

American Constitutional Law

American Constitutional Law
by Louis Fisher and Katy J. Harriger

is available in two formats:

SINGLE-VOLUME HARDCOVER EDITION

American Constitutional Law

TWO-VOLUME PAPERBACK EDITION

VOLUME 1

Constitutional Structures
Separated Powers and Federalism

VOLUME 2

Constitutional Rights
Civil Rights and Civil Liberties

American Constitutional Law

Twelfth Edition

Louis Fisher
Katy J. Harriger



CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2019
Louis Fisher and Katy J. Harriger
All Rights Reserved

ISBN 978-1-5310-0950-2
e-ISBN 978-1-5310-0951-9
LCCN 2018956946

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

TO THE CONSTITUTION PROJECT—LOUIS FISHER

IN MEMORY OF MY FATHER, RUSSELL E. HARRIGER (1923–2010)—KATY J. HARRIGER

Summary of Contents

INTRODUCTION	xxi
1 CONSTITUTIONAL POLITICS	3
2 THE DOCTRINE OF JUDICIAL REVIEW	35
3 THRESHOLD REQUIREMENTS: HUSBANDING POWER AND PRESTIGE	75
4 JUDICIAL ORGANIZATION	113
5 DECISION MAKING: PROCESS AND STRATEGY	139
6 SEPARATION OF POWERS: DOMESTIC CONFLICTS	165
7 SEPARATION OF POWERS: EMERGENCIES AND FOREIGN AFFAIRS	257
8 FEDERAL-STATE RELATIONS	325
9 POLITICAL PARTICIPATION	415
10 ECONOMIC LIBERTIES	497
11 FREE SPEECH IN A DEMOCRATIC SOCIETY	545
12 FREEDOM OF THE PRESS	613
13 RELIGIOUS FREEDOM	675
14 DUE PROCESS OF LAW	753
15 SEARCH AND SEIZURE	847
16 RACIAL DISCRIMINATION	909
17 THE EXPANSION OF EQUAL PROTECTION	985
18 RIGHTS OF PRIVACY	1055
19 EFFORTS TO CURB THE COURT	1121
APPENDICES	1161
TABLE OF CASES	1189
INDEX	1241

Contents

ABOUT THE AUTHORS	xvii		
ACKNOWLEDGMENTS	xix		
INTRODUCTION	xxi		
1 CONSTITUTIONAL POLITICS	3		
A. Litigation as a Political Process	5		
B. Lobbying the Courts	8		
C. The Executive in Court	9		
Reading:			
Steel Seizure Case of 1952: Oral Argument Before the District Court	13		
D. Congressional Duties	14		
Reading:			
Raines v. Byrd (521 U.S. 811 (1997))	17		
E. Judge as Lawmaker	18		
F. Judge as Administrator	20		
G. Independent State Action	21		
H. Who Has the “Last Word”?	22		
Readings:			
Congress Responds to the Sedition Act	24		
Jackson’s Veto of the Bank Bill	26		
The Senate Debates Jackson’s Veto Message	27		
Lincoln’s Critique of <i>Dred Scott</i>	28		
WALTER F. MURPHY, Who Shall Interpret?	29		
Notes and Questions	31		
Selected Readings	32		
2 THE DOCTRINE OF JUDICIAL REVIEW	35		
A. Sources of Judicial Review Authority	35		
B. The Framers’ Intent	38		
Reading:			
ALEXANDER HAMILTON, Federalist No. 78	40		
C. The Road to <i>Marbury</i>	41		
		Readings:	
		Marbury v. Madison	
		5 U.S. (1 Cr.) 137 (1803)	46
		WILLIAM W. VAN ALSTYNE, A Critical Guide to <i>Marbury v. Madison</i>	48
		Martin v. Hunter’s Lessee	
		14 U.S. (1 Wheat.) 304 (1816)	50
		Cohens v. Virginia	
		19 U.S. (6 Wheat.) 264 (1821)	52
		D. Constraints on Judicial Review	54
		Readings:	
		Eakin v. Raub: Gibson’s Dissent	
		12 S. & R. 330 (Pa. 1825)	58
		The Boundaries of Judicial Review: Interview with Justice Powell	60
		E. Methods of Constitutional Interpretation	61
		Readings:	
		The Doctrine of Original Intent: Attorney General Meese versus Justice Brennan	69
		The Natural Law Debate: Frankfurter Against Black Robert Jackson’s Advice	71 72
		Notes and Questions	73
		Selected Readings	74
		3 THRESHOLD REQUIREMENTS:	
		HUSBANDING POWER AND PRESTIGE	75
		A. Cases and Controversies	75
		Readings:	
		Ashwander v. TVA (The Brandeis Rules)	
		297 U.S. 288 (1936)	79
		Bellotti v. Baird (Advisory Opinions)	
		443 U.S. 622 (1979)	80
		B. Standing to Sue	81
		Readings:	
		Frothingham v. Mellon	
		262 U.S. 447 (1923)	85

