

*Essays,  
Cases, and  
Comparative Notes*

*American*  
Constitutional *Law*

Donald P. Kommers  
John E. Finn  
Gary J. Jacobsohn

*third edition*

# *American Constitutional Law*

**Essays, Cases, and Comparative Notes**

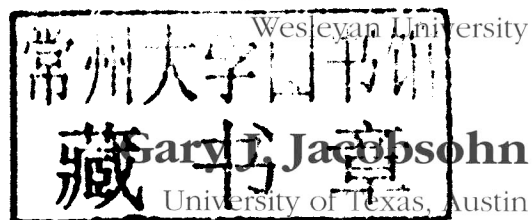
*Third Edition*

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For Nancy, Linda, and Beth

There is no remedy for love  
but to love more  
—*Thoreau*

# Preface

T

his book was born of the conviction that the study of constitutional law is an integral part of—and should draw upon—a liberal arts education. In light of this, we have tried to produce a unique casebook, one that will encourage students and citizens to think critically about the principles and policies of the American constitutional order. As taught in law schools, constitutional law tends to focus on technical rules and doctrines that students are asked to apply to a given set of facts, after which they proceed to the next case. A liberal arts view, by contrast, seeks to drive constitutional doctrine and policy back to their foundation in social, moral, and political theory, prompting students to engage the great questions of political life addressed by the Constitution and constitutional interpretation. Among these issues are questions that concern the meaning of justice, liberty, equality, and America itself. We believe that our focus on these questions distinguishes this text from the standard law school book on constitutional law as well as from other texts designed for undergraduates whose main concerns are with other things.

We should note that this book centers largely, but not exclusively, on constitutional meaning as defined by the United States Supreme Court. Accordingly, judicial opinions constitute the core of its documentary materials. But this does not mean, nor do we wish to imply, that the Supreme Court monopolizes the field of constitutional interpretation. Congress, the President, governors, state legislators, and even police officers on the beat interpret the Constitution when they issue orders, pass laws, or arrest persons suspected of crime. In focusing mainly on the process of judicial interpretation, we have nevertheless tried to consider this broader latticework of constitutional decision-making, as several of the nonjudicial materials in the appendices would indicate. Moreover, several cases reproduced in this book address the role of nonjudicial institutions in the interpretation of the Constitution.

One of this book's major features is the introductory essay that precedes the cases in each chapter. We have written these essays not only to situate the cases in their proper historical and political context, but also to highlight three themes or perspectives. Each theme is designed to facilitate critical thinking and draws upon knowledge and skills central to the liberal arts. Our first theme, the interpretive perspective, stresses the nature and process

of constitutional interpretation. It asks students to consider how judges and other interpreters find meaning in the wonderfully elastic language of the Constitution. Accordingly, the introductory essays pay special attention to judicial modes of inquiry, styles of argument, and other approaches used by the Supreme Court in deciding constitutional disputes. Is constitutional decision-making little more than politics by another name? Is it an objective process of interpretation apart from and independent of a justice's personal values or moral commitments? Is it a matter of finding the right answer to a constitutional problem? Is there any such thing as a "right" answer in constitutional law? The notes and queries following each case, like the essays, raise these and related questions.

Our second theme, the normative perspective, prompts inquiry into the substantive values of our constitutional jurisprudence. Apart from the social, moral, and political theories—be they explicit or implicit—informing judicial rulings, the chapters of this book invite students to consider how and why constitutional argument, both at the founding and in our own time, has concentrated on three main conflicts. The first is the perennial conflict between nation and state over the limits and scope of their respective powers; the second is the conflict between the principles of democracy and constitutionalism; the third, finally, is the conflict between the values of individual liberty and those based on the claims of the larger community. Students are asked to reflect on whether the judicial resolution of these conflicts represents in some sense the "best" accommodation attainable between competing constitutional values or principles.

