AMERICAN CASEBOOK SERIES

LAW AND JURISPRUDENCE IN AMERICAN HISTORY

CASES AND MATERIALS

Seventh Edition

Stephen B. Presser, Jamil S. Zainaldin

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CASES AND MATERIALS

Seventh Edition

By

Stephen B. Presser

Raoul Berger Professor of Legal History
Northwestern University

Jamil S. Zainaldin

President, Georgia Humanities Council
Visiting Professor, Emory University

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To ArLynn, to Ingrid,
and to our colleagues and students.

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Preface to the Seventh Edition

Jefferson Davis, the man who would become president of the Confederate States of America, was for much of his adult life in service to his home state of Mississippi and to the nation. He was a West Point graduate, a member of the House of Representatives, a U.S. Senator, and a cabinet member. He interrupted his service in the House to serve in the Mexican War and returned home a genuine hero. In a contentious debate on the floor of the Senate on the admission of California as a free state in 1850, in response to a Southern Senator who said the South was his true home, Davis interjected "I, sir, am an American citizen." He opposed secession and the "fire eaters" of South Carolina but believed, like Thomas Jefferson and James Madison before him, that the States were sovereign, and, as such, had the right to alter or abolish the national government when it subverted the ends for which it was established. Secession was a perilous step, however, and Davis urged his fellow Southerners not to take precipitate action. Even so, the strict construction of the Constitution to result in the view that states could withdraw if the federal government went too far was not simply a Southern phenomenon. James Buchanan, a Pennsylvanian, a fellow Democrat of Davis's, and President of the United States from 1857–1861, believed himself constitutionally powerless to stem the secession movement that began on his watch in December 1860 after Lincoln's election. In January 1861, Davis resigned his seat in the United States Senate, but did so only after his home state of Mississippi voted to secede from the Union. He called it the saddest day of his life.

Abraham Lincoln entered the national electoral stage as a relative newcomer with his presidential victory in the autumn of 1860. Though Lincoln served one two-year term in the House of Representatives in the 1840s, his national appointive and electoral service was a mere shadow when compared to Jefferson Davis' national experience (Lincoln did serve in the Illinois legislature). Indeed, Lincoln's eventual emergence as the nation's greatest war leader and the savior of the Union was almost accidental: It was his anti-slavery speech at the Cooper Union in New York City in February of 1860 that thrust him into the limelight as a contender for the Republican Party presidential nomination. His election was not exactly a thundering victory: He won a majority of electoral votes, but carried barely 40 percent of the popular vote. Put another way, 60 percent of the American voters disagreed with Lincoln's view that the Constitution limited slavery to the traditional Southern slave-owning states, and that it should not be extended to the territories that had not yet become states.

Lincoln and Davis claimed to love the U.S. Constitution; both adored, even worshipped, the Patriot Generation of 1776 and 1789 and saw themselves as the Founders' lineal descendants. Yet each led their "nation" (Lincoln never acknowledged the legitimacy of the CSA) in a fratricidal war

against the other in the name of "fundamental rights and liberties." How do we explain this seeming paradox, this escalating and careening war of words? Was the American Civil War inevitable or was it accidental, a byproduct of bumbling politics and serious misunderstandings? What role did slavery play in the rent of the national fabric? What role did law play? And what were the consequences—in law, jurisprudence, and politics—of this episode in "civil rebellion?" Were the Southern secessionists the true American patriots, as they claimed? Did the evolution of the North's war aims toward the abolition of slavery imbue their cause with a moral imperative that made their victory inevitable? And what became of the freedmen in the aftermath of the war? These great questions of American history are, at least in large part, questions of law and jurisprudence.

In this seventh edition we have filled a gap in our coverage of history and law by adding new material on the Civil War era. The war plunged the nation into chaos, claimed the lives of more than 600,000 Americans, ever after altered the nature of the Union, freed the slaves, and deposited in American jurisprudence a new understanding of citizenship and national power. The post-war period of Reconstruction and Reunion, however, can also be seen as an era of war by other means, a war that lingered until the modern Civil Rights movement in the nineteen fifties and sixties. The causes and the meaning of the Civil War and its aftermath remain a vital subject of modern American historiography. With two new interpretative essays that provide context for the era leading up to and following the hostilities of 1861–65, as well as new documents and cases, this seventh edition, occurring in the year of the Lincoln Bicentennial, adds new depth to our summary of American legal culture.

