American Constitutional Law and History

American Constitutional Law and History

Michael S. Ariens
Professor of Law, St. Mary's University School of Law

Carolina Academic Press
Durham, North Carolina

ISBN: 978-1-61163-098-5
LCCN: 2012934921

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668

www.cap-press.com

Printed in the United States of America.

For my students

Contents

Preface xv
Articles of Confederation xvii
The Constitution of the United States xxiii
Timeline of Events in American Legal and Political History xxxvii
Biographies of Selected Justices of the Supreme Court li
Chapter One • The Constitution and Judicial Power 3
A. Background to the Creation of the Constitution 3
B. Judicial Review 6
1. Review of Federal Action 6
A Timeline of Events Leading to *Marbury v. Madison* 7
Marbury v. Madison 9
2. Judicial Review of State Actions 18
Martin v. Hunter's Lessee 18
C. Modes of Constitutional Interpretation 20
1. Historical Background 20
Cohens v. Virginia 20
Calder v. Bull 20
2. Sources of Constitutional Interpretation 23
a. Text 23
b. History 25
c. Structure 25
d. Precedent 26
e. Consensus 26
f. Purposes 27
3. The Modern Court and Constitutional Interpretation 27
District of Columbia v. Heller 28
D. The Limits of the Judicial Power 51
1. Justiciability 51
a. Standing 53
Valley Forge Christian College v. Americans United for Separation of Church and State 53
Lujan v. Defenders of Wildlife 56
Allen v. Wright 56
b. Political Question Doctrine 65
Baker v. Carr 66
Powell v. McCormack 72
2. Congressional Limitations on Federal Judicial Power 73
A Timeline of Events Leading to *Ex Parte McCardle* 74
Ex Parte McCardle 75

E. The Work of the Supreme Court 76
Chapter Two • Federal Legislative Power 79
A. The Meaning of Enumerated Powers 79
1. The Necessary And Proper Clause 80
McCulloch v. Maryland 81
United States v. Comstock 91
B. Commerce Power 102
1. Historical Background 102
Gibbons v. Ogden 102
2. Early Judicial Interpretation of Commerce: Rise and Fall 102
a. Regulating Commerce 103
United States v. E.C. Knight Co. 103
Swift & Co. v. United States 108
Houston, East & West Texas Railway Co. v. United States (*The Shreveport Rate Cases*) 109
b. Prohibiting Interstate Commerce 110
Champion v. Ames (*The Lottery Case*) 110
Hammer v. Dagenhart 113
c. Raising The Stakes 117
Schechter Poultry Corp. v. United States (*Sick Chicken Case*) 119
Carter v. Carter Coal Co. 122
d. Doctrinal Retreat And Abandonment 123
A Partial Timeline of the Court Reorganization (Court-Packing) Plan 124
NLRB v. Jones & Laughlin Steel Corp. 125
United States v. Darby 129
Wickard v. Filburn 131
e. Civil Rights and the Commerce Clause 134
Heart of Atlanta Motel v. United States 135
Katzenbach v. McClung 135
f. The Re-Emergence and Retreat of Commerce Clause Limitations 135
United States v. Lopez 136
Perez v. United States 150
United States v. Morrison 151
Gonzales v. Raich 152
C. Immunity from Federal Regulation 169
Garcia v. San Antonio Metropolitan Transit Authority 170
Printz v. United States 178
D. Other Congressional Powers 187
1. Taxation and Spending 187
Bailey v. Drexel Furniture Co. (*Child Labor Tax Case*) 188
United States v. Butler 188
Chas. C. Steward Mach. Co. v. Davis 192
Helvering v. Davis 195
South Dakota v. Dole 196
2. Treaty and War Powers 199
Missouri v. Holland 199
Medellin v. Texas 200
3. Power under the Reconstruction Amendments 200

