

法精要·影印本

West Nutshell Series

宪法公民权

第3版

Constitutional Civil Rights



【美】诺曼·维拉/著

NORMAN VIEIRA



法律出版社



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NORMAN VIEIRA

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总 序

许传玺*

在美国法律教育界与律师实务界,这套“美国法精要”是颇具特色的一套小书。这套书最突出的特点当推它们的简捷明快、深入浅出。每种书均由富有教学经验的法学院教授执笔,在三、四百页的篇幅内集中介绍某一法律部门的基本原理、主要法规和重点案例。

由于这些特点,这套丛书受到了无数美国读者的欢迎和喜爱。众多法学院的学生将这套书作为课外的辅助教授,由此掌握美国各主要部门法的精义。执业律师也经常借助这套书,以迅速了解自己尚未熟习的某些部门法,或者温习过去曾经学过的某些课程。

相信这套书也能赢得国内读者的欢迎。无论是法律专业的本科生、研究生,还是执业律师或其他人士,都能从这套丛书中获得有关美国法律的大量知识,对自己的学习和工作有所助益。此外,通过阅读原汁原味的英文来学习美国法律也应能提高读者的法律英语水平,促进与美国同行的对话和交流。

应原出版者的要求,这套丛书的国内版增加了中文前

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言,以介绍美国各部门法的概况、每种书的内容及原书作者。这些前言作者都是在美国受过专业教育或从事专门研究的中国法律学者甚或专家。相信他们的介绍会对读者有所帮助。

Happy reading!

1999 年 4 月
于哈佛法学院

前 言

董和平*

人类自脱离了蒙昧时代,就持续不断地追求着自由与幸福。直到17、18世纪,这种平等自由的理想才由西方启蒙思想家以“人权”(Human Rights)的口号和理论予以高度概括,成为反对封建专制、创制民主国家的理论基石和良心动力。近现代民主制度确立以后,尊重和保障人权成为立宪的核心准则和主要内容,宪法中的人权规范遂被称为“宪法公民权”(Constitutional Civil Rights)。无论其宪法权利的立法实施,还是相关的理论研究,都是源远流长,极富成就的。我们虽然并不认为美国宪法是人类宪法权利立法的惟一模式或人权保障的绝对理想状态,但放开我们的视野,于比较学习中发现我们宪政建设中的问题,借鉴其优胜为我所用,却具有重要而迫切的现实意义。即使是其中的理论歧见和实践瑕疵,亦足以警示我们,而成为有益的养料。因此,学习一点美国宪法公民权的知识,十分必要。

在美国宪法中,宪法公民权具有本源性的宪制地位。按照立宪者的宪制理念,政府权力和人民权利是一对基本

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政治范畴,前者的存在来源于后者保障的需要,后者对前者具有制约和最终取舍的力量,宪制的目的就在于划清并维持二者的合理界限。由此,便形成了美国宪法立法中以宪法公民权和权力分立体制为基本内容,将宪法公民权和政府权力视为两极,规范后者以保障前者,并由最高法院作为司法公断(违宪审查)的特点。这种宪政体制赋予法院过大的权力,使它不仅拥有司法权和对立法、行政权力的制衡权,从一定意义上讲也拥有了立宪权。因为通过违宪审查所形成的案例(Case)实际上是另一种形式的立宪,而不是对宪法原有条文的简单解释。这是美国宪政设计和宪法权利保障的独特之处,也是其效力之源。

从结构上把握美国宪法公民权,应注意对其法定内容的全面整体理解。第一,宪法基本权利(Fundamental Rights)。这是美国宪法权利的主体。就其构成来讲,不仅包括人权法案(Bill of Rights),即宪法修正案第1—10条;也包括最高法院依据人权法案或其他宪法条款甚至立宪精神,通过案例形成的,它认为至关重要的公民自由权,诸如婚姻家庭自主权、生育权、性行为 and 性向选择权、选举权、受教育权、申诉和获得司法救助权,言论自由权和宗教自由权,以及一些有关人身保障和经济类的权利。这些权利亦可视为权利法案立法的具体化。第二,适当程序法则(Due Process of Law)。这实际上是对政府剥夺公民权利行为的法律限制,包括实质性程序要求(Substantive Due Process)和程序性程序要求(Procedural Due Process)。前者是指政府剥夺公民权利的行为是否具有合理的理由和足够的正当性,后者则是指政府剥夺公民权利的行为是否遵守了与此有关的特定形式的公告(Notice)和听证(Hearing)程序。第三,平等保护法则(Equal Protection of Law)。这是美国内

