

THE CANONS OF CONSTITUTIONAL LAW: TEACHING WITH A POLITICAL- HISTORICAL FRAMEWORK

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In my writings on constitutional law, I make an effort to provide a broad context so that readers and students can better appreciate and understand a court decision. I want them to understand the conditions that give rise to a court case and how those conditions influence what a court eventually does, either to duck a case or decide it. I want them to understand the role of other institutions, particularly Congress, the President, and the executive agencies.

I also devote considerable space to showing how the same constitutional issue is treated differently at the state level. By rejecting the "Supreme Court Only" model, I complicate the story of constitutional law somewhat, but this approach produces an account that is not only more accurate but more interesting. No one branch of government prevails. The process is polyarchal, not hierarchical. The latter, perhaps attractive for architectural structures, is inconsistent with our aspiration for self-government.

The task of understanding these dimensions has been made easier by my association and friendship with Neal Devins. Starting first with lunches, followed by jointly-written articles, moving on to *Political Dynamics of Constitutional Law* (now in its third edition), and with the completion of a book-length treatment of constitutional law in a democratic society, I have learned much about the ins and outs, the trends and patterns, of our legal process. Typically, after Neal and I battle out an issue, I am forced to return to my constitutional law text to rewrite sections and get it a little better.

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I. A RICH DIALOGUE

In my textbook, *American Constitutional Law*,¹ I do whatever I can, at every opportunity, to highlight the dialogue that exists among the judiciary, Congress, the President, the states, and the general public. The opening chapter sets the stage for these participants, including issues of judicial capacity for making social policy and the role of public opinion, lobbyists, and group pressures in identifying and defining constitutional values. Readings and boxed materials highlight Jefferson's position on the Sedition Act, Jackson's veto of the Bank Bill, and Lincoln's critique of *Dred Scott*. In Chapter 2, on judicial review, I provide many materials to keep *Marbury v. Madison* in its proper, limited place: statements by Madison, Justices Chase and Iredell, and John Marshall's letter to Chase, arguing that Congress, instead of impeaching judges for their decisions, should simply reverse legal opinions "deemed unsound by the legislature," for that would "better comport with the mildness of our character." Other materials in these early chapters, including one on thresholds, identify the many factors that limit judicial power.

Throughout the rest of the book, I offer dozens of examples of this judicial-nonjudicial dialogue. Some constitutional issues never reach the courts, like the Ineligibility Clause (pp. 183-85). Two back-to-back readings explain how the Court strikes down the legislative veto but Congress—operating through committee and subcommittee vetoes—continues it (pp. 243-50); two readings show how the Court decides some high-profile disputes over executive privilege (the Watergate case) but other courts encourage congressional committees and the executive branch to settle their disputes outside the courts (the AT&T cases) (pp. 262-68); two readings illustrate how the Court can read presidential power broadly in *Curtiss-Wright* but Congress, in the Iran-Contra report, finds *Curtiss-Wright* deficient in reasoning (pp. 288-92); a box on page 347 explains how much Chief Justice Marshall in *McCulloch* borrowed from executive branch interpretations on the constitutionality of the U.S. Bank; one reading has the Court in *Pennsylvania v. Nelson* (1956) offering views about preemption, while the next has Congress lambasting the Court's ruling, followed by the Court backing away in *Uphaus v. Wyman* (pp. 423-26).

1. Louis Fisher, *American Constitutional Law* (Carolina Academic Press, 3d ed. 1999). The fourth edition will be published in February, 2001.

So it goes. Although at times I have Congress championing and protecting rights left unsecured by the courts, I include readings to show how Congress has failed in its constitutional duties, as with the appropriations rider that led to *United States v. Lovett* (1946) (pp. 514-16). I also include congressional debate on the Sedition Act of 1798 (pp. 569-71).

On religious freedom, I include President Clinton's 1995 memo on legitimate ways of providing for religious expression in public schools (p. 697), and follow that with a reading from congressional hearings in 1964 that helped build better support and understanding of the Court's decision in *Engel v. Vitale*, helping to forestall a constitutional amendment (pp. 701-02). When the Supreme Court in *Zurcher v. Stanford Daily* (1978) opened third-parties (including the press) to search and seizure, Congress responded with legislation two years later to place restrictions on such practices. I give the background on this and include the congressional debate (pp. 789-91).

The difficult area of electronic surveillance depends to a great extent on executive branch initiatives and legislation adopted by Congress (pp. 823-27). After the Supreme Court in *United States v. Miller* (1976) held that bank depositors were not protected by the Fourth Amendment when the government wanted to gain access to microfilms of checks, deposit slips, or other bank records, Congress passed the Financial Privacy Act of 1978 to offer greater rights and protections to depositors. I include a reading on the congressional debate (pp. 1097-98).

