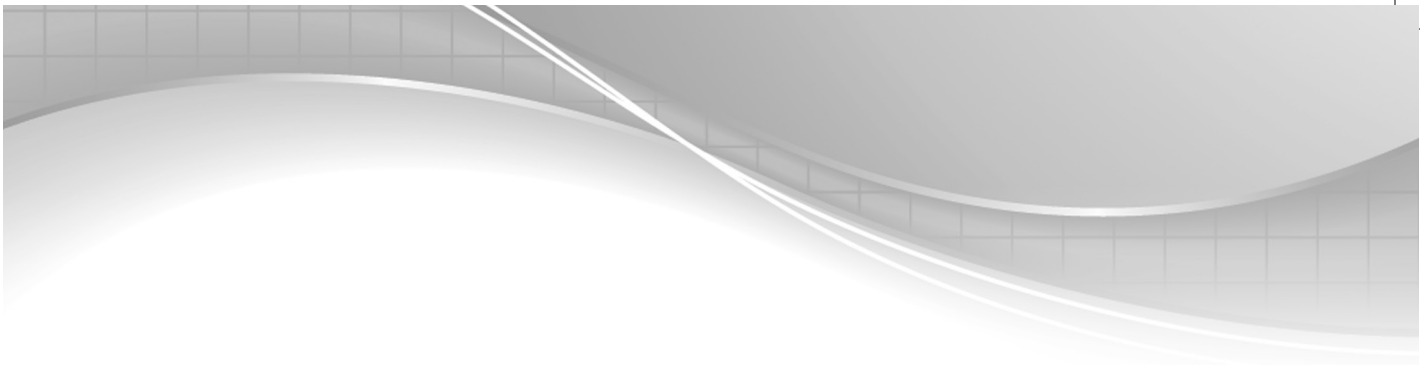




Preface

THE MATURATION OF A CONSTITUTIONAL LAW CASEBOOK (2008-2027)

Our constitutional law casebook has now gone through five iterations: the First Edition, in 2008; the Second Edition, in 2013; the Third Edition, in 2017 (when Blackman joined); the Fourth Edition, in 2021; and now the Fifth Edition, in 2027, with a YouTube video library linked by embedded QR codes. This eighteen-year span has felt like a lifetime in the development of modern constitutional law. As our text reaches the age of majority, this preface will chart constitutional law's maturation over this period. Justice Antonin Scalia would often say that the Constitution is dead, dead, dead! But in the words of Doctor Frankenstein, constitutional law is alive!

In all seriousness, while the original *meaning* of the Constitution is fixed, constitutional *law*—that is, constitutional implementing doctrines—continues to evolve. The challenge facing any casebook author is how to add the new cases while keeping the book a manageable length. This requires cutting or trimming cases that previously were important enough to include in a casebook. In several instances, the cases in the Fourth Edition were building toward a destination they reached by the Fifth Edition, so these transitional cases could now be omitted.

This preface proceeds in ten parts. Part I surveys the settled foundation. Our textbook coverage of cases from the Founding through the Warren Court has remained, and likely will remain, unchanged. The canonical and anti-canonical decisions of the Marshall Court, the Taney Court, Reconstruction, the Progressive Era, the New Deal, and the Warren Court have made their permanent imprint on American constitutional law. The cases that have dropped, or may drop, from our casebook come from the Burger, Rehnquist, and early Roberts Courts.

Part II traces the shift in the Court's cases concerning legislative power. The Second Edition introduced *NFIB v. Sebelius*, but no new enumerated powers cases were added until the Fifth Edition. This area has remained static but may expand in the future.

Part III, on executive power, reflects the fading relevance of the George W. Bush presidency. The First, Second, and Third Editions covered the Guantanamo Bay cases, but those decisions were dropped for the Fourth Edition. None of the executive power

decisions from the Obama and Biden Administrations made the cut. There are many cases from Trump's two terms, but we chose to categorize them in the next section.

