

# CONTENTS

<i>Preface</i> .....	xix
<i>Acknowledgments</i> .....	xxi
<i>Introduction to Governmental Powers: Cases and Readings</i> <i>in Constitutional Law and American Democracy</i> .....	xxv
<i>Introduction to the Constitution and the Supreme Court</i> .....	xxix
<i>The Constitution of the United States</i> .....	xli

## PART I: JUDICIAL AUTHORITY

### CHAPTER 1 THE ORIGINS OF JUDICIAL REVIEW .....

5	
Alexander Bickel, <i>The Least Dangerous Branch</i> .....	7
Gordon Wood, <i>The Origins of Judicial Review Revisited</i> , or <i>How the Marshall Court Made More Out of Less</i> .....	15
Alexander Hamilton, <i>The Federalist No. 78</i> .....	22
Brutus, <i>Untitled Essays Against Ratification of the United States</i> <i>Constitution</i> .....	26
Thomas Jefferson, <i>Letter to Judge Spencer Roane</i> .....	32
<i>Calder v. Bull</i> .....	33
<i>Marbury v. Madison</i> .....	39
<i>Fletcher v. Peck</i> .....	49
<i>Martin v. Hunter's Lessee</i> .....	53
<i>Trustees of Dartmouth College v. Woodward</i> .....	55
<i>Cohens v. Virginia</i> .....	59
Synthesis Questions for Further Discussion .....	62
Key Terms .....	64

<b>CHAPTER 2</b>	<b>FROM JUDICIAL REVIEW TO JUDICIAL SUPREMACY</b> .....	65
	Stephen Breyer, <i>Judicial Review: A Practicing Judge's Perspective</i> .....	68
	Ronald Dworkin, <i>Freedom's Law: The Moral Reading of the American Constitution</i> .....	74
	Larry Kramer, <i>We the Court</i> .....	83
	Jeremy Waldron, <i>The Core of the Case Against Judicial Review</i> .....	95
	<i>Cooper v. Aaron</i> .....	101
	<i>Nixon v. United States</i> .....	106
	<i>Lujan v. Defenders of Wildlife</i> .....	109
	<i>City of Boerne v. Flores</i> .....	116
	<i>Bush v. Gore</i> .....	124
	Synthesis Questions for Further Discussion .....	132
	Key Terms .....	133

## **PART II: CONGRESSIONAL AUTHORITY AND ITS LIMITS**

<b>CHAPTER 3</b>	<b>THE IDEA OF ENUMERATED POWERS</b> .....	143
	Alexander Hamilton, <i>Opinion as to the Constitutionality of the Bank of the United States</i> .....	145
	Thomas Jefferson, <i>Opinion on the Constitutionality of a National Bank</i> .....	151
	<i>McCulloch v. Maryland</i> .....	154
	<i>Gibbons v. Ogden</i> .....	161
	<i>South Dakota v. Dole</i> .....	168
	Synthesis Questions for Further Discussion .....	173
	Key Terms .....	174

<b>CHAPTER 4</b>	<b>THE BATTLE OVER ECONOMIC REGULATION</b>	175
	Bruce Ackerman, We the People	178
	Franklin Roosevelt, Address to Congress—“Four Freedoms”	189
	Franklin Roosevelt, State of the Union Message to Congress— “Second Bill of Rights”	192
	Cass R. Sunstein & Randy E. Barnett, Constitutive Commitments and Roosevelt’s Second Bill of Rights: A Dialogue	194
	Douglas Ginsburg, On Constitutionalism	198
	Richard Epstein, How Progressives Rewrote the Constitution	201
	<i>Swift and Company v. United States</i>	204
	<i>Hammer v. Dagenhart</i>	207
	<i>A.L.A. Schechter Poultry Corp. v. United States</i>	212
	<i>Carter v. Carter Coal Company</i>	216
	<i>National Labor Relations Board v. Jones &amp; Laughlin Steel Corp.</i>	218
	<i>United States v. Darby</i>	222
	<i>Wickard v. Filburn</i>	226
	<i>Heart of Atlanta Motel, Inc. v. United States</i>	230
	<i>Katzenbach v. McClung</i>	239
	Synthesis Questions for Further Discussion	242
	Key Terms	243
<b>CHAPTER 5</b>	<b>THE NEW FEDERALISM</b>	245
	Michael W. McConnell, Federalism: Evaluating the Founders’ Design	248
	Kathleen M. Sullivan, From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court	255
	<i>National League of Cities v. Usery</i>	261
	<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	265
	<i>United States v. Lopez</i>	275
	<i>Printz v. United States</i>	283
	<i>United States v. Morrison</i>	289
	<i>Gonzales v. Raich</i>	298
	Synthesis Questions for Further Discussion	308
	Key Terms	309