For valuable research assistance we thank Eric Reese, Heather Schiewe, and Melissa Solomon. And for invaluable administrative assistance, Tim Jacobs. Finally, we thank our intrepid editors at West, particularly Louis Higgins, now West editor-in-chief of legal academic publications for his faith in us and for his friendship, and we express our gratitude to Laura Holle, who edited this edition.

JAMIL S. ZAINALDIN
STEPHEN B. PRESSER

Atlanta, Georgia
Chicago, Illinois
May 2009

Preface to the Sixth Edition

Scholarship in legal history has long and distinguished roots in England, but in the United States it moved in fits and starts. Oliver Wendell Holmes was perhaps our first important historian of law. His classic *The Common Law* (1881) was much like the English model in one important respect: it focused on the evolution of rules of law. Holmes's attention to the context in which law developed, or what Holmes called "the felt necessities of the time," marked out his work as profoundly different from the English legal history tradition. Holmes's challenge to legal historians in America remained unmet until the publication sixty-nine years later of J. Willard Hurst's *The Growth of American Law: The Law Makers* (1950) followed by his *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956). With Hurst setting the stage, in the mid–1970s, three magisterial books appeared within a few years of each other: Lawrence Friedman's *A History of American Law* (1973), William Nelson's *The Americanization of the Common Law* (1975), and Morton Horwitz's *The Transformation of American Law* (1977). Earlier, in 1970, the University of Chicago Law School had taken the unusual step of hiring Professor Stanley Katz, a non-lawyer, but a distinguished colonial historian trained at Harvard, to begin a program in legal historical studies. Katz's seminal work on colonial history and law demonstrated the possibilities that might come from marrying these two academic disciplines.

In the mid-seventies, when we first considered putting together a casebook of materials that would capture some of this excitement, we were faced with the question of precisely what such a book should include. Our mentors, Morton Horwitz and Stanley Katz, exerted a powerful influence by the examples of their scholarship and teaching. Presser taught (and still teaches) in Northwestern's law school while Zainaldin at the time was teaching in Northwestern's history department (he now teaches at Emory). The pairing of these two disciplinary specialties for the purpose of teaching two differing audiences (law students and undergraduates) was a challenge, and we were well aware that there might be little interest in a casebook exploring the emerging field of legal history. Given the novelty of this partnership of law and history and a lawyer and an historian, the decision of what to include in our first edition was a delicate and sensitive collaborative effort. We were aware that we might well be contributing to a sort of canon in legal history, and, borrowing lavishly from the new scholarship in legal history for the first and subsequent editions, we endeavored to tell law's story in America by focusing primarily on cases and original sources reflecting a handful of historical themes limned in the preface to the first edition in 1980.

As this sixth edition goes to press, we continue to believe as before that law is best understood by examining its past. We know why law is important. Perhaps the best statement of the centrality of the kind of law we wanted to

write about was that recently made by the English philosopher, Roger Scruton, who stated that "The common law of England is proof that there is a distinction between legitimate and illegitimate power, that power can exist without oppression, and that authority is a living force in human conduct." The same can be said, of course, of American law.

But why is history important? Imagine that you know next to nothing of the sport of baseball, and are told that Babe Ruth is one of the greatest players who ever lived. You would nod, at least, in recognition of the name, for "the bambino," George Herman Ruth (1895–1948), was also one of the country's first modern celebrities whose every move on and off the field was scrutinized by the new tabloids. But you would not know how to judge Ruth, why he was a figure of consequence, and how his own life figured in baseball's rise as a national pastime. To know that you would need to know much more: what baseball is, what excellence in that sport means, the game's rules, how Babe Ruth compares with players in his time and after. Ruth's fame, then, is not simply about Ruth; it is also about the emergence of competitive sports on a nationwide scale at the turn of the twentieth century, the rise of mass media, the invention of the radio (and the harnessing of electricity), and the construction of massive sporting arenas that matched the ambitions and the appetites of an urbanizing, industrial America. It becomes impossible to separate the Babe from the history of the sport and the nation. Indeed, he is significant *because* of these intersections. Now imagine that the subject is law. How can we possibly "know" what is important about American law, or the legal system, if we know little or nothing about what it was, what it meant at various stages in our history, how and why it came to be, and who created it? How can we understand the United States if we do not know something of law's role in the nation's development? And how can we understand law if we do not know something of the people—the men and women—whose own stories are woven in the fabric of law? It is not possible to answer these questions completely, nor perhaps even satisfactorily. Such is the immensity of the legal historian's task.

