

Contents

<i>Preface</i>	xxi	
<i>Acknowledgments</i>	xxiii	
Chapter I	Judicial Review	I
§1.1	Introduction and Overview	1
§1.2	The Background of <i>Marbury v. Madison</i>	2
§1.2.1	Independence and the Articles of Confederation	3
§1.2.2	The First State Constitutions	3
§1.2.3	The Emergence of Judicial Review	5
§1.2.4	Creating a New National Government	6
§1.2.5	The Federalist Era, 1789–1801	7
§1.2.6	The Republican Assault on the Judiciary	8
§1.3	<i>Marbury v. Madison</i> : Judicial Review of the Coordinate Branches	10
§1.3.1	Judicial Review of Acts of Congress	10
§1.3.2	Judicial Review of Executive Conduct	12
§1.3.3	The Constitution as Paramount Law in Court	13
§1.3.4	Marshall’s Textual Defense of Judicial Review	14
§1.3.5	The Legitimacy of Judicial Review	17
§1.4	Federal Judicial Review of State Conduct	19
§1.4.1	Challenges Initiated in Federal Court	19
§1.4.2	Supreme Court Review of State Judgments	19
§1.4.3	Adequate and Independent State Grounds	22
	What Constitutes an “Adequate” State Ground?	23
	What Constitutes an “Independent” State Ground?	26
	In Case of Doubt: <i>Michigan v. Long</i>	29
	Cases Filed in the Federal Courts	33
§1.5	The Role of Judicial Review in a Democratic Society	33
§1.6	The Debate Over Constitutional Interpretation	36
§1.6.1	Interpretivism versus Noninterpretivism	36
§1.6.2	Textualism	38
§1.6.3	Originalism	39
§1.6.4	Nonoriginalism	40
§1.6.5	Approaching Consensus	41
§1.6.6	Sources and Levels of Generality	43

Contents

§1.7	The Techniques of Constitutional Interpretation	45
§1.7.1	Constitutional Text	46
§1.7.2	Original Intent	46
§1.7.3	Constitutional Structure	47
§1.7.4	History and Tradition	48
§1.7.5	Fairness and Justice	50
§1.7.6	Political Theory	50
§1.7.7	Social Policy	50
§1.7.8	Foreign, International, and State Law	51
§1.7.9	Supreme Court Precedent	52
§1.8	Authoritativeness of Judicial Interpretations	54
§1.8.1	The Supreme Court's Interpretations as Law	55
§1.8.2	Binding Effect on Other Courts	57
§1.8.3	Binding Effect on Nonjudicial Officials	58
Chapter 2	Congressional Power to Limit the Jurisdiction of the Supreme Court and Inferior Federal Courts	65
§2.1	Introduction and Overview	65
§2.2	The Power to Make Exceptions to the Appellate Jurisdiction of the Supreme Court	67
§2.2.1	Defining the Scope of the Exceptions Power The Traditional or Plenary Power View Mandatory Interpretations Historical Practice Precedent	68 68 70 71
§2.2.2	Structural Limits on Exercises of the Exceptions Power	72
§2.2.3	External Limits on Exercises of the Exceptions Power	77
§2.2.4	A Comment on Ambiguities in the Jurisprudence of the Exceptions Clause	79
§2.3	The Power to Create Article III Courts Inferior to the Supreme Court	79
§2.3.1	Defining the Power to Constitute Inferior Tribunals	80
§2.3.2	The Implicit Authority to Regulate Jurisdiction	83
§2.3.3	Structural Limits on the Power to Create Inferior Tribunals	85
§2.3.4	External Limits on the Power to Create Inferior Tribunals	90
§2.4	The Power to Create Non-Article III Courts	91
§2.4.1	The Argument Against Non-Article III Courts	91
§2.4.2	The Justification for Non-Article III Courts	92

