SIXTH EDITION

CONSTITUTIONAL INTERPRETATION

Powers of Government

Volume I

CRAIG R. DUCAT

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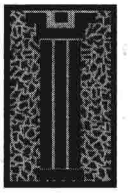

CONSTITUTIONAL INTERPRETATION

Powers of Government
Volume I

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TO

Justice Black, Justice Frankfurter, Justice Brennan,
mighty protagonists of diverse approaches
and
Justice Jackson,
a man for all seasons.

Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew the Truth put to the worse, in a free and open encounter?

—John Milton, *AREOPAGITICA*

PREFACE

This edition of *Constitutional Interpretation* is very different from the book Hal Chase and I brought forth twenty years ago. The absence of Hal's name from the title page is not the only feature that is different. The format of the book has been radically altered, and most of the chapters have been reworked such that they share only a distant kinship with the originals. Jettisoning the past in such obvious ways has not been easy, but it has been necessary. Although revision of previous editions reflected an ongoing effort to save what I could from the original book, the changing work of the Court and many very helpful suggestions from reviewers and colleagues convinced me that the book needed a thorough rethinking.

No area of constitutional law can probably ever be pronounced dead because subjects thought to be forever behind us periodically surface again, sometimes on the most unusual and unforeseen occasions, but any casebook on the subject of constitutional interpretation must regularly let go of familiar but spent topics and devote greater space to those that are current or new. I also became convinced that the separation of the introductory essays from the text of the cases they referred to was a major impediment to understanding. In this edition, commentary is interwoven with the materials, and I have taken care to bridge the cases so that it should be clearer how they relate to one another. This preface is written thirteen years to the month from Hal's death. Although it is different in form from the book he preferred, I hope it still shares his consistent commitment to a fair-minded presentation of the issues.

The sixth edition of *Constitutional Interpretation* includes cases, legislation, and other materials through the end of the Supreme Court's October 1993 Term. In addition to the master volume, *Constitutional Interpretation* is also published in two softcovers subtitled *Powers of Government* (Chapters 1–7) and *Rights of the Individual* (Chapters 8–14). Because the traditional two-semester constitutional law course has been expanded at a number of colleges and universities to a three-semester sequence, the coverage of civil rights and liberties is roughly twice that devoted to governmental powers. An instructor's manual to accompany *Constitutional Interpretation* provides examination questions, suggests relevant videotapes, and furnishes bibliographies of supplemental readings. As in the past, *Constitutional Interpretation* will be updated annually by a cumulative supplement published near the end of August.

The sixth edition reflects many changes. Among the many new features—some of them restorations—that distinguish this edition from its predecessor are the following:

- inclusion of more introduction and commentary on the cases
- integration of text with the major cases and notes

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- restoration of an extensive, freestanding chapter on property rights and economic liberties
- expansion of the chapter on the Presidency to include material formerly focusing on war and emergency powers
- reestablishment of a separate chapter on the right of privacy
- presentation of the major approaches to constitutional interpretation in an independent chapter
- enlargement of the chapter on the dormant commerce power highlighting environmental regulation

Although the manner of presentation may be different from its predecessors, the aim of the sixth edition remains the same: "The purpose of *Constitutional Interpretation* is to present, as fully as possible, examples in the development of constitutional doctrine at the hands of the Supreme Court. It is not intended to provide a history of constitutional developments or a comprehensive description of judicial politics, subjects that are more properly the respective focus of constitutional history or judicial process courses. Those in search of extensive descriptions of the law of the Constitution, its historical development, or discussion of the intentions of the framers of the Constitution, the Bill of Rights, or the Fourteenth Amendment are referred to the many fine commentaries that exist on those subjects. [My] aim is to provide an array of materials that is both generous and compatible with many different approaches to teaching about the Constitution."

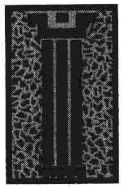
As in previous editions, footnotes are identified by numbers and letters. Notes indicated by numerals are those of the Court; notes indicated by letters are those of the author. Notes indicated by an asterisk may be from either source, although the context should make clear which source it comes from.

