Basic Cases In CONSTITUTIONAL LAW

Third Edition

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PREFACE

As we guide *Basic Cases in Constitutional Law* into its third incarnation, we still intend it to help undergraduates in liberal arts better understand the U.S. Constitution. We have brought together in edited versions many of the opinions of the Supreme Court—and the dissents thereto—that have interpreted the Constitution in ways that critically influence the American polity.

To be sure, the justices are not the only people who authoritatively interpret the Constitution. Presidents, senators, representatives, federal bureaucrats, and state officials of every sort do so as well. Police engage in this activity when they decide to arrest a suspect, search a vehicle, or interrogate a prisoner. Even "We, the people" can perform this high political function if we carefully obtain information about candidates for political office, then vote for or against them depending on their records and promises of constitutional interpretation—and, at the next election, hold them accountable for those promises.

Still, the justices are the most obvious, and sometimes the most important, interpreters; and they usually go about their interpretive tasks more self-consciously and systematically than do others. Not only do they take oaths to decide cases "agreeably to the Constitution," but, by custom, they offer extensive, closely reasoned justifications for those decisions, explaining the meanings they find in the capacious and general clauses of that text as well as in the text's even more capacious silences.

The specific use for this casebook that we anticipate is as a set of additional readings to flesh out introductory courses in American politics or the judicial process. We would be pleased, however, were it to find use as a basic text in a short course on constitutional interpretation or constitutional law.

We open this edition with a brief introduction about why political scientists are—or should be—concerned with the work of judges. We begin each of the succeeding chapters with an even briefer essay, in which we try to put the particular cases of that chapter into a coherent perspective. We also have written a paragraph or two that runs before each case to explain the background of the legal dispute. The justices, of course, provide such a setting, but they do so in fine detail that often

covers many pages. Thus we find it worthwhile both to shorten their statements of "the facts" and to add more general information to aid students' understanding.

In the end what we, as editors, say is far less important than what the justices, as constitutional interpreters, say. As that great Italian statesman Italo Bombolini would put it, our essays offer only a bit of sauce; the justices' opinions provide the pasta. Moreover, just as we do not mean our essays to preempt the justices' work, so we do not want our arrangement of cases to restrict the order in which instructors assign these materials.

We are indebted to many people: colleagues, friends, and students at Princeton: Rosemary Allen Little, David L. Herrington, Laird Kingler, Stephanie Jinks, Noah Pickus, Jamie Sigmund, and Helen S. Wright; Jeffrey K. Tulis of the University of Texas, who persuaded us not to let this book die a natural death; and John Brigham at the University of Massachusetts, who offered thoughtful suggestions for improving the text.

The staff at Congressional Quarterly, especially Brenda Carter, Kerry Kern, and Jenny Philipson, provided valuable assistance throughout the editing and production of this book.

As much as we would like to shift to others, especially to sitting justices of the United States Supreme Court, the blame for mistakes in judgment, we see no honorable way to do so. Thus we accept mistakes as our own, though we ask readers not to identify us with some of the views expressed herein by learned judges.

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INTRODUCTION: POLITICS, THE CONSTITUTION, AND THE SUPREME COURT

Why bother to study judicial opinions if one's concerns are politics and public policy? What do black-robed judges deciding cases between individuals have to do with governance? Intelligent responses to these questions require thought not only about politics in general but also about constitutions and judges.

Politics is a much corrupted word, often misused to refer to petty matters. At root, however, politics addresses a society's most fundamental problems: how citizens identify, define, and justify their goals as a nation and how they choose means to achieve those goals—the ways in which a society allocates rights and responsibilities, costs and benefits. Politics is also very much concerned with the substantive content of such decisions. In sum, it deals with values: their meanings, their implications, their justifications, their preservation, and their changes over time.

A constitution is crucial to such a concept of politics, for in that instrument—whether conceived as a specific document, a bevy of practices, a tradition, a set of political theories, or a combination of some or all of these—societies typically try to enunciate their goals, specify governmental procedures, divide authority among officials, and mark off certain areas as beyond government's legitimate reach. In this sense, then, a constitution is an effort to limit power—even the power of "the People." It is also an effort to make it clear that government may legitimately exercise certain kinds of power. In an even deeper sense, a constitution is an effort to control the future by structuring government. Those efforts are at least audacious, and one might well say foolish. But, in fact, constitutions have frequently provided frameworks that have heavily influenced, if not controlled, the procedures by which government has acted as well as the substance of public policy.

Who Shall Interpret?

The degree of a constitution's effectiveness as an instrument of governance depends on many factors, including the wisdom of its framers in assessing their society's values and in devising procedural and substantive

provisions to enhance those values. In addition, a constitution's success depends on latter-day framers—its interpreters—who translate the sacred document, sacred traditions, or both to cope with current problems.

