# Contents

Preface to the Sixth Edition xxxi  
Preface to the Fifth Edition xxxiii  
Preface to the Fourth Edition xxxv  
Preface to the Third Edition xxxvii  
Preface to the Second Edition xxxix  
Preface to the First Edition xli  
The Constitution of the United States xliii

## I THE ROLE OF THE COURTS IN CONSTITUTIONAL INTERPRETATION 1

### 1 Judicial Review and Constitutional Structure 3

A. The Origins and Theory of Judicial Review 3  
   *Marbury v. Madison* 7  
   Notes 15  
2. Judicial Exclusivity in Constitutional Interpretation? 21  
   *Cooper v. Aaron* 22  
   Note 23  
B. The Power to Review State Court Judgments 25  
   *Martin v. Hunter’s Lessee* 27  
   Notes 31  
C. The Adequate and Independent State Grounds Doctrine 34  
   *Michigan v. Long* 34  
   Notes 35
D. The Utility of Judicial Review 36
   1. Counter-Majoritarian Role 37
   2. Avoiding the Counter-Majoritarian Problem 38
   3. Stability 38
   4. Entrenched Error 39
   5. Erosion of Constitutional Responsibility by the Political Branches 39
E. Methods of Constitutional Interpretation 40
   1. Interpretation or Imagination? 40
      Calder v. Bull 40
      Notes 41
   2. The Textual Method 42
   3. Historical Argument 43
      a. Original Intent 43
      b. Original Meaning 43
      c. The “Vectors” of History 43
   4. Structural Arguments 45
   5. Doctrinal Arguments 45
   6. Prudential Arguments 46
   7. Cultural Arguments 46
   8. Constitutional Interpretation Versus Constitutional Implementation 47
F. The Uneven Nature of Judicial Review: Tiered Review and the Unequal Status of Constitutional Claims 48

2 Doctrines Limiting the Scope of Judicial Review 53

A. Direct Political Controls: Amendment, Appointment, and Impeachment 53
   1. Amendment 54
      a. Non-contemporaneous Ratification 54
      b. Convention Calls 55
      c. Rescission Before Ratification 55
      d. “Unconstitutional” Amendments? 56
   2. Appointment 56
   3. Impeachment 58
B. Congressional Power to Control the Jurisdiction of the Federal Courts 59
   1. Power to Establish Federal Courts 60
   2. Exceptions to and Regulations of Supreme Court Appellate Jurisdiction 60
      Ex parte McCardle 60
      Notes 62
a. “External” Limits on Congressional Power to Curtail the Supreme Court’s Appellate Jurisdiction 63
b. “Internal” Limits on Congressional Power to Curtail the Supreme Court’s Appellate Jurisdiction 64

3. Limitations on Congressional Control of the Jurisdiction of Inferior Federal Courts 65
   a. The Mandatory Federal Jurisdiction Position 66
   b. The Discretionary Position 67
   c. The Irrelevance of Motive 68

4. Limitations on Congressional Power to Curtail the Jurisdiction of All Federal Courts 68

   *United States v. Klein*

   Notes 69

C. Justiciability: The Proper Role of Federal Courts 73
   1. Advisory Opinions 74

      *The Correspondence of Jefferson and the Justices*

      Notes 75
   2. Standing to Sue 77
      a. The Constitutional Core of Standing 78

      *Lujan v. Defenders of Wildlife*

      Notes 83

      *Massachusetts v. Environmental Protection Agency*

      Notes 100
      b. “Prudential” or Non-constitutional Standing Rules 104
         i. Third-Party Standing 105
         ii. The “Zone of Interests” Requirement 105
      c. Organizational Standing 106
   3. Ripeness and Mootness 106
      a. Ripeness 106
      b. Mootness 107
   4. Political Questions 108

      *Nixon v. United States*

      Notes 110

II ENFORCING THE CONSTITUTIONAL ALLOCATION OF GOVERNMENT POWER 123

A. Who Should Decide Federalism Issues? 124
B. What Is the Purpose or Value of Federalism? 125
   1. The Liberty of Individual Choice 125
   2. Experimental Laboratories 126
   3. Thwarting Tyranny 126
3. The Limits of Federal Legislative Power: Judicially or Politically Enforceable Federalism? 131

