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Constitutional Law

Thirty-Fourth Edition

Steven L. Emanuel

Wolters Kluwer

CONSTITUTIONAL LAW

THIRTY-FOURTH EDITION

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Dedication

To Jeffrey Howard Emanuel,

No longer even close to being
the littlest Emanuel

Abbreviations Used in Text

CASEBOOKS

Chemerinsky — Erwin Chemerinsky, *Constitutional Law* (Wolters Kluwer, 4th Ed. 2013)

L,K,&C — Lockhart, Kamisar, Choper, Shiffrin & Fallon, *Constitutional Law — Cases, Comments, Questions* (West Publ., 8th Ed., 1996)

S,S,S,T&K — Stone, Seidman, Sunstein, Tushnet & Karlan, *Constitutional Law* (Wolters Kluwer, 7th Ed., 2013)

Sullivan & Gunther — Kathleen Sullivan & Gerald Gunther, *Constitutional Law* (West Academic, 19th Ed., 2016). (Where earlier editions are referenced, the edition number is indicated.)

HORNBOOKS AND OTHER AUTHORITIES

Chemerinsky Hnbk — Erwin Chemerinksy, *Constitutional Law: Principles and Policies* (Wolters Kluwer, 4th Ed. 2011)

Ely — John Ely, *Democracy and Distrust* (Harvard Univ. Press, 1980)

Engdahl — David Engdahl, *Constitutional Power: Federal and State* (West Publ., Nutshell Series, 1974)

N&R — Nowak & Rotunda, *Constitutional Law* (West Publ., 5th Ed., 1995)

Schwartz — Bernard Schwartz, *Constitutional Law: A Textbook* (MacMillan Publ., 2nd Ed., 1979)

Tribe — Lawrence Tribe, *American Constitutional Law* (Foundation Press, 2nd Ed., 1988)

Preface

Thank you for buying this book.

This new edition includes full coverage of the Supreme Court's term that ended in June 2016. It features extensive coverage of two landmark Supreme Court decisions:

- *Whole Woman's Heath v. Hellerstedt,* where the Court struck down, as an ***"undue burden"*** on ***abortion rights***, Texas provisions that required abortion doctors to have ***local-hospital admitting privileges*** and abortion facilities to meet the standards of ***"ambulatory surgery centers***." I have completely restructured our discussion of abortion rights to take *Hellerstedt* into account, and have tried to assess what the decision is likely to mean for other attempts by federal and state governments to regulation the abortion process.
- *Fisher v. Univ. of Texas ("Fisher II"),* the ***university-admissions affirmative-action*** case in which the Court ***strictly scrutinized*** UT's ***race-conscious admissions plan,*** but nonetheless ***upheld*** the plan as necessary to achieve the compelling goal of increasing the educational benefits that would derive from a more diverse student body.

Here are some of this book's special features:

- **"Casebook Correlation Chart"** — This chart, located just after this Preface, correlates each section of the main Outline with the pages covering the same topic in the five leading Constitutional Law casebooks.
- **"Capsule Summary"** — This is a 116-page summary of the key concepts of Constitutional Law, specially designed for use in the last week or so before your final exam.
- **"Quiz Yourself"** — Either at the end of the chapter, or after major sections of a chapter, I give you short-answer questions so that you can exercise your analytical muscles. There are over 100 of these questions, each written by me.
- **"Exam Tips"** — These alert you to what issues repeatedly pop up on real-life Constitutional Law exams, and what factual patterns are commonly used to test those issues. I created these Tips by looking at literally hundreds of multiple-choice and essay questions asked by law professors and bar examiners. You'd be surprised at how predictable the issues and fact-patterns chosen by professors really are!

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:[1]

1. The book seems (and is) *big*. But don't panic. The actual text includes over 60 pages of *Quiz Yourself* short-answer questions, plus lots of *Exam Tips*. Anyway, you don't have to read everything in the book — there are lots of special features that you may or may not decide to take advantage of.
2. During the semester, use the book in preparing each night for the next day's class. To do this, first

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1. These suggestions relate only to this book. I don't talk about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn't mean I don't think these other steps are important — it's just that in this Preface I've chosen to focus on how I think you can use this outline.

read your casebook. Then, use the *Casebook Correlation Chart* to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel®*.