Flast v. Cohen		ROBERT H. JACKSON, The Limitation	
392 U.S. 83 (1968)	87	of Dissent	158
United States v. Richardson		E. Caseload Burdens	159
418 U.S. 166 (1974)	89	Notes and Questions	161
Allen v. Wright		Selected Readings	162
468 U.S. 737 (1984)	91		
C. Mootness	93	6 SEPARATION OF POWERS: DOMESTIC	
Reading:		CONFLICTS	165
DeFunis v. Odegaard		A. The Separation Doctrine	165
416 U.S. 312 (1974)	94	Readings:	
D. Ripeness	96	Congress Interprets the Ineligibility	
Reading:		Clause	170
Poe v. Ullman		Presidential Signing Statements	171
367 U.S. 497 (1961)	98	Madison's Analysis of the Separation	
E. Political Questions	100	Doctrine	173
Readings:		B. Presidential Power	175
Baker v. Carr		Reading:	
369 U.S. 186 (1962)	103	Hamilton on Executive Power	176
Nixon v. United States		C. Creating the Executive Departments	177
506 U.S. 224 (1993)	105	Readings:	
Virtues and Vices:		Bowsler v. Synar	
Bickel versus Gunther	107	478 U.S. 714 (1986)	182
F. Equitable Discretion	109	Attorney General Opinion on	
Notes and Questions	110	Ministerial Duties	184
Selected Readings	110	Morrison v. Olson	
4 JUDICIAL ORGANIZATION	113	487 U.S. 654 (1988)	185
A. Federal Court System	113	D. Appointments and Removals	188
B. Legislative and Specialized Courts	117	Readings:	
C. The Appointment Process	121	Buckley v. Valeo	
Reading:		424 U.S. 1 (1976)	191
Nomination Hearings of Sandra Day		OLC Memo on President Obama's	
O'Connor	126	Recess Appointments (2012)	194
D. Tenure, Removal, and Compensation	128	NLRB v. Noel Canning	
E. Judicial Lobbying	133	573 U.S. ____ (2014)	195
Reading:		Myers v. United States	
Burger on Judicial Lobbying	136	272 U.S. 52 (1926)	198
Notes and Questions	137	Humphrey's Executor v. United States	
Selected Readings	137	295 U.S. 602 (1935)	201
5 DECISION MAKING: PROCESS AND		Free Enterprise Fund v. Public Company	
STRATEGY	139	Accounting Oversight Board	
A. Jurisdiction: Original and Appellate	140	561 U.S. 477 (2010)	204
B. The Writ of Certiorari	141	E. Delegation of Legislative Power	207
Reading:		Readings:	
DAVID LAUTER, Certiorari Strategies	144	Hampton & Co. v. United States	
C. From Oral Argument to Decision	145	276 U.S. 394 (1928)	210
Reading:		Schechter Corp. v. United States	
FRANK M. COFFIN, The Process of		295 U.S. 495 (1935)	212
Writing a Decision	152	F. Congressional Oversight	214
D. Unanimity and Dissent	153	Readings:	
Readings:		Clinton v. City of New York	
WILLIAM O. DOUGLAS, The Dissent:		524 U.S. 417 (1998)	219
A Safeguard of Democracy	157	INS v. Chadha	
		462 U.S. 919 (1983)	220

