

American Constitutional Law

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Eighth Edition

VOLUME 2

Constitutional Rights

Civil Rights and Civil Liberties

Louis Fisher

Katy J. Harriger

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TO THE LAW LIBRARY—LOUIS FISHER

TO MY FATHER, RUSSELL E. HARRIGER—KATY J. HARRIGER

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LOUIS FISHER received his B.S. from the College of William and Mary and his Ph.D. from the New School for Social Research. After teaching political science at Queens College, he joined the Congressional Research Service of the Library of Congress in 1970, where he served as Senior Specialist in Separation of Powers. On March 6, 2006, he joined the Law Library of the Library of Congress. He has testified before congressional committees on such issues as war powers, state secrets, NSA surveillance, Congress and the Constitution, executive lobbying, executive privilege, impoundment of funds, legislative vetoes, the item veto, the pocket veto, presidential reorganization authority, recess appointments, executive spending discretion, the congressional budget process, the Balanced Budget Amendment, biennial budgeting, covert spending, and CIA whistleblowing. During 1987 he served as Research Director for the House Iran-Contra Committee.

His books include *President and Congress* (1972), *Presidential Spending Power* (1975), *The Constitution between Friends* (1978), *The Politics of Shared Power* (4th ed., 1998), *Constitutional Conflicts between Congress and the President* (5th ed., 2007), *Constitutional Dialogues* (1988), *Political Dynamics of Constitutional Law* (with Neal Devins, 4th ed., 2006), the four-volume *Encyclopedia of the American Presidency* (with Leonard W. Levy, 1994), *Presidential War Power* (2d ed. 2004), *Congressional Abdication on War and Spending* (2000), *Religious Liberty in America: Political Safeguards* (2002), *Nazi Saboteurs on Trial: A Military Tribunal & American Law* (2003), *The Politics of Executive Privilege* (2004), *The Democratic Constitution* (with Neal Devins, 2004), *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (2005), *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006), *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008), and *Rival Interpretations: The Supreme Court and Congress* (2009).

Dr. Fisher has been active with CEELI (Central and East European Law Initiative) of the American Bar Association. He traveled twice to Bulgaria, twice to Albania, and to Hungary to lend assistance to constitution writers. In addition to these trips abroad, he participated in CEELI conferences in Washington, D.C., involving delegations from Lithuania, Romania, and Russia, and has served on CEELI "working groups" on Armenia and Belarus. He traveled to Russia in 1992 as part of a CRS delegation to assist on questions of separation of powers and federalism and to Ukraine in 1993 to participate in an election law conference.

Dr. Fisher's specialties include constitutional law, war powers, state secrets, budget policy, executive-legislative relations, and judicial-congressional relations. He is the author of more than 380 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. He has been invited to speak in Albania, Australia, Belgium, Bulgaria, Canada, the Czech Republic, China, England, France, Germany, Greece, Israel, Japan, Macedonia, Malaysia, Mexico, the Netherlands, Oman, the Philippines, Poland, Romania, Russia, Slovenia, South Korea, Taiwan, Ukraine, and United Arab Emirates.

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This book, in gestation for years, has many contributors and abettors. With the publication of the eighth edition, Katy J. Harriger joins as co-author. She brings to the task a strong background in constitutional law and separation of powers and many years of classroom experience and professional activity on legal issues. David Gray Adler, co-author of the seventh edition, offered extensive analytical contributions and in previous editions provided careful, thoughtful reviews.

Morton Rosenberg of the Congressional Research Service lent a guiding hand, giving encouragement and insightful observations. In reviewing the manuscript and selections for readings, he was the major source of counsel and enlightenment. Other friends and colleagues who offered important advice and comments include Susan Burgess, Phillip J. Cooper, Neal Devins, Murray Dry, Roger Garcia, Jerry Goldman, Nancy Kassop, Jacob Landynski, Leonard W. Levy, Robert Meltz, Ronald Moe, Christopher Pyle, Jeremy Rabkin, Harold Relyea, William Ross, Jay Shampansky, Gordon Silverstein, Mitchel Sollenberger, Charles Tiefer, and Stephen Wasby.

I joined the Law Library of the Library of Congress on March 6, 2006, after mining its wonderful collections over the past 35 years. It is my pleasure to dedicate the book to the Law Library. On the weekends, when I enter the building to pursue my writings, it is always a joy to place on the sign-in sheet my name, type of pass, and the division I work for: LAW.

Louis Fisher

After many years of teaching American Constitutional Law using this textbook, it has been a privilege and a pleasure to work with Lou Fisher on the eighth edition and to realize all that goes into keeping the book current and relevant. I have always been drawn to this text because it recognizes that constitutional law is made through a dynamic dialogic political process rather than simply by nine Supreme Court justices. This seems a particularly important lesson to understand, for political science and law students alike, in a time when the popular understandings of constitutional politics and issues are so shallow and, and often, misinformed. I dedicate the book to my father, Russell E. Harriger, who has always encouraged and supported my endeavors, even when he disagreed with me (which in the area of constitutional law was early and often).

