

Third Edition

# Constitutional Law and Judicial Policy Making

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Joel B. Grossman • Richard S. Wells

Third Edition

# Constitutional Law and Judicial Policy Making

*Written and Edited by*

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# CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING, Third Edition

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# Preface

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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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# Overview of Contents

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*Preface to the Third Edition* / xix

**Chapter 1.** A Political View of the Supreme Court / 1

**Chapter 2.** The Decision-Making Process / 33

**Chapter 3.** The Power of the Supreme Court / 95

**Chapter 4.** The Supreme Court and the Economy / 165

**Chapter 5.** The Supreme Court and Presidential Power / 219

**Chapter 6.** Equality in American Life: Race, Gender, Wealth, and Reapportionment / 282

**Chapter 7.** The Supreme Court and Criminal Justice / 437

**Chapter 8.** First Amendment Rights in American Society / 553

**Chapter 9.** The Constitutional Right to Privacy / 653

*Constitution of the United States* / 691

*Glossary* / 703

*Index of Cases* / 705



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# Contents

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*Preface* / xix

## **CHAPTER 1 A POLITICAL VIEW OF THE SUPREME COURT 1**

### **1. The Supreme Court as a Political Institution / 1**

- A. Introductory Essay / 1
- B. The Study of Constitutional Law and the Legal System / 4
- C. James MacGregor Burns and Richard B. Morris, "The Thirteen Crucial Questions" / 6
- D. The Supreme Court and Social Change / 9
- E. Social Science and the Supreme Court / 13

### **2. Supreme Court Policy Making / 15**

- A. The Characteristics of Supreme Court Policy Making and Implementation / 15
- B. The Anatomy of Supreme Court Policy Making / 22
  - (1) Two Views of Protest as Political Expression / 22
    - (a) *Tinker v. Des Moines Community School District* (1969) / 23
    - (b) *United States v. O'Brien* (1968) / 27
  - (2) "Briefing" a Supreme Court Decision: The Nuts and Bolts of Constitutional Cases / 30

## **CHAPTER 2 THE DECISION-MAKING PROCESS 33**

### **1. Introductory Essay / 33**

### **2. Demands on the Supreme Court: The Case Selection Process / 37**

- A. The Supreme Court's Jurisdiction / 37
- B. Setting the Docket: The Certiorari Process / 39
- C. The Business of the Supreme Court / 42
- D. The Workload of the Supreme Court: Is There a Problem? / 46
- E. The Politics of Workload Reform / 48

