

H-Net Reviews

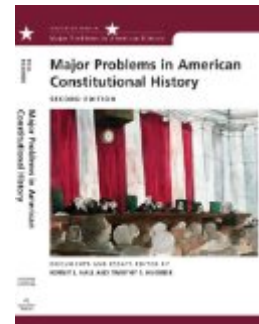
in the Humanities & Social Sciences

Kermit Hall, Timothy S. Huebner, eds. *Major Problems in American Constitutional History: Documents and Essays*. Boston: Wadsworth Cengage Learning, 2010. xvii + 580 pp. \$74.95 (paper), ISBN 978-0-618-54333-5.

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Commissioned by Christopher R. Waldrep



Legal historians teaching in history, political science, legal studies, and humanities departments are probably familiar with the late Kermit Hall's two-volume collection of documents and essays in constitutional history, first published in 1992. The volumes' expansive coverage—more than 1000 pages and over 150 documents in all—provided students a firm grounding in important areas of constitutional development, from colonial charters to the struggle over an Equal Rights Amendment. Paired with graciously edited essays from leading scholars on topics ranging from the Constitutional Convention of 1787 to the failures of originalism as an interpretive stance, the documents in Hall's volumes gave students access to both primary and secondary sources on virtually every topic a teacher might put on a syllabus about the Constitution.

Yet, the volumes had their limits in utility, a problem shared by all multivolume sets on constitutional history marketed today. Professors teaching a single-semester course on constitutional history needed students to purchase both volumes—and, regardless of location, nowadays more colleges and universities seem headed in the direction of a single course, rather than a year-long sequence of courses, covering material on changes in constitutional thought. In addition, the contents of the two volumes drew to a close in the mid-1980s, when the shadow of Ed Meese's support for "original intent" loomed large on the landscape. Picking up the 1992 volumes now, one can see the landmarks that once dominated certain areas of legal thought: the *Bakke* decision (affirmative action), and *Webster v. Reproductive Health Services* (abortion rights), to choose only two, were both "state of the art" thinking at the time the volumes were

compiled, now overshadowed by more recent decisions. And just as the Court has continued to turn out opinions, scholarship has not stood still since 1992. Understandably, the volumes needed to be updated to reflect new ideas and perspectives on a whole range of constitutional topics.

Enter Tim Huebner, a student of Hall's and scholar of nineteenth-century jurisprudence. Huebner, an expert on southern judges in both the antebellum and Reconstruction periods, has carefully transformed the two-volume set, pruning down the original 1000 pages by nearly half, to about 560 pages in all. He's also taken the first edition's 24 chapters and reduced them to 15. Aware of only these facts, a curious reader would want to know what sections have been trimmed the most. The chapter on constitutionalism before the Constitution (Magna Carta to William Penn's Frame of Government in 1682) is gone, as is the section about James Otis and the Writs of Assistance case and two first-wave state constitutions. The Northwest Ordinance did not make the cut, nor did several of the more eloquent complaints made by anti-Federalists in the 1780s against Constitutional ratification. One might argue that all these documents are now to be found on the Yale Law School Avalon Web site, freely available to all, and therefore not essential for a textbook. Large cuts also claimed material on Andrew Jackson's expansion of presidential power in the 1830s, and South Carolina's nullification ordinance of the 1833 Force Bill (forerunner of their 1860 act of secession). Gone too are *Dartmouth College*, the *Charles River Bridge* case, and *Prigg v. Pennsylvania*—all readable online. Ditto the Declaration of Sentiments from Seneca Falls. Indeed, at first glance, I thought most of the excised material

came from America's pre-1865 years. But upon closer inspection, I realized that the revisions ended up purging even more from the nineteenth and twentieth centuries. *Munn v. Illinois*, the *E. C. Knight* case, *Pollock*, and *Debs* did not make it to the second edition. Indeed, a large portion of the chapters on laissez-faire constitutionalism and freedom to contract (e.g., *Ritchie*, *Allgeyer*) were left behind. On balance, I think when cuts were made, economic issues often lost out to topics like race and federalism in the new volume, since they continue to have strong coverage before and after 1865. What surprised me most, in the end, was the loss of two whole chapters on civil liberties in the Cold War and the death penalty—topics that one would expect many instructors to comment about, never mind what students might find interesting. Abortion rights, religious freedom, and terrorism, however, are still included.

Herein lies the rub. A fourteen- or fifteen-week course—the new collegiate default in studying constitutional thinking—cannot cover every topic, and a textbook editor designing a text for such a course must make hard choices. A two-volume set allows an editor some freedom to cover topics in detail that the instructor cannot in a single semester. In slimming down this set from two volumes to one, the cuts have been carefully made, concentrated in a few areas that many (but perhaps not all) instructors would agree with. I happen to think that the cuts in the early period are easily remedied with sources widely available online, if an instructor wishes to offer more coverage in that period. Finding edited versions of some key twentieth-century texts may, in some instances, be harder.

Lest the reader think that this review is strictly a lament for what is gone, be assured: the second edition of *Major Problems* is well worth using. Every piece of secondary writing in the first edition has been revisited by Huebner, and most have been replaced with newer scholarship that brings students up to date on interpretive controversies and innovative thinking. Daniel Farber and James McPherson debate the merits of Lincoln on civil rights and collective rights. Derrick Bell and Kermit Hall (posthumously) argue the merits of the *Brown* legacy. John Yoo and Peter Irons duke it out on whether

the president has legitimate augmented powers to combat terrorism. Important additions include the voices of Linda Kerber, Jan Lewis, Joan Hoff, and Catherine MacKinnon, who address the role of gender in constitutional interpretation at various points along the way. The secondary literature chosen to illuminate the primary sources in *Major Problems* is of the highest quality and reveals the fine touch of the editor's hand. More amazing, cutting and culling was not the only transformation from first to second edition. Huebner has incorporated new cases, many decided since 1992—a welcome development for scholar-teachers trying to keep their classes current with the Supreme Court's activities. Excerpts from twelve important cases have been added, sometimes reaching back for those that were omitted in the first edition (e.g., *Heart of Atlanta Motel*), sometimes extending extant sections with further analysis (*Zelman v. Simmons-Harris* in the chapter "Freedom of and Freedom From Religion"), and sometimes opening up new areas of constitutional thought that will get students talking (*Hamdi v. Rumsfeld*, on detention of suspected al Qaeda sympathizers). The selections made are tautly excerpted, well designed for students with collegiate reading skills to comprehend and analyze. In addition, several of the case selections included in the first edition were re-edited to highlight the essential elements for student readers. Even the appendix covering Supreme Court nominations and appointments has been revised to indicate which judges were appointed by which presidents. Huebner then added the judges' states of residence, political party affiliations, and length of service on the high court. These improvements allow students to consider the politicized nature of the court in every period, not merely the present day.

One may grieve for the vanishing two-course sequence of constitutional thought in American universities. Its disappearance limits what an instructor can pass on to students who have no intention of going to law school, for fifteen weeks is hardly long enough. Nonetheless, if one is restricted to a single semester for such a course, then the new edition of *Major Problems in American Constitutional History* is a volume well suited for classroom use. It will find many adopters, and rightfully so.

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