

# MODERN CONSTITUTIONAL LAW

CASES AND NOTES

Eighth Edition

Ronald D. Rotunda

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# **MODERN CONSTITUTIONAL LAW CASES AND NOTES**

**Eighth Edition**

**By**

**Ronald D. Rotunda**

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George Mason University School of Law

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*To Sol, Jackie, & Bob*

*If I ever need a lawyer, I hope it is one of them*

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## Preface to the Eighth Edition

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Much has changed over the years. As I look out my office window, I see the Washington Monument in the distance. When the first edition of this book was published, I was a young man in my 30s. Now I am a young man in my 60s. (Students will learn, as they get older, that one's perspective as to what is "old" changes with time.) One may think that all things tend towards entropy if they are used, and towards atrophy if they are not used. Well, law is different. Over time, law tends towards complexity. Constitutional Law is no exception to that principle.

Since the first edition, there has been relatively little change with respect to state powers under the dormant commerce clause, but the same cannot be said of federal powers in light of the commerce clause. *National League of Cities v. Usery* ushered in the rise of a new Tenth Amendment, followed by its fall (when the Court overruled *Usery*), followed by its partial resurrection with *New York v. United States* and cases within its wake. With the first edition, one speculated whether there were really any restrictions to federal power under the Commerce Clause. Now, *United States v. Lopez* and its offspring taught us that some limitations do exist. In fact, all nine justices agreed in *Lopez* with that conclusion (although the four person dissent argued that the particular law in question was within federal power).

Separation of Powers cases have also exploded since the first edition. Legislative veto, war powers, the Independent Counsel law, term limits for federal legislators, and the line item veto—for years these issues were mooted; now they are decided. The cases on state action have witnessed the creation of the mirror image cases. The chapter on Equal Protection has seen the growth and later cut-backs in affirmative action. The Court has also given us further illuminations on the scope of Congressional power to use the enforcement clauses of the Civil War Amendments. Campaign finance regulation becomes more complex. The development in free speech law has been amazing, with the Court applying First Amendment protections to cable television and the Internet. The framers of our Constitution could not have anticipated either technology. Indeed, few legal academics had heard of the Internet when the first edition was published. But it is tribute to the genius of the framers that the magnificent protections of the Bill of Rights apply without regard to time. The number of cases dealing with religious freedom have also expanded, and the Court has rethought the issue of aid to private schools.

Yet, for all the changes, the basic organization of this book has not changed during the last quarter century. I like to think that this organizational stability is proof of my unusual prescience, but I think that another factor is more important. Changes in the law are inevitable, but these

changes tend to be evolutionary because the judges do not own the law. They are merely its custodians, passing it down from one generation to the next, and, as they do so, they change it slowly over time. One of the important jobs of lawyers is to predict the law. Law is usually predictable because change is incremental. Even if one cannot predict a particular decision, one can predict the major arguments that both sides will use. Sometimes a particular decision is unanticipated, but we should foresee the arguments that support it.

I express sincere thanks to my secretary, Jane Barton, for her assistance, and to my former colleague, John E. Nowak, and to my new colleagues, Nelson Lund, David Bernstein, Joyce Lee Malcolm, Neomi Rao, Ilya Somin, and particularly Allison Hayward who helped me navigate the complexities of campaign finance law. I am also indebted to the thoughtful suggestions of various law professors, law students, and others who have helped make this edition a better teaching tool.

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. I have also deleted citations within cases without any special indication. The cut-off date for this edition is February 21, 2007.

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Arlington, Virginia  
February, 2007

## Preface to the First Edition

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I have intended this book to serve as a compact pedagogical tool introducing and exposing students to the underlying principles of constitutional law.<sup>1</sup> 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.<sup>2</sup> 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 authority<sup>3</sup> 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

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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. 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.

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 classroom discussion. For the same reason the book occasionally includes hypotheticals following some of the cases.<sup>4</sup> 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

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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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