Preface to the Third Edition

In the Preface to the second edition of this book, I noted that "American constitutional law presents a constantly shifting terrain." The few years in between editions have proved this statement true. While the U.S. Supreme Court every term issues decisions breaking new ground, refining old doctrines, and retiring doctrinal constructs, the 2021-2022 term was significant by any measure: the Court abandoned federal constitutional protection of a woman's right to choose, expanded the individual right to bear arms, and enhanced the ability of individuals to bring free exercise claims. It follows that, as in the past, there are real limits to how much the material reasonably can be covered in a three- or four-credit constitutional law course. At the same time, this book's chief aims have not changed. The goal is to make the subject of constitutional law as manageable and useful for you, the law student, as possible. The book seeks to do so in two ways: first, by continuing to emphasize the constitutional law principles and doctrines that will be most relevant to you when you graduate into the practice of law; and, second, by providing you a strong base for the development of the analytical skills with which all your first year courses are primarily concerned.

Courses in constitutional law are typically organized around casebooks that seek to tackle the entirety of American constitutional law in all its facets. Constitutional law courses and casebooks, moreover, are often organized from the perspective of the constitutional scholar—in other words, employing a top-down approach that encompasses (and even emphasizes) theoretical and philosophical perspectives and debates on such matters as judicial review and the development of the doctrinal tests upon which courts rely to implement the constitution's commands.

This book, on the other hand, is organized from the ground-up: rather than assuming you and your classmates all will one day be making constitutional arguments before the U.S. Supreme Court (or teaching constitutional law), this book assumes it is more likely that you will be making constitutional arguments before a state or federal *trial* court. In these courts, attorneys by and large are not addressing issues regarding, say, the theoretical underpinnings of judicial review; rather, they are seeking to challenge or defend government action based upon precedent—for example, to challenge on due process grounds procedures put in place by the local school board, or to defend on equal protection grounds a regulatory scheme that appears to single out a readily-identifiable class of citizens for differential treatment. Accordingly, the question guiding the selection of materials covered in *Modern Constitutional Law: Cases, Problems and Practice* is this: What will you need to know about constitutional law to best represent your future clients?

In addition, the basic constitutional law course presents an opportunity for you to develop your legal reasoning skills, by wrestling with cases and doctrines that, unfortunately, tend in the main to be messy and open-ended. *Modern*

Constitutional Law: Cases, Problems and Practice features generous excerpts of the constitutional cases that illustrate the Supreme Court's approach to core provisions of the Constitution, so you can get a sense of how these decisions are structured and reasoned and, more importantly, so you can learn how to wring from them what you need in order to adequately represent clients who may have or be facing legitimate constitutional claims. The goal here is to use the study of constitutional law to complement the curricular goal of the first year of law school (or to enhance your skills in the second or third year, if that is when you are taking this course): to become proficient at legal reasoning. A practical approach to the study of constitutional law serves to promote your ability to read cases and discern and articulate controlling principles, which can be used to make predictions about outcomes in future cases—in other words, to advise clients on how courts will resolve particular cases that raise constitutional questions.

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Before we begin, it's worth taking a moment to address the anxiety many students bring to the study of constitutional law. I have often told students that the course does not require very much knowledge of political science or the nature of the American governmental system. The cases themselves generally provide all the information a careful reader will need to appreciate the court's holding and the reasoning behind it. That said, it may be helpful to have some basic understanding of how the U.S. Supreme Court itself works, because a course in constitutional law is inevitably a study of the Supreme Court's institutional role in our governmental scheme, as well as its primary role in interpreting the Constitution.

First, the Supreme Court has nine members. This number is not a constitutional requirement, but it has been set at nine by Congress for some time. Note that many state high courts have fewer than nine members—the Massachusetts Supreme Judicial Court has seven, for example, while the New Hampshire Supreme Court has five. What seems most relevant is that the number be odd, to reduce the possibility of a tie vote. In the wake of Justice Antonin Scalia's passing in 2016, for example, the Court split four votes to four in many cases; a tie generally means that the lower court's determination will stand.