### **3. Decision on the Merits / 49**

- A. Mobilizing a Majority / 49



B. David Danelski, "The Influence of the Chief Justice in the Decisional Process"	/ 51
C. "The Switch in Time that Saved Nine"	/ 54
(1) A Note on the "Hughberts" Game	/ 54
(2) Felix Frankfurter, "Mr. Justice Roberts"	/ 55
D. A Note on Opinion Assignments	/ 56
E. The Frequency and Causes of Dissent	/ 58
<b>4. The Decision-Making Environment</b>	<b>/ 60</b>
A. The "Strategic Environment"	/ 60
B. Frank Sorauf, "Winning in the Courts: Interest Groups and Constitutional Change"	/ 62
C. Interest Groups and the Supreme Court	/ 66
D. Congress and the Supreme Court	/ 70
E. Recruiting Supreme Court Justices	/ 76
(1) The Politics of Judicial Selection	/ 76
(2) Francis Biddle, "An Inside View of Appointing Supreme Court Justices"	/ 81
(3) Who Becomes a Supreme Court Justice?	/ 82
(4) A Profile of the Justices	/ 83
<b>5. Explaining Supreme Court Decisions</b>	<b>/ 86</b>
A. The "Causes" of Supreme Court Decisions: Individual Policy Preferences and Group Dynamics	/ 86
B. J. Woodford Howard, "On the Fluidity of Judicial Choice"	/ 91
<b>CHAPTER 3 THE POWER OF THE SUPREME COURT</b>	<b>95</b>
<b>1. Introductory Essay</b>	<b>/ 95</b>
<b>2. Constitutionalism</b>	<b>/ 97</b>
A. A Note on the Meaning of Constitutionalism	/ 97
B. An Excerpt from <i>United States v. Nixon</i> (1974)	/ 100
C. Robert McCloskey, "The Genesis and Nature of Judicial Power"	/ 101
<b>3. Judicial Review</b>	<b>/ 104</b>
A. Judicial Review before <i>Marbury</i>	/ 104
B. <i>Marbury v. Madison</i> (1803)	/ 105
C. John Marshall's Dilemma	/ 109
D. The Legitimacy of Judicial Review: A Continuing Quest	/ 111
<b>4. The Supreme Court and the Doctrine of National (Judicial) Supremacy</b>	<b>/ 115</b>
A. John R. Schmidhauser, "States' Rights and the Origin of the Supreme Court's Power in Federal-State Relations"	/ 115
B. <i>Martin v. Hunter's Lessee</i> (1816)	/ 117
C. <i>McCulloch v. Maryland</i> (1819)	/ 120
D. <i>Cooper v. Aaron</i> (1958)	/ 125
<b>5. The Separation of Powers Principle</b>	<b>/ 127</b>
<b>6. Doctrines of Self-Limitation</b>	<b>/ 132</b>
A. "Cases and Controversies"	/ 132

- B. *Flast v. Cohen* (1968) / 135
- C. *United States v. Richardson* (1974) / 138
- D. *Younger v. Harris* (1971) / 143
- E. The Doctrine of Political Questions / 145
  - (1) *Baker v. Carr* (1962) / 146
  - (2) *Powell v. McCormack* (1969) / 150
- F. Revival of the Eleventh Amendment / 153

## 7. The Limits of Supreme Court Power in a Democratic Society / 155

- A. The Supreme Court's "Special Role" / 155
- B. Raoul Berger, "The Imperial Judiciary" / 156
- C. Alexander Bickel, "The Web of Subjectivity" / 160
- D. John Hart Ely, "A 'Representation-Reinforcing' Role for the Supreme Court" / 162
- E. William J. Brennan, "The Constitution of the United States: Contemporary Ratification" / 164

## CHAPTER 4 THE SUPREME COURT AND THE ECONOMY 165

### 1. Introductory Essay / 165

### 2. The Development of American Capitalism / 171

- A. Establishing a National Commercial System / 171
  - (1) *Gibbons v. Ogden* (1824) / 171
  - (2) *Cooley v. Board of Wardens of the Port of Philadelphia* (1852) / 174
  - (3) The Regulation of Commerce by the States / 177
- B. The Doctrine of Substantive Due Process / 181
  - (1) A Note on the Contract Clause and Substantive Due Process: Private Rights and the Public Interest / 181
  - (2) *The Slaughterhouse Cases* (1873) / 182
  - (3) *Munn v. Illinois* (1877) / 184
  - (4) *Lochner v. New York* (1905) / 186
  - (5) The Decline of Substantive Due Process and a Revival of the Contract Clause / 188

### 3. National Regulation of the Economy / 190

- A. The Taxing and Spending Clause / 190
  - (1) *United States v. Butler* (1936) / 190
  - (2) *South Dakota v. Dole* (1987) / 193
- B. Congress' Power under the Commerce Clause / 195
  - (1) Congressional Use of the Commerce Power before and after 1937 / 195
  - (2) *N.L.R.B. v. Jones & Laughlin Steel Corporation* (1937) / 196
  - (3) *United States v. Darby Lumber Company* (1941) / 199
  - (4) *Perez v. United States* (1971) / 201
- C. Reviving the Tenth Amendment / 204
  - (1) *National League of Cities v. Usery* (1976) / 204
  - (2) *Garcia v. San Antonio Metropolitan Transit Authority* (1985) / 209

