

CONTENTS

<i>Preface to the Ninth Edition</i>	xxix
<i>Acknowledgments</i>	xxxix
<i>Editorial Notice</i>	xxxv
<i>The Constitution of the United States</i>	xxxvii
<i>Biographical Notes on Selected U.S. Supreme Court Justices (online)</i>	BIO-1
<i>The Supreme Court Since 1789</i>	li

CHAPTER 1

The Constitution and the Supreme Court	1
A. The Origins of the U.S. Constitution	1
<i>The Federalist No. 10 (Madison)</i>	8
Note: Madisonian Republicanism	12
<i>The Federalist No. 51 (Madison)</i>	14
Note: Madisonian Republicanism and Checks and Balances	16
Note: Madisonian Republicanism and Contemporary Constitutionalism	18
Note: Why (and How) Does the Constitution Bind?	19
B. The Basic Framework of Judicial Review	22
<i>Marbury v. Madison</i>	22
Note: <i>Marbury v. Madison</i>	29
<i>Martin v. Hunter's Lessee</i>	34
Note: Supreme Court Review of State Courts and State Laws	37
Note: Judicial Exclusivity in Constitutional Interpretation?	40
C. The Sources of Judicial Decisions: Text, Original Meaning, Structure, Morality	43
1. Text and Original Meaning	43
<i>District of Columbia v. Heller</i>	43
Note: Text and "Original Public Meaning"	46
2. Structure	49
<i>McCulloch v. Maryland</i>	49
Note: Constitutional Methodology and Interpretation in <i>McCulloch</i>	57
3. Natural Law and Natural Rights	60
<i>Calder v. Bull</i>	60
Note: Natural Law, Moral Argument, and the Supreme Court	61
D. Political Control Over the Supreme Court	64
Note: Amendment, Appointment, Impeachment, and the Election Returns	64
<i>Ex parte McCordle</i>	69
Note: Political Control over Jurisdiction of Article III Courts	70
Note: The Power of Reprisal—General Thoughts	74
E. "Case or Controversy" Requirements and the Passive Virtues	75
1. Advisory Opinions	76
2. Standing	77

<i>Lujan v. Defenders of Wildlife</i>	77
<i>Massachusetts v. EPA</i>	85
<i>Clapper v. Amnesty International USA</i>	92
Note: The Purposes of Standing	100
Note: The Emergence and Application of the Injury in Fact Requirement	101
Note: The Nexus Requirement	112
Note: The Standing of Governmental Entities	114
Note: Prudential Standing	118
3. Political Questions	120
<i>Baker v. Carr</i>	120
Notes: Partisan Gerrymandering and the Federal Courts	124
<i>Rucho v. Common Cause</i>	125
Note: The Bases for Finding a Political Question	131
<i>Bush v. Gore</i>	140
Notes	146
4. Questions of Timing—Ripeness and Mootness	149
F. The Jurisdiction of the Supreme Court	150
Note: Jurisdiction, Certiorari, and the U.S. Supreme Court	150
CHAPTER 2	
Federalism at Work: Congress and the National Economy	153
A. The Values of Federalism and Some Techniques for Implementing Them	153
Note: A Government of Enumerated Powers	153
Note: The Values of Federalism	155
B. Doctrinal Fundamentals: Federalism and Judicial Review	159
<i>Gibbons v. Ogden</i>	159
Note: <i>Gibbons v. Ogden</i>	161
<i>Hammer v. Dagenhart (The Child Labor Case)</i>	162
<i>Wickard v. Filburn</i>	164
Note: Political Constraints versus Judicial Enforcement	166
C. The Evolution of Commerce Clause Doctrine: The Lessons(?) of History	172
<i>United States v. E. C. Knight Co.</i>	173
<i>Houston, East & West Texas Railway v. United States</i> (<i>The Shreveport Rate Cases</i>)	174
Note: Direct, Indirect, and Stream of Commerce Tests	174
<i>Champion v. Ames (The Lottery Case)</i>	176
Note: Prohibiting Interstate Transportation—Proper Regulation or Improper Pretext?	177
Note: The New Deal Crisis	178
<i>A. L. A. Schechter Poultry Corp. v. United States</i>	178
<i>Carter v. Carter Coal Co.</i>	180
Note: New Deal Legislation and Commerce Clause Tests in the 1930s	183
<i>NLRB v. Jones & Laughlin Steel Corp.</i>	184
<i>United States v. Darby, 312 U.S. 100 (1941)</i>	187
Note: The New Deal Legacy	189
<i>Heart of Atlanta Motel v. United States</i>	190
<i>Katzenbach v. McClung</i>	191
Note: Federalism and Congressional Motivation	193

