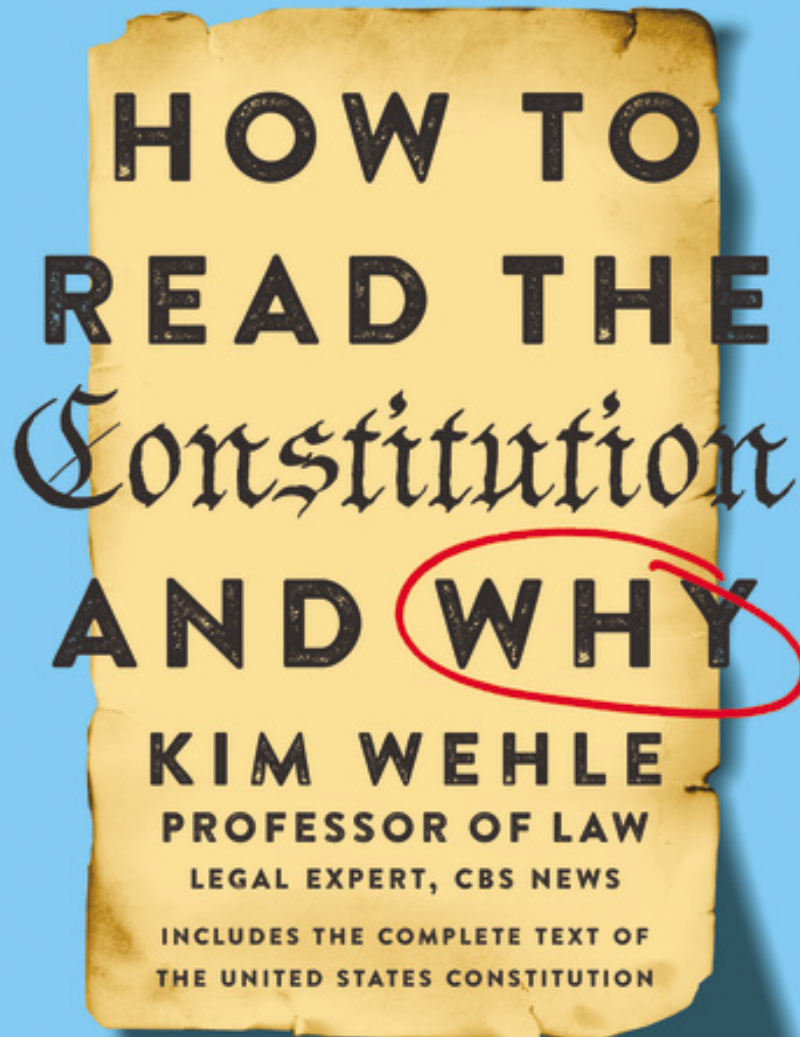


TEACHER'S GUIDE



"Not since perhaps the Nixon years have there been so many valid questions about the US Constitution and its role in our lives. Wehle's book provides essential, compelling reading on this glorious document. A must-read for this era."

—JAKE TAPPER, CNN anchor and chief Washington correspondent

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NOTE TO INSTRUCTORS FROM THE AUTHOR

The purpose of this instructors' guide is to provide additional opportunities for your students to understand and explore the Constitution.

This guide can be used in the classroom or in study groups. Instructors can choose to use the provided materials for some or all chapters.

The guide contains the following features:

1. It provides a framework for working through each chapter. I've found from years of teaching that a skeletal, thematic structure can greatly assist people in comprehending new and sometimes difficult legal concepts.
2. The guide offers three sets of questions after each chapter to prompt further discussion around the book's broader themes.

I recommend that, before assigning each chapter, you review the corresponding section of this guide first. Each chapter's questions can be used as writing assignments or as a guide to discussion. The goal is to tie the book's themes to each other, to current events, and even to everyday life.

After all, the Constitution is not some lofty script set in stone for scholars to ponder offline. It's what keeps government off our backs, and individual freedoms in our backpacks. It is something that every American should have in mind on the way to the ballot booth, poised to flex the precious power of the vote.

