

CHARLES FRIED



Saying What
the Law Is

THE CONSTITUTION IN
THE SUPREME COURT

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Saying What the Law Is

For Anne, again

Preface

This book is neither a treatise nor a reference work. Rather it offers an understanding of the main topics of constitutional law. The Constitution sets up the government of the United States more or less from the ground up, with amendments adopted over a period of some two hundred years. One cannot sensibly expect the law of the Constitution to offer some single unifying theme, but there is a coherence to the law of each of the main topics, considered here, which are of the most general interest and which give our national life its distinct and admirable texture. It is this coherence (or these coherences) that makes constitutional law a subject that can not only be learned but understood. As in anatomy there is something beyond learning the names of nerves, bones, and muscles; there are the great systems of the living body: the nervous, the circulatory, digestive, and musculo-skeletal systems. So in constitutional law there are the principal themes and systems and their articulation one with another that make this a subject that may properly be presented in more general terms. It is these coherences that make it possible to offer an account of constitutional law that can be illuminating to the educated layman and non-specialist lawyer without condescension or the slighting of crucial nuance. And it is the search for these coherences that may make a work like this illuminating even to the specialist in constitutional law, to the mature lawyer, or to the student entering on a study of the subject. At the same time the search for coherence can be pressed too far. Consti-

tutional law is a human and a political creation; tensions and contradictions, gaps and questions on the way to answers are inevitable. These ragged edges and outright failures must be noted as faithfully as are noted the instances in which constitutional law seems, in Lon Fuller's phrase, to be working itself pure. Above all, a book like this must be aware of its own prejudices and predilections and must guard against mistaking them for some underlying best explanation of what is really there.

My first encounter with the subject was in 1958 as a student of Herbert Wechsler, the greatest law teacher I have known in forty-five years in legal education. His high and astringent intellect sought, and where it did not find, imposed, the rule of reason on law. When I entered teaching he was my model. My first practical encounter with constitutional law had been as a law clerk to Justice John Marshall Harlan. He too believed that reason ruled in the house of the law. This devotion to reason was perhaps more remarkable in his case because he had spent his professional life before going on the bench as a highly successful New York practitioner. He treated his two law clerks as collaborators in a great work. When we could not persuade him and he could not move us before he gave his vote in conference, he would say sadly as he left the room, "Well, I guess I'm the Justice." In that Term he wrote a number of opinions—in *Monroe v. Pape*, *Mapp v. Ohio*, *Poe v. Ullman*—the wisdom of which now seems prescient. After that year I did not return to constitutional law until 1985 when I was first Deputy Solicitor General and then Solicitor General. For four years the Supreme Court was my principal scene of activity. Among the cases discussed in this book which I and my office presented to the Court were *Morrison v. Olson*, *Bowsher v. Synar* (Chapter 3—Separation of Powers), *Nollan v. California Coastal Commission* (Chapter 6—Liberty and Property), *Cleburne v. Cleburne Living Center*, and *City of Richmond v. J. A. Croson Co.* (Chapter 7—Equality).

When I returned to teaching I made constitutional law my subject. I also had the opportunity to participate as an advocate in some of the cases discussed in this book, particularly *United States v. Morrison* (Chapter 2), *Zelman v. Simmons-Harris* (Chapter 5—Religion), and the commercial speech cases discussed in Chapter 4. I had written one book on my experiences as Solicitor General, *Order and Law: Arguing the Reagan Revolution* (1991). (Here Chapter 3, on the separation of powers, draws on Chapter 5 of that work; I am grateful to Si-

mon & Schuster for permission to repeat some of its passages.) I then decided to do a book on constitutional law itself, and published two articles that announced my project and are adapted here as its first chapter (“Constitutional Doctrine,” 107 *Harv. L. Rev.* 1140 (1994) and “Types,” 14 *Constitutional Commentary* 55 (1997)).

My writing on constitutional law since then has all been done with this project in mind and I draw on that writing in several places. In Chapter 1 and the Afterword, I make use of some of the ideas in “Five to Four: Reflections on the School Voucher Case,” 116 *Harv. L. Rev.* 163 (2002). In Chapter 3, I draw on “Perfect Freedom, Perfect Justice,” 78 *B.U. L. Rev.* 717 (1998), “Perfect Freedom or Perfect Control?” 114 *Harv. L. Rev.* 606 (2000), and “Scholars and Judges: Reason and Power,” *Harv. J.L. & Pub. Pol’y* 23, 3 (Summer 2000). Material from “Revolutions?” 109 *Harv. L. Rev.* 12 (1995) appears in Chapters 1, 2, and the Afterword.

My project was delayed by my four years’ service as an associate justice of the Supreme Judicial Court of Massachusetts. Deciding, as well as teaching and arguing, constitutional cases has greatly influenced the perspective in this book. All of this experience has strengthened my faith that to a remarkable extent here reason rules.

