LexisNexis Law School Publishing Advisory Board

Charles P. Craver  
Freda H. Alverson Professor of Law  
The George Washington University Law School

Richard D. Freer  
Robert Howell Hall Professor of Law  
Emory University School of Law

Craig Joyce  
Andrews Kurth Professor of Law &  
Co-Director, Institute for Intellectual Property and Information Law  
University of Houston Law Center

Ellen S. Podgor  
Professor of Law  
Stetson University College of Law

Paul F. Rothstein  
Professor of Law  
Georgetown University Law Center

Robin Wellford Slocum  
Professor of Law & Director,  
Legal Research and Writing Program  
Chapman University School of Law

Charles J. Tabb  
Alice Curtis Campbell Professor of Law  
University of Illinois College of Law

Judith Welch Wegner  
Professor of Law  
University of North Carolina School of Law
ACKNOWLEDGMENTS

A number of people helped us produce this Fifth Edition of this casebook. We would like to thank Kathleen Spartana for her outstanding editing and administrative help and research assistants Lea Ann Carlisle, John J. Greffet, Merideth Helgeson, Laura Kemp, Nancy McCahan, Mark Murray, Elizabeth Stewart Raines, Susan Southerland, and Heather Stobaugh for their significant contributions, and Mary Dougherty, Tina Brosseau and Rachael Short for their help in organizing and typing the book. As always, we appreciate the institutional support of Dedman School of Law at Southern Methodist University; Saint Louis University School of Law; and Wachtell, Lipton, Rosen & Katz. Pali Chheda of LexisNexis helped edit this Fifth Edition.

Bernard Schwartz co-authored the first three editions of this book. He died on December 23, 1997 and accordingly did not work on subsequent editions. He was a giant among those who follow the Supreme Court’s work and who interpret the Constitution, and he is greatly missed.

Joel Goldstein is primarily responsible for the first six chapters. John Attanasio and Norman Redlich prepared chapters 7 to 16.

Norman Redlich

John Attanasio

Joel K. Goldstein

March 2008
PREFACE

I

This book aims to present Constitutional Law in the grand tradition. More than 200 years after its adoption, the United States Constitution continues to provide the basic framework against which many of our problems are addressed. The enterprise of constitutional interpretation involves government officials in all three branches yet judges play a unique role. The judicial review power distinguishes American judges from those of many other lands. Many other nations have now adopted it.

The power is truly awesome. Six citizens — five members of the Supreme Court and one person challenging a law — can trump the wishes of popular majorities and lead to a rule of constitutional law binding on other branches of government and the nation at large. Constitutional jurisprudence is riveting, too, due to the nature of the questions it routinely addresses. These involve the basic structure of our government and our fundamental values as a society and as a culture. Indeed, we live in an age when the Supreme Court routinely encounters issues that engage deep questions of political morality.

We have tried to provide a book that will acquaint readers with constitutional law primarily as it is practiced in courts. We consciously provide readers with tools to recognize and assess the available types of constitutional arguments made in cases, and those that might have been advanced. The constitutional issues the Court addresses often involve deep questions of ethics or political theory. We have tried to organize this book in a way which would encourage students to explore those questions.

We think, too, that cases are important teaching devices. We have erred on the side of retaining the justices’ language rather than editing it out and have included important concurrences and dissents. This approach helps educate students about the Court’s thinking by allowing the justices to speak for themselves. It also helps redirect the focus away from narrow holdings and toward the reasoning that drives constitutional adjudication. Retaining more of the case serves several other important functions. We include the logical steps of the Court’s analysis so the reader can understand the cases more thoroughly, and more quickly. The cases include more of the reasoning of the justices on issues that grow ever more complex. The inclusion of more dicta from the opinions helps the reader make sense of “the law” when decisions are the product of several opinions. Inclusion of this material also helps to predict future decisions in an era when it is growing more necessary to know the views of individual justices. Inclusion of dissents and concurrences provides a dynamic point of departure for classroom discussion as students have already been exposed to a variety of views in their reading. It also suggests the dynamics of constitutional law as students see that the dissents of one generation command majorities in other days.

The Fifth Edition remains faithful to the scheme of the first four. In order to maintain a manageable length while continuing to give a more complete view of what the justices think, we present many important cases as long notes. These notes quote profusely from the opinions of the justices; they extensively review not only majority opinions but also concurrences and dissents. While the principal cases remain less heavily edited than those of other books, they have been pruned to some extent. We also have added many more references to scholarly works with parentheticals designed not so much to summarize the work as to provoke thoughts.
PREFACE

and discussion. The ellipse structure is streamlined; for example, we often omit citations without notice.¹

We have tried to make this book one which a range of readers will find accessible. We hope it allows them to share our passion for, and fascination with, constitutional law. For the reader’s convenience, we provide a brief roadmap or overview of where we are going.

II

The book begins by examining the fundamental building block of the course, the power of judicial review. The power of courts to review the constitutionality of decisions of government is fundamental and all but a few of the cases in this book involve exercises of this power. Chapter I reviews the basic organization of the Federal court system and Congress’ role in creating Federal courts and in establishing their jurisdiction. Chapter I exposes students to the power of judicial review and the limitations on the judiciary. This includes treatment of the extent to which Congress can limit the jurisdiction of the Supreme Court. Chapter I also explores justiciability, constitutional or prudential reasons why a Federal court may refuse to hear a constitutional or other challenge. Included are basic doctrines involving advisory opinions, mootness, ripeness, standing, and political questions. As with all chapters, we expose students to the types of arguments courts use to shape the doctrine and try to present sufficient material to allow them to shape their views.

The discussion of the court system and the power of judicial review is a fundamental building block for the entire course. At the same time, it also involves the structure of one branch of American government. The Framers intended to disperse power among various government entities. They viewed dispersing governmental authority as an important means of preventing tyranny. In the Federalist Papers, James Madison said:²

‘‘[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department, the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.’’

Not vesting sovereignty in a single governmental authority, like a king, presents a complex set of problems. Most important, what are the boundary lines between these various

¹ Ellipses frequently depart from bluebook form. When an ellipses appears, it only signifies that some material is omitted. For example, an ellipses at the end of a paragraph may mean that the rest of that paragraph is missing, or only that subsequent paragraphs are missing, or that both the remainder of that paragraph and subsequent paragraphs are missing. Moreover, if a paragraph begins with bracketed material, it indicates that some material in the beginning of the paragraph has been omitted.

governmental entities? Moreover, who sets these boundary lines between various governmental entities? The next few chapters explore the dispersal of power among the three branches of the federal government (the doctrine of separation of powers) and the division of power between the national government and the states (the doctrine of federalism).

Chapter II analyzes the constitutional authority of the United States Congress. After contrasting enumerated and implied powers, the chapter takes up several of Congress’ constitutionally enumerated powers. Congressional powers explored include the Commerce Power, the Taxing Power, the Spending Power and Treaty Power. These topics all have implications for separation of powers theory in that they all involve the division of authority between Congress and the other branches of the national government. Still, the cases treating the powers of Congress generally focus on federalism issues; that is, they focus on the division of regulatory authority between Congress and the states.

