

Contents

<i>Preface</i>	xxi
<i>Acknowledgments</i>	xxiii

Chapter 1 Introduction to Individual Rights 1

§ 1.1 Introduction and Overview	1
§ 1.2 The Fourteenth Amendment: An Introductory Overview	4
The Text of § 1 of the Fourteenth Amendment	4
A Brief Historical Survey	6
Early Judicial Trends in Construing the Fourteenth Amendment	8
§ 1.3 The Incorporation Doctrine	10
§ 1.4 The State Action Doctrine	14
§ 1.4.1 The Categorical Approach	17
Private Performance of a Public Function	18
Judicial Enforcement of Private Agreements	23
Joint Activity Between a State and a Private Party	25
State Endorsement of Private Conduct	31
§ 1.4.2 The Two-Part Approach	32
A State Actor Anomaly	42
§ 1.5 Congressional Enforcement of the Civil War Amendments	42
§ 1.5.1 Enforcement of the Thirteenth Amendment	43
§ 1.5.2 Enforcement of the Fourteenth Amendment	47
Parallel Enforcement	48
Nonparallel Enforcement	50
Congressional Interpretation	58
§ 1.5.3 Enforcement of the Fifteenth Amendment	59

Chapter 2 Substantive Due Process 63

§ 2.1 Introduction and Overview	63
The Origins of the Due Process Clause	63
Procedural versus Substantive Due Process	64
Executive Abuse of Power	65
Standards of Review	66
Economic versus Noneconomic Due Process	67

Contents

§ 2.2	The Rise and Fall of Economic Due Process	67
§ 2.2.1	Economic Due Process in the <i>Lochner</i> Era	67
	Liberty to Contract	68
	The Decision in <i>Lochner v. New York</i>	69
§ 2.2.2	The Demise of <i>Lochner</i>	71
§ 2.2.3	Property and Economic Liberty Today	73
	Punitive Damages	76
§ 2.3	Noneconomic Liberty from <i>Lochner</i> to <i>Carolene Products</i>	82
§ 2.3.1	The <i>Lochner</i> Era and Noneconomic Liberties	82
§ 2.3.2	<i>Carolene Products</i> ' Footnote Four	83
§ 2.4	<i>Griswold</i> and the Reemergence of Unenumerated Liberties	85
§ 2.4.1	Penumbras and Emanations	85
§ 2.4.2	Alternative Approaches: Liberty and the Ninth Amendment	87
§ 2.4.3	The Risks in Protecting Unenumerated Rights	88
§ 2.4.4	The Fundamental Rights Model with Variations	90
	The Basic Fundamental Rights Model	90
	The Concept of Impingement	91
	Variations on the Basic Strict Scrutiny Model	92
§ 2.5	The Right of Privacy and Personal Autonomy	94
§ 2.5.1	Abortion Before and After <i>Dobbs v. Jackson</i> <i>Roe v. Wade</i> and the Trimester Framework	95
	<i>Planned Parenthood v. Casey</i> and the End of the Trimester Approach	98
	The Undue Burden Test	99
	<i>Dobbs v. Jackson Women's Health Organization</i>	100
§ 2.5.2	Marriage	103
§ 2.5.3	Family Integrity	107
	Family Living Arrangements	107
	The Parent-Child Relationship	110
	Nonparental Visitation Statutes	111
§ 2.5.4	Intimate Association	114
§ 2.5.5	Sexual Intimacy	117
§ 2.5.6	Medical Treatment	118
	A Right to Choose Certain Medical Treatment?	118
	The Right to Reject Unwanted Medical Treatment	121
§ 2.5.7	The Right to Refuse Lifesaving Hydration and Nutrition	122
§ 2.5.8	Suicide and Physician-Assisted Suicide	125
§ 2.6	Other Protected Liberty Interests	128
§ 2.6.1	Freedom of Movement	128
	Freedom from Physical Restraint	128

