Third Edition

Constitutional Law and Judicial Policy Making

Joel B. Grossman • Richard S. Wells

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Preface

The third edition of this textbook inevitably reflects an increasingly difficult balance between what previous editions have contained and what a new edition must add. A new edition is both cumulative and selective, and this book is certainly no exception. In our attempts to update, revise, and also (at the behest of our new publisher) to shorten the book, some of the choices have been difficult.

We have retained the original emphasis on the policy-making function of the Supreme Court, and we have also continued to stress the close relationship of the Court's policies to its decision-making processes. Concerns about the methodologies of judicial research have been reduced, however, largely because those matters are more thoroughly addressed in easily available supplementary books. While retaining the organization of the first two editions, we have added certain marginal features, such as emerging relationships of the Supreme Court to bureaucratic entities. In the first edition there was a special section on "frontier issues" that were emerging as salient constitutional and political concerns, but had not yet taken concrete constitutional shape; privacy, gender equality, and reapportionment, the main examples, have now passed into the mainstream and are given the full treatment they deserve. In an essay concluding the second edition, we noted that the focus of the Burger Court, as expected, was more on "old" than "new" frontiers, on trimming the sails of the Warren Court rather than breaking new constitutional ground. Considerations of time and space have precluded inclusion of a similar essay in this book. But had we written it, surely its emphasis would have been on the reemergence of traditional property rights as the object of judicial solicitude, with a secondary emphasis on the revival of federalism as a constitutional concern. Those who teach with our book will surely want to elaborate on those concerns with supplementary materials. If there is a fourth edition, they will almost certainly have to occupy a central place in it.

In keeping with the bicentennial emphasis on institutional and historical issues, and on the proper role of the Supreme Court in a democratic society, we have devoted more attention to such subjects as constitutionalism, original intent, and problems of constitutional interpretation. It is all too apparent from the political and public reaction to the nomination of Judge Robert Bork that matters of constitutional interpretation and the Supreme Court's role have reached a new level of salience, even though recent surveys reveal a disheartening (but not surprising) level of public ignorance about the Constitution. "Interpretivism" and "original intent" are not yet household words, but the mobilization of political forces for and against Judge Bork suggests at least a public awareness that the Constitution, and how it is interpreted, are and should be of public concern.

A new edition also makes obvious the fact that our indebtedness exceeds the space allocated for acknowledgements. The prefaces to earlier editions record our gratitude to those who contributed to them. For this edition, we wish to express our thanks to Don Kash, Paul Tharp, Donald Maletz, Steve Shaw, Todd McKinnis, Bobby James, and John Longshore at the University of Oklahoma; and to Patrick Bruer, Lisa Bower, Jonathan Goldberg-Hiller, Jack Ebben, John Jarosz, and Robert Pretto—law students and graduate students at the University of Wisconsin, Madison. Too numerous to mention are our colleagues at other universities who have used earlier editions and offered useful suggestions on how to improve this one.

With this edition the entire text was converted to diskettes, an enormous and difficult task that should make revision for future editions considerably more efficient. Mary Kay Mans keyboarded the entire manuscript with great skill and, given the twists and turns of the editing process, considerable patience and fortitude as well. We are very much in her debt. Much of the new material in this edition first appeared in annual supplements prepared by Geri Rowden, and her contribution is also gratefully recorded.

We also wish to acknowledge the contributions of the editorial and production staff of Longman: Irving Rockwood, who as political science editor had the vision and

skill to rescue a beleaguered book from its former publishing home; David Estrin, the current Longman political science editor, who exhorted us to streamline and finish the book and who pushed the project to completion; and Helen Greer and Nancy Rose, who edited the manuscript and supervised its production.

Our families have lived with "the book" longer than any of us could have imagined. Mary and Maurine have been supportive and patient, and have come to accept it as part of the normal course of our lives. Our children may at times have viewed the book as a sibling rival. It has certainly been a member of the family. Let us hope that it does not turn into Cinderella.

The idea for this book, and initial plans for it, took form when we were graduate students together at the University of Iowa. Professor John Schmidhauser was our major advisor, and his support for the project and his contributions to our development as constitutional law teachers was acknowledged in the first edition. Our debt to him remains strong and genuine. But in reflecting on that formative period in our professional lives we recognize a second, equally important voice, that of Lane Davis. Lane made us, and so many of his other students now established in the profession, realize that the work of being an excellent teacher can nourish, enliven, and occupy the life of the mind. On the occasion of his forthcoming retirement, we wish to dedicate this edition to him.

Joel B. Grossman
Richard S. Wells
November 1987

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A Political View of the Supreme Court

1. THE SUPREME COURT AS A POLITICAL INSTITUTION

A. INTRODUCTORY ESSAY

> *The Supreme Court of the United States is different from all other courts, past and present. It decides fundamental social and political questions that would never be put to judges in other countries—the boundaries between church and state, the relations between the white and Negro races, the powers of the national legislature and executive. One could easily forget that it is a court at all. Its public image seems sometimes to be less that of a court than of an extraordinarily powerful demigod sitting on a remote throne and letting loose constitutional thunderbolts whenever it sees a wrong crying for correction.*
>
> *But the Supreme Court is not a demigod, nor even a roving inspector general with a conscience. It is a court, and for all its power it must operate in significant respects as courts have always operated. It cannot, like a legislature or governor or President, initiate measures to cure the ills it perceives. It is . . . a substantially passive instrument to be moved only by the initiative of litigants. In short, the Court must sit and wait for issues to be presented to it in lawsuits.*[1]

The Supreme Court of the United States is popularly considered the guardian of our constitutional culture, the ultimate repository of legal wisdom, and the institution that has the "final" word on all legal questions. Like most popular views of the political system, this one is part fiction, part fact, and part fancy. But like many myths, however, this view of the Court is quite functional. Not only does it "explain" the Court to most people in terms satisfactory to them, but in time of crisis it is said to protect the Court from the retributive acts of its political enemies.

The difficulty most people have in understanding the Court lies partly in the fact that, as Anthony Lewis has written, it is "different from all other courts, past and present," and it does "decide fundamental social and political questions that would never be put to judges in other countries. . . ." And, to complicate matters, Lewis might have added, it performs its functions in a physical setting with appropriate majestic and honorific rituals designed to convey the image of a court rather than the image of a quasi judicial body as much concerned with politics as with law.

In the 1980s it is impossible to deny that the Supreme Court is an important political institution. As Robert Dahl wrote more than three decades ago, "As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it is a political institution and not quite capable of denying it." As a result of this confusion, "frequently we take both positions at once. This is confusing to foreigners, amusing to logicians, and rewarding to ordinary Americans who thus manage to retain the best of both worlds."[2]

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[1]Anthony Lewis, *Gideon's Trumpet* (New York: Random House, 1964), pp. 11–12.

[2]Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," **6** *Journal of Public Law* (1957), 279.