THE PRACTICE OF AMERICAN CONSTITUTIONAL LAW

Americans often think about constitutional law in terms of high-profile decisions by the Supreme Court – decisions that divide the justices by ideology, not law. This focus often leads to the erroneous conclusion that constitutional law arguments are, and can only be, political in substance. In *The Practice of American Constitutional Law*, H. Jefferson Powell demonstrates that there is a longstanding, shared practice of constructing and evaluating constitutional law claims that transcends current political disagreements. Powell describes how lawyers and judges identify constitutional problems by using a specifiable method of inquiry that enables them to agree on what the questions are, and thus what any plausible answer must address, even when disagreement over the most persuasive answers remains. Rather than being simply politics by other means, constitutional law is the successful practice of giving substance to the Constitution as supreme law.

H. Jefferson Powell is a professor of law at Duke University. He is the former Principal Deputy Solicitor General and a former deputy assistant attorney general in the US Department of Justice. His books include *A Community Built on Words: The Constitution in History and Politics* (2003), *Constitutional Conscience: The Moral Dimension of Judicial Decision* (2008), *The President as Commander in Chief: An Essay in Constitutional Vision* (2013), *and Targeting Americans: The Constitutionality of the U.S. Drone War* (2016).

The Practice of American Constitutional Law

H. JEFFERSON POWELL
Duke University, North Carolina

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781009158848
DOI: 10.1017/9781009158855

First published 2022

A catalogue record for this publication is available from the British Library.

ISBN 978-1-009-15884-8 Hardback
ISBN 978-1-009-15886-2 Paperback

To Sarah,
with wonder, laughter, and love

Contents

Preface

The subject of this book is the practice of American constitutional law, the activity of identifying legal problems that arise under the Constitution of the United States and proposing answers to the questions that the problems present. This lawyers' practice should not be of interest to lawyers alone. Constitutional law plays a major role in the life of the American political community, to an extent not wholly paralleled in other countries, and Americans often have strong views about the right answers to high-profile constitutional law questions even if they otherwise have little interest in or knowledge of law. Despite its political and even cultural salience, however, the activity or practice of constitutional law – what it is that lawyers do when they argue over the right answers – has attracted relatively little attention. Most nonlawyers are primarily (and understandably) interested in the answers, not in the means of getting to the answers. Among constitutional lawyers themselves, reflection about the practice tends to focus on theories about how constitutional decision-making *ought* to be done, the assumption being that practitioners and scholars must understand how *in fact* decisions are made. After all, decisions are made!

I do not mean to quarrel with this assumption, but it is incomplete. Mistakes are made too: no constitutional lawyer thinks that even the Supreme Court is infallible, and despite the strong political tenor of much criticism of the high Court's decisions, no serious constitutional lawyer thinks all disagreements over the right answer to a constitutional law question are sheerly political disputes. In practice, if not always in theory, everyone, lawyer or not, thinks that some constitutional law answers are errors of law. (We shall leave for Chapter 6 the question whether the opposite to an error in constitutional law is the *right* answer or the *most persuasive* one. For now, we can treat these adjectives as interchangeable.) Adherents to a normative theory about how constitutional decisions ought to be made measure error by the extent to which a decision deviates from their preferred theory. But most constitutional lawyers are not rigorous adherents to any theory (to the great frustration of the theorists!), and yet they work with the same idea, that there are mistakes, and thus there are right (or better) answers in constitutional law.

This book is an attempt to spell out the implicit standards by which constitutional lawyers, including judges, identify truth and measure error in the practice of constitutional law when the individual lawyer has not subordinated the practice, which is common to all constitutional lawyers, to a theory – and *no* theory is in fact dominant in practice. My objective is to articulate the best (most accurate) description of the accepted practice of American constitutional law from within the practice, speaking as a lawyer who engages in the practice, not as an external observer or critic. The value of such a description for lawyers who accept the legitimacy of the practice is to articulate what they already know but usually leave implicit; for constitutional theorists and external critics, the value is to provide them with a clearer picture of the practice they are seeking to change or to understand.