Contents

	Freedom to Move About and the Right to Remain	130
	§ 2.6.2 The Rights to Protection and Care	132
	§ 2.6.3 Access to Courts	135
	§ 2.6.4 Informational Privacy	136
§ 2.7	What Happened to Life?	137
	Abortion	137
	Subsistence Benefits	138
	The Death Penalty	139
	Death Caused by Government Officials	140
Chapter 3	The Takings Clause	143
§ 3.1	Introduction and Overview	143
§ 3.2	Condemnation and Inverse Condemnation	143
§ 3.3	The Requirement of Public Use	146
§ 3.4	An Approach to Analyzing Inverse Condemnation Problems	149
§ 3.5	The Difference Between Physical Occupation and Regulation	150
§ 3.6	Physical Occupations and Invasions	151
§ 3.7	Regulatory Takings	155
	§ 3.7.1 Destroying All Use or Value	156
	Real Property	156
	Personal Property	158
	Measuring Loss in Value: The Denominator Problem	158
	§ 3.7.2 Partial Deprivations	162
	§ 3.7.3 The Nuisance Exception	165
	§ 3.7.4 Remedies for Temporary Regulatory Takings	167
§ 3.8	Conditions Attached to Building Permits	168
	§ 3.8.1 Only Certain Types of Conditions Qualify	169
	§ 3.8.2 The Essential Nexus Requirement	171
	§ 3.8.3 The Rough Proportionality Requirement	172
	The Nature of the Condition	172
	The Extent of the Condition	173
Chapter 4	The Contracts Clause	175
§ 4.1	Introduction and Overview	175
§ 4.2	The Preliminary Questions	177
	§ 4.2.1 Is There a Contractual Obligation?	177
	Implied Contractual Obligations	178
	State Contract Law as an Implied Contractual Obligation	178

Contents

§4.2.2	Does a Change in State Law Impair a Contractual Obligation?	180
§4.2.3	Is the Impairment Substantial?	181
§4.3	The Balancing Test and the Reserved Powers Doctrine	184
§4.4	The Special Problems of Contracts to Which a State Is a Party	191
Chapter 5	Procedural Due Process and Irrebuttable Presumptions	195
§ 5.1	Introduction and Overview	195
§ 5.2	A Protected Liberty or Property Interest?	197
§ 5.2.1	What Constitutes Liberty?	197
§ 5.2.2	What Constitutes Property?	200
§ 5.2.3	The Relevance of Custom and Practice	205
§ 5.3	What Constitutes a Deprivation?	206
§ 5.4	The Content of Notice	207
§ 5.5	What Kind of Hearing Must Be Afforded?	209
§ 5.5.1	The “Bitter with the Sweet” Approach	209
§ 5.5.2	The <i>Mathews v. Eldridge</i> Test	210
§ 5.5.3	The Requirement of a Prior Hearing	212
§ 5.5.4	Exceptions to the Prior Hearing Requirement	214
§ 5.5.5	The Formality of the Prior Hearing	218
§ 5.6	Possible Post-Deprivation Remedies Where No Liberty or Property Interest Exists	220
§ 5.7	The Irrebuttable Presumption Doctrine	221
§ 5.7.1	Rebuttable and Irrebuttable Presumptions	221
§ 5.7.2	The Doctrine in Its Prime	222
§ 5.7.3	The Doctrine Today	223
Chapter 6	Equal Protection: Ordinary, “Suspect,” and “Quasi-Suspect” Classifications	225
§ 6.1	Introduction and Overview	225
§ 6.2	Equal Protection: General Principles	228
§ 6.2.1	Detecting Discrimination: Facial, Design, and Applied	228
	Facial Discrimination	228
	Discrimination by Design	229
	Discriminatory Application	229
§ 6.2.2	The Prima Facie Case	230
	Disproportionate Impact	231
	Discriminatory Purpose	232

Contents

Legislative History	234
The Manner of Adoption	234
Inferring Purpose from Impact and Other Circumstantial Evidence	236
Inferring Purpose from Application	237
The <i>Keyes</i> Presumption	238
Difficulties with the Purpose Element	239
§ 6.2.3 Rebutting the Prima Facie Case	241
§ 6.3 The Rational Basis Equal Protection Test	243
§ 6.4 Classifications on the Basis of Race or National Origin	249
§ 6.4.1 Race as a Suspect Classification	249
The Court's Early Treatment of Race	249
The Rationale for Strict Scrutiny	252
§ 6.4.2 Scrutiny as a Measure of Constitutionality	253
Compelling Interest	254
Narrowly Tailored	255
§ 6.4.3 Racial Segregation of Public Schools	257
<i>Brown v. Board of Education</i>	257
Implementing <i>Brown</i>	259
§ 6.4.4 Interdistrict Remedies	260
Proving an Interdistrict Violation	261
Responding to White Flight	263
§ 6.4.5 Remedying Segregation at the College Level	265
§ 6.4.6 Other Limitations on Desegregation Orders	267
Minimizing the Degree of Federal Interference	267
Duration of Federal Desegregation Orders	268
§ 6.4.7 Affirmative Action	271
Strict Scrutiny for Affirmative Action	271
Compelling Interests	274
Narrowly Tailored	279
§ 6.5 Classification on the Basis of Alienage	288
§ 6.5.1 The Standard for State and Local Laws	288
The Reason for Strict Scrutiny	288
Governmental or Political Functions	289
Undocumented Aliens	291
§ 6.5.2 The Standard for Federal Laws	292
§ 6.6 Classification on the Basis of Gender or Legitimacy	293
§ 6.6.1 Gender as a Quasi-Suspect Classification	293
§ 6.6.2 Mid-Level Scrutiny as a Measure of Constitutionality	295
Important and Legitimate Objectives	295
Proof of Actual Purpose	296
Means Substantially Related to Goal	297

