

TABLE OF CONTENTS

PREFACE TO THE SIXTH EDITION.....	V
TABLE OF CASES.....	XXVII
Chapter 1. A Prologue on Constitutional History	1
Section 1. The Founding Generation: The Constitution and the Bill of Rights, 1787–1791.....	3
Section 2. The Marshall Court’s Nationalist Vision, 1801–1835.....	13
Section 3. States’ Rights, Slavery, and the Taney Court, 1836–1864.....	17
Section 4. Reconstruction and the Ambiguous Triumph of Abolition, 1864–1896.....	21
Section 5. The Labor Movement, Progressivism, and Rights for Women and Blacks, 1896–1937.....	27
Section 6. The New Deal, the Court-Packing Controversy, and the <i>Carolene</i> Court, 1937–1953.....	35
Section 7. The Warren Court and the Triumph of the Civil Rights Movement, 1953–1969.....	42
Section 8. The Nixon-Reagan Court: Conservative Legal Process and Women’s Rights, 1969–2001.....	49
Section 9. The Millennial Court.....	59
Appendix: Recent Justices.....	65
Chapter 2. An Introduction to Constitutional Decisionmaking	73
Section 1. <i>Brown v. Board of Education</i> : A Case Study.....	73
A. The Fourteenth Amendment and Race: 1865–1912.....	74
Plessy v. Ferguson.....	78
Notes on <i>Plessy</i> and the Constitutionality of State-Mandated Racial Segregation.....	81
B. The Road to <i>Brown</i>	84
C. The End of Separate but Equal.....	90
Brown v. Board of Education.....	94
Bolling v. Sharpe.....	98
Notes on <i>Brown</i> , <i>Bolling</i> , and the Role of Judicial Review.....	99
Note on the Influence of <i>Brown</i> on Other Social Movements.....	101
Section 2. The Supreme Court’s Role in Our Political System.....	103
A. Bases for Judicial Review.....	104
Marbury v. Madison.....	105
Notes on <i>Marbury</i> and the Power of Judicial Review.....	110
B. The Court’s Supremacy in Constitutional Interpretation?.....	114
Cooper v. Aaron.....	115
Edwin Meese, III, <i>The Law of the Constitution</i>	117
Note on Whether Officials Are Required to Follow the Supreme Court’s Interpretation of the Constitution?.....	117

C.	After <i>Brown</i> : Evaluation and Critique.....	119
1.	From <i>Brown II</i> to <i>Swann</i>	119
	<i>Swann v. Charlotte-Mecklenburg Board of Education</i>	121
	In <i>Swann's Wake</i> : Notes on Affirmative Remedies in Public Rights Litigation	122
2.	Drawing the Line: From <i>Swann</i> to <i>Pitts</i>	124
	<i>Milliken v. Bradley</i>	126
	<i>Freeman v. Pitts</i>	128
	Note on the Future of <i>Brown I & II</i>	131
3.	Has <i>Brown</i> Made a Difference? A Good Difference?	134
	<i>Parents Involved in Community Schools v. Seattle School</i> District No. 1	138
	A Note on Constitutional Law and Legal Education.....	138
Section 3.	<i>Brown</i> and Theories of Constitutional Decisionmaking.....	139
A.	Original Meaning Theories of Judicial Review	140
1.	Constitutional Text.....	142
2.	Original Context for Constitutional Text.....	148
	Robert H. Bork, <i>The Tempting of America: The Political</i> <i>Seduction of the Law</i>	149
	Problem 2-1: Is <i>Brown</i> Consistent with the Original Meaning of the Fourteenth Amendment?	151
	Note on Pragmatic Arguments for Original Meaning	158
3.	Original Purpose.....	159
	Robert H. Bork, <i>The Tempting of America: The Political</i> <i>Seduction of the Law</i>	159
	Note on Original Purpose and Translating Goals from One Era to the Next.....	160
	Problem 2-2: Does the Original Meaning of the Fourteenth Amendment Bar Sex-Based Discriminations?	162
B.	Legal Process Theories of Judicial Review	163
1.	Neutral Principles and Representation-Reinforcement Theory.....	163
	John Hart Ely, <i>Democracy and Distrust: A Theory of</i> <i>Judicial Review</i>	165
	Notes on Representation Reinforcement and Theories of Political Dysfunction.....	171
	Problem 2-3: Representation-Reinforcing Judicial Review ...	174
2.	Institutional Competence and Theories of Judicial Restraint.....	175
	Alexander M. Bickel, <i>The Least Dangerous Branch: The</i> <i>Supreme Court at the Bar of Politics</i>	176
	Note on the Passive Virtues and Other Theories of Judicial Restraint.....	178
3.	Common Law Constitutionalism	179
	Ernest Young, <i>Rediscovering Conservatism: Burkean</i> <i>Political Theory and Constitutional Interpretation</i>	180

