

PREFACE

This book is dedicated to my students and is a product of having listened to their views about constitutional law casebooks over the past 29 years. Although I have used several different books, my students always have voiced the desire for a more straightforward, student-friendly text. With the encouragement and support of Carol McGeehan at Aspen Publishers, that is what I have tried to provide.

Concerns that my students have raised have influenced every aspect of this book. They have expressed a desire for a book that does not pose countless rhetorical questions, leaving them uncertain about what to focus on in their studying. This book assumes that each teacher will ask the questions that are of greatest interest to him or her. (An accompanying teacher's manual offers suggestions, based on the questions that I focus on in teaching the cases.)

My students also have communicated experiencing difficulty with passages from excerpted law review articles. They have indicated that often the excerpts are so brief and so removed from the context of the original article that they are difficult to understand. They also have expressed the desire for a book that provides more context for understanding the cases.

This book attempts to address these concerns by presenting, almost without exception, just three types of material: major cases, secondary cases that are more heavily edited, and author-written essays. My essays are meant to provide a context for the cases, to provide historical background, to describe the development of the law in areas where the cases are not directly presented, and to summarize scholarly debates on various topics. Throughout the book, my goal is to provide students the material I would want them to read before class on a particular topic. Unlike virtually every other constitutional law casebook, there are no numbered notes following cases.

I am not attempting to provide a reference book that is comprehensive in presenting every related case or citations to every major law review article. Instead, my hope is to provide a casebook that gives students the basic material to study and understand constitutional law. Professors desiring to expose their students to the rich scholarly literature on the topic may supplement this book with one of the many excellent constitutional law readers that are available.

The book follows a simple, fairly traditional organization. I realize, however, that every teacher has a preferred structure for the course. I never have followed the organization of any casebook that I have used. Also, I know that the structure and organization of constitutional law courses vary widely across the country. Therefore, I have written this book so that it will be easy for teachers to use in any order. Except for references to make clear where particular topics are covered, I have tried to avoid referring to material in other chapters in a way that assumes students have read the book in order.

The book is organized in ten chapters. Chapter 1 focuses on the federal judicial power. After presenting the cases on the authority for judicial review, Chapter 1 focuses on the method of constitutional interpretation, Congressional control over Supreme Court jurisdiction, and the justiciability doctrines as constraints on the judicial power. Apart from the justiciability doctrines, other constitutional and prudential limits on the federal judicial power, such as the abstention doctrines, are omitted because they usually are covered in federal courts courses rather than in constitutional law. The one exception to this is that Chapter 2, which discusses Congressional power, includes a subsection on Congress's ability to authorize suits against state governments. This includes discussion of the Eleventh Amendment and recent sovereign immunity cases.

Chapter 2 focuses on the federal legislative power, particularly in relation to the scope of Congress's power and the extent to which concern for state sovereignty should limit such power. The chapter begins by considering *McCulloch v. Maryland* and then examines, in detail, several specific Congressional powers: the Commerce Clause, the spending power, § 5 of the Fourteenth Amendment, and the authority to authorize suits against state governments. In each area, the focus is on the breadth of Congressional authority and the extent to which concern for states should cause it to be interpreted narrowly or should restrict it through the Tenth Amendment.

Chapter 3 examines the federal executive power, particularly in relation to executive-legislative conflicts. Thus as a matter of organization, the focus of Chapter 2 is Congress's power relative to state authority and the focus of Chapter 3 is issues arising in conflicts between Congress and the executive branch. The chapter begins by considering whether the President may exercise inherent authority and its application to the area of executive privilege. Next, the chapter looks at the constitutional problems of administrative agencies, including the non-delegation doctrine; the legislative veto; and other ways of holding agencies accountable, such as the appointment and removal powers. The chapter then considers the President's powers in foreign affairs and in the war on terror. Finally, the chapter considers ways of holding the executive accountable, such as through civil suits or impeachment.

Chapter 4 focuses on federalism as a limit on state and local power. The chapter begins by examining the issue of preemption and then considers the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV. The chapter concludes with a short discussion of state taxation of interstate commerce.

Chapter 5 is titled "The Structure of the Constitution's Protection of Civil Rights and Civil Liberties." It attempts to present material concerning every part of the Constitution dealing with individual liberties and civil rights. Specifically, the central theme of the chapter concerns to whom the Constitution applies. The chapter examines the application of the Bill of Rights to the states (incorporation) and the application of the Constitution's protections to private actors (the state action doctrine).

