CONSTITUTIONAL LAW

FIFTH EDITION

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Bernard Schwartz co-authored the first three editions of this book. He died on December 23, 1997 and accordingly did not work on subsequent editions. He was a giant among those who follow the Supreme Court's work and who interpret the Constitution, and he is greatly missed.

Joel Goldstein is primarily responsible for the first six chapters. John Attanasio and Norman Redlich prepared chapters 7 to 16.

Norman Redlich

John Attanasio

Joel K. Goldstein

March 2008

PREFACE

I

This book aims to present Constitutional Law in the grand tradition. More than 200 years after its adoption, the United States Constitution continues to provide the basic framework against which many of our problems are addressed. The enterprise of constitutional interpretation involves government officials in all three branches yet judges play a unique role. The judicial review power distinguishes American judges from those of many other lands. Many other nations have now adopted it.

The power is truly awesome. Six citizens — five members of the Supreme Court and one person challenging a law — can trump the wishes of popular majorities and lead to a rule of constitutional law binding on other branches of government and the nation at large. Constitutional jurisprudence is riveting, too, due to the nature of the questions it routinely addresses. These involve the basic structure of our government and our fundamental values as a society and as a culture. Indeed, we live in an age when the Supreme Court routinely encounters issues that engage deep questions of political morality.

We have tried to provide a book that will acquaint readers with constitutional law primarily as it is practiced in courts. We consciously provide readers with tools to recognize and assess the available types of constitutional arguments made in cases, and those that might have been advanced. The constitutional issues the Court addresses often involve deep questions of ethics or political theory. We have tried to organize this book in a way which would encourage students to explore those questions.

We think, too, that cases are important teaching devices. We have erred on the side of retaining the justices' language rather than editing it out and have included important concurrences and dissents. This approach helps educate students about the Court's thinking by allowing the justices to speak for themselves. It also helps redirect the focus away from narrow holdings and toward the reasoning that drives constitutional adjudication. Retaining more of the case serves several other important functions. We include the logical steps of the Court's analysis so the reader can understand the cases more thoroughly, and more quickly. The cases include more of the reasoning of the justices on issues that grow ever more complex. The inclusion of more dicta from the opinions helps the reader make sense of "the law" when decisions are the product of several opinions. Inclusion of this material also helps to predict future decisions in an era when it is growing more necessary to know the views of individual justices. Inclusion of dissents and concurrences provides a dynamic point of departure for classroom discussion as students have already been exposed to a variety of views in their reading. It also suggests the dynamics of constitutional law as students see that the dissents of one generation command majorities in other days.

The Fifth Edition remains faithful to the scheme of the first four. In order to maintain a manageable length while continuing to give a more complete view of what the justices think, we present many important cases as long notes. These notes quote profusely from the opinions of the justices; they extensively review not only majority opinions but also concurrences and dissents. While the principal cases remain less heavily edited than those of other books, they have been pruned to some extent. We also have added many more references to scholarly works with parentheticals designed not so much to summarize the work as to provoke thoughts

and discussion. The ellipse structure is streamlined; for example, we often omit citations without notice.[1]

We have tried to make this book one which a range of readers will find accessible. We hope it allows them to share our passion for, and fascination with, constitutional law. For the reader's convenience, we provide a brief roadmap or overview of where we are going.

II

The book begins by examining the fundamental building block of the course, the power of judicial review. The power of courts to review the constitutionality of decisions of government is fundamental and all but a few of the cases in this book involve exercises of this power. Chapter I reviews the basic organization of the Federal court system and Congress' role in creating Federal courts and in establishing their jurisdiction. Chapter I exposes students to the power of judicial review and the limitations on the judiciary. This includes treatment of the extent to which Congress can limit the jurisdiction of the Supreme Court. Chapter I also explores justiciability, constitutional or prudential reasons why a Federal court may refuse to hear a constitutional or other challenge. Included are basic doctrines involving advisory opinions, mootness, ripeness, standing, and political questions. As with all chapters, we expose students to the types of arguments courts use to shape the doctrine and try to present sufficient material to allow them to shape their views.

The discussion of the court system and the power of judicial review is a fundamental building block for the entire course. At the same time, it also involves the structure of one branch of American government. The Framers intended to disperse power among various government entities. They viewed dispersing governmental authority as an important means of preventing tyranny. In the Federalist Papers, James Madison said:[2]

"[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department, the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Not vesting sovereignty in a single governmental authority, like a king, presents a complex set of problems. Most important, what are the boundary lines between these various

[1] Ellipses frequently depart from bluebook form. When an ellipses appears, it only signifies that some material is omitted. For example, an ellipses at the end of a paragraph may mean that the rest of that paragraph is missing, or only that subsequent paragraphs are missing, or that both the remainder of that paragraph and subsequent paragraphs are missing. Moreover, if a paragraph begins with bracketed material, it indicates that some material in the beginning of the paragraph has been omitted.