	Note on Pragmatism as Another Resource for Common Law	
	Constitutionalism	182
	Richard A. Posner, <i>The Problems of Jurisprudence</i>	184
C.	Civic Republicanism and Polycentric Constitutionalism.....	185
1.	Social Movements as Engines for Civic Republican	
	Engagement	187
	William N. Eskridge Jr., <i>Some Effects of Identity-Based</i>	
	<i>Social Movements on Constitutional Law in the</i>	
	<i>Twentieth Century</i>	187
	Robin L. West, <i>Constitutional Skepticism</i>	190
	Note on Progressive Constitutionalism.....	192
	Note on Interest Convergence Theory.....	195
2.	Polycentric Constitutionalism	197
	Bruce A. Ackerman, <i>Constitutional Politics/Constitutional</i>	
	<i>Law</i>	198
	Note on the Civil Rights Revolution as a Constitutional	
	Moment.....	199
	Robert Post & Reva Siegel, <i>Legislative Constitutionalism</i>	
	<i>and Section Five Power: Policentric Interpretation of</i>	
	<i>the Family and Medical Leave Act</i>	201
3.	Taking the Constitutional Away from the Courts?	202
	James Bradley Thayer, <i>John Marshall</i>	202
	Mark Tushnet, <i>Taking the Constitution Away from the</i>	
	<i>Courts</i>	203
	Note on Taking the Constitution Away from the Courts	204
	Problem 2-4: The Constitutionality of Gun Control Laws:	
	An Exercise in Constitutional Methodology.....	205
	Chapter 3. The Constitution and Racial Discrimination	217
Section 1.	Racial Classifications After Brown.....	222
A.	Facial Racial Classifications That Disadvantage Minorities or	
	Evidence Racial Hostility	222
	Loving v. Virginia	223
	Notes on <i>Loving</i> and Government Actions Classifying by Race....	227
	Problems Involving Racial Classifications in Law Enforcement	
	and Adoption	231
B.	Facially Neutral Classifications (Discriminatory Intent and	
	Effect)	232
	Yick Wo v. Hopkins	232
	Notes on <i>Yick Wo</i> and Discriminatory Intent.....	234
	Washington v. Davis	239
	Notes on <i>Davis</i> and Proving Discriminatory Intent.....	243
	Problem Concerning Presidential Speech and Discriminatory	
	Intent	248

C.	Concluding Thoughts About Statutes with Discriminatory Effects.....	249
	Charles Lawrence, III, <i>The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism</i>	251
	Note on the Cognitive Turn and Implicit Bias	253
	Problems Concerning Discriminatory Intent.....	254
Section 2.	The State Action Doctrine as a Limit on the Judicial Power to Address Racial Discrimination	256
A.	Introduction	256
B.	The Public/Private Distinction Today	259
1.	Private Actors and Public Functions	259
2.	State Encouragement of or Entanglement with Private Actors.....	264
	Shelley v. Kraemer	264
	Notes on <i>Shelley</i>	267
	Moose Lodge No. 107 v. Irvis	270
	Notes on <i>Moose Lodge</i>	274
3.	The Special Context of the Courtroom	278
	Problem on State Action: Entwinement Revisited	281
Section 3.	The Affirmative Action Controversy: Benign Racial Classifications or Reverse Discrimination?	281
A.	An Introduction to the Debate	281
	Regents of the University of California v. Bakke	282
	Notes on Affirmative Action in a Broader Theoretical Context ...	284
	Thomas Sowell, <i>Civil Rights: Rhetoric or Reality?</i>	285
	Patricia Williams, <i>Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times</i>	287
	Notes on Specific Arguments in the Affirmative Action Debate ...	288
B.	The Evolution of the Modern Case Law and the Road to Strict Scrutiny, 1980–1995.....	290
	Adarand Constructors, Inc. v. Pena	294
	Note on Applying Strict Scrutiny to the Federal Government.....	299
	Note on the Potential Implications of Applying Strict Scrutiny to Statutes Designed to Benefit Victims of Racial Discrimination	299
C.	Revisiting the Diversity Rationale and Admission to State University Professional Schools	302
	Grutter v. Bollinger	302
	Gratz v. Bollinger	313
	Notes on the Michigan Cases.....	314
	Schuette v. Coalition to Defend Affirmative Action	315
	Fisher v. University of Texas at Austin	317
	Notes.....	326
	Problems on Facially Neutral University Admissions Programs Designed to Benefit Racial Minorities.....	326

