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VOLUME 2

Constitutional Rights

Civil Rights and Civil Liberties

Louis Fisher

Katy J. Harriger



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TO THE CONSTITUTION PROJECT—LOUIS FISHER

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

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His twenty books, listed on his webpage at <http://loufisher.org>, include *Constitutional Conflicts between Congress and the President* (5th ed., 2007), *Constitutional Dialogues* (1988), *Presidential War Power* (2d ed. 2004), *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* (2013).

Dr. 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 has served on CEELI “working groups” on Armenia and Belarus. He traveled to Russia in 1992 as part of a CRS delegation to assist on questions of separation of powers and federalism and to Ukraine in 1993 to participate in an election law conference.

His specialties include constitutional law, war powers, state secrets, budget policy, executive-legislative relations, and judicial-congressional relations. He is the author of more than 450 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. He has been invited to speak in Albania, Australia, Belgium, Bulgaria, Canada, the Czech Republic, China, Denmark, England, France, Germany, Greece, Israel, Japan, Macedonia, Malaysia, Mexico, the Netherlands, Oman, the Philippines, Poland, Romania, Russia, Slovenia, South Korea, Sweden, Taiwan, Ukraine, and United Arab Emirates.

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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. Most recently she co-authored, with Jill J. McMillan, *Speaking of Politics: Preparing College Students for Democratic Citizenship through Deliberative Dialogue* (Kettering Foundation Press, 2007). 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), and the Schoonmaker Award for Community Service (2006).

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It is my pleasure to dedicate the book to The Constitution Project, which I have worked with for more than a decade 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 late August 2010, I worked even more closely with The Constitution Project as Scholar in Residence 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).

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Katy J. Harriger

Introduction

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

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

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

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

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

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

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

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

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

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

Comp. Gen.	Decisions of the Comptroller General.
Elliot	Jonathan Elliot, ed., <i>The Debates in the Several State Conventions, on the Adoption of the Federal Constitution</i> (5 vols., Washington, D.C., 1836–1845).
Farrand	Max Farrand, ed., <i>The Records of the Federal Convention of 1787</i> (4 vols., New Haven: Yale University Press, 1937).
Fisher	<i>Constitutional Conflicts between Congress and the President</i> (5th ed. 2007).
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.
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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).
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