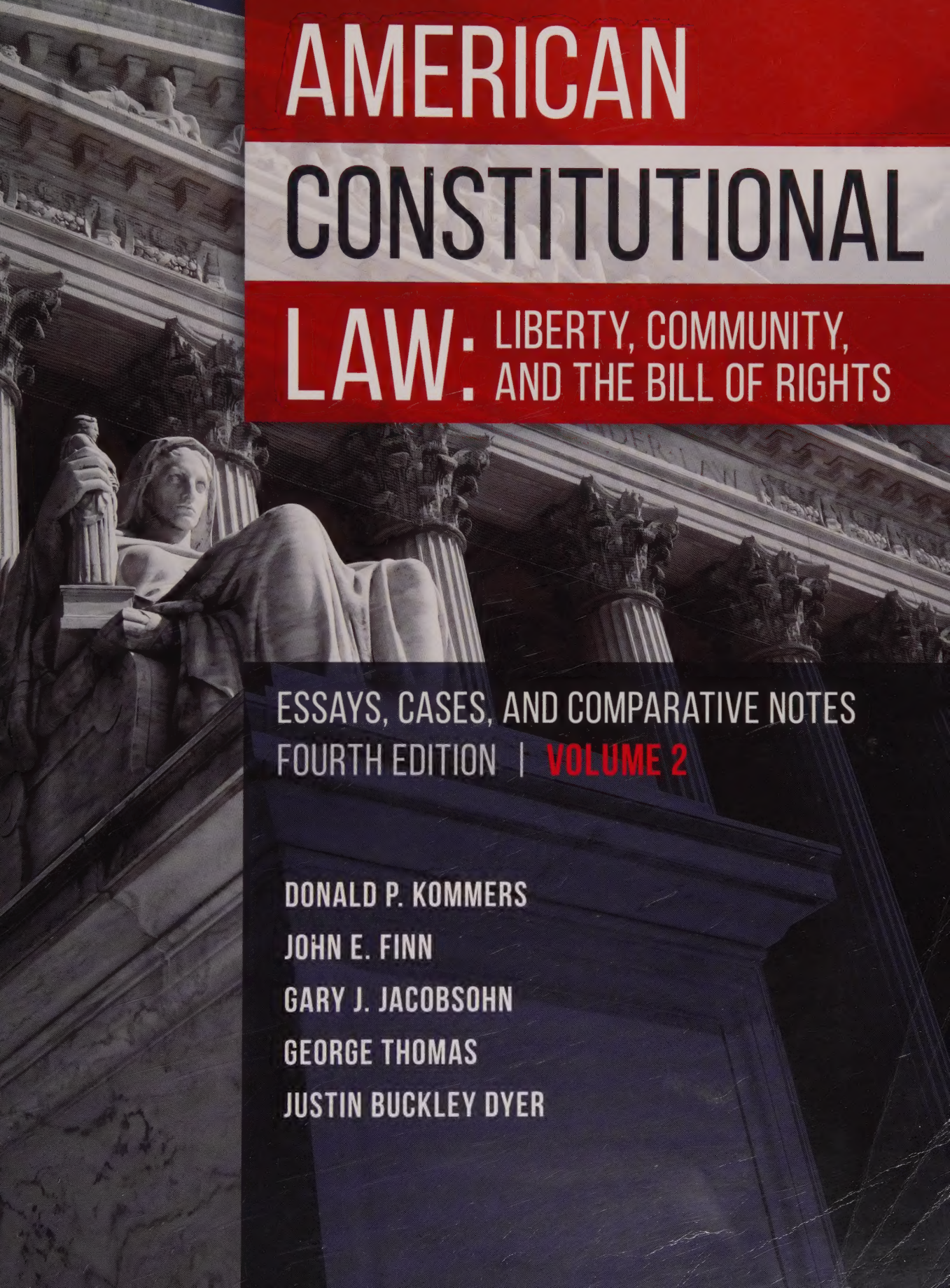




AMERICAN CONSTITUTIONAL

LAW: LIBERTY, COMMUNITY,
AND THE BILL OF RIGHTS

ESSAYS, CASES, AND COMPARATIVE NOTES
FOURTH EDITION | **VOLUME 2**

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AMERICAN CONSTITUTIONAL LAW

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ESSAYS, CASES, AND COMPARATIVE NOTES

Fourth Edition, Volume 2

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For Nancy, Linda, Beth, Courtney, and Kyle

There is no remedy for love
but to love more

—*Thoreau*

Preface

This book was born of the conviction that the study of constitutional law is an integral part of—and should draw upon—a liberal arts education. In light of this, we have tried to produce a unique casebook, one that will encourage students and citizens to think critically about the principles and policies of the American constitutional order. As taught in law schools, constitutional law tends to focus on technical rules and doctrines that students are asked to apply to a given set of facts, after which they proceed to the next case. A liberal arts view, by contrast, seeks to drive constitutional doctrine and policy back to their foundation in social, moral, and political theory, prompting students to engage the great questions of political life addressed by the Constitution and constitutional interpretation. Among these issues are questions that concern the meaning of justice, liberty, equality, and America itself. We believe that our focus on these questions distinguishes this text from the standard law school book on constitutional law as well as from other texts designed for undergraduates whose main concerns are with other things.