D.	Student Assignment in K–12 Public Education	327
	Parents Involved in Community Schools v. Seattle School District No. 1	327
	Notes on the Seattle and Louisville School Cases	341
	Problems on Reducing Racial Isolation in Public Schools	349
E.	Facially Neutral Classifications Designed to Benefit Racial Minorities	349
	1. Introduction	349
	2. The Context of Electoral Redistricting.....	353
	Shaw v. Reno.....	355
F.	A Concluding Thought: The Road from <i>Brown</i>	359
 Chapter 4. Sex and Gender Discrimination and Other Equal		
	Protection Concerns	361
Section 1.	Minimal Equal Protection Scrutiny (the Rational-Basis Test)....	362
	Railway Express Agency, Inc. v. New York	364
	Notes on <i>Railway Express</i> and the Rational-Basis Standard	367
	Problem 4-1: Applying Rational-Basis Scrutiny to Driver’s Licensing	371
	Note on the Court’s Application of Heightened Scrutiny to Non-Race Classifications: A “Double Standard”?	371
	United States Department of Agriculture v. Moreno	374
Section 2.	Sex- and Gender-Based Discrimination	375
A.	Women Outside the Constitution: The Traditional Jurisprudence of Difference	375
	Bradwell v. Illinois	377
B.	The Jurisprudence of Equal Treatment and Heightened Scrutiny of Sex-Based Distinctions	382
	Wendy Webster Williams, <i>Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate</i>	384
	1. From Rational Basis to Intermediate Scrutiny (and Beyond?) in Gender Cases.....	385
	Reed v. Reed.....	386
	Frontiero v. Richardson.....	386
	Notes on the Race Analogy and Whether Sex-Based Classifications Should Be Subject to Strict Scrutiny	390
	Craig v. Boren	393
	Note on the Court’s “Middle Tier” Scrutiny	398
	Richard Epstein, <i>The Rule of Sex-Blind Jurisprudence Isn’t Always Fair</i>	398
	Califano v. Webster	399
	J.E.B. v. Alabama ex rel. T.B.	400
	Mississippi University for Women v. Hogan.....	401
	Note on Theories of Cultural Feminism and Sociobiology	402
	United States v. Virginia	404
	Notes on VMI	409

2.	Deference to Traditional Gender Classifications Based upon “Real Differences”	411
	Michael M. v. Superior Court of Sonoma County	411
	Notes on <i>Michael M.</i>	413
	Nguyen v. INS.....	414
	Sessions v. Morales-Santana	416
	Notes on <i>Nguyen</i> and <i>Morales-Santana</i>	419
B.	The Jurisprudence of Equal Treatment and Heightened Scrutiny of Sex-Based Distinctions.....	420
3.	Classifications That Have a Disparate Impact upon Women.....	420
	Geduldig v. Aiello.....	420
	Personnel Administrator of Massachusetts v. Feeney	421
	Notes on <i>Feeney</i> and Discriminatory Impact on Women	423
	Note on Statutory Rights Against Sex and Pregnancy Discrimination in Private and Public Employment	425
	Problem 4-2: Sex Discrimination and Gender Identity.....	426
C.	Critiques of Abstract Equality and the Emergence of a Jurisprudence of Difference	428
	Problem 4-3: Is Sex Segregation in Schools Ever Constitutional?.....	429
	Catharine A. MacKinnon, <i>Toward a Feminist Theory of the State</i>	431
	Notes on Radical and Critical Feminist Theories	434
Section 3.	What Level of Scrutiny for Other “Suspicious” Classifications?	438
A.	Wealth	438
	M.L.B. v. S.L.J.	440
	Notes on Poverty and Access to Court	441
B.	Language and Ethnicity.....	442
	Juan Perea, <i>Buscando América: Why Integration and Equal Protection Fail to Protect Latinos</i>	442
	Hernandez v. New York	444
	Notes on Language- & Ethnicity-Based Discrimination.....	448
	Problem 4-4: Constitutionality of English-Only Laws?	449
C.	Physical or Mental Disability	449
	City of Cleburne v. Cleburne Living Center	450
	Note on <i>Cleburne</i> and Equal Protection Tiers	457
	Heller v. Doe	459
D.	Sexual Orientation	460
	Romer v. Evans.....	461
	Notes on <i>Romer</i> and Its Implications for Judicial Review of Antigay State Policies	469
	Note on Judicial Review of Popular Initiatives and Referenda.....	471
	Problem 4-5: What Tier of Scrutiny for Sexual Orientation Claims?.....	473
	United States v. Windsor	476

Notes.....	481
Problem 4-6: A Ban on Lesbian, Gay or Transgender Grade School Teachers	482
Concluding Note on Equal Protection	483
Chapter 5. Protecting Fundamental Rights	485
Section 1. Should Courts Ever Enforce Unenumerated Rights?.....	485
Note on the Historical Roots of Unenumerated Rights	485
The Slaughter House Cases.....	487
Notes on the Aftermath of the <i>Slaughter House Cases</i>	488
Palko v. Connecticut.....	489
Adamson v. California.....	492
Notes on the Incorporation Debate	496
McDonald v. City of Chicago.....	498
Notes on <i>McDonald's</i> Multiple Approaches.....	507
Skinner v. Oklahoma ex rel. Williamson	508
Notes on <i>Skinner</i> and Protecting Implied Fundamental Rights.....	510
A World Without Implied Fundamental Rights: A Note on the Social Context of <i>Buck v. Bell</i> and <i>Skinner</i>	511
Section 2. Protecting Economic Liberty and Property.....	514
A. Historical Introduction.....	514
B. The Rise and Decline of Liberty of Contract and Substantive Due Process Review.....	516
Lochner v. New York.....	517
Notes on <i>Lochner</i> and the Heyday of Substantive Due Process....	522
West Coast Hotel v. Parrish	524
Williamson v. Lee Optical	525
Section 3. Equal Protection and “Fundamental Interests”	525
A. Voting	528
Reynolds v. Sims.....	530
Notes on <i>Reynolds</i> and the “Fundamental Right” to Vote.....	533
Note on Political Gerrymandering	534
Bush v. Gore.....	538
Notes on <i>Bush v. Gore</i>	542
Crawford v. Marion County Election Bd.....	543
B. Basic Rights for the Least Advantaged.....	545
San Antonio Independent School District v. Rodriguez.....	545
Plyler v. Doe.....	551
Notes on <i>Rodriguez</i> and <i>Plyler</i>	552
Edgewood Independent School District v. Kirby	554
Notes on <i>Edgewood</i> , State Constitutional Protections, and Constitutional Balancing	557
Problem 5-1: Racial Disparities and State Constitutional Law	560
C. The Right to Travel	561
Shapiro v. Thompson.....	561
Saenz v. Roe	562
Notes on <i>Saenz</i>	566

