

Constitutional Law and American Democracy

Cases and Readings



Corey Brettschneider



Wolters Kluwer
Law & Business

ASPEN COLLEGE SERIES

CONSTITUTIONAL LAW AND AMERICAN DEMOCRACY

Cases and Readings

■ COREY BRETTSCHEIDER



Wolters Kluwer
Law & Business

Copyright © 2012 CCH Incorporated.

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-7982-8

Library of Congress Cataloging-in-Publication Data

Brettschneider, Corey Lang.

Constitutional law and American democracy : cases and readings / Corey L. Brettschneider.

p. cm. — (Aspen College Series)

Includes index.

ISBN 978-0-7355-7982-8

1. Constitutional law — United States. 2. Casebooks I. Title.

KF4550.B725 2011

342.73 — dc23

2011046345

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Best Case Solutions is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

*For my father, Eric Brettschneider,
who brought me to my first law class at age 6.*

ABOUT THE AUTHOR

COREY BRETTSCHEIDER is Associate 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

November 2011

ACKNOWLEDGMENTS

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. They also created the charts and figures in Chapters 1 and 2 that give the theoretical frame of the entire project. 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. Their insights are reflected in Chapters 5 and 6.

As I completed the final draft of this book I was fortunate to have two friends and colleagues who are also world-class constitutional law scholars help me to hone my presentation. Steve Calabresi has been an amazing colleague while visiting here at Brown. He provided invaluable assistance on Chapter 4. Gordon Silverstein, who was a fellow during our year at Princeton, worked with me to improve Chapter 3. He encouraged me to add more cases and provided assistance in creating better commentary. Together these two scholars made Part II on constitutional powers much better than it would have been.

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.

I thank the members of my family who talked with me about and supported this project, Allison Brettschneider, Sophie Helen Brettschneider, Susan Brettschneider, Kim Brettschneider, Jeanne Rostaing, Robert Klopfer, Patrick Heppell, John Weisz, and Jenny Weisz. Jenny provided helpful commentary on Chapter 7, drawing from her own legal background. I dedicate this book to my father, Eric Brettschneider, who began talking to me about the issues here when I first learned to speak in sentences. He was attending law school at the time, and was a terrific enough father to convince me at age six that I too was a student in his class.

Finally, I am grateful to the copyright holders for permission to reprint the following materials:

Bruce Ackerman, reprinted by permission of the publisher from *We the People: Volume 1, Foundations* by Bruce Ackerman, pp. 8-10, 40-44, 47-52, 105, Cambridge, Mass.: The Belknap Press of Harvard University Press, Copyright © 1991 by the President and Fellows of Harvard College.

Bruce Ackerman, reprinted by permission of the publisher from *We the People, Volume 2, Transformations* by Bruce Ackerman, pp. 268-271, 309-311, 314, Cambridge, Mass.: The Belknap Press of Harvard University Press, Copyright © 1998 by the President and Fellows of Harvard College.

Akhil Amar, "Of Sovereignty and Federalism," 96 Yale L.J. 1425-1450. The Yale Law Journal by Yale Law School. Copyright 1987 Reproduced with permission of Yale Law Journal Company, Inc. in the format Textbook and Other book via Copyright Clearance Center.

Raoul Berger, *Government by Judiciary* (1997). Reprinted by permission of Liberty Fund Press.

Justice Hugo Black, "The Bill of Rights," 35 N.Y.U. L. Rev. 865. Reprinted by permission of the publisher.

William Brennan, "The Constitution of the United States: Contemporary Ratification," Speech to the Text and Teaching Symposium, Georgetown University, 1985. Reprinted by permission of National Lawyers Guild.

Corey Brettschneider, "A Transformative Theory of Religious Freedom," 38 Pol. Theory 187. Used by permission of publisher.

Stephen Breyer, "Judicial Review: A Practicing Judge's Perspective," Oxford Journal of Legal Studies, Vol. 19, Summer 1999, by permission of Oxford University Press.

G. Calabresi & James Lindgren, "The President: Lightning Rod or King?" Yale Law Journal, Vol. 115, p. 2611, 2006. The Yale law journal by Yale Law School. Copyright 2006 Reproduced with permission of Yale Law Journal Company, Inc. in the format Textbook and Other book via Copyright Clearance Center.

Erwin Chemerinsky, "The Foulston Siefkin Lecture: Civil Liberties and the War on Terrorism," 45 Washburn L.J. 1, Fall 2005. Reprinted by permission of the publisher.

Ronald Dworkin, "The Moral Reading and the Majoritarian Premise" and "Roe in Danger" reprinted by permission of the publisher from *Freedom's Law: The Moral Reading of the American Constitution* by Ronald Dworkin, pp. 15-33, 44-59, Cambridge, Mass.: Harvard University Press, Copyright © 1996 by Ronald Dworkin.

Ronald Dworkin, "Women and Pornography," New York Review of Books. Reprinted with permission from The New York Review of Books. Copyright © 1993 NYREV, Inc.

Ronald Dworkin et al., "The Philosopher's Brief," New York Review of Books, March 27, 1997. Reprinted with permission from The New York Review of Books. Copyright © 1997 NYREV, Inc.