We should note that this book centers largely, but not exclusively, on constitutional meaning as defined by the United States Supreme Court. Accordingly, judicial opinions constitute the core of its documentary materials. But this does not mean, nor do we wish to imply, that the Supreme Court monopolizes the field of constitutional interpretation. Congress, the President, governors, state legislators, citizens, and even police officers on the beat interpret the Constitution when they issue orders, pass laws, or arrest persons suspected of crime. In focusing mainly on the process of judicial interpretation, we have nevertheless tried to consider this broader latticework of constitutional decision-making, as several of the nonjudicial materials in the appendices would indicate. Moreover, several cases reproduced in this book address the role of nonjudicial institutions in the interpretation of the Constitution.

One of this book's major features is the introductory essay that precedes the cases in each chapter. We have written these essays not only to situate the cases in their proper historical and political context, but also to highlight three themes or perspectives. Each theme is designed to facilitate critical thinking and draws upon knowledge and skills central to the liberal arts. Our first theme, the interpretive perspective, stresses the nature and process of constitutional interpretation. It asks students to consider how judges and other interpreters find meaning in the wonderfully elastic language of the Constitution. Accordingly, the

introductory essays pay special attention to judicial modes of inquiry, styles of argument, and other approaches used by the Supreme Court in deciding constitutional disputes. Is constitutional decision-making little more than politics by another name? Is it an objective process of interpretation apart from and independent of a justice's personal values or moral commitments? Is it a matter of finding the right answer to a constitutional problem? Is there any such thing as a "right" answer in constitutional law? The notes and queries following each case, like the essays, raise these and related questions.

Our second theme, the normative perspective, prompts inquiry into the substantive values of our constitutional jurisprudence. Apart from the social, moral, and political theories—be they explicit or implicit—informing judicial rulings, the chapters of this book invite students to consider how and why constitutional argument, both at the founding and in our own time, has concentrated on three main conflicts. The first is the perennial conflict between nation and state over the limits and scope of their respective powers; the second is the conflict between the principles of democracy and constitutionalism; the third, finally, is the conflict between the values of individual liberty and those based on the claims of the larger community. Students are asked to reflect on whether the judicial resolution of these conflicts represents in some sense the "best" accommodation attainable between competing constitutional values or principles.

Our third theme, the comparative perspective, represents our belief that the study of American constitutional law should be informed by the great variety and richness of comparative materials now available in other constitutional democracies. Indeed, constitutional borrowing from other nations is an increasingly prominent theme in comparative constitutional studies. The United States Supreme Court often cites leading decisions of other national high courts as an aid to constitutional interpretation, though not without controversy, both within and outside the Court. Needless to say, this is not a casebook in comparative constitutional law. But we believe that the limited and selective comparative materials that we have introduced—mainly in the form of boxed extracts from foreign constitutional courts—helps to enrich the study of American constitutional law in several ways, not least by encouraging students to consider what, if anything, is unique in American constitutional life and what we share with other constitutional democracies. Some readers may find the inclusion of comparative materials novel, or even disquieting. We prefer to think of comparative analysis as a longstanding part of constitutional argument in the United States, one that reaches at least as far back as the *Federalist Papers*.

In most other respects, the organization of this book should seem familiar. The casebook is divided into three parts. Part One consists of original essays focusing, respectively, on the Supreme Court as a decision-making institution and on the Constitution and its interpretation. Part Two contains one chapter dealing with the power of the Supreme Court. Part Three, finally, includes seven chapters on civil rights and liberties. We trust that teachers accustomed to the canon will find much that is familiar, as well as recognize why and where our themes have led us to depart from the normal course.

A Note on Reading the Text

For those students who may not have taken a law-related course prior to using this book, we would advise that they consult Appendix F for an account of how to understand Supreme Court opinions. In addition, at the outset of each edited case, just before the opinion of the Court, we (the editors) have written a brief summary of the facts in the background of the judicial contest, including a statement of how the dispute was decided in the lower courts. The summary concludes with a list of the justices who participated in the decision. Names appearing in italics identify the authors of dissenting, concurring, and majority or plurality opinions. (Justices whose names are set in roman type have joined one or more of these opinions.) Students will notice that selected dissenting and concurring opinions have been omitted. We omit them only if they contribute little to our understanding of a case or duplicate the reasoning of other opinions.

Acknowledgments

A book such as we have written and edited was not fashioned out of whole cloth. Years of teaching undergraduate constitutional law stand behind this enterprise: 35 years at Notre Dame in the case of Donald Kommers, 32 years at Williams College and 14 at the University of Texas in the case of Gary Jacobsohn, 30 years at Wesleyan University in the case of John Finn, over 15 years of teaching at Claremont McKenna (and Williams College) in the case of George Thomas, and 9 years of teaching at the University of Missouri in the case of Justin Dyer. Many of the changes and additions introduced into this edition were in response to student reactions to earlier editions. We are deeply grateful for their comments and for suggestions made by other users of our casebook.

For their help and advice on this and previous editions, we would like to thank Michael Tolley (Northeastern University), Theodore M. Vestal (Oklahoma State University), William Buscemi (Wittenberg University), Rodney Hero (University of Notre Dame), Nicholas Aroney (Queensland University, Australia), Peter W. Hogg (York University, Canada), Winfried Brugger (Heidelberg University, Germany), Sotirios Barber (University of Notre Dame), Martin Gruber (University of Wisconsin at Oshkosh), Paul F. Mullen (Florida International University), Harold Pohlman (Dickinson College), David Barnum (DePaul University) and Jerry Simich (University of Nevada at Las Vegas), Frank Colucci (Purdue University), Alec Ewald (University of Vermont), and Lloyd Mayer (Notre Dame Law School), Donald Downs (University of Wisconsin), and Mariah Zeisberg (University of Michigan).