—Kim Wehle

PART I: STRUCTURE

FRAMEWORK

A. *Structural Constitution*

1. Article I (Congress and legislation)
2. Article II (President and law execution)
3. Article III (Judges and adjudication of discrete disputes)

B. *Rights-Based Constitution*

1. The Bill of Rights (first 10 Amendments)
2. Later Amendments to the Constitution

C. *Themes*¹

1. Consequences for violating laws and norms are vital if laws are to mean anything.
2. Policy and politics are very different.
3. Increased government power usually means increased government power for keeps
4. Words have different meanings, including those contained in the Constitution.
5. American values are not in the text of the Constitution, so how are they upheld?
6. Nobody in government is supposed to be above the law under our Constitution.
7. Law—like life—is not black and white, but many shades of gray.

DISCUSSION QUESTIONS

- Scroll through your newsfeed. Identify a story that discusses a government *policy*. Then identify a story that discusses *politics*. Explain how they are different. For bonus points, identify a story that combines policy and politics, tease those two themes apart, and ask yourself: which matters most to you?
- Think of a time in which you broke a rule—or witnessed someone else break a rule—and nothing happened. Was the lack of consequences a bad thing? If not, think of another time that someone broke a rule, got away with it, and it did turn out to be a bad thing. Now think of a time that a government actor broke a rule and faced the consequences. What if that person had gotten away with it? Does it matter if the rule-breaker is the government versus a private person? Why or why not?
- Why do you think the framers broke up government into three parts? What would happen if any one of the three parts disappeared. Would it affect how government operates? Perhaps more importantly, what happens to the rights of the individual when one of the branches becomes powerless? Why was the Bill of Rights added to the Constitution in the first place?

¹ Try restating these in your own words.

CHAPTER 1: THE BASICS: EACH BRANCH HAS A JOB DESCRIPTION—AND TWO BOSSES

FRAMEWORK

A. Recall the two axes of constitutional law (structure and rights)

1. What the Vesting Clauses are
2. How the Amendments to the Constitution differ from the three main Articles

B. Interpreting words in the Constitution

1. Think the Bible, Torah, Koran, poetry
2. The terms “legislative” or “executive,” for example, can have different meanings

C. Core constitutional concepts

1. Separation of powers
2. Checks and balances
3. Overlapping powers of government
4. Government by “We the People”

DISCUSSION QUESTIONS

- Why does it matter that each branch stays in its constitutional “sandbox”? Why is it a problem if the president makes the laws and also executes them? Or if Congress makes the laws and also decides who broke them? Or if judges prosecute violations of the law (i.e., executes the laws) and also decide whether the person being prosecuted actually violated a law?
- How do federal agencies do all three things that the three branches of government do? What about private companies—how do they sometimes do all three things? Should the Constitution even care that the three branches aren't the only “government” actors? Why or why not?
- Think of an alternative model of government—say, a monarchy or a parliamentary government (where the legislature picks the prime minister), as in England. Why do we have what we have instead of those models? Imagine that you open an ice cream shop and need to set up an organizational structure. How would each of these models of “governance” likely to work out?

CHAPTER 2: CONGRESS: LOTS OF POWER TO A HERD OF CATS

FRAMEWORK

A. Vesting Clause: “All legislative Powers herein shall be vested in a Congress”

1. “Shall” does not strictly mean shall—the executive branch also makes laws
2. Congress is also constrained by the states

B. Taxing and spending powers

1. Congress can use these so long as it does not violate another part of the Constitution
2. Congress does things other than raise money by the taxing power (e.g., regulating firearms)

C. Necessary and Proper Clause

1. A big source of congressional power
2. “Necessary” has been equated with useful, giving Congress lots of leeway under the Necessary and Proper Clause.

D. Commerce Clause

1. Another big source of congressional power
2. Allows Congress to make laws that have an effect on commerce, which can be broadly and/or narrowly read

E. Oversight of the Executive: Emoluments and Impeachment Clauses

1. The Emoluments Clause bars office-holders (including the president) from accepting “any present” from a “foreign State” unless they have “the Consent of Congress.”
2. Impeachment is a trial in Congress, it applies to more officials than just the president, and it is appropriate for “high Crimes and Misdemeanors,” which are not the same as a crime under the criminal laws that could put people in jail.
3. Both the Emoluments and Impeachment Clauses have become ineffective as a check on the president because they are not enforced by Congress.