<i>United States v. Lopez</i>	194
<i>United States v. Morrison</i>	199
Note: Federalism after the New Deal	201
<i>National Federation of Independent Business v. Sebelius</i>	205
Note: Activity and Inactivity	222
Note: Observations on Court-Imposed Limitations on Congress's Powers	223
D. State Regulation of Interstate Commerce	223
1. The Fundamental Framework	223
Note: The Classical View	223
Note: The Modern View	225
2. Protection Against Discrimination	228
Note: General Considerations	228
<i>City of Philadelphia v. New Jersey</i>	229
Note: Facial/Intentional Discrimination	231
<i>C & A Carbone, Inc. v. Clarkstown</i>	232
Note: Geographic Discrimination	236
<i>West Lynn Creamery, Inc. v. Healy</i>	238
Note: The Alternative of Subsidies	240
Note: Other Doctrines Concerning Discrimination	241
Note: Concluding Observations	244
3. Facially Neutral Statutes with Significant Effects on Interstate Commerce	244
<i>Hunt v. Washington State Apple Advertising Commission</i>	246
Note: Inferring Intent from Effect	247
<i>Exxon Corp. v. Governor of Maryland</i>	248
Note: Facially Neutral Statutes with (Merely?) Disproportionate Effects for Commercial or Social Purposes	251
<i>Kassel v. Consolidated Freightways Corp.</i>	252
Note: Facially Neutral Statutes with (Merely?) Disproportionate Effects for Police Power Purposes	256
Note: Taxation of Interstate Commerce	258
E. Preemption	261
<i>Arizona v. United States</i>	261
Note: Preemption	265
Note: Concluding Observations	268

CHAPTER 3

The Scope of Congress's Powers: Taxing and Spending, War Powers, Individual Rights, and State Autonomy 271

A. Regulation Through Taxing, Spending, and the War Power	271
1. The Taxing Power	272
<i>National Federation of Independent Business v. Sebelius</i>	274
2. The Spending Power	277
<i>United States v. Butler</i>	277
Note: The Spending Power and the New Deal Court	281
<i>National Federation of Independent Business v. Sebelius</i>	282
Note: Conditional Spending, Coercion, and the Political Process	290
3. The "War" Power	292
Note: Individual Rights and the War Power	293

B. Congress's Enforcement Power Under the Reconstruction Amendments	295
Note: Possible Interpretations of the Section 5 Power	295
<i>Katzenbach v. Morgan</i>	296
Note: The Scope of Section 5	298
<i>City of Boerne v. Flores</i>	300
Note: The Roles of Court and Congress	302
Note: The Interaction of Congressional Enforcement Power and the Eleventh Amendment	305
<i>Board of Trustees v. Garrett</i>	307
Note: Congressional Power to Abrogate States' Sovereign Immunity	307
Note: Congressional Power to Regulate "Private" Action for Civil Rights Purposes	312
C. The Treaty Power	314
<i>Missouri v. Holland</i>	314
Note: Limits on the Treaty Power	315
D. The Tenth Amendment as a Federalism-Based Limitation on Congressional Power	318
Note: The Modern Revival of Tenth Amendment-Based Restraints on Federal Regulation of State and Local Governments	319
<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	319
Note: From <i>Garcia</i> to <i>New York v. United States</i>	321
<i>New York v. United States</i>	322
<i>Printz v. United States</i>	323
Note: The "Anticommandeering" Principle	325
CHAPTER 4	
The Distribution of National Powers	331
A. Introduction	331
<i>The Federalist No. 47 (Madison)</i>	331
<i>The Federalist No. 48 (Madison)</i>	331
Note: The Theory of Separation and Checks and Balances	332
B. Case Study: Presidential Seizure	333
<i>Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)</i>	333
Note: <i>Youngstown</i> and the Power of the President	340
C. Foreign Affairs	342
1. Executive Authority	342
<i>United States v. Curtiss-Wright Export Corp.</i>	342
<i>Dames & Moore v. Regan</i>	344
<i>Medellin v. Texas</i>	346
<i>Zivotofsky Ex Rel. Zivotofsky v. Kerry</i>	347
Note: The President and Foreign Affairs	349
Note: The Allocation of Warmaking Authority	349
Note: The "War on Terror" and the Second Gulf War	350
<i>Hamdi v. Rumsfeld</i>	352
Note: The Interplay between the President, Congress, and the Court with Regard to the "War on Terror"	356
Note: Some Unanswered Questions	359
2. Legislative Authority	360
Note: The War Powers Resolution	360

