

**2012 INSTRUCTORS' MANUAL**  
*for*  
**American Constitutional Law:**  
**An Overview, Analysis, and Integration**  
*with*  
**Practice Problems, Analytical Frameworks, Conceptual Graphics,**  
**Teaching Suggestions, and Other Materials**

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## PREFACE

### A. *American Constitutional Law and this Instructors' Manual*

The Preface to *American Constitutional Law: An Overview, Analysis, and Integration* (hereinafter, “ACL”) includes pertinent information on the content, premises, goals, and uses of the text (see ACL pp. xv–xx). That information is important background for the materials in this *Manual*. As indicated in the ACL Preface, the book is designed for use both by “students who are studying American constitutional law in law school courses [and students] in law-related graduate school courses” (p. xviii). This *Manual*, following suit, is for the instructors of these students. In turn, instructors using ACL as a required course text may also distribute materials from this *Manual* to their students, as explained in sections A and E of the General Introduction, below.

### B. The Challenge of Teaching Constitutional Law

The amount of material potentially to be covered in constitutional law courses has become voluminous—almost overwhelming. The body of substantive law continues to reflect rapid growth and change. The theoretical base of the subject continues to expand in complexity. The law often appears to be so abstract and amorphous that its concrete role in the legal process and the lawyering process is obscured. Constitutional law courses, especially introductory or survey courses, have thus become an increasingly formidable challenge for instructors and students alike. It is more difficult each year for instructors to make the course a manageable enterprise for students and more difficult each year for students to achieve a level of learning that will have lasting impact and practical utility after their graduation. ACL accepts this challenge and is supported in the endeavor by this *Manual*.

### C. Meeting the Challenge

Both ACL and this *Manual* provide various types of supporting materials, and numerous “devices” for teaching and learning, that will help instructors and their students to meet the growing challenge of teaching constitutional law well. ACL, for instance, includes an introductory section on “Initial Perspectives on Constitutional Law: Prescriptions for Study and Practice;” “conceptual overviews” of most subjects; ten study Exercises with answers included (see, e.g., ACL chap. 5, sec. B); a set of eight practical steps for reading and analyzing constitutional cases (ACL chap. 3, sec. C); lists of study questions and suggested readings for particular topics (see, e.g., ACL chap. 5, sec. G), a four-part model for analyzing constitutional law issues (ACL chap. 15, sec. C); and various sections on the process of constitutional interpretation (see, e.g., ACL chap. 2, sec. F). In conjunction, this *Manual* includes, for instance, lists of the key (essential) cases for each subject, with study questions for most of the cases (as further explained in part C of the General Introduction to the *Manual*, below); and a variety of materials, including large-scale Practice Problems with Review Guidelines for each of them, and “Analytical Frameworks” or “Analytical Pathways” to be used for problem-solving (as further explained in part D of the General Introduction, below).

Moreover, regarding coverage of cases, ACL and the *2011 Update* for ACL<sup>1</sup> contain analytical presentations of numerous cases, with quotations from the opinion(s), that often substitute for students' reading the actual Court opinion(s) in particular cases. Examples include *Gibbons v. Ogden*, ACL pp. 146–147, 153, 175–176; *Pike v. Bruce Church*, ACL pp. 179–180; *Moose Lodge v. Iris*, ACL pp. 247–249; *Palmore v. Sidoti*, ACL pp. 273–275; *U.S. v. Virginia (VMI Case)*, ACL pp. 278–280; *Romer v. Evans*, ACL pp. 280–82; *Grutter v. Bollinger* and *Gratz v. Bollinger*, ACL pp. 288–291; *Reynolds v. Sims*, ACL pp. 291–293; *Planned Parenthood v. Casey*, ACL pp. 309–310; *Goldberg v. Kelly*, ACL pp. 322–325; *Board of Regents v. Roth*, ACL pp. 325–327; *Matthews v. Eldridge*, ACL pp. 327–329; and *Clark v. Community for Creative Non-Violence*, ACL pp. 370–374. ACL also includes four edited cases that are used for exercises in the book: *New York Times v. United States* (ACL p. 63), *Brown v. Board of Education* (ACL p. 238), *Plessy v. Ferguson* (ACL p. 234), and *Skinner v. Oklahoma* (ACL p. 331); and the *Manual* adds a fifth: *Jurek v. Texas*, 428 U.S. 262 (1976).