Emphasizing federalism concerns, Chapter III treats the extent to which the United States Constitution limits the power of Congress to regulate, thereby leaving regulatory power to the States. To a great extent, Chapter III focuses on the Tenth and Eleventh Amendments and structural arguments that have shaped the pertinent doctrine.

Chapter IV continues to focus on federalism issues but turns to examine the extent to which the United States Constitution limits the regulatory powers of the several states. It begins by discussing the fundamental notion that laws and regulations promulgated by the national government are supreme over competing exercises of regulatory power by the states. The chapter proceeds to examine whether there are any limits on the supremacy of the national government itself in the way of directly regulating the states. It then turns to examine intergovernmental tax and regulatory immunities, briefly explores interstate relationships, and concludes by examining the constitutional limits on the ability of the states to regulate interstate commerce. This so-called “dormant commerce clause” jurisprudence is rather extensive and consequently is treated in some detail.

Chapter V returns to separation of powers issues to examine the powers of the executive branch of the national government. The seminal Youngstown case is advanced to the beginning of the chapter and presented in greater length because of its centrality. Principal areas examined are authority over domestic and international affairs, and the role as commander-in-chief of the armed forces. In the domestic realm, the chapter explores the President’s legislative powers and administrative powers. In connection with the international arena, we explore the foreign affairs power, the power to make executive agreements, and the commander-in-chief authority. The chapter concludes with some fascinating interbranch collisions focused on the Presidency. These include cases dealing with presidential privileges and immunities and cases raising more general themes regarding separation of powers.

The first five Chapters of the book are concerned with structure of government issues revolving around the twin themes of federalism and separation of powers. Chapters VII to XVI focus on individual rights and liberties issues. Chapter VI is the transition to individual rights issues. Specifically, this chapter treats the congressional powers to enforce individual rights using the Thirteenth, Fourteenth, of Fifteenth Amendments to the Constitution — the post-Civil War amendments. These amendments dramatically shifted regulatory power away from the states in favor of the national government. Consequently, the amendments clearly implicate federalism concerns. For example, congressional enforcement of individual rights and liberties stands in some tension with the Supreme Court’s role as arbiter of the Constitution, particularly if Congress uses its enforcement power to define the scope of a
PREFACE

constitutional right. These congressional enforcement powers thus also raise important separation of power issues.

By combining separation of powers, federalism, and individual rights issues, Chapter VI serves as a natural transition between the first five chapters of the book which focus on structure of government questions and the last ten which focus on individual rights and liberties issues. This transition also nicely illuminates several important larger points about constitutional analysis. For example, it illustrates that notwithstanding the Court’s role as arbiter of the Constitution, other branches of government have authority to enforce the document as well. More importantly, the chapter illuminates the artificiality of rigidly distinguishing between issues of government structure, and issues of individual rights and liberties. The Framers certainly did not create any such stringent distinction. Their design contemplated the protection of individual rights through a government structure that divided power among many different persons and entities. Along with judicial enforcement of rights, this structure prevented impairments of individual rights through unchecked abuse of government power. Moreover, many individual rights decisions have deep structure of government implications. For example, many raise questions about the proper scope of the power of the courts in our constitutional scheme. Some cases, involving such issues as busing or election redistricting, have even more direct federalism or separation of powers implications.

Chapter VI also introduces the critical concept of state action. With rare exceptions, the Constitution only applies to the activities of government. While involvement by the government is a prerequisite for nearly all causes of action arising under the Constitution, such involvement is necessarily present in virtually all structure of government cases. Consequently, the concept of state action is not introduced until this point in the book. Without state action of some sort, no constitutional cause of action generally exists.

Chapter VII focuses on the Due Process Clauses of the Fifth and Fourteenth Amendments. These Clauses prohibit the government from depriving persons of “life, liberty, or property without due process of law.” These Clauses have been interpreted by the Supreme Court to protect various categories or kinds of rights. Some of these rights have been more oriented toward property or economics; others involve more personal liberties, such as the right of the accused explicitly guaranteed by the Bill of Rights, or in such other areas as childbearing and child rearing. Some of the rights that the Court has grounded in the Due Process Clauses have largely procedural content, while others are substantive. In the course of the chapter, several additional provisions of the Constitution relating to liberty or property rights are also discussed.

Chapter VII begins by overviewing many of the changes promulgated by the post-Civil War amendments from a judicial perspective rather than the primarily legislative focus of Chapter V. The scope of the changes brought by these amendments has been so vast that many commentators refer to their promulgation as the second framing period. The chapter proceeds briefly to review how the construction of the Due Process Clause of the Fourteenth Amendment incorporates against the states select provisions of the Bill of Rights. We will primarily focus on the selective incorporation against the states of the procedural guarantees afforded a person accused of committing a crime. Proceeding to focus on economic or property rights that are overtly substantive, the chapter explores the rise and fall of liberty of contract as guaranteed by the Court through the doctrine of substantive due process. In this section, we also explore modern economic or property rights afforded by the Court using the Contracts Clause of Article 1, Section 10, and the Takings Clause of the Fifth Amendment.
Turning to the modern Court’s revival of substantive due process, the chapter examines cases involving such matters as birth control, abortion, homosexuality and termination of life support systems. The chapter concludes by reviewing the constitutional protections for entitlements granted by the government.

The next four chapters deal with the Equal Protection Clause. With the important exception of the prohibition against titles of nobility, the emphasis on equality is of comparatively recent vintage in the American constitutional landscape. Indeed, the original document explicitly recognized slavery. Despite these ignominious beginnings, a rich jurisprudence of equality has evolved. Chapter VIII examines the developments in the area of racial discrimination. The chapter traces the downfall of segregation and continues by exploring busing and other remedies designed to dismantle segregated schools. It then examines some general themes, in particular, purposeful discrimination and suspect classes. Chapter VIII concludes by examining racial discrimination decisions applying these and other principles to such areas as employment, housing and zoning, voting, and the criminal justice system.

Chapter IX takes up a major, and more recent, theme in the Court’s equal protection jurisprudence — gender discrimination. The chapter begins by surveying the different attitudes that the Court has exhibited toward gender discrimination over time. In this section, we also review the Court’s struggle to settle on an appropriate standard to deal with these cases. The Court analyzes these cases using a “middle tier” level of scrutiny that is less exacting than the strict scrutiny standard used to review discrimination based on race or ethnicity. After treating some general themes in equal protection jurisprudence relating to gender, the chapter devotes separate sections to gender discrimination cases involving employment, government benefits, and pregnancy. Particularly difficult for the Court have been cases involving the constitutionality of allegedly benign discrimination programs, which are designed to compensate for past discrimination but are often criticized for falling prey to the same stereotypes that they are trying to combat.

Chapter X examines affirmative action. Many of the cases reveal the Court’s struggle with the powerful ideal that the law should be color blind and gender neutral, and the harsh reality that strict adherence to this ideal hampers efforts to redress the continuing effects of past discrimination. At times the Court has emphasized what might be called the nondiscrimination principle; at other times, it has allowed affirmative action for the historically disadvantaged. Separate sections of Chapter X deal with affirmative action in education and employment. To achieve a broader understanding of the Court’s affirmative action jurisprudence, we have included a few cases decided under Title VII of the Civil Rights Act of 1964, the principal statute dealing with racial, gender, and certain other forms of discrimination in employment. These Title VII cases shed additional light on the Court’s affirmative action jurisprudence under the Equal Protection Clause.

