

Preface

This textbook pioneers a new approach to American constitutionalism. Our target audience consists of professors, students, and readers interested in researching, teaching, and learning about constitutional politics in the United States. This preface explains four crucial features of the material that follows.

- We discuss *all important debates* in American constitutional history.
- We include readings from *all prominent participants* in these constitutional debates.
- We organize these constitutional debates by *historical era*.
- Chapter introductions clearly lay out the *political and legal contexts*.

Our goal is to familiarize readers with the central constitutional issues that have excited Americans over the years—and that are still vigorously debated in our time. We hope to break the habit of equating American constitutionalism with the decisions of the Supreme Court of the United States. Constitutionalism in the United States covers more topics, is more complex, and is more interesting than one would gather from merely reading essays by judges in law reports.

American Constitutionalism is directed at all persons who hope to become sophisticated observers and informed participants in a constitutional regime, not just the very few who make arguments before federal judges or the extraordinary few who become federal judges. Our text provides readers with the materials they need to form educated opinions on the fundamental questions of American constitutionalism.

Constitutional norms pervade all of American politics, and all of us participate in that constitutional politics. The very vocabulary that ordinary Americans use when talking politics reflects the language chosen by long-dead framers. When we think that government is treating us unfairly, we complain that we have been

denied “the equal protection of the laws.” We insist or deny that national health care is a legitimate exercise of the congressional power under Article I “to regulate commerce among the several states.” We debate whether the individual mandate in the Affordable Health Care Act of 2010 is a “necessary and proper” exercise of the constitutional power “to lay and collect Taxes and provide for the general welfare of the United States.”

Sophisticated observers and informed participants need a different introduction to American constitutionalism than lawyers practicing before the Supreme Court. Both should be exposed to such judicial landmarks as *McCulloch v. Maryland* (1819), the decision that defined the scope of national powers, and *Brown v. Board of Education* (1954), the decision that declared unconstitutional the laws that mandated racial segregation in public schools. For this reason, *American Constitutionalism* includes generous selections from the most important cases decided by the Supreme Court of the United States.

Participants in constitutional politics should be familiar with important constitutional issues that are *not* being litigated, and may never have been litigated, before the Supreme Court. They should know the basic arguments for and against presidential power to initiate military action in foreign countries, even if that constitutional question has not been decided by the Supreme Court. Sophisticated observers should be aware of the ways in which Supreme Court rulings may be consequences of previous constitutional choices made by other constitutional authorities. The *Brown* decision, for example, occurred only after Presidents Roosevelt, Truman, and Eisenhower had packed the federal courts with racial liberals who believed Jim Crow unconstitutional.

American Constitutionalism provides the tools and resources for this more comprehensive perspective on

American constitutional politics. If our goal is to understand American constitutionalism, then we should be open to the full range of the American constitutional experience. If our goal is to engage the fundamental questions that have roiled American politics and understand the dynamics of constitutional development, then we must widen our point of view. We must incorporate the constitutional politics underlying landmark Supreme Court decisions, and we must include landmark constitutional decisions made by elected officials and state courts. *American Constitutionalism* offers these materials.

Constitutional arguments are as much the stuff of politics as the pork barrel and the log roll. The interplay of legal principles, moral values, partisan interests, and historical developments is a central feature of our constitutional system. Basic constitutional institutions provide normative and procedural frameworks that allow political debate and decision making to move forward in ways that political winners and losers alike usually consider legitimate. At the same time, preexisting constitutional commitments confer advantages on some political movements and partisan coalitions relative to others.

With the materials that follow we hope to provide an understanding of how constitutionalism actually works in the United States. We reject the simple view that constitutionalism has nothing to do with politics—and the equally simple view that constitutionalism is nothing more than a dressed-up version of ordinary politics. American constitutionalism is a distinctive form of politics with distinctive goals and modes of justification. Understanding the interplay between all the different elements of constitutional law and politics is a precondition for any realistic assessment of how American constitutionalism actually works, how that system of governance should work, and how our political order might work better.