Beginning as an experiment, this casebook has gone through five subsequent editions. In that time the coverage and documentary selections were revised, the *Notes and Questions* enhanced or modified to take advantage of recent scholarship, and the title altered to reflect the expanding scope of the book. We added new chapters and new sections, to take account of developments in the three decades the book has been in print. Yet the fundamental approach of the casebook has remained unchanged. In the preparation of this sixth edition, we are reminded that the story of our nation is as complex as law, and as susceptible to multiple interpretations. Some of our own views have changed with time. The way we see the past cannot be separated from the influence of the present. Indeed, the past grows in importance when we most need to understand the significance of the present. In this edition we have sought to make clearer the importance of law and American history to understanding our present dilemmas, and to recognize that for many coming to this course, this will be a first exposure to the discipline of history. Thus, in a series of new introductory essays to four chapters, as well as new introduc-

tions for nine sections, we hope to have made the task of synthesizing these materials easier for students.

When the first edition of this book appeared, Jimmy Carter was in the last year of his presidency. Today we are in the first decade of a new century. Along the way we have learned much from our students and colleagues. Each edition has benefited from their sage advice and good questions. To our colleagues and students who have walked with us on this journey, we say thank you and to them, we dedicate this edition.

JAMIL S. ZAINALDIN
STEPHEN B. PRESSER

Atlanta, Georgia
Chicago, Illinois
February 2006

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PREFACE TO THE FIFTH EDITION

As this edition goes to press the situation in Constitutional Law has never been more precarious. Since the Fourth Edition, the United States Supreme Court, for the first time in history, has decided a Presidential election, has decided that the right to engage in homosexual sodomy is protected by the due process clause, that "diversity" is a legitimate rationale to make distinctions based on race in university admissions, that student-initiated prayer at football games is impermissible, and that states may not prohibit "partial birth abortion" unless provision is made to permit the practice if the health of the mother is in danger. The country has engaged in armed combat in Afghanistan and Iraq, following a terrorist attack in which thousands of lives were lost. Many feel that the war against terrorism puts civil liberties at risk, and many wonder whether our commitment to the rule of law remains in force. Judging, at both the federal and state levels has become more politicized, as both major parties make judging campaign issues, and as both vie for judges with particular "judicial ideologies" to be placed on, or barred from, the bench.

The aim of this book continues to be to renew the understanding of, and perhaps a faith in, the rule of American law as a means of dispassionately resolving the inevitable social, political, and cultural controversies that increasingly are decided by our judges. Toqueville observed almost two centuries ago that our political disputes have a way of winding up in our courts, but even Toqueville might not have been able to predict our current situation, where what happens in our courts now inevitably ends up the subject of our politics. What is attempted by these materials is adequately discussed in the preceding Prefaces, to which those encountering this subject for the first time are referred. This edition offers new materials at the end, principally revolving around the *Bush v. Gore* (2000) decision, and the cases from the most recent (2002–2003) term of the United States Supreme Court. There are many more citations to the scholarly literature on most of the topics addressed in this edition, in order to facilitate use of this volume as not only a *coursebook*, but also a *sourcebook* for students and scholars.

When the First edition came out, almost a generation ago, American legal history was very much the ugly stepchild of the historical and legal professions. Historians shied away from law because of its technical difficulty, and lawyers were uninterested in anything not immediately relevant to their practical needs. As more and more historians have acquired law degrees, and as more and more of them have taught in law schools, the situation has been changing. As lawyers have been faced with challenging ideological arguments, they have discovered that an appeal to history is often effective, and, as our politics has continued to be interested in law and judging, undergraduate departments have also been more receptive. All of this has encouraged

scholarship, more of the fruits of which are now numbered in these pages. This volume itself has modestly contributed to the renaissance in legal history, and this edition seeks to continue that contribution.