Concluding the discussion of equal protection, Chapter XI surveys a number of other theories under which litigants have brought, or the Court has granted, equal protection challenges. These theories generally fall into two categories. One concerns extending some form of suspect class status to other groups. The other tack engages a different strand of equal protection jurisprudence involving fundamental rights. This latter theory maintains that certain fundamental rights, such as the right of access to the appellate process, should be distributed equally — primarily irrespective of wealth. Some decisions incorporate both fundamental rights and suspect class analyses. Chapter XI begins by discussing whether the Court should extend some form of heightened scrutiny to such groups as aliens, illegitimates, the aged, the mentally retarded, homosexuals, and the poor. It proceeds to discuss the right to travel, and
equality in the political process. This latter subject involves such issues as political
gerrymandering. The discussion of the Equal Protection Clause concludes by surveying the
overwhelming majority of governmental actions involving economic or social policy questions
in which the Court exercises virtually no scrutiny and thus affords wide discretion to
governmental decisions.

The last five chapters of the book treat the rich jurisprudence of the First Amendment. Some
commentators consider this amendment the capstone of American liberties. The first four
chapters treat freedom of expression. Various commentators offer different justifications for
stringently protecting freedom of speech, but most agree that safeguarding the free flow of
information is essential in a democracy to empower the electorate to be able to make informed
decisions. Chapter XII traces the development of free speech jurisprudence and the theory
underlying it. This development largely evolved from cases pertaining to political speech and
association.

Surprisingly, First Amendment jurisprudence did not really develop until the time of the
First World War. From this starting point, Chapter XII recounts the celebrated dissents and
concurrences of Justices Holmes and Brandeis that laid the groundwork for strong protection
of freedom of speech. The chapter also discusses the stringent protection that the modern
Court affords freedom of speech and association. Continuing with the theme of political
speech and association, the chapter concludes by discussing the free speech rights of
government employees. This section treats such problems as patronage dismissals of
government employees, restraints on their political activity, and their ability to criticize the
government.

Although it has not been construed differently from the Free Speech Clause, the First
Amendment has a separate Press Clause. Chapter XIII treats the extensive body of free speech
jurisprudence relating to the print and broadcast media. The chapter treats such varied issues
as the doctrine against prior restraints, media access to the government, regulation and
taxation of the media, confidentiality of reporters’ sources, and defamation. Just as some of the
doctrines discussed in Chapter XII have applicability beyond political speech and association,
many of the doctrines in Chapter XIII have applicability beyond the media. Examples include
constitutional protection for defamatory speech, and constitutional proscription of prior
restraints against speech.

Even if one has strong rights to say whatever one chooses, these may be meaningless if one
does not have ready means through which to express one’s ideas. For those who do not own a
newspaper, an auditorium, or another medium of communication, expressing certain
unpopular ideas — or any ideas at all — may prove difficult. Chapter XIV treats public forum
analysis, the primary means by which First Amendment jurisprudence seeks to afford access to
the marketplace of ideas. The notion is that persons have a right to speak on certain
government property. Classic public forums include parks, streets, and sidewalks. After
tracing the development of public forum theory, the chapter first recounts the testing of that
theory during the civil rights movement, and then examines the modern approach to public
forum analysis which relates free speech rights to the character of the property where the
speech takes place. The chapter also reviews cases discussing certain special candidates for
public forum analysis, such as company towns, private shopping centers, and public schools.

Chapter XV discusses some special doctrines in the system of free expression. These are
expressive conduct (or symbolic speech), campaign expenditures, government funding of
speech activity, commercial speech, and pornography. Extending constitutional protection to
these various kinds of behavior poses special dangers and problems for First Amendment
PREFACE

jurisprudence. On the other hand, not affording constitutional protection to any of these areas poses dangers of another kind. The Court has sought to reconcile these difficulties by fashioning special doctrines for scrutinizing each of these areas. Generally, these doctrines afford less protection than First Amendment jurisprudence affords other forms of protected expression.

The last chapter of the book explores the other major pillar of the First Amendment, freedom of religion. Treating this topic last in no way reflects its importance in the constitutional scheme. Many people came to this nation seeking to escape religious persecution and secure freedom of conscience. The Constitution enshrined these aspirations in two provisions, the Establishment and the Free Exercise Clauses. The former prohibits the state from establishing religion; the latter prohibits the government from interfering with freedom of conscience and religious worship. As the cases indicate, the Clauses stand in some tension with each other. Specific topics treated in Chapter XVI include aid to religious schools, prayer in the public schools, displays of religious symbols, and Sunday closing laws. The book concludes with cases focusing on the free exercise of religion.

“Human history,” says H. G. Wells, “is in essence a history of ideas.” The great theme in the history of American Constitutional Law is the concept of law as a check upon public power. That idea has been given practical reality in the decisions of the Supreme Court of the United States. Those decisions are — to paraphrase Holmes — a virtual magic mirror in which we see reflected our whole constitutional development and all that it has meant to the nation. When one thinks on this majestic theme, the eyes dazzle: that is what Constitutional Law is all about. If only part of our feelings are communicated to those who use the book, we will be amply rewarded for our efforts.

Norman Redlich

John Attanasio

Joel K. Goldstein

March 2008
# Table of Contents

Acknowledgments ................................................................. v
Preface .................................................................................. vii

Chapter I JUDICIAL REVIEW: ESTABLISHMENT AND OPERATION . 1
§ 1.01 ESTABLISHMENT ................................................................. 1
*Marbury v. Madison* ................................................................. 1
Note On Historical Context Of *Marbury* .................................. 8
Notes On *Marbury* ................................................................. 10
§ 1.02 REVIEW OF STATE LAW ..................................................... 14
*Martin v. Hunter’s Lessee* .......................................................... 14
Notes On *Martin v. Hunter’s Lessee* ........................................... 18
§ 1.03 SUPREME COURT ORGANIZATION AND JURISDICTION . . . 20
  [1] Supreme Court Organization .............................................. 20
Notes ....................................................................................... 20
  [2] Supreme Court Original Jurisdiction .................................... 21
Notes ....................................................................................... 21
  [3] Supreme Court Appellate Jurisdiction ................................... 21
*Ex Parte McCardle* ................................................................. 21
Notes ON THE SUPREME COURT’S APPELLATE JURISDICTION . . . 23
§ 1.04 LOWER FEDERAL COURTS ORGANIZATION AND
  JURISDICTION .................................................................. 25
Notes ....................................................................................... 25
§ 1.05 NON-ARTICLE III COURTS ................................................... 26
*Palmore v. United States* .......................................................... 26
Notes on Non-Article III Courts ................................................... 29
§ 1.06 CASES AND CONTROVERSIES; JUSTICIABILITY
  DOCTRINE ................................................................... 30
  [1] Introduction .................................................................... 30
Notes ....................................................................................... 30
Notes On Advisory Opinions .................................................... 31
§ 1.07 STANDING .................................................................... 32
*Massachusetts v. Environmental Protection Agency* ................... 32
Notes ....................................................................................... 37
§ 1.08 RIPENESS; MOOTNESS .......................................................... 43
Notes ....................................................................................... 43
§ 1.09 POLITICAL QUESTIONS ......................................................... 47
*Goldwater v. Carter* ................................................................. 47
Notes ....................................................................................... 51
*Nixon v. United States* .............................................................. 53
# Table of Contents

