Civil Rights and Liberties

Cases and Readings in Constitutional Law and American Democracy

Corey Brettschneider

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For my father, Eric Brettschneider,
who brought me to my first law class at age six.

ABOUT THE AUTHOR

COREY BRETTSCHNEIDER is Professor of Political Science at Brown University, where he teaches courses in political theory and public law. He is also Associate Professor, by courtesy, of Philosophy. Brettschneider has been a Rockefeller Faculty Fellow at the Princeton University Center for Human Values, a Visiting Associate Professor at Harvard Law School, and a Faculty Fellow at the Harvard Safra Center for Ethics.

Brettschneider received a Ph.D. in Politics from Princeton University and a J.D. from Stanford University. He is the author of *Value Democracy: Promoting Equality and Protecting Rights* (Princeton University Press, 2012) and *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007). His articles have appeared in top journals. They include "The Politics of the Personal: A Liberal Approach," in *American Political Science Review* (2007), "A Transformative Theory of Religious Freedom," in *Political Theory* (2010), and "When the State Speaks, What Should It Say? Democratic Persuasion and the Freedom of Expression," in *Perspectives on Politics* (2011).

PREFACE

Perhaps no other area of study brings together as many exciting and controversial issues as the study of constitutional law. The most hotly contested topics in our polity—from abortion rights to affirmative action to war—are found in the various areas that make up this field. But in addition to being contemporary, the topic is also by its nature historical. These contemporary topics are viewed through the lens of a document written in the eighteenth century. Thus, the study of constitutional law presents a major challenge: How can a document written so early in American history govern questions that those who wrote it could never have fathomed?

As we will see throughout this text, the question of how to interpret the Constitution, and how to apply it to today's issues, is itself contested. Debates rage among "originalists" devoted to the original meaning of the Constitution, "pragmatists" committed to future-oriented policy decisions, "proceduralists" concerned to see the document as reinforcing democracy, and those who advocate a "moral reading" of the Constitution, who emphasize the need to decide constitutional questions based on the document's underlying moral principles. Rather than shying away from the controversies at the heart of constitutional law, and the related debates among citizens and academics about these issues, this book is compiled with the aim of introducing you to the terrain of these debates. Through landmark and contemporary cases as well as through other seminal readings, historical writings, and commentary by leading scholars, you will learn how to think about the most complex and important legal challenges in our nation.

In addition to presenting some of the most important cases in American history, this book emphasizes readings that place these cases in the context of wider normative and historical debates, with the hope that it can be taught both in constitutional law classes and in those that seek to combine political theory and philosophy with a study of American political development and of the Supreme Court. The approach is designed to teach you the contours of the legal debates in the area of constitutional law. But as I see it, the role of teaching constitutional law is not primarily to train future litigators—although some of you might choose that path. It is rather to give you an understanding of the Constitution itself, the primary ways in which it has been interpreted by our

political institutions, and the ways you can connect your own views on these subjects with distinctly legal questions. You will thus not only come away from this book with an understanding of the positions of the Supreme Court and of major scholars on a host of issues, but you will also have become constitutional interpreters yourselves.

Corey Brettschneider
Brown University
June 2013

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I began this project several years ago to create a casebook that teaches constitutional doctrine by tying it to fundamental themes from constitutional theory, political theory, political science, and the study of democracy. My aim was to write a book informed by the way many scholars teach constitutional law, and one that reflects the wide research interests of those who work in the subject.

I am grateful to the many students who have taken my courses at Brown University. The book grows out of what was originally my civil liberties course, later expanded to include a discussion of governmental powers. When I first came to Brown I worked with students to create a course that had the right balance between cases and readings on larger themes related to the U.S. Constitution. As I developed drafts of the book, I began teaching it. My students' feedback over the last three years has been fundamental in shaping the final product.

I am most indebted to the outstanding and inspiring team of Brown undergraduates who worked as research assistants on the project and who made its completion possible. They made working on the book a pleasure, and they were often the ones teaching me. Tobin Marcus provided invaluable support at the proposal stage. David McNamee and Manuel Possolo worked closely with me on all aspects of the book's first draft. Together we finalized the outline, selecting the readings and cases. David and Manuel helped to find the right tone and approach in the commentaries. Tobin, David, and Manuel have already achieved terrific success at top law and PhD programs, working in positions of responsibility for the federal government. Brittany Harwood also provided invaluable support on the first draft.