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Katy J. Harriger

Introduction

To accommodate the leading cases on constitutional law, textbooks concentrate on court decisions and overlook the political, historical, and social framework in which these decisions are handed down. Constitutional law is thus reduced to the judicial exercise of divining the meaning of textual provisions. The larger process, including judicial as well as nonjudicial actors, is ignored. The consequence, as noted by one law professor, is the absence of a “comprehensive course on constitutional law in any meaningful sense in American law schools.”¹

The political process must be understood because it establishes the boundaries for judicial activity and influences the substance of specific decisions, if not immediately then within a few years. This book keeps legal issues in a broad political context. Cases should not be torn from their environment. A purely legalistic approach to constitutional law misses the constant, creative interplay between the judiciary and the political branches. The Supreme Court is not the exclusive source of constitutional law. It is not the sole or even dominant agency in deciding constitutional questions. The Constitution is interpreted initially by a private citizen, legislator, or executive official. Someone from the private or public sector decides that an action violates the Constitution; political pressures build in ways to reshape fundamental constitutional doctrines.

Books on constitutional law usually focus exclusively on Supreme Court decisions and stress its doctrines, as though lower courts and elected officials are unimportant. Other studies describe constitutional decision making as lacking in legal principle, based on low-level political haggling by various actors. We see an open and vigorous system struggling to produce principled constitutional law. Principles are important. Constitutional interpretations are not supposed to be idiosyncratic events or the result of a political free-for-all. If they were, our devotion to the rule of law would be either absurd or a matter of whimsy.

It is traditional to focus on constitutional rather than statutory interpretation, and yet the boundaries between these categories are unclear. Issues of constitutional dimension usually form a backdrop to “statutory” questions. Preoccupation with the Supreme Court as the principal or final arbiter of constitutional questions fosters a misleading impression. A dominant business of the Court is statutory construction, and through that function it interacts with other branches of government in a process that refines the meaning of the Constitution.

This study treats the Supreme Court and lower courts as one branch of a political system with a difficult but necessary task to perform. They often share with the legislature and the executive the responsibility for defining political values, resolving political conflict, and protecting the political process. Through commentary and reading selections, we try to bridge the artificial gap in the literature that separates law from politics. Lord Radcliffe advised that “we cannot learn law by learning law.” Law must be “a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. It is not strong enough in itself to be a philosophy in itself.”²

A Note on Citations. The introductory essays to each chapter contain many citations to court cases, public laws, congressional reports, and floor debates. The number of these citations may seem con-

1. W. Michael Reisman, “International Incidents: Introduction to a New Genre in the Study of International Law,” 10 *Yale J. Int’l L.* 1, 8 n.13 (1984).

2. Lord Radcliffe, *The Law & Its Compass* 92-93 (1960).

fusing and even overwhelming. We want to encourage the reader to consult these documents and develop a richer appreciation of the complex process that shapes constitutional law. Repeated citations to federal statutes help underscore the ongoing role of Congress and the executive branch in constitutional interpretation. To permit deeper exploration of certain issues, either for a term paper or scholarly research, footnotes contain leads to supplementary cases. Bibliographies are provided for each chapter. The appendices include a glossary of legal terms and a primer on researching the law.

If the coverage is too detailed, the instructor may always advise students to skip some of the material. Another option is to ask the student to understand two or three departures from a general doctrine, such as the famous *Miranda* warning developed by the Warren Court but whittled away by the Burger and Rehnquist Courts. Even if a student is initially stunned by the complexity of constitutional law, it is better to be aware of the delicate shadings that exist than to believe that the Court paints with bold, permanent strokes.

At various points in the chapters, we give examples where state courts, refusing to follow the lead of the Supreme Court, conferred greater constitutional rights than available at the federal level. These are examples only. They could have been multiplied many times over. No one should assume that rulings from the Supreme Court represent the last word on constitutional law, even for lower courts.

Compared to other texts, this book offers much more in the way of citations to earlier decisions. We do this for several reasons. The citations allow the reader to research areas in greater depth. They also highlight the process of trial and error used by the Court to clarify constitutional principles. Concentration on contemporary cases would obscure the Court's record of veering down side roads, backtracking, and reversing direction. Focusing on landmark cases prevents the reader from understanding the *development* of constitutional law: the dizzying exceptions to "settled" doctrines, the laborious manner in which the Court struggles to fix the meaning of the Constitution, the twists and turns, the detours and dead ends. Describing major cases without these tangled patterns would presume an orderly and static system that mocks the dynamic, fitful, creative, and consensus-building process that exists. No one branch of government prevails. The process is polyarchal, not hierarchical. The latter, perhaps attractive for architectural structures, is inconsistent with our aspiration for self-government.

In all court cases and other documents included as readings, footnotes have been deleted. For the introductory essays, reference works are abbreviated as follows:

Comp. Gen.	Decisions of the Comptroller General.
Elliot	Jonathan Elliot, ed., <i>The Debates in the Several State Conventions, on the Adoption of the Federal Constitution</i> (5 vols., Washington, D.C., 1836–1845).
Farrand	Max Farrand, ed., <i>The Records of the Federal Convention of 1787</i> (4 vols., New Haven: Yale University Press, 1937).
Fisher	<i>Constitutional Conflicts between Congress and the President</i> (4th ed. 1997).
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