Our third theme, the comparative perspective, represents our belief that the study of American constitutional law should be informed by the great variety and richness of comparative materials now available in other constitutional democracies. Indeed, constitutional borrowing from other nations is an increasingly prominent theme in comparative constitutional studies. The United States Supreme Court often cites leading decisions of other national high courts as an aid to constitutional interpretation, though not without controversy, both within and outside the Court. Needless to say, this is not a casebook in comparative constitutional law. But we believe that the limited and selective comparative materials that we have introduced—mainly in the form of boxed extracts from foreign constitutional courts—helps to enrich the study of American constitutional law in several ways, not least by encouraging students to consider what, if anything, is unique in American constitutional life and what we share with other constitutional democracies. Some readers may find the inclusion of comparative materials novel, or even disquieting. We prefer to think of comparative analysis as a longstanding part of constitutional argument in the United States, one that reaches at least as far back as the *Federalist Papers*.

In most other respects, the organization of this book should seem familiar. The casebook is divided into three parts. Part I consists of original essays focusing, respectively, on the Supreme Court as a decision-making institution and on the Constitution and its interpretation. Part II contains six chapters dealing with the structures and powers of government. Part III, finally, includes seven chapters on civil rights and liberties. We trust that teachers accustomed to the canon will find much that is familiar, as well as recognize why and where our themes have led us to depart from the normal course.

It took several years to produce the first edition of this book, published in 1998. Along the way, we received the wise counsel and support of numerous colleagues and teachers of constitutional law. We also had the advice and encouragement of the forty-eight college teachers selected to participate in several National Endowment for the Humanities (NEH) Summer Seminars for College Teachers, conducted by one of



us, on the topic, “American Constitutionalism in Comparative Perspective.” These teachers, most of whom teach undergraduate constitutional law courses in liberal arts colleges, helped to convince us to stay the course and bring the first edition to completion.

## The Second Edition

Gary Jacobsohn joined us as editor and author of the 2nd edition of this casebook. His work in American and comparative constitutional law and jurisprudence has helped to bolster and enrich the three perspectives mentioned earlier. Those familiar with the first edition noticed significant changes and additions to the 2nd edition. Among these were:

- A new chapter on voting and political representation.
- Updated critical essays that introduce students to the Supreme Court’s most recent work.
- New materials on the Court’s revival of the Eleventh Amendment as a limitation on state rights.
- A wider array of comparative notes, including boxed extracts from decisions of constitutional courts in India, Israel, South Africa, and Australia (along with Canada, Germany, Japan, Hungary, and the European Court of Human Rights).
- Expanded introductory essays that highlight issues of constitutional design and borrowing from other nations.
- A list of web sites for easy access to American and foreign case law as well as information on numerous foreign constitutional courts.
- An extensive set of appendices, including an updated glossary and materials on how to study Supreme Court opinions and how to research comparative materials.
- New cases and materials on the Patriot Act and other efforts to combat terrorism in the United States and abroad.

The 2nd edition also included several changes and additions in the list of reprinted cases. Nineteen of 132 cases included in the 1st edition were replaced with 23 new cases, not to mention the eight cases featured in the new chapter on voting. The additional cases were selected to account for new and dramatic developments related to presidential power, state sovereignty, limits on congressional law-making, the death penalty, abortion, homosexual privacy, affirmative action, and sex discrimination. The new chapter on voting, finally, highlights the 2000 election and the controversial case of *Bush v. Gore* as well as the most recent party finance cases.

## The Third Edition

This 3rd edition follows the general format of the 2nd edition, with its interpretative, normative, and comparative emphases. Each of these themes has been profoundly influenced by substantial political, economic, and social developments since the publication of the 2nd edition.

For example, the 3rd edition accounts for important developments with respect to our interpretative theme by discussing how judicial interpretation of the Constitution has been influenced by new understandings of certain approaches to constitutional interpretation, such as originalism and aspirationalism. We consider, for instance, the Court’s recent decision in *District of Columbia v. Heller* (2008). In addition, we focus on nonjudicial interpretation of the Constitution by considering the renewed insistence by other constitutional actors, such as the President, of their own power to

interpret and defend the Constitution. With respect to the normative theme, the 3rd edition similarly features a renewed emphasis on questions of constitutional maintenance and fidelity—about the desirability and durability of constitutional commitments generally. These are partly the result of important changes in constitutional jurisprudence post-9/11, including the war on terrorism and the rise of the unitary executive. We thus include new and expanded sections on presidential power in several chapters, focusing in part on the intense debate provoked by the Bush Administration's claims about executive power. The new cases here include *Hamdan v. Rumsfeld* (2006) and *Boumediene v. Bush* (2008). We also include new sections on the problems and challenges terrorism poses for constitutional government. Our treatment includes an expanded discussion of judicial supervision of the war on terrorism in other countries, such as Canada, Israel, the UK, and Germany.

