

Cases and Materials on
Federal Constitutional Law

Volume I

*Introduction to Interpretive
Methods & the Federal Judicial Power*

CAROLINA ACADEMIC PRESS
MODULAR CASEBOOK SERIES

FEDERAL CONSTITUTIONAL LAW, VOLUME I
Introduction to Interpretive Methods and the
Federal Judicial Power, Third Edition

Scott W. Gaylord, Christopher R. Green, and Lee J. Strang

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Federal Executive Power and the Separation of Powers, Third Edition

Scott W. Gaylord, Christopher R. Green, and Lee J. Strang

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Scott W. Gaylord, Christopher R. Green, and Lee J. Strang

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THIRD EDITION

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*To Pamela and our family and to all the families who serve and
sacrifice to protect the Constitution.*

S.W.G.

To Bonnie and Justice John Marshall Harlan I.

C.R.G.

To Elizabeth and Saint Thomas Aquinas.

L.J.S.

Contents

Introduction to the Modular Casebook Series	xi
Acknowledgments	xiii
Preface to the Third Edition	xv
Technical Note from the Editors	xvii
Introduction to Volume 1	xix
A. The Five Forms of Argument in Constitutional Law	xix
B. Federal “Judicial Power”	xx
C. A Note about Constitutional Law in the Law School Curriculum	xx
Chapter 1 • Introduction to the Foundational Texts of American Constitutional Law and the Key Forms of Constitutional Interpretation	3
Exercise 1 (Structure)	3
The Constitution of the United States	4
The Bill of Rights	13
Later Amendments	14
An Introduction to the Concept of Sovereignty	14
Exercise 2 (Historical Setting)	17
The Declaration of Independence	18
The Articles of Confederation	21
Exercise 3 (Text)	26
Chapter 2 • Additional Forms of Historical Arguments	31
Exercise 4 (Ratification Debates)	32
Ratification Debates — Essays of Brutus	32
Ratification Debates — Essays of Publius	43
The First Congress	52
Exercise 5 (Early Practice)	52
An Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs.	53
An Act to Establish the Treasury Department.	54
An Act to Provide for the Safe-Keeping of the Acts, Records and Seal of the United States, and for Other Purposes.	55
An Act to Establish the Judicial Courts of the United States.	56

Chapter 3 • The Early Judiciary	61
Letter from Secretary of State Thomas Jefferson to the Justices of the U.S. Supreme Court	62
Letter from Chief Justice John Jay and the Associate Justices of the U.S. Supreme Court to President Washington	62
Federal Pensions for Disabled Veterans of the Revolutionary War	63
Exercise 6	66
A Note on Early Supreme Court Opinions	67
<i>Calder v. Bull</i>	67
Exercise 7	71
Hidden Meaning in “Terms of Art” in Article III	71
The Continued Debate over Sovereignty	73
<i>Chisholm v. Georgia</i>	74
Exercise 8	83
Chapter 4 • The Impact of Amendments on the Constitution’s Meaning: The Eleventh Amendment in the Nineteenth Century	85
<i>Cohens v. Virginia</i>	87
Exercise 9	97
<i>Hans v. State of Louisiana</i>	97
Exercise 10	101
Chapter 5 • The Election of 1800 and the Transformation of the Federal Judiciary	103
Exercise 11(A)	104
The Federal Judiciary Act of 1801	104
Judiciary Act for the District of Columbia	106
The Federal Judiciary Act of 1802	107
The Washington Federalist (March 3, 1802)	108
The Reaction of the Federal Judiciary	109
<i>Stuart v. Laird</i>	110
Exercise 11(B)	111
The Aftermath	112
<i>Marbury v. Madison</i>	113
Exercise 12	123
A Note on the First Party System	125
Chapter 6 • Refining the Scope of the Judicial Power	129
A. Justiciability Doctrines	129
1. Introduction	129
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.</i>	130
Exercise 13(A)	141
<i>National Park Hospitality Ass’n v. Department of the Interior</i>	142
Exercise 13(B)	147

Exercise 14(A)	152
<i>Arizona Christian School Tuition Organization v. Winn</i>	152
Exercise 14(B)	158
B. Congressional Control over Federal Courts: Revision and Reopening of Judicial Determinations	159
<i>Miller v. French</i>	160
Exercise 15	165
Note on Adjudication by Non-Article III Tribunals	166
C. Restraining Judicial Power	170
1. Standards of Review	170
Exercise 16(A)	170
<i>Field v. Clark</i>	171
Exercise 16(B)	173
<i>Cooper v. Aaron</i>	174
Exercise 16(C)	176
2. Judicial Restraint	177
<i>Ashwander v. Tennessee Valley Authority</i>	177
Exercise 17	179
3. Political Question Doctrine	180
<i>Baker v. Carr</i>	180
Exercise 18	187
4. <i>Stare Decisis</i>	188
<i>Planned Parenthood of Southeastern Pa. v. Casey</i>	189
Exercise 19	197
Table of Cases	199
Index	203

Introduction to the Modular Casebook Series

By now you have realized that the course materials assigned by your instructor have a very different form than traditional casebooks. The *Modular Casebook Series* is intentionally designed to break the mold. Course materials consist of one or more separate volumes selected from among a larger set of volumes. Each volume is relatively short so that an instructor may “mix and match” a suitable number of volumes for a course of varying length and focus.