The second and final drafts saw another impressive team of Research Assistants: Jasleen Salwan, Andrea Matthews, and Anthony Badami helped add readings, rewrite much of the commentary, and respond to excellent suggestions from reviewers. This team was essential to finishing the book, and it was a pleasure to work with them. Jasleen in particular provided a heroic and efficient effort as the manuscript reached the final stages. Her work on the accompanying products, especially the instructor's manual, shows that she is already a brilliant teacher.

I thank not only my students, but also my teachers who introduced me to the subject of constitutional law. At Princeton, Amy Gutmann, George Kateb, Stephen Macedo, and Robert George taught me early on that political theorists have an obligation to engage with constitutional issues and have a valuable contribution to make in understanding the most important document of our government. I will always be grateful to these teachers, and I deeply appreciate their continued friendship and mentorship. At Stanford Law, Lawrence Lessig was an ideal mentor who showed me how to be rigorous yet creative in thinking about doctrine. I thank him too for his continued support of my research and career. Kathleen Sullivan taught what might be the most perfect first-year constitutional law course in existence. Tom Grey supervised my independent work and provided a model of how to integrate legal theory and constitutional law.

It is also a pleasure to thank my terrific colleagues who enthusiastically supported this project from the start. James Morone, John Tomasi, Sharon Krause, David Estlund, and Charles Larmore are an extraordinarily collegial group working across the boundaries of philosophy and political science. I have been happy to build the political theory program at Brown with them. Estlund and I taught a Harvard Law course in 2009 on "Democratic Theory and the Law," related to the materials in this book. I learned an immense amount from him and from our students in the course. I am indebted to the people at Aspen who made this book possible. In particular I would like to thank Carol McGeehan at Aspen for encouraging me to pursue this project, and Susan Boulanger for terrific editing work.

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INTRODUCTION TO *CIVIL RIGHTS AND LIBERTIES: CASES AND READINGS IN CONSTITUTIONAL LAW AND AMERICAN DEMOCRACY*

In the United States, it is no longer contested that the Supreme Court has the power to strike down laws passed by Congress, the states, or municipalities that violate the Constitution. And while the Court operates under strict majoritarian rule—it takes only five of the nine justices to make these momentous decisions—the Court itself uses this power of judicial review to block and reverse the preferences of a national majority expressed through their elected representatives. This raises obvious questions: Why? Should the Supreme Court have this power? If so, how should it be exercised? These questions seem particularly puzzling in a democracy. Many Americans believe that they live in a system of self-government, in which majorities have a say in making law. Why, then, should such a small number of people be entitled to pass judgment on the preferences and will of hundreds of millions?

Alexander Bickel perhaps most famously addresses this problem, which he calls the "counter-majoritarian difficulty."* For Bickel, the fundamental question in examining the Constitution is whether we can regard the Court's power of judicial review as democratic given the minuscule number of people that are involved in the process of judicial review, as compared to the multitudes involved in the legislative process. He also challenges the idea that the Court is democratic, given the fact that its members are not elected, but rather appointed by the president. We will return to Bickel's "counter-majoritarian difficulty" and this dual challenge it poses to the Court, in analyzing readings throughout the volume.

One response to Bickel's objection appeals to the text of the Constitution itself. The justices, we might think, have the power to strike down legislation not in order to impose their own beliefs about policy, but rather as a means to enforce the document's requirements. The power of "judicial review," then, might be thought to stem from the Constitution's inherent supremacy over other governmental actions. Indeed, Article VI of the Constitution tells us that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

*See Alexander Bickel, The Least Dangerous Branch (Yale University Press 1986).