DISCUSSION QUESTIONS

- Why do you think the framers of the Constitution believed that Congress was “the most dangerous branch”? They rejected a monarchy, after all, but made the executive branch headed by a single person. What’s so worrisome about Congress? Should we be more worried about the presidency?
- Jot down your assumptions about how Congress gets elected and how it actually functions. Keep the list handy when you get to Part III, because some of those assumptions might turn out to be inaccurate. What does that say about the power of the voters to act through their elected representatives?
- What do you think at this point in the book about “plain language” reading of the Constitution? Do you think that Congress’s powers are being given their “plain” reading these days? What, for example, do the plain words, “regulate interstate commerce,” mean to you in today’s speech?

CHAPTER 3: THE (REAL) POWERS OF THE PRESIDENT: NO MORE KINGS

FRAMEWORK**A. Executive power and the Take Care Clause**

1. The president enforces the laws, but prosecutors cannot take and prosecute every single possible case
2. The Constitution states that the president “shall take care” that the laws are faithfully executed, so can he just ignore certain laws?

B. Agencies

1. Federal agencies are created by Congress
2. But they are run by the president

3. They do what all three branches of government do: make, execute, and adjudicate the laws.
4. They are a very big deal when it comes to the scope of the federal government, but few people understand them.

C. Appointment and Removal

1. In regular life, it matters whether a boss has meaningful power hire and fire employees, and it matters that the president has the power to hire and fire people within the executive branch, too.
2. Removal power is not actually in the Constitution, but it's been implied from the Appointments Clause.

D. Executive Orders

1. These are laws, but not made by Congress
2. New presidents can change them as easily as old presidents made them (think: DACA)

E. Pardon power

1. People say this is unlimited, but nothing in the Constitution is unlimited—every exercise of power has to comply with the other parts of the Constitution.
2. The pardon power is quite broad.

F. Commander-in-chief power

1. Congress also has war powers, but it's largely ceded them to the presidency over the years.
2. The president commands the armed forces, which have to be nimble on the battlefield.

G. Treaty power

1. The president has the authority to make treaties.
2. Two-thirds of the Senate must agree.
3. But presidents also make what's called "executive agreements" without Senate buy-in.

DISCUSSION QUESTIONS

- Take moment to do a brief review the Vesting Clauses. Which is which? Which governs Congress? The President? What does "law execution" mean and how does it differ from "law making"?
- The list of presidential powers is pretty long. Does the modern presidency have too much power? Recall the list of takeaways from the introduction. Which apply to the president's powers?
- If you have a "bad boss," what can be done to "check" how he runs his staff? What is the most effective check for a president these days?

CHAPTER 4: THE COURTS: WHAT WAS THAT ABOUT KINGS?

FRAMEWORK

A. Keys to the federal courthouse door

1. Not every case gets into federal court. You need the keys to that courthouse door.
2. You need to be injured in an individual way, not in a way that everyone in the country shares (that's for Congress).

B. Federal courts nonetheless have significant power

1. Part of their power comes from the inevitable ambiguity in laws—the Constitution as well as statutes; courts get to fill in the blanks.
2. There's sometimes a fine line between what courts do and what Congress does.

DISCUSSION QUESTIONS

- We have all seen court cases on TV, but in reality, things are quite different. What about this chapter (if anything) surprised you when it comes to the court system?
- Is it okay that courts have power to fill in the blanks of ambiguous laws? If courts didn't do it, who would—Congress? Consider that every time the Supreme Court identifies a constitutional issue and decides it, that decision is set in stone for generations—unless there's an amendment to the Constitution or a new majority on the Supreme Court. How would things be different if things like abortion and gun rights were left to voters and legislators and not the Supreme Court?
- As voters, how much power do “We the People” have over federal courts? What does that mean for the Supreme Court?

PART II: RIGHTS

CHAPTER 5: SPEECH, RELIGION, AND THE FIRST AMENDMENT

FRAMEWORK

A. Free speech

1. The law in this area is all over the place, and relatively complex.
2. The government can legally put restrictions on speech, despite the language of the First Amendment.
3. The reason free speech is so important is because if the government can arbitrarily restrict speech, it can restrict thoughts, which is scary.