The activity of judicial review, the exercise by courts of the authority to follow their own views of constitutional requirements and ignore or set aside contrary constitutional understandings, is central to the broader practice of constitutional law. This book, however, is framed in terms of how a conscientious and skillful constitutional lawyer, filling any role in the system, constructs arguments rather than specifically how a judge decides constitutional cases. Discussions of constitutional law reasoning often adopt a court-centric perspective, but I believe it is helpful to take a broader view. What the judge does in coming to a decision in a constitutional case is in fact very similar to what the constitutional advocate does in writing a good brief – the judge is trying to persuade the reader that he or she has given the best answer to the constitutional law question before the court just as the advocate is trying to persuade the judge that his or her arguments are superior to opposing counsel's.

Whatever may be true about other forms of legal advocacy (trying a criminal case to a jury, for example), constitutional law advocacy, whether the lawyer's to the court or the court's to the reader, is a kind of adversarial reasoning that takes into account the arguments for and against a particular answer in advocating a particular conclusion. For this reason, I refer to the forms of constitutional law thought alternatively as "reasoning" or "argument" because the constitutional lawyer (the judge as much as anyone else) is engaged in persuasion, even if the person to be persuaded is the lawyer him- or herself. It is this activity of adversarial, persuasive reasoning or argument that I shall call the practice of constitutional law.

Because my concern is with this intellectual practice in itself and regardless of who is engaging in the practice, I do not discuss the specific professional skills and techniques a litigator must employ in effectively presenting a constitutional argument to a court. Litigators must engage in the practice of constitutional law in my sense – they must persuade themselves which lines of argument are most likely to persuade the court and then attempt actually to persuade the judges – but many constitutional lawyers are not litigators but judges, advisors, or commentators. Each of these roles requires skills peculiar to that role. In Chapter 4, I discuss certain considerations that are specific to the particular perspective that a constitutional

lawyer must adopt in carrying out his or her role, but the book as a whole is meant to portray a practice that is broadly the same across all perspectives.

Again, this book is descriptive rather than prescriptive: I explain to the reader what I think the actual practice of constitutional law is rather than what I think it should be. To be sure, the task of description has required me to make many judgments about formulation and emphasis with which other constitutional lawyers might disagree. To give one particularly important example, I think that the actual practice of constitutional law is shaped more by the constitutional text than some may believe. But my objective is to enable the reader to understand a shared public practice of reason and argument that is not determined by my personal opinions, or indeed those of anyone else. Some of the terminology I use is my own, but if I have succeeded in my goal, the content of the book, its description of our practice, is something I share with constitutional lawyers of all shades of opinion on contested questions of substance.

The reader, therefore, should not infer my personal agreement in the abstract with all of the arguments I present to explain specific rules and principles: I am trying to make the most sense out of the practice as I perceive it, and that includes making sense out of aspects of the practice that in my personal opinion represent a wrong turn. I have no doubt failed on occasion completely to exclude personal and contestable judgments, but any such errors are entirely inadvertent and, I hope, limited to minor details. The book also refrains, almost entirely, from discussion of theoretical debates over originalism, "the living Constitution," and so on. As I explain in the excursus at the end of Chapter 1, with specific reference to originalism, those debates are of minimal significance to the project of describing what constitutional lawyers actually do almost all of the time. I am describing the practice we share rather than the contestable and contested theories that divide us.

As my objective is to explain the *practice* of constitutional law, which has remained remarkably consistent since the time of the early Republic, rather than the *substance* of constitutional law, the reader should not expect to find a systematic presentation of current doctrine in any area of constitutional law. At times I have thought it necessary or helpful to summarize briefly some corner of the great, amorphous body of substantive law that American lawyers recognize as the law of the Constitution, but in every instance, my goal is to aid readers' understanding of the practice rather than provide them with a mini-treatise.

This book often explains a point not by citing its most recent articulation by the Supreme Court (as a lawyer writing a brief might do) but by reference to very old discussions: the reader will quickly note that I frequently use expressions such as "long-standing" and "from the beginning," and that the Supreme Court's 1819 decision in *McCulloch* v. *Maryland* repeatedly shows up to ground an assertion. The reason is not mere antiquarian delight in constitutional law's history. Locating a principle or rule in the law's past is meant to provide a basis for the reader (and the author!) to understand the point being made as genuinely part of the shared practice

rather than the author's personal choice among claims that are contestable in the present day.

