

Second Edition



Constitutional Law and Criminal Justice

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Cliff Roberson

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This book is dedicated to the men and women serving and those who have served in our criminal justice system. We, as Americans, are truly fortunate to have had fine, devoted professionals ever tending that fine blue line. For your anonymous help in our times of need and to perhaps make up some for the thanks that we have failed to express, thank you.

Preface

This book, *Constitutional Law and Criminal Justice*, second edition, is designed to provide students and persons interested in the both our Constitution and criminal justice with an easy-to-read work on the relationship between the two. While I have attempted to remove any indication of my political viewpoints or political opinions of the court decisions from the discussion, some may have crept in for which I apologize in advance. The Constitution is not a perfect document, but it far exceeds anything else available today to ensure basic human rights to the people it serves. A complete text of the U.S. Constitution is attached as Appendix A.

Often I see or hear the statement: “The judge threw out the evidence based on technicalities.” When I see this statement in newspapers or hear it from individuals, I consider it a statement from someone who is uneducated as to the importance of our Constitution. Judges do not exclude evidence for technical reasons; judges exclude evidence based on violations of constitutional rights. The violation of a constitutional right is never a mere technical violation.

Many cases and excerpts of cases are included in the text. In many instances, the cases or excerpts were edited to enhance the understanding of the material. I have taken great effort not to change the meanings of the material so edited. Lawyers, including myself, tend to put in too many citations and extraneous matters. Judges are no exception. The average U.S. Supreme Court decision is approximately 50 pages. Accordingly, editing is necessary.

Even though I am listed as the sole author of the text, numerous persons assisted in the preparation of the manuscript, including the editor at Taylor & Francis, Carolyn Spence, project director Kari A. Budyk, project editor Ed Curtis, and project manager Ramya Gangadharan. Thanks to each of you for your assistance and encouragement. Comments and suggestions for improvement regarding the contents of the material may be forwarded to me by email at cliff.roberson@washburn.edu.

New to the second edition:

- Chapter objectives have been added to each chapter.
- Selected chapters have a summary outline of recent U.S. Supreme Court decisions.
- A summary has been added to each chapter.
- An extended discussion has been added on the issue of “Does the United States have an unwritten constitution in addition to a written one?”
- All chapters were revised in accordance with Supreme Court decisions that were announced after the publication of the first edition.

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Introduction to the U.S. Constitution

1

Chapter Objectives

After studying this chapter you should understand the following principles, issues, and concepts:

- The purpose of a written constitution.
- The issues as to whether or not the United States also have an unwritten constitution.
- The impact of the constitutional amendments on the criminal justice system.
- The original first amendment was designed to protect the people from congress.
- The right to bear arms under the Second Amendment is not an absolute right.
- The Fourth, Fifth, and Sixth Amendments are key amendments that have significant impact on the criminal justice system.
- The U.S. Constitution is the supreme law of the land.
- The United States has a dual court system: the federal and the state.
- The Supreme Court decides only a few cases each year.
- Before a court hears a case it must have jurisdiction.

Introduction

Before starting a study of the U.S. Constitution, several key issues should be examined:

- What is the ultimate purpose of a constitution?
- Do we also have an unwritten constitution?
- What is the function of the U.S. Supreme Court?

Why Do Nations Have Constitutions?

In 1787, rather than drafting a constitution, the framers at the Constitutional Convention in Philadelphia could have served as the first legislature and established a structure of government by statutes. As noted by Erwin Chemerinsky in his text, *The Case Against the Supreme Court* (2014), Great Britain has not written a constitution. Chemerinsky also points out that in the Netherlands the courts do not have the power to declare any legislative act unconstitutional. Yet the governments in these two countries are not totalitarian.

The key difference between a government established by legislation and one established by a constitution is that a constitutionally established government is far more difficult to change. A legislative-created government can be modified by subsequent legislation. Probably, the most defining characteristic of the U.S. Constitution is that it is very difficult to alter.

Chemerinsky wonders why a society that is committed to majority rule would be governed by a document that is difficult to change. The framers when they created our constitutional government made it difficult to change. Probably because the framers wanted to limit the government in order to protect the values they cherished. Accordingly, our Constitution limits the ability of a majority to harm or undermine those values that the framers sought to instill in our government. Those values include regular elections, separation of powers, individual rights, and equality.

The U.S. Constitution thus serves as a unifying document and increases our feeling of the legitimacy of government and government actions. In addition, the Constitution protects minorities from the dictates of a bare majority. Without a constitution, a president with a bare majority in both the senate and the house could completely change our government.

Why a Supreme Court?

