

AMERICAN CONSTITUTIONAL LAW

Volume I The Structure of Government

Seventh Edition

RALPH A. ROSSUM
Claremont McKenna College

G. ALAN TARR
Rutgers University, Camden

THOMSON

WADSWORTH

Australia • Brazil • Canada • Mexico • Singapore • Spain
United Kingdom • United States



Contents

PREFACE xvii

NOTE TO THE READER xxi

1 INTERPRETATION OF THE CONSTITUTION 1

Approaches to Constitutional Interpretation 4

The Approaches in Perspective 15

The Ends of the Constitution 16

The Means to the Ends 18

Notes 24

Selected Reading 27

2 CONSTITUTIONAL ADJUDICATION 29

The Justices of the Supreme Court 30

The Supreme Court in the Federal Judicial System 32

How Cases Get to the Supreme Court 33

How the Supreme Court Decides Cases 38

The Impact of Supreme Court Decisions 42

Analyzing Supreme Court Decisions 47
 Sources in Constitutional Law 50
 Notes 51
 Selected Reading 53

3 THE JUDICIAL POWER 55

The Power of Judicial Review 57
 Externally Imposed Restraints on Judicial Review 62
 Court-Imposed Restraints on Judicial Review 64
 The Expanding Role of the Courts 71
 The Courts, Judicial Review, and the Problem of Legitimacy 72
 Notes 77
 Selected Reading 80

CASES

Marbury v. Madison (1803) 83
Calder v. Bull (1798) 86
Eakin v. Raub (1825) 88
Cooper v. Aaron (1958) 90
Plaut v. Spendthrift Farm, Inc. (1995) 93
Young v. United States ex rel. Vuitton (1987) 97
Ex Parte McCordle (1869) 99
Frothingham v. Mellon (1923) 100
Flast v. Cohen (1968) 101
Lujan v. Defenders of Wildlife (1992) 104
Luther v. Borden (1849) 107
Baker v. Carr (1962) 109
Nixon v. United States (1993) 114
Deshaney v. Winnebago County Department of Social Services (1989) 119

4 THE LEGISLATIVE BRANCH 124

The Scope of Congressional Power 125
 Powers That Facilitate Legislative Activity 126
 Nonlegislative Powers 132
 Safeguarding Legislative Power 135
 Conclusions 138
 Notes 139
 Selected Reading 140

CASES

McCulloch v. Maryland (1819) 141
Powell v. McCormack (1969) 146
U.S. Term Limits, Inc. v. Thornton (1995) 149

<i>Gravel v. United States</i> (1972)	157
<i>McGrain v. Daugherty</i> (1927)	160
<i>Watkins v. United States</i> (1957)	161
Articles of Impeachment against William Jefferson Clinton (1998)	164
<i>Schechter Poultry Corporation v. United States</i> (1935)	166
<i>Mistretta v. United States</i> (1989)	168
<i>Immigration and Naturalization Service v. Chadha</i> (1983)	172

5 THE EXECUTIVE BRANCH 178

The Aims of the Framers	179
Grants of Power and Their Use	181
Implied Powers	182
Prerogative Powers	187
Notes	189
Selected Reading	190

CASES

<i>Clinton v. City of New York</i> (1998)	191
<i>Myers v. United States</i> (1926)	197
<i>Morrison v. Olson</i> (1988)	201
<i>United States v. Nixon</i> (1974)	205
<i>Clinton v. Jones</i> (1997)	207
<i>In Re Neagle</i> (1890)	210
<i>Youngstown Sheet & Tube Company v. Sawyer</i> (1952)	211

6 WAR AND FOREIGN AFFAIRS 216

The Interbranch Distribution of Power	217
The Foundation and Extent of the Foreign Affairs Power	222
War and Individual Rights	225
Notes	230
Selected Reading	231

CASES

<i>The Prize Cases</i> (1863)	233
The Gulf of Tonkin Resolution (1964)	234
The War Powers Resolution (1973)	234
<i>United States v. Curtiss-Wright Export Corporation</i> (1936)	236
<i>Missouri v. Holland</i> (1920)	238
<i>Ex Parte Milligan</i> (1866)	240
<i>Korematsu v. United States</i> (1944)	243
<i>Ex Parte Quirin</i> (1942)	246
The USA PATRIOT Act (2001)	251

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (2001)	255
<i>Hamdi v. Rumsfeld</i> (2004)	257
<i>Rasul v. Bush</i> (2004)	267
Letter on Wiretapping by the National Security Agency (2005)	272
Congressional Research Service Memorandum (2006)	274

