TABLE OF CONTENTS

INTRODUCTION V

TABLE OF CASES XIX

PART ONE. THE CONSTITUTION AND JUDICIAL REVIEW

Chapter One. The Constitution and the Dead Hand 3
Section 1.1. Constitutional Functions 3
The Constitution of the United States of America 4
Joseph Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries 21
Note on Constitutional Functions 22
Section 1.2. The Dead Hand Problem 24
District of Columbia v. Heller 24
Michael W. McConnell, Textualism and the Dead Hand of the Past 49
Notes on *Heller* and the Dead Hand 57
Introductory Note on Interpretive Methodology, with Particular Emphasis on Textualism and Originalism 60
Introductory Note on the Role of Constitutional Doctrine 66

Chapter Two. Judicial Review 69
Section 2.1. The Case for Judicial Review 69
The Federalist, No. 78 (Alexander Hamilton) 70
Note on Hamilton's Argument for Judicial Review 75
Introductory Note on *Marbury v. Madison* 77
Marbury v. Madison 80
Note on *Marbury* and the Legitimacy of Judicial Review 90
Section 2.2. Cases and Controversies 94
Correspondence of the Justices (1793) 95
Note on Advisory Opinions 96
Warth v. Seldin 99
Note on the Justiciability Doctrines 112
Section 2.3. Political Questions 117
Baker v. Carr 117
Nixon v. United States 124
Note on the Political Question Doctrine 132
Note on Other Limits on Judicial Review 137

PART TWO. A HISTORY OF JUDICIAL REVIEW

Chapter Three. The Marshall Court and the Federal Balance 145
Introductory Note on the Bank of the United States 146
McCulloch v. Maryland 149
Note on *McCulloch* and the Scope of National Power 164
Gibbons v. Ogden 168
Willson v. Black Bird Creek Marsh Co. 178
Note on the Commerce Clause as a Limit on State Power 180

Chapter Four. Slavery, Civil War, and Reconstruction **185**
Section 4.1. The Taney Court and Slavery 186
Prigg v. Pennsylvania 187
Note on *Prigg* and the Relation Between Slavery and Federalism 195
Dred Scott v. Sandford 196
Sanford Levinson, Pledging Faith in the Civil Religion, or, Would You Sign the Constitution? 217
Note on Slavery and the Constitution 222
Section 4.2. Reconstruction and the Fourteenth Amendment 225
Barron v. Baltimore 226
Slaughter-House Cases 229
Civil Rights Cases 246
Note on the Effect and Interpretation of the Reconstruction Amendments 262

Chapter Five. The *Lochner* Era and the New Deal Crisis **267**
Section 5.1. Freedom of Contract 268
Lochner v. New York 269
Note on *Lochner* and Judicial Review of Economic Regulation 278
Nebbia v. New York 282
Note on *Nebbia* and the Scope of Substantive Due Process Under *Lochner* 291
Section 5.2. Federalism in the *Lochner* Era 292
United States v. E.C. Knight Co. 293
The Shreveport Rate Cases 300
Hammer v. Dagenhart 303
A.L.A. Schechter Poultry Corp. v. United States 308
Note on Dual Federalism in the *Lochner* Era 314
Section 5.3. The Judicial Revolution of 1937 317
Franklin Delano Roosevelt, Fireside Chat on Reorganization of the Judiciary 319
Note on Court-Packing and the "Switch in Time" 325
West Coast Hotel Co. v. Parrish 327
National Labor Relations Board v. Jones & Laughlin Steel Corp. 331
Wickard v. Filburn 339
Note on the Constitutional Revolution of 1937 345
Section 5.4. Judicial Deference and the Double Standard 346
United States v. Carolene Products 347
Williamson v. Lee Optical of Oklahoma, Inc. 351
Note on the "Double Standard" After 1937 353

Chapter Six. Civil Rights and the Warren Court **361**
Section 6.1. *Brown* and the Problem of Racial Segregation 362
Plessy v. Ferguson 363
Note on the Application of "Separate but Equal" 371
Brown v. Board of Education (Brown I) 373
Bolling v. Sharpe 377
Note on the School Segregation Decisions 378

Herbert Wechsler, Toward Neutral Principles in Constitutional Law 380
Charles Black, The Lawfulness of the Segregation Decisions 386
Note on Neutral Principles and the Segregation Decisions 392
Section 6.2. Segregation Remedies and the Judicial Role 395
Brown v. Board of Education (Brown II) 396
Note on Desegregation Remedies 398
Cooper v. Aaron 401
Note on *Cooper* and the Allocation of Authority to Interpret the Constitution 409
Note on the Efficacy of Judicial Decisions 414
Section 6.3. Incorporation and the Nationalization of Criminal Procedure 417
Adamson v. California 419
Duncan v. Louisiana 428
Note on Incorporation of the Bill of Rights into the Fourteenth Amendment 440