A. Implementing Enumerated Powers and “Default” Rules 131
   1. Implementing Enumerated Powers: The “Necessary and Proper Clause” 131
      *McCulloch v. Maryland* 131
      Notes 139
   2. Implying “Default” Rules for Federal and State Power 143
      *McCulloch v. Maryland* 143
      Notes 146
      *U.S. Term Limits, Inc. v. Thornton* 148
      Note 155

B. Commerce 155
   1. Origins, Development, and the New Deal “Revolution” 156
      *Gibbons v. Ogden* 156
      Notes 159
      *NLRB v. Jones & Laughlin Steel Corp.* 169
      Notes 172
      *Wickard v. Filburn* 172
      Notes 174
   2. The “Counter-Revolution” 175
      *United States v. Lopez* 175
      Notes 182
      *Gonzales v. Raich* 186
      Notes and Problems 193
      *National Federation of Independent Business v. Sebelius* 196

3. Limits Imposed by Principles of State Autonomy 200
   a. Substantive Immunity 201
   b. Procedural Immunity 202
      Notes 205
      *Murphy v. National Collegiate Athletic Association* 207
      Notes, Questions, and Problems 215

C. Taxation 217
   *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)* 218
   Notes 220
   *National Federation of Independent Business v. Sebelius* 222
4 Limiting the Scope of State Power over Interstate Commerce 253

A. The Dormant Commerce Clause 254
1. Introduction 254
   a. Theory 254
   b. Doctrinal History 255
      Cooley v. Board of Wardens 257
      Note 259
   c. Modern Doctrine 260
2. Discrimination Against Interstate Commerce 261
   Philadelphia v. New Jersey 262
   Notes 266
3. Neutral Burdens on Interstate Commerce 269
   Southern Pacific Co. v. Arizona 270
   Kassel v. Consolidated Freightways Corp. 273
   Notes 282
4. Facially Neutral Regulations with Discriminatory Effects on Interstate Commerce 287
   Dean Milk Co. v. Madison 288
   Notes 290
   a. Assessing Discriminatory Effects 291
      Note 294
      Exxon Corp. v. Governor of Maryland 294
      Note 296
   b. Assessing Discriminatory Purposes 296
      West Lynn Creamery, Inc. v. Healy 296
      Notes and Problems 301
5. States as “Market Participants”: An Exception to the Dormant Commerce Clause  

_South-Central Timber Development, Inc. v. Wunnicke_ 303  
Notes 308

B. The Privileges and Immunities Clause of Article IV 312  

_United Building & Construction Trades Council v. City of Camden_ 313  
Notes and Problems 318

C. Preemption and Consent: Congress has the Final Word 321  
1. Preemption 321  
   Notes 323  
2. Consent to State Regulation of Interstate Commerce 326

D. State Taxation of Interstate Commerce 329  
   Notes 329

5. **Separation of Powers** 333

A. The Reasons for Separated Powers 333

B. Executive Action 335  
1. In Domestic Affairs 335  
   _Youngstown Sheet & Tube Co. v. Sawyer_ 335  
   _The Steel Seizure Case_ 335  
   Notes and Problem 346  
   a. The Appointment Power 347  
      _Morrison v. Olson_ 347  
      Notes 351  
   b. The Removal Power 353  
      _Morrison v. Olson_ 354  
      Notes 357  
2. In Foreign Affairs 360  
   a. General Principles 361  
      _United States v. Curtiss-Wright Export Corp._ 361  
      Notes 363  
      _Trump v. Hawaii_ 364  
      _Zivotofsky v. Kerry_ 371  
      Notes and Questions 377  
      _Dames & Moore v. Regan_ 377  
      Note 381  
   b. War 382  
      _The Prize Cases_ 382  
      Note 383  
      _The War Powers Resolution_ 384  
      Notes 386  
   c. Treaties and Executive Agreements 396
C. Legislative Action and the Administrative State 399
   1. General Themes 399
      Mistretta v. United States 400
      Morrison v. Olson 406
      Note 409
   2. Specific Limits 410
      a. Nondelegation 410
         Mistretta v. United States 410
         Notes 412
      b. Bicameralism and Presentment 414
         INS v. Chadha 414
         Notes 421
         Clinton v. City of New York 422
D. Immunities and Privileges 428
   1. Legislative Immunities 428
   2. Executive Immunities 429
      Clinton v. Jones 431
      Note 434
   3. Executive Privilege 435
      United States v. Nixon 435
      Note 438

