
CONSTITUTIONAL LAW

Principles and Policies

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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 1,000 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 work. 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

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.

¹ These are covered in detail in Erwin Chemerinsky, *Federal Jurisdiction* (2d ed. 1994).

The material is divided into twelve 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, and congressional control of federal court jurisdiction.² 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. 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 of 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 in which various types of discrimination have been treated by the Supreme Court.

Chapter 10 discusses fundamental rights protected under due process and equal protection. 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 of 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.

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

The book is complete through December 31, 1996. In light of the often rapid pace of change in constitutional law, I expect to write new editions at regular intervals. I welcome comments and suggestions from readers.

Erwin Chemerinsky

April 1997

²A major part of Chapter 2 is adapted from my earlier book, *Federal Jurisdiction* (2d ed. 1994).

Acknowledgments

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

First and foremost, I want to thank my family—Catherine, Jeffrey, Adam, and Alex—for their encouragement, their patience, and their support. This book is dedicated to them with love and much thanks.

I want to express my deep appreciation to my friend Stephen Siegel for reading a draft of each chapter and offering insightful comments. His criticisms improved the book greatly and his praise was invaluable inspiration to keep going.

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The book simply could not have been completed without the help of Bob Nissenbaum and the Loyola Law School Library, which kindly “stored” a set of the Supreme Court Reporter at my house. I also am grateful to the reference librarians at U.S.C. for their helpful assistance.

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§1.1 THE CONSTITUTION'S FUNCTIONS

Creates national government and separates power

The Constitution creates a national government and divides power among three branches. Article I creates the legislative power and vests it in Congress. Article II places the executive power in the president of the United States. Article III provides that the judicial power of the United States shall be in the Supreme Court and such inferior courts as Congress creates.

The division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule. In general, in order for the government to act, at least two branches must agree. Adopting a law requires passage by Congress and the signature of the president (unless it is adopted over his or her veto). Enforcing a law generally requires that the executive initiate a prosecution and that the judiciary convict. Chapters 2, 3, and 4 examine the powers of the judiciary, the legislature, and the executive respectively. The conflicts and tensions among the branches is a constant theme throughout these chapters.

The Constitution specifies the term of each office among the three branches, the qualifications necessary to hold office, and the manner by which the office is to be filled. Article I, for example, provides for popular election of members of