It should not go without saying that the advice and suggestions of others made an invaluable contribution. I want to thank the following colleagues for their helpful comments and suggestions for improving the previous edition: Jilda Aliotta (University of Hartford), Cindy Benson (University of Central Florida), Robert A. Carp (University of Houston), Robert L. Dudley (George Mason University), Robert Jacobs (Central Washington University), Carolyn P. Johnson (University of Kansas), David S. Mann (College of Charleston), William P. McLauchlan (Purdue University), Jerry O'Callaghan (State University of New York at Cortland), Richard Pacelle (University of Missouri–St. Louis), Glenn A. Phelps (Northern Arizona University), P. S. Ruckman, Jr. (Northern Illinois University), David F. Schwartz (Southern Illinois University at Edwardsville), and Elliot E. Slotnick (Ohio State University). I am particularly grateful to Paula J. Lundberg both for her moral support and for preparing the instructor's manual to accompany this edition. As always, the people at West Publishing have been magnificent. I especially want to express my appreciation to my editor, Elizabeth Hannan, for being particularly supportive and thoughtful, and to Patty Bryant and Lisa Gunderman, who oversaw the production of this volume with meticulous attention to detail. Above all, this edition—like the five that preceded it—bears an incalculable debt to thousands of students over the years whose favorable response and probing questions helped frame these materials.

CRAIG R. DUCAT
DeKalb, Illinois
January 1995

TABLE OF CASES

Principal cases are in italic type. Non-principal cases are in roman type. References are to Pages.



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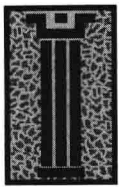
CHAPTER 1



JUDICIAL POWER

IT HAS BECOME a commonplace that, as then-Governor (later Chief Justice) Charles Evans Hughes put it, "We are under a Constitution, but the Constitution is what the judges say it is * * *."[a] Although this cliché is seriously misleading when it suggests that courts always have the last word on questions of constitutionality and insofar as it implies that judges are free to adopt whatever reading of the Constitution pleases them, it does contain a kernel of truth—even if it is overblown—that the courts play an important role in governing America because they play a central role in interpreting the Constitution. This is especially true of the U.S. Supreme Court. The study of constitutional law necessarily begins with an examination of judicial power because the political influence of courts, constitutionally speaking, flows from their power to decide cases.

As Martin Shapiro pointed out many years ago, the study of constitutional law makes both too much and too little of the Supreme Court. Examining the operation of government only through the lens of the Court's constitutional decisions makes too much of the Court because it appears as the focal point of the American political system and this magnifies its role out of all proportion. Although the Supreme Court has played—and continues to play—a vital role in governing America, studying only what it as Constitutional Court has said about itself and other branches and levels of government fosters the distorted impression of a judicial Goliath "marching through American history waving the huge club of judicial review."[b]

Of course, the judiciary is a coordinate branch of government, but it is an equal branch only in the formal legal sense. While the power "to say what the law is"[c] can result in a formidable capacity to legitimize or withhold approval of actions taken by other government officials, in such a legalistic culture "preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of

a. Speech at Elmira, New York, May 3, 1907, quoted in Merlo J. Pusey, Charles Evans Hughes (1951), p. 204.

b. Martin Shapiro, Law and Politics in the Supreme Court (1964), p. 6.

c. Chief Justice John Marshall, speaking for the Court, in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 63 (1803).

the American mind with a false value."[d] In the last analysis, the political power of courts is both subtle and fragile. In terms of raw politics, Alexander Hamilton got it right when he observed in *Federalist No. 78* that

> the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

In terms of sheer political might, it is Congress and the President, not the courts, who are at the epicenter of the political system. It is surely the legislative and executive branches that exercise the dominant influence over the public policy, both foreign and domestic.

To see the Supreme Court as Constitutional Court also makes too little of the Court. To focus on the Supreme Court's constitutional rulings is to miss the many cases in which it makes policy by interpreting the laws passed by Congress. Until the 1960s, easily more than half of the decisions it handed down every year turned on the Court's reading of statutes, not the Constitution. To miss this important exercise in interstitial policymaking is to miss the Court's substantial influence in shaping environmental law, tax law, immigration law, federal criminal law—regulatory law of all kinds.

