CONSTITUTIONAL LAW

CIVIL LIBERTY AND INDIVIDUAL RIGHTS

Sixth Edition

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William Cohen • David J. Danelski • David A. Yalof

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AND

INDIVIDUAL RIGHTS

SIXTH EDITION

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For Nancy and Jill

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PREFACE

This volume, which is for undergraduate courses, focuses on the individual rights necessary for democracy and self-realization. These rights are freedom of thought and belief, freedom of speech and press, freedom of association, freedom of religion (including freedom from religious establishment), privacy, equality, due process, and the right to vote.

We approach these rights institutionally, doctrinally, historically, and realistically.

We begin by considering four constitutional institutions in relation to each other—the Bill of Rights (broadly considered), federalism, the judiciary, and judicial review. Because of the Supreme Court's importance in the American judiciary and in defining and guaranteeing individual rights, we explain and illustrate the six steps in the Court's decisionmaking process: (1) preliminary case selection, (2) oral argument, (3) conference discussion and voting, (4) opinion assignment, (5) opinion writing and circulation, and (6) public announcement of decisions and delivery of opinions.

The justices' opinions—majority, dissenting, and concurring—almost invariably reflect constitutional or legal doctrine. Such doctrine consists of theories, principles, rules, tests, and policies that are often used to justify future decisions in similar cases. We report, examine, clarify, trace the growth, and at times raise questions as to the soundness and consistency of judicial doctrine.

The individual rights covered in this volume must be approached historically because most of those rights antedate the making of the Constitution in 1787 and the Bill of Rights in 1791, and their interpretation has changed over time. In addition, we stress this approach because law-school courses in constitutional law typically do not emphasize it, apparently because those courses assume that law students had studied constitutional history as undergraduates.

Our presentation of material from court members' working papers—*certiorari* memos, conference notes, voting data in docket books, draft opinions, and intra-Court communications—provides a realistic dimension in understanding Supreme Court decisionmaking, for such materials sometimes show that the reasons for the Court's decisions are not those given in its opinions. In other words, opinions are often justifications (or rationalizations) for decisions reached on some other basis. It is not uncommon for ideologically-based decisions to be justified on the basis of

doctrine that satisfies a majority. And it is not uncommon for a doctrinal shift and even doctrinal abandonment to occur when there is a change of personnel in the Court following a change of ideology in the nation reflected in the presidency and Congress.

Consistent with our realistic approach, we report, where evidence is available, the political and social impact of principal cases in this volume. We do so for three reasons—(1) to show that Supreme Court decisions are not self-executing and that compliance varies, (2) to show that the consequences of decisions sometimes constitute feedback in the Court, and (3) to show that Supreme Court decisionmaking often plays a part in the nation's socio-political process.

We hope that this volume will be interesting and enjoyable for students. In an effort to make it interesting and to show the human side of the Supreme Court, we have presented biographies of all justices who wrote opinions reported in this volume. The data in the biographies include the Court member's social class, education, religion, party affiliation, appointing president, and confirmation vote. The biographies and notes also report relevant facts that often fall between the cracks—for example, Oliver Wendell Holmes, Jr., rereading Mill's *On Liberty* just before writing his opinion in *Schenk v. United States* (1919), which established the clear and present danger test; John Marshall Harlan I deliberately using the same pen and inkwell in writing his dissenting opinion in *The Civil Rights Cases* (1883) that Chief Justice Taney had used to write the Court's opinion in *Dred Scott v. Stanford* (1857); and William J. Brennan, Jr., asking Thurgood Marshall, when *Regents of the University of California v. Bakke* (1978) was before the Court, whether he thought it was proper for one of his sons to be accorded special consideration in the medical admissions process because of race and Marshall answering: "Damn right. They owe us."

WILLIAM COHEN
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ABOUT THE AUTHORS

William Cohen clerked for Justice William O. Douglas after graduation from UCLA Law School. He has been a member of the law faculties at Minnesota, UCLA, and Stanford. He is the author or co-author of several casebooks on constitutional law.

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David A. Yalof is an associate professor of political science at the University of Connecticut. His first book, *Pursuit of Justices*, won the 1999 American Political Science Association's Richard Neustadt prize as the best book published on presidential studies. A graduate of The University of Virginia Law School (J.D. 1991) and the Johns Hopkins University (Ph.D. 1997), Dr. Yalof has authored numerous articles about various aspects of constitutional law inter-branch relations.

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