Contents

§2.4.3	Territorial Courts	93
§2.4.4	Military Courts	93
§2.4.5	Adjunct Courts	94
§2.4.6	The Public Rights Exception: Original Form	97
§2.4.7	The Public Rights Exception: Modern Form	100
Chapter 3	Justiciability	103
§3.1	Introduction and Overview	103
§3.2	The Elements of a Case or Controversy	106
§3.2.1	Constitutional Minimum Applied: Advisory Opinions and Collusive Suits	107
§3.2.2	Constitutional Minimum Applied: Declaratory Relief	108
§3.2.3	Constitutional Minimum Applied: Supreme Court Review of State Decisions	109
§3.3	Prudential Considerations: Beyond the Constitutional Minimum	110
§3.4	The Standing Doctrine	112
§3.4.1	Injury-in-Fact The Problem of Future Harm	114 125
§3.4.2	Causation	132
§3.4.3	Redressability General Federal and State Taxpayer Standing	138 142
§3.4.4	The Prohibition Against Generalized Grievances Taxpayer Standing and the Establishment Clause	143 146
§3.4.5	The Rule Against Third-Party Standing	148
§3.4.6	The Zone of Interests Test	158
§3.4.7	Organizational Standing	159
§3.4.8	Legislative Standing	161
§3.4.9	The Curious Cases of <i>United States</i> <i>v. Windsor</i> and <i>Hollingsworth v. Perry</i>	164
§3.5	The Timeline of Justiciability: The Ripeness and Mootness Doctrines	168
§3.6	Ripeness Examined	170
§3.7	Mootness Examined, and Variations	174
§3.7.1	Collateral Consequences	177
§3.7.2	Wrongs Capable of Repetition Yet Evading Review	178
§3.7.3	Voluntary Cessation	180
§3.7.4	Class Actions	184
§3.8	The Political Question Doctrine	185

Contents

Chapter 4	Special Limitations on Judicial Review of State Laws	197
§4.1	Introduction and Overview	197
§4.2	The Eleventh Amendment	197
§4.2.1	The Eleventh Amendment and Sovereign Immunity	197
§4.2.2	Structural Waivers: Suits Filed by the United States	201
§4.2.3	Structural Waivers: Suits Filed by Another State	202
§4.2.4	Other Structural Waivers	203
	Bankruptcy Proceedings	203
	Federal Eminent Domain Proceedings	204
	Proceedings to Enforce Congress's Power to Raise and Support Armies	204
§4.2.5	Supreme Court Review of State Court Decisions	205
§4.2.6	The Stripping Doctrine	206
	<i>Ex parte Young</i> and the Fiction of Stripping	206
	Designating the Proper Defendant	208
	Prospective versus Retroactive Relief	210
	Holding Officials Personally Liable in Damages	211
	No Stripping for State Law Claims	219
	Congressional Restriction of the Stripping Doctrine	220
§4.2.7	Suits Against Governmental Entities and Officials	222
	Classifying a Governmental Entity	223
	Stating a Cause of Action: §1983	225
§4.2.8	Congressional Abrogation	227
§4.2.9	State Waiver by Consent to Suit	232
§4.2.10	The Eleventh Amendment Anomaly	234
§4.3	The Siler Doctrine	236
§4.4	Abstention	238
§4.4.1	Abstention: The <i>Pullman</i> Doctrine	239
§4.4.2	Abstention: A Few Variations	243
§4.4.3	Abstention: The <i>Younger</i> Doctrine	244
	“Pending” State Proceedings	246
	The Nature of State Proceedings	249
	• Proceedings of a Judicial Nature	249
	• Implicating Important State Interests	251
	• Opportunity to Raise the Federal Claim in the State Proceeding	253
	Exceptions to the <i>Younger</i> Doctrine	253
	• Bad Faith or Harassment	254