Its approach has been kindly received by an impressive number of teachers of both undergraduates and law students, most recently in a splendid appreciation of legal history by Professor Michael E. Parrish, in a review essay on a new book by a titan in the field, Lawrence M. Friedman.[1] Slowly there does seem to be a consensus forming that there is a core body of knowledge about the history of American law and jurisprudence that should be a part of the equipment of educated citizens. This core body of knowledge is explored not only here, but in notable recent synthetic treatments such as Lawrence Friedman, Law in America: A Short History (2003), Kermit Hall, The Magic Mirror: Law in American History (1989), Anthony Chase, Law and History: The Evolution of the American Legal System (1997), Peter Karsten, Heart Versus Head: Judge Made Law in Nineteenth Century America (1997), Kermit L. Hall, James W. Ely, Joel B. Grossman, and William M. Wiecek, editors, The Oxford Companion to the Supreme Court of the United States (1992), Kermit L. Hall and David Scott Clark, editors, The Oxford Companion to American Law (2002), and Paul Finkelman, Kermit L. Hall, and William Wiecek, American Legal History: Cases and Materials (2nd ed. 1986). These other books might profitably be consulted by students taking courses in which this casebook is used, and, through the beefier bibliography this time, this edition seeks to go further in suggesting the commonality of current efforts in the teaching and practice of legal and constitutional history.

As usual, thanks are due to West, now a part of the Thomson Corporation, and, in particular, to Louis Higgins and Roxy Birkel, with whom I have worked most closely on this edition. I have benefited from the generous support of the Searle Foundation over the past four years, which permitted me to take the time necessary to prepare this edition, and I am deeply grateful to Dan and Gideon Searle, as well as Northwestern's President Henry Bienen and the Law School's Dean, David Van Zandt, who were all instrumental in securing that support. My law student research assistant, Kara Moskowitz, prepared the drafts of the *Bush v. Gore* materials, and aided my undergraduate research assistants Meagan Kudchadkar from Northwestern and Katie Rasor, from Stanford, in the ferreting out of recent developments in scholarship. All three critically read the entire manuscript and made valuable suggestions for revision. My assistant, Tim Jacobs, with his usual elegance, performed myriad invaluable tasks. I have benefited greatly from the many scholars who have forwarded their work to me, and, in particular, from the advice I received this time from Richard Bernstein, Alfred Brophy, Brannon Denning, Mary Dudziak, Scott Gerber, Patrick J. Kelley, Thomas McAfee, and Polly Price. As usual (and customary) I was able to follow it only in part, so any errors and outrages that remain are attributable to me, not them. As before, the book remains a work in progress, and Zainaldin and I hope for

1. Michael E. Parrish, "Book Review: Friedman's Law: American Law in the Twentieth Century by Lawrence M. Friedman," 112 Yale L.J. 925 (2003).

future editions, so that critical comments from adopters and users of this edition are solicited and would be much appreciated.

STEPHEN B. PRESSER

Chicago, Illinois
October 2003

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PREFACE TO THE FOURTH EDITION

The preface to the Third Edition, to be found on the pages following, still gives a good summary of the changes in thematic focus from prior editions. Changes in this edition have been made with the aims of more effectively understanding the current challenges to the rule of law and of appreciating the significance of law and legal institutions to ordinary Americans. There are two main alterations or additions to this edition. The first is a reworking of the slavery materials in Chapter Four, to eliminate the Elkins materials on the psychological impact of the peculiar institution on slaves, and to substitute therefore the testimony of the slaves themselves, from the slave narratives. Material from these narratives, particularly that of Solomon Northrup, also appears in the notes and questions after several of the materials on state and federal cases on slavery. These narratives, we hope, offer a view of slavery "from the ground" that may help put in perspective nineteenth century lawyers' and judges' understanding of the institution.