[2] Federalist No. 51 *in* THE FEDERALIST 321-22 (C. Rossiter ed., 1961).

governmental entities? Moreover, who sets these boundary lines between various governmental entities? The next few chapters explore the dispersal of power among the three branches of the federal government (the doctrine of separation of powers) and the division of power between the national government and the states (the doctrine of federalism).

Chapter II analyzes the constitutional authority of the United States Congress. After contrasting enumerated and implied powers, the chapter takes up several of Congress' constitutionally enumerated powers. Congressional powers explored include the Commerce Power, the Taxing Power, the Spending Power and Treaty Power. These topics all have implications for separation of powers theory in that they all involve the division of authority between Congress and the other branches of the national government. Still, the cases treating the powers of Congress generally focus on federalism issues; that is, they focus on the division of regulatory authority between Congress and the states.

Emphasizing federalism concerns, Chapter III treats the extent to which the United States Constitution limits the power of Congress to regulate, thereby leaving regulatory power to the States. To a great extent, Chapter III focuses on the Tenth and Eleventh Amendments and structural arguments that have shaped the pertinent doctrine.

Chapter IV continues to focus on federalism issues but turns to examine the extent to which the United States Constitution limits the regulatory powers of the several states. It begins by discussing the fundamental notion that laws and regulations promulgated by the national government are supreme over competing exercises of regulatory power by the states. The chapter proceeds to examine whether there are any limits on the supremacy of the national government itself in the way of directly regulating the states. It then turns to examine intergovernmental tax and regulatory immunities, briefly explores interstate relationships, and concludes by examining the constitutional limits on the ability of the states to regulate interstate commerce. This so-called "dormant commerce clause" jurisprudence is rather extensive and consequently is treated in some detail.

Chapter V returns to separation of powers issues to examine the powers of the executive branch of the national government. The seminal *Youngstown* case is advanced to the beginning of the chapter and presented in greater length because of its centrality. Principal areas examined are authority over domestic and international affairs, and the role as commander-in-chief of the armed forces. In the domestic realm, the chapter explores the President's legislative powers and administrative powers. In connection with the international arena, we explore the foreign affairs power, the power to make executive agreements, and the commander-in-chief authority. The chapter concludes with some fascinating interbranch collisions focused on the Presidency. These include cases dealing with presidential privileges and immunities and cases raising more general themes regarding separation of powers.

The first five Chapters of the book are concerned with structure of government issues revolving around the twin themes of federalism and separation of powers. Chapters VII to XVI focus on individual rights and liberties issues. Chapter VI is the transition to individual rights issues. Specifically, this chapter treats the congressional powers to enforce individual rights using the Thirteenth, Fourteenth, of Fifteenth Amendments to the Constitution — the post-Civil War amendments. These amendments dramatically shifted regulatory power away from the states in favor of the national government. Consequently, the amendments clearly implicate federalism concerns. For example, congressional enforcement of individual rights and liberties stands in some tension with the Supreme Court's role as arbiter of the Constitution, particularly if Congress uses its enforcement power to define the scope of a

constitutional right. These congressional enforcement powers thus also raise important separation of power issues.

By combining separation of powers, federalism, and individual rights issues, Chapter VI serves as a natural transition between the first five chapters of the book which focus on structure of government questions and the last ten which focus on individual rights and liberties issues. This transition also nicely illuminates several important larger points about constitutional analysis. For example, it illustrates that notwithstanding the Court's role as arbiter of the Constitution, other branches of government have authority to enforce the document as well. More importantly, the chapter illuminates the artificiality of rigidly distinguishing between issues of government structure, and issues of individual rights and liberties. The Framers certainly did not create any such stringent distinction. Their design contemplated the protection of individual rights through a government structure that divided power among many different persons and entities. Along with judicial enforcement of rights, this structure prevented impairments of individual rights through unchecked abuse of government power. Moreover, many individual rights decisions have deep structure of government implications. For example, many raise questions about the proper scope of the power of the courts in our constitutional scheme. Some cases, involving such issues as busing or election redistricting, have even more direct federalism or separation of powers implications.

