## **C**ONTENTS

Preface		xxiii	
Ac	knowledgments	XXV	
Ch	apter 1 Placing Federal Courts in Context	1	
A.	The Stakes of the Enterprise	1	
В.	Animating Principles: Separation of Powers and Federalism	5	
	1. Separation of Powers and Federal Jurisdiction	5	
	2. Judicial Federalism	7	
	3. Democracy and Individual Rights	11	
C.	The Emergence of Judicial Review	13	
	Marbury v. Madison	14	
	Fletcher v. Peck	29	
D.	The Politics of Judicial Review	35	
	1. The Early Republic	35	
	2. The Civil War and Reconstruction	40	
	3. The Territorial Expansion of the United States and the Plenary Power Doctrine	42	
	4. Twentieth and Twenty-First Century Developments	43	
E.	Article III of the U.S. Constitution and Statutory Grants of Jurisdiction	46	
	1. A Mandatory Supreme Court and Congressional Power to Create Lower Courts	47	
	2. Judicial Independence: Tenure of Office and Protection Against Diminution of Salary	48	
	3. Textual Limits on Judicial Power	49	
	4. Division of Labor Among the Courts and Other Provisions of Article III	50	
	5. The Judiciary Act of 1789 and the Structure of the Federal Courts	52	
	a. Structure of the Judiciary	53	
	b. Changes in Supreme Court Size	55	
	c. Increases in Supreme Court Control Over Its Docket	56	
	d. Enlargement of Supreme Court's Jurisdiction and the End of Circuit Riding	57	

FCCXT\_FM\_pi-xxvi\_proof4.indd 11 09-05-2023 20:22:33

xii		Contents
	e. The U.S. Courts of Appeals	57
	f. The U.S. District Courts	59
	g. Specialized Federal Courts	60
F.	Conclusion: Federal Courts and Battles over the Legitimacy	
	of Judicial Review	62
	Cooper v. Aaron	63
Ch	napter 2 Invoking the Authority of the Federal Courts	67
A.	The Subject Matter Jurisdiction of the Federal District Courts	70
	1. Federal Question Jurisdiction	70
	Osborn v. Bank of the United States	73
	Louisville & Nashville R.R. Co. v. Mottley	81
	Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.	83
	2. Diversity and Alienage Jurisdiction	92
	National Mut. Ins. Co. v. Tidewater Transfer Co., Inc.	96
	3. Supplemental Jurisdiction	104
	Exxon Mobil Corp. v. Allapattah Services, Inc.	106
	4. Removal Jurisdiction	119
	Tennessee v. Davis	121
	Mays v. City of Flint	125
	5. Concurrent and Exclusive Jurisdiction	133
	Tafflin v. Levitt	133
	6. State Law in Federal Court	141
В.	Federal Court of Appeals Jurisdiction	141
	1. Final Judgments	141
	Catlin v. United States	142
	2. Collateral Orders	146
	Mohawk Indus., Inc. v. Carpenter	148
	3. Supplemental Appellate Jurisdiction	154
	Swint v. Chambers County Comm'n	154
	4. Injunctions	161
	5. Certification	162
	6. Rulemaking	163
Ch	napter 3 Justiciability: Constitutional and Prudential Limits on Federal Judicial Power	165
A	Advisory Opinions and the Adverseness Requirement	166
	Muskrat v. United States	169
	United States v. Windsor	172
	~	1/2

