Preface

Every casebook involves the construction of a canon — a set of materials and approaches that the editors believe that every student who wishes to master the subject should know. This casebook is no exception. Indeed, we have been particularly conscious of the existing canons of constitutional thought and the kinds of choices that are involved both in the materials presented and in their editing, order, and arrangement. The history of this casebook has been a series of continuing attempts to rethink the existing canon of constitutional law and present a better one. This edition represents our latest views on the subject.

The history of this casebook

The first edition of Processes of Constitutional Decisionmaking, created by Paul Brest, and published in 1975, was born out of personal frustration with the existing methods of teaching constitutional law. Invariably beginning with Marbury v. Madison and related doctrines of judicial review, most casebooks proceeded to examine bodies of substantive doctrine, subject by subject, without much attention to political or historical context. The question of *how* the courts arrived at their decisions continually arose but was not systematically examined. Nor did casebooks explore the role that legislatures, the executive, and other political institutions (for example, political parties and social movements) played in constitutional decisionmaking. The unspoken and repeated message was that the Constitution was largely what the Supreme Court said it was, and if the Supreme Court had not spoken on a particular subject, there was no constitutional law on the question at all.

The first edition, therefore, focused on the methods of constitutional interpretation and decisionmaking that different actors in the system employed and on the processes through which constitutional doctrine was created. Although much has changed in the book's coverage over the years, this basic focus on methods of constitutional interpretation and on the multiple groups and institutions that participate in the creation of constitutional meaning has remained a constant.

The second edition, published in 1983, reflected the lessons learned from teaching the first edition as well as the interests of its new co-editor, Sanford Levinson. As before, the casebook continued its focus on the processes of constitutional change and the role of constitutional interpretations made by nonjudicial actors. However, beginning with the second edition, the book's emphasis became historical. The opening half of the book was (and continues to be) explicitly organized on historical-chronological lines, so that students would confront the legal consciousness of a particular period in the context of multiple constitutional doctrines. Brest retired from active participation in the casebook after the third edition, published in 1992, but the editors have tried to continue his innovative spirit. The fourth

edition, published in 2000, consolidated the basic approach of the second and third editions, and added two new authors, Jack Balkin and Akhil Amar. Reva Siegel joined the casebook for the fifth edition in 2006.

The organization of the casebook

In this, the seventh edition, we have continued to benefit from classroom experience and from new historical and political science scholarship. Part One of the Casebook, which takes us up to the beginning of the New Deal, is organized chronologically by period. Our primary concern is not the identity of the Chief Justice at a particular point in time (Marshall or Taney) but the succession of *constitutional regimes* in which constitutional law develops. Examples include the early republic of the Federalist (1789-1800) and Jeffersonian (1800-1828) regimes, the Jacksonian regime that leads to the Civil War, and the long regime dominated by the Republican Party that extends from Reconstruction to the New Deal. These chapters examine recurring issues of federalism, property rights, race and sex equality, governmental (and, more particularly, presidential) authority in time of war, treatment of ''subversive'' speech, and judicial review.

The materials within each of these historical chapters cover different subjects and doctrines but together reflect the constitutional arrangements and political realities that underlie most of the important constitutional questions in a given era. Thus, for example, arguments about state sovereignty and slavery structure much of the jurisprudence of the Jacksonian regime; and we think it is impossible to understand the *Lochner* era's substantive due process decisions apart from its decisions about the commerce power or the taxing and spending powers. Nor can one understand the nineteenth century's treatment of women's rights apart from its understandings about race, or either apart from that era's understanding of federalism and national power.

Part One of the book ends on the brink of the New Deal, which marks the boundary that inaugurates the ''modern'' period in American constitutional law, as described in the introduction to Part Two.

Chapter 5 continues the casebook's historical periodization, covering questions of government power during the New Deal and Civil Rights regime that lasts roughly from 1934 to 1980. This period, although ''modern'' in the sense of having very different assumptions than those prevalent in the eighteenth and nineteenth centuries, is no longer ''contemporary.'' The constitutional struggle over the New Deal happened almost 80 years ago. The innovations of the Warren Court, the Civil Rights movement, and the second wave of American feminism in the 1970s seem increasingly distant to most law students; they have become historical artifacts, much like the struggle over the New Deal seemed to the generation that came of age in the 1960s and 1970s. The legal consciousness that underlies much of the Supreme Court's work during this period has slowly given way to new conceptions of federal power, race relations, and civil liberties. The rise of conservative social movements in the 1970s and 1980s, and the dominance of the Republican Party that they helped engender, have had multiple effects in constitutional law.

Ronald Reagan's election in 1980 began a second Republican regime, dominated by conservative social movements, and a correspondingly conservative

constitutional jurisprudence, a regime that we are still living in today. This regime has defined our contemporary constitutional world. Whether we are slowly transitioning into a new constitutional regime with a different set of constitutional assumptions will only be known many years after this edition is published.

