
PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS

Third Edition

Paul Brest

Dean and Richard E. Lang Professor of Law
Stanford University

Sanford Levinson

The W. St. John Garwood and W. St. John Garwood, Jr.,
Regents Chair in Law
University of Texas at Austin



Little, Brown and Company
Boston Toronto London

Copyright © 1992 by Paul Brest and Meira Leah Levinson and
Rachel Bessara Levinson

All rights reserved. No part of this book may be reproduced in any form or by any
electronic or mechanical means including information storage and retrieval systems
without permission in writing from the publisher, except by a reviewer who may
quote brief passages in a review.

Library of Congress Catalog No. 91-75793

ISBN 0-316-10787-5

Fourth Printing

Published simultaneously in Canada
by Little, Brown & Company (Canada) Limited

Printed in the United States of America

Preface

The first edition of *Processes of Constitutional Decisionmaking*, published in 1975, was born out of personal frustration with teaching the introductory course in constitutional law from existing casebooks. After invariably beginning with *Marbury v. Madison* and several introductory sections on judicial review, those books proceeded to examine bodies of substantive doctrine, subject by subject. Questions of *how* the courts arrived at their decisions continually arose but were not systematically examined. The same was true of questions concerning the decisionmaking roles of legislatures and other nonjudicial institutions. The message of the existing casebooks, regardless of their authors' intentions to the contrary, appeared to be that the Constitution is only what the Supreme Court has said it is. When the Court had not spoken, the implication seemed to be that there was no constitutional law on the matter at all.

The conventional format seemed uncongenial to analyzing issues of methodology, process, and allocation of decisionmaking authority; yet it seemed impossible to present a coherent and undistorted view of constitutional doctrine in isolation from them. The first edition was shaped by the belief that an explicit focus on the processes of constitutional decisionmaking offered an understanding of the structure and operation, as well as of the doctrines, of American constitutional law, that the conventional organization could not offer.

The second edition, published in 1983, though reflecting those initial concerns, also responded to lessons learned while teaching from the first edition and to changes in our own thinking about constitutional law. In particular, Part One of the second edition was explicitly organized on historical-chronological lines, so that students would confront the legal consciousness of a particular period in the context of several different constitutional doctrines. We also made an effort to address constitutional law as articulated by nonjudicial institutions. With some notable additions and omissions, this third edition maintains the essential structure of the second edition.¹

1. In response to suggestions from students and instructors using the book and our own continuing thought, we have added materials on the separation of powers (with emphasis on presidential power), aspects of the religion clauses of the First Amendment, the Second Amendment, the constitutional protection accorded private property, and constitutional aspects of the cultural pluralism that characterizes American society.

The addition of new material, including the updating of important doctrinal areas, has required the elimination of some materials contained in the second edition. We readily abandoned the chapter dealing with "the structuring of constitutional litigation" and problems such as standing, ripeness, and mootness, relegating these issues to advanced courses in civil procedure and federal jurisdiction where they are typically covered. More difficult was our decision to eliminate a substantial chapter devoted to the free speech and press aspects of the First Amendment. We do treat the issue of "subversive" speech throughout Part One, and Chapter 8 focuses on symbolic speech. Many law schools have full-scale courses on freedom of speech and of the press; this is not the casebook for such courses.

Chapter 1 introduces many of the recurring themes of the course. The chapter focuses on the constitutional issues surrounding the first two banks of the United States. The reader first approaches these issues through the conflicting views of Representative James Madison, Secretary of State Thomas Jefferson, and Secretary of the Treasury Alexander Hamilton. Chief Justice Marshall's renowned opinion comes later in the chapter, followed by contemporary critical commentary and President Andrew Jackson's message vetoing a bill to recharter the second bank. We also include substantial discussion of the Kentucky and Virginia Resolutions of 1798-1799, especially as they present the notion of the Constitution as a compact among the states (in contrast to Marshall's assertion of popular sovereignty in *McCulloch*) and the concomitant authority of the states to engage in independent constitutional review of disputed congressional legislation such as the Sedition Act of 1798. The materials thus introduce the concept of constitutional government, the allocation of decisionmaking authority between the judiciary and nonjudicial institutions, and some basic problems of constitutional interpretation, while placing the constitutional controversy in a broader social and political context.

