
CONTENTS

<i>Preface</i>	xxx
<i>Acknowledgments</i>	xxxv
<i>The Constitution of the United States</i>	xxxvii
CHAPTER 1	
The Federal Judicial Power	1
A. The Authority for Judicial Review	1
<i>Marbury v. Madison</i>	2
Notes on <i>Marbury v. Madison</i>	7
Authority for Judicial Review of State Judgments	8
<i>Martin v. Hunter's Lessee</i>	9
<i>Cohens v. Virginia</i>	9
B. Limits on the Federal Judicial Power	10
1. Interpretive Limits	10
2. Congressional Limits	12
The Exceptions and Regulations Clause	13
<i>Ex parte McCordle</i>	13
Separation of Powers as a Limit on Congress's Authority	15
<i>United States v. Klein</i>	15
Notes on <i>United States v. Klein</i>	17
<i>Robertson v. Seattle Audubon Society</i>	17
<i>Bank Markazi v. Peterson</i>	17
3. Justiciability Limits	18
a. Prohibition of Advisory Opinions	20
Opinion of the Justices	20
<i>Hayburn's Case</i>	20
<i>Plaut v. Spendthrift Farm, Inc.</i>	21
Notes on Advisory Opinions	22
<i>Nashville, C. & St. L. Ry. v. Wallace</i>	22
b. Standing	22
i. Constitutional Standing Requirements	23
<i>Allen v. Wright</i>	23
<i>Massachusetts v. Environmental Protection Agency</i>	29
Notes on Constitutional Standing Requirements: Injury, Causation, and Redressability	34
<i>City of Los Angeles v. Lyons</i>	35
<i>Lujan v. Defenders of Wildlife</i>	36
<i>Clapper v. Amnesty International USA</i>	39
<i>TransUnion LLC v. Ramirez</i>	40
<i>Uzuegbunam v. Preczewski</i>	44

Linda R. S. v. Richard D.	47
Warth v. Seldin	47
Simon v. Eastern Kentucky Welfare Rights Organization	48
Duke Power Co. v. Carolina Environmental Study Group, Inc.	48
ii. Prudential Standing Requirements	48
The Prohibition of Third-Party Standing	49
<i>Singleton v. Wulff</i>	49
Barrows v. Jackson	51
Craig v. Boren	51
Gilmore v. Utah	51
Elk Grove Unified School District v. Newdow	52
June Medical Services L.L.C. v. Russo	52
The Prohibition of Generalized Grievances	54
<i>United States v. Richardson</i>	55
<i>Flast v. Cohen</i>	58
c. Ripeness	62
<i>Poe v. Ullman</i>	63
<i>Abbott Laboratories v. Gardner</i>	65
United Public Workers v. Mitchell	66
Regional Rail Reorganization Act Cases	66
Lake Carriers Ass'n v. MacMullan	66
Susan B. Anthony List v. Driehaus	66
303 Creative LLC v. Elenis	67
d. Mootness	68
Moore v. Ogilvie	69
Roe v. Wade	69
DeFunis v. Odegaard	70
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services</i>	70
<i>United States Parole Commission v. Geraghty</i>	71
e. The Political Question Doctrine	72
i. The Political Question Doctrine Defined	72
What Is a Political Question? The Issues of Malapportionment and Partisan Gerrymandering	73
<i>Baker v. Carr</i>	74
<i>Rucho v. Common Cause</i>	77
ii. The Political Question Doctrine Applied: Congressional Self-Governance	89
<i>Powell v. McCormack</i>	89
iii. The Political Question Doctrine Applied: Foreign Policy	90
<i>Goldwater v. Carter</i>	91
<i>Zivotofsky v. Clinton</i>	93
iv. The Political Question Doctrine Applied: Impeachment and Removal	94
<i>Nixon v. United States</i>	94
CHAPTER 2	
The Federal Legislative Power	99
A. Introduction: Congress and the States	99
The Framework for Analysis: <i>McCulloch v. Maryland</i>	100
<i>McCulloch v. Maryland</i>	101

What Role Should Concern over Protecting States Have in Defining Congress's Powers?	108
<i>National Federation of Independent Business v. Sebelius</i>	111
B. The Necessary and Proper Clause	129
C. The Commerce Power	130
1. The Initial Era: Gibbons v. Ogden Defines the Commerce Power	130
<i>Gibbons v. Ogden</i>	131
2. The 1890s-1937: A Limited Federal Commerce Power	133
a. What Is "Commerce"?	135
b. What Does "Among the States" Mean?	136
c. Does State Sovereignty Limit Congressional Power?	138
3. 1937-1990s: Broad Federal Commerce Power	139
Key Decisions Changing the Commerce Clause Doctrine	140
<i>NLRB v. Jones & Laughlin Steel Corp.</i>	140
<i>United States v. Darby</i>	143
<i>Wickard v. Filburn</i>	145
The Meaning of "Commerce Among the States"	147
<i>Heart of Atlanta Motel, Inc. v. United States</i>	147
<i>Katzenbach v. McClung, Sr. & McClung, Jr.</i>	149
<i>Hodel v. Indiana</i>	151
<i>Perez v. United States</i>	151
The Tenth Amendment Between 1937 and the 1990s	152
<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	154
4. 1990s-??? : Narrowing of the Commerce Power and Revival of the Tenth Amendment as a Constraint on Congress	157
a. What Is Congress's Authority to Regulate "Commerce Among the States"?	158
<i>United States v. Lopez</i>	158
<i>United States v. Morrison</i>	167
<i>Gonzales v. Raich</i>	173
b. Does the Tenth Amendment Limit Congress's Authority?	181
<i>New York v. United States</i>	181
<i>Printz v. United States</i>	189
<i>Reno v. Condon</i>	196
<i>Murphy v. National Collegiate Athletic Association</i>	198
D. The Taxing and Spending Power	201
For What Purposes May Congress Tax and Spend?	201
<i>United States v. Butler</i>	201
Chas. C. Steward Mach. Co. v. Davis	203
<i>Sabri v. United States</i>	204
Conditions on Grants to State Governments	205
<i>South Dakota v. Dole</i>	205
E. Congress's Powers Under the Post-Civil War Amendments	207
1. Whom May Congress Regulate Under the Post-Civil War Amendments?	208
<i>United States v. Morrison</i>	209
2. What Is the Scope of Congress's Power?	211
<i>City of Boerne v. Flores</i>	213
<i>Shelby County, Alabama v. Holder</i>	218

