

MODERN
CONSTITUTIONAL LAW
CASES AND NOTES
Fourth Edition

Ronald D. Rotunda

American Casebook Series®



MODERN CONSTITUTIONAL LAW CASES AND NOTES

Fourth Edition

By

Ronald D. Rotunda

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University of Illinois*

AMERICAN CASEBOOK SERIES®



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To Nora & Mark

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Preface to the Fourth Edition

It is said that as people become older, they tend to get a little fatter. So it is with books, as they move from one edition to the next. This book is now in its fourth edition, and I have tried to put it on a very strict diet. Unfortunately, Supreme Court decisions constitute the main diet of this book, and these decisions seem to be becoming longer and longer, with the law becoming more complex. The trick is to keep this book within manageable size, without sacrificing completeness. With each new edition, this trick is getting a lot harder to perform.

Changes in the law have, of course, necessitated dropping some cases and adding others. Where the Supreme Court has shown particular interest in an area of law, or where an area seems more unsettled, I have focused more on the recent cases. See, for example, the Supreme Court's recent flurry of cases involving the public forum, § 10-3.3, and commercial speech, § 10-7. For most of the life of the Court, there has been a dearth of separation of powers cases. But not in recent years. Consequently, Chapter 5 has been expanded, with the addition, among others of *Bowsher v. Synar* (1986), invalidating portions of the Gramm-Rudman-Hollings Act, *Morrison v. Olson* (1988), upholding the Independent Counsel law, and *Mistretta v. United States* (1989), upholding the Sentencing Commission.

I have retained the basic pedagogical purposes of the first edition. The Preface to that edition, which explains my approach to the basic course in Constitutional Law, is reprinted after this one. This volume contains the more significant United States Supreme Court cases issued through June 1992, the end of the latest Court Term. More recent decisions will appear in the annual supplements, the first appearing in August, 1993. As before, in these annual cumulative supplements, I will seek to keep the number of excerpted cases to a minimum, rather than merely chronicle the work of the Court. These supplements will include only those new developments of particular note.

My students over the years, as well as several book reviews and colleagues who use this book in this school and elsewhere, have all caused me to rethink the structure and content of this casebook. I am also indebted to the various thoughtful suggestions of Professor Charles Alan Wright. I am grateful for these and other suggestions that have made this edition, I hope, not only more up-to-date than the previous edition but a better teaching tool.

I express sincere thanks to my secretary, Ruth Manint for her assistance in preparation of the manuscript, and Elaine Chin, the Stuart N. Greenberger Research Assistant.

A brief style note: for the main cases, the votes of all the justices are indicated, whether a justice's individual opinion is included or not. However, not all the votes of individual justices are included for the noted cases. Also, I have deleted citations within cases without any special indication.

R.D.R.

Champaign
January, 1993

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Preface to the Third Edition

As in the first edition, I have intended to keep this book within manageable size, but without sacrificing completeness. The effort, unfortunately, has become more difficult over the years. The law is becoming more complex, and the opinions seem to be getting longer and longer. Changes in the law have, of course, necessitated dropping some cases and adding others. Where the Supreme Court has shown particular interest in an area of law, or where an area seems more unsettled, I have focused more on the recent cases. See, for example, the Supreme Court's recent flurry of cases involving the public forum cases, § 10-3.3, and commercial speech, § 10-7. For most of the life of the Court, there has been a dearth of separation of powers cases. But not in recent years. Consequently, Chapter 5 has been expanded, with the addition, among others of *Bowsher v. Synar* (1986) invalidating portions of the Gramm-Rudman-Hollings Act, and *Morrison v. Olson* (1988), upholding the Independent Counsel law.

I have retained the basic pedagogical purposes of the first edition. The Preface to that edition, which explains my approach to the basic course in Constitutional Law, is reprinted after this one. This volume contains the more significant United States Supreme Court cases issued through July 29, 1988, the end of the latest Court Term. More recent decisions will appear in the annual supplements, the first appearing in August, 1989. As before, in these annual cumulative supplements, I will seek to keep the number of excerpted cases to a minimum, rather than merely chronicle the work of the Court. These supplements will include only those new developments of particular note.