Section 4. Fundamental Privacy Rights	567
Meyer v. Nebraska	568
Note: What Kinds of “Liberty” Are Substantively Protected by the Due Process Clause?.....	570
A. Contraception, Marriage, and Family.....	571
Poe v. Ullman.....	572
Griswold v. Connecticut	575
Notes on <i>Griswold</i> and the Right of Privacy	583
Robert H. Bork, <i>Neutral Principles and Some First Amendment Problems</i>	585
Notes on the Ninth Amendment.....	587
B. Abortion.....	591
Roe v. Wade.....	591
Notes on <i>Roe</i> and the Abortion Controversy.....	596
Reva Siegel, <i>Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection</i> ...	598
Note on Abortion Regulation as Sex Discrimination	599
Note: The Abortion Right from <i>Roe</i> to <i>Casey</i>	600
Planned Parenthood of Southeastern Pennsylvania v. Casey.....	603
Notes on <i>Casey</i> and the Right to Abortion	615
Gonzales v. Carhart.....	620
Whole Woman’s Health v. Hellerstedt	629
Notes.....	638
Problem 5-2: Regulating Abortions	640
C. Consensual Sexual Activity	640
Bowers v. Hardwick.....	641
Lawrence v. Texas	641
Notes on <i>Lawrence</i> and the Future of the Right of Privacy.....	648
D. The Right to Marry.....	650
Obergefell v. Hodges.....	653
Notes.....	667
Problem 5-3: Plural Marriage.....	670
Section 5. The “Right to Die”	671
Washington v. Glucksberg	671
Notes on the “Right to Die” Case.....	679
Problem 5-4: Human Cloning	681
Section 6. Procedural Due Process.....	681
A. Introductory Notes on Procedural Due Process.....	681
Goldberg v. Kelly	685
B. Defining “Liberty” and “Property”.....	686
Board of Regents v. Roth.....	686
Notes on Defining “Property” and “Liberty”	689
C. Defining “What Process Is Due”	691
Mathews v. Eldridge.....	691
Notes on Defining “What Process Is Due”	695
Problem 5-5: Issues of Procedural Due Process.....	697
Caperton v. A.T. Massey Coal Company, Inc.	698

Williams v. Pennsylvania.....	701
Notes on <i>Williams v. Pennsylvania</i>	702
Chapter 6. The First Amendment	703
Section 1. Free Speech and Competing Values	704
Note on the Original Understanding of Freedom of Speech.....	705
Texas v. Johnson	706
R.A.V. v. City of St. Paul.....	707
Notes on <i>Johnson</i> and <i>R.A.V.</i>	710
Notes on First Amendment Values	711
United States v. Stevens.....	713
United States v. O'Brien.....	714
Reed v. Town of Gilbert.....	714
Notes on <i>Reed</i>	715
National Institute of Family and Life Advocates [NIFLA] v. Becerra	716
Notes on <i>NIFLA v. Becarra</i>	721
Problem 6-1.....	721
Section 2. Regulation of Political Expression	722
A. Illegal Advocacy	722
Masses Publishing Co. v. Patten	723
Schenck v. United States	724
Abrams v. United States	725
A Note on Subversive Speech from 1920–1960	727
Gitlow v. New York	728
Whitney v. California	728
Dennis v. United States	730
Brandenburg v. Ohio.....	731
Notes on <i>Brandenburg</i>	733
Virginia v. Black	734
Notes on <i>Virginia v. Black</i>	736
Holder v. Humanitarian Law Project.....	737
B. Defamation and Other Torts	738
New York Times Co. v. Sullivan.....	738
Gertz v. Robert Welch, Inc.	742
Notes on Post-New York Times Developments in Defamation Law	742
United States v. Alvarez	744
Notes on <i>Alvarez</i>	745
Bartnicki v. Vopper	746
Hustler Magazine v. Falwell.....	747
Snyder v. Phelps	747
C. Campaign Expenditures	748
Buckley v. Valeo	749
Note on Campaign Finance Regulation After <i>Buckley v. Valeo</i>	749
McConnell v. Federal Election Commission	751
Notes on <i>McConnell</i>	754

