



VOLUME II.

AMERICAN CONSTITUTIONAL LAW

THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS

EIGHTH EDITION

Ralph A. Rossum and G. Alan Tarr

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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. 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



Contents

PREFACE xvii

NOTE TO THE READER xxi

1 INTERPRETATION OF THE CONSTITUTION 1

- Approaches to Constitutional Interpretation 4
- The Approaches in Perspective 14
- The Ends of the Constitution 15
- Constitutional Means to Constitutional Ends 16
- Notes 21
- Selected Reading 24

2 CONSTITUTIONAL ADJUDICATION 26

- The Justices of the Supreme Court 27
- The Supreme Court in the Federal Judicial System 29
- How Cases Get to the Supreme Court 30
- How the Supreme Court Decides Cases 34
- The Impact of Supreme Court Decisions 38
- Analyzing Supreme Court Decisions 42
- Sources in Constitutional Law 44
- Notes 46
- Selected Reading 48

3 RIGHTS UNDER THE CONSTITUTION 49

- Rights and the Founding 50
- The Fourteenth Amendment 52
- Due Process and the Bill of Rights 54
- Rights During Wartime and Other Emergencies 59
- The Second Amendment 63
- Notes 66
- Selected Reading 68

CASES

- Barron v. Baltimore* (1833) 70
- Palko v. Connecticut* (1937) 71
- Adamson v. California* (1947) 73
- Duncan v. Louisiana* (1968) 76
- Ex parte Milligan* (1866) 79
- Korematsu v. United States* (1944) 82
- Hamdi v. Rumsfeld* (2004) 86
- Boumediene v. Bush* (2008) 96
- District of Columbia v. Heller* (2008) 106

4 ECONOMIC DUE PROCESS AND THE TAKINGS CLAUSE 119

- The Fourteenth Amendment 120
- The Evisceration (and Possible Recent Restoration?) of the Privileges or Immunities Clause 121
- Economic Regulation and the Rise of Substantive Due Process 123
- The Demise of Substantive Due Process in the Economic Realm 126
- Punitive Damages: An Exception to the Demise of Substantive Due Process in the Economic Realm? 127
- The Emergence of Substantive Due Process in the Civil Liberties Realm 129
- The Takings Clause 130
- Notes 134
- Selected Reading 136

CASES

- The Slaughter-House Cases* (1873) 138
- Saenz v. Roe* (1999) 143
- Munn v. Illinois* (1877) 150
- Lochner v. New York* (1905) 153
- West Coast Hotel Company v. Parrish* (1937) 156
- Williamson v. Lee Optical Company* (1955) 158

<i>State Farm Mutual Automobile Insurance Company v. Campbell</i> (2003)	159
<i>United States v. Carolene Products Company</i> (1938)	162
<i>Kelo v. City of New London</i> (2005)	163
<i>Nollan v. California Coastal Commission</i> (1987)	170
<i>Lucas v. South Carolina Coastal Council</i> (1992)	175
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> (2002)	178
<i>Dolan v. City of Tigard</i> (1994)	183

5 FREEDOM OF SPEECH, PRESS, AND ASSOCIATION 186

The Meaning of the First Amendment	187
First Amendment Standards	189
Political Expression	192
The Regulation of Speech	195
Restraints on the Press	201
Libel and Invasion of Privacy	204
Obscenity	205
Conclusions	207
Notes	208
Selected Reading	209

CASES

<i>Gitlow v. New York</i> (1925)	211
<i>Schenck v. United States</i> (1919)	213
<i>Dennis v. United States</i> (1951)	214
<i>Barenblatt v. United States</i> (1959)	218
<i>Brandenburg v. Ohio</i> (1969)	222
<i>McConnell v. Federal Election Commission</i> (2003)	223
<i>Boy Scouts of America v. Dale</i> (2000)	239
<i>Texas v. Johnson</i> (1989)	246
<i>R.A.V. v. City of St. Paul</i> (1992)	249
<i>Hill v. Colorado</i> (2000)	252
<i>Near v. Minnesota</i> (1931)	257
<i>New York Times Company v. United States</i> (1971)	259
<i>Brandenburg v. Hayes</i> (1972)	263
Memorandum Opinion and Order, Federal Communications Commission (1987)	265
<i>New York Times v. Sullivan</i> (1964)	268
<i>Miller v. California/Paris Adult Theater I v. Slaton</i> (1973)	270
<i>Reno v. American Civil Liberties Union</i> (1997)	273
Indianapolis Anti-Pornography Ordinance (1984)	278

6 FREEDOM OF RELIGION 280

- Establishment of Religion 281
- Free Exercise of Religion 286
- Reconciling the Religion Clauses 289
- Trends and Prospects 290
- Notes 291
- Selected Reading 292

CASES

- Everson v. Board of Education* (1947) 293
- School District of Abington Township v. Schempp* (1963) 295
- Lemon v. Kurtzman* (1971) 298
- Wallace v. Jaffree* (1985) 301
- Lee v. Weisman* (1992) 304
- McCreary County v. American Civil Liberties Union* (2005) 310
- Van Orden v. Perry* (2005) 315
- Rosenberger v. University of Virginia* (1995) 320
- Zelman v. Simmons-Harris* (2002) 324
- West Virginia Board of Education v. Barnette* (1943) 333
- Sherbert v. Verner* (1963) 336
- Lyng v. Northwest Indian Cemetery Protective Association* (1988) 338
- Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 341
- City of Boerne v. Flores, Archbishop of San Antonio* (1997) 346