Part IV explores the remarkable revolution the Roberts Court has brought to the separation of powers. The Fifth Edition includes five cases with Trump in the name, four of them new: *Trump v. Vance*, *Trump v. United States*, *Trump v. Slaughter*, *Trump v. Cook*, and *Learning Resources, Inc. v. Trump*. From the Burger Court, we dropped *Nixon v. Fitzgerald*, *Dames & Moore v. Regan*, and *INS v. Chadha*. From the early Roberts Court, we dropped *Free Enterprise Fund v. PCAOB*, *NLRB v. Noel Canning*, and *Seila Law LLC v. CFPB*. We expect even more changes for the Sixth Edition.

Part V reflects the foundational shift in equal protection doctrine. While *Bakke* remains, the Michigan and Texas affirmative action cases that built up to it are gone. Now, *Students for Fair Admissions v. Harvard* is the leading precedent for race discrimination. With sex discrimination, we dropped *Frontiero v. Richardson* and *Craig v. Boren* and shortened *United States v. Virginia*. Instead, two cases involving transgender rights have taken center stage: *United States v. Skrmetti* and *West Virginia v. B.P.J.* To teach "heightened" rational basis scrutiny, we removed *Romer v. Evans* — always a difficult case for students to understand — but retained *City of Cleburne v. Cleburne Living Center, Inc.*

Part VI tracks the doctrine of substantive due process from "emanations and penumbras" to "history and tradition." *Griswold v. Connecticut* remains, but *Roe v. Wade* and *Planned Parenthood v. Casey* are substantially shortened. Likewise, *Lawrence v. Texas* and *Obergefell v. Hodges* are trimmed, while *United States v. Windsor* is gone. *Bowers v. Hardwick* and *Washington v. Glucksberg*, which were almost deleted from the Fourth Edition, are now principal cases leading up to *Dobbs v. Jackson Women's Health Organization*. The next three parts focus on the Bill of Rights.

Part VII reorients the focus of the Free Exercise Clause. This section now begins with an 1813 New York case that exempted a priest from testifying about information he learned during confession. *Reynolds v. United States* and *Sherbert v. Verner* still follow, but we added *Wisconsin v. Yoder*, a case reanimated by the newest decision in the corpus, *Mahmoud v. Taylor*. For now, at least, *Employment Division v. Smith* remains controlling.

Part VIII mirrors the uprooting of the Court's Establishment Clause jurisprudence. The chapter is now divided into two eras. First, the "separationist" period tracks *Everson v. Board of Education of the Township of Ewing*, *Engel v. Vitale*, and *Lemon v. Kurtzman*. Second, the "history and tradition" period includes five decisions from the Roberts Court, including *Kennedy v. Bremerton School District* and *Carson v. Makin*. We also introduce the burgeoning church autonomy doctrine, which previously was subsumed under the ministerial exception doctrine.

Part IX turns to the growing constitutional law of the Second Amendment. This jurisprudence was born three months after the First Edition was published and has matured over the past eighteen years. For the Fifth Edition, we compressed *District of Columbia v. Heller* and *McDonald v. City of Chicago* — which mainly concerned original meaning — to make room for new doctrinal developments. Now the governing tests from *New York State Rifle & Pistol Association, Inc. v. Bruen* and *United States v. Rahimi* confound the lower courts. Two new cases, *Wolford v. Lopez* and *United States v. Hemani*, present novel applications of the doctrine.

Finally, Part X takes a detour to a topic that was not even in the realm of possible coverage back in 2008: birthright citizenship. *Trump v. Barbara* was added after *Plessy*

v. Ferguson. To make this landmark case digestible, we divided it into seven excerpts to illustrate different facets of the majority and dissenting opinions. We suspect this case will not be the Supreme Court's last foray into this topic.

I. STABILITY FROM THE FOUNDING THROUGH THE WARREN COURT

The narrative of American constitutional law stretches nearly 250 years. The first two centuries of this story have remained stable throughout all editions of our casebook and are unlikely to change in the future. This is one feature of using a casebook that adopts the narrative organization. The first part of every class remains somewhat unchanged as students are first exposed to the canon and anti-canon.

