



# CONSTITUTIONAL LAW AND POLITICS

VOLUME ONE

*Struggles for Power and Governmental Accountability*

SEVENTH EDITION

David M. O'Brien





# CONSTITUTIONAL LAW AND POLITICS

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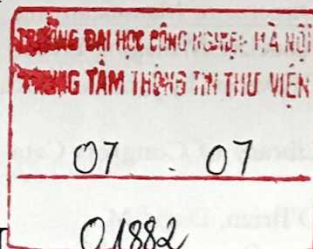
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DAVID M. O'BRIEN

UNIVERSITY OF VIRGINIA



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## *For Claudine, Benjamin, Sara, and Talia*

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## PREFACE

Because there is no dearth of casebooks, perhaps an explanation is needed of how this one differs from others. What distinguishes this casebook is its treatment and incorporation of material on constitutional history and American politics. Few casebooks pay adequate attention to the forces of history and politics on the course of constitutional law. Yet constitutional law, history, and politics are intimately intertwined.

The Constitution and Bill of Rights, of course, are political documents. Rooted in historic struggles and based on political compromises, their provisions and guarantees continue to invite competing interpretations and political contests over, for example, the separation of powers between Congress and the president, federalism, and civil rights and liberties. Because the Constitution says nothing about *who* should interpret it or about *how* it should be interpreted, constitutional law is animated by the politics of interpretation and the interpretation of politics. Neither do we have a single accepted theory of constitutional interpretation, nor do the justices write on a clean slate. Instead, we face constitutional choices and competing judicial and political philosophies, as well as new social, economic, and technological changes.

The Supreme Court's decisions do not occur in a political vacuum, standing apart from history and the political struggles within the Court and the country. Virtually every major political controversy raises questions of constitutional law, no less than do technological changes and social movements and economic forces. The development and direction of constitutional law also shift (more or less quickly) with the Court's changing composition. Members of the Court, just as other citizens, differ in their readings of the Constitution. Moreover, major confrontations in constitutional law and politics, such as those over the powers of the national government, school desegregation, abortion and the right of privacy, involve continuing struggles that run from one generation to another. In the course of those struggles, constitutional law evolves with changes in the Court and the country. The Constitution and the Bill of Rights bind the Court, other political institutions, and the people in an ongoing dialogue over the exercise of and limitations on governmental power.

By providing the historical context and explaining the political



contests among the justices and between the Court and the country, this casebook aims to make constitutional law more accessible for students. History and politics are also important for students' analyzing of particular decisions and their relation to developments and changes in constitutional law and politics. They are crucial as well for students trying critically to evaluate competing interpretations and to appreciate the political consequences of alternative interpretations. And they are essential if students are to engage in the dialogue of constitutional law, confront constitutional choices, and come to terms with their and others' views of the Constitution and the Bill of Rights.

The casebook remains different in several ways. First, it comes in two very comprehensive, anthology-like volumes. Volume I, *Struggles for Power and Governmental Accountability*, deals with separation of powers, federalism, and the democratic process. Volume II, *Civil Rights and Civil Liberties*, is devoted to the enduring struggles to limit governmental power and guarantee civil rights and liberties. As a two-volume set, it not only includes more Court decisions than other casebooks but also permits more introductory background material. Instructors, therefore, have greater flexibility when assigning cases, and students will find useful the additional cases and guides to other cases and resources.

Second, two chapters dealing with the politics of constitutional interpretation and Supreme Court decision making contain material not usually found in casebooks. Chapter 1 goes beyond dealing with the establishment of the power of judicial review, and political criticisms of the Court's exercise of that power, to examining rival theories of constitutional interpretation. Students are introduced to differing judicial and political philosophies and referred to cases and opinions found in subsequent chapters that illustrate these different positions on constitutional interpretation. Chapter 2 combines an introduction to jurisdictional matters, such as standing, with a discussion of how the Court operates as an institution and in relation to other political institutions, which may help promote compliance with and implementation of its rulings, or thwart and even reverse them. In short, Chapter 1 prepares students for critically evaluating competing interpretations of constitutional provisions in subsequent chapters. And Chapter 2 prepares them for understanding the political struggles that take place within the Court as well as between the Court and other political institutions over its decisions. While the volumes together are designed for a two-semester course, both of these chapters, as well as The Constitution of the United States, are included in each volume for the convenience of teachers and students who might be involved in only one of the two-semester constitutional law course sequence.