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Finally, we owe a special word of thanks to our families for their understanding and patience during the year of this edition's preparation. Gary Jacobsohn wishes to thank his wife, Beth, and their three children, Vanessa, Joseph, and Matthew; John Finn his wife, Linda, and their two children, Alexandra and Ellery; Donald Kommers his wife, Nancy; George Thomas his wife, Courtney, and their two children Angelo and Isabella; and Justin Dyer his wife, Kyle, and children Bennett, Pierce, and Lincoln. It is only appropriate that we dedicate this book to each of our spouses.

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Introduction

Our many years of teaching constitutional law have persuaded us that because of the questions it raises about the nature of our polity and the political morality of our Constitution, a course on constitutional law should be an integral part of a student's education in the liberal arts, and not simply an exercise in professional preparation. Like its predecessors, then, we began this new edition of *American Constitutional Law* with the premise that the study of constitutional law is a vital part of a civic education. Seen from this perspective, a constitutional law course can be—and is—no less than an extended commentary on the meaning of America. Such a commentary is especially relevant in a time when our commitment to the values of constitutional government is threatened by war and economic hardship. Consequently, as with previous editions, we hope to encourage students and citizens of the Constitution to engage the basic principles and policies of our shared constitutional order.

As with the first edition of this work, we have tried to produce a casebook appropriate for such a commentary, one that goes beyond the facts and rulings of particular cases to engage the great issues of constitutional interpretation and one that avoids the insularity of an exclusively domestic focus. In this new edition we take up much the same task, encouraged by the increasing relevance and importance of comparative constitutional law and the growth of international human rights law.

We think it most helpful to consider constitutional theory and Supreme Court opinions as embracing two interrelated concerns, one dealing with the forms and methods of judicial review, the other with the political theory of the Constitution as a whole. The first highlights the process of constitutional interpretation and directs attention to how judges decide cases and when they should declare legislation valid or invalid. The second concern, which emphasizes the political theory of the Constitution, emphasizes efforts to reinterpret American liberalism and to revive an older tradition of civic republicanism. Both concerns, the interpretive and the normative, promise to make the study of American constitutional cases more inviting, challenging, and relevant to the design of a stable political order in the United States.

We also think it important that students and citizens learn to view American constitutional law in a comparative light. The globalization of constitutional law is a central feature of contemporary politics, owing in part to the growth of

international human rights law and to the rich and voluminous jurisprudence of foreign constitutional courts created after the Second World War, not to mention the transnational European Court of Human Rights.¹ In recent years, for example, scholars and constitutional courts alike have engaged in an extensive discussion about the possibilities and limits of “constitutional borrowing,” or the practice of seeking guidance from the constitutional experience of other democracies. In interpreting their respective constitutions, foreign constitutional courts have been consulting each other’s case law, including American cases, with increasing frequency. The Constitution of South Africa (1996) even contains an interpretive provision expressly advising the court, in protecting basic rights, that it “must consider international law” and “may consider foreign law.”² Although there are some justices on the United States Supreme Court who routinely make reference to constitutional developments elsewhere, such as Justices Breyer and Ginsburg, in general the Court remains relatively impervious to these foreign developments. Indeed, constitutional law is one of the few areas of contemporary law and political science that remains resistant to the comparative approach. We may doubt, however, whether Americans can any longer ignore the ideas and practices of other nations with liberal constitutions similar to their own and designed for the governance of modern, secular, and pluralistic societies. So we have introduced carefully selected materials from countries and jurisdictions whose constitutional law parallels that of the United States.

Yet this book remains emphatically a text on *American* constitutional law. We have therefore introduced comparative elements in three limited ways: by including boxes featuring extracts from foreign constitutions and cases, carefully spliced into the text so as to focus on points of special interest; by reserving the concluding section of each introductory essay to discuss comparable foreign developments; and by raising comparative issues in the notes and queries following each case. Our goal is to combine these three perspectives—

¹ See, e.g., Vikram Amar and Mark Tushnet, *Global Perspectives on Constitutional Law* (New York: Oxford University Press, 2008); Brian K. Landsberg and Leslie Gielow Jacobs, *Global Issues in Constitutional Law* (New York: West Thomson, 2007); Sujit Choudry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007); and Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer, *Comparative Constitutionalism: Cases and Materials* (St. Paul, MN: Thomson/West, 2003). For an account of the rise and spread of judicial review around the globe, see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: The Bobbs-Merrill Company, Inc., 1971). For a more updated study, see Miguel Shor, “Mapping Comparative Judicial Review,” 7 *Washington University Global Legal Studies Law Review* 257 (2008); Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Oxford University Press, 1989) and A.R. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989). See also Andrzej Rapaczynski, “Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad” in Louis Henkin and Albert J. Rosenthal, eds., *Constitutionalism and Rights* (New York: Columbia University Press, 1990): 405–462; and Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 3rd ed. (New York: Foundation Press, 2014).

² South African Constitution, 1996. Sec. 39(1)(b) and (c).

interpretive, normative, and comparative—into a single integrated text. The book is thus aimed at students who may welcome an approach to constitutional law that draws upon the learning they have acquired in a liberal arts curriculum. We hope to challenge and encourage these students to reflect upon constitutional law in the light both of new thinking currently taking place in American constitutional law and of comparative developments.

In reading the cases reproduced here, students will find that the interpretive, normative, and comparative perspectives interact and overlap. *How* judges interpret the Constitution often depends on their underlying vision of the kind of society or political democracy the Constitution was designed to promote, but this vision has itself unfolded within a world where ideas, values, and attitudes—constitutional and political as well as social and philosophical—easily migrate across national borders. For purposes of further clarifying the goals and concerns of this casebook, however, we shall keep the three perspectives analytically distinct in the following remarks.