The decisions of the Marshall Court remain canonical and are the standards against which all other decisions are compared: *Marbury v. Madison*, *McCulloch v. Maryland*, *Gibbons v. Ogden*, and *Barron v. Baltimore*. The Court's decisions concerning slavery remain controversial, but *must* be taught: *Prigg v. Pennsylvania* and *Dred Scott v. Sandford*. The original structure of the Constitution was deeply affected by the preservation of slavery, and the Fourteenth Amendment revised that structure as a result of resistance to slavery's demise. And antislavery constitutionalism introduced into constitutional discourse the schism between original intent and original meaning interpretive methods. This history about slavery will remain an integral aspect of our casebook.

The Civil War brought several important disputes about the President's war powers: *Ex parte Merryman*, the Emancipation Proclamation, and the *Prize Cases*. Decisions from the Reconstruction period established the formative interpretations of the Thirteenth and Fourteenth Amendments: the *Slaughter-House Cases*, *Bradwell v. Illinois*, and *United States v. Cruikshank*. Later opinions defined the powers of state and federal governments regarding racial discrimination: *Strauder v. West Virginia*, the *Civil Rights Cases*, *Yick Wo v. Hopkins*, and *Plessy v. Ferguson*.

The Progressive Era struggled to define Congress's powers under the Commerce Clause and the Necessary and Proper Clause: *United States v. E.C. Knight Co.*, *Champion v. Ames*, and *Hammer v. Dagenhart*. That same Progressive Era Court refined the scope of liberty protected by the Due Process Clause with a slew of decisions, including *Lochner v. New York*, *Muller v. Oregon*, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Buck v. Bell*.

The New Deal Court revisited the Progressive Era's decisions on the Due Process Clause by tinkering with the presumption of constitutionality, including *West Coast Hotel Co. v. Parrish* and *United States v. Carolene Products Co.* The New Deal Court vastly expanded the federal government's powers through *NLRB v. Jones & Laughlin Steel Corp.*, *United States v. Darby*, and *Wickard v. Filburn*. World War II and the Korean War brought conflicts over presidential power with *Hirabayashi v. United States*, *Korematsu v. United States*, *Ex parte Endo*, and *Youngstown Sheet & Tube Co. v. Sawyer*.

Then came the Warren Court, which revolutionized nearly every facet of constitutional law and constitutional law casebooks. *Brown v. Board of Education*, *Bolling v. Sharpe*, and *Loving v. Virginia* were landmark Equal Protection Clause cases. *Heart*

of *Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung* expanded the scope of Congress's enumerated powers. *Williamson v. Lee Optical Co.* removed the Court from the business of reviewing economic regulations. But *Griswold v. Connecticut* opened a new front to scrutinize morality-based laws. Chief Justice Warren stepped down from the Court in 1969.

All of the cases mentioned above between 1789 and 1969, plus many more, have become the constitutional canon and anti-canon. They are not going anywhere. The doctrines now in flux concern only cases from the past half-century, roughly twenty percent of the Supreme Court's service. Apart from these modern cases, our casebook coverage has remained largely unchanged since 2008.

Each generation of law students sees changes in how the Supreme Court interprets the Constitution, shaped by the conflicts of the day. Often these shifts happen slowly and even imperceptibly. Other changes happen radically in a short span of time. Here, the Justices control the shift. In both types of cases, the Justices may not appreciate the consequences of one decision until the next case comes along.

People tend to think the times they are living in are the most unprecedented and unpredictable, but that is rarely the case. The Supreme Court decided cases during the nation's formation, conflicts over slavery, the Civil War, Reconstruction, the Progressive Era, World War I, the Great Depression, and World War II. When teaching constitutional law, it is important to keep the big picture in mind and not get bogged down in the minutiae of the day. The remainder of the preface will focus on the cases that have dropped, or may drop, from the casebook: those added and subtracted from the Burger, Rehnquist, and Roberts Courts.