These various types of materials, and the suggestions for using them that are in this *Manual* (see part B of the General Introduction below) open up new possibilities for instructors in planning and conducting their courses, and can yield at least these benefits:

(1) ACL and the *Manual* create new options regarding course coverage, topic selection, and use of classroom time. The instructor, for example, could introduce a major topic by assigning a “conceptual overview” section from ACL rather than taking valuable class time for an introductory lecture. Moreover, the instructor could give abbreviated (yet still meaningful) coverage to selected topics by assigning a conceptual overview section and other text reading from ACL in lieu of Court opinions; or by assigning readings from ACL along with one or two “key cases;” or by assigning a few key cases along with a Practice Problem from the *Manual*. Or the instructor could assign a reading from ACL (e.g., on the values approach to constitutional interpretation, or on state constitutions) to cover a topic that otherwise would not be formally addressed.

(2) ACL and the *Manual* assist students to develop an integrated and comprehensive perspective on constitutional law, thus reinforcing the instructor's efforts in this regard and easing the instructor's time and energy commitment to this task. The book and *Manual* provide a foundation and framework for all of constitutional law. Within this structure, the materials interrelate theory and practice, substance and process, and power issues and rights issues. The book thus illuminates the enduring principles and the “big picture” of constitutional law that students can otherwise miss in the midst of clause-by-clause and case-by-case views of the Constitution, especially when power issues and rights issues are divided into separate courses. At the same time, the book and *Manual* help to demystify constitutional law and make it more accessible for students.

(3) ACL, and especially this *Manual*, facilitate use of the problem method of instruction in constitutional law courses. The problem method can be a particularly potent pedagogical technique in constitutional law courses, lending a concreteness and practicality to what may otherwise become

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<sup>1</sup> The *2011 Update*, covering the most important developments from 2004 through the end of the U.S. Supreme Court's term in June 2011, is to be published simultaneously with the *Instructors' Manual*.

an overly ephemeral and esoteric subject. The General Introduction, below, provides further information and guidance on the problem method.

To achieve these benefits, or others that instructors may discern themselves, instructors may use ACL in one of three basic ways. (1) They may adopt ACL for use by their students in conjunction with a published casebook; (2) they may adopt ACL for student use in conjunction with cases, and perhaps other readings, that the instructor has collected and organized; or (3) they may adopt ACL for students to use along with one or two other texts or a variety of readings, rather than relying on the study of the actual opinions in Supreme Court cases. This *Manual* supports all three ways of using ACL.

#### **D. Using ACL and this *Manual* in Law School Courses**

I have used ACL, along with materials in this *Manual*, for various versions of constitutional law courses in law schools: for a five-credit, one-semester, first-year course covering both powers and rights; for a full-year survey course covering two credits of powers in the fall semester and three credits of rights in the spring; for two separate introductory courses—a three-credit powers course in the first year and a three-credit rights course in the upper-level years; and for a one-semester, three-credit course in the first year covering both powers and rights. Although some adjustments must be made to accommodate the particular situation, the materials work well in all these contexts. In addition, I have used ACL and *Manual* materials for upper-level First Amendment courses—using the materials selectively, of course, but finding that a considerable array of these materials fit well for a First Amendment course.<sup>2</sup>

I have also used ACL and the *Manual* materials in courses that I have organized differently from the book and *Manual*. For many years, for instance, I taught the constitutional rights part of the course before the constitutional powers part. This is easily accomplished by flipping the rights materials (chapters 9–13) in both ACL and the *Manual* with the powers materials (chapters 4–8 in both ACL and the *Manual*). Either way, chapters 1–3 continue to provide a suitable introduction to both powers and rights, and chapters 14–15 continue to provide a suitable integration of powers and rights.

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<sup>2</sup> In addition to all of chapters 12 and 13 in ACL and the *Manual*, which cover the First Amendment and provide three First Amendment practice problems with review guidelines, these other sections of ACL and the *Manual* are particularly apt for a First Amendment course: ACL chap. 1, secs. A & B (background on constitutional law); ACL chap. 2, sec. F (review of constitutional interpretation); ACL chap. 3, secs. A-C (analyzing judicial opinions); ACL chap. 3, sec. D (exercise on analyzing a First Amendment free expression case); ACL chap. 9, sec. E (historical context for development of individual rights, including First Amendment rights); ACL chap. 9, sec. B (interpreting First Amendment rights clauses); ACL chap. 9, sec. D (the state action doctrine); ACL chap. 14, sec. E (state constitutional rights, including freedom of expression and religion); ACL chap. 5, sec. D (access to court issues that arise in litigating individual rights cases); and ACL chap. 15 (various materials on integrating the study of constitutional rights).