	Citizens United v. Federal Election Commission	755
	Notes on the First Amendment and Campaign Finance Laws	760
Section 3.	Cultural Discourse and Intergroup Relations.....	762
A.	Sexuality and Gender.....	763
	Miller v. California	763
	Notes on Regulating Sexually Explicit Writings and Videos	765
	City of Renton v. Playtime Theatres, Inc.....	766
	Barnes v. Glen Theatre, Inc.....	766
	City of Erie v. Pap's A.M.	767
B.	Fighting Words, Captive Audiences, and Hate Speech	768
	Cohen v. California.....	768
	Notes on <i>Cohen</i> and Offensive Speech	771
	1. An Exception for Hate Speech?.....	772
	Beauharnais v. Illinois	772
	Wisconsin v. Mitchell.....	773
	Note on the Hate Speech Debate	774
	Problem 6-2: University Regulation of Discriminatory Harassment	777
	2. Offensive Speech in the Electronic Media.....	778
	Federal Communications Commission v. Pacifica Foundation	779
	Note on Sexual Content in Electronic Media	780
	Brown v. Entertainment Merchants Association	781
	Note on <i>Entertainment Merchants</i>	785
	Packingham v. North Carolina	786
	Notes on Commercial Speech.....	787
Section 4.	Speech with a Government Nexus.....	789
A.	Public Forum Doctrine	789
	United States v. Grace	790
	Hill v. Colorado.....	791
	McCullen v. Coakley.....	792
	Notes on <i>McCullen</i>	796
	Notes on <i>Grace</i> , <i>Hill</i> , and the Traditional Public Forum.....	796
	Ward v. Rock Against Racism.....	797
	Notes on <i>Rock Against Racism</i> and Time, Place and Manner Regulation	799
	Perry Educ. Ass'n v. Perry Local Educators' Ass'n	799
	Matal v. Tam.....	801
	Notes on the Implications of <i>Matal</i>	804
B.	Government-Supported Speech	805
	Note on Public Employee Speech	805
	Janus v. American Federation of State, County, and Municipal Employees	806
	Rust v. Sullivan	808
	Agency for International Development v. Alliance for Open Society Int'l, Inc.	811
	Notes.....	816

Process-Based Protections for Speech.....	816
New York Times Co. v. United States.....	818
Section 5. Freedom of Association.....	823
NAACP v. Claiborne Hardware Co.	823
Board of Directors of Rotary International v. Rotary Club of Duarte	824
Boy Scouts of America v. Dale	826
Note: Can <i>Rotary/Roberts</i> and <i>Dale</i> Be Reconciled?	827
Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)	828
Note on <i>FAIR</i>	829
Christian Legal Society Chapter v. Martinez.....	830
Notes on <i>Christian Legal Society</i> and the Limited Public Forum.....	831
Section 6. The Religion Clauses	832
Stansbury v. Marks	833
Notes on <i>Stansbury</i>	833
Wisconsin v. Yoder	835
Notes on <i>Yoder</i> and Religious Exemptions	836
Employment Division, Department of Human Resources v. Smith.....	837
Notes on <i>Smith</i> and Free Exercise	840
Note on the Historical Debate over <i>Smith</i> in the <i>Boerne</i> Opinions	840
Church of the Lukumi Babalu Aye, Inc. v. Hialeah.....	842
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC ...	843
Notes on <i>Hosanna-Tabor</i>	844
Masterpiece Cakeshop v. Colorado Civil Rights Comm’n.....	846
Notes on Religious Liberty-LGBTQI Equality Clashes	852
Problem 6-3 First Amendment Rights of Religious Traditionalists? ...	854
Everson v. Board of Education	855
Wallace v. Jaffree	859
Notes on <i>Everson</i> , <i>Jaffree</i> , and Establishment Clause Analysis.....	860
Note on Establishment Clause Tests	861
Chapter 7. Federalism: Congressional Power and State Authority.....	865
Section 1. Enumerated Federal Power, Reserved State Authority:	
Introduction	865
McCulloch v. Maryland	866
Notes on Constitutional Reasoning in <i>McCulloch</i> : Original Intent or Meaning, Constitutional Structure, Representation Reinforcement.....	876
U.S. Term Limits, Inc. v. Thornton.....	878
United States v. Comstock.....	880
Notes on Theories of Federal/State Sovereignty and on the Advantages of a Federal Arrangement	881
Problem 7-1: Federal Insurance Regulation.....	884
Note on the Framers’ Discussions of Congress’s Powers	885
Section 2. Congressional Power Under the Commerce Clause	888
Problem 7-2: Regulation of Public Accommodations.....	888

