AMERICAN CONSTITUTIONAL LAW

INTRODUCTION AND CASE STUDIES

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ROBERT J. STEAMER is professor emeritus of political science at the University of Massachusetts, where he taught courses in constitutional law, civil liberties, and American politics. A former president of the New England Political Science Association, he is the author of several highly regarded books on the United States Supreme Court, including *The Supreme Court in Crisis* (University of Massachusetts Press, 1971). His most recent book, *Chief Justice: Leadership and the Supreme Court* (University of South Carolina Press, 1986) was selected by *Choice* as one of the "outstanding academic books" of 1986–1987. He has also contributed scores of articles and reviews to political science, history, and law journals.

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Between them, the authors have some 60 years of experience as teachers of constitutional law. Both have won awards and recognition for teaching excellence and both have held academic appointments at several universities in the United States and in Great Britain.

To
Justin, Jillian, Bruce, and Daniel

PREFACE

For the past several decades, most undergraduates have studied American Constitutional Law in a two-semester course sequence. The first semester typically is devoted to United States Supreme Court decisions on such subjects as judicial review, separation of powers, federalism, and economic regulation. Depending upon the instructor's orientation, there might also be coverage of institutional aspects of the court—such as internal decision making, the selection of justices, modes of constitutional interpretation, and debates about the Court's proper role in the American constitutional system. The second semester course usually focuses on civil rights and civil liberties, particularly freedom of speech, press, and religion, criminal procedure, and racial equality. This two-term approach assumes that the courses comprise two halves of a comprehensive whole; it usually takes for granted that most students will complete both courses.

In recent years, however, a growing number of political science departments have abandoned this traditional approach. In part this may reflect the increased competition from such relatively new political science offerings as public policy and area studies. Moreover, as colleges and universities move toward more elaborate core curricula, academic departments sometimes find it necessary to contract their major requirements to provide students with more flexibility in choosing their courses. Whatever the reasons, it is clear that the two-semester constitutional law sequence is no longer as dominant pedagogically as it once was. In fact, in a recent random survey of college and university catalogues, we found that about 40 percent of all political science or equivalent departments now offer only a single constitutional law course. Catalogue descriptions indicate that most such courses are hybrids of the traditional sequence—that is, they cover the most essential elements of the two-semester approach, including judicial review, separation of powers, civil rights and liberties, and Supreme Court decision making.

Despite these developments, constitutional law textbooks continue to be

written and published as if nothing had changed. Most of the books produced for two-semester courses (still, of course, a sizable market) provide far too much depth and detail for courses only half that length. Not surprisingly, students resent being required to buy an expensive textbook and then reading only half of it. The other kind of casebook is written with only one-half of the traditional sequence in mind. It may cover civil liberties quite admirably, while ignoring governmental powers. And such books usually include little or no coverage of institutional aspects of the Supreme Court. In sum, we believe that neither the "long" nor the "short" casebooks now on the market are particularly well suited to one-semester constitutional law courses.

What we have produced, then, is a relatively compact, tightly organized text/casebook that is both comprehensive and economical in its coverage of constitutional law and the Supreme Court. Our goal has been to provide students with a solid grasp of the Supreme Court's work while introducing them to major constitutional doctrines. This has been done through a technique of selecting opinions to do double duty by simultaneously illustrating substantive constitutional development and judicial approaches to policy formulation. We have also tried to strike a reasonable balance between breadth and depth by limiting the number of opinions we cover, but beginning each chapter with an expository essay and prefacing each case by an introductory narrative. Following each edited opinion (except the most recent ones) is a discussion of the decision's aftermath. Typically this includes the impact of the case on the litigants themselves (where this information is available) and, more importantly, the effect of the case on future doctrinal development.

Within this framework we have devoted the first two chapters to discussion of crucial institutional matters—general legal concepts, the structure of the judicial system, the Supreme Court's internal workings, conflicts about the application of judicial review, and the Court's relationship with the presidency and Congress. The remaining five chapters deal with substantive issues in constitutional law including federalism, separation of powers, due process of law, freedom of speech and religion, and equal protection of the laws. Although the book has been fashioned specifically for a one-semester course, we believe that it would work equally well, with appropriate supplementary materials, in either term of a year-long sequence.