Contents

	Comparing the Tests for Gender and Race Discrimination	303
	§ 6.6.3 Legitimacy	304
§ 6.7	Other Possibly Disfavored Bases of Classification	306
	§ 6.7.1 The Rejection of New “Suspect” and “Quasi-Suspect” Classes	306
	§ 6.7.2 Discrimination Against Out-of-Staters	307
	§ 6.7.3 Discrimination Against the Mentally Retarded	308
	§ 6.7.4 Discrimination on the Basis of Sexual Orientation	309
Chapter 7	Equal Protection: Fundamental Rights	313
	§ 7.1 Introduction and Overview	313
	§ 7.2 Equal Protection and Fundamental Rights	313
	§ 7.3 The Right to Vote	316
	§ 7.3.1 The Absolute versus the Equal Right to Vote	316
	§ 7.3.2 Selective Denial of the Franchise	318
	§ 7.3.3 Individual Vote Dilution: “One Person, One Vote”	323
	The Problem: Unequal Weighting of Votes	323
	“One Person, One Vote”	325
	At-Large Election Schemes	327
	Reapportionment	327
	§ 7.3.4 Group Vote Dilution	330
	Minimizing Group Voting Strength	330
	Dilution Through At-Large Elections	331
	Dilution Through Gerrymandering	332
	Dilution Through Use of Multimember Districts	333
	Vote Dilution and Nonracial Groups: Partisan Political Gerrymandering	334
	§ 7.3.5 Nondilutional Race-Based Districting	337
	§ 7.3.6 Access to the Ballot	346
	§ 7.3.7 Unequal Vote Count	348
	§ 7.4 The Right to Travel	349
	§ 7.4.1 Durational Residency Requirements	350
	§ 7.4.2 Fixed-Point and Fixed-Date Residency Requirements	353
	§ 7.4.3 The Equal Protection Alternative to Strict Scrutiny	355
	§ 7.4.4 Bona Fide Residency Requirements	357
	§ 7.5 Access to the Courts	358
	§ 7.6 Welfare and Subsistence	361
	§ 7.7 Access to a Basic Education	363

Contents

§ 7.8	A Sliding-Scale Approach to Equal Protection	367
§ 7.8.1	Problems with the Three-Tier Model	367
§ 7.8.2	Marshall's Sliding-Scale Approach	367
§ 7.8.3	<i>Plyler v. Doe</i>	368
Chapter 8	The First Amendment: Freedom of Speech and of the Press	371
§ 8.1	Introduction and Overview	371
§ 8.2	Introductory Themes	372
§ 8.2.1	Defining Terms: Speech and Press	372
§ 8.2.2	Protected and Unprotected Speech	378
§ 8.2.3	The Distinction Between Matters of Public and Private Concern	378
§ 8.2.4	The Special Problem of Prior Restraints	380
§ 8.2.5	The Overbreadth and Vagueness Doctrines	385
§ 8.3	Content-Based Restrictions on Speech	391
§ 8.3.1	What Constitutes a Content-Based Restriction?	391
§ 8.3.2	Advocacy of Unlawful Conduct: The Clear and Present Danger Test	396
§ 8.3.3	Fighting Words, True Threats, and Hate Speech	404
§ 8.3.4	Free Speech Limitations on Defamation (and Other Torts) The Burdens Imposed by the Actual Malice Standard	407 408
	The Contexts in Which the Actual Malice Standard Applies	410
	The Standards for Private-Plaintiff Lawsuits	412
	The First Amendment and Speech-Premised Torts Generally	412
§ 8.3.5	Campaign Financing, Campaign Advocacy, and Restrictions on the Initiative Process	414
	Campaign Financing and Campaign Advocacy	414
	Restrictions on Judicial Elections	419
	Restrictions on the Initiative Process	419
§ 8.3.6	Commercial Speech	420
	The Definition of Commercial Speech	421
	The Rationale for Protecting Commercial Speech	424
	The <i>Central Hudson</i> Test	425
	Mandatory Disclosure Requirements	432
§ 8.3.7	Sexually Explicit Speech—Obscenity and Pornography	434
	A Definition of Obscenity	434

