

AMERICAN CONSTITUTIONAL LAW

Volume 1 The Structure of Government

Tenth Edition

RALPH A ROSSUM
Claremont McKenna College

G. ALAN TARR
Rutgers University, Camden





Contents

PREFACE xiii

NOTE TO THE READER xviii

1 INTERPRETATION OF THE CONSTITUTION 1

Approaches to Constitutional Interpretation 4
The Approaches in Perspective 13
The Ends of the Constitution 14
Constitutional Means to Constitutional Ends 15
Notes 20
Selected Readings 21

2 CONSTITUTIONAL ADJUDICATION 24

The Justices of the Supreme Court 24
The Supreme Court in the Federal Judicial System 26
How Cases Get to the Supreme Court 27
How the Supreme Court Decides Cases 31
The Impact of Supreme Court Decisions 34
Analyzing Supreme Court Decisions 38
Notes 40
Selected Readings 41

3 THE JUDICIAL POWER 43

The Power of Judicial Review 45
Externally Imposed Restraints on Judicial Review 51
Court-Imposed Restraints on Judicial Review 53
The Expanding Role of the Courts 61
The Courts, Judicial Review, and the Problem of Legitimacy 62
Notes 64
Selected Readings 66

CASES

- Marbury v. Madison* (1803) 68
Eakin v. Raub (1825) 71
Cooper v. Aaron (1958) 74
Plaut v. Spendthrift Farm, Inc. (1995) 76
Ex parte McCordle (1869) 81
Lujan v. Defenders of Wildlife (1992) 82
Hein v. Freedom from Religion Foundation (2007) 86
Luther v. Borden (1849) 95
Baker v. Carr (1962) 97
Nixon v. United States (1993) 103
Deshaney v. Winnebago County Department of Social Services (1989) 108

4 THE LEGISLATIVE BRANCH 112

- The Scope of Congressional Power 113
Powers That Facilitate Legislative Activity 115
Nonlegislative Powers 119
Safeguarding Legislative Power 122
Conclusions 124
Notes 124
Selected Readings 125

CASES

- McCulloch v. Maryland* (1819) 126
United States v. Comstock (2010) 131
Powell v. McCormack (1969) 137
U.S. Term Limits, Inc. v. Thornton (1995) 140
Gravel v. United States (1972) 148
McGrain v. Daugherty (1927) 151
Watkins v. United States (1957) 152
Schechter Poultry Corporation v. United States (1935) 156
Mistretta v. United States (1989) 158
Immigration and Naturalization Service v. Chadha (1983) 162

5 THE EXECUTIVE BRANCH 167

- The Aims of the Framers 168
Grants of Power and Their Use 169
Implied Powers 171
Prerogative Powers 176
Notes 177
Selected Readings 177

CASES

- National Labor Relations Board v. Noel Canning* (2014) 179
Myers v. United States (1926) 183

Morrison v. Olson (1988) 187
United States v. Nixon (1974) 191
Clinton v. Jones (1997) 193
In re Neagle (1890) 196
Youngstown Sheet & Tube Company v. Sawyer (1952) 198

6 WAR AND FOREIGN AFFAIRS 203

The Interbranch Distribution of Power 204
 The Foundation and Extent of the Foreign-Affairs Power 208
 War and Individual Rights 211
 Notes 216
 Selected Readings 217

CASES

The Prize Cases (1863) 218
 The War Powers Resolution (1973) 219
 Authorization for Use of Military Force (2001) 220
United States v. Curtiss-Wright Export Corporation (1936) 221
Missouri v. Holland (1920) 224
Medellin v. Texas (2008) 225
Zivotofsky v. Kerry (2015) 232
Ex parte Milligan (1866) 238
Korematsu v. United States (1944) 241
Ex parte Quirin (1942) 245
 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against
 Terrorism (2001) 250
Hamdi v. Rumsfeld (2004) 252
Boumediene v. Bush (2008) 262

7 FEDERALISM 273

Federalism and the Founding 274
 Federalism and the First Congress 277
 Federalism and the Marshall Court 278
 Federalism and Its Protection by Subsequent Courts 280
 The Post-Civil War Amendments and the Shifting of the Federal Balance 294
 Notes 297
 Selected Readings 298