Note: Congressional Control over Agreements with Foreign States—Treaties, Executive Agreements, and Congressional-Executive Agreements	362
D. Domestic Affairs	363
1. Executive Authority	363
<i>United States v. Nixon</i>	363
Note: Executive Privilege and Presidential Immunity	367
<i>Trump v. Vance</i>	369
Note: The “Law” of Impeachment	373
Note: The Politics of Impeachment	374
2. Legislative Authority	376
Note: The Nondelegation Doctrine and “Quasi-Constitutional” Statutes	377
<i>INS v. Chadha</i>	380
Note: The Legislative Veto	385
Note: Where Do Administrative Agencies “Fit” in the Separation of Powers Scheme?	386
Note: The Appointments and Recess Appointments Clauses	387
<i>Bowsher v. Synar</i>	391
<i>Morrison v. Olson</i>	393
<i>Seila Law v. Consumer Financial Protection Bureau</i>	399
<i>Collins v. Yellen</i>	403
Note: Distribution of National Powers—Final Thoughts	404
CHAPTER 5	
Equality and the Constitution	405
A. Slavery, Jim Crow, and the Equal Protection Principle	405
1. Slavery and the Constitution	406
<i>State v. Post</i>	407
Note: The Constitutionality of Slavery	408
<i>Dred Scott v. Sandford</i>	410
Note: <i>Dred Scott</i> and the Power of Judicial Review	412
2. Reconstruction and Retreat	413
Note: The Work of the Reconstruction Congress	414
Note: The Judicial Reaction	415
<i>Plessy v. Ferguson</i>	418
Note: Separate but Equal	420
3. The Attack on Jim Crow	422
Note: The Road to <i>Brown</i>	422
<i>Brown v. Board of Education of Topeka (Brown I)</i>	425
Note: Justifications and Explanations for <i>Brown</i>	427
<i>Brown v. Board of Education of Topeka (Brown II)</i>	431
Note: “All Deliberate Speed”	432
4. The Meaning of <i>Brown</i>	433
Note: The Initial Response to <i>Brown</i>	433
Note: The De Jure/De Facto Distinction and Limits on Courts’ Remedial Powers	437
B. Equal Protection Methodology: Rational Basis Review	444
<i>New York City Transit Authority v. Beazer</i>	445
Note: Equal Treatment and Relevant Differences	447

Note: Limitations on Permissible Government Purposes	449
<i>U.S. Department of Agriculture v. Moreno</i>	450
<i>City of Cleburne v. Cleburne Living Center</i>	451
<i>Romer v. Evans</i>	452
Note: “Naked Self-Dealing”	453
Note: “Actual Purpose” Review	454
<i>Minnesota v. Clover Leaf Creamery Co.</i>	454
Note: The Means-Ends Nexus	457
<i>Railway Express Agency v. New York</i>	459
<i>Williamson v. Lee Optical</i>	460
C. Equal Protection Methodology: Heightened Scrutiny and the Problem of Race	463
1. The Origins and Rationale for Heightened Scrutiny in Race-Specific Classifications That Disadvantage Racial Minorities	464
<i>Strauder v. West Virginia</i>	464
<i>Korematsu v. United States</i>	465
<i>Loving v. Virginia</i>	469
Note: Doctrinal Evolution in the Scrutiny Applied to Racial Classifications	470
Note: Justifications for Strict Scrutiny of Racial Classifications	472
Note: The Structure of Strict Scrutiny	476
2. Facially Nonracial Classifications That Disadvantage Racial Minorities: When Does Heightened Scrutiny Apply?	481
<i>Washington v. Davis</i>	481
Note: Rational Basis Review of Non–Race-Specific Classifications	483
Note: What Constitutes a Racially Motivated Classification: Questions of Discriminatory Purpose	485
Note: Distinctive Problems in the Administration of Criminal Justice	490
<i>McCleskey v. Kemp</i>	492
Note: Racial Disparities in Investigating, Charging, and Sentencing	495
3. Race-Specific Classifications Designed to Benefit Racial Minorities	498
Note: The Imposition of Strict Scrutiny	498
<i>Adarand Constructors, Inc. v. Peña</i>	502
Note: The Constitutionality of “Benign” Racial Classifications	506
<i>Grutter v. Bollinger</i>	509
Note: The Contemporary Application of Strict Scrutiny	519
<i>Gratz v. Bollinger</i>	523
Note: Scrutiny of Means	525
<i>Fisher v. University of Texas (Fisher II)</i>	526
Note: The Special Problem of Facially Neutral but Race-Specific Voting Districts	532
Note: The “Special” Case of Indigenous People	537
Note: A Comparative Perspective	538
4. The Synthesis of <i>Brown</i> and Affirmative Action	539
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i>	539
Note: <i>Parents Involved</i> and the Synthesis of Equal Protection Law	553
D. Equal Protection Methodology: Heightened Scrutiny and the Problem of Gender	557
1. The Early Cases	557
2. The Road to Intermediate Scrutiny	559

