

CASES AND MATERIALS
ON CONSTITUTIONAL
LAW

Sixth Edition

LexisNexis Law School Publishing Advisory Board

Paul Caron

Professor of Law
Pepperdine University School of Law
Herzog Summer Visiting Professor in Taxation
University of San Diego School of Law

Bridgette Carr

Clinical Professor of Law
University of Michigan Law School

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 and Senior Scholar
Elon University School of Law

Carole Goldberg

Jonathan D. Varat Distinguished Professor of Law
UCLA School of Law

Oliver Goodenough

Professor of Law
Vermont Law School

Paul Marcus

Haynes Professor of Law
William and Mary Law School

John Sprankling

Distinguished Professor of Law
McGeorge School of Law

CASES AND MATERIALS ON CONSTITUTIONAL LAW

Sixth Edition

David Crump

*John B. Neibel Professor of Law
University of Houston*

David S. Day

*Professor of Law
The University of South Dakota*

Eugene Gressman

*Professor Emeritus of Law
University of North Carolina*

ISBN: 978-1-6304-3056-6
Looseleaf ISBN: 978-1-6304-3057-3
eBook ISBN: 978-0-3271-7764-7

Library of Congress Cataloging-in-Publication Data

Crump, David, author.

Cases and materials on constitutional law / David Crump, John B. Neibel Professor of Law, University of Houston, Eugene Gressman, Professor Emeritus of Law, University of North Carolina, David S. Day, Professor of Law, University of South Dakota. — Sixth edition.

p. cm.

Includes index.

ISBN 978-1-6304-3056-6

I. Constitutional law — United States — Cases. I. Gressman, Eugene, 1917-2010, author. II. Day, David S., author.

III. Title.

KF4550.C378 2014

342.73—dc23

2014014790

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 © 2014 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

Preface to Sixth Edition

Organization and Methodology. This book is mostly traditional in approach. It begins with judicial review, deals next with legislative and executive powers, and contains coverage of individual rights in the latter half. The landmark cases, from *Marbury v. Madison* to *Brown v. Board of Education* to *Bush v. Gore* to *United States v. Lopez* and beyond, are present, and coverage in this volume extends through the Court's term ending in July, 2013. Our goal is to provide a comprehensive, traditionally organized set of materials that is presented in a concise and manageable format.

Special Features. However, there is more to the book than traditional organization and approach. The following is a description of some of the special features that we have included.

SPECIAL FEATURES

“Applied” Constitutional Law: Study of Actual Litigation Documents. In addition to traditional case materials, the book includes documents from actual litigation. Complaints and answers, motions, briefs, orders, and record excerpts, all are reproduced for the student to see and study. In Chapter 1, testimony of Professors Tribe and Wright in a legislative hearing concerning the Pennzoil-Texaco dispute is reproduced to show the legislative function in enforcing the Constitution. An Appendix to Chapter 3 contains litigation documents from an actual preemption case; and Chapter 11 is followed by an appendix entitled, “The Story of a First Amendment Case.” Finally, Chapter 7, which is entitled “The Anatomy of a Constitutional Case,” is unique among constitutional law casebooks: it reproduces major documents from start to finish in a single constitutional case, so that students may see how such a case is developed in the real world. We believe that these materials will give the student a feel for the strategies required to litigate constitutional issues. In addition, they show that constitutional law is not made only by the Supreme Court, but also in legislatures, state and federal trial courts, and intermediate appellate courts. And these “real world” materials will help the student to understand the theory of constitutional law better, because each example contains a knotty constitutional question—in its procedural context.

Encouraging Reading of the Constitution: Constitutional Theory and History. We have placed the Constitution at the beginning of the book, not at the end. We want to encourage the student to read the Constitution. Toward that end, we also have inserted reading assignments, with specific references to constitutional text, throughout the book. And in the preface that contains the Constitution, we have included source documents and commentary that will introduce the student to constitutional history. Finally, in Chapters 1 and 9, we have inserted appendices that emphasize constitutional theory.

A “User Friendly” Book. Above all, we have tried to produce a book that makes the fundamentals easy for the student to grasp. Complex chapters (such as those on federalism, equal protection, and the first amendment) are introduced by text that gives the student a “road map” of the issues. The cases are edited with student comprehension in mind, and explanations of difficult principles are inserted in brackets. Our notes and questions are self-contained; they do not require the student to consult outside sources. We know that constitutional law requires intense work in class, and it generates questions that can be appreciated only through Socratic dialogue—but our philosophy is that it is

Preface to Sixth Edition

best for the student to come to class having actually understood the material in the book. The class then does not need to consist solely of helping get across the basics, and the professor can raise more interesting issues.

Problems Taken From Actual Litigation Situations. Most of the Chapters contain from one to a dozen problems. In almost every instance, the problems are taken from actual litigation situations, such as controversies decided by lower courts. The problems are real. For example, the abortion cases are followed by a problem on forced cesarean sections, which have generated court decisions in more than a dozen states. In the speech chapter, a problem about rap music that allegedly encourages violence, based upon pending litigation, is included. Also included is a problem about the notorious “Hit Man” case, in which a hired assassin followed a manual called “Hit Man,” written so as to give directions to Killers. Professor Crump was involved in this case, writing an amicus brief. There are also materials from the “Beef Check Off” case, showing the importance of preserving the record on appeal. Professor Day was part of the trial here.

State Constitutional Law. One chapter contains coverage of state constitutional law. As the chapter indicates the former Supreme Court Justice William J. Brennan Jr. has called state constitutionalism the “most important” development in constitutional law of recent years. Our coverage is very brief, because few professors will have time for more. But it should serve at least to introduce the student to the length and breadth of state constitutional law.

The “Embarrassing” (or Frightening?) Second Amendment. Our book has a chapter covering the militia clauses and second amendment right to bear arms. The second amendment makes an excellent exercise in interpretation. Guns and violence are, moreover, an important societal issue.

Careful Case Selection and Edition to Produce a Comprehensive, but Compact Book. We have included “major” cases in more complete text, “squib” cases (or paragraph cases) that are more heavily edited, and note cases. Our objective is to produce a book in which major cases can be read and discussed in depth, squib cases provide additional points—and notes provide detail in compact form. We have attempted to provide a “comprehensive” set of materials.

For this Sixth Edition, several Chapters have been partially modified and streamlined. Chapters 1, 2, 3, 10, 11 and 14 have been changed to reflect current doctrinal developments. Other Chapters have received minor modifications and consolidations. Many Notes have been added. The new reference Notes enhance the opportunities for students to pursue topics further.

Preface to Sixth Edition

It remains our hope that we have produced a book that will be particularly useful to counteract the constitutional law professor's occupational frustration in not having sufficient time to develop this complex area of law.

We hope that you will enjoy the book as much as we and our students have.

David Crump
University of Houston

David S. Day
The University of South Dakota
School of Law

The Late *Eugene M. Gressman*
University of North
Carolina (Emeritus)

Table of Contents

Chapter 0	PREFATORY CHAPTER THE CONSTITUTION AND ITS ADOPTION	1
§ 0.01	TEXT OF THE CONSTITUTION	1
§ 0.02	SOURCE DOCUMENTS FROM WHICH CONSTITUTIONAL PRINCIPLES WERE DRAWN	17
	Introductory Note: Separation of Powers, from the Greek Philosophers to Magna Carta to Montesquieu to Madison	17
	Plato, <i>Dialogues (Laws XI)</i>	17
	<i>Magna Carta</i>	18
	C. Walker, <i>Relations and Observations, Historical and Politick, Upon the Parliament Begun Anno Dom. 1640</i>	19
	J. Locke, <i>Second Treatise</i>	19
	11 Montesquieu, <i>Spirit of the Laws</i>	19
	<i>Constitution of the [Pre-Constitutional] State of Virginia</i>	19
	Madison, <i>The Federalist No. 47: Separation of Powers within the Federal Government</i>	20
	Notes and Questions	20
§ 0.03	EVENTS THAT LED TO THE CONSTITUTIONAL CONVENTION	21
	<i>Articles of Confederation (1781)</i>	21
	Notes and Questions	21
	Madison, <i>Statement of the Causes of the Constitutional Convention</i>	22
§ 0.04	THE CONSTITUTIONAL CONVENTION	23
	James Kirby Martin, <i>In the Course of Human Events: An Interpretive Exploration of the American Revolution</i>	23
	Madison, <i>Records of the Federal Convention (1787)</i>	29
§ 0.05	RATIFICATION OF THE CONSTITUTION AND ADOPTION OF THE BILL OF RIGHTS	30
[A]	The Federalists, The Opponents, and The Debates on Ratification	30
	Madison, <i>The Federalist No. 47: Separation of Powers within the Federal Government and Charges of Opponents</i>	31
	Notes and Questions	32
[B]	The Bill of Rights and The Fourteenth Amendment	32
	Hittner, <i>The Bill of Rights and the Ratification of the Constitution</i>	32
	Constitutional History: Suggestions for Further Reading	34