LOUIS FISHER, Legislative Vetoes After <i>Chadha</i>	224	C. Treaties and Executive Agreements	287
G. Investigations and Executive Privilege	226	Readings:	
Readings:		Goldwater v. Carter	292
Watkins v. United States		Dames & Moore v. Regan	293
354 U.S. 178 (1957)	232	D. The War Power	296
Barenblatt v. United States		Readings:	
360 U.S. 109 (1959)	234	Hamdi v. Rumsfeld	
United States v. Nixon		542 U.S. 507 (2004)	308
418 U.S. 683 (1974)	236	Hamdan v. Rumsfeld	
Negotiating Executive Privilege: The		548 U.S. 557 (2006)	311
AT&T Cases	240	Boumediene v. Bush	
Clinton v. Jones		553 U.S. 723 (2008)	313
520 U.S. 681 (1997)	241	War Powers Resolution	315
H. Congressional Membership		Dellums v. Bush	
and Prerogatives	244	752 F. Supp. 1141 (D.D.C. 1990)	317
Reading:		Campbell v. Clinton	
Powell v. McCormack		203 F.3d 19 (D.C. Cir. 2000)	319
395 U.S. 486 (1969)	247	Military Operations in Libya	
I. Immigration Policy	249	OLC opinion	320
Executive Branch Statements		E. Rights of Citizenship	321
Regarding DACA	252	Conclusions	322
Conclusions	253	Notes and Questions	323
Notes and Questions	253	Selected Readings	323
Selected Readings	254		
7 SEPARATION OF POWERS: EMERGENCIES		8 FEDERAL-STATE RELATIONS	325
AND FOREIGN AFFAIRS	257	A. The Principle of Federalism	325
A. External and Internal Affairs	257	Readings:	
Readings:		McCulloch v. Maryland	
United States v. Curtiss-Wright Corp.		17 U.S. 315 (1819)	332
299 U.S. 304 (1936)	262	Missouri v. Holland	
Congress Interprets <i>Curtiss-Wright</i> :		252 U.S. 416 (1920)	335
The Iran-Contra Report	264	B. The Commerce Clause	337
Zivotofsky v. Kerry		Readings:	
576 U.S. ____ (2015)	266	Gibbons v. Ogden	
Haig v. Agee		22 U.S. (9 Wheat.) 1 (1824)	340
453 U.S. 280 (1981)	268	Cooley v. Board of Wardens	
Trump v. Hawaii		53 U.S. 299 (1852)	342
585 U.S. ____ (2018)	270	C. Nationalization of the Economy	343
B. An Executive Prerogative?	272	Readings:	
Readings:		Champion v. Ames (Lottery Case)	
The Prize Cases		188 U.S. 321 (1903)	345
2 Black (67 U.S.) 635 (1863)	276	Hammer v. Dagenhart	
Ex parte Milligan		247 U.S. 251 (1918)	347
4 Wall. (71 U.S.) 2 (1866)	278	D. The New Deal Watershed	349
Korematsu v. United States		Readings:	
323 U.S. 214 (1944)	279	Carter v. Carter Coal Co.	
Youngstown Co. v. Sawyer		298 U.S. 238 (1936)	351
343 U.S. 579 (1952)	282	NLRB v. Jones & Laughlin	
New York Times Co. v. United States		301 U.S. 1 (1937)	353
403 U.S. 713 (1971)	284	United States v. Darby	
ERWIN N. GRISWOLD, How Sensitive		312 U.S. 100 (1941)	356
Were the “Pentagon Papers”?	286		