Chapter VI also introduces the critical concept of state action. With rare exceptions, the Constitution only applies to the activities of government. While involvement by the government is a prerequisite for nearly all causes of action arising under the Constitution, such involvement is necessarily present in virtually all structure of government cases. Consequently, the concept of state action is not introduced until this point in the book. Without state action of some sort, no constitutional cause of action generally exists.

Chapter VII focuses on the Due Process Clauses of the Fifth and Fourteenth Amendments. These Clauses prohibit the government from depriving persons of "life, liberty, or property without due process of law." These Clauses have been interpreted by the Supreme Court to protect various categories or kinds of rights. Some of these rights have been more oriented toward property or economics; others involve more personal liberties, such as the right of the accused explicitly guaranteed by the Bill of Rights, or in such other areas as childbearing and child rearing. Some of the rights that the Court has grounded in the Due Process Clauses have largely procedural content, while others are substantive. In the course of the chapter, several additional provisions of the Constitution relating to liberty or property rights are also discussed.

Chapter VII begins by overviewing many of the changes promulgated by the post-Civil War amendments from a judicial perspective rather than the primarily legislative focus of Chapter V. The scope of the changes brought by these amendments has been so vast that many commentators refer to their promulgation as the second framing period. The chapter proceeds briefly to review how the construction of the Due Process Clause of the Fourteenth Amendment incorporates against the states select provisions of the Bill of Rights. We will primarily focus on the selective incorporation against the states of the procedural guarantees afforded a person accused of committing a crime. Proceeding to focus on economic or property rights that are overtly substantive, the chapter explores the rise and fall of liberty of contract as guaranteed by the Court through the doctrine of substantive due process. In this section, we also explore modern economic or property rights afforded by the Court using the Contracts Clause of Article 1, Section 10, and the Takings Clause of the Fifth Amendment.

Turning to the modern Court's revival of substantive due process, the chapter examines cases involving such matters as birth control, abortion, homosexuality and termination of life support systems. The chapter concludes by reviewing the constitutional protections for entitlements granted by the government.

The next four chapters deal with the Equal Protection Clause. With the important exception of the prohibition against titles of nobility, the emphasis on equality is of comparatively recent vintage in the American constitutional landscape. Indeed, the original document explicitly recognized slavery. Despite these ignominious beginnings, a rich jurisprudence of equality has evolved. Chapter VIII examines the developments in the area of racial discrimination. The chapter traces the downfall of segregation and continues by exploring busing and other remedies designed to dismantle segregated schools. It then examines some general themes, in particular, purposeful discrimination and suspect classes. Chapter VIII concludes by examining racial discrimination decisions applying these and other principles to such areas as employment, housing and zoning, voting, and the criminal justice system.

Chapter IX takes up a major, and more recent, theme in the Court's equal protection jurisprudence — gender discrimination. The chapter begins by surveying the different attitudes that the Court has exhibited toward gender discrimination over time. In this section, we also review the Court's struggle to settle on an appropriate standard to deal with these cases. The Court analyzes these cases using a "middle tier" level of scrutiny that is less exacting than the strict scrutiny standard used to review discrimination based on race or ethnicity. After treating some general themes in equal protection jurisprudence relating to gender, the chapter devotes separate sections to gender discrimination cases involving employment, government benefits, and pregnancy. Particularly difficult for the Court have been cases involving the constitutionality of allegedly benign discrimination programs, which are designed to compensate for past discrimination but are often criticized for falling prey to the same stereotypes that they are trying to combat.

Chapter X examines affirmative action. Many of the cases reveal the Court's struggle with the powerful ideal that the law should be color blind and gender neutral, and the harsh reality that strict adherence to this ideal hampers efforts to redress the continuing effects of past discrimination. At times the Court has emphasized what might be called the nondiscrimination principle; at other times, it has allowed affirmative action for the historically disadvantaged. Separate sections of Chapter X deal with affirmative action in education and employment. To achieve a broader understanding of the Court's affirmative action jurisprudence, we have included a few cases decided under Title VII of the Civil Rights Act of 1964, the principal statute dealing with racial, gender, and certain other forms of discrimination in employment. These Title VII cases shed additional light on the Court's affirmative action jurisprudence under the Equal Protection Clause.

