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U.S. Constitution **FOR** **DUMMIES®**

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Wiley Publishing, Inc.

U.S. Constitution For Dummies®

Published by

Wiley Publishing, Inc.

111 River St.

Hoboken, NJ 07030-5774

www.wiley.com

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Published by Wiley Publishing, Inc., Indianapolis, Indiana

Published simultaneously in Canada

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Library of Congress Control Number: 2009925425

ISBN: 978-0-7645-8780-1

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1



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Michael Arnheim's active interest in the U.S. Constitution started with a comparative paper he wrote at the age of 17, for which he was awarded a special prize in the Royal Commonwealth Society Essay competition. As a junior barrister he wrote a fortnightly column in the *Solicitors Journal*, in which he dealt with U.S. constitutional issues among others. He has also written on U.S. constitutional themes for publications such as the *New Law Journal* and *Counsel* magazine. In 1994, he was invited to edit the comparative *Common Law* volume in the prestigious *International Library of Essays in Law and Legal Theory*, published by Ashgate Dartmouth. He has also been consulted on matters involving immigration, healthcare, protectionism, states' rights, and same-sex marriage.

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For updates on the U.S. Constitution, comments, and reviews on the subject, go to www.michaelarnheim.com.

Dedication

To the memory of my beloved parents.

To my students over the years, who kept me on my toes.

And to the spirit of American liberty, in the light of Abraham Lincoln's challenge:

Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?

Acknowledgments

My classical and historical training has stood me in good stead in my practice of law, and, not least, in my study of the U.S. Constitution. Professor Theo Haarhoff taught me how difficult it sometimes is to differentiate between objective views and subjective views that mimic objectivity. Professor Hugo Jones and Professor John Crook of Cambridge University were two of the most tolerant minds that I have ever come across, but they never made the mistake of equating toleration with acceptance of all views as equally valid.

Special thanks to my editors at Wiley: Kathy Cox, Diane Steele, and Joan Friedman. My thanks also to Susan Ellis Wild for her review of the manuscript. I owe a particular debt of gratitude to Kathy Nebenhaus, Vice President and Executive Publisher at Wiley, who, beyond the call of duty, took this book under her wing and saw it through to completion.

As I don't have a cat, I can't blame it for clambering over the keyboard. The sole responsibility for any mistakes rests on me. The law as stated in the book is correct as of Washington's Birthday (Presidents' Day), February 16, 2009. For updates, go to www.michaelarnheim.com.

Publisher's Acknowledgments

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Contents at a Glance

Foreword	xix
Introduction	1
Part I: Exploring Constitutional Basics	7
Chapter 1: Constitutional Law: The Framework for Governance	9
Chapter 2: Framing the U.S. Constitution: Big Thinkers, Big Thoughts	17
Chapter 3: Debating the Constitution	31
Chapter 4: Introducing . . . the Constitution! The Preamble and the Seven Articles	43
Chapter 5: Amending versus Interpreting the Constitution: Taking Time for Change	53
Part II: We the People: How the United States Is Governed	65
Chapter 6: Scrutinizing Sovereignty: Who Rules America?	67
Chapter 7: Federalism: Forming One out of Many	79
Chapter 8: Separation of Powers: To Each His Own	91
Chapter 9: Doing Business: The Commerce Clause	101
Part III: Balancing the Branches of Government: The President, Congress, and the Judiciary	113
Chapter 10: Looking at the Role of Commander in Chief	115
Chapter 11: Giving Everyone a Voice: The House of Representatives and Senate	139
Chapter 12: “During Good Behaviour”: The Judicial System	157
Chapter 13: You’re Fired! Investigating the Impeachment Process	179
Part IV: The Bill of Rights: Specifying Rights through Amendments	193
Chapter 14: The First Amendment: Freedom of Religion, Speech, and Assembly	195
Chapter 15: The Second Amendment: Bearing Arms	207
Chapter 16: The Third and Fourth Amendments: Protecting Citizens from Government Forces	217
Chapter 17: Taking the Fifth — and a Bit of the Fourteenth	231