Notes ........................................................................................................... 56

## Chapter II CONGRESSIONAL POWERS ........................................... 59

§ 2.01 ENUMERATED AND IMPLIED POWERS .................................. 59
*McCulloch v. Maryland* ............................................................................. 59
Notes ........................................................................................................... 59

§ 2.02 THE COMMERCE POWER ........................................................... 70
*Gibbons v. Ogden* .................................................................................. 70
Notes ........................................................................................................... 73

§ 2.03 COMMERCE POWER 1895-1936 ................................................. 74
[1] Productive Industries ........................................................................... 74
*United States v. E.C. Knight Co.* ............................................................ 74
Notes ........................................................................................................... 77

[2] Regulation versus Prohibition ............................................................. 79
*Champion v. Ames [Lottery Case]* .......................................................... 79
Notes ........................................................................................................... 81

Hammer v. Dagenhart [Child Labor Case] .................................................. 82
Notes ........................................................................................................... 84

*Carter v. Carter Coal Co.* ........................................................................ 85
Notes ........................................................................................................... 88

§ 2.04 COMMERCE POWER: MODERN APPROACHES ....................... 90
[1] “The Court Retreats to the Constitution” .............................................. 90
*National Labor Relations Bd. v. Jones & Laughlin Steel Corp.* .......... 90
Notes ........................................................................................................... 94

[2] The Commerce Clause from the 1940s: *Darby and Wickard* ......... 96
*United States v. Darby* ............................................................................ 96
Notes ........................................................................................................... 100

*Wickard v. Filburn* ................................................................................ 101
Notes ........................................................................................................... 103

[3] Commerce and Civil Rights ................................................................. 105
*Heart of Atlanta Motel, Inc. v. United States* ......................................... 105
Notes ........................................................................................................... 108

§ 2.05 THE COMMERCE CLAUSE: A NEW TURNING POINT? ............. 109
*United States v. Lopez* ......................................................................... 109
Notes ........................................................................................................... 120

*Gonzales v. Raich* .................................................................................. 121
Notes ........................................................................................................... 134

§ 2.06 TAXING POWER ........................................................................... 135
Notes ........................................................................................................... 135

§ 2.07 SPENDING POWER ...................................................................... 137
# Table of Contents

*United States v. Butler* ................................................................. 137  
Note .................................................................................. 140  
*South Dakota v. Dole* ............................................................... 140  
Notes ............................................................................. 142  
§ 2.08  TREATY POWER ................................................................. 143  
Notes ............................................................................. 143  
*Missouri v. Holland* ................................................................. 144  
Notes .................................................................................. 146  

## Chapter III  
LIMITS ON NATIONAL POWER OVER THE STATES  . . . . . . . . . . . 149

§ 3.01  RESERVED POWERS ................................................................. 149  
*U.S. Term Limits Inc. v. Thornton* .................................................. 149  
Notes ............................................................................. 157  
§ 3.02  THE STATES AND GENERALLY APPLICABLE LAWS ........... 158  
*Garcia v. San Antonio Metropolitan Transit Authority [SAMTA]* .... 158  
Notes ............................................................................. 166  
§ 3.03  COMMANDEERING THE STATES ........................................... 168  
*New York v. United States* ........................................................... 168  
Notes ............................................................................. 178  
*Printz v. United States* ............................................................... 179  
Notes ............................................................................. 180  
§ 3.04  IMMUNITY FROM SUIT ............................................................. 182  
*Seminole Tribe of Florida v. Florida* ................................................. 182  
Note on Dissents .............................................................................. 186  
Notes ............................................................................. 187  
*Alden v. Maine* .................................................................................. 189  
Notes .................................................................................. 191  

## Chapter IV  
FEDERALISM AND STATE REGULATORY POWER  . . . . . . . . . . . 195

§ 4.01  FEDERAL SUPREMACY ............................................................... 195  
*McCulloch v. Maryland* ............................................................... 195  
Notes .................................................................................. 198  
§ 4.02  FEDERAL REGULATORY IMMUNITY ...................................... 199  
Notes .................................................................................. 199  
§ 4.03  INTERGOVERNMENTAL TAX IMMUNITIES: FEDERAL IMMUNITY ................................................................. 200  
*United States v. New Mexico* .......................................................... 200  
Notes .................................................................................. 201  
§ 4.04  STATE TAX IMMUNITY ............................................................. 202  
*South Carolina v. Baker* ............................................................ 202
Table of Contents

Notes ............................................................................................................. 203
§ 4.05 COOPERATIVE FEDERALISM ...................................................... 204
United States Steel Corp. v. Multistate Tax Comm’n ................................... 204
§ 4.06 STATE REGULATION OF COMMERCE; THE DORMANT
COMMERCE CLAUSE ........................................................................... 205
[1] Historical Development ..................................................................... 205
Cooley v. Board of Wardens of the Port of Philadelphia ......................... 205
Notes ....................................................................................................... 207
[2] Protectionism ..................................................................................... 213
Philadelphia v. New Jersey ...................................................................... 213
Notes ....................................................................................................... 217
Hunt v. Washington State Apple Advertising Comm’n .............................. 220
Exxon Corp. v. Governor of Maryland ..................................................... 222
Notes ....................................................................................................... 225
Reeves, Inc. v. Stake ............................................................................... 227
Notes ....................................................................................................... 230
Notes ....................................................................................................... 232
§ 4.07 PRIVILEGES AND IMMUNITIES ............................................ 234
Supreme Court of Virginia v. Friedman ................................................... 234
Notes ....................................................................................................... 237

Chapter V THE PRESIDENCY AND SEPARATION OF POWERS ...... 239

§ 5.01 INHERENT POWER .................................................................... 239
Youngstown Sheet & Tube Co. v. Sawyer ............................................... 239
Notes ....................................................................................................... 249
§ 5.02 LEGISLATIVE POWERS OF THE EXECUTIVE ......................... 254
[1] Legislative Veto ............................................................................... 254
Immigration and Naturalization Service v. Chadha ............................... 254
Notes ....................................................................................................... 259
[2] Line Item Veto ............................................................................... 260
Clinton v. City of New York ................................................................... 260
Note on Signing Statements ................................................................. 267
§ 5.03 ADMINISTRATIVE CHIEF ......................................................... 268
Morrison v. Olson ................................................................................. 268
Notes ....................................................................................................... 280
§ 5.04 FOREIGN AFFAIRS ................................................................... 283
[1] The Scope of Presidential Power ...................................................... 283
United States v. Curtiss-Wright Export Corp. ......................................... 283

