

MODERN CONSTITUTIONAL LAW

CASES AND NOTES

Fifth Edition

Ronald D. Rotunda

American Casebook Series®



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Fifth Edition

By

Ronald D. Rotunda

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University of Illinois*

AMERICAN CASEBOOK SERIES®



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Preface to the Fifth Edition

It is hard to believe that 16 years and four editions have passed since I wrote the Preface to the first edition of this book. The first edition was completed in Italy, where I was working on a project dealing with the efforts to create the European Union. Sixteen years ago, Western Europeans, as part of their long term effort to create a United States of Europe, wanted to examine the American experience with our unique federal structure. Since that first edition I have been privileged to travel to other countries—such as Cambodia and various countries of the former Soviet Bloc (Moldova, Ukraine, Romania, the Czech Republic). In each case, the new leaders of these countries also wanted to learn from the American experience. In fact, I began work on this edition last spring in Prague, where I was working with members of the Czech Bar and the Judiciary.

It is no coincidence that the newly emerging democracies, as well as Western Europe, often turn to the American constitutional experience. The countries of Europe and the far East are centuries older than the United States, but when it comes to constitution-building, we are the ones with the long tradition. It is well known that the United States Constitution is the oldest written constitution. What is less well known is that it is the oldest by far. Though there are nearly 200 written constitutions today, more than half were written after 1970. Only 15 constitutions were written prior to World War II, and only five were written prior to this century. Our constitution is the only one that was ratified in the Eighteenth Century. The second-oldest constitution is Norway's, and it dates only to 1815.

Our constitution does not appear to offer much when compared with the sweeping promises of the typical communist or socialist constitution. A recent Soviet constitution provided for the rights of "guaranteed work, health protection, [and] education."¹ Our Bill of Rights secures none of that. Yet, a half century after World War II, communism and its failed promises are in disarray, while democracy and a market economy are the wave of the future. As the modern author Salman Rushdie, has observed, the "people's spiritual needs, more than their material needs, have driven the commissars from power."² Our constitution gives no guarantee of food for the body but it offers food for the mind, by protecting freedom of conscience. It protects the right to vote, so that people can choose a government that attends to material needs.

The organization of this edition is surprisingly similar to the organization of the first edition. That simple fact does not suggest that I have unusual prophetic powers, only that the law, including Constitutional Law, generally proceeds in logical steps. There is not the logic of Euclidian geometry, but there is a logic nonetheless.

The original edition was only 1025 pages long. This edition is only about 150 pages longer. The reason for the small increase is not that the Court has decided

1. Konst. SSR ch. 7, art. 39–45 (1977, amended 1081).

2. Salman Rushdie, *Is Nothing Sacred: The Herbert Read Memorial Lecture*, Feb. 6, 1990, at 809. The spiritual head of Iran announced to the world in early 1989 that Rushdie must die

because of his book, *Satanic Verses*, was, in the eyes of some Muslims, offensive. Since then, Rushdie went into hiding and several people who translated his book from English to other languages have been killed.

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.

Champaign
January, 1989

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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.

Champaign
January, 1985

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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. 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 class-

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.

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The United States Supreme Court, 1997



BACK ROW (*from left to right*): Ruth Bader Ginsburg;
David H. Souter; Clarence Thomas; Stephen G. Breyer

FRONT ROW (*from left to right*): Antonin Scalia; John Paul Stevens;
William H. Rehnquist; Sandra Day O'Connor; Anthony M. Kennedy

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The Justices of the Supreme Court

| Chief Justice | Age at Appointment | President | Term of Service |
|------------------------|--------------------|----------------|-----------------|
| John Jay | 43 | Washington | 1789–1795 |
| * John Rutledge | 55 | Washington | 1795 |
| Oliver Ellsworth | 50 | Washington | 1796–1800 |
| John Marshall | 45 | J. Adams | 1801–1835 |
| Roger B. Taney | 58 | Jackson | 1836–1864 |
| Salmon P. Chase | 56 | Lincoln | 1864–1873 |
| Morrison R. Waite | 57 | Grant | 1874–1888 |
| Melville W. Fuller | 55 | Cleveland | 1888–1910 |
| * Edward D. White | 65 | Taft | 1910–1921 |
| William H. Taft | 63 | Harding | 1921–1930 |
| * Charles E. Hughes | 67 | Hoover | 1930–1941 |
| * Harlan F. Stone | 68 | F.D. Roosevelt | 1941–1946 |
| Fred M. Vinson | 56 | Truman | 1946–1953 |
| Earl Warren | 62 | Eisenhower | 1953–1969 |
| Warren E. Burger | 61 | Nixon | 1969–1986 |
| * William H. Rehnquist | 61 | Reagan | 1986– |