Anyone who has ever written a book or designed a course will appreciate that our most difficult task was to decide not what to put in, but what to leave out. As experienced teachers, we were guided primarily by our convictions about what undergraduates must know to be conversant with the essentials of American constitutional law. We were also impelled by our experience of which Supreme Court cases are most likely to engage and interest students. Thus, we have chosen what we consider a judicious mix of opinions from different eras of the Court's history, organized topically to convey a sense of the Court's influence upon the nation's political and legal structure. Although we acknowledge some bias in our case selection toward the late twentieth century and toward civil rights and liberties, our introductory essays should make it abundantly clear that American constitutional history did not begin with *Brown* v. *Board of Education* and end with *Roe* v. *Wade!*

We wish to express our gratitude to the following professional reviewers whose cogent suggestions were, in large part, incorporated into the final

manuscript: Frank Anechiarico, Hamilton College; William Ansberry Southeast Missouri State University; Thomas Barth, University of Wisconsin–Eau Claire; Donald Dahlin, University of South Dakota; Dennis Goldford, Drake University; John O'Callaghan, Suffolk University; Samuel Ramsay, Bryant College; Susan Siggelakis, University of New Hampshire; Ron Stidham, Lamar University; and Robert Wood, North Dakota State University.

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ROBERT J. STEAMER
RICHARD J. MAIMAN

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1 The Supreme Court in American Politics

The United States Congress may not authorize the comptroller general to make spending cuts as part of a statutory scheme to reduce the federal budget deficit . . . A state may not make it a crime to burn the American flag as an act of political protest . . . Congress may permit the detention of certain defendants without bail before trial . . . Military authorities may prohibit servicemen from wearing yarmulkas while in uniform . . . A public school principal may delete from a student newspaper articles he or she considers objectionable . . . A state may not mandate the death penalty for a murder committed by a prisoner already serving a life sentence without possibility of parole . . . Congress may withhold federal highway funds from states that set the legal drinking age at less than 21 years . . .

Scores of policy pronouncements like these are issued each year by the United States Supreme Court. Most meet the first test of political significance: they affect "who gets what, when and how" in the United States. Typically, the "who" in a Supreme Court case is a person, a private institution, a government agency, or a corporate enterprise, for whom the potential rewards of a favorable decision are sufficient to justify the considerable expense, time, and effort required to see a case through to the Supreme Court. Often these parties are supported financially by organizations representing others not directly involved in the case whose interests will be affected, for better or worse, by the Court's decision.

"What" is at stake is usually one of the conventional political resources of power, money, or freedom. In all likelihood the questions that come before the Supreme Court have been answered already by decision makers in the legislative and executive arenas. However, only the Court can determine that a particular outcome is required by the Constitution itself. Although a Supreme Court decision is not necessarily the last word on any given "what," it does lend tremendous legitimacy to a prevailing claim. Vindication by the Supreme Court is one of the greatest prizes available in American politics.

"When" a judgment occurs is a matter for the Supreme Court itself to decide, since it exercises extraordinary control over its own agenda. Generally it is several years between the initiation of a lawsuit and its resolution by the Supreme

Court, though in cases the Court deems especially important the waiting period can be reduced to a matter of a few weeks.

"How" Supreme Court decisions are made involves a unique combination of secrecy and public scrutiny. In each case the Court considers written and oral arguments, deliberates privately, and then issues its decision accompanied by a written explanation of the outcome. Members of the Court who disagree with the judgment are free to say so and to disclose their reasons in writing. Thus, despite the cloistered atmosphere in which it works, the Supreme Court engages in a continuing public dialogue about the major political issues of the day.

