

CONSTITUTIONAL THEORY:  
ARGUMENTS AND  
PERSPECTIVES

FOURTH EDITION

# LexisNexis Law School Publishing Advisory Board

---

**Paul Caron**

*Professor of Law*

Pepperdine University School of Law

*Herzog Summer Visiting Professor in Taxation*

University of San Diego School of Law

**Olympia Duhart**

*Professor of Law and Director of Lawyering Skills & Values Program*

Nova Southeastern University, Shepard Broad Law School

**Samuel Estreicher**

*Dwight D. Opperman Professor of Law*

*Director, Center for Labor and Employment Law*

NYU School of Law

**Steven I. Friedland**

*Professor of Law and Senior Scholar*

Elon University School of Law

**Joan Heminway**

*College of Law Distinguished Professor of Law*

University of Tennessee College of Law

**Edward Imwinkelried**

*Edward L. Barrett, Jr. Professor of Law*

UC Davis School of Law

**Paul Marcus**

*Haynes Professor of Law*

William and Mary Law School

**John Sprankling**

*Distinguished Professor of Law*

McGeorge School of Law

**Melissa Weresh**

*Director of Legal Writing and Professor of Law*

Drake University Law School

# CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES

---

## Fourth Edition

**Michael J. Gerhardt**

*Samuel Ashe Distinguished Professor in Constitutional Law & Director,  
Center for Law and Government  
University of North Carolina School of Law*

**Stephen M. Griffin**

*Rutledge C. Clement, Jr. Professor in Constitutional Law  
Tulane University School of Law*

**Thomas D. Rowe, Jr.**

*Elvin R. Latty Professor of Law Emeritus  
Duke University School of Law*

**Lawrence B. Solum**

*Professor of Law  
Georgetown University Law Center*

ISBN: 978-0-7698-6519-5

eBook ISBN: 978-0-3271-8990-9

**Library of Congress Cataloging-in-Publication Data**

Gerhardt, Michael J., 1956- author.

Constitutional theory : arguments and perspectives / Michael J. Gerhardt, Samuel Ashe Distinguished Professor in Constitutional Law & Director, Center for Law and Government, University of North Carolina School of Law; Stephen M. Griffin, Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane University School of Law; Thomas D. Rowe, Jr., Elvin R. Latty Professor of Law Emeritus, Duke University School of Law; Lawrence B. Solum, Professor of Law, Georgetown University Law Center. -- Fourth edition.

pages cm.

ISBN 978-0-7698-6519-5

I. Constitutional law--United States. I. Griffin, Stephen M., 1957- author. II. Rowe, Thomas D., Jr., 1942- author. III. Solum, Lawrence, author. IV. Title.

KF4550.G467 2013

342.73--dc23

2013043095

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2013 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

**NOTE TO USERS**

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at [www.lexisnexis.com/lawschool](http://www.lexisnexis.com/lawschool).

**Editorial Offices**

121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *DEDICATION*

---

For our families.



# *PREFACE*

---

Arguments about interpreting the United States Constitution take place on several levels. On the United States Supreme Court, the Justices debate and publish controversial opinions on how the Constitution should be interpreted. These opinions frequently become the focal point of public disputes about constitutional interpretation. In the political arena, the arguments reflect the high stakes that are involved when government tries to interpret the Constitution. These stakes may include the future role of the Supreme Court, as in confirmation battles over nominations to the Court or the degree to which the Constitution without explicitly saying so protects individual liberties from state regulation, as reflected during the past two decades in controversies over abortion and gay rights.

On yet another level, legal scholars heatedly debate the meaning and coherence of (1) constitutional doctrine — the Supreme Court’s pronouncements on different constitutional issues and the frameworks for approaching particular areas — and (2) constitutional theory — the different ways scholars (as well as judges and lawyers) attempt to organize, explain, justify, and argue about constitutional decisionmaking. These controversies obviously interest the participants, who have, however, often done a less than adequate job of explaining to students the relevance and significance of their academic disputes to the study and development of constitutional law.

For students in constitutional law classes, it is far from self-evident that theoretical debates about constitutional adjudication are as old as the Constitution itself, that they draw from and may at times inform the disputes among Supreme Court Justices about proper constitutional interpretation, and that they provide the intellectual justifications for the directions in constitutional law that different political forces or interest groups advocate. In short, the connection between judicial, political, and academic disputes over proper constitutional interpretation is real and substantial, and sometimes overlooked in books currently used in classes on the Constitution or American government.