Second, the members of the Supreme Court are nominated by the President with the advice and consent of the Senate (more on this later). They do not stand for election and have no natural political constituencies they must satisfy. They serve for life. Again, this is in contrast to many state systems in which judges at all levels stand for election, are subject to some kind of retention election, or are required to step down from the bench upon reaching a certain age. And it is not to say that the justices of the U.S. Supreme Court are immune from politics—to the contrary, the political process of nomination and appointment is a critical democratic influence on the Court.

Third, the Supreme Court decides its own docket through the certiorari process. As Margaret Meriwether Cordray and Richard Cordray have noted, "[o]nce a relatively passive institution which heard all appeals that Congress authorized, the Court is now a virtually autonomous decisionmaker with respect to the nature and

extent of its own workload." Margaret Meriwether Cordray and Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L. Rev. 389 (2004). It takes four votes from members of the Court to grant certiorari—that is, to agree to hear an appeal. Many cases concern so-called "Circuit splits," in which different federal Circuit Courts of Appeal have reached contrary results in cases addressing the same issue. But even in the midst of a Circuit split, it may be difficult to find four votes; as one former Supreme Court law clerk responded when asked how the justices choose the cases that make up the Supreme Court's docket: "Serendipity." H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 1 (1991).

Indeed, the most intriguing feature of the certiorari process may be the lack of formal rules governing the justices' discretion in determining whether to vote to take a case. When the Court declines to grant certiorari—as it does most of the time—the public is left to wonder why. Which doesn't mean that nothing at all can be read into such determinations. Consider, for example, the Court's refusal in December 2015 to take a case challenging a municipal ban on the sale and ownership of certain kinds of assault weapons. The plaintiffs were a state association of gun owners and an individual gun owner who claimed to need such weapons to defend his home; they argued the law violated the Second Amendment and *District of Columbia v. Heller* (2008), in which a majority of the Court concluded the Second Amendment protects an individual right to bear arms for the purpose of self-defense. Justices Clarence Thomas and Antonin Scalia dissented from the denial of certiorari. Perhaps, as one legal commentator noted, they could not find two more votes because of events at the time—namely, a great number of widely reported incidents in the United States involving gun violence. But that may be "more weight than a disputed denial of review can bear." Linda Greenhouse, *Guns and Thunder on the Supreme Court's Right*, N.Y. Times, Dec. 10, 2015. At the end of the day, we simply cannot attribute substantive meaning to the Court's many, many denials of certiorari. And, as you will see in the first chapter of this book, the Court in 2022 decided a Second Amendment case that explicates the doctrinal test for assessing the validity of numerous firearms regulations.

Fourth, and finally, the Supreme Court decides cases in a structured way. Its decisions are informed initially and primarily by the arguments of the lawyers representing the parties in the cases before the Court. The Court receives briefs from the parties and interested *amici curiae*, hears oral argument from the parties' attorneys, and, after those arguments, retreats to the conference room in the Supreme Court building to vote. That vote generally determines which justice will draft the majority opinion—an assignment typically the prerogative of either the Chief Justice or senior-most justice in the majority. The lineup of justices on one side of the issue or the other may change as drafts are circulated between and among the justices' chambers, each of which functions as its own unit. Each term of the U.S. Supreme Court begins the first Monday in October, with a commitment to decide all cases heard in that term by the end of June. Though the modern Supreme Court releases only 60 or so written decisions per term, some decisions may take many months of effort to craft before they are ready for public announcement, at which point we—lawyers and laypeople alike—all have the opportunity to read and assess the Court's reasoning for ourselves, which

represents no small check on the legitimacy of its decision-making in our constitutional republic.

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One last note. This book was designed to be used by you as a tool to aid in the development of your legal reasoning skills. It is a book, to be sure, but you need not treat it as sacred: write in the margins, highlight the case holdings, sketch diagrams on the end papers. Use it and make it yours, so that at semester's end it is more than what you started with.

Lawrence Friedman
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