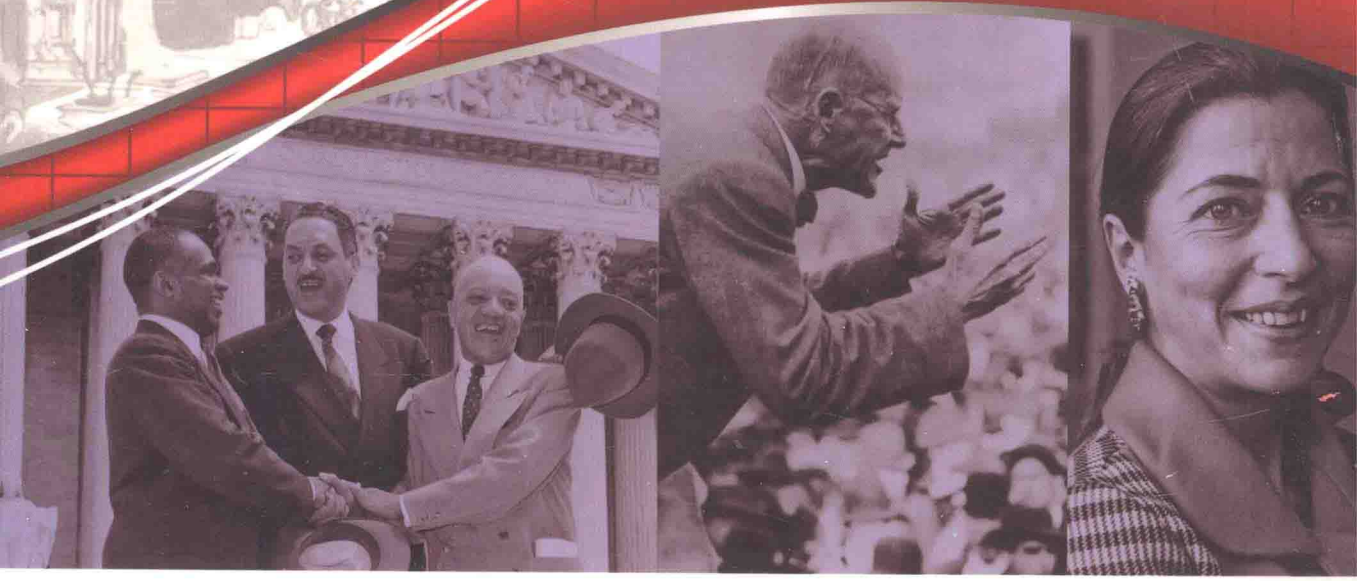
Aspen Casebook Series

Constitutional Rights

Cases in Context



Randy E. Barnett ■ Howard E. Katz

Wolters Kluwer
Law & Business

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CONSTITUTIONAL RIGHTS

Cases in Context

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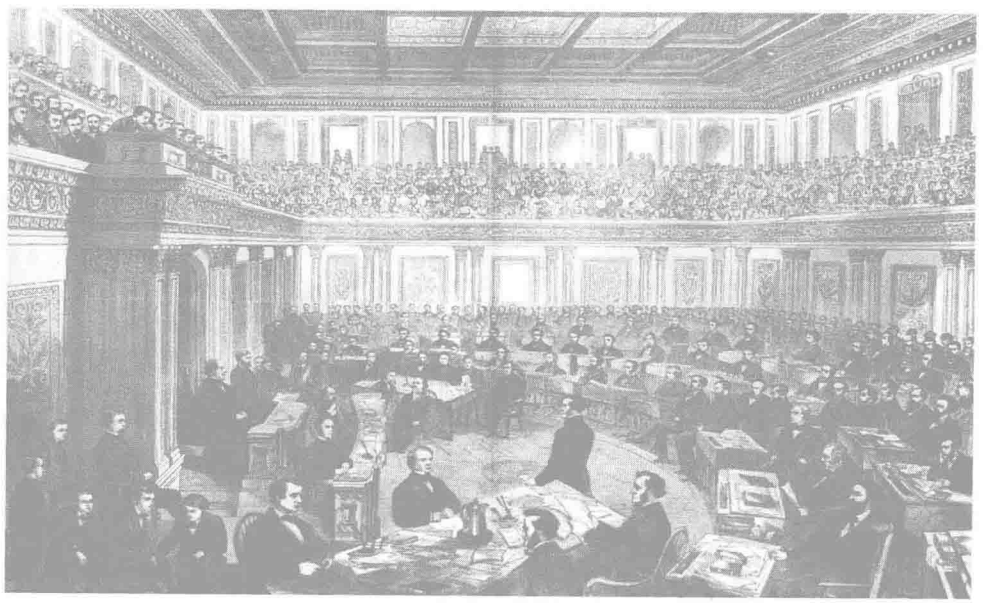