Wickard v. Filburn	357	Readings:	
317 U.S. 111 (1942)		Smith v. Allwright	435
E. From <i>National League to Garcia</i>	360	321 U.S. 649 (1944)	
Readings:		Harper v. Virginia Board of Elections	437
National League of Cities v. Usery	361	383 U.S. 663 (1966)	
426 U.S. 833 (1976)		South Carolina v. Katzenbach	439
Garcia v. San Antonio		383 U.S. 301 (1966)	
Metro. Transit Auth.		Mobile v. Bolden	441
469 U.S. 528 (1985)	363	446 U.S. 55 (1980)	
F. State Powers Revived	365	Congress Reverses <i>Mobile v. Bolden</i>	443
Readings:		Shelby County v. Holder	445
United States v. Lopez	370	570 U.S. 529 (2013)	
514 U.S. 549 (1995)		C. Reapportionment	447
United States v. Morrison		Readings:	
529 U.S. 598 (2000)	373	Colegrove v. Green	459
Gonzales v. Raich		328 U.S. 549 (1946)	
545 U.S. 1 (2005)	376	Baker v. Carr	460
G. The Spending and Taxing Powers	378	369 U.S. 186 (1962)	
Readings:		Wesberry v. Sanders	462
Bailey v. Drexel Furniture Co. (Child		376 U.S. 1 (1964)	
Labor Tax Case)		Reynolds v. Sims	464
259 U.S. 20 (1922)	381	377 U.S. 533 (1964)	
Steward Machine Co. v. Davis		Shaw v. Reno	466
301 U.S. 548 (1937)	382	509 U.S. 630 (1993)	
South Dakota v. Dole		Miller v. Johnson	468
483 U.S. 203 (1987)	384	515 U.S. 900 (1995)	
National Federation of Independent		D. Campaign Financing	470
Business v. Sebelius	386	Reading:	
567 U.S. 519 (2012)		Buckley v. Valeo	482
King v. Burwell		424 U.S. 1 (1976)	
576 U.S. ____ (2015)	390	Citizens United v. FEC	484
South Dakota v. Wayfair, Inc., et al.		558 U.S. 310 (2010)	
585 U.S. ____ (2018)	394	Senate Testimony by Lawrence Lessig	488
H. Preemption and Abstention	397	E. Lobbying	489
Readings:		Reading:	
Pennsylvania v. Nelson	401	Madison’s Views on Factions	492
350 U.S. 497 (1956)		Conclusions	494
Arizona v. United States		Notes and Questions	494
567 U.S. 387 (2012)	402	Selected Readings	495
I. Nationalization of the Bill of Rights	405		
Reading:		10 ECONOMIC LIBERTIES	497
The Incorporation Doctrine:		A. The Meaning of Property	497
Testimony by Justice Rehnquist	409	Readings:	
Conclusions	411	Madison’s Essay on Property	498
Notes and Questions	411	B. The Contract Clause	499
Selected Readings	412	Readings:	
9 POLITICAL PARTICIPATION	415	Calder v. Bull	503
A. Presidential Elections	415	3 U.S. (3 Dall.) 385 (1798)	
Reading:		Fletcher v. Peck	504
Bush v. Gore		10 U.S. (6 Cr.) 87 (1810)	
531 U.S. 98 (2000)	422	Dartmouth College v. Woodward	505
B. Voting Rights	425	17 U.S. (4 Wheat.) 517 (1819)	
		Charles River Bridge v. Warren Bridge	507
		36 U.S. (11 Pet.) 420 (1837)	

Home Bldg. & Loan Assn. v. Blaisdell	509	Readings:	
290 U.S. 398 (1934)		Walker v. Texas Div., Sons of	
C. The Takings Clause	511	Confederate Veterans, Inc.	
Readings:		576 U.S. ____ (2015)	577
Hawaii Housing Authority v. Midkiff		Cohen v. California	
467 U.S. 229 (1984)	518	403 U.S. 15 (1971)	580
Kelo v. City of New London		R.A.V. v. St. Paul	
545 U.S. 469 (2005)	520	505 U.S. 377 (1992)	583
Congress Responds to <i>Kelo</i>	522	Tinker v. Des Moines School Dist.	
D. The Police Power	523	393 U.S. 503 (1969)	585
Readings:		Morse v. Frederick	
Slaughter-House Cases		551 U.S. 393 (2007)	587
16 Wall. 36 (1873)	525	D. Forms of Speech	589
Munn v. Illinois		Readings:	
94 U.S. 113 (1877)	527	Texas v. Johnson	
E. Substantive Due Process	529	491 U.S. 397 (1989)	593
Readings:		Snyder v. Phelps	
Lochner v. New York		562 U.S. 443 (2011)	595
198 U.S. 45 (1905)	533	E. Commercial Speech	598
Adkins v. Children’s Hospital		F. Campaign Finance	601
261 U.S. 525 (1923)	536	G. Broadcasting Rights	602
West Coast Hotel Co. v. Parrish		Readings:	
300 U.S. 379 (1937)	538	FCC v. Pacifica Foundation	
Ferguson v. Skrupa		438 U.S. 726 (1978)	605
372 U.S. 726 (1963)	540	Packingham v. North Carolina	
F. Continuing Issues	541	582 U.S. ____ (2017)	608
Conclusions	542	Conclusions	610
Notes and Questions	543	Notes and Questions	611
Selected Readings	544	Selected Readings	611
11 FREE SPEECH IN A DEMOCRATIC SOCIETY	545	12 FREEDOM OF THE PRESS	613
A. Free Speech and National Security	545	A. The Evolution of Press Freedoms	613
Readings:		Readings:	
Schenck v. United States		JOHN MILTON, <i>Areopagitica</i> (1644)	616
249 U.S. 47 (1919)	550	House Debate on the Sedition Act	
Abrams v. United States		of 1798	617
250 U.S. 616 (1919)	551	B. Regulating the Press	618
Gitlow v. New York		Readings:	
268 U.S. 652 (1925)	552	Near v. Minnesota	
Whitney v. California		283 U.S. 697 (1931)	625
274 U.S. 357 (1927)	554	New York Times Co. v. United States	
Dennis v. United States		403 U.S. 713 (1971)	627
341 U.S. 494 (1951)	556	Branzburg v. Hayes	
Brandenburg v. Ohio		408 U.S. 665 (1972)	630
395 U.S. 444 (1969)	558	C. Free Press vs. Fair Trial	632
Holder v. Humanitarian Law Project		Readings:	
561 U.S. 1 (2010)	560	Nebraska Press Assn. v. Stuart	
B. Associational Rights	563	427 U.S. 539 (1976)	635
Readings:		Gannett Co. v. DePasquale	
Congress Seeks to Remove		443 U.S. 368 (1979)	637
“Subversives” from FDR’s		Richmond Newspapers, Inc.	
Administration	566	v. Virginia	
C. The Regulation of Speech	567	448 U.S. 555 (1980)	639