Chapter 6 looks at the Constitution's protection of economic liberties. Freedom of contract under the Due Process Clause, the Contracts Clause of Article I, § 10, and the Takings Clause are all considered. I have chosen this approach for many reasons. The various doctrines concerning economic liberties are best understood, of course, when studied together, but it is useful for students to see how the Supreme Court treated economic rights over the course of the

twentieth century and to contrast this treatment with its protection of other individual rights in the same period.

Chapter 7 looks at equal protection. After an introduction to the concept of equal protection, Chapter 7 presents the material on rational basis review and then considers discrimination based on race and national origin, gender, alienage, parents' marital status, age, disability, wealth, and sexual orientation.

Chapter 8 examines the Constitution's protection of individual rights, other than the First Amendment. The chapter presents the law concerning rights of privacy and personhood, the right to travel, the right to vote, and the right of access to the courts. The chapter concludes by examining procedural due process rights. The chapter thus covers individual rights protected under each of the clauses of the Fourteenth Amendment: the Due Process, Equal Protection, and the Privileges or Immunities Clause. Although the chapter is clear about where each right was found and is protected, its unifying theme is its focus on the rights possessed by individuals.

Chapter 9 focuses on the First Amendment's protection of freedom of expression. This is the longest chapter of the book and I recognize that courses vary in how they cover this topic. Some schools, such as my own, have an entire course devoted to the First Amendment's protection of speech and religion. For such courses, I have been fairly comprehensive in covering these topics, so that the book has enough material in these two chapters to be used for an entire course. However, I also recognize that some constitutional law courses cover the First Amendment as a smaller part of a broader survey course. I therefore tried to be careful to construct the chapter so that it could be used in whole or in part, in any order, and still be comprehensible.

The chapter begins by considering the Court's method in examining freedom of speech, examining topics such as the distinctions between content-based and content-neutral government regulation, prior restraints, vagueness and overbreadth, what is "speech," and what is an infringement of speech. The chapter then considers the categories of unprotected and less-protected speech, such as incitement, sexual speech, commercial speech, defamation, and so on. The chapter then examines the availability of property for speech and concludes by considering, in turn, freedom of association and freedom of the press.

Finally, Chapter 10 looks at the Religion Clauses: the Free Exercise Clause and the Establishment Clause. Again, the goal is to provide sufficient material to allow use of the book in a course specializing in the First Amendment or to allow excerption for a constitutional law survey course.

In the years since the second edition, there have been major decisions in virtually every area of constitutional law including standing, congressional power, presidential power and the war on terror, preemption, school desegregation, abortion rights and voting rights, and First Amendment issues concerning speech and religion. There is substantial coverage of all of these new developments. One disquieting trend has been the significant increase in the length of Supreme Court opinions. I have erred on the side of completeness to give students a full sense of the arguments on both sides.

Two other prefatory comments are necessary. When I began this book, my goal was to edit the cases less than most constitutional law casebooks. Reading the original decisions convinces me that for virtually every case, important material inevitably has been excised. However, as I worked on the book, I discovered that producing a text of reasonable length necessitates far more editing than I

wish were necessary. I agonized over how to cut the cases and always ended up editing far more than I wanted. For the sake of readability, I have not indicated with ellipses where I have cut. Providing ellipses does not tell the reader anything about what was omitted, and constant ellipses are distracting. However, additions to the Court's language, even of a word, are indicated in brackets. I generally omitted the Court's citations, except where they seemed important to communicate something specific about the authority relied upon.

The other prefatory comment concerns the relationship of this book to my one-volume treatise, *Constitutional Law: Principles and Policies*. The books are quite different in their goals and presentation. This is a casebook designed to present the major cases of constitutional law along with sufficient additional material to provide context and a basis for class discussions. The treatise is meant to be a reference work that summarizes the law and describes competing policy considerations.

Of course, there are places where I am saying essentially the same thing, such as in providing context and historical background. Initially, I was determined not to repeat anything I said in the treatise. This proved impossible and, I think, unnecessary. I often could not think of other ways to communicate the same material. Thus, sometimes the same language, and even the same paragraphs, appear in both books. My hope is that this will in no way diminish the usefulness of my treatise, even for students using this casebook. The books are so different in their focus and presentation that occasional overlap should not be a problem.

The third edition follows the same approach as the first two editions, but has the benefit of many helpful comments and suggestions I received from users of the book. In some places, the cases are less edited.

This third edition is current through the end of the Supreme Court's October 2007 term, which ended on June 26, 2008. I will continue to prepare annual supplements and a new edition every four years. I welcome suggestions from students and teachers using this book.

Erwin Chemerinsky

March 2009