Table of Contents

Chapter 1	JUDICIAL POWER AND ITS LIMITS	37
§ 1.01	JUDICIAL REVIEW: ITS NATURE AND ITS APPROPRIATENESS	37
	A. Hamilton, <i>The Federalist No. 78</i>	37
[A]	Can the Courts Overrule Congress?	37
[1]	Inferring Judicial Review from the American Written Constitution: <i>Marbury v. Madison</i>	38
	Note on the Historical Background of <i>Marbury v. Madison</i>	38
	<i>Marbury v. Madison</i>	40
	Notes and Questions on the <i>Marbury</i> Opinion	44
[2]	Judicial Review and the Madisonian Dilemma: Reconciling Democratic Governance with Minority Protection	49
	Bickel, <i>The Least Dangerous Branch</i>	49
	<i>United States v. Carolene Products, Co.</i>	49
	Notes and Questions on the Relationship of Judicial Review to Democracy	50
[3]	The Court's Political Environment: Separation of Powers, Independent Duties of Co-ordinate Branches, and the Problem of Defiance	52
	<i>Cooper v. Aaron</i>	52
	Notes and Questions on the Political Position of the Supreme Court	53
	Problem A	54
	Problem B	54
	Note on Other Nations' Approaches to Judicial Review	55
[B]	Review of State Court Decisions	56
	Introductory Note	56
	<i>Martin v. Hunter's Lessee</i>	56
	Notes and Questions	59
	Appendix to § 1.01: Constitutional Law in Practice— The Use of Constitutional Arguments to Support and Oppose Proposed Legislation Relating to the <i>Pennzoil-Texaco</i> Dispute	60
	Note on the Use of Constitutional Arguments to Oppose Legislation or its Enforcement	60
	<i>Opinion of Professor Laurence Tribe on the Unconstitutionality of S.B. 1414</i>	60
	<i>Opinion of Professor Charles Alan Wright on the Constitutionality of S.B. 1414</i>	61
	Notes and Questions	63
§ 1.02	LIMITING JUDICIAL POWER	65
[A]	The "Case or Controversy" Requirement	65

Table of Contents

[1]	Advisory Opinions and Nonadversary Procedures	65
	Introductory Note: Advisory Opinions	65
	<i>Muskrat v. United States</i>	65
	Notes and Questions	67
	Problem C	68
	<i>Webster v. Reproductive Health Services</i>	68
[2]	Other Conditions of Adjudication: Standing	69
	Note on Standing and Related Doctrines	69
	<i>Massachusetts v. Mellon</i> and <i>Frothingham v. Mellon</i>	69
	Note on Changes to Constitutional Standing: From <i>Frothingham</i> to the Present Day	70
	<i>Lujan v. Defenders of Wildlife</i>	71
	Notes and Questions	73
	Note on Taxpayer Standing Developments	78
	<i>Arizona Christian School Tuition Organization v. Winn</i>	78
	Notes and Questions	79
	Note on Standing to Assert Rights of Third Persons	81
	<i>Singleton v. Wulff</i>	81
	Notes and Questions	82
[3]	Other Conditions of Adjudication Requirements: Ripeness	82
[4]	Other Conditions of Adjudication Requirements: Mootness	84
	Problem D	86
[B]	The Political Question Doctrine: An Exception to Judicial Review	87
	Note on the History and Meaning of the Political Question Doctrine: How to Read the Case of <i>Baker v. Carr</i>	87
	<i>Baker v. Carr</i>	88
	Notes and Questions	92
	<i>Davis v. Bandemer</i>	93
	Notes and Questions	94
	<i>Nixon v. United States</i>	95
	Notes and Questions	100
	Problem E	103
	Problem F	103
[C]	Congressional Power to Limit Jurisdiction	104
	<i>Ex Parte McCordle</i>	104
	Notes and Questions	106
[D]	The Supreme Court's Jurisdiction under Current Statutes	107
	Note on Supreme Court Jurisdictional Statutes	107
	Note on Procedure for Review by Certiorari or Appeal	109
[E]	Stare Decisis	109
	<i>Payne v. Tennessee</i>	109

Table of Contents

	<i>Planned Parenthood v. Casey</i>	111
[F]	“Amending the Constitution”: Through Article V and Otherwise	112
	Note on Constitutional Amendments	112
Appendix 1	THEORIES OF JUDICIAL REVIEW: HOW SHOULD THE JUDGES READ THE CONSTITUTION?	113
[A]	ORIGINALISM, NON-ORIGINALISM, AND TEXTUALISM	113
	Introductory Note	113
	Meese, <i>The Supreme Court of the United States: Bulwark of a Limited Constitution</i>	114
	Brennan, <i>The Constitution of the United States: Contemporary Ratification</i>	114
	Notes and Questions	116
[B]	INTERPRETIVISM AND SUPPLEMENTATION (OR NON-INTERPRETEVISM?)	120
	Introductory Note	120
	Problem G	121
	Brest, <i>The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship</i>	122
	Brest, <i>The Misconceived Quest for the Original Understanding</i>	123
	Bork, <i>Styles in Constitutional Theory</i>	124
	Notes and Questions	126
	Note on Professor Bobbit’s “Six Modalities” of Constitutional Argument	128
	Notes and Questions	129
	Problem H	129
Chapter 2	CONGRESSIONAL POWER	131
§ 2.01	NATIONAL LEGISLATIVE POWER: ITS NATURE AND LIMITS	131
[A]	The Federalist Vision of Strong Central Government	131
	Madison, <i>The Federalist No. 10: Violence of Parties Restrained by a Stronger Federal Union</i>	131
[B]	Enumerated, Implied, and Inherent Powers	132
	Note: Congress’ Powers in a Federal System	132
	Madison, <i>The Federalist No. 44: Limitations on State Powers and a Broad Interpretation of Federal Powers Defended</i>	133
	Problem A	134
	Note on the Background to the <i>National Bank Case</i>	135
	<i>McCulloch v. Maryland</i>	137
	Notes and Questions	140

Table of Contents

§ 2.02	THE COMMERCE POWER AND ITS DEVELOPMENT	143
[A]	The Early Commerce Clause: From the Founding to the 1930s	143
	Note on the Origins of the Commerce Power	143
[1]	What is “Commerce among the Several States?”: Early Development	143
	<i>Gibbons v. Ogden</i>	143
	Notes and Questions	145
	<i>The Daniel Ball</i>	146
	Notes and Questions	147
[2]	The Commerce Power during the “Dual Federalism” Era: From the Late 1800s to the 1930s	147
	Introductory Note: The Dual Federalism Era	147
	<i>United States v. E.C. Knight Co.</i>	148
	The Shreveport Rate Case (<i>Houston, East & West Texas Ry. v.</i> <i>United States</i>)	148
	Notes and Questions	150
	Note on the Police Power	152
	<i>Champion v. Ames (The Lottery Case)</i>	152
	Notes and Questions	153
	<i>Hammer v. Dagenhart (The Child Labor Case)</i>	154
	Notes and Questions	155
[B]	The Great Depression, the New Deal, and the Direct-Indirect Effects Doctrine: A Case Study in the Need to Limit Constitutional Law	155
	Note on the Background to the <i>Schechter Poultry</i> Case	155
	<i>A.L.A. Schechter Poultry Corp. v. United States</i>	156
	Notes and Questions	157
[C]	Expansion and Breakthrough: National Economic Problems as Objects of the Commerce Power	158
	<i>NLRB v. Jones & Laughlin Steel Corp.</i>	158
	Notes and Questions	159
	<i>United States v. Darby</i>	160
	Notes and Questions	162
	Problem B	163
[D]	The Modern Commerce Power	163
[1]	Large Accumulations of Small Effects	163
	<i>Wickard v. Filburn</i>	163
	Notes and Questions	165
[2]	Civil Rights Protection and the Commerce Power	166
	<i>Heart of Atlanta Motel, Inc. v. United States</i>	166
	<i>Katzenbach v. McClung</i>	169
	Notes and Questions	171

Table of Contents

	Problem C	171
[3]	Criminalizing Local Activities under the Commerce Power	172
	<i>Perez v. United States</i>	172
[4]	The Commerce Power Today: What are the Limits?	172
	<i>United States v. Lopez</i>	173
	Notes and Questions	180
	Problem D	183
	<i>United States v. Morrison</i>	183
	Notes and Questions	184
	<i>Gonzales v. Raich</i>	185
	Notes and Questions	192
§ 2.03	THE TAXING AND THE SPENDING POWER	194
[A]	The Taxing Power as an Instrument of Regulation	194
	<i>The Child Labor Tax Case (Bailey v. Drexel Furniture Co.)</i>	194
	Notes and Questions	194
	<i>United States v. Kahriger</i>	195
	Notes and Questions	196
[B]	The Spending Power: “Insurance” Plans, Transfer Payments, and Inducements for State Regulation	198
	<i>United States v. Butler</i>	198
	Notes and Questions	199
	<i>Steward Machine Co. v. Davis</i>	200
	<i>South Dakota v. Dole</i>	201
	Notes and Questions	203
§ 2.04	A COMPENDIUM OF ARTICLE I POWERS	207
[A]	The Healthcare Challenge	207
	<i>National Federation of Independent Business v. Sebelius</i>	207
	Notes and Questions	229
[B]	Other Congressional Powers	231
	Notes and Questions	231
Chapter 3	FEDERALISM: NATIONAL POWER AS AFFECTING THE POWERS OF THE STATES	235
	Note: What this Chapter is About	235
§ 3.01	PREEMPTION OF STATE POWER BY CONGRESSIONAL ACTION: THE SUPREMACY CLAUSE	235
[A]	Implied Preemption	236
	<i>Pennsylvania v. Nelson</i>	236
	<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission</i>	237
	Notes and Questions	240