xviii
## Table of Contents

Notes ........................................................... 286

[2] Executive Agreements ........................................ 287

*Dames & Moore v. Regan* ........................................ 287

Notes ........................................................... 291

§ 5.05 COMMANDER-IN-CHIEF ................................ 291

*Prize Cases* ..................................................... 291

Notes ........................................................... 293

*Hamdi v. Rumsfeld* ........................................... 295

Notes ........................................................... 309

§ 5.06 PRESIDENTIAL ACCOUNTABILITY ......................... 312

[1] Privilege ................................................... 312

*United States v. Nixon* ......................................... 312

Notes ........................................................... 315

[2] Immunities ................................................... 318

*Nixon v. Fitzgerald* ........................................... 318

Notes ........................................................... 321

[3] Impeachment ................................................... 321

Notes ........................................................... 321

[4] Presidential Succession and Inability ...................... 323

Notes ........................................................... 323

§ 5.07 SEPARATION OF POWERS ................................ 323

*Mistretta v. United States* ..................................... 323

Notes ........................................................... 328

---

### Chapter VI CONGRESSIONAL PROTECTION OF CIVIL RIGHTS . . . . 331

§ 6.01 INTRODUCTION ............................................. 331

§ 6.02 POST-CIVIL WAR AMENDMENTS ......................... 331

§ 6.03 STATE ACTION ............................................ 332

*Shelley v. Kraemer* ........................................... 332

Notes ........................................................... 334

*Georgia v. McCollum* ......................................... 336

Notes ........................................................... 339

*Moose Lodge No. 107 v. Irvis* ............................... 340

Notes ........................................................... 342

§ 6.04 POST-BELLUM CIVIL RIGHTS STATUTES ................. 344

§ 6.05 CONGRESSIONAL ENFORCEMENT POWER: FOURTEENTH AMENDMENT ............................................. 345

*Katzenbach v. Morgan* ......................................... 345

Notes ........................................................... 348

*City of Boerne v. Flores* ..................................... 350

Notes ........................................................... 355
Table of Contents

§ 6.06 THIRTEENTH AND FIFTEENTH AMENDMENTS ........... 359
South Carolina v. Katzenbach ........................................ 359
Notes .............................................................. 362
Jones v. Alfred H. Mayer Co. ....................................... 363
Note ..................................................................... 366
Runyon v. McCrary ..................................................... 366
Notes .............................................................. 369

Chapter VII LIBERTY AND PROPERTY RIGHTS IN THE DUEPROCESS,
TAKING, AND CONTRACT CLAUSES ...................... 371

§ 7.01 INTRODUCTION TO THE INCORPORATION CONTROVERSY
AND THE BILL OF RIGHTS ........................................... 371
Slaughter-House Cases .............................................. 372
Notes .............................................................. 380

§ 7.02 THE RIGHTS OF THE ACCUSED: THE “INCORPORATION
CONTROVERSY” ...................................................... 382
Notes .............................................................. 382
Duncan v. Louisiana ................................................... 383
Notes .............................................................. 385

§ 7.03 REGULATION OF BUSINESS AND OTHER PROPERTY
INTERESTS ................................................................. 386
[1] Liberty of Contract Under the Due Process Clauses ........ 386
Lochner v. New York ................................................... 386
Note: The Development of Liberty of Contract and the Court-Packing Crisis ...... 389
Nebbia v. New York .................................................... 390
Note: The New Deal, Constitutional Crisis, Economic Regulation, and Property Rights . 390
United States v. Carolene Products Co. ............................. 392
Notes .............................................................. 393
BMW of North America v. Gore ..................................... 395
Notes .............................................................. 398
State Farm Mutual Auto. Ins. Co. v. Campbell ...................... 401
Note .............................................................. 403
[3] Economic Regulation and the Contract Clause of
Article I, Section 10 ................................................ 404
Energy Reserves Group, Inc. v. Kansas Power and Light Co. ....... 404
Notes .............................................................. 407
(a) General Principles ............................................... 408
Keystone Bituminous Coal Association v. DeBenedictis ........... 408
Notes .............................................................. 415
Table of Contents

(b) Public Use ......................................... 422
Kelo v. City of New London ............................ 422
Note ....................................................... 423
(c) Temporary Takings ................................. 424
Lucas v. South Carolina Coastal Council .......... 424
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency .... 425
(d) Court Decisions ..................................... 427
(e) Nexus Requirement .................................. 428
Dolan v. City of Tigard .................................. 428
Note ....................................................... 430
Lingle v. Chevron U.S.A., Inc. ....................... 430
Note ....................................................... 432
Palazzolo v. Rhode Island ............................. 432

§ 7.04 LIBERTY IN PROCREATION AND OTHER PERSONAL MATTERS ........................................ 433
Skinner v. Oklahoma .................................... 433
Note ....................................................... 434
Griswold v. Connecticut .................................. 434
Notes ....................................................... 440
Roe v. Wade .............................................. 442
Notes ....................................................... 447
Harris v. McRae .......................................... 450
Notes ....................................................... 451
Planned Parenthood of Southeastern Pa. v. Casey ......................... 458
Stenberg v. Carhart ....................................... 472
Notes ....................................................... 474
Hodgson v. Minnesota .................................... 476
Notes ....................................................... 476
Gonzales v. Carhart ....................................... 477
Note ....................................................... 493
[2] The Family Relationship ............................. 493
Zablocki v. Redhail ....................................... 493
Troxel v. Granville ....................................... 494
Michael H. v. Gerald D. .................................. 495
Notes ....................................................... 497
[3] Homosexuality ......................................... 499
Lawrence v. Texas ........................................ 499
[4] Right to Die ............................................. 508
Cruzan v. Director, Missouri Department of Health ............. 508
Washington v. Glucksberg ................................ 515
Table of Contents

Whalen v. Roe ................................................. 521
Notes .......................................................... 523

§ 7.05 PERSONAL PROPERTY RIGHTS: NEW FORMS OF
PROTECTION FOR NEW PROPERTY INTERESTS ............. 524

Goldberg v. Kelly ............................................. 525
Notes .......................................................... 527

Paul v. Davis .................................................. 526
Notes .......................................................... 527

Cleveland Board of Education v. Loudermill ................. 528
Notes .......................................................... 529

Deshaney v. Winnebago County Department of Social Services
Notes .......................................................... 530

Chapter VIII RACIAL EQUALITY .................................. 533

§ 8.01 OVERVIEW ............................................. 533

Dred Scott v. Sanford .......................................... 533

§ 8.02 SEGREGATION IN PUBLIC FACILITIES ................ 537

[1] The Rise and Fall of “Separate but Equal” ............ 537

Plessy v. Ferguson .............................................. 537
Note ............................................................. 538

Brown v. Board of Education of Topeka ...................... 539
Notes ........................................................... 542


Brown v. Board of Education (Brown II) ...................... 544
Notes: State Reaction to Brown .............................. 545

Swann v. Charlotte-Mecklenburg Board of Education ........ 547
Notes ........................................................... 548

[3] Limiting the Remedies ...................................... 551

Milliken v. Bradley ............................................ 551
Notes ........................................................... 555

Freeman v. Pitts ................................................ 555
Notes ........................................................... 561

Parents Involved In Community Schools v. Seattle School District
Notes ........................................................... 563

United States v. Fordice ........................................ 580

§ 8.03 OTHER FORMS OF RACIAL DISCRIMINATION ........ 582

[1] General Principles: Purposeful Discrimination and
Suspect Classes .................................................. 582

Korematsu v. United States .................................... 583
Notes ........................................................... 585


Washington v. Davis .......................................... 588
Notes ........................................................... 590
Table of Contents