CHAPTER 3	
The Federal Executive Power	229
A. Inherent Presidential Power	229
<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	230
The Scope of Inherent Power: The Issue of Executive Privilege	237
<i>United States v. Richard M. Nixon, President of the United States</i>	239
The Authority of Congress to Increase Executive Power	242
B. The Constitutional Problems of the Administrative State	243
1. The Nondelegation Doctrine and Its Demise	244
<i>A.L.A. Schechter Poultry Corp. v. United States</i>	244
<i>Panama Refining Co. v. Ryan</i>	245
<i>Gundy v. United States</i>	247
2. The Major Questions Doctrine	253
<i>Biden v. Nebraska</i>	254
3. The Legislative Veto and Its Demise	261
<i>Immigration & Naturalization Service v. Jagdish Rai Chadha</i>	262
4. Checking Administrative Power	269
The Appointment Power	269
<i>Alexia Morrison, Independent Counsel v. Theodore B. Olson</i>	269
The Removal Power	276
The Impeachment of Andrew Johnson	277
<i>Myers v. United States</i>	277
<i>Humphrey's Executor v. United States</i>	278
<i>Wiener v. United States</i>	279
<i>Bowsher v. Synar</i>	280
<i>Morrison v. Olson</i>	282
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i>	283
<i>Seila Law LLC v. Consumer Finance Protection Bureau</i>	285
C. Separation of Powers and Foreign Policy	288
1. Are Foreign Policy and Domestic Affairs Different?	289
<i>United States v. Curtiss-Wright Export Corp.</i>	289
Notes on <i>Curtiss-Wright</i>	290
<i>Zivotofsky v. Kerry</i>	292
2. Treaties and Executive Agreements	298
<i>Dames & Moore v. Regan, Secretary of the Treasury</i>	299
3. War Powers	301
50 U.S. Code Chapter 33 — War Powers Resolution	302
D. Presidential Power and the War on Terrorism	305
1. Detentions	305
<i>Hamdi v. Rumsfeld</i>	305
<i>Boumediene v. Bush</i>	315
2. Military Tribunals	329
<i>Ex parte Quirin</i>	330
E. Presidential Power over Immigration	336
<i>Trump v. Hawaii</i>	336
F. Checks on the President	345
1. Suing and Prosecuting the President	345
<i>Richard Nixon v. A. Ernest Fitzgerald</i>	345
<i>William Jefferson Clinton v. Paula Corbin Jones</i>	348

2. Subpoenaing Presidential Information	351
<i>Trump v. Vance</i>	351
<i>Trump v. Mazars USA</i>	360
3. Impeachment	364

CHAPTER 4

Limits on State Regulatory and Taxing Power 369

A. Preemption of State and Local Laws 370

1. Express Preemption	372
<i>Lorillard Tobacco Co. v. Reilly</i>	372
2. Implied Preemption	378
a. Conflicts Preemption	378
<i>Florida Lime & Avocado Growers, Inc. v. Paul, Director, Department of Agriculture of California</i>	378
b. Preemption Because State Law Impedes the Achievement of a Federal Objective	379
<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission</i>	379
c. Preemption Because Federal Law Occupies the Field	383
<i>Arizona v. United States</i>	383

B. The Dormant Commerce Clause 390

1. Why a Dormant Commerce Clause?	391
<i>Tennessee Wine & Spirits Retailers Association v. Thomas</i>	392
2. The History of the Dormant Commerce Clause	398
<i>Aaron B. Cooley v. The Board of Wardens of the Port of Philadelphia ex rel. Society for Relief of Distressed Pilots</i>	399
3. Analyzing Whether a Law Violates the Dormant Commerce Clause	401
a. Determining Whether a Law Is Discriminatory	401
Facially Discriminatory Laws	402
<i>City of Philadelphia v. New Jersey</i>	402
Facially Neutral Laws	404
<i>Hunt, Governor of the State of North Carolina v. Washington State Apple Advertising Commission</i>	405
<i>Exxon Corp. v. Governor of Maryland</i>	407
<i>West Lynn Creamery, Inc. v. Healy, Commissioner of Massachusetts Department of Food & Agriculture</i>	410
<i>State of Minnesota v. Clover Leaf Creamery Co.</i>	412
b. Analysis If a Law Is Deemed Discriminatory	413
<i>Dean Milk Co. v. City of Madison, Wisconsin</i>	414
<i>Maine v. Taylor & United States</i>	415
c. Analysis If a Law Is Deemed Nondiscriminatory	417
<i>Loren J. Pike v. Bruce Church, Inc.</i>	417
<i>National Pork Producers Council v. Ross</i>	420
Summary	427
4. Exceptions to the Dormant Commerce Clause	427
Congressional Approval	428
<i>Western & Southern Life Insurance Co. v. State Board of Equalization of California</i>	428
The Market Participant Exception	429

