

CONSTITUTIONAL

LAW *for* CRIMINAL JUSTICE PROFESSIONALS AND STUDENTS

A Plain Language
Explanation
of Constitutional Law

STATE TROOPER

KENNETH BRESLER

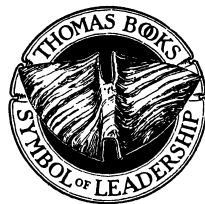
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FOR CRIMINAL JUSTICE
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By

KENNETH BRESLER



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*In memory of Archibald Cox, and in honor of
Philip B. Heymann and Laurence H. Tribe, the
venerable men who taught me constitutional law.*

PREFACE

This Textbook's Approach

Who writes criminal justice textbooks about law? Lawyers. In other words, authors

- who have been to law school;
- whose textbooks tend to recreate their first-year law school training;
- which means that their textbooks emphasize cases, case names, legal reasoning, and briefing cases.

But why should these textbooks emphasize these things? The reliance on actual cases (the case-study method), rather than summaries,

- is inefficient;
- is controversial in *law schools*;
- and is unnecessary in legal education *outside* law schools, such as criminal justice programs.

Non-law students do not need to master legal reasoning—the ability to analogize and extrapolate from precedents—to learn the law itself. And the time that criminal justice students often spend briefing cases—tediously extracting facts and principles—would be better spent learning the law itself.

I have written a textbook that is readable, gets to the point, and therefore covers more material. I explain what the many constitutional provisions mean and I provide examples, some actual, some hypothetical, whichever works best. Examples

- illustrate principles;
- make the principles stick in the reader's memory; and
- make constitutional law more interesting. Many examples are stories and everyone loves stories.

Rather than paraphrase the facts in a Supreme Court case—and reinvent the wheel—I often quote the facts. I don’t always quote the *principles* from a case; I often paraphrase them. That way, I avoid the language that only a lawyer could love and sometimes that only a lawyer can understand.

But I also don’t want readers to miss the majesty and poetry of the Court’s accessible pronouncements, and I do quote many of them. Thus, my mix of quoting from and paraphrasing cases is different from other textbooks.

I de-emphasize case names, with a few exceptions. Principles matter; case names usually don’t. (In any event, the case names are all there, in footnotes.)

I’m a part-time academic—which led me to write this book; I was frustrated over my choices of textbooks. But I was a practicing prosecutor. I had eight years of trial experience and six years of appellate experience. And that gave me a better idea of what to write about.

Some exceptions to the exceptions of constitutional rules are too obscure to cover in this textbook. They exist theoretically in law books but not in a prosecutor’s workaday world, and you can read about them in other textbooks. And some major cases and constitutional principles—whose implications prosecutors work and grapple with every day and spend a great of time complying with—simply go unmentioned or barely mentioned in other textbooks.

Does this textbook cover history, theory, political science, and civics (such as how the Civil War amendments came to be ratified; how the Supreme Court came to decide that the Bill of Rights governed the states; and why Congress can’t pass certain laws)? I love those topics; I do. And they’re not in here. There’s enough to cover, enough nuts-and-bolts material, without covering history, theory, and so on.

Thus, this textbook does not take the traditional approach to teaching law, even in a criminal justice program. Many lawyer-professors, who are steeped in precedent—and what is precedent except tradition?—will prefer the traditional approach.

You can think of this textbook as the conversational approach. For instructors who prefer this approach, I want to help you engage in conversation about the intersection of the U.S. Constitution and the criminal justice system.

The conversation is about a topic that I’m passionate about. I hope my passion shows in these pages. I hope to inspire passion about constitutional law in the classroom, and, if I’m lucky, in the cruiser and coffee shop, too, as police officers take their breaks.

This Textbook's Organization

Six dynamics/phenomena influenced my sequence of chapters.

A. The heart of constitutional law for criminal justice purposes consists of the Fourth, Fifth, and Sixth Amendments.

B. Just because the amendments were passed in a certain chronology doesn't mean that we should tackle them in that sequence. For our purposes, the numbering is random, and we shouldn't be bound by it.

C. In my years of teaching constitutional law to criminal justice students, I have found that the Fourth Amendment (search and seizure) is so complicated that it can be daunting. When studying the Fourth, Fifth, and Sixth Amendments in that order, it has been a relief for students to reach the Fifth and Sixth Amendments, to find them more digestible, and to realize that they have already conquered the summit of the Fourth Amendment. So I save the Fourth Amendment until students feel confident in their mastery of important, but less daunting material.

D. The Fifth Amendment has a Due Process Clause and so does the Fourteenth Amendment. Although one governs the federal government and one governs the states, the two Due Process Clauses have been interpreted together and should be examined together.