B. Freedom of religion and the Establishment Clause

1. There are two issues here: whether the government can interfere with establishing a church and whether it can interfere with how you personally worship (or not).
2. There is no “separation of church and state” language in the Constitution; it's implied.
3. The Supreme Court has allowed government to entangle with religion; the lines are not clearly drawn.

DISCUSSION QUESTIONS

- Think about a time in your life—when you were in a particular job, or in a relationship with a particular parent or a spouse—that you felt like you could never say anything right. You were criticized or attacked whenever you spoke about how you feel. How did you react? Did you get quiet? Did you push back? If you pushed back, what happened? Now think about a government that pushes back on your speech in the same way, but on a much bigger scale. Does that analogy help with your understanding of why free speech is protected under the First Amendment? Why?
- The media has been under attack these days, and journalists do get things wrong sometimes. It's also hard for regular consumers of information to know what sources and facts are reliable anymore. Imagine, though, that the media was run solely by the government, as it is in Russia. How might that affect your individual rights? Your knowledge about the world? Your informed vote?
- There's an argument floating around that allowing the government to endorse a particular religion is no big deal, i.e., nothing to worry about. But imagine that all of a sudden the elected president is from a different religion than any president in history. Imagine, for example, that he is a strict Muslim. Would you feel differently about how much the government is allowed to entangle itself officially with religion?

CHAPTER 6: GUNS AND THE SECOND AMENDMENT

FRAMEWORK

- A. The Second Amendment by its plain language arguably protects the right of militias to own guns—not the rights of individuals—but the Supreme Court has flip-flopped on this question.*
- B. The right to own a handgun in your home is protected, but not the right to own any kind of weapon without any regulation from the government.*

DISCUSSION QUESTIONS

- We know by now that the Supreme Court likes balancing tests and applies them all the time to the Constitution. If you were the Court and could pick the factors to balance when it comes to gun rights, what might you balance? How would you weigh those factors?
- Gun rights is partly about the power of government over individuals. What other topics fall into this broad framework? Free speech? Freedom of religion? How about abortion rights?
- How much should state and federal legislators be able to weigh in on gun rights? How much power should nine individuals on the Supreme Court have over this issue? Does it have to be all-or-nothing (either way)?

CHAPTER 7: CRIME AND THE FOURTH, FIFTH, SIXTH, AND EIGHTH AMENDMENTS

FRAMEWORK

A. Fourth Amendment

1. This limits government's power to unreasonably search your home or car (cars are less protected) and to seize you or your property.

2. It's usually associated with the criminal justice system, but the Fourth Amendment plays a big role in protecting everyone's privacy from government intrusion.
3. In general, it protects areas in which you have a "reasonable expectation of privacy," so if you make something public, you've waived your Fourth Amendment protections.
4. Also requires the government to get a warrant signed by judge in order to do a search of a home or other private space, and the warrant has to be supported by evidence.

B. Fifth Amendment

1. The government can't force you to say things that will help make a case for putting you in jail.
2. If the government gives you immunity from prosecution, you can no longer "take the Fifth," and you have to talk or you could go to jail for contempt.

C. Sixth Amendment

1. This one protects people by ensuring that the government provides fair procedures once a person goes to trial in a criminal case.
2. The jury has to be impartial, among other things.

D. Eighth Amendment

1. The Eighth Amendment bans cruel and unusual punishment, but capital punishment is allowed, as is the beating of prisoners.
2. Remember: What's "allowed" under the Eighth Amendment depends on how the Supreme Court has construed ambiguous language—it's not clear in the Constitution itself—but this one has big implications for individual rights (like the right to life).

DISCUSSION QUESTIONS

- How does the Internet and big data change the notion of a "search," which was originally concerned with physical searches of physical property (a closet, a drawer, a car)? If the government can "search" an online data footprint and piece together lots of personal information to figure out what you are up to, does the Fourth Amendment need rethinking? If so, who should do that—Congress or the federal courts?
- Most of us assume that we won't end up being prosecuted for a crime. Should we care about the Sixth Amendment anyway? Why or why not?
- What kind of elements do you think should be balanced when it comes to capital punishment? If it costs a lot in taxpayer dollars and sometimes the government gets it wrong and kills innocent people, what makes it worth it? How much should we worry about a too-powerful government in this respect?