Similarly – considering other organizational alternatives – ACL and the *Manual* easily accommodate teaching equal protection after due process rather than before (the latter being the ACL arrangement);<sup>3</sup> teaching state action along with the race discrimination materials, or at the end of the rights materials, rather than at the beginning of rights (the ACL arrangement);<sup>4</sup> or teaching the access to federal court (jurisdiction and justiciability) materials toward the end of the course rather than toward the beginning.<sup>5</sup>

**E. Using ACL and the *Manual* in Other Graduate School Courses**

While the primary audience for ACL is law school instructors and students, especially in introductory courses, the book—and this *Manual*—could also serve well the interests and needs of instructors and their graduate students in government, political science, public administration, and other law-related courses. Some instructors in these contexts may not teach by the case method, and they thus may use ACL as the core text supplemented by other readings, or use ACL as one of two or three required texts. Such instructors may be particularly helped by ACL’s extended discussions of particular cases (see section C of this Preface), since they illustrate the case law and its implications without any need to resort to the case method as such.

For such instructors, some of the materials in this *Manual* may be less helpful than they will be for instructors (generally law school instructors) who regularly have students read cases in preparation for class. The Practice Problems in the “Teaching Materials” parts of the *Manual*, for example, may be less helpful to the extent that they require analysis of actual court opinions and ask students to play lawyer’s roles. On the other hand, however, instructors outside law schools may easily adjust their use of the *Manual* materials to suit their circumstances. The Practice Problems, for example, could be used as examples of the contexts in which lawyers and governmental officials confront constitutional problems; and the Review Guidelines for the problems could be used as examples of how lawyers would approach and analyze particular constitutional problems. Using the problems in this way would likely lead to valuable discussions of how public policy-makers and government administrators can best work with lawyers in identifying and resolving constitutional problems.

William Kaplin  
Washington, DC  
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<sup>3</sup> The instructor need only move current chapter 11, section E to the next to the last section of current chapter 10; move current chapter 10, section E, to the beginning of current chapter 11; and then flip the two chapters.

<sup>4</sup> The instructor need only move chapter 9, section D, the state action section, to somewhere in chapter 10; or move chapter 9, section D, to the end of chapter 13 or the beginning of chapter 14.

<sup>5</sup> The instructor need only combine chapter 5, sections D and E, with chapter 15, section B, or place chapter 5, sections D and E wherever else, toward the end of the course that the instructor would like to place them. (See the prototype course syllabus in Appendix A of this *Manual* for one example of such an arrangement.)

## GENERAL INTRODUCTION TO THE *INSTRUCTORS' MANUAL* AND ITS USES

### A. Overview

This *Instructors' Manual* supplements and is keyed to *American Constitutional Law: An Overview, Analysis, and Integration* (“ACL”). It is for instructors who have adopted the ACL text, or are considering adopting it, as a required course text. The *Manual* has fifteen chapters that correspond to, and are numbered the same as, the fifteen chapters of ACL. Each of the fifteen *Manual* chapters is divided into three parts: (A) Teaching Suggestions, (B) Key Cases and Study Questions, and (C) Teaching Materials. There are also two Appendices containing other useful materials.

Much of the material in the *Manual* is suited for use by students as well, at the instructor's option. As provided in the copyright notice (above) and in part E of the General Introduction, below, provision has been made for instructors to distribute the *Manual* materials to their students.

The rest of this General Introduction describes the materials in the *Manual*, discusses how instructors can use these materials for their constitutional law courses, and explains why they may wish to do so.

### B. The “Teaching Suggestions” Parts of the *Manual*

The “Teaching Suggestions” parts of the *Manual* provide numerous specific comments on how to use ACL for constitutional law courses, and how to use the materials in this *Manual* along with ACL. These teaching suggestions are specific to each chapter of ACL, and to the corresponding *Manual* chapter, so that instructors can follow them from chapter to chapter and topic to topic throughout the course. In particular, these suggestions cover how and when instructors can use each document from the “Teaching Materials” part of each chapter in the *Manual* — e.g., how and at what point to use a Practice Problem and its Review Guidelines from this *Manual*.

