup>44</sup> and *Booker*,<sup>45</sup> as a new set of decisions raises questions about the role of judges and juries in capital sentencing. This would provide one more opportunity to reflect on the relationship between consistency and fairness in sentencing on the one hand, and jury discretion and responsiveness to sensational details (potentially introducing bias and caprice in distinguishing between life in prison and death) on the

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36. Oshinsky, *supra* n. 2.

37. *Gregg v. Ga.*, 428 U.S. 153 (1976).

38. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

39. Oshinsky, *supra* n. 2, at 94-108. See also David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983).

40. *Baze v. Rees*, 553 U.S. 35 (2008).

41. *Walton v. Ariz.*, 497 U.S. 639 (1990).

42. *Apprendi v. N.J.*, 530 U.S. 466 (2000).

43. *Ring v. Ariz.*, 536 U.S. 584 (2002).

44. *Blakely v. Wash.*, 542 U.S. 296 (2004).

45. *U.S. v. Booker*, 543 U.S. 220 (2005).

other. Of course, what constitutes adequate counsel in death penalty cases, and the Court's reluctance to say very much about this, would be another interesting issue.

The earliest of these volumes, *The Michigan Affirmative Action Cases*,<sup>46</sup> was published in 2007, after *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>47</sup> had been accepted for oral argument by the Supreme Court but prior to a decision. Nevertheless, this engaging text should have considerable staying power, and the final chapter discussing what has happened as a result of *Grutter* and *Gratz* nicely examines how actors and activists altered their behavior and strategy. Perry has done a laudable job with *Bakke*<sup>48</sup> and other precedents in the chapter "Bakke to the Future," and I find this the best of the three volumes under review in terms of understanding the legal context within which the cases take place. The blend of human-interest stories and legal analysis works rather well in this volume, although the narrative bogs down some as we wind our way through the appeals process. Perry has done a good job in treating the impact of changing personnel on the Court on this issue, on the role of all three branches in affirmative action, and on shifts in public opinion about affirmative action in response to administration rhetoric.

There are a few important issues, however, that should have been covered better. Perry does not make clear that *City of Richmond v. J.A. Croson Co.* sets the standard of review at strict scrutiny for state-initiated affirmative action in hiring and contracting (Marshall's lengthy dissent, acknowledging this settling, is not mentioned).<sup>49</sup> Perry does not touch upon another extremely important and related development, namely the Court's reading of the Fourteenth Amendment, § 5's remedial ("prophylactic"<sup>50</sup>) power and the tension in the years between *City of Richmond* and *Adarand* over whether the federal government might have remedial, affirmative action powers that states lacked. The Court's curbing of possible legislative responses to what Congress believed to be persisting issues of discrimination under this section is an important story that impacts other recent developments in the law and relations between the branches. While § 5 interpretation is a bit complex, I believe students and lay readers could be made to understand it, and that a treatment of this issue is very important for understanding what kind of equal protection visions Congress may attempt to secure by acting upon state actors. Were there more time and space, it would have been useful to hear about the Court's declining interest in oversight of school districts that were required to design desegregation plans and the sense, at least on the part of a number of Justices, that resegregation (absent current discriminatory intent) fails to present a constitutional issue.

David Richards's exploration of *Bowers* and *Lawrence* in *The Sodomy Cases* provides a very fine treatment of the Court decisions, concurrences, and dissents; the background of each case; and aftermath.<sup>51</sup> The depth of treatment of the two major cases and of *Romer* promotes a strong and rich understanding of these cases richer by comparison to the crisper and more concise treatment of *Furman* and *Gregg* in the

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46. Barbara A. Perry, *The Michigan Affirmative Action Cases* (U. Press Kan. 2007).

47. *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

48. *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978).

49. *City of Richmond*, 488 U.S. at 493-498.

50. *See Nev. Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721, 727-728 (2003).

51. Richards, *supra* n. 32.



*Capital Punishment on Trial*. Like the other works reviewed, Richards provides a well-written, engaging, easy-to-read volume. The post-*Lawrence* chapter considers the likely fate of same-sex marriage and, briefly, the Right's charge that *Lawrence* will lead to the decriminalization of other sexual offenses.<sup>52</sup> As noted earlier, Richards also provides the most romantic narrative about the law of the three authors: we are witness to a democratizing process and to the Court's increasing recognition of universal human rights, including recognition of a basic human right to an intimate life.<sup>53</sup> The author's passions and investment in the outcome of this battle are highly pronounced throughout.