3. If you make your own outline for the course, use the *Emanuel®* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel®* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel®*.
4. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you about one day.
5. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. You can find these quickly by looking for *Quiz Yourself* entries in the Table of Contents. When you do these questions: (1) record your short "answer" on the small blank line provided after the question, but also: (2) try to write out a "mini essay" on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.
6. Three or four days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step **5**, so that you use the Tips to help you spot the issues in the short-answer questions. You'll also probably want to follow up from many of the Tips to the main Outline's discussion of the topic.
7. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your thinking and writing juices flowing, and (2) re-scan the *Exam Tips* (spending about 2-3 hours).

My deepest thanks go to my colleagues at Wolters Kluwer, Barbara Lasoff and Barbara Roth, who have helped greatly to assure the reliability and readability of this and my other books.

Good luck in your ConLaw course. If you'd like any other Wolters Kluwer publication, you can find it at your bookstore or at **www.WKLegaledu.com**. If you'd like to contact me, you can email me at **semanuel@westnet.com**.

Steve Emanuel

Larchmont NY

August 1, 2016

CASEBOOK CORRELATION CHART

(**Note:** general sections of the outline are omitted from this chart. **NC** = not directly covered by this casebook.)

Emanuel's Constitutional Law Outline *(by chapter and section heading)*	Sullivan & Feldman **Constitutional Law** (19th ed. 2016)	Stone, Seidman, Sunstein, Tushnet & Karlan **Constitutional Law** (7th ed. 2013)	Rotunda, **Modern Constitutional Law** (11th ed. 2015)	Varat, Cohen & Amar **Constitutional Law** (14th ed. 2013)	Chemerinsky, **Constitutional Law** (4th ed. 2013)
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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed. The order of topics is occasionally somewhat different from that in the main outline.

CHAPTER 1

INTRODUCTION

I. THREE STANDARDS OF REVIEW

A. Three standards: There are three key ***standards of review*** which reappear constantly throughout Constitutional Law. When a court reviews the constitutionality of government action, it is likely to be choosing from among one of these three standards of review: (1) the ***mere-rationality*** standard; (2) the ***strict scrutiny*** standard; and (3) the ***middle-level review*** standard. [2]

1. **Mere-rationality standard:** Of the three standards, the easiest one to satisfy is the ***"mere-rationality"*** standard. When the court applies this "mere-rationality" standard, the court will ***uphold*** the governmental action so long as two requirements are met:

   a. **Legitimate state objective:** First, the government must be pursuing a ***legitimate governmental objective***. This is a very broad concept — practically any type of health, safety or "general welfare" goal will be found to be "legitimate."

   b. **Rational relation:** Second, there has to be a ***"minimally rational relation"*** between the means chosen by the government and the state objective. This requirement, too, is extremely easy to satisfy: only if the government has acted in a completely ***"arbitrary and irrational"*** way will this rationl link between means and end not be found.

2. **Strict scrutiny:** At the other end of the spectrum, the standard that is hardest to satisfy is the ***"strict scrutiny"*** standard of review. This standard will only be satisfied if the governmental act satisfies two very tough requirements:

   a. **Compelling objective:** First, the ***objective*** being pursued by the government must be ***"compelling"*** (not just "legitimate," as for the "mere-rationality" standard); and

   b. **Necessary means:** Second, the ***means*** chosen by the government must be ***"necessary"*** to achieve that compelling end. In other words, the "fit" between the means and the end must be extremely tight. (It's not enough that there's a "rational relation" between the means and the end, which is enough under the "mere-rationality" standard.)

      i. **No less restrictive alternatives:** In practice, this requirement that the means be "necessary" means that there must not be any ***less restrictive*** means that would accomplish the government's objective just as well.