In *Mobile v. Bolden* (1980), the Supreme Court held that the Voting Rights Act of 1965 only prohibits states from purposefully discriminating against the voting rights of blacks. I include a reading for that decision, but follow it with the congressional debate in 1982 on legislation to allow plaintiffs to show discrimination not on *intent* but solely on the *effects* of a voting plan (pp. 1122-28).

II. INDEPENDENT STATE ACTION

Just as I emphasize the participation of all three branches at the national level, so do I show the actions of the fifty states and how they reach constitutional decisions that depart from and reject the rulings of the U.S. Supreme Court. One of my favorite examples is the decision of the Supreme Court of Washington in 1980 to exclude evidence from a trial, the ruling of the U.S. Supreme Court two years later to reverse and remand the state

court decision to allow the introduction of the evidence under the “plain view” doctrine, and the decision by the state supreme court in 1984 to resolve the issue solely under the state constitution and state laws, leading to the exclusion of the evidence and the rejection of what the U.S. Supreme Court had decided (p. 22).

On free speech in shopping centers, I have a box that lists the state courts that have decided to protect free speech more broadly than the U.S. Supreme Court does (p. 540). Although the U.S. Supreme Court has supported the use of public funds to pay for textbooks and transportation for parochial schools, I have a chart on page 680 that shows the many states that reject such assistance by analyzing specific language in state constitutions. These courts reflected on the “child benefit” theory offered by the U.S. Supreme Court and found it wanting and unpersuasive. I have a box on page 727 describing how state courts have rejected the Supreme Court’s decision in *Swain v. Alabama* (1965), regarding peremptory challenges of jurors.

The Supreme Court received great credit for its decision in *Gideon v. Wainwright* (1962), but state courts had recognized the need to provide counsel for indigents a century earlier (p. 750). On the issue of conducting search and seizure of trash and garbage, some state courts have declined to accept such practices, as the Supreme Court did in *California v. Greenwood* (1988) (box on p. 796). Similarly, some state courts have parted company with the Court’s decision in *United States v. Ross* (1982) regarding warrantless searches of automobiles (box on p. 798). In 1992, the Supreme Court of Hawaii chose to adopt a principle of search and seizure more protective of individual rights than could be obtained from the U.S. Supreme Court (box on p. 801). A number of states have rejected the Supreme Court’s decision regarding the *Leon* good-faith test (box on p. 838).

In a box on page 921, I summarize the recent initiatives in such states as California, Texas, and Michigan to place limits on affirmative action policies. A box on page 1048 shows how a number of state courts have decided that restrictions on public funding of abortion, such as the Hyde Amendment at the federal level (upheld by the Supreme Court), are unacceptable under state constitutions. I include a reading on the House debate on the Hyde Amendment (pp. 1059-61).

Although the Supreme Court in *Bowers v. Hardwick* (1986) upheld a Georgia statute that criminalized sodomy, a number of

states have invalidated state statutes that criminalize consensual sodomy. I discuss those and include a box on the 1992 Kentucky decision, *Commonwealth v. Sasson* (pp. 1087-88).

III. OPERATING IN ALL THE BRANCHES

Law students need this broader picture in order to function effectively after they graduate. Much of their time will be spent in litigating, or assisting in litigating, but when results in the courts are disappointing they need to know how to turn to other political institutions to seek satisfaction for their clients.

A typical example is Nathan Lewin, who handled the yarmulke case for Captain Simcha Goldman. Lewin first tried to convince the Air Force to change its regulation to permit Captain Goldman, an Orthodox Jew, to wear his yarmulke while indoors on duty. When that failed, Lewin took the dispute to court, narrowly losing when it reached the Supreme Court in *Goldman v. Weinberger* (1986). Defeat was not the end of the road. Lewin next turned to Congress, which every year passes a military authorization bill. In 1987 he was able to get an amendment enacted that told the Air Force to change its regulation, allowing people in the military to wear religious apparel so long as it does not interfere with their military duties.

In setting this up in my textbook, I devote a paragraph to the basic ingredients of the dispute, including Justice Brennan's dissent that urged Congress to safeguard religious freedoms left unprotected by the Court (p. 642). Next I have excerpts from the Court's decision (pp. 648-50). I immediately follow that with the House and Senate debates on the legislation that would require the Air Force to change the regulation (pp. 650-53). The debate is not only instructive but amusing, particularly the futile "20-star letter" from the Joint Chiefs of Staff opposing the amendment (four stars for the Chairman of the Joint Chiefs, joined by four stars each for the General of the Air Force, the General of the Army, the General of the Marine Corps, and the Admiral of the Navy!).