<i>Reeves, Inc. v. William Stake</i>	430
White v. Massachusetts Council of Construction Employers, Inc.	432
<i>South-Central Timber Development, Inc. v. Commissioner, Department of Natural Resources of Alaska</i>	432
C. The Privileges and Immunities Clause of Article IV, §2	434
1. Introduction	434
2. Analysis Under the Privileges and Immunities Clause	436
What Are the “Privileges and Immunities of Citizenship”?	436
<i>Toomer v. Witsell</i>	438
<i>United Building & Construction Trades Council of Camden County v. Mayor & Council of the City of Camden</i>	439
<i>Lester Baldwin v. Fish & Game Commission of Montana</i>	441
What Justifications Are Sufficient to Permit Discrimination?	442
<i>Supreme Court of New Hampshire v. Kathryn A. Piper</i>	442
CHAPTER 5	
The Structure of the Constitution’s Protection of Civil Rights and Civil Liberties	447
A. Introduction	447
B. The Application of the Bill of Rights to the States	448
1. The Rejection of Application Before the Civil War	448
<i>Barron v. Mayor & City Council of Baltimore</i>	448
2. A False Start in Applying the Bill of Rights to the States: The Privileges or Immunities Clause and the Slaughter-House Cases	450
<i>Slaughter-House Cases: Butchers’ Benevolent Association of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.</i>	451
<i>Saenz v. Roe</i>	457
3. The Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment	458
The Debate over Incorporation	460
Palko v. Connecticut	460
Adamson v. California	461
The Current Law as to What’s Incorporated	463
<i>McDonald v. City of Chicago</i>	465
<i>Timbs v. Indiana</i>	470
The Content of Incorporated Rights	472
<i>Ramos v. Louisiana</i>	472
C. The Application of the Bill of Rights and the Constitution to Private Conduct	474
1. The Requirement for State Action	474
<i>The Civil Rights Cases: United States v. Stanley</i>	474
2. The Exceptions to the State Action Doctrine	477
a. The Public Functions Exception	479
<i>Marsh v. Alabama</i>	479
<i>Jackson v. Metropolitan Edison Co.</i>	481
<i>Terry v. Adams</i>	483
<i>Evans v. Newton</i>	484
<i>Manhattan Community Access Corporation v. Halleck</i>	486
<i>Hudgens v. National Labor Relations Board</i>	490
b. The Entanglement Exception	491

Judicial and Law Enforcement Actions	492
<i>Shelley v. Kraemer</i>	492
<i>Lugar v. Edmondson Oil Co.</i>	495
<i>Edmonson v. Leesville Concrete Co.</i>	497
Government Regulation	498
<i>Burton v. Wilmington Parking Authority</i>	499
<i>Moose Lodge No. 107 v. Irvis</i>	501
Government Subsidies	503
<i>Norwood v. Harrison</i>	503
<i>Rendell-Baker v. Kohn</i>	505
Entwinement	508
<i>Brentwood Academy v. Tennessee Secondary School Athletic Association</i>	508
CHAPTER 6	
Economic Liberties	515
A. Introduction	515
Historical Overview	515
Organization of the Chapter	516
B. Economic Substantive Due Process	517
1. Introduction	517
2. The Early History of Economic Substantive Due Process	517
3. Substantive Due Process of the <i>Lochner</i> Era	520
<i>Allgeyer v. Louisiana</i>	520
<i>Lochner v. New York</i>	521
Laws Protecting Unionizing	526
Maximum Hours Laws	527
<i>Muller v. Oregon</i>	527
Minimum Wage Laws	529
<i>Adkins v. Children's Hospital</i>	529
Consumer Protection Legislation	531
<i>Weaver v. Palmer Bros. Co.</i>	531
4. Economic Substantive Due Process Since 1937	532
Pressures for Change	532
The End of <i>Lochnerism</i>	533
<i>West Coast Hotel Co. v. Parrish</i>	533
<i>United States v. Carolene Products Co.</i>	535
Economic Substantive Due Process Since 1937	536
<i>Williamson v. Lee Optical of Oklahoma, Inc.</i>	537
The Rebirth of Economic Due Process? Constitutional Limits on Punitive Damages	538
<i>BMW of North America, Inc. v. Gore</i>	539
<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i>	542
Too Much Deference?	549
C. The Contracts Clause	549
1. Introduction	549
2. The Modern Use of the Contracts Clause	550
<i>Home Building & Loan Association v. Blaisdell</i>	550
Government Interference with Private Contracts	553
<i>Energy Reserves Group, Inc. v. Kansas Power & Light Co.</i>	553