II. LATE-BREAKING CHANGES FOR THE LEGISLATIVE POWER

The vast majority of the chapter on legislative powers has remained the same since the First Edition was published in 2008. The Rehnquist Court's federalism revolution had hit a roadblock three years earlier. *Gonzales v. Raich*, which Barnett argued, halted the progress made by *United States v. Lopez* and *United States v. Morrison*. The Second Edition from 2013 ushered in *NFIB v. Sebelius*, with a generous forty-page excerpt. No further changes were made in the Third and Fourth Editions. Indeed, it seemed to both of us that the justices were not willing to look more closely at the scope of federal enumerated powers. The Fifth Edition introduces two unexpected enumerated powers cases: *Landor v. Louisiana Department of Corrections and Public Safety*, which clarified the relationship between the Spending Power and the Necessary and Proper Clause, and Justice Thomas's concurrence from *United States v. Hemani*, which proposed tightening the so-called "jurisdictional hook" analysis.

The future looks promising for a reconsideration of enumerated powers, as the Court is finally escaping its Obamacare hangover. Indeed, we trimmed *NFIB* by ten pages to make room for the new cases. We are cognizant that professors cannot reasonably assign

more than about thirty-five pages in a single class. Introducing new cases into a topic requires shortening old cases. Moreover, the physical size of the book cannot exceed about 1,900 pages. For every new page added, a page has to be removed. Our general rule of thumb is one page in, one page out.

III. THE CONTRACTING AND EXPANDING EXECUTIVE POWER

In March 2008, the Court was primarily occupied by President George W. Bush's global war on terror. The First Edition of the casebook included *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*. But this duo presented an incomplete accounting of this doctrine. Three months later, the Court would conclude the trilogy with *Boumediene v. Bush*, which held that the writ of habeas corpus runs to Guantanamo Bay. But that case would be a fleeting flash, as the global war on terror faded from relevance. By the Second Edition, only *Hamdi* remained. And in the Fourth Edition, *Hamdi* vanished. Most first-year law students today were born after September 11, 2001, and have no living memory of the events that gave rise to the conflict in Afghanistan. What seemed so critical for the decade after 9/11 is now a faint memory.

IV. THE REALIGNMENT OF THE SEPARATION OF POWERS

Perhaps the most significant revisions across all five editions of the casebook came in the context of the separation of powers. Labeling these cases is tricky. Not only do cases move in and out of the canon, but the way they are perceived sometimes shifts. Many cases started out under the label of separation of powers — as the Court enforced the balance of authority between the branches — but now might be considered executive power cases. Ultimately, we opted to keep these cases in the separation of powers chapter, as each concerned inter-branch conflicts.

Only three separation of powers cases have survived all five editions: *United States v. Nixon*, *Morrison v. Olson*, and *Clinton v. Jones*. Still, we pondered at some length whether to retain *Morrison*, as it has largely been supplanted by *Trump v. Slaughter*. Rather than add *Humphrey's Executor v. United States* as background to *Slaughter*, we decided to retain *Morrison*, which describes the now-overruled *Humphrey's Executor*. Moreover, Justice Scalia's iconic solo dissent now stands vindicated. Three staples from the Burger Court were dropped: *Dames & Moore v. Regan*, *Nixon v. Fitzgerald*, and *INS v. Chadha*. In the 1980s, these cases were landmark decisions. Over time, however, their relevance faded. Still, as reflected in Justice Neil Gorsuch's concurrence in *Learning Resources v. Trump* (discussed in the next paragraph), *Chadha*'s effect has been magnified

as the Court has ceded more power to the President over executive branch agencies originally enacted with legislative vetoes that were later invalidated. Three decisions from the early Roberts Court quickly entered and left the chat. *Free Enterprise Fund v. PCAOB* and *Seila Law LLC v. CFPB* were replaced by *Trump v. Slaughter*. *NLRB v. Noel Canning* was an important case about originalism, but it has become largely obsolete over the past three presidencies.

President Donald Trump has been the most consequential president for the Supreme Court's separation-of-powers jurisprudence since Franklin D. Roosevelt. Five cases bearing his name now appear in the separation of powers chapter. *Trump v. Vance*, which concerned the president's tax returns, was added before the Fourth Edition went to press. The Fifth Edition now welcomes a Trump quartet. *Trump v. United States* expanded the scope of presidential immunity from the Nixon era. *Trump v. Slaughter* at last overruled *Humphrey's Executor*, as *Morrison v. Olson* remains in a zone of twilight. *Trump v. Cook* reaffirmed the Federal Reserve's independence. And *Learning Resources, Inc. v. Trump* invalidated the President's tariffs. These cases, *Slaughter* in particular, will likely trigger an entire generation of new cases concerning the separation of powers. Who knows what the Sixth Edition will bring?