[3] Housing and Zoning ................................................. 591
Arlington Heights v. Metropolitan Housing Development Corp. .................. 591
Notes ........................................................... 593
Rogers v. Lodge .......................................................... 594
Notes ........................................................... 596
Shaw v. Reno ............................................................ 597
Note .................................................................. 602
Miller v. Johnson .......................................................... 602
Bush v. Vera ............................................................ 603
Notes ........................................................... 607
[5] The Criminal Justice System ........................................... 610
Batson v. Kentucky ...................................................... 610
Notes ........................................................... 611
McCleskey v. Kemp ...................................................... 616
Notes ........................................................... 617

Chapter IX EQUAL RIGHTS FOR THE SEXES .......................... 619

§ 9.01 Changing Attitudes Toward Gender-Based Classifications ................. 619
Goesaert v. Cleary .......................................................... 619
Notes ........................................................... 620
Craig v. Boren ............................................................ 621
Rostker v. Goldberg ...................................................... 622
Notes ........................................................... 623
Mississippi University For Women v. Hogan ........................................... 625
Notes ........................................................... 629
J.E.B. v. Alabama .......................................................... 630
Note .................................................................. 631
United States v. Virginia ...................................................... 631
Note .................................................................. 636
§ 9.02 Employment Discrimination Based on Gender ................................. 637
Massachusetts v. Feeney ...................................................... 637
Note .................................................................. 638
§ 9.03 Gender Discrimination in Government Benefit Programs .................. 638
Weinberger v. Wiesenfeld ...................................................... 638
Notes ........................................................... 641
§ 9.04 Discrimination Involving Pregnancy ................................................. 642
Geduldig v. Aiello .......................................................... 642
Notes ........................................................... 645
**Table of Contents**

Concluding Note ................................................... 645

Chapter X  AFFIRMATIVE ACTION ............................. 647

§ 10.01  EDUCATION ........................................... 647

Regents of University of California v. Bakke ........................................... 647

Note ............................................................ 660

Grutter v. Bollinger ................................................. 660

Gratz v. Bollinger ................................................... 678

§ 10.02  EMPLOYMENT ........................................... 681

Notes ........................................................... 681

City of Richmond v. J.A. Croson Company ........................................... 683

Notes ........................................................... 692

Adarand Constructors, Inc. v. Pena ........................................... 694

Notes ........................................................... 697

Chapter XI  EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS .......... 699

§ 11.01  DISCRETE AND INSULAR MINORITIES ................... 700

[1]  Aliens ........................................................... 700

Bernal v. Fainter ................................................... 700

Notes ........................................................... 703

[2]  Illegitimate Children ........................................... 706

Trimble v. Gordon ................................................... 706

Lalli v. Lalli ....................................................... 706


Massachusetts Board of Retirement v. Murgia ........................................... 707


Cleburne v. Cleburne Living Center ........................................... 709

[5]  Sexual Orientation .............................................. 714

Romer v. Evans ..................................................... 714

Note ........................................................... 719

§ 11.02  EQUAL PROTECTION FOR THE POOR ................... 719

[1]  Wealth as a Suspect Classification; Fundamental Rights to Necessities ........ 720

San Antonio School District v. Rodriguez ........................................... 720

Notes ........................................................... 722

[2]  Access to the Justice System ...................................... 724

Douglas v. California ................................................ 724

Note ........................................................... 724

United States v. Kras ................................................ 725
Table of Contents

Notes ........................................................................... 726
§ 11.03 EQUALITY IN THE POLITICAL PROCESS .................. 727
[1] Distinctions Based on Wealth ................................. 727
Kramer v. Union Free School District ................................. 728
Note ........................................................................ 728
Reynolds v. Sims .......................................................... 729
Notes ........................................................................ 730
Bush v. Palm Beach County Canvassing Board (Bush I) ............. 731
Bush v. Gore ............................................................. 732
Notes ........................................................................ 746
Davis v. Bandemer .......................................................... 746
Vieth v. Jubelirer ............................................................ 749
League of United Latin Am. Citizens v. Perry ............................ 750
Note ........................................................................ 753
§ 11.04 THE RIGHT TO TRAVEL .................................... 753
Saenz v. Roe ............................................................... 753
Notes ........................................................................ 755
§ 11.05 “ECONOMIC AND SOCIAL LEGISLATION” .................... 757
Railway Express v. New York .............................................. 757
Notes ........................................................................ 759
Vacco v. Quill ............................................................... 762
Concluding Note ............................................................ 764

Chapter XII POLITICAL SPEECH AND ASSOCIATION ............... 765

§ 12.01 OVERVIEW .................................................. 765
§ 12.02 ADVOCACY OF UNLAWFUL OBJECTIVES .................. 766
Schenck v. United States .................................................. 766
Debs v. United States ..................................................... 768
Abrams v. United States .................................................. 769
Gitlow v. New York .......................................................... 773
Notes ........................................................................ 775
Whitney v. California ...................................................... 775
Notes ........................................................................ 777
Dennis v. United States ................................................... 778
Brandenburg v. Ohio ....................................................... 782
Notes ........................................................................ 784
McIntyre v. Ohio Elections Commission ................................. 786
Note ........................................................................ 788
Table of Contents

§ 12.03 MEMBERSHIP IN POLITICAL ORGANIZATIONS AS A BASIS FOR GOVERNMENT SANCTIONS .......... 789
   Keyishian v. Board of Regents ................................................................. 789
   Notes ........................................................................................................... 789
   Illinois ex rel. Madigan v. Telemarketing Ass’n ............................................ 791

§ 12.04 COMPULSORY DISCLOSURE OF POLITICAL AFFILIATIONS OR MEMBERSHIP ..................... 792
   Communist Party of the United States v. Subversive Activities Control Board .......... 792
   Notes ........................................................................................................... 793
   Gibson v. Florida Legislative Investigation Committee ...................................... 794
   Notes ........................................................................................................... 796

§ 12.05 ASSOCIATIONAL RIGHTS IN OTHER CONTEXTS ............................................ 797
   EU v. San Francisco County Democratic Central Committee ......................... 797
   Notes ........................................................................................................... 799
   N.A.A.C.P. v. Claiborne Hardware Co. ............................................................ 801
   Notes ........................................................................................................... 804
   Boy Scouts of America and Monmouth Council v. Dale ..................................... 805
   Note ............................................................................................................. 807

§ 12.06 FREE SPEECH PROBLEMS OF GOVERNMENT EMPLOYEES ......................... 807
   [1] Patronage Dismissals .............................................................................. 807
   Branti v. Finkel .............................................................................................. 807
   Notes ........................................................................................................... 812
   Rutan v. Republican Party of Illinois .............................................................. 812
   O’Hare Truck Service v. City of Northlake ..................................................... 815
   Note ............................................................................................................. 817
   [2] Restraints on Political Activity .................................................................. 817
   Broadrick v. Oklahoma .................................................................................... 817
   Notes ........................................................................................................... 821
   Connick v. Myers ........................................................................................... 823
   Notes ........................................................................................................... 827
   Waters v. Churchill ......................................................................................... 829
   Garcetti v. Ceballos ......................................................................................... 831
   Board of Comm’rs v. Umbehr ........................................................................ 833
   [4] Special Protection for Legislators and other Government Employees ............. 835
   Hutchinson v. Proxmire .................................................................................... 835
   Notes ........................................................................................................... 835
   Republican Party of Minnesota v. White ........................................................ 836
### Table of Contents

