

SKILLS AND VALUES: CONSTITUTIONAL LAW

LexisNexis Law School Publishing Advisory Board

Paul Caron

Charles Hartsock Professor of Law
University of Cincinnati College of Law

Olympia Duhart

Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland

Professor of Law
Elon University School of Law

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus

Haynes Professor of Law
William and Mary Law School

John Sprankling

Distinguished Professor of Law
McGeorge School of Law

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

SKILLS AND VALUES: CONSTITUTIONAL LAW

William D. Araiza

Professor of Law

Brooklyn Law School

Thomas E. Baker

Professor of Law

Florida International University College of Law

Olympia Duhart

Professor of Law and Director of Lawyering Skills & Values Program

Nova Southeastern University, Shepard Broad Law School

Steven I. Friedland

Professor of Law and Senior Scholar

Elon University School of Law

ISBN: 978-1-4224-7451-8 (print)

ISBN: 978-0-3271-7963-4 (eBook)

Library of Congress Cataloging-in-Publication Data

Araiza, William D.

Skills and values. Constitutional law / William D. Araiza, Professor of Law, Brooklyn Law School [and three others].

pages cm.

Includes index.

ISBN 978-1-4224-7451-8

1. Constitutional law—United States—Problems, exercises, etc. I. Title. II. Title: Constitutional law.

KF4550.Z9A47 2013

342.73—dc23

2013007551

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2013 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices

121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

www.lexisnexis.com

MATTHEW  BENDER

ACKNOWLEDGEMENTS

Professor Araiza would like to thank his research assistants: Jing Jin, Kristie LaSalle, Meir Lax, and Michael Teitel. He also thanks Gloria Kern for her general assistance, and acknowledges the support of Dean Nicholas Allard.

Professor Baker is especially grateful for the helpful efforts of his research assistants: Keoki Baron, Andrea M. Canona, Alexander Martini, and Dick M. Ortega. He also thanks Veronica Torres for her general assistance. Finally, he appreciates the support of Dean R. Alex Acosta and the FIU College of Law.

Professor Duhart would like to thank her research assistant Lydia Harley for her thoughtful edits and assistance on this project. She is also very grateful to her faculty assistant Joseph H. Baldelomar for his dedication and support.

Professor Friedland would like to thank my research assistant, Susanna Guffy and library liaison, Lisa Watson, for their dedicated and unwavering efforts to improve my work product, and faculty assistant Kristin Walker for her work and ability to keep smiling during the most wretched computer snafus. All errors, ambiguities and inconsistencies in my work are definitely my responsibility.

INTRODUCTION

These materials are intended to provide an opportunity to use various lawyering skills within the context of a Constitutional Law course. We have designed the problems around active learning — it will be up to you to solve the analytical issues while using specific skills. A concurrent goal with the deployment of skills is that by working through the exercises, you should be able to supplement and enhance your understanding of the substantive Constitutional Law material as well.

Each chapter is cabined by a substantive law area. Within these areas you will find exercises by which you will be able to apply your knowledge of the constitutional law rules using a variety of skills. Each exercise focuses on a particular doctrinal rule or rules. You must transfer your knowledge of the subject to a particular fact setting — but generally not by merely answering a legal question directly. Instead, you might be asked to draft a statute, write a complaint, compose a motion to dismiss, take a deposition or do other lawyer-specific tasks. You also will be asked to represent particular clients — take sides — as well as serve as a judge.

Each exercise offers an opportunity to track your performance and obtain ready and particularized feedback. Feedback is very helpful in determining whether you are progressing in your level of knowledge and your and skills. The student notes offer the authors' ideas about the issues, but it is important to emphasize that these are not the only way to respond to the questions. Instead, the notes offer at least one way to analyze the questions presented.

Since Constitutional Law is a second semester course in your first year of law school or offered in the second year, you likely already know that how your professor approaches the substantive issues is controlling — not our approach. One additional matter — the self-assessments, found on the LexisNexis Web Course, are designed to help you after you have worked through the problems and are not there to provide some assistance in advance. It will defeat the purpose if you decide to run through the exercises backwards, looking at the self-assessments before attempting your own analysis. Besides, some people need to muck about with issues for a while before the light bulb goes off and their learning reaches a new threshold. That could be you.

The LexisNexis Web Course also has additional material and information. Our goal with this book was to provide tools to assist you throughout the learning process, and some of these tools were best deployed on the LexisNexis Web Course.