### 4. The Supreme Court and the Modern Economic State / 213

- A. The Uncertain Relationship of the Supreme Court to the Economy / 213
- B. *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission* (1983) / 215

## CHAPTER 5 THE SUPREME COURT AND PRESIDENTIAL POWER 219

### 1. Introductory Essay / 219

### 2. The Constitutional Basis of Executive Power / 223

- A. Presidential Power: Executive and Federative / 223
- B. Constitutional Questions Relating to Executive Power: A Summary View / 224
- C. The Inherent Powers of the President / 230
  - (1) The Concept of Inherent Power / 230
  - (2) *United States v. Curtiss-Wright Export Corporation* (1936) / 231
  - (3) *Youngstown Sheet and Tube Company v. Sawyer* (1952) / 233
- D. The President in Foreign Relations / 236
  - (1) Executive Independence in Foreign Affairs / 236
  - (2) *Missouri v. Holland* (1920) / 242
  - (3) *Dames & Moore v. Regan* (1981) / 243
- E. Emergency Powers / 246
  - (1) The Emergency Powers of the President / 246
  - (2) *Korematsu v. United States* (1944) / 247

### 3. Vietnam, Executive Power, and the Constitution / 251

- A. The Disputed Legality of the War / 251
- B. The Legality of the War and the Authority to Conscript / 252
- C. The War Powers Resolution (1973) / 254
- D. The Need for a War Powers Resolution / 256

### 4. Recent Presidential Actions at the Constitutional Limits of Executive Power / 257

- A. The Press and National Security / 257
  - (1) The "Pentagon Papers Case": *New York Times v. United States* (1971) / 257
  - (2) The Grenada Episode and the Press / 260
- B. Watergate and Presidential Immunity / 261
  - (1) The Constitutional Significance of Watergate / 261
  - (2) *United States v. Nixon* (1974) / 262
  - (3) *Nixon v. Fitzgerald* (1982) / 266
- C. The Constitutional Politics of Executive-Congressional Relations / 269
  - (1) Impeachment as a Limitation on Presidential Power / 269
  - (2) Executive Authority and Efforts to Avoid the Will of Congress / 273
  - (3) *Train v. City of New York* (1975) / 275
  - (4) The Legislative Veto Case: *Immigration and Naturalization Service v. Chadha* (1983) / 276

## CHAPTER 6 EQUALITY IN AMERICAN LIFE: RACE, GENDER, WEALTH AND REAPPORTIONMENT 282

### 1. Introductory Essay: Equality and the Constitution / 282

### 2. Racial Equality / 287

- A. The Supreme Court and Racial Equality / 287
- B. Racial Discrimination in the Public Schools / 295
  - (1) *Plessy v. Ferguson* (1896) / 295