Many colleagues at Harvard and elsewhere have commented on drafts of one or more chapters. David Shapiro read an earlier draft of the whole book and his encouragement was particularly valuable. The chapter on speech benefited from the expertise and careful suggestions of Elena Kagan (who also commented on other chapters), Robert Post, Frederick Schauer, Laurence Tribe, and Eugene Volokh. Lon Berk, Scott Brewer, Stephen Breyer, Richard Fallon, Heather Gerken, Mary Ann Glendon, Ryan Goodman, John Manning, Frank Michelman, Martha Minow, Robert Nozick, Joseph Singer, and William Stuntz commented on one or more chapters. In every instance their help was an act of friendship as well as of scholarly assistance, and the encouragement that their criticisms gave me sustained me through this effort. I am very grateful to them. I did not follow all their advice, so they must stand absolved of any responsibility for errors in the book. And it is obvious to those who know these distinguished critics that their views on many of the subjects touched on here are often not mine. That is why their comments were particularly useful. I presented early drafts of individual chapters at faculty work-

shops at Berkeley, Cardozo, Harvard, New York University, and University of Pennsylvania law schools. I learned from the colleagues who took part in those discussions. Tara Kole of the Harvard Law School class of 2003 worked through the whole text with me more than once. Her help was invaluable. Jaime Dodge Byrnes, Justin Dillon, and Michael Dimino also provided research assistance while students at Harvard Law School. Matthew Seccombe provided valuable editorial assistance. I am grateful to the Harvard Law School and Dean Robert Clark for providing me with material support and occasional relief from other duties as I was working on this book. Finally, I owe a great debt to the students who studied constitutional law with me over many years.

August 2003

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Doctrine

The Constitution was written in 1787 and came into effect in 1789; its most important amendments were adopted in 1791 (Amendments I–X) and 1865–1870 (Amendments XIII–XV). The text of the Constitution and its amendments comes to just over seventy-five hundred words. If the purpose of this book were to understand that text, it would be a work of history. But this is a book about understanding constitutional law, and that law principally comes out of the decisions of the Supreme Court of the United States, which as of this writing consist of more than five hundred and thirty volumes (although probably less than half of those decisions touch on constitutional issues). It is for this reason that this book quotes—often at length—from important Supreme Court opinions: they state the law, and sometimes with a signal eloquence and pungency. They are not only the words but the music of our constitutional law. To a lesser extent constitutional law also comes out of decisions of lower federal courts and state courts dealing with federal constitutional issues, the practices and pronouncements of Congress and the executive branch, and to a small degree the teaching of constitutional scholars. The rules and principles that emerge from all of these sources are what is compendiously called constitutional doctrine.¹ The constitutional doctrines in the domains of federalism, the separation of powers, speech, religion, liberty, and equality are the subjects of the chapters that follow. But before presenting these topics, this chapter offers a discussion on the nature of constitutional doctrine in general.

The first issue about doctrine is whether it exists at all. The decisions of the Supreme Court of the United States certainly resolve disputes—a striking recent example is *Bush v. Gore*.² But do they make law? In a trivial sense they must make law—they are what lawyers call the law of the case, because they are the definitive resolution of particular disputes that have invoked the legal system. But the ambition of law goes further: each legal decision should be referable to a rule or principle; it should be justifiable not just by the good that it does but as part of the fabric of the law. This is what Felix Frankfurter meant when he said, “we do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”³ It is what is necessary if constitutional law is to be *law*, rather than just a set of political decisions made by politicians. We want courts—and the Supreme Court is above all a court—to be bound by rules and principles. Some of these principles are fundamental; they go deeper than political expediency. And in the larger number of cases not governed by some fundamental principle of political morality, individual liberty is only secure if government is limited by rules.⁴ Courts are the natural agency of government to assure both adherence to fundamental principles and regularity in the application of rules. These normative judgments about the nature of a well-functioning legal system are sometimes collected under the rubric of the rule of law,⁵ to which I devote some attention in Chapter 3 on the separation of powers.

A challenge to this conception of the rule of law doubts that generalities are capable of constraining particular judgments, and so for better or worse the Supreme Court does not and cannot adhere to rules and principles. If courts cannot adhere to rules and principles as they decide particular cases, then doctrine is not possible, because doctrine is the web that courts spin as they decide cases in a lawful way. That courts cannot adhere to rules and principles is a radical challenge, rooted in deep philosophical disputes, that I shall not address.⁶ Rather I shall assume that doctrine is possible, because creating and following rules are pervasive human activities. Whether the Court is in fact constrained by doctrine or whether it is just fooling around as it goes about painstakingly formulating and referring to it is something that readers can judge for themselves as I describe in subsequent chapters the course of decisions in particular difficult areas. In the balance of this chapter, I turn to the nature and sources of con-

stitutional doctrine in general, to the role of precedent in the formulation of that doctrine, and to the question of what it means for a court to adhere to doctrine.