D. Libel Law	641	D. Financial Assistance to Sectarian Schools	715
Readings:		Readings:	
New York Times Co. v. Sullivan		Everson v. Board of Education	
376 U.S. 254 (1964)	645	330 U.S. 1 (1947)	725
Gertz v. Robert Welch, Inc.		Lemon v. Kurtzman	
418 U.S. 323 (1974)	648	403 U.S. 602 (1971)	727
Hustler Magazine v. Falwell		Zelman v. Simmons-Harris	
485 U.S. 46 (1988)	650	536 U.S. 639 (2002)	729
E. Obscenity	652	E. Religious Instruction and Prayers	731
Readings:		Readings:	
Roth v. United States		Engel v. Vitale	
354 U.S. 476 (1957)	661	370 U.S. 421 (1962)	738
Miller v. California		Congressional Hearings on School	
413 U.S. 15 (1973)	663	Prayer (1964)	739
New York v. Ferber		Wallace v. Jaffree	
458 U.S. 747 (1982)	665	472 U.S. 38 (1985)	741
Reno v. ACLU		Lee v. Weisman	
521 U.S. 844 (1997)	667	472 U.S. 38 (1985)	743
The House Responds to		Santa Fe Independent Sch. Dist.	
<i>Stevens</i> (2010)	670	v. Doe	
Conclusions	671	530 U.S. 290 (2000)	745
Notes and Questions	672	McCreary County v. ACLU	
Selected Readings	672	545 U.S. 844 (2005)	747
13 RELIGIOUS FREEDOM	675	F. Nine Justices in Search of a Model	748
A. The Virginia Statute	676	Notes and Questions	749
Readings:		Selected Readings	750
Virginia Statute for Establishing		14 DUE PROCESS OF LAW	753
Religious Freedom (1786)	678	A. The Concept of Due Process	753
House Debate on the Religion		Reading:	
Clauses (1789)	679	Powell v. Alabama	
B. Free Exercise Clause	680	287 U.S. 45 (1932)	756
Readings:		B. Due Process for Juveniles	758
Minersville School District v. Gobitis		Reading:	
310 U.S. 586 (1940)	688	In re Gault	
West Virginia State Board of		387 U.S. 1 (1967)	760
Education v. Barnette		C. Grand Juries and Jury Trials	762
319 U.S. 624 (1943)	690	Readings:	
Goldman v. Weinberger		Duncan v. Louisiana	
475 U.S. 503 (1986)	692	391 U.S. 145 (1968)	768
Congress Reverses <i>Goldman</i>	694	Apodaca v. Oregon	
Burwell v. Hobby Lobby Stores, Inc.		406 U.S. 404 (1972)	770
573 U.S. ____ (2014)	695	Ballew v. Georgia	
C. Establishment Clause	698	435 U.S. 223 (1978)	772
Readings:		Batson v. Kentucky	
Lynch v. Donnelly		476 U.S. 79 (1986)	773
465 U.S. 668 (1984)	706	Foster v. Chatman	
Allegheny County v. Greater		578 U.S. ____ (2016)	778
Pittsburgh ACLU		D. Fundamentals of a Fair Trial	783
492 U.S. 573 (1989)	708	Reading:	
Employment Division v. Smith		Palko v. Connecticut	
494 U.S. 872 (1990)	710	302 U.S. 319 (1937)	789
Congress Reacts to <i>Smith</i>	712	E. Self-Incrimination	791
City of Boerne v. Flores		F. Assistance of Counsel	795
521 U.S. 507 (1997)	713		

