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A Practical Companion to the Constitution: How the Supreme Court Has Ruled on Issues from Abortion to Zoning

Jethro K. Lieberman

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Updated and Expanded Edition of
THE EVOLVING CONSTITUTION

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For Jo, s.p.h.p. enduringly

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HOW TO USE THIS BOOK

This is a reference book on the Constitution, not a narrative history. It summarizes in a single, readable volume what the Constitution means as the United States Supreme Court sees it. This lofty ambition prescribes its own limitations, for although the Constitution is short, its official commentaries are long. No single volume can do justice to the richness of our constitutional history and the sheer profusion of constitutional analysis, even when narrowed to a single court. Since 1803, when Chief Justice John Marshall declared that judges may strike down federal laws that violate the Constitution, the Supreme Court has decided more than 7,500 cases focusing on or somehow dealing with the Constitution. Just to list their names is a forbidding exercise.

For that reason, too, this book is not a conventional treatise. It does not dwell on the Court's justifications for its decisions or on the fine, even gossamer, distinctions that make the doctrinal path so tortuous. There is scarcely room even to list all the issues and controversies touching on the Constitution. There is certainly no room to tell all their stories in full.

Moreover, because the Constitution is short and old, those who today seek the Constitution's shelter find their problems crowding under the protective shadow of a relatively few short sections. A handful of clauses account for the majority of cases that come to the courts today: the Due Process Clauses, the Equal Protection Clause, the First Amendment, the Fourth Amendment, the Sixth Amendment, and very few others. So diverse are the controversies that fall under these few clauses that a discussion tracking the Constitution's outline can be compared with the famous Saul Steinberg cartoon of the United States from the *New Yorker's* point of view—a swollen Manhattan and very little else.

To overcome these difficulties to the extent possible, this book is arranged by topic. If you want to learn about the abortion controversy, look it up directly under "abortion," not under the more mysterious entry "Fourteenth Amendment."

To be sure, this arrangement poses its own problems. Because so many issues are connected, a discussion by topic risks the Scylla of repetition or the Charybdis of discontinuity. Through a series of cross-references and typographical conventions, I have attempted to steer between these shoals.

Here is how to use entries in the book.

If you are new to the Constitution and its terminology, first read the short essay entitled **The Constitution: A Guided Tour**, beginning on page 1. This essay explains how the Constitution is structured and what it attempts to do. Second, read **Some Thoughts on Interpreting the Constitution** for an overview of why constitutional meaning is so hotly disputed. Turn to **How the Supreme Court Hears and Decides Cases** for a quick look at how the justices grapple with constitutional controversies. Then look up any topic. For example:

ABORTION . . . In 1973, in *Roe v. Wade*,²⁰¹⁴ the Supreme Court held 7–2 that the fundamental right to PRIVACY, protected by the DUE PROCESS Clause of the FOURTEENTH AMENDMENT, is “broad enough to encompass” a qualified right to an abortion.

Roe is one of the most notable instances of the use of the Fourteenth Amendment to protect a woman’s right to act in her personal life without fear of prosecution. In effect, this line of reasoning, called SUBSTANTIVE DUE PROCESS, says that we retain some personal liberties with which the government may simply not interfere. . . .

The discussion of each topic immediately follows its entry. Words in SMALL CAPITAL LETTERS indicate that a word or phrase in the discussion will be found as a separate entry. To avoid cluttering the pages, footnotes have been avoided; all bibliographic information and occasional comments appear in notes in the section beginning on page 755. An asterisk indicates that additional information concerning the entry may be found in the notes. The superscripted numbers in the text (such as that following *Roe v. Wade* above), whether or not attached to a case name, refer not to the backnotes but to numbered entries in the **Table of Cases**, beginning on page 633. There you will find a brief sketch of the case. Names of cases *italicized* in the text do not, as a rule, carry superscripted numbers, since those cases may be looked up directly in the alphabetically arranged **Table of Cases**.

A “see also” line at the end of a topic tells you where to find related topics that will help round out the discussion.

See also: FOURTEENTH AMENDMENT; FUNDAMENTAL INTERESTS, RIGHTS, AND PRIVILEGES; PRIVACY.

Occasionally the “see also” entry will direct you to a topic by concept rather than by name. For example, in the “see also” line under the entry “Bill of Rights” you are directed to “Amendments 1 through 10” and to “particular rights guaranteed by the first ten amendments.” Such general descriptive terms are necessary to avoid the tedium of listing the dozens of such rights at that point.

The entry for a topic may simply refer you to another topic.

ABRIDGING FREEDOM OF SPEECH, see: freedom of speech

Such cross-references contain no discussion but enable you to look for a topic under a variety of possible labels without having to know in advance what term I or the courts have chosen. The **Index of Subjects and Names** provides a more detailed method of finding particular topics.