The Interpretive Perspective

In recent years, Americans have watched and participated in a fierce national debate over the source and scope of judicial power. The debate has been going on since before *Marbury v. Madison* (1803),³ but in recent decades, it has reached a level of intensity unmatched in the history of American constitutional discourse, and it shows no signs of abating.⁴ At the center of this debate are two basic questions: *Who* shall be responsible for interpreting the Constitution and *how* shall it be interpreted? But there is a prior question. Before any interpretation can take place, we must know *what* we are interpreting. What, in short, is the Constitution? Is it the 7,000-word document that emerged from the Philadelphia Convention? Or does the Constitution include other foundational documents, such as the Declaration of Independence and President Lincoln's First Inaugural Address (see Appendixes A and D), or other principles, precepts, practices, rights, or theories that are not laid out in the written text? One aim of this book is to encourage students to read the opinions of the Supreme Court with these queries in mind. Another is to draw attention to the sources of information, interpretive techniques, and styles of argument used by the Court in deciding cases. Certain approaches to constitutional interpretation (*e.g.*, historical, textual, structural,

³ 5 U.S. (1 Cranch) 137 (1803).

⁴ A poignant example of the depth and sharpness of the debate is Sotirios A. Barber, *The Constitution of Judicial Power* (Baltimore: Johns Hopkins Press, 1993). See also Cass Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (Princeton: Princeton University Press, 2009). For a discussion of similar issues from a comparative perspective, see Kenneth M. Holland, ed., *Judicial Activism in Comparative Perspective* (London: Macmillan, 1991).

doctrinal, ethical, and prudential) compete for supremacy on and off the Supreme Court and, as the Senate hearings on the John Roberts and Samuel Alito nominations showed, many Americans are themselves caught up in the argument. Thus debates that can be heard on street corners and read in letters to the editor on such politically contentious issues as gun regulation are echoed in the technical legalese of academic discourse and the carefully crafted prose of Supreme Court opinions. The 2008 case of *District of Columbia v. Heller*, for example, where the Court narrowly invalidated a law limiting handgun use, was argued in large part over which of the justices were being more faithful to the Framers' intentions regarding the use of firearms. Each side availed itself of scholarship devoted to such theories as originalism and structuralism, but when read closely the opinions could be viewed as essentially a more sophisticated version of the sort of interpretive disagreement that one often encounters in ordinary conversation; namely, how should a very old document be interpreted in a time and place far removed from the circumstances that brought the relevant language in dispute into the Constitution?

Although in dealing with these interpretive issues we are mainly concerned with the approaches and techniques used by the Court in construing the Constitution, institutional issues also loom large. When and under what circumstances should the judiciary, rather than the legislature or other political actors, decide a particular question of constitutional law? It is, of course, no secret that legislative and executive officials—even the police officer on the beat and citizens—also interpret the Constitution. Indeed, as we shall see in later chapters, in recent years the authority of the President to determine constitutional meaning, alone or in conjunction with Congress, has been a critically important part of constitutional dialogue. What deference, if any, do judicial decision-makers owe to legislators and executive officials who have made independent assessments of the constitutionality of their actions? These and related issues are brought up mainly in the notes and queries to each case.

The Normative Perspective

This casebook seeks to frame the debate over what the Constitution means within the broader context of political theory. Here too constitutional argument in our time is largely a revived and sophisticated version of a much older debate reaching back to the “founding” disputes between Federalists and anti-Federalists. This debate has traditionally focused on three central normative tensions: (1) the conflict over the limits of federal and state power; (2) the conflict between democracy (rule by political majorities) and constitutionalism (limits on majoritarian democracy); and (3) the meaning of and conflict between liberty and

community. The playing out of these overlapping tensions forms the basis of the doctrinal history of American constitutional law. More broadly, they invite students to broach questions about constitutional maintenance and our fidelity to constitutional values—to consider the desirability and durability of constitutional commitments generally.

These normative issues are important because they go to the heart of the kind of nation Americans aspire to be and the Supreme Court's role in defining that people. Should the Supreme Court, for example, seek to promote individualism and personal liberty, striking down laws that impinge on individual autonomy or entrepreneurialism? Or should the Court use its moral authority to protect the rights of groups and reinforce a sense of community based on widely shared and deeply held visions of the good life? Through substantial introductory essays, in the notes and queries, and by the manner in which we have edited cases, we encourage students to focus on central issues of liberty, equality, community, individualism, and personhood.

The Comparative Perspective

By introducing comparative materials into the standard course in American constitutional law, this casebook serves not only as a springboard for fresh reflection on the American Constitution, but it also anticipates an important trend in teaching constitutional law. Foreign constitutional texts and judicial opinions, along with international human rights law, are inviting targets of study, particularly if chosen to illuminate aspects of domestic constitutionalism. The outsider's perspective may furnish students with insights into their own society that would otherwise have remained invisible. In the same vein, Richard Stewart writes: "[A] glimpse into the households of our neighbors serves the better to illuminate our own, as when by pressing hard against the pane we see not only the objects on the other side but our own features reflected in the glass."⁵ Carefully selected comparative references can help students better appreciate the work of our Supreme Court and enhance their understanding of the American Constitution.