FCCXT\_FM\_pi-xxvi\_proof4.indd 12 09-05-2023 20:22:33

Co	Contents	
В.	Standing	178
	1. Injury	180
	Lujan v. Defenders of Wildlife	182
	TransUnion, LLC v. Ramirez	192
	City of Los Angeles v. Lyons	206
	Notes on Standing and the Risk of Future Injuries	214
	2. Causation and Redressability	216
	Linda R.S. v. Richard D.	217
	Allen v. Wright	220
	Notes on Causation and Redressability	230
	3. The Limitation on Third-Party Standing	234
	Singleton v. Wulff	236
	June Medical Services, LLC v. Russo	243
	Notes on Overbreadth Doctrine	251
	4. The Prohibition Against Generalized Grievances	253
	Hein v. Freedom from Religion Foundation	254
	5. Governmental Standing	264
	a. The Standing of the Federal Government	265
	In re Debs	267
	b. State Standing	270
	Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez	272
	Massachusetts v. EPA	279
	6. Representational Standing: Organizational Standing and Legislative Standing	287
	a. Organizational Standing	287
	b. Legislative Standing	288
C.	Ripeness	289
	O'Shea v. Littleton	290
	Poe v. Ullman	296
	Abbott Laboratories v. Gardner	301
	Trump v. New York	305
D.	Mootness	308
	1. When Does a Case Become Moot?	309
	Chafin v. Chafin	310
	Campbell-Ewald Co. v. Gomez	315
	2. What Should Happen to Underlying Relief?	319
	U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship	319
	3. Exceptions to Mootness	323
	a. Collateral Consequences	323

FCCXT\_FM\_pi-xxvi\_proof4.indd 13 09-05-2023 20:22:33

xiv	Contents
b. Capable of Repetition Yet Evading Review	325
Weinstein v. Bradford	326
Honig v. Doe	327
c. Voluntary Cessation	332
DeFunis v. Odegaard	333
4. Class Action	337
E. Political Question Doctrine	339
<ol> <li>Congressional Self-Governance and Impeachment and Removal from Office</li> </ol>	342
Nixon v. United States	342
2. Foreign Policy	349
Goldwater v. Carter	349
Zivotofsky v. Clinton	351
3. The Structure of Government and Electoral Processes	359
Rucho v. Common Cause	359
Chapter 4 Congressional Control of Federal and State Adjudication	379
A. Congressional Control of Federal Court Jurisdiction	382
Lower Federal Court Jurisdiction	382
a. Congressional Restriction on the Jurisdiction of Lower Federal Courts and Statutory Limitations on Federal Remedies	382
Sheldon v. Sill	383
Webster v. Doe	384
Lauf v. E.G. Shinner $\mathcal{E}$ Co.	395
Brown v. Plata	405
2. Congressional Control of the Jurisdiction	.05
of the U.S. Supreme Court	423
Ex Parte McCardle	425
Ex Parte Yerger	427
Felker v. Turpin	432
3. Dictating Rules of Decision in Pending Cases: The Klein Principle	438
Bank Markazi v. Peterson	440
4. Interference with Final Decisions	453
Pennsylvania v. Wheeling & Belmont Bridge Co.	454
Plaut v. Spendthrift Farm	457
Miller v. French	465
B. Congressional Power to Create Legislative Courts and to Authorize Administrative Adjudication	472
1. Legislative Courts for the Territories and the District of Columbia	473
<u> </u>	

FCCXT\_FM\_pi-xxvi\_proof4.indd 14 09-05-2023 20:22:33

XV

	a. Territorial Courts, Constitutional Rights, and the Doctrine of	
	Unincorporated Territories	473
	Dorr v. United States	475
	b. District of Columbia Courts	478
	2. Legislative Courts for the Military	479
	3. Non-Article III Adjudication of Public Rights Cases	480
	Murray's Lessee v. Hoboken Land & Improvement Co.	480
	Crowell v. Benson	486
	Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.	493
	Stern v. Marshall	507
	Oil States Energy Servs. v. Greene's Energy Group, LLC	521
C.	Congressional Power to Have State Courts Decide Federal Law Matters	529
	1. Discrimination Against Federal Claims	531
	Testa v. Katt	531
	Haywood v. Drown	535
	Tarble's Case	547
D.	Congressional Power to Separate Challenges to the Validity of	
	Regulations From the Court in Which they are Enforced	554
	United States v. Mendoza-Lopez	555
Ch	napter 5 Federal Common Law	565
A.	The Scope of Federal Common Law	566
	1. The Prohibition of Federal Common Law Crimes	567
	United States v. Hudson & Goodwin	568
	2. The <i>Erie</i> Doctrine and the Development of Federal Common Law in Civil Actions	571
	Erie R.R. Co. v. Tompkins	572
	Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.	580
В.	The Development of Federal Common Law to Protect Federal Interests	590
	1. Federal Common Law to Protect Proprietary Interests	590
	Clearfield Trust Co. v. United States	591
	United States v. Kimbell Foods, Inc.	593
	2. Federal Common Law to Protect Federal Interests in International	
	Relations	596
	Banco Nacional de Cuba v. Sabbatino	596
	3. Federal Common Law to Resolve Disputes Among Sovereigns	599
	a. Federal Common Law and Interstate Controversies	599
	Illinois v. City of Milwaukee	599
	City of Milwaukee v. Illinois	601

