1995 Supplement to

CASES AND MATERIALS ON CONSTITUTIONAL LAW

THEMES FOR THE CONSTITUTION'S THIRD CENTURY

Daniel A. Farber
William N. Eskridge, Jr.
Philip P. Frickey

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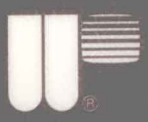

1995 SUPPLEMENT TO

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THEMES FOR THE CONSTITUTION'S THIRD CENTURY

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PREFACE

This supplement contains material concerning the 1993 and 1994 Terms of the Supreme Court, as well as opinions from the 1992 Term that were decided too late for inclusion in the casebook. We have also included extensive attention to what we consider to be the emerging constitutional issue of the '90s, the extent to which the Constitution protects gay men, lesbians, and bisexuals from discriminatory treatment.

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July 1995

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Chapter 1

A PROLOGUE ON CONSTITUTIONAL HISTORY

Page 31. Insert the following at the bottom of the page:

Justice White, in 1993, and Justice Blackmun, in 1994, retired from the Supreme Court. Their replacements are, respectively, Ruth Bader Ginsburg, formerly a judge of the United States Court of Appeals for the District of Columbia Circuit, and Stephen Breyer, formerly Chief Judge of the United States Court of Appeals for the First Circuit.

Ginsburg was a professor at Columbia University Law School in 1980 when President Carter tapped her for the D.C. Circuit. She was well known for her role in leading the Women's Rights Project of the American Civil Liberties Union. During the 1970s, she participated either as counsel for a party or as *amicus* in the leading gender discrimination cases of the day, including *Reed v. Reed* (casebook, p. 305), *Frontiero v. Richardson* (casebook, p. 306), and *Craig v. Boren* (casebook, p. 315). In light of this background, she surprised many observers by her nonactivist, middle-of-the-road behavior as a D.C. Circuit judge. At the time of her elevation to the Supreme Court, she was widely viewed as the least liberal of the four Carter appointees to the D.C. Circuit.

Breyer was likewise appointed to the First Circuit by President Carter in 1980. A former Harvard law professor and chief counsel to the Senate Judiciary Committee, Breyer is a respected scholar, primarily in the fields of administrative law and regulated industries. As a First Circuit judge, he had a reputation as a moderate.

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Chapter 2

AN INTRODUCTION TO CONSTITUTIONAL DECISIONMAKING

Page 89. Add the following at the end of Note 1:

In *Missouri v. Jenkins*, 115 S.Ct. 2038 (1995), the Court set limits on the kind of remedy authorized in *Milliken II*. The district judge had mandated a far-reaching program of educational improvements of the district. For example, he ordered that the student-teacher ratio be dramatically reduced and that highly ambitious magnet schools be established. The total cost of the magnet program had reached $448 million by the time the case reached the Supreme Court. The district court also mandated a $187 million capital improvements plan. The annual costs of the decree were now approaching $200 million, and had been used to finance such items as a 25-acre farm, broadcast TV and radio stations, and movie editing rooms. This program was designed in part to equalize opportunities for African American children, and in part to draw white children back into the system from suburbs and private schools. Chief Justice Rehnquist's opinion for the Court remanded the case for further consideration after taking strong issue which much of the lower court's rationale. (The Court's view of the remedies issues presented by the case are discussed in more detail in Chapter 9 of this Supplement.) Importantly, the Court made it clear that the district judge was not entitled to set, as an independent goal, any target of equalizing the educational achievement of the children in the district with those elsewhere in the state. Justices Souter, Stevens, Ginsburg, and Breyer dissented.

Justice Thomas's concurring opinion set forth his thoughts about the basic import of *Brown*:

> Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race. Of course, segregation additionally harmed black students by relegating them to schools with substandard facilities and resources. But neutral policies, such as local school assignments, do not offend the Constitution when individual private choices concerning work or residence produce schools with high black populations. The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.

> Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment. Indeed, it may very well be that what has been true for historically black colleges is true for black middle and high schools. Despite their origins in "the shameful history of state-enforced segregation," these institutions can be " 'both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of . . . learning for their children.' " Because of their "distinctive histories and traditions," black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.

Are these views consistent with *Brown* and its progeny? Should Justice Thomas's analysis prompt a rethinking of the integrationist ideal?

