Second Edition

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CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING

Second Edition

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CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING

preface to the second edition

We have been enormously pleased with the reception given the first edition of *Constitutional Law and Judicial Policy Making*, and we hope that in fashioning this second edition we have retained the most popular features of the first. "Improving" a text is hazardous, yet we have attempted just that, stimulated and guided by the criticism of students and teachers who have used the book.

The fundamental conception of the first edition, that the study of constitutional law is best carried out by stressing the social and political context of Supreme Court decisions, remains firm in our thinking. Judicial decisions are events—often central events—in ongoing political processes, and ought to be presented as such. Each chapter, including many chapter subsections as well, is designed to present that context for the cases included in it. In reading a case, and the contextual supporting materials, the student ought to obtain a good understanding of not only the issues, and what the Supreme Court decided, but also the political interests at stake, some elements of litigation strategy, and at least some preliminary appreciation of the impact each case had. Cases are thus seen as the medium through which the Supreme Court acts as a primary maker of public policy, and we have chosen cases which best illustrate the nuances, and the ebb and flow, of judicial policies. Salient policy issues, rather than formal constitutional structures, remain the basis for organizing the chapters in Part II.

A major problem with the first edition, identified by many critics, was an overly selective view of the Court's work. Our deliberate omission of some of the traditional subject matter of constitutional law books left many potential users—and some users—uncomfortable if not downright unhappy. We have responded to this criticism in part by creating a new section dealing with the religion clauses of the First Amendment. And we have included a full treat-

ment of *The Slaughterhouse Cases* (1873), whose omission in the first edition, more than any other case, elicited negative comment. Indeed, our own experience in teaching with the book convinced us that students needed a full treatment of this seminal event in the jurisprudence of the Supreme Court.

Another problem noted by our readers was that our editing of cases and other materials too often presumed that the implicit and tacit meaning of these items would be evident to the student. In this edition we have made strenuous efforts to provide explanatory notes before most cases—and following the more important ones as well—to assist the student in interpreting the meaning of the Court's decision. In this respect, the balance between cases and explanatory notes has shifted toward increased emphasis on the latter.

Constitutional law is a dynamic subject at any time, and it has been particularly so in the eight years since the first edition went to press. The first edition was dominated by decisions of, and our preoccupation with, the Warren Court. The Burger Court, by 1971, had yet to establish a firm and identifiable philosophy, although even some of its early decisions presaged important doctrinal changes. Thus, we could identify a number of potentially critical confrontations between the emerging philosophy of the Burger Court and its predecessor, particularly over such salient criminal justice issues as the "Miranda" rules, and the exclusionary rule. Now, nearly a decade later, the dominant themes of the Burger Court with regard to these doctrines are more clear.

The new policy directions of the Burger Court forced us to re-examine and often reconstruct every policy chapter. Thus, the Court's new hard line on access to the federal courts, its closing off of the inviting avenues of *Flast v. Cohen* (1968), and its tightening of policies toward standing (while loosening the restrictions of "mootness") required substantial changes and some enlargement of the section on doctrines of self-limitation. School busing and affirmative action questions required considerable enlargement of the materials on racial equality. When the first edition went to press, the Supreme Court had decided only one gender classification case, *Reed v. Reed* (1971). But that opened the floodgates and we have selected a half dozen more to illustrate how the Court has grappled with such issues.

As expected, a major focus of the Burger Court, especially after the third and fourth appointments by President Nixon were made in 1971, was criminal justice. Efforts to chip away at *Miranda v. Arizona* (1966) and undermine, if not overrule, *Mapp v. Ohio* (1961), have been among the most visible enterprises of the Court in recent years. So, too, has been its grappling with the complex legal and moral questions of capital punishment. Search and seizure issues have become especially prominent, and there is increased emphasis on such cases. And some account is taken of the Court's involvement in prisoners' rights cases.

Our chapter on the presidency has been substantially changed to include the increased focus of the 1970s on the domestic side of presidential power, particularly as new limits on its exercise were pressed in the wake of the Watergate scandals. But we have also expanded our treatment of treaties and executive agreements, and of various efforts by Congress to restore some of the balance between it and the presidency in foreign policy decision making.

The chapter on personal rights has been almost entirely recast, and substantially expanded. We have added a section on religious freedom cases, and ex-

panded the treatment of issues involving the press—prior restraints, libel, the asserted privilege of confidentiality for reporters, and issues of access to, and by, the media.