The famous (or infamous) Supreme Court ruling in *Roe* v. *Wade,* handed down in 1973, can be used to illustrate the Court's political decision-making role. Texas was one of about 20 states in the early 1970s with statutes dating from the nineteenth century which prohibited abortions except when a woman's life would be endangered by continuing her pregnancy. An unmarried pregnant woman named Norma McCorvey, using the legal pseudonym Jane Roe to protect her anonymity, challenged the Texas law on the ground that it interfered with her personal privacy, which she claimed was protected by a number of provisions of the U.S. Constitution. In her complaint McCorvey specified that she was suing "on behalf of herself and all other women" similarly situated—all women, that is, who because of restrictive state laws were unable to obtain legal abortions. Thus the *who* in this case included the many thousands of persons who would be affected by the Court's decision. *What* the Court was asked to decide was whether the freedom of reproductive choice that McCorvey believed the Texas law denied her was indeed protected by the American Constitution. While the Supreme Court had previously held that the Constitution protected "marital privacy," including the right of married persons to obtain contraceptives without state interference, it had not yet considered the question of abortion. In this respect the *Roe* case was rather unusual, since the Supreme Court generally prefers to take only small steps beyond its previous positions.

When Norma McCorvey's legal challenge was heard might have significantly affected its outcome, since the gestation period of a federal court case is considerably longer than that of a human fetus. To keep McCorvey's case alive, though she was no longer pregnant (she had had a child and given it up for adoption), the Court waived its usual procedural requirements regarding "mootness." Timing is a serious problem in judicial decision making, and particularly so in complex cases where the wheels of the legal process may move so slowly that prevailing parties are not able to enjoy the fruits of their eventual victories. Even after a decision is made, its implementation can be extremely time-consuming. For example, because of years of defiance and delay on the part of southern politicians and school officials, none of the black children who won the Supreme Court's landmark ruling in *Brown* v. *Board of Education* in 1954 ever benefited directly from the decision. Indeed, 35 years after *Brown* a federal court held that the Topeka, Kansas, school board still had not fully complied with the Supreme Court's mandate.

How the Supreme Court eventually responded to McCorvey's petition tells us a great deal about the Court's policy-making role. When the decision was announced in January 1973, a majority of the justices agreed with McCorvey's claim that she had a constitutionally protected right to obtain an abortion, and that state laws in Texas and elsewhere prohibiting the exercise of that right were therefore invalid. However, the seven justices in the majority based their decision

not on a single explicit constitutional provision, but rather on a more generalized right of privacy which they found rooted variously in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The two dissenting justices questioned the constitutional underpinnings of this right of privacy and severely criticized the Court's willingness to read into the Constitution a meaning that almost certainly was not intended by its authors. Implicit in their criticism was a question that the Court's critics often ask outright: why, in a nation that calls itself democratic, should a handful of judges with lifetime tenure be able to exercise such sweeping authority over their fellow citizens?

Why indeed? The role of the Supreme Court in the American political system is more widely debated than understood. To understand that role requires knowledge of the Constitution of the United States, of law and legal processes, of the structures and functions of courts, and of judicial behavior. It is simple enough to read a Supreme Court opinion and to understand in a literal sense what the Court has said. It is another matter to comprehend it fully, both as a decision which affects the legal rights of parties to a lawsuit, and as an authoritative pronouncement which may have a significant impact on the political system.

Each chapter of this book comprises a number of carefully selected and edited Supreme Court opinions covering many of the important issues in American constitutional law. These opinions, the basic units of Supreme Court decision making, normally consist of a ruling on the constitutional issues presented and the reasoning that supports it. The systematic study of judicial opinions makes it possible to grasp the fundamentals of American constitutionalism. However, to appreciate more fully the meaning of those opinions one must be conversant with the environment of judicial decision making. Thus in this book each set of Supreme Court opinions is preceded by an essay establishing the frameworks—historical, legal, and political—in which the opinions should be read. The remainder of this first essay will serve as a general introduction to the setting in which the Supreme Court operates.

WHAT IS LAW?