战以后由于黑奴制度的废除和妇女解放运动的发展而出现的宪法平等保障原则及由此形成的宪法公民权,包括种族平等保护、对非婚生子女的平等保护、对无合法证件的外国人的平等保护和各州对本州境内的外州公民的平等保护(Privileges or Immunities Clause),等等。

本书是关于美国宪法公民权的简明读本。其特点:一是简明扼要,专就宪法公民权问题提供入门指引或复习提要,内容涵盖宪法公民权的各个方面,书后还附有若干相关的美国人权法规范,有助于读者对美国宪法公民权形成基本认识和较为清晰的脉络;二是以案说法,从案例(Case)出发讲解宪法规范,这当然也是整个美国法学教学的特点。该书的这些特点,既是其优势,又带来相应的不足。正因为简明和专项论述,故很少提及宪法公民权与其他宪法规范的关系,即使对宪法权利本身的说明,限于篇幅也难有具体而充分的理论展开;而没有相关宪法案例的详尽讲解,亦可能给读者阅读时造成理解上的困难。这些缺憾,只能提醒读者通过其他相关资料的补充阅读予以弥补。

本书作者诺曼·维拉教授(Norman Vieira),1959年获哥伦比亚大学文学士(A. B.),1962年获芝加哥大学法博士(J. D.),1968年至1982年任爱达荷大学法学院教授,1982年至今执教于南伊利诺伊大学法学院。除本书外,主要著述还有:《最高法院任命:法官伯克与参议院确认的政治化》(1998年南伊利诺伊大学出版社出版),及《哈德沃克案与隐私权》(1988年)、《学校祷告与自愿旁听原则》(1987年)、《平等权利修正案:分离、扩展和公正性》(1981年)和《种族平衡、黑人分离主义和可接受的种族分类》(1969年)等论文。

最后需要指出,本书只是作者个人对美国宪法公民权

的理解和理论说明,并不代表美国学术界的一致观点,更不能视其为惟一正确的人权观。引进本书的目的,在于向读者打开一扇了解美国人权与宪政的窗户,愿它能对读者拓宽视野、获取新知有所助益。

1999年4月于哥伦比亚大学法学院

PREFACE

This brief text, like others in the Nutshell series, is intended primarily for the use of law students and practitioners. In addition, it may serve as ancillary reading in appropriate undergraduate courses. The space limitations imposed by the goal of providing "a succinct exposition of the law" have made it necessary to abbreviate the discussion of some subjects and to exclude other subjects entirely. The main focus of the text is on fourteenth amendment case law, but I have generally omitted treatment of criminal procedure problems, which are ably discussed in Isreal & LaFave, *Criminal Procedure in a Nutshell*, and of the first amendment, which is a subject for another book. Similarly, in setting forth the statutory law, the text concentrates on certain major developments described in chapters seven and eight, but more detailed coverage of some of the statutes can be found elsewhere. See, e.g., *Player, Employment Discrimination Law*.

It should be obvious that for law students a text in the field of constitutional law must serve as a supplement to, and not as a substitute for, the careful reading of Supreme Court opinions. Nevertheless, students and practitioners may find a textbook helpful in understanding the cases and in analyzing them critically. With this in mind, I have at some

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points tendered my own analysis of issues—not with any purpose to indoctrinate the reader, who must of course reach his or her own judgment, but merely to stimulate deliberation and debate. However, if a student's analytical skills are to be sharpened in this process, it is essential that close attention be given to what the Supreme Court has said and done.

I am indebted to my research assistant, Gregg Walters, for his diligent work on various parts of this book.

In order to facilitate early publication of this volume, it has been necessary to treat most of the cases decided near the end of the 1996 Term only briefly and to set June, 1997 as the cutoff date for material included in the text.

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