

THE CONSTITUTION OF THE UNITED STATES

A GUIDE AND BIBLIOGRAPHY to Current Scholarly Research



OF THE UNITED STATES

A GUIDE AND BIBLIOGRAPHY

to Current Scholarly Research

by
BERNARD D. REAMS, JR., J.D., Ph.D.
and
STUART D. YOAK, Ph.D.

OCEANA PUBLICATIONS, INC., DOBBS FERRY, NEW YORK



Library of Congress Cataloging-in-Publication Data

Reams, Bernard D.

The Constitution of the United States.

Includes indexes.

I. United States—Constitutional law—Bibliography.

I. Yoak, Stuart D. II. Title.

KF4546.A1R4 1987 016.34273'029 87-11244

ISBN 0-379-20888-1 016.34730229

© Copyright 1987 by Oceana Publications, Inc.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, xerography, or any information storage and retrieval system, without permission in writing from the publisher.

Manufactured in the United States of America

THE CONSTITUTION OF THE UNITED STATES
A GUIDE
AND BIBLIOGRAPHY

THE CONSTITUTION



FOREWORD and DEDICATION
by
THE HONORABLE EDWARD D. RE

*Chief Judge
United States Court of International Trade*

*Distinguished Professor of Law
St. John's University School of Law*

When I was invited by Dr. Bernard D. Reams, Jr., of the law faculty of Washington University in St. Louis, Missouri, to write a brief Foreword and Dedication to this book, I accepted with pleasure and without hesitation. Having known Dr. Reams for many years, as well as the quality of his previous works, I was confident that any research guide and bibliography that he and his colleague, Dr. Yoak, would compile, would be thorough and useful. A review of the manuscript has confirmed my assumption of the value of this work for legal researchers seeking recent scholarly legal writings on the United States Constitution.

The sources cited, legal treatises, articles and government documents published from 1970 through 1986, will greatly facilitate the research of the beginning student as well as the constitutional scholar. Surely, the publication of this bibliography on the Constitution of the United States, in the year 1987, is most appropriate, and is to be welcomed since it coincides with the Bicentennial Celebrations which commemorate the signing of the United States Constitution on September 17, 1787.

An additional reason that added to my pleasure was the decision that this bibliography, intended to assist researchers and authors on the United States Constitution, should be dedicated to Chief Justice Warren E. Burger, the fifteenth Chief Justice of the United States. This respectful dedication is in recognition of his many years of dedicated service to our country, and its constitutional system of justice. An outstanding lawyer, Chief Justice Burger served as a partner in a major law firm, as a faculty member at the William Mitchell College of Law, as an Assistant United States Attorney General, as a Judge of the United States Court of Appeals for the District of Columbia Circuit, and, from 1969 to 1986 as the Chief Justice of the United States.

With the total dedication that has characterized his entire career in the law and the cause of justice, Chief Justice Burger continues to serve the nation as the Chairman of the Commission on the Bicentennial of the United States Constitution. In this new capacity, he continues to utilize his energies to the fullest in celebrating the Bicentennial of this noble and living document — the United States Constitution. A principal goal of this National Commission is to promote and stimulate an understanding and appreciation of our national heritage, and the freedoms that men and women enjoy and take for granted under the United States Constitution.

This new bibliography is a most significant tool for the legal researcher. It is much more than a mere listing of citations. The researcher who utilizes this bibliography will certainly be impressed by the array of scholarly titles set forth in this work. Its scope of coverage and importance are readily apparent from the arrangement of the bibliography.

It is clear that the compilers have used a detailed and objectively sound method to select each entry, and that all of the entries have been placed under an appropriate designation within the Constitution's framework. This accom-

plishment, although seemingly simple, in itself, is a task of considerable proportions, and is a major contribution. The arrangement of entries by each article, section and amendment of the Constitution provides the legal scholar with the most direct and precise approach for research on the Constitution and its provisions.

To avoid confusion, the compilers have intentionally avoided subjective discussions of the various entries. In order to render maximum assistance to the researcher, they have also provided comprehensive author, title, and subject indexes. It would be fair to state that, to date, no other bibliography on the Constitution has this vast scope and method of coverage.

