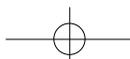
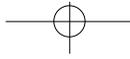


American Constitutional Law







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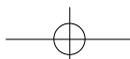
An Overview, Analysis, and Integration

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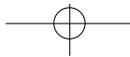
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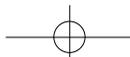
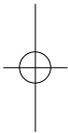
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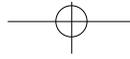
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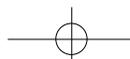
I dedicate this book to my father, Albert W. Kaplin (1911–2001), who died in the midst of my work on the manuscript. He was, and always will be, a model for me of personal integrity, personal diligence, and good stewardship in all aspects of life, and his example provides a continuing reminder to respect the dignity of all persons and to extend a helping hand whenever needed.





“Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit.”

James Madison
Federalist No. 51



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Preface

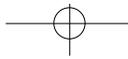
A. The Content of This Book

As the title suggests, this is a book about American constitutional law in both its broad sweep and its particulars. While the book addresses the major doctrinal areas of constitutional law and the key United States Supreme Court cases, it is not primarily a book about doctrine. To move the discussion beyond the doctrine and the individual cases, I have identified and developed the foundational concepts and first principles that undergird the substantive law and give it deeper meaning and greater coherence. In doing so, I have also identified and developed the key conceptual distinctions in constitutional law that guide all analysis and that enable students and practitioners to observe the constituent parts of constitutional law that make up the whole. In addition, I have sorted out the various doctrinal areas and the analytical problems that they present, and I have interwoven them into a “big picture” of American constitutional law, the United States Constitution, and the American constitutional system of government. In developing this integrated view, I have relied on U.S. Supreme Court cases from the entire history of the Court’s work; but I have also utilized sources and perspectives that range well beyond the individual cases. In particular, I have relied on legal commentators as well as the cases themselves; and I have used perspectives from legal theory and jurisprudence, history, and political science selectively throughout the book.

Further specifics on the content of this book are in the Table of Contents and in the General Introduction that precedes Chapter 1, as well as in the remainder of this Preface.

B. Premises and Goals of This Book

I have built this book upon three interlocking premises, each of which is explained below. These premises give the book its own particular identity and character, and serve to distinguish it from other books on this subject. These three premises also serve to establish the goals and unifying themes for the book.



My first premise is this: *to understand constitutional law fully and use it effectively, one must develop an integrated view of the subject matter.* As suggested in part A of this Preface, one must see the “big picture” as well as the pieces or, stated differently, one must see “the constitutional forest” as well as “the constitutional trees.” One goal of this book is to develop such an integrated presentation of American constitutional law and to assist readers in developing their own integrated views. To achieve this goal, I have focused as much on process issues as on substantive issues. I have placed considerable emphasis, for instance, on the sources of, and approaches to, constitutional interpretation and on the components of the analytical process for constitutional law issues. Similarly, I have addressed state constitutions as well as the federal Constitution and have sought to elucidate relationships between them. I have also treated theory as well as practice and interrelated them so that each enriches the overall picture.

I have also developed a synthesis of each of the substantive areas that I have covered, set out primarily in sections called “Conceptual Overviews.” In doing so, I have given careful attention to conceptual distinctions that frame each substantive area and provide a foundation for analysis and argumentation. Examples of the broader or more global distinctions include: constitutional powers versus constitutional rights, judicial limits on constitutional powers versus political limits, free speech versus free press, non-establishment versus free exercise, substantive due process versus procedural due process, equal protection (egalitarian rights) versus due process (libertarian rights), and federal constitutional rights versus state constitutional rights. I have emphasized such distinctions and the importance of synthesis because one must identify and sort out the pieces (the trees) before one can assemble them into the big picture (the forest); and because moving from the pieces to the big picture requires that one have a workable synthesis of each substantive area to use as stepping stones.