Contents

	• Patently Unconstitutional	255
	• Extraordinary Circumstances	255
	Returning to Federal Court	255
§4.5	Common Law Immunity	257
Chapter 5	The Powers of the National Government	259
§5.1	Introduction and Overview	259
§5.2	The Necessary and Proper Clause	261
§5.3	The Power Over Interstate Commerce	264
§5.3.1	A Brief History of Commerce Clause Jurisprudence	266
§5.3.2	The Modern Law of the Commerce Clause	271
§5.3.3	The Commerce Clause and Civil Rights	278
§5.3.4	Closer Judicial Scrutiny: <i>Lopez</i> and <i>Morrison</i>	280
§5.3.5	Regulating Commercial “Inactivity”	287
§5.4	The Power to Tax and Spend	291
§5.4.1	What Constitutes a Tax for Purposes of the Taxing Power?	292
	The “Some Revenue” Test	293
	Is the Law Penal or Prohibitory?	294
§5.4.2	Specific Limitations on the Power to Tax	298
	The Requirement of Uniformity	298
	Direct Taxes and Proportionality	298
	Prohibition on Taxes or Duties Laid on Exports	300
§5.4.3	What Constitutes an Expenditure for Purposes of the Spending Power?	300
	Regulatory Spending	301
	Unconstitutional Conditions	304
	Spending Directed Toward the States	305
	Regulatory Authority Over Third Parties	309
§5.5	The Power Over Foreign Affairs	310
§5.5.1	The Foreign Commerce Power	311
§5.5.2	The Treaty Power	311
§5.5.3	Executive Agreements	319
§5.5.4	The War Powers	322
§5.6	The Constitutionally Enforceable Principle of Federalism	324
Chapter 6	The Supremacy Clause	331
§6.1	Introduction and Overview	331
§6.2	The Preemption Doctrine	334
§6.2.1	Types of Preemption	334
§6.2.2	Field Preemption	336
	Express Field Preemption	336
	Implied Field Preemption	340

Contents

§6.2.3	Conflict Preemption	343
	Express Conflict: State Law Inconsistent with a Federal Statutory Prohibition	343
	Implied Conflict: State Law Requires or Allows What Federal Law Prohibits, or State Law Prohibits What Federal Law Requires or Allows	344
	Implied Conflict: State Law Operates as an Obstacle to a Congressional Objective	346
§6.2.4	Ascertaining a Law's 'Real Purpose'	354
§6.3	Federal Immunity from State Regulation	356
§6.4	Federal Immunity from State Taxation	357
§6.5	State-Imposed Limits on Election to Federal Office and on States' Presidential Electors	360
Chapter 7	The Separation of Powers	365
§7.1	Introduction and Overview	365
§7.2	"Checks and Balances" and the Commingling of Powers	366
§7.3	Textual versus Structural or Functional Arguments	368
§7.3.1	Textual Separation of Powers Arguments	368
§7.3.2	Structural Separation of Powers Arguments	369
§7.3.3	Analyzing Separation of Powers Problems	370
§7.4	The Domestic Arena	371
§7.4.1	Presidential Exercise of Lawmaking Power	371
	The Nondelegation Doctrine	374
	The Major Questions Doctrine	376
	The Item Veto	378
§7.4.2	The Legislative Veto	379
§7.4.3	The Administrative State	382
§7.4.4	The Appointment of Federal Officers	383
	Classifying Particular Government Positions	384
	Interbranch Appointments	390
	Appointments Made by Congress	390
	Setting Qualifications for Office	392
§7.4.5	The Removal of Federal Officers	392
	Congressional Participation in the Removal Process	393
	Other Interbranch Removals	394
	Assigning Removal Authority to an Executive Official Other than the President	395
	Limiting the President's Grounds for Removal	395
	Multiple Layers and Limited Grounds	397
	Prohibiting Removal Except by Impeachment	398