The claim that the Constitution is supreme, however, only raises a deeper question that will be at the heart of our inquiry into constitutional law in this book. Namely, although the Constitution is at times clear in its meaning, it is often ambiguous. In some places, it is hard to imagine much disagreement about its terms. For example, no one could argue that someone 22 years of age is eligible to be elected President of the United States. Article II, Section 1 of the Constitution explicitly states that the office excludes any "person . . . who shall not have attained to the Age of thirty five." Similarly, the Constitution is clear that "The Senate of the United States shall be composed of two Senators from each State." In contrast, consider whether the Eighth Amendment's prohibition of "cruel and unusual punishment" forbids the use of the electric chair in executions. What is "cruel"? What is "unusual"? According to whom? The Eighth Amendment does not set up a clear rule; rather, it creates a standard that must be subject to interpretation. Indeed, at points in American history, some have claimed that the death penalty constitutes "cruel and unusual" punishment. Others have disagreed, suggesting that because capital punishment is explicitly referenced in the Constitution, it cannot be prohibited by the document.

A course that merely focused on the least ambiguous provisions of the Constitution would not be very interesting. You would merely be asked obvious questions, such as the one I asked about the 22-year-old candidate for president, and would reach obvious conclusions. But fortunately, the bulk of constitutional inquiry that makes up the body of constitutional law, and that we will pursue here, is fraught with disagreement and contains some of the most interesting debates in American history. Indeed, in the United States, many of the issues discussed at our dinner tables and in our newspapers are "constitutionalized." The issues of abortion, the right to die, and the freedom of speech are among those that gain the most attention in our society. The Supreme Court, by overturning laws within these domains, has entered into the fray. Far from shying from controversy in this book, we will dive right into it.

Specifically, we will concern ourselves with two purposes. First, we will examine what the Supreme Court has said about a host of controversies. Second, rather than merely learn what the Court has said and done, we will challenge its conclusions and reasoning, taking on the task of constitutional interpretation ourselves.

Structure of the Book

Our inquiry, then, begins with a foundational problem in constitutional law — constitutional interpretation. Chapter 1 tackles a variety of accounts that explain how the Court ought to interpret the Constitution if it does, in fact, have the power of judicial review. As we will see in this chapter, just as some of the provisions of the document are ambiguous, so too is there great controversy over the way to read those provisions. We will see how justices and political thinkers alike substantively disagree on interpretive strategy.

After this introduction to several interpretive theories, we explore constitutional rights and liberties. This part of the book will examine what these rights are and also will enable you to think for yourselves about what guarantees are provided by the Constitution. We begin with the Free Speech Clause of the First Amendment. Is the protection of free speech only a protection of political speech? Or does it extend to obscene materials as well? We move on in this section to consider religious protections afforded by two clauses in the First Amendment—the right to "free exercise of religion" and the prohibition against any "establishment of religion" by the government. We consider whether the Fourteenth Amendment of the Constitution establishes fundamental rights not explicitly enumerated by the Constitution, such as the right to privacy. The Court has protected some of these rights under the doctrine of "substantive due process." As we will see in the later chapters, such an inquiry takes us broadly into the areas of procreation, abortion, and the right to die.

The final two chapters look only at the Fourteenth Amendment, which guarantees citizens "equal protection of the laws." Here we will inquire into what kind of equality is protected by the Constitution. We will ask under which circumstances, if any, it is fair for laws to treat people differently on the basis of race, gender, or sexual orientation. We will also investigate the extent to which ideas of fairness bear upon our understanding of equal protection in these same areas.

Throughout this book, we will be guided both by the opinions of the Supreme Court and by the most important writers thinking about these issues.

How to Read and Brief a Case

It is important for you to note that there is a specific way to read, or to decode, the cases to follow. Namely, it will be helpful, especially in the first few cases that you read, to create a "case outline" or "brief." It is essential that this be done in a particular way to ensure that you have understood the case. I will include here some essential elements that must be included in a case brief, although your instructor might point you to others. First, it is essential to understand the basic facts of the case. In some instances, this will involve one party suing another; in others, an individual who has been arrested and accused of a crime; in still others, a contract dispute between two parties. In issues about a dispute between two parties, be sure to note who the original *plaintiff* and *defendant* were at the trial level. In criminal cases, the dispute is between the *government* and the *defendant*; there is no *plaintiff* in such cases. It is important, however, not to confuse plaintiff and defendant with the *petitioner* and *respondent*, terms that refer in appeals cases to the party who lost at the previous level, and the party who won, respectively. Usually, though not always, the petitioner's name will be first in the name of the case.