### C. The “Key Cases and Study Questions” Parts of the *Manual*

The “Key Cases and Study Questions” parts of the *Manual* include only U.S. Supreme Court cases that I consider to be essential to the study of that chapter's pertinent topics. For instructors using a casebook but needing to pick and choose among its materials, the Key Cases lists may help the instructor determine when to assign a case from the casebook along with the discussion of that case in ACL, and when to rely only on the discussion of the case in ACL or the *2012 Update* for ACL.\* For instructors not using a casebook, but relying instead on case materials that they generate

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\* A *2012 Update*, covering the most important developments from 2004 through the end of the U.S. Supreme Court's

themselves, the lists of Key Cases in this *Manual* should help with the selection of cases; such instructors in some courses could do well using only these key cases, along with the discussions of additional cases that are in ACL (see Preface, above, sec. C) or the *Update*, plus an occasional new case that the Court decides in terms subsequent to the 2010–2011 term.

Whichever approach is selected, the Study Questions that accompany most of the Key Cases can facilitate instructors' and students' preparation for class, and can stimulate class discussion of each case. I do not intend the Study Questions to be exhaustive, of course; instructors may wish to devise additional questions probing other matters that they wish to highlight. In particular, the Study Questions are generally descriptive in character rather than normative. (This is also the case for the analysis called for in the Practice Problems introduced in sec. C of this General Introduction.) I expect that instructors will choose the best times and places to pose normative questions for their students. But I also expect that instructors will first undertake descriptive analysis and guide students to a strong descriptive understanding of the case or cases before challenging them with normative questions.

#### **D. The “Teaching Materials” Parts of the *Manual***

The “Teaching Materials” parts of the *Manual* contain the following types of teaching materials: (a) Practice Problems; (b) Review Guidelines for the Practice Problems; (c) smaller scale problems and exercises; (d) “analytical frameworks” (or “analytical pathways”) to conceptually guide problem solving for particular categories of problems; (e) other miscellaneous materials that help instructors to teach with problems, including a set of “Guidelines for Preparing Written Responses to Constitutional Law Problems;” (f) various graphic illustrations that can be displayed in class and that help students understand basic concepts and conceptual distinctions of constitutional law (*e.g.*, a graphic on “Equal Protection Tiers of Scrutiny”); and (g) outlines and timelines that instructors can display in class and that help students organize particular topics in their minds (*e.g.*, an “Outline of Analytical Techniques for Free Expression Problems”). These extensive materials are presented as separate documents, each beginning on a new page, to facilitate distribution to students and projection in the classroom (see part E of this General Introduction, below).

In addition, there are two appendices in the *Manual* that contain supplementary teaching materials. Appendix A includes a course syllabus and a course outline for an introductory Constitutional Law course, which instructors may use in developing or revising their own course syllabus and/or course outline. Appendix B includes five “Teaching and Learning Memos,” designed primarily for introductory courses, that instructors may distribute to their students at selected points in the course to help guide their progress.

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term in June, 2011, is to be published simultaneously with this *Instructors' Manual*.



**E. Using the *Manual* Materials**

The Teaching Suggestions are for the instructors' use only, as are the lists of Key Cases. The Study Questions that accompany most of the Key Cases, however, as well as the Teaching Materials, are also designed for use by students. Instructors who are using ACL as a required course text may distribute these materials electronically or by hard copy to the students currently in the course, so long as proper attribution is included on each document that is distributed (see the copyright notice at the beginning on this *Manual*).

Of course, instructors may find uses for these materials even if they do not distribute them to students. The Study Questions, for example, may help guide the instructor's preparation to teach particular cases; and the Practice Problems and Review Guidelines may suggest issues to cover in class, or may provide illustrations or examples to use in class, even though the instructor does not intend to distribute these materials to the students.

**F. Prototypes of a Course Syllabus and a Course Outline**

My customary practice is to distribute a course syllabus and a separate course outline to students prior to the first class session of the course. Prototypes of the syllabus and outline that I use for introductory courses covering both powers and rights are in Appendix A to this *Manual*. Through a process of selective deletions, the prototypes can also be revised to fit either a separate powers course or a separate rights course. The Course Outline indicates which sections of ACL are assigned with each part of the course.