This table illustrates which cases were added and dropped across the five editions of our casebook. A checkmark indicates continued coverage.

	1st Ed. (2008)	2nd Ed. (2013)	3rd Ed. (2017)	4th Ed. (2021)	5th Ed. (2027)
Burger Court					
U.S. v. Nixon	✓	✓	✓	✓	✓
Nixon v. Fitzgerald	✓	✓	✓	DROPPED	
Dames & Moore	✓	✓	✓	✓	DROPPED
INS v. Chadha	✓	✓	✓	DROPPED	
Rehnquist Court					
Morrison v. Olson	✓	✓	✓	✓	✓
Clinton v. Jones	✓	✓	✓	✓	✓
Roberts Court					
Free Enterprise Fund		ADDED	DROPPED		
Noel Canning			ADDED	✓	DROPPED
Seila Law				ADDED	DROPPED
Trump v. Vance				ADDED	✓
Trump v. U.S.					ADDED
Trump v. Slaughter					ADDED
Trump v. Cook					ADDED
Learning Resources v. Trump					ADDED

V. MAKE EQUAL PROTECTION EQUAL AGAIN

The chapters on the Equal Protection Clause remained virtually unchanged between the First and Fourth Editions. During this span, the trilogy of affirmative action cases remained the same: *Regents of the University of California v. Bakke*, *Grutter v. Bollinger*, and *Gratz v. Bollinger*. The Third and Fourth Editions added *Fisher v. University of Texas*, parts I and II. These cases seemed to signal that Justice Kennedy was unwilling to revisit *Grutter*, a case he had dissented in. Moreover, the trilogy of sex discrimination cases remained unchanged across four editions: *Frontiero v. Richardson*, *Craig v. Boren*, and *United States v. Virginia*. The first four editions also included a pair of cases concerning “heightened” rational basis scrutiny: *City of Cleburne v. Cleburne Living Center, Inc.* and *Romer v. Evans*. These two cases didn’t fit the conventional accounting of equal protection doctrine, but they remained relevant to how Justice Kennedy reviewed laws he viewed as denying dignity to minority groups. “Rational basis with teeth” scrutiny remains a category students need to know. This sort of standard ought to be used in economic liberty cases generally instead of the deferential model from *Williamson v. Lee Optical Co.*

With the change in the Court’s personnel, the Fifth Edition reports the sea change in Equal Protection Clause doctrine. On affirmative action, *Bakke* remains the seminal case, but *Grutter*, *Gratz*, as well as the *Fisher* pair, are gone, along with Justices O’Connor and Kennedy. Instead, *Students for Fair Admissions v. President and Fellows of Harvard College* is now the Roberts Court’s decisive precedent. With sex discrimination, we made the difficult decision to drop *Frontiero* and *Craig*. These decisions established how intermediate scrutiny was adopted. But that sideways development is now just a historical curiosity. We also trimmed down *Virginia*, as that precedent arguably was scaled back by two new cases from the Roberts Court involving transgender rights: *United States v. Skrmetti* and *West Virginia v. B.P.J.* The laws at issue in these cases would have been unthinkable in 2008, but societal movements changed quickly, and here the Supreme Court deferred to the democratic process. Finally, we dropped *Romer*, but retained *Cleburne* as an illustration of how “heightened” rational basis scrutiny might operate.

VI. FROM “EMANATIONS AND PENUMBRAS” TO “HISTORY AND TRADITION”

The First Edition presented what seemed to be a stable equipoise for the doctrine of substantive due process. The Warren Court had decided *Griswold v. Connecticut*. The Burger Court added *Roe v. Wade* but countered it somewhat with *Bowers v. Hardwick*. The Rehnquist Court reaffirmed a right to abortion in *Planned Parenthood v. Casey* but declined to recognize a right to assisted suicide in *Washington v. Glucksberg*. Then *Lawrence v. Texas* recognized a substantive due process “liberty” protecting homosexual relations, overruling *Bowers*. The Third Edition ushered in two new gay-rights opinions: *United States v. Windsor* and *Obergefell v. Hodges*. By 2015, Justice Kennedy’s gloss

on substantive due process would reach its apex. In the Fourth Edition, *Whole Woman's Health v. Hellerstedt* refused to scale back *Roe* and *Casey*.