E. The Fourteenth Amendment contains a Due Process Clause and also the Equal Protection Clause. Those two Fourteenth Amendment clauses often overlap in their effect. That means that segueing from the Fourteenth Amendment's Due Process Clause to the Equal Protection Clause makes sense doubly.

F. Some constitutional provisions, while important, are not important enough to deserve an entire chapter.

Thus the chapters proceed like this:

Chapter 1 is an overview of the **entire U.S. Constitution**. It also examines, in depth, provisions such as the **Habeas Corpus Suspension Clause**, the **Ex Post Facto Clause**, and the **Second Amendment**. (As more cases interpret the Second Amendment, it might deserve its own chapter in later editions.)

Chapter 2 examines two provisions of the **Fifth Amendment**.

Chapter 3 continues examining the **Fifth Amendment**, a third provision of it.

Chapter 4 examines together the **Due Process Clause** of the **Fifth Amendment** and the **Due Process Clause** of the **Fourteenth Amendment**.

Chapter 5 continues examining the **Due Process Clause** of the **Fifth Amendment** and the **Due Process Clause** of the **Fourteenth Amendment**. It also examines the **Equal Protection Clause**.

Chapters 6, 7, and 8 examine the **Sixth Amendment**.

Chapters 9, 10, 11, and 12 examine the **Fourth Amendment** and related issues.

Chapter 13 examines the **exclusionary rule**, which applies primarily to the Fourth Amendment, but also to the Fifth and Sixth Amendments.

Chapter 14 examines the **Eighth Amendment**.

Chapters 15 and 16 examine the **First Amendment**.

Terms

This textbook refers to defendants unapologetically as “he.” All other participants in the criminal justice system, such as judges and police officers, are “he” or “she.” But most defendants are male and it’s simpler to refer to them individually as “he.”

The textbook uses “appeals court” and “appellate court” interchangeably.

It generally favors simple words, like “lawyer” over “attorney” and “counsel,” not to dumb down the text, but because legalese is unnecessary. Why struggle with difficult concepts *and* difficult language? Exception: The Sixth Amendment contains a right, not simply to a lawyer, but to an *effective* lawyer. The standard phrase, a term of art, is the right to “effective assistance of counsel”—not the right to “an effective lawyer,” or the “effective assistance of a lawyer,” or even the “effective assistance of *a* counsel.” So this textbook’s examination of that right does discuss “counsel”—and not “*a* counsel.”

Brackets around a single letter in quotations indicate that a capital letter has been changed to lower case or vice versa. For example, in this quotation— “[T]he grand jury can investigate merely on suspicion that the law is being violated”—the capital “T” beginning the sentence is lower case in the original.

Brackets can also indicate that a tense has been changed. In this quotation, “deliver[] up,” the original is “delivered up.” Another example: the word “unmanageability” was changed to “unmanageab[le].”

Biography

An early reviewer of this textbook doubted that the author was really a lawyer. After all, the author, whoever he or she was, didn’t use legalese. So here goes, my credentials:

I received my law degree from Harvard Law School. I was a trial Assistant District Attorney in Massachusetts, prosecuting street crime; then a federal prosecutor in Massachusetts, prosecuting financial crime; then an Assistant District Attorney in Massachusetts handling appeals. I spent a summer in The Hague, the Netherlands, working with the International Criminal Tribunal for the former Yugoslavia.

A year after the 30-decades-long civil war ended in Angola, I traveled to that African country with an international legal delegation to assess its post-recovery legal needs. I have written case studies for Harvard Law School, including one about a human rights trial in Haiti and one (which I co-wrote) about the second Bush Administration's legal memoranda on torture and interrogation techniques.

I have written two books about legal writing, particularly about plain English legal writing. I have created and edited legal and financial documents, books, and curriculum, presenting complex ideas in plain English for clients including financial companies and the California Family Courts.

Note to Instructors

In a semester with 15 substantive classes—that is, you assign and discuss chapters from this textbook in 15 classes (the first class might not be substantive)—or with 15 weeks, I recommend:

Assigning and Discussing Chapters in the Textbook According to Length of Course

15 Weeks		14 Weeks		13 Weeks	
<i>Class/Week</i>	<i>Chapter(s)</i>	<i>Class/Week</i>	<i>Chapter(s)</i>	<i>Class/Week</i>	<i>Chapters(s)</i>
1	1	1	1	1	1
2	2	2	2	2	2
3	3	3	3	3	3
4	4	4	4	4	4, 5
5	5	5	5	5	6
6	6	6	6	6	7
7	7	7	7	7	8
8	8	8	8	8	9, 10
9	9, 10	9	9, 10	9	11
10	11	10	11	10	12
11	12	11	12	11	13, 14
12	13	12	13, 14	12	15
13	14	13	15	13	16
14	15	14	16		
15	16				

