Political Dynamics of Constitutional Law

Fifth Edition

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To The College of William and Mary
for intellectual stimulation

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PREFACE

Constitutional decisionmaking cannot be traced solely to the efforts of nine Justices, or a majority of nine. Other parts of government both interpret the Constitution and influence the judiciary. Volleys between the elected branches and the courts take place on a regular basis. Unfortunately, this creative and healthy exchange is largely overlooked in the literature on constitutional law. The consequence, as noted by Professor Michael Reisman of the Yale Law School, is that there is no "comprehensive course on constitutional law in any meaningful sense in American law schools." W. Michael Reisman, International Incidents: Introduction to a New Genre in the Study of International Law, 10 Yale J. Int'l L. 1, 8 n.13 (1984).

This state of affairs is regrettable. Courses in constitutional law and the judicial process offer a rare opportunity for students to learn both about government operations and the workings of three-branch interpretation. A book highlighting the interchange between the courts and the elected branches will help correct this deficiency.

The purpose of this book is to expose students to a broad array of materials that bear directly on constitutional law—materials not covered in traditional constitutional law casebooks. These materials include excerpts from congressional sources (legislative debates, hearings, committee reports, and court filings), White House sources (presidential signing statements, executive orders, and White House/departmental communications), Department of Justice sources (Attorney General opinions, Solicitor General briefs, and internal departmental memoranda), Supreme Court sources (oral arguments, correspondence between Justices, and case conferences), interest group activities (briefs, position papers, party platforms), academic research (studies on implementation of judicial decisions, as well as studies of litigants and attorneys involved in landmark cases), and executive, legislative, and judicial activities at the state level.

These materials will allow the student to understand the process of lawmaking and oversight in Congress, the stages of decisionmaking within agencies, and the preparation of documents for a court challenge. Effective participation in constitutional and administrative law requires a sophisticated understanding of the operations in all three branches.

Conventional constitutional law casebooks omit these materials. Aside from incompletely describing the shaping of constitutional values, these omissions are unfortunate for several reasons. First, the constitutional law class is enlivened by the introduction of nonjudicial material. Students are better equipped and more willing to discuss constitutional doctrine when it is played against the larger backdrop of political pressures welling within and outside the government.

Second, the inclusion of nonjudicial materials is much more than an intellectual exercise. Irrespective of whether students ever participate in constitutional litigation, exposure to legislative and executive documents is critical for a quality legal education. The typical law school curriculum, however, does not mandate coverage of such materials. This book fills a void in the traditional legal education.

Third, a good attorney must be able to function in every sector: judicial, legislative, and executive (state as well as federal). If an attorney finds one avenue closed, others may be available. Thus, Nathan Lewin represented Captain Goldman on the yarmulke case. Goldman v. Weinberger, 475 U.S. 503 (1986). First he tried to convince the Air Force to change its regulation to permit Goldman to wear his yarmulke indoors while on duty. Losing that effort, Lewis took the issue to federal district court and the U.S. Supreme Court, failing once again. On a final round, he turned to Congress to seek legislation directing the Air Force to change the restrictive regulation. His last move proved to be the winning one.

The dilemma faced by law professors is understandable. To make room for new cases, textbooks in constitutional law give short shrift to nonjudicial activities or ignore them altogether. The result is a truncated view of how law develops. Our book is designed to supplement the traditional textbook in constitutional law. The detailed case studies in this book—each illustrated with documents—will allow the student to understand the deficiencies of court-centered analyses and to appreciate the richness of more comprehensive perspectives.

Table of Abbreviations

In all documents and readings, footnotes have been deleted. For citations in the introductory essays and some of the readings, standard reference works are abbreviated as follows:

Annals of Cong.	Annals of Congress. Volumes of congressional debates of Congress from 1789 to 1824.
C.F.R.	Code of Federal Regulations. Agency rules, regulations, and orders currently in effect.
Cong. Globe	Congressional Globe. Volumes of congressional debates from 1833 to 1873.
Cong. Rec.	Congressional Record. Volumes of congressional debates from 1873 to present.
Elliot	Jonathan Elliot, ed., The Debates in the Several State Conventions, on the Adoption of the Federal Constitution (5 vols., Washington, D.C., 1836-1845).
Fed. Reg.	Federal Register. Includes presidential proclamations, executive orders, and agency regulations.
Farrand	Max Farrand, ed., The Records of the Federal Convention of 1787 (4 Vols., New Haven: Yale University Press, 1937).
Landmark Briefs	Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. G. Gunther & G. Casper, eds. University Publications of America.
Pub. Papers	Public Papers of the Presidents, published annually by the Government Printing Office.
Richardson	James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents (20 vols., New York: Bureau of National Literature, 1897-1925).
Stat.	United States Statutes at Large.
Weekly Comp.	Weekly Compilation of Presidential Documents, published each week by the Government Printing Office since 1965.