Chris Eisgruber & Lawrence Sager, "The Vulnerability of Conscience," 61 U. Chi. L. Rev. 1245 (1994), pp. 1248, 1254, 1256-1259, 1260-1265, 1282-1284, 1297-1298, 1315. The University of Chicago Law Review by University of Chicago. Copyright 1994. Reproduced with permission of University of Chicago Law School in the format Textbook and Other book via Copyright Clearance Center.

John Hart Ely, reprinted by permission of the publisher from *Democracy and Distrust: A Theory of Judicial Review* by John Hart Ely, pp. 11-14, 18-19, 39-40, 43-48, 69-81, 87-93, 98-103, Cambridge, Mass.: Harvard University Press, Copyright © 1980 by the President and Fellows of Harvard College.

- John Hart Ely, "Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 Yale L.J. 920 (1973). The Yale law journal by Yale Law School. Copyright © 1973. Reproduced with permission of Yale Law Journal Company, Inc. in the format Textbook and Other Book via Copyright Clearance Center.
- John Hart Ely, *War and Responsibility*. Copyright © 1993 Princeton University Press. Reprinted by permission of Princeton University Press.
- Richard A. Epstein, *How Progressives Rewrote the Constitution*. Copyright © 2006. Reproduced with permission of Cato Institute in the format Textbook and Other Book via Copyright Clearance Center.
- John Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *Am. J. Juris.*, 1997 42: 97. Reprinted by permission of the author and the publisher.
- William A. Galston, "Parents, Government and Children" in *Child, Family, and State*, (nomos xlv) (Macedo Eds.: NYU Press, 2003).
- Douglas Ginsburg, "On Constitutionalism," *Cato Supreme Court Review* 7, Washington, DC: Cato Institute, 2002-2003. *Cato Supreme Court review* 2003-2004 by Cato Institute. Center for Constitutional Studies Copyright © 2003. Reproduced with permission of Cato Institute in the format Textbook and Other Book via Copyright Clearance Center.
- Mark Graber, "Desperately Ducking Slavery: *Dred Scott* and Contemporary Constitutional Theory," *Constitutional Commentary* 1997. Reprinted by permission of the publisher and the author.
- Amy Gutmann, "Children, Paternalism, and Education: A Liberal Argument," *Philosophy and Public Affairs*, Vol. 9, No. 4 (Summer, 1980), pp. 338-358. Copyright © 1980 Blackwell Publishing Ltd. Reproduced with permission of Blackwell Publishing Ltd.
- Amy Gutmann, "Responding to Racial Injustice" (pg 118). Appiah K. Anthony, *Color Conscious*. Copyright © 1996 by Princeton University Press. 1998 paperback edition reprinted by permission of Princeton University Press.
- Sam Issacharoff, "Gerrymandering and Political Cartels," 116 *Harv. L. Rev.* 593 (2002). *Harvard Law Review* by Harvard Law Review Association. Copyright © 2002. Reproduced with permission of Harvard Law Review Association in the format Textbook via Copyright Clearance Center.
- Leon Kass, "The Right to Life and Human Dignity," in *The New Atlantis*. Reprinted by permission of the publisher.
- Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 69 *N.Y.U. L. Rev.* 197 (1994). Reproduced by permission of the publisher.
- Larry Kramer, "We the Court," 115 *Harv. L. Rev.* 4 (2001), pp. 4-169. *Harvard Law Review* by Harvard Law Review Association. Copyright © 2001. Reproduced with permission of Harvard Law Review Association in the format Textbook and Other Book via Copyright Clearance Center.
- Irving Kristol, "Pornography, Obscenity and the Case for Censorship," *The New York Times Magazine*, March 28, 1971, pp. 112-113. Reprinted by permission of the author's Estate.
- Lawrence Lessig & Cass Sunstein, "The President and the Administration," *Columbia Law Review*, Vol. 94, No. 1, Jan. 1994. Copyright © 1994. Reproduced with permission of the authors and Columbia Law Review Association, Inc. in the format Textbook and Other Book via Copyright Clearance Center.
- Catherine MacKinnon, "Pornography, Civil Rights, and Speech," *Harv. CR-CLL Rev.*, 1985 20: 1. *Harvard Civil Rights-Civil Liberties Law Review* by Harvard Civil