The Fifth Edition, however, would witness a revolution in substantive due process and in how it is taught. We decided it was not enough to simply add *Dobbs v. Jackson Women's Health Organization* as the final case. We carefully rearranged the entire chapter. We trimmed down *Griswold v. Connecticut* and, for the first time, added *Eisenstadt v. Baird*. This precedent shows how the groundwork was set for *Roe*. Speaking of *Roe*, we shortened our excerpt from twenty pages to about fifteen. And our *Casey* excerpt shrank from sixteen pages to five. These cuts made room for a generous excerpt from *Dobbs*. These older substantive due process cases, once foundational, can now be covered as vestiges in about half a class session. While *Roe* and *Casey* shrank, we maintained our coverage of *Bowers v. Hardwick* and *Washington v. Glucksberg*. Justice Kennedy's landmark cases are also withering away. As noted above, *Romer v. Evans* was dropped entirely. *Lawrence v. Texas* was reduced from twenty-six pages to eight pages. The transitional case of *Windsor* is gone. *Obergefell* shrank slightly from twenty pages to fourteen, though most of the cuts come from the majority opinion. The *Obergefell* dissents are now the most relevant, as a possible signpost for the future.

We made several other changes that we think were innovative. We added a section on history- and tradition-based substantive due process with three cases: *McDonald v. City of Chicago* (which was moved from the now-swelling Second Amendment chapter), *Timbs v. Indiana* (a newish incorporation case), and, of course, *Dobbs*. *McDonald* is now more significant as a harbinger of Justice Alito's analysis in *Dobbs* than as a right-to-arms case. We closed the chapter with a section on *stare decisis* and substantive due process. That topic has been difficult to teach alongside the merits of *Casey* and *Lawrence*. So we excised their discussions and combined them with *Dobbs* in a discrete teaching unit. These readings give students a complete picture of modern substantive due process doctrine and how we got here. Again, neither of us could have fathomed in 2008 how this chapter would evolve over the course of eighteen years. But our job as casebook editors is to present students with what the law is (and how it came to be) and not what the law professoriate thinks it ought to be.

VII. FREE EXERCISE OF RELIGION

In 2008, the concept of “religious liberty” was nascent. The conservative justices on the Court, led by Justice Scalia, were most skeptical of religious litigants who were seeking exemptions from neutral and generally applicable laws. In this area, conservative judicial restraint tended to trump enforcing original meaning. The free exercise of religion doctrine didn't seem problematic. In the First Edition, the entire chapter stretched only twenty pages. We included *Reynolds v. United States* to draw the contrast between belief and conduct. For modern cases, we jumped from *Sherbert v. Verner* on the Warren Court to *Employment Division v. Smith* on the Rehnquist Court. That precedent seemed set in stone, with no prospects of reversal. *Church of the Lukumi Babalu Aye v. City of Hialeah* provided an exception to the *Smith* rule, where a particular faith is targeted. Overall, the scope of free exercise doctrine seemed both settled and limited.

Government policies that reflected society's growing secularism began to clash with not only minority faiths, like Jehovah's Witnesses and Seventh-Day Adventists, but also mainstream Catholic and Protestant beliefs. Slowly but surely, protections for religious liberty would expand. The Second Edition introduced the so-called ministerial exception with *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. The Third Edition previewed future clashes over funding of religious schools in *Trinity Lutheran Church of Columbia, Inc. v. Comer*. We also included *Burwell v. Hobby Lobby Stores, Inc.*, although that statutory conflict about the Religious Freedom Restoration Act would be cut. By the Fourth Edition, the Court's trajectory on taxpayer funding for religious schools seemed clearer with *Espinoza v. Montana Department of Revenue*. But we did not include any of the COVID free exercise cases because they did not affect settled precedent. At this point, the chapter stretched to about forty pages.