7 FEDERALISM 281

Federalism and the Founding	282
Federalism and the First Congress	286
Federalism and the Marshall Court	288
Federalism and Its Protection by Subsequent Courts	290
The Post-Civil War Amendments and the Shifting of the Federal Balance	305
Notes	309
Selected Reading	312

CASES

The Judiciary Act of 1789	314
<i>Cohens v. Virginia</i> (1821)	317
<i>Coyle v. Smith</i> (1911)	321
<i>Baldwin v. Montana Fish and Game Commission</i> (1978)	322
<i>Dred Scott v. Sandford</i> (1857)	325
<i>New York v. United States</i> (1992)	334
<i>Printz v. United States</i> (1997)	340
<i>Alden v. Maine</i> (1999)	346
<i>Tennessee v. Lane</i> (2004)	354
The Civil Rights Cases (1883)	358
<i>Jones v. Alfred H. Mayer Company</i> (1968)	363

8 THE EXERCISE OF NATIONAL POWER 366

The Commerce Power	367
The Taxing Power	375
The Spending Power	376
Limitations on National Power	378
Notes	378
Selected Reading	379

CASES

<i>Gibbons v. Ogden</i> (1824)	381
<i>United States v. E. C. Knight Company</i> (1895)	385
<i>Hammer v. Dagenhart</i> (1918)	387

<i>National Labor Relations Board v. Jones & Laughlin Steel Corporation</i> (1937)	388
<i>Wickard v. Filburn</i> (1942)	390
<i>Heart of Atlanta Motel v. United States</i> (1964)	392
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> (1985)	393
<i>United States v. Lopez</i> (1995)	400
<i>Gonzales v. Raich</i> (2005)	403
<i>United States v. Butler</i> (1936)	409
<i>United States v. Kahriger</i> (1953)	413
<i>South Dakota v. Dole</i> (1987)	414

9 THE EXERCISE OF STATE POWER 417

Constitutional Principles	418
Preemption	419
Negative Implications of the Commerce Clause	420
State Regulation and the Modern Court	423
The Role of the Court	425
Notes	426
Selected Reading	426

CASES

<i>Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission</i> (1983)	428
<i>Cooley v. Board of Wardens</i> (1852)	430
<i>Dean Milk Company v. City of Madison</i> (1951)	432
<i>Southern Pacific Company v. Arizona</i> (1945)	434
<i>Camps Newfound/Owatonna, Inc. v. Town of Harrison</i> (1997)	436

10 THE CONSTITUTION AND NATIVE AMERICAN TRIBES 443

Native American Tribes and the New Republic	444
Tribal Self-Determination	446
Tribal Authority over Disposition of Lands	447
Tribal Authority to Institute a Government	448
Tribal Authority to Enter into Treaties	449
Tribes and Their Relation to the States	450
Tribal Authority to Administer Justice	452
Tribal Authority to Engage in "Indian Gaming"	453
Notes	455
Selected Reading	458

CASES

<i>Cherokee Nation v. Georgia</i> (1831)	460
--	-----

	<i>Worcester v. Georgia</i> (1832)	462
	<i>United States v. Kagama</i> (1886)	464
	<i>Johnson v. McIntosh</i> (1823)	467
	<i>Lone Wolf v. Hitchcock</i> (1903)	469
	<i>McClanahan v. Arizona State Tax Commission</i> (1973)	470
	Public Law 280 (1953)	472
	<i>United States v. Lara</i> (2004)	475
	<i>California v. Cabazon Band of Mission Indians</i> (1987)	479
11	THE CONTRACT CLAUSE	484
	Marshall's Expansion of the Contract Clause	486
	The Decline of the Contract Clause	487
	A Continued Relevance?	491
	Notes	492
	Selected Reading	494
	CASES	
	<i>Fletcher v. Peck</i> (1810)	496
	<i>Dartmouth College v. Woodward</i> (1819)	498
	<i>Charles River Bridge Company v. Warren Bridge Company</i> (1837)	501
	<i>Home Building and Loan Association v. Blaisdell</i> (1934)	503
	<i>United States Trust Company v. New Jersey</i> (1977)	508
12	ECONOMIC DUE PROCESS AND THE TAKINGS CLAUSE	511
	The Fourteenth Amendment	512
	The Evisceration (and Possible Recent Restoration?) of the Privileges or Immunities Clause	513
	Economic Regulation and the Rise of Substantive Due Process	515
	The Demise of Substantive Due Process in the Economic Realm	519
	Punitive Damages: An Exception to the Demise of Substantive Due Process in the Economic Realm?	520
	The Emergence of Substantive Due Process in the Civil Liberties Realm	522
	The Takings Clause	523
	Notes	529
	Selected Reading	531
	CASES	
	<i>The Slaughter-House Cases</i> (1873)	533
	<i>Saenz v. Roe</i> (1999)	537
	<i>Munn v. Illinois</i> (1877)	544
	<i>Lochner v. New York</i> (1905)	547