## CHAPTER 6 RECALIBRATING THE POWERS OF CONGRESS: TAXATION, COMMERCE, AND THE DEBATE OVER HEALTH CARE . . . . . 311

Andrew Koppelman, Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform . . . . .	312
Randy E. Barnett, Testimony Before the Senate Judiciary Committee . . . . .	316
<i>National Federation of Independent Business v. Sebelius</i> . . . . .	320
<i>Bailey v. Drexel Furniture Co.</i> . . . . .	330
<i>National Federation of Independent Business v. Sebelius</i> . . . . .	335
Synthesis Questions for Further Discussion . . . . .	346
Key Terms . . . . .	347

## PART III: PRESIDENTIAL AUTHORITY AND ITS LIMITS

### CHAPTER 7 THE EXECUTIVE AND THE SEPARATION OF POWERS . . . . . 355

Montesquieu, The Spirit of the Laws . . . . .	357
James Madison, The Federalist No. 51 . . . . .	359
An Old Whig V . . . . .	360
Alexander Hamilton, The Federalist No. 70 . . . . .	362
Lawrence Lessig & Cass R. Sunstein, The President and the Administration . . . . .	365
Steven G. Calabresi & James Lindgren, The President: Lightning Rod or King? . . . . .	374
<i>Myers v. United States</i> . . . . .	380
<i>Humphrey's Executor v. United States</i> . . . . .	384
<i>Youngstown Sheet &amp; Tube Co. v. Sawyer</i> . . . . .	388
<i>Immigration and Naturalization Service v. Chadha</i> . . . . .	400
<i>Bowsher v. Synar</i> . . . . .	410
<i>Morrison v. Olson</i> . . . . .	414
<i>Clinton v. City of New York</i> . . . . .	425
Synthesis Questions for Further Discussion . . . . .	434
Key Terms . . . . .	436

## **CHAPTER 8** FOREIGN AFFAIRS AND THE POWER TO DECLARE WAR . . . . . 439

The Proclamation of Neutrality of 1793 and the Pacificus-Helvidius Debate . . . . .	440
John Hart Ely, War and Responsibility . . . . .	445
John Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers . . . . .	452
<i>Prize Cases</i> . . . . .	461
<i>United States v. Curtiss-Wright Export Corp.</i> . . . . .	464
<i>Goldwater v. Carter</i> . . . . .	468
<i>Dames &amp; Moore v. Regan</i> . . . . .	472
Congressional Resolutions Relating to U.S. Military Actions . . . . .	475
Gulf of Tonkin Resolution (1964) . . . . .	476
War Powers Resolution (1973) . . . . .	476
Authorization for Use of Military Force (2001) . . . . .	479
Synthesis Questions for Further Discussion . . . . .	480
Key Terms . . . . .	481

## **CHAPTER 9** THE PRESIDENCY AND THE RULE OF LAW . . . . . 483

John Locke, Second Treatise of Government . . . . .	484
Harvey Mansfield, The Case for the Strong Executive: Under Some Circumstances, the Rule of Law Must Yield to the Need for Energy . . . . .	488
<i>United States v. Nixon</i> . . . . .	493
<i>Nixon v. Fitzgerald</i> . . . . .	499
<i>Clinton v. Jones</i> . . . . .	503
Synthesis Questions for Further Discussion . . . . .	507
Key Terms . . . . .	508
 <i>Glossary</i> . . . . .	 509
<i>Table of Cases</i> . . . . .	511
<i>Index</i> . . . . .	513