Chapter 3 • Separation of Powers 201
A. Introduction 201
B. Presidential Power 202
A Partial Timeline of Events Leading to the *Steel Seizure Case* 202
Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure Case*) 203
A Partial Timeline of Events Leading to *Dames & Moore v. Regan* 216
Dames & Moore v. Regan 217
Medellin v. Texas 222
C. Presidential Immunities 223
A Partial Timeline of Watergate and *United States v. Nixon* 223
United States v. Nixon 225
Clinton v. Jones 229
A Partial Timeline of Events Involving Impeachment of President Clinton 234
D. Congress's Power 235
1. The Administrative State 235
2. Non-Delegation Doctrine 236
3. Legislative Veto 236
Immigration and Naturalization Service v. Chadha 236
Morrison v. Olson 245
E. Separation of Powers and Foreign Policy 246
1. General Principles 246
United States v. Curtiss-Wright Export Corp. 246
2. War Powers Resolution 248
3. War, Terrorism, and Separation of Powers 249
Hamdi v. Rumsfeld 249
Hamdan v. Rumsfeld 266
Boumediene v. Bush 266
Munaf v. Green 267
Chapter 4 • National Markets, State Regulations, and Judicial Review 269
A. Introduction 269
B. Dormant Commerce Clause 271
1. Historical Background 271
Gibbons v. Ogden 271
Willson v. Black Bird Creek Marsh Co. 272
Cooley v. Board of Wardens 272
2. Dormant Commerce Clause Theory and Test 273
a. Theory 273
b. Doctrine 275
3. Modern Doctrinal Development 276
a. Protectionism and Discrimination 276
City of Philadelphia v. New Jersey 276
C&A Carbone, Inc. v. Clarkstown 282
United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth. 282
b. Facially Neutral Statutes That May Discriminate 283
Hunt v. Washington State Apple Advertising Comm'n 283
Exxon Corp. v. Maryland 288
c. Facially Neutral Laws That Are Non-Discriminatory 289
South Carolina State Highway Department v. Barnwell Bros. 289

Southern Pacific Co. v. Arizona 292
Kassel v. Consolidated Freightways Corp. 296
d. The Market Participant Exception to the Dormant Commerce Clause 304
White v. Massachusetts Council of Constr. Employees 305
South-Central Timber Development, Inc. v. Wunnicke 305
C. Privileges and Immunities Clause of Article IV, § 2 309
1. Citizens 309
2. Privileges and Immunities 310
Toomer v. Witsell 310
3. "Of the Several States" 310
4. Doctrine 310
United Building and Construction Trades Council v. Camden 310
5. Standard of Appellate Review 316
Chapter 5 • Individual Rights, Incorporation, and the State Action Doctrine 319
A. Introduction 319
B. Incorporation 320
1. Before the Civil War 320
Barron v. Baltimore 321
Permoli v. New Orleans 322
2. The Privileges or Immunities Clause of the Fourteenth Amendment 323
The Slaughter-House Cases 323
3. Successful Incorporation 334
Twining v. New Jersey 334
Palko v. Connecticut 336
Adamson v. California 337
McDonald v. Chicago 342
C. The State Action Doctrine 342
1. Historical Antecedents 342
The Civil Rights Cases 342
D. Modern Definitions of "State" Action 347
1. The Public Function Doctrine 347
Marsh v. Alabama 348
Jackson v. Metropolitan Edison Co. 349
2. Entanglement Doctrine 353
Shelley v. Kraemer 353
Burton v. Wilmington Parking Authority 356
3. State Action and Discriminatory Peremptory Challenges 359
Chapter 6 • Due Process 361
A. Introduction 361
B. Procedural Due Process 361
1. Deprivation of Life, Liberty or Property 362
C. Substantive Due Process 363
1. Introduction 363
2. Historical Antecedents 365
Dred Scott v. Sandford 366
Munn v. Illinois 366
3. The Lochner Era 367
Allgeyer v. Louisiana 367
Lochner v. New York 371