12 Weeks		11 Weeks	
<i>Class/Week</i>	<i>Chapter(s)</i>	<i>Class/Week</i>	<i>Chapter(s)</i>
1	1	1	1, half of 2
2	2	2	half of 2, 3
3	3	3	4, 5
4	4, 5	4	6
5	6	5	7
6	7	6	8
7	8	7	9, 10
8	9, 10	8	11
9	11	9	12
10	12	10	13, 14
11	13, 14	11	15, 16
12	15, 16		

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**CONSTITUTIONAL LAW
FOR CRIMINAL JUSTICE
PROFESSIONALS AND STUDENTS**

The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

– U.S. Supreme Court, *Almeida-Sanchez v. U.S.* (1973).¹

Chapter 1

OVERVIEW OF THE U.S. CONSTITUTION; HABEAS CORPUS; EXPOST FACTO; AND THE SECOND AMENDMENT

Chapter Objectives

To learn

- what the U.S. Constitution is;
- why the U.S. Constitution matters;
- what habeas corpus is;
- what ex post facto laws are;
- what the Bill of Rights is; and
- about the Second Amendment and the right to bear arms.

Key Terms

Bill of Rights
Civil War Amendments
ex post facto
Ex Post Facto Clause
extradition
Great Writ
habeas corpus
preamble
rendition
right to bear arms
Second Amendment
Supremacy Clause
Suspension Clause
treason
writ of habeas corpus

Our Constitution is a covenant running from the first generation of Americans to us, and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.

—Justices Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter in *Planned Parenthood v. Casey* (1992).²

We are oath-bound to defend the Constitution

The provisions of the Constitution . . . are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government [W]e must apply those rules. If we do not, the words of the Constitution become little more than good advice.

—U.S. Supreme Court, *Trop v. Dulles* (1958).³

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as [drafter James] Madison dared to hope, the veneration of the American people The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.

—U.S. Supreme Court, *Roper v. Simmons* (2005).⁴

Why study the U.S. Constitution, the charter establishing and organizing the U.S. government and safeguarding the rights of its inhabitants? If you're an American, it's your covenant and should be central to your national identity. If you live in America, whether you're a citizen or not, it secures the individual freedom and preserves the human dignity of you and your loved ones. If you're a law enforcement official, you almost certainly have sworn to uphold it—you, like the Supreme Court, are "oath-bound to defend" it—and if you take your oaths and duties seriously, you must know what you have promised to uphold. If you're an aspiring law enforcement official, you must know what you will promise to uphold. And if you're a criminal justice student, fully understanding the criminal justice system requires that you understand the "specific guarantees for the accused in criminal cases."

THE BASICS

Before the United States Constitution was ratified (adopted by the necessary number of states) in 1788, the United States was governed by the Articles of Confederation. Since this textbook is generally about what the law *is*, not what the law *was*, the inadequacies of that document, which have been well covered in other books, will not concern us.

The United States government started operating under the Constitution in March 1789. The Constitution consists of a preamble (introduction), seven articles (provisions), and 27 amendments (changes). The seven articles are broken down into various sections. The sections and amendments, in turn, contain various clauses that judges and commentators have named, but whose names are not officially part of the document. For example, you can see the heading “Article IV” in the Constitution, but you won’t see a heading “the Suspension Clause.” The Appendix contains a copy of the Constitution.

We’ll preview the provisions of the Constitution that are relevant to criminal justice in this chapter. And if they merit only a short discussion, we’ll discuss them in this chapter, too.

THE PREAMBLE

The preamble—and thus the Constitution—begins with “We the People.” It’s a familiar phrase, which many groups have incorporated into their names and website addresses, and which in script is a familiar sight, almost a logo. Why did “We the People of the United States” establish the Constitution? The first of six reasons, right there in the preamble, was “to form a more perfect Union.” We can correctly surmise that the Articles of Confederation, the predecessor document, had created an ineffective central government. The next two reasons for the Constitution are particularly relevant to criminal justice professionals and students: to “establish Justice” and “insure domestic Tranquility.”

The preamble sets the tone for the Constitution, but is not the subject of substantive cases. In other words, courts have not struck down various government action or laws as violating the preamble, or upheld them as complying with the preamble.

We the people of the United States, in order to form a more perfect union, **establish justice, insure domestic tranquility**, provide for the common defense, promote the general welfare, and secure the blessings of liberty to