Government Interference with Government Contracts	556
<i>United States Trust Co. v. New Jersey</i>	556
D. The Takings Clause	560
1. Introduction	560
2. Is There a “Taking”?	561
Possessory Takings	561
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i>	561
<i>Horne v. Department of Agriculture</i>	563
<i>Cedar Point Nursery v. Hassid</i>	564
Regulatory Takings	571
<i>Pennsylvania Coal Co. v. Mahon</i>	571
<i>Miller v. Schoene</i>	573
<i>Penn Central Transportation Co. v. New York City</i>	575
<i>Lucas v. South Carolina Coastal Council</i>	578
Nollan v. California Coastal Comm’n	583
<i>Dolan v. City of Tigard</i>	583
<i>Palazzolo v. Rhode Island</i>	588
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i>	591
3. Is It for “Public Use”?	597
<i>Kelo v. City of New London</i>	598
4. What Is the Requirement for “Just Compensation”?	605
<i>Brown v. Legal Foundation of Washington</i>	605
CHAPTER 7	
Equal Protection	609
A. Introduction	609
1. Constitutional Provisions Concerning Equal Protection	609
2. A Framework for Equal Protection Analysis	610
Question 1: What Is the Classification?	610
Question 2: What Is the Appropriate Level of Scrutiny?	611
Question 3: Does the Government Action Meet the Level of Scrutiny?	613
The Protection of Fundamental Rights Under Equal Protection	614
B. The Rational Basis Test	615
1. Introduction	615
2. Does the Law Have a Legitimate Purpose?	616
What Constitutes a Legitimate Purpose?	616
<i>Romer v. Evans</i>	617
Must It Be the Actual Purpose, or Is a Conceivable Purpose Enough?	621
3. The Requirement for a “Reasonable Relationship”	622
Tolerance for Underinclusiveness Under Rational Basis Review	622
<i>Railway Express Agency, Inc. v. New York</i>	622
Tolerance for Overinclusiveness Under Rational Basis Review	624
<i>New York City Transit Authority v. Beazer</i>	625
Cases in Which Laws Are Deemed Arbitrary and Unreasonable	628
<i>U.S. Department of Agriculture v. Moreno</i>	628
<i>City of Cleburne, Texas v. Cleburne Living Center, Inc.</i>	630
C. Classifications Based on Race and National Origin	633
1. Race Discrimination and Slavery Before the Thirteenth and Fourteenth Amendments	634

Dred Scott v. Sandford	635
<i>Dred Scott v. Sandford</i>	636
The Post-Civil War Amendments	638
2. Strict Scrutiny for Discrimination Based on Race and National Origin	639
3. Proving the Existence of a Race or National Origin Classification	640
a. Race and National Origin Classifications on the Face of the Law	640
Race-Specific Classifications That Disadvantage Racial Minorities	640
<i>Korematsu v. United States</i>	641
Racial Classifications Burdening Both Whites and Minorities	645
<i>Loving v. Virginia</i>	645
<i>Palmore v. Sidoti</i>	647
Laws Requiring Separation of the Races	648
<i>Plessy v. Ferguson</i>	649
The Initial Attack on “Separate but Equal”	651
Brown v. Board of Education	652
<i>Brown v. Board of Education</i>	653
The Invalidation of Segregation in Other Contexts	655
b. Facially Neutral Laws with a Discriminatory Impact or with Discriminatory Administration	657
The Requirement for Proof of a Discriminatory Purpose	657
<i>Washington v. Davis</i>	657
<i>McCleskey v. Kemp</i>	660
<i>City of Mobile v. Bolden</i>	666
Is Proof of a Discriminatory Effect Also Required?	668
<i>Palmer v. Thompson</i>	669
How Is a Discriminatory Purpose Proven?	670
<i>Personnel Administrator of Massachusetts v. Feeney</i>	671
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i>	672
Application: Discriminatory Use of Peremptory Challenges	674
4. Remedies: The Problem of School Segregation	676
Introduction: The Problem of Remedies	676
<i>Brown v. Board of Education</i>	676
Massive Resistance	678
Judicial Power to Impose Remedies in School Desegregation Cases	680
<i>Swann v. Charlotte-Mecklenburg Board of Education</i>	680
<i>Milliken v. Bradley</i>	683
When Should Federal Desegregation Remedies End?	686
<i>Board of Education of Oklahoma City Public Schools v. Dowell</i>	686
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i>	688
5. Racial Classifications Benefiting Minorities	700
The Emergence of Strict Scrutiny as the Test	701
<i>Richmond v. J.A. Croson Co.</i>	702
The Arguments for and Against Strict Scrutiny	710
The Use of Race to Benefit Minorities in College and University Admissions	711
<i>Students for Fair Admissions, Inc. v. President and Fellows of Harvard College</i>	713
Drawing Election Districts to Increase Minority Representation	735
D. Sex Discrimination	737
1. The Level of Scrutiny	737