A comparative perspective enriches the study of constitutional law in several ways. First, by looking at foreign models of constitutional governance or other traditions of freedom, students may begin to discern what is purely historical and contingent in the American experience and what is more universal and permanent. Second, Americans may take a great deal of pride in knowing something about the extent to which their constitutional ideals and practices are embedded in the provisions and features of other liberal democracies. Third, they may also find

⁵ *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford: Clarendon Press, 1982), viii.

great value in the distinctive aspects of foreign constitutions and the sharp contrasts to American law found in foreign constitutional doctrine. For example, the idea of an “objective order of values” or an “unconstitutional constitutional amendment,” or the distinction between negative and positive rights, found in the constitutional theory of Germany and India, may hold fascinating implications for Americans seeking new ways of understanding their own Constitution.

For purposes of illustration, we might briefly compare *Bowers v. Hardwick*,⁶ the first American sodomy case, with *Dudgeon v. United Kingdom*,⁷ a similar case decided by the European Court of Human Rights. In *Dudgeon*, the European Court ruled that Northern Ireland’s law prohibiting sexual conduct between consenting gay men constituted an interference with the respect for private life guaranteed by Article 8 (1) of the European Convention on Human Rights. Five years later, in 1986, the U.S. Supreme Court, in a 5–4 vote, came to the opposite conclusion. It sustained the constitutionality of a Georgia statute criminalizing same-sex sodomy even when engaged in by consenting adults.⁸ That the two cases produced different results invites reflection in its own right, but the distinctive analytical approaches of the two tribunals are equally compelling. Justice White’s majority opinion held that the Fourteenth Amendment’s concept of due process does not confer “a fundamental right upon homosexuals” to engage in acts of consensual sodomy. Justice Blackmun, writing for the minority, held that Georgia’s law violated the fundamental right to privacy implicit in the due process clause of the Fourteenth Amendment. The two opinions are marked by an irreconcilable polarity. Under the majority’s holding that there is no fundamental right to engage in such conduct, the state won easily; had the minority prevailed, declaring that such conduct is included in the fundamental right to privacy, the individual would have won just as easily.

In sharp contrast to both of these opinions, the European Court engaged in a nuanced and sensitive balancing of the valid interests of both state and individual. The Court recognized the state’s interest in regulating sexual morality, but also the individual’s interest in protecting the most intimate aspects of one’s private life. After examining the policies of other European nations and finding that in Northern Ireland itself there appeared to be no “pressing need” to criminalize the conduct, the Court concluded that the “detrimental effects [of the legislation] on the life of a person of homosexual orientation” outweighs “the

⁶ 478 U.S. 186 (1986). The decision in *Bowers*, however, was overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003).

⁷ 4 E.H.R.R. 186 (1986).

⁸ Georgia’s criminal code also punished heterosexual sodomy. For present purposes, however, it is sufficient to focus on the statute’s punishment of same-sex sexual conduct.

state's justification . . . for retaining the law in force.”⁹ There was some faint suggestion in the opinion, however, that in other circumstances and with different facts, the decision could conceivably have gone the other way.

Students may well wonder why none of the opinions in *Bowers* made reference to the European Court's opinion. Was it a conscious omission, and if so, why? Whatever the explanation, *Dudgeon* figured prominently in the Supreme Court decision in *Lawrence v. Texas* (2003). Writing for a 6–3 majority, Justice Kennedy explicitly overruled *Bowers*, concluding that the Due Process Clause of the Fourteenth Amendment does protect “the full right to engage in private conduct without government intervention.” In many ways *Lawrence* seems simply to replay *Bowers*, but this time with a different result. In *Bowers* the Court had characterized the issue as whether the Constitution “confers upon homosexuals a right to commit sodomy.” In *Lawrence*, however, Justice Kennedy rejected that formulation, writing instead that “Liberty presumes an autonomy of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” In dissent, Justice Scalia argued that “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable.’ . . . *Bowers* held that this was a legitimate state interest.”

Unlike the *Bowers* Court, however, both the majority and the dissents in *Lawrence* made use of *Dudgeon*, as well as the case law of other jurisdictions. Justice Kennedy, for example, noted that *Dudgeon* is “Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), [and] at odds with the premise in *Bowers* that the claim put forward there was insubstantial in our Western civilization.” The Court further noted that “Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”

In dissent, Justice Scalia criticized these references to other jurisdictions, as he often did. “The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta.” Quoting Justice Thomas, Scalia concluded that “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”

We need not decide here which of these opinions is right. Suffice to say that *Bowers* and *Lawrence* are rich for the interpretive, normative, and comparative issues they raise. First, they prompt questions about the interpretive approaches used by the Court in construing the Constitution—its reliance on history, text, precedent,

⁹ *Supra* note 7, at 167.

structure, natural law, social utility, consensus, among other possibilities—along with the institutional question of when federal judicial power should be used to overturn majoritarian policies. Second, they revolve around the crucial normative tensions we mentioned earlier, raising important questions: What theory of liberty should inform the general meaning of the Constitution? How shall individual rights be reconciled (if they should be reconciled) with the desire to enforce the community's prevailing conception of social morality? What visions of society and human personality emerge from the case? Finally, students may be driven to wonder about the relative wisdom of the European Court's analytical approach, as opposed to those of the majority and minority opinions in *Bowers* and *Lawrence*.