Table of Contents

	Problem A	243
[B]	Express Preemption	244
	<i>Ingersoll-Rand Co. v. McClendon</i>	244
	<i>Cipollone v. Ligget Group, Inc.</i>	245
	Notes and Questions	248
§ 3.02	THE NEGATIVE COMMERCE CLAUSE: RESTRICTIONS ON STATE POWER TO AFFECT INTERSTATE COMMERCE	251
	Introductory Note: The Two Faces of the Commerce Clause	251
	Madison, <i>The Federalist No. 42: Powers over Foreign and Interstate Affairs</i>	252
[A]	The Early Development of the Negative Commerce Clause	253
	Note on the Police Power in the Era of “Selective Exclusivity”	253
	<i>Gibbons v. Ogden</i>	253
	Notes and Questions	255
	<i>Cooley v. Board of Wardens of the Port of Philadelphia</i>	256
	Notes and Questions	257
	Problem B	259
[B]	The Modern Standard under the Negative Commerce Clause	260
	Note on (1) Discrimination and (2) The <i>Pike</i> Formulation	260
[1]	Discrimination Against Interstate Commerce: The “Strictest Scrutiny” or “Presumptively Invalid” Standards	260
	Introductory Note	260
	<i>Dean Milk Co. v. City of Madison</i>	261
	Notes and Questions	261
	<i>City of Philadelphia v. New Jersey</i>	262
	Notes and Questions	263
	<i>Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon</i>	264
	Notes and Questions	268
[2]	Embargoes	269
	Problem C	269
	<i>C & A Carbone, Inc. v. Town of Clarkstown</i>	270
[3]	The Prohibition upon “Projecting Legislation into other States”	270
	<i>Brown-Forman Distillers Corp. v. New York Liquor Authority</i>	270
	Notes and Questions	271
[4]	“Nondiscriminatory” Regulation: The Balancing Test	271
	<i>Bibb v. Navajo Freight Lines, Inc.</i>	271
	<i>Southern Pacific Co. v. Arizona</i>	272
	Notes and Questions	274
	Note on How to Read the <i>Pike</i> Case	274
	<i>Pike v. Bruce Church, Inc.</i>	275
	Notes and Questions	277

Table of Contents

	Problem D	278
	Notes and Questions	278
[5]	Subsidies to In-State Residents	280
	<i>West Lynn Creamery, Inc. v. Healy</i>	280
	Problem E	281
[6]	The Importance of Fact Litigation as to Burdens	281
	<i>Raymond Motor Transportation, Inc. v. Rice</i>	281
	<i>Kassel v. Consolidated Freightways Corp.</i>	282
	Notes and Questions	283
	Problem F	283
[7]	The States' Own Purchases, Sales, and Resources in the Marketplace	284
	<i>Reeves, Inc. v. Stake</i>	284
	<i>South-Central Timber Development, Inc. v. Wunnicke</i>	287
	Notes and Questions	287
§ 3.03	THE SOVEREIGNTY ISSUE AND THE TENTH AMENDMENT: STATES "AS STATES"	289
[A]	Just What is the Place of a State in the Constitutional Hierarchy?: The Original Understanding	289
	Barbash, <i>The Founding</i>	289
	Notes and Questions	291
[B]	The Extent of State Immunity from National Regulation	291
	State Sovereignty Prior to the <i>National League of Cities</i> Case	291
	<i>National League of Cities v. Usery</i>	292
	Notes and Questions	293
	<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	294
	Notes and Questions	295
	<i>New York v. United States</i>	296
	Notes and Questions	301
	<i>Alden v. Maine</i>	303
	<i>Federal Maritime Commission v. South Carolina Ports Authority</i>	304
§ 3.04	THE INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE	305
	Introduction to Article IV: The Privileges and Immunities Clause	305
	<i>Supreme Court of New Hampshire v. Piper</i>	306
	Notes and Questions	308
§ 3.05	THE ELEVENTH AMENDMENT	312
	Introductory Notes	312
	<i>Seminole Tribe of Florida v. Florida</i>	315
	Notes and Questions	317
§ 3.06	ATTEMPTS BY THE STATE TO CONTROL THE FEDERAL GOVERNMENT	318

Table of Contents

	Note on the Federal Government’s Immunity from Efforts by the States to Disadvantage It	318
	<i>U.S. Term Limits, Inc. v. Thornton</i>	319
	Notes and Questions	322
Appendix 3	CONSTITUTIONAL LAW IN PRACTICE—NEGATIVE COMMERCE CLAUSE AND PREEMPTION ARGUMENTS IN <i>PENNZOIL CO. v. TEXACO, INC.</i>	325
	Background to the Pennzoil-Texaco Dispute	325
	Texaco’s Complaint	326
	Affidavit Supporting Prayer for TRO	328
	Notes and Questions	331
Chapter 4	STATE TAXATION OF INTERSTATE COMMERCE	333
§ 4.01	THE HISTORICAL CONCERNS: DISCRIMINATION, MULTIPLE BURDENS (APPORTIONMENT), JURISDICTION, AND FAIR RELATIONSHIP	333
	Introductory Note	333
	<i>Western Live Stock v. Bureau of Revenue</i>	333
	Notes and Questions	335
	<i>Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment</i>	335
	Notes and Questions	336
§ 4.02	THE MODERN CASES AND THE FOUR-PART TEST	337
	Note on the Demise of the “Privilege Tax” Doctrine	337
	<i>Complete Auto Transit, Inc. v. Brady</i>	337
	Notes and Questions	338
Chapter 5	PRESIDENTIAL POWER AND RELATED POWERS OF CONGRESS; SEPARATION OF POWERS	341
§ 5.01	EXECUTIVE VERSUS LEGISLATIVE POWER	341
[A]	Chapter Introduction: Imperial Presidency or Imperial Congress?	341
	Notes and Questions	341
[B]	Sources of Executive Power	343
	Notes and Questions	343
	<i>Youngstown Sheet & Tube Co. v. Sawyer</i> [<i>The Steel Seizure Case</i>]	345
	Notes and Questions	350
[C]	The President’s Exercise of Quasi-Legislative Powers	351
	Introductory Note	351
[1]	The Presidential Veto	352

Table of Contents

[2]	The (Statutory) Line-Item Veto	352
	<i>Clinton v. City of New York</i>	353
	Notes and Questions	357
[3]	The Pocket Veto	358
[4]	Impoundment	359
[D]	The Legislature’s Exercise of Quasi-Executive Powers:	
	Bicameralism and Presentment	361
	Introductory Note	361
	<i>I.N.S. v. Chadha</i>	362
	Notes and Questions	366
[E]	Congressional Delegation of Quasi-Legislative Power to	
	“Independent Regulatory Agencies” or Officers	368
	Introductory Note	368
	<i>Yakus v. United States</i>	369
	Notes and Questions	369
	<i>Bowsher v. Synar</i>	370
	Notes and Questions	374
	Eugene Gressman, <i>Separation of Powers: The Third Circuit</i>	
	<i>Dimension</i>	375
	<i>Morrison v. Olson</i>	375
	<i>Mistretta v. United States</i>	380
	Notes and Questions	385
§ 5.02	JUDICIAL EXERCISE OF QUASI-LEGISLATIVE POWERS	387
	Notes and Questions	387
§ 5.03	FOREIGN OR EXTERNAL AFFAIRS	388
[A]	The Treaty Power	388
	Introductory Note	388
	<i>Missouri v. Holland</i>	388
	Notes and Questions	389
[B]	Executive Proclamations and Agreements	390
	Introductory Note	390
	<i>United States v. Curtiss-Wright Export Corp.</i>	390
	Notes and Questions	392
[C]	Executive Agreements Based on Unclear Congressional Authority	392
	Introductory Note	392
	<i>Dames & Moore v. Regan</i>	392
	Notes and Questions	395
[D]	The Limits of Executive Power	396
	<i>Medellín v. Texas</i>	396
§ 5.04	THE WAR AND MILITARY POWERS AND THE	
	COMMANDER-IN-CHIEF	398
[A]	The Extent of the War Power	398