All Important Constitutional Debates

American Constitutionalism covers the major constitutional controversies that have excited Americans from the Colonial Era to the present. Readings range from protests that the Stamp Act violated the unwritten English Constitution to the arguments made in the contemporary controversy over “enhanced” methods of interrogating suspected terrorists. Along the way, we

include the constitutional debates over the Bill of Rights, the Louisiana Purchase, the Emancipation Proclamation, Prohibition, women’s suffrage, the New Deal, and presidential power to order troops into foreign countries.

When determining what materials to include, we looked to the impact of the controversy on American constitutional development. We devote space to the constitutional disputes over the annexation of Texas and the proposed Human Life Amendment. Both debates were central to the constitutional politics of the time and provide foundations for contemporary constitutional politics. We spend less time on technical legal questions primarily of interest to lawyers with a federal courts practice. We believe that scarce space in a textbook aimed at providing a deeper understanding of the workings of our constitutional system is better spent covering such issues as the N.A.A.C.P.’s litigation strategy for defeating segregation than the precise details of the Supreme Court’s commercial speech jurisprudence.”

All Important Constitutional Participants

American Constitutionalism examines the contributions of all Americans to important constitutional debates. These contributions include the judicial opinions in such landmark Supreme Court cases as *Marbury v. Madison* (1803) and *Roe v. Wade* (1973). The major contributions to important constitutional debates also include the arguments that lawyers made before the Supreme Court, the judicial opinions and legal arguments in lower federal court and state court cases, presidential speeches and opinions of the attorney general, congressional debates and legislative reports, party manifestos, pamphlets produced by interest groups, and scholarly commentaries. A comprehensive education in American constitutionalism should include Salmon Chase’s argument that Congress had no constitutional power to pass a fugitive slave act, the prominent state court decisions interpreting provisions in state bills of rights, President Nixon’s veto of the War Powers Resolution, the congressional debates over the ratification of the post-Civil War Amendments, and the Margold Report outlining the NAACP’s strategy during the 1930s and 1940s for securing a Supreme Court decision that ended the policy of “separate but equal.”

We include these materials because we recognize that American constitutionalism takes shape in the legislative and executive branches of government, as well as in the judiciary. Constitutional provisions and principles are elaborated within the national government, by state and local officials, and on the streets and in meeting places throughout the United States. Constitutional meaning is determined by government officials, party platforms, campaign speeches, legal treatises, and newspaper articles.

Our emphasis on all participants is closely related to our concern with presenting all major constitutional debates. Consider the constitutional issues raised by national expansion and presidential war-making powers. These matters were debated and settled by elected officials. We would only skim the surface of the constitutional controversies raised during the contemporary War on Terror if we limited materials to Supreme Court rulings. Even when courts make constitutional rulings, those rulings are typically preceded and structured by constitutional politics outside the judiciary. The Supreme Court in *Planned Parenthood v. Casey* (1992) refrained from overruling *Roe v. Wade* in part because pro-choice Democrats in 1986 were able to prevent President Reagan from appointing Robert Bork, a vigorous critic of *Roe*, to the Supreme Court. The Supreme Court in *McCulloch v. Maryland* declared that congressional decisions made during the preceding decade had partly settled questions about the constitutionality of the national bank. Elected officials often decide the fate of judicial decisions once they are handed down. If we pay too much attention to *Brown v. Board of Education* (1954), we will overlook the crucial role that the Civil Rights Act of 1964 played in securing desegregation. If we concentrate too narrowly on the words of the Court in *Brown*, we miss the equally significant and diverse words of Harry Truman, Dwight Eisenhower, the Southern Manifesto, and Martin Luther King, Jr.