Gibbons v. Ogden.....	888
Notes on <i>Gibbons</i> and Commerce Clause Limits on National Power ...	892
Note on Enumerated Powers and Dual Federalism as Strong Limitations on Congressional Authority.....	895
Note on the New Deal's Early Difficulties Meeting Commerce Clause Scrutiny, 1934–36.....	898
National Labor Relations Board v. Jones & Laughlin Steel Corp.	900
United States v. Darby	901
Wickard v. Filburn	904
Note on Civil Rights and Federalism.....	905
Heart of Atlanta Motel v. United States.....	906
Katzenbach v. McClung	908
Note on the Post-New Deal Commerce Clause and Civil Rights Decisions	909
United States v. Lopez	909
Notes on <i>Lopez</i> and the Commerce Clause's New Teeth	917
Problem 7-3: The Reach of Commerce Clause Power After <i>Lopez</i>	919
Section 3. Congressional Authority to Promote Civil Rights	919
A. Congressional Authority Vested by the Reconstruction Amendments.....	920
The Civil Rights Cases	921
Notes on the Civil Rights Cases	926
Jones v. Alfred H. Mayer Co.	928
Note on <i>Alfred H. Mayer</i> and Congress's Thirteenth Amendment Power	930
Note on the Voting Rights Act of 1965.....	930
South Carolina v. Katzenbach	931
Katzenbach v. Morgan	932
Note on the Remedial vs. the Substantive Theory of Congress's Enforcement Power	936
Oregon v. Mitchell	936
Note on the Voting Rights Act's Effects Test.....	938
Problem 7-4: Legislative Factfinding: Fourteenth Amendment "Persons"	940
Note on the Religious Freedom Restoration Act of 1993	941
City of Boerne v. Flores.....	941
Notes on <i>Boerne</i> and Congressional Power to Enforce the Fourteenth Amendment.....	949
B. Congressional Power and the Eleventh Amendment.....	952
1. An Overview of the Eleventh Amendment	952
2. May Congress Abrogate States' Eleventh Amendment (or Article III) Immunity?.....	954
Seminole Tribe of Florida v. Florida.....	954
Alden v. Maine	956
Notes on the Elastic Eleventh Amendment.....	957
3. Congress's Fourteenth Amendment Authority to Abrogate State Eleventh Amendment Immunity After <i>Boerne</i>	960

C.	Congressional Power to Respond to Discrimination Against Women and to Protect Fundamental Rights	963
	United States v. Morrison	963
	Notes on <i>Morrison</i> and the Values of Federalism	972
	Nevada Department of Human Resources v. Hibbs	974
	Tennessee v. Lane	976
	Coleman v. Court of Appeals of Maryland	979
	Notes on <i>Hibbs</i> , <i>Lane</i> , and <i>Coleman</i>	980
	Shelby County, Alabama v. Holder	982
	Notes on <i>Shelby County</i>	990
Section 4.	Beyond the Commerce and Civil Rights Enforcement Powers	992
A.	Taxing Power	992
B.	Spending Power	993
	South Dakota v. Dole.....	995
	Notes on <i>Dole</i> and Conditional Federal Spending.....	999
	Problem 7-5: Spending Clause and the Solomon Amendment	1001
C.	The Treaty Power	1002
	Missouri v. Holland	1002
	Notes on the Treaty Power and Original Meaning	1005
	Bond v. United States	1008
Section 5.	Intergovernmental Immunities and Congressional Power	1010
A.	State Immunity from Direct National Regulation	1011
	National League of Cities v. Usery.....	1011
	Note on the Constitutional Experiment in <i>National League of Cities</i>	1013
	Garcia v. San Antonio Metropolitan Transit Authority.....	1013
	Note on <i>Garcia</i> : Should the Court Abstain from Enforcing Federalism-Based Limits on Congress?	1019
	Note on Intergovernmental Tax Immunities.....	1021
	South Carolina v. Baker.....	1022
B.	State Immunity from National Commandeering	1023
	New York v. United States	1023
	Notes on <i>New York</i> and Process Federalism	1032
	Saikrishna Prakash, <i>Field Office Federalism</i>	1034
	Printz v. United States.....	1035
	Notes on <i>Printz</i> , Federalism, and Original Meaning	1042
	Problem 7-6: Federalism Values in the Marriage Equality Cases.....	1044
	Reno v. Condon	1046
	Murphy v. NCAA	1048
	Problem 7-7 How Far Do the Anti-Commandeering Precedents Reach?.....	1050
	Note on Federal Regulation of State Process	1050
	Problem 7-8: What Precedents Ought to Be Overruled?	1051
C.	Summing up Federalism Doctrine: The Affordable Care Act Case	1053
	National Federation of Independent Business v. Sebelius	1053