Thus the question arises of who these interpreters of text and tradition will be. The standard answer of civics books is "the Supreme Court." But nothing in early American history and nothing in the constitutional document of 1787 or its amendments inevitably makes judges of any court the primary interpreters of the Constitution. Indeed, one might argue that judges are not in fact the primary constitutional interpreters. All public officials interpret the Constitution, usually before a case gets to a court. A police officer who sees a piece of evidence that might help convict a criminal is—however unconsciously—interpreting the Constitution when deciding whether or not to seize that evidence. Every time a legislator, state or federal, votes for a bill, he or she makes a judgment that the proposed law conforms to constitutional standards. Every time any public officer, from the president to the officer on the beat, decides he or she has authority to enforce (or not enforce) a particular piece of public policy, that official in effect if not intention interprets the Constitution.

Moreover, on occasion state or federal officials have balked at obeying particular judicial decisions and more often have refused to be bound in the future by the reasoning judges offered to justify their rulings. In 1832, for example, President Andrew Jackson vetoed legislation continuing federal support for the Bank of the United States because, in his opinion, establishing such a bank was beyond Congress's constitutional powers. In response to the argument that the Supreme Court had settled the issue of constitutionality in McCulloch v. Maryland (1819; see Case 3.1), Jackson wrote:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over judges, and on that point the President is independent of both.[1]

Other presidents, including Thomas Jefferson, Abraham Lincoln, Franklin D. Roosevelt, and Ronald Reagan, have agreed with Jackson, as have hundreds of senators and representatives over two centuries. Thus we warn readers of this book not to think the Supreme Court always has the last word. Whether it should is a matter about which reasonable people can—and do—reasonably differ.

With that much said, however, the usual—though not the inevitable or invariable—effect of the Supreme Court's constitutional interpretation has been willing or grudging acquiescence by the president, Congress, and state officials. Their opposition is less likely to be expressed in defiance than in selecting new justices with new ideas as older judges die or retire, in writing new legislation to circumvent the Court's constitutional objections, in con-

fronting the Court with new cases in the hope of persuading judges to change their minds, or in proposing constitutional amendments. Sometimes these efforts achieve their aims, though the last has only rarely succeeded.

One need only recall a tiny portion of the last generation's history to see how far-reaching the effect of judicial rulings can be:

- the end of the legitimacy if not the fact of governmentally mandated segregation by race (see Brown v. Board of Education [1954], Case 7.2);
- a similar but not quite so sweeping invalidation of governmentally imposed distinctions based on gender (see Mississippi University for Women v. Hogan [1982], Case 7.6);[2]
- requirements that government provide lawyers to poor people who are arrested to defend them and that police, when they arrest, inform accused of their rights to silence and to counsel (see Miranda v. Arizona [1966], Case 8.1);
- recognition of a right to privacy that protects the freedom of married and unmarried people to choose to use birth control and of women, at least in the early stages of pregnancy, to have abortions (see Roe v. Wade [1973], Case 6.1);
- second thoughts about the extent, and perhaps even the validity, of a woman's right to abortion (see Ohio v. Akron Center for Reproductive Health [1990], Case 6.2); and
- insistence that the democratic theory underpinning the Constitution requires that governors, state legislators, and members of the U.S. House of Representatives be chosen by electoral systems that as nearly as possible give equal weight to each citizen's vote (see Reynolds v. Sims [1964], Case 5.5).

One could multiply these examples; but, even if these were the only ones, the judiciary's impact on American society would have been little short of revolutionary. Today it is difficult to realize the extent to which the United States before World War II was a caste society, with harsh, governmentally imposed distinctions based on race, gender, and wealth; how little police needed to worry about the substantive or procedural commands of the Bill of Rights; or how perverted was the claim of most state legislatures and the U.S. House of Representatives to speak for "the People."

Reaction to Pressure

Judges, of course, did not bring about these changes single-handedly. They were reacting to pressures generated within society. But in each instance judges reacted favorably to those pressures *before* Congress did and in all but racial issues before the president. And, in the fight against

racism, judicial decisions pressured Congress and the president to bring to bear the full authority and the physical force of the federal government. It was of crucial importance to this social and political revolution that judges grounded all of these rulings in the Constitution—in the document and tradition that profess to define the kind of people Americans are and wish to become.

By setting the ensuing political debates in terms of such fundamental principles, the judges made it difficult for opponents to gather support. For instance, in the context of a constitution that demands "equal protection of the laws" and a culture whose ideals include human equality, open appeals to racism or to assertions that men have a greater right to respect than women or that a person living in a rural area should have his or her vote count more than that of a person in a suburb are likely to embarrass or even anger rather than convert the uncommitted.