<table>
<thead>
<tr>
<th>Chapter XIII</th>
<th>GOVERNMENT AND THE MEDIA: PRINT AND ELECTRONIC</th>
<th>841</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 13.01</td>
<td>THE DOCTRINE AGAINST PRIOR RESTRAINTS</td>
<td>841</td>
</tr>
<tr>
<td>Near v. Minnesota</td>
<td></td>
<td>841</td>
</tr>
<tr>
<td>New York Times Co. v. United States</td>
<td></td>
<td>842</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>850</td>
</tr>
<tr>
<td>Eldred v. Ashcroft</td>
<td></td>
<td>852</td>
</tr>
<tr>
<td>§ 13.02</td>
<td>THE RIGHT TO REPORT GOVERNMENTAL AFFAIRS</td>
<td>853</td>
</tr>
<tr>
<td>Nebraska Press Association v. Stuart</td>
<td></td>
<td>853</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>855</td>
</tr>
<tr>
<td>Gentile v. State Bar of Nevada</td>
<td></td>
<td>857</td>
</tr>
<tr>
<td>§ 13.03</td>
<td>ACCESS BY THE MEDIA TO GOVERNMENT ACTIVITY</td>
<td>858</td>
</tr>
<tr>
<td>Houchins v. K.Q.E.D., Inc.</td>
<td></td>
<td>858</td>
</tr>
<tr>
<td>Richmond Newspapers, Inc. v. Virginia</td>
<td></td>
<td>862</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>864</td>
</tr>
<tr>
<td>Press Enterprise Company v. Superior Court of California</td>
<td></td>
<td>865</td>
</tr>
<tr>
<td>§ 13.04</td>
<td>PROTECTING THE NEWSGATHERING PROCESS</td>
<td>866</td>
</tr>
<tr>
<td>Branzburg v. Hayes</td>
<td></td>
<td>866</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>871</td>
</tr>
<tr>
<td>§ 13.05</td>
<td>REGULATION AND TAXATION</td>
<td>874</td>
</tr>
<tr>
<td>Red Lion Broadcasting Co. v. F.C.C.</td>
<td></td>
<td>874</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>877</td>
</tr>
<tr>
<td>Columbia Broadcasting System v. Democratic National Committee</td>
<td></td>
<td>878</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>879</td>
</tr>
<tr>
<td>Miami Herald Publishing Co. v. Tornillo</td>
<td></td>
<td>880</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>881</td>
</tr>
<tr>
<td>§ 13.06</td>
<td>TAXATION</td>
<td>881</td>
</tr>
<tr>
<td>Minneapolis Star &amp; Tribune v. Minnesota Commissioner of Revenue</td>
<td></td>
<td>881</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>882</td>
</tr>
<tr>
<td>§ 13.07</td>
<td>ELECTRONIC MEDIA</td>
<td>883</td>
</tr>
<tr>
<td>[1] Broadcast Media</td>
<td></td>
<td>883</td>
</tr>
<tr>
<td>Federal Communications Commission v. League of Women Voters of California</td>
<td></td>
<td>883</td>
</tr>
<tr>
<td>Note</td>
<td></td>
<td>885</td>
</tr>
<tr>
<td>[2] Cable Television</td>
<td></td>
<td>886</td>
</tr>
<tr>
<td>Turner Broadcasting System, Inc. v. Federal Communications Commission</td>
<td></td>
<td>886</td>
</tr>
<tr>
<td>Turner Broadcasting System, Inc. v. Federal Communications Commission (Turner II)</td>
<td></td>
<td>895</td>
</tr>
<tr>
<td>Denver Area Educational Tele-Communications Consortium, Inc. v. Federal Communications Commission</td>
<td></td>
<td>897</td>
</tr>
<tr>
<td>Notes</td>
<td></td>
<td>902</td>
</tr>
<tr>
<td>[3] The Internet</td>
<td></td>
<td>902</td>
</tr>
<tr>
<td>Reno v. American Civil Liberties Union</td>
<td></td>
<td>902</td>
</tr>
</tbody>
</table>
Table of Contents

Notes ................................................................................. 913
§ 13.08 DEFAMATION AND PRIVACY ................................. 915
[1] Public Figures versus Private Individuals .................. 915
Notes ........................................................................ 920
Gertz v. Welch, Inc. ............................................................ 922
Notes ........................................................................ 928
Milkovich v. Lorain Journal Co. ........................................ 930
[3] Quoted Material ............................................................ 931
Masson v. New Yorker Magazine, Inc. ............................... 931
Bose Corporation v. Consumers Union of United States, Inc. 931
Notes ........................................................................ 933
Dun & Bradstreet v. Greenmoss Builders, Inc. .................. 935
Notes ........................................................................ 936
[6] Invasions of Privacy ...................................................... 937
Zacchini v. Scripps-Howard ................................................ 937
Notes ........................................................................ 938
Florida Star v. B.J.F. ............................................................ 939
Bartnicki v. Vopper ............................................................. 941
Notes ........................................................................ 944

Chapter XIV SPEECH IN PUBLIC PLACES ....................... 947

§ 14.01 OFFENSIVE SPEECH IN PUBLIC PLACES ............. 947
[1] Defamation: General Principles ...................................... 947
Chaplinsky v. New Hampshire ........................................... 947
Notes ........................................................................ 949
National Socialist Party v. Skokie ........................................ 950
Notes ........................................................................ 952
R.A.V. v. St. Paul ................................................................. 952
Virginia v. Black ................................................................. 955
Notes ........................................................................ 957
[2] Sexually Offensive Speech ............................................... 958
Young v. American Mini Theatres, Inc. ......................... 958
Federal Communications Commission v. Pacifica Foundation 964
Notes ........................................................................ 967
Erie v. Pap’s A.M. ................................................................. 969

xxviii
### Table of Contents

§ 14.02 SPEECH IN TRADITIONAL PUBLIC FORUMS: STREETS, SIDEWALKS, PARKS .................................................. 971

*Cox v. New Hampshire* .................................................. 971
Notes .............................................................................. 973

*Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* .................................................. 978
Notes .............................................................................. 979

§ 14.03 THE CIVIL RIGHTS MOVEMENT, MASS DEMONSTRATIONS, AND NEW RULES FOR NEW PUBLIC FORUMS .................. 981

*Cox v. Louisiana (Cox I)* .................................................. 981
*Cox v. Louisiana (Cox II)* ................................................. 985
Notes .............................................................................. 986

§ 14.04 THE MODERN APPROACH: LIMITING SPEECH ACCORDING TO THE CHARACTER OF THE PROPERTY .................. 987

[1] Public Property ......................................................... 987

*Greer v. Spock* ............................................................. 987

*Perry Education Ass’n v. Perry Local Educators’ Ass’n* ........ 989
Note .............................................................................. 993

*Cornelius v. N.A.A.C.P. Legal Defense & Educational Fund* .................................................. 993
Notes .............................................................................. 999

*Ward v. Rock Against Racism* ........................................ 1001

*United States v. Kokinda* ................................................ 1003

*Society for Krishna Consciousness v. Lee* ......................... 1004
Note .............................................................................. 1005

*City of Ladue v. Gilleo* .................................................... 1005
Notes .............................................................................. 1007

