

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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Table of Contents Constitutional Law Barbri

1. Understanding the eBook Constitutional Law Barbri
 - The Rise of Digital Reading Constitutional Law Barbri
 - Advantages of eBooks Over Traditional Books
2. Identifying Constitutional Law Barbri
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Constitutional Law Barbri
 - User-Friendly Interface
4. Exploring eBook Recommendations from Constitutional Law Barbri
 - Personalized Recommendations
 - Constitutional Law Barbri User Reviews and Ratings
 - Constitutional Law Barbri and Bestseller Lists
5. Accessing Constitutional Law Barbri Free and Paid eBooks
 - Constitutional Law Barbri Public Domain eBooks
 - Constitutional Law Barbri eBook Subscription Services

- Constitutional Law Barbri Budget-Friendly Options
- 6. Navigating Constitutional Law Barbri eBook Formats
 - ePub, PDF, MOBI, and More
 - Constitutional Law Barbri Compatibility with Devices
 - Constitutional Law Barbri Enhanced eBook Features
- 7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Constitutional Law Barbri
 - Highlighting and Note-Taking Constitutional Law Barbri
 - Interactive Elements Constitutional Law Barbri
- 8. Staying Engaged with Constitutional Law Barbri
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Constitutional Law Barbri
- 9. Balancing eBooks and Physical Books Constitutional Law Barbri
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Constitutional Law Barbri
- 10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
- 11. Cultivating a Reading Routine Constitutional Law Barbri
 - Setting Reading Goals Constitutional Law Barbri
 - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Constitutional Law Barbri
 - Fact-Checking eBook Content of Constitutional Law Barbri
 - Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
 - Utilizing eBooks for Skill Development
 - Exploring Educational eBooks
- 14. Embracing eBook Trends

-
- Integration of Multimedia Elements
 - Interactive and Gamified eBooks

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