

American Constitutional Law and History

American Constitutional Law and History

THIRD EDITION

Michael S. Ariens

ALOYSIUS A. LEOPOLD PROFESSOR OF LAW
ST. MARY'S UNIVERSITY SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2023
Michael S. Ariens
All Rights Reserved

LCCN 2023934987
ISBN 978-1-5310-2724-7
eISBN 978-1-5310-2725-4

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

For my students

Contents

Preface to Third Edition	xv
Preface to Second Edition	xvii
Preface	xix
Articles of Confederation	xxiii
The Constitution of the United States	xxxix
Timeline of Events in American Legal and Political History	xlvi
Biographies of Selected Justices of the Supreme Court	lxvii
Chapter 1 · The Constitution and Judicial Power	3
A. Background to the Creation of the Constitution	3
B. Judicial Review	7
1. Review of Federal Action	7
<i>Marbury v. Madison</i>	11
2. Judicial Review of State Actions	22
C. Modes of Constitutional Interpretation	24
1. Historical Background	24
<i>Calder v. Bull</i>	24
2. Sources of Constitutional Interpretation	27
a. Text	28
b. History	29
c. Structure	30
d. Precedent	31
e. Consensus	31
f. Purposes	32
3. The Modern Court and Constitutional Interpretation	33
<i>District of Columbia v. Heller</i>	33
D. The Limits of the Judicial Power	62
1. Justiciability	62
a. Standing	63
<i>Allen v. Wright</i>	66
b. Political Question Doctrine	77

i. Introduction	77
<i>Baker v. Carr</i>	78
2. Congressional Limitations on Federal Judicial Power	87
<i>Ex Parte McCordle</i>	90
E. The Work of the Supreme Court	91
Chapter 2 · Federal Legislative Power	93
A. The Meaning of Enumerated Powers	93
1. The Necessary and Proper Clause	94
<i>McCulloch v. Maryland</i>	96
B. Commerce Power	115
1. Historical Background	115
2. Early Judicial Interpretation of Commerce: Rise And Fall	116
a. Regulating Commerce	116
<i>United States v. E.C. Knight Co.</i>	116
b. Prohibiting Interstate Commerce	125
<i>Champion v. Ames (The Lottery Case)</i>	125
c. Raising The Stakes	132
<i>A.L.A. Schechter Poultry Corp. v. United States</i>	
(Sick Chicken Case)	133
d. Doctrinal Retreat and Abandonment	138
<i>NLRB v. Jones & Laughlin Steel Corp.</i>	141
<i>Wickard v. Filburn</i>	147
e. Civil Rights and the Commerce Clause	151
3. The Re-Emergence and Retreat of Commerce Clause Limitations	152
<i>United States v. Lopez</i>	152
<i>National Federation of Independent Business v. Sebelius</i>	175
C. Immunity from Federal Regulation	198
<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	199
<i>Printz v. United States</i>	210
D. Other Congressional Powers	221
1. Taxation And Spending	221
<i>National Federation of Independent Business v. Sebelius</i>	223
2. Treaty and War Powers	240
3. Power to Enforce Amendments by Appropriate Legislation	241
Chapter 3 · Separation of Powers	243
A. Introduction	243
B. Presidential Power	244
<i>Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)</i>	246
<i>NLRB v. Noel Canning</i>	265
1. Presidential Power, Appointments and Removals, and Independent Agencies and Inferior Officers	283
C. Presidential Immunities	290
<i>United States v. Nixon</i>	294