The fourth edition of this reader, like the first three, aims to demystify constitutional theory both for those uninitiated in the study of constitutional law and for those with a grounding in constitutional doctrine. It brings together in one volume comprehensive materials across the spectrum of constitutional theory. The book fills a gap in the existing literature on constitutional law by providing in-depth surveys of and commentaries on different theoretical approaches to constitutionalism, judicial review, and constitutional interpretation. This approach gives students, practitioners, and academics a better foundation for understanding the nature of different interpretive theories, as well as future events in which we can expect constitutional theory to play a significant role — events including confirmation proceedings, separation-of-powers conflicts, and constitutional disputes regarding civil liberties. This focus also clarifies the important connection between theory and judicial, political, and academic debates over the direction of constitutional law.

Part I provides important background material to set a context for the study of constitutional theory. Part II concerns the main debates in constitutional theory over judicial review and constitutional interpretation, including controversies over judicial activism, judicial review, judicial supremacy, and the major sources and methods in constitutional interpretation, such as the text, original meaning, structure, precedent, and moral reasoning.

---

## *PREFACE*

Part III is more experimental and surveys the self-conscious and programmatic contributions to constitutional law and theory by conservatives and progressives. Part III concludes with a chapter examining issues of global constitutionalism in the light of the American constitutional tradition. Throughout, selections present opposing views to make readers better aware of existing conflicts and to facilitate debate. We have also attached at the end of each chapter a list of suggestions for further reading in order to assist professors interested in making assignments beyond the selections provided and to enable others to do more reading on their own.

We have omitted most footnotes from the materials presented, but the original numbering is used for those footnotes that we have retained. We have enclosed the latter numbers in brackets to distinguish them from our own footnotes. For the fourth edition, footnotes were retained when they provided helpful bibliographic information or essential citations. All omissions from or insertions within cases and excerpts of articles and books, except for some omitted citations, are indicated by ellipses, asterisks, or brackets.



# *ACKNOWLEDGMENTS*

---

We are grateful to Alexander Aleinikoff, Richard Chused, John Goldberg, Leslie Griffin, Carrie Menkel-Meadow, Gary Peller, Bob Rasmussen, Louis M. Seidman, Robin West, and Wendy Williams for their help and comments during the preparation of this book. In addition, we are grateful for the diligent research assistance and support provided by Derreck Brown, Felicia Burton, Dana Fitzsimons, Amanda Frazier, Matthew Gardner, Jeanne Gordon, Della Harris, Ian Morse, Gina Rudeira, and especially Mary Meek. In preparing the third edition, the assistance of Katherine C. Penberthy was invaluable. In preparing the fourth edition, Professor Griffin would like to thank Lindsay Calhoun and Rebekka Veith. Indispensable secretarial support was provided by Toni Mochetta for the third and fourth editions.



# TABLE OF CONTENTS

|                  |  |           |
|------------------|--|-----------|
| <b>PART I</b>    | <b>Why Theory? .....</b>   | <b>1</b>  |
| <b>Chapter 1</b> | <b>AN OVERVIEW OF THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL THEORY .....</b>  | <b>3</b>  |
| § 1.01           | INTRODUCTION .....   | 3         |
| § 1.02           | EARLY CONTROVERSIES OVER JUDICIAL REVIEW .....   | 4         |
| § 1.03           | THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN THE 20TH CENTURY .....   | 6         |
|                  | Keith E. Whittington, <i>Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory</i> .....       | 8         |
| § 1.04           | APPROACHES TO CONSTITUTIONAL THEORY AND THE ORGANIZATION OF THIS BOOK .....  | 12        |
| § 1.05           | SUGGESTIONS FOR FURTHER READING: "CLASSIC" WRITINGS OF GENERAL INTEREST ON AMERICAN CONSTITUTIONAL THEORY ..         | 14        |
| <b>Chapter 2</b> | <b>WHY CONSTITUTIONALISM? .....</b>  | <b>15</b> |
| § 2.01           | INTRODUCTION .....   | 15        |
| § 2.02           | WHY COMMIT TO THE CONSTITUTION? .....  | 15        |
|                  | Daryl J. Levinson, <i>Parchment and Politics: The Positive Puzzle of Constitutional Commitment</i> .....             | 15        |
|                  | Comment by Professor Griffin .....   | 18        |
|                  | Daryl J. Levinson, <i>Parchment and Politics: The Positive Puzzle of Constitutional Commitment</i> (continued) ..... | 20        |
|                  | Comment by Professor Griffin .....   | 25        |
|                  | Daryl J. Levinson, <i>Parchment and Politics: The Positive Puzzle of Constitutional Commitment</i> (continued) ..... | 27        |
|                  | Comment by Professor Griffin .....   | 30        |
| § 2.03           | UNDERSTANDING CONSTITUTIONAL CHANGE .....  | 31        |
|                  | Daryl J. Levinson, <i>Parchment and Politics: The Positive Puzzle of Constitutional Commitment</i> (continued) ..... | 32        |
|                  | Comment by Professor Griffin .....   | 36        |
|                  | Bruce A. Ackerman, <i>Revolution on a Human Scale</i> .....  | 40        |
|                  | BRUCE A. ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS .....  | 43        |
| § 2.04           | PARTISAN ENTRENCHMENT AND CONSTITUTIONAL CHANGE BY THE JUDICIARY .....   | 49        |
|                  | Jack M. Balkin & Sanford Levinson, <i>Understanding the Constitutional Revolution</i> .....                          | 49        |