7 CRIMINAL PROCEDURE 350

- The Ex Post Facto Clauses 352
- Search and Seizure 353
- Self-Incrimination and Coerced Confessions 363
- Due Process of Law 366
- The Right to Counsel 368
- The Insanity Defense 370
- The Entrapment Defense 371
- Trial by Jury 372
- The Right to a Speedy Trial 374
- The Right to Confrontation 374
- Plea Bargaining 375
- Bail and Pretrial Detention 376
- Cruel and Unusual Punishments 377
- Prisoners' Rights 379
- Retroactive Application of Criminal Procedure Guarantees 381
- Basic Themes in the Court's Criminal Procedure Decisions 382

Notes 383
 Selected Reading 386

CASES

Stogner v. California (2003) 388
Smith v. Doe (2003) 391
Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls (2002) 395
Indianapolis v. Edmond (2000) 400
Mapp v. Ohio (1961) 403
Olmstead v. United States (1928) 407
Katz v. United States (1967) 410
Miranda v. Arizona (1966) 412
Dickerson v. United States (2000) 419
Nix v. Williams (1984) 424
Connecticut Department of Public Safety v. Doe (2003) 429
Powell v. Alabama (1932) 430
Gideon v. Wainwright (1963) 432
Clark v. Arizona (2006) 434
Jacobson v. United States (1992) 438
Blakely v. Washington (2004) 442
Davis v. Washington (2006) 448
Gregg v. Georgia (1976) 452
Roper v. Simmons (2005) 457
Kennedy v. Louisiana (2008) 465
Harmelin v. Michigan (1991) 475
Ewing v. California (2003) 480

8 THE EQUAL PROTECTION CLAUSE AND RACIAL DISCRIMINATION 488

Race and the Founding 489
 Racial Desegregation 494
 Private Discrimination and the Concept of State Action 502
 Racial Discrimination in Jury Trials 505
 Racial Discrimination in Prisons 506
 Proof of Discrimination: Impact Versus Intent 507
 Notes 508
 Selected Reading 510

CASES

Plessy v. Ferguson (1896) 512
Brown v. Board of Education (1954) 514
Bolling v. Sharpe (1954) 517
Brown v. Board of Education (1955) 518

<i>Swann v. Charlotte-Mecklenburg Board of Education</i> (1971)	519
<i>Milliken v. Bradley</i> (1974)	522
<i>United States v. Fordice</i> (1992)	528
<i>Missouri v. Jenkins</i> (1995)	536
<i>Shelley v. Kraemer</i> (1948)	543
<i>Moose Lodge No. 107 v. Irvis</i> (1972)	545
<i>Georgia v. McCollum</i> (1992)	548
<i>Johnson v. California</i> (2005)	552
<i>Wards Cove Packing Co. v. Atonio</i> (1989)	558
The Civil Rights Act of 1991	561

9 SUBSTANTIVE EQUAL PROTECTION 563

The Two-Tier Approach	565
The Development of an Intermediate Level of Review	566
Suspect Classifications	568
Fundamental Rights	581
The Future of Equal Protection Analysis	582
Notes	583
Selected Reading	584

CASES

<i>Richmond v. Croson Company</i> (1989)	586
<i>Adarand Constructors, Inc. v. Peña</i> (1995)	596
<i>Grutter v. Bollinger</i> (2003)	602
<i>Gratz v. Bollinger</i> (2003)	615
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> (2007)	619
<i>Foley v. Connelie</i> (1978)	632
<i>Trimble v. Gordon</i> (1977)	634
<i>Massachusetts Board of Retirement v. Murgia</i> (1976)	638
<i>Frontiero v. Richardson</i> (1973)	641
<i>United States v. Virginia</i> (1996)	643
<i>Rostker v. Goldberg</i> (1981)	649
<i>Shapiro v. Thompson</i> (1969)	654
<i>San Antonio Independent School District v. Rodriguez</i> (1973)	657
<i>Nordlinger v. Hahn</i> (1992)	663

10 VOTING AND REPRESENTATION 667

Equal Protection and the Right to Vote	668
Race and Representation: The Fifteenth Amendment and the Voting Rights Act	676

Notes 680

Selected Reading 681

CASES

Wesberry v. Sanders (1964) 684

Reynolds v. Sims (1964) 686

Vieth v. Jubelirer (2004) 690

Harper v. Virginia State Board of Elections (1966) 698

Dunn v. Blumstein (1972) 701

Crawford v. Marion County Election Board (2008) 704

Bush v. Gore (2000) 710

Katzenbach v. Morgan (1966) 721

Thornburg v. Gingles (1986) 724

Shaw v. Reno (1993) 726

League of United Latin American Citizens v. Perry (2006) 731

11 THE RIGHT TO PRIVACY 740

The Constitutional Basis 741

What the Right to Privacy Protects 742

Qualifications on the Right to Privacy 753

Privacy and the Right to Die 754

Notes 754

Selected Reading 757

CASES

Troxel v. Granville (2000) 759

Griswold v. Connecticut (1965) 762

Roe v. Wade (1973) 767

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) 772

Gonzales v. Carhart (2007) 786

Lawrence v. Texas (2003) 799

In re Marriage Cases (2008) 805

Defense of Marriage Act of 1996 812

Cruzan v. Director, Missouri Department of Health (1990) 813

Washington v. Glucksberg (1997) 820

Vacco v. Quill (1997) 826

THE CONSTITUTION OF THE UNITED STATES OF AMERICA 829

JUSTICES OF THE SUPREME COURT 843

GLOSSARY OF COMMON LEGAL TERMS 847

TABLE OF CASES 851



Interpretation of the Constitution

Approaches to Constitutional
Interpretation

The Approaches in Perspective

The Ends of the Constitution

Constitutional Means to
Constitutional Ends

Notes

Selected Reading