<i>Reed v. Reed</i>	559
<i>Frontiero v. Richardson</i>	559
Note: From <i>Reed</i> to <i>Craig v. Boren</i> : Evolution and Doctrinal Confusion	561
<i>Craig v. Boren</i>	564
Note: Heightened Scrutiny for Gender Classifications?	568
3. Archaic and Overbroad Generalizations versus “Real” Differences	572
<i>United States v. Virginia</i>	572
Note: “Real Differences” and Formal Equality	579
<i>Nguyen v. Immigration and Naturalization Service</i>	581
<i>Sessions v. Morales-Santana</i>	584
Note: The Relevance of “Real Differences”	586
Note: Gender Discrimination as a Two-Edged Sword	589
Note: The Problem of “Benign” Gender Classifications	591
Note: Sex Discrimination Law and Constitutional Evolution	593
E. Equal Protection Methodology: The Problem of Sexual Orientation	594
Note: The Nature of the Class at Issue	594
<i>Romer v. Evans</i>	595
Note: The Meaning of <i>Romer</i>	602
Note: The Standard of Review	603
F. Equal Protection Methodology: Other Candidates for Heightened Scrutiny	610
1. Alienage	610
<i>Sugarman v. Dougall</i>	611
Note: Strict Scrutiny for Classifications Based on Alienage: Defining the Political Community	613
Note: Alienage and Federal Preemption	616
2. Wealth Classifications	619
Note: Defining the Class	619
Note: Wealth Discrimination and the Problem of Affirmative Rights	620
3. Other Disadvantaged Groups	624
<i>City of Cleburne v. Cleburne Living Center</i>	625
Note: Evaluating the Claims of Other Disadvantaged Groups	626
CHAPTER 6	
Implied Fundamental Rights	631
A. Introduction	631
Note: Theories of Constitutional Interpretation — “Originalism” and Its Critics	632
B. The Privileges or Immunities Clause	639
<i>The Slaughter-House Cases</i>	639
Note: The Demise of the Privileges or Immunities Clause	643
C. The Due Process Clause and the Incorporation Controversy	646
Note: Due Process and Incorporation	646
<i>McDonald v. City of Chicago</i>	648
D. Substantive Due Process: The Protection of Economic Interests and the Question of Redistribution	655
Note: The Road to <i>Lochner</i>	656
<i>Lochner v. New York</i>	658
Note: The (Alleged?) Vices of <i>Lochner</i>	662

Note: The <i>Lochner</i> Era, 1905–1934	667
<i>Nebbia v. New York</i>	668
<i>West Coast Hotel Co. v. Parrish</i>	670
Note: The End of an Era	670
<i>United States v. Carolene Products Co.</i>	671
<i>Williamson v. Lee Optical of Oklahoma</i>	672
<i>Ferguson v. Skrupa</i>	673
Note: Pluralism, Naked Wealth Transfers, and the Courts	673
E. Fundamental Interests and the Equal Protection Clause	676
<i>Skinner v. Oklahoma</i>	676
Note: The Fundamental “Right to Have Offspring”	678
1. Voting	679
a. Denial of the “Right to Vote”	679
<i>Harper v. Virginia State Board of Elections</i>	680
Note: Is the Right to Vote “Fundamental”?	681
<i>Kramer v. Union Free School District</i>	683
Note: <i>Kramer</i> and Its Progeny	684
b. Dilution of the “Right to Vote”	686
<i>Reynolds v. Sims</i>	686
Note: <i>Reynolds</i> and Its Progeny	688
<i>City of Mobile v. Bolden</i>	691
Note: Vote Dilution and the Interests of Groups	693
c. Denial of “Access to the Ballot”	697
<i>Williams v. Rhodes</i>	697
Note: <i>Williams</i> and Its Progeny	698
2. Access to the Judicial Process	700
<i>Griffin v. Illinois</i>	700
<i>Douglas v. California</i>	700
Note: Fundamental Interests and the Criminal Justice System	701
<i>Boddie v. Connecticut</i>	703
Note: Access to the Judicial Process in Civil Cases	704
3. Travel	704
<i>Shapiro v. Thompson</i>	704
<i>Saenz v. Roe</i>	707
Note: The Right to Travel as a “Fundamental Interest”	708
Note: “Penalizing” the Right to Travel	709
4. Welfare	712
<i>Dandridge v. Williams</i>	713
Note: <i>Dandridge</i> and the Judicial Role in the Welfare Context	714
5. Education	716
<i>San Antonio Independent School District v. Rodriguez</i>	716
Note: The <i>Rodriguez</i> Formulation	721
<i>Plyler v. Doe</i>	722
Note: <i>Plyler</i> and the Equal Protection Clause	725
F. Modern Substantive Due Process: Privacy, Personhood, and Family	726
1. The Right of Privacy	727
<i>Griswold v. Connecticut</i>	727
Note: <i>Griswold</i> and the Right of Privacy	733