Nor have courts been the only agencies of government that have shaped the meaning of the Constitution. What Congress, Presidents, federal and state administrators, scholars, and the media do has also had a significant impact in developing the meaning of the Constitution. And the American people themselves, through elections and protests, have expressed strong preferences that have supported or opposed assertions of power under or in spite of the Constitution. These impacts are naturally greatest where there are significant ambiguities or lacunae (omissions) in the text of the Constitution.

Despite their brilliance, the Framers after all could not possibly have envisioned the technological state of contemporary America. With regard to some matters, they just guessed badly. They failed to provide for political parties because they regarded them as a bane to be avoided (as James Madison contended in *Federalist No. 10* and as George Washington admonished in his Farewell Address). Their fear of democracy—reflected in the fact that the people were limited to directly electing only members of the House of Representatives—was overtaken by the inexorable drive to expand popular participation in government, a movement vividly reflected in half a dozen amendments to the Constitution.

Although the Framers intended Congress to be the principal architect of federal policy, this scheme has been badly undercut by events in the twentieth century. Today, we expect the President to do much more than simply execute the laws Congress enacts. Ordinarily, we expect the President to take the initiative—to be a leader, not a clerk. At least since the Great Depression, we have operated on the assumption that the President should propose programs and Congress should respond to them rather than the other way around. Reflecting on the transformation of the Presidency over the course of the last two centuries, Justice Jackson in the *Steel*

d. Justice Felix Frankfurter, dissenting, in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 670, 63 S.Ct. 1178, 1200 (1943).

Seizure Case "note[d] the gap that exists between the President's paper powers and his real powers." He continued, "The Constitution does not disclose the measure of actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blue print of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution." Once an exercise of power becomes accepted on the basis of precedent, it can truly be said that such an exercise has become a part of the constitutional *system*, although one could argue that technically it is not a part of the Constitution. The precedent of actions that go uncontested or are allowed to stand is a powerful argument for legitimation.

The fact remains, however, that the judiciary—particularly the Supreme Court—plays a leading role in constitutional interpretation, primarily because of the uniquely American institution of judicial review. Anyone who wants to learn the meaning of the Constitution must know what the Supreme Court has said about it—as a beginning if not as the final word. At the outset, then, it is necessary to understand how the Court derived this power of interpretation as well as what ground rules circumscribe its exercise.

A. THE SUPREME COURT'S JURISDICTION AND ITS ASSUMPTION OF JUDICIAL REVIEW

Judicial Review

Judicial review is the doctrine according to which courts are entitled to pass upon the constitutionality of an action taken by a coordinate branch of government. The doctrine had its origin in England as early as the seventeenth century. Although the practice was recognized in *Dr. Bonham's Case* in 1610, judicial review never became a principle capable of limiting legislative authority in Britain, largely because the notion of judicial supremacy inherent in judicial review conflicted with the principle of parliamentary supremacy. In a parliamentary system, the acts of the legislature share equal legal status with many ancient documents, such as Magna Charta and the other legal milestones that together comprise Britain's "unwritten Constitution." Parliamentary supremacy entails the logical consequence that the legislature may alter the constitution by simply passing a law.

Although most of the Framers of the Constitution were familiar with the concept of judicial review and were for it, there is the hard fact that they considered and rejected the idea for a Council of Revision, which would have permitted the Supreme Court to join with the President in vetoing acts of Congress. It seems a fair appraisal of what took place in Philadelphia during that summer of 1787 to suggest that proponents of judicial review, like Hamilton (see *Federalist No. 78*), decided that it was a good tactical move not to try to resolve that issue in the Convention, but rather to leave the Constitution ambiguous. Two factors point up such an interpretation: First, there were individuals at the Convention who were bitterly opposed to judicial review. Knowing that including judicial review in the Constitution would make ratification more difficult, those who favored the practice decided not to press this controversial issue, which they hoped to achieve in other ways. Second, it was not very difficult to predict who would head the new government and who would have the initiative in interpreting the document at the outset—Washington and those in whom he had trust. That group included his former chief

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