Table of Contents

	<i>Woods v. Cloyd W. Miller Co.</i>	398
[B]	Separation of Powers and the War Power	399
	Introduction to the War Powers Resolution	399
	The War Powers Resolution	399
	Notes and Questions	401
§ 5.05	EXECUTIVE AND LEGISLATIVE PRIVILEGE; IMMUNITIES	405
[A]	Legislative Immunity	405
	Note on the Speech or Debate Clause	405
[B]	Executive Privilege for Confidential Information	406
	Introductory Note	406
	<i>United States v. Nixon</i>	406
	Notes and Questions	409
[C]	Executive Immunity against Liability for Damages	410
	<i>Nixon v. Fitzgerald</i>	410
	<i>Clinton v. Jones</i>	411
§ 5.06	THE APPOINTMENTS POWER, POWER OVER PERSONNEL, AND NATIONAL PROPERTY POWER	412
[A]	The Appointments Power	412
	Introductory Note	412
	<i>Buckley v. Valeo</i>	412
[B]	Presidential Power Over Personnel and Property	413
	Notes and Questions	413
§ 5.07	THE PARDON POWER	414
	Note on the Pardon Power	414
§ 5.08	THE ELECTORAL COLLEGE AND PRESIDENTIAL ELECTIONS	415
	Notes on the Electoral College	415
	<i>Bush v. Gore</i>	416
	Notes and Questions	427
Chapter 6	CONSTITUTIONAL PROTECTION OF ECONOMIC RIGHTS	429
§ 6.01	CONSTITUTIONAL PROTECTION OF ECONOMIC, AS OPPOSED TO PERSONAL OR POLITICAL, RIGHTS	429
	Note: Do Economic Rights Have a Status Similar to that of Other Personal and Political Rights?	429
§ 6.02	SUBSTANTIVE DUE PROCESS AND BUSINESS REGULATION	431
[A]	Early Conceptions: Justice Chase’s “Natural Rights” Theory	431
	<i>Calder v. Bull</i>	431
	Notes and Questions	432
[B]	The Fourteenth Amendment	433
	Note: Substantive Due Process and the Historical Basis of the	

Table of Contents

	Fourteenth Amendment	433
	<i>The Slaughter House Cases</i>	434
	Notes and Questions	436
	<i>Munn v. Illinois</i>	437
	Notes and Questions	438
[C]	“Liberty of Contract”: A Case Study in the Need for Judicial Restraint	439
	<i>Lochner v. New York</i>	439
	Notes and Questions	442
	Note: From <i>Lochner</i> to <i>Schechter Poultry</i> : The Court Uses the Commerce Clause and Substantive Due Process to Control Legislatures	445
[D]	Substantive Due Process Recedes: The “Rational Basis” Test	446
	<i>Nebbia v. New York</i>	446
	Notes and Questions	448
	<i>Williamson v. Lee Optical of Oklahoma, Inc.</i>	449
	<i>Duke Power Co. v. Carolina Environmental Study Group, Inc.</i>	449
	Problem A	450
	Notes and Questions	451
	Problem B	452
[E]	Equal Protection in the Economic Context	452
§ 6.03	TAKING OF PROPERTY WITHOUT JUST COMPENSATION	453
	Introductory Note on the Taking Clause Doctrine	453
	Note on the Purposes of the Taking Clause	454
[A]	Taking by Physical Invasion or by Destruction	455
	<i>Loretto v. Teleprompter Manhattan CATV Corp.</i>	455
	<i>Nollan v. California Coastal Commission</i>	456
	Notes and Questions	459
	<i>Phillips v. Wash. Legal Foundation</i>	460
	Notes and Questions	461
	<i>Dolan v. City of Tigard</i>	462
	Notes and Questions	463
[B]	Taking by Regulation of Use	464
[1]	When Does “Regulation” Become “A Taking”?	464
	<i>Penn Central Transportation Co. v. City of New York</i>	464
	Notes and Questions	470
	<i>Lucas v. South Carolina Coastal Council</i>	472
	<i>Eastern Enterprises v. Apfel</i>	473
	Notes and Questions	474
	Problem C	476
[2]	Remedies for Takings: Inverse Condemnation	476

Table of Contents

	<i>First English Evangelical Lutheran Church v. County of Los Angeles</i>	476
	Notes and Questions	478
[C]	Problems Associated with Price Regulation	479
	Note: Price Regulation and the Takings Clause	479
	<i>Duquesne Light Co. v. Barasch</i>	480
	Notes and Questions	482
[D]	The Public Purpose Requirement	483
	<i>Hawaii Housing Authority v. Midkiff</i>	483
	Notes and Questions	484
	Appendix to §§ 6.02–.03: Constitutional Law in Practice—Due Process and Taking Clause Issues in <i>Ball Development Co. v. City of Virginia City</i>	485
	Background to the Dispute: <i>Ball Development Co. v. City of Virginia City</i>	485
	Note on Defendant’s Answer	488
	Note on the Defendant City’s Cross-Motion for Summary Judgment and Supporting Factual Material	492
	Notes and Questions	492
§ 6.04	THE CONTRACT CLAUSE	494
[A]	The Original Understanding	494
	Note on the Historical Purpose of the Contract Clause	494
	<i>Fletcher v. Peck</i>	498
	Notes and Questions	498
[B]	The Long Dark Age of the Contract Clause	499
	<i>Charles River Bridge Co. v. Warren Bridge Co.</i>	499
	<i>Stone v. Mississippi</i>	500
	Notes and Questions	500
[C]	The Renaissance of the Contract Clause	501
	<i>United States Trust Co. v. New Jersey</i>	501
	<i>Allied Structural Steel Co. v. Spannaus</i>	503
	Notes and Questions	506
	Problem D	507
[D]	Reburial of the Contract Clause?	508
	<i>Energy Reserves Group v. Kansas Power & Light Co.</i>	508
	Notes and Questions	509

Table of Contents

Chapter 7	THE ANATOMY OF A CONSTITUTIONAL CASE: <i>REDI-MART, INC. v. LONDON RETAIL MERCHANTS ASSOCIATION</i>	511
§ 7.01	THE BACKGROUND TO THE “WEST YORK BLUE LAW” DISPUTE	511
	Introductory Note	511
	The West York Sunday Closing Law	512
	Notes and Questions	513
	Note on the Lawyers in the “Real” Case	514
§ 7.02	THE PLEADINGS	515
	Notes and Questions	518
§ 7.03	SIMULTANEOUS ACTIVITY IN THE LEGISLATIVE ARENA	519
	Note on Legislative Activity	519
§ 7.04	DISCOVERY, FACT-GATHERING, AND OTHER PRETRIAL ACTIVITY	520
	Note on Production and Deposition Discovery	523
	Note on Negotiation Between the Parties	523
	Notes and Questions	524
§ 7.05	HEARING, “TRIAL,” AND JUDGMENT	525
	Note on Plaintiff’s Trial Brief	527
	Note on, and Excerpts from, Preliminary Injunction Hearing	527
	Note on Stipulations, Final Judgment, and Request for Findings	531
§ 7.06	INTERMEDIATE APPEALS AND OTHER REVIEW	534
	Note on Perfection of Appeal	534
	Note on Further Proceedings, Including Reply Brief and Oral Argument	540
	<i>London Retail Merchants Association v. Redi-Mart, Inc.</i>	543
	Note on Rehearing and on State Supreme Court’s Denial of Discretionary Review	546
§ 7.07	PROCEEDINGS IN THE UNITED STATES SUPREME COURT	548
	Questions Presented	548
	Notes and Questions	550
§ 7.08	LEGISLATION MOOTS THE QUESTION	551
	Note on the Campaign to Repeal the West York Blue Law	551
	Notes and Questions	552
Chapter 8	THE BASIC PROCEDURAL STRUCTURE OF DUE PROCESS AS A PROTECTION AGAINST STATE ACTION	553
§ 8.01	THE REQUIREMENT OF STATE ACTION (ALSO COVERED IN CHAPTER 13, BELOW)	553
	Introductory Note on the “State Action” Requirement	553

Table of Contents

	<i>Edmonson v. Leesville Concrete Co.</i>	554
	Notes and Questions	555
§ 8.02	THE HISTORICAL DEVELOPMENT OF DUE PROCESS INTERPRETATION	555
[A]	The Search for Constitutional Protection of Personal Liberties Against State Governments	555
	Note on the Theories that Failed: Privileges and Immunities, Natural Law, etc.	555
[B]	The Incorporation Debate: The “Total Incorporation,” “Selective Incorporation,” “Ordered Liberty,” “Fundamental Fairness,” “American Scheme of Justice,” and “Federalism” Theories	556
	Notes and Questions on the Incorporation Debate	556
	<i>Duncan v. Louisiana</i>	558
	Notes and Questions on the Legitimacy of Incorporation and on the “Jot-For-Jot” Theory of Incorporation of Interpretations	559
	<i>Johnson v. Louisiana</i>	561
§ 8.03	PROCEDURAL DUE PROCESS	561
	Introductory Note	561
[A]	What “Liberty” or “Property” Interests Are Protected by Procedural Due Process?	562
	Notes and Questions	562
	<i>Bishop v. Wood</i>	564
	Notes and Questions	566
	<i>Town of Castle Rock (Co.) v. Gonzales</i>	569
	Problem A	570
[B]	What Kind of “Deprivation” of a Protected Interest Triggers Procedural Due Process?	571
[1]	Intentional Deprivations	571
	<i>Goldberg v. Kelly</i>	571
[2]	Negligence By Government	572
	Problem B	572
	<i>Daniels v. Williams</i>	573
	Notes and Questions	574
[C]	What Process Is “Due” (i.e., Constitutionally Required)?	575
	Introductory Note	575
	<i>Mathews v. Eldridge</i>	575
	Notes and Questions	578
	<i>Ingraham v. Wright</i>	579
[1]	Notice	579
	Notes and Questions	579
[2]	A “Hearing”	580
	<i>Goldberg v. Kelly</i>	580