3. **Middle-level review:** In between these two review standards is so-called ***"middle-level"*** review.

   a. **"Important" objective:** Here, the governmental objective has to be ***"important"*** (half way between "legitimate" and "compelling").

   b. **"Substantially related" means:** And, the means chosen by the government must be ***"substantially related"*** to the important government objective. (This "substantially

related" standard is half way between "rationally related" and "necessary").

B. Consequences of choice: The court's choice of one of these standards of review has two important consequences: [2]

1. **Burden of persuasion:** First, the choice will make a big difference as to who has the ***burden of persuasion***.
   a. **Mere-rationality standard:** Where the governmental action is subject to the "mere-rationality" standard, the ***individual*** who is attacking the government action will generally bear the burden of persuading the court that the action is unconstitutional.
   b. **Strict scrutiny:** By contrast, if the court applies "strict scrutiny," then the ***governmental body*** whose act is being attacked has the burden of persuading the court that its action is constitutional.
   c. **Middle-level review:** Where "middle level" scrutiny is used, it's not certain how the court will assign the burden of persuasion, but the burden will usually be placed on the government.
2. **Effect on outcome:** Second, the choice of review standard has a very powerful effect on the ***actual outcome***. Where the "mere-rationality" standard is applied, the governmental action will ***almost always be upheld***. Where "strict scrutiny" is used, the governmental action will ***almost always be struck down***. (For instance, the Supreme Court applies strict scrutiny to any classification based on race, and has upheld only one such strictly scrutinized racial classification in the last 50 years.) Where middle-level scrutiny is used, there's roughly a 50-50 chance that the governmental action will be struck down.
   a. **Exam Tip:** So when you're writing an exam answer, you've got to concentrate exceptionally hard on choosing the correct standard of review. Once you've determined that a particular standard would be applied, then you might as well go further and make a prediction about the outcome: if you've decided that "mere-rationality" review applies, you might write something like, "Therefore, the court will almost certainly uphold the governmental action." If you've chosen strict scrutiny, you should write something like, "Therefore, the governmental action is very likely to be struck down."

C. When used: Here is a quick overview of the entire body of Constitutional Law, to see where each of these review standards gets used: [3]

1. **Mere-rationality standard:** Here are the main places where the "mere-rationality" standard gets applied (and therefore, the places where it's very hard for the person attacking the governmental action to get it struck down on constitutional grounds):
   a. **Dormant Commerce Clause:** First, the "mere-rationality" test is the main test to determine whether a state regulation that affects interstate commerce violates the ***"dormant Commerce Clause."*** The state regulation has to pursue a legitimate state end, and be rationally related to that end. (But there's a second test which we'll review in greater detail later: the state's interest in enforcing its regulation must also outweigh any ***burden*** imposed on interstate commerce, and any discrimination against interstate commerce.)
   b. **Substantive due process:** Next comes ***substantive due process***. So long as no "fundamental right" is affected, the test for determining whether a governmental act violates substantive due process is, again, the "mere-rationality" standard. In other words, if the state is pursuing a legitimate objective, and using means that are rationally related to that objective, the state will not be found to have violated the substantive Due Process Clause. So the vast bulk of ***economic regulations*** (since these don't affect fundamental rights) will be tested by the mere-rationality standard and almost certainly upheld.

c. **Equal protection:** Then, we move on to the ***equal protection*** area. Here, "mere-rationality" review is used so long as: (1) ***no suspect*** or ***quasi-suspect classification*** is being used; and (2) ***no fundamental right*** is being impaired. This still leaves us with a large number of classifications which will be judged based on the mere-rationality standard, including: (1) almost all economic regulations; (2) some classifications based on alienage; and (3) rights that are not "fundamental" even though they are very important, such as food, housing, and free public education. In all of these areas, the classification will be reviewed under the "mere-rationality" standard, and will therefore almost certainly be upheld.

d. **Contracts Clause:** Lastly, we find "mere-rationality" review in some aspects of the ***"Obligation of Contracts"*** Clause.