Readings:		Katz v. United States	
Gideon v. Wainwright		389 U.S. 347 (1967)	893
372 U.S. 335 (1963)	802	E. The Exclusionary Rule	895
Escobedo v. Illinois		Readings:	
378 U.S. 478 (1964)	803	Weeks v. United States	
Miranda v. Arizona		232 U.S. 383 (1914)	900
384 U.S. 436 (1966)	805	Mapp v. Ohio	
Dickerson v. United States		367 U.S. 643 (1961)	902
530 U.S. 428 (2000)	807	United States v. Leon	
G. The Eighth Amendment	809	468 U.S. 897 (1984)	904
Readings:		Conclusions	906
Investigation of the Ferguson		Notes and Questions	907
Police Department		Selected Readings	907
March 4, 2015	819		
Furman v. Georgia		16 RACIAL DISCRIMINATION	909
408 U.S. 238 (1972)	821	A. Slavery	909
Gregg v. Georgia		Reading:	
428 U.S. 153 (1976)	824	Dred Scott v. Sandford	
Atkins v. Virginia		60 U.S. (19 How.) 393 (1857)	913
536 U.S. 304 (2002)	826	B. Civil War Amendments	916
Glossip v. Gross		Readings:	
576 U. S. ____ (2015)	829	Civil Rights Cases	
JUSTICE LEWIS POWELL, JR., The Death		109 U.S. 3 (1883)	920
Penalty and Public Opinion	832	Plessy v. Ferguson	
H. Prisoners' Rights	833	163 U.S. 537 (1896)	923
I. The Right to Bear Arms	837	C. School Desegregation	925
Reading:		Readings:	
District of Columbia v. Heller		Government's Brief in <i>Brown</i>	934
554 U.S. 570 (2008)	839	Brown v. Board of Education	
Notes and Questions	844	347 U.S. 483 (1954)	935
Selected Readings	844	Bolling v. Sharpe	
		347 U.S. 497 (1954)	937
15 SEARCH AND SEIZURE	847	Brown v. Board of Education	
A. Expectations of Privacy	847	349 U.S. 294 (1955)	938
B. Arrest and Search Warrants	849	Cooper v. Aaron	
Readings:		358 U.S. 1 (1958)	939
Congress Responds to <i>Zurcher</i>	854	Swann v. Charlotte-Mecklenburg	
C. Exceptions to the Warrant Requirement	855	Bd. of Ed.	
Readings:		402 U.S. 1 (1971)	941
Coolidge v. New Hampshire		Milliken v. Bradley	
403 U.S. 443 (1971)	872	418 U.S. 717 (1974)	943
California v. Ciraolo		Parents Involved in Community	
476 U.S. 207 (1986)	875	Schools v. Seattle School District	
United States v. Ross		No. 1	
456 U.S. 798 (1982)	877	551 U.S. 701 (2007)	944
Terry v. Ohio		D. Desegregating Other Activities	948
392 U.S. 1 (1968)	879	Readings:	
Chimel v. California		Shelley v. Kraemer	
395 U.S. 752 (1969)	881	334 U.S. 1 (1948)	952
New Jersey v. T.L.O.		Congress Interprets the Commerce	
469 U.S. 325 (1985)	883	Clause	954
D. Electronic Eavesdropping	885	Heart of Atlanta Motel v.	
Readings:		United States	
Olmstead v. United States		379 U.S. 241 (1964)	955
277 U.S. 438 (1928)	891	E. Employment and Affirmative Action	957