Early Cases Approving Gender Discrimination	738
The Emergence of Intermediate Scrutiny	740
<i>Frontiero v. Richardson</i>	741
<i>Craig v. Boren</i>	743
<i>United States v. Virginia</i>	745
2. Proving the Existence of a Gender Classification	749
When Is It “Discrimination”?	750
<i>Geduldig v. Aiello</i>	750
3. Gender Classifications Benefiting Women	752
Gender Classifications Based on Role Stereotypes	753
<i>Orr v. Orr</i>	753
<i>Mississippi University for Women v. Hogan</i>	755
<i>Michael M. v. Superior Court of Sonoma County</i>	757
<i>Rostker v. Goldberg</i>	760
Gender Classifications Benefiting Women as a Remedy	763
<i>Califano v. Webster</i>	763
Classifications Benefiting Women Because of Biological Differences Between Men and Women	764
<i>Nguyen v. Immigration & Naturalization Service</i>	765
E. Discrimination Against Non–United States Citizens	772
1. Strict Scrutiny as the General Rule	773
<i>Graham v. Richardson</i>	773
2. Discrimination Against Noncitizens Related to Self-Government and the Democratic Process	774
<i>Foley v. Connelie</i>	775
<i>Ambach v. Norwick</i>	777
3. Congressional and Presidential Approved Discrimination	780
4. Undocumented Noncitizens and Equal Protection	780
<i>Plyler v. Doe</i>	781
F. Discrimination Against Nonmarital Children	785
Laws Denying Benefits to All Nonmarital Children	786
Laws That Provide a Benefit to Some Nonmarital Children	787
G. Other Types of Discrimination: Only Rational Basis Review	788
1. Age Classifications	789
<i>Massachusetts Board of Retirement v. Murgia</i>	789
2. Discrimination Based on Disability	791
3. Wealth Discrimination	792
4. Discrimination Based on Sexual Orientation	793
CHAPTER 8	
Fundamental Rights	795
A. Introduction	795
The Concept of Fundamental Rights	795
The Ninth Amendment	797
Procedural Due Process	797
B. Framework for Analyzing Fundamental Rights	797
First Issue: Is There a Fundamental Right?	798
Second Issue: Is the Constitutional Right Infringed?	799

Third Issue: Is There a Sufficient Justification for the Government's Infringement of a Right?	799
Fourth Issue: Is the Means Sufficiently Related to the Purpose?	799
C. Constitutional Protection for Family Autonomy	800
1. The Right to Marry	800
Loving v. Virginia	800
Obergefell v. Hodges	805
2. The Right to Custody of One's Children	817
Stanley v. Illinois	817
Michael H. v. Gerald D.	819
3. The Right to Keep the Family Together	824
Moore v. City of East Cleveland, Ohio	824
4. The Right of Parents to Control the Upbringing of Their Children	827
Meyer v. Nebraska	827
Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary	829
Troxel v. Granville	831
D. Constitutional Protection for Reproductive Autonomy	834
1. The Right to Procreate	835
Buck v. Bell	835
Skinner v. Oklahoma ex rel. Williamson	836
2. The Right to Purchase and Use Contraceptives	837
Griswold v. Connecticut	837
Eisenstadt v. Baird	842
3. The Right to Abortion	844
Roe v. Wade	845
Planned Parenthood v. Casey	851
Dobbs v. Jackson Women's Health Organization	859
E. Constitutional Protection for Medical Care Decisions	888
Right to Refuse Treatment	888
Cruzan v. Director, Missouri Department of Health	888
Right to Physician-Assisted Death	894
Washington v. Glucksberg	894
Vacco v. Quill	899
F. Constitutional Protection for Sexual Orientation and Sexual Activity	901
Lawrence v. Texas	901
G. Constitutional Protection for Control over Information	911
Whalen v. Roe	911
H. The Second Amendment Right to Bear Arms	914
District of Columbia v. Heller	914
New York State Rifle and Pistol Association v. Bruen	929
I. Constitutional Protection for Travel	946
Saenz v. Roe	946
Restrictions on Foreign Travel	952
J. The Right to Vote	952
1. The Right to Vote as a Fundamental Right	952
2. Restrictions on the Ability to Vote	954
Poll Taxes	954
Harper v. Virginia State Board of Elections	954
Property Ownership Requirements	955
Kramer v. Union Free School District	955

Literacy Tests	958
Prisoners' and Convicted Criminals' Right to Vote	958
Requirement for Photo Identification for Voting	959
<i>Crawford v. Marion County Election Board</i>	959
3. Dilution of the Right to Vote	968
<i>Reynolds v. Sims</i>	968
4. The Ability of State Courts to Enforce State Constitutions: The Independent State Legislature Theory	975
<i>Moore v. Harper</i>	975
5. Counting "Uncounted" Votes in a Presidential Election: Bush v. Gore	979
The Events Leading to Bush v. Gore	979
<i>Bush v. Gore</i>	982
Issues to Consider Concerning Bush v. Gore	996
K. Constitutional Protection for Access to Courts	997
Filing Fees	998
<i>Boddie v. Connecticut</i>	999
<i>United States v. Kras</i>	1001
Prisoners' Right of Access to the Courts	1006
Bounds v. Smith	1006
<i>Lewis v. Casey</i>	1008
L. Constitutional Protection for a Right to Education	1010
<i>San Antonio Independent School District v. Rodriguez</i>	1010
M. Procedural Due Process	1016
1. What Is a "Deprivation"?	1017
Is Negligence Sufficient to Constitute a Deprivation?	1018
<i>Daniels v. Williams</i>	1018
<i>County of Sacramento v. Lewis</i>	1019
When Is the Government's Failure to Protect a Person from Privately Inflicted Harms a Deprivation?	1021
<i>DeShaney v. Winnebago County Department of Social Services</i>	1021
2. Is It a Deprivation of "Life, Liberty, or Property"?	1027
The "Rights-Privileges" Distinction and Its Demise	1027
<i>Goldberg v. Kelly</i>	1027
What Is a Deprivation of Property?	1031
<i>Board of Regents of State Colleges v. Roth</i>	1031
What Is a Deprivation of Liberty?	1036
Reputation as a Liberty Interest	1036
<i>Goss v. Lopez</i>	1036
<i>Paul v. Davis</i>	1038
Liberty Interest for Prisoners	1040
Sandin v. Conner	1043
3. What Procedures Are Required?	1045
<i>Mathews v. Eldridge</i>	1046
Government Employment	1049
Family Rights	1050
Substantive and Procedural Due Process: The Relationship	1051
District Attorney's Office for the Third Judicial District v. Osborne	1051