CASES

The Judiciary Act of 1789 300
Cohens v. Virginia (1821) 303
Coyle v. Smith (1911) 307
Baldwin v. Montana Fish and Game Commission (1978) 309
Dred Scott v. Sandford (1857) 312
New York v. United States (1992) 323

<i>Printz v. United States</i> (1997)	330
<i>Alden v. Maine</i> (1999)	336
<i>The Civil Rights Cases</i> (1883)	344
<i>Jones v. Alfred H. Mayer Company</i> (1968)	350

8 THE EXERCISE OF NATIONAL POWER 353

The Commerce Power	354
The Taxing Power	360
The Spending Power	361
Health Care and the Constitution	362
Limitations on National Power	365
Notes	366
Selected Readings	366

CASES

<i>Gibbons v. Ogden</i> (1824)	367
<i>United States v. E. C. Knight Company</i> (1895)	371
<i>Hammer v. Dagenhart</i> (1918)	373
<i>National Labor Relations Board v. Jones & Laughlin Steel Corporation</i> (1937)	375
<i>Wickard v. Filburn</i> (1942)	377
<i>Heart of Atlanta Motel v. United States</i> (1964)	378
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> (1985)	380
<i>United States v. Lopez</i> (1995)	387
<i>Gonzales v. Raich</i> (2005)	391
<i>United States v. Butler</i> (1936)	396
<i>United States v. Kahriger</i> (1953)	400
<i>South Dakota v. Dole</i> (1987)	402
<i>National Federation of Independent Business v. Sebelius</i> (2012)	404

9 THE EXERCISE OF STATE POWER 416

Constitutional Principles	417
Preemption	418
Negative Implications of the Commerce Clause	420
State Regulation and the Modern Court	422
The Role of the Court	424
Notes	425
Selected Readings	425

CASES

<i>Arizona v. United States</i> (2012)	426
<i>Cooley v. Board of Wardens</i> (1852)	433
<i>Southern Pacific Company v. Arizona</i> (1945)	435
<i>Granholm v. Heald</i> (2005)	437
<i>Comptroller of the Treasury of Maryland v. Wynne</i> (2015)	442

10 THE CONSTITUTION AND NATIVE AMERICAN TRIBES 448

- Native American Tribes and the New Republic 449
- Tribal Sovereignty and the Marshall Trilogy 450
- Tribal Self-Determination 452
- Tribal Authority over Disposition of Lands 453
- Tribal Authority to Institute a Government 454
- Tribal Authority to Enter into Treaties 454
- Tribes and Their Relation to the States 456
- Tribal Authority to Administer Justice 456
- Tribal Authority to Engage in "Indian Gaming" 458
- The Continued Viability of the Canons of Construction of
Federal Indian Law? 461
- Notes 461
- Selected Readings 462

CASES

- Johnson v. McIntosh* (1823) 464
- Cherokee Nation v. Georgia* (1831) 466
- Worcester v. Georgia* (1832) 469
- United States v. Kagama* (1886) 471
- Lone Wolf v. Hitchcock* (1903) 474
- Public Law 280 (1953) 476
- United States v. Lara* (2004) 479
- California v. Cabazon Band of Mission Indians* (1987) 483
- Adoptive Couple v. Baby Girl* (2013) 488

11 THE CONTRACT CLAUSE 493

- Marshall's Expansion of the Contract Clause 495
- The Decline of the Contract Clause 496
- A Continued Relevance? 499
- Notes 501
- Selected Readings 502

CASES

- Fletcher v. Peck* (1810) 504
- Dartmouth College v. Woodward* (1819) 506
- Charles River Bridge Company v. Warren Bridge Company* (1837) 509
- Home Building and Loan Association v. Blaisdell* (1934) 512
- United States Trust Company v. New Jersey* (1977) 517
- Taylor v. City of Gadsden* (2013) 519

12 ECONOMIC DUE PROCESS AND THE TAKINGS CLAUSE 523

- The Fourteenth Amendment 524
- The Evisceration (and Possible Recent Restoration?) of the Privileges or
Immunities Clause 525

