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For my students
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Preface

In addition to teaching doctrine, this book has a threefold purpose: (1) it explains through repeated examples how a judge tries to persuade the reader that his or her opinion (whether majority, concurring, or dissenting) more accurately reflects the meaning of the Constitution than a competing opinion; (2) it assesses the manner in which American history has informed and affected the development of American constitutional law; and (3) it highlights and evaluates the impact of legal thought, particularly legal formalism and legal realism, on Supreme Court decision making. As a result, the excerpted cases are edited for their doctrinal point and for two other reasons: (a) to demonstrate how the excerpted opinions attempt to persuade the reader that the particular vision expressed in the opinion is more true to the text of the Constitution, its history and structure, earlier Supreme Court precedent, elite and popular consensus and the purposes of the Constitution than a contrasting opinion, and (b) how realism and formalism, as well as the presumed “legacy” of those two jurisprudential approaches, affect the ways in which the justices decide cases.

When Supreme Court justices write their opinions, they regularly use recurring types of reasoning. The Justices attempt to persuade the reader by using (1) reasoning by analogy; (2) syllogistic reasoning; (3) narrower or broader level of generality arguments; and (4) arguments of “rhetoric,” including (a) the appeal to authority, also known as the “famous dead person” argument, (b) the argument of subsequent consequences, also known as the claim of speculation or the “slippery slope” argument, (c) the appeal to passion, and (d) “flipping” the adversary’s argument, that is, turning one party’s argument in such a way as to favor the other party’s position. Some forms of reasoning predominate in different areas of constitutional law (e.g., members of the Supreme Court regularly use competing and varying levels of generality in substantive due process cases, and use reasoning by analogy in free speech cases, and make “rhetorical” arguments in federalism cases). These same forms of reasoning are given again and again in opinions. This book is structured to make students proficient at naming, applying, and critiquing each of these types of reasoning.

This book also offers a “long view” of constitutional law. Given the contested and often unstable nature of constitutional law doctrine, it is crucial for students to understand not only what the Court concluded, but how the Court as a historical matter reached this point. For example, it is important for students to understand that the 1787 Constitution was written in significant part in reaction to the Articles of Confederation. Thus, I include the Articles to let students compare it with the Constitution. Another example is the Court’s free speech decision in Dennis v. United States (1951), excerpted in Chapter 8.B.1. The opinions in Dennis are enigmatic without understanding the Dennis Court’s (1) reaction to its post-World War I free speech jurisprudence, (2) the rise of Nazi Germany and World War II, (3) the onset of the Cold War, the Korean Conflict and the testing by the
Soviet Union of a nuclear bomb, and (4) the cultural and legal impact of the trials of the Rosenberg's for conspiracy to commit espionage and of Alger Hiss for perjury. The Court's subsequent free speech cases are best understood in light of the reaction to its decision in Dennis. To give students a sketch of American history, the book provides a modest Timeline of Events in American Legal and Political History. In order to provide a more particular historical focus, a number of specific Timelines are included before opinions to provide a context for understanding those cases.

Some constitutional law doctrine is rule-based, while other doctrine is standards-based. Crafting rules echoes historical legal formalism, while adopting standards echoes historical legal realism. All judges are aware of the history and impact of both legal formalism and legal realism in American legal thought. No judge will claim to be solely a formalist or a realist, though most judges prefer one jurisprudential approach to the other, and neither legal formalism nor legal realism should be understood as reflective of a judge’s political conservatism or liberalism. Judges now largely use formalism and realism as techniques to craft doctrine. The means that most judges will adopt rules (a more formalistic approach) in some areas of constitutional law and standards (a more realistic approach) in other doctrinal areas. To understand how and why judges oscillate between rules and standards, a student needs to understand the history of legal formalism and legal realism.

This book is not intended to serve as a compendium, but as a survey of the Constitution as interpreted by the Supreme Court. Instead of citing secondary authorities in the text, students may look at a Bibliography with citations to important secondary works in constitutional law. In addition, students are given an “Afterword” rather than “Notes and Comments.” The Afterword provides both an assessment of the excerpted case and a summary of any significant changes generated by the excerpted case. The Afterword reinforces the need for students to understand how the different premises of the majority and dissenting opinions bring forth different analytical approaches.

Unlike other areas of American law, it is important to understand not only what the Court decided, but who wrote the opinion of the Court (as well as who wrote any dissenting opinion). Thus, students should consult the brief biographies of important Supreme Court justices.

Finally, AMERICAN CONSTITUTIONAL LAW AND HISTORY includes a number of decision trees and tables intended to give the student a better visual sense of constitutional law doctrine. For example, students can look at the rather complicated decision tree that attempts to encapsulate free speech jurisprudence. That general free speech decision tree is then broken down into component parts as the student moves through the various free speech issues decided by the Court.

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