Historical Organization

American Constitutionalism is organized historically. The text respects the traditional pedagogical division of constitutionalism into two courses: the first on the structures of government and the second on rights and liberties. Within each volume, we divide American constitutional development into ten relatively distinct and stable political regimes: Colonial (before 1776),

Founding (1776–1791), Early National (1791–1828), Jacksonian (1829–1860), Civil War/Reconstruction (1861–1876), Republican (1877–1932), New Deal/Great Society (1933–1968), Liberalism Divided (1969–1980), Reagan (1981–1993), and Contemporary (1994–present). These ten eras are characterized by important constitutional stabilities that mark each period off from previous and later eras.

Constitutional questions about secession and slavery were settled by the Civil War. Americans during the Jacksonian Era bitterly debated the constitutional issues associated with national territorial expansion, banking, and internal improvements. Americans after Reconstruction were far more concerned with national power to regulate railroads and drinking. New Dealers temporarily settled the constitutional questions over national power to regulate the economy that divided Americans from 1876 to 1932. Many of these issues reemerged in new forms during the Contemporary Era. *Brown v. Board of Education* was hotly contested during the New Deal and Great Society. Americans after 1968 celebrated *Brown* and debated whether that decision supported or undermined affirmative action.

Approaching American constitutionalism historically provides a sound framework for understanding crucial episodes in American constitutional politics. Consider struggles over constitutional authority. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt maintained that the president, when making constitutional decisions, should not always be bound by past Supreme Court decisions. Other presidents have accepted judicial rulings as authoritative. Our period divisions enable readers to see patterns in this cycle of presidential assertion and deference.

The historical approach also enables students to see vital connections between different constitutional issues. Debates over slavery ranged from the scope of the federal power to regulate the interstate slave trade under the interstate commerce clause to whether the Sixth Amendment gave alleged fugitive slaves the right to a jury trial. The movement for racial equality during the 1950s and 1960s challenged existing constitutional understandings of the First Amendment, constitutional criminal procedure, cruel and unusual punishment, equal protection, the scope of federal power over interstate commerce, and state power to regulate interstate commerce in the absence of federal power. We risk losing the vital connections between

constitutional provisions when we cabin American constitutionalism into artificial doctrinal categories and treat them as timeless abstractions.

The Political and Legal Contexts

In all these ways, *American Constitutionalism* provides readers with information about the political and legal contexts in which constitutional controversies arise, are debated, and are settled. A concise introduction to each chapter identifies the central features of American constitutional politics during a particular era. These crucial elements are both political and legal.

The *political elements* include the most important partisan coalitions that fought for electoral supremacy, the main interests that supported those coalitions, the positions that those coalitions took on the most important issues that divided Americans, and the extent to which one coalition was more successful than others at gaining control of the national government. The *Dred Scott* decision (1857), which declared that Congress could not ban slavery in American territories, articulated the constitutional commitments of the Jacksonian Democrats, who largely controlled the national government from 1828 to 1860.

The *legal elements* include the most important schools of constitutional and legal thought in a particular era. They include the general principles that most people believed best justified the constitutional order, what governing authorities thought the best methods for interpreting the Constitution, and the available precedents that could be invoked to justify future constitutional developments. New Deal liberals, when justifying extensive government regulation of the national economy, relied heavily on notions of a “living Constitution” that had become increasingly prominent in legal thought during the early twentieth century.

Pedagogical Framework

The context presented in chapter introductions is part of a consistent pedagogical framework:

- An opening chapter lays out the basic concepts essential to understanding rights and liberties, and the constitutional politics of rights and liberties.

This chapter also provides an essential introduction to students unfamiliar with basic principles of constitutional interpretation and constitutional authority.

- Each historical chapter is divided into a consistent set of topical sections.
- After the period introduction, sections within each subsequent chapter summarize the major issues. Each section begins with a bulleted list of major developments, for ease of reference and to facilitate understanding.
- All readings are prefaced with explanatory headnotes, and all headnotes to court cases end with questions. We believe that this more effectively creates engaged readers and engaged citizens.
- Period illustrations, such as political cartoons, further suggest controversies and contexts.
- Tables throughout the volume summarize key issues and court cases.
- All chapters end with suggested readings.