Readings:		Yick Wo v. Hopkins	
Regents of the University of California		118 U.S. 356 (1886)	1026
v. Bakke		Plyler v. Doe	
438 U.S. 265 (1978)	966	457 U.S. 202 (1982)	1028
Fullilove v. Klutznick		D. Rights of the Poor	1031
448 U.S. 448 (1980)	969	Shapiro v. Thompson	
Richmond v. Croson Co.		394 U.S. 618 (1969)	1034
488 U.S. 469 (1989)	971	San Antonio School Dist. v.	
Adarand Constructors, Inc. v. Pena		Rodriguez	
515 U.S. 200 (1995)	972	411 U.S. 1 (1973)	1035
Gratz v. Bollinger		E. Equal Protection for Gays and Lesbians	1038
539 U.S. 244 (2003)	975	Readings:	
Grutter v. Bollinger		Romer v. Evans	
539 U.S. 306 (2003)	976	517 U.S. 620 (1996)	1040
Fisher v. University of Texas		Attorney General Letter to Congress	
579 U.S. ____ (2016)	978	Regarding DOMA	1043
Conclusions	981	United States v. Windsor	
Notes and Questions	982	570 U.S. ____ (2013)	1045
Selected Readings	982	Masterpiece Cakeshop, Ltd. v.	
		Colorado Civil Rights	
		Commission	
		584 U.S. ____ (2018)	1048
		Conclusions	1052
		Notes and Questions	1052
		Selected Readings	1053
17 THE EXPANSION OF EQUAL PROTECTION	985	18 RIGHTS OF PRIVACY	1055
A. The Struggle for Women's Rights	985	A. Dimension of Privacy	1055
Readings:		Readings:	
Bradwell v. State		Buck v. Bell	
83 U.S. 130 (1873)	990	274 U.S. 200 (1927)	1059
Congress Responds to <i>Bradwell</i>	992	Stanley v. Georgia	
Equal Pay Act of 1963: Congressional		394 U.S. 557 (1969)	1061
Debate	993	B. Use of Contraceptives	1062
Civil Rights Act of 1964:		Reading:	
Congressional Debate	994	Griswold v. Connecticut	
B. Protecting Against Gender Discrimination	996	381 U.S. 479 (1965)	1064
Readings:		C. Reproductive Freedom	1066
Frontiero v. Richardson		Readings:	
411 U.S. 677 (1973)	1005	Roe v. Wade	
Craig v. Boren		410 U.S. 113 (1973)	1076
429 U.S. 190 (1976)	1007	Hyde Amendment of 1976:	
Michael M. v. Sonoma County		Congressional Debate	1079
Superior Court		Harris v. McRae	
450 U.S. 464 (1981)	1010	448 U.S. 297 (1980)	1080
Personnel Administrator of Mass.		Akron v. Akron Center for	
v. Feeney		Reproductive Health	
442 U.S. 256 (1979)	1011	462 U.S. 416 (1983)	1082
Johnson v. Transportation Agency		Planned Parenthood v. Casey	
480 U.S. 616 (1987)	1013	505 U.S. 833 (1992)	1084
Automobile Workers v. Johnson		Stenberg v. Carhart	
Controls		530 U.S. 914 (2000)	1086
499 U.S. 187 (1991)	1015	Gonzales v. Carhart	
Rostker v. Goldberg		550 U.S. 124 (2007)	1089
453 U.S. 57 (1981)	1017		
Senate Debates Women in Combat	1018		
United States v. Virginia			
518 U.S. 515 (1996)	1019		
C. Rights of Aliens	1022		

D. The Right to Die	1091	Readings:	
Readings:		Jurisdiction-Stripping Proposals:	
Cruzan v. Director, Missouri Dept. of Health		ABA Report	1138
497 U.S. 261 (1990)	1094	Human Life Bill: Senate Hearings	1139
Vacco v. Quill		Ex Parte McCardle	
521 U.S. 793 (1997)	1096	74 U.S. (7 Wall.) 506 (1869)	1141
E. Homosexuality and Privacy Rights	1097	E. The Claim of Judicial Finality	1142
Readings:		Readings:	
Bowers v. Hardwick		Sustaining Public Confidence	1144
478 U.S. 186 (1986)	1103	Prayers in Public Schools	1145
Lawrence v. Texas		F. Constitutional Dialogues	1146
539 U.S. 558 (2003)	1105	Readings:	
Obergefell v. Hodges		Is the Supreme Court	
576 U.S. ____ (2015)	1107	the Constitution?	1150
F. Defining the Limits of Privacy	1111	The “Finality” of Supreme Court	
Readings:		Decisions: Senate Hearings	1151
Financial Privacy Act of 1978:		G. Correcting Judicial Errors	1154
Congressional Debate	1113	Conclusions	1158
The Right to Privacy: The Bork		Notes and Questions	1158
Hearings	1115	Selected Readings	1159
Conclusions	1118	APPENDICES	
Notes and Questions	1118	Appendix 1	
Selected Readings	1119	The Constitution of the United States	1161
19 EFFORTS TO CURB THE COURT	1121	Appendix 2	
A. Constitutional Amendments	1122	Justices of the Supreme Court	
B. Statutory Reversals	1124	(1789–2016)	1175
Reading:		Appendix 3	
Statutory Reversal: Lilly Ledbetter	1127	Glossary of Legal Terms	1177
C. Court Packing	1128	Appendix 4	
Reading:		How to Research the Law	1183
FDR’s Court-Packing Plan:		TABLE OF CASES	1189
Senate Report	1132	INDEX	1241
D. Withdrawing Jurisdiction	1133		

