
Contents

<i>Preface</i>	<i>xxi</i>
<i>Acknowledgments</i>	<i>xxv</i>

CHAPTER 1

Historical Background and Contemporary Themes 1

§1.1	The Constitution's Functions	1
§1.2	Why a Constitution?	8
§1.3	A Brief History of the Creation and Ratification of the Constitution and Its Amendments	11
§1.4	How Should the Constitution Be Interpreted?	18
§1.5	Who Should Be the Authoritative Interpreter of the Constitution?	28

CHAPTER 2

The Federal Judicial Power 33

§2.1	Introduction	34
§2.2	The Authority for Judicial Review	39
§2.2.1	<i>Marbury v. Madison</i> : The Authority for Judicial Review of Congressional and Presidential Actions	39
§2.2.2	The Authority for Judicial Review of State and Local Actions	47

Contents

§2.3	Introduction to the Justiciability Doctrines	49
§2.4	The Prohibition Against Advisory Opinions	53
§2.5	Standing	60
§2.5.1	Introduction	60
§2.5.2	Injury	64
§2.5.3	Causation and Redressability.	84
§2.5.4	The Limitation on Third-Party Standing	95
§2.5.5	The Prohibition Against Generalized Grievances	104
§2.5.6	The Requirement That the Plaintiff Be Within the Zone of Interests Protected by the Statute	113
§2.6	Ripeness	117
§2.6.1	Introduction	117
§2.6.2	Criteria for Determining Ripeness: The Hardship to Denying Review	120
§2.6.3	Criteria for Determining Ripeness: The Fitness of the Issues and Record for Judicial Review.	127
§2.7	Mootness	129
§2.7.1	Description of the Mootness Doctrine	129
§2.7.2	Exceptions to the Mootness Doctrine: Collateral Consequences	132
§2.7.3	Exceptions to the Mootness Doctrine: Wrongs Capable of Repetition Yet Evading Review	135
§2.7.4	Exceptions to the Mootness Doctrine: Voluntary Cessation.	139
§2.7.5	Exceptions to the Mootness Doctrine: Class Actions	144
§2.8	The Political Question Doctrine	148
§2.8.1	What Is the Political Question Doctrine?	148
§2.8.2	Should There Be a Political Question Doctrine?	150
§2.8.3	The “Republican Form of Government” Clause and Judicial Review of the Electoral Process	153
§2.8.4	Foreign Policy	160
§2.8.5	Congressional Self-Governance.	164
§2.8.6	The Process for Ratifying Constitutional Amendments	165
§2.8.7	Excessive Interference with Coordinate Branches of Government.	168
§2.8.8	Impeachment and Removal from Office: <i>Nixon v. United States</i>	169
§2.9	Congressional Control of Federal Court Jurisdiction	170
§2.9.1	Introduction	170
§2.9.2	Congressional Control of Supreme Court Jurisdiction	176
§2.9.3	Congressional Control of Lower Federal Court Jurisdiction	189
§2.10	Sovereign Immunity as a Limit on the Federal Judicial Power.	201
§2.10.1	History of the Ratification of the Eleventh Amendment	204

Contents

§2.10.2 What Does the Eleventh Amendment Mean? 208
§2.10.3 The Application of the Eleventh Amendment: What’s Barred and What’s Allowed 214
§2.10.4 Ways Around the Eleventh Amendment: Suits Against State Officers 222
§2.10.5 Ways Around the Eleventh Amendment: Waiver 241
§2.10.6 Ways Around the Eleventh Amendment: Suits Pursuant to Federal Laws 246

CHAPTER 3

The Federal Legislative Power 257

§3.1 The Doctrine of Limited Federal Legislative Authority 258
§3.2 *McCulloch v. Maryland* and the Scope of Congressional Powers 260
§3.3 The Necessary and Proper Clause 266
§3.4 The Commerce Power 268
 §3.4.1 Introduction to the Commerce Power 268
 §3.4.2 *Gibbons v. Ogden* and the Definition of the Commerce Power 270
 §3.4.3 The Commerce Clause Before 1937 272
 §3.4.4 The Commerce Clause from 1937 to 1995 280
 §3.4.5 The Commerce Clause After *United States v. Lopez* 289
§3.5 The Taxing and Spending Power 299
 §3.5.1 The Scope of the Taxing and Spending Power 299
 §3.5.2 The Taxing Power 301
 §3.5.3 The Spending Power 305
§3.6 Other Congressional Powers Under Article I and Article IV 308
 §3.6.1 Foreign Policy 308
 §3.6.2 Domestic Affairs 314
§3.7 Congress’s Powers Under the Reconstruction-Era Amendments 316
 §3.7.1 May Congress Regulate Private Conduct? 317
 §3.7.2 What Is the Scope of Congress’s Power? 321
§3.8 Congress’s Power to Authorize Suits Against State Governments 331
§3.9 Congress’s Power to Investigate 344
§3.10 The Tenth Amendment and Federalism as a Limit on Congressional Authority 347
§3.11 Delegation of Legislative Power and the Problems of the Administrative State 363
 §3.11.1 The Nondelegation Doctrine and Its Demise 363

