American Constitutionalism

Volume II Rights and Liberties

THIRD EDITION

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New York Oxford
Oxford University Press

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

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Library of Congress Cataloging-in-Publication Data

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Printing number: 9 8 7 6 5 4 3 2 1

Printed by LSC Communications, Inc., United States of America

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Preface to the Third Edition

Donald Trump makes determining when to put out a new edition of a textbook on American constitutionalism difficult. The Trump presidency and the newly solidified conservative majority on the Supreme Court are, whatever one's political proclivities, a gift that keeps on giving to those of us who teach constitutional law. New controversies emerge by the month, if not by the week. Take a break and the Supreme Court grants certiorari in two cases that might alter the constitutional law with religious freedom. Go out to a movie and discover the House of Representatives and Senate are at constitutional loggerheads over whether the House must deliver to the Senate articles of impeachment immediately after voting to impeach President Trump. Raging debates over the emoluments clause (what's that?) and whether the Supreme Court will overrule *Roe v. Wade* (1973) (would they dare?) stimulate interest in constitutionalism classes, as well as generate more media appearances for constitutional law teachers. Such developments as the Mueller Report, the Kavanaugh imbroglio, the debate over Trump's taxes, new challenges to birthright citizenship, the "Muslim ban" and ensuing Supreme Court decision in *Trump v. Hawaii* (2018), the court's sharply libertarian turn in free speech and as sharp an accommodationist turn in religion suggest publishing new editions as soon as possible. On the other hand, Trump's behavior and the new conservative majority on the Supreme Court consistently give reasons for delay. When the draft for the third edition of Volume II was being finished, we understood we risked not including President Trump's impeachment, Supreme Court decisions on whether the president had a right to withhold tax information from state prosecutors and Congress, the first decision in over a decade on the substance of the Second Amendment and, as always, the continued cultural warfare on abortion, not to mention the 2020 national election. Any timing choice we made would incorporate the latest "crisis" in American constitutionalism only to miss the next one. We split the difference by finishing the third edition of *American Constitutionalism* (Vol. II: Rights and Liberties) in early winter 2019–2020 and finishing the third edition of *American Constitutionalism* (Vol. I: Structures of Government) in early winter 2020–2021 to better incorporate impeachment and related constitutional developments.

Constitutional politics moves faster than we can write and Oxford University Press can publish. We expected that while the this edition was in production the Supreme Court would hand down major decisions, President Trump would become involved in other constitutional controversies[1] and each major political party would lay out their distinctive constitutional visions in anticipation of the 2020 presidential election. We reluctantly accepted that these developments would have to go on our companion website (https://global.oup.com/us/companion.websites/umbrella/gillman/), to be incorporated into the fourth edition. We did not anticipate a global pandemic that would raise fundamental issues about federalism and individual rights, as well as unprecedented protests against the policing of African-Americans. We were able to slip in *Jacobson v. Commonwealth of Massachusetts* (1905), which for more than one-hundred years has been the leading case on police power and public health. We added comments to the

1. As this paragraph is being typed, the Trump administration is seeking a temporary restraining order to prevent the publication of former national security advisor John Bolton's "tell-all" about Trump administration foreign policy when Bolton was a prominent member of the Trump administration.

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Introduction and Chapter 12 on the constitutional issues being raised by shelter-in-place orders. We updated a new except on the constitutional issues raised by policing in Baltimore and around the country. The rest must be left to the website and future editions. We can safely predict that, had we waited another two weeks, we would witness more developments we would want to incorporate into this text. But, of course, we could predict the same had we waited two weeks after that.

The broader perspective *American Constitutionalism* offers nevertheless suggests a great many continuities that make the precise timing of new editions less important, even in a time of an unprecedented pandemic and racial unrest The basic structure of American constitutional politics for the next few years, we can predict comfortably, will be structured by two polarized political parties. Republicans will champion judicial activism, legislation, and executive decisions limiting national power to trench on matters states have historically regulated,, protecting property rights, expanding the rights of gun owners, eliminating affirmative action, and accommodating religious conservatives. Democrats will champion judicial activism, legislation, and executive decisions expanding national power on matters states have historically regulated, protecting the rights of a different set of religious believers, expanding abortion rights and the rights of LGBTQ persons, reducing or eliminating Republican efforts to burden voting or gerrymander election districts, and protecting the rights of persons of color, women, and other groups deemed "discrete and insular minorities." Democrats and Republicans will bitterly divide over the constitutionality of responses to the COVID-19 pandemic and the reforms necessary to ensure persons of color have access to adequate and constitution police services. Very few prominent justices, politicians, political leaders, or even professors will favor one area of activism from the Republican column A and another from the Democrat column B. Social media will continue to play an increasing role both acting on constitutional politics and being acted on by constitutional politics. Whose constitutional vision wins out will depend on what factions in American constitutional politics, candidates for political office, domestic political entrepreneurs and, as the 2016 national election demonstrated, foreign countries interested in the outcomes of American politics best use new election and speech technologies. Privacy will continue to disappear. Much constitutional debate will concern whether new technologies of speech and surveillance are covered by traditional constitutional rules or require new forms and categories of constitutional thinking. Race and gender will remain vital areas of constitutional contestation. Prominent Americans will cry racism and sexism, while equally prominent Americans will interpret those cries as political correctness. Regardless of who wins the next election, commentators will continue perceiving a crisis of constitutional democracy, differing only over whether this crisis is primarily domestic or deeply rooted in more global trends.