Yet reactions to these decisions illustrate the limited role that judges have in the American polity. Invoking the Constitution can be effective, but it provides no panacea. There has been resistance to most important Supreme Court decisions. Years of violent defiance, even bloodshed, followed the decisions on segregation; other rulings provoked much foot-dragging, attempts to maintain the old policy through new legislation, and efforts to amend the Constitution. And the fight is by no means over as far as abortion or the rights of the criminally accused are concerned. The Court's decisions do not end all controversy, but they do focus debate. Presidents will choose new judges with (perhaps) new ideas; new tides and currents will sweep through society, and these do not, as Justice Benjamin N. Cardozo once observed, "turn aside in their course and pass the judges by." [3] Sometimes these fresh tides will flow against, sometimes flow with, judicial interpretations of the Constitution.

The picture that emerges is not a simple one. On the one hand, judicial decisions are important not only because they set the framework within which public policy is made, but also because they affect allocations of rights and duties, costs and benefits within society, even as they define society's goals and the legitimate means to achieve those goals. On the other hand, judicial rulings are sometimes wrong-headed about both the Constitution and public policy; and right or wrong they do not always succeed, in either the short or the long run. American society keeps contact with its traditional values as embodied in its constitutional document, yet at the same time modifies those values and even evolves new ones. Constitutional interpretation plays a significant role in processes both of continuity and of change.

Judicial decisions are also important because they mark out battlegrounds for continuing struggles over goals, over means, and over rights. Courts are agencies of government; and judges are rulers. They share power with a host of other officials; but, even as they share, they

participate in governing the nation. Their claim to participate is based on reason, not force; on constitutional interpretation, not on winning elections or commanding police or armies. Their claim to obedience to their decisions is likewise based on reason, on using words to limit power. And much—not all but much—of the effect of their interpretations is based on their capacity to persuade citizens—elected representatives as well as "We, the People"—by reason. Thus, it is essential for anyone who would achieve even an elementary understanding of American politics to understand the Court's work in interpreting the Constitution, in setting boundaries on power, even the power of "the People," in defining and redefining the nation's goals, and in silhouetting issues on which there is sharp disagreement.

A Note on Reading Judicial Opinions

Most educated Americans can understand much of political discourse. Elected politicians may try to confuse voters on some issues, but those efforts are often transparent, for to win or retain office a candidate typically has to speak in language voters comprehend. We can read or watch much that passes for political debate and largely if not fully decode it, for most presidential messages as well as speeches by legislators, governors, and mayors are designed to be intelligible on television and radio and quoted in newspapers and popular magazines.

In contrast, judicial opinions are couched in what many people fear is a foreign language. That fear is exaggerated. Judges, it is true, seldom lighten their opinions with humor and invariably clutter them with references to previous decisions; but most cases involve the dramatic stuff of human conflict—whether married and unmarried individuals have a right to choose their own sexual partners, whether a state can execute convicted murderers, whether newspapers can publish classified governmental documents. And, whatever their failings, judges try to meet these problems by reasoning in a rigorously logical fashion within opinions and to apply similar rules to the same sorts of cases over time. To understand such arguments requires close attention.

The first and most important rubric in reading judicial opinions is to understand what they are: justifications for decisions, not explanations of how courts arrived at decisions. The second rubric is to read opinions carefully, for the choice of an adjective or adverb can shift the course of the law *and* public policy.

The third rubric is to read critically, for judges are not infallible. One need go no further than judges themselves to learn that courts are often wrong in their decisions, in their reasoning, and even in their perceptions of the facts. The cases frequently provide lively—and occasionally bit-

ter—debates about the meaning of the Constitution as well as about implications of its terms for public policy. For, on significant political issues, judges are as apt to disagree among themselves as are other public officials and private citizens. And, unlike courts in some countries, American judges publish several different kinds of opinions, most importantly:

- opinions of the court—which justify the decision the entire court or a majority of its members reached in a case;
- concurring opinions—in which one or several judges agree with the majority about the decision but justify it by different reasoning; and
- dissenting opinions—in which a minority of judges disagree with their colleagues about both the decision and the reasoning.

At times, the Supreme Court is so sharply divided that it is not possible for a majority of the justices to agree on common reasoning; thus there is sometimes no opinion of the Court, only a series of opinions. Usually in such instances, the opinion that commands the largest number of votes (the plurality opinion) announces the decision. That ruling is binding on the litigants in the case, but the various opinions remain those of individual justices, not of the Supreme Court, and so carry only such weight as precedents as future majorities decide.

Being able to decipher the numbers that judges use to cite previous judicial decisions helps to filter out static from opinions. Brown v. Board of Education, the school segregation case, is cited as 347 U.S. 483 (1954). The "347" refers to volume 347; the "U.S." to the *United States Reports*, the official publication of decisions of the Supreme Court; and "483" to the page in volume 347 on which the case begins. The "(1954)" explains that the decision was made public in 1954.