Appreciation

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About the Authors

Louis Fisher is Scholar in Residence with the Constitution Project. Previously he served as Specialist in Constitutional Law at the Law Library of Congress and Senior Specialist in Separation of Powers at the Congressional Research Service. The views expressed here are personal, not institutional. He has testified before congressional committees on a number of constitutional issues and served as research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. His publications include more than 400 articles in edited books, law reviews, political science journals, magazines, and newspapers. His books include *American Constitutional Law* (9th ed., Carolina Academic Press, 2011); *On Appreciating Congress: The People's Branch* (Paradigm Publishers, 2010); *The Supreme Court and Congress: Rival Interpretations* (CQ Press, 2009); *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008); In the Name of National Security: Unchecked Presidential Power and the Reynolds Case (CQ Press, 2006); *Military Tribunals and Presidential Power* (Kansas Press, 2005); *Presidential War Power* (2d ed., Kansas Press, 2004); *The Politics of Executive Privilege* (Carolina Academic Press, 2004); *The Democratic Constitution*, with Neal Devins (Oxford Univ. Press, 2004); *Nazi Saboteurs on Trial* (Kansas Press, 2003); *Religious Liberty in America* (Kansas Press, 2002); *Congressional Abdication on War and Spending* (Texas A&M Press, 2000); *Encyclopedia of the American Presidency*, with Leonard W. Levy (4 vols., Simon & Schuster, 1994); *Constitutional Conflicts between Congress and the President* (4th ed., Kansas Press, 1997); *Constitutional Dialogues* (Princeton Univ. Press, 1988); *The Politics of Shared Power* (4th ed., Texas A&M Press, 1998); *The Constitution between Friends* (St. Martin's, 1978); *Presidential Spending Power* (Princeton Univ. Press, 1975); and *President and Congress* (The Free Press, 1972). Professor Fisher is a graduate of the College of William and Mary (B.S. 1956) and the New School for Social Research (Ph.D. 1967).

Neal Devins is the Goodrich Professor of Law, Professor of Government, and Director of the Institute of Bill of Rights Law at the College of William and Mary. Along with Louis Fisher, he is the author of *The Democratic Constitution* (Oxford 2004). He is also the author of *Shaping Constitutional Values: The Supreme Court, Elected Government, and the Abortion Dispute* (Johns Hopkins University Press, 1996), co-editor of *Congress and the Constitution* (Duke, 2005), co-editor of *A Year at the Supreme Court* (Duke 2004), co-editor of *Redefining Equality* (Oxford University Press, 1998), and editor of *Public Values, Private Schools* (Stanford Series on Education and Public Policy, 1989). He is the author of numerous articles on constitutional, civil rights, and education topics. His work has appeared in *The Public Interest, The Yale Law Journal, The Stanford Law Review, The Columbia Law Review, The Michigan Law Review, The California Law Review, The Virginia Law Review, The University of Pennsylvania Law Review, The Texas Law Review, The Duke Law Journal, The UCLA Law Review, The Georgetown Law Journal,* and several other journals and magazines. Professor Devins is also the author of op-eds appearing in *The Wall Street Journal, The New York Times, The Washington Post, The Christian Science Monitor, The Chicago Tribune,* and several other newspapers. He has testified before Congress on budget reform and separation of powers. Professor Devins is a graduate of Georgetown University (A.B. 1978) and Vanderbilt Law School (J.D. 1982).

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CONSTITUTIONAL POLITICS

The complex and pervasive interactions among the branches of government in making constitutional law are largely unknown to students. They are taught that the courts are the dominant if not exclusive interpreters of the Constitution. Beginning with *Marbury v. Madison* (1803), students learn that judges are the "final arbiters" of the meaning of the Constitution, that all issues of constitutional moment percolate upwards to the Court for resolution, and that nonjudicial actors sit passively awaiting the Court's judgment.

This picture is highly simplistic. Even a general understanding of American legal history does not support the view that courts are the predominant force in shaping the Constitution. Many constitutional issues are addressed and resolved outside the judiciary. When courts do decide a case, their judgments are regularly overturned by constitutional amendments, congressional statutes, state actions, and shifting social and political attitudes. Judges are merely one of many authoritative actors in the complicated process of constitutional change.