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To those whose vision of the Constitution is not limited to that of the Supreme Court

To my wife, Beth — Randy Barnett
To my wife, Jacki — Howard Katz

Preface

LEARNING THE CANON AND ANTICANON OF CONSTITUTIONAL LAW

Welcome to *Constitutional Rights: Cases in Context*, which is based on the Second Edition of *Constitutional Law: Cases in Context*. Howard Katz has joined Randy Barnett as coauthor. Howard is the coauthor of *Strategies and Techniques of Law School Teaching*.[1] His experience teaching at a number of law schools, his thoughts on pedagogy, and the fact that we hold divergent views on many constitutional issues will, we hope, make this casebook even more accessible and interesting to students and even more amenable to professors with diverse opinions on constitutional law.

We undertook the daunting task of writing this casebook with one pedagogical objective in mind: to provide students with a more accessible and engaging way to learn constitutional law than is now available in existing casebooks. What is lacking in the other casebooks? To begin with, most casebooks are far too complex for students who are unfamiliar with constitutional law. They consist of longer excerpts of major cases, shorter excerpts of minor cases, excerpts from a variety of legal scholarship, and long and complicated "notes" that add additional detail about constitutional doctrine. This is especially true of casebooks that have evolved through many editions over a long period of time.

To address this issue, we edited these materials by adhering to a few basic principles that have proven successful in the Barnett casebook on contract law:[2]

- First and foremost, be realistic about what students who have no previous familiarity with constitutional law can actually learn in a single-semester course, often taught in the first year of law school (and even in the very first semester). This means sticking to discussions of first principles and method rather than doctrinal details.
- Second, include as many of the landmark "classic cases" as possible — the cases that provide the basic vocabulary of constitutional law. For reasons we will discuss in a

[1] Howard E. Katz & Kevin Francis O'Neill, Strategies and Techniques of Law School Teaching (Wolters Kluwer, 2009).
[2] Randy E. Barnett, Contracts: Cases and Doctrine (Wolters Kluwer, 5th ed., 2012).

moment, this is even more vital in constitutional law than in contracts or other first-year courses.

- Third, present these cases at somewhat greater length. To make room for this, while keeping reading assignments manageable, drop even well-known cases that mainly deal with ancillary technicalities that are so often presented in distracting squibs or notes.
- Fourth, rather than the vexatious "notes" that both students and teachers detest, judiciously supplement the cases with other materials, especially in the early part of the course, to provide a context that draws students into the subject.
- Finally, adopt a transparent and straightforward organization, one that is both easy for students to grasp and easy for professors to rearrange to suit their teaching preferences.

In addition to these features, we have included occasional illustrations and extra background facts in boxes alongside some of the cases. We hope these additional pictures and tidbits of information will make the study of constitutional law come alive just a little more. After all, the framers, Justices, and advocates on both sides of the great constitutional battles over the years were real people, and we hope this helps convey that.

But there is another feature at the core of this book that reflects how constitutional law differs from other subjects. In contracts, for example, one reads cases to learn about doctrines — rules and principles — that have evolved over centuries in England and the United States. So it does not much matter which court is speaking or when a particular case was decided, provided it well illustrates the doctrine under consideration. Constitutional law, however, is fundamentally different.

Unlike any other course, the case law component of American constitutional law largely involves the decisions of a single court with a continually evolving membership that has been considering the same basic issues for over two centuries. The justices not only have constantly been debating among themselves in their opinions, they are also constantly debating with their predecessors, choosing which of the previous "precedents" to elevate and which "antiprecedents" to diminish and even disparage. And they are always justifying what they are doing in the context of a past they seek either to emulate or avoid. Consequently, constitutional lawyers must constantly try to make their current arguments resonate with or follow the precedents while avoiding claims that resemble the antiprecedents.