Contents

§3.11.2 The Legislative Veto 371
§3.11.3 Delegation of Executive Power to Congress and
Its Officials 374

CHAPTER 4

The Federal Executive Power 377

§4.1 Express and Inherent Presidential Powers 377
§4.2 Appointment and Removal Power 386
 §4.2.1 The Appointment Power 387
 §4.2.2 The Removal Power 396
§4.3 Executive Privilege 404
§4.4 Presidential Immunity to Criminal and Civil Suits 409
§4.5 Pardon Power 414
§4.6 Foreign Policy 417
 §4.6.1 Are Foreign Policy and Domestic Affairs Different? 417
 §4.6.2 Treaties and Executive Agreements 418
 §4.6.3 War Powers 424
 §4.6.4 Presidential Power and the War on Terrorism 427
 §4.6.5 Presidential Power and Immigration 435
§4.7 Impeachment and Removal from Office 438

CHAPTER 5

Limits on State Regulatory and Taxing Power 445

§5.1 Introduction 446
§5.2 Preemption of State and Local Laws 448
 §5.2.1 Introduction 448
 §5.2.2 Express Preemption of State Laws 452
 §5.2.3 “Field Preemption” 458
 §5.2.4 Conflicts Between State and Federal Laws 467
 §5.2.5 State Laws That Impede Achievement of
 Federal Objectives 471
 §5.2.6 Preemption of State Taxation or Regulation of the
 Federal Government 477
§5.3 The Dormant Commerce Clause 480
 §5.3.1 What Is the Dormant Commerce Clause? 480
 §5.3.2 Should There Be a Dormant Commerce Clause? 482
 §5.3.3 An Overview of the Dormant Commerce Clause 485

Contents

§5.3.4	The Central Question: Is the State Discriminating Against Out-of-Staters?	491
§5.3.5	The Analysis When a State Is Not Discriminating	498
§5.3.6	The Analysis When a State Is Discriminating	504
§5.3.7	Exceptions	509
§5.4	State Taxation of Interstate Commerce.	515
§5.4.1	The Test Used to Evaluate State Taxes of Interstate Commerce.	515
§5.4.2	The Requirement for a Substantial Nexus to the Taxing State	517
§5.4.3	The Requirement for Fair Apportionment.	520
§5.4.4	The Prohibition of Discrimination Against Out-of-Staters	522
§5.4.5	The Requirement for Fair Relationship to Services Provided by the State.	526
§5.5	The Privileges and Immunities Clause of Article IV, §2	527
§5.5.1	Introduction	527
§5.5.2	What Are the “Privileges and Immunities” of Citizenship?	530
§5.5.3	What Is Sufficient Justification for Discrimination?	535

CHAPTER 6

**The Structure of the Constitution’s Protection of
Civil Rights and Civil Liberties 537**

§6.1	Introduction	538
§6.2	Textual Provisions, Apart from the Bill of Rights, Protecting Individual Rights	539
§6.2.1	A Review of the Textual Provisions Protecting Rights	539
§6.2.2	The Prohibition of Bills of Attainder	541
§6.2.3	The Prohibition Against Ex Post Facto Laws	546
§6.3	The Application of the Bill of Rights to the States	553
§6.3.1	The Rejection of Application Before the Civil War	553
§6.3.2	A False Start: The Privileges or Immunities Clause and the <i>Slaughter-House Cases</i>	554
§6.3.3	The Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment	560
§6.4	The Application of Civil Rights and Civil Liberties to Private Conduct: The State Action Doctrine	569
§6.4.1	The Requirement for State Action	569
§6.4.2	Why Have a State Action Requirement?	572

