

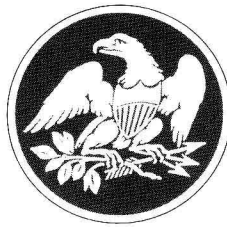
# **Constitutional Structures: Separated Powers and Federalism**



**VOLUME 1 OF  
American Constitutional Law**

**Louis Fisher**

# Constitutional Structures: Separated Powers and Federalism



Volume 1 of American Constitutional Law

Louis Fisher

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SEPARATED POWERS AND FEDERALISM

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## ABOUT THE AUTHOR

LOUIS FISHER received his B.S. from the College of William and Mary and his Ph.D. from the New School for Social Research. After teaching political science at Queens College, he joined the Congressional Research Service of the Library of Congress in 1970, where he is Senior Specialist in Separation of Powers. He has testified before congressional committees on such issues as executive privilege, impoundment of funds, legislative vetoes, the item veto, the pocket veto, executive reorganization authority, executive spending discretion, and the congressional budget process. During 1987 he served as Research Director for the House Iran-Contra Committee.

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TO THE  
NEW SCHOOL FOR SOCIAL RESEARCH



# INTRODUCTION

To accommodate the leading cases on constitutional law, textbooks concentrate on court decisions and overlook the political, historical, and social framework in which these decisions are handed down. Constitutional law is thus reduced to the judicial exercise of divining the meaning of textual provisions. The larger process, including judicial as well as nonjudicial actors, is ignored. The consequence, as noted recently by a law professor, is the absence of a “comprehensive course on constitutional law in any meaningful sense in American law schools.”<sup>1</sup>

The political process must be understood because it establishes the boundaries for judicial activity and influences the substance of specific decisions, if not immediately, then within a few years. This book keeps legal issues in a broad political context. Cases should not be torn from their environment. A purely legalistic approach to constitutional law misses the constant, creative interplay between the judiciary and the political branches. The Supreme Court is not the exclusive source of constitutional law. It is not the sole or even dominant agency in deciding constitutional questions. The Constitution is interpreted initially by a private citizen, legislator, or executive official. Someone from the private or public sector decides that an action violates the Constitution; political pressures build in ways to reshape fundamental constitutional doctrines.

These developments affect the entire public. Justice Blackmun, in a 1982 interview, emphasized that the Court “doesn’t belong to me, or to the nine of us, or to the Chief Justice. It’s an instrument of government. And I try to preach the gospel that lay people, as well as lawyers, should take an interest in the Court and what it’s doing.”<sup>2</sup> Constitutional law, pared to its essentials, expresses how we want to live as

<sup>1</sup>W. Michael Reisman, “International Incidents: Introduction to a New Genre in the Study of International Law,” 10 *Yale J. Int’l L.* 1, 8 n. 13 (1984).

<sup>2</sup>“A Justice Speaks Out: A Conversation with Harry A. Blackmun,” Cable News Network, Inc., conducted November 25, 1982, at 20.

individuals within a society. What powers shall government exercise? What rights and liberties remain with us? Basic questions of political philosophy and conscience are at stake.

Constitutional questions are considered when Congress debates legislation and when Presidents decide to sign or veto bills presented to them. The Attorney General and the Comptroller General analyze (and resolve) many constitutional questions, as do general counsels in the agencies. Actions by the political branches, over the course of years, help determine the direction and result of a Supreme Court decision. Constitutional issues are often hammered out without the need for litigation.

Charles Evans Hughes, in a widely quoted epigram, said that “We are under the Constitution, but the Constitution is what the judges say it is.”<sup>3</sup> The Supreme Court nevertheless recognizes that each branch of government, in the performance of its duties, must initially interpret the Constitution.<sup>4</sup> Those interpretations are given great weight by the Court; sometimes they are the controlling factor.<sup>5</sup> A number of issues never reach the courts because of self-limiting conditions imposed by judges: the doctrines of ripeness, mootness, standing, political questions, and prudential considerations.

When the Supreme Court decides a question, the ruling must be translated into action by lower courts, executive agencies, Congress, and local government. Ambiguities and generalities in a ruling produce broad choices of interpretation and implementation. Decisions usually provide only a broad framework for public officials and citizens. As Justice Frankfurter once noted, the Court “can only hope to set limits and point the way.”<sup>6</sup> If Congress, the President, and the public oppose a decision, it is often only a matter of time before the issue is back in the political stream to test and usually alter what the Court has announced.

Books on constitutional law sometimes focus exclusively on Supreme Court decisions and stress its doctrines, as though lower courts and governmental officials are unimportant. Other studies describe constitutional decisionmaking as lacking in legal principle, based on low-level political haggling by various actors. I see an open and vigorous system struggling to produce principled constitutional law. Principles are important. Constitutional interpretations are not idiosyncratic events or the result of a political free-for-all. If they were, our devotion to the rule of law would be either absurd or a matter of whimsy.

