

INTRODUCTION TO
AMERICAN
CONSTITUTIONAL
STRUCTURE

William Funk

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INTRODUCTION TO AMERICAN CONSTITUTIONAL STRUCTURE

By

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Professor of Law
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*For Renate, because she has to put up with me;
For my children, because I love them;
And for my ConLaw class of the Fall 2007,
because they were the guinea pigs*

*

Preface

More than a half century ago, Professors Noel Dowling at Columbia and Paul Freund at Harvard separately invented the modern Constitutional Law casebook. Today, the Dowling book continues in its sixteenth edition under the names of Professors Kathleen Sullivan and the now deceased Gerald Gunther. What characterized the modern Constitutional Law casebook was its focus on the Supreme Court and judicial review, beginning the book with *Marbury v. Madison*, and its coverage—both the structural constitution and selected rights provisions, normally substantive due process, equal protection, and the First Amendment. Today, while there are a few exceptions, this model has endured.

Typically well over 1,000 pages, these books are not even designed for a one semester course and usually even two semesters cannot cover the entire book. Moreover, today they are not well suited for an introduction to the Constitution. They reflect their pedigree in books written at a time when most beginning law students had “pre-law” backgrounds in college and progressed directly to law school. Thus, they presume a fair acquaintance with American history and government, which today’s entering students are much less likely to possess.

This book is specifically designed to be used in a one semester introduction to the Constitution. Its design is at once both unusual and traditional. It is unusual in at least two ways. First, unlike most Constitutional Law casebooks, this book is limited to the structural constitution. That is, it is limited to the powers of the three branches of the federal government, their interaction, and their relation to the powers and responsibilities of the states. Moreover, it is also consciously limited in length, so that it can be fully covered in one semester, even while it does not radically edit cases. Second, unlike virtually all other Constitutional Law casebooks, it does not assume that the students are knowledgeable concerning American history or government. Today, the last time many entering law students were exposed to any American history or government was in high school. Foreign students are even less likely to have any background in American history or government. This book addresses that lack in three ways. First, it begins with the entire Constitution, from Article I to the Twenty Seventh Amendment, accompanied by comments and questions to expose students to the “forest” of the Constitution as a prologue to the particular “trees” that the book will later focus on. Second, it supplies a rich historical narrative both for the original Constitution as well as for many of the cases that follow, thereby furnishing a context for the students. This is supplemented with an appendix that provides a time-line connecting historical events, cases,

and Chief Justices. The first chapter also includes an introduction to theories of constitutional interpretation and their characterization. In addition, to further bring cases alive, pictures and short biographies of current and famous former justices are provided when they first appear in cases. Third, the book consciously strives to anticipate and answer the questions beginning law students are likely to have and which are likely to make legal study more intimidating than necessary. For example, what is a “plaintiff in error” or a “writ”? What is the difference between a “concurring opinion” and an “opinion concurring in the judgment”? What is the difference between a “concurrent resolution” and a “joint resolution,” and how is the latter different from a normal “bill”?

Although this book is novel in these respects, it is traditional in its coverage of the normal first semester of Constitutional Law. After the introductory chapter, *Marbury v. Madison* is the first case ushering in the subject of judicial review, albeit after an extensive narrative on the structure of the federal and state court systems and on Supreme Court procedure. The chapter on legislative powers focuses on the Commerce Clause, although some of the other Section 8 powers are included, and there is also significant coverage of the recent developments regarding Congress’s powers under Section 5 of the Fourteenth Amendment, which is followed by a chapter on the Dormant Commerce Clause. The chapter on executive powers and the separation of powers includes all the canonical cases, while bringing the present “war on terror” into the mix.

The book’s goal is to make the structural constitution both exciting and accessible to the modern student who never knew a life before the internet and cell phones. I hope it succeeds, and I invite your comments and suggestions.

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April, 2008

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