IV. PROTECTING MINORITY RIGHTS

The yarmulke case is a good way to test the proposition that the judiciary is somehow better structured than legislative bodies to protect minorities. From James Madison to the present, it is widely argued that courts stand as sturdy sentinels to shield indi-

viduals and minorities from unbridled majoritarian actions. Madison believed that by adding the Bill of Rights to the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."² It didn't turn out that way. For the first century and a half, individual rights were decided almost exclusively by the majoritarian process. On the rare occasions when such issues were brought before the federal courts, judges were more likely to side with government and corporations than with individuals.³

While the record of federal courts in the past half century has improved, contemporary scholars continue to exaggerate the extent to which courts can be trusted to protect individual and minority rights. Insulated somewhat from political forces, federal judges are said to have the independence and technical expertise to defend constitutional rights, especially those of minorities.⁴ The political branches and the general public—operating through legislatures that vote on majoritarian grounds—are supposedly less sensitive to personal rights and liberties.⁵ It is said that political power must be invested in an unelected Court to protect minorities "from democratic excess."⁶ In his famous footnote in *Carolene Products*, Justice Stone said that a "more searching judicial inquiry" may be required to protect "discrete and insular minorities."⁷

The Supreme Court's actual record in safeguarding minority and individual rights has never been that attractive or reliable. The Court barely began to sketch out a jurisprudence of relig-

2. 1 Annals of Cong. 457 (1789).

3. See generally Henry W. Edgerton, *The Incidence of Judicial Control Over Congress*, 22 *Corn. L.Q.* 299 (1937).

4. See Laurence H. Tribe, *God Save This Honorable Court* 20 (Random House, 1985) ("Even when the Congress and the President can be counted upon to defend most of us from the infringement of fundamental liberties, because the political majorities to which those departments of government answer demand such protection, the Supreme Court often stands alone as the guardian of minority groups. The democratic political process, by its very nature, leaves political minorities vulnerable to the will of the majority. True, the Supreme Court's record in championing the cause of oppressed minorities is hardly unstained.")

5. See Jesse H. Choper, *Judicial Review and the National Political Process* 2 (U. Chicago Press, 1980) ("... although judicial review is incompatible with a fundamental precept of American democracy—majority rule—the Court must exercise this power in order to protect individual rights, which are not adequately represented in the political processes")

6. William Mishler and Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions*, 87 *Am. Pol. Sci. Rev.* 87, 87 (1993).

7. *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 n.4 (1938).

ious freedom until 1940.⁸ Individuals and private organizations, in their efforts to protect their rights, often turn to nonjudicial bodies and the states for relief. Instead of the Court serving as the exclusive or even dominant guardian of individual rights, a powerful dialogue operates between judicial and nonjudicial bodies, with the courts often playing a secondary role. Caught in this crossfire, the Court can be overridden by a majoritarian process that advances liberties beyond what is available from the courts.

There should be nothing astonishing about the proposition that the Court has a limited role to play in protecting individual liberties. Congress, the President, and state governments have major institutional strengths and responsibilities and are frequently driven by private groups that are well-organized and effective in articulating and advancing their values, preferences, and agendas. Despite the belief that majoritarian institutions cannot protect minority rights, Congress and the President often champion the cause of individuals who are rebuffed by the courts. As one study noted: "the Court has not been behaving as the counter-majoritarian force of its textbook description. It has instead been heeding quite carefully the policies endorsed by the majoritarian branches of government."⁹

I have readings from the flag-salute cases of 1940 and 1943, but my text makes it clear that the more generous reading of religious freedom comes from the broad public condemnation of the 1940 decision, not from any fine sentiments on the Court (pp. 639-40). *Smith*, RFRA, *Boerne*, and "Son of RFRA" give me an opportunity to again discuss the vigorous dialogue on religious freedom between the Court and nonjudicial institutions (pp. 657-58, 659, 667-78).

Although constitutional law texts often concentrate on *Brown v. Board of Education* and subsequent cases to suggest a Court solicitous of civil rights, I devote many pages to the pre-*Brown* record: the record leading up to and including *Dred Scott* (pp. 855-62); the progressive legislation adopted by Congress after the Civil War, some of which (particularly public accommodations) was struck down by the Court (pp. 862-64, 866-69); the need for federal legislation to convert the principles of *Brown* into reality (pp. 875-78, 882-88, 907-08); and the combination of

8. See generally *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

9. Leslie Friedman Goldstein, *The ERA and the U.S. Supreme Court*, 1 Res. in L. & Pol'y Stud. 145, 154-55 (1987).

judicial rulings, executive orders, and congressional statutes regarding affirmative action (pp. 914-22).