This question has been asked by the leading intellects of the day ever since humans have been capable of reasoning and communicating their thoughts to others. Yet even today, after centuries of probing, there is no definitive answer to what appears to be a perennially elusive question. We do know, however, that all societies live under rules. They may be relatively simple as in primitive societies, or they may be so complex that a professional class of lawyers is needed to interpret them for the general population. But whatever the nature or the number of the rules, their use is universal, a strong empirical indication that human beings cannot live together without them. In modern societies these rules are designated as law and are binding upon everyone, enforceable by the government through the threat of fine, imprisonment, or even death. And only the government, of all society's myriad institutions, possesses a legal monopoly of force. One may agree to be bound by the rules (law) of a church, a private club, or any number of organizations to which men and women gravitate, but one cannot be arrested or sent to jail by the Episcopal church, by the Elks club, or by the American Bar Association. Any attempt to punish members in a physically harmful way for not abiding by the organization's rules is itself subject to legal intervention by the

state. Clearly, any discussion of law must include a discussion of the state, or politics, as well as philosophy, for law evolved and continues to grow and change only as humans reflect on their position in the universe and upon the best form of society.

Although scores of thinkers have pondered the fundamental issues surrounding the concept of law for centuries, neither the solutions for society's conflicts nor the basic problems themselves have changed much since the Greeks first grappled with them. It is, for example, difficult to improve upon Aristotle's formulations of the major themes and conflicts found in law. First is the concept of human beings as part of the universe, subject to its physical laws, and yet capable of dominating nature through a free will that can distinguish between good and evil. Second is Aristotle's distinction between distributive and remedial justice. The former concerns the distribution of goods and honors to each according to his place in the community, an ordering of equal treatment of equals before the law. This is much more complicated than appears at first glance as we shall see when we deal with "equal protection of the laws," a Fourteenth Amendment guarantee which the United States Supreme Court has construed broadly to ensure equal status of persons under the Constitution. Remedial or corrective justice relates to the redress of consequences of a person's action. Punishment redresses crime, and reparation redresses civil wrong. A thief may be sent to jail and a person whose automobile has been damaged may sue to collect the cost of repairs. In each instance it is the duty of the law to order a new arrangement which is objectively in balance with the old.

Aristotle's third contribution is his separation of legal from natural justice or, as moderns would state it, the difference between positive and natural law. This is essentially the distinction between man-made visible laws, enforceable as commands—in John Austin's phrase, "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him"—and laws based on human nature, universally discoverable through reason, which dictate what human beings ought and ought not to do. Another of Aristotle's differentiations is that between law and equity. One of the most important characteristics of law is generality, a concept which maintains that laws must be phrased in broad language in order to apply to situations not contemplated by the legislators who write them. Courts apply laws written in general terms to concrete cases, or as Supreme Court Justice Felix Frankfurter once said, "Legislatures make law wholesale; courts make law retail." Generality makes possible impartiality in administration. At the same time a law may, if applied to an individual case, be unduly harsh, even unjust. Under such circumstances courts may apply a corrective, an equitable solution to a conflict by making an exception to the law. In its broadest sense equity denotes fairness. Equity also has a more technical meaning in Anglo-American law which we shall discuss below.

Aristotle's final contribution is a precursor of modern constitutionalism, namely, his definition of laws as a body of rules which bind the governors as well as the governed. "Laws," he wrote, "are the rules by which magistrates should exercise their powers, and should watch and check transgressors." American constitutional law is essentially concerned with rules by which magistrates exercise their powers, magistrates being an inclusive generic term embracing presidents, senators, congressmen, governors, legislators, bureaucrats, and judges as well as thousands upon thousands of local officials.

SOME WORKING DEFINITIONS

Although Aristotle's framework tells us that law cannot be defined neatly in a sentence or a paragraph, but must be viewed as a complex idea intertwined with the whole of human existence, it is appropriate to begin our study by defining the word "law" as it is prefaced by distinctive adjectives peculiar to American, and often Anglo-American, usage. This may be done by juxtaposing the six sets of terms which one encounters most often in any discussion of American law.