We wish to reemphasize, however, that our insertion of comparative materials is extremely selective and largely for the purpose of illustrating issues and problems of *American* constitutional law. Thus we draw these materials mainly from the decisions of foreign constitutional courts in countries which face social and political problems similar to those of the United States, which share constitutional language similar to the words and phrases of the U.S. Constitution, and whose supreme judicial tribunals play roles analogous to that of the United States Supreme Court—primarily Canada, Germany, India, Israel, Japan, South Africa, and the Council of Europe. All of these jurisdictions have produced bodies of constitutional law comparable in complexity and learning to the jurisprudence of our Supreme Court, and their opinions are accessible to students unfamiliar with the complex judicial structures, legal systems, and doctrinal writings of the foreign jurisdictions. In this book we can only open the door a tiny crack to ways in which other constitutional democracies have dealt with the issues discussed in this introduction. Nevertheless, we believe that the comparative perspective, for the reasons given earlier, can offer guidance to Americans engaged in reexamining the goals and content of their own Constitution, and perhaps this book will encourage interested students to explore that perspective further.

Apart from the comparative materials, the organization of this book is fairly conventional, covering the usual topics and leading cases found in the standard course on American constitutional law. We hope, therefore, that teachers of American constitutional law accustomed to presenting the standard course materials may find this book simultaneously useful and challenging.

The casebook is divided into three parts: Part One includes two introductory chapters. Chapter 1 focuses on the organization, procedures, powers, and personnel of the United States Supreme Court. Chapter 2 introduces students to the structure and principles of the United States Constitution, describes various approaches to judicial review, and discusses competing theories of the

Constitution. These chapters also compare the process of constitutional interpretation and the institution of judicial review in the United States with their variants in other advanced constitutional democracies, a discussion intended to help students think comparatively about the larger issues of liberty and community underlying particular constitutional cases and controversies in the United States.

Volume One includes six additional chapters dealing with governmental structures and relationships. These chapters include edited cases and materials dealing respectively with the expansion of judicial power (chapter 3), divided and separated powers (chapter 4), foreign and military affairs (chapter 5), federalism (chapter 6), national regulatory powers (chapter 7), and elections and political representation (chapter 8).

Volume Two includes chapters 1–3 from Volume One and seven additional chapters on civil rights and basic freedoms. They deal respectively with the Bill of Rights and the Fourteenth Amendment (chapter 4); liberty and property (chapter 5); liberty, life, and personhood (chapter 6); freedom of expression (chapter 7); freedom of religion (chapter 8); race, slavery, and the Equal Protection Clause (chapter 9); and gender discrimination and other discriminatory classifications (chapter 10). An original essay that calls attention to interpretive and normative issues raised by the edited cases and readings precedes each of these chapters. In addition, each essay describes parallel developments in selected non-American jurisdictions for the purpose of raising questions about American constitutional values and their transmission to other cultures.

Finally, we have included several appendixes. Appendixes A, B, C, D, and E reproduce the texts of the Declaration of Independence, the U.S. Constitution, *Federalist* 78, President Lincoln's First Inaugural Address, and the Gettysburg Address, respectively. Appendix F offers tips on how to study constitutional law and includes an example of how to summarize or brief a constitutional case. Appendix G features a glossary of technical legal terms. Appendix H presents a chronological chart of the justices who have served on the U.S. Supreme Court.

About the Authors

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AMERICAN CONSTITUTIONAL LAW

LIBERTY, COMMUNITY, AND THE BILL OF RIGHTS

ESSAYS, CASES, AND COMPARATIVE NOTES

Fourth Edition, Volume 2

PART ONE

Institutional and Interpretive Foundations

The first part of this book (chapters 1 and 2) provides students with background on the Supreme Court and its role in the American system of government as well as an overview of the process of constitutional interpretation. It locates the Court within our “dual” system of state and federal courts and focuses on its organization, composition, and decision-making procedures. Among the Court’s important decisional procedures is its discretionary authority to decide only those cases it chooses to decide, a prerogative that accounts for its heavy emphasis on *constitutional* adjudication. Prior to 1950, barely 5 percent of the Court’s dispositions with full opinions dealt with constitutional issues, whereas today such issues form the principal question in some 60 percent of cases decided with full opinions. Indeed, over the years, the Supreme Court has evolved, for all practical purposes, into a constitutional tribunal not unlike the specialized constitutional courts created in Western Europe after the Second World War.

Part One also offers advice on how to read Supreme Court opinions. Reading constitutional cases is not like reading P. G. Wodehouse or S. J. Perelman. Judicial opinions require close reading. They are manifestations of legal reasoning, which is not a simple thing. Justice Felix Frankfurter once remarked that judicial opinions often “convey accents and nuances which the ear misses on a single reading, and [they] reveal meanings in silences.” Unveiling these nuances and listening to these silences is one of the exciting intellectual challenges in reading constitutional cases.

The purpose of this volume, however, is not merely to introduce students to the policies, principles, and rulings of the Supreme Court in constitutional cases. An equally important inquiry is *how* the Court reaches its decisions. Accordingly, chapter 2 introduces students to various methods and sources of constitutional advocacy. As we shall see, constitutional arguments may be drawn from a variety of sources, and arguments about which of those sources are legitimate, and which should be out of bounds, are a significant part of constitutional argumentation.

Constitutional interpretation itself involves the various ways by which judges and other constitutional actors seek to determine what the Constitution means. Familiarity with these methods is important because a constitutional doctrine or policy enunciated by the Court may well depend on the particular judicial method or approach to interpretation. It is also important to understand that the various methods of interpretation play an important role in reconciling the tension between democracy and constitutionalism. Finally, chapter 2 compares American interpretive approaches with those used by foreign constitutional tribunals. These comparisons will also be a part of all of the remaining chapters in this book, reflecting both the importance of constitutional globalization in the twenty-first century and the usefulness of looking abroad to gain valuable perspective on our own constitutional arrangements and choices.