Notes on the Affordable Care Act Case.....	1072
Problem 7-9: Does the ACA Survive the Repeal of the Mandate?.....	1078
Section 6. Nationalist Limitations upon State Regulatory Authority	1078
A. Constitutional Principles, Policies, and History	1078
Gibbons v. Ogden.....	1080
Note on Federalism as a Limit on State Power.....	1083
Cooley v. Board of Wardens of the Port of Philadelphia.....	1084
Note on the Dormant Commerce Clause After <i>Cooley</i>	1085
Notes on Why the Court Might Enforce the “Dormant” Feature of the Commerce Clause.....	1086
B. Dormant Commerce Clause Doctrine.....	1089
1. Discrimination Against Interstate Commerce.....	1089
City of Philadelphia v. New Jersey	1092
Notes on <i>City of Philadelphia</i> and the Court’s Policing Discriminations Against Commerce	1096
Note on the Post- <i>Philadelphia</i> Waste Cases	1099
United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority.....	1100
Notes on <i>United Haulers</i> and the Kentucky Bonds Case ...	1103
Note on State Taxation of Interstate Commerce	1104
Comptroller of the Treasury of Maryland v. Wynne	1105
South Dakota v. Wayfair, Inc.....	1108
Note on State Laws Having Extraterritorial Effect	1110
2. State Rules Burdening Interstate Commerce.....	1111
Kassel v. Consolidated Freightways Corp.	1113
Notes on <i>Kassel</i> and Judicial Evaluation of State Laws Burdening Interstate Commerce	1118
Problem 7-10: Should <i>Pike</i> and <i>Kassel</i> Be Overruled?.....	1121
3. Exceptions to Dormant Commerce Clause Review	1121
Granholt v. Heald	1121
Note on the Market-Participant Exception.....	1123
West Lynn Creamery, Inc. v. Healy	1125
Should State Subsidies Be Exempted from Dormant Commerce Clause Regulation?	1126
C. Should the Dormant Commerce Clause Be Laid to Rest? Alternate Limitations on the States.....	1127
Camps Newfound/Owatonna, Inc. v. Town of Harrison.....	1127
1. The Import-Export Clause	1128
2. The Privileges and Immunities Clause	1129
Notes Contrasting the Dormant Commerce Clause and the Privileges and Immunities Clause.....	1130
3. The Supremacy Clause and Preemption	1132
Arizona v. United States	1133
Notes on the <i>Arizona</i> Immigration Case.....	1142
Problem 7-11: What State and Local Laws Survive <i>Arizona v. United States</i> ?	1144

Chapter 8. Separation of Powers	1147
Gerhard Casper, <i>An Essay in Separation of Powers: Some Early Versions and Practices</i>	1155
Note on Early Interactions Between the Branches of the Government, 1790–1798	1160
Section 1. Issues of Executive Aggrandizement (Imperial Presidency).....	1162
A. The Post-New Deal Framework	1164
Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)	1164
Note on Frameworks for Thinking About Separation of Powers Issues	1174
National Labor Relations Board v. Noel Canning.....	1178
B. Foreign Relations and War	1182
United States v. Curtiss-Wright Export Corp.	1182
Note on the Vesting Clause Thesis for Presidential Primacy in Foreign Affairs	1183
1. Presidential Authority to Make or Enforce Binding International Commitments	1186
United States v. Belmont	1187
Dames & Moore v. Regan	1188
Note on Executive Agreements as “Law of the Land”	1189
Medellín v. Texas.....	1190
Note on the ICJ Judgment Case and the Foreign Affairs Vesting Thesis	1193
2. President’s Commander-in-Chief Authority	1195
Problem 8-1: Is the War Powers Resolution Constitutional?	1199
3. Presidential Authority in Foreign Relations and Immigration	1206
Zivotofsky v. Kerry	1206
Problem 8-2: Presidential Deferral of Deportation of Undocumented Immigrants	1211
C. Executive Privileges and Immunities	1212
United States v. Nixon	1212
Notes on Executive Privileges and the Nixon Tapes Case	1218
Nixon v. Administrator of General Services	1219
Problem 8-3: Executive Privilege and Congressional Deliberations	1220
Nixon v. Fitzgerald	1224
Clinton v. Jones	1225
Notes on the Presidential Immunity Cases	1226
Problem 8-4: Subjecting a President to Criminal Prosecution?	1228
Note on Congress’s Impeachment Power: The Case of William Jefferson Clinton.....	1229
Problem 8-5: Can a President Be Impeached for Abuse of Pardons?	1231

Section 2. Issues of Legislative Overreaching	1231
A. “Excessive” Congressional Delegations and the Article I, Section 7 Structure for Lawmaking	1233
1. The Decline and Potential Revival of the Nondelegation Doctrine	1234
Mistretta v. United States	1236
Whitman v. American Trucking Ass’ns.....	1238
The Nondelegation Doctrine and Canons of Statutory Interpretation.....	1238
Problem 8-6: The Attorney General’s Authority to Preempt State Aid-in-Dying Laws	1239
Problem 8-7: An Opportunity for the Supreme Court to Give Teeth to the Nondelegation Doctrine.....	1241
2. The Legislative Veto	1242
Immigration & Naturalization Service v. Chadha	1243
Notes on <i>Chadha</i> and Constitutional Formalism.....	1252
Note on Severability	1254
3. The Line Item Veto	1256
Clinton v. City of New York	1257
Notes on <i>Clinton v. City of New York</i>	1263
B. Congressional and Presidential Power to Control “Executive” Officials	1265
Myers v. United States.....	1265
Humphrey’s Executor v. United States.....	1266
Buckley v. Valeo	1267
Bowsher v. Synar.....	1268
Notes on <i>Myers</i> Through <i>Bowsher</i> : The Supreme Court’s Unsteady Path	1273
Note on the Constitutionality of Independent Agencies	1275
Peter L. Strauss, <i>The Place of Agencies in Government:</i> <i>Separation of Powers and the Fourth Branch</i>	1276
Morrison v. Olson	1277
Notes on Constitutional Formalism and the Independent Counsel Case.....	1282
Steven G. Calabresi & Saikrishna B. Prakash, <i>The President’s</i> <i>Power to Execute the Laws</i>	1285
Note on the Unitary Executive Thesis	1286
Free Enterprise Fund, Inc. v. Public Company Accounting Oversight Board.....	1287
PHH Corp. v. Consumer Financial Protection Bureau	1291
Note: Should the Court Overrule One of Its Removal Precedents?	1295
Problem 8-8: Presidential Review of Independent Agency Rules	1296
C. Congressional Structuring of Adjudication	1296
1. Assigning Article III Judges Nonjudicial Duties	1297
Mistretta v. United States	1297