| Associate Justice | Age at Appointment | President | Term of Service |
|---------------------|--------------------|------------|-----------------|
| ** John Rutledge | 50 | Washington | 1789–1791 |
| William Cushing | 57 | Washington | 1789–1810 |
| James Wilson | 47 | Washington | 1789–1798 |
| John Blair | 57 | Washington | 1789–1796 |
| James Iredell | 38 | Washington | 1790–1799 |
| Thomas Johnson | 58 | Washington | 1791–1793 |
| William Paterson | 47 | Washington | 1793–1806 |
| Samuel Chase | 54 | Washington | 1796–1811 |
| Bushrod Washington | 36 | J. Adams | 1798–1829 |
| Alfred Moore | 44 | J. Adams | 1799–1804 |
| William Johnson | 32 | Jefferson | 1804–1834 |
| Henry B. Livingston | 49 | Jefferson | 1806–1823 |
| Thomas Todd | 42 | Jefferson | 1807–1826 |
| Joseph Story | 32 | Madison | 1811–1845 |
| Gabriel Duval | 58 | Madison | 1811–1835 |
| Smith Thompson | 55 | Monroe | 1823–1843 |
| Robert Trimble | 49 | J.Q. Adams | 1826–1828 |
| John McLean | 43 | Jackson | 1829–1861 |
| Henry Baldwin | 49 | Jackson | 1830–1844 |
| James M. Wayne | 45 | Jackson | 1835–1867 |
| Philip B. Barbour | 52 | Jackson | 1836–1841 |
| John Catron | 51 | Jackson | 1837–1865 |
| John McKinley | 57 | Van Buren | 1837–1852 |

* Indicates was also an Associate Justice.

** Indicates was also Chief Justice.

| Associate Justice | Age at Appointment | President | Term of Service |
|------------------------|-----------------------|----------------|-----------------|
| William O. Douglas | 40 | F.D. Roosevelt | 1939–1975 |
| Frank Murphy | 49 | F.D. Roosevelt | 1940–1949 |
| James F. Byrnes | 62 | F.D. Roosevelt | 1941–1942 |
| Robert H. Jackson | 49 | F.D. Roosevelt | 1941–1954 |
| Wiley B. Rutledge | 48 | F.D. Roosevelt | 1943–1949 |
| Harold H. Burton | 57 | Truman | 1945–1958 |
| Tom C. Clark | 49 | Truman | 1949–1967 |
| Sherman Minton | 58 | Truman | 1949–1956 |
| John M. Harlan | 55 | Eisenhower | 1955–1971 |
| William J. Brennan | 50 | Eisenhower | 1956–1990 |
| Charles E. Whittaker | 56 | Eisenhower | 1957–1962 |
| Potter Stewart | 43 | Eisenhower | 1958–1981 |
| Byron R. White | 44 | Kennedy | 1962–1993 |
| Arthur J. Goldberg | 54 | Kennedy | 1962–1965 |
| Abe Fortas | 55 | L.B. Johnson | 1965–1969 |
| Thurgood Marshall | 59 | L.B. Johnson | 1967–1991 |
| Harry A. Blackmun | 61 | Nixon | 1970–1994 |
| Lewis F. Powell, Jr. | 64 | Nixon | 1971–1987 |
| **William H. Rehnquist | 47 | Nixon | 1971– |
| John Paul Stevens | 55 | Ford | 1975– |
| Sandra Day O'Connor | 51 | Reagan | 1981– |
| Antonin Scalia | 50 | Reagan | 1986– |
| Anthony M. Kennedy | 51 | Reagan | 1988– |
| David H. Souter | 51 | Bush | 1990– |
| Clarence Thomas | 43 | Bush | 1991– |
| Ruth Bader Ginsburg | 60 | Clinton | 1993– |
| Stephen G. Breyer | 56 | Clinton | 1994– |

*

** Indicates was also Chief Justice.

The Constitution of the United States *

1787¹

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence,

* Adapted, with permission, from United States Code Annotated, Constitution of the United States, Annotated (West Publishing Co. 1968).

1. In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz.: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton of New York,) expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigences of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them, and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry, of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1790. Vermont, in convention, ratified the Constitution January 10, 1791, and was on March 4, 1791, by an act of Congress approved February 18, 1791, "received and admitted into this Union as a new and entire member of the United States".