Chapters 2 and 15 of this book are especially important to my goal of integration, and Chapters 4 and 9 play a supporting role in helping to integrate, respectively, the Constitution’s power clauses and its rights clauses. The first sections of Chapters 10 and 12 perform a similar function regarding rights by looking at the entire Fourteenth Amendment (Chap. 10, Sec. A) before considering its individual clauses in Chapters 10 and 11; and by looking at the entire First Amendment (Chap. 12, Sec. A) before considering its individual clauses in Chapters 12 and 13.

My second basic premise is that *classical constitutional law — the classic cases and the classic commentaries — is still vastly important to a full understanding of American constitutional law.* The classical cases, as I perceive them, are the cases that establish fundamental principles, or mark a focal point or turning point in the development of constitutional law, or otherwise provide a spotlight that illumines the way for future courts and interpreters; and that also retain their historical or legal importance over a long expanse of time. The classical commentators are those who, in addressing the U.S. Constitution or constitutional cases decided by the courts, have developed fundamental principles or the theory behind them, or precipitated a turning point in the development of constitutional law, or otherwise provided illumination for a critical future pathway for courts and interpreters; and whose commentary has also retained its importance over a long expanse of time. This classical constitutional law has too often

been de-emphasized, ignored, or perhaps just innocently forgotten in modern constitutional law. Thus, a second goal of this book is to recapture classical constitutional law and demonstrate its continuing importance to the disposition of contemporary cases and the development of contemporary trends. To fulfill this goal, I have emphasized both the classical cases and the classical commentaries in this book, and related their teachings to more modern developments.

Examples of the classical cases that I have discussed include the “old” classics *Marbury v. Madison*, *McCulloch v. Maryland*, *Gibbons v. Ogden*, *Prigg v. Pennsylvania*, *Coley v. Board of Port Wardens*, *The Civil Rights Cases*, *Yick Wo v. Hopkins*, and *Plessy v. Ferguson*; and the Twentieth Century classics *Schenck v. United States*, *United States v. Darby*, *Skinner v. Oklahoma*, *Youngs town Sheet & Tube v. Sawyer*, *Everson v. Board of Education*, *Brown v. Board of Education*, *Engel v. Vitale*, *Griswold v. Connecticut*, *Reynolds v. Sims*, *New York Times v. Sullivan*, *Goldberg v. Kelly*, and *New York Times v. United States (The Pentagon Papers Case)*. Examples of the classical commentators that I have quoted or cited include James Madison, the author of many of *The Federalist Papers*; St. George Tucker, the author of the very first constitutional law textbook — published in 1803, the year *Marbury v. Madison* was decided; and Joseph Story, early Supreme Court Justice and author of the famous COMMENTARIES ON THE CONSTITUTION, published in 1833, with an abridged successor volume titled A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES following in 1840.

In addition to individual discussions of classical cases, I have also collected excerpts of first principles from these cases and included them in two sections of Chapter 2, both under the heading “In the Words of the Great Justices;” and I have developed two timelines of classical (and likely to become classical) cases, one for power cases in Chapter 4 and one for rights cases in Chapter 9. In emphasizing the classical cases, I do not short-change other more contemporary cases. Late Twentieth Century cases that I believe are already becoming classics, for instance, are also covered. Examples include *United States v. O’Brien*, *Moose Lodge v. Irvis*, *San Antonio Independent School District v. Rodriguez*, *Roe v. Wade*, and *Clark v. Community for Creative Non-Violence*. Moreover, I have also given substantial treatment to more recent cutting edge cases. Examples include *Employment Division v. Smith*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *United States v. Lopez*, *City of Boerne v. Flores*, *Boy Scouts of America v. Dale*, *Grutter v. Bollinger* and *Gratz v. Bollinger*, and *Lawrence v. Texas*.