- (2) The Development of Segregation in the Public Schools / 297
- (3) The School Segregation Cases / 299
  - (a) *Brown v. Board of Education of Topeka* (1954) [*Brown I*] / 299
  - (b) *Bolling v. Sharpe* (1954) / 302
  - (c) *Brown v. Board of Education of Topeka* (1955) [*Brown II*] / 303
- (4) *Cooper v. Aaron* (1958) / 304
- (5) The Response to *Brown* / 304
- (6) School Busing and De Facto Segregation: The Limits of Remedial Action / 306
  - (a) *Swann v. Charlotte-Mecklenburg Board of Education* (1971) / 306
  - (b) *Milliken v. Bradley* (1974) / 311
  - (c) The Politics and Demography of School Integration: *Brown* after Thirty Years / 314
- C. The Right to Vote / 317
  - (1) *Smith v. Allwright* (1944) / 317
  - (2) *South Carolina v. Katzenbach* (1966) / 319
  - (3) *United Jewish Organizations of Williamsburgh Inc. v. Carey* (1977) / 324
  - (4) *Rogers v. Lodge* (1982) / 326
  - (5) The Impact and Extension of the Voting Rights Act / 329
- D. The State Action Doctrine / 331
  - (1) *The Civil Rights Cases* (1883) / 331
  - (2) *Shelley v. Kraemer* (1948) / 336
  - (3) *Burton v. Wilmington Parking Authority* (1961) / 338
  - (4) *Moose Lodge #107 v. Irvis* (1972) / 340
- E. Congressional Power to Protect Civil Rights / 344
  - (1) *Heart of Atlanta Motel v. United States* (1964) / 344
  - (2) Expanding Federal Protection of Civil Rights: The *Guest* and *Price* Cases / 347
  - (3) *Jones v. Mayer* (1968) / 349
- F. Job Qualifications, "Benign Classifications," and Affirmative Action: The Limits of Equal Protection / 353
  - (1) Job Qualification Tests and "Intent" to Discriminate: *Griggs v. Duke Power Company* (1971) / 353
  - (2) Race as a Suspect Classification: Affirmative Action and Benign Quotas / 355
  - (3) *Board of Regents of the University of California v. Bakke* (1978) / 356
  - (4) *United Steelworkers of America v. Weber* (1979) / 363
  - (5) Bette Novit Evans, "Civil Rights and the Notion of a Protected Class" / 367
  - (6) The Supreme Court, the Reagan Administration, and Affirmative Action Policy / 371
  - (7) *Local 28 of the Sheetmetal Workers' International Association v. EEOC* (1986) / 372
  - (8) *Johnson v. Transportation Agency, Santa Clara County* (1987) / 377

### 3. Gender Equality / 380

- A. Women's Rights and the Constitution / 380
- B. *Frontiero v. Richardson* (1973) / 383
- C. *Craig v. Boren* (1976) / 386
- D. *Personnel Administrator v. Feeney* (1979) / 388
- E. *Mississippi University for Women v. Hogan* (1982) / 391
- F. *Roberts v. United States Jaycees* (1984) / 393
- G. The Rise and Fall of the Equal Rights Amendment / 396

### 4. Wealth / 398

- A. The Supreme Court and the Legal Needs of the Poor / 398
- B. *Shapiro v. Thompson* (1969) / 403

- C. *Goldberg v. Kelly* (1970) / 407
- D. *San Antonio Independent School District v. Rodriguez* (1973) / 410

## 5. Political Equality and Equal Representation / 414

- A. Antecedents of *Baker v. Carr* (1962) / 414
- B. *Wesberry v. Sanders* (1964) / 415
- C. *Reynolds v. Sims* (1964) / 416
- D. *Kirkpatrick v. Preisler* (1969) / 421
- E. *Mahan v. Howell* (1973) / 424
- F. *Whitcomb v. Chavis* (1971) / 426
- G. *Rogers v. Lodge* (1982) / 430
- H. *Davis v. Bandemer* (1986) / 430
- I. The Impact of the Reapportionment Decisions / 434

## CHAPTER 7 THE SUPREME COURT AND CRIMINAL JUSTICE 437

### 1. Introductory Essay / 437

### 2. The Bill of Rights, the Fourteenth Amendment, and the States / 446

- A. The Bill of Rights and the Emerging Notion of Due Process / 446
- B. *Palko v. Connecticut* (1937) / 446
- C. A Note on *Adamson v. California* (1947) and the "Incorporation" Doctrine / 450
- D. *Malloy v. Hogan* (1964) / 452
- E. *Duncan v. Louisiana* (1968) / 454
- F. The Demise of *Palko* / 456