Table of Contents

	Notes and Questions	581
[3]	Proof by the Opponent, Evidence Development, and Discovery	584
	<i>Santosky v. Kramer</i>	584
	Notes and Questions	585
[4]	Counsel (And Funds For Expert Witnesses?)	586
	<i>Lassiter v. Department of Social Services</i>	586
	Notes and Questions	587
[5]	An Ostensibly “Impartial” Factfinder	588
	<i>Ward v. Village of Monroeville</i>	588
	Notes and Questions	589
	<i>Washington v. Harper</i>	590
	Problem C	592
[6]	Freedom from Arbitrary Application of Law: Punitive Damages . . .	592
	Notes and Questions	592
	<i>BMW of North America v. Gore</i>	593
	Notes and Questions	595
[7]	Appeal	596
	Notes and Questions	596
[8]	A Timely and Effective Remedy	597
	Notes and Questions	597
Appendix 8	SAMPLE PROCEDURES FOR STUDENT SUSPENSION OR EXPULSION	599
	<hr/>	
	Frels & Cooper, <i>School Discipline, Policies and Procedures: A Practical Guide 7–11, D6–D11</i>	599
	Notes and Questions	603
Chapter 9	DUE PROCESS: SUBSTANTIVE RIGHTS OF “PRIVACY” AND PERSONAL AUTONOMY	605
<hr/>		
§ 9.01	THE FUNDAMENTAL RIGHTS CONTROVERSY	605
	Notes and Questions	605
	Gressman, <i>The Unhappy History of Civil Rights Legislation</i>	606
	Notes and Questions	607
	Note on Roger Sherman’s Draft of a Bill of Rights	608
§ 9.02	REPRODUCTION, ABORTION, AND SEXUAL CONDUCT	608
	<i>Skinner v. Oklahoma</i>	608
	Notes and Questions	609
[A]	Birth Control and the Basic Structure of Modern Substantive Due Process	610
	<i>Griswold v. Connecticut</i>	610
	Notes and Questions	615
[B]	Abortion and Substantive Due Process	620

Table of Contents

	<i>Roe v. Wade</i>	620
	<i>Doe v. Bolton</i>	627
	Notes and Questions	629
	Problem A	632
[C]	Is Abortion a “Clash of Absolutes”—Or Is There Room for Persuasion?: “Serious, Respectful Debate” with “Greater Humility”	633
	L. Tribe, <i>Abortion: The Clash of Absolutes</i>	633
[D]	The Progeny of <i>Roe v. Wade</i> : Many Years of Grappling with Abortion-Related Issues	634
[1]	Abortion Consent, Notification, Etc.	634
	Note on the <i>Danforth</i> , <i>Bellotti</i> and <i>Matheson</i> Decisions	634
	Notes and Questions	635
	Problem B	636
[2]	Abortion Funding	637
[3]	The Third and Fourth Generations of Abortion Statutes: Regulating The Circumstances of Abortion	637
	Note on the 1983 Abortion Decisions: <i>Akron</i> and <i>Ashcroft</i>	637
	Note on the 1986 Abortion Decision (<i>Thornburgh v. American College of Obstetricians and Gynecologists</i>)	638
	Notes and Questions	639
	Problem C	639
[4]	The Webster Decision: An Assault Upon the Trimester Framework	640
[E]	<i>Stare Decisis</i> or Failure of Duty?: The “Undue Burden” Standard of the <i>Casey</i> Decision	642
	Note on Understanding <i>Planned Parenthood v. Casey</i>	642
	<i>Planned Parenthood v. Casey</i>	643
	Notes and Questions	656
	Problem D	657
	The First Partial-Birth Abortion Decision: <i>Stenberg v. Carhart</i>	658
	Notes and Questions	659
	<i>Gonzales v. Carhart</i>	659
	Notes and Questions	667
	Problem E	669
[F]	Sexual Conduct And Intimate Relationships	669
	Introductory Notes and Questions	669
	Introductory Note	670
	<i>Lawrence v. Texas</i>	670
	Notes and Questions	676
	Appendix to §9.02 Readings on the Constitutional Theory of the Abortion Cases	678

Table of Contents

[A]	The Interpretivism—Supplementation—Noninterpretivism Debate . . .	678
	Ely, <i>The Wages of Crying Wolf: A Comment on Roe v. Wade</i>	678
	Grey, <i>The Constitution as Scripture</i>	678
[B]	What Kind of “Supplementation” or Noninterpretivism?	679
	Perry, <i>Abortion, the Public Morals, and the Police Power: The</i> <i>Ethical Function of Substantive Due Process</i>	679
	Grano, <i>Judicial Review and a Written Constitution in a Democratic</i> <i>Society</i>	680
	Bennett, <i>Objectivity in Constitutional Law</i>	681
[C]	The Meaning of “Privacy”: As Autonomy, As Freedom From Bodily Invasion, and As Other Concepts	682
	Henkin, <i>Privacy and Autonomy</i>	682
	Regan, <i>Rewriting Roe v. Wade</i>	683
	Chemerinsky, <i>Rationalizing the Abortion Debate: Legal Rhetoric in</i> <i>the Abortion Controversy</i>	683
[D]	Personhood—And The Human Life Bill	684
	Noonan, <i>The Root and Branch of Roe v. Wade</i>	684
	Estreicher, <i>Congressional Power and Congressional Rights:</i> <i>Reflections on Proposed “Human Life” Legislation</i>	684
§ 9.03	THE FAMILY	685
	<i>Village of Belle Terre v. Boraas</i>	685
	<i>Moore v. East Cleveland</i>	685
	Notes and Questions	689
	<i>Michael H. v. Gerald D.</i>	689
	Notes and Questions	691
§ 9.04	THE RIGHT TO INTERSTATE TRAVEL	692
	<i>Edwards v. California</i>	692
	Notes and Questions	693
§ 9.05	OTHER ISSUES RELATED TO PRIVACY OR AUTONOMY: THE RIGHTS TO CONTROL ONE’S PERSONALITY, TO TREATMENT, TO DIE, OR TO BE LET ALONE	694
[A]	How Does the Court Really Discover Fundamental Rights: Is It a Two-Step Methodology?	694
	David Crump, <i>How do the Courts Really Discover Unenumerated</i> <i>Fundamental Rights? Cataloguing the Methods of Judicial</i> <i>Alchemy</i>	694
[B]	Personality, Reputation, and Related Issues	698
	<i>Paul v. Davis</i>	698
	Notes and Questions	700
	<i>DeShaney v. Winnebago County Department of Social Services</i> . . .	701
	Notes and Questions	702
	Problem F	703

Table of Contents

[C]	Bodily Security and Freedom from Restraint	704
	<i>Youngberg v. Romeo</i>	704
	Notes and Questions	706
[D]	Interests Regarding Death: Is There a “Right to Die”?	707
	Notes and Questions	707
	<i>Washington v. Glucksberg</i>	708
	Notes and Questions	712
	Note on Other Nations’ Consideration of the “Right to Die”	714
Chapter 10		715
EQUAL PROTECTION		715
§ 10.01	AN OVERVIEW OF EQUAL PROTECTION: THE THREE-TIERED APPROACH	715
	Note on the Overall Structure of the Equal Protection Decisions	715
	Problem A	716
§ 10.02	TRADITIONAL EQUAL PROTECTION: THE RATIONAL BASIS TEST	718
	Notes and Questions	718
	<i>Fitzgerald v. Racing Association of Central Iowa</i>	720
	Notes and Questions	722
	Problem B	723
§ 10.03	THE “UPPER TIER”: STRICT SCRUTINY AND “COMPELLING” GOVERNMENTAL INTERESTS	724
[A]	Race and Other “Suspect Classifications”	724
[1]	Before and After The Civil War Amendments	724
	Note: Background to the <i>Dred Scott</i> Case	724
	<i>Scott v. Sandford [The Dred Scott Case]</i>	724
	Notes and Questions	725
[2]	Express Racial Classifications	726
	<i>Korematsu v. United States</i>	726
	Notes and Questions	730
[a]	Segregation, Including the Separate But Equal Doctrine	731
	<i>Plessy v. Ferguson</i>	731
	Notes and Questions	732
	Note on the Route from <i>Plessy</i> to <i>Brown</i> :	
	<i>McLaurin, Sweatt, etc.</i>	733
	<i>Brown v. Board of Education (“Brown I”)</i>	733
	Notes and Questions	737
[b]	Other Express Racial Classifications	738
	<i>Loving v. Virginia</i>	738
	Notes and Questions	739
	<i>St. Francis College v. Al-Khazraji</i>	741