Part One, consisting of the first five chapters, is organized historically. It examines recurring constitutional issues of federalism, property rights, racial equality, governmental (and, more particularly, presidential) authority in time of war, treatment of speech thought to be subversive, and judicial review. These are considered concurrently within each of several periods: the Marshall and Taney Courts; from the end of the Civil War to the mid-1930s; and 1937 to the 1980s.

Without sacrificing doctrinal continuity — by the end of Part One, students will know the development of the Commerce Clause from *Gibbons v. Ogden* (1824) to *Garcia v. San Antonio Metropolitan Transit Authority* (1985) — this organization illuminates relationships among seemingly discrete bodies of legal doctrine and between the constitutional system and the society in which it operates. A separate aim, pursued primarily in the first two chapters, covering the Marshall Court, is to introduce various strategies of interpreting the Constitution.

A colleague sympathetic to our historical approach has suggested that the period from 1937 to approximately 1980 should now be recognized as having a unity similar to that of the earlier periods. That is, the legal consciousness that serves to explain much of what the Supreme Court did following 1937 has, in important ways, come to its end, being replaced by the strikingly different approaches identified with Chief Justice Rehnquist, Justice Scalia, and other justices appointed by Presidents Reagan and Bush. We suspect there is much merit to this point, but its full realization must await the next edition, when the nature and extent of any changes in legal consciousness will be clearer. However, students should be aware that some of what this casebook describes as “modern” constitutional doctrine may be in the process of replacement.

Part Two is entitled *Constitutional Adjudication in a Nonoriginalist World*. Doctrinally it focuses on modern issues under the equal protection clause and the due process clause — the latter especially insofar as it has been viewed as the source of “fundamental rights” not explicitly mentioned in the text of the Constitution. Methodologically, Part Two is concerned with strategies of constitutional decisionmaking when the text of the Constitution and the history surrounding its

adoption do not provide significant guidance for the resolution of constitutional disputes.

Part Two also contains chapters on “state action,” political participation, and the Constitution in the welfare state, a chapter that brings together issues that encompass a broad range of doctrinal issues.

Chapter 13, *Constituting the American Community*, has already been mentioned above. It examines constitutional implications of the cultural pluralism that characterizes American society, focusing on the ways that individuals can gain or lose their citizenship, the rights of resident aliens, and the limits of toleration toward citizens with markedly different practices than those of most of their compatriots. (We examine nineteenth-century Mormons following the tenet of their faith mandating polygamy, Jehovah’s Witnesses refusing to salute the American flag, Amish parents trying to maintain their community in the face of state compulsory education laws, and Native Americans smoking peyote as part of traditional religious ceremonies.)

Chapter 14, *The Allocation of Constitutional Decisionmaking Authority*, focuses on issues of institutional competence and authority. After examining the “political question” doctrine, we consider the Congress’s decisionmaking authority under Article III and section 5 of the Fourteenth Amendment.

Not only in the last chapter but throughout, we take seriously constitutional decisionmaking by nonjudicial institutions, ranging from the Kentucky and Virginia legislatures in the late eighteenth century, to the President and Congress of the United States, to particular individuals such as senatorial candidates Abraham Lincoln and Stephen Douglas and the noted abolitionist Frederick Douglass. Nonetheless, the overwhelming bulk of the book consists of decisions of the Supreme Court of the United States. This editorial choice is supported by rationales besides adherence to the conventional emphasis (which we wish to question) on the Court as the uniquely authoritative interpreter of the Constitution: Most important federal constitutional issues eventually come before the Supreme Court, which provides, far more than is generally true of other decisionmaking institutions, elaborate written justifications for its constitutional decisions. While a well-trained lawyer should be aware that state constitutions treat many of these same issues, there are pragmatic advantages to focusing on the constitution of a single jurisdiction, especially when it presents enough issues to keep even the most industrious teachers and students occupied for a year.