Chapter 18: Dealing with Justice and Individual Rights: The Sixth through Eighth Amendments	247
Chapter 19: The Ninth and Tenth Amendments: Leaving Things Up to the People and States	263
<i>Part V: Addressing Liberties and Modifying the Government: More Amendments.....</i>	277
Chapter 20: States' Rights, Elections, and Slavery: The Eleventh through Thirteenth Amendments	279
Chapter 21: The Fourteenth Amendment: Ensuring Equal Protection	291
Chapter 22: Starts, Stops, and Clarifications: Amendments since 1870.....	305
<i>Part VI: The Part of Tens</i>	321
Chapter 23: Ten Landmark Constitutional Cases	323
Chapter 24: Ten Influential Supreme Court Justices	329
Chapter 25: Two Sides of Five Constitutional Conundrums.....	337
<i>Appendix: Constitution of the United States of America</i>	345
<i>Index</i>	369

Table of Contents

<i>Foreword</i>	<i>xix</i>
-----------------------	------------

<i>Introduction</i>	1
---------------------------	----------

About This Book	1
Conventions Used in This Book.....	2
What You're Not To Read.....	2
How This Book is Organized	3
Part I: Exploring Constitutional Basics	3
Part II: We the People: How the United States Is Governed	3
Part III: Balancing the Branches of Government: The President, Congress, and the Judiciary.....	4
Part IV: The Bill of Rights: Specifying Rights through Amendments	5
Part V: Addressing Liberties and Modifying the Government: More Amendments	5
Part VI: The Part of Tens.....	5
Icons Used in This Book	5
Where To Go from Here.....	6

<i>Part I: Exploring Constitutional Basics</i>	7
--	----------

Chapter 1: Constitutional Law: The Framework for Governance	9
--	----------

Defining "Constitution"	9
Knowing When and Why the Constitution Was Created	10
Summarizing the Main Principles of the Constitution	11
Identifying Some Areas of Controversy	14

Chapter 2: Framing the U.S. Constitution: Big Thinkers, Big Thoughts	17
---	-----------

Building on Magna Carta	18
Respecting the Rule of Law (Or the Rule of Lawyers?)	19
Analyzing the Concepts Underlying the Declaration of Independence	21
Invoking the law of nature	22
Securing "unalienable Rights"	23
"Deriving their just powers from the consent of the governed" ...	24



Establishing a Republic.....	26
Getting rid of the king.....	26
Crafting the Articles of Confederation	28
Leaving democracy out of the U.S. Constitution	29

Chapter 3: Debating the Constitution31

Listing Some Sources of Confusion	31
Discarding Out-Of-Date Ideas?	33
Untangling Ambiguities.....	34
Giving Some Important Principles the Silent Treatment.....	35
Interpreting the Constitution.....	37
Comparing interpretations of “cruel and unusual punishments”	38
Comparing interpretations of partial-birth abortion	39
Identifying methods of interpretation.....	40

Chapter 4: Introducing . . . the Constitution!

The Preamble and the Seven Articles43

Presenting the Preamble: “We the People . . .”	43
Article I: Setting up the Congress	44
Magnifying the commerce power	45
(Mis)interpreting the “necessary and proper” clause	46
Article II: Hailing the Chief.....	46
Listing presidential powers and duties.....	47
Identifying the real issues.....	47
A drafting boo-boo.....	48
Succeeding to the presidency	48
Article III: Understating Judicial Power	49
Article IV: Getting Along with the Neighbors — and Uncle Sam	50
Article V: Changing versus Amending the Constitution	51
Article VI: Fudging Federalism	52
Article VII: Ratifying the Constitution	52

Chapter 5: Amending versus Interpreting the Constitution:

Taking Time for Change53

Noting the Four Paths to an Amendment	54
Explaining What Happens in Practice.....	55
Listing the Amendments.....	56
Rating the Ratification of the Fourteenth Amendment	57
Reviving a Forgotten Amendment	58
Calling Time on an ERA.....	59
Reviewing Other Unratified Proposed Amendments	59
Debating the Need for Judge-Made Law	60
Reading a Right to Privacy into the Constitution	61
Using a sledgehammer to crack a nut: <i>Griswold v. Connecticut</i> ...	62
Disliking a law versus declaring it unconstitutional	62
Embarking on the road to <i>Roe v. Wade</i>	63

***Part II: We the People: How the United States Is Governed* 65**

Chapter 6: Scrutinizing Sovereignty: Who Rules America? 67

Introducing “We the People”	68
Ordaining and establishing a Constitution	68
Resolving to preserve democracy	69
Defining democracy	70
Testing for democracy today	71
Hailing the Chief	72
Congress: Flexing Its Lawmaking Muscle	73
The High Court: Saying What the Law Is	74
Giving the States Their Due	76
Uncovering Conspiracies	77

