



VOLUME I

# AMERICAN CONSTITUTIONAL LAW

THE STRUCTURE OF GOVERNMENT

EIGHTH EDITION

Ralph A. Rossum and G. Alan Tarr

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# AMERICAN CONSTITUTIONAL LAW



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*To the Memory of Herbert J. Storing*



## Preface

*American Constitutional Law*, Eighth Edition, is designed as a basic text for courses in constitutional law and civil liberties. As with the previous editions, its approach to these subjects is based on three major premises.

First, the study of the Constitution and constitutional law is of fundamental importance to a full and coherent understanding of the principles, prospects, and problems of America's democratic republic. Cases should be examined not merely to foster an appreciation of what court majorities have thought of particular issues at certain points in time (although that is obviously important), but also to gain a deeper and fuller understanding of the principles at the very heart of the American constitutional system. To that end, this text emphasizes precedent-setting cases and presents comprehensive expositions of alternative constitutional positions. Substantial excerpts from cases and other constitutionally significant pronouncements have been included so that students can grapple with the arguments and justifications for these alternative positions. To ensure that the best arguments on all sides of a constitutional question are presented, extensive extracts of both concurring and dissenting opinions have been included.

Second, no interpretation of the Constitution can be evaluated properly without an appreciation of what those who initially drafted and ratified the Constitution sought to accomplish. The text incorporates documentary evidence in seeking to identify and explain the original purposes of the Constitution and the means provided for the achievement of those purposes. This inquiry into the Framers' understanding of the Constitution, in turn, furnishes one of the criteria for evaluating judicial decisions and constitutionally significant pronouncements from the executive and legislative branches.

Third, the study of the Constitution involves much more than an examination of its judicial interpretation. The Constitution is not merely what the Supreme Court says it is; its words are not so many empty vessels into which justices can pour meaning. Accordingly, this volume examines the interpretations of a variety of sources. The original



understanding of the founding generation is one source. Another, equally indispensable source is, of course, the Supreme Court, whose decisions have influenced so profoundly our understanding of the Constitution and its principles. And because other governmental bodies have contributed significantly to the overall interpretation of the Constitution, this text includes decisions of the lower federal courts and state judiciaries and also extrajudicial materials of constitutional significance such as certain congressional acts and resolutions and executive orders.

As we approach constitutional questions throughout this text, we begin by turning to the Framers. We do so, however, not so much for specific answers as for general guidance concerning what the Constitution was designed to accomplish. Obviously no interpretation can be expected to conform strictly to the expectations of the Framers. Other legitimate approaches may also contribute to an understanding of the Constitution, relying variously on analysis of the text itself, judicial precedent, constitutional doctrine, logical reasoning, adaptation of constitutional provisions to changing circumstances, and foreign law and sources. All these approaches are described in Chapter 1.

The structure of the volumes might be seen as a reflection of James Madison's observation in *The Federalist*, No. 51, that "in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place; oblige it to control itself." Chapter 1 explores in general how the Constitution was designed to resolve this difficulty, and Chapter 2 introduces the reader to the actual process of constitutional adjudication. The remainder of this two-volume work systematically examines how the Constitution and its amendments not only grant the national and state governments sufficient power to control the governed, but also oblige these governments to control themselves. Chapters 3 through 6 of Volume I consider the distribution of power in the national government. As a group, these chapters explore how the constitutional scheme of separation of powers and checks and balances both grants and controls power. Because of the importance of the distribution of power among the branches of the national government, we devote separate chapters to the judiciary, the Congress, the presidency, and war and foreign affairs. Chapters 7 through 11 of Volume I consider the distribution of power between the national government and the states and between the national government and Native American tribal governments. These chapters focus on how the division of power among various governments in the United States helps to advance the ends of the Constitution. Chapter 12 (repeated as Chapter 4 in Volume II) and Chapters 3 through 11 of Volume II shift to an examination of the distribution of power between the government and the individual. The emphasis in these chapters is not so much on institutional contrivances that oblige the government to control itself as on the Bill of Rights and those subsequent amendments that guarantee specific rights and liberties, an emphasis that illuminates the way in which our most precious rights and liberties increasingly have become dependent for their vindication not upon constitutional structure but upon what *The Federalist* called mere "parchment barriers."