Bibliographies on major legal subjects abound, and they serve as helpful starting points for the researcher in the initial identification of the major literature and sources on a particular topic. Until this bibliography was published, however, there remained a gap in the bibliographic literature since there was no major bibliography which covered the scholarly articles and books on the interpretation and application of the United States Constitution to meet the research needs of law students, lawyers, and legal scholars. It was not until 1984 that Kermit L. Hall compiled *A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979*, an extensive bibliography which lists writings on the United States Constitution. The Hall bibliography, published by Kraus International Publications, concentrates on writings of an analytical, historical nature, and is arranged under broad subject categories, with constitutional historians as its major audience. It is fitting that the Reams and Yoak bibliography, with its appeal to a much broader audience, be published on the occasion of the 200th anniversary of our Constitution.

In the final analysis, all classic bibliographies are measured by their usefulness. It is my prediction that this bibliography will prove itself worthy of this designation. There can be no doubt that, at this time, it fills a major gap in our legal literature. Furthermore, it is published at a moment in our national history when any serious work that calls attention, and facilitates research and additional literature on our Constitution, is to be welcomed.

19 February 1987
New York, New York

INTRODUCTION

In conjunction with the Bicentennial celebrations commemorating the signing of the United States Constitution in 1787, we have prepared this research guide and bibliography of recent primary and secondary research. It is our hope that this text will function as a guide for both the serious scholar and the beginning student of constitutional study. The sources cited are primarily legal treatises, periodical articles and government documents published during the period 1970 through 1986.

The bibliography is arranged according to each section and amendment of the Constitution. This provides the user with the most direct access to those publications which focus attention upon specific articles, sections, clauses and amendments. Every article, section and amendment of the Constitution was exhaustively researched and included in the bibliography. The Table of Contents provides a complete listing of each heading. Where an article, section or amendment is not listed we were unable to find any references which dealt specifically with this portion of the Constitution.¹

Under each of the chapter headings and subheadings the materials are organized in reverse chronological order with books preceding articles. This means the most recent references are placed at the very beginning of the list. In citing to treatises and government documents we have used the *Chicago Manual of Style*, 13th edition.² All periodical references follow the format set forth in *A Uniform System of Citation*, 14th edition.³

In producing a research guide we wanted the text to provide scholars with something more than a listing of entries. The work begins with a comprehensive Table of Contents which identifies each Article and Section of the Constitution and the body of the text follows this arrangement. Where there are bibliographic references which concentrate on individual clauses these will be found under the appropriate article and section even though, for the sake of brevity, not set out separately in the Table of Contents.

The work concludes with three separate indexes. The first two indexes identify each reference in the bibliography by author and title. As can be seen from the size of these indexes this aspect of the project was a major undertaking even when aided by computer processing. These indexes offer more than just another entry point into the literature surrounding the United States Constitution. They also enable the researcher to expand or narrow an investigation. Once an entry is located the researcher may want to consult the title index to determine under what other sections of the Constitution this same entry is listed. These indexes also bring together similar bibliographic titles and/or the range of work by any particular author.

The final index that completes this guide is a brief Subject Index. The subject approach makes it possible to identify entries in the bibliography without knowing in advance the specific article, section or amendment of the Constitution. In this manner, the Subject Index can function as a brief guide to the United States Constitution itself for the beginning student of constitutional law.

To be an effective research guide we were convinced that it was necessary to illustrate the range of literature available. As a bibliography it was imperative that the coverage be as comprehensive as possible. Our primary task was to provide an extensive treatment of the books and articles which focus directly on specific portions of the United States Constitution. This has not been done before. However, it was just as important to demonstrate for scholars the breadth of additional materials of a general and classic nature. We, therefore,

have included chapters covering government documents, general texts and other bibliographies. The chapter on government documents we consider of particular importance since it identifies a substantial new area of materials not covered by the traditional legal research literature.

In deciding to produce a bibliography on the United States Constitution one is immediately struck by the enormity of the project. Certainly this of all American legal documents has benefited from the prodigious efforts of numerous commentators and critics. What has been missing, however, is a text which brings together primary and secondary materials focused on the legal literature surrounding the Constitution. In locating bibliographic references for the coverage of books and articles we have made an exhaustive survey of legal indexes and other source materials.