Second, it is essential to identify what is known as the legal issue in the case. The legal issue can be summarized in one sentence. Try to see in each case if you can identify one question that summarizes the legal issue, and then see how the Court answers it. Third, we want to identify the holding of the case. The holding

is sometimes as short as "yes" or "no" respecting the legal issue. For instance, when you read *District of Columbia v. Heller*, the legal issue is: Does the District of Columbia's gun ban violate the Second Amendment? The holding here answers the question in the affirmative.

Fourth, you should be able to identify the legal reasoning that explains why the holding is reached. Here, you will have to reconstruct the legal argument in order to figure out its structure. Finally, be sure to understand the outcome of the case. In whose favor did the Court rule? What are the implications of the ruling? This will not always be as obvious as you might think. In some cases, the reasoning of the Court may appear to support one side, but the judgment may nevertheless fall in favor of another side for various reasons.

Legal Citations

As you read and brief cases, you may find it useful to understand the specialized legal citation format used by judges in the writing of opinions. Each case can be cited using a relatively concise citation consisting of the name of the case, the reporter, the volume number, and page number. The year of the decision is also often included. Supreme Court opinions, which comprise the bulk of the cases in this book, are published in the official *United States Reports*, available in any law library and on the Internet. These reports are referenced with the simple abbreviation "U.S." Thus, a complete citation might look like this: *Roe v. Wade*, 410 U.S. 113 (1973).

Notice that the name of the case is always italicized. On second reference, judges or commentators may refer to a case by a shorter name and will omit the full citation—here, just *Lochner*. When judges wish to cite a particular location in a case, and not merely the case itself, they may cite two page numbers. Thus, a quotation on the third page of *Lochner* would be cited as *Lochner v. New York*, 198 U.S. 45, 47 (1905).

You will also come across citations of lower courts, such as those of federal circuit courts of appeals. These decisions are typically published in the *Federal Reporter* and are cited with the abbreviations F. or F.2d (for older cases) and F.3d (for more recent ones). Select opinions from district-level courts are published in the *Federal Supplement*, abbreviated as F. Supp. or F. Supp. 2d. Cases heard in state courts have varying citation formats, which you will not need to worry about for this book. It is usually possible, however, to decipher what they refer to.

The case law you will read in this book has been edited and abridged—indeed, many of the cases you will read run to 100 pages or more in the original. If you are curious to read the original versions of any of these cases, you can find them easily in any law library or online at Web sites such as FindLaw, Westlaw, or the Cornell Law Legal Information Institute. We have also listed these cases at the Web site that accompanies this book.

INTRODUCTION TO THE CONSTITUTION AND THE SUPREME COURT

Overview of the Constitution

Before we tackle the important and controversial issues that make up the bulk of this book, it is important to clarify some basic features of the Constitution, which form the basis for most constitutional issues. You should read the entire text of the document itself, included below, starting on page xli, before reading what follows.

The first thing you should note about the document is that its first three articles establish the three branches of government. Article I creates Congress, the legislative branch; Article II the office of the President of the United States, the executive; and Article III the judiciary, including the Supreme Court. In establishing each of the branches, the Constitution grants certain powers as well as limiting them. The federal government is thus known to be one of "enumerated" or "granted" powers. In contrast, the state governments have more general powers. For instance, among the powers often thought to be "reserved" to the states is the "police power" within their own jurisdictions to regulate the "welfare, health, safety, and morals" of citizens. The Tenth Amendment lays out the difference between the limited federal government and the states, declaring that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Three Branches of Government (Articles I, II, and III)

Article I of the Constitution creates and lays out the powers of Congress. As you look through Article I, many of the powers will seem to be straightforward. However, even several of those that seem simple at first glance turn out to be at the heart of the most difficult disputes over constitutional interpretation. Take, for instance, the Commerce Clause found in Section 8, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States." A fundamental question here is where this power of the Congress begins and where the power of states to regulate their own "intrastate" commerce ends. What kinds of activity are of an interstate nature, and what kinds belong only to the jurisdiction of one state?