It is traditional to focus on constitutional rather than statutory interpretation, and yet the boundaries between these categories are unclear. Issues of constitutional dimension usually form a backdrop to “statutory” questions. Preoccupation with the Supreme Court as the principal or final arbiter of constitutional questions fosters a misleading impression. A dominant business of the Court is statutory construction, and through that function it interacts with other branches of government in a process that refines the meaning of the Constitution. The judicial branch has fashioned guidelines to avoid many of the constitutional issues pressed upon it. If a

<sup>3</sup>Charles Evans Hughes, *Addresses and Papers* 139 (1908).

<sup>4</sup>*United States v. Nixon*, 418 U.S. 683, 703 (1974).

<sup>5</sup>*Rostker v. Goldberg*, 453 U.S. 57 (1981), concerning male-only registration for military service.

<sup>6</sup>*Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (concurring opinion).

case can be decided either on constitutional grounds or as a question of statutory construction, the courts prefer to deal only with the latter.<sup>7</sup>

This study treats the Supreme Court and lower courts as one branch of a political system with a difficult but necessary task to perform. They often share with the Legislature and the Executive the responsibility for defining political values, resolving political conflict, and protecting the political process. Through commentary and reading selections, I try to bridge the artificial gap in the literature that presently separates law from politics. Lord Radcliffe advised that “we cannot learn law by learning law.” Law must be “a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. It is not strong enough in itself to be a philosophy in itself.”<sup>8</sup>

*A Note on Citations.* The introductory essays to each chapter contain many citations to court cases, public laws, congressional reports, and floor debates. The number of these citations may seem confusing and even overwhelming. In part I want to encourage the reader to consult these documents and develop a richer appreciation for the complex process that shapes constitutional law. Repeated citations to federal statutes help underscore the ongoing role of Congress and the executive branch in constitutional interpretation. To permit deeper exploration of certain issues, either for a term paper or scholarly research, footnotes contain leads to supplementary cases. Bibliographies are provided for each chapter. The appendices include a glossary of legal terms and a primer on researching the law.

If the coverage is too detailed, the instructor may always advise students to skip some of the material. Another option is to ask the student to understand two or three departures from a general doctrine, such as the famous *Miranda* warning developed by the Warren Court but whittled away by the Burger and Rehnquist Courts. Even if a student is dumbfounded by the complexity of constitutional law, it is better to be aware of the delicate shadings that exist than to believe that the Court paints with bold, permanent strokes.

At various points in the chapters I give examples where state courts, refusing to follow the lead of the Supreme Court, conferred greater constitutional rights than available at the federal level. These are examples only. They could have been multiplied many times over. No one should assume that rulings from the Supreme Court represent the last word on constitutional law, even for lower courts.

Compared to other texts written by political scientists, this book offers much more in the way of citations to earlier decisions. I do this for several reasons. The citations allow the reader to research areas in greater depth. They also highlight the process of trial-and-error used by the Court to clarify constitutional principles. Concentration on contemporary cases would obscure the Court's record of veering down side roads, backtracking, and reversing direction. Focusing on landmark cases prevents the reader from understanding the *development* of constitutional law: the dizzying exceptions to “settled” doctrines, the laborious manner in which the Court struggles to fix the meaning of the Constitution, the twists and turns, the detours and dead ends. Describing major cases without these tangled patterns would presume an

<sup>7</sup>Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). See also *Rescue Army v. Minicipal Court*, 331 U.S. 549, 568-572 (1947).

<sup>8</sup>Lord Radcliffe, *The Law & Its Compass* 92-93 (1960).

orderly and static system that mocks the dynamic, fitful, creative, and consensus-building process that exists. No one branch of government prevails. The process is polyarchal, not hierarchical. The latter, perhaps attractive for architectural structures, is inconsistent with our aspiration for self-government.

In all court cases and other documents included as readings, footnotes have been deleted. For footnotes in the introductory essays, standard reference works are abbreviated as follows:

- |                          |  |
|--------------------------|--|
| Elliot                   | Jonathan Elliot, ed., <i>The Debates in the Several State Conventions, on the Adoption of the Federal Constitution</i> (5 vols., Washington, D.C., 1836-1845). |
| Farrand                  | Max Farrand, ed., <i>The Records of the Federal Convention of 1787</i> (4 vols., New Haven: Yale University Press, 1937).                                      |
| Richardson               | James D. Richardson, ed., <i>A Compilation of the Messages and Papers of the Presidents</i> (20 vols., New York: Bureau of National Literature, 1897-1925).    |
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This is my seventh book since graduating from the New School for Social Research in 1967. I had received a bachelor's degree in chemistry, completed some graduate work in physical chemistry, and did technical writing for a few years before taking undergraduate classes in the social sciences at the New School. In 1963, after a conference with Joseph Greenbaum, Dean of the Graduate Faculty of Political and Social Science at the New School, I was accepted into the graduate program. As I walked down the hall, exhilarated by my new venture, he stuck his head out of his office and shouted: "Don't take any more chemistry." I haven't. Grateful for four stimulating years of graduate work at an institution that urges interdisciplinary research, I am happy to dedicate this book to the New School.

LOUIS FISHER

**Constitutional Structures:  
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