CHAPTER 9	
First Amendment: Freedom of Expression	1057
A. Introduction	1057
1. Historical Background	1057
2. Why Should Freedom of Speech Be a Fundamental Right?	1059
a. Self-Governance	1060
b. Discovering Truth	1061
c. Advancing Autonomy	1062
d. Promoting Tolerance	1063
e. Conclusion	1063
3. The Issues in Free Expression Analysis	1063
B. Free Speech Methodology	1064
1. The Distinction Between Content-Based and Content-Neutral Laws	1064
a. The Importance of the Distinction	1065
<i>Reed v. Town of Gilbert</i>	1065
<i>City of Austin, Texas v. Reagan National Advertising of Texas</i>	1071
b. How Is It Determined Whether a Law Is Content-Based?	1077
The Requirement for Viewpoint Neutrality	1077
<i>Matal v. Tam</i>	1077
Subject-Matter Restrictions	1082
Content-Neutral Laws	1083
c. Problems in Applying the Distinction Between Content-Based and Content-Neutral Laws	1084
i. Permissible Purposes and Content Neutrality	1084
<i>City of Renton v. Playtime Theatres, Inc.</i>	1084
ii. When the Government Must Make Content-Based Choices	1087
<i>National Endowment for the Arts v. Finley</i>	1088
iii. Government Speech	1091
<i>Pleasant Grove City, Utah v. Summum</i>	1091
<i>Walker v. Texas Division, Sons of Confederate Veterans</i>	1094
2. Vagueness and Overbreadth	1099
a. Vagueness	1100
<i>Coates v. City of Cincinnati</i>	1100
b. Overbreadth	1101
<i>Schad v. Borough of Mount Ephraim</i>	1102
c. Relationship Between Vagueness and Overbreadth	1105
<i>Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.</i>	1105
3. Prior Restraints	1106
a. What Is a Prior Restraint?	1106
b. Are Prior Restraints Really So Bad?	1107
i. Court Orders as a Prior Restraint	1109
<i>Near v. State of Minnesota ex rel. Olson</i>	1109
ii. Court Orders to Protect National Security	1111
<i>New York Times Co. v. United States</i>	1111
iii. Court Orders to Protect Fair Trials	1117
<i>Nebraska Press Association v. Stuart</i>	1117
iv. Court Orders Seizing the Assets of Businesses Convicted of Obscenity Violations	1121
<i>Alexander v. United States</i>	1122

c. Licensing as a Prior Restraint	1123
Lovell v. City of Griffin, Ga.	1123
i. Important Reason for Licensing	1125
ii. Clear Standards Leaving Almost No Discretion to the Government	1125
City of Lakewood v. Plain Dealer Publishing Co.	1125
iii. Procedural Safeguards	1126
4. What Is an Infringement of Freedom of Speech?	1127
Civil Liability and Denial of Compensation for Speech	1128
Prohibitions on Compensation	1129
<i>United States v. National Treasury Employees Union</i>	1129
Compelled Speech	1131
<i>West Virginia State Board of Education v. Barnette</i>	1131
<i>National Institute of Family & Life Advocates v. Becerra</i>	1133
<i>303 Creative LLC v. Elenis</i>	1142
<i>Rumsfeld v. Forum for Academic & Institutional Rights, Inc.</i>	1153
<i>McIntyre v. Ohio Elections Commission</i>	1157
Unconstitutional Conditions	1161
Speiser v. Randall	1161
<i>Rust v. Sullivan</i>	1162
<i>Legal Services Corp. v. Velazquez</i>	1166
Government Pressures	1172
C. Types of Unprotected and Less-Protected Speech	1173
1. Incitement of Illegal Activity	1174
a. The “Clear and Present Danger” Test	1175
<i>Schenck v. United States</i>	1176
<i>Frohwerk v. United States</i>	1177
<i>Debs v. United States</i>	1177
<i>Abrams v. United States</i>	1178
b. The Reasonableness Approach	1181
<i>Whitney v. California</i>	1181
c. The Risk Formula Approach	1185
<i>Dennis v. United States</i>	1185
d. The <i>Brandenburg</i> Test	1190
<i>Brandenburg v. Ohio</i>	1190
<i>Holder v. Humanitarian Law Project</i>	1192
2. True Threats	1199
<i>Counterman v. Colorado</i>	1199
3. Fighting Words, the Hostile Audience, and the Problem of Racist Speech	1207
a. Fighting Words	1207
<i>Chaplinsky v. New Hampshire</i>	1207
i. Narrowing the Fighting Words Doctrine	1209
ii. Fighting Words Laws Invalidated as Vague and Overbroad	1209
<i>Gooding v. Wilson</i>	1210
iii. Narrow Fighting Words Laws as Content-Based Restrictions	1211
<i>R.A.V. v. City of St. Paul, Minnesota</i>	1212
b. The Hostile Audience Cases	1217
The Problem of Racist Speech	1219
<i>Virginia v. Black</i>	1221
4. Sexually Oriented Speech	1227
a. Obscenity	1227