Page 131. Insert the following at the bottom of the page:

TERM LIMITS PROBLEM

"At the general election on November 3, 1992, the voters of Arkansas adopted Amendment 73 to their State Constitution. Proposed as a 'Term Limitation Amendment,' its preamble stated:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

"The limitations in Amendment 73 apply to three categories of elected officials. Section 1 provides that no elected official in the executive branch of the state government may serve more than two 4-year terms. Section 2 applies to the legislative branch of the state government; it provides that no member of the Arkansas House of Representatives may serve more than three 2-year terms and no member of the Arkansas Senate may serve more than two 4-year terms. Section 3 applies to the Arkansas Congressional Delegation. It provides:

> (a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.
>
> (b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

Amendment 73 states that it is self-executing and shall apply to all persons seeking election after January 1, 1993."

Section 3 is challenged, and the Arkansas Supreme Court invalidates it as inconsistent with the U.S. Constitution. The issue reached the U.S. Supreme Court in the 1994 Term. That the Court was narrowly divided (5–4) in *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995), suggests that this is a "hard case" and, therefore, a good testing ground for various constitutional

theories. The Court struck down the law, but don't let that influence your analysis.

There are three ways you can do the following exercise. First, you can evaluate the constitutionality of section 3 based upon each type of evidence or argument we present, from constitutional text through democratic theory. (When in quotes, the evidence will be taken from either the majority opinion by Justice Stevens or the dissenting opinion by Justice Thomas.) Second, you can consider all the evidence cumulatively. Third, you can pick and choose which kind of evidence you consider relevant. In deciding how the case should be decided, draw some lessons about constitutional methodology as well.

(A) Constitutional Text. There are two primary "Qualifications Clauses" in the Constitution.[1] Article I, § 2, cl. 2 provides:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article I, § 3, cl. 3:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Article I, § 5, cl. 1, provides in part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business . . . ."

Does section 3 of the Arkansas term limit amendment violate the plain text of the Constitution? Should analysis stop with the plain text?

(B) Original Intent. **Majority opinion**: "In Federalist Paper No. 52, dealing with the House of Representatives, Madison addressed the 'qualifications of the electors and the elected.' Madison first noted the difficulty in achieving uniformity in the qualifications for electors, which resulted in the Framers' decision to require only that the qualifications for federal electors be the same as those for state electors. Madison argued that such a decision 'must be satisfactory to every State, because it is comfortable to the standard already established, or which may be established, by the State itself.' Madison then explicitly contrasted the state control over the qualifications of electors with the lack of state control over the qualifications of the elected:

---

1. Other clauses bearing on "qualifications" to hold congressional office include the following: Article I, § 3, cl. 7, authorizes the disqualification of any person convicted in an impeachment proceeding from "any Office of honor, Trust or Profit under the United States." Article I, § 6, cl. 2, provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Section 3 of the 14th Amendment disqualifies any person "who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." See also the Guarantee Clause of Article IV and the oath requirement of Article VI, cl. 3.

> The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election be an inhabitant of the State he is to represent; and, during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

Madison emphasized this same idea in Federalist 57:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. *No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.* (emphasis added).

"The provisions in the Constitution governing federal elections confirm the Framers' intent that States lack power to add qualifications. The Framers feared that the diverse interests of the States would undermine the National Legislature, and thus they adopted provisions intended to minimize the possibility of state interference with federal elections. For example, to prevent discrimination against federal electors, the Framers required in Art. I, § 2, cl. 1, that the qualifications for federal electors be the same as those for state electors. As Madison noted, allowing States to differentiate between the qualifications for state and federal electors 'would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.' The Federalist No. 52. Similarly, in Art. I, § 4, cl. 1, though giving the States the freedom to regulate the 'Times, Places and Manner of holding Elections,' the Framers created a safeguard against state abuse by giving Congress the power to 'by Law make or alter such Regulations.' The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections. Madison noted that '[i]t was impossible to foresee all the abuses that might be made of the discretionary power.' 2 Farrand 240. Gouverneur Morris feared 'that the States might make false returns and then make no provisions for new elections.' *Id.*, at 241. When Charles Pinckney and John Rutledge moved to strike the congressional safeguard, the motion was soundly defeated. *Id.*, at 240–241. As Hamilton later noted: 'Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.' The Federalist No. 59, at 363. See also *ibid.* (one justification for Times, Places and Manner Clause is that '[i]f we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government').

