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Erwin Chemerinsky



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CONSTITUTIONAL LAW

Principles and Policies

Fourth Edition

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Constitutional Law

Principles and Policies

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*For my family —
Catherine, Jeffrey, Kim, Adam, Alex, and Mara*

Preface

The American Constitution is in many ways an amazing document. Written over 200 years ago for a vastly different world, it remains the vehicle for debating and resolving society's most profound political and moral issues. Although it can be discussed in terms of elegant abstract theories, it also has enormous practical effects on the most intimate and important aspects of people's lives.

Constitutional principles can and must be evaluated from a myriad of perspectives: issues of interpretation and how meaning should be given to the document; questions of institutional competence, especially as to the role of the judiciary in a democratic society; normative visions about theories of government and individual freedoms; and perhaps most of all, in terms of how constitutional doctrines affect people's lives. Ultimately, constitutional law is about the meaning of a just society and how best to achieve it.

My goal is to write the most thorough and lucid discussion of American constitutional law that I can in approximately 1,400 pages. I want both to state clearly constitutional doctrines and to identify the competing policy considerations in each area.

Constitutional law is a vast field, and space limitation affected every aspect of the book. First, many aspects of constitutional law that are covered in parts of the law school curriculum other than constitutional law courses are omitted. Most notably, constitutional provisions concerning criminal procedure — such as the Fourth Amendment, the Fifth Amendment's double jeopardy and grand jury clauses, and the Sixth Amendment — are not included. Nor does the book cover aspects of federal court jurisdiction that are traditionally the focus of federal jurisdiction courses, such as the Eleventh Amendment and abstention doctrines.¹

¹ These are covered in detail in Erwin Chemerinsky, *Federal Jurisdiction* (6th ed. 2012).

Preface

Second, the focus is primarily on the Supreme Court, and there is relatively little discussion of lower court decisions. There are many areas where lower court decisions are mentioned or cited, but there simply was not space for lengthy discussion of lower court approaches on various issues.

Finally, citations to secondary source materials are kept to a minimum. Although the literature on constitutional law is very rich, only a relatively small amount is cited in each area.

The material is divided into 12 chapters. Chapter 1 is an introduction and briefly describes the functions of the Constitution, the history of its drafting and ratification, and competing theories of constitutional interpretation.

Chapter 2 focuses on the federal judicial power and examines the authority for judicial review, justiciability doctrines, congressional control of federal court jurisdiction, and sovereign immunity of state governments.

Chapter 3 considers the federal legislative power, including various congressional powers, federalism as a limit on Congress's authority, and the problems of the administrative state.

Chapter 4 examines the federal executive power. A new section of this chapter focuses on presidential power in connection with the war on terrorism. Areas of overlap are acknowledged and dealt with by cross-references.

Chapter 5 discusses limits on state government power necessitated by the existence of a national government and of other states. Specifically, preemption, the dormant commerce clause, state taxation of interstate commerce, and the privileges and immunities clause are considered.

Chapter 6 examines the structure of the Constitution's protection of individual liberties. It discusses provisions in the Constitution's text, apart from the Bill of Rights, that concern individual rights. It also examines basic principles that apply to all the constitutional provisions dealing with individual liberties and civil rights, including the application of the Bill of Rights to the states, the requirement for government action, and the levels of scrutiny.

Chapter 7 focuses on procedural due process. The distinction between procedural and substantive due process is discussed at the outset. The chapter then examines what constitutes a deprivation of life, liberty, or property and what procedures must be followed when such a deprivation occurs.

Chapter 8 considers economic liberties under the Constitution. The chapter explores the use of substantive due process to protect economic rights, the contracts clause of Article I, §10, and the takings clause found in the Fifth Amendment.

Equal protection is examined in Chapter 9. This chapter begins by describing the analytical approach used in equal protection cases and focuses on the ways various types of discrimination have been treated by the Supreme Court.

Preface

Chapter 10 discusses fundamental rights. Because the Court often is unclear about whether a particular right, such as the right to marry, is found under due process or equal protection or both, it is clearest to place in one chapter all the Supreme Court decisions under these provisions that have concerned individual rights. The source of the various rights, of course, is discussed throughout the chapter. Also, new to this edition is a section on the Second Amendment in light of the Supreme Court's important recent decisions.

Chapter 11 looks at the First Amendment's protection of expression, including the rights of speech, press, assembly, and association. Chapter 12 examines the First Amendment's protection of religion under both the free exercise clause and the establishment clause.

Since the publication of the third edition, two new justices have joined the Court: Sonia Sotomayor and Elena Kagan. The Court has handed down many key new rulings affecting areas such as presidential power and the war on terror, the use of race in desegregating schools, abortion rights, the Second Amendment, First Amendment rights of corporations and unions in elections, speech rights of government employees, and student speech rights. All of these and many other developments are discussed in detail throughout the book.

The book is complete through the end of the Supreme Court's October 2009 term, which ended on June 29, 2010. It is current through December 31, 2010. In light of the often rapid pace of change in constitutional law, I expect to continue to write new editions at regular intervals. I welcome comments and suggestions from readers.

Erwin Chemerinsky

April 2011

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Writing a one-volume constitutional law treatise often seemed overwhelming. I was enormously helped by many people.

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I completed the first two editions of this book while on the faculty of the University of Southern California Law School. Dean Scott Bice and Dean Matt Spitzer provided constant support and encouragement. My work on the first two editions was enormously aided by my assistant, Margaret Miller. The third edition was completed at Duke Law School, and Dean Kate Bartlett provided great support.

This edition was undertaken and completed at the University of California, Irvine. Chancellor Michael Drake and Executive Vice Chancellor Michael Gottfredson are tremendously supportive of my work and the law school in every way. My assistant, Brandy Stewart, provides invaluable assistance on literally a daily basis.

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