A Partial Timeline of the Supreme Court and Substantive Due Process, 1890–1937 378
Nebbia v. New York 381
Morehead v. New York ex rel. Tipaldo 383
A Partial Timeline of the Court Reorganization (Court-Packing) Plan 384
4. The Switch in Time? 385
West Coast Hotel Co. v. Parrish 385
5. The Re-Emergence of Substantive Due Process 390
Skinner v. Oklahoma ex rel. Williamson 391
Williamson v. Lee Optical 393
Griswold v. Connecticut 396
Eisenstadt v. Baird 406
Roe v. Wade 407
a. Due Process Liberty and Abortion 415
A Partial Timeline of the Supreme Court's Abortion Cases, 1973–1991 416
Planned Parenthood of Southeastern Pennsylvania v. Casey 417
Gonzales v. Carhart 439
b. Sexual Autonomy and the Right to Privacy 439
Bowers v. Hardwick 439
Romer v. Evans 442
Lawrence v. Texas 443
c. Marriage and the Right to Privacy 452
Loving v. Virginia 452
Zablocki v. Redhail 454
d. Family and the Right to Privacy 455
Moore v. City of East Cleveland 456
Michael H. v. Gerald D. 459
Troxel v. Granville 467
e. The Right to Die 473
Cruzan v. Director, Missouri Department of Health 473
Washington v. Glucksberg 484
Vacco v. Quill 496
6. Due Process and Equal Protection 499
San Antonio Independent School District v. Rodriguez 500
Plyler v. Doe 513
D. Takings Clause 514
1. Is The Property "Taken"? 514
Pennsylvania Coal Co. v. Mahon 515
2. Is It Taken for a Public Use? 519
Kelo v. City of New London 520
3. Is the Compensation Just? 527
E. Contracts Clause 528
Home Building & Loan Ass'n v. Blaisdell 528
Chapter 7 • Equal Protection 535
A. Introduction 535
1. Ends and Means 536
2. Equal Protection Analysis 539
B. Rational Basis Review 540

1. The Standard Approach 540
Railway Express Agency, Inc. v. New York 540
Williamson v. Lee Optical 543
New York City Transit Authority v. Beazer 544
2. Rational Basis with a Bite 546
Romer v. Evans 546
City of Cleburne v. Cleburne Living Center 555
C. Race-Based Classifications 557
1. Historical Background 557
Dred Scott v. Sandford 557
Plessy v. Ferguson 559
A Partial Timeline of the History of Civil Rights, 1865–1968 564
2. Strict Scrutiny in Racial Classification Cases 567
Korematsu v. United States 567
3. The End of Jim Crow 572
Brown v. Board of Education 573
Brown v. Board of Education (*Brown II*) 575
4. De-Segregating Public Schools 576
5. Proving Discrimination When the Law Is Facially Neutral 577
Washington v. Davis 577
McClesky v. Kemp 581
6. How to Prove Discriminatory Purpose 582
Village of Arlington Heights v. Metropolitan Housing Development Corp. 583
D. Affirmative Action 585
Grutter v. Bollinger 589
Gratz v. Bollinger 613
Parents Involved in Community Schools v. Seattle School District No. 1 614
E. Gender Discrimination 615
Craig v. Boren 616
Personnel Administrator of Massachusetts v. Feeney 623
Kirchberg v. Feenstra 623
Michael M. v. Superior Court 623
Mississippi University for Women v. Hogan 628
United States v. Virginia 632
F. Other Forms of Discrimination and Heightened Scrutiny 641
1. Alienage 641
Cabell v. Chavez-Salido 642
2. Children of Unmarried Parents 650
Chapter 8 • Freedom of Speech, Association, and Press 653
A. Introduction 653
1. Historical Background 653
2. Why Freedom of Speech? 654
3. Is the State Regulating the Content of the Speech? 654
Boos v. Barry 655
4. Where May Speakers Speak? 656
5. Vagueness and Overbreadth 657
a. Vagueness 657
b. Overbreadth 657