American Constitutionalism continues to provide students and their teachers with the materials necessary to understand contemporary constitutional crises, real and imagined. The past decade demonstrates why the student of American constitutionalism cannot pitch a tent outside the Supreme Court, ignoring the rest of American politics while waiting for mandarin decisions from above. The Garland, Gorsuch, and Kavanaugh judicial nominations highlight the role elections and politics play in determining the composition of Supreme Court majorities. Constitutional visions in the contemporary United States are often better reflected in partisan platforms and manifestos issued by political movements than judicial decisions. We will learn as much about American constitutional politics by reading such documents as the Republican and Democratic Party Platforms and by going on websites managed by the Tea Party, Black Lives Matter, and the Women's March. Such crucial constitutional issues as presidential privilege and what constitutes an impeachable offense are being fought out in electoral settings. The dispute over the consent decree signed by the Baltimore City Police Department captures better than any set of judicial opinions differences between racial progressives and racial conservatives. State governors, state courts and lower federal court justices have played a far greater role in the debates over shelter at home orders than the Supreme Court, which is likely to make final decisions on such policies only after a vaccine for COVID-19 is developed or other developments makes the need for such emergency policies less pressing.

The path of constitutional law continues to be determined by the complex interaction of law and politics that cannot be completely disaggregated. Impeachment is an obvious example. Partisan politics

matters. Almost without exception, Democrats claim that President Trump has committed impeachable offenses. Republican officeholders are even more united when claiming that President Trump has not committed impeachable offenses. Electoral politics matters. The near unanimity with which Republicans in Congress support Trump disappears entirely when we examine prominent conservative journalists who do not hold elective office, many of whom, including George Will, Max Boot, Jennifer Rubin, and Bret Stephens, support impeachment. Law matters as well. Trump was impeached only for what are arguably "high crimes and misdeameanors." Most Democrats are aghast by Trump's decisions to withdraw from the Paris Accord on the environment and his staffing the federal judiciary with young movement conservatives, but few claim these are impeachable actions. That Congress opened up impeachment hearings with testimony for four constitutional law experts highlights the importance each side places in demonstrating their views are in the mainstream of American constitutional law. The constitutional path of abortion rights also reflects this mixture of law and politics. On the one hand, the Supreme Court has not intervened when conservatives on state and lower federal courts sustain new state restrictions on abortion. On the other hand, the justices out of respect for precedent have not allowed the lower courts to take actions that seem inconsistent on their face with past Supreme Court decisions. Lower courts will be permitted to modify past decisions protecting abortion rights, but not overrule them.

The third edition of *American Constitutionalism* continues our effort to obliterate sharp law and politics distinctions that artificially assign questions of politics to social scientists, who study political behavior, and questions of law to law professors, who study the constitutional law made by the Supreme Court of the United States.[2] The way American constitutional politics has been stuck in a polarized rut for more than two decades highlights the importance of integrating law and politics, as well as the importance of looking at constitutionalism outside the court. The direction of American constitutional law has had a major impact on the polarization of American politics and has been impacted by American politics. The polarization of judicial voting over the last twenty years is rooted in the polarization of American politics. This polarization is deeply constitutional. Republicans and Democrats do not simply want to distribute the spoils of government to different factions. Their more fundamental disagreements are over the principles underlying the Constitution of the United States and the best application of those principles.