### 3. Policing the Police / 459

- A. Investigating Criminal Activity / 459
  - (1) The Law of Arrest, Search, and Seizure / 459
  - (2) *Terry v. Ohio* (1968) / 465
  - (3) *United States v. Robinson* (1973) / 467
  - (4) *Payton v. New York* (1980) / 469
  - (5) *United States v. Ross* (1982) / 471
  - (6) *Michigan v. Long* (1983) / 474
- B. Wiretapping and Electronic Surveillance / 476
  - (1) *Katz v. United States* (1967) / 476
  - (2) Wiretapping and the Omnibus Crime Control Act of 1968, Title III / 479
  - (3) *United States v. United States District Court* (1972) / 480
  - (4) Controlling Electronic Surveillance Activities / 483
- C. The Exclusionary Rule / 485
  - (1) *Mapp v. Ohio* (1961) / 485
  - (2) The Exclusionary Rule: Reaffirmation, Revision, or Repudiation? / 488
  - (3) *United States v. Calandra* (1974) / 490
  - (4) The Empirical Reality of the Exclusionary Rule: Assessing the "Success" or "Failure" of *Mapp* / 492
  - (5) *United States v. Leon* (1984) / 493

<b>4. The Citizen in the Station House: The Continuing Controversy over Police Interrogation</b>	<b>/ 497</b>
A. A Note on <i>Escobedo v. Illinois</i> (1964)	/ 497
B. <i>Miranda v. Arizona</i> (1966)	/ 498
C. <i>Miranda</i> and the Retroactive Application of Supreme Court Decisions	/ 503
D. The Response to <i>Miranda</i>	/ 505
E. The Burger Court and the <i>Miranda</i> Decision: Curbing the "Due Process Revolution"	/ 507
F. <i>Rhode Island v. Innis</i> (1981)	/ 510
<b>5. Fair Trial</b>	<b>/ 512</b>
A. What is a Fair Trial?	/ 512
B. The Right to Counsel	/ 513
(1) <i>Gideon v. Wainwright</i> (1963)	/ 513
(2) <i>Argersinger v. Hamlin</i> (1972)	/ 516
C. Reporting Criminal Trials: "Fair Trial v. Free Press"	/ 518
(1) <i>Sheppard v. Maxwell</i> (1966)	/ 518
(2) <i>Nebraska Press Association v. Stuart</i> (1976)	/ 521
(3) <i>Richmond Newspapers Inc. v. Virginia</i> (1980)	/ 523
D. Justice for Juveniles	/ 525
(1) <i>In re Gault</i> (1967)	/ 525
E. Jury Selection and Racial Discrimination	/ 529
<b>6. The Constitutional Standards for Punishment and Incarceration</b>	<b>/ 530</b>
A. Capital Punishment	/ 530
(1) A Note on the Supreme Court and the Death Penalty	/ 530
(2) <i>Gregg v. Georgia</i> (1976)	/ 533
(3) The Death Penalty Roulette	/ 538
(4) <i>Pulley v. Harris</i> (1984)	/ 539
(5) Proportionality in Sentencing and the Eighth Amendment	/ 541
(6) Lingering Death Penalty Issues	/ 542
(7) <i>McCleskey v. Kemp</i> (1987)	/ 544
B. Due Process for Prisoners	/ 549
(1) <i>Hudson v. Palmer</i> (1984)	/ 549

## **CHAPTER 8 FIRST AMENDMENT RIGHTS IN AMERICAN SOCIETY      553**

<b>1. Introductory Essay</b>	<b>/ 553</b>
<b>2. Religious Freedom</b>	<b>/ 560</b>
A. The Constitutional Background of Religious Freedom	/ 560
B. The "Establishment" of Religion	/ 563
(1) <i>Everson v. Board of Education</i> (1947)	/ 563
(2) <i>Abington Township v. Schempp</i> (1963)	/ 565
(3) <i>Wallace v. Jaffree</i> (1985)	/ 566
(4) <i>Lemon v. Kurtzman</i> (1971)	/ 570

- (5) *Mueller & Noyes v. Allen* (1983) / 573
- (6) *Marsh v. Chambers* (1983) / 575
- (7) *Lynch v. Donnelly* (1984) / 577
- C. The Free Exercise of Religion / 579
  - (1) *Braunfeld v. Brown* (1961) / 579
  - (2) *Wisconsin v. Yoder* (1972) / 580
  - (3) *United States v. Lee* (1982) / 583