III INDIVIDUAL RIGHTS: LIMITS ON THE USE OF GOVERNMENTAL POWER 441

6 Due Process 445

A. Procedural Due Process 446
   1. Defining the Interests Protected by Due Process 446
      a. Property 447
         Cleveland Board of Education v. Loudermill 448
         Notes 451
      b. Liberty 452
   2. Determining the Process That Is Due 454
      Mathews v. Eldridge 455
      Notes 458
B. Substantive Due Process 461
   1. The Incorporation Doctrine 462
      Slaughter-House Cases 464
      Notes 469
   2. The Rise and Fall of Economic Rights as the Substance of Due Process 474
      Lochner v. New York 476
      Notes 480
3. The Modern Revival: “Privacy” Rights
   a. Origins: Contraceptive Use
      Griswold v. Connecticut 488
      Notes 495
   b. Abortion
      Roe v. Wade 498
      Notes 502
      Planned Parenthood of Southeastern Pennsylvania v. Casey 508
      Notes 517
      Whole Woman’s Health v. Hellerstedt 517
      Notes and Problem 524
      Gonzales v. Carhart; Gonzales v. Planned Parenthood Federation of America 526
      Notes 532
   c. Family Relationships
      Moore v. City of East Cleveland 534
      Notes and Problems 537
   d. The Right to Die
      Cruzan v. Director, Missouri Department of Health 540
      Notes 544
      Washington v. Glucksberg 545
      Notes 548
   e. Consensual Sexual Choices
      Lawrence v. Texas 551
      Notes 557
   f. Marriage
      Obergefell v. Hodges 560
      Notes and Questions 566
   g. Other Asserted Privacy or Autonomy Interests 567

7 Economic Rights: The Takings and Contracts Clauses 569

A. The Takings Clause
   1. The Public Use Requirement
      Hawaii Housing Authority v. Midkiff 571
      Notes 573
      Kelo v. City of New London 574
      Notes and Problems 580
   2. Regulatory Takings: When Does Regulation Become a Taking?
      a. Early Approaches
         Pennsylvania Coal Co. v. Mahon 582
         Notes 584
Miller v. Schoene 586
Questions 587

b. The Categorical Approach 587
Lucas v. South Carolina Coastal Council 587
Horne v. Department of Agriculture 594
Note 598

Lucas v. South Carolina Coastal Council 587

Horne v. Department of Agriculture 594

Note 598

3. Conditional Regulatory Takings 612
Nollan v. California Coastal Commission 612
Dolan v. City of Tigard 615
Notes 618

B. The Contracts Clause 619
Home Building & Loan Association v. Blaisdell 621
Note 624

1. Public Contracts After Blaisdell 629
United States Trust Co. v. New Jersey 625
Note 628

2. Private Contracts After Blaisdell 629
Allied Structural Steel Co. v. Spannaus 629
Energy Reserves Group, Inc. v. Kansas Power & Light Co. 631
Notes and Problems 632

8 Equal Protection 635

A. Overview 635
1. Levels of Judicial Scrutiny 636
2. Classifications and Objectives 637
3. Categorizing Classifications 639

B. Minimal Scrutiny: The Default Level of Review 641
Railway Express Agency, Inc. v. New York 641
Notes 643
United States Railroad Retirement Board v. Fritz 645
Note 649