Even more importantly, the invocation of old or deeply rooted authority indicates the historical foundation of the book's basic assumption, which I must now state. The practice of constitutional law is the legitimate, coherent, principled tradition of legal argument over the best answers to questions arising under the United States Constitution, rather than the tool of policy and partisan conflict that on occasion Supreme Court adjudication appears to be. This assumption is, obviously, *not* a mere description. It is instead a normative assertion, a statement of my opinion on how arguments in the practice ought to be evaluated, and not simply my judgment on what the practice actually consists of as a matter of observation. When anyone, including a justice of the high Court, proffers an answer to a constitutional question that fails to meet the demands of the practice, the answer is illegitimate, and in principle, the rest of us should reject it. The only form of advocacy for my opinion that I present in this book – except in this preface and in the Conclusion – lies in the implications of what I believe is a neutral and dispassionate account of the practice that constitutional lawyers actually share and in which they engage.

Adherence to the forms of reasoning that make up the practice of constitutional law does not exclude personal political and moral commitment from playing a role in difficult cases. I think it is undeniable – though there are those who say otherwise – that such commitments influence the judgment of even the most conscientious judge or lawyer on the right answers in highly contestable issues. As a great judge and Supreme Court justice, Benjamin N. Cardozo, once wrote, no matter how objectively we approach legal problems, "we can never see them with any eyes except our own."[1] In a hard case, where there are strong arguments on either side and the disagreement has deep roots in basic constitutional principles, which arguments a lawyer or judge finds persuasive, *as a matter of constitutional law and not simply on political grounds*, can depend on the extra-legal political and moral commitments that shape any person's thinking. This is not a fault in the system or proof that anyone is advancing legal arguments for improperly extra-legal purposes; it is a product of the reality that the practice of constitutional law involves persuasive, adversarial, *legal* reasoning rather than adherence to a species of deductive logic.

The accusation or fear that constitutional law is "simply" politics is, I think, chiefly due to the fact that the most visible constitutional law decision-maker, the Supreme Court, addresses (as it must, given the Court's role) the most contestable constitutional law questions. The result is that the correlation in those cases between the justices' differing legal judgments and their different political and ideological beliefs is unmistakable. That correlation is also unavoidable and in itself no reason to question the justices' good faith adherence to the accepted practice of constitutional

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process* 13 (New Haven: Yale University Press, 1921).

law or to doubt that the practice this book describes is the framework within which the vast majority of constitutional law questions are answered. That there have been individual Supreme Court decisions that were inexcusably political is more than likely, but lapses in fidelity to principle are also a feature of the human condition. The existence and normative force of the practice of constitutional law is the baseline against which such deviations, by the justices or others, can be identified and criticized.

The introduction which follows explains that in practice, what lawyers regularly mean when they refer to "the Constitution" is usually not the document itself but rather what I shall call the Constitution-in-practice, the set of legal rules and principles that lawyers and judges have created in the course of trying to apply the written Constitution to the real world of legal and political conflict. Chapter 1 explains the reason for which the Constitution-in-practice came into existence. The constitutional text and the structures of government it creates or addresses give rise to problems, not only in litigation but also in the activities of legislators and executive officials, for which the text provides no clear solution or, just as vexingly, more than one plausible solution. Because the written Constitution announces itself to be, and is universally understood to be, "the supreme law" of the American political community, the problems demand solutions, and so from the first years of the Republic, lawyers – who are by profession problem solvers – have set out to find the right solutions. In doing so, the lawyers (some of whom, of course, were judges) created the practice of constitutional law.

Chapters 2 through 5 describe the modes of thought and argument that make up this practice. In Chapter 2, I explain that the first step in solving a constitutional problem is to determine exactly what sort of problem it is, and that constitutional lawyers do so by applying what I refer to as a twofold logic of inquiry. All constitutional issues, if one analyzes them carefully, pose one or more questions that fall, invariably, into one of two categories: questions of authorization (does the Constitution-in-practice authorize *this* part of government to take the action at issue?) and questions of prohibition (does the Constitution-in-practice prohibit *this* part of government from doing so?). Questions of authorization apply, almost exclusively, to the federal government, and all federal actions must be constitutionally authorized. In the practice of federal constitutional law, we presuppose that state governments possess a general power of governance that is not derived from the Constitution, the "police power." Constitutional prohibitions, most of which are addressed to both federal and state governments, override constitutional authorizations and the states' police power alike.