---

## TABLE OF CONTENTS

|        |                                       |    |
|--------|---------------------------------------|----|
| § 2.05 | SUGGESTIONS FOR FURTHER READING ..... | 57 |
|--------|---------------------------------------|----|

---

### PART II                      Judicial Review and Constitutional Interpretation ..... 59

#### Chapter 3                      JUDICIAL ACTIVISM AND RESTRAINT: THE CONTEMPORARY DEBATE ..... 61

|        |  |    |
|--------|--|----|
| § 3.01 | INTRODUCTION .....   | 61 |
| § 3.02 | UNDERSTANDING JUDICIAL RESTRAINT .....                                       | 61 |
|        | Richard A. Posner, <i>The Rise and Fall of Judicial Self-Restraint</i> ..... | 62 |
| § 3.03 | JUDICIAL MINIMALISM .....  | 74 |
|        | Cass R. Sunstein, <i>Burkean Minimalism</i> .....                            | 75 |
| § 3.04 | THE REHNQUIST COURT AND JUDICIAL ACTIVISM .....                              | 81 |
| § 3.05 | CONCLUSION .....   | 84 |
| § 3.06 | SUGGESTIONS FOR FURTHER READING .....  | 84 |

---

### Part II                      Judicial Review and Constitutional Interpretation ..... 87

#### Chapter 4                      THEORIES OF JUDICIAL REVIEW AND JUDICIAL SUPREMACY ..... 87

|        |  |     |
|--------|--|-----|
| § 4.01 | ALEXANDER BICKEL'S COUNTER MAJORITARIAN DIFFICULTY<br>AND ITS CONSEQUENCES .....   | 87  |
|        | ALEXANDER BICKEL, <i>THE LEAST DANGEROUS BRANCH</i> .....  | 87  |
|        | JOHN HART ELY, <i>DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL<br/>REVIEW</i> .....  | 91  |
|        | Nimer Sultany, <i>The State of Progressive Constitutional Theory:<br/>The Paradox of Constitutional Democracy and the Project of Political<br/>Justification</i> ..... | 96  |
| § 4.02 | A MAJORITARIAN COURT? THE ROLE OF POLITICS AND PUBLIC<br>OPINION .....   | 117 |
|        | Richard H. Pildes, <i>Is the Supreme Court a "Majoritarian" Institution?</i> ..  | 119 |
| § 4.03 | WALDRON'S NORMATIVE CRITIQUE OF JUDICIAL REVIEW .....  | 133 |
|        | Jeremy Waldron, <i>The Core of the Case Against Judicial Review</i> .....  | 134 |
|        | Richard H. Fallon, Jr., <i>The Core of an Uneasy Case for Judicial Review</i> .  | 151 |
| § 4.04 | JUDICIAL SUPREMACY DEBATED .....   | 162 |
|        | Larry Alexander & Frederick Schauer, <i>On Extrajudicial Constitutional<br/>Interpretation</i> .....   | 163 |
|        | Keith E. Whittington, <i>Extrajudicial Constitutional Interpretation: Three<br/>Objections and Responses</i> .....   | 166 |
| § 4.05 | SUGGESTIONS FOR FURTHER READING .....  | 179 |