Finally, the 3rd edition also underscores the growing importance of the comparative dimension of constitutional interpretation. In recent years we have seen a veritable explosion of comparative constitutional law scholarship, including a vigorous debate both on and off the Supreme Court over the significance and relevance of foreign constitutional case law in the interpretation of the U.S. Constitution.

Among the other changes in this edition are:

- Updated and expanded treatment of key cases on gerrymandering and campaign finance.
- Expanded discussion of the Court's work on federalism and the Commerce Clause.
- Discussions of the Court's new cases on the death penalty, including a discussion of the controversy within the Court about the propriety of citing foreign case law.
- An expanded discussion of the Court's recent work in the area of privacy, including the Court's decisions with regard to partial birth abortions and same sex marriages.
- An expanded section on the Court's continuing efforts to develop a coherent takings clause jurisprudence.
- Full coverage of new developments and cases concerning affirmative action and school desegregation.

## A Note on Reading the Text

For those students who may not have taken a law-related course prior to using this book, we would advise that they consult Appendix E for an account of how to understand Supreme Court opinions. In addition, at the outset of each edited case, just before the opinion of the Court, we (the editors) have written a brief summary of the facts in the background of the judicial contest, including a statement of how the dispute was decided in the lower courts. The summary concludes with a list of the justices who participated in the decision. Names appearing in italics identify the authors of dissenting, concurring, and majority or plurality opinions. (Justices whose names are set in roman type have joined one or more of these opinions.) Students will notice that selected dissenting and concurring opinions have been omitted. We omit them only if they contribute little to our understanding of a case or duplicate the reasoning of other opinions.

## Acknowledgments

A book such as we have written and edited was not fashioned out of whole cloth. Years of teaching undergraduate constitutional law stand behind this enterprise: 35



years at Notre Dame in the case of Donald Kommers, 32 years at Williams College and 5 at the University of Texas in the case of Gary Jacobsohn, and 23 years at Wesleyan University in the case of John Finn. Many of the changes and additions introduced into the 3d edition were in response to student reactions to the first two editions. We are deeply grateful for their comments and for suggestions made by other users of our casebook.

For their help and advice on previous editions, we would like to thank Michael Tolley (Northeastern University), Theodore M. Vestal (Oklahoma State University), William Buscemi (Wittenberg University), Rodney Hero (University of Notre Dame), Nicholas Aroney (Queensland University, Australia), Peter W. Hogg (York University, Canada), Winfried Brugger (Heidelberg University, Germany), Sotirios Barber (University of Notre Dame), Martin Gruberg (University of Wisconsin at Oshkosh), Paul F. Mullen (Florida International University), Harold Pohlman (Dickinson College), and George Thomas (University of Oklahoma), David Barnum (DePaul University) and Jerry Simich (University of Nevada at Las Vegas). We are also indebted to our graduate and undergraduate research assistants for their invaluable help, especially Kevin Gingras, Brendan Dunn, and Jesse Covington of Notre Dame; Justin Crowe and Hayley Horwitz of Williams College; Andrew Calica and Peter Harvey of Wesleyan; and William Adsit of the University of Connecticut Law School. We would also like to acknowledge the work of our tireless secretaries, Janet Demicco, Debbie Sumption, and Lu Ann Nate; law librarians Dwight King, Patti Ogden, and Carmela Kinslow; and the three computer wizards who liberated us from a number of frustrations, namely, Daniel Manier, Timothy Gritten, and Susan Good. Last, but not least, we are deeply grateful to Jennifer Knerr, Renee Legatt, Christopher Ruel, and Alden Perkins, all of Rowman & Littlefield, for their irreplaceable expertise and enthusiastic commitment to this book.

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Finally, we owe a special word of thanks to our families for their understanding and patience during the year of this edition's preparation. Gary Jacobsohn wishes to thank his wife, Beth, and their three children, Vanessa, Joseph, and Matthew; John Finn his wife, Linda, and their two children, Alexandra and Ellery; and Donald Kommers his wife, Nancy. It is only appropriate that we dedicate this book to each of our spouses.

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