FCCXT\_FM\_pi-xxvi\_proof4.indd 15 09-05-2023 20:22:33

xvi	Contents
b. Federal Common Law and Indian Affairs	604
County of Oneida, N.Y. v. Oneida Nation of N.Y. State	604
C. The Development of Federal Common Law to Effectuate	
Congressional Intent	608
<ol> <li>The Application of Federal Common Law Versus State Law to Answer Questions That a Federal Statute Does Not</li> </ol>	
Expressly Address	609
Robertson v. Wegmann	610
2. Express Versus Implied Private Rights of Action Under Federal Statutes	613
Touche Ross & Co. v. Redington	616
Alexander v. Sandoval	621
Sosa v. Alvarez-Machain	626
Kiobel v. Royal Dutch Petroleum	632
3. Implied Rights of Action to Enforce Preemption?	638
Chapter 6 Suits Against State and Local Governments, Native Nations, Foreign Governments, and Their Officers	645
A. Suits Against State Governments: The Eleventh Amendment and	
Sovereign Immunity	645
<ol> <li>The History and Ratification of the Eleventh Amendment: Competing Interpretations</li> </ol>	646
2. Applications of the Eleventh Amendment and State Sovereign Immunity	648
Hans v. Louisiana	649
Blatchford v. Native Village of Noatak and Circle Village	656
3. Suits Against State Officers for Prospective Relief, Waiver, and	
Abrogation of State Sovereign Immunity	668
a. Suits Against State Officers for Prospective Relief	668
Ex parte Young	669
Notes on the Right of Action	679
Notes on the Legal Right Violated	681
Notes on the Identity of the Defendant	682
Notes on the Remedy Requested	684
Notes on Expenditures Ancillary to Prospective Relief	687
Edelman v. Jordan	688
b. Waiver	697
Lapides v. Board of Regents of University System of Georgia	698
c. Abrogation of Immunity by Congress	700
Fitzpatrick v. Bitzer	700

FCCXT\_FM\_pi-xxvi\_proof4.indd 16 09-05-2023 20:22:33

Contents	xvii
Seminole Tribe of Florida v. Florida	704
Alden v. Maine	721
d. Surrender of State Sovereign Immunity in the "Plan of the Convention"	736
Central Virginia Community College v. Katz	736
B. Federal Court Relief Against Local Governments and State and Local Government Officers: 42 U.S.C. §1983	747
1. "Under the Color of State Law"	749
Monroe v. Pape	749
2. Section 1983 Suits Against Local Governments	755
a. Formally Enacted Policy, Ordinance, or Regulation	755
Monell v. Department of Social Services	757
b. Authorization or Participation by a Final Policymaker	761
Pembaur v. City of Cincinnati	762
c. Deliberate Indifference	765
Connick v. Thompson	766
4. Section 1983 v. Collateral Habeas Proceedings	775
Heck v. Humphrey	776
5. Absolute Immunity	782
a. Judicial	783
Stump v. Sparkman	783
b. Prosecutorial	787
c. Legislative	789
Tenney v. Brandhove	789
6. Qualified Immunity	794
a. What Is Qualified Immunity?	795
Harlow v. Fitgerald	795
b. What Is a "Clearly Established" Right?	799
(1) Plain Text	799
Groh v. Ramirez	799
(2) Materially Similar Facts	801
Mullenix v. Luna	802
Jessop v. City of Fresno	808
(3) "Obvious" Violations	811
Hope v. Pelzer	811
Taylor v. Riojas	818
c. Sources of Clearly Established Law	819
d. Procedural Issues	820
Tolan v. Cotton	820
e. The Future of Qualified Immunity	825