With the exception of the first two chapters, each chapter opens with an introductory essay that is then followed by cases and, where appropriate, extrajudicial materials. Each essay ends with extensive notes that provide valuable explanatory details and references to additional materials and a list of suggested readings, including essays in *The Federalist*, additional cases, and scholarly books and articles. Each case also has its own introductory headnote, which provides historical perspective, indicates where the case stands in relation to current law, and gives the final court vote. Some cases have end notes that elaborate on the short- and long-term consequences of the decision. The text includes four

appendices: the Constitution of the United States, a list of Supreme Court justices, a glossary of legal terms, and a table of cases.

We encourage readers to visit the Web site for *American Constitutional Law*, which is found at [www.westviewconlaw.com](http://www.westviewconlaw.com). We include three sets of cases on the Web site. First, under New Cases, we will periodically post our edited versions of major court rulings decided after the publication of the Eighth Edition. Instructors can use these cases to supplement and update materials presented in the casebook, and the cases listed on the Web site give a good indication of those cases likely to be included in subsequent editions of *American Constitutional Law*. Second, we include several cases and other materials that appear in one volume of the casebook but that may also be of interest to instructors using the other volume. Cases appearing in Volume I and reproduced on the Web site include *Marbury v. Madison*, *Korematsu v. United States*, *The Civil Rights Cases*, *Dred Scott v. Sandford*, and *Jones v. Alfred H. Mayer Company*. Cases and materials appearing in Volume II and reproduced on the Web site include *Rostker v. Goldberg*, *Griswold v. Connecticut*, *Roe v. Wade*, *City of Boerne v. Flores*, *Archbishop of San Antonio*; and the Civil Rights Act of 1991. Finally, to accommodate the varying needs of instructors while keeping the casebook a manageable length, we also include cases that appeared in earlier editions of *American Constitutional Law* but do not appear in the current edition.

We thank the excellent editorial staff at Westview Press for so smoothly and efficiently bringing the eighth edition into print. We express particular gratitude to Toby Wahl, senior acquisition editor; Meredith Smith, project editor; Cathleen Tetro, publisher; Erica Lawrence, marketing manager; Kelsey Mitchell, editorial assistant; and Beth Wright and Ann Delgehausen of Trio Bookworks, copyeditors.

Any errors of fact or interpretation are, of course, solely our responsibility. Finally, we wish to express our gratitude to our wives, Constance and Susan, for their patience, understanding, and loving support throughout this project.

Ralph A. Rossum  
G. Alan Tarr





## Note to the Reader

The authors of *American Constitutional Law* have adopted a convention to inform the reader of how each justice then serving on the Supreme Court voted in each of the cases presented in these two volumes. The convention is perhaps best explained by an example. At the end of the headnote to *Kelo v. City of New London* (2005), a case found in “Economic Due Process and the Takings Clause” (Chapter 12 in Volume I and Chapter 4 in Volume II), the following language is found: “Opinion of the Court: Stevens, Kennedy, Souter, Ginsburg, Breyer. Concurring opinion: Kennedy. Dissenting opinions: O’Connor, Rehnquist, Scalia, Thomas; Thomas.” This language indicates that (1) the Court in *Kelo* was divided 5 to 4 on the question before it; (2) Justice Stevens wrote the Opinion of the Court in which Justices Kennedy, Souter, Ginsburg, and Breyer joined (for any opinion, be it the Opinion of the Court, the judgment of the Court, a concurrence, or a dissent, the author’s name is listed first and underscored, followed by the names of the other justices who join in that opinion, listed in order of seniority); (3) Justice Kennedy wrote a separate concurring opinion (concurring opinions are listed separately from opinions in which justices concur only in the judgment of the Court); (4) Justices O’Connor, Scalia, and Thomas and Chief Justice Rehnquist dissented; (5) Justice O’Connor wrote a dissenting opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined; and (6) Justice Thomas wrote a separate dissenting opinion (each concurring or dissenting opinion is separated from the others by a semicolon). Throughout the casebook, the name of any justice who wrote an opinion in a case is underscored whether or not excerpts from that opinion are actually included in the text.

# AMERICAN CONSTITUTIONAL LAW



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