Note on <i>Mistretta</i> and Junior Varsity Lawmakers.....	1300
2. Assigning Adjudicative Tasks to Non-Article III Judges.....	1301
Northern Pipeline Co. v. Marathon Pipe Line Co.	1302
Commodity Futures Trading Commission v. Schor	1303
Note on <i>Schor</i>	1305
Ex Parte Quirin	1305
Lucia v. Securities and Exchange Commission	1308
3. Congressional Attempts to Alter Valid Article III Judgments.....	1309
Section 3. Separation of Powers, Due Process, Religion, and the War on Terror	1309
Philip Bobbitt, <i>Terror and Consent: The Wars for the Twenty-First Century</i>	1309
Hamdi v. Rumsfeld.....	1312
Notes on <i>Hamdi</i> and the War on Terror.....	1324
Problem 8-9: Criminal Responsibility for Torture of Prisoners?	1328
Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, <i>Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A</i>	1329
Rasul v. Bush.....	1332
Note on the New Statutory Processes for Guantanamo Detainees.....	1333
Boumediene v. Bush.....	1335
Notes on <i>Boumediene</i> and the Application of Habeas to Noncitizen Detainees.....	1339
Problem 8-10: President Trump’s Anti-Terror Authority.....	1342
Trump v. Hawaii	1345
Notes on the Travel Ban Case and Judicial Review of Presidential Authority Touching National Security.....	1354
Chapter 9. Limits on the Judicial Power.....	1359
Section 1. The Political Question Doctrine	1360
Luther v. Borden	1361
Giles v. Harris	1361
Colegrove v. Green	1362
Gomillion v. Lightfoot	1363
Baker v. Carr	1364
Note on <i>Baker v. Carr</i>	1367
Notes on the Political Question Doctrine Since <i>Baker</i>	1367
Nixon v. United States.....	1371
Zivotofsky v. Clinton	1377
Problem 9-1: The Case of the Gulf War	1378
Problem 9-2: The Case of the Senate-Originated Revenue Bill	1379
A Note on Political Questions and the Guarantee Clause.....	1379
Section 2. “Cases” or “Controversies”.....	1380
Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville.....	1390
Note on Taxpayer Standing.....	1391

Note on Third-Party Standing.....	1391
Lujan v. Defenders of Wildlife.....	1393
Notes on <i>Defenders of Wildlife</i> and Standing to Enforce Statutes.....	1396
Federal Election Commission v. Akins.....	1399
Massachusetts v. EPA.....	1400
Notes on <i>Massachusetts v. EPA</i>	1406
Summers v. Earth Island Institute.....	1407
Clapper v. Amnesty International.....	1408
Notes on <i>Clapper</i>	1412
Note on Standing Claims Based on Political Roles.....	1413
Hollingsworth v. Perry.....	1414
United States v. Windsor.....	1415
Problem 9-3: Can Congress Sue the President?.....	1417
Spokeo, Inc. v. Robins.....	1418
Notes on <i>Spokeo</i>	1421
Notes.....	1422
Section 3. Remedial Limitations.....	1423
Missouri v. Jenkins (<i>Jenkins II</i>).....	1423
Notes on <i>Jenkins II</i> and Structural Injunctions.....	1424
Missouri v. Jenkins (<i>Jenkins III</i>).....	1426
Brown v. Plata.....	1428
Notes on <i>Brown</i> and Article III.....	1431
Boumediene v. Bush.....	1432
Note on <i>Boumediene</i> and Prudential Limits.....	1434
Section 4. Congressional Control of Jurisdiction.....	1435
Plaut v. Spendthrift Farm, Inc.....	1435
Problem 9-4: Congressional Efforts to Strip Federal Courts of Authority to Require Busing as a Remedy for <i>Brown</i> Violations.....	1438
Ex Parte McCardle.....	1440
Felker v. Turpin.....	1442
Notes on <i>McCardle</i> and Congress's Authority to Restrict the Supreme Court's Jurisdiction.....	1442
Note on Congress's Power to Restrict the Jurisdiction of Inferior Federal Courts.....	1444
Concluding Thoughts on the Supreme Court and American Society.....	1445
Appendix 1. The Constitution of the United States.....	1449
Appendix 2. Constitutional Ratification Materials.....	1467
INDEX.....	1481