FCCXT\_FM\_pi-xxvi\_proof4.indd 17 09-05-2023 20:22:33

χvi	iii	Content
	(1) Qualified Immunity and The Reckoning	826
	Est. of Jones by Jones v. City of Martinsburg	826
	Jamison v. McClendon	830
	(2) Proposals for Reform	839
C.	Federal Court Relief Against Tribal Governments and Tribal	
	Government Officers	840
	1. Causes of Action	840
	Santa Clara Pueblo v. Martinez	842
	2. Tribal Sovereign Immunity	851
	Kiowa Tribe v. Mfg. Techs.	85
	Michigan v. Bay Mills Indian Cmty.	854
D.	Federal Court Relief Against Foreign Governments	862
	Federal Republic of Germany v. Philipp	863
Ch	apter 7 Federal Court Relief Against the Federal Government and Federal Officers	871
A.	Suits Against the Federal Government	872
	1. Federal Sovereign Immunity	872
	Federal Crop Ins. Corp. v. Merrill	872
	2. Injunctive Relief Against the United States	874
	3. Other Congressional Waivers of Federal Sovereign Immunity	875
	a. The Federal Torts Claims Act	875
	b. The Tucker Act	878
	United States v. Bormes	879
В.	Suits Against Federal Officers	882
	1. Causes of Action	882
	2. Implied Causes of Action	882
	a. For Constitutional Claims	882
	Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics	88
	(1) The Expansion of <i>Bivens</i>	890
	(2) The Narrowing of Bivens Suits	891
	(3) The Current Test with Regard to Bivens Suits	896
	Ziglar v. Abbasi	898
	Hernandez v. Mesa	912
	Egbert v. Boule	919
	b. The Availability of Injunctive Relief to Enforce Federal Law	924
	Free Enterprise Fund v. PCAOB	925
	3. Immunity from Monetary Liability and Executive Privilege	928
	Nixon v. Fitzgerald	928
	Notes on Executive Power and Executive Privilege	938

FCCXT\_FM\_pi-xxvi\_proof4.indd 18 09-05-2023 20:22:33

Co	ntents		XIX
Chapter 8 The Writ of Habeas Corpus: Relief Against a State or Federal Officer Responsible for Unlawful Detention		The Writ of Habeas Corpus: Relief Against a State or Federal Officer Responsible for Unlawful Detention	943
A.	Introduc	tion to the Writ of Habeas Corpus	943
	1. A Brie	f History of The Writ	948
		al Habeas Jurisdiction in the New Republic: The First Judiciary 1789 and the Habeas Corpus Act of 1867	946
	3. Execu	tive Detention	950
		beas Corpus and National Security Enforcement: The First pension	950
	j	Hamdi v. Rumsfeld	952
	j	Boumediene v. Bush	966
	b. Hal	beas Corpus and Immigration Detention	988
	Ì	Dep't of Homeland Security v. Thuraissigiam	990
В.	Collatera	ll Attack on State Criminal Convictions	1009
		dural Prerequisites to Collateral Attack on State Court	
	Judgn		1014
	a. Cus		1015
		naustion	1017
		ocedural Default	1018
		Wainwright v. Sykes	1019
		e Statute of Limitations	1034
		Holland v. Florida	1035
		ecessive Petitions	1047
		Felker v. Turpin, Warden	1048
		t Finding	1051
		tandard of Review	1054
		e Warren Court Approach	1055
		Brown v. Allen	1057
		n-Retroactivity of "New" Rules	1070
		Teague v. Lane	1075
		Exceptions to <i>Teague's</i> Non-Retroactivity Principle	1088
		Edwards v. Vannoy	1089
		Retroactivity Rules for State Courts	1099
		Montgomery v. Louisiana	1100
		ngress Intervenes: AEDPA §2254(d)	1112
		Terry Williams v. Taylor  Terry Williams v. Taylor  Terry Williams v. Taylor  Principle and \$9954(d)	1114
		Teague's Non-Retroactivity Principle and §2254(d)	1132
		Harmless Error and §2254(d)	1133
	(111)	Actual Innocence in Capital Cases	1134