For the Fifth Edition, we have restructured the chapter on the free exercise of religion to reflect the current, more protective doctrine. We now begin with *People v. Philips*, an 1813 New York case that exempted a priest from testifying about incriminating information he learned during a confession. This interesting case stands in sharp tension with *Smith*. We added a precursor to *Smith*, the landmark case *Barnette v. West Virginia State Board of Education* (which, in all candor, should probably always have been included). After *Sherbert*, we added *Wisconsin v. Yoder*, which *Mahmoud v. Taylor* reinvigorated. *Trinity Lutheran* and *Espinoza* were dropped from the free exercise chapter, as the spending cases would now be covered in the Establishment Clause chapter.

VIII. DE-SEPARATING THE ESTABLISHMENT CLAUSE

After the Equal Protection Clause chapter, the Establishment Clause chapter saw the most significant revisions. In 2008, *Lemon v. Kurtzman* was the law of the land, except when it wasn't. *Marsh v. Chambers* and *Lee v. Weisman* did not apply the *Lemon* test, while *McCreary County, Kentucky v. A.C.L.U. of Kentucky* did. *Van Orden v. Perry* stood as something of an outlier, presumably because Justice Breyer thought it was imprudent for the Court to mandate the destruction of an old monument. All of these precedents seemed settled and would remain unchanged in the Second Edition.

The Third Edition, however, would signal a new trajectory. *Marsh v. Chambers* was augmented by *Town of Greece v. Galloway*, which followed a "history and tradition" approach to uphold a legislative prayer. And in the Fourth Edition, *American Legion v. American Humanist Association* suggested *Lemon* was on shaky ground. But all of the above cases remained.

For the Fifth Edition, we completely rewrote the Establishment Clause chapter after the Supreme Court deemed *Lemon* to be, if not reversed, then "abandoned." The first section now includes three cases in which the Supreme Court purported to separate church and state: *Everson v. Board of Education of the Township of Ewing*, *Engel v. Vitale*, and *Lemon v. Kurtzman*. We previously did not include *Everson* and *Engel* but thought it useful to show how the now-defunct "separationist" *Lemon* came to be. We retained *Lee*

v. Weisman but deleted *McCreary County* and *Van Orden*. Given the scarcity of classroom time and casebook space, those cases have come to be less relevant than five cases from the Roberts Court: *Town of Greece v. Galloway*, *Kennedy v. Bremerton School District*, *Our Lady of Guadalupe School v. Morrissey-Berru*, *Carson v. Makin*, and *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*. All five would have been unthinkable in 2008 but now define the contours of the Establishment Clause.

IX. THE STALLED SECOND AMENDMENT

The Supreme Court heard oral argument in *District of Columbia v. Heller* in March 2008, the same month and year our book's First Edition was published. But Justice Scalia's majority opinion was still three months away. The First Edition could only include a short excerpt from the Supreme Court's majority opinion in *United States v. Miller* from 1939. The entire chapter stretched to about five pages. At the time, the Second Amendment — much less Second Amendment doctrine — was not yet a thing.

The Second Amendment chapter would begin to take shape in the Second Edition. The excerpts of *District of Columbia v. Heller* and *McDonald v. City of Chicago* each stretched to about twenty pages. We also included two circuit court decisions that began the process of developing doctrines to implement the Second Amendment. Blue states legislated as if the holdings of *Heller* and *McDonald* were limited to the possession of guns inside the home. For whatever reason, as circuit courts upheld virtually every novel gun measure, the Supreme Court went for more than a decade without deciding a major gun case. The leading support for gun rights from the Supreme Court came from dissents from denials of certiorari, which condemned treating the right to arms as a "second class" constitutional right.

The Third Edition retained *Heller* and *McDonald*, but added eight lower court decisions concerning gun ranges, gun stores, safe storage laws, "assault weapons," and the right to carry. For the Fourth Edition, we retained two lower court decisions, including one from Amy Coney Barrett, then a federal appeals court judge.