As already noted, each chapter and subsection contains a lengthy



introductory essay. These essays focus on particular provisions of the Constitution and the Bill of Rights, why they took the form they did, and what controversies surrounded them during the Founding period and later. Most begin with the debates at the Constitutional Convention of 1787 and those between the Federalists and Anti-Federalists during the ratification period, and then review subsequent cases and controversies. Besides providing a historical and political context for the cases in each chapter, the essays highlight the continuity and changes in the debates over constitutional law and politics that run from the Founding period to those rulings of the Roberts Court.

Something should also be said about the case excerpts. Most are preceded by “headnotes,” short explanations of the facts and why the case was appealed to the Court. But, unlike the brief (and usually dry) headnotes typically found in casebooks, these reveal something about the personal and political struggles of those who appeal to the Court. Throughout, there is an attempt to help students understand the judicial and political process and appreciate how questions of constitutional law are embedded in everyday life. For this reason, students will also find excerpts from oral arguments before the Court and other materials bearing on the political struggles that they represent. Along with excerpts of the opinion announcing the decision of the Court, students will frequently encounter excerpts from separate concurring and dissenting opinions. These are included to help students appreciate the choices that the Court and they must make when interpreting the Constitution and the Bill of Rights. Related to this is a good suggestion made by a number of adopters of the first edition: the headnotes record the actual Court vote.

In addition, each volume contains four types of boxes, which include materials that further place constitutional interpretation and law in historical and political perspective. One set of boxes, **CONSTITUTIONAL HISTORY**, presents important background material, such as excerpts from John Locke on the connection between property and liberty and explanatory notes on the “Watergate crisis” and civil liberties in wartime. Another set, **THE DEVELOPMENT OF LAW**, shows changes and patterns in constitutional law and refers students to other cases on topics of special interest. The third, **INSIDE THE COURT**, illustrates the internal dynamics of the Court when engaged in the process of constitutional interpretation and deciding cases. Finally, **IN COMPARATIVE PERSPECTIVE** boxes illustrate how courts around the world have dealt with similar constitutional controversies. These boxes are indicated by □ in the contents. Also included at the end of each volume are brief biographies of the current sitting justices.



This seventh edition updates the introductions, the cases, and the four types of boxes, as well as incorporates the highlights of the Court's terms through the 2006–2007 term. Along with adding a number of new boxes on CONSTITUTIONAL HISTORY, THE DEVELOPMENT OF LAW, and IN COMPARATIVE PERSPECTIVE, this edition includes a number of other new features. RESEARCHING LEGAL MATERIALS provides a guide for students to access and to search for legal materials and law-related sources on the Internet. THE HOW, WHY, AND WHAT TO BRIEFING AND CITING COURT CASES discusses the how, why, and what to briefing and citing court decisions and opinions. In response to requests from adopters of past editions, the chapter titled “Economic Rights and American Capitalism” is included in both volumes; it appears as Chapter 9 in Volume One and remains Chapter 3 in Volume Two. Besides maintaining the SUPREME COURT WEB WATCH (at [www.wwnorton.com/scww/](http://www.wwnorton.com/scww/)), with links to pertinent information on the Supreme Court and the Constitution, in order to keep this edition up to date, I will continue to write, and Norton to publish each September, an annual supplement that we call SUPREME COURT WATCH.

What follows will, it is hoped, enrich students' understanding of constitutional law, politics, and history, as well as open them to the possibilities in interpreting the Constitution and the Bill of Rights. But the Constitution is where students should begin their study, and it is assuredly where they will return again and again.

D. M. O.