FCCXT\_FM\_pi-xxvi\_proof4.indd 19 09-05-2023 20:22:33

XX	Contents
Chapter 9 Supreme Court Review	1137
Introduction: The Supreme Court's Functions	1137
A. Original Jurisdiction	1140
Ohio v. Wyandotte Chemicals Corp.	1142
Nebraska v. Colorado	1147
B. Appellate Jurisdiction over Federal Courts	1150
1. Review of Federal Courts of Appeals	1151
Hohn v. United States	1151
2. Review of Three-Judge District Courts	1159
Gunn v. University Committee	1159
C. Appellate Review of State Courts	1163
1. Origins of Supreme Court Review of State Courts	1163
Martin v. Hunter's Lessee	1169
Cohens v. Virginia	1178
NAACP v. Alabama ex rel. Flowers	1185
2. The Final Judgment Rule	1191
Cox Broadcasting Corp. v. Cohn	1192
3. The Independent and Adequate State Ground Doctrine	1199
a. Origins of the Doctrine	1199
Murdock v. City of Memphis	1200
<ul> <li>Justifications and Criticisms of the Independent and Adequate State Grounds Doctrine</li> </ul>	1208
c. When Is There an "Independent" and "Adequate" State Ground?	1209
d. How to Proceed When the State Court's Decision Is Unclear?	1214
Michigan v. Long	1215
D. Expedited Appellate Review	1222
Conkright v. Frommert	1225
Maryland v. King	1226
Chapter 10 The Relationship Between Federal District Courts and the State Courts	1231
A. Statutory Control	1232
1. The Anti-Injunction Act	1232
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers	1234
Mitchum v. Foster	1240
2. The Tax Injunction Act	1245
Hibbs v. Winn	1246

FCCXT\_FM\_pi-xxvi\_proof4.indd 20 09-05-2023 20:22:33

Contents	
3. The Johnson Act	1255
4. The Civil Rights Removal Act	1255
City of Greenwood v. Peacock	1257
B. Abstention	1266
1. Unclear State Law and Federal Constitutional Avoidance	1268
Railroad Comm'n of Texas v. Pullman Co.	1269
a. Exceptions	1271
b. England Reservation	1271
c. Certification	1272
Mckesson v. Doe	1273
2. Unclear State Law and Diversity Jurisdiction	1275
Louisiana Power & Light Co. v. City of Thibodaux	1276
3. Unclear State Law and Complex Regulatory Schemes	1280
New Orleans Pub. Serv., Inc. v. Council of City of New Orlean	as 1280
4. Parallel Civil Proceedings	1282
Colorado River Water Conservation Dist. v. United States	1284
5. Ongoing State Coercive Proceedings	1290
a. Equitable Restraint and "Our Federalism"	1290
Younger v. Harris	1292
b. What Is an "Ongoing" Proceeding	1296
c. What Type of State Proceedings?	1297
Sprint Communications, Inc. v. Jacobs	1298
d. What Type of Federal Relief Implicates Younger?	1302
Samuels v. Mackell	1302
e. Exceptions	1304
i. Bad Faith	1304
ii. Bias	1305
Gibson v. Berryhill	1305
iii. Timeliness	1309
iv. Patently Unconstitutional	1309
Table of Cases	1311
Table of Rules and Codes	1325
Table of Authorities	
Index	

FCCXT\_FM\_pi-xxvi\_proof4.indd 21 09-05-2023 20:22:33

FCCXT\_FM\_pi-xxvi\_proof4.indd 22 09-05-2023 20:22:33