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# PREFACE

## *The Supreme Court in Its Own Words*

I undertook the daunting task of writing this casebook with one, and only one, pedagogical objective in mind: To provide students with a more accessible and engaging way to learn constitutional law than is now available in existing casebooks. What is lacking in the other casebooks? To begin with, most casebooks are far too complex for students who are unfamiliar with constitutional law. They consist of longer excerpts of major cases, shorter excerpts of minor cases, excerpts from a variety of legal scholarship, and long and complicated “notes” that add additional detail about constitutional doctrine. This is especially true of casebooks with multiple authors that have developed through many editions over a long period of time.

To address this issue, I edited these materials by adhering to a few basic principles that have proven successful in my casebook on contract law<sup>1</sup>: First, and foremost, be realistic about what can actually be learned by students who have no previous familiarity with constitutional law, in a single semester course often taught in the first year of law school, and even in the very first semester. This means sticking to discussions of first principles and method rather than doctrinal details. Second, include as many of the landmark “classic cases” as possible, the cases that provide the basic vocabulary of constitutional law. Third, present these cases at somewhat greater length. To make room for this, while keeping reading assignments short, drop even well-known cases that mainly deal with ancillary technicalities that are so often presented in vexatious and distracting squibs or notes. Fourth, judiciously supplement the cases with other materials, especially in the early classes, to provide a context that draws students further into the subject. Finally, adopt a transparent and straightforward organization, one that is both easy for students to grasp and easy for professors to rearrange to suit their teaching preferences. (These pedagogical principles also make this book more accessible to undergraduates than its rivals.)

It is the organization, above all else, that separates this book from the others. I chose to present the classic cases chronologically rather than doctrine by doctrine. Why? There are a number of advantages to a chronological approach. Most importantly, it conveys the story of constitutional law that every literate lawyer *ought* to know—constitutional law is, after all, a required course for all students—and that every future constitutional litigator or academic *needs* to know. While current constitutional law doctrine can be highly technical and is always changing, the back story of constitutional law that “everyone knows” (but students do not) is the

1. RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* (Aspen, 4th ed. 2008).

relatively fixed background against which doctrine is developed and constrained. The pole stars of constitutional law known by a single name—*Marbury*, *McCulloch*, *Gibbons*, *Dred Scott*, *Slaughter-House*, *Plessy*, *Lochner*, *Darby*, *Wickard*, *Youngstown*, *Brown*, *Griswold*, *Roe*, and so many more—were decided in a particular order and were connected temporally by other crucial cases and writings, not to mention by events that impelled and illuminate their outcomes and methods.

We professors take our knowledge of this story for granted, having picked it up along the way, but for most students it is entirely new and more than a little strange. This story is almost impossible to grasp when confronting disparate cases completely divorced from the context in which they were decided. Of course, the story that explains these canonical cases can be learned doctrine by doctrine with the assistance of background notes, but it is just so much easier to appreciate their significance when exposed to them for the first time as they unfolded. *The order itself* enables students to discern and begin to internalize on their own the significance of each of these decisions. This book is no more “historical” than any other; it is simply more *chronological* in presenting the story of constitutional law that every book is trying to teach.

As I edited these materials, I discovered something entirely unexpected. By sticking rigorously to the chronological method (or nearly so, for there are a few, hopefully well-chosen, deviations<sup>2</sup>), it became clear that the cases could be edited to allow the Justices themselves to tell the story of constitutional law in their own words. Because supplementing the cases with other materials became much less necessary, students can read longer opinions in shorter assignments. When combined with the order of presentation, reading fuller debates among the Justices provides a context that takes the place of thousands of words of auxiliary reading. And with less inevitably opinionated supplementation by the casebook author, professors are freer to put their own stamp on the story as it unfolds.

In hindsight, this really should not have been a surprise. Unlike any other course, the case law component of American constitutional law largely involves the decisions of a single court with an evolving membership that has been deliberating the same basic issues for over two centuries. The Justices not only have constantly been debating among themselves in their opinions, they are also constantly debating with their predecessors, choosing which of the previous “precedents” to elevate and which to diminish and even disparage. And they are always justifying what they are doing in the context of a past they seek either to emulate or avoid.

Textual introductions to chapters and sections are kept brief and factual. Because this book is chronological rather than historical, I limited myself to providing just those facts that are essential to understanding the decisions but that students are unlikely to know. My goal was to allow the story to emerge from the materials themselves rather than from me; and I tried very hard to keep these factual interjections as uncontroversial as possible.

2. In addition, depending on the format of the course, I sometimes teach a few units out of the order in which they appear. The modular organization of this book by “assignments” makes this easy to do. But even when reordered, the time period covered by the chapters in which students locate the assignments conveys vital information.