The one major difference in these volumes and the first two editions enables us to see better the polarization of American constitutional politics and the consequences of that polarization. We have divided the last chapter, formerly The Contemporary Era: 1994–Present, into two chapters, Chapter 11: The Polarized Era: 1994–2008 and Chapter 12: The Contemporary Era: 2009–Present. Chapter 11 will enable students to see the polarization of American politics that took place at the turn of the twenty-first century. Chapter 12 describes the constitutional trench warfare between Republicans and Democrats as each seeks the elusive total control of the national government necessary to make their pure constitutional vision the official law of the land. As always, expansions come with the cost of cutting other materials to ensure the volume is suitably streamlined. Those materials can be found on the course website.[3]

New additions provide new and much-appreciated opportunity to thank many old and new friends for the help they have given us. We are, as always, particularly grateful to all users of *American Constitutionalism* for their kindness in pointing out what materials worked and their friendship in pointing out where improvements were useful. We are also grateful to friends on various listservs that have sometimes accepted our challenges to think in different ways about the constitutional universe and sometimes challenged our challenge that the constitutional universe must be looked at differently.

2. See Mark A. Graber, "The Collapse of the New Deal Conceptual Universe: The Schmooze Project," *Maryland Law Review* 77 (2017), 108.

3. http://www.oup.com/us/gillman

Preface to the Second Edition

The Supreme Court's decision in *Obergefell v. Hodges* (2015) set off another round in the long-standing debate over whether judicial decisions declaring laws unconstitutional are law or politics, and highlighted how American constitutionalism is shaped by historical and political context. Justice Anthony Kennedy, who wrote the majority opinion, insisted that the justices were compelled by law to declare that the due process clause of the Fourteenth Amendment protected the right of same-sex couples to marry. Quoting Justice Robert Jackson's famous catechism in *West Virginia Board of Education. v. Barnette* (1943), Kennedy stated, "The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts.'" Chief Justice John Roberts, who wrote the main dissent, insisted that the majority opinion was based entirely on policy preferences. He claimed, "Under the Constitution, judges have the power to say what the law is, not what it should be. . . . Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not."

The same debate occurred three years earlier when the Supreme Court was considering the constitutionality of the individual mandate and federal spending provisions of the Affordable Care Act (ACA). This time, the more conservative justices on the Supreme Court and their supporters insisted that the Constitution compelled them to declare that the federal government had no power to pass these measures, while the more liberal justices on the Supreme Court and their supporters insisted that the arguments against the ACA were mere policy preferences weakly disguised as law. Constitutional law classes throughout the nation play variations on these themes, as more law-oriented textbooks seek to teach students how to identify constitutional decisions based on law and more political science–oriented casebooks suggest all constitutional decisions are based on politics.

American Constitutionalism seeks to transcend what has become a tired debate over whether constitutional decision making is law or politics. Our text explores constitutional politics, an amalgam of law and politics that we believe is present in every constitutional decision throughout American constitutional history, whether that decision was made by the Supreme Court, was made by the president of the United States, or, as is almost always the case, was the outcome of a series of decisions made by numerous government officials and political actors. Consider *Obergefell v. Hodges*. In sharp contrast with Justice Kennedy and those who praise his opinion for putting law above ordinary politics, *American Constitutionalism* teaches that the decision to grant same-sex couples the right to marry cannot be understood in the absence of what are usually considered to be political factors:

- By the summer of 2015, public opinion polls were showing that for the first time in history, a majority of Americans believed that same-sex couples had the right to be married.
- Recent elections revealed a shift in American voting behavior, with voters in some states approving same-sex marriage and proposed constitutional bans on same-sex marriage going down to defeat in a number of other states.
- President Obama signaled his support of same-sex marriage before his successful reelection campaign.

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- Same-sex marriage was legal in most states when *Obergefell v. Hodges* was decided, and most Americans knew of and were probably friendly with at least one person in a same-sex relationship.

In sharp contrast with Chief Justice Roberts and those who condemn *Obergefell* as an exercise in raw politics, *American Constitutionalism* also teaches that the decision to grant same-sex couples the right to marry cannot be understood in the absence of what are usually considered to be legal factors:

- A long tradition exists in American constitutionalism of using due process and related clauses in the federal and state constitutions to protect rights deemed to be fundamental, ranging from the right to drink intoxicating liquors to rights to sexual intimacy.
- Over the past half-century, the Supreme Court has invoked the due process clause of the Fourteenth Amendment to protect various rights to intimacy and to control reproduction, and the equal protection clause of the Fourteen Amendment to strike down laws claimed to be motivated by animus against gays and lesbians.
- The vast majority of federal and state judges, conservative and liberal, who heard same-sex marriage cases after the summer of 2013 interpreted the line of precedents from *Griswold v. Connecticut* (1965) (married couples have a right to use birth control) to *United States v. Windsor* (2013) (federal government cannot refuse to grant benefits to same-sex couples legally married in their state of residence) as justifying granting same-sex couples the right to marry.