---

## TABLE OF CONTENTS

---

|                  |   |            |
|------------------|---|------------|
| <b>Part II</b>   | <b>Judicial Review and Constitutional Interpretation . . . . .</b>  | <b>181</b> |
| <b>Chapter 5</b> | <b>ORIGINALISM . . . . .</b>  | <b>181</b> |
| § 5.01           | INTRODUCTION AND OVERVIEW . . . . .   | 181        |
|                  | Lawrence Solum, <i>What Is Originalism?</i> , in THE CHALLENGE OF<br>ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY . . . . . | 181        |
| § 5.02           | THE ORIGINAL INTENTIONS OF THE FRAMERS . . . . .  | 206        |
|                  | Richard S. Kay, <i>Original Intention and Public Meaning in Constitutional<br/>    Interpretation</i> . . . . .             | 206        |
| § 5.03           | THE “NEW ORIGINALISM” . . . . .   | 215        |
|                  | Keith E. Whittington, <i>The New Originalism</i> . . . . .  | 216        |
| § 5.04           | THE INTERPRETATION-CONSTRUCTION DISTINCTION AND ITS<br>CRITICS . . . . .  | 228        |
|                  | Randy E. Barnett, <i>Interpretation and Construction</i> . . . . .  | 229        |
| § 5.05           | DISAGREEMENTS ABOUT THE ROLE OF THE CONSTITUTIONAL<br>TEXT AND PRECEDENT . . . . .  | 235        |
|                  | Antonin Scalia, <i>Originalism: The Lesser Evil</i> . . . . .   | 236        |
|                  | Randy E. Barnett, <i>Scalia’s Infidelity: A Critique of “Faint-Hearted”<br/>    Originalism</i> . . . . .                   | 246        |
| § 5.06           | CONTEMPORARY CRITIQUES OF ORIGINALISM . . . . .   | 259        |
|                  | Stephen M. Griffin, <i>Rebooting Originalism</i> . . . . .  | 260        |
|                  | Michael J. Klarman, <i>Antifidelity</i> . . . . .   | 267        |
| § 5.07           | PROGRESSIVE ORIGINALISM . . . . .   | 278        |
|                  | Jack M. Balkin, <i>Fidelity to Text and Principle</i> . . . . .   | 278        |
|                  | Lawrence B. Solum, <i>Construction and Constraint</i> . . . . .   | 288        |
| § 5.08           | CONCLUSION . . . . .  | 291        |
| § 5.09           | SUGGESTIONS FOR FURTHER READING . . . . .   | 292        |
| <b>Chapter 6</b> | <b>STRUCTURAL REASONING . . . . .</b>   | <b>295</b> |
| § 6.01           | INTRODUCTION . . . . .  | 295        |
| [A]              | Structural Reasoning in Separation-of-Powers Disputes: The Formalism-<br>Functionalism Debate . . . . .                     | 296        |
| [B]              | Structural Reasoning in Individual-Rights Disputes . . . . .  | 300        |
| [C]              | Structural Reasoning in Federalism Cases . . . . .  | 302        |
| [D]              | The Unitary Theory of the Executive . . . . .   | 303        |
| [E]              | The Constitution Outside the Court . . . . .  | 305        |
| § 6.02           | CONCLUSION . . . . .  | 308        |
| § 6.03           | SUGGESTIONS FOR FURTHER READING . . . . .   | 309        |