Economic Regulation and the Rise of Substantive Due Process	528
The Demise of Substantive Due Process in the Economic Realm	531
Punitive Damages: An Exception to the Demise of Substantive Due Process in the Economic Realm?	532
The Emergence of Substantive Due Process in the Civil Liberties Realm	534
The Takings Clause	535
Notes	539
Selected Readings	540

CASES

<i>The Slaughter-House Cases</i> (1873)	542
<i>Munn v. Illinois</i> (1877)	547
<i>Lochner v. New York</i> (1905)	549
<i>West Coast Hotel Company v. Parrish</i> (1937)	553
<i>Williamson v. Lee Optical Company</i> (1955)	555
<i>State Farm Mutual Automobile Insurance Company v. Campbell</i> (2003)	556
<i>United States v. Carolene Products Company</i> (1938)	559
<i>Kelo v. City of New London</i> (2005)	560
<i>Horne v. Department of Agriculture</i> (2015)	567
<i>Nollan v. California Coastal Commission</i> (1987)	572
<i>Lucas v. South Carolina Coastal Council</i> (1992)	576
<i>Koontz v. St. Johns River Water Management District</i> (2013)	579

THE CONSTITUTION OF THE UNITED STATES OF AMERICA 587

JUSTICES OF THE SUPREME COURT 601

GLOSSARY OF COMMON LEGAL TERMS 607

TABLE OF CASES 611

AMERICAN CONSTITUTIONAL LAW

Volume 2 The Bill of Rights and Subsequent Amendments

Tenth Edition

RALPH A ROSSUM
Claremont McKenna College

G. ALAN TARR
Rutgers University, Camden





Contents

PREFACE xv

NOTE TO THE READER xix

1 INTERPRETATION OF THE CONSTITUTION 1

Approaches to Constitutional Interpretation 4
The Approaches in Perspective 13
The Ends of the Constitution 14
Constitutional Means to Constitutional Ends 15
Notes 20
Selected Readings 21

2 CONSTITUTIONAL ADJUDICATION 23

The Justices of the Supreme Court 24
The Supreme Court in the Federal Judicial System 26
How Cases Get to the Supreme Court 27
How the Supreme Court Decides Cases 31
The Impact of Supreme Court Decisions 34
Analyzing Supreme Court Decisions 38
Notes 40
Selected Readings 41

3 RIGHTS UNDER THE CONSTITUTION 43

Rights and the Founding 44
The Fourteenth Amendment 46
Due Process and the Bill of Rights 48
Rights During Wartime and Other Emergencies 52
The Second Amendment 56
Notes 59
Selected Readings 60

CASES

- Barron v. Baltimore* (1833) 62
Palko v. Connecticut (1937) 63
Adamson v. California (1947) 65
Duncan v. Louisiana (1968) 68
Ex parte Milligan (1866) 71
Korematsu v. United States (1944) 74
Hamdi v. Rumsfeld (2004) 78
Boumediene v. Bush (2008) 88
District of Columbia v. Heller (2008) 98
McDonald v. Chicago (2010) 110

4 ECONOMIC DUE PROCESS AND THE TAKINGS CLAUSE 122

- The Fourteenth Amendment 123
The Evisceration (and Possible Recent Restoration?) of the Privileges or Immunities Clause 124
Economic Regulation and the Rise of Substantive Due Process 127
The Demise of Substantive Due Process in the Economic Realm 130
Punitive Damages: An Exception to the Demise of Substantive Due Process in the Economic Realm? 131
The Emergence of Substantive Due Process in the Civil Liberties Realm 133
The Takings Clause 134
Notes 138
Selected Readings 139

CASES

- The Slaughter-House Cases* (1873) 141
Munn v. Illinois (1877) 146
Lochner v. New York (1905) 148
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
Kelo v. City of New London (2005) 159
Horne v. Department of Agriculture (2015) 166
Nollan v. California Coastal Commission (1987) 171
Lucas v. South Carolina Coastal Council (1992) 175
Koontz v. St. Johns River Water Management District (2013) 178