2. Abortion	736
a. Initial Protection	736
Note: The Abortion Decision	737
Note: Abortion Regulation Between <i>Roe</i> and <i>Casey</i>	740
b. Reaffirmation	742
Note: From <i>Casey</i> to <i>Dobbs</i>	743
<i>Dobbs v. Jackson Women’s Health Organization</i>	748
3. Same-Sex Intimacy	765
<i>Lawrence v. Texas</i>	765
Note: The Legal and Political Landscape on the Eve of <i>Obergefell</i>	774
<i>Obergefell v. Hodges</i>	776
Note: A Right to Same-Sex Marriage	791
4. Other Family and Privacy Interests	792
<i>Moore v. City of East Cleveland</i>	792
Note: Nontraditional Association	793
5. The Right to Die	796
<i>Cruzan v. Director, Missouri Department of Health</i>	796
<i>Washington v. Glucksberg</i>	797
Note: The Right to Die	800
G. Procedural Due Process	801
1. Liberty and Property Interests	801
<i>Board of Regents of State Colleges v. Roth</i>	802
<i>Perry v. Sindermann</i>	803
<i>Cleveland Board of Education v. Loudermill</i>	804
Note: Defining “Liberty” and “Property”	805
Note: Statutory Entitlements, Property, and Natural Liberty	807
2. What Process Is Due	812
<i>Mathews v. Eldridge</i>	812
Note: Balancing Tests and the Due Process Clause	815
Note: Procedural Due Process and “Legislative” Determinations	822
H. The Contracts and Takings Clauses	823
1. The Contracts Clause	823
Note: Early Interpretive Problems	823
<i>Home Building & Loan Association v. Blaisdell</i>	826
Note: Market Ordering and Constitutional Interpretation	829
<i>United States Trust Co. v. New Jersey</i>	830
<i>Allied Structural Steel Co. v. Spannaus</i>	831
Note: <i>United States Trust, Spannaus</i> , and the Nonrevival of the Contracts Clause	833
2. The Eminent Domain Clause	835
<i>Kelo v. City of New London</i>	837
Note: The Public Use Requirement and the Takings Clause	838
<i>Cedar Point Nursery v. Hassid</i>	839
<i>Pennsylvania Coal Co. v. Mahon</i>	845
<i>Miller v. Schoene</i>	847
<i>Penn Central Transportation Co. v. New York City</i>	848
<i>Keystone Bituminous Coal Association v. DeBenedictis</i>	853
Note: “Takings” and the Police Power	854
<i>Nollan v. California Coastal Commission</i>	861
Note: <i>Nollan</i> , Unconstitutional Conditions, and Other Problems	863

<i>Lucas v. South Carolina Coastal Council</i>	867
Note: <i>Lucas</i> , the Environment, and Regulatory Takings	874
<i>Palazzolo v. Rhode Island</i>	877
Note: <i>Palazzolo</i> —Final Thoughts	880
CHAPTER 7	
Freedom of Expression	881
A. Introduction	881
Note: The History of Free Expression	881
Note: The Philosophy of Free Expression	885
Note: Organization	891
B. Content-Based Restrictions: Dangerous Ideas and Information	891
1. Speech That “Causes” Unlawful Conduct	891
<i>Shaffer v. United States</i>	892
<i>Masses Publishing Co. v. Patten</i>	893
<i>Schenck v. United States</i>	895
Note: <i>Shaffer</i> , <i>Masses</i> , and <i>Schenck</i>	896
<i>Frohwerk v. United States</i>	899
<i>Debs v. United States</i>	899
<i>Abrams v. United States</i>	900
Note: <i>Abrams</i> and the Emergence of the Holmes/Brandeis Tradition	903
<i>Gitlow v. New York</i>	905
Note: “Abstract Doctrine” versus “Urging to Action”	907
<i>Whitney v. California</i>	908
Note: The Brandeis Concurrence and the Road to <i>Dennis</i>	911
<i>Dennis v. United States</i>	913
Note: <i>Dennis</i> and the Communist “Conspiracy”	916
Note: The Road to <i>Brandenburg</i>	919
<i>Brandenburg v. Ohio</i>	921
Note: The <i>Brandenburg</i> Formulation	923
Note: Abridgment of Speech Other Than by Direct Criminal Prohibition	927
2. Speech That Provokes a Hostile Audience Reaction	932
<i>Terminiello v. Chicago</i>	932
<i>Cantwell v. Connecticut</i>	932
<i>Feiner v. New York</i>	933
Note: The Search for Mechanisms of Control	936
<i>Chaplinsky v. New Hampshire</i>	939
Note: Fighting Words	940
Note: The <i>Skokie</i> Controversy	943
<i>Snyder v. Phelps</i>	945
3. Classified Information	946
<i>New York Times Co. v. United States; United States v. Washington</i> <i>Post Co.</i>	946
Note: The Pentagon Papers Controversy	952
Note: Dangerous Ideas and Information—Final Thoughts	956
C. Overbreadth, Vagueness, and Prior Restraint	956
1. Overbreadth and Vagueness	957
<i>Gooding v. Wilson</i>	957