### 3. Public Expression / 584

- A. Political Orthodoxy / 584
  - (1) The "Clear and Present Danger" Test / 584
  - (2) *Schenck v. United States* (1919) / 586
  - (3) *Dennis v. United States* (1951) / 587
  - (4) *Brandenburg v. Ohio* (1969) / 590
- B. Symbolic Speech / 592
  - (1) Expression and Action / 592
  - (2) *Cox v. Louisiana* (1965) / 593
  - (3) *United States v. O'Brien* (1968) / 596
  - (4) *Tinker v. Des Moines Community School District* (1969) / 596
- C. Speech in the Public Forum / 597
  - (1) *Cohen v. California* (1971) / 597
  - (2) *Wooley v. Maynard* (1977) / 599
  - (3) *Pruneyard Shopping Center v. Robins* (1980) / 600
  - (4) *Perry Education Association v. Perry Local Educators' Association* (1983) / 601
  - (5) The Nazis in Skokie / 603

### 4. The Media as "The Press" / 605

- A. Restraints on the Press / 605
  - (1) Freedom of the Press / 605
  - (2) *New York Times v. United States* (1971) / 606
  - (3) *United States v. The Progressive, Inc.* (1979) / 606
- B. Libel and Free Speech / 608
  - (1) *New York Times v. Sullivan* (1964) / 608
  - (2) *Gertz v. Robert Welch, Inc.* (1974) / 611
  - (3) *Hutchinson v. Proxmire* (1979) / 615
- C. Access and the Media / 619
  - (1) *Red Lion Broadcasting Co. v. Federal Communications Commission* (1969) / 619
  - (2) *Miami Herald Publishing Company v. Tornillo* (1974) / 622
  - (3) *Federal Communications Commission v. League of Women Voters of California* (1984) / 624
  - (4) *Nebraska Press Association v. Stuart* (1976) / 627
  - (5) *Richmond Newspapers Inc. v. Virginia* (1980) / 627
- D. Commercial Expression / 627
  - (1) *Bates v. State Bar of Arizona* (1977) / 627
  - (2) *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* / 631
- E. Regulation Creative Expression / 635
  - (1) A Note on the Problem of Obscenity / 635
  - (2) *Roth v. United States* and *Alberts v. California* (1957) / 637
  - (3) *Stanley v. Georgia* (1969) / 638
  - (4) *Miller v. California* and *Paris Adult Theatre I v. Slaton* / 639
  - (5) *Young v. American Mini Theaters, Inc.* (1976) / 644



- (6) *New York v. Ferber* (1982) / 647  
(7) Sexual Violence and Pornography: *American Booksellers Association v. Hudnut* (1985) / 649

## **CHAPTER 9 THE CONSTITUTIONAL RIGHT TO PRIVACY 653**

### **1. Introductory Essay / 653**

### **2. Privacy and the Media / 661**

- A. Privacy Rights and Media Rights / 661  
(1) *Time, Inc. v. Hill* (1967) / 662  
(2) *Cox Broadcasting Co. v. Cohn* (1975) / 664

### **3. Privacy and Law Enforcement / 666**

- A. *New Jersey v. T.L.O.* (1985) / 666

### **4. Privacy as Personal Autonomy: The Growth and Limits of "Sexual Due Process" / 668**

- A. *Roe v. Wade* (1973) / 668  
B. *Harris v. McRae* (1980) / 674  
C. *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) / 677  
D. *Bowers v. Hardwick* (1986) / 685

*Constitution of the United States* / 691

*Glossary* / 703

*Index of Cases* / 705

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## CHAPTER 1

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# A Political View of the Supreme Court

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### 1. THE SUPREME COURT AS A POLITICAL INSTITUTION

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#### 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.<sup>1</sup>*

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.”<sup>2</sup>

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<sup>1</sup>Anthony Lewis, *Gideon's Trumpet* (New York: Random House, 1964), pp. 11–12.

<sup>2</sup>Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as National Policy-Maker,” 6 *Journal of Public Law* (1957), 279.