Chapter 7: Federalism: Forming One out of Many 79

Tracing the Origins of U.S. Federalism	79
Analyzing the founding documents	80
Forming “a more perfect Union”	81
Banking on <i>McCulloch v. Maryland</i>	82
Testing the limits of federal power	83
Realizing the repercussions	84
Navigating the Commerce Clause with John Marshall	85
Riding the Federalism Rollercoaster	85
Ignoring the Elephant in the Room:	
The Question of State Sovereignty	88
Defining sovereignty	88
Testing state sovereignty: <i>Chisholm v. Georgia</i>	89
Can a state secede from the union?	89
Dredging up the Articles of Confederation	89

Chapter 8: Separation of Powers: To Each His Own 91

No Moonlighting for the President	92
Keeping the Branches Apart	93
Membership	93
Functions	94
Checking and Balancing	97
Keeping each branch in line	97
Considering the judiciary’s special position	99

Chapter 9: Doing Business: The Commerce Clause 101

How the Commerce Clause Was Born	101
Interpreting the Commerce Clause	102
Hunting Down the Dormant Commerce Clause	103
Assuming Congress has exclusive power	103
Giving concurrent powers to the states	104
Poking holes in the Dormant Commerce Clause	105

Tracing the Changing Meaning of the Commerce Clause.....	106
Protecting freedom of contract.....	106
Introducing the Four Horsemen and the Three Musketeers.....	107
Signaling the feds' control of the economy	108
Controlling the production of wheat that never left its home farm	109
Using the Commerce Clause to advance civil rights	110
Turning back the federal tide?	110
"Appropriating state police powers under the guise of regulating commerce"	111
Taking a step backward	112

Part III: Balancing the Branches of Government: The President, Congress, and the Judiciary 113

Chapter 10: Looking at the Role of Commander in Chief. 115

Being "Eligible to the Office of President"	115
Picking a President	117
Paying the price for passing over political parties.....	117
Rescuing the situation with the Twelfth Amendment.....	118
Examining the modern electoral system	118
Exploding some myths about the Electoral College.....	120
Canning the President.....	123
Signing, Vetoing, and Pocketing Legislation	123
Appointing Key Positions	124
Hailing the Chief: The President's Administration.....	125
Uncovering the secrets of Cabinet secretaries	126
Unmasking the imperial presidency.....	128
Unlocking the Executive Office of the President.....	129
Selling the President's legislative program	130
Battling Executive Privilege.....	131
Claiming executive privilege in the early days	131
Achieving a total blowout against President Nixon	132
Balancing recent claims of justice against executive privilege....	133
Making War versus Declaring War	134
Controlling the President through the War Powers Act of 1973.....	135
Preventing presidential precedents?	136

Chapter 11: Giving Everyone a Voice: The House of Representatives and Senate 139

Making the Laws That Govern the Land.....	140
One function, two houses	140
Keeping the President in the loop	140

Visiting the People's House.....	141
Representing the U.S. population	142
Respecting the power of the Speaker.....	142
Controlling the nation's purse strings	145
Deciding disputed presidential elections	146
Impeaching the President and other civil officers.....	147
Declaring war.....	147
Getting to Know the Senate.....	149
Electing a senator	150
Presiding over the Senate.....	151
Advising and consenting.....	152
Passing Legislation	153
Tracking a bill's progress	153
Examining congressional committees.....	155

Chapter 12: "During Good Behaviour": The Judicial System. 157

Examining the Courts' Function	157
Defining jurisdiction	158
Applying the law	159
Appointments and Elections: Becoming a Judge	159
Judging the election process.....	160
Considering whether elections taint the judiciary	161
Understanding Judicial Independence without Accountability	162
Bypassing term limits and salary concerns	162
Grappling with issues the Constitution doesn't address.....	163
Examining the abortion litmus test	164
Making the Judiciary Paramount: Judicial Review	165
Understanding the nature of judicial review.....	165
Tracing the origins of judicial review.....	167
Noting Jefferson's response to Marbury v. Madison	169
Considering alternatives for solving Constitutional conflicts.....	170
Watching the Supreme Court's power seep into politics	171
Casting the Swing Vote	172
Recalling "the switch in time that saved nine"	172
Wielding the swing vote under Rehnquist and Roberts	173
Labeling Supreme Court Justices	175
Conservative/liberal	175
Strict constructionism/living Constitution.....	175
Stare decisis/free exercise of power	176
Judicial activism/judicial restraint	176