- Liberties Research Service. Copyright © 1985. Reproduced with permission of Harvard University / Law School in the format Textbook and Other Book via Copyright Clearance Center.
- Jane Mansbridge, *Why We Lost the ERA*. University of Chicago 1986. Reproduced by permission of the author and the publisher, University of Chicago.
- Harvey Mansfield, "The Case for the Strong Executive: Under Some Circumstances the Rule of Law Must Yield to the Need for Energy," *The Wall Street Journal*, May 2, 2007. Reprinted by permission of the author.
- Michael McConnell, review of Raoul Berger, "The Founders' Limits," 54 U. Chi. L. Rev. 1484. The University of Chicago law review by University of Chicago. Copyright © 1987 by University of Chicago Law School. Reproduced with permission of University of Chicago Law School in the format Textbook and Other Book via Copyright Clearance Center.
- Michael McConnell, "Religious Participation in Public Programs: Religious Freedom at a Crossroads," 69 U. Chi. L. Rev. 115, pp. 168-169, 170-171, 172-173, 175, 176-186, 188-189, 192-194. The University of Chicago law review by University of Chicago. Copyright © 2002. Reproduced with permission of University of Chicago Law School in the format Textbook and Other Book via Copyright Clearance Center.
- John McWhorter, "Real Diversity After *Bakke*," *New York Sun*, April 23, 2003. Reprinted by permission of the author.
- Alexander Meikeljohn, pp. 1-27 from *Free Speech and Its Relation to Self-Government*. Copyright © 1948 by Harper & Brothers, renewed © 1976 by Helen E. Meikeljohn. Reprinted by permission of HarperCollins Publishers.
- Robert Nozick, *Anarchy, State, and Utopia*. Copyright © 1977 by Robert Nozick. Reprinted by permission of Basic Books, a member of the Perseus Books Group.
- Martha Nussbaum, "Liberty of Conscience: The Attack on Equal Respect," *Journal of Human Development*, Vol. 8, No. 3, November 2007. Copyright © 2007 United Nations Development Programme. Reprinted by permission of Taylor & Francis Ltd. (<http://www.tandf.co.uk/journals>) on behalf of United Nations Development Programme.
- Susan Okin, "On the Distinction Between Sex and Gender," in *Justice, Gender, and the Family*. Copyright © 1991 by Susan Moller Okin. Reprinted by permission of Basic Books, a member of the Perseus Books Group.
- Richard Posner, "Against Constitutional Theory," 73 N.Y.U. L. Review (1998). Reprinted by permission of NYU Law Review.
- Richard Posner, "Security versus Civil Liberties," *Atlantic Monthly*, Dec., 2001 pp 46-48. Reprinted by permission of the author.
- John Rawls, "The Idea of Public Reason Revisited," 64 U. Chi. L. Rev. 3, pp. 780-786; 794-806. The University of Chicago Law Review by University of Chicago. Copyright © 1997. Reproduced with permission of University of Chicago Law School in the format Textbook and Other Book via Copyright Clearance Center.
- Antonin Scalia, "Originalism and the Lesser Evil," 57 U. Cin. L. Rev. 849. Used by permission of University of Cincinnati Law Review.
- Phyllis Schlafly, *The Power of The Positive Woman* by Phyllis Schlafly, copyright © 1977 by Phyllis Schlafly. Used by permission of Arlington House, a division of Random House, Inc.
- Kathleen Sullivan, "Federalism: From States' Rights Blues to Blue States' Rights: Federalism after the Rehnquist Court," 75 Fordham L. Rev. 799, 2006. Reprinted by permission of the publisher.
- Cass Sunstein, "Incompletely Theorized Agreements," 108 Harv. L. Rev. 1733 (1995). Reprinted by permission of the author.

Cass R. Sunstein & Randy E. Barnett, "Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue," 53 Drake L. Rev. 205, Winter, 2005. Sections I, II, VII. Reprinted by permission of Drake Law Review Copyright © 2005 in the format Textbook and Other Book via Copyright Clearance Center.

Gordon S. Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less," 56 Wash. & Lee L. Rev. 787 (1999).

John Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," Cal. L. Rev., Vol. 84, No. 2, Mar. 1996. Reprinted by permission of the author.

INTRODUCTION TO *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?

One answer to these questions 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."

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 limiting 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

Part I: Foundations

We begin the book with an inquiry into the foundations of judicial review. We ask first, in Chapter 1, why the Court should have the authority to strike down legislation passed by majoritarian institutions. Specifically, the chapter asks whether the reasoning in favor of this practice is sound through an examination of case law and commentary. We also examine the origin of the Court’s power of judicial review, which is never explicitly granted by the Constitution. We proceed in Chapter 2 to tackle a variety of accounts that explain how the Court ought to interpret the Constitution if it does 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 there is great controversy over the way to read those provisions.

Part II: Powers

In the next part of the book, we move on to the question of which powers the particular branches of the government are afforded by the Constitution. Here, we will pivot from the question of judicial authority to questions about the powers and limits of the legislative and executive branches. To what extent can these

branches make law, and enforce it? What should be done when conflicts emerge between the branches? In addition to these questions of “separation of powers,” or more precisely, “conflicts of powers,” we will examine the relationship between the federal government and the states. Where does the power of the states end and the power of the federal government begin?

Part III: Liberty

In the third part of the book, we move from questions of powers to questions of rights. In addition to establishing the various powers of government in its three branches, the Constitution guarantees individual rights. 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. Finally, 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 this final section, such an inquiry takes us broadly into the areas of procreation, abortion, and the right to die.

Part IV: Equality

Whereas the first three parts of this book draw on a variety of provisions of the Constitution in carving out particular themes, the final section looks 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 what 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.

Our inquiry, then, begins with two foundational problems in constitutional law—that concerning judicial authority, and that concerning constitutional interpretation. As is the case throughout this book, we are guided here 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