In Chapter 3, we turn to the constitutional lawyer's basic toolkit, the forms of argument that the lawyer employs in constructing the answers to the questions that the problem at hand presents. There are two basic forms, arguments directly based on the written Constitution and arguments derived from the precedents that make up the Constitution-in-practice. Reasoning that focuses on the written instrument

includes not only straightforward textual claims but also arguments about the text's original meaning and the structures of government it ordains. Despite the logical priority of the written Constitution, however, in most situations, the rules and principles of the Constitution-in-practice are controlling. The Supreme Court's decisions and doctrines are the primary basis of precedential reasoning, but American political practice and legal tradition also play a role. Chapter 4 discusses the varying perspectives that a lawyer may need to adopt in a specific role or in order to answer a specific constitutional question. For example, a lawyer arguing to a court or sitting as a judge must take into account both the limits on the power of courts to interfere with political decisions in the name of the Constitution and the courts' complementary recognition that democratic politics, not judicial decision, is the ordinary mode of governance in the American Republic. Chapter 5 discusses unusual aspects of certain provisions in the written Constitution that the constitutional lawyer may find puzzling.

As I observed previously, the practice of constitutional law is not a form of deductive logic, and intelligent constitutional lawyers thinking in good faith about a difficult problem may not come to the same conclusion about the right solution. Chapter 6 addresses the very difficult question of what makes one constitutional law argument more persuasive than another. A persuasive argument must be well constructed: It must make intellectually honest use of the accepted forms of argument and take into account the perspectives that are relevant to the question and the weight of the reasons for rejecting a proposed answer. When a constitutional law question is relatively straightforward, it may be possible to formulate an argument that most competent lawyers will accept as compelling because no contrary argument seems plausible in comparison. But on a difficult question, professional craftsmanship alone may not determine which answer is most persuasive, and other considerations will play a proportionately larger role.

In the Conclusion, I return to the normative question posed in this preface and restate – in the light of my description of the practice – my belief that the practice of constitutional law merits its role as the established, legitimate, and appropriate means of addressing the problems that invariably arise under the Constitution of the United States.

The Appendix briefly discusses the English common law, which is the intellectual and institutional ancestor of American constitutional law and also addresses the constitutional debate over the existence of a federal common law.

Notes to the Reader

My concern throughout this book is with *federal* constitutional law, the law of the United States Constitution. Much of what I write applies, I think, to the distinct constitutional laws of the states and of the other subnational political communities that make up the United States, but they are not my topic. All references to "the Court" are to the Supreme Court of the United States.

I am deeply indebted in all that follows, not just to those mentioned in the acknowledgments but also to the many writers on constitutional law topics from whose work I have learned over the years. I am grateful to them all, but in a book of this nature, it is not possible to document the sources of my own thinking, even if I could recognize them all. The brief reading list at the end of the book is intended to provide ideas about further reading for those who have found this book helpful.

In quotations, I have adjusted without notice upper case/lower case letters to fit the context except when I am quoting the text of the Constitution. I have removed internal quotation marks and brackets when they seemed unnecessary or distracting, but, of course, the wording is original and unless noted so are any emphases. To reduce the number of footnotes, I have usually provided the citations to all quotations or case references in a paragraph in a single footnote at the paragraph's end.

Acknowledgments

This book reflects from beginning to end what I have learned from my teachers, colleagues in the academy and in government, and my students, and I am grateful to them all.

Two good friends, Henry Paul Monaghan and James Boyd White, read the manuscript with extraordinary care and gave me the great gift of their comments, suggestions, and criticisms. The book is immeasurably better as a result, and I deeply appreciate their time and wisdom. Of course, Henry and Jim are not to be blamed for the faults I failed to correct!

As always, my older daughter Sara was an enthusiastic sounding board as I wrote. I was fortunate indeed to have her advice on questions of structure and approach, advice based in part on her own fascinating work as a scholar of Slavic literatures.

This book would not exist if it were not for my wife Sarah. When I first mentioned the idea, well over a decade ago, her immediate response was that this was a book worth writing. Without her consistent belief in the project and her confidence in my ability to carry it out, I would have abandoned the book on numerous occasions. And as in past work, I have benefitted more than I can say from her lawyerly intellect and insight and her sense of style. Dedicating *The Practice of American Constitutional Law* to her is an inadequate way of expressing my gratitude, but I trust that Sarah will hear what I do not have the words to say.