

CONSTITUTIONAL LAW OVERVIEW

by Professor Robert Pushaw

I. OVERVIEW OF CONSTITUTIONAL LAW I—GOVERNMENT STRUCTURE

A. ROLE OF FEDERAL COURTS IN INTERPRETING CONSTITUTION

Theme: Founders expected constitutional interpretation to be shared by all three branches. Over past 50 years, however, Supreme Court has asserted it's the ultimate arbiter of the Constitution, and that everyone (not merely the parties to a particular case) must follow its interpretation unless Court changes its mind (*Cooper*).

1. Ongoing Controversy

(A) Judicial Activism or Independence of the Judiciary?

Article III makes judges independent, especially so they can enforce Constitution, even when it's politically unpopular (e.g., allowing offensive free speech, like flag burning). But Framers intended federal courts to invalidate laws only when they "clearly" violated Constitution, like suspending habeas corpus when there's no emergency. Gradually, however, Court began to strike down laws that did NOT clearly contradict any constitutional provision, but rather with Court's view of the best interpretation of that provision. And because Court is independent of political process, and enjoys such prestige, it can create new constitutional rights under the guise of interpretation. Such activism can reflect either liberal or conservative ideology. So independence is a two-edged sword.

(B) States' Rights vs. National Uniformity

Supremacy Clause makes plain that FEDERAL law trumps STATE law when they conflict. Court is final word on federal constitutional law, which must be (1) superior to all other law, and (2) uniform, so that your rights don't vary depending on what state you're in.

Nonetheless, there's been a persistent notion of "states' rights"—states can act on own independent interpretation of Constitution. That's how Southern States justified secession, and you would think that this idea would have died after the Civil War. But it didn't (e.g., Southern States' resistance to desegregation). Even today, a majority of the Court assert that federal law (including the Constitution) generally should be construed narrowly to preserve state power—*Lopez* and *Morrison* are examples.

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