We hope that the materials provided here allow readers to think about questions of constitutional interpretation and what the various texts mean, but also to think about questions of constitutional design and practice. If resolving fundamental disputes were merely a matter of consulting a neutral referee, such as a Supreme Court, whose authority was acknowledged by all players, then constitutional politics would be a simple matter of appeals, decisions, and essays in law books. Because our system does not work in this way, we have written this book.

For ease of use, the readings in the text are modernized, and we generally use modern terminology to refer to political and constitutional concepts. Since U.S. Supreme Court cases can now be easily found, we have generally cited them only by party names and decision date. We provide footnote citations to state cases only when they are not otherwise identified in excerpts. To help readers distinguish references to U.S. Supreme Court cases and state cases we have added state identifiers to the decision dates when we mention state cases; e.g., *Smith v. Jones* (MD 1823). All excerpts from presidential speeches and party platforms are taken from the terrific “American Presidency Project” at the University of California, Santa Barbara. These materials can be found at <http://www.presidency.ucsb.edu/index.php>. All quotations from *The Federalist Papers* are taken from *The Federalist: A Collection of Essays, Written*

in Favour of the New Constitution, as Agreed Upon by the Federal Convention, September 17, 1787, in two volumes (New York: J. and A. McLean, 1788).

Supplements

However hard we tried, two volumes alone could not have space for all the participants in all the debates without growing so large as to be both costly and intimidating. While we have kept chapters flexible so that instructors can skip around, we nonetheless took a further step: we have made many more readings available on the Web, as part of the extensive supplements available with this book at www.oup.com/us/Gillman.

We also make available correlation guides to match our coverage to more traditional sequences. We wish to make our unusual range of coverage suitable to *any* class. Yet we also hope in this way to make the transition to a new approach easier. We believe that a historical organization best reflects the lived experience of the political actors who challenged existing constitutional practices and the constitutional authorities who determined the validity of those challenges.

Acknowledgments

American Constitutionalism was inspired by and is for our teachers and our students. Walter Murphy, Sanford Levinson, Mark Tushnet, Stephen Elkin, Lou Fisher, Bruce Ackerman, Martin Shapiro, and Rogers Smith are foremost among our many teachers. From them and others we learned that American constitutionalism was about the construction of a political regime and not limited to close analysis of a few Supreme Court opinions. Leslie Goldstein, Judith Baer, Gary Jacobsohn, H. W. Perry, Gordon Silverstein, Paul Frymer, Julie Novkov, George Lovell, Daniel Carpenter, Cornell Clayton, Michael McCann, Barry Friedman, Jack Balkin, Randy Barnett, Douglas Reed, Steve Griffin, Karen Orren, Pamela Brandwein, Kevin McMahon, Tom Keck, Keith Bybee, Shep Melnick, Ken Kersch, Ron Kahn, Stephen Skowronek, and many others have simultaneously been our teachers and students. For the past quarter-century we have participated in a common project devoted to elaborating new constitutional histories, new constitutional theories, and new constitutional visions

all aimed at exploring the ways in which the study of American constitutional politics might differ from the study of constitutional law. We are particularly grateful for the opportunities to teach and learn from Kim Scheppele, Ran Hirschl, Gary Jacobsohn, Leslie Goldstein, and Thomas Ginsburg, who have consistently reminded us that we can understand American constitutionalism only by understanding constitutionalism outside of the United States. Over the past decade, we have welcomed Mariah Zeisberg, Tom Clark, Bradley Hays, Steve Simon, Beau Breslin, Doug Edlin, Helen Knowles, David Erdos, Justin Crowe, David Glick, and Emily Zackin to this constitutionalist fellowship. Each of these talented scholars has been tolerant of our foibles while diligently pointing out the many mistakes made in the initial elaboration of this new American constitutionalism. Finally, we should acknowledge the debt we owe to our students at Princeton University, the University of Southern California, and the University of Maryland. They will inherit American constitutionalism, if not *American Constitutionalism*. From them, we have learned that less is often more. We have experienced firsthand the hunger in younger Americans for ways to better understand and reform the American constitutional order.