In the first edition we concluded with a chapter on "frontiers" which considered newly emerging issues, such as gender equality, and older but not yet resolved issues such as reapportionment and wealth/status equality. None of these issues can still be described as a constitutional frontier. Individual cases in each area continue to come to the Court, but the main policy determinations have been made. All have been incorporated into our enlarged chapter on "equality."

For reasons described more fully in the concluding chapter of this second edition, which we have entitled "The Burger Court and the Old Frontier," we have been unable to identify a current salient frontier issue—at least not one recognized by a majority of the members of the Supreme Court. Of course the Court is constantly challenged by new issues. In some instances, such as affirmative action, it has taken up the challenge; in others, it has not. But in none of these issues do we detect the same sense of "prospect" suggested by our first edition frontier cases. In a very fundamental sense this may simply reflect philosophical differences between the Warren Court's "idea of progress,"[1] and the Burger Court's preference for reducing the role of the Court to somewhat more orthodox dimensions.

This is a much larger book than the first edition. The additional size results both from our efforts to be comprehensive and from design changes intended to make the book more readable. Students should still be able to afford it, especially since it is likely to be used for a two semester or two quarter course. We also *hope* that they can carry it. But as so many of the students who take constitutional law courses plan to attend law school after graduation, they might as well develop their muscles as well as their minds.

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Richard S. Wells
December, 1979

[1]See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970).

preface to the first edition

Three recent developments in American political science have provided materials that meet some of the inadequacies inherent in traditional "casebooks." First, the behavioral revolution in political science directed attention to many neglected facets of the judicial process, with a particular emphasis on Supreme Court decision making. Second, political scientists have developed conceptions of the "judiciary" that extend its processes and recognize its impact well beyond the courtroom. The pervasive societal context of the judiciary is readily apparent, and a parochial focus on one narrow arena is clearly inadequate. Third, within the societal context of judicial action, political scientists seem increasingly interested in the contributions of the Supreme Court to the development of public policy in the United States, rather than in Supreme Court decisions for their own sake.

Our view of Supreme Court policy making recognizes that there are both similarities and differences between the Court and other political institutions. Studying the decision-making processes of the court from the perspective of political decision making generally has produced enormous gains in our understanding, but at the same time the unique aspects of the judicial process should be recognized. For the same reasons judicial policy *outputs* may have unique properties, but they also share characteristics with policy decisions made by nonjudicial institutions. We have attempted to show this integration of decision making and policy within the Court and between the Court and other institutions. The Court is not simply an end in itself, to be studied on a presumption of its importance. Instead, it should be viewed as a significant part of a larger and much more complex social system. The Court is important, yet its importance is neither uniform nor self-evident. As some of the succeeding chapters will show, there are some areas in which the Supreme Court has

exercised considerable influence and others where it has had little or no impact.

Viewed from this general perspective, particular problems emerge for the writer-editor in explicating the ways of the Supreme Court. First, there is the question of a rationale for inclusion and exclusion of materials. Second, there is the problem of the "case"—how it is to be viewed and what its function is, both for purposes of the Court and for providing an understanding of its actions. Third, what balance should be struck between historical factors, technically legal considerations (the nice points that attract the aspiring Perry Masons in undergraduate classes), and behavioral matters of professional political science.

Developing a "rationale" worthy of that word proved to be a difficult undertaking. Initially we stipulated that certain cases would be included and would not be the highly abbreviated hatchet jobs found in some casebooks. The notion was to allow the student to see the *full* development of judicial policy and craftsmanship in a limited number of areas. We planned to have generous exerpts from the "classical" as well as the contemporary, "cutting-edge", critical literature. We would be interdisciplinary, and draw generously from the range of social sciences, and perhaps even more exotic reaches of academic and other professional endeavors. However, space and cost as well as our own teaching experiences impinged on the grandness of our original notions. We found that shortened editorial versions of cases accompanied by editorial notes were clearer than a series of cases and articles designed to highlight subtle meanings. The generous and dispassionately friendly criticism of colleagues and "readers" helped us even more in transforming grand rationale into practical editorial guides.

Basically, we have tried to minimize case materials in comparison with other textbooks. Our intention has been to demonstrate that the Court deals with ideas in order to shape events and that these ideas have consequences. The introductions to each chapter are intended to provide a setting within which the variety of materials are made to seem coherent; they are also efforts to reduce the sheer amount of materials that we would have had to use in order to show the background against which all policy action is taken. "Policy" chapters are organized around problem areas rather than by constitutional label. Our purpose is not a catalogue of decisions but a selective view of how the Court has contributed to the allocation of power and the determination of important policy issues. No attempt has been made to cover all of the things that the Supreme Court does.