Another feature unique to this book, but borrowed from my contracts casebook, are “study guide” questions *before* each case—questions that are intended to guide the reading and suggest connections between the materials, rather than to confound both students and professors as traditional “notes” tend to do.

Whatever its advantages, no method comes without its costs. The chronological approach is no exception. The most obvious issue is the need to delay the gratification of reading the latest Supreme Court cases. Although some students may become anxious about this, especially if other courses are being taught using the doctrine-by-doctrine method, in my experience surprisingly few students have this problem. Perhaps this is due to my own evident enthusiasm for the method as well as my candor in explaining up front its rationale and benefits.

In class, I also frequently preview how the classic cases we are reading will connect with present controversies. In this way, students get to hear about the latest developments throughout the course. By the time they reach the newer cases themselves, they already pretty much know what to expect. Most importantly, however, they immediately grasp their significance; each modern case provides an “aha” moment. Because they already know the back story, they can readily appreciate the significance of recent cases—just like professors do.

In my experience, learning the material this way is like a guilty pleasure for the students. Whatever concerns some may have about its departure from the other courses, they find it seductively engrossing. All they really need is the reassurance from the professor that they are learning what they truly need to know; an assurance that is easy to make because, well, they are. Indeed, most come to realize that they are learning far more than their classmates who are using the doctrine-by-doctrine method. But this will not be entirely apparent until the end when it all comes together and they “get it.” At least, this has been my consistent experience in the classroom.

Another concern some professors may have about this method is whether it is too “case-centric,” or Supreme Court oriented. While the book did emerge much more focused on the Supreme Court than I had expected, this is mitigated by the supplemental materials I chose to include. Rival interpretations of the Constitution by founders, Presidents, and other critics of the Court’s decisions are better represented here than in many other casebooks.

On the other hand, by no means is the chronological approach particularly flattering to the Court. The story of constitutional law that emerges is often one of its failure, short-sightedness, bigotry, or abdication of responsibility. While the story of constitutional law may indeed be a morality play of sorts with the Justices as major characters, it is more often one of tragedy than of triumph. In this way, a Supreme Court-oriented approach is as likely to undermine as encourage faith in “The Court,” but I tried to leave this to the eye of the beholder. Root for or against the Justices and their opinions as you will.

At first blush, some professors may wonder whether their students know history well enough to handle this approach. To the contrary, this method was developed precisely *because* students very often do lack adequate historical knowledge to appreciate the cases when presented out of

order by doctrine. The main reason to read the cases in order—together with the textual introductions and supplemental readings—is to fill this gap in students' knowledge.

There is another advantage of the chronological approach for teachers. Since the beginning of the course will remain relatively fixed as new cases are decided, it becomes easier to organize the material from year to year. Newer cases will always go in the last half of the course. This advantage will also be reflected in future supplements, which will largely take the place of later cases and not require the annoying interspersing of new cases and notes throughout the book and, therefore, throughout the course.

A final advantage of the chronological approach is of personal importance to me. Teaching the materials in order highlights the crucial role in the story of constitutional law played by the institution of slavery and its eventual abolition, followed by the century-long subordination of the freed slaves and their progeny by black codes, Jim Crow, and enforced racial segregation. A candid consideration of slavery and its aftermath is, I believe, crucial to understanding both the form and substance of the Constitution itself, as well as constitutional law as it has evolved since the Founding. Unfortunately, when the cases are organized doctrine by doctrine, the role played by slavery does not seem to fit anywhere very comfortably. As a result, the subject of slavery either gets washed out of the course, buried in notes, or injected in a manner that appears to the students to be gratuitous. Approaching constitutional law chronologically makes the study of slavery well nigh unavoidable and therefore more acceptable to the students.

Of course, time constraints inevitably require sacrifices of coverage. No one can teach an entire casebook in a single course. I certainly do not. For this reason, you will find that each era is organized internally by doctrine and by explicit bite-sized “assignments” to make it easier to omit and reorder topics when planning a syllabus.

In revising my contracts casebook over the years, I learned a great deal from those who use the book, especially when moving from the first to the second edition. I encourage both professors and students to send me their comments and suggestions for revisions. In my view, one writes a casebook to provide an effective teaching tool for others, not to express one's viewpoints (however inevitable this will be). The measure of a casebook's merit is how well it works to convey an understanding of the subject in an efficient and enjoyable way. The more constructive feedback I get from users, the better I can accomplish this in future editions. Of course, you should also praise what you like so it is preserved in the course of revising.

To the professors who have chosen to adopt this book, I thank you. To the students anxiously reading this preface before starting their course on constitutional law, I encourage you to kick back and enjoy one of the most fascinating stories you will ever read!

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