2. **Strict scrutiny:** Here are the various contexts in which the court applies ***strict scrutiny***: [4]

a. **Substantive due process/fundamental rights:** First, where a governmental action affects ***fundamental rights***, and the plaintiff claims that his ***substantive due process*** rights are being violated, the court will use strict scrutiny. So when the state impairs rights falling in the ***"privacy"*** cluster of marriage, child-bearing, and child-rearing, the court will use strict scrutiny (and will therefore probably invalidate the governmental restriction). For instance, government restrictions that impair the right to use contraceptives receive this kind of strict scrutiny.

b. **Equal protection review:** Next, the court uses strict scrutiny to review a claim that a classification violates the plaintiff's ***equal protection*** rights, if the classification relates either to a ***suspect classification*** or a ***fundamental right***. "Suspect classifications" include ***race***, ***national origin***, and (sometimes) ***alienage***. "Fundamental rights" for this purpose include the right to ***vote***, to be a ***candidate***, to have access to the ***courts***, and to ***travel interstate***. So classifications that either involve any of these suspect classifications or impair any of these fundamental rights will be strictly scrutinized and will probably be struck down.

c. **Freedom of expression:** Next, we move to the area of ***freedom of expression***. If the government is impairing free expression in a ***content-based way***, then the court will use strict scrutiny and will almost certainly strike down the regulation. In other words, if the government is restricting some speech but not others, based on the ***content of the messages***, then this suppression of expression will only be allowed if necessary to achieve a compelling purpose (a standard which is rarely found to be satisfied in the First Amendment area). Similarly, any interference with the right of ***free association*** will be strictly scrutinized.

d. **Freedom of religion/Free Exercise Clause:** Lastly, the court will use strict scrutiny to evaluate any impairment with a person's ***free exercise*** of religion. Even if the government does ***not intend*** to impair a person's free exercise of his religion, if it substantially burdens his exercise of religion the government will have to give him an ***exemption*** from the otherwise-applicable regulation unless denial of an exemption is necessary to achieve a compelling governmental interest.

3. **Middle-level review:** Finally, here are the relatively small number of contexts in which the court uses middle-level review: [4]

a. **Equal protection/semi-suspect:** First, middle-level review will be used to judge an ***equal protection*** claim, where the classification being challenged involves a ***semi-suspect*** trait. The two traits which are considered semi-suspect for this purpose are: (1) ***gender***; and (2) ***illegitimacy***. So any government classification based on gender or illegitimacy will have to be "substantially related" to the achievement of some "important" governmental interest.

b. **Contracts Clause:** Second, certain conduct attacked under the Obligation of Contracts Clause will be judged by the middle-level standard of review.

c. **Free expression/non-content-based:** Finally, in the First Amendment area we use a standard similar (though not identical) to the middle-level review standard to judge government action that impairs expression, but does so in a ***non-content-based*** manner. This is true, for instance, of any content-neutral ***"time, place and manner"*** regulation.

CHAPTER 2

THE SUPREME COURT'S AUTHORITY AND THE FEDERAL JUDICIAL POWER

I. THE SUPREME COURT'S AUTHORITY AND THE FEDERAL JUDICIAL POWER

A. ***Marbury*** principle: Under *Marbury v. Madison*, it is the Supreme Court, not Congress, which has the authority and duty to declare a congressional statute unconstitutional if the Court thinks it violates the Constitution. [5-7]

B. **Supreme Court review of state court decision:** The Supreme Court may review state court opinions, but only to the extent that the decision was decided ***based on federal law.*** [7-10]

1. **"Independent and adequate state grounds":** Even if there is a federal question in the state court case, the Supreme Court may not review the case if there is an "***independent and adequate***" state ground for the state court's decision. That is, if the same result would be reached even had the state court made a different decision on the federal question, the Supreme Court may not decide the case. This is because its opinion would in effect be an "advisory" one. [8]

a. **Violations of state and federal constitutions:** If a state action violates the ***same clause*** of both state and federal constitutions (e.g., the Equal Protection Clause of each), the state court decision may or may not be based on an "independent" state ground. If the state court is saying, "This state action would violate our state constitution whether or not it violated the federal constitution," that's "independent." But if the state court is saying, "Based on our reading of the constitutional provision (which we think has the same meaning under both the state and federal constitutions), this state action violates both constitutions," this is ***not*** "independent," so the Supreme Court may review the state court decision. [9]

2. **Review limited to decisions of highest state court:** Federal statutes limit Supreme Court review to decisions of the ***highest state court available***. But this does not mean that the top-ranking state court must have ruled on the ***merits*** of the case in order for the Supreme Court to review it. All that is required is that the case be heard by the highest state court ***available*** to the petitioner, which might be an intermediate appellate court.