In recent years, constitutional scholars have come to refer to the landmark precedents that all law students and practitioners must know as "the canon."[3] In any constitutional litigation, these canonical cases are taken as fixed points of reference by lower court judges, and even by the justices of the Supreme Court. In contrast, there are a handful of iconic "antiprecedent" cases that have been so adamantly rejected that they have become what some have called the "anticanon." [4] Just as any constitutional claim must be reconciled with the canonical cases, so too must it be

[3] For scholarship on the role of the canon and anticanon in legal education and practice, see Jack M. Balkin, Wrong the Day It Was Decided: Lochner and Constitutional Historicism, 85 B.U. L. Rev. 677 (2005); J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963 (1998); Ian Bartrum, The Constitutional Canon as Argumentative Metonymy, 18 Wm. & Mary Bill of Rts. J. 327 (2009); Richard A. Primus, Canon, Anti-Canon, and Judicial Dissent, 48 Duke L.J. 243 (1998).

[4] *See* Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379 (2011) (evaluating what makes some discarded decisions anticanonical).

distinguished from the anticanonical cases. If an attorney's claim seems to suggest the validity of or appear too analogous to one of these antiprecedents, that attorney's case is in deep trouble.

But how best to learn the canon and anticanon? It is not enough to have in mind a list of approved and disapproved Supreme Court decisions, though this is a useful start. One must also have some grasp of *why* these cases have been approved or disapproved by the legal and political culture in so decided a fashion as to make them polestars of constitutional law. This requires, we believe, that these cases be learned and considered "in context," hence the subtitle of this book.

Therefore, where feasible within each doctrinal category, the canonical cases are presented chronologically as they were decided. Learning how a line of cases developed conveys the story of constitutional law that every literate lawyer *ought* to know — constitutional law is, after all, a required course for all students — and that every future constitutional litigator or academic *needs* to know. Although current constitutional law doctrine can be highly technical and is always changing, the backstory of constitutional law that "everyone knows" (but students do not know *yet*) is the relatively fixed background against which doctrine is developed and constrained. And we consider it useful (in fact, vital) for students to understand that what seem to be present-day battles — for example, over the scope of Congress's power — are in fact as old as the Republic itself.

The canonical cases of constitutional law are often known by a single name — *Marbury*, *McCulloch*, *Gibbons*, *Slaughter-House*, *Darby*, *Wickard*, *Youngstown*, *Brown*, *Griswold*, and *Roe*. So too are the anticanonal: *Dred Scott*, *Plessy*, *Korematsu*, and *Lochner*. These cases were decided in a particular order and were connected temporally by other crucial cases and writings, not to mention by events that impelled and illuminate their outcomes and methods. We professors take our knowledge of this story for granted, having picked it up along the way. But for most students it is entirely new and more than a little strange. This story is almost impossible to grasp when confronting disparate cases completely divorced from the context in which they were decided.

By confining the book largely to the canonical cases in context, we found that the opinions could be edited more generously to allow the Justices themselves to tell the story of constitutional law in their own words. Supplementing the cases with other materials became much less necessary, allowing for longer opinions in shorter reading assignments. The order of presentation and the fuller debates among the Justices together provide a context that takes the place of thousands of words of auxiliary reading. And with less inevitably opinionated supplementation by the casebook authors, professors know the students have the raw material in front of them that can be examined through whatever lens or lenses the professor believes to be most useful, allowing each professor to put his or her own stamp on the story as it unfolds.

Textual introductions to chapters and sections are kept brief. Where students are unlikely to know some of the historical background, we include some facts that are essential to understanding the context of these decisions. Our goal was to allow the story to emerge from the materials themselves rather than from us; though these interjections sometimes present to the student competing points of view, we have tried very hard to keep them from being controversial or one-sided. Another feature unique to this book (but borrowed from the Barnett contracts casebook) are "study guide" questions *before* each case. These questions are intended to guide the reading, suggest connections between the materials, remind students of recurring themes, and draw attention to certain aspects of the case that they might otherwise overlook, rather than to confound both students and professors (as traditional "notes" tend to do).

Some professors may be concerned that this approach is too "case-centric," or Supreme Court oriented. While the book does focus heavily on Supreme Court opinions, this is mitigated

by the supplemental materials we have included. Rival interpretations of the Constitution by founders, Presidents, and other critics of the Court's decisions are better represented here than in many other casebooks.

On the other hand, focusing on the canonical cases in context is by no means particularly flattering to the Supreme Court. The story of constitutional law that emerges is often one of its failure, shortsightedness, bigotry, or abdication of responsibility. Although the story of constitutional law may indeed be a morality play of sorts with the Justices as major characters, it is often one of tragedy rather than one of triumph. In this way, a Supreme Court–oriented approach is as likely to undermine as to encourage faith in "The Court," but we leave this to the eye of the beholder. Root for or against the Justices and their opinions as you will.