The organization of any casebook is inevitably ideological — especially in a subject as fraught with ideology as constitutional law. No approach to the study of constitutional law is independent of the instructors’ or casebook editors’ more general intellectual and political interests. For example, we devote more space to the topic of slavery than do other casebooks. In addition to the doctrinal interest of the slave cases, this reflects our belief that students should understand the extent to which the legal ownership of one human being by another — in the United States, almost inevitably the ownership of a black by a white — pervaded American law prior to 1865 and set the stage for subsequent epic social and constitutional struggles that show no signs of abating.

The first edition of *Processes of Constitutional Decisionmaking* explicitly adopted the ideology of the legal process tradition identified with Albert Sacks and Henry Hart, who were especially influential teachers at the Harvard Law

School following World War II (and with whom Paul Brest studied during the early 1960s). Hart and Sacks argued that there existed apolitical decisionmaking procedures, adherence to which could provide substantively acceptable and politically legitimate decisions. Although the validity of this hypothesis remains a central concern of the book — for it is crucial matter about which every student must come to his or her own judgment — the second edition manifested our skepticism about the legitimating power of process and, indeed, about the meaning of “legitimacy” itself. Nothing that has happened since 1981, when the second edition was prepared, has lessened our skepticism. The 1980s were a time of especially vigorous and often acrimonious debates about central constitutional issues. And these debates were not confined to the pages of law reviews or the conversations of legal academics. The 1987 confirmation hearing of Robert Bork brought the critique of the post-World War II judiciary and many of its most important cases to the living rooms of American citizens. We have tried to bring to the surface these and similar issues where they can be confronted explicitly. But, of course, for every assumption that is consciously illuminated, others remain hidden in the shadows. You will get the most out of the course taught from this casebook if you take its agendas seriously even while keeping a sharp eye out for its unstated assumptions.

Acknowledgments

Paul Brest gratefully acknowledges the assistance of Matt Gonzalez, Marty Hansen, Elizabeth Leff, Lisa Yanney, and Ellen Zalman in preparing the third edition.

Sanford Levinson wishes to express his gratitude to his University of Texas Law School colleagues, including Jack Balkin, Philip Bobbitt, Doug Laycock, Scot Powe, and Jordan Steiker. Dean Mark Yudof has provided both individual and institutional support throughout the long time between the last and current editions of this casebook. Meira Levinson provided invaluable research assistance on Chapter 11. The authors are also grateful to Niva Elkin-Koren for her work on the index.

Both authors have also benefitted from the responses of a number of friends at other institutions. They include, especially, Akhil Reed Amar, Milner Ball (who pressed the claims of Native Americans to be treated as an important part of the American constitutional narrative), Walter Dellinger (who initially suggested including material from the Lincoln-Douglas debates), Paul Finkelman, Lewis LaRue, Peter Linzer, Robert Post, and Stephen Seigel.

The authors also gratefully acknowledge permission to print excerpts from the following materials:

Aleinikoff, Alexander, *Theories of Loss of Citizenship*, 84 Mich. L. Rev. 1471 (1986). Copyright © 1986 by the Michigan Law Review. Reprinted by permission of the author and the Michigan Law Review.

Anderson, David, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983). Copyright © 1983 by the Regents of the University of California. All rights reserved. Reprinted by permission of the UCLA Law Review and Fred B. Rothman & Co.

Bator, Paul, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605 (1981). Copyright © 1981 by Paul M. Bator. Reprinted by permission.

Bell, Derrick, *Introduction: Awakening after Bakke*, 14 Harv. C.P.-C.L.L. Rev. 1 (1979). Copyright © 1979 by the President and Fellows of Harvard College. Reprinted by permission of the Harvard Civil Rights-Civil Liberties Law Review.

Berle, A.A., *Constitutional Limitations on Corporate Activity — Protection of Personal Rights from Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933 (1952). Copyright © 1952 by the University of Pennsylvania Law Review. Reprinted by permission of the University of Pennsylvania Law Review and Fred B. Rothman & Co.

Bestor, Arthur, *The American Civil War as a Constitutional Crisis*, 69 Am. Historical Rev. 327-352 (1964). Copyright © 1964. Reprinted by permission.

Bice, Scott, *Rationality Analysis in Constitutional Law*, 65 Minn. L. Rev. 1. Copyright © 1980. Reprinted by permission of the author and the University of Minnesota Law Review.