The third premise undergirding this book is that *constitutional law is too important to be left solely to the lawyers*. Non-lawyers also have needs and interests that intersect with the U.S. Constitution and American constitutional law. Moreover, lawyers need the broader context provided by the contributions that scholars and practitioners in other disciplines have made to the understanding of constitutional law. Thus the third goal for this book is to present constitutional law in a manner that is accessible and useful not only to lawyers, but also to those in other academic disciplines (such as government, history, political science, public administration, and philosophy of law) and other professional pursuits (such as public policy analysts, public interest advocates, and government officials), without slighting any of the legal complexities of the subject matter. To further this goal, I have selectively borrowed from political science, his-

tory, and legal philosophy in the textual discussions in this book, as well as in the text and footnote citations; and I have sought to weave these supplementary perspectives together with the legal concepts and principles.

I wish to be especially clear about this third premise. Although constitutional law is too important to be left solely to the lawyers, the work of lawyers was nevertheless central to the historical process of creating and implementing the Constitution, and the work of lawyers continues to be a central aspect of the ongoing process of constitutional interpretation and decisionmaking. Thus this book *is* written for lawyers (and law students), even though it is not written *solely* for them. I have therefore presented the U.S. Constitution as “hard law” useable by lawyers and courts (see Chap. 2, Sec. A.3); and I have focused on the lawyering process as it relates to the application of constitutional law principles and precedents. I have also sought to elucidate the decisionmaking of the courts (filled with judges who are lawyers) and to confront and shed light on the major interpretive disputes and analytical difficulties that engage the attention of lawyers.

C. Use of This Book by Law Students, Graduate Students, and Independent Learners

This book contains substantial study guidance for students who are studying American constitutional law in law school courses, in law-related graduate school courses, or as independent learners. Chapter 1 contains a set of introductory perspectives (Sec. B) that will orient the student to the subject matter; it also contains a section on print and Internet-based sources for constitutional law research and for tracking recent developments (Sec. C) and a listing of recommended reference resources on constitutional law (Sec. D). Chapter 2 contains the first two of ten study Exercises with answers included (Secs. D and G) that are presented in the book. Chapter 3 contains a set of eight practical steps to use in reading and analyzing a constitutional law case (Sec. C) and two more study Exercises that provide guided practice in such reading and analysis (Secs. D and E). Chapters 5 through 8 and 10 through 14 each end with a section on “Study Suggestions” that provides suggestions for reviewing the chapter’s materials as well as sources “for further reading” on the chapter’s subject matter.¹ These chapters also contain six more study Exercises, each adapted to the subject matter of a particular chapter or two adjoining chapters. Chapter 15 contains a section setting out a model, with four components, for use in analyzing constitutional law problems (Sec. C). Appendix A to the book contains a copy of the U.S. Constitution with key provisions emphasized in bold face type; and Appendix B contains a set of Study and Learning Suggestions designed specifically for students in formal courses.²

1. Even though the Study Suggestions sections appear at the end of the chapters, it may be beneficial for some readers to study these sections at the beginning of the chapters and then review them at the end.

2. For instructors in formal courses, I am planning to prepare a *Teacher’s Manual* for use in conjunction with this book. This *Manual* will provide not only tips for instructors on using the

In addition to these various sections that specifically support the study of constitutional law, most of the rest of the sections in this book also provide guidance useful to law students, graduate students, and independent learners. Two chapters, for example, develop the essential contexts for the study, respectively, of constitutional powers (Chap. 4) and constitutional rights (Chap. 9). Chapters 5 through 8 and 10 through 13 each contain “Conceptual Overviews” that will introduce students to the particular subject matter to be studied and help them to synthesize the material as they proceed through their study. And Chapter 15 provides various perspectives and aids (in addition to the analytical model noted above) for integrating the subject of constitutional law at the conclusion of a course.

D. Tips on Using This Book

1. The cut-off date for including materials in this book is the end of 2003. The book thus includes pertinent new U.S. Supreme Court cases through the end of the 2002–2003 Court term. For the 2003–2004 term, however, the book includes only pertinent petitions for certiorari that the Court granted before the end of 2003 for cases to be decided during 2004. To locate the opinions in these cases, as well as all other cases decided after the cut-off-date for this book, readers should consult the sources described in Chapter 1, Section C, of this book. Among these sources are various websites that provide assistance in staying current with the Court’s docket and with contemporary trends in constitutional law, and that also provide access to valuable research materials.