---

## TABLE OF CONTENTS

---

|                      |  |                |
|----------------------|--|----------------|
| <b>Chapter 7</b>     | <b>MORAL REASONING .....</b>   | <b>311</b>     |
| § 7.01               | INTRODUCTION .....   | 311            |
| § 7.02               | THE USE OF MORAL PHILOSOPHY TO DISCOVER THE RIGHT<br>ANSWERS TO CONSTITUTIONAL QUESTIONS .....   | 312            |
| § 7.03               | THE CRITIQUE OF MORAL REASONING .....  | 322            |
| § 7.04               | CONCLUSION .....   | 335            |
| § 7.05               | SUGGESTIONS FOR FURTHER READING .....  | 335            |
| <br><b>Chapter 8</b> | <br><b>PRECEDENT IN CONSTITUTIONAL ADJUDICATION ..</b>   | <br><b>337</b> |
| § 8.01               | INTRODUCTION .....   | 337            |
| § 8.02               | CASE ILLUSTRATIONS .....   | 339            |
| § 8.03               | CONSTITUTIONAL THEORY AND THE PROBLEM OF<br>NONCONFORMING PRECEDENT .....  | 355            |
| § 8.04               | CONSTITUTIONAL CONVENTIONS .....   | 357            |
| § 8.05               | CONCLUSION .....   | 359            |
| § 8.06               | SUGGESTIONS FOR FURTHER READING .....  | 359            |
| <br><b>PART III</b>  | <br><b>Perspectives .....</b>  | <br><b>363</b> |
| <br><b>Chapter 9</b> | <br><b>CONSERVATIVES AND CONSTITUTIONAL THEORY ..</b>  | <br><b>365</b> |
| § 9.01               | INTRODUCTION .....   | 365            |
| § 9.02               | THE REAGAN ADMINISTRATION AND THE CONSERVATIVE LEGAL<br>MOVEMENT .....   | 367            |
|                      | Office of Legal Policy, U.S. Department of Justice, <i>Guidelines on<br/>Constitutional Litigation</i> .....                           | 367            |
| § 9.03               | ECONOMICS, LIBERTARIANISM, AND THE CONFLICT WITHIN THE<br>CONSERVATIVE LEGAL MOVEMENT .....  | 372            |
| [A]                  | Economic Analysis of the Constitution .....  | 373            |
|                      | Richard Posner, <i>The Constitution as an Economic Document</i> .....  | 374            |
| [B]                  | Constitutional Economic Rights? .....  | 380            |
|                      | Antonin Scalia, <i>Economic Affairs as Human Affairs</i> , in ECONOMIC<br>LIBERTIES AND THE JUDICIARY .....                            | 380            |
|                      | Richard Epstein, <i>Judicial Review: Reckoning on Two Kinds of Error</i> , in<br>ECONOMIC LIBERTIES AND THE JUDICIARY .....            | 383            |
| [C]                  | The Role of Natural Law and Barnett's Libertarian Theory .....   | 386            |
| [D]                  | Calabresi's Critique of Barnett .....  | 392            |
|                      | Steven G. Calabresi, <i>The Originalist and Normative Case Against<br/>Judicial Activism: A Reply to Professor Randy Barnett</i> ..... | 392            |
| § 9.04               | SUGGESTIONS FOR FURTHER READING .....  | 403            |

---

## TABLE OF CONTENTS

|                   |   |            |
|-------------------|---|------------|
| <b>Chapter 10</b> | <b>PROGRESSIVES AND CONSTITUTIONAL THEORY . . .</b>   | <b>405</b> |
| § 10.01           | INTRODUCTION . . . . .  | 405        |
| § 10.02           | DEFINING PROGRESSIVE CONSTITUTIONALISM . . . . .  | 407        |
|                   | Mark Tushnet, <i>Progressive Constitutionalism: What is “It”?</i> . . . . .   | 407        |
| § 10.03           | PROGRESSIVES AND CONSTITUTIONAL INTERPRETATION . . . . .  | 413        |
|                   | James E. Ryan, <i>Laying Claim to the Constitution: The Promise of New Textualism</i> . . . . .   | 413        |
| § 10.04           | SUGGESTIONS FOR FURTHER READING . . . . .   | 425        |
| <br>              |   |            |
| <b>Chapter 11</b> | <b>THE U.S. CONSTITUTION AND GLOBAL CONSTITUTIONALISM . . . . .</b>   | <b>427</b> |
| § 11.01           | INTRODUCTION . . . . .  | 427        |
| § 11.02           | THE U.S. CONSTITUTION ABROAD . . . . .  | 428        |
|                   | David S. Law & Mila Versteeg, <i>The Declining Influence of the United States Constitution</i> . . . . .  | 428        |
| § 11.03           | PRESIDENTIALISM AND THE SEPARATION OF POWERS . . . . .  | 436        |
|                   | Bruce Ackerman, <i>The New Separation of Powers</i> . . . . .   | 438        |
|                   | Steven G. Calabresi, <i>The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution</i> . . . . . | 452        |
| § 11.04           | COMPARATIVE JUDICIAL RESPONSES TO TERRORISM . . . . .   | 460        |
|                   | Michel Rosenfeld, <i>Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror</i> . . . . .      | 460        |
| § 11.05           | CONSTITUTIONALISM IN EAST ASIA . . . . .  | 474        |
|                   | Jiunn-Rong Yeh & Wen-Chen Chang, <i>The Emergence of East Asian Constitutionalism: Features in Comparison</i> . . . . .                                     | 474        |
| § 11.06           | SUGGESTIONS FOR FURTHER READING . . . . .   | 482        |
| <br>              |   |            |
| <b>Appendix</b>   | <b>The Constitution of the United States . . . . .</b>  | <b>483</b> |