Note: Overbreadth	958
Note: Vagueness	961
2. Prior Restraint	962
<i>Lovell v. Griffin</i>	962
Note: Licensing as Prior Restraint	963
<i>Near v. Minnesota</i>	966
Note: Injunction as Prior Restraint	967
D. Content-Based Restrictions: “Low” Value	969
1. False Statements of Fact	970
<i>New York Times v. Sullivan</i>	970
Note: “The Central Meaning” of <i>New York Times v. Sullivan</i>	975
<i>Curtis Publishing Co. v. Butts; Associated Press v. Walker</i>	977
<i>Gertz v. Robert Welch, Inc.</i>	978
Note: Public and Private Figures, Public and Private Speech	980
<i>Dun & Bradstreet v. Greenmoss Builders</i>	981
Note: Other False Statements of Fact	982
<i>United States v. Alvarez</i>	983
<i>Hustler Magazine v. Falwell</i>	985
2. “Nonnewsworthy” Disclosures of “Private” Information	987
<i>Cox Broadcasting Corp. v. Cohn</i>	987
Note: Invasion of Privacy and the First Amendment	989
3. Threats	992
<i>Bridges v. California</i>	992
<i>Watts v. United States</i>	993
<i>Planned Parenthood v. American Coalition of Life Activists</i>	993
4. Commercial Advertising	995
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council</i>	996
Note: <i>Virginia Pharmacy</i> and “the Free Flow of Commercial Information”	1001
Note: Truthful, Nondeceptive Commercial Advertising after <i>Virginia Pharmacy</i>	1003
<i>Central Hudson Gas v. Public Service Commission of New York</i>	1004
Note: Truthful, Nondeceptive Commercial Advertising	1005
Note: Other Regulations of Commercial Advertising	1008
5. Obscenity	1011
<i>Roth v. United States; Alberts v. California</i>	1012
Note: Obscenity and Free Expression	1013
Note: Developments in the Law of “Obscenity” — 1957–1973	1016
<i>Miller v. California</i>	1019
<i>Paris Adult Theatre I v. Slaton</i>	1021
Note: The 1973 Reformulation and Its Aftermath	1024
6. Child Pornography, Animal Cruelty, and Violent Expression	1027
<i>New York v. Ferber</i>	1027
<i>Ashcroft v. The Free Speech Coalition</i>	1029
Note: Child Pornography	1031
<i>United States v. Stevens</i>	1032
<i>Brown v. Entertainment Merchants Ass’n</i>	1034
7. The Lewd, the Profane, and the Indecent	1037
<i>Cohen v. California</i>	1037

Note: Profanity, <i>Cohen</i> , and the Captive Audience	1040
<i>Erznoznik v. Jacksonville</i>	1042
<i>FCC v. Pacifica Foundation</i>	1043
Note: Fleeting Expletives	1045
<i>Iancu v. Brunetti</i>	1046
<i>Sable Communications, Inc. v. FCC</i>	1047
<i>Reno v. American Civil Liberties Union</i>	1047
<i>Ashcroft v. American Civil Liberties Union</i>	1048
Note: “Indecent” Expression	1049
Note: Zoning Theaters with Adult Movies and Bars with Nude Dancing	1052
8. Hate Speech	1055
<i>Beauharnais v. Illinois</i>	1055
Note: Group Defamation and “Hate Speech”	1057
<i>R.A.V. v. City of St. Paul</i>	1061
<i>Wisconsin v. Mitchell</i>	1064
Note: <i>R.A.V.</i> and <i>Mitchell</i>	1065
<i>Virginia v. Black</i>	1067
Note: <i>R.A.V.</i> and <i>Black</i>	1074
Note: Pornography and the Victimization of Women	1074
Note: “Low” Value Speech—Final Thoughts	1076
E. Content-Neutral Restrictions: Limitations on the Means of Communication and the Problem of Content-Neutrality	1078
1. General Principles	1078
<i>Schneider v. State</i>	1078
<i>Martin v. City of Struthers</i>	1079
<i>Kovacs v. Cooper</i>	1079
<i>Metromedia, Inc. v. San Diego</i>	1080
<i>City of Ladue v. Gilleo</i>	1081
<i>Bartnicki v. Vopper</i>	1082
Note: The Search for Principles	1083
Note: The Meaning of “Content-Neutrality”	1084
2. Speech on Public Property: The Public Forum	1087
a. The Public Forum: Streets and Parks	1087
<i>Commonwealth v. Davis, Aff’d Sub Nom. Davis v. Massachusetts</i>	1087
<i>Hague v. CIO</i>	1088
<i>Schneider v. State</i>	1089
Note: Regulating the Public Forum	1089
Note: Devices for Regulating the Public Forum	1094
b. The Public Forum: Other Publicly Owned Property	1096
<i>Adderley v. Florida</i>	1096
Note: “No Less Than a Private Owner of Property”?	1097
<i>International Society for Krishna Consciousness v. Lee</i>	1100
Note: Modern Public Forum Doctrine	1102
Note: The Right to a “Private” Forum	1103
c. The Public Forum: Unequal Access and the Problem of Content-Neutrality	1104
<i>Police Department of Chicago v. Mosley</i>	1105
Note: <i>Mosley</i> and the “Equality” of Ideas	1106
<i>Lehman v. City of Shaker Heights</i>	1108