United States v. Stevens 658
B. Content-Based Regulations of Speech 658
1. Inciting Illegal Activity 660
A Partial Timeline of World War I, the First Red Scare, and the Supreme Court's Initial Free Speech Decisions 660
Schenck v. United States 661
Frohwerk v. United States 662
Debs v. United States 664
Abrams v. United States 665
A Partial Timeline of the Second Red Scare and the Cold War 670
Dennis v. United States 671
Brandenburg v. Ohio 680
2. Fighting Words 682
Chaplinsky v. New Hampshire 682
a. Group Libel 685
Beauharnais v. Illinois 685
b. Hate Speech 689
R.A.V. v. City of St. Paul 690
Virginia v. Black 690
3. Defamation 698
New York Times Co. v. Sullivan 698
4. Obscenity and Pornography 709
a. Defining Obscene Speech 709
Roth v. United States 709
Miller v. California 712
Paris Adult Theatre I v. Slaton 716
b. Child Pornography 721
New York v. Ferber 721
c. Secondary Effects of Sexually Oriented Speech 724
Young v. American Mini-Theatres, Inc. 724
City of Los Angeles v. Alameda Books, Inc. 725
5. Offensive Speech 733
Cohen v. California 733
Federal Communications Commission v. Pacifica Foundation 737
6. Commercial Speech 744
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 745
Central Hudson Gas & Electric Corp. v. Public Service Commission 753
44 Liquormart, Inc. v. Rhode Island 759
7. Conduct That Communicates 767
a. The Test of Symbolic Speech 767
United States v. O'Brien 767
b. Free Speech and the American Flag 770
Texas v. Johnson 770
8. Religious Speech 780
Widmar v. Vincent 780
Rosenberger v. Rectors and Visitors of the University of Virginia 781
C. Prior Restraints 781
A Partial Timeline of *The Pentagon Papers Case* 782

New York Times Co. v. United States (*The Pentagon Papers Case*) 783
Nebraska Press Ass'n v. Stuart 792
D. Electoral Politics, Money, and Speech 792
1. Campaign Announcements, Promises, and Pledges 793
Republican Party of Minnesota v. White 793
Caperton v. A.T. Massey Coal Co., Inc. 804
2. Money, Politics, and Speech 805
Citizens United v. FEC 806
E. Freedom of Association 806
1. Requiring Disclosure of Membership 808
National Association for the Advancement of Colored People v. Alabama ex rel. Patterson 808
2. Laws Prohibiting Discrimination by Private Associations 811
Roberts v. United States Jaycees 811
3. Compelled Association 816
Board of Regents of the University of Wisconsin System v. Southworth 817
Christian Legal Society Chapter of the University of California Hastings College of Law v. Martinez 821
F. Freedom of Press 821
Branzburg v. Hayes 821
Chapter 9 • The Religion Clause 829
A. Introduction 829
1. Historical Background 829
A Partial Timeline of the Debate on the Religion Clause 831
2. Theory of the Religion Clause 832
a. Neutrality 833
b. Separation 834
c. Accommodation 834
d. Voluntarism 835
e. Federalism 835
3. Categorization of Claims 836
Locke v. Davey 837
B. The Nonestablishment Clause 843
Everson v. Board of Education 843
Zorach v. Clauson 854
Lemon v. Kurtzman 858
County of Allegheny v. ACLU 867
Van Orden v. Perry 869
McCreary County v. American Civil Liberties Union 881
C. The Free Exercise Clause 883
Sherbert v. Verner 884
Wisconsin v. Yoder 889
Employment Division v. Smith 895
D. Defining Religion 906
United States v. Seeger 908
Welsh v. United States 908
Bibliography 911

Preface

In addition to teaching doctrine, this book has a threefold purpose: (1) it explains through repeated examples how a judge tries to persuade the reader that his or her opinion (whether majority, concurring, or dissenting) more accurately reflects the meaning of the Constitution than a competing opinion; (2) it assesses the manner in which American history has informed and affected the development of American constitutional law; and (3) it highlights and evaluates the impact of legal thought, particularly legal formalism and legal realism, on Supreme Court decision making. As a result, the excerpted cases are edited for their doctrinal point and for two other reasons: (a) to demonstrate how the excerpted opinions attempt to persuade the reader that the particular vision expressed in the opinion is more true to the text of the Constitution, its history and structure, earlier Supreme Court precedent, elite and popular consensus and the purposes of the Constitution than a contrasting opinion, and (b) how realism and formalism, as well as the presumed "legacy" of those two jurisprudential approaches, affect the ways in which the justices decide cases.