<i>West Coast Hotel Company v. Parrish</i> (1937)	550
<i>Williamson v. Lee Optical Company</i> (1955)	552
<i>State Farm Mutual Automobile Insurance Company v. Campbell</i> (2003)	553
<i>United States v. Carolene Products Company</i> (1938)	556
<i>Kelo v. City of New London</i> (2005)	557
<i>Nollan v. California Coastal Commission</i> (1987)	564
<i>Lucas v. South Carolina Coastal Council</i> (1992)	568
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> (2002)	571
<i>Dolan v. City of Tigard</i> (1994)	575

THE CONSTITUTION OF THE UNITED STATES OF AMERICA 579

JUSTICES OF THE SUPREME COURT 592

GLOSSARY OF COMMON LEGAL TERMS 596

TABLE OF CASES 599

AMERICAN CONSTITUTIONAL LAW

Volume II The Bill of Rights and Subsequent Amendments

Seventh Edition

RALPH A. ROSSUM
Claremont McKenna College

G. ALAN TARR
Rutgers University, Camden

THOMSON

WADSWORTH

Australia • Brazil • Canada • Mexico • Singapore • Spain
United Kingdom • United States



Contents

PREFACE xvii

NOTE TO THE READER xxi

1 INTERPRETATION OF THE CONSTITUTION 1

Approaches to Constitutional Interpretation 4

The Approaches in Perspective 15

The Ends of the Constitution 16

The Means to the Ends 18

Notes 24

Selected Reading 27

2 CONSTITUTIONAL ADJUDICATION 29

The Justices of the Supreme Court 30

The Supreme Court in the Federal Judicial System 32

How Cases Get to the Supreme Court 33

How the Supreme Court Decides Cases 38

The Impact of Supreme Court Decisions 42

Analyzing Supreme Court Decisions 47

Sources in Constitutional Law 50

Notes 51

Selected Reading 53

3 RIGHTS UNDER THE CONSTITUTION 55

- Rights and the Founding 56
- The Fourteenth Amendment 59
- Due Process and the Bill of Rights 61
- Rights During Wartime and Other Emergencies 67
- The Second Amendment 71
- Notes 74
- Selected Reading 76

CASES

- Barron v. Baltimore* (1833) 78
- Palko v. Connecticut* (1937) 79
- Adamson v. California* (1947) 81
- Duncan v. Louisiana* (1968) 83
- Ex Parte Milligan* (1866) 86
- Korematsu v. United States* (1944) 89
- Hamdi v. Rumsfeld* (2004) 93
- Rasul v. Bush* (2004) 103
- United States v. Emerson* (2001) 107

4 ECONOMIC DUE PROCESS AND THE TAKINGS CLAUSE 113

- The Fourteenth Amendment 114
- The Evisceration (and Possible Recent Restoration?) of the
Privileges or Immunities Clause 115
- Economic Regulation and the Rise of Substantive Due Process 117
- The Demise of Substantive Due Process in the Economic Realm 121
- Punitive Damages: An Exception to the Demise of Substantive
Due Process in the Economic Realm? 122
- The Emergence of Substantive Due Process in the Civil
Liberties Realm 124
- The Takings Clause 125
- Notes 131
- Selected Reading 133

CASES

- The Slaughter-House Cases* (1873) 135
- Saenz v. Roe* (1999) 139
- Munn v. Illinois* (1877) 146
- Lochner v. New York* (1905) 149
- West Coast Hotel Company v. Parrish* (1937) 152
- Williamson v. Lee Optical Company* (1955) 154
- State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 155
- United States v. Carolene Products Company* (1938) 158

<i>Kelo v. City of New London</i> (2005)	159
<i>Nollan v. California Coastal Commission</i> (1987)	166
<i>Lucas v. South Carolina Coastal Council</i> (1992)	170
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> (2002)	173
<i>Dolan v. City of Tigard</i> (1994)	177