Each chapter includes the following components:

- *Introduction to the substantive law.* These introductions provide an overview and review of the doctrinal areas covered by the exercises. We have thrown in some commentary as well, trying to dig beneath the surface of the rules.
- *Your Role in the Exercise.* You could be any one of a number of individuals involved in a problem, from a private lawyer, to a government lawyer, to offering advice to a group to serving as a judge or expert.
- *Required Tasks.* This component describes what it is you will be asked to do, from

writing a memorandum, to taking a deposition, writing a motion or providing advice.

- *Practice Skills Utilized.* The particular skills needed to respond to the question will be listed in the problem so you can have an idea in advance of what tools will be needed to solve the problem.
- *Time for Completion and Level of Difficulty.* Each exercise has its own time-table and rating for a level of difficulty. While these are subjective, it is in keeping with the theme of this book, and that is to provide as much express guidance as possible.

We hope you find this supplement useful and worthwhile. Given the push toward integrating skills in traditional substantive courses, we eagerly wanted to provide at least a small opportunity to students to experience lawyering skills at an early stage of law school.

William D. Araiza
Thomas E. Baker
Olympia Duhart
Steven I. Friedland

TABLE OF CONTENTS

Chapter 1	A PREREQUISITE TO CONSTITUTIONAL ISSUES: STATE ACTION	1
	Exercise 1.1: The Company Town and the Care Facility	3
Chapter 2	STANDING AND THE SPENDING POWER	9
	Exercise 2.1: Federal Dollars/Federal Litigation	14
Chapter 3	THE FEDERAL INTERSTATE COMMERCE POWER AND THE TENTH AMENDMENT	17
	Exercise 3.1: Federal Protection of Wetlands	21
	Exercise 3.2: Involving the States in a Federal Program	24
Chapter 4	STATE SOVEREIGN IMMUNITY AND CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT	25
	Exercise 4.1: Genetics Discrimination	29
Chapter 5	FEDERAL EXECUTIVE POWERS	37
A.	THE PRESIDENT’S APPOINTMENT AND REMOVAL POWERS	37
	Exercise 5.1: The American Jobs Bank	40
B.	THE PRESIDENT’S COMMANDER-IN-CHIEF POWERS	41
	Exercise 5.2: The War Powers Resolution Revisited and Revised	44
Chapter 6	THE “DORMANT” COMMERCE CLAUSE	47
A.	FEDERALISM — CONFLICT AND PREEMPTION	48
B.	LIMITS UNDER THE DORMANT COMMERCE CLAUSE	49
C.	LIMIT #1 ON STATE POWER OVER REGULATION OF LOCAL COMMERCE: NO DISCRIMINATION	49
D.	LIMIT #2: NO UNDUE BURDEN ON INTERSTATE COMMERCE	50
E.	EXCEPTIONS TO LIMITS	50
	Exercise 6.1: Red, Red Wine	51
	Exercise 6.2: The Minnesota Gift Card Law	54
	Exercise 6.3: Fog Lights	58
Chapter 7	PROCEDURAL DUE PROCESS	61
	Exercise 7.1: Drafting a Law School Grade Appeal Policy	64
	Exercise 7.2: Contesting a Benefits Cut-Off	66

TABLE OF CONTENTS

Chapter 8	IS THERE A RIGHT TO DIE?	71
	Exercise 8.1: Difficult Decisions	73
Chapter 9	EQUAL PROTECTION	79
	Exercise 9.1: Fire and Vice	82
Chapter 10	PRIVILEGES OR IMMUNITIES CLAUSE	87
	Exercise 10.1: Family Matters	88
Chapter 11	THE PROTECTION OF ECONOMIC RIGHTS	95
	Exercise 11.1: The Purple Pension Plan	97
Chapter 12	THE FREEDOM OF SPEECH	99
A.	PRIOR RESTRAINTS	99
	Exercise 12.1: The <i>Pentagon Papers Case</i> Redux	102
B.	RACIST SPEECH, INCITEMENTS & THREATS	105
	Exercise 12.2: Prosecutorial Discretion: Federal Crime or Free Speech? .	109
C.	FREE SPEECH IN PUBLIC SCHOOLS FOR TEACHERS	111
	Exercise 12.3: Is The Outspoken Teacher Out of a Job?	114
D.	FREE SPEECH IN PUBLIC SCHOOLS FOR STUDENTS	125
	Exercise 12.4: A Student Suspension for Speech on the Internet	128
Chapter 13	THE ESTABLISHMENT CLAUSE	133
	Exercise 13.1: Drafting and Implementing a “Moment of Silence” Statute	135
Chapter 14	THE FREE EXERCISE CLAUSE	137
	Exercise 14.1: Providing a Legal Opinion About a Proposed “Driveway Fee”	139