Bowker's Law Books and Serials in Print Update.
New York: Data Services Division, R. R. Bowker Co., 1986.

CIS Annual: Abstracts and Indexes
Bethesda, MD: Congressional Information Service, Inc., 1986.

The Constitution of the United States of America: Analysis and Interpretation.
U.S. Congress. Senate. 92d Cong., 2d sess., 1973. S. Doc. 92-82.

Current Law Index.
Menlo Park, Ca: Information Access Corporation, 1980.

Index to Legal Periodicals.
New York: H. W. Wilson Co., 1986.

Law Books 1876-1981.
New York: Technical Development Department, R. R. Bowker Co., 1981.

Law Books Recommended for Libraries.
Association of American Law Schools.
South Hackensack, N.J.: Fred B. Rothman and Co., 1967-70.

Law Books Recommended for Libraries.
Association of American Law Schools.
South Hackensack, N.J.: Fred B. Rothman and Co., 1976. Supplement, vol. 1, no. 13.

National Legal Bibliography.
Buffalo: William S. Hein and Co., Inc., 1986.

Our second criterion in preparing this work was to focus upon current research work. Legal scholarship in its review of the Constitution has undergone significant change in the last ten to fifteen years. The dynamic nature of the law mandates that most researchers must have ready access to current source materials. Throughout we have selected those articles and books which provide the most direct link with specific articles or sections of the Constitution and which were written since 1970.

In compiling the bibliography we used two different methods for identifying and selecting materials. The first and most traditional technique was to rely upon the various indexes noted above. These proved helpful in obtaining a core of basic references. However, upon completion of this process we were not satisfied that all of the most significant works had been identified. Since the bibliography focuses attention upon specific articles, sections, clauses, and amendments to the Constitution many indexes were not detailed enough for our purposes. One of the best sources for periodical literature in law is *Current*

Law Index and, yet, since it did not begin publication until 1980 it too was limited. We needed some additional method for covering the ten years from 1970-1980. The problem was to devise a technique that would give us the level of specificity required and that would focus upon legal research from the last fifteen years.

Much of the legal research concerning the Constitution receives its initial impetus from decisions handed down by the United States Supreme Court. In addition to specific Constitutional Amendments, it is through these decisions from the United States Supreme Court that the Constitution retains its living status in law. These decisions constitute the paramount manner in which the Constitution is applied and construed for each generation. The task was to find a mechanism that would allow us to identify the research which was based upon and grew out of these decisions.

The method we developed required that we first identify all of the cases which had been handed down by the United States Supreme Court during the period 1970 through 1985 and which concerned a specific article, section, clause or amendment of the Constitution. This was accomplished using the *Shepard's United States Citations: Statutes*. The next task was to rank order these cases into some sort of priority. This was necessary for two reasons. First, the sheer volume of case citations involved was enormous. Second, our project was to produce a selective bibliography, not a comprehensive one. We wanted to restrict the bibliography to significant scholarly research. These selected articles, we felt, would be of greatest value to the widest possible audience. The more important the case the more significant treatment it will receive in the legal literature.

The criterion we selected in order to establish a priority ranking among the cases was based upon the frequency of citation count. This approach assumes that the more frequently cited cases will be the more important cases. This assumption is grounded on two points. First, that these cases are certainly the most important cases for judges of the United States Supreme Court as well as judges in lower federal and state courts. A landmark decision can be defined as one that changes the way in which the judges understand the law. Any change will be reflected in the frequency with which that landmark case is cited. The frequency of citations is a neutral criterion since it reflects decisions that are followed as well as those that are distinguished or overruled. No matter why judges are citing to any particular decision, the simple fact that they refer more frequently to some than to others indicates that these highly cited cases are the ones which are most important.

The second reason that frequency of citation may be used in order to define a class of important cases is that these are the cases on which commentators and critics will focus attention. The United States Supreme Court is our most prestigious and, therefore, the most visible court. Cases which alter the way judges interpret and apply the law are the cases which attract the most attention. Simply stated, these are the cases that make legal news.