2. Ends: What Purposes Are Not Legitimate? 649
United States Department of Agriculture v. Moreno 649
Romer v. Evans 651
Notes 655
3. “Enhanced” Minimal Scrutiny: Is the Problem Means, Ends, or Both? 657
   City of Cleburne, Texas v. Cleburne Living Center, Inc. 657
   Notes 661
   Plyler v. Doe 662
   Notes 666
C. Strict Scrutiny and Suspect Classifications: Race and Ethnicity 667
   1. Overview 667
   2. Purposeful Discrimination Required 670
      Washington v. Davis 671
      Notes 673
   3. Official Racial Segregation 678
      a. The Road to Brown 678
      b. The End of “Separate But Equal” 680
         Brown v. Board of Education of Topeka (Brown I) 680
         Notes 681
   4. Affirmative Action 687
      a. First Views: Bakke 687
         Regents of the University of California v. Bakke 687
      b. General Principles 694
         City of Richmond v. J.A. Croson Co. 694
         Note 700
         Adarand Constructors, Inc. v. Pena 701
         Notes and Problems 704
      c. Public Universities and Public Schools 706
         Grutter v. Bollinger 706
         Gratz v. Bollinger 718
         Note and Problem 721
         Fisher v. University of Texas at Austin (Fisher II) 722
         Notes 730
         Parents Involved in Community Schools v. Seattle School District No. 1; Meredith v. Jefferson County Board of Education 732
         Problem 740
   5. Race and the Political Process 740
      Hunter v. Erickson 741
      Washington v. Seattle School District 743
      Notes 747
      Schuette v. Coalition to Defend Affirmative Action 748
D. Strict Scrutiny and Suspect Classifications: Lawful Resident Aliens 756
   Sugarman v. Dougall 756
   Notes 759
E. Intermediate Scrutiny: Sex and Illegitimacy 760
   Craig v. Boren 761
   Notes 765
   Michael M. v. Superior Court of Sonoma County 766
### Contents

- **Rostker v. Goldberg** 769
- Notes 770
- **United States v. Virginia** 772
- Notes 780

**F. Fundamental Rights: Strict Scrutiny Redux** 784

1. **Introduction** 784
   - **San Antonio Independent School District v. Rodriguez** 785
   - Notes 789

2. **Voting: Denial** 790
   - **Harper v. Virginia State Board of Elections** 790
   - Notes 791
   - **Crawford v. Marion County Election Board** 795
   - Note and Problem 800

3. **Voting: Dilution** 800
   - **Reynolds v. Sims** 800
   - **Bush v. Gore** 803
   - Notes 804

4. **Voting: Gerrymanders** 805
   - **Davis v. Bandemer** 806
   - Notes 807
   - **Shaw v. Reno** 813
   - Notes 816

5. **Access to Courts** 818
   a. **Criminal Litigation** 818
   b. **Civil Litigation** 820
      - **M.L.B. v. S.L.J.** 821
      - Note 823

6. **Penalties on the Right of Interstate Migration** 823
   a. **Origins** 824
   b. **Two Versions of a Single Right** 824
      - **Saenz v. Roe** 826
      - Problems 830

### 9 Free Expression of Ideas 833

A. **Overview of Free Expression** 833
   1. **Rationales for Free Expression** 833
   2. **The Distinction Between Content-Based Regulation and Content-Neutral Regulation** 836

B. **Content-Based Regulation of Speech** 839
   1. **Incitement of Immediate Crime** 839
      a. **“Clear and Present Danger”** 840
         - **Schenck v. United States** 840
         - Note 841
Abrams v. United States 841
Note 843

b. Criminal Anarchy and Communists: Clear and Not So Present Danger 844
   *Gitlow v. New York* 844
   Notes 846

c. The Contemporary Standard for Incitement 848
   *Brandenburg v. Ohio* 848
   Notes and Problem 850