Table of Contents

	<i>Shaare Tefila Congregation v. Cobb</i>	741
	Problem C	741
[3]	“De Facto” Discrimination or Discrimination In Effect: Discriminatory “Purpose” Is Required?	742
	Introductory Note on Intent and Impact	742
	Note on the Relationship Between Intent and Evil: From the Star Wars Legends to the Supreme Court Opinions	743
	<i>Yick Wo v. Hopkins</i>	744
	<i>Washington v. Davis</i>	745
	Notes and Questions	748
	<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i>	750
	Notes and Questions	751
	Problem D	753
	Problem E	753
	<i>Batson v. Kentucky</i>	754
	Notes and Questions	757
[4]	“Equitable Remedies” For Segregation in the Schools	758
	<i>Brown v. Board of Education (“Brown II”)</i>	758
	Notes and Questions	759
	<i>Milliken v. Bradley</i>	761
	<i>Freeman v. Pitts</i>	762
	Notes and Questions	769
[5]	Affirmative Action: Addressing General Societal Effects by “Benign” Consideration of Race—or “Reverse” Discrimination?	770
	Note on How to Read the <i>Bakke</i> Case	770
	<i>Board of Regents v. Bakke</i>	771
	Notes and Questions	780
	Problem F	782
	Note on Employment-Related Racial Preferences: The <i>Fullilove</i> , <i>Croson</i> , <i>Metro</i> , and <i>Adarand</i> Cases	782
	Notes and Questions on <i>Fullilove</i> , <i>Croson</i> , and <i>Metro</i>	786
	<i>Adarand Constructors, Inc. v. Peña</i>	787
	Notes and Questions	792
	Introductory Note to <i>Grutter</i> and <i>Gratz</i>	793
	<i>Grutter v. Bollinger</i>	793
	Notes and Questions	802
	<i>Gratz v. Bollinger</i>	804
	Notes and Questions	807
	<i>Fisher v. University of Texas at Austin</i>	808
	Notes and Questions	810

Table of Contents

	<i>Parents Involved in Community Schools v. Seattle School District No. 1</i>	810
	Notes and Questions	822
	<i>Shaw v. Hunt</i>	823
	Notes and Questions	826
[6]	Other Suspect (or Conditionally Suspect) Classifications:	
	Alienage and Nationality	829
	<i>Graham v. Richardson</i>	829
	<i>Bernal v. Fainter</i>	829
	Notes and Questions	831
[B]	Fundamental Rights	831
	Note on Conduct Classifications	831
[1]	The Right To Vote	832
[a]	Denial Of The Right To Vote	832
	<i>Kramer v. Union Free School District</i>	832
	<i>Salyer Land Co. v. Tulare Lake Basin Water Storage District</i>	834
	Notes and Questions	835
[b]	Voting Apportionment: “One Person, One Vote”	836
	The Early Decisions: <i>Baker v. Carr</i> and its Progeny	836
	<i>Reynolds v. Sims</i>	837
	Notes and Questions	840
	<i>Davis v. Bandemer</i>	841
	Problem G	842
[2]	The “Right” to be a Candidate for Election: “Flexible Balancing”	843
	Notes and Questions	843
[3]	The Right To Travel In Interstate Commerce	845
	<i>Shapiro v. Thompson</i>	845
	Notes and Questions	847
	<i>Sosna v. Iowa</i>	848
	<i>Saenz v. Roe</i>	849
	Notes and Questions	853
[4]	Other Fundamental Rights: Marriage, Family, Speech, Association, and Privacy	854
	<i>Vacco v. Quill</i>	855
§ 10.04	THE “MIDDLE TIER”: SHIFTING AREAS OF GREATER-THAN- NORMAL (BUT NOT FUNDAMENTAL) PROTECTION	856
[A]	How Should Claims for Heightened Scrutiny Be Determined?	
	The Example of Age	856
	<i>Machusetts Board of Retirement v. Murgia</i>	856
[B]	Gender	857
	Introductory Note	857
	<i>Reed v. Reed</i>	857

Table of Contents

	<i>Frontiero v. Richardson</i>	858
	Notes and Questions	860
	<i>Craig v. Boren</i>	861
	<i>Califano v. Webster</i>	862
	Notes and Questions	864
	<i>Michael M. v. Superior Court</i>	864
	Notes and Questions	865
	<i>Mississippi University For Women v. Hogan</i>	866
	Notes and Questions	867
	<i>United States v. Virginia</i>	869
	Notes and Questions	872
	Problem H	873
	Problem I	874
	Note on the Proposed Equal Rights Amendment	875
[C]	Sexual Orientation: The Arguments of Gays, Lesbians, and Others . . .	876
	Notes and Questions	876
	<i>Romer v. Evans</i>	876
	Notes and Questions	881
	Problem J	882
	<i>United States v. Windsor</i>	883
	Notes and Questions	893
[D]	Illegitimacy	895
	Introductory Notes and Questions	895
	<i>Lalli v. Lalli</i>	896
	Notes and Questions	899
[E]	Court Access As Influenced By Poverty	899
	Introductory Note	899
	<i>Douglas v. California</i>	899
	<i>Boddie v. Connecticut</i>	900
	Notes and Questions	901
[F]	The Court Limits the Use of Heightened Scrutiny: Education, Housing, and Subsistence as Subject to “Mere Rationality” Review	902
	<i>Dandridge v. Williams</i>	902
	Notes and Questions	904
	<i>San Antonio Independent School District v. Rodriguez</i>	906
	Notes and Questions	910
[G]	Are There Other “Middle Tier” Classifications?: The Case of the Developmentally Disabled	911
	<i>City of Cleburne v. Cleburne Living Center</i>	911
	Notes and Questions	915
	Problem K	915

Table of Contents

Chapter 11 SPEECH, PRESS, AND ASSOCIATION 917

§ 11.01	POLICIES, PRINCIPLES, AND HISTORY OF THE FIRST AMENDMENT	917
[A]	History and Purposes of the First Amendment	917
	Note on the Historical Development of the Freedom of Speech	917
	Note: Why Protect the Freedom of Speech?	918
[B]	An Introduction to the Principles Contained in First Amendment Decisions	919
	Note on Major Themes in First Amendment Decisions	919
§ 11.02	THE “PREFERRED” POSITION OF THE FREEDOM OF SPEECH: UTTERANCES THAT POSE ALLEGED DANGERS OF VIOLENCE OR INSURRECTION	923
	Introductory Note	923
[A]	The “Clear and Present Danger” Doctrine	923
[1]	The Early History: The Holmes-Brandeis Formulation	923
	<i>Schenck v. United States</i>	923
	Notes and Questions	925
	<i>Abrams v. United States</i>	926
[2]	The Hostile Crowd (and the Hecklers’ Veto)	927
	<i>Feiner v. New York</i>	927
	<i>Terminiello v. City of Chicago</i>	928
	Notes and Questions	929
	Problem A	929
	Problem B	930
	<i>Forsyth County v. Nationalist Movement</i>	931
	Notes and Questions	934
	Problem C	934
[B]	Advocacy of Unlawful Conduct (or of Unpopular Ideas)	935
[1]	The Historical Background: “Criminal Anarchy,” Sedition, Communism, and the Gravity-of-the-Evil Test	935
	Note on the Communist Party Cases	935
	<i>Dennis v. United States</i>	936
	Notes and Questions	937
[2]	The Modern Test for Criminalizing Speech Urging Illegal Action	938
	<i>Brandenburg v. Ohio</i>	938
	Notes and Questions	941
	Problem D	942
	Problem E	942
	Problem F	943
	Problem G	944

Table of Contents

§ 11.03	SOME GENERAL PRINCIPLES: THE TWO-TRACK SYSTEM AND THE OVERBREADTH AND VAGUENESS DOCTRINES	946
[A]	“Track One” and “Track Two” Analysis: Content-Based Regulation Versus Content-Neutral Regulation	946
	Introductory Note: The Two-Track System	946
	<i>Police Department of Chicago v. Mosley</i>	946
	<i>Boos v. Barry</i>	947
	Notes and Questions	948
	<i>Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board</i>	949
	Notes and Questions	951
	Problem H	954
	<i>Turner Broadcasting System, Inc. v. Federal Communications Commission</i>	954
[B]	The Overbreadth and Vagueness Doctrines	955
	Introductory Note	955
	<i>United States Civil Service Commission v. National Association of Letter Carriers</i>	955
	Notes and Questions	956
	<i>Broaderick v. Oklahoma</i>	957
	Notes and Questions	960
§ 11.04	UNPROTECTED SPEECH (OR SPEECH “THAT IS NOT PROTECTED SPEECH”)	961
[A]	Unprotected Speech Categories: An Overview	961
	Introductory Note	961
	<i>Chaplinsky v. New Hampshire</i>	961
	<i>United States v. Stevens</i>	962
	Notes and Questions	963
[B]	Obscenity	964
[1]	Development of the Basic Doctrine	964
	<i>Roth v. United States</i>	964
	Notes and Questions	965
	Note on <i>Redrup v. New York</i> and its Aftermath	966
	<i>Miller v. California</i>	967
	<i>Paris Adult Theatre I v. Slaton</i>	969
	Notes and Questions	971
	Problem I	972
	Note: Canada Accepts the Feminist Anti-Pornography Approach	974
[2]	“Variable” Obscenity and Related Issues	974
	<i>Stanley v. Georgia</i>	974
	Notes and Questions	975