Each volume is also designed to serve an instructional purpose rather than as a treatise; as a result, the *Modular Casebook Series* is published in soft cover. Publication of the separate volumes in soft cover also permits course materials to be revised more easily so that they will incorporate recent developments. Moreover, by purchasing only the assigned volumes for a given course, students are likely to recognize significant savings over the cost of a traditional casebook.

Traditional casebooks are often massive tomes, frequently exceeding 1,000 or even 1,500 pages. Traditional casebooks are lengthy because they attempt to cover the entire breadth of material that *might* be useful to an instructor for a two-semester course of five or six credits. Even with six credits, different instructors will cover different portions of a traditional casebook within the time available. As a consequence, traditional casebooks include a range of materials that may leave hundreds of unexplored pages in any particular six-credit class. Especially for a student in a three or four credit-course, such a book is hardly an efficient means of delivering the needed materials. Students purchase much more book than they need, at great expense. And students carry large, heavy books for months at a time.

Traditional casebooks are usually hard cover publications. It seems as though they are constructed to last as a reference work throughout decades of practice. In fact, as the presence of annual supplements to casebooks makes clear, portions of casebooks become obsolete shortly after publication. Treatises and hornbooks are designed to serve as reference works; casebooks serve a different purpose. Once again, the traditional format of casebooks seems to impose significant added costs on students for little reason.

The form of traditional casebooks increases the probability that the content will become obsolete shortly after publication. The publication of lengthy texts in hardcover produces substantial delay between the time the author completes the final draft and

the time the book reaches the hands of students. In addition, the broader scope of material addressed in a 1,600 page text means that portions of the text are more likely to be superseded by later developments than any particular narrowly-tailored volume in the *Modular Casebook Series*. Because individual volumes in the *Modular Casebook Series* may be revised without requiring revision of other volumes, the materials for any particular course will be less likely to require supplementation.

Most importantly, the cases and accompanying exercises in the *Modular Casebook Series* provide students with the opportunity to learn and deploy the standard arguments in the various subject matters of constitutional law. Each case is edited to emphasize the key arguments made by the Court and justices. For instance, in many older cases, headings were added to note a new or related argument. Furthermore, the exercises following each case focus on identifying and critiquing the Court's and justices' arguments. The exercises also form the basis for rich class discussion. All of this introduces students to the most important facet of constitutional law: the deployment of standard arguments in each doctrinal context and across constitutional law doctrines.

We hope you enjoy this innovative approach to course materials.

Acknowledgments

We thank Tom Odom for proposing and initiating the Modular Casebook Series, and for inviting us to participate in the Series, and, for research leave and support, to the Elon University School of Law, the Jamie Lloyd Whitten Chair of Law and Government Endowment at the University of Mississippi School of Law, and the University of Toledo College of Law. Without our wives' and children's loving support, this project would not have been completed.

Preface to the Third Edition

Technological improvements permit the compilation of resources in a manner unthinkable when we were law students. Materials that permit further examination of assigned reading can be delivered in a cost-effective manner and in a format more likely to be useful in practice than reams of photocopies.

With regard to assigned reading, there is no good reason to burden students with stacks of hand-outs or expensive annual supplements. Publication through the *Modular Casebook Series* ensures that even very recent developments may be incorporated prior to publication. Moreover, if important cases are decided after publication of the latest edition of a volume, they will be included on the series website www.federalconstitutionallaw.com. Cases and materials that shed additional light on matter in the hard-copy casebook are also included on the website.

We welcome comments from readers so that we may make further improvements in the next edition of this publication.

Scott W. Gaylord
Christopher R. Green
Lee J. Strang

Technical Note from the Editors

The cases and other materials excerpted in this Volume have been edited in an effort to enhance readability. Citations of multiple cases for a single proposition have been shortened in many places to reference only one or two prominent authorities. In some places, archaic language or spelling has been revised. Headings were added to some of the longer decisions to permit ease of reference to various parts of the opinion. Such headings may also assist the reader in identifying a transition from one point to another.

Cases have been edited to a suitable length. In order to achieve that result, many interesting but tangential points have been omitted. The length of some opinions also hindered the inclusion of excerpts from concurring or dissenting opinions. Where such opinions have been omitted, it is noted in the text.

In editing these cases, we have not indicated the portions of cases we deleted unless such deletion with the absence of ellipses would have been misleading. However, any time we inserted material into a case, we indicated the insertion with the use of brackets.