A similar analysis helps us understand the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* (2012), the decision that sustained the "Obamacare" individual mandate while declaring unconstitutional the federal spending program enacted by the ACA. We cannot explain or justify that decision unless we understand how the election of Ronald Reagan and the Republican takeover of Congress challenged the New Deal understanding that the federal government could resolve any problem Congress deemed national, how subsequent Supreme Court precedents handed down by an ideologically divided Court chipped away at federal power under the commerce clause, and how President Obama's revival of New Deal/Great Society constitutional understandings set the stage for a showdown between these post-1980 developments.

Neither these decisions, nor any other in American constitutional history, can be explained or justified until we look at the broader dynamics of constitutional debate within the political system during particular historical periods. From this perspective, legal considerations suffuse what is too often considered politics. If we claim that the Supreme Court followed law when declaring that the due process clause protects the right of same-sex couples to marry, then the Democratic Party is also acting legally when incorporating provisions respecting the right of same-sex couples in their party platform and most conservative governors are following law when they either do not oppose judicial decisions granting same-sex couples the right to marry or merely declare that religious state employees need not give a same-sex couple the official state form, as long as some other state employee will do so. Conversely, political considerations suffuse what is too often considered law. If we claim that a candidate for the presidency is acting politically when promising to appoint only persons who favor same-sex marriage to the federal bench, then those justices are also acting politically when they protect the rights of same-sex couples. The better approach is to abandon contests over whether to apply the political or legal label to all constitutional phenomena and study the ways in which traditional legal and political factors interact to create a distinctive form of constitutional politics.

Such an approach requires attention to the distinctive historical eras in which various struggles over constitutional meaning and authority have taken place. That the Roberts Court has tended to be sharply polarized between a liberal wing composed of Democratic appointees and a conservative wing composed of Republican appointees reflects the sharp polarization of American politics more generally since the 1990s. By comparison, during the New Deal/Great Society Era, a time in which Americans were divided more by section than by party, judicial majorities in major cases regularly consisted of both Democratic and Republican judicial nominees. That many but not all major separation-of-powers issues are at present decided by the Supreme Court partly reflects the gridlock that often results when the elected branches of the government are controlled by different parties

with distinctive constitutional visions. By comparison, during the Civil War, when Republicans controlled all the elected branches of the national government, many but not all major separation-of-powers controversies were settled by compromises between the president and members of Congress.

The second edition of *American Constitutionalism* continues our efforts to enable students and their teachers to explore all of American constitutionalism and not just those struggles as they are reflected in opinions written by the Supreme Court of the United States. American constitutional politics continues to be best described as trench warfare between two major political parties, each with distinctive but evolving constitutional visions. In the contemporary period we cannot explain or justify the course of controversies over health care, presidential power, and same-sex marriage that occupy contemporary constitutional politics in the absence of information about the constitutional visions that animate Barack Obama, the Republican majority in Congress, the Tea Party, MoveOn, and other political actors as they move to make their vision the official constitutional policy of the land. However, to understand the primacy of context, we must set aside metaphors about a "line of cases" on a certain constitutional topic and instead retell the story of American constitutionalism as a product of the distinctive political dynamics of particular historical eras. Hence our organizational structure.

We have updated the second edition to include all major constitutional controversies that occurred in the United States between 2012, when the first edition went to press, and the summer of 2015. We have also revised many of the materials in Chapter 11 in light of political and legal developments that have taken place in the past four years and updated all figures. Both volumes, Volume II in particular, have been streamlined to make them easier to use. All materials deleted from either volume can be found on our websites,[4] which we plan to continually update.

This new edition of *American Constitutionalism* gives us a much-appreciated opportunity to thank many old and new friends for the help they have given us. We are particularly grateful to all users of *American Constitutionalism* for their kindness in pointing out what materials worked and their friendship in pointing out where improvements were useful.

4. The website for Volume I is http://global.oup.com/us/companion.websites/9780190299477/. The website for Volume II is http://global.oup.com/us/companion.websites/9780190299484/.

Preface to the First Edition

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

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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 ements of constitutional law and poli ition for any realistic assessment of h onstitutionalism actually works, how overnance should work, and how our ight work better.

We have fixed this head level style as per previous

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 NAACP'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

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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 re-emerged 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—for example, *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 first-hand 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 Sundaresan, 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 difficult 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.

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; and Martha T. Zingo, Oakland University.

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.