- Bickel, Alexander, *The Least Dangerous Branch*. Copyright © 1962 by Bobbs-Merrill Company, Inc. Reprinted by permission of the Bobbs-Merrill Co.
- Bickel, Alexander, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955). Copyright © 1955 by the Harvard Law Review Association. Reprinted by permission.
- Black, Charles, *Impeachment: A Handbook*. Copyright © 1974 by the Yale University Press. Reprinted by permission of Yale University Press.
- Black, Charles, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960). Copyright © 1959. Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman and Co.
- Brant, Irving, *Impeachment: Trials and Errors*. Copyright © 1972 by Irving Brant. Reprinted by permission of Alfred A. Knopf, Inc.
- Brest, Paul, *Congress as a Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57 (1986). Copyright © 1986. Reprinted by permission of the University of Georgia Law Review.
- Brest, Paul, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 224 (1980). Copyright © 1980. Reprinted by permission of the Boston University Law Review.
- Brest, Paul, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95. Copyright © 1971 by the University of Chicago. Reprinted by permission of The University of Chicago Press.
- Burt, Robert, *Miranda and Title II: A Morganatic Marriage*, 1969 Sup. Ct. Rev. 81. Copyright © 1969 by The University of Chicago. Reprinted by permission of The University of Chicago.
- Colker, Ruth, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U.L. Rev. 1003 (1986). Copyright © 1986. Reprinted by permission of the New York University Law Review.
- Corwin, Edward S., *The President: Office and Powers*. Copyright © 1957 by New York University. Reprinted by permission of New York University Press.
- Cox, Archibald, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971). Copyright © 1971. Reprinted by permission of the author and the University of Cincinnati Law Review.
- Dahl, Robert, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. Pub. L. 279 (1957). Copyright © 1957. Reprinted by permission of the Journal of Public Law of Emory University School of Law.
- Deutsch, Jan, *Neutrality, Legitimacy, and the Supreme Court*, 20 Stan. L. Rev. 169 (1968). Copyright © 1968 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission of the Stanford Law Review and Fred B. Rothman & Co.
- Ely, John, *Democracy and Distrust: A Theory of Judicial Review*. Copyright © 1980 by the President and Fellows of Harvard College. Reprinted by permission of the Harvard University Press.
- Fine, Sidney, *Laissez Faire and the General Welfare State* (1956). Copyright © 1956. Reprinted by permission of the University of Michigan Press.
- Foner, Eric, *Life and Writings of Frederick Douglass*, vol. II (1953). Copyright © 1953. Reprinted by permission of International Publishers.

- Gordon, Robert, Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920, in *Professions and Professional Ideologies in American, 1730-1940*. Copyright © 1983. Reprinted by permission of the author and the University of North Carolina Press.
- Grey, Thomas, Procedural Fairness and Substantive Rights, from *Due Process (Nomos XVIII)* (1977). Copyright © 1977 by New York University. Reprinted by permission of New York University Press.
- Gunther, Gerald, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 *Stanford L. Rev.* 719 (1975). Copyright © 1975 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission of the author and Fred B. Rothman and Co.
- Henkin, Louis, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 *U. Pa. L. Rev.* 473 (1962). Copyright © 1962. Reprinted by permission of the University of Pennsylvania Law Review.
- Jensen, Merrill, 75 *Harv. L. Rev.* 456 (1961). Copyright © 1961. Reprinted by permission of the Harvard Law Review.
- Jacobs, James, Race Relations and the Prison Subculture, in 1 *Crime and Justice: An Annual Review of Research*. Copyright © 1979 by The University of Chicago. Reprinted by permission of the University of Chicago Press.
- Kelly, Alfred, The School Desegregation Case, in *Quarrels That Have Shaped the Constitution* (John A. Garraty, ed.). Copyright © 1964 by Harper & Row, Publishers, Inc. Reprinted by permission of the publisher.
- Lawrence, Charles R., III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 *Stan. L. Rev.* 317 (1987). Copyright © 1987 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission of the Stanford Law Review and Fred B. Rothman & Co.
- Laycock, Douglas, Due Process and Separation of Powers: The Efforts to Make the Due Process Clauses Nonjusticiable, 60 *Tex. L. Rev.* 875 (1982). Copyright © 1982 by the Texas Law Review Association. Reprinted by permission.
- Laycock, Douglas, A Survey of Religious Liberty in the United States, 47 *Ohio St. L.J.* 409 (1986). Copyright © 1986. Reprinted by permission of the author and the Ohio State Law Journal.
- Levinson, Sanford, Suffrage and Community: Who Should Vote?, 1989 *Fla. L. Rev.* 545. Copyright © 1989. Reprinted by permission of the Florida Law Review.
- Levy, Leonard W., Freedom of Speech and Press in Early American History: Legacy of Suppression. Copyright © 1960. Reprinted by permission.
- Littleton, Christine, Reconstructing Sexual Equality, 75 *Cal. L. Rev.* 1279 (1986). Copyright © 1986. Reprinted by permission of the California Law Review.
- McCloskey, Robert, *The American Supreme Court*. Copyright © 1960 by The University of Chicago. Reprinted by permission of the University of Chicago Press.
- McCloskey, Robert, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 *Sup. Ct. Rev.* 34. Copyright © 1969 by The University of Chicago. Reprinted by permission of the University of Chicago Press.