Similarly, the record of state and federal courts in protecting women's rights ranged from "poor to abominable" (Johnson & Knapp study in 1971). In sharp contrast, state legislatures and Congress as early as the 1870s began to enact many measures to support the rights of women to engage in various professions, including law. This is impressive. All-male legislatures were voting in favor of women's rights. I devote substantial text and several boxes and readings to drive home this point (pp. 945-57). A main purpose of the ERA, as Congressman Martha Griffiths said, was to tell the Supreme Court: "Wake up! This is the 20th century. Before it is over, judge women as individual human beings."¹⁰ Much of what has happened since that time in protecting the rights of women consist of statutory initiatives (pp. 957-65), in some cases to reverse such Court decisions as *General Electric Co. v. Gilbert* (1976). I have a reading on the Senate's debate on women used in combat roles (pp. 985-86).

V. COURT-CURBING EFFORTS

As the final chapter of the cloth edition, and as the final chapter of both of the paperback splits, I conclude with a wrap-up chapter "Efforts to Curb the Court." I open by rejecting Justice Stone's advice to his brethren: "the only check upon our own exercise of power is our own sense of self-restraint." Judges operate within an environment that constantly tests the reasonableness and acceptability of their rulings.

Earlier chapters identified some of the constraints that operate on the judiciary: the President's power to appoint, the Senate's power to confirm, congressional powers over the purse, impeachment, legislative controls over court jurisdiction, and the force of public opinion, the press, and scholarly studies. The final chapters cover constitutional amendments, statutory reversals, changing the number of Justices (court packing), withdrawing jurisdiction, and noncompliance with court rulings.

I discuss, in the text and in a box, the statute that Congress passed in 1867 in response to *Ex parte Milligan* (pp. 1203-04). In the section "Constitutional Dialogues," I analyze the various arguments for judicial finality, include a box on Chief Justice Warren's challenge to the idea of judicial supremacy, discuss the flap

10. 117 Cong. Rec. 35323 (1971).

over Ed Meese's speech "The Law of the Constitution" in 1986, and add an interesting give-and-take between Senator Specter and Judge Anthony Kennedy at Kennedy's 1987 confirmation hearing (pp. 1218-23). I set forth eight guidelines to qualify the last-word doctrine (pp. 1217-18). I conclude that judicial supremacy is incompatible with the value we place on freedom, discourse, and limited government, and that the dialogue between the Court and the rest of society is both constructive and stabilizing because it adds to public understanding and public support for constitutional values.

VI. EDITING CASES

Part of the headache (or challenge) in editing court cases is boiling them down. Certainly the reasoning process of the Court is important to include, but is that just the central reasoning or the side trips as well? I try to make room for both so the students do not think judges reason in straight-line fashion. I also do what I can to include not merely dissents but significant concurrences, especially when a "concurrence" looks a little more like a dissent or finds serious deficiencies with the majority or plurality opinion.

Second, it is tempting to keep cutting existing case readings to make room for new ones, but I don't want to see cases like *Marbury*, *McCulloch*, *Dred Scott*, etc., chopped down to a few paragraphs. In my book, with oversized pages and two columns per page for readings, *Marbury* takes more than five pages, and I follow that with about three pages from Van Alstyne's "A Critical Guide." *McCulloch* runs more than five pages and *Dred Scott* is about five. The *Civil Rights Cases* of 1883 and *Plessy v. Ferguson* are about four pages each. A number of constitutional law texts give short shrift to these early civil rights cases, but I want to remind the reader of what the Court did in earlier days.

VII. COURT DOCTRINES

To simplify the student's task somewhat, I box up and summarize various Court doctrines: standing for Members of Congress (p. 14), the elements of standing (p. 90), the mootness doctrine (p. 106), the ripeness doctrine (p. 110), criteria for political questions (p. 114), major reasons for granting certiorari (p. 158), delegation doctrines (p. 224), judicial standards for congressional investigations (p. 253), what the Speech or Debate

Clause does and does not cover (p. 274), stages of federalism (p. 379), the doctrine of vested rights (p. 441), free speech tests (p. 497), forums for speech (p. 517), judicial guidelines for free speech cases (p. 522), acceptable and unacceptable regulations for the press (p. 573), libel doctrines (p. 596), obscenity doctrines (p. 613), protected and unprotected areas of religious liberty (p. 638), the *Lemon* test (p. 653), acceptable and unacceptable financial assistance to sectarian schools (p. 685), the complex area of double jeopardy rulings (p. 738), compelled testimony and tainted witnesses (p. 747), required and unrequired assistance of counsel (p. 751), habeas corpus relief for death-row inmates (p. 773), standards for administrative inspections (p. 803), exceptions to the exclusionary rule (p. 836), stages in the racial integration of public facilities (p. 900), affirmative action principles (p. 919), standards of review (p. 958), permissible and impermissible regulations for abortion (p. 1053), deviations from mathematical exactness for reapportionment (p. 1132), controls on independent campaign expenditures (p. 1172), and permissible and impermissible limits on campaign funding (p. 1173).