To be effective in this complex environment, the student of law needs to understand the various arenas that affect constitutional values. A defeat in the courts does not necessarily end the struggle for constitutional rights and liberties. It may mark only a momentary setback, stimulating the attorney and client to pursue their interests in the legislature, an executive agency, in the states and in the public media. When the courts close one door, others remain open. To this extent, it can be said that a court ruling is "final" only when society accepts it as well-reasoned and persuasive. Otherwise, the search for constitutional values continues.

I. PARTICIPANTS AND PROCESSES

Constitutions draw their life from a variety of forces that operate outside the courts: ideas, customs, social pressures, and the constant dialogue that takes place among political institutions. Just as the judiciary leaves its mark on society, so does society drive the agenda and decisions of the courts. Justice Cardozo reminded us that the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

To safeguard their institutional position, courts must reach accommodations with social pressures and public opinion. At times they take the lead, but the historical record demonstrates that the judiciary often accepts the political boundaries of its times. Attempts to defy those

boundaries and invalidate the policies of elected leaders create substantial risks for the legitimacy and effectiveness of the judicial system. Abstract legal analysis is tempered by a sense of pragmatism and statesmanship among judges. Courts are independent but they are also part of the political system.

Constitutional interpretations by the courts are not simply mirror images of contemporary values. If that were true, there would be no need for a constitution or for courts to decide constitutional decisions. Constitutional questions could be left with legislative bodies, as is the case in such countries as England and Holland. By contrast, federal courts in the United States play an important function in deliberating on constitutional questions and deciding the powers of Congress, the President, executive agencies, and the states. But courts are not the sole participants in the process of shaping and declaring constitutional values. They share that task with other political institutions at both the national and the state level.

A. Congress

Congress performs a crucial role in constitutional analysis at many stages: enacting laws that balance various constitutional values, investigating constitutional violations by executive officials, and intervening in court cases. Bills are subjected to constitutional analysis by members, committee staff, and such legislative agencies as the Congressional Research Service of the Library of Congress. Outside experts are invited to testify at congressional hearings on constitutional questions. Those questions are regularly analyzed in committee reports and during floor debate.

Throughout the legislative process, Congress invokes its powers to decide constitutional issues. It uses its power of the purse to add restrictive riders and provisos to appropriations bills, thereby controlling the executive branch on constitutional issues and announcing to private citizens the limits of their constitutional rights (such as access to public funds to finance abortions). Legislation is introduced to strip the federal courts (including the Supreme Court) of jurisdiction to hear a case. Legislation may also be introduced to reverse a court ruling that interprets a statute. Through this process, called statutory reversal, Congress may overturn judicial decisions on issues of constitutional moment, including racial and gender discrimination. In 1991, Congress passed a civil rights bill that overturned or modified nine Supreme Court rulings, five of them from 1989, two from 1991, and one each from 1986 and 1987. Moreover, Congress passes constitutional amendments and sends them to the states for ratification, all part of a process that may result in nullifying Supreme Court decisions.

Congress may respond to a Supreme Court decision by reenacting a statute that the Court struck down. For example, Congress strongly disagreed with the Court's 1918 ruling that the commerce power could not be used to regulate child labor. Hammer v. Dagenhart, 247 U.S. 251 (1918). Twenty years later, after the Court's composition had changed, Congress again based child labor legislation on the commerce clause—legislation that a unanimous Court upheld! United States v. Darby, 312 U.S. 100 (1941). Another way Congress expresses its disapproval of a Supreme Court decision is to protect rights that the Court is unwilling to protect. For example, Congress passed legislation in 1980 to prohibit third-party searches of newspapers despite the Court's approval of such searches two years before. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). For Congress, this legislation was necessary because the Supreme Court's decision had "thrown into doubt" "a longstanding principle of constitutional jurisprudence." 126 Cong. Rec. 26562 (1980) (statement of Rep. Kastenmeier).

Congressional responses to Supreme Court decisions are not always hostile. Sometimes Congress affirmatively assists in the implementation of a Court decision. For example, in response to Southern resistance to the school segregation decision, Congress took steps to make *Brown v. Board of Education* (1954) a reality. In 1964, it prohibited segregated systems from receiving federal aid and authorized the Department of Justice to file desegregation lawsuits. These federal efforts proved critical in ending dual school systems. More actual desegregation took place the year after these legislative programs took effect than in the decade following *Brown*.

The appointment of federal judges offers Congress another opportunity to exert its influence on constitutional law. The Senate, during the confirmation process, not only examines the judicial temperament and competence of nominees but inquires into their judicial philosophy as well. If Senators are uncomfortable about the legal doctrines of a nominee, they may reject the person and require the President to send forth another name. Senators also have an important role on who is nominated to be a judge, particularly for the lower courts.