The second major change in the book is the addition, at the end of Chapter Eight, of materials regarding the impeachment and trial of President Clinton. They are properly placed in the Section on "Postmodern Neopragmatic Constitutional Law," as the question about what to do about Mr. Clinton invariably involved questions about how the law and Constitution ought to be interpreted, and involved interpretative strategies that often suggested the influence of pragmatism, if not postmoderism. More than one commentator, for example, explicitly suggested that Mr. Clinton had become our first "postmodern" President when he ruminated in his grand jury testimony over questions like what the meaning of the word "is" was. The materials on the Clinton impeachment nicely echo themes as well from the Chase impeachment treated in Chapter Two.

Bibliographical information regarding works published since the third edition is included in the revisions of the slavery section, and can also be found in the revised teacher's manual, available to instructors.

Once again we'd like to thank West Publishing for its support for this casebook, and its allowing it to go into an unprecedented (for a legal history casebook) fourth edition. More than a few of our non-history colleagues have asked us how a book on legal history could ever need revisions, since history doesn't change. History moves forward, however, so there is always room for more materials to cover events that have occurred since prior editions, and the interest of historians and students in the past often shifts in perspective or in content. This is still a work in progress, we hope for future editions, and we still solicit and welcome comments from students and instructors. For suggestions regarding materials to be included in this fourth edition we are particularly grateful to Ariela J. Gross, Marc Harris, Jeffrey Sawyer, Jon–

Christian Suggs, Eric G. Tscheschlek, and Sandra F. Van Burkleo. Claudia Launer–Campos and Patrick Daly, now second-year students at Northwestern, and Zora Shaw, now a third-year, each did research and drafted parts of the new materials for this edition. Alon Ziv, a visiting student from Israel, prepared background materials on the Clinton impeachment. Their long hours, unflagging enthusiasm, and shrewd insight were greatly appreciated and are hereby acknowledged. Northwestern's' Dean, David Van Zandt, generously provided research support and personal encouragement for this edition, without which it would not have been possible.

STEPHEN B. PRESSER

Chicago, Illinois
December 1999

Preface to the Third Edition

The rule of law, it would seem, is now pretty much up for grabs in this country. Since *Brown v. Board of Education* in 1954, or perhaps since the "Constitutional Revolution" of 1937, it had been assumed by most legal academics that it was the task of American courts to lead the nation into a more progressive era by implementing social policies that favored secularization, democratization, redistribution, and egalitarianism to an extent even greater than was possible through legislative action. Scholars talked confidently of the inevitable growth of the welfare state in what appeared to be the terminal stages of capitalism. The events in Central Europe in 1989, and the elections of the Fall of 1994 in the United States might well have changed all that. Much more attention is being paid, in the academy and elsewhere, to theories of private property, to the failings of the federal government, and to the importance of tradition and morality in law and society.

This third edition of this casebook has been prepared with particular attention to these developments. It was always the aim of the book to suggest variant approaches to legal problems, and to demonstrate the manner in which American law and legal institutions have oscillated between polar conceptions of the good polity, but that aim may have been more implicit than explicit. With the increased attention paid in this edition to bibliographical references to the work of scores of legal historians, most of them in the early years of their academic career, with the addition of two of the most important 5–4 recent decisions of the United States Supreme Court (*Planned Parenthood v. Casey* and *Lee v. Weisman*), and with somewhat more pointed notes and questions, the richness of the ongoing jurisprudential discourse should now be apparent. One of the reviewers of our first edition thought that the book was too timid and mainstream, and one commentator on the second edition found it to be heavily influenced by Critical Legal Studies. We must leave it to others to make the determination, but this edition has been crafted as a sort of post-modernist or neopragmatic examination of the development of American law, as will be most evident in the concluding sections of the book.

Given the richness and variety of discordant approaches to the teaching of legal history as our discipline continues to mature, we have striven to present a set of materials that can be used both to emphasize the conflicts and the consensus in our legal and constitutional history. We have tried to allow for, and even to encourage, differing interpretations of events and persons in the law, but we have also continued our effort to build a sort of canon of cases and materials for the field. Pursuant to this end, and with particular importance for law school users of the book, the course materials try to illustrate common themes in the development of seemingly disparate public and private law doctrines, and to provide at least the rudiments of a perspective in general

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