The method we developed began by using the *Shepard's United States Citations: Statutes* to identify the cases which cited to specific portions of the Constitution. These case citations were then rank ordered by frequency from the period 1970-1985. The next step in the process was to convert these highly cited cases into specific case names and to search through the periodical indexes by the case name. This was not, however, the last step. Since we could not be certain that every journal article indexed under the specific case name actually dealt with the Constitutional issue with which we began, it was necessary to review these articles and distinguish those which were discussions

of the Constitution from those which focused on different aspects or issues in the case.

An example may help to clarify our methodology. We used the *Shepard's United States Citations: Statutes* to identify all of the cases which the Supreme Court handed down for each Article and Amendment of the Constitution for the period 1970 through 1985. When one looks at the *Supplement Volume Six, 1974-1979*, one of the cases cited under Article I, Section 8, Clause 3, is 413 US 18. This case, *Miller v. California*, concerns a State's right to regulate the distribution of sexually explicit material. Using the specific page citation from *Shepard's* it was necessary to verify the name of the case and that the case actually begins on page fifteen from the *United States Reports*.

The next step is to see how frequently 413 US 15 has been cited by the courts from the date it was handed down in 1973. In checking *Shepard's United States Citations: Cases, Volume Six, 1984*, and the *Semiannual Supplement* for 1986 under 413 US 15 one finds a total of twenty-seven and a half columns of case citations. The implication is that *Miller v. California* is a highly significant case because of the frequency with which it has been cited.

In using the frequency of citations as our guide we had to make adjustments in the citation count for what constituted a highly significant case as the time frame changed. Cases handed down in the early 1970's might naturally be cited more often than a recent opinion. Therefore, we required fewer citations the more recent the date of decision.

The third step in the process was to go back through the periodical indexes from the date of the decision in *Miller*, 1973, and identify all of the articles written about the case through 1985. This was possible because both the *Index to Legal Periodicals* and *Current Law Index* have case name tables. The result was a list of journal articles many of which we would have missed using the standard index headings for the United States Constitution and constitutional law.

However, it was not possible simply to record all of the articles as legitimate references for inclusion in the bibliography. Although all of these articles certainly do concern the *Miller* opinion not all of them will discuss Article I, Section 8, Clause 3. We, therefore, had to review individually each of the articles identified through the periodical indexes in order to distinguish those which would be appropriate for the bibliography. Only those articles which focused directly on the Constitutional issues involved in the specific article, section, clause or amendment were included in the bibliography.

The great value of this methodology is that it allowed us to begin with specific articles, sections, clauses and amendments to the United States Constitution and, from this starting point, identify articles directly pertinent to the scope of the bibliography. Most periodical indexes do not use subject headings that are both specific enough and comprehensive enough for a legal bibliography to the United States Constitution. Therefore, this work constitutes a unique and comprehensive reference source that has never been undertaken before.

Contained in a separate portion of the bibliography, also arranged by article, section and amendment of the Constitution, is a section on United States government documents. These items were included for a number of reasons. First, the activity of the United States Congress over the past fifteen years has often concerned Constitutional issues. Second, this is an area that most bibliographies ignore and which can provide a wealth of information for the legal scholar both directly and indirectly. Often in the legislative process of committee hearings and through the materials prepared specifically for

members of a committee, researchers can uncover resources not available elsewhere. As with the earlier portion of the text, this is a selective compilation of the most significant Congressional documents which focus attention on the United States Constitution.

The bibliography concludes with a brief selection of General Works and Bibliographies. Although our primary goal was to provide only those references which focus directly upon specific portions of the Constitution we could not ignore the many fine works of a general nature. Other bibliographies before us have listed the major historical works of note. Our intention in this last section was simply to point the researcher in the direction of those materials which provide a broad discussion of the Constitution and of constitutional issues in general.

In producing a work of this magnitude one encounters many debts along the way. We wish to thank Oceana Publications, Inc., for its understanding and encouragement throughout. The following students assisted us in the compilation of entries: Alexander Angueira, Toni Elerts, Daryl Hylton, Penny Lynn, Sterling Miller, Christopher Sneed, Krista Werner.

Finally, a special thank you is due to Ms. Nancy A. Schultz, Circulation Assistant at the Freund Law Library, and Ms. Diane Peters, Research Assistant, who worked with us on typing, proofreading and producing the manuscript in a computerized format.