i. Supreme Court Decisions Finding Obscenity Unprotected	1227
<i>Roth v. United States</i>	1227
<i>Paris Adult Theatre I v. Slaton</i>	1229
<i>Miller v. California</i>	1232
ii. Should Obscenity Be a Category of Unprotected Speech?	1233
iii. Should There Be a New Exception for Pornography?	1235
b. Child Pornography	1236
<i>New York v. Ferber</i>	1236
c. Protected but Low-Value Sexual Speech	1240
i. Zoning Ordinances	1240
<i>Young v. American Mini Theatres, Inc.</i>	1240
ii. Nude Dancing	1243
iii. Should There Be Such a Category as Low-Value Sexual Speech?	1244
d. Government Techniques for Controlling Obscenity and Child Pornography	1245
<i>Stanley v. Georgia</i>	1245
Osborne v. Ohio	1246
e. Profanity and “Indecent” Speech	1247
<i>Cohen v. California</i>	1247
i. The Broadcast Media	1250
<i>Federal Communications Commission v. Pacifica Foundation</i>	1250
ii. Telephones	1252
iii. The Internet	1253
<i>Reno v. American Civil Liberties Union</i>	1253
iv. Cable Television	1256
5. A New Exception for Violent Speech?	1258
<i>United States v. Stevens</i>	1258
<i>Brown v. Entertainment Merchants Association</i>	1264
6. Commercial Speech	1270
a. Constitutional Protection for Commercial Speech	1270
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer</i>	
<i>Council, Inc.</i>	1271
Overview of the Section	1275
b. What Is Commercial Speech?	1276
<i>Bolger v. Youngs Drug Products Corp.</i>	1276
<i>Sorrell v. IMS Health Inc.</i>	1277
c. The Test for Evaluating Regulation of Commercial Speech	1283
<i>Central Hudson Gas & Electric Corp. v. Public Service Commission of</i>	
<i>New York</i>	1283
Is Least Restrictive Alternative Analysis Applicable?	1286
d. Advertising of Illegal Activities	1287
e. False and Deceptive Advertising	1288
f. Advertising That Inherently Risks Deception	1288
Restrictions on Trade Names	1288
Attorney Solicitation of Prospective Clients	1289
Solicitation by Accountants	1290
g. Regulating Commercial Speech to Achieve Other Goals	1291
i. “For Sale” Signs on Houses	1291
ii. Alcohol Products	1291
<i>44 Liquormart, Inc. v. Rhode Island</i>	1292
iii. Tobacco Products	1293
iv. Gambling	1294

v. Advertising by Lawyers and Other Professionals	1295
7. Reputation, Privacy, Publicity, and the First Amendment: Torts and the First Amendment	1297
a. Defamation	1297
i. Public Officials as Defamation Plaintiffs	1297
<i>New York Times Co. v. Sullivan</i>	1297
ii. Public Figures as Plaintiffs	1302
<i>Gertz v. Welch</i>	1303
iii. Private Figures, Matters of Public Concern	1307
iv. Private Figures, Matters Not of Public Concern	1308
v. Conclusion	1309
b. Intentional Infliction of Emotional Distress	1309
<i>Hustler Magazine v. Falwell</i>	1309
<i>Snyder v. Phelps</i>	1311
c. Public Disclosure of Private Facts	1315
<i>Cox Broadcasting Corp. v. Cohn</i>	1315
Information from Nongovernment Sources	1318
d. Right of Publicity	1319
8. Conduct That Communicates	1319
a. What Is Speech?	1319
b. When Is Conduct Communicative?	1320
c. When May the Government Regulate Conduct That Communicates?	1320
i. The <i>O'Brien</i> Test	1320
<i>United States v. O'Brien</i>	1321
ii. Flag Desecration	1323
<i>Texas v. Johnson</i>	1324
iii. Spending Money as Political Speech	1328
<i>Buckley v. Valeo</i>	1328
Criticisms of <i>Buckley</i>	1335
The Continuing Distinction Between Contributions and Expenditures	1335
When Are Contribution Limits Too Low?	1336
Are Corporate Expenditures Protected Speech?	1338
<i>First National Bank of Boston v. Bellotti</i>	1338
<i>Citizens United v. Federal Election Commission</i>	1341
The Constitutionality of Public Financing of Elections	1355
<i>Arizona Free Enterprise Club's Freedom Club PAC v. Bennett</i>	1356
D. What Places Are Available for Speech?	1362
1. Government Properties and Speech	1362
a. Initial Rejection and Subsequent Recognition of a Right to Use Government Property for Speech	1362
b. What Government Property and Under What Circumstances?	1363
c. Public Forums	1365
i. Content Neutrality	1365
<i>Police Department of the City of Chicago v. Mosley</i>	1365
ii. Time, Place, and Manner Restrictions	1367
<i>Hill v. Colorado</i>	1368
<i>McCullen v. Coakley</i>	1372
iii. Licensing and Permit Systems	1380
iv. No Requirement for Use of the Least Restrictive Alternative	1381
<i>Ward v. Rock Against Racism</i>	1381