The Supreme Court

In *Federalist* 78, Alexander Hamilton argued “the judiciary is beyond comparison the weakest of the three branches.” Whether Hamilton’s conclusion is an accurate description of the Court’s place in our constitutional life is a question we shall consider throughout this book. In 1788, Hamilton’s observation was surely accurate. Today, appointment to the Court is a prize, the culmination of a career in law. President Washington, though, had to plead with friends and twist arms to find people to serve on the Court. The first Chief Justice, John Jay, left the Court after only five years, finding a more prestigious and powerful position as Governor of New York. Another justice resigned his commission in favor of a seat on the South Carolina supreme court.

When the Court first convened on 1 February 1790, it met in the Royal Exchange Building in New York City. Thereafter and until 1939, it met in a spare room in the basement of the capitol building. Today, the Court holds office in an impressive palace of white marble on the corner of First and A Streets in Washington, D.C. Inside, the justices and their clerks are surrounded by polished wood and gleaming brass. The Court has its own library, printing press, cafeteria, museum, gift shop, and even a basketball court.

The splendor of the Court’s residence mirrors its prominence as an institution. The Court presides over a vast bureaucracy that includes more than one hundred lower courts staffed by over eight hundred judges. In Fiscal Year 2017, the federal judiciary’s budget request was \$7.0 billion (less than one percent of the total U.S. budget), a 3.2 percent increase over the Judiciary’s FY 2016 budget of \$6.8 billion. More importantly, the Court is at the center of public debate and policymaking in such areas as abortion, affirmative action, health care, sexuality, gun control, and privacy. In nearly every term, the Court considers cases that go to the very heart of the separation of powers, federalism, and the Bill of

Rights. As Alexis de Tocqueville wrote, “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹

It was not always so. Under the Articles of Confederation, there was no Supreme Court—indeed, no federal judiciary at all. In contrast, Article III of the Constitution provides “there shall be a Supreme Court and such inferior courts” as Congress may desire. To ensure the independence of the federal judiciary, it also gives judges lifetime tenure and protects against a reduction of their salaries. In broad strokes Article III also defines what kinds of cases the Court can hear.

On the other hand, it tells us nothing about who the justices should be, or how many there should be. Moreover, Article III provides no information about how the Court works, about how the Court decides which cases to hear, or how the justices should decide them. Thus, the federal court system is a product of an evolution that has been profoundly influenced by other features of the constitutional order, such as federalism, the separation of powers, and the tension between individual liberty and popular rule. And as we shall see in chapter 3, Congress, by expanding the jurisdiction of the federal courts and giving the Supreme Court greater control over its own jurisdiction, has also advanced the development of the federal courts.

Article III’s vagueness is due, in part, to considerable conflict at the Philadelphia Convention about whether a national judiciary was a necessary concomitant of national power. Some delegates, such as Alexander Hamilton, argued in favor of a national judiciary because “the majesty of the national authority must be manifested through the medium of the courts of justice.”² Some of the other delegates thought a national judiciary would be a terrible threat to the sovereignty of the individual states, each of which possessed its own judiciary.

A. THE JUSTICES: POLITICS OF APPOINTMENT

The appointment of a Supreme Court justice is one of the notable events of American political life. As specified in Article II, justices are nominated by the President and must be confirmed by a majority of the Senate. If confirmed, a justice serves for life on “good behavior” and can be removed only by

¹ J. P. Mayer, ed., *Democracy in America* (Garden City, N.Y.: Doubleday, 1969), 270.

² Clinton Rossiter, ed., *The Federalist Papers* No. 16 (New York: New American Library, Mentor Books, 1961), 116.

impeachment by the House of Representatives and conviction by the Senate.³ On average, there is a vacancy on the Court every two years. Franklin Roosevelt made no appointments in his first term, but had nine opportunities between 1937 and 1943. President Carter made no appointments to the Court, while President Reagan made three. President George H.W. Bush made two appointments in his one term and President Clinton two appointments in two terms. President George W. Bush made two appointments to the Court. Bush nominated John Roberts as an associate justice to replace Justice Sandra Day O'Connor. Following the death of Chief Justice William Rehnquist on 3 September 2005, President Bush withdrew the nomination and instead nominated Roberts for the Chief Justiceship. The Senate confirmed Roberts by a vote of 78 to 22.

On 3 October 2005, Bush nominated Harriet Miers for O'Connor's seat. The nomination proved extremely controversial, in part because opponents, from a wide variety of positions and perspectives, thought she lacked the requisite experience and record necessary for the position. President Bush withdrew her nomination on 27 October. Four days later, Bush nominated Samuel Alito to the seat. The Alito nomination was also very controversial, although for different reasons. Critics of the nomination thought Alito would be too eager to embrace an extremely conservative approach to deciding cases. Such fears, for example, led the American Civil Liberties Union to oppose the nomination, and Senator John Kerry to attempt to filibuster it. Alito was confirmed by a vote of 58 to 42 on 31 January 2006, the second lowest on the current court (Justice Thomas was confirmed by a vote of 52 to 48).