When Supreme Court justices write their opinions, they regularly use recurring types of reasoning. The Justices attempt to persuade the reader by using (1) reasoning by analogy; (2) syllogistic reasoning; (3) narrower or broader level of generality arguments; and (4) arguments of "rhetoric," including (a) the appeal to authority, also known as the "famous dead person" argument, (b) the argument of subsequent consequences, also known as the claim of speculation or the "slippery slope" argument, (c) the appeal to passion, and (d) "flipping" the adversary's argument, that is, turning one party's argument in such a way as to favor the other party's position. Some forms of reasoning predominate in different areas of constitutional law (*e.g.*, members of the Supreme Court regularly use competing and varying levels of generality in substantive due process cases, and use reasoning by analogy in free speech cases, and make "rhetorical" arguments in federalism cases). These same forms of reasoning are given again and again in opinions. This book is structured to make students proficient at naming, applying, and critiquing each of these types of reasoning.

This book also offers a "long view" of constitutional law. Given the contested and often unstable nature of constitutional law doctrine, it is crucial for students to understand not only *what* the Court concluded, but *how* the Court as a historical matter reached this point. For example, it is important for students to understand that the 1787 Constitution was written in significant part in reaction to the Articles of Confederation. Thus, I include the Articles to let students compare it with the Constitution. Another example is the Court's free speech decision in *Dennis v. United States* (1951), excerpted in Chapter 8.B.1. The opinions in *Dennis* are enigmatic without understanding the *Dennis* Court's (1) reaction to its post-World War I free speech jurisprudence, (2) the rise of Nazi Germany and World War II, (3) the onset of the Cold War, the Korean Conflict and the testing by the

Soviet Union of a nuclear bomb, and (4) the cultural and legal impact of the trials of the Rosenbergs for conspiracy to commit espionage and of Alger Hiss for perjury. The Court's subsequent free speech cases are best understood in light of the reaction to its decision in *Dennis*. To give students a sketch of American history, the book provides a modest *Timeline of Events in American Legal and Political History*. In order to provide a more particular historical focus, a number of specific *Timelines* are included before opinions to provide a context for understanding those cases.

Some constitutional law doctrine is rule-based, while other doctrine is standards-based. Crafting rules echoes historical legal formalism, while adopting standards echoes historical legal realism. All judges are aware of the history and impact of both legal formalism and legal realism in American legal thought. No judge will claim to be solely a formalist or a realist, though most judges prefer one jurisprudential approach to the other, and neither legal formalism nor legal realism should be understood as reflective of a judge's political conservatism or liberalism. Judges now largely use formalism and realism as techniques to craft doctrine. The means that most judges will adopt rules (a more formalistic approach) in some areas of constitutional law and standards (a more realistic approach) in other doctrinal areas. To understand how and why judges oscillate between rules and standards, a student needs to understand the history of legal formalism and legal realism.

This book is not intended to serve as a compendium, but as a survey of the Constitution as interpreted by the Supreme Court. Instead of citing secondary authorities in the text, students may look at a *Bibliography* with citations to important secondary works in constitutional law. In addition, students are given an "Afterword" rather than "Notes and Comments." The *Afterword* provides both an assessment of the excerpted case and a summary of any significant changes generated by the excerpted case. The *Afterword* reinforces the need for students to understand how the different premises of the majority and dissenting opinions bring forth different analytical approaches.

Unlike other areas of American law, it is important to understand not only what the Court decided, but who wrote the opinion of the Court (as well as who wrote any dissenting opinion). Thus, students should consult the brief biographies of important Supreme Court justices.

Finally, American Constitutional Law and History includes a number of decision trees and tables intended to give the student a better visual sense of constitutional law doctrine. For example, students can look at the rather complicated decision tree that attempts to encapsulate free speech jurisprudence. That general free speech decision tree is then broken down into component parts as the student moves through the various free speech issues decided by the Court.

Thanks to my wife Renée for reading much of the book and spotting a number of infelicities and errors. Thanks also to my research assistants, Aaron Culp, Buddy Parsons, Gregory Roberts, and Lauren Valkenaar, for reading and re-reading the manuscript. Thanks to Maria Vega for getting the book in printable shape. Finally, thanks to my Constitutional Law students, whose thoughts and ideas helped shape the structure and content of the book. All remaining errors are my responsibility. If you have thoughts about how to improve the book, please e-mail me at: mariens@stmarytx.edu.

Michael Ariens
January 2012