2. The citation form used in this book generally follows “The Bluebook” (A UNIFORM SYSTEM OF CITATION (Harvard Law Review Ass’n, *et al.*, 17th ed., 2000), with some exceptions to promote clarity of the citations for non-lawyers. Cites to law reviews, for instance, often contain more expansive abbreviations of the law review’s name than that prescribed by The Bluebook. U.S. Supreme Court cases are cited only by their official citation (*U.S. Reports*), except for recent cases for which the official cites were not yet available at press time. These recent cases are cited by their *Supreme Court Reporter* citation.

3. To assist the reader, this book has a fully developed organizational scheme that is displayed in the Table of Contents and in the text with numerous descriptive section and subsection headings. This organizational scheme is further explained in the General Introduction to this book that immediately precedes Chapter 1. There is also a comprehensive Subject Matter Index with over 500 entries that pinpoint specific topics and subjects covered in the book; a Table of Cases that lists, and gives page references for, every case cited in the book; and a Table of Authorities that lists, and gives page references for, every book and article cited in the book. In addition, there are cross-references in the text of every chapter to aid the reader’s integration of the subject matter, and a judicious use of footnotes throughout the book to provide additional explanation or provide additional supportive authority. For the cross-references, I have used the form “Sec. ____ above” or “Sec. ____ below” when the reference is to another section in the

book but also additional study guidance that instructors may make available to students (see, e.g., footnote 3 below). Contact the publisher for further details.

same chapter, and the form “Chap. _____, Sec. _____” when the reference is to a section in a different chapter. The footnotes appear at the bottom of the text pages and are numbered consecutively by chapter, so that the numbering begins again at 1 for each chapter. I have also frequently used quotations throughout the book to target the most important language in U.S. Supreme Court opinions and in key commentaries.

4. Because the personal and historical dramas behind constitutional cases reveal the human dimensions of conflict and may enhance readers’ understanding, I have occasionally included brief stories—or citations to a source that tells a story—within my presentation of cases and topics. The primary examples are the story behind *Brown v. Board of Education* (Chap. 3, Sec. E); the story of Daniel Ellsberg and his involvement in the Pentagon Papers controversy (Chap. 3, Sec. D); the story of Belva Lockwood, the first woman to be admitted to the United States Supreme Court bar (Chap. 10, Sec. D.1); the story of Richard and Mildred Loving, petitioners in *Loving v. Virginia* (Chap. 10, Sec. D.2); the story of Angela Velez, one of the plaintiff welfare recipients in *Goldberg v. Kelly* (Chap. 11, Sec. D.1); and the story of George Eldridge, the disability benefits recipient who was the plaintiff in *Mathews v. Eldridge* (Chap. 11, Sec. D.3). For other stories, see CONSTITUTIONAL LAW STORIES, a 2004 book described in the bibliography in Chapter 1, Section D of this book; and for discussion on using stories for teaching and learning constitutional law, see William Kaplin, “Problem Solving and Storytelling in Constitutional Law Courses,” 21 SEATTLE L. REV. 885 (1998).

5. In addition to the various uses suggested in parts B and C of this Preface, this book can also serve as a successor edition of my 1992 volume, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW (Carolina Academic Press). Users of this earlier book will find, in this new book, expanded and updated discussions of most of the topics addressed in CONCEPTS AND METHODS, as well as revised and enhanced versions of most of the Exercises in that volume. The Practice Problems, Review Guidelines, and Analytical Frameworks in CONCEPTS AND METHODS, however, do not appear in this new book.³ Conversely, there are many topics and much material included in this new book that have no counterpart in the earlier volume.

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3. I am planning to include these Practice Problems, Review Guidelines, and Analytical Frameworks in a *Teachers’ Manual* available to teachers adopting this book for use in a formal course. Consult the publisher for further details.

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