*Arkansas Educational Television Commission v. Forbes* .... 1008

*Madsen v. Women’s Health Center, Inc.* .......................... 1009

*Schenck v. Pro-Choice Network of Western New York* .... 1019

*Hill v. Colorado* ............................................................. 1021


*Hudgens v. N.L.R.B.* ....................................................... 1024
Notes .............................................................................. 1027

[3] Speech in Public Schools ................................................ 1028

*Tinker v. Des Moines Independent School District* ............... 1028

*Hazelwood School District v. Kuhlmeier* ......................... 1029
Notes .............................................................................. 1034


*Widmar v. Vincent* ......................................................... 1035
Notes .............................................................................. 1036

*Capitol Square Review Bd. v. Pinette* ............................... 1036
Notes .............................................................................. 1039

xxix
Table of Contents

Good News Club v. Milford Central School .................................. 1040

Chapter XV SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF
EXPRESSION .................................................. 1043

§ 15.01 EXPRESSIVE CONDUCT .................................... 1043
United States v. O’Brien .............................................. 1043
Notes .............................................................. 1047
Texas v. Johnson .................................................... 1048
Notes .............................................................. 1054
Clark v. Community for Creative Non-Violence .................................. 1055

§ 15.02 EXPENDITURES OF MONEY IN THE POLITICAL ARENA ........ 1056
Buckley v. Valeo .................................................... 1056
Notes .............................................................. 1068
Federal Elections Comm’n v. Colorado Republican Federal Campaign Comm. . 1072
Randall v. Sorrell ..................................................... 1074
Note ............................................................... 1077
First National Bank v. Bellotti ........................................... 1078
Notes .............................................................. 1079
Austin v. Michigan Chamber of Commerce ................................ 1080
Note ............................................................... 1082
McConnell v. Federal Election Commission ................................ 1083
Federal Election Commission v. Wisconsin Right to Life, Inc. ............. 1105

§ 15.03 GOVERNMENT FUNDING OF SPEECH-RELATED
ACTIVITIES ...................................................... 1108
Rust v. Sullivan ....................................................... 1108
Note ............................................................... 1114
Rosenberger v. University of Virginia ...................................... 1114
Notes .............................................................. 1115
National Endowment for the Arts v. Finley ................................ 1116
Note ............................................................... 1118
Legal Services Corp. v. Velasquez ........................................ 1119
Rumsfeld v. Forum for Academic & Institutional Rights (“Fair”) .......... 1121

§ 15.04 COMMERCIAL SPEECH ..................................... 1123
[1] Protection for Commercial Speech: General Principles .............. 1123
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. .... 1123
Bolger v. Youngs Drug Products Corp. .................................. 1129
Note ............................................................... 1130
Central Hudson Gas & Electric Corporation v. Public Service Commission of
New York .......................................................... 1130
Notes .............................................................. 1132
44 Liquormart, Inc. v. Rhode Island ...................................... 1135

xxx
Table of Contents

Notes ........................................................................... 1138
Lorillard Tobacco Co. v. Reilly .................................................. 1140
Note ........................................................................ 1143
[2] Lawyer and Other Professional Advertising ......................... 1144
Bates v. State of Arizona ...................................................... 1144
Notes ........................................................................ 1145
§ 15.05 OBSCENITY .................................................... 1150
Miller v. California ............................................................ 1150
Paris Adult Theater I v. Slaton .................................................. 1154
Arcara v. Cloud Books, Inc. ................................................... 1155
Notes ........................................................................ 1156
New York v. Ferber ............................................................. 1160
Notes ........................................................................ 1161
Ashcroft v. The Free Speech Coalition ...................................... 1162
Note: The Feminist Attack on Pornography .............................. 1164
Southeastern Promotions Ltd. v. Conrad .................................... 1165
Notes ........................................................................ 1167
Fort Wayne Books, Inc. v. Indiana ............................................. 1170
Alexander v. United States ................................................... 1172

Chapter XVI RELIGIOUS FREEDOM ..................................... 1175

§ 16.01 COMPETING APPROACHES: WALL OF SEPARATION VERSUS ACCOMMODATION .................................................... 1176
Everson v. Board of Education .................................................. 1176
Note ........................................................................ 1181
Illinois Ex. Rel. McCollum v. Board of Education ....................... 1182
Zorach v. Clauson .................................................................. 1183
Note ........................................................................ 1185
§ 16.02 THE ESTABLISHMENT CLAUSE AND AID TO RELIGIOUS INSTITUTIONS ........................................................................... 1186
Note ........................................................................ 1186
[1] Aid to Religious Schools ................................................ 1187
Lemon v. Kurtzman ............................................................. 1187
Notes ........................................................................ 1189
Mueller v. Allen ................................................................. 1190
Notes ........................................................................ 1195
Agostini v. Felton .................................................................. 1196
Mitchell v. Helms ................................................................ 1200

xxxi
Table of Contents

Zelman v. Simmons-Harris ........................................... 1210
   Than Parochial Education ........................................ 1219
Bowen v. Kendrick ................................................. 1219
Notes .......................................................... 1221
Texas Monthly, Inc. v. Bullock ........................................ 1222
§ 16.03 GOVERNMENT SUPPORT FOR RELIGIOUS PRACTICES . . 1224
[1] Prayer in Public Schools ........................................ 1224
Engel v. Vitale .................................................... 1224
Notes .......................................................... 1227
Lee v. Weisman ..................................................... 1228
Notes .......................................................... 1230
Good News Club v. Milford Central School ......................... 1231
Notes .......................................................... 1233
Lynch v. Donnelly .................................................... 1235
Notes .......................................................... 1243
County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh . . . 1243
Notes .......................................................... 1249
Van Orden v. Perry ................................................ 1250
McCreary County v. American Civil Liberties Union of Kentucky ...................... 1258
Wallace v. Jaffree ................................................... 1262
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos .......... 1270
§ 16.04 ESTABLISHMENT OF RELIGION THROUGH RELIGIOUS
   INSTITUTIONS BECOMING INVOLVED IN
   GOVERNMENTAL DECISIONS .................................... 1271
Larkin v. Grendel’s Den, Inc. ........................................ 1271
Board of Education of Kiryas Joel Village School District v. Grumet ...................... 1272
Notes .......................................................... 1275
§ 16.05 FREE EXERCISE OF RELIGION .............................. 1276
Sherbert v. Verner .................................................... 1276
Notes .......................................................... 1279
Wisconsin v. Yoder ................................................... 1280
Thomas v. Review Board of the Indiana Employment Security Division .............. 1281
Note: What Is A Religion? ............................................. 1285
Notes .......................................................... 1286
Goldman v. Weinberger ............................................... 1287
Lyng v. Northwest Indian Cemetery Protective Ass’n .................................. 1287
Employment Division, Department of Human Resources of Oregon v. Smith .......... 1289

xxxii
Table of Contents

Notes .................................................................................................................. 1295
*City of Boerne v. Flores* .......................................................... 1296
Notes ........................................................................................................... 1298
*Cutter v. Wilkinson* .................................................................................. 1299
Note ............................................................................................................ 1301
Appendix: The Constitution of the United States ........................................ App-1
Table of Cases .......................................................................................... TC-1
Index ....................................................................................................... I-1