Richards provides an introduction to the history of homosexuality that is more social history than legal and jurisprudential history; the first chapter begins with the construction of homosexuality in Western culture. This is a broad-brush *mise-en-scène* for these series books. An intelligent and curious reader would like to better understand the treatment of homosexuality in American law and the kinds of prosecutions persons charged with same-sex sodomy faced under various state laws in the many years before *Griswold*<sup>54</sup> begins building the case for privacy. And, although the treatment of *Bowers*, *Lawrence*, and *Romer* is extremely good, this careful, close attention to arguments and counterarguments on the bench doesn't tend to carry over as well into the coverage of surrounding or ensuing material, where Richards sometimes reverts to the wide lens. Invoking not only jurists and legal scholars (Learned Hand, John Hart Ely, Cass Sunstein) but also Shakespeare, Nathaniel Hawthorne, and Adrienne Rich, Richards, unlike the other Kansas authors considered here, is involved in express advocacy.

It is interesting to note that Justice Lewis Powell plays a central but somewhat troubling role in all three case histories. Powell, author of *Bakke*, stood with the conservatives on part of the opinion and with the liberals on another part. Thus, the only thing holding *Bakke* together was Powell's vision of the law: no racial quotas, but race as a plus factor among others (as used by his alma mater, Harvard) could pass muster since diversity could be a compelling state interest. When this understanding was finally put to the test twenty-seven years later, *Grutter* and *Gratz* seem to reveal that *Bakke* is still good constitutional law. On capital punishment, Oshinsky notes that Justice Powell, when asked in retirement whether he would go back in time to change one of his votes on the Court, replied, "Yes, *McCleskey v. Kemp*."<sup>55</sup> It is also well-known that, in an interview following his retirement, Powell—who had originally considered casting his vote to overturn the antisodomy statute at issue in *Bowers* but who changed his mind, providing the pivotal vote upholding the Georgia law—said, "I think I probably made a mistake in the *Hardwick* case."<sup>56</sup> While the damage done in *Bowers* has been erased in large measure through *Lawrence* (overturning *Bowers*), *McCleskey* still stands as a virtually insurmountable barrier to a convicted inmate of color attempting to argue that

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52. *Id.* at 157-176.

53. *Id.* at 177-184.

54. *Griswold v. Conn.*, 381 U.S. 479 (1965).

55. Oshinsky, *supra* n. 2, at 107.

56. Nat Hentoff, *Village Voice, Infamous Sodomy Law Struck Down: What Was the State of Georgia Doing in Hardwick's Bedroom?*, <http://www.villagevoice.com/1998-12-22/news/infamous-sodomy-law-struck-down/> (Dec. 22, 1998) (remarks made in response to questioning at New York University Law School). See also Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, 147 N.Y. Times A1 (Aug. 26, 1998).

there has been an Equal Protection violation because of racial patterns in application of the death penalty. Sometimes, revisitings are eloquent: Justice Blackmun's dissent from the denial of certiorari in *Callins v. Collins* renouncing tinkering with the "machinery of death," at least provided some support, through his rationale, for opponents of the death penalty.<sup>57</sup> Powell's musings after leaving the bench did no such thing.

With any luck, the students who read Landmark Law Cases volumes such as the recent ones by Oshinsky, Perry, and Richards will have some idea what the competing principles are, where they stand, and why. Historical institutionalists and students of law and American political development certainly hope that students will come away with a sense that, overall, the Court's trajectory is neither simply the sum of personal preferences of individual Justices who come and go nor one of ad hoc decision making on matters of such great import.

These volumes in the Landmark Cases series do not break new ground in interpreting the cases under review, nor were they designed to do so. They are very good introductions. They will work best when, in the hands of faculty who use one or two on a syllabus, they are set within a framework for examining the Court's place in the political system or in the development of a specific policy controversy, the relationship between the branches, how to understand the Court, and even why we should regard particular cases as landmarks other than the fact that they may defuse controversy for a time, or that we like or dislike the results.

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57. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

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