"The Framers' discussion of the salary of representatives reveals similar concerns. When the issue was first raised, Madison argued that congressional compensation should be fixed in the Constitution, rather than left to state legislatures, because otherwise 'it would create an improper dependence.' 1 Farrand 216. George Mason agreed, noting that 'the parsimony of the States

might reduce the provision so low that . . . the question would be not who were most fit to be chosen, but who were most willing to serve.' *Ibid.*

"When the issue was later reopened, Nathaniel Gorham stated that he 'wished not to refer the matter to the State Legislatures who were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them.' *Id.*, at 372. Edmund Randolph agreed that '[i]f the States were to pay the members of the Nat[ional] Legislature, a dependence would be created that would vitiate the whole System.' *Ibid.* Rufus King 'urged the danger of creating a dependence on the States,' *ibid.*, and Hamilton noted that '[t]hose who pay are the masters of those who are paid,' *id.*, at 373. The Convention ultimately agreed to vest in Congress the power to set its own compensation. See Art. I, § 6. * * *

"We also find compelling the complete absence in the ratification debates of any assertion that States had the power to add qualifications. In those debates, the question whether to require term limits, or 'rotation,' was a major source of controversy. The draft of the Constitution that was submitted for ratification contained no provision for rotation. In arguments that echo in the preamble to Arkansas' Amendment 73, opponents of ratification condemned the absence of a rotation requirement, noting that 'there is no doubt that senators will hold their office perpetually; and in this situation, they must of necessity lose their dependence, and their attachments to the people.' Even proponents of ratification expressed concern about the 'abandonment in every instance of the necessity of rotation in office.' At several ratification conventions, participants proposed amendments that would have required rotation.

"The Federalists' responses to those criticisms and proposals addressed the merits of the issue, arguing that rotation was incompatible with the people's right to choose. * * * Robert Livingston argued: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism.' 2 Elliot's Debates 292-293. Similarly, Hamilton argued that the representatives' need for reelection rather than mandatory rotation was the more effective way to keep representatives responsive to the people, because '[w]hen a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument.' *Id.*, at 320.

"Regardless of which side has the better of the debate over rotation, it is most striking that nowhere in the extensive ratification debates have we found any statement by either a proponent or an opponent of rotation that the draft constitution would permit States to require rotation for the representatives of their own citizens. If the participants in the debate had believed that the States retained the authority to impose term limits, it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro-rotation forces. The absence in an otherwise freewheeling debate of any suggestion that States had the power to impose additional qualifications unquestionably reflects the Framers' common understanding that States lacked that power."

Dissenting opinion: "To the extent that the records from the Philadelphia Convention itself shed light on this case, they tend to hurt the majority's case. The only evidence that directly bears on the question now before the Court comes from the Committee of Detail, a five-member body that the Convention charged with the crucial task of drafting a Constitution to reflect the decisions that the Convention had reached during its first two months of work. A document that Max Farrand described as '[a]n early, perhaps the first, draft of the committee's work' survived among the papers of George Mason. 1 Farrand xxiii, n. 36. The draft is in the handwriting of Edmund Randolph, the chairman of the Committee, with emendations in the hand of John Rutledge, another member of the Committee. As Professor Farrand noted, '[e]ach item in this document . . . is either checked off or crossed out, showing that it was used in the preparation of subsequent drafts.' 2 *id.*, at 137, n. 6.

"The document is an extensive outline of the Constitution. Its treatment of the National Legislature is divided into two parts, one for the 'House of Delegates' and one for the Senate. The Qualifications Clause for the House of Delegates originally read as follows: 'The qualifications of a delegate shall be the age of twenty five years at least. and citizenship: *and any person possessing these qualifications may be elected except* [blank space].' *Id.*, at II (emphasis added). The drafter(s) of this language apparently contemplated that the Committee might want to insert some exceptions to the exclusivity provision. But rather than simply deleting the word 'except' — as it might have done if it had decided to have no exceptions at all to the exclusivity provision — the Committee deleted the exclusivity provision itself. In the document that has come down to us, all the words after the colon are crossed out. *Ibid.*

"The majority speculates that the exclusivity provision may have been deleted as superfluous. But the same draft that contained the exclusivity language in the House Qualifications Clause contained no such language in the Senate Qualifications Clause. See 2 Farrand 141. Thus, the draft appears to reflect a deliberate judgment to distinguish between the House qualifications and the Senate qualifications, and to make only the former exclusive. If so, then the deletion of the exclusivity provision indicates that the Committee expected neither list of qualifications to be exclusive. * * *

"Unable to glean from the Philadelphia Convention any direct evidence that helps its position, the majority seeks signs of the Framers' unstated intent in the Framers' comments about four *other* constitutional provisions. The majority infers from these provisions that the Framers wanted 'to minimize the possibility of state interference with federal elections.' But even if the majority's reading of its evidence were correct, the most that one could infer is that the Framers did not want state legislatures to be able to prescribe qualifications that would narrow the people's choices. However wary the Framers might have been of permitting state legislatures to exercise such power, there is absolutely no reason to believe that the Framers feared letting the people themselves exercise this power. Cf. The Federalist No. 52 (Madison) ('it cannot be feared that the people of the States will alter this

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