Chapter Seven. The Rebirth of Substantive Due Process 449
Section 7.1. The Right to Privacy 450
Griswold v. Connecticut 450
Note on *Griswold*, the Right to Privacy, and Neutral Principles 463
Section 7.2. The Right of Abortion 469
Roe v. Wade 469
Note on *Roe v. Wade* and the "Living Constitution" 482
Section 7.3. Abortion and Stare Decisis 487
Planned Parenthood of Southeastern Pennsylvania v. Casey 488
Note on *Casey*, the Abortion Debate, and Common Law Constitutionalism 522

PART THREE. THE STRUCTURAL CONSTITUTION

Chapter Eight. The Federal System 535
Section 8.1. The Federal System and Dual Sovereignty 536
Federalist No. 10 (James Madison) 537
Federalist No. 51 (James Madison) 543
Note on the Political Theory of the Federalist 547
U.S. Term Limits, Inc. v. Thornton 549
Note on Sovereignty, Representation, and the *Term Limits* Case 579
Note on the Values of Federalism 581
Section 8.2. Judicial and Political Safeguards of Federalism 587
Garcia v. San Antonio Metropolitan Transit Authority 589
Federalist No. 45 (James Madison) 606
Federalist No. 46 (James Madison) 611
Note on the Political, Judicial, and Procedural Safeguards of Federalism 616

Chapter Nine. The Powers of Congress 623
Section 9.1. The Commerce Power 624
United States v. Lopez 624

Note on *Lopez* and the "Federalist Revival" 644
Gonzales v. Raich 650
Note on *Raich* and the Future of the Commerce Clause 670
Section 9.2. Congress's Power to Enforce the Reconstruction Amendments 677
Katzenbach v. Morgan 678
City of Boerne v. Flores 684
Note on the Section Five Power 697
Section 9.3. The Taxing and Spending Powers 702
National Federation of Independent Business v. Sebelius 704
Note on the Taxing Power 716
South Dakota v. Dole 717
National Federation of Independent Business v. Sebelius 723
Note on the Spending Power 740

Chapter Ten. External Limits on National Power 749
Section 10.1. Clear Statement Rules 749
Jones v. United States 751
Gregory v. Ashcroft 755
Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers 764
Note on the Clear Statement Cases 772
Section 10.2. The Anti-Commandeering Doctrine 775
New York v. United States 776
Printz v. United States 795
Note on the Anti-Commandeering Doctrine 813

Chapter Eleven. Limits on State Power 821
Section 11.1. The Dormant Commerce Clause 822
Philadelphia v. New Jersey 823
Kassel v. Consolidated Freightways Corp. 830
Note on the "Dormant" Commerce Clause 844
Section 11.2. Congressional Consent, Market Participants, and Alternate Constraints on Discrimination Against Out-of-Staters 847
South-Central Timber Development, Inc. v. Wunnicke 848
United Building & Construction Trades Council v. Mayor and Council of the City of Camden 856
Metropolitan Life Ins. Co. v. Ward 865
Note on the Litigant's Toolkit in Challenges to State Economic Regulation 873
Section 11.3. Federal Preemption of State Law 875
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n 876
Lorillard Tobacco Co. v. Reilly 885
Note on Federal Preemption of State Law 898

Chapter Twelve. The Separation of Powers 905
Federalist No. 47 (James Madison) 906
Federalist No. 48 (James Madison) 909

Note on Separation of Powers and Political Theory 912
Youngstown Sheet & Tube Co. v. Sawyer 914
Note on the *Steel Seizure* Case 934

Chapter Thirteen. Structure of the Political Branches 941
Section 13.1. Nondelegation and the Administrative State 942
A.L.A. Schechter Poultry Corp. v. United States 943
Whitman v. American Trucking Assn's, Inc. 951
Note on Judicial Review of Agencies Exercising Delegated Authority 961
Section 13.2. Altering the Legislative Process 968
Immigration and Naturalization Service v. Chadha 969
Clinton v. City of New York 986
Note on the Legislative Process Cases 1003
Section 13.3. Executive Privileges and Immunities 1006
United States v. Nixon 1006
Note on Executive Privileges and Immunities 1014
Section 13.4. Appointments and the Unitary Executive 1017
Morrison v. Olson 1018
Note on the Independent Counsel and the Unitary Executive 1043