d. Designated Public Forums	1382
e. Limited Public Forums	1383
<i>Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez</i>	1384
f. Nonpublic Forums	1393
2. Private Property and Speech	1396
3. Speech in Authoritarian Environments: Military, Prisons, and Schools	1397
a. Military	1397
<i>Parker v. Levy</i>	1397
b. Prisons	1399
<i>Thornburgh v. Abbott</i>	1400
c. Schools	1403
<i>Tinker v. Des Moines Independent Community School District</i>	1404
<i>Morse v. Frederick</i>	1407
<i>Mahanoy Area School District v. B.L.</i>	1414
d. The Speech Rights of Government Employees	1419
<i>Garcetti v. Ceballos</i>	1420
E. Freedom of Association	1426
1. Laws Prohibiting and Punishing Membership	1426
2. Laws Requiring Disclosure of Membership	1428
<i>NAACP v. State of Alabama ex rel. Patterson</i>	1428
Campaign Finance Disclosure	1430
3. Compelled Association	1432
<i>Janus v. American Federation of State, County & Municipal Employees, Council 31</i>	1432
<i>Board of Regents of the University of Wisconsin System v. Southworth</i>	1440
4. Laws Prohibiting Discrimination	1443
<i>Roberts v. United States Jaycees</i>	1443
<i>Boy Scouts of America v. Dale</i>	1448
F. Freedom of the Press	1452
1. Introduction: Are There Special Rights for the Press?	1452
2. Freedom of the Press as a Shield to Protect the Press from the Government	1453
a. Taxes on the Press	1453
<i>Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue</i>	1453
b. Application of General Regulatory Laws	1457
c. Keeping Reporters' Sources and Secrets Confidential	1458
<i>Branzburg v. Hayes</i>	1458
d. Laws Requiring That the Media Make Access Available	1464
3. Freedom of the Press as a Sword: A First Amendment Right of Access to Government Places and Papers?	1465
a. Access to Judicial Proceedings	1465
<i>Richmond Newspapers v. Virginia</i>	1466
b. Prisons	1471
<i>Houchins v. KQED</i>	1471
 CHAPTER 10	
First Amendment: Religion	1477
A. Introduction	1477
1. Constitutional Provisions Concerning Religion and the Tension Between Them	1477

2. History in Interpreting the Religion Clauses	1478
3. What Is Religion?	1479
The Attempt to Define Religion Under the Selective Service Act	1480
<i>United States v. Seeger</i>	1480
Requirement for Sincerely Held Beliefs	1482
<i>United States v. Ballard</i>	1483
The Relevance of Religious Dogma and Shared Beliefs	1485
B. The Free Exercise Clause	1485
1. Introduction: Free Exercise Clause Issues	1485
2. The Law Before Employment Division v. Smith	1486
a. Government Benefit Cases	1488
b. Compulsory Schooling	1488
c. Cases Rejecting Exemptions Based on the Free Exercise Clause	1489
3. The Current Test	1490
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i>	1490
4. Supreme Court Decisions Clarifying the Employment Division v. Smith Test	1497
a. When Is a Law Not “Neutral”?	1497
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission</i>	1498
b. When Is a Law Not of “General Applicability”?	1506
<i>Fulton v. City of Philadelphia</i>	1506
5. Applying the Free Exercise Clause	1514
a. Interfering with Choices as to Clergy	1514
b. Free Exercise Challenges to Restrictions to Limit the Spread of COVID	1515
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i>	1515
<i>Tandon v. Newsom</i>	1520
6. Statutory Protection of Religious Freedom	1521
C. The Establishment Clause	1524
1. Competing Theories of the Establishment Clause	1524
a. Strict Separation	1524
b. Neutrality Theory	1525
c. Accommodation	1527
d. The Theories Applied: An Example	1529
<i>County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter</i>	1529
<i>American Legion v. American Humanist Association</i>	1533
2. Government Discrimination Among Religions	1540
3. The Test for the Establishment Clause	1540
a. The <i>Lemon</i> Test for the Establishment Clause	1541
<i>Lemon v. Kurtzman</i>	1541
The Requirement for a Secular Purpose	1542
The Requirement for a Secular Effect	1543
The Prohibition of Excessive Entanglement	1544
b. Overruling the <i>Lemon</i> Test	1544
4. Religious Speech and the First Amendment	1545
a. Religious Group Access to School Facilities	1546
b. Student Religious Groups’ Receipt of Government Funds	1547
D. The Application of the Free Exercise and Establishment Clauses	1548
1. When Can Religion Become a Part of Government Activities?	1548
a. Religion as a Part of Government Activities: Schools	1548
Release Time	1548

School Prayers and Bible Reading	1549
<i>Engel v. Vitale</i>	1549
<i>Lee v. Weisman</i>	1552
<i>Santa Fe Independent School District v. Doe</i>	1558
<i>Kennedy v. Bremerton School District</i>	1562
Curricular Decisions	1576
b. Religion as a Part of Government Activities: Legislative Chaplains	1576
<i>Town of Greece v. Galloway</i>	1577
2. When May and When Must Government Give Aid to Religion?	1584
Aid to Religious Elementary and Secondary Schools	1585
a. The Law from the 1970s to 2000	1585
b. A More Permissive Approach	1586
<i>Mitchell v. Helms</i>	1586
<i>Zelman v. Simmons-Harris</i>	1594
c. Finding the Denial of Aid to Religious Schools to Violate the Free Exercise Clause	1605
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i>	1606
<i>Carson v. Makin</i>	1615
Tax Exemptions for Religious Organizations	1624
Aid to Religious Colleges and Universities	1625
Aid to Religious Institutions Other than Schools	1627
<i>Table of Cases</i>	1629
<i>Index</i>	1651