CHAPTER 8: LIBERTY AND EQUALITY: FIFTH AND FOURTEENTH AMENDMENTS

FRAMEWORK

A. Fifth Amendment

1. Contains the first of two Due Process Clauses in the Constitution.
2. Applies to the federal government.

3. What due process means is that you get notice and a fair proceeding before the government can take away your life, liberty, or property.
4. Due process (like most of the Constitution) does *not* bind private companies.
5. The Supreme Court has also implied substantive rights from the Due Process Clause, such as the right to raise your children as you see fit and the right to an abortion.

B. Fourteenth Amendment

1. The Fourteenth Amendment does a lot of work because it's how the entire Bill of Rights gets applied to both the states and the federal government.
2. Also contains the Due Process Clause that's applicable to the states.
3. Also contains the Equal Protection Clause, which is where a lot of our civil rights come from—the government can't treat you differently based on immutable characteristics unless it has a good reason.

DISCUSSION QUESTIONS

- Substantive due process rights get a bad rap, particularly when it comes to abortion. The Supreme Court has been criticized for reading into the Constitution text that's not actually in there. But in practice this is limited to due process? What other things have you read about thus far that the Court has implied from the Constitution without explicit text?
- What do you think about the tiers of scrutiny that the Supreme Court has devised for equal protection issues? Should race and national origin get a higher level than gender? Why or why not? Can you think of a better way to construe the government's mandate to provide "equal protection of the laws"?
- Why were these Amendments added to the Constitution in the first place? The original framers thought the three-part structure (Part I of the book) itself would protect people from arbitrary government action. Were they wrong? How is the structure working to protect people's individual rights these days, you think?

CHAPTER 9: WHAT DOES THE CONSTITUTION SAY ABOUT THE STATES?

FRAMEWORK

- A. Federalism is a wonky name for states' rights, and it's part of what keeps us from having a too-powerful federal government.***
- B. The Tenth Amendment is particularly important in terms of doing the work of preserving states' rights, and basically provides that the only power the federal government gets is in the Constitution's text (but the Supreme Court has loosely interpreted that).***

DISCUSSION QUESTIONS

- How much should the federal government do to regulate things on a national scale and how much should individual states do? Is there a benefit to having uniform laws across the country? Downsides?
- How much should the U.S. Supreme Court get to decide when it comes to the question of whether the federal government has intruded on states' rights? If the Supreme Court didn't make that decision, who would?

- Why is it either fair or unfair that people in Texas have different benefits and obligations than people in New Hampshire? How important is it that we have one national government—what about a bunch of mini-countries, like in Europe, instead?

PART III: WHY CARE?

CHAPTER 10: WHY IT MATTERS HOW POLITICIANS GET HIRED AND FIRED

FRAMEWORK

A. Electing a president

1. To elect a president, primaries and caucuses are held first in order to produce conventions to select nominees.
2. The Electoral College—a process involving delegates that are chosen to represent states in the election—ultimately decides who becomes president.

B. Electing Senators and members of the House of Representatives

1. Senators are elected every six years, and there are two per state—regardless of the size of the state.
2. Members of the House serve two-year terms, and are fixed by statute at 435 total, a number that's carved up based on U.S. Census figures.

C. The legislative process

1. A lot of how laws are made depends on internal rules decided by the members of Congress in power—not the voters.
2. Committees hash out differences between parties on proposed bills, but they have fallen out of use as the Congress has become more and more polarized since the 1990s.

D. Money in politics

1. Hard money, soft money, PACs, Super PACs, dark money, and 501(c)(4)'s are terms that matter when it comes to financing campaigns and our right to vote in general.
2. The Supreme Court's decision in *Citizens United v. FEC* led to a flood of big money into political campaigns.

DISCUSSION QUESTIONS

- Why do we have the Electoral College instead of simply counting up votes? And is it fair that voters in some states have a greater say in choosing a president and a bigger voice in the Senate than other voters?
- Now that the Supreme Court has made campaign finance a constitutional issue under the First Amendment, Congress cannot change certain laws to limit money in politics. A constitutional amendment would be necessary for that. Did the Supreme Court overstep here? What about the individual's right to vote—should that weigh into this equation? How?
- Most people agree that the electoral process isn't working because of some combination of factors, including money in politics, gerrymandering, term limits, voter suppression, and party polarization.