Chapters 6 through 10 are organized doctrinally. Chapter 6 features sections on contemporary economic regulation, the commerce, taxing, and spending powers, Congressional power under the Civil War amendments, federalism, and separation of powers. It also includes expanded coverage of war and executive power. Chapter 7 covers racial equality and the constitutional treatment of alienage, while Chapter 8 covers sex equality. Chapter 9, entitled, ''Liberty, Equality, and Fundamental Rights: The Constitution, the Family, and the Body,'' covers rights of liberty and equality that concern sexual autonomy, marriage and family formation, intimate association, bodily integrity, and self-defense. Most but not all of these rights are protected by the Fourteenth Amendment and by the Fifth Amendment's Due Process Clause. The chapter also includes a section on constitutional struggles over gun rights and the interpretation of the Second Amendment.

Chapter 10, entitled ''The Constitution in the Welfare State,'' covers affirmative liberties (like education and the rights of the poor), procedural due process, and the problem of conditional subsidies, sometimes called the problem of ''unconstitutional conditions.'' Chapter 10 is organized in this way because we think that it is important for students to understand the welfare state as a central constitutional structure of our era.

Throughout the doctrinal coverage of Chapters 6 through 10 we have structured the casebook with an eye to placing contemporary events in their historical perspective, continually asking the student to compare them to constitutional transformations and upheavals of the past. The doctrinal discussions of race, gender, sexual autonomy, sexual orientation, and gun rights have been thoroughly updated and revised to show how constitutional change occurred in the context of social mobilizations and counter-mobilizations and other aspects of political struggle and contestation. This basic strategy, we hope, will help students to take the longer view of the ebb and flow of American constitutional culture, and to reflect on the key role that social movements and political parties play in shaping that culture.

Our historical approach

We have worked to make the present edition compatible with many different ways of organizing a basic course in constitutional law; nevertheless we retain a strong commitment to a historical approach. As noted above, even in materials that are doctrinally organized, we have tried to highlight the social and political context in which constitutional decisionmaking occurs. A historical approach, we believe, has virtues that are lost in a purely clause-bound approach to constitutional law.

In particular, we think it is important for students to recognize that notions of what constitutes a good or persuasive constitutional argument have changed and will continue to change over time. Arguments that might have seemed perfectly reasonable for well-trained lawyers in one period can seem bizarre or ''off-the-wall'' in earlier or later periods. Arguments that seem to have been written off

for good (like the compact theory of state sovereignty) uncannily reemerge in new guises a century later. Visionary claims of social movements that would be rejected by all right-thinking lawyers of the period become the accepted orthodoxy of later eras. The ideological valence of arguments — as ''liberal'' or ''conservative,'' moderate or radical — also drifts as arguments are introduced or repeated in new social and legal contexts. Finally, the popularity and persuasiveness of different styles of constitutional argument — for example, textualism or originalism — wax and wane with historical and social change and with concomitant changes in the legal profession.

There is, in short, no transhistorical criterion for ''thinking like a constitutional lawyer,'' other than an abiding faith in the basic constitutional enterprise. There is no better way to demonstrate this, we think, than to let students confront the actual texts produced in different periods and study closely the ''common sense'' and authoritative legal arguments of the past, witnessing both their strangeness and their resemblance to the constitutional common sense of our own day.

One of the reasons why constitutional argument changes as it does is that the practice of constitutional reasoning is deeply connected to changes in political and social life. Although courts play a central role in the history of constitutional law, other parties play roles equally important in shaping constitutional meaning. Our understandings of the American Constitution would have been very different without Jacksonianism, abolitionism, the Civil War, the feminist movement, the New Deal, the Civil Rights movement, the Religious Right, and other conservative political movements of the modern period. For this reason, we have included not only constitutional arguments from the executive and legislative branches of government, but also constitutional interpretations offered by representatives of important social movements in the country's history, as well as by members of the groups that mobilized against them. And we have repeatedly tried to stress the connections between what occurs in the language of court opinions and the political and social events that surround those decisions.

Finally, we continue to emphasize a historical approach to understand our debt to the past, and to reckon with both our moral successes and our moral failures. From the second edition on, Processes of Constitutional Decisionmaking has contained far more sustained coverage of chattel slavery than any other casebook. We think that, as a doctrinal matter, the question of slavery haunts the whole of antebellum constitutional law and that the legacy of slavery affects the great issues of federalism and equality that came later. But we think it is equally important for law students to confront slavery precisely because everyone now recognizes it to have been a great evil. It was a great evil that was sustained and perpetuated through law and, in particular, through constitutional law as interpreted by the finest legal minds America had to offer. Law students must come to understand how well-trained lawyers acting in good faith could have participated in such a system and rationalized it according to well-accepted modes of legal argument, justifying their work in the name of America's great charter of democracy, liberty, and equality. We think that if they can recognize this use of law in America's constitutional past, they will be better equipped to ask themselves the much more difficult question of whether well-trained lawyers in our own era could be similarly engaged in the rationalization of great injustices in the name of our Constitution, even though there may be great disagreement about what these are. The goal of a historically informed

approach is not merely to see the achievements and injustices of the past through our own eyes, but to remind us to consider how our present interpretations of the Constitution might look to future generations.