2. True Threats 852
   *Virginia v. Black* 852
   Notes and Problem 855

3. Obscenity, Pornography, and Putative Analogs 856
   a. Obscenity 857
      *Roth v. United States; Alberts v. California* 857
      Notes 859
      *Miller v. California* 861
      *Paris Adult Theatre I v. Slaton* 863
      Notes and Problem 865
   
   b. Pornography 867
      *New York v. Ferber* 867
      Notes 870
      *American Booksellers Association v. Hudnut* 870
      Note 873
      *Ashcroft v. The Free Speech Coalition* 874
      Problems 876
   
   c. Analogs: Depictions of Cruelty and Violence 876
      *United States v. Stevens* 876
      Notes and Questions 879
      *Brown v. Entertainment Merchants Association* 879

4. Fighting Words 885
   *Chaplinsky v. New Hampshire* 885
   Notes 886

5. Offensive Speech 888
   a. The General Rule 888
      *Cohen v. California* 888
      Notes and Problems 892
      *Matal v. Tam* 893
   
   b. Hate Speech 896
      *R.A.V. v. City of St. Paul* 899
      *Wisconsin v. Mitchell* 904
      Notes 905
      Notes 906
   
   c. Hostile Audiences 908
      *Terminiello v. Chicago* 908
      *Feiner v. New York* 909
      Note 911
d. Indecent Speech, Broadcasting, and Captive Audiences 912
   *FCC v. Pacifica Foundation* 912
   Notes and Problems 915
e. Indecency, Cable Television, and the Internet 918
   *Reno v. American Civil Liberties Union* 919
   Notes 921

6. False Statements of Fact 921
   a. Defamation 921
      *New York Times Co. v. Sullivan* 921
      Notes 924
      *Gertz v. Robert Welch, Inc.* 926
      Notes 929
   b. “False Light” Invasion of Privacy 930
   c. Lies About Oneself 931
      *United States v. Alvarez* 931
      Notes and Question 937

7. Tortious Invasion of Emotional and Economic Interests 938
   a. Intentional Infliction of Emotional Distress 938
      *Hustler Magazine v. Falwell* 938
      Notes 940
      *Snyder v. Phelps* 941
   b. Public Disclosure of Private Facts 945
   c. Misappropriation of Expression 947

8. Commercial Speech 948
   *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council* 949
   Notes 952
   *Central Hudson Gas & Electric Corp. v. Public Service Commission* 953
   Notes 955
   *44 Liquormart, Inc. v. Rhode Island* 959
   Notes 962

C. Content-Neutral Regulations of Speech 964
1. Time, Place, and Manner of Speech 965
   *Ward v. Rock Against Racism* 965
   Notes and Problems 969
   *McCullen v. Coakley* 970
   Notes and Problems 976
   *Packingham v. North Carolina* 977
2. Expressive Conduct 981
   *United States v. O’Brien* 981
   Notes and Problems 985
   *Texas v. Johnson* 986
   Note and Problems 991
3. The “Secondary Effects” Doctrine 992
   *City of Renton v. Playtime Theatres, Inc.* 993
   Notes and Problems 995
D. Regulation of Speech When the Government Is Both Sovereign and Proprietor 997
   1. Public Forum 997
      Notes 1006
   2. Public Education 1012
      *Tinker v. Des Moines School District* 1012
      *Bethel School District No. 403 v. Fraser* 1014
      *Hazelwood School District v. Kuhlmeier* 1016
      Notes and Problems 1018
   3. Public Employment 1022
      *Connick v. Myers* 1024
      Notes 1026
      *Garcetti v. Ceballos* 1030
      Note and Problems 1033
   4. Public Sponsorship of Speech 1035
      *Rust v. Sullivan* 1036
      Notes and Problems 1037
      *Legal Services Corp. v. Velasquez* 1039
      Notes and Problems 1042
E. Overbreadth, Vagueness, and Prior Restraints 1047
   1. Overbreadth 1047
      *Broadrick v. Oklahoma* 1049
      Notes 1050
   2. Vagueness 1053
   3. Prior Restraints 1054
      a. Licensing 1055
      b. Injunctions 1057
      *Near v. Minnesota* 1057
      Notes 1058
F. Expression Rights Implicit in the Free Speech Guarantee 1061
   1. Freedom of Association 1061
      *Roberts v. United States Jaycees* 1063
      Notes 1067
      *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 1068
      Notes and Problems 1070
   2. The Freedom Not to Speak 1075
      *West Virginia State Board of Education v. Barnette* 1076
      *Wooley v. Maynard* 1077
      Notes 1079
      *Pacific Gas & Electric Co. v. Public Utilities Commission* 1080
      Notes 1083
10 The Religion Clauses 1147