Contents

§6.4.3 Is It the Government? 575
§6.4.4 The Exceptions to the State Action Doctrine 579
§6.5 The Levels of Scrutiny 602

CHAPTER 7

Procedural Due Process 609

§7.1 The Distinction Between Procedural and Substantive Due Process 609
§7.2 What Is a “Deprivation”? 613
§7.3 Is It a Deprivation of “Life, Liberty, or Property”? 621
 §7.3.1 The “Rights-Privileges” Distinction and Its Demise 621
 §7.3.2 Deprivations of “Property” 623
 §7.3.3 Deprivations of “Liberty” 629
 §7.3.4 Deprivations of “Life” 642
§7.4 What Procedures Are Required? 643
 §7.4.1 When Is Procedural Due Process Required? 643
 §7.4.2 What Is the Test for Determining What Process Is Due? 645
 §7.4.3 The *Mathews v. Eldridge* Test Applied. 647

CHAPTER 8

Economic Liberties 673

§8.1 Introduction 673
§8.2 Economic Substantive Due Process 676
 §8.2.1 Economic Substantive Due Process During the
 Nineteenth Century. 676
 §8.2.2 Economic Substantive Due Process
 During the *Lochner* Era 682
 §8.2.3 Economic Substantive Due Process Since 1937 689
§8.3 The Contracts Clause 697
 §8.3.1 Introduction 697
 §8.3.2 The Contracts Clause Before 1934 699
 §8.3.3 The Contracts Clause Since 1934 702
§8.4 The Takings Clause 708
 §8.4.1 Introduction 708
 §8.4.2 What Is a “Taking”? 709

Contents

§8.4.3 What Is “Property”? 730
§8.4.4 What Is a Taking for “Public Use”? 734
§8.4.5 What Is the Requirement for “Just Compensation”? 736

CHAPTER 9

Equal Protection 739

§9.1 Introduction 740
§9.1.1 Constitutional Provisions Concerning Equal Protection 740
§9.1.2 A Framework for Equal Protection Analysis 741
§9.2 The Rational Basis Test 750
§9.2.1 Introduction 750
§9.2.2 The Requirement for a “Legitimate Purpose” 752
§9.2.3 The Requirement for a “Reasonable Relationship” 758
§9.3 Classifications Based on Race and National Origin 762
§9.3.1 Race Discrimination and Slavery Before the Thirteenth
and Fourteenth Amendments 763
§9.3.2 Strict Scrutiny for Discrimination Based on Race and
National Origin 767
§9.3.3 Proving the Existence of a Race or National Origin
Classification 769
§9.3.4 Remedies: The Problem of School Segregation 795
§9.3.5 Racial Classifications Benefiting Minorities 808
§9.4 Gender Classifications 828
§9.4.1 The Level of Scrutiny 828
§9.4.2 Proving the Existence of a Gender Classification 836
§9.4.3 Gender Classifications Benefiting Women 839
§9.5 Discrimination Against Noncitizens 846
§9.5.1 Introduction 846
§9.5.2 Strict Scrutiny as the General Rule 848
§9.5.3 Discrimination Against Noncitizens Related
to Self-Government and the Democratic Process 851
§9.5.4 Congressionally Approved Discrimination 853
§9.5.5 Undocumented Immigrants and Equal Protection 855
§9.6 Discrimination Against Nonmarital Children 856
§9.7 Other Types of Discrimination: Rational Basis Review 861
§9.7.1 Age Classifications 861
§9.7.2 Discrimination Based on Disability 863

Contents

§9.7.3 Wealth Discrimination 864
§9.7.4 Discrimination Based on Sexual Orientation 866