In his two terms of office, President Obama was presented with three vacancies on the Court. In 2009, President Obama nominated Sonia Sotomayor to replace Justice Souter; the Senate confirmed Justice Sotomayor by a vote of 68–31. Obama nominated Elena Kagan to replace Justice Stevens in 2010; the Senate approved Kagan by a vote of 63–37. In March 2016, President Obama nominated Merrick Garland to fill the vacancy occasioned by the death of Justice Antonin Scalia. The Republican Party leadership in the Senate refused to hold hearings or to permit a vote on the nomination. The refusal of the Senate to take up the Garland nomination revived longstanding concerns that the nomination process is flawed if not irreparably broken, a victim both of partisan politics and unsound design. President Trump filled the vacancy left by Justice Scalia with Judge Neil Gorsuch. The Senate voted to confirm Justice Gorsuch 54–45, mostly along party

³ Only one Supreme Court justice—Samuel Chase—has been impeached. The Jeffersonians brought charges against Chase in 1805. The Senate did not convict him. For an account, see Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 57–58.

lines. Interestingly, Gorsuch is the first Supreme Court justice to serve alongside another justice for whom he once had clerked (Anthony Kennedy).

In view of the fact that many justices will serve terms that may exceed 30 years, some commentators have called for replacing life time appointments with staggered fixed terms, (say of 12, or 18 years) as is common in many other constitutional democracies. Proponents argue that this method of selection would help to depoliticize the current process by making opportunities for personnel change more frequent and less subject to chance or fortune.

Presidents typically seek out Supreme Court nominees whose judicial philosophy and record are similar to the President's own political views. As often as not, however, Supreme Court justices go their own way, surprising and sometimes disappointing presidential expectations. President Eisenhower, for example, appointed both Chief Justice Earl Warren and Justice William J. Brennan. Their "liberal" inclinations on the Court disappointed Eisenhower, who later called them "the biggest damned-fool mistakes" of his presidency.⁴ Some presidential administrations have tried to guard against surprise by closely examining a potential nominee's writings and judicial opinions for their conformity to an ideological litmus test, a development that some observers trace to the Reagan Administration.⁵

The nomination process has always been political and, in recent years, has often been contentious, as the nominations of Clarence Thomas in 1991 and Merrick Garland in 2016 vividly demonstrate, albeit for different reasons. In addition to the President and the Senate, important players in the confirmation process include the American Bar Association, which on its own initiative has chosen to evaluate nominees based on judicial experience and temperament. A wide array of interest groups and political associations are also involved, such as the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the National Organization for Women. At times, sitting members of the Court have also tried to influence the process. The presence of so many actors testifies to the importance of the nomination process:

⁴ For a more detailed discussion, see Phillip Cooper and Howard Ball, *The United States Supreme Court: From the Inside Out* (Upper Saddle River, N. J.: Prentice-Hall, 1996), 31–74. On the other hand, Professor Theodore Vestal reports that the source of this quote is an oral history interview of Ralph H. Cae, a former Republican national committee member from Oregon and a longtime political enemy of Warren, which suggests it could be an effort to discredit Eisenhower. Theodore M. Vestal, *The Eisenhower Court and Civil Liberties* (Westport, Conn.: Praeger Publishers, 2002), 23–24.

⁵ In 1985, for example, *Newsweek Magazine* reported that during the Reagan administration, all federal judicial nominees were subject to ideological screening, including an interview with Grover Rees III, Attorney General Edwin Meese's Special Assistant for judicial selection. Among the topics for screening were the interviewee's thinking about *Roe v. Wade*.

It is one of the most important ways the community has of influencing the Court and enforcing a measure of political accountability. For the same reasons, the nomination process reflects the tension between our dual commitments to democratic self-governance and constitutionalism.

Most of the people appointed to the Court have had long and distinguished careers in the law and an exemplary record of public service. Many have been members of Congress, some have aspired to the presidency, and, since 1975, all have been judges on lower courts. For many years, the overwhelming majority were Protestant, white, and males of means.⁶ (When Justice Gorsuch joined the Court in 2017, however, there were six Catholics and three Jews, and three women.) A great number have graduated from the country's most prestigious law schools, and several justices began their careers as clerks to Supreme Court justices after graduating from law school. There is, however, no constitutional requirement that a justice have a law degree or be a lawyer.

Notwithstanding this similarity of background, Presidents have usually considered diversity an important factor in the Court's composition. For many years, the Court had a "Jewish" seat, and concerns about geographical and ideological diversity have also influenced the makeup of the Court. President Johnson appointed Thurgood Marshall as the first African American on the Court in 1967. In 1981, President Reagan appointed Sandra Day O'Connor as the first woman on the Court, and he appointed Justice Antonin Scalia, the first Italian American, in 1986. President Obama's appointment of Sonia Sotomayor made her the first Latina on the High Court.

Most nominees are confirmed without great difficulty. Between 1900 and 1967 the Senate rejected only one nominee. Since 1967, however, the Senate has rejected seven nominees and refused to hold hearings for one (Garland). On what basis may the Senate reject an appointment? There is much disagreement about how the confirmation process should work.⁷ Should the Senate assess the moral character of a nominee? The nation struggled with this question during the Senate's hearings on Clarence Thomas. Should it inquire into the political or

⁶ Justice Brandeis' appointment to the Court, for example, was delayed by some Senators who objected to his supposed "radicalism" and commitment to social justice. Historians have also noted that a significant cause of senatorial opposition to Brandeis was virulent anti-Semitism. See "A History of Supreme Court Confirmation Hearings," <https://www.npr.org/templates/story/story.php?storyId=106528133> (July 12, 2009).

⁷ See Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, N. J.: Princeton University Press, 2007); see also Susan Low Bloch, Vicki C. Jackson, and Thomas G. Krattenmaker, *Inside the Supreme Court: The Institution and Its Procedures* 2d ed. (St. Paul, Minn.: West Publishing Company, 2008), ch. 2.