Note: <i>Lehman</i> and the Limits of <i>Mosley</i>	1111
<i>Perry Educators' Association v. Perry Local Educators' Association</i>	1113
Note: Quintessential, Designated, and Nonpublic Forums	1114
Note: Religious Expression and the Meaning of "Viewpoint Neutrality"	1117
<i>Christian Legal Society Chapter v. Martinez</i>	1119
d. The End of the Distinction Between Subject Matter and Viewpoint-Based Restrictions?	1122
<i>Reed v. Town of Gilbert</i>	1122
e. Unequal Access and the Problem of Government Speech	1125
<i>Southeastern Promotions v. Conrad</i>	1125
<i>Board of Education, Island Trees Union Free School District v. Pico</i>	1127
<i>Regan v. Taxation With Representation of Washington</i>	1129
<i>National Endowment for The Arts v. Finley</i>	1130
<i>Rust v. Sullivan</i>	1132
Note: The Implications of <i>Rust</i>	1134
<i>Legal Services Corporation v. Velazquez</i>	1135
<i>Agency for International Development v. Alliance for Open Society International</i>	1137
Note: The Reach of Government Speech: <i>Sumnum, Walker, Matal</i> and <i>Shurtleff</i>	1139
3. Symbolic Conduct	1144
<i>United States v. O'Brien</i>	1145
Note: Draft Card Burning and the First Amendment	1149
Note: Flag Desecration and Misuse	1153
<i>Barnes v. Glen Theatre, Inc.</i>	1158
Note: Other Forms of Symbolic Speech	1160
4. Other Means of Expression: Litigation, Association, and the Right Not to Speak	1161
<i>NAACP v. Button</i>	1161
Note: Litigation and the First Amendment	1162
<i>NAACP v. Alabama</i>	1163
<i>Roberts v. U.S. Jaycees</i>	1164
Note: Association and the First Amendment	1165
<i>Boy Scouts of America v. Dale</i>	1166
Note: The Meaning of <i>Dale</i>	1168
<i>Pruneyard Shopping Center v. Robins</i>	1169
Note: Compelled Affirmation, Expression, and Association: The Right Not to Speak	1169
5. Regulation of Political Solicitation, Contribution, Expenditure, and Activity	1175
<i>Buckley v. Valeo</i>	1176
Note: <i>Buckley</i> and the Problem of Abridging Speech to "Enhance" the Electoral Process	1182
Note: Subsidy and Disclosure	1185
Note: Campaign Finance Regulation in the Thirty Years After <i>Buckley</i>	1187
<i>McConnell v. Federal Election Comm'n</i>	1190
Note: Campaign Finance and the Roberts Court	1193
<i>Citizens United v. Federal Elections Commission</i>	1196
Note: Reflections on <i>Citizens United</i>	1204

	<i>McCutcheon v. Federal Election Commission</i>	1207
	<i>Federal Elections Commission v. Ted Cruz for Senate</i>	1210
	Note: Additional Regulation of the Electoral Process	1214
	Note: Regulating the Political Activities of Public Employees	1216
	Note: Content-Neutral Restrictions—Final Thoughts	1219
F.	Freedom of the Press	1220
1.	A “Preferred” Status for the Press?	1220
2.	A Right to “Gather” News?	1221
	<i>Branzburg v. Hayes</i>	1221
	Note: A Right to Gather News?	1225
	Note: A Press Right of Access to Information?	1227
	<i>Richmond Newspapers v. Virginia</i>	1228
	<i>Globe Newspaper Co. v. Superior Court</i>	1229
	Note: Variations on the Press Right of Access	1230
3.	Differential Treatment of the Press	1231
	<i>Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue</i>	1231
	Note: Differential Treatment	1232
4.	Regulating the Press to “Improve” the Marketplace of Ideas	1234
	<i>Red Lion Broadcasting Co. v. FCC</i>	1234
	Note: Regulating the Airwaves	1236
	<i>Miami Herald Publishing Co. v. Tornillo</i>	1237
	<i>Turner Broadcasting System Inc. v. FCC</i>	1238
	Note: <i>Turner</i> and the Regulation of Cable	1240
	Note: The First Amendment in Cyberspace	1241
	Note: Free Expression—Final Thoughts	1247