Chapter 13: You're Fired! Investigating the Impeachment Process . . . 179

There's Nothing Peachy about Impeachment	179
"High Crimes and Misdemeanors": What Impeachment Is and Isn't	180
Defining impeachment	181
Can you be impeached for something that isn't a crime at all?... 181	

Tracking the Impeachment Process.....	182
Playing grand jury and prosecutor: The role of the House	183
Trying the articles of impeachment: The role of the Senate.....	184
Understanding the Implications of Impeachment.....	184
Impeaching isn't the same as convicting.....	184
Keeping Congress out of the fray.....	185
Impeaching for poor private conduct	185
Pardoning is not an option	186
Impeachment in Action: Johnson, the Judges, and Clinton	186
Andrew Johnson: "Let them impeach and be damned".....	187
Judging the judges	188
Bill Clinton: "I did not have sexual relations . . ."	188
Removing State Officials from Office.....	191
Impeaching governors.....	192
Total recall, or terminating a governor.....	192

Part IV: The Bill of Rights: Specifying Rights through Amendments..... 193

Chapter 14: The First Amendment: Freedom of Religion, Speech, and Assembly.....195

Considering the Amendment's Wording	195
Prohibiting Congress from taking away rights.....	196
Applying the amendment to the states.....	196
Separating Church and State.....	196
Guaranteeing the Free Exercise of Religion	199
Adopting a strict scrutiny test	199
Witnessing judicial gyrations: Jehovah's Witnesses and the Supreme Court	200
Guaranteeing Freedom of Expression.....	201
Denying protection to speech creating a "clear and present danger"	202
Allowing obscenity to be seen?.....	203
Using and abusing the right to freedom of the press.....	204
Protecting the Right to Assemble and Petition	205

Chapter 15: The Second Amendment: Bearing Arms.....207

Debating Interpretation: Individual versus State Rights	208
Breaking Down the Amendment's Clauses.....	209
Understanding the states' rights interpretation.....	209
Interpreting "the right of the people"	212
Upholding Individual Rights: D.C. v. Heller	213
Considering an earlier Supreme Court decision.....	214
Taking two sides on what Miller meant	215
Considering the Future of the Debate.....	215

Chapter 16: The Third and Fourth Amendments: Protecting Citizens from Government Forces 217

Keeping the Feds Out of Your House	217
Keeping the Government Off Your Back.....	220
Prohibiting “unreasonable searches and seizures”	221
Excluding evidence.....	222
Avoiding making “a crazy quilt of the Fourth Amendment”	224
Rewriting the Fourth Amendment	225
Defining “probable cause”	226
Prohibiting police fishing expeditions	227
Searching without a warrant?	228
Protecting America without a warrant?	229

Chapter 17: Taking the Fifth — and a Bit of the Fourteenth 231

Invoking the “Great Right” Against Self-Incrimination.....	232
Peeking Behind the Closed Doors of the Grand Jury.....	233
Deciding whether to indict	234
Victimizing suspects or protecting victims?	235
Avoiding Double Jeopardy	235
Applying the principle.....	235
Allowing for an end to litigation.....	236
Jeopardizing “life or limb”	237
Agonizing over Due Process.....	237
Trying to define the term	238
Triggering due process	238
Wrestling with substantive due process	239
Opening Up the Incorporation Debate.....	242
Does the Bill of Rights apply to the states?	242
Watching selective incorporation in action	243
Taking Private Property.....	245
Recognizing eminent domain	246
Losing protection.....	246

Chapter 18: Dealing with Justice and Individual Rights: The Sixth through Eighth Amendments 247

Outlining Defendants’ Rights in Criminal Prosecutions:	
The Sixth Amendment.....	248
Having the same rights in a state and federal trial.....	249
How speedy is a speedy trial?	249
Appreciating the need for a public trial.....	250
Guaranteeing trial by jury.....	251
Being “informed of the nature and cause of the accusation”	253
Confronting adverse witnesses.....	253
Compelling witnesses to attend.....	254
Demanding the right to counsel.....	254
Guaranteeing Jury Trials in Civil Suits: The Seventh Amendment.....	256

Prohibiting “Cruel and Unusual Punishments”:	
The Eighth Amendment	257
Banning excessive bail	257
Removing excessive fines	258
Barring “cruel and unusual punishments”	259
Debating the death penalty	260