A. A Summary of the History and Theory of the Religion Clauses 1147
1. Two Views of History 1148
2. The Quest for a Unifying Theory 1149
3. A Threshold Problem: Defining Religion 1150

B. The Free Exercise Clause 1152
1. Generally Applicable Laws That Impede Religious Conduct 1153
Sherbert v. Verner
Notes 1156

Employment Division, Department of Human Resources of Oregon v. Smith
Notes 1163

2. Legislation That Targets Religious Conduct or Belief 1166
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah
Notes and Problem 1170
Locke v. Davey
Note and Problem 1177
Trinity Lutheran Church v. Comer
Notes 1183

C. The Establishment Clause 1183
1. Government Financial Aid to Religion 1185
Everson v. Board of Education
Notes 1187
Mueller v. Allen
Notes 1190
Agostini v. Felton
Note and Problems 1194
Zelman v. Simmons-Harris
Notes and Problem 1200

2. Governmental Endorsement of Religious Belief or Non-belief and Governmental Coercion to Believe or Not Believe 1201
a. Religion and Public Schools
Lee v. Weisman
Notes 1207
Edwards v. Aguillard
Note 1212
Good News Club v. Milford Central School 1213
b. Other Government Adoption of Religious Symbols 1214
Lynch v. Donnelly
Notes 1219
McCreary County v. American Civil Liberties Union of Kentucky 1222
Van Orden v. Perry
Notes and Problems 1229
Town of Greece v. Galloway
Notes and Questions 1237
3. Governmental Accommodation of Religion 1238
   a. Cession of Government Power to Religion 1238
   b. Religious Exemptions from General Requirements 1239

11 State Action and the Power to Enforce Constitutional Rights 1243

A. State Action 1243
   1. The Public Function Doctrine 1244
      Marsh v. Alabama 1246
      Notes 1247
      Jackson v. Metropolitan Edison Co. 1248
      Notes 1251
   2. Inextricable Entanglement 1252
      Burton v. Wilmington Parking Authority 1252
      Notes 1254
      Brentwood Academy v. Tennessee Secondary School Athletic Association 1255
      Notes and Problems 1259
   3. Coercion and Encouragement 1260
      Shelley v. Kraemer 1260
      Notes 1262
      Reitman v. Mulkey 1263
      Notes 1266

B. Congressional Power to Enforce Constitutional Rights 1268
   1. The Scope of Enforcement Power: Public or Private Conduct? 1268
      Civil Rights Cases 1268
      Notes and Problems 1271
   2. The Scope of Enforcement Power: Remedial or Substantive? 1273
      Katzenbach v. Morgan 1274
      Notes 1277
      City of Boerne v. Flores 1278
      Notes and Problem 1282
      Board of Trustees of the University of Alabama v. Garrett 1283
      Notes and Problems 1287
      Nevada Department of Human Resources v. Hibbs 1288
<table>
<thead>
<tr>
<th>Contents</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Notes</td>
<td>1291</td>
</tr>
<tr>
<td><em>Shelby County v. Holder</em></td>
<td>1294</td>
</tr>
<tr>
<td>Note</td>
<td>1301</td>
</tr>
</tbody>
</table>

### 12 The Right to Keep and Bear Arms

<table>
<thead>
<tr>
<th>Notes</th>
<th>1303</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>District of Columbia v. Heller</em></td>
<td>1303</td>
</tr>
<tr>
<td>Notes</td>
<td>1321</td>
</tr>
</tbody>
</table>

**Table of Cases** 1329  
**Index** 1343