- McConnell, Michael, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501 (1989). Copyright © 1989. Reprinted by permission of the Yale Law Journal.
- MacKinnon, Catherine A., *Toward a Feminist Theory of the State*, Chapter 12 (1989). Copyright © 1989 by Catherine A. MacKinnon. Reprinted by permission of Harvard University Press.
- MacKinnon, Catherine, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo* (1983), in *Feminism Unmodified: Discourses on Life and Law* 65-69 (1987). Copyright © 1987 by the President and Fellows of Harvard College. Reprinted by permission of Harvard University Press.
- Mashaw, Jerry, *The Supreme Court's Due Process Calculus*, 44 U. Chi. L. Rev. 28 (1977). Copyright © 1977 by The University of Chicago. Reprinted by permission of the author and the University of Chicago Law Review.
- Michelman, Frank, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969). Copyright © 1969 by the Harvard Law Review Association. Reprinted by permission.
- Monaghan, Henry P., *Presidential War-Making*, 50 B.U.L. Rev. 19 (1970). Copyright © 1970. Reprinted by permission of the Boston University Law Review.
- Monaghan, Henry, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988). Copyright © 1988 by the Directors of the Columbia Law Review Association, Inc. All rights reserved. Reprinted by permission.
- Moskos, Charles, *Army Women*, *The Atlantic*, Aug. 1990, at 71-78. Copyright © 1990. Reprinted by permission of the author.
- New York Times, *Transcript of Frost-Nixon Interview*, May 20, 1977, at A16. Copyright © 1977 by the New York Times Company. Reprinted by permission.
- Olsen, Frances, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387 (1984). Copyright © 1984 by the Texas Law Review Review Association. Reprinted by permission.
- Oral History Collection of Columbia University, *Conversations with Mr. Justice Frankfurter*. Copyright © 1972 by the Trustees of Columbia University. Reprinted by permission.
- Powell, H. Jefferson, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). Copyright © 1985. Reprinted by permission of the Harvard Law Review.
- Raphael, Alan, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 Willamette L. Rev. 293 (1989). Copyright © 1989. Reprinted by permission of Willamette Law Review.
- Redish, Martin, *Freedom of Expression: A Critical Analysis*. Copyright © 1984 by the Michie Company. Reprinted by permission of the Michie Company, Charlottesville, Va.
- Regan, Donald, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). Copyright © 1986 by the Michigan Law Review. Reprinted by permission of the Michigan Law Review.
- Richards, David A.J., *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974). Copyright © 1974 by the University of Pennsylvania Law Review. Reprinted by permission.