Precedent

American constitutional doctrine has two principal sources: the text of the Constitution itself and prior court decisions, especially the decisions of the Supreme Court of the United States. That the Constitution's text is a source of constitutional law (constitutional doctrine) is not surprising, and needs explaining only in a work of legal philosophy—which often takes as its task explaining the obvious. It is enough to say that that text *is* the Constitution, and it is that text that judges and other officials swear to support as the “supreme law of the land.”⁷ It is more problematic that court decisions should be as important a source as they are—so important, indeed, that in many constitutional disputes the text receives only a passing, as it were polite nod, as courts go about their business of parsing not the text but the prior decisions of the Supreme Court, which are treated as controlling the outcome. It is a source of frustration to many that constitutional doctrine—and that means those hundreds of volumes of cases—stand between us and the Constitution itself.⁸ Like the Protestant cry, “Only Scripture,” there is a longing to refer all decisions directly to the constitutional text.⁹ There must be judges, and citizens must accept their rulings in their particular cases, but the citizen should be able to plead his case person to person in terms just of the Constitution, unmediated by the distorting filter of doctrine. This is a fantasy, but it is worth pausing to see why.

The believer struggling with his God is fighting about ultimate truth and the salvation of his soul. The citizen coming to court procures a judgment between himself and his adversaries, a judgment that may ultimately have to be enforced by the power of the state, a judgment to which other citizens will look to infer something about what they too might expect if they come into controversy with their neighbors or officials. Unmediated, fresh reference in contemporary disputes to the spare and distant text of the Constitution cannot possibly offer the regularity and rationality which is the indispensable characteristic of a government of law. The Constitution's text must be mediated by doctrine before it can yield decision. But that does not mean that prec-

edent—prior court decisions—must be a source of that mediating doctrine. It is said that Continental judges are supposed to decide cases under the governing codes by direct reference to the authoritative texts, without regard to prior decisions, although in practice that reference too is mediated by doctrine: the rules and principles developed by scholars and text writers, who in turn draw on what is called the “jurisprudence,” that is, the course of decisions on a particular matter.¹⁰

American courts both before and after the Revolution followed the English courts’ practice of accompanying their decisions by opinions which explained those decisions by reference to prior decisions and opinions—that is precedent. From the very start the Supreme Court was thought of as a court like the other courts with which the founding generation was familiar, albeit with a special jurisdiction. It too decided cases—and only cases, not abstract and general disputes—after hearing opposing counsel, and the Court’s decisions were accompanied by the opinions of the judges disposing of the arguments made to them by the parties.¹¹ So it was quite natural for the Supreme Court more or less from the beginning to treat precedent as an essential element in reasoning about constitutional law. This does not mean that past decisions had an unbreakable grip on the future. Anglo-American courts have always been adept at the casuistry that allows prior decisions to be acknowledged but distinguished from the case at hand. And American courts interpreting the Constitution could not be rescued from a precedential dead end by an omnipotent legislature, as could the English courts developing the common law, so that the Supreme Court, in addition to sometimes unconvincing distinctions, also has had to resort to occasional outright overruling. But distinguishing and overruling aside, because the Supreme Court in deciding constitutional cases has acted like a common law court developing the law according to its precedents, those five-hundred-odd volumes of Supreme Court Reports are the principal source of constitutional law, of constitutional doctrine.

Although any decision that explains itself implies some generalization, and to that extent a commitment to that generalization, some may object that this commitment cannot be taken to justify deference to prior decisions as elements or building blocks of doctrine, because the commitment need not extend beyond that occasion. It is conceivable that judges and other officials might disregard prior court deci-