If your day-to-day life isn't really affected by these issues, should they really concern you? When might they become a problem for you? Can you think of a hypothetical that would get you concerned about protecting your right to vote? What can be done about these problems with our electoral process?

CHAPTER 11: IF THE CONSTITUTION STOPS FUNCTIONING, WHY SHOULD I CARE?

FRAMEWORK

A. *Anti-federalists in 1787*

1. They worried that a central authority would become corrupt and too powerful.
2. They knew that the alternative is an autocracy.

B. *How democracies slip into autocracies*

1. Control the referees.
2. Attack opponents.
3. Ignore the rules of the game.
4. Encourage violence.

DISCUSSION QUESTIONS

- Most Americans don't worry about our country becoming a dictatorship. We walk around pretty complacent that our rights will be protected and the government won't go too far—at least with respect to us and our own families. Are you one of those carefree people? What makes you feel confident that things will work out when it comes to the many structural problems in our government? Why might we be immune from an autocracy? Why not?
- Consider the list of four elements that scholars have identified as signaling that a democracy is slipping into an autocracy. Have you seen examples of these by any president in your lifetime? When might you worry about this phenomenon in America—if ever?
- Think again about your own everyday life. What happens in regular life when a bad boss—and bad employees—get away with bullying? (Hollywood even made a movie called *Terrible Bosses*.) What happens when a child acts badly and the parents don't do anything? Do these things happen in government too? If not, why not? If yes, how do they play out? Can you think of an example?

CHAPTER 12: SUSTAINING DEMOCRACY: SOME TAKEAWAYS

FRAMEWORK

A. *Two-thirds of the States can call for a convention to re-write the Constitution*

1. As of 2019, we are 6 states away from one.
2. There is no roadmap for what this would look like, except that the members of the original constitutional convention scrapped the Articles of Confederation altogether rather than rewriting them.

B. Voting matters

1. “We the People” must be our own Constitution cop—nothing in the Constitution itself does it for us.
2. Our right to vote is precious—use it.

FINAL DISCUSSION QUESTIONS

- Has this book affected how you think about your constitutional rights and the right to vote in particular? How? If you had to provide three central takeaways from this book, what would they be?
- Recall the original discussion of “soft” norms—American values that aren’t laid out in the Constitution. Do these norms matter in your everyday life? How? How do they matter in government? How can we all ensure that they continue to matter in government?
- What have you learned about how to think about the law, and the generic question: “Is that legal?” What does it mean to look for gray areas rather than thinking in black and white? How would a “gray area” approach to a strongly-held belief of yours change how you think about that issue? Try to change your mind a little about something right now.

ABOUT THE AUTHOR



Tim Corburn Photography

Kim Wehle is a tenured Professor of Law at the University of Baltimore School of Law, where she teaches and writes on the constitutional separation of powers, administrative law, and civil procedure. She was formerly an Assistant United States. Professor Wehle is also an On-Air and Off-Air Legal Expert, Analyst and Commentator for *CBS News*, as well as a Contributor for *BBC World News* and *BBC World News America* on PBS, an Op-Ed Contributor for *The Bulwark*, and an Opinion Contributor for *The Hill*.

She has been a regular guest legal analyst on various media outlets regarding Special Counsel Robert Mueller’s probe into Russian influence in the 2016 presidential election and other issues regarding the structural Constitution and the Trump Administration, including on CNN, MSNBC, NPR’s Morning Edition, PBS NewsHour, and Fox News. Her articles have also appeared in the *Baltimore Sun*, the *Los Angeles Times*, and *NBC News Think*. She is regularly interviewed and cited by prominent print journalists on a range of legal issues.

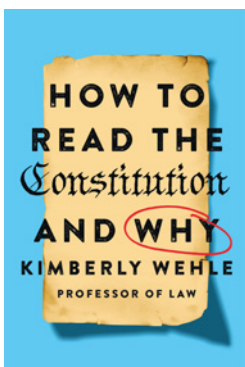
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