Congress may present its constitutional viewpoints directly to the judiciary. Although Congress initially relied on the Attorney General and the Justice Department to defend congressional interests in court, Congress always retained the prerogative to represent itself directly. In *Myers v. United States*, 272 U.S. 52 (1926), which concerned the President's power to remove executive officials, the Supreme Court invited Senator George Wharton Pepper (R-Pa.) to present an amicus curiae (friend of the court) brief and participate in oral argument. Other courts have invited the House of Representatives and the Senate to submit briefs on pending cases.

Individual members of Congress may take constitutional issues directly to the courts for resolution. When President Nixon used the "pocket veto" during a brief Christmas recess in 1972, Senator Edward M. Kennedy (D-Mass.) went to court as a litigant and successfully argued that Nixon's action violated the Constitution. Kennedy v. Sampson, 364 F.Supp. 1075 (D.D.C. 1973), aff'd, Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

On most occasions, members of Congress who take constitutional issues to the courts are told by judges that they lack standing to sue, that the issue is not ripe for adjudication, or that the matter is a "political question" to be resolved by Congress and the President. Judges conclude that few of these cases are genuine cases or controversies between Congress and the President. Instead, they generally represent the failure of one faction of legislators to convince a majority to work its will against the President. Judges basically advise the faction to return to the legislative branch and build a majority. E.g., Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

In recent decades, members of Congress have created legislative institutions to defend congressional interests in court. The Justice Department sometimes refused to defend the constitutionality of certain statutes, either because they threatened presidential powers or because they invaded constitutional rights. In some situations the Justice Department agreed to defend congressional interests in the district and appellate courts, only to withdraw its representation of Congress when the case reached the Supreme Court. S. Rep. No. 170, 95th Cong., 1st Sess. 11-12 (1977).

To safeguard its institutional prerogatives, the Senate established an Office of Senate Legal Counsel in 1978 to defend the Senate or a committee, subcommittee, member, office, or employee of the Senate. The Senate Legal Counsel may also intervene or appear as amicus curiae in cases involving legislative powers and responsibilities. The House General Counsel handles litigation that involves members, House officers, and staff. Senate and House counsel frequently file briefs and participate in oral argument before the courts.

B. The Executive Branch

Executive power in constitutional decisionmaking is extraordinarily broad. The executive nominates Supreme Court Justices, recommends legislation and constitutional amendments, exercises the veto power, promulgates regulations, and delivers speeches. In each of these ways, the executive interprets the Constitution and shapes constitutional values. The Constitution guarantees the executive a large role in legislative decisionmaking, requiring the President to recommend measures judged necessary and expedient. The executive has made frequent use of this power, sending proposals to Congress on busing, flag burning, school prayer, the USA Patriot Act, homeland security, and health care.

Presidents wield the veto power in part to protect the prerogatives of their office and to prevent Congress from passing laws they consider unconstitutional. For example, President George H. W. Bush helped maintain strict abortion funding restrictions by successfully vetoing five bills that allowed some federal funding of abortion. Even the threat of a veto is often sufficient reason for Congress to revise or remove contested language in a bill. In cases where the Supreme Court upholds the constitutionality of a federal statute and that statute is later revived or reauthorized by Congress, the President may exercise his own independent judgment and veto the bill on constitutional grounds.

The power of the President to nominate federal judges is a potent tool for redirecting judicial doctrines. Although executive officials deny that they use a "litmus test" to screen potential nominees on their views concerning abortion and other key issues, enough is known in advance about an individual's views before even extending an invitation. Of course an individual, once on the bench, has lifetime tenure and can decide cases antagonistic to the President who originally made the nomination. Presidents are known to express deep disappointment in the conduct of their selections. Nevertheless, the power of appointment can transform the judiciary. President Franklin D. Roosevelt was able, over time, to convert the Supreme Court from a conservative institution to one that was more liberally inclined.

Similarly, successive appointments by Presidents Nixon, Reagan, and Bush helped convert the liberal Supreme Court of the Earl Warren era into the conservative Rehnquist Court. Appointments by President Bill Clinton (Ruth Bader Ginsburg and Stephen Breyer) moved the Court in a more moderate direction. Appointments by President George W. Bush (John Roberts and Samuel Alito) solidified the Court's conservative base. President Barack Obama's selections of Sonia Sotomayor to replace David Souter and Elena Kagan to replace John Paul Stevens are not expected to change the Court's direction significantly.