sions and decide each case by a fresh consideration of how the text and the principles standing behind the text bear upon it, although of course the unencumbered judge might look to past decisions as a source of wisdom—as he might to the arguments of counsel or to law review articles. (I put aside whether the authentic meaning is arrived at by reconstructing the intentions of those who wrote, debated, and ratified the text, or by discerning the meaning of the text, or by recurring directly to whatever fundamental truths of morality and justice the Constitution is believed to embody.) This “fresh start” conception is quite different from the notion that a decision need imply no commitment or generalization at all. Imagine that a court strikes down, as violating the First Amendment, a state statute that punishes speech disrespectful of the legislature. If the court then declined to invalidate a statute punishing speech disrespectful of the governor, it would either have to explain why such a statute is different (thus honoring the prior decision) or acknowledge, while disregarding, the similarity. When deciding for the governor, the court may acknowledge that its decision against the legislature was incompatible with its new decision and therefore wrong. Convinced of its prior error, why should the court not shift ground completely? In each case a responsible court would offer—or at least have in mind—a justification for its decision, a justification that should point to how this decision fits with, or criticizes, other decisions that have been or might be made. There would be doctrine in the first case, maybe even quite an elaborate doctrine, and contrary doctrine in the second—doctrine at every turn. Not only doctrine, but even commitment. It is not just a commitment that survives reevaluation in light of the acknowledged ultimate criterion of correctness. This way there is not a deficiency, but a surplus of doctrine—as much as one doctrine for each decision. Of course such a from-the-ground-up, fresh-each-time mode of reasoning is quite unrealistic. No merely human judge would have the time or the intellect to think every case out afresh. Doctrine not only mediates between first principles and particular results along the timeless dimension of inference, but it in fact—if not in logical necessity—provides continuity between a particular decision and those that have gone before. It is respect for precedent that makes for continuity in doctrine. Such continuity gives Supreme Court decisions the regularity and predictability they must have to make the Court’s exercise of power both be and seem to be lawlike and acceptable.

Continuity and Character

Although precedent—regard for what came before—in some form or other is necessary to the continuity of law and persistence in doctrine, it has a particular salience in the decisions of the Supreme Court and the constitutional doctrine that that court generates. Supreme Court justices have hardly cultivated the colorless impersonal style of their European counterparts. The supreme bench has been populated by strong personalities. Their selection has sometimes been attended by fierce political battles. And once on the bench they have tended to stay for a very long time—life tenure being guaranteed by the Constitution. In its two-hundred-and-fourteen-year history, during most of which the Court had nine members, there have been only one hundred and eight justices. From the Marshall Court onward the Court's judgments have almost always been announced as having been written by a single named justice, in which the other justices joined or to which they responded in concurring or dissenting opinions. Thus the institutional voice of the Court has always been suffused with a strong personal element. This personal element invites a greater, not a lesser emphasis on precedent. An unelected justice, wielding great power, is naturally moved to demonstrate that his judgment is supported, if not compelled, not just by the force of logic but by the authority of what others before him have concluded, conclusions that have won acceptance and proved themselves, if not wise, at least workable. More personally, a judge writing under his own name cannot help but wish to appear consistent, first of all with what he himself has written in earlier cases and more remotely with opinions others have written and which he is recorded as having joined. More remotely still, a judge when she must write or vote in a case similar to one decided before her accession to the Court, while not moved by the same tug of consistency as moves her more senior colleagues, will feel some strong part of that pull herself: lest each new appointment signal the possible undoing of a line of precedent developing until that time, the new judge may wish the promise of some persistence in the doctrine in whose development she will participate. And so precedent is like a rope woven of fibers, none of which stretch through its whole length. None of this is logically compelled, as the fantasy example of the hypothetical judge who considers each case anew shows. Nor is it just a practical necessity, although it is that. Respect for precedent is

what gives both a judge and a court character. And character inspires confidence in those who must submit to a court's power and imposes discipline on the exercise of that power.

We require continuity in legal doctrine. Yet we also require each new decision to be more or less right on its merits. The only way we can have both is for the new decision to be right, in part at least because it accords with established doctrine. We encounter here an instance of what may seem a general paradox of rationality: a rational person is always in principle open to reason, yet any human pursuit—certainly the pursuit of reason—would be thwarted if those committed to it kept returning to first principles to make sure that the beginning was right. I call this a paradox because we try to have it both ways: to shut down argument after some reasonable point and yet to be unwilling to put any proposition permanently and in principle beyond question. (We want to avoid being like the man who cannot get to work in the morning because he must keep returning home to make quite sure that he has turned off the gas.) The paradox appears in its most intimate form in the design of our own life plans—and it manifests itself in the law, even though the judge's plan is not her personal life plan, but a plan for the law.¹²

The solution to the paradox at every level begins by noticing that we are time-extended, not punctuated, beings. The ends we pursue, the thoughts we entertain, the sentiments that grip us are all time extended, not punctuated. Our affections, commitments, and projects are also time extended. Just as we could not whistle a tune if at every moment we started afresh, so we could be neither friend nor enemy, we could not keep promises, do acts of kindness, nor take revenge, if every momentary and discrete movement were the occasion of a fresh choice. Steadiness and commitment are not just virtues that keep us unswervingly on course to some goal or end point: they make our lives more or less coherent; they allow us to understand and describe what it is that moves us at all. They give character. They give character to a judge as she pursues a course of decision, but this same steadiness and commitment give character to the Court. Without such steadiness the Court's work would not only be unpredictable and the law unreliable, it would be threatened with incoherence. Unless doctrine persists, unless doctrine itself is prolonged, it cannot sufficiently order social action. The Constitution promises that kind of persistence, and it can only deliver if its commands are instantiated in doc-