Public Law and Private Law

Public law embraces all questions and conflicts which arise as a result of the state acting in its sovereign capacity. Any lawsuit in which the government, or an agent of the government, is one of the parties is public. All criminal prosecutions, for example, fall into the category of public law as do cases involving a suit between two states, a dispute between the United States and a state, or an action brought against a local government by a citizen who is attempting to reduce tax assessments. Most acts of Congress, and all actions of the President and the executive bureaucracy, form a part of American public law. Private law, on the other hand, embraces private relationships which are defined primarily, although not exclusively, by state legislatures. The subject matter of statutes and lawsuits which may be deemed private include such human relationships as marriage, divorce, and contracts, and often involve actions for damages (torts) whether for personal physical assault, libel, or medical malpractice. The list of situations in which individuals come into conflict is almost endless, and legislatures and courts attempt to bring some order to the chaotic human struggle which the English philosopher Thomas Hobbes called "nasty, brutish, and short." The line between public and private law is somewhat blurred since the state furnishes not only the machinery for moderating private disputes but also fixes the ground rules governing the methods or procedure and modes of settlement. And in some instances a private controversy, such as a suit for money damages alleging defamation of character, becomes public because of the intrusion of the constitutionally guaranteed right of free speech. Or a divorce action in which one of the parties moves to a state other than that of the marriage domicile, may raise a public law question if the "full faith and credit clause" of Article IV of the Constitution becomes an issue. In spite of the imperfect line between public and private, there are broad areas of litigation in which the government itself is not directly involved.

Constitutional Law and Administrative Law

Public law has two major components: constitutional and administrative law. The latter encompasses the vast array of presidential edicts (executive orders) and rules and regulations promulgated by the executive departments, the independent regulatory commissions, and the armed forces. Given the growth of the federal bureaucracy in the twentieth century, Congress has had little choice but to permit the agencies to prescribe rules and regulations and to issue orders enforcing these rules. Any order issued by an administrative agency is subject to review in the courts, and a large body of law surrounds the process involving

such matters as unfair labor practices dealt with by the National Labor Relations Board and the safety of aircraft supervised by the Federal Aviation Administration. If litigation raises constitutional questions, it may move into the category of constitutional law. More often than not, a corporation or an individual is merely challenging the agency's interpretation of an act of Congress and no constitutional question enters the case.

Constitutional law will, of course, be our main concern. In a phrase, it involves the interpretation and application of the Constitution by the Supreme Court as well as lower federal and state courts. In those nations in which the government is not bound by a single specific written instrument—England is the foremost example—constitutional law, while not ignoring court decisions, would find much of its significant material in acts of the parliament which are ipso facto constitutional. No court in the United Kingdom can declare them otherwise. In the United States, however, since the written Constitution is the "supreme law of the land," as it says with unvarnished clarity, and since the Supreme Court decides its final meaning, American constitutional law is primarily the study of Supreme Court decisions. Any action of any government official—federal, state, or local—must theoretically accord with the Constitution. When the Court is faced with a challenge to official action, it must first decide what the Constitution means, and very often the Court must determine the meaning of such inexact phrases as "due process," "equal protection," "interstate commerce," or "direct taxes." The Court gives definitive interpretation to the scope and limits of governmental power and at the same time guarantees the integrity of the system.

Statutory Law and Decisional Law

An important distinction must be made between *a* law and *the* law. The former refers to a written statute which has been formally enacted by a legislative body—Congress or a state legislature—and is known as *statutory law.* All statutes must conform to the Constitution of the United States and are subject to a challenge of unconstitutionality in a court of proper jurisdiction. When a court interprets and applies a law within the framework of a case, assuming the law is constitutional, the resulting decision then becomes *the* law on that particular subject. This is variously known as *decisional law* or *case law.* In practice there is an inevitable mixture of legislative statutes and court decisions, for sooner or later a statute will end up with a judge's view of its intent, a judicial gloss which may expand, contract, clarify, or even distort the original meaning of the legislature. If a legislative body disagrees with the judicial interpretation of a statute, it may reenact the legislation in language which will require a judicial reassessment of legislative intent. Thus, on matters of statutory interpretation, the legislative will is supreme, unlike questions of constitutionality on which the judicial word is final unless the Constitution is amended.

Common Law and Equity

This raises the controversial question: Who makes the law, the legislature or the courts? The answer is both. The American legal system is in the common law tradition and herein lies the root of judge-made law. The common law of England which developed over centuries was transplanted to most of the English-speaking world including the American colonies, and it is today the foundation of the