The Supreme Court speaks to a variety of public issues. More often than not, no single case is sufficient to delineate action that one would presume to consider policy making. We have thus tried to use a series of court decisions wherever possible so that we can provide a glimpse of judicial policy in the Court's "own words." Occasionally, however, the Court does not enunciate clearly in a decision, and it is necessary to resort to critical literature to clarify what is important but vague. Where the Court seems ambivalent in its actions we attempt to provide secondary materials that demonstrate the complexities of the issues with which the Court is apparently wrestling. We hope through the use of such secondary materials to show the enormity of the Court's task in

a society that is changing rapidly and the implicit limits on its judicial style of policy making.

Our conception of the "case" is that it is a single instance of Court action in a social setting, or context, that is complex and ambiguous. Obviously, a major portion of the context is additional cases, but the social circumstances that represent the problem that the decision speaks to are delineated by a range of social actors other than judges.

In our view the judge cannot be the exclusive focal point of any current textbook on law and the judicial process. The increasing attention to the societal context of the legal process and to questions of compliance and impact makes the judge perhaps more an instrumental presence who conveys ideas. Therefore his policies become the result of many factors of which he and the influence of his background are only a part. Our view has increasingly been that attention should shift from near exclusive concern with the judge to explication of the range of circumstances and situations in which parties seeking particular social results must act. Thus, our materials are selected with an eye to a wider span than that often found in traditional or process-oriented textbooks.

A problem that exists for anyone developing a textbook in constitutional law is the balance to be struck between materials that are traditional and of historic importance and those reflecting current processes of development. Wherever possible we have conveyed traditional conceptions as background. Some notions that have long been abandoned still have relevance in explaining current developments, and these have been included. Others seemed to us to be primarily of historical interest, and these have on the whole been ignored.

For example, we have included such cases as *Gibbons* v. *Ogden* (1824) and the *Cooley* case (1851) because we felt them essential to any treatment of economic policy making by the Supreme Court. Likewise, the *Civil Rights Cases* (1883) and *Plessy* v. *Ferguson* (1896) seemed important enough as examples of how the Court in the past met problems still current, while the *Slaughterhouse Cases* (1873) seemed adequately conveyed by a more concise summary. Older cases were included where it seemed particularly important to convey a sense of doctrinal development or to show the constancy of problems and issues that have confronted the Supreme Court throughout its history. By contrast, we have included many very recent cases which indicate where the Supreme Court is moving now, although we recognize that this may only be concerned speculation and that these cases may never achieve any lasting historical importance. Our experience in teaching has convinced us that, on the whole, students are most interested in the current relevance of the Supreme Court; we share that view and we think, on balance, that this book reflects it as well. In the interest of brevity and readability, footnotes have been omitted from articles and cases included in the book.

The materials finally included in the book represent less than half of those initially compiled. The need to produce a book which the student could both afford *and* carry has forced us not only to cut cases and materials more than we intended but also to delete a few topics of obvious importance. We have done this in the belief that it was more important to be thorough than exhaustive. What remains is, in our view, appropriate for a two-semester or two-quarter

course, leaving room for the course instructor to assign a variety of supplementary materials. With some omissions the book should also be suitable for a one-semester course. We have tried to be eclectic, yet it would have been impossible to make the book all things to all teachers. We shall see.

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acknowledgments

Many changes in this edition resulted from comments and suggestions of those who used the first edition, students as well as teachers. In particular we are indebted to our own students. They gave the most direct responses to our efforts with a spirit of helpfulness. Although there are too many students to name individually, we acknowledge their contributions collectively.

Once again we acknowledge the help of our teacher, John R. Schmidhauser, who helped us form ideas of what a good text should be. Although we are by now far from being new arrivals to the study and teaching of constitutional politics, we are still guided by the contextual approach that we first learned under his influence. Kenneth Dolbeare helped us form our conception of a text, and we thank him for his early good counsel.

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Once again our wives, Mary and Maurine, and our children, Alison, Joanna, and Daniel Grossman, and Caroline and John Wells, have endured and survived our writing. We particularly thank our wives for their patience and forbearance. As for our children, who can now read and perhaps judge our efforts, we thank them for not asking too often why "the book" took that much time and effort.

J.B.G.
R.S.W.

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