<i>Clinton v. Jones</i>	299
D. Congress's Power	307
1. The Administrative State	307
2. Non-Delegation Doctrine	308
3. Legislative Veto	309
<i>Immigration and Naturalization Service v. Chadha</i>	310
E. Separation of Powers and Foreign Policy	320
1. General Principles	320
<i>United States v. Curtiss-Wright Export Corp.</i>	320
2. War Powers Resolution	322
3. War, Terrorism, and Separation of Powers	323
<i>Hamdi v. Rumsfeld</i>	324
Chapter 4 · National Markets, State Regulations, and Judicial Review	347
A. Introduction	347
B. Dormant Commerce Clause	349
1. Historical Background	349
2. Dormant Commerce Clause Theory and Test	351
a. Theory	351
b. Doctrine	354
3. Modern Doctrinal Development	355
a. Protectionism and Discrimination	356
<i>City of Philadelphia v. New Jersey</i>	356
b. Facially Neutral Statutes That May Discriminate	364
<i>Hunt v. Washington State Apple Advertising Comm'n</i>	364
c. Facially Neutral Laws That Are Non-Discriminatory	371
<i>South Carolina State Highway Department v. Barnwell Bros.</i>	371
<i>Southern Pacific Co. v. Arizona</i>	375
<i>Kassel v. Consolidated Freightways Corp.</i>	380
d. The Market Participant Exception to the Dormant Commerce Clause	390
<i>South-Central Timber Development, Inc. v. Wunnicke</i>	391
C. Privileges and Immunities Clause of Article IV, § 2	395
1. Citizens	396
2. Privileges and Immunities	396
3. "Of the Several States"	396
4. Doctrine	396
<i>United Building and Construction Trades Council v. Camden</i>	397
5. Standard of Appellate Review	404
Chapter 5 · Individual Rights, Incorporation, and the State	
Action Doctrine	405
A. Introduction	405
B. Incorporation	406
1. Before the Civil War	407

<i>Barron v. Baltimore</i>	407
2. The Privileges or Immunities Clause of the Fourteenth Amendment	409
<i>The Slaughter-House Cases</i>	410
3. Successful Incorporation	423
<i>Palko v. Connecticut</i>	425
<i>Adamson v. California</i>	427
C. The State Action Doctrine	435
1. Historical Antecedents	435
<i>The Civil Rights Cases</i>	435
D. Modern Definitions of “State” Action	440
1. The Public Function Doctrine	441
<i>Jackson v. Metropolitan Edison Co.</i>	443
2. Entanglement Doctrine	448
<i>Shelley v. Kraemer</i>	448
3. State Action and Discriminatory Peremptory Challenges	453
Chapter 6 · Due Process	455
A. Introduction	455
B. Procedural Due Process	455
1. Deprivation of Life, Liberty or Property	456
C. Substantive Due Process	457
1. Introduction	457
2. Historical Antecedents	460
3. The <i>Lochner</i> Era	462
<i>Allgeyer v. Louisiana</i>	462
<i>Lochner v. New York</i>	467
<i>Nebbia v. New York</i>	479
4. The Switch in Time?	484
<i>West Coast Hotel Co. v. Parrish</i>	484
5. The Re-Emergence of Substantive Due Process	490
<i>Skinner v. Oklahoma ex rel. Williamson</i>	491
<i>Williamson v. Lee Optical</i>	494
<i>Griswold v. Connecticut</i>	497
<i>Roe v. Wade</i>	510
a. Due Process Liberty and Abortion	520
b. Sexual Autonomy and the Right to Privacy	529
<i>Lawrence v. Texas</i>	531
c. Marriage and the Right to Privacy	542
<i>Loving v. Virginia</i>	542
d. Family and the Right to Privacy	547
<i>Moore v. City of East Cleveland</i>	547
e. The Right to Die	554
<i>Washington v. Glucksberg</i>	555

6. Same-Sex Marriage, Marriage Equality, and Positive Rights	571
<i>Obergefell v. Hodges</i>	572
7. The End of <i>Roe</i>	598
<i>Doobbs v. Jackson Women’s Health Organization</i>	598
8. Due Process and Equal Protection	624
<i>San Antonio Independent School District v. Rodriguez</i>	625
D. Takings Clause	642
1. Is The Property “Taken”?	643
<i>Pennsylvania Coal Co. v. Mahon</i>	644
2. Is It Taken For A Public Use?	649
<i>Kelo v. City of New London</i>	650
3. Is The Compensation Just?	659
E. Contracts Clause	659
<i>Home Building & Loan Ass’n v. Blaisdell</i>	660
Chapter 7 · Equal Protection	669
A. Introduction	669
1. Ends and Means	671
2. Equal Protection Analysis	674
B. Rational Basis Review	675
1. The Standard Approach	675
<i>Railway Express Agency, Inc. v. New York</i>	675
<i>New York City Transit Authority v. Beazer</i>	679
2. Rational Basis with a Bite	682
<i>Romer v. Evans</i>	683
C. Race-Based Classifications	693
1. Historical Background	693
<i>Plessy v. Ferguson</i>	695
2. Strict Scrutiny in Racial Classification Cases	705
<i>Korematsu v. United States</i>	706
3. The End of Jim Crow	712
<i>Brown v. Board of Education</i>	713
<i>Brown v. Board of Education (Brown II)</i>	715
4. De-Segregating Public Schools	716
5. Proving Discrimination When the Law Is Facially Neutral	717
<i>Washington v. Davis</i>	718
6. How to Prove Discriminatory Purpose	723
<i>Village of Arlington Heights v. Metropolitan Housing</i>	
<i>Development Corp.</i>	724
D. Affirmative Action	727
<i>Fisher v. University of Texas at Austin</i>	739
E. Gender Discrimination	762
<i>Craig v. Boren</i>	764
<i>Michael M. v. Superior Court</i>	773