CHAPTER 8**The Constitution and Religion 1251**

A.	Introduction: Historical and Analytical Overview	1251
	<i>Everson v. Board of Education</i>	1251
	Note: The History of the Religion Clauses	1253
	Note: General Approaches to the Religion Clauses	1259
	Note: Defining Religion	1264
B.	The Establishment Clause	1267
1.	The Anticoercion Principle	1268
	<i>Lee v. Weisman</i>	1268
	Note: The Anticoercion Principle	1274
2.	The Nonendorsement Principle, History’s Relevance, and De Facto Establishments	1277
	Introductory Note: Formulating the Nonendorsement Principle	1277
	<i>American Legion v. American Humanist Association</i>	1280
	Note: Abandoning the <i>Lemon</i> Test and Replacing It with What?	1288
3.	Impermissible Purposes	1291
	Note: Problems with a Purpose Test	1291
4.	Facially Neutral Statutes That Incidentally Aid Religion: Permissible and Impermissible Effects	1297
	Note: The Problem and Its Background	1297
	<i>Mueller v. Allen</i>	1299

<i>Zelman v. Simmons-Harris</i>	1302
Note: Purpose and Effect in Aid to Nonpublic Education — Benevolent Neutrality?	1304
Note: Concluding Observations	1309
C. The Free Exercise Clause: Required Accommodations	1310
Note: From <i>Reynolds</i> to <i>Smith</i>	1310
<i>Braunfeld v. Brown</i>	1311
<i>Sherbert v. Verner</i>	1311
<i>Wisconsin v. Yoder</i>	1312
Note: Problems of Mandatory Accommodation	1313
<i>Employment Division, Department of Human Resources v. Smith</i>	1316
Note: Should Accommodation Be Required?	1323
D. Permissible Accommodation	1328
<i>Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos</i>	1329
<i>Texas Monthly v. Bullock</i>	1332
<i>Board of Education of Kiryas Joel Village School District v. Grumet</i>	1333
Note: When — If Ever — Should Accommodations of Religion Be Permitted?	1335
<i>Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n</i>	1337
Note: The Implications of <i>Masterpiece Cakeshop</i>	1338
E. Free Exercise, Free Speech, and the Right of Expressive Association	1340
<i>Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC</i>	1340
Note: The Relation Between the Religion Clauses and Other Protections of Expression	1341
Note: Concluding Observations	1345
CHAPTER 9	
State Action (online)	9-1
A. State Action, Federalism, and Individual Autonomy	9-2
1. State Action and Federalism	9-2
<i>The Civil Rights Cases</i>	9-2
Note: Federalism and the Substantive Content of the State Action Doctrine	9-4
2. State Action and Individual Autonomy	9-5
B. Pure Inaction and the Theory of Governmental Neutrality	9-7
1. Pure Inaction	9-7
<i>DeShaney v. Winnebago County Department of Social Services</i>	9-7
<i>Flagg Brothers v. Brooks</i>	9-9
<i>Lugar v. Edmondson Oil Co.</i>	9-12
Note: The Problem of the Passive State	9-13
2. Judicial Action and the Theory of Government Neutrality	9-17
<i>Shelley v. Kraemer</i>	9-17
Note: <i>Shelley v. Kraemer</i> , State Inaction, and the Theory of Government Neutrality	9-20
C. Constitutionally Impermissible Departures from Neutrality: State Subsidization, Approval, and Encouragement	9-24
1. State Subsidization of Private Conduct	9-24
<i>Burton v. Wilmington Parking Authority</i>	9-24

Note: Subsidies, Penalties, and the Search for a Baseline	9-27
<i>Rendell-Baker v. Kohn</i>	9-29
<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Committee</i>	9-30
Note: State Action as Coercion or Significant Encouragement	9-31
2. State Licensing and Authorization	9-33
<i>Public Utilities Commission v. Pollak</i>	9-33
<i>Moose Lodge No. 107 v. Irvis</i>	9-34
<i>Jackson v. Metropolitan Edison Co.</i>	9-36
Note: Licensing, Authorization, and Entwinement as State Action	9-37
D. Constitutionally Required Departures from Neutrality:	
The Public Function Doctrine	9-38
<i>Marsh v. Alabama</i>	9-38
Note: The “Public Function” Theory and the Passive State	9-40
<i>Jackson v. Metropolitan Edison Co.</i>	9-44
<i>Manhattan Community Access Corp. v. Halleck</i>	9-45
Note: Public Functions as “Exclusive Prerogatives” of the State	9-53
E. Unconstitutional Conditions and the Benefit/Burden Distinction	9-56
<i>Rust v. Sullivan</i>	9-57
<i>Maher v. Roe</i>	9-58
<i>National Federation of Independent Business v. Sebelius</i>	9-58
<i>Nollan v. California Coastal Commission</i>	9-60
Note: Benefits, Burdens, and Coercion	9-61
F. Some Final Thoughts	9-68
<i>Table of Cases</i>	1349
<i>Table of Authorities</i>	1373
<i>Index</i>	1403