5 FREEDOM OF SPEECH, PRESS, AND ASSOCIATION 185

- The Meaning of the First Amendment 186
First Amendment Standards 188
Political Expression 190

The Regulation of Speech and Association	195
Restraints on the Press	200
Libel and the Invasion of Privacy	203
Obscenity and Video Games	204
Conclusions	206
Notes	206
Selected Readings	207

CASES

<i>Gitlow v. New York</i> (1925)	208
<i>Schenck v. United States</i> (1919)	209
<i>Dennis v. United States</i> (1951)	210
<i>Barenblatt v. United States</i> (1959)	215
<i>Brandenburg v. Ohio</i> (1969)	219
<i>Holder v. Humanitarian Law Project</i> (2010)	220
<i>Citizens United v. Federal Election Commission</i> (2010)	227
<i>Texas v. Johnson</i> (1989)	240
<i>R. A. V. v. City of St. Paul</i> (1992)	243
<i>Walker v. Texas Division, Sons of Confederate War Veterans, Inc.</i> (2015)	246
<i>McCullen v. Coakley</i> (2014)	250
<i>Near v. Minnesota</i> (1931)	256
<i>New York Times Company v. United States</i> (1971)	258
<i>Branzburg v. Hayes</i> (1972)	262
<i>New York Times v. Sullivan</i> (1964)	264
<i>Reno v. American Civil Liberties Union</i> (1997)	266
Indianapolis Anti-Pornography Ordinance (1984)	272
<i>Brown v. Entertainment Merchants Association</i> (2011)	273

6 FREEDOM OF RELIGION 280

Establishment of Religion	281
Free Exercise of Religion	285
Reconciling the Religion Clauses	289
Notes	290
Selected Readings	290

CASES

<i>Everson v. Board of Education</i> (1947)	292
<i>School District of Abington Township v. Schempp</i> (1963)	294
<i>Lemon v. Kurtzman</i> (1971)	297
<i>Wallace v. Jaffree</i> (1985)	300
<i>Lee v. Weisman</i> (1992)	303
<i>McCreary County v. American Civil Liberties Union</i> (2005)	309
<i>Van Orden v. Perry</i> (2005)	314

<i>Rosenberger v. University of Virginia</i> (1995)	318
<i>Zelman v. Simmons-Harris</i> (2002)	323
<i>West Virginia Board of Education v. Barnette</i> (1943)	331
<i>Sherbert v. Verner</i> (1963)	334
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i> (1990)	336
<i>City of Boerne v. Flores, Archbishop of San Antonio</i> (1997)	341
<i>Burwell v. Hobby Lobby Stores, Inc.</i> (2014)	345

7 CRIMINAL PROCEDURE 356

The <i>Ex Post Facto</i> Clauses	358
Search and Seizure	359
Self-Incrimination and Coerced Confessions	370
Due Process of Law	373
The Right to Counsel	375
The Insanity Defense	377
The Entrapment Defense	378
Trial by Jury	379
The Right to a Speedy Trial	381
The Right to Confrontation	381
Plea Bargaining	384
Bail and Pretrial Detention	385
Cruel and Unusual Punishments	385
Prisoners' Rights	388
Retroactive Application of Criminal Procedure Guarantees	390
Basic Themes in the Court's Criminal Procedure Decisions	391
Notes	392
Selected Readings	393

CASES

<i>Stogner v. California</i> (2003)	395
<i>Smith v. Doe</i> (2003)	398
<i>Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls</i> (2002)	402
<i>Los Angeles v. Patel</i> (2015)	407
<i>Maryland v. King</i> (2013)	413
<i>Riley v. California</i> (2014)	420
<i>Mapp v. Ohio</i> (1961)	428
<i>Olmstead v. United States</i> (1928)	432
<i>Katz v. United States</i> (1967)	435
<i>Miranda v. Arizona</i> (1966)	436
<i>Nix v. Williams</i> (1984)	443
<i>Connecticut Department of Public Safety v. Doe</i> (2003)	448
<i>Powell v. Alabama</i> (1932)	449
<i>Gideon v. Wainwright</i> (1963)	451
<i>Blakely v. Washington</i> (2004)	453