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Christopher R. Green
Lee J. Strang

Introduction to Volume 1

This is Volume 1 of a six volume series of case books on federal constitutional law. Volume 1 has two primary goals. First, it introduces you to the five key forms of argument in constitutional law. Second, it reviews the primary legal doctrines governing the exercise of Article III “judicial Power” by federal courts.

A. The Five Forms of Argument in Constitutional Law

American constitutional law has, at its core, a written text. The Constitution of the United States is in the National Archives, and to it all government officers, federal and state, swear an oath.¹ This text-centric focus of the American legal system strongly influences how American judges, legal scholars, and lawyers, interpret the Constitution.

American lawyers characteristically use five forms or types of legal argument to interpret the Constitution: (1) text; (2) structure; (3) historical setting; (4) tradition; and (5) judicial precedent. The Constitution’s text is the first and most powerful form of argument. Typically, and with rare exception,² if the Constitution’s text requires an outcome, then that is the appropriate result. The other four forms of argument ostensibly aim to provide more information about what the Constitution’s text means. All else being equal, the more forms of argument that one can muster in favor of one’s interpretation of the Constitution’s text, then that position is more powerful.

Think of these forms of argument as the lawyer’s “toolkit” to interpret the Constitution. Your goal is to become adept at utilizing these forms of argument. To do so, you will need to be able to recognize these five forms of argument and, more importantly, deploy them to support your—and, in the future, your client’s—position.

You will learn the five forms of argument in **Chapters 1–5**, as you cover the formative documents and historical influences on the American Constitution generally and federal “judicial power” in particular. For instance, you will see how the Supreme Court moved toward exercising the power of constitutional judicial review in *Marbury*

1. U.S. CONST., art. VI, cl. 3; *see also* Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) (arguing that officer oath-taking commits those officers to following the written Constitution’s original meaning).

2. There are few scholars, individual justices, and Supreme Court opinions that acknowledge deviations between the Constitution’s text and the respective scholar’s, justice’s, or Court opinion.

v. Madison, 5 U.S. (1 Cranch) 137 (1803), and the various forms of argument it used to justify its exercise of that important power.

B. Federal “Judicial Power”

Article III of the United States Constitution grants “[t]he judicial Power of the United States” to the Supreme Court and lower federal courts.³ Article III’s grant of authority to the federal courts extends to “cases” and “controversies.”⁴ The Supreme Court has articulated a set of doctrines explaining the scope of “judicial Power.” **Chapter 6** focuses directly on the Supreme Court’s modern doctrine governing federal court exercise of “judicial Power.” Each of these doctrines defines a limit on federal judicial power. **Chapter 6** reviews what are known as the justiciability doctrines that implement Article III’s ban on advisory opinions. Part A covers the doctrines called constitutional and prudential standing. You will also learn the related doctrines governing mootness and ripeness. Part B reviews Congress’ ability to control federal court exercises of judicial power. You will learn to what extent Congress may exercise control over federal judicial power and decisions.

At this point in the course, you will have learned that federal courts possess the power of constitutional judicial review. You will also know from **Chapter 6** the various current doctrines limiting federal courts’ exercise of that power. Yet, this leaves a relatively broad field for federal courts to exercise judicial power, a field too broad for many justices (and many Americans off the Court as well). As a result, the Supreme Court has crafted a number of doctrines and practices that further confine its exercise of “judicial Power.” These include standards of review, the practice of judicial restraint, the political question doctrine, and *stare decisis*. These subjects are covered in Part C.

C. A Note about Constitutional Law in the Law School Curriculum

Standard law school courses in constitutional law typically cover a subset of constitutional issues. Your course is no exception. The focus of Volumes 1–4 is on the structure of the government established by the Constitution and the powers held thereunder by the respective three branches of government. Volume 1 covers federal judicial power, Volume 2 examines federal executive power and the important principle of separation of powers, and Volume 3 reviews federal legislative authority. Volume 4 turns to the impact of the federal structure of our country on the respective powers of the federal and state governments, and their interrelationship.

Volumes 5 and 6 turn their attention from federal powers and structure to individual constitutional rights. Volume 5 covers the doctrines of incorporation, sub-

3. U.S. CONST., art. III, § 1.

4. *Id.* § 2.

stantive due process, and equal protection, all grounded in the Fourteenth Amendment. Volume 6 covers the related First Amendment doctrines of freedom of speech, religious exercise, and the Establishment Clause.

The scope of constitutional law doctrine is extremely broad and permeates a substantial portion of the law school curriculum. Many important subjects must await more specialized courses addressing other facets of the Constitution. For example, in Civil Procedure, students likely encountered the Due Process Clause in the study of personal jurisdiction, the Seventh Amendment in the determination of when matters must be tried by a jury, and the Full Faith and Credit Clause in examining the bases for certain preclusion doctrines. Similarly, students are more likely to study the Takings Clause in a course on Property. In a course on Criminal Procedure, much of the focus is on the provisions of the Fourth, Fifth, and Sixth Amendments. Our course addresses foundational matters not likely to be covered in depth in other courses.