Chapter 19: The Ninth and Tenth Amendments: Leaving Things Up to the People and States. 263

Reading the Constitution: The Ninth Amendment	264
Considering the Tenth Amendment	266
Analyzing the wording	267
Balancing power between federal and state governments	267
Determining the limits of federal power	268
Puzzling over “prohibited” powers	271
Disentangling states’ rights from individual rights	272
Giving the Tenth Amendment its due	276

Part V: Addressing Liberties and Modifying the Government: More Amendments 277

Chapter 20: States’ Rights, Elections, and Slavery: The Eleventh through Thirteenth Amendments 279

The Eleventh Amendment: Asserting State Sovereign Immunity?	280
Overruling the Supreme Court	280
Interpreting the Eleventh Amendment	280
Cleaning Up the Framers’ Political Mess: The Twelfth Amendment	282
Electing the President: The original rules	282
Understanding politics 1796 style	283
Tying and vying with your running mate: The 1800 election	283
Preventing future chaos	284
Removing the Blot of Slavery: The Thirteenth Amendment	284
Tracking the debate on slavery	285
Sliding into secession	286
Considering the Corwin amendment	287
Graduating from emancipation to abolition	288
Introducing an entirely different thirteenth amendment	289

Chapter 21: The Fourteenth Amendment: Ensuring Equal Protection 291

Defining Citizenship	292
Understanding States’ Obligations	293
Disentangling state citizenship	294
Analyzing “privileges or immunities”	294

Achieving “Equal Justice Under Law” — Or Not	296
Age discrimination.....	297
Capital punishment	297
Racial segregation.....	298
School busing	298
Affirmative action	300
Gerrymandering	301
Apportioning Representatives	301
Recognizing proportionality 80 years too late?	301
Denying or abridging the right to vote.....	302
Disqualifying Confederates from Office.....	303
Repudiating Confederate Debts.....	304
Empowering Congress	304

Chapter 22: Starts, Stops, and Clarifications:

Amendments since 1870 305

Removing Race Qualifications for Voting:	
The Fifteenth Amendment	305
Letting Uncle Sam Raid Your Piggy Bank:	
The Sixteenth Amendment	307
Electing the Senate: The Seventeenth Amendment	308
Outlawing Liquor: The Eighteenth Amendment	309
Giving Women the Vote: The Nineteenth Amendment.....	310
Moving Out of the Horse and Buggy Age:	
The Twentieth Amendment	311
Repealing Prohibition: The Twenty-First Amendment	311
Taking George Washington’s Lead:	
The Twenty-Second Amendment.....	312
Enfranchising the Nation’s Capital: The Twenty-Third Amendment	314
Banning Tax Barriers to Voting: The Twenty-Fourth Amendment	315
Succeeding to the Presidency: The Twenty-Fifth Amendment.....	317
Succeeding as President or Acting President?.....	317
Replacing the Veep	317
Acting as President.....	318
Lowering the Voting Age: The Twenty-Sixth Amendment.....	319
Limiting Congressional Pay Raises:	
The Twenty-Seventh Amendment.....	320

Part VI: The Part of Tens..... 321

Chapter 23: Ten Landmark Constitutional Cases 323

Marbury v. Madison (1803)	323
Brown v. Board of Education (1954)	324
Parents Involved in Community Schools v.	
Seattle School District No. 1 and Meredith v.	
Jefferson County Board of Education (2007).....	325

West Coast Hotel v. Parrish (1937)	325
United States v. Lopez (1995)	326
Kelo v. City of New London (2005)	326
United States v. Nixon (1974)	327
Nixon v. Fitzgerald (1982)	327
Clinton v. Jones (1997)	327
Boumediene v. Bush (2008)	328

Chapter 24: Ten Influential Supreme Court Justices 329

John Marshall	330
Oliver Wendell Holmes, Jr.	331
Louis Brandeis	331
Felix Frankfurter	332
Earl Warren	332
Thurgood Marshall	333
William Rehnquist	334
Sandra Day O'Connor	335
Antonin Scalia	335
John Roberts	336

Chapter 25: Two Sides of Five Constitutional Conundrums 337

Is the Constitution Outdated?	337
Should the Electoral College Be Abolished?	338
Does the U.S. Supreme Court Have Too Much Power?	340
Why Is There No Agreed-Upon Interpretation of the Constitution?	342
Does the President Have Too Much Power?	343

***Appendix: Constitution of the United States of America*** 345

***Index*** 369

Foreword

.....