Michigan v. Bryant (2011) 459
Gregg v. Georgia (1976) 464
Kennedy v. Louisiana (2008) 469
Roper v. Simmons (2005) 479
Miller v. Alabama (2012) 487
Harmelin v. Michigan (1991) 493
Ewing v. California (2003) 498

8 THE EQUAL PROTECTION CLAUSE AND RACIAL DISCRIMINATION 506

Race and the Founding 507
 Racial Desegregation 511
 Private Discrimination and the Concept of State Action 519
 Racial Discrimination in Jury Trials 522
 Racial Discrimination in Prisons 523
 Proof of Discrimination: Disparate Treatment Versus Disparate Impact 524
 Notes 525
 Selected Readings 526

CASES

Plessy v. Ferguson (1896) 528
Brown v. Board of Education (1954) 530
Bolling v. Sharpe (1954) 533
Brown v. Board of Education (1955) 534
Swann v. Charlotte-Mecklenburg Board of Education (1971) 535
United States v. Fordice (1992) 538
Missouri v. Jenkins (1995) 546
Shelley v. Kraemer (1948) 553
Moose Lodge No. 107 v. Irvis (1972) 555
Georgia v. McCollum (1992) 558
 The Civil Rights Act of 1991 563
Ricci v. DeStefano (2009) 564

9 SUBSTANTIVE EQUAL PROTECTION 575

The Two-Tier Approach 577
 The Development of an Intermediate Level of Review 578
 Suspect Classifications 579
 Fundamental Rights 594
 The Future of Equal-Protection Analysis 595
 Notes 596
 Selected Readings 597

CASES

Richmond v. J. A. Croson Company (1989) 598
Adarand Constructors, Inc. v. Peña (1995) 608
Grutter v. Bollinger (2003) 615

<i>Gratz v. Bollinger</i> (2003)	628
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> (2007)	631
<i>Massachusetts Board of Retirement v. Murgia</i> (1976)	644
<i>Frontiero v. Richardson</i> (1973)	647
<i>United States v. Virginia</i> (1996)	650
<i>Rostker v. Goldberg</i> (1981)	656
<i>Shapiro v. Thompson</i> (1969)	661
<i>San Antonio Independent School District v. Rodriguez</i> (1973)	664

10 VOTING AND REPRESENTATION 670

Equal Protection and the Right to Vote	671
Race and Representation: The Fifteenth Amendment and the Voting Rights Act	679
Notes	684
Selected Readings	685

CASES

<i>Wesberry v. Sanders</i> (1964)	686
<i>Reynolds v. Sims</i> (1964)	688
<i>Vieth v. Jubelirer</i> (2004)	692
<i>Harper v. Virginia State Board of Elections</i> (1966)	700
<i>Crawford v. Marion County Election Board</i> (2008)	703
<i>Bush v. Gore</i> (2000)	709
<i>Katzenbach v. Morgan</i> (1966)	720
<i>Shaw v. Reno</i> (1993)	723
<i>Shelby County v. Holder</i> (2013)	728

11 THE RIGHT TO PRIVACY, PERSONAL AUTONOMY, AND DIGNITY 737

The Constitutional Basis	738
What the Right to Privacy Protects	739
Qualifications on the Right to Privacy	750
Personal Autonomy and the Right to Die	751
Notes	751
Selected Readings	753

CASES

<i>Troxel v. Granville</i> (2000)	755
<i>Griswold v. Connecticut</i> (1965)	758
<i>Roe v. Wade</i> (1973)	763
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> (1992)	768
<i>Gonzales v. Carhart</i> (2007)	783
<i>Lawrence v. Texas</i> (2003)	795
Defense of Marriage Act of 1996	802
<i>Obergefell v. Hodges</i> (2015)	802

Cruzan v. Director, Missouri Department of Health (1990) 818
Washington v. Glucksberg (1997) 825
Vacco v. Quill (1997) 831

THE CONSTITUTION OF THE UNITED STATES OF AMERICA 835

JUSTICES OF THE SUPREME COURT 849

GLOSSARY OF COMMON LEGAL TERMS 855

TABLE OF CASES 859