About the Authors

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 as Specialist in Constitutional Law. Upon his retirement from the Library in August 2010, he joined The Constitution Project as scholar in residence. He has testified before congressional committees more than 50 times on such issues as war powers, state secrets, NSA surveillance, Congress and the Constitution, executive lobbying, executive privilege, committee subpoenas, 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 twenty-six books, listed on his webpage at <http://loufisher.org>, include *Constitutional Conflicts between Congress and the President* (6th ed., 2014), *Constitutional Dialogues* (1988), *Presidential War Power* (3d ed. 2013), *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008), *Defending Congress and the Constitution* (2011), and *The Law of the Executive Branch: Presidential Power* (2014), *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (2017), and *President Obama: Constitutional Aspirations and Executive Actions* (2018).

Fisher has been active with CEELI (Central and East European Law Initiative) of the American Bar Association, traveling to Bulgaria, Albania, and 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 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.

KATY J. HARRIGER received her B.A. in Political Science from Edinboro State College in Pennsylvania and her M.A. and Ph.D. in Political Science from the University of Connecticut. She is a Professor of Politics and International Affairs at Wake Forest University where she teaches courses in American Constitutional Law, American politics, judicial process, and democracy and citizenship. She has testified before Congress and been a frequent media commentator on issues related to the use of independent counsel and political influences on the Department of Justice. Dr. Harriger is the editor of *Separation of Powers: Commentary and Documents*, (Congressional Quarterly Press 2003), the author of *The Special Prosecutor in American Politics*. 2nd ed., revised (University Press of Kansas, 2000), and *Independent Justice: The Federal Special Prosecutor in American Politics* (University Press of Kansas, 1992), as well as a number of articles about constitutional law issues in journals and law reviews. She has also co-authored two studies on teaching college students deliberative dialogue and measuring its long-term impact on their political values and behavior. They were published by the Kettering Foundation Press in 2007 and 2017. At Wake Forest, Harriger has been the recipient of the

Reid Doyle Prize for Excellence in Teaching (1988), the John Reinhardt Distinguished Teaching Award (2002), the Schoonmaker Award for Community Service (2006), and the F. Michael Crowley Distinguished Faculty Fellowship (2018–2023).

Acknowledgments

This book, in gestation for years, has many contributors and abettors. With the publication of the eighth edition, Katy J. Harriger joined 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, Wayne Moore, Ronald Moe, Christopher Pyle, Jeremy Rabkin, Harold Relyea, William Ross, Jay Shampansky, Gordon Silverstein, Mitchel Sollenberger, Charles Tiefer, and Stephen Wasby.

It is my pleasure to dedicate the book to The Constitution Project, which I have worked with for over two decades on a number of issues, including war powers and the state secrets privilege. Its expertise, analytical skills, and nonpartisan approach contribute to an informed and professional debate on key questions of constitutional law. Upon my retirement from government in August 2010, I became Scholar in Residence at The Constitution Project and am proud to be among its supporters.

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 recent editions. 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 often misinformed. I dedicate the book to my late father, Russell E. Harriger, who always encouraged and supported my endeavors, even when he disagreed with me (which in the area of constitutional law was early and often).

I am thankful for the help of student research assistant Jay Sherrill, who has been enormously helpful in keeping me up to date with contemporary developments in the law. Keith Sipe, Susan Trimble, and the rest of the staff at Carolina Academic Press, were amiable, helpful and professional in bringing this project to fruition. We express our thanks and gratitude to them for all of their efforts.

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. According to this approach, constitutional law is reduced to the judicial exercise of divining the meaning of textual provisions. The larger process, taking account of both judicial and 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 substantially overlap. 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

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).

A Note on Citations. The introductory essays to each chapter contain many citations to court cases, public laws, congressional reports, and floor debates. Reference to these citations may seem confusing and even overwhelming. We include them to encourage readers 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 comprehensive, the instructor may always advise students to focus on selected areas. 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> (6th ed. 2014).
Landmark Briefs	<i>Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law.</i> Gerald Gunther and Gerhard Casper, eds. University Publications of America.
O.L.C.	Office of Legal Counsel Opinions, U.S. Department of Justice.
Op. Att'y Gen.	Opinions of the Attorney General.
Richardson	James D. Richardson, ed., <i>A Compilation of the Messages and Papers of the Presidents</i> (20 vols., New York: Bureau of National Literature, 1897–1925).
Wkly Comp. Pres. Doc.	<i>Weekly Compilation of Presidential Documents</i> , published each week by the Government Printing Office from 1965 to 2009; currently available online.