Constructing the constitutional canon

Our commitment to a historical approach is joined to an equally strong commitment to rethinking the canons of constitutional law — the materials, issues, and problems that law students are exposed to and that law professors write and theorize about. To this end, we have added materials on the Progressive Era amendments, the constitutional controversy surrounding the adoption of paper money, the procedural irregularities surrounding the adoption of the Fourteenth Amendment, America's constitutional treatment of Native Americans, and America's role as a colonial power. We have expanded coverage of the history of the women's movement and the constitutional treatment of women from the antebellum era to the adoption of the Nineteenth Amendment to the struggles over the Equal Rights Amendment and beyond. We think that these additions will give students a richer and fuller vision of constitutional history. They also pose genuine and interesting challenges for constitutional theorists who have neglected important aspects of constitutional interpretation and constitutional decisionmaking because traditional approaches offer much too narrow a view of the relevant materials that must be explained and justified.

If there is one theme that runs through this book, it is that the Supreme Court is not the only interpreter of the Constitution, even if it is surely the most obvious and important one for most lawyers. This view is clearly reflected in our construction of the canon. Throughout the book, we take seriously constitutional decisionmaking by nonjudicial institutions by including materials ranging from resolutions by the Kentucky and Virginia legislatures in the late eighteenth century, to constitutional interpretations by the President and Congress of the United States, to constitutional assertions by social movements, such as the Seneca Falls Declaration of 1848, to constitutional arguments by particular individuals such as senatorial candidates Abraham Lincoln and Stephen Douglas, the noted abolitionist Frederick Douglass, and civil rights pioneer Pauli Murray. Indeed, far from being the only source of constitutional law, the Supreme Court is not even the only judicial source. In this edition we have included more constitutional arguments by lower federal courts, by state supreme courts (often interpreting analogous provisions of state constitutions), and even a few references to the constitutions of other countries.

Among the most important elements of the Constitution are structural features that are rarely litigated, including, among others, bicameralism, equal voting power in the Senate, and the presidential veto. Lawyers pay little attention to them because they are rarely litigated and so little judicial doctrine has developed around them. Nevertheless, these choices are crucial features of constitutional design and the political science literature that studies their consequences is considerable. We have tried to raise a few issues of constitutional design where appropriate, but given the natural focus of a law school casebook, we can do no more than hint at some of the more important questions these provisions raise.

Just as any construction of a constitutional canon involves incorporation and inclusion of some materials, it must also include selection and exclusion of others. As constitutional law has grown in richness and complexity over the years, it has become increasingly difficult to do justice to the field within the pages of a single casebook. Fortunately, new technologies increasingly allow us to escape the limitations of traditional forms of publication. Thus, we have placed parts of our teaching materials on a special website, *http://jackbalkin.yale.edu/conlawnet*. There readers will find special topics and materials that they can download and use to supplement the materials found in the casebook. Through this combination of website and traditional text, we hope to create a flexible set of teaching materials that can respond better to future changes in the field.

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 have already noted the amount of space devoted to the question of slavery, which reflects our view that the question of slavery pervaded American law before the Civil War and that its aftermath set the stage for epic social and constitutional struggles that show no signs of abating to this day. We have also emphasized the role of textual and structural argument in constitutional interpretation, as well as the centrality of social movements and political parties as engines of constitutional change.

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 this book — for it is a crucial matter about which every student must come to his or her own judgment — the second edition (and its successors) manifested considerable skepticism about the legitimating power of process divorced from larger substantive political values. Nothing that has happened since 1981, when the second edition was prepared, has lessened our skepticism.

The Constitution does not belong to the lawyers, to the politicians, or even to the judges. It belongs to everyone. And the Constitution matters and should matter to everyone, even if arguments about the Constitution are not always phrased in the proper constitutional grammar recognized by legal professionals. Our era, like those before it, is a time of vigorous debate about the central constitutional issues of American life. In this book we have tried to bring out the political and social assumptions of contemporary constitutional discourse and contemporary constitutional decisionmaking. We have tried to show where these assumptions originated and how they have been transformed through time. But, of course, for every assumption that is consciously illuminated, others remain hidden in the shadows. You will get the most out of a course taught from this casebook if you take its agendas seriously while keeping a sharp eye out for its unstated assumptions. For our part, the student we seek is not one who necessarily agrees with us, but one who is willing to engage critically with us and, in the process, to learn and grow.