NOTES

1. We can state that our coverage of each article, section and amendment of the Constitution is comprehensive with one exception. In the process of compiling this text we encountered many interesting items of note, but none quite so puzzling as the reference to Article X of the U.S. Constitution.

In *Shepard's United Citations: Statutes - Court Rules*, Volume One, 1986, on page 69 the following reference appears:

Art. 10, Cir. 8, 42 BRW 285.

The reference is to *In re City of Wellston*, a case before the United States Bankruptcy Court, Eastern District of Missouri, and reported in volume 42 of the *West's Bankruptcy Reporter*. On page 285 of the opinion handed down by the Honorable James J. Barta, Bankruptcy Judge, the following appears:

The Federal law clearly intends to limit intrusion by its Courts into the political and governmental operations of a municipality, notwithstanding the voluntary filing of a Chapter 9 Bankruptcy petition. Article X, Constitution of the United States; 11 U.S.C. §§903 and 904 ...

We can report that this is the only reference we found to *Article X* and that to date it has not generated any references in the primary and secondary literature. Not wanting to second-guess the Honorable Justice Barta, the West Publishing, or Shepard's/McGraw-Hill one may venture the speculation that the citation should be to *Amendment X: Reserved Powers*, and not to the clearly vacuous and fictitious Article X. Instances such as this do tend to confirm the originality of the legal system and the reference tools upon which we rely.

2. The Chicago Manual of Style, 13th ed., rev., Chicago, IL: University of Chicago, 1982.

3. A Uniform System of Citation, 14th ed., Cambridge, MA: Harvard Law Review Assoc., 1986.

THE CONSTITUTION OF THE UNITED STATES
A GUIDE
AND BIBLIOGRAPHY

ESSAYS, ARTICLES and BOOKS

TABLE OF CONTENTS

Foreword and Dedication	ix
Introduction	xi

ESSAYS, ARTICLES AND BOOKS

Chapter One

Article I: Legislative Department

Section 1	Legislative Powers	1
Section 2	House of Representatives	2
Section 3	Senate	3
Section 4	Elections	3
Section 5	Powers and Duties of the House	4
Section 6	Rights and Disabilities of Members	4
Section 7	Legislative Process	5
Section 8	Powers of Congress	5
Section 9	Powers Denied to Congress	10
Section 10	Power Denied to the States	15

Chapter Two

Article II: Executive Department

Section 1	The President	17
Section 2	Powers and Duties of the President	18
Section 3	Legislative, Diplomatic and Law Enforcement Duties of the President	20
Section 4	Impeachment	20

Chapter Three

Article III: Judicial Department	21
Section 1 Judicial Power	32
Section 2 Jurisdiction	35

Chapter Four

Article IV: States' Relations	45
Section 1 Full Faith and Credit	48
Section 2 Privileges and Immunities	50
Section 3 Property of the United States	51

Chapter Five

Article V: Mode of Amendment	53
------------------------------------	----

Chapter Six

Article VI: Prior Debts, National Supremacy, Oaths of Office	55
Clause 2 Supremacy of the Constitution, Laws and Treaties	58

Chapter Seven

First Amendment: Religion and Expression	67
---	----

Chapter Eight	
Second Amendment:	
Bearing Arms	113
Chapter Nine	
Third Amendment:	
Quartering Soldiers	115
Chapter Ten	
Fourth Amendment:	
Search and Seizure	117
Chapter Eleven	
Fifth Amendment:	
Rights of Persons	165
Chapter Twelve	
Sixth Amendment:	
Rights of the Accused in Criminal Proceedings	203
Chapter Thirteen	
Seventh Amendment:	
Civil Trials	231
Chapter Fourteen	
Eighth Amendment:	
Further Guarantees in Criminal Cases	233
Chapter Fifteen	
Ninth Amendment:	
Unenumerated Rights	243
Chapter Sixteen	
Tenth Amendment:	
Reserved Powers	247
Chapter Seventeen	
Eleventh Amendment:	
Suits Against States	255
Chapter Eighteen	
Thirteenth Amendment:	
Slavery and Involuntary Servitude	261
Chapter Nineteen	
Fourteenth Amendment:	
Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process and Equal Protection	263