CHAPTER 10

Fundamental Rights 871

§10.1 Introduction 872
 §10.1.1 Constitutional Bases for Fundamental Rights 872
 §10.1.2 Framework for Analyzing Fundamental Rights 874
§10.2 Constitutional Protection for Family Autonomy 877
 §10.2.1 The Right to Marry 878
 §10.2.2 The Right to Custody of One’s Children 884
 §10.2.3 The Right to Keep the Family Together 888
 §10.2.4 The Right to Control Upbringing of Children 890
§10.3 Constitutional Protection for Reproductive Autonomy 895
 §10.3.1 The Right to Procreate 895
 §10.3.2 The Right to Purchase and Use Contraceptives 896
 §10.3.3 The Right to Abortion: From *Roe* to *Casey* to *Dobbs* 900
§10.4 Constitutional Protection for Sexual Activity and Sexual Orientation 912
§10.5 Constitutional Protection for Medical Care Decisions 914
§10.6 Constitutional Protection for
 Control over Information 922
§10.7 Constitutional Protection for Travel 925
 §10.7.1 The Recognition of the Right to Travel as a
 Fundamental Right 925
 §10.7.2 What Constitutes an Infringement of the
 Right to Travel? 929
 §10.7.3 Restrictions on Foreign Travel 936
§10.8 Constitutional Protection for Voting 939
 §10.8.1 The Right to Vote as a Fundamental Right 939
 §10.8.2 Restrictions on the Ability to Vote 943
 §10.8.3 Dilution of the Right to Vote 954
 §10.8.4 Inequalities in Counting Votes Within a State 964
 §10.8.5 Racial Discrimination in Voting Rights 972
 §10.8.6 Restrictions on Parties and Candidates 975
§10.9 Constitutional Protection for Access to Courts 982

Contents

§10.10 The Second Amendment Right to Bear Arms. 991
§10.11 Constitutional Protection for a Right to Education 1000

CHAPTER 11

First Amendment: Expression 1003

§11.1 Introduction 1004
 §11.1.1 Historical Background. 1004
 §11.1.2 Why Should Freedom of Speech Be a
 Fundamental Right? 1006
 §11.1.3 The Issues in Free Expression Analysis 1013
§11.2 Free Speech Methodology 1014
 §11.2.1 The Distinction Between Content-Based and
 Content-Neutral Laws 1014
 §11.2.2 Vagueness and Overbreadth 1027
 §11.2.3 Prior Restraints 1036
 §11.2.4 What Is an Infringement of Freedom of Speech? 1055
 §11.2.5 Government Speech 1076
§11.3 Types of Unprotected and Less Protected Speech 1080
 §11.3.1 Introduction 1080
 §11.3.2 Incitement of Illegal Activity 1081
 §11.3.3 Fighting Words, the Hostile Audience, and the Problem
 of Racist Speech. 1096
 §11.3.4 Sexually Oriented Speech 1111
 §11.3.5 Reputation, Privacy, Publicity, and the First
 Amendment: Torts and the First Amendment 1142
 §11.3.6 Symbolic Speech: Conduct That Communicates 1162
 §11.3.7 Commercial Speech. 1189
 §11.3.8 Speech of Government Employees 1214
 §11.3.9 Attorneys' Speech 1226
 §11.3.10 Labor Picketing and Protests. 1230
§11.4 What Places are Available for Speech? 1231
 §11.4.1 Introduction 1231
 §11.4.2 Government Properties and Speech 1232
 §11.4.3 Private Property and Speech 1258
 §11.4.4 Speech in Authoritarian Environments: Military, Prisons,
 and Schools 1259
§11.5 Freedom of Association 1270

Contents

§11.5.1	Introduction	1270
§11.5.2	Laws Prohibiting or Punishing Membership	1271
§11.5.3	Laws Requiring Disclosure of Membership	1274
§11.5.4	Laws Prohibiting Discrimination.	1279
§11.6	Freedom of the Press	1283
§11.6.1	Introduction	1283
§11.6.2	Freedom of the Press as a Shield to Protect the Press from the Government.	1284
§11.6.3	Freedom of the Press as a Sword to Gain Access to Government Places and Papers.	1295

CHAPTER 12

First Amendment: Religion 1299

§12.1	Introduction	1300
§12.1.1	Constitutional Provisions Concerning Religion and the Tension Between Them.	1300
§12.1.2	What Is Religion?	1305
§12.2	The Establishment Clause	1310
§12.2.1	Competing Theories of the Establishment Clause	1310
§12.2.2	Government Discrimination Among Religions	1318
§12.2.3	The <i>Lemon</i> Test for the Establishment Clause and Its Apparent Demise	1320
§12.2.4	Religious Speech and the First Amendment	1325
§12.2.5	When Can Religion Become a Part of Government Activities?	1334
§12.2.6	When Can Government Give Aid to Religion? When Must It Do So?	1352
§12.3	The Free Exercise Clause.	1371
§12.3.1	Introduction	1371
§12.3.2	Challenges to Laws Regulating or Burdening Religious Conduct	1375
§12.3.3	Government Involvement in Religious Disputes	1406
Appendix The Constitution of the United States of America		1409
<i>Table of Cases</i>		1425
<i>Index</i>		1473