Concluding the discussion of equal protection, Chapter XI surveys a number of other theories under which litigants have brought, or the Court has granted, equal protection challenges. These theories generally fall into two categories. One concerns extending some form of suspect class status to other groups. The other tack engages a different strand of equal protection jurisprudence involving fundamental rights. This latter theory maintains that certain fundamental rights, such as the right of access to the appellate process, should be distributed equally — primarily irrespective of wealth. Some decisions incorporate both fundamental rights and suspect class analyses. Chapter XI begins by discussing whether the Court should extend some form of heightened scrutiny to such groups as aliens, illegitimates, the aged, the mentally retarded, homosexuals, and the poor. It proceeds to discuss the right to travel, and

equality in the political process. This latter subject involves such issues as political gerrymandering. The discussion of the Equal Protection Clause concludes by surveying the overwhelming majority of governmental actions involving economic or social policy questions in which the Court exercises virtually no scrutiny and thus affords wide discretion to governmental decisions.

The last five chapters of the book treat the rich jurisprudence of the First Amendment. Some commentators consider this amendment the capstone of American liberties. The first four chapters treat freedom of expression. Various commentators offer different justifications for stringently protecting freedom of speech, but most agree that safeguarding the free flow of information is essential in a democracy to empower the electorate to be able to make informed decisions. Chapter XII traces the development of free speech jurisprudence and the theory underlying it. This development largely evolved from cases pertaining to political speech and association.

Surprisingly, First Amendment jurisprudence did not really develop until the time of the First World War. From this starting point, Chapter XII recounts the celebrated dissents and concurrences of Justices Holmes and Brandeis that laid the groundwork for strong protection of freedom of speech. The chapter also discusses the stringent protection that the modern Court affords freedom of speech and association. Continuing with the theme of political speech and association, the chapter concludes by discussing the free speech rights of government employees. This section treats such problems as patronage dismissals of government employees, restraints on their political activity, and their ability to criticize the government.

Although it has not been construed differently from the Free Speech Clause, the First Amendment has a separate Press Clause. Chapter XIII treats the extensive body of free speech jurisprudence relating to the print and broadcast media. The chapter treats such varied issues as the doctrine against prior restraints, media access to the government, regulation and taxation of the media, confidentiality of reporters' sources, and defamation. Just as some of the doctrines discussed in Chapter XII have applicability beyond political speech and association, many of the doctrines in Chapter XIII have applicability beyond the media. Examples include constitutional protection for defamatory speech, and constitutional proscription of prior restraints against speech.

Even if one has strong rights to say whatever one chooses, these may be meaningless if one does not have ready means through which to express one's ideas. For those who do not own a newspaper, an auditorium, or another medium of communication, expressing certain unpopular ideas — or any ideas at all — may prove difficult. Chapter XIV treats public forum analysis, the primary means by which First Amendment jurisprudence seeks to afford access to the marketplace of ideas. The notion is that persons have a right to speak on certain government property. Classic public forums include parks, streets, and sidewalks. After tracing the development of public forum theory, the chapter first recounts the testing of that theory during the civil rights movement, and then examines the modern approach to public forum analysis which relates free speech rights to the character of the property where the speech takes place. The chapter also reviews cases discussing certain special candidates for public forum analysis, such as company towns, private shopping centers, and public schools.

Chapter XV discusses some special doctrines in the system of free expression. These are expressive conduct (or symbolic speech), campaign expenditures, government funding of speech activity, commercial speech, and pornography. Extending constitutional protection to these various kinds of behavior poses special dangers and problems for First Amendment

jurisprudence. On the other hand, not affording constitutional protection to any of these areas poses dangers of another kind. The Court has sought to reconcile these difficulties by fashioning special doctrines for scrutinizing each of these areas. Generally, these doctrines afford less protection than First Amendment jurisprudence affords other forms of protected expression.

The last chapter of the book explores the other major pillar of the First Amendment, freedom of religion. Treating this topic last in no way reflects its importance in the constitutional scheme. Many people came to this nation seeking to escape religious persecution and secure freedom of conscience. The Constitution enshrined these aspirations in two provisions, the Establishment and the Free Exercise Clauses. The former prohibits the state from establishing religion; the latter prohibits the government from interfering with freedom of conscience and religious worship. As the cases indicate, the Clauses stand in some tension with each other. Specific topics treated in Chapter XVI include aid to religious schools, prayer in the public schools, displays of religious symbols, and Sunday closing laws. The book concludes with cases focusing on the free exercise of religion.

"Human history," says H. G. Wells, "is in essence a history of ideas." The great theme in the history of American Constitutional Law is the concept of law as a check upon public power. That idea has been given practical reality in the decisions of the Supreme Court of the United States. Those decisions are — to paraphrase Holmes — a virtual magic mirror in which we see reflected our whole constitutional development and all that it has meant to the nation. When one thinks on this majestic theme, the eyes dazzle: that is what Constitutional Law is all about. If only part of our feelings are communicated to those who use the book, we will be amply rewarded for our efforts.

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