“We the people” are the opening words of the U.S. Constitution, and it is fitting that this book is written for “We the people.” Both the Constitution itself, and this book explaining it, were meant for everybody, for all of the American people.

This book can be read on several different levels. If you just want to understand the basics of the Constitution, this book offers you an easy, enjoyable, and at times humorous way to do so. But the book also offers a much deeper insight into the Constitution and all the controversies surrounding it.

Michael Arnheim does not pull his punches. He makes no secret of his own views on the Constitution. However, the book always presents both sides of every argument fairly, so that you, the reader, can decide what take to adopt on any issue.

The U.S. Constitution is the world’s oldest written constitution, and it was a revolutionary document. Written by men who just a few years earlier had won American independence from Britain, it changed the relationship altogether between people and government.

Indeed, that was the genius of the Constitution — limiting government to protect the liberty of the people. Because the Framers recognized that unchecked government can strip the people of their freedoms, they designed a constitution to prevent that from happening.

James Madison, the primary author of the Constitution, explained as follows:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Because men are not angels, the Constitution was designed to create an effective national government and, at the same time, prevent the government from overreaching.

At the time of this writing, our Nation is facing some of the greatest challenges in its history. One possible solution to these problems is to allow the government ever-expanding power. But it remains to be seen whether that would really be the best choice either in practical terms or in terms of the Constitution.

For good or for ill, the meaning of the Constitution has often been very much in the hands of the nine justices of the U.S. Supreme Court. This book goes in depth into the different approaches adopted by different justices over the years. Dr. Arnheim explains his own interpretations in simple, direct language, and he also explains why he favors the approach that he adopts — while at the same time setting out the opposing views.

For example, Justices William Brennan and Thurgood Marshall both believed that the death penalty always constituted “cruel and unusual punishment.” Dr. Arnheim explains why he believes they were wrong — based on the text of the Constitution itself. But Dr. Arnheim goes further, arguing that Justices Brennan and Marshall were really confusing what the Constitution actually says with what they as judges thought it *ought* to have said. There are serious policy arguments both for and against capital punishment — but given that the constitutional text twice explicitly authorizes capital punishment, the only proper way to change that would be a constitutional amendment as laid down in Article V of the Constitution. And an amendment is unlikely to be passed, because large majorities of the American people have consistently supported capital punishment for the very worst criminals. Accordingly, a judge imposing his or her views on the issue is not only unconstitutional, it is also undemocratic.

Chief Justice Rehnquist, for whom I had the honor of clerking, was an original dissenter from the Court’s opinion striking down the death penalty. And, over his three decades on the Court, he helped overturn that decision and return the Court to a more limited view of judicial authority. Indeed, the very last opinion he ever wrote was a case I was privileged to litigate for the State of Texas, *Van Orden v. Perry*, which upheld the Texas Ten Commandments monument and repudiated many years of judicial hostility to expressions of religious faith (discussed in Chapter 14).

Likewise, in 2008, the Supreme Court decided *District of Columbia v. Heller*, holding for the first time that the Second Amendment protects an individual right to keep and bear arms (discussed in depth in Chapter 15). Texas led 31 states in defense of the Second Amendment in that case, and our arguments for giving force to the plain text of the Constitution and the original understanding of the Framers prevailed by a vote of 5 to 4.

The Constitution is designed to limit government and to protect all the freedoms that you and I cherish as Americans. And this book is a clear, straightforward roadmap to understanding how it works — and a lot more.

Ted Cruz

Partner, Morgan, Lewis & Bockius LLP

Former Solicitor General of Texas

Introduction

Okay, so you bought this book (or you got it as a present, or you borrowed it, or you're browsing through it in a bookstore). Obviously, you have some interest in the U.S. Constitution, but maybe you're afraid the Constitution isn't really that interesting.

Well, you're in luck. Even if you don't find the Constitution itself to be the most riveting read, it's a never-ending source of debates and arguments. And we all know how interesting debates and arguments can be!

About This Book

This book explains the Constitution simply and thoroughly, including all the juicy controversy it evokes. Whether you're a student, a lawyer, or just a concerned citizen, I hope you find it to be both a good read and a great resource.

You don't have to read this book from cover to cover, and you don't have to read the chapters in order. I've written each chapter so it can be understood on its own; if it refers to topics that aren't covered in that chapter, I tell you where to find information about that topic elsewhere in the book. Using the Table of Contents or the Index, feel free to identify topics of the greatest interest to you, and dive in wherever you want. Even if you dive into the middle or end first, I promise I won't let you get lost.