The additional numbers and letters that often appear are citations to unofficial reports put out by commercial publishers. The two most widely cited are S. Ct., short for *Supreme Court Reporter*, a product of the West Publishing Company, and L. Ed., *Lawyers Edition*, sold by the Lawyers Cooperative Publishing Company. Thus *Brown* is also cited as 74 S. Ct. 686, meaning it is located in volume 74 of the *Supreme Court Reporter*, beginning at page 686; and as 98 L. Ed. 873—that is, volume 98 of the *Lawyers Edition*, starting at page 873. The *Lawyers Edition* went into a second series in 1956, and cases since are cited as L. Ed. 2d.

Before 1816 the Court's opinions were published unofficially, and the volumes bear the compilers' names: A. J. Dallas (cited as Dall.) and William Cranch (cited as Cr.). In 1816 Congress created the Office of Reporter for the Court, and until 1875 decisions were published under the reporter's name:

Dates	Reporter	Citation
1816-1827	Wheaton	Wh.
1828-1843	Peters	Pet.
1843-1860	Howard	How.
1861-1862	Black	Bl.
1863-1874	Wallace	Wall.

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1. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (Washington, D.C.: Bureau of National Literature and Art, 1908), II, 581-582.
2. There are some who argue that the Supreme Court, by striking down such gender-based legislation as denials of equal protection of the laws required by the Fourteenth and Fifth amendments, actually weakened the case for ratification of an equal rights amendment to the Constitution.
3. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 168.

1. COURTS AND THE CONSTITUTION

Americans have had a long love affair with written constitutions. A series of agreements—such as the Mayflower Compact of 1620, the various colonial charters granted by the king, and the constitutions most states adopted during the revolutionary period—nourished faith that words inscribed on paper can tame arbitrary political force. When the time came to establish a new nation, the founding generation chose to adopt first the Articles of Confederation and later the Constitution; the Founders gave little serious thought to using the British notion of an unwritten basic law.

With the new Constitution came a period of economic prosperity and political expansion. The document's initial successes quickly cast a halo around it. One of the first senators from Pennsylvania complained that to hear some people talk one would have thought that "neither wood grew nor water ran in America before the happy adoption of the Constitution." The Constitution became and has remained sacrosanct, a form of higher law. For most Americans something that is "unconstitutional" is also morally evil. The Constitution, President Grover Cleveland said at the celebration of its first centennial, is the "ark of the people's covenant."

But Americans have also developed a love affair with democracy, believing both that, in the abstract, government derives its just powers from the consent of the governed and, specifically, that public officials should be chosen by, and held responsible to, the people. As in most multiple love affairs, there is great potential for conflict.[1] The very notion of constitutionalism—that individuals have certain rights that government must respect—exists in tension with the idea that the people should rule, for what a large majority of the people want at any particular time may trample on the rights of those in the minority.

Thus judges have played ambivalent roles in the American political system. On frequent occasions, they have spoken for constitutionalism against democracy's claims and have invalidated acts of Congress or the president through an authority called judicial review. In the first case reprinted in this chapter, Marbury v. Madison (1803), Chief Justice John Marshall explained the reasoning behind the Supreme Court's discovery of this great power. Ex parte Milligan (1866) and United States v. United

States District Court (1972) show judges using this authority to protect unpopular people against the wrath of democratically chosen officials. Judges, however, have also often deferred to elected officials, as the third case in this chapter, Korematsu v. United States (1944), illustrates. This latter kind of judicial activity attracts little attention because it tends to soothe rather than generate conflict.

By what authority do judges assert authority to invalidate presidential and congressional policy? The constitutional document provides no answer to the question of who is its ultimate interpreter, only a series of tantalizing hints that point toward "the People," the Congress, the president, and the courts. (Judicial control over state action is more obviously grounded in the plain words of Article VI.) In the first case we read, Marbury v. Madison (1803), Chief Justice John Marshall tried to reduce the argument for judicial review to a syllogism. How well he succeeded has been a matter of dispute. Thomas Jefferson, for instance, maintained that the chief justice had utterly failed to make a persuasive argument.

Nevertheless, Marshall's justification has been widely accepted, and Americans have cheerfully—and sometimes mindlessly—blended constitutionalism and democracy. The role of judges as important constitutional interpreters has become an integral part of the political system. What is not a part of the system—so presidents Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan have claimed—is that judges are the *final* constitutional interpreters.

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1. As Chapter 3 points out, Americans have simultaneously had other political love affairs—with localism, for instance, the idea that people in various parts of the country (or even within a single state) have somewhat different needs and outlooks and that diversity is something to be cherished, not merely tolerated. The notion of localism is instilled in the American constitutional system in the form of federalism.