For production reasons, the Court’s treatment of constitutional issues during its 1997–98 term is covered in a separate section, also arranged topically, beginning on page 555. Cases decided during this term are contained in the main case table. A dagger (†) at the end of an entry indicates that the topic is considered further in the section on the Court’s 1997–98 term.

Information about all cited cases is set out in the alphabetically and numerically ordered **Table of Cases**. A representative entry is as follows:

2014. *Roe v. Wade*, 410 U.S. 113 (1973).
7–2, BLACKMUN. Concurrences: Burger, Douglas, Stewart. Dissents:
White, Rehnquist. 66pp. *Noted at:* 13, 16, 19–22, 81a, 110b, 125a, 254a, 262b, 309b,
315a, 349a, 378a, 407b, 476a, 489a.

Here, the initial number corresponds to the number used throughout the text to refer to the particular case. It is followed by the case name and the official citation to the *United States Reports*, available in any law library; 410 U.S. 113 means that *Roe v. Wade* can be found in volume 410 of the *United States Reports* beginning on p. 113. (Because the Court’s own volumes have a production lag of a year or two, some of the most recent cases carry the West Publishing Company citation “S.Ct.”) Then comes the Court’s vote. The author of the majority opinion is in CAPITALS, and the names of those who wrote

concurring and dissenting opinions (and, occasionally, the names of those not participating) follow. The number before “pp.” is the total page length of all opinions written in that case. The final set of numbers following “Noted at” is an index to pages on which the case is cited or referred to in the text.

Other sections of this book include the following:

- **The Constitution of the United States.** For the complete text of the Constitution and all amendments, see pages 571–584.
- **Concordance to the Constitution.** To find a particular word or phrase used in the Constitution, consult the Concordance, beginning on page 585.
- **Time Chart and Biographical Notes of the Justices.** To see which justices served together, see the **Time Chart of the Justices of the Supreme Court**, beginning on page 607. For basic biographical information about each of the justices, see **Biographical Notes on the Justices of the Supreme Court**, beginning on page 617.
- **Further Reading.** For brief descriptions of other reading, consult the list of readings beginning on page 751.
- **Index of Subjects and Names.** For a detailed guide to names, concepts, references to justices quoted in the text, and so on, consult the index, beginning on page 771, which includes many individual names and other subjects not contained in the cross-references throughout the text.

A Word about What Is *Not* Contained in This Book

Many legal, political, and social issues have constitutional dimensions. But to understand them fully, you must plumb below their constitutional surfaces. The Constitution is not the only law; Congress, the states, their subdivisions, regulatory agencies, and the courts give us plenty of other law to chew on. And since this is not a book about law in general or about specific policy issues, inevitably only parts of many stories are told here. The right to vote, for instance, is a constitutional topic; five amendments and several provisions in the main text of the Constitution deal with it. But purely constitutional issues about the right to vote have long since been resolved. Instead, the most difficult questions today arise under such laws as the federal Voting Rights Act. The reader will search in vain here for a narrative on voting and other major policy problems, because this is a volume about the Constitution and cases that arise under it, not about policy issues that happen to have constitutional dimensions. The Constitution obviously helps shape the policy debate, but it does not dictate in any detail how we must resolve our pressing problems. Many things are permitted under the Constitution but prohibited by other law. Moreover, constitutional law resides not only in Supreme Court decisions but also in the decisions of many other federal and state courts. For lack of space, not lack of significance, discussion of this vast branch of constitutional law is necessarily omitted. Likewise, the profusion of constitutional theories propounded by many scholars is almost wholly ignored, despite their relevance and their habit of turning up years later as the basis of many Supreme Court judgments. Finally, this book does not inquire whether the lower courts and the government abide by the Supreme Court’s opinions, even though what happens is often quite different from what the Court says ought to happen. For these limitations I do not so much beg the reader’s pardon as ask the reader’s understanding—how big a book do you wish to hold in your hands?

Author’s Note

References to particular clauses in the Constitution are abbreviated as follows:

Art. I-§8[2] refers to Article I, Section 8, Clause 2.

Amendment 14-§1 refers to Section 1 of the Fourteenth Amendment.

To conserve space, many of the discussions about particular constitutional rights are written as if the Bill of Rights applied directly to the states. Technically, the Bill of Rights limits only the federal government; it does not apply to the states. Beginning in the late nineteenth century, however, the Supreme Court began to apply to the states individual rights contained in the Bill of Rights, by "incorporating" them into the Due Process Clause of the Fourteenth Amendment, which itself applies directly to the states. Through a long process of "selective incorporation" (discussed in detail under INCORPORATION DOCTRINE in this book), the Bill of Rights today has largely been absorbed in the Fourteenth Amendment and hence is equally applicable to the states and the federal government. Because it would be cumbersome in scores of essays to refer to "the Eighth Amendment right against cruel and unusual punishments, as incorporated in the Fourteenth Amendment," the fact of incorporation has largely been omitted.