<i>Mississippi University for Women v. Hogan</i>	778
<i>United States v. Virginia</i>	783
F. Other Forms of Discrimination and Heightened Scrutiny	794
1. Alienage	794
<i>Cabell v. Chavez-Salido</i>	795
2. Children of Unmarried Parents	805
Chapter 8 · Freedom of Speech, Association and Press	807
A. Introduction	807
1. Historical Background	807
2. Why Freedom of Speech?	808
3. Is the State Regulating the Content of the Speech?	809
4. Where May Speakers Speak?	815
5. Vagueness and Overbreadth	817
a. Vagueness	817
b. Overbreadth	817
B. Content-Based Regulations of Speech	818
1. Inciting Illegal Activity	820
<i>Schenck v. United States</i>	821
<i>Frohwerk v. United States</i>	823
<i>Debs v. United States</i>	825
<i>Abrams v. United States</i>	827
<i>Dennis v. United States</i>	834
<i>Brandenburg v. Ohio</i>	845
a. True Threats	847
2. Fighting Words	849
<i>Chaplinsky v. New Hampshire</i>	849
a. Group Libel	851
<i>Beauharnais v. Illinois</i>	851
b. Hate Speech	857
<i>Virginia v. Black</i>	858
3. Defamation	868
<i>New York Times Co. v. Sullivan</i>	868
4. Obscenity and Pornography	880
a. Defining Obscene Speech	880
<i>Miller v. California</i>	881
<i>Paris Adult Theatre I v. Slaton</i>	886
b. Child Pornography	892
<i>New York v. Ferber</i>	892
c. Secondary Effects of Sexually Oriented Speech	895
<i>City of Los Angeles v. Alameda Books, Inc.</i>	897
5. Offensive Speech	906
<i>Cohen v. California</i>	906
<i>Federal Communications Commission v. Pacifica Foundation</i>	911

6. Commercial Speech	921
<i>Virginia State Board of Pharmacy v. Virginia Citizens</i>	
<i>Consumer Council, Inc.</i>	922
<i>44 Liquormart, Inc. v. Rhode Island</i>	934
7. Conduct That Communicates	943
a. The Test of Symbolic Speech	943
b. Free Speech and the American Flag	945
<i>Texas v. Johnson</i>	945
8. Religious Speech	957
C. Prior Restraints	958
<i>New York Times Co. v. United States</i> (The Pentagon Papers Case)	959
D. Electoral Politics, Money, and Speech	971
1. Campaign Announcements, Promises, and Pledges	972
<i>Williams-Yulee v. Florida Bar</i>	975
2. Money, Politics and Speech	987
E. Freedom of Association	990
1. Requiring Disclosure of Membership	991
<i>National Association for the Advancement of Colored</i>	
<i>People v. Alabama ex rel. Patterson</i>	991
2. Laws Prohibiting Discrimination by Private Associations	995
3. Compelled Association	997
<i>Janus v. AFSCME</i>	999
F. Freedom of Press	1010
<i>Branzburg v. Hayes</i>	1011
Chapter 9 · The Religion Clause	1019
A. Introduction	1019
1. Historical Background	1019
2. Theory of the Religion Clause	1023
a. Neutrality	1023
b. Separation	1025
c. Accommodation	1025
d. Voluntarism	1026
e. Federalism	1026
3. Categorization of Claims	1027
<i>Kennedy v. Bremerton School District</i>	1029
B. The Nonestablishment Clause	1047
<i>Everson v. Board of Education</i>	1048
<i>Van Orden v. Perry</i>	1073
C. The Free Exercise Clause	1088
<i>Sherbert v. Verner</i>	1090
<i>Employment Division v. Smith</i>	1098
<i>Trinity Lutheran Church of Columbia v. Comer</i>	1113
D. Defining Religion	1132

