AMERICAN CONSTITUTIONAL LAW

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PREFACE

This treatise ventures a unified analysis of constitutional law.* I have been tempted to state a more modest purpose, hoping to be measured by a more generous standard than this claim sets for the work, but that just wouldn't wash. The book has been too long in the making, its scope too obviously embracing, for me to offer it as merely a collection of tentative, disconnected observations on constitutional topics (though parts of it are tentative) or as only a student guide (though it certainly is designed to guide students).

I believe that another extended outline, a largely non-critical summary of leading cases and black-letter rules, would not serve the real needs even of beginning students, let alone of scholars, practitioners, and officials sworn to uphold the Constitution. My conclusion, after a number of years of teaching and talking about constitutional law with all these groups, is that their needs are more shared than divergent, and that only a systematic treatment, rooted in but not confined to the cases, sensitive to but not centered on social and political theory, can offer a clear perspective on how the doctrines and themes of our constitutional law have been shaped, what they mean, how they interconnect, and where they are moving. I also think only such a treatment can provide a coherent foundation for an active, continuing, and openly avowed effort to construct a more just constitutional order.

To achieve coherence without sacrificing nuance, I have relied heavily upon Supreme Court decisions and less upon the decisions of other courts and non-judicial tribunals. Yet I do not regard the rulings of the Supreme Court as synonymous with constitutional truth. As Justice Robert Jackson once observed of the Court, "We are not final because we are infallible, but we are infallible only because we are final." And the Courts that held slaves to be non-persons, separate to be equal, and pregnancy to be non sex-related can hardly be deemed either final *or* infallible. Such passing finality as judicial pronouncements possess is an essential compromise between constitutional order and chaos: the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices. This process cannot be the special province of any single entity. Thus my central topic is the Constitution itself, not the Supreme Court as an institution. While addressing relevant issues of institutional capacities and roles, I do not stop at discussing the Court as the right or wrong forum to review a particular issue and render judgment; the more crucial question for me is whether the judgment itself was right or wrong as an element in the living development of constitutional justice.

* Criminal procedure, however, is considered only in conjunction with other topics rather than as a unified and complete whole.

While conceding the courts a less exclusive role as constitutional oracles, this book cedes them a greater authority—and duty—to advance that justice overtly. Judicial neutrality inescapably involves taking sides. The judgment of the Court, though it may be to elude an issue, in effect settles the substance of the case. Judicial authority to determine when to defer to others in constitutional matters is a procedural form of substantive power; judicial restraint is but another form of judicial activism. In advocating a more candidly creative role than conventional scholarship has accorded the courts, I see myself as a proponent more of self-awareness than of an altered balance of governmental power. Most of the worry about how far judges may go, however genuine it may be and however fashionable it is again becoming, strikes me as rote unreality, profoundly misconceived in light of the inevitable social and cultural constraints on judicial intention and impact. Those constraints are perennially strong; they explain why the Supreme Court's decisions, even those universally rejected in a later era, may be controversial when they are rendered but never seem *unthinkable* at that time. The inescapable boundaries of societal context and consciousness argue not that judges should restrain themselves still further, but that they must raise distinctive voices of principle. Though I express occasional reservations about judicial initiative in specific settings, I reject the assumptions characteristic of Justices like Felix Frankfurter and scholars like Alexander Bickel: the highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, "to form a more perfect Union" between right and rights within that charter's necessarily evolutionary design.

It should be plain by now that I do not shrink from offering forthright opinions in this book. For me, the morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description. Instead such morality points to an avowal of the substantive beliefs and commitments that necessarily inform any account of constitutional arguments and conclusions. I am convinced that attempts to treat constitutional doctrine neutrally elide important questions and obscure available answers. Therefore the reader will find this book taking explicit positions on the most troublesome problems in constitutional law. To understand the structure of those problems, as it is set forth here, and to understand the principles that bear on the solutions, one need not share my views—either about the proper role of judges or about the correct resolution of substantive constitutional controversies. Because such views are openly presented, and because I believe that contrary views are fairly considered, the decision to forego an illusory neutrality can enhance the value of the book to all readers, who whether they agree, dissent, or wonder at any given point will know more of the values that may have influenced a particular judgment, which at bottom can never stand solely on a neutral base.

Having said I would be open about my own views, I should state at the outset that I perceive in recent decisions of the Supreme Court a distressing retreat from an appropriate defense of liberty and equality. Given its remarkable activism in constraining the President vis-a-vis Congress and the courts and in limiting Congress vis-a-vis the States, the current Supreme Court cannot be understood as pursuing a modest institutional role. In truth no less activist than its predecessors, the Burger Court has been animated by a specific substantive vision of the proper relationship between individuals and government—a vision I regard as bordering on the authoritarian, unduly beholden to the status quo, and insufficiently sensitive to human rights and needs. I believe that the course of the Burger Court, at least in its first years, will eventually be marked not as the end of an era of exaggerated activism on behalf of individuals and minorities, but as a sad period of often opposite activism, cloaked in the worn-out if well-meant disguise of judicial restraint. Because I understand and respect other assessments, I do not take the correctness of my own view for granted, but rather undertake the case for it. Indeed, my reactions to the Burger Court are not uniformly negative. I reject the thesis that the Court is engaged merely in the dismantling of Warren Court doctrines, and I see much to commend in the current Court's resurrection of economic rights through such provisions as the contract clause and in its efforts to enhance state and local autonomy and responsibility. Admittedly, though, I am more a critic than an admirer of the Burger Court—and in the end, differences of opinion on matters of this sort must turn on different axioms about issues too irreducible to be explored at length in a work on constitutional law. Still I prefer postulates honestly expressed to analyses whose underlying assumptions are obscured by the jargon of neutral principles and the language of "objective" legal description.

Equally fundamental is my belief that the conventional ways even of *stating* the choices between greater freedom or equality, on the one hand, and greater governmental power, on the other hand—and particularly the conventional emphasis on "balancing interests" as the statesmanlike method of making such choices—are remarkably unilluminating as well as misleadingly ahistorical. I think that the evolution of constitutional doctrine can be far better understood in terms of a division of the subject into distinct models of constitutional argument that I believe have shaped, and continue to shape, that fundamental body of law. I introduce seven such models in Chapter 1; they are the central organizing idea of the entire work. By showing how constitutional analysis has been structured over time, I hope not only to clarify otherwise confusing aspects of technical constitutional doctrine but also to expose otherwise concealed doctrinal connections and to reveal possibilities of freedom, equality, and fraternity latent in doctrinal alternatives. In short, I hope to provide not just a summary of constitutional rulings, but a system of thought

about constitutional law. This should serve simultaneously to explicate the traditional approaches and to introduce ideas that go beyond them.

If the pages that follow begin to offer an alternative to the habit of reading the final words of constitutional wisdom solely in the entrails of specific Supreme Court opinions, I will be deeply gratified. But even if this book succeeds only in making more transparent the ideas and tensions that have directed our constitutional development, my investment of years will have been rewarded.

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Cambridge, Mass.
November, 1977

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TABLE OF CASES

Principal cases are in italic type. Cases cited or discussed are in roman type. References are to Pages.