A short concise answer to this question is that the Court is needed to enforce the Constitution against the will of the majority. While a majority may protect itself through the political processes, it is those in the minorities that need protection from the majority. The minorities include individuals considered as minorities because of their political, social, racial, or economic beliefs or status.

An Unwritten Constitution

Akhil Reed Amar (2012) in his text, *American's Unwritten Constitution*, contends that there are two constitutions that we are governed by: the formal U.S. Constitution and our unwritten constitution. Amar, a Yale Law professor and noted researcher on constitutional issues, points out that our written constitution does not enumerate all of the rules and rights, principles and procedures that actually govern the present-day United States. According to Amar, the 8000 words in our written Constitution only begin to map out the basic ground rules that actually govern our government. He notes that the First Amendment prevents "Congress" from abridging various freedoms but it does not expressly protect those freedoms from abridgement by the president or the states. The written constitution does not mention the right of privacy that the Supreme Court has held to be a constitutional right. Other rights that exist that are not covered by the written constitution are those embodied in the Miranda warning, the exclusionary rule, the rule of law, separation of powers, and checks and balances.

Impact on Criminal Justice

Any study on the impact of the U.S. Constitution on the criminal justice system will consist mostly of a study of the first 10 amendments to the Constitution, the Bill of Rights. Generally, the Bill of Rights is studied in separate segments. As noted by Amar (1998), students study the First, Ninth, and Tenth Amendments in an introductory course in constitutional law. The Fourth, Fifth, Sixth, and Eighth Amendments are studied in a course on criminal procedure, and the Fourth is also studied in courses on evidence. The due process clause of the Fifth Amendment is also studied in courses on property law. The Seventh Amendment is normally studied in a course in civil procedure. Amar notes that

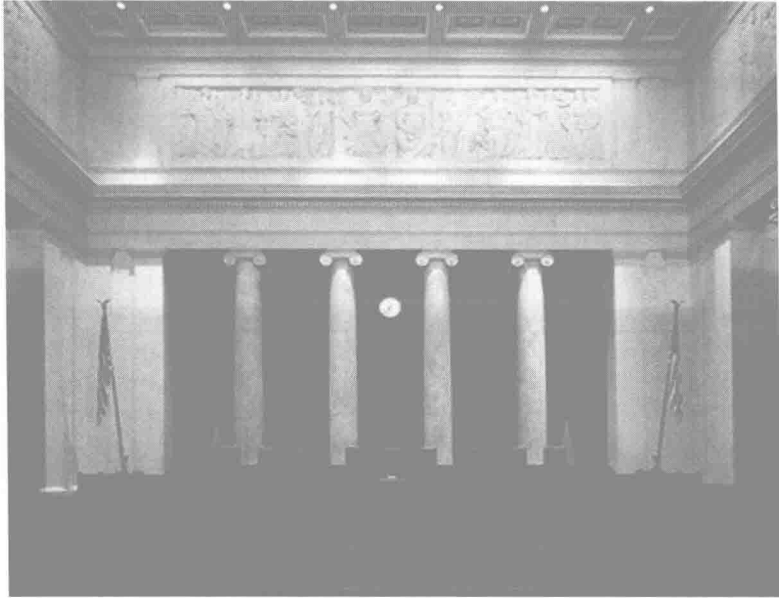


FIGURE 1.1 Courtroom where the U.S. Supreme Court has sat since 1935. (Photo by Cliff Roberson.)

the Second and Third Amendments are generally ignored. In this chapter, we will briefly examine all the amendments to introduce the Bill of Rights as a whole document rather than separate amendments. In Chapters 2 through 10 we will examine in more detail those amendments that significantly impact the criminal justice system.

The U.S. Supreme Court traditionally decides more business- and corporate-related cases than those involving criminal justice. Each year, the Court receives about 10,000 petitions for review. The Court accepts less than 2% of the petitions, and most of those will be in areas other than criminal justice. A review of the Court's last 20 years indicates that the Court will decide fewer than 20 cases involving criminal justice issues each year. Figure 1.1 is a picture of the courtroom where the Court presently hears cases.

Original Constitution

By “original constitution” I am referring to the Constitution as first proposed by the Philadelphia convention. This constitution focused primarily on the organizational structure of the new government and the self-governance issues of federalism, separation of powers, bicameralism, and how the Constitution could be amended. The general consensus is that the Bill of Rights that was drafted by the first Congress had little to say on those issues and instead focused on the rights of individuals and minority groups. Amar (1998) disagrees with this consensus and contends that the Bill of Rights includes structural ideas that are interconnected with the language of the amendments.

The original constitution contained no Bill of Rights. Because the records of the Philadelphia convention are fragmentary, it can only be speculated as to why they were left out of the Constitution (Cohen and Danelski, 2002). Shortly before the convention