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*Third
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CONSTITUTIONAL LAW

Third Edition

Erwin Chemerinsky

Dean and Distinguished Professor of Law
University of California, Irvine, School of Law



Wolters Kluwer

Law & Business

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This book is dedicated to my students—
past, present, and future.

PREFACE

This book is dedicated to my students and is a product of having listened to their views about constitutional law casebooks over the past 29 years. Although I have used several different books, my students always have voiced the desire for a more straightforward, student-friendly text. With the encouragement and support of Carol McGeehan at Aspen Publishers, that is what I have tried to provide.

Concerns that my students have raised have influenced every aspect of this book. They have expressed a desire for a book that does not pose countless rhetorical questions, leaving them uncertain about what to focus on in their studying. This book assumes that each teacher will ask the questions that are of greatest interest to him or her. (An accompanying teacher's manual offers suggestions, based on the questions that I focus on in teaching the cases.)

My students also have communicated experiencing difficulty with passages from excerpted law review articles. They have indicated that often the excerpts are so brief and so removed from the context of the original article that they are difficult to understand. They also have expressed the desire for a book that provides more context for understanding the cases.

This book attempts to address these concerns by presenting, almost without exception, just three types of material: major cases, secondary cases that are more heavily edited, and author-written essays. My essays are meant to provide a context for the cases, to provide historical background, to describe the development of the law in areas where the cases are not directly presented, and to summarize scholarly debates on various topics. Throughout the book, my goal is to provide students the material I would want them to read before class on a particular topic. Unlike virtually every other constitutional law casebook, there are no numbered notes following cases.

I am not attempting to provide a reference book that is comprehensive in presenting every related case or citations to every major law review article. Instead, my hope is to provide a casebook that gives students the basic material to study and understand constitutional law. Professors desiring to expose their students to the rich scholarly literature on the topic may supplement this book with one of the many excellent constitutional law readers that are available.

The book follows a simple, fairly traditional organization. I realize, however, that every teacher has a preferred structure for the course. I never have followed the organization of any casebook that I have used. Also, I know that the structure and organization of constitutional law courses vary widely across the country. Therefore, I have written this book so that it will be easy for teachers to use in any order. Except for references to make clear where particular topics are covered, I have tried to avoid referring to material in other chapters in a way that assumes students have read the book in order.

The book is organized in ten chapters. Chapter 1 focuses on the federal judicial power. After presenting the cases on the authority for judicial review, Chapter 1 focuses on the method of constitutional interpretation, Congressional control over Supreme Court jurisdiction, and the justiciability doctrines as constraints on the judicial power. Apart from the justiciability doctrines, other constitutional and prudential limits on the federal judicial power, such as the abstention doctrines, are omitted because they usually are covered in federal courts courses rather than in constitutional law. The one exception to this is that Chapter 2, which discusses Congressional power, includes a subsection on Congress's ability to authorize suits against state governments. This includes discussion of the Eleventh Amendment and recent sovereign immunity cases.

Chapter 2 focuses on the federal legislative power, particularly in relation to the scope of Congress's power and the extent to which concern for state sovereignty should limit such power. The chapter begins by considering *McCulloch v. Maryland* and then examines, in detail, several specific Congressional powers: the Commerce Clause, the spending power, § 5 of the Fourteenth Amendment, and the authority to authorize suits against state governments. In each area, the focus is on the breadth of Congressional authority and the extent to which concern for states should cause it to be interpreted narrowly or should restrict it through the Tenth Amendment.

Chapter 3 examines the federal executive power, particularly in relation to executive-legislative conflicts. Thus as a matter of organization, the focus of Chapter 2 is Congress's power relative to state authority and the focus of Chapter 3 is issues arising in conflicts between Congress and the executive branch. The chapter begins by considering whether the President may exercise inherent authority and its application to the area of executive privilege. Next, the chapter looks at the constitutional problems of administrative agencies, including the non-delegation doctrine; the legislative veto; and other ways of holding agencies accountable, such as the appointment and removal powers. The chapter then considers the President's powers in foreign affairs and in the war on terror. Finally, the chapter considers ways of holding the executive accountable, such as through civil suits or impeachment.

Chapter 4 focuses on federalism as a limit on state and local power. The chapter begins by examining the issue of preemption and then considers the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV. The chapter concludes with a short discussion of state taxation of interstate commerce.

Chapter 5 is titled "The Structure of the Constitution's Protection of Civil Rights and Civil Liberties." It attempts to present material concerning every part of the Constitution dealing with individual liberties and civil rights. Specifically, the central theme of the chapter concerns to whom the Constitution applies. The chapter examines the application of the Bill of Rights to the states (incorporation) and the application of the Constitution's protections to private actors (the state action doctrine).