Bibliography	1139
Introduction	1139
Chapter 1	1141
Chapter 2	1143
Chapter 3	1145
Chapter 4	1146
Chapter 5	1146
Chapter 6	1147
Chapter 7	1149
Chapter 8	1150
Chapter 9	1152
Table of Cases	1155
Index	1173

Preface to Third Edition

The Supreme Court has issued a number of important decisions since the publication of the second edition of this casebook. The most important of these decisions are now principal cases in this third edition; other recent decisions are summarized and added as note cases. In order to keep this work at roughly the same length as the previous two editions, I have turned several older principal cases into note cases. I remain steadfast in believing law students are best served by reading and assessing arguments made in Supreme Court decisions in a detailed fashion. I have edited several principal cases to maintain those arguments while minimizing their length. Tables, charts, timelines, and figures are also included to allow students better to visualize and organize often-complex doctrines.

The relative instability of constitutional law requires teachers of Constitutional Law to teach more than doctrine. I continue to ask students to read the cases and recognize, examine, and dissect the recurring types of legal arguments made in Supreme Court opinions. I also believe students will better understand the current Court's decisions if they can study them in light of American history. This permits students better to understand legal formalism, legal realism, and their successors. In the time between this and the previous edition, the Court has more pointedly adopted a "historical" lens to its "originalist" and "textualist" interpretations of constitutional text.

My thanks to student assistants Jade Smith, Austin Havens, and Emilia Garanzuay for their excellent work in shaping this edition.

Before she retired, Maria Vega organized all the tables, charts, and figures for inclusion. Maria has been a wonderful collaborator on this project, and I trust she will enjoy a long and joyful retirement. As is always the case, my wife Renée was instrumental in my completing this edition. The curiosity and intense interest my Constitutional Law students have shown for this fascinating topic has again made my editing job easier. All errors are mine alone.

Michael S. Ariens
September 2022

Preface to Second Edition

The Supreme Court has issued a number of important decisions since the publication of the first edition. To avoid simply adding more to the book, I have taken a number of cases excerpted in the first edition and made them note cases. I have also worked to minimize in length many principal cases, though I continue to believe it is in the interests of students of Constitutional Law to wrestle with the detailed arguments of the opinions of the majority and dissenters. I have also tried to offer thorough but succinct explanations of the course of the Court's decisions, which has resulted in re-writing a number of the Afterwords. In addition, I have added several more Timelines for the sake of clarity, and included some more tables and charts for those students who, like me, appreciate an occasional visual depiction of the law.

Constitutional Law courses must teach more than doctrine. I remain a true believer in the power of teaching students how to recognize, examine, and dissect the recurring types of legal arguments made in Supreme Court opinions to persuade the reader. I also believe it is crucial for students to better appreciate the influence of American history on the Court's work and decisions, particularly to understand formalism and realism, and their successors. Further, students understand the crooked course of Constitutional Law when they are given repeated exposure to the six generally accepted modes of constitutional interpretation.

Because I believe the approach taken in the first edition offers a number of benefits for students, particularly 1L students, I have maintained the same approach: this book is not a compendium, it is designed for students to learn some of the same lessons in a number of different chapters, it includes an Afterword rather than Notes and Comments, it emphasizes the authors of the cases and their jurisprudential views, and it avoids citing secondary authorities in the text.

Thanks to my wife Renée for again helping me complete this project. Thanks again also to Maria Vega for getting the book in printable shape. Thanks to my Constitutional Law students, whose questions, comments, thoughts and ideas have made me think often and hard about communicating this difficult material to them. Thanks to my research assistants Dorian Ojemen, Stephanie Green, Mitchell Gonzales and Sumner Macdaniel for their work in getting the second edition ready for publication. They regularly demonstrated why they will make great lawyers, and why I am blessed to teach at St. Mary's University School of Law. All errors are my responsibility.

Michael Ariens
March 2016

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