The three of us owe a special debt of gratitude to the many persons who directly assisted the actual writing of *American Constitutionalism*. The list of friends and colleagues who responded promptly when we asked for advice about such matters as executive privilege in the Jacksonian Era or Sunday laws in the 1920s is probably longer than this volume, if that can be imagined. Nevertheless, we ought to single out Rogers Smith and Sandy Levinson for being particularly helpful with their comments and assistance. A legion of research assistants worked diligently finding cases, making tables, correcting typos, and inserting periods. They include Deborah Beim, David Bridge, Benjamin Bruins, Jonathan Cheng, Colleen Clary, Ina Cox, Danny Frost, Wandaly Fernandez, David Glick, Abigail Graber, Ayana Mayberry, April Morton, David Myers, Herschel Nachlis, Benjamin Newton, David Nohe, Amanda Radke, Jennifer Ratcliff, Jessica Rebarber, Edward Reilly, Ryan Palmer, Clara Shaw, Michael Sullivan, Thaila Sundaesan, Jeff Tessin, and Katie Zuber.

Many friends and colleagues helped us test earlier iterations of *American Constitutionalism*. Each of them provided vital encouragement to us at initial stages of the project, but also gave us plain hard truths about the diffi-

cult choices we needed to make in order to bring this book to market. We thank them profusely for their counsel, as well as their students, whose comments on earlier editions we did our best to incorporate in the later volumes.

This project would not exist if not for Jennifer Carpenter and John Haber, our editors at Oxford University Press. They combined consistent encouragement, meticulous editing, and the patience of Job. Most important, they kept the faith that what we had to say mattered if said right and clearly. Other members of Oxford University Press, most notably Shelby Peak and Maegan Sherlock, demonstrated the same standard of exemplary professionalism and friendship. Sarah Vogelsong was a fabulous and copyeditor. Sue McCarty provided first-rate help on the references.

We must also thank the many reviewers who closely examined each chapter to ensure its scholarly integrity and suitability to their course in constitutional law: Christopher W. Bonneau, University of Pittsburgh; Jennifer Bowie, George Mason University; Daniel Breen, Brandeis University; Rose Corrigan, Drexel University; McKinzie Craig, Texas A&M University; John P. Feldmeier, Wright State University; Michael P. Fix, Georgia State University; Louis Gordon, California State University, San Bernardino; Hans J. Hacker, Arkansas State University; Charles Hersch, Cleveland

State University; Jeffrey D. Hockett, University of Tulsa; Melvin C. Laracey, The University of Texas at San Antonio; Mark C. Miller, Clark University; Wayne D. Moore, Virginia Polytechnic Institute and State University; Paul Nolette, Marquette University; Adam W. Nye, The Pennsylvania State University; Rogers M. Smith, University of Pennsylvania; Isaac Unah, The University of North Carolina at Chapel Hill; Teena Wilhelm, University of Georgia; Martha T. Zingo.

Still others have class-tested drafts of this text with their students: Emily Zackin, Hunter College, and Helen Knowles, Whitman College.

Before, during, and after writing this book, we drew inspiration from our families, who seem appropriately amused with our fascination for American constitutional development. Mark Graber wishes to extend his love and appreciation to his mother, Anita Wine Graber, and his spouse, Julia Bess Frank, and children—Naomi, Abigail, and Rebecca. Keith Whittington thanks Tracey and Taylor for their great patience and love. Howard Gillman thanks Ellen, Arielle, and Danny. The good news for our families is that, if they are reading this, the volume is finally done. The bad news is that we are probably still down in the basement, obsessed by some other project on which we have already missed a deadline.