I cover the entire Constitution in this book, but I don't give each article or amendment equal attention. That's because some parts are more important, more difficult to understand, more controversial, or more relevant to modern society than others. If I believe a particular part of the Constitution requires or deserves more explanation than another, I give it lots of real estate in the pages that follow. Parts that are easier to understand or less important to your 21st-century life get less space in the book.

Throughout the book, I offer not just facts but also a variety of opinions about constitutional issues that have created debate for more than 200 years. In some cases, the opinions belong to Supreme Court justices, advocates for or against specific rights, or any number of other sources. In other cases, the

opinions are my own — and I alert you to that fact. I may sometimes try to persuade you of the rightness or wrongness of a certain opinion, but you're welcome to disagree — that's the fun and the privilege of becoming a more informed citizen!

Conventions Used in This Book

Whenever I quote or refer to a specific part of the Constitution, I tell you the name of that part. You'll often see this reference in the form of an *article*, a *section*, and maybe a *clause* — for example, Article I, Section 8, Clause 3. If you turn to the Appendix at the back of the book, where the text of the Constitution is provided, you can see that it's broken into seven articles, some of which are divided into sections. If a section contains more than one paragraph, I refer to each paragraph as a clause. So if you're looking for Clause 3 within Section 8 of Article I, just find the third paragraph in that section.

The amendments to the Constitution appear in the Appendix after the main body of the document (and after the list of people who signed it). It's pretty easy to locate an amendment, as long as you aren't too rusty on Roman numerals.

When you see the term *the Constitution*, it always refers to the U.S. Constitution. Each of the 50 states also has its own constitution, but if I'm referring to one of those, I include the state name (such as *the Virginia Constitution*). Similarly, when I refer to *the Supreme Court*, *the high court*, or just *the Court*, that means the U.S. Supreme Court. If I refer to a state supreme court, I always give the name of the state concerned (such as *the Texas Supreme Court*).

You can't learn about the Constitution without being introduced to some legal, political, and other jargon, but I do my best in this book to ease you into the constitutional vocabulary. If I use a term that I suspect may not be familiar to you, I put that term in italic and provide a definition or explanation nearby.

What You're Not To Read

This may seem like a strange topic to discuss — after all, I'd love for you to read every word that I've written! But the beauty of the *For Dummies* series is that I won't demand such commitment. If you're not interested in knowing

every nitty-gritty detail about a certain subject, there are two types of text you can skim or skip altogether:

- ✓ **Paragraphs that have a Technical Stuff icon next to them:** In just a minute, I explain what the various icons in this book mean. This one means that the information in a given paragraph goes into detail that may be interesting to some readers but isn't essential to your understanding of the subject at hand.
- ✓ **Sidebars:** The text tucked into gray boxes is also optional. Sidebars contain in-depth historical information, somewhat technical explanations of legal or political situations, or just interesting stories that happen to be tangential to the topic at hand. Take them or leave them — it's your call.

How This Book is Organized

I've divided the book into six parts, each of which contains a series of related chapters. Here's a bird's-eye view of the way the book is arranged.

Part I: Exploring Constitutional Basics

This part of the book explains the basic concepts underlying the Constitution and the motivating forces behind its creation. I present the basic concepts of the Constitution and where they came from. You may find a few surprises here. For example, the Constitution didn't originally establish a democracy — the word *democracy* doesn't appear even once in the entire document.

I also explain the different approaches to interpreting the Constitution and how those approaches can conflict. And I then show you how the Constitution has changed in the past 200-plus years in both formal ways (through relatively few amendments) and informal ways (as a result of the way the U.S. Supreme Court has interpreted and reinterpreted the Constitution).

Part II: We the People: How the United States Is Governed

In this part, I first study who wields power in the United States, considering how that power is shared among “We the People,” the President, Congress, the Supreme Court, and possibly other entities.

The *Framers* of the Constitution (the men who wrote and ratified it) were anxious to prevent the concentration of power in the hands of one person or one government institution, so they designed an elaborate structure to make sure that power was shared. They did so first by creating a *federal* government: one in which power is shared between the national and state governments. In Chapter 7, I explore how that power-sharing arrangement works.

In Chapter 8, I discuss another way in which power is shared: among the three branches of the federal government — the Executive (the President and his Cabinet), the Legislature (Congress), and the Judiciary (the Supreme Court and other federal courts).