5 FREEDOM OF SPEECH, PRESS, AND ASSOCIATION 181

The Meaning of the First Amendment	182
First Amendment Standards	184
Political Expression	187
The Regulation of Speech	191
Restraints on the Press	198
Libel and Invasion of Privacy	201
Obscenity	202
Conclusions	204
Notes	205
Selected Reading	207

CASES

<i>Gitlow v. New York</i> (1925)	209
<i>Schenck v. United States</i> (1919)	210
<i>Dennis v. United States</i> (1951)	211
<i>Barenblatt v. United States</i> (1959)	215
<i>Brandenburg v. Ohio</i> (1969)	219
<i>McConnell v. Federal Election Commission</i> (2003)	220
<i>Boy Scouts of America v. Dale</i> (2000)	235
<i>Texas v. Johnson</i> (1989)	242
<i>R.A.V. v. City of St. Paul</i> (1992)	245
<i>Hill v. Colorado</i> (2000)	248
<i>Near v. Minnesota</i> (1931)	252
<i>New York Times Company v. United States</i> (1971)	254
<i>Branzburg v. Hayes</i> (1972)	257
Memorandum Opinion and Order, Federal Communications Commission (1987)	259
<i>New York Times v. Sullivan</i> (1964)	262
<i>Miller v. California/Paris Adult Theater I v. Slaton</i> (1973)	264
<i>Reno v. American Civil Liberties Union</i> (1997)	266
Indianapolis Anti-Pornography Ordinance (1984)	272

6 FREEDOM OF RELIGION 274

Establishment of Religion	275
Free Exercise of Religion	281

Reconciling the Religion Clauses	284
Trends and Prospects	285
Notes	286
Selected Reading	287

CASES

<i>Everson v. Board of Education</i> (1947)	288
<i>School District of Abington Township v. Schempp</i> (1963)	290
<i>Lemon v. Kurtzman</i> (1971)	293
<i>Wallace v. Jaffree</i> (1985)	296
<i>Lee v. Weisman</i> (1992)	298
<i>McCreary County v. American Civil Liberties Union</i> (2005)	304
<i>Van Orden v. Perry</i> (2005)	309
<i>Rosenberger v. University of Virginia</i> (1995)	313
<i>Zelman v. Simmons-Harris</i> (2002)	317
<i>West Virginia Board of Education v. Barnette</i> (1943)	325
<i>Sherbert v. Verner</i> (1963)	328
<i>Lyng v. Northwest Indian Cemetery Protective Association</i> (1988)	330
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i> (1990)	333
<i>City of Boerne v. Flores, Archbishop of San Antonio</i> (1997)	337

7 CRIMINAL PROCEDURE 341

The <i>Ex Post Facto</i> Clauses	343
Search and Seizure	345
Self-Incrimination and Coerced Confessions	355
Due Process of Law	359
The Right to Counsel	361
The Entrapment Defense	363
Trial by Jury	364
The Right to a Speedy Trial	366
The Right to Confrontation	367
Plea Bargaining	368
Bail and Pretrial Detention	369
Cruel and Unusual Punishments	369
Prisoners' Rights	372
Retroactive Application of Criminal Procedure Guarantees	375
Basic Themes in the Court's Criminal Procedure Decisions	376
Notes	377
Selected Reading	381

CASES

<i>Stogner v. California</i> (2003)	383
-------------------------------------	-----

<i>Smith v. Doe</i> (2003)	386
<i>Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls</i> (2002)	390
<i>Indianapolis v. Edmond</i> (2000)	394
<i>Mapp v. Ohio</i> (1961)	397
<i>Olmstead v. United States</i> (1928)	401
<i>Katz v. United States</i> (1967)	403
<i>Miranda v. Arizona</i> (1966)	405
<i>Dickerson v. United States</i> (2000)	411
<i>Nix v. Williams</i> (1984)	416
<i>Connecticut Department of Public Safety v. Doe</i> (2003)	421
<i>Powell v. Alabama</i> (1932)	422
<i>Gideon v. Wainwright</i> (1963)	424
<i>Jacobson v. United States</i> (1992)	425
<i>Blakely v. Washington</i> (2004)	430
<i>Coy v. Iowa</i> (1988)	435
<i>Gregg v. Georgia</i> (1976)	439
<i>Woodson v. North Carolina</i> (1976)	443
<i>Roberts v. Louisiana</i> (1976)	445
<i>McCleskey v. Kemp</i> (1987)	446
<i>Roper v. Simmons</i> (2005)	450
<i>Payne v. Tennessee</i> (1991)	458
<i>Harmelin v. Michigan</i> (1991)	466
<i>Ewing v. California</i> (2003)	471