Table of Contents

[C]	Certain Types of “Offensive” Speech: Profanity, “Fighting Words” and “Indecent” Speech	975
[1]	Profane Speech	975
	<i>Cohen v. California</i>	975
	Notes and Questions	978
[2]	Fighting Words and Hate Speech	980
	<i>R.A.V. v. City of St. Paul, Minnesota</i>	980
	Notes and Questions	983
	Problem J	984
[3]	“Indecent” Speech	985
	<i>FCC v. Pacifica Foundation</i>	985
	Notes and Questions	988
	<i>Reno v. American Civil Liberties Union</i>	990
	Notes and Questions	993
	Problem K	994
	Problem L	995
[D]	Child Pornography	996
	<i>Ginsberg v. New York</i>	996
	<i>New York v. Ferber</i>	997
	Notes and Questions	1000
	<i>Ashcroft v. The Free Speech Coalition</i>	1001
	Notes and Questions	1001
	Problem M	1002
[E]	Adult Pornography: Zoning and Other Regulation	1003
	<i>Young v. American Mini-Theaters, Inc.</i>	1003
	Notes and Questions	1006
[F]	“True Threats” as Unprotected Speech	1007
	<i>Virginia v. Black</i>	1007
	Notes and Questions	1012
[G]	Defamation and Invasion of Privacy	1013
[1]	Defamation in the Public Arena	1013
	<i>New York Times Co. v. Sullivan</i>	1013
	Notes and Questions	1017
	<i>Milkovich v. Lorain Journal</i>	1019
	Problem N	1021
[2]	Libel Law in the Context of Private Figures or Events	1021
	<i>Gertz v. Robert Welch, Inc.</i>	1021
	Notes and Questions	1025
[3]	Invasion of Privacy and Intentional Infliction of Emotional Distress	1026
	<i>Florida Star v. B.J.F.</i>	1026

Table of Contents

	Notes and Questions	1030
	<i>Hustler Magazine v. Falwell</i>	1031
	Notes and Questions	1032
	<i>Snyder v. Phelps</i>	1033
	Notes and Questions	1037
[H]	Copyright Infringement	1038
	<i>Harper & Row, Publishers, Inc. v. Nation Enterprises</i>	1038
[I]	“Violent Speech” As Unprotected Speech?	1039
	<i>Brown v. Entertainment Merchants Association</i>	1039
	Notes and Questions	1040
[J]	False Statements of Fact As Unprotected Speech?	1041
	<i>United States v. Alvarez</i>	1041
§ 11.05	THE FREE PRESS CLAUSE: PRIOR RESTRAINT, SUBSEQUENT REGULATION, AND PRESS ACCESS	1042
[A]	The “Prior Restraint” Doctrine	1042
	<i>Near v. Minnesota</i>	1042
	<i>New York Times Co. v. United States</i>	1043
	Notes and Questions	1047
	<i>Nebraska Press Ass’n v. Stuart</i>	1049
	Notes and Questions	1050
	Problem O	1050
[B]	Regulation of The Press Other than by Prior Restraint: Judicial Review of “Subsequent Regulation.”	1051
	<i>Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue</i>	1051
	Notes and Questions	1055
	<i>Cohen v. Cowles Media Company</i>	1056
	Notes and Questions	1059
[C]	Newsgathering	1060
	<i>Branzburg v. Hayes</i>	1060
	Notes and Questions	1064
[D]	Press Access to Government Institutions	1065
	Introductory Notes and Questions	1065
	<i>Press Enterprise Co. v. Superior Court of California</i>	1065
	Notes and Questions	1069
	Note on the Fair Trial, Free Press Issue: The <i>Estes</i> and <i>Sheppard</i> Cases	1070
	Problem P	1071
[E]	Regulation Of Broadcasters: Rationales And Results	1072
	Introductory Note on the Different Constitutional Treatment of the Broadcast Media	1072
[F]	“Access” To The Press	1073

Table of Contents

[1]	Different Treatment of Access in Broadcast and in Print Media . . .	1073
	<i>Red Lion Broadcasting Co. v. FCC</i>	1073
	<i>Miami Herald Publishing Co. v. Tornillo</i>	1075
	Notes and Questions	1076
	<i>Columbia Broadcasting System, Inc. v. Democratic National</i> <i>Committee</i>	1077
	Notes and Questions	1078
	Problem Q	1079
[2]	Revisiting the Red Lion Doctrine	1080
	<i>Turner Broadcasting System, Inc. v. Federal</i> <i>Communications Commission</i>	1080
§ 11.06	TRACK TWO REGULATION	1081
[A]	Time, Place, or Manner Regulations	1081
[1]	Licensing: Historical Development	1081
	<i>Lovell v. Griffin</i>	1081
	<i>Cox v. New Hampshire</i>	1081
	<i>Nationalist Movement v. Forsyth County</i>	1082
	Notes and Questions	1083
[2]	The Modern Time, Place, or Manner Doctrine	1085
	<i>Heffron v. International Society for Krishna Consciousness</i>	1085
	Notes and Questions	1088
	<i>Madsen v. Women’s Health Center, Inc.</i>	1089
[B]	The “Public Forum” Doctrine	1091
[1]	What Is a “Public Forum?”: Defining The Boundaries	1091
	<i>Brown v. Louisiana</i>	1091
	<i>Adderley v. Florida</i>	1092
	Notes and Questions	1093
[2]	Different Kinds of Forums (with Different Levels of Protection): Traditional, Designated, and Nonpublic Forums	1095
	<i>International Society for Krishna Consciousness, Inc. v. Lee</i> . . .	1095
	<i>Lee v. International Society for Krishna Consciousness, Inc.</i> . . .	1098
	Notes and Questions	1099
	Problem R	1101
[C]	The Incidental Regulation Standard: The Standard for Regulation of “Symbolic Speech”	1101
	<i>Tinker v. Des Moines School District</i>	1101
	<i>United States v. O’Brien</i>	1102
	Notes and Questions	1104
	<i>Texas v. Johnson</i>	1107
	Notes and Questions	1113
	The Response to the Flag—Burning Decision: Flag Protection	

Table of Contents

	Legislation and a Proposed Constitutional Amendment	1114
	<i>United States v. Eichman</i>	1115
	Problem S	1116
	Notes and Questions	1116
	<i>Barnes v. Glen Theatre, Inc.</i>	1119
	Notes and Questions	1122
§ 11.07	COMMERCIAL SPEECH	1123
	Notes and Questions	1123
	<i>Bates v. State Bar</i>	1124
	Notes and Questions	1125
	<i>Central Hudson Gas & Electric Corp. v. Public Service Commission</i>	1126
	Notes and Questions	1129
	Problem T	1133
§ 11.08	WHEN GOVERNMENT FUNCTIONS ARE INTERTWINED WITH SPEECH: PUBLIC SCHOOLS, ELECTIONS, GOVERNMENT EMPLOYEES, AND GOVERNMENT SUBSIDY	1134
[A]	Education: The Public Schools	1134
	Introductory Note	1134
	<i>Bethel School District v. Fraser</i>	1134
	Notes and Questions	1135
	<i>Hazelwood School District v. Kuhlmeier</i>	1135
[B]	Election Campaigns	1138
	<i>Buckley v. Valeo</i>	1138
	<i>Citizens United v. Federal Election Commission</i>	1139
	Notes and Questions	1141
[C]	Government Speech: The Government as Speaker or the Government's Message	1143
	Yudof, <i>When Government Speaks</i>	1143
[1]	Government Subsidy	1144
	<i>FCC v. League of Women Voters</i>	1144
	<i>Rust v. Sullivan</i>	1144
	<i>National Endowment for the Arts v. Finley</i>	1146
	Notes and Questions	1149
[2]	Speech By Government Employees	1154
	Introductory Notes	1154
	<i>Rankin v. McPherson</i>	1155
	Notes and Questions	1158
	Problem U	1160
[3]	Government Employees' or Licensees' Freedom of Belief or Association	1161
	<i>Elrod v. Burns</i>	1161

Table of Contents

	Notes and Questions	1163
§ 11.09	FREEDOM OF ASSOCIATION AND RELATED CONCEPTS	1165
[A]	Associational Privacy	1165
	<i>NAACP v. Alabama</i>	1165
	<i>Talley v. California</i>	1165
	Problem V	1166
	<i>Brown v. Socialist Workers’ ‘74 Campaign Committee</i>	1167
	Notes and Questions	1167
[B]	Concerted Action As “Speech”	1168
	<i>NAACP v. Claiborne Hardware Co.</i>	1168
	Notes and Questions	1169
[C]	The Right to Exclude (or Meet Privately With) Others: Private (and Not-So-Private) Clubs	1170
	<i>Board of Directors of Rotary International v. Rotary Club of Duarte</i>	1170
	Notes and Questions	1171
§ 11.10	THE RIGHT NOT TO SPEAK—AND NOT TO LISTEN	1173
[A]	Freedom Not to Speak and Loyalty Oaths	1173
	<i>Wooley v. Maynard</i>	1173
	<i>Cole v. Richardson</i>	1174
	Notes and Questions	1176
	<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i>	1178
	Notes and Questions	1179
[B]	Protection of the “Captive Auditor”	1180
	<i>Kovacs v. Cooper</i>	1180
	Notes and Questions	1180
	<i>Frisby v. Schultz</i>	1181
	Notes and Questions	1182
Appendix 11	THE STORY OF A FIRST AMENDMENT CASE—SELECTED MATERIALS FROM RANKIN v. McPHERSON	1185
	Introductory Note	1185
	Notes and Questions	1187
	Notes and Questions	1196
	Note on Court of Appeals Opinion	1197
	Note on Supreme Court’s Grant of Certiorari	1197
	Questions Presented for Review	1198
	Notes and Questions on Quality of Advocacy and Amicus Briefs	1199
	Question Presented for Review	1203
	Note on Supreme Court Decision	1204