Contents

Assigning Federal Duties to Persons Outside the Federal Government	400
§7.4.6 Congressional Exercise of Executive Power	402
§7.4.7 Separation of Powers and the Judiciary	404
Assigning Nonjudicial Duties to Federal Judges	404
Removing Private Rights Suits from the Federal Courts	405
Interfering with Federal Court Judgments	406
§7.5 War and Foreign Affairs	408
§7.5.1 Declaring War and Initiating Hostilities	409
Theory versus Practice	409
The War Powers Resolution	410
The Situation Today	412
§7.5.2 Recognition of Foreign Governments	412
§7.5.3 Treaties and Executive Agreements	414
The Permissible Subject Matter of Treaties	414
Abrogating Treaties	415
Executive Agreements as a Substitute for Treaties	417
§7.6 Impeachment and Temporary Suspension from Office	421
§7.7 The Speech or Debate Clause	424
§7.8 Executive Immunity and Executive Privilege	427
§7.8.1 Executive Immunity from Suit	427
Immunity from Criminal Actions	427
Asserting a Cause of Action Against Federal Officials	432
Absolute or Qualified Immunity from Civil Damages Actions	434
Absolute Civil Damages Immunity for the President	437
§7.8.2 Executive Privilege for Presidential Communications	438
§7.8.3 Compelled Disclosure of a Sitting President's Private Communications	441
Chapter 8 The Dormant Commerce Clause	445
§8.1 Introduction and Overview	445
§8.2 Early Developments	447
§8.3 The Modern Approach: An Overview	448
§8.4 Rational Relationship to a Legitimate State Purpose	448
§8.4.1 Legitimate State Purpose	449
§8.4.2 Economic Protectionism	450
§8.4.3 Rational Relationship	452
§8.5 Extraterritorial Regulatory Effects	453

Contents

§8.6	Discrimination Against Interstate Commerce	457
§8.6.1	What Constitutes Discrimination?	458
§8.6.2	Less Discriminatory Alternatives	461
§8.7	Balancing Burdens and Benefits	463
§8.7.1	Burdens Must Clearly Outweigh Benefits	464
§8.7.2	Relevance of Other Statutes	465
§8.7.3	The Future of Balancing	465
§8.8	Using the Least Burdensome Alternative	466
§8.8.1	Less Burdensome Alternatives	467
§8.8.2	Less Burdensome and Less Discriminatory Alternatives	468
§8.9	State Regulation of Alcohol	470
§8.10	State Laws That Affect Foreign Commerce	471
§8.11	Congressional Consent or Authorization	471
§8.12	The Market Participant Doctrine	473
§8.12.1	The State as Buyer or Seller	474
§8.12.2	State Subsidies	476
§8.12.3	State Tax Credits and Tax Exemptions	478
§8.13	State Taxes and the Dormant Commerce Clause	478
§8.13.1	Substantial Nexus to the Taxing State	479
§8.13.2	Fair Apportionment	479
	The Subject of a Tax	481
	Methods of Apportionment	482
§8.13.3	Discrimination Against Interstate Commerce	484
§8.13.4	Fairly Related to State Services	487
§8.13.5	Taxation of Foreign Commerce	488
§8.14	State Taxes and the Due Process Clause	489
Chapter 9	The Privileges and Immunities Clause of Article IV	493
§9.1	Introduction and Overview	493
§9.2	Significant Burden on Fundamental Rights	494
§9.3	Protectionist Purpose	498
§9.4	Discrimination Against Citizens of Other States	499
§9.4.1	The Requirement of Discrimination	499
	Corfield v. Coryell and Natural Law	499
	The Rejection of Corfield	499
	Proof of Discriminatory Intent	500
§9.4.2	Who Qualify as “Citizens” of Other States?	503
§9.4.3	Discrimination Based on Municipal Residence	505
§9.5	The Substantial Reason Test	507
§9.5.1	The General Test	507
§9.5.2	State-Owned Goods or Resources	510

Contents

§9.6 Other Means of Challenging Discrimination Against Out-of-Staters	511
§9.6.1 Discrimination Against Out-of-State Corporations	512
§9.6.2 Discrimination Against Citizens of Other States Where No “Fundamental” Right Is Involved	513
§9.6.3 Discrimination Against Former Citizens of Other States	513
§9.7 The Fourteenth Amendment Privileges or Immunities Clause	514
<i>Table of Cases</i>	517
<i>Index</i>	531