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Constitutional Law

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Questions & Answers
Constitutional Law

FOURTH EDITION

*Multiple Choice and Short Answer
Questions and Answers*

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To Patrick — you will always be a part of me
To Marianne — wherever we go, you're my home

P.E.M.

To the memory of Professor David “the Godfather” Guinn — my inspiration
To Marcie and Mason — My life's greatest treasures

R.R.

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Preface

As we publish this fourth edition, Constitutional Law is in an era of significant doctrinal and methodological change. Since the publication of the third edition in 2017, three new Justices have joined the Supreme Court—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Their arrival accelerated the pace of constitutional change, with a firm majority of the Court favoring a historical approach to most—if not all—constitutional questions. Consequently, over the last six years, the Court has increasingly replaced balancing and other constitutional tests with judicial tests based on historical analysis. For example, the Court applies a historical test for identifying concrete injuries for purposes of Article III standing, analyzing government action under the Establishment Clause, deciding cases under the Second Amendment’s right to bear arms, and reviewing claims of unenumerated fundamental rights under the Due Process Clause of the Fourteenth Amendment. Barring an unexpected change to the Court’s membership, this historical turn should continue throughout the time that this edition is in print.

Our revisions in this edition take account of this reality in two main ways. First, in drafting answers to the questions, we note when the Supreme Court has signaled that a specific constitutional law doctrine or test may change. For example, as this edition goes to press, a significant case is pending before the Supreme Court concerning the application of the Equal Protection Clause to race-conscious admissions policies in colleges and universities. Our answer notes that pending case and discusses how the Court’s anticipated decision might change the legal doctrine on that topic.

Second, when the Supreme Court adopts a history-based test for an area of constitutional law, we do not discuss how that test might apply to new issues that might arise. For example, the Supreme Court has held that for a litigant to have standing to proceed in federal court, their complaint must allege a concrete injury that has a historical analog in American law. Our volume does not ask students to conduct this historical analysis because it is outside the scope of an ordinary constitutional law survey course. So, while we would ask a question that requires discussion of what types of concrete injury Supreme Court cases have already recognized, we do not ask students to perform a historical analysis of a new type of injury, which would require extensive research of American common law and statutes.

More generally, this book is written for students taking the basic survey course in Constitutional Law. In drafting questions, we have pitched the breadth, depth, and level of difficulty to those

studying the subject for the first time. This approach led to several choices regarding coverage as well as the form of the questions and answers. To help the reader better understand our approach, and thus how best to use this study tool, we offer the following observations.

First, unlike hornbooks and treatises, our coverage is not encyclopedic. We expect that our readers will take a final exam in a general survey course, and so our coverage is that of a typical introductory Constitutional Law course. Advanced issues within each topic are hit upon lightly, and more specialized wrinkles are omitted entirely.

Second, our topic selection is further influenced by the growing tendency to shrink the coverage of the basic Constitutional Law course. With many schools reducing their Constitutional Law survey courses from six to four hours, it has become impracticable to include all the structural and individual rights material into a single course. Consequently, many schools have shifted some topics from the basic survey course to upper-level electives. For example, the First Amendment is increasingly covered in a separate course. Similarly, the Takings Clause is often covered in the Property survey course. For this reason, we offer only the type of broad-brush coverage of free speech, religious freedom, and takings that one might expect in the Constitutional Law survey course. More detailed coverage of those subjects appears in other volumes in the Q&A series.

Third, the answers in this volume can be quite lengthy. This is because most Constitutional Law questions that arise cannot be answered and explained in a short space. So, while our multiple-choice questions each list four (A), (B), (C), (D) one-sentence answer choices, the true answers — and the ones we would expect to see students produce on our exams — are the explanations we supply in the second half of the volume. Further, our “short answers” may be longer than those you will find in other volumes in the Q&A series. Again, the reason is that the types of questions that will best prepare you for a Constitutional Law exam are rarely susceptible to one-paragraph answers. In the end, we have tried to balance brevity with the need to provide the student with realistic, useful questions. Our practice has been to err on the side of usefulness, resulting in somewhat longer discussions.

Several of the questions in this volume do not have easy answers. When this is the case, we identify the question as a close call and then suggest which answer we believe is best. That does not mean our preferred answer is the “correct” one. Indeed, you or your professor may disagree with our chosen answer. That said, we believe each answer discusses all the relevant arguments, and this is what counts on our Constitutional Law exams. More important than merely choosing the “correct” or “best” answer is understanding why one answer is better than the others. If you reach this understanding and disagree with our choice, so be it.

As many of the questions are difficult and contestable, we are interested in hearing from you — our readers. We welcome any and all suggestions about alternate analyses, confusing discussions, or twists on various questions. We are grateful for the comments and questions that helped improve this edition, so please keep the feedback coming. You can reach us at the e-mail addresses listed below.

Last, the fourth edition sees the departure of our co-author, Professor Linda Eads, from this volume. Professor Eads wrote the first edition in collaboration with Professor McGreal, and the current edition bears her continued influence. Indeed, the remaining co-authors owe her a great

debt of gratitude for her work on this project, as well as her care, collegiality, and support throughout the writing process. While working on a tome like this is never easy, with Professor Eads, it was always a joy. And even more, Professor McGreal has had the great gift of her friendship for over thirty years. And so, while this specific collaboration has come to a close, that connection will continue.

All the best in your studies!

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