To the professors who have chosen to adopt this book, we thank you. To the students reading this preface before starting their course on constitutional law, we encourage you to kick back and enjoy one of the most fascinating stories you will ever read!

Randy Barnett
Washington, DC
Howard Katz
Greensboro, NC

July 2013

Acknowledgments

The person most responsible for this book is Carol McGeehan who for many years persistently urged me to write it. No author could possibly ask for a more engaged, understanding, and constructive editor. Her faith in a junior contracts professor to write a solo-authored casebook led to *Contracts: Cases and Doctrine* (now in its fifth edition) and *Perspectives on Contracts* (now in its fourth). Her confidence that I could "double major" in writing a constitutional law casebook even before I had ever taught the course was truly inspirational.

I am, of course, especially appreciative to my law school classmate, Howard Katz of the Elon School of Law, for joining me as my coauthor. I knew I needed a second set of eyes to improve the pedagogy and balance of the book, and I could think of no one more qualified than the coauthor of *Strategies and Techniques of Law School Teaching*. Howard has provided invaluable assistance in the reorganization of the book, as well as ensuring that it is evenhanded.

At Wolters Kluwer, Eric Holt patiently worked around my other commitments while never completely easing the pressure to produce a manuscript for the first edition, after which Peter Skagestad efficiently shepherded the book from manuscript to publication. For the second edition, we have Jay Harward to thank. A special thanks goes to Barbara Roth for all her efforts to make the second edition a real improvement over the first, and to Naomi Kornhauser for locating the wonderful photographs that light up the new edition.

As always, enormous assistance was provided by Wolters Kluwer's anonymous peer-review system that vetted the original proposal as well as the first and second drafts of the manuscript for the first edition. Additional reviewers provided much-appreciated feedback on the first edition that led to a substantial reorganization of the materials. The comments of all these reviewers, both supporters and skeptics, were invaluable. The casebook was revised in significant ways, both large and small, to respond to their many insightful suggestions.

As always, I am especially appreciative of the help and support I received from my dear friend and Georgetown colleague Larry Solum. Larry even taught from a tentative version of the casebook long before it was completed, and his suggestions for its improvement were invariably correct, as they always are. And it was Larry who first urged me years ago to pay close attention to *Chisholm v. Georgia*, a recommendation I failed to heed until I began writing the casebook and realized the enormous significance of this, the first great constitutional case.

I am grateful to my students in my Con Law I and II courses at the Georgetown Law Center for patiently enduring instruction from a casebook-in-progress. I also thank Georgetown and my dean, William Treanor, for the research support that made writing this book possible.

Finally, I am deeply grateful to my wife, Beth, who is unfailingly patient and supportive as I bury myself in all too many writing projects. I am sure she is as happy as I am that this one is finally out of my hands.

R.B.

First, I want to thank Carol McGeehan and Randy Barnett for inviting me to join this project, as well as the rest of the people behind the scenes who have helped make the final product what it is. This has been a wonderful and engaging endeavor, and I want to express my deep appreciation to all those who helped this book come into being.

My constitutional law students at Northern Illinois, Tulane, Cleveland-Marshall, Howard, and Elon deserve appreciation for helping me to think about constitutional law and how to convey the excitement I find in the subject. Likewise, I owe a debt of gratitude to my father, to my constitutional law professors in college and law school, speakers at various conferences and on podcasts I have listened to over the years, and authors of articles too numerous to mention. A few of them convinced me to change my mind, many of them challenged me or forced me to refine my thinking, and most of them have in some way helped shape or add to my current knowledge. A special thank you is owed to the colleagues of mine at Elon who have been a source of support and inspiration for the past several years.

The publication of this book allows me to make a special mention of my late classmate and friend Tom Sargentich, for many years a professor of administrative and constitutional law. I so wish he was here to see this book.

Finally and most importantly, I want to thank my wife, Jacki Knapman, for her advice on matters related to the book — whether substantive, procedural, or grammatical — and for her patience, encouragement, and support.

H.K.

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The Constitution of the United States

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, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

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* Changed by Section 2 of the Fourteenth Amendment.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,]* for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]*

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be [on the first Monday in December,]** unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

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* Changed by the Seventeenth Amendment.

** Changed by Section 2 of the Twentieth Amendment.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;