Once again, the Fifth Edition would bring a wealth of pedagogical riches, even if there is still a lack of doctrinal certainty. The *Heller* excerpt was reduced to about fifteen pages to make room for new decisions. *McDonald*, which is more instructive as an incorporation case than as a Second Amendment case, was moved to the chapter on substantive due process. All lower court decisions were dropped. In their place, four new Supreme Court decisions now have full coverage. The Court decided two cases about *where* the right to bear arms applies: *New York State Rifle & Pistol Association, Inc. v. Bruen* and *Wolford v. Lopez*. The Court also decided two other cases about *who* can bear arms: *United States v. Rahimi* and *United States v. Hemani*. Alas, this developing jurisprudence is proving difficult to apply and even understand. In 2008, we had great expectations that *Heller* would bring to the right to keep and bear arms that which First Amendment decisions in the twentieth century brought regarding the freedom of speech. Any such movement has developed slowly. But the logjam appears to have been broken by more recently appointed Justices. As we write this, the Court has granted certiorari on a magazine capacity case, which will address the important but neglected

question of *which* arms are protected by the Constitution. We hope this decision will bring more clarity to this doctrine for the Sixth Edition.

X. DEFINING BIRTHRIGHT CITIZENSHIP

Perhaps the most unexpected addition to the Fifth Edition was a topic that we could not have fathomed back in 2008: birthright citizenship. Indeed, we had both determined, based on the scholarship at the time, that the conventional account of birthright citizenship was correct. But once again, both times and scholarship would change. Starting in 2025, both of us took a closer look at “birthright citizenship” — a term that does not appear in the Fourteenth Amendment — and realized the issue was much closer than we thought.

The constitutional arguments advanced by the Trump Administration were ridiculed by both the professoriate and lower court judges but came within one vote of prevailing at the Supreme Court. Due to the complexity of the issues, we spent considerable time figuring out where and how to teach this case. Ultimately, we added seven distinct excerpts from *Trump v. Barbara* to illustrate different facets of the majority, concurring, and dissenting opinions. The question remained where this seemingly isolated doctrine would fit into the casebook. Because the opinions primarily concerned the original meaning of the Fourteenth Amendment and discussed executive branch practice in the Amendment’s immediate wake, we decided to append it to the end of the chapter on the Reconstruction Amendments.

CONCLUSION

Up through the Fourth Edition, constitutional law followed a somewhat predictable arc. Sure, there were shifts to the left and to the right, but the doctrine could be explained by a coherent narrative: the New Deal settlement on federal power was untouchable; the Court would offer only modest protections for federalism; the administrative state was beyond reproach; attempts to single out unpopular groups would be halted; “benign” racial classifications were permitted; church and state were strictly separated. Now, each aspect of this narrative has been reconceived. The five years since the Fourth Edition appeared, however, have brought the most changes to constitutional law since the Warren Court.

For better or worse, lawyers internalize the constitutional law that existed when they attended law school. Virtually all law professors today came of age in a time of stasis. They could safely assume that the trajectory of the Warren Court would continue indefinitely. But the jurisprudence of the Burger and Rehnquist Courts was primed for a reversal, just as the Warren Court reversed so many precedents from before.

Perhaps unsurprisingly, law professors who became acculturated to the constitutional law in the era they went to law school have struggled to cope with sudden changes in the doctrine. Some have voiced their despair of teaching constitutional law at all. Unsurprisingly, their students also struggle to cope with these developments. This trend

is regrettable. Our role as casebook editors is to guide students through the entire corpus of constitutional law, from the Framing to the present day, without any nostalgia for, or bias against, times gone by.

Still, despite all of these changes, much has stayed the same. In 2024, we predicted that, “Even after accounting for the recent terms, our syllabus will be about ninety percent the same as it was in 2019.”* After the Supreme Court’s 2025 term concluded, we needed to lower our estimate to about eighty percent. Even as the teaching of this constitutional moment remains a challenge, for students, the study of constitutional law is as exciting as ever.

* Randy E. Barnett & Josh Blackman, *Coping with a Court One Disagrees With*, 34 Wm. & Mary Bill Rts. J. 365 (2025).