My students over the years, as well as several book reviews and colleagues who use this book in this school and elsewhere, have all caused me to rethink the structure and content of this casebook. For example, some professors have suggested that the casebook should include more information on commerce clause limitations on state and local taxing powers; therefore a textual note has been added as an appendix to the end of Chapter Three. I am also indebted to the various thoughtful suggestions of Professor Charles Alan Wright. I am grateful for these and other suggestions which have made this edition, I hope, not only more up-to-date than the previous edition but a better teaching tool.

I express sincere thanks to my secretary, Ruth Manint for her assistance in preparation of the manuscript.

A brief style note: for the main cases, the votes of all the justices are indicated, whether a justice's individual opinion is included or not. However, not all the votes of individual justices are included for the noted cases. Also, I have deleted citations within cases without any special indication.

R.D.R.

Preface to the Second Edition

This edition is a revision and update of the previous edition. It retains much of the same organization except that some of the complex procedural issues—which had been in Chapter One of the first edition—have been moved to a new Chapter Twelve, The Procedural Context of Constitutional Litigation.

As in the first edition, I have intended to keep this book within manageable size, but without sacrificing completeness. Changes in the law have, of course, necessitated dropping some cases and adding others. Where the Supreme Court has shown particular interest in an area of law, or where an area seems more unsettled, I have focused more on the recent cases. See, for example, the Supreme Court's recent interest in the state as market participant (Chapter 3, section 3-4); and the tenth amendment (Chapter 4, section 4-5). In other areas the Supreme Court has helped clarify the law, see for example its more complete definition of the public forum. See Chapter 10, section 10-3.3.

I have retained the basic pedagogical purposes of the first edition. The Preface to that edition, which explains my approach to the basic course in Constitutional Law, is reprinted immediately after this one. As in the first edition this volume contains the more significant United States Supreme Court cases issued through July 5, 1984, the end of the latest Court Term. I have also included in this volume the 1985 decision in *Garcia* which overruled *National League of Cities*. Other 1985 decisions will appear in the annual supplements. As before, I have sought to keep the number of excerpted cases to a minimum, rather than merely chronicle the work of the Court.

My students over the years, as well as several book reviews and colleagues who use this book in this school and elsewhere, have all caused me to rethink the structure and content of this casebook. For example, some professors have suggested that the casebook should include more information on commerce clause limitations on state and local taxing powers; therefore a textual note has been added as an appendix to the end of Chapter Three. I am also indebted to the various thoughtful suggestions of Professor Charles Alan Wright. I am grateful for these and other suggestions which have made this edition, I hope, not only more up-to-date than the previous edition but a better teaching tool.

I express sincere thanks to my secretary, Barbara Milazzo, for her assistance in preparation of the manuscript, and also to Marcia Williams and C. David Watson, third year law students at the University of Illinois, for their assistance.

Each year, at the end of the Supreme Court term, I will publish cumulative annual supplements, which will include only those new developments of particular importance.

R.D.R.

Preface to the First Edition

I have intended this book to serve as a compact pedagogical tool introducing and exposing students to the underlying principles of constitutional law.¹ An understanding of these principles in the introductory constitutional law course is, I believe, much more important than simply acquiring knowledge of many intricate, rapidly changing, constitutional rules.² It is fair to say that in some areas only half of what a student learns in school today will be “law” by the time he or she graduates, and it is difficult to predict which half. Consequently it is of greater significance for a student to acquire from the case law a sound understanding of the basic principles. The student must also learn how to use these principles in developing an ability to analyze thoroughly the issues that will face the courts in the years ahead. Finally, he or she should have a sense of where the law is moving, because what the law ought to be influences what the law is and will be.