8 THE EQUAL PROTECTION CLAUSE AND RACIAL DISCRIMINATION 479

Race and the Founding	480
Racial Desegregation	485
Private Discrimination and the Concept of State Action	495
Racial Discrimination in Jury Trials	498
Racial Discrimination in Prisons	500
Proof of Discrimination: Impact Versus Intent	500
Notes	502
Selected Reading	504

CASES

<i>Plessy v. Ferguson</i> (1896)	506
<i>Brown v. Board of Education</i> (1954)	508
<i>Bolling v. Sharpe</i> (1954)	511
<i>Brown v. Board of Education</i> (1955)	512
<i>Swann v. Charlotte-Mecklenburg Board of Education</i> (1971)	513

<i>Milliken v. Bradley</i> (1974)	515
<i>United States v. Fordice</i> (1992)	521
<i>Missouri v. Jenkins</i> (1995)	528
<i>Shelley v. Kraemer</i> (1948)	535
<i>Moose Lodge No. 107 v. Irvis</i> (1972)	537
<i>Georgia v. McCollum</i> (1992)	539
<i>Johnson v. California</i> (2005)	544
<i>Wards Cove Packing Co. v. Atonio</i> (1989)	549
The Civil Rights Act of 1991	551

9 SUBSTANTIVE EQUAL PROTECTION 553

The Two-Tier Approach	555
The Development of an Intermediate Level of Review	556
Suspect Classifications	558
Fundamental Rights	573
The Future of Equal Protection Analysis	574
Notes	576
Selected Reading	577

CASES

<i>Richmond v. Croson Company</i> (1989)	579
<i>Adarand Constructors, Inc. v. Peña</i> (1995)	588
<i>Grutter v. Bollinger</i> (2003)	594
<i>Gratz v. Bollinger</i> (2003)	606
<i>Foley v. Connelie</i> (1978)	610
<i>Trimble v. Gordon</i> (1977)	612
<i>Massachusetts Board of Retirement v. Murgia</i> (1976)	615
<i>Frontiero v. Richardson</i> (1973)	618
<i>United States v. Virginia</i> (1996)	620
<i>Rostker v. Goldberg</i> (1981)	626
<i>Shapiro v. Thompson</i> (1969)	631
<i>San Antonio Independent School District v. Rodriguez</i> (1973)	634
<i>Nordlinger v. Hahn</i> (1992)	639

10 VOTING AND REPRESENTATION 643

Equal Protection and the Right to Vote	644
Race and Representation: The Fifteenth Amendment and the Voting Rights Act	653
Notes	658
Selected Reading	659

CASES

<i>Wesberry v. Sanders</i> (1964)	661
<i>Reynolds v. Sims</i> (1964)	663
<i>Vieth v. Jubelirer</i> (2004)	667
<i>Harper v. Virginia State Board of Elections</i> (1966)	674
<i>Dunn v. Blumstein</i> (1972)	676
<i>Bush v. Gore</i> (2000)	679
<i>Katzenbach v. Morgan</i> (1966)	690
<i>Thornburg v. Gingles</i> (1986)	692
<i>Shaw v. Reno</i> (1993)	694
<i>Hunt v. Cromartie</i> (2001)	699

11 THE RIGHT TO PRIVACY 703

The Constitutional Basis	704
What the Right to Privacy Protects	706
Qualifications on the Right to Privacy	717
Privacy and the Right to Die	718
Notes	719
Selected Reading	722

CASES

<i>Troxel v. Granville</i> (2000)	724
<i>Griswold v. Connecticut</i> (1965)	727
<i>Roe v. Wade</i> (1973)	731
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> (1992)	736
<i>Stenberg v. Carhart</i> (2000)	749
<i>Lawrence v. Texas</i> (2003)	758
<i>Goodridge v. Department of Public Health</i> (2003)	764
Defense of Marriage Act of 1996	774
<i>Cruzan v. Director, Missouri Department of Health</i> (1990)	775
<i>Washington v. Glucksberg</i> (1997)	782
<i>Vacco v. Quill</i> (1997)	787

THE CONSTITUTION OF THE UNITED STATES OF AMERICA 790

JUSTICES OF THE SUPREME COURT 803

GLOSSARY OF COMMON LEGAL TERMS 807

TABLE OF CASES 810