Table of Contents

Chapter 12	FREEDOM OF RELIGION	1205
§ 12.01	THE RELIGION CLAUSES: AN OVERVIEW	1205
§ 12.02	THE ESTABLISHMENT CLAUSE	1206
	Introductory Note	1206
[A]	Aid to Religion or Religious Institutions	1208
[1]	Financial Aid	1208
	<i>Everson v. Board of Education</i>	1208
	Notes and Questions	1210
	<i>Lemon v. Kurtzman</i>	1212
	<i>Tilton v. Richardson</i>	1214
	Notes and Questions	1216
	Notes on the <i>Lemon</i> Test	1220
	<i>Kiryas Joel Village School District v. Grumet</i>	1220
	Notes and Questions	1221
	<i>Zelman v. Simmons-Harris</i>	1222
	Notes and Questions	1229
[2]	Non-Financial Aid: “Accommodation” or Official Recognition	1231
	<i>Widmar v. Vincent</i>	1231
	Notes and Questions	1232
	<i>Lynch v. Donnelly</i>	1234
	Notes and Questions	1237
	<i>County of Allegheny v. American Civil Liberties Union</i> <i>Greater Pittsburgh Chapter</i>	1238
	<i>The Ten Commandments Cases</i>	1239
	<i>Van Orden v. Perry</i>	1240
	<i>McCreary County, Ky v. American Civil Liberties Union</i>	1240
	Notes and Questions	1241
	Problem A	1242
[B]	Religion in the Public Schools	1243
	Notes and Questions	1243
	<i>Zorach v. Clauson</i>	1243
	<i>Engel v. Vitale</i>	1244
	<i>School District of Abington Township v. Schempp</i>	1245
	Problem B	1248
	Notes and Questions	1249
	<i>Wallace v. Jaffree</i>	1251
	Notes and Questions	1253
	Problem C	1254
[C]	Discrimination or Preferences Among Religions	1255
	<i>United States v. Ballard</i>	1255
	<i>Larson v. Valente</i>	1255

Table of Contents

	Notes and Questions	1257
§ 12.03	THE FREE EXERCISE CLAUSE	1258
[A]	What is a “Religion?”	1258
	Note on the Difficulty of Determining the “Religious” Basis of a Belief or Practice	1258
[B]	Should Free Exercise be Protected by Strict Scrutiny?: The Search for a Standard	1260
	<i>Sherbert v. Verner</i>	1260
	Notes and Questions	1262
	<i>Wisconsin v. Yoder</i>	1263
	Notes and Questions	1266
	Problem D	1267
[C]	Conflict with Nondiscriminatory Secular Regulation: The Modern Court Limits the Use of Strict Scrutiny	1267
	<i>Employment Division v. Smith</i>	1267
	Notes and Questions	1272
	<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i>	1273
	Notes and Questions	1274
	<i>Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC</i>	1276
	Notes and Questions	1278
	The Religious Freedom Restoration Act	1278
	Problem E	1279
	Note on the Invalidation of RFRA	1280
Chapter 13	STATE ACTION vs. PRIVATE ACTION	1281
	Introductory Note	1281
§ 13.01	THE “GOVERNMENT FUNCTION” DOCTRINE	1281
	Introductory Note	1281
[A]	Expansion	1282
	Note on the “White Primary” Cases	1282
	<i>Marsh v. Alabama</i>	1282
	Notes and Questions	1283
	Problem A	1284
[B]	Contraction	1285
	Note on the Shopping Center Cases	1285
	<i>Hudgens v. NLRB</i>	1285
	<i>Jackson v. Metropolitan Edison Co.</i>	1286
	Notes and Questions	1288
	Problem B	1289
§ 13.02	STATE INVOLVEMENT OR MUTUAL BENEFITS	1289

Table of Contents

	Note on State Licensing, Leasing, or Regulation	1289
	<i>Burton v. Wilmington Parking Authority</i>	1289
	Notes and Questions	1291
	<i>Moose Lodge No. 107 v. IRVIS</i>	1292
	Problem C	1293
	<i>National Collegiate Athletic Association v. Tarkanian</i>	1293
	Notes and Questions	1295
	<i>Lebron v. National Railroad Passenger Corp.</i>	1295
	Notes and Questions	1296
§ 13.03	STATE ENCOURAGEMENT, ENFORCEMENT, OR APPROBATION	1297
	Note on State Action by “Encouragement”	1297
	<i>Shelley v. Kraemer</i>	1297
	Notes and Questions	1298
	<i>Reitman v. Mulkey</i>	1298
	Notes and Questions	1300
	<i>Flagg Bros. v. Brooks</i>	1301
	Notes and Questions	1302
§ 13.04	THE ENTWINEMENT THEORY	1303
	<i>Brentwood Academy v. Tennessee Secondary School Athletic Association</i>	1303
	Notes and Questions	1308
	Problem D	1309
Chapter 14	CONGRESSIONAL ENFORCEMENT OF THE CIVIL RIGHTS AMENDMENTS	1311
§ 14.01	AN OVERVIEW OF THE STATUTES	1311
§ 14.02	ENFORCING THE FOURTEENTH AND FIFTEENTH AMENDMENTS AGAINST STATE ACTION	1313
	<i>South Carolina v. Katzenbach</i>	1313
	<i>Katzenbach v. Morgan</i>	1314
	Notes and Questions	1316
	Problem A	1319
[A]	Post- <i>Morgan</i> Developments For the Interpretation of the Section 5 Power	1320
	<i>City of Boerne, Texas v. Flores</i>	1320
	Notes and Questions	1326
	<i>Nevada Department of Human Resources v. Hibbs</i>	1328
	Notes and Questions	1333
[B]	Post- <i>South Carolina v. Katzenbach</i> Developments for the Interpretation of the Section 2 Power	1334

Table of Contents

	Notes and Questions	1334
	<i>Shelby County, Alabama v. Holder</i>	1336
	Notes and Questions	1337
§ 14.03	ENFORCING THE THIRTEENTH AND FOURTEENTH AMENDMENTS AGAINST PRIVATE CONDUCT	1338
[A]	Legislating Against Private Action Under the Fourteenth Amendment	1338
	Introductory Note	1338
	<i>United States v. Guest</i>	1339
	Notes and Questions	1341
[B]	Enforcement of the Thirteenth Amendment Against Private Action	1341
	Introductory Note	1341
	<i>Jones v. Alfred H. Mayer Co.</i>	1342
	Notes and Questions	1343
Chapter 15	THE RIGHT TO KEEP AND BEAR ARMS AND THE MILITIA CLAUSES	1345
§ 15.01	THE CONSTITUTIONAL TEXT: CONGRESS’S MILITIA POWERS AND THE PHRASEOLOGY OF THE SECOND AMENDMENT	1345
	Introductory Note	1345
§ 15.02	THE HISTORICAL CONTEXT: SAFEGUARDING STATE MILITIA POWER, OR INDIVIDUAL SELF-DEFENSE AGAINST CRIMES —OR, PERHAPS, PRESERVING AN ARMED CITIZENRY AS A BULWARK AGAINST TYRANNY?	1346
	<i>United States v. Miller</i>	1346
	Notes and Questions	1347
	<i>District of Columbia v. Heller</i>	1349
	Notes and Questions	1363
	<i>McDonald v. City of Chicago</i>	1364
Chapter 16	STATE CONSTITUTIONAL LAW	1367
§ 16.01	THE CASE FOR AND AGAINST EXPANSION OF STATE CONSTITUTIONAL LAW	1367
	Introductory Note	1367
§ 16.02	STATE CONSTITUTIONAL PROVISIONS PARALLEL TO FEDERAL PROVISIONS	1368
[A]	The Most Frequent Construction: Similar Meaning	1368
	Note on Similar Construction of Parallel Provisions	1368
[B]	Greater Extension of Protection under State Constitutions	1369
	Note on Broader State Protection by Different Construction of Similar Provisions	1369

Table of Contents

[C]	Parallel Provisions with Significantly Different Language	1370
	Notes and Questions	1370
§ 16.03	AMENDMENT OF STATE CONSTITUTIONS TO ADD (OR DELETE) RIGHTS	1371
	Note on State Constitutional Amendments	1371
§ 16.04	STATE PROVISIONS NOT SHARED BY THE FEDERAL CONSTITUTION	1372
[A]	“Open Courts” and “Due Course of Law” Provisions: Language Found in the Majority of State, but not the Federal, Constitutions	1372
	<i>LeCroy v. Hanlon</i>	1372
	Notes and Questions	1373
[B]	Education	1374
	Note on State Constitutional “Over Rulings” of <i>San Antonio</i> <i>Independent School District v. Rodriguez</i>	1374
Table of Cases		TC-1
Table of Secondary Authorities		TSA-1
Index		I-1