Chapter Fourteen. Military and Foreign Affairs Powers 1049
Section 14.1. Sources of Presidential Power in Foreign Affairs 1050
Proclamation of Neutrality, April 22, 1793 (George Washington) 1051
"Pacificus" No. 1 (Alexander Hamilton) 1052
United States v. Curtiss-Wright Export Corp. 1055
Note on the Sources of Presidential Power in Foreign Affairs 1062
Section 14.2. Congress vs. The President in Foreign Affairs 1069
Zivotofsky v. Kerry 1069
Note on *Zivotofsky* and the Extent of Presidential Power at Its "Lowest Ebb" 1105
Section 14.3. The Power to Use Military Force 1107
Little v. Barreme 1108
The Prize Cases 1111
Durand v. Hollins 1118
National Security Council, The National Security Strategy of the United States of America (September 2002) 1119
Michael D. Ramsey, Textualism and War Powers 1123
Note on the Constitutional Allocation of War Powers 1125
War Powers Resolution 1128
Richard Nixon, Veto Message on the War Powers Resolution 1132
Joint Resolution, Sept. 18, 2001 1134
Joint Resolution, Oct. 16, 2002 1135
Note on Declarations, Authorizations, and Resolutions 1140
Section 14.4. Powers Incident to the Conduct of War 1142
Ex parte Merryman 1143
William H. Rehnquist, All the Laws but One 1149

Hamdan v. Rumsfeld 1155
Note on Presidential Power and Executive Detention and Trial 1176

PART FOUR. LIBERTY AND EQUALITY

Chapter Fifteen. Equal Protection 1183
Section 15.1. Race After *Brown* 1184
Loving v. Virginia 1184
Note on Interracial Marriage and Strict Scrutiny for Racial Classifications 1189
Washington v. Davis 1190
Note on Discriminatory Purpose and Disparate Impacts 1197
Section 15.2. Gender Discrimination 1199
Craig v. Boren 1199
United States v. Virginia 1211
Note on Equal Protection and Gender 1243
Section 15.3. Other Classifications 1245
New York City Transit Authority v. Beazer 1245
City of Cleburne v. Cleburne Living Center 1254
Note on Rational Basis Review and the Identification of Suspect Classifications 1270
Section 15.4. Affirmative Action and "Benign" Racial Classifications 1272
Adarand Constructors, Inc. v. Peña 1274
Note on "Benign" and "Malign" Discrimination 1291
Grutter v. Bollinger 1293
Note on Affirmative Action in Higher Education 1321
Parents Involved in Community Schools v. Seattle School District No. 1 1325
Concluding Note on Affirmative Action 1363
Section 15.5. Equal Protection and Fundamental Rights 1366
Shapiro v. Thompson 1367
San Antonio Independent School District v. Rodriguez 1384
Note on the Fundamental Rights Prong of Equal Protection Doctrine 1411

Chapter Sixteen. Due Process 1417
Section 16.1. Identifying Substantive Rights and Burdens 1417
Michael H. v. Gerald D. 1419
Note on *Michael H.* and the Level of Generality Problem 1436
Washington v. Glucksberg 1438
Note on *Glucksberg* and the Nature of Substantive Due Process Review 1461
Rust v. Sullivan 1463
Note on Individual Rights and Unconstitutional Conditions 1474
Section 16.2. Procedural Due Process 1478
Board of Regents of State Colleges v. Roth 1479
Perry v. Sindermann 1488
Matthews v. Eldridge 1493
Cruzan by Cruzan v. Director, Missouri Dept. of Public Health 1503

Note on Procedural Due Process 1527
Section 16.3. The Revival of Economic Substantive Due Process? 1528
BMW of North America, Inc. v. Gore 1529
Eastern Enterprises v. Apfel 1552
Note on the (Possible) Revival of Economic Substantive Due Process 1575

Chapter Seventeen. Gay Rights and the Relation Between Liberty and Equality 1577
Section 17.1. Initial Skepticism 1577
Bowers v. Hardwick 1578
Note on Gay Rights, Due Process, and Equal Protection 1593
Section 17.2. The Tide Turns—and the Tiers Break Down 1595
Romer v. Evans 1595
Lawrence v. Texas 1614
Note on Gay Rights, Due Process, and Equal Protection 1632
Section 17.3. The Marriage of Equality and Due Process (and Federalism?) 1635
United States v. Windsor 1636
Obergefell v. Hodges 1660
Note on Equality, Liberty, and Federalism in the Recognition of Same-Sex Marriage 1699

INDEX 1705