- Richards, David, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 Hastings L. Rev. 957, 976 (1979). Copyright © 1979. Reprinted by permission of the Hastings Law Journal.
- Rosenfeld, Michel, Decoding *Richmond*: Affirmative Action and the Elusive Meaning of Constitutional Equality, 87 Mich. L. Rev. 1729 (1989). Copyright © 1989 by the Michigan Law Review. Reprinted by permission of the author and the Michigan Law Review.
- Sandalow, Terrance, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 1 (1969). Copyright © 1969 by the Regents of the University of California. Reprinted by permission.
- Schmidt, Benno, Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases, 82 Colum. L. Rev. 646 (1982). Copyright © 1982 by the Directors of the Columbia Law Review Association, Inc. All rights reserved. Reprinted by permission.
- Shapiro, Martin, Law and Politics in the Supreme Court. Copyright © 1964 by The Free Press, a Division of Macmillan Publishing Co., Inc. Reprinted by permission of Macmillan Publishing Co., Inc.
- Stern, Robert, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335 (1934). Copyright © 1934. Reprinted by permission of the Harvard Law Review.
- Still, Jonathan, Political Equality and Election Systems, 91 Ethics (1981). Copyright © 1981. Reprinted by permission.
- Stone, Geoffrey, Restriction of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81 (1978). Copyright © 1978. Reprinted by permission of the University of Chicago Law Review.
- Sullivan, Kathleen, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78 (1986). Copyright © 1986. Reprinted by permission of the Harvard Law Review.
- tenBroek, Jacobus, Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction, 26 Calif. L. Rev. 287 (1938), 27 Calif. L. Rev. 157 (1939). Copyright © 1939. Reprinted by permission of the California Law Review.
- Tribe, Laurence, American Constitutional Law (2d ed. 1988). Copyright © 1988. Reprinted by permission of Foundation Press.
- Tribe, Laurence, N.Y. Times, July 3, 1989. Copyright © 1989 by the New York Times Company. Reprinted by permission.
- Tussman, Joseph, & Jacobus tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 346-353 (1949). Copyright © 1949 by the California Law Review, Inc. Reprinted by permission of the California Law Review and Fred B. Rothman & Co.
- Tyack, David, Thomas James & Aaron Benavot, Law and the Shaping of Public Education, 1785-1954 (1987). Copyright © 1987. Reprinted by permission of the University of Wisconsin Press.
- Wall Street Journal, The Lords of the Manor, June 1, 1984, at 18. Copyright © 1984 by Dow Jones & Co., Inc. All rights reserved. Reprinted by permission of the Wall Street Journal.
- Wasserstrom, Richard, The Judicial Decision: Toward a Theory of Legal Justifi-

- cation. Copyright © 1961 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission of the author and Stanford University Press.
- Wasserstrom, Richard, Racism, Sexism, and Preferential Treatment, 24 U.C.L.A.L. Rev. 581 (1977). Copyright © 1977 by the Regents of the University of California. Reprinted by permission.
- Wechsler, Herbert, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, in Principles, Politics and Fundamental Law. Copyright © 1960 by the President and Fellows of Harvard College. Copyright renewed 1989 by Herbert Wechsler. Reprinted by permission of the Harvard University Press.
- Wechsler, Herbert, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). Copyright © 1959 by the Harvard Law Review Association. Reprinted by permission of the Harvard Law Review.
- Wilkins, Roger, The Black Poor Are Different, N.Y. Times, Aug. 22, 1989, at A19. Copyright © 1989 by the New York Times Company. Reprinted by permission.
- Williams, Wendy, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 Women's Rights L. Rep. 175 (1982). Copyright © 1982. Reprinted by permission of the author.
- Williams, Wendy, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-1985). Copyright © 1985. Reprinted by permission of the New York University Review of Law and Social Change.
- Wofford, John, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L. Rev. 502 (1964). Copyright © 1964 by The University of Chicago. Reprinted by permission.
- Woodward, C. Vann, The Strange Career of Jim Crow (3d rev. ed.). Copyright © 1974 by Oxford University Press, Inc. Reprinted by permission.

The Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.¹ The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof,² for six Years; and each Senator shall have one Vote.

1. Changed by section 2 of the Fourteenth Amendment.

2. Changed by clause 1 of the Seventeenth Amendment.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.³

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.⁴

Section 5. [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

3. Changed by clause 2 of the Seventeenth Amendment.

4. Changed by section 2 of the Twentieth Amendment.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Laws of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.⁵

[5] No Tax or Duty shall be laid on Articles exported from any State.

5. But see the Sixteenth Amendment.