Perhaps the biggest tug-of-war between the federal government and the states has centered on the power given to Congress in the Commerce Clause of the Constitution. In Chapter 9, I explain why this power is so important, how judicial interpretation has broadened it (and has recently reined it in slightly), and why the whole issue matters so much.

Part III: Balancing the Branches of Government: The President, Congress, and the Judiciary

This part tackles the three main parts of the U.S. government — the Executive, Legislative, and Judicial branches — as well as how members of those branches can be fired or removed.

I open this part by focusing on the President, covering such topics as how the President is elected, what it means to be commander in chief, how a president makes appointments, and whether (and when) a president is immune from lawsuits. I then turn my attention to Congress, explaining the membership and the important functions of the House of Representatives and Senate. Chapter 12, on the judiciary, explains how the justices of the Supreme Court and other federal judges are appointed, the powers of the Supreme Court, and how the Court operates.

I finish this part with a discussion of impeachment, explaining why it's possible to be impeached but not convicted (and therefore not removed from office), what the impeachment process is, and who has been impeached since the Constitution was ratified.

Part IV: The Bill of Rights: Specifying Rights through Amendments

Here I discuss the first ten amendments to the Constitution, which were all ratified together in 1791 (only three years after the main body of the Constitution). These amendments are commonly referred to as the *Bill of Rights* because they confer or guarantee fundamental civil rights, including the right to freedom of speech and assembly; the separation of church and state; the right to bear arms; the guarantee of a fair trial; the protection of private property rights; and the prohibition of “cruel and unusual punishments.”

Part V: Addressing Liberties and Modifying the Government: More Amendments

In this part, I discuss the ragbag of amendments that have been ratified since 1791, including amendments that have reformed presidential elections, abolished slavery, ensured equal protection, prohibited alcohol and then made it legal again, given voting rights to women, and limited presidents to two elected terms.

Part VI: The Part of Tens

This part contains three short chapters: one that outlines ten landmark Supreme Court cases that have tackled constitutional issues; one that discusses the influence of ten Supreme Court Justices who have served at various times in the country’s history; and one that presents two sides of five sticky constitutional issues that are bound to be debated for years to come.

Icons Used in This Book

Throughout this book, you find small pictures in the margins. These *icons* highlight paragraphs that contain certain types of information. Here’s what each icon means:



The Remember icon sits beside paragraphs that contain information that's worth committing to memory. Even if you're not studying for an exam on the Constitution, you may want to read these paragraphs twice.



This icon denotes material that may fall into the “too much information” category for some readers. If you like to know lots of details about a topic, the information in these paragraphs may thrill you. If details aren't your thing, feel free to skip these paragraphs altogether.



The Constitution is nothing if not controversial, and this icon highlights paragraphs that explain what all the debate is about. If you want to know why people can't seem to figure out what this document means even after 200-plus years, head toward these icons.



Where there's debate, there are opinions, and I won't pretend not to have some of my own. Where you see this icon, you'll know that I'm offering my perspective on the subject at hand, and I don't necessarily expect you to agree!

Where To Go from Here

That depends on why you're reading this book. If you're a student who needs help understanding how and why the Constitution was created, what it says, and why it's still so important, I'd suggest that you start at the beginning.

If you picked up this book because you want to understand the debate about a certain issue (such as gun rights), check the Table of Contents or Index and flip to the chapter where that debate is explored. (In the case of gun rights, that'd be Chapter 15.)

If you're planning to start a campaign to impeach a government official who rubs you entirely the wrong way, perhaps Chapter 13 will be your cup of tea.

If you want to very quickly get a sense of why constitutional issues can cause tempers to flare, flip to Chapter 25 and read about just five of the many debates that keep people talking.

Part I

Exploring Constitutional Basics

The 5th Wave

By Rich Tennant

George Washington: Father of the Country and first U.S. President. Presided over the Philadelphia Convention that drafted the United States Constitution in 1789 because of general dissent with the Articles of Confederation, and rewrote existing boating regulations to increase the number of occupants in a row boat from 5 to 12.



In this part . . .

These chapters give you a bird's-eye view of constitutional thought as a whole, starting with the ideas on which the Constitution was based and ending with a very brief summary of the Constitution as originally ratified in 1788 and of some of its amendments. Chapter 5 also explains how the Constitution has undergone some fundamental changes without formal amendment.