Chapter 6 looks at the Constitution's protection of economic liberties. Freedom of contract under the Due Process Clause, the Contracts Clause of Article I, § 10, and the Takings Clause are all considered. I have chosen this approach for many reasons. The various doctrines concerning economic liberties are best understood, of course, when studied together, but it is useful for students to see how the Supreme Court treated economic rights over the course of the

twentieth century and to contrast this treatment with its protection of other individual rights in the same period.

Chapter 7 looks at equal protection. After an introduction to the concept of equal protection, Chapter 7 presents the material on rational basis review and then considers discrimination based on race and national origin, gender, alienage, parents' marital status, age, disability, wealth, and sexual orientation.

Chapter 8 examines the Constitution's protection of individual rights, other than the First Amendment. The chapter presents the law concerning rights of privacy and personhood, the right to travel, the right to vote, and the right of access to the courts. The chapter concludes by examining procedural due process rights. The chapter thus covers individual rights protected under each of the clauses of the Fourteenth Amendment: the Due Process, Equal Protection, and the Privileges or Immunities Clause. Although the chapter is clear about where each right was found and is protected, its unifying theme is its focus on the rights possessed by individuals.

Chapter 9 focuses on the First Amendment's protection of freedom of expression. This is the longest chapter of the book and I recognize that courses vary in how they cover this topic. Some schools, such as my own, have an entire course devoted to the First Amendment's protection of speech and religion. For such courses, I have been fairly comprehensive in covering these topics, so that the book has enough material in these two chapters to be used for an entire course. However, I also recognize that some constitutional law courses cover the First Amendment as a smaller part of a broader survey course. I therefore tried to be careful to construct the chapter so that it could be used in whole or in part, in any order, and still be comprehensible.

The chapter begins by considering the Court's method in examining freedom of speech, examining topics such as the distinctions between content-based and content-neutral government regulation, prior restraints, vagueness and overbreadth, what is "speech," and what is an infringement of speech. The chapter then considers the categories of unprotected and less-protected speech, such as incitement, sexual speech, commercial speech, defamation, and so on. The chapter then examines the availability of property for speech and concludes by considering, in turn, freedom of association and freedom of the press.

Finally, Chapter 10 looks at the Religion Clauses: the Free Exercise Clause and the Establishment Clause. Again, the goal is to provide sufficient material to allow use of the book in a course specializing in the First Amendment or to allow excerption for a constitutional law survey course.

In the years since the second edition, there have been major decisions in virtually every area of constitutional law including standing, congressional power, presidential power and the war on terror, preemption, school desegregation, abortion rights and voting rights, and First Amendment issues concerning speech and religion. There is substantial coverage of all of these new developments. One disquieting trend has been the significant increase in the length of Supreme Court opinions. I have erred on the side of completeness to give students a full sense of the arguments on both sides.

Two other prefatory comments are necessary. When I began this book, my goal was to edit the cases less than most constitutional law casebooks. Reading the original decisions convinces me that for virtually every case, important material inevitably has been excised. However, as I worked on the book, I discovered that producing a text of reasonable length necessitates far more editing than I

wish were necessary. I agonized over how to cut the cases and always ended up editing far more than I wanted. For the sake of readability, I have not indicated with ellipses where I have cut. Providing ellipses does not tell the reader anything about what was omitted, and constant ellipses are distracting. However, additions to the Court's language, even of a word, are indicated in brackets. I generally omitted the Court's citations, except where they seemed important to communicate something specific about the authority relied upon.

The other prefatory comment concerns the relationship of this book to my one-volume treatise, *Constitutional Law: Principles and Policies*. The books are quite different in their goals and presentation. This is a casebook designed to present the major cases of constitutional law along with sufficient additional material to provide context and a basis for class discussions. The treatise is meant to be a reference work that summarizes the law and describes competing policy considerations.

Of course, there are places where I am saying essentially the same thing, such as in providing context and historical background. Initially, I was determined not to repeat anything I said in the treatise. This proved impossible and, I think, unnecessary. I often could not think of other ways to communicate the same material. Thus, sometimes the same language, and even the same paragraphs, appear in both books. My hope is that this will in no way diminish the usefulness of my treatise, even for students using this casebook. The books are so different in their focus and presentation that occasional overlap should not be a problem.

The third edition follows the same approach as the first two editions, but has the benefit of many helpful comments and suggestions I received from users of the book. In some places, the cases are less edited.

This third edition is current through the end of the Supreme Court's October 2007 term, which ended on June 26, 2008. I will continue to prepare annual supplements and a new edition every four years. I welcome suggestions from students and teachers using this book.

Erwin Chemerinsky

March 2009

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Finally, and most important, I want to thank my family: my wife, Catherine Fisk, and my children, Jeff, Adam, Alex, and Mara. Their love, support, and encouragement mean more than words can ever express.

THE CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, judgment and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each house shall be the Judge of the Elections, Returns and Qualifications of its own members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.