The goal of keeping this volume to a manageable size is not reached at the expense of thoroughness, for it is better to know a few things well than to know many things superficially. Thus I have sought to limit the size of the book in other ways. For example, the book treats sparingly certain areas that now are frequently taught as separate courses, such as state and local taxation and criminal procedure; it also restricts citations to and excerpts from secondary authority³ in order to emphasize the case law; and it limits textual notes to a minimum in order to favor intensive coverage of a limited number of cases. Although this book is already substantially shorter than most of the other materials available, the teacher can further reduce its size by deciding to omit certain areas. Thus one may eliminate much of the first chapter on jurisdictional issues (or save these issues until the end of the course).

The coverage of this book focuses on those areas of constitutional law that are of basic and historical significance and those areas of contemporary interest that are likely to be of increasing importance in the years ahead. The emphasis is on *modern* constitutional law. Thus the text includes a rather extensive section on the treaty power, power over aliens, and similar foreign affairs problems.

1. Students interested in a research (as opposed to a teaching) tool can turn to J. Nowak, R. Rotunda, and J. Young, *Constitutional Law* (West Pub. Co. 1978) plus latest pocket part, or L. Tribe, *American Constitutional Law* (Foundation Press 1978). The organization of this casebook roughly follows the first of these texts, though I have made various organizational changes for pedagogical purposes.

2. Some imagine the law “as a big book of rules, and to know them may be the task of its apprentices. A third of a century ago the story used to be told at Harvard of the new law student who went to call on the dear old lady in

Brookline. ‘Well, well,’ she said, ‘So you’ve been studying law for two weeks. How many laws have you learned?’ ” A. Sutherland, Prologue to an Introduction vii, viii, in *An Introduction to Law: Selected Essays Reprinted from the Harvard Law Review* (1965).

3. Thus, the book often omits secondary authority cited within an excerpted case. Also deleted are many internal case and statute citations within a case. Footnotes to cases are numbered as in the original. No special indication is made when footnotes, case law, and other authority are deleted within a case.

This section—as well as others, such as the zoning powers—also directs the student's attention to the civil liberties implications of the case law.

In determining which cases to excerpt, I have included not only the historical beacons, but also some of the lesser lights that help to provide thoughtful classroom discussion. For the same reason the book occasionally includes hypotheticals following some of the cases.⁴ The case excerpts are usually quite lengthy to facilitate Socratic dialogue. Also, excessive editing makes it more difficult for a student to get a genuine feeling for the case: one who has had an opportunity to read an extensive excerpt of *Home Building & Loan Association v. Blaisdell* (1934) would not be surprised by the result of the more recent decision in *Allied Structural Steel v. Spannaus* (1978).

In preparing this book I have greatly profited from discussions with my colleagues at the University of Illinois who have read parts of the manuscript and offered helpful suggestions: Professors Francis Boyle, Daniel A. Farber, Mary Louise Fellows, Harry D. Krause, J. Steven Lawrence, Wayne R. LaFave, John E. Nowak, John E. Muench, Ralph Reisner, and J. Nelson Young. I am particularly indebted to John Nowak, for throughout this book are insights resulting from our many conversations on problems of constitutional law. I am grateful to former Dean John Cribbet and Dean Peter Hay, who offered encouragement, advice, and research support. Any errors that remain in the book are, of course, my responsibility. I would also like to thank the authors and publishers for permission to reprint excerpts of any copyrighted materials, and to thank Clarence Krantz and Steven Stevens, law students at the University of Illinois, for their careful cite checking and proof reading. My secretary, Diane Defeo, deserves special thanks for her assistance in preparation of the manuscript.

The cut off date for this book is October, 1980. Annual supplements will include only those new developments of particular importance, with the first supplement to appear in August, 1981.

RONALD D. ROTUNDA

Florence
January, 1981

4. Often these hypotheticals are followed by a case or other citation. The citation is intended for reference only, and the student should be able to discuss fully the issues (and often predict

the result) on the basis of the prior reading, without examining the cited materials.

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