**G. Using Problem-Solving Methods with ACL and this *Manual***

1. Problem-Solving Materials

ACL, and especially the *Manual*, contain materials with which the instructor may introduce problem-solving methods into a basic constitutional law course or an upper-level course. With these materials, problem solving can be done on an occasional basis for illustrative purposes or can become the predominate pedagogical method undergirding the course. The problem-solving materials in the *Manual* include: (1) a series of 16 Practice Problems that instructors can assign for class discussion or recommend for independent study; (2) Review Guidelines for each of the Practice Problems that instructors can use in preparing for class discussion and that students can use for review at the end of a problem or can use for independent study; (3) four "analytical frameworks" or "analytical pathways" that can be used to guide the problem-solving process and to structure the analysis for students in a more practical and meaningful way; \*\* (4) various outlines that elucidate the

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\*\*The four analytical frameworks (*see, e.g.*, chap. 6, sec. C of this *Manual*) are not intended to encompass all the specifics and subtleties of analysis but rather to *organize, focus, and guide* analysis. Moreover, since most of these analytical pathways are extracted from existing law and reflect the reasoning actually employed by the U.S. Supreme Court in majority opinions, they may not be well suited to arguments seeking to *change* existing law. The analytical

analytical process for particular types of problems; and (5) a set of guidelines for writing responses to constitutional law problems (see chap. 11, sec. C of this *Manual*). In addition, the Review Guidelines for each problem include numerous references to pertinent sections of ACL, some or all of which instructors may use as assigned reading prior to doing the problem or may recommend to students as a resource to consult while doing the problem.

In ACL, many of the sections in chapters 1-4 and 9 provide basic information and perspectives, and an overall framework, that facilitate the introduction of problem solving into the course. The conceptual overviews and other analyses in ACL provide students grounding in the area(s) of law implicated in each problem, and are also useful for problem review. And chapter 15, section C, of ACL (“Constitutional Analysis and Its Components”) guides students in integrating all they have learned about problem solving.

## 2. Importance of Problem Solving

Problem-solving methods are receiving increased attention in higher education, and the values to be attained from their use are increasingly recognized. Regarding legal education, for example, an influential 1992 report of the American Bar Association includes “Problem Solving” as the first on its list of “the fundamental lawyering skills essential to competent representation” and called problem solving one of the two “conceptual foundations for virtually all aspects of legal practice . . .” (The Task Force on Law Schools and the Profession, *Narrowing the Gap: Legal Education and Professional Development, an Educational Continuum* 135, 141–157 (ABA, 1992)).

For other helpful discussions of legal problem-solving methods in legal education, see Suzanne Kurtz, Michael Wylie, and Neil Gold, “Problem-Based Learning: An Alternative Approach to Legal Education,” 13 *Dalhousie L. J.* 797 (1990); Stephen Nathanson, “The Role of Problem Solving in Legal Education,” 39 *J. of Legal Educ.* 167 (1989); Myron Moskovitz, “Beyond the Case Method: It’s Time to Teach with Problems,” 42 *J. of Legal Educ.* 241 (1992); and William Kaplin, “Problem Solving and Storytelling in Constitutional Law Courses,” 21 *Seattle L. Rev.* 885, 888–891 (1998). These articles draw on the psychology of learning and would be useful guides whether the setting is a law school, a graduate school of government or political science, or other graduate program that includes law-related courses.

## 3. Problem-Solving Objectives

There are many specific objectives that may be achieved or enhanced by use of problem-solving methods in constitutional law courses. In basic courses, these objectives include engaging students in deeper levels of analysis; moving students to interrelate theory and practice; affording students an opportunity to test their understanding of course materials and, more broadly, to evaluate

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model in chapter 15, section C of ACL, however, would be well-suited to such revisionist arguments.

their strengths and weaknesses as students and as prospective professionals; introducing students to legal forums other than appellate courts and to lawyering competencies other than advocacy; introducing students to the concepts of lawyering roles, lawyering tasks, and professional responsibilities to clients; and introducing students to ways in which nonlawyers (e.g., public policy makers) may work with lawyers in the resolution of constitutional problems. The materials in *ACL* and the *Manual* leave instructors free to determine which particular objectives and styles they wish to emphasize most.

In an upper-level course, essentially the same objectives may be achieved through use of the materials in *ACL* and this *Manual*, but these objectives could be pursued in greater depth. The instructors would also be able to engage students in collaborative learning. In a constitutional law seminar, for example, an instructor using *ACL* and the *Manual* could supplement the Practice Problems with additional problem materials, with simulation settings and role playing, and with memos and other written products that students prepare in response to the problems.