Contents

Nonobscene Sexually Explicit Speech— Pornography	438
Indecent or Vulgar Speech	441
Indecent Speech and the Internet	442
§ 8.3.8 Speech that Depicts Actual Violence or Cruelty	446
§ 8.3.9 Content Discrimination Within Categories of Unprotected Speech	447
§ 8.3.10 Compelled Speech	449
§ 8.3.11 Ad Hoc Balancing	452
§ 8.3.12 Free Speech Rights of Public Employees and Other Voluntary Participants in Government Programs	455
§ 8.3.13 Government Coercion of Private Parties to Violate the Free Speech Rights of Others	459
§ 8.4 Content-Neutral Restrictions on Speech: The Time, Place, and Manner Test	460
§ 8.4.1 Content Neutrality	460
§ 8.4.2 Narrowly Tailored to Advance a Significant Governmental Interest	463
§ 8.4.3 Alternate Channels for Communication	467
§ 8.4.4 Prior Restraints	468
§ 8.4.5 Injunctions	469
§ 8.4.6 The Special Problem of Copyrights	470
§ 8.5 The Nature of the Public Forum	471
§ 8.5.1 Traditional Public Forum	473
§ 8.5.2 Designated Public Forum	475
§ 8.5.3 Nonpublic Forum	479
§ 8.5.4 Student Speech in Public Schools	482
§ 8.6 Government Speech	487
§ 8.7 The First Amendment Right of Association The Right of Association and State Regulation of Elections	491
501	
§ 8.8 Special Problems of the Media	505
§ 8.8.1 Access to Information	505
§ 8.8.2 Access to Criminal Proceedings	506
§ 8.8.3 Gag Orders in Criminal Proceedings	506
§ 8.8.4 The Publication of Truthful, Lawfully Obtained Information	507
§ 8.8.5 The Protection of Confidential Sources	509
§ 8.8.6 Forced Access to the Press: Print Media	510

Contents

§ 8.8.7	The First Amendment and Modern Technologies	511
	The Broadcast Media	511
	Developing Technologies— Cable Operators	513
	Developing Technologies— Social Media	515

Chapter 9 **The First Amendment: Freedom of Religion** **519**

§ 9.1	Introduction and Overview	519
§ 9.2	The Establishment Clause: Themes, Theories, and Tests	520
§ 9.2.1	Separationist Theory	520
§ 9.2.2	Nonpreferentialist Theory	521
§ 9.2.3	Three Compromise Approaches	522
§ 9.2.4	The Lemon Test	523
	Secular Purpose	523
	Primary Effect That Does Not Advance, Endorse or Inhibit Religion	523
	Not Foster Excessive Entanglement with Religion	524
§ 9.2.5	The Establishment Clause Today	525
§ 9.3	The Establishment Clause Applied: Discrimination Between Religions	526
§ 9.3.1	The Ban on Officially “Established” Religions	526
§ 9.3.2	The Limitation on Conferring a Preferred Status	527
§ 9.3.3	The Limitation on Imposing a Disfavored Status	528
§ 9.4	The Establishment Clause Applied: The Discriminatory Promotion of Religion	530
§ 9.4.1	Public Aid to Parochial Schools	532
§ 9.4.2	Prayer in Public Schools	536
§ 9.4.3	Other Contexts	543
§ 9.5	The Free Exercise Clause	545
§ 9.5.1	The Distinction Between Belief and Conduct	545
§ 9.5.2	The Protection of Religious Belief	547
	The Right to Profess Religious Beliefs	548
	Ecclesiastical Disputes	551
§ 9.5.3	The Protection of Religiously Motivated Conduct	553
	The Purposeful Suppression or Selective Nonfunding of Religiously Motivated Conduct	553
	The Nonpurposeful Regulation of Religiously Motivated Conduct	563
	The Incidental Burdening of Religiously Motivated Conduct	570
§ 9.6	The Accommodation of Religion	573

Contents

Chapter 10	The Right to Keep and Bear Arms	577
§ 10.1	Introduction and Overview	577
§ 10.2	<i>District of Columbia v. Heller</i>	578
§ 10.2.1	Interpreting the Second Amendment	578
§ 10.2.2	Applying the Second Amendment	581
§ 10.3	Developments Since <i>Heller</i>	582
§ 10.3.1	The Range of Protected Arms	582
§ 10.3.2	The Spatial Aspect of the Right to Bear Arms	584
§ 10.4	The <i>Bruen</i> Standard of Review	586
§ 10.5	The <i>Bruen</i> Standard Applied	587
	<i>Table of Cases</i>	591
	<i>Index</i>	607