C. **Federal judicial power:** Article III, Section 2 sets out the federal judicial power. This includes, among other things: (a) cases arising under the ***Constitution*** or the ***"laws of the U.S."*** (i.e., cases posing a "federal question"); (b) cases of ***admiralty***; (c) cases between ***two or more states***; (d) cases between ***citizens of different states***; and (e) cases between a state or its citizens and a ***foreign country or foreign citizen***. Note that this does ***not*** include cases where both parties are citizens (i.e., residents) of the same state, and no federal question is raised. [10]

II. CONGRESS' CONTROL OF FEDERAL JUDICIAL POWER

A. **Congress' power to decide:** ***Congress*** has the general power to ***decide what types of cases the Supreme Court may hear***, so long as it doesn't expand the Supreme Court's jurisdiction beyond the federal judicial power (as listed in the prior paragraph). [*Ex parte McCardle*] [10-12]

B. Lower courts: Congress also may decide what ***lower federal courts*** there should be, and what cases they may hear. Again, the outer bound of this power is that Congress can't allow the federal courts to hear a case that is not within the federal judicial power. [12]

> **Example 1:** Congress may cut back the jurisdiction of the lower federal courts pretty much whenever and however it wishes. Thus Congress could constitutionally eliminate diversity jurisdiction (i.e., suits between citizens of different states), even though such suits are clearly listed in the Constitution as being within the federal judicial power.
>
> **Example 2:** But Congress could not give the lower federal courts jurisdiction over cases between two citizens of the same state, where no federal issue is posed. The handling of such a case by the federal courts would simply go beyond the federal judicial power as recited in the Constitution.

CHAPTER 3

FEDERALISM AND FEDERAL POWER GENERALLY

I. THE CONCEPT OF FEDERALISM

A. The federalist system: We have a ***"federalist"*** system. In other words, the national government and the state governments co-exist. Therefore, you always have to watch whether some power being asserted by the federal government is in fact allowed under the Constitution, and you must also watch whether some power asserted by the states is limited in favor of federal power. [15]

B. Federal government has limited powers: The most important principle in this whole area is that the federal government is one of ***limited, enumerated powers***. In other words, the three federal branches (Congress, the executive branch, and the federal courts) can only assert powers ***specifically granted*** to them by the United States Constitution. So any time Congress passes a statute, or the President issues, say, an Executive Order, or the federal courts decide a case, you've got to ask: What is the enumerated, specified power in the U.S. Constitution that gives the federal branch the right to do what it has just done? (This is very different from what our Constitution says about the powers of ***state*** governments: state governments can do whatever they want as far as the U.S. Constitution is concerned, unless what they are doing is ***expressly forbidden*** by the Constitution.) [15]

1. **No general police power:** The most dramatic illustration of this state/federal difference is the general ***"police power."*** Each state has a general police power, i.e., the ability to regulate solely on the basis that the regulation would enhance the welfare of the citizenry. But there is ***no general federal police power***, i.e., no right of the federal government to regulate for the health, safety or general welfare of the citizenry. Instead, each act of federal legislation or regulation must come within one of the very specific, enumerated powers (e.g., the Commerce Clause, the power to tax and spend, etc.).

   a. **Tax and spend for general welfare:** Congress *does* have the right to "lay and collect taxes … to pay the debts and provide for the … general welfare of the United States. … " (Article I, Section 8.) But the phrase "provide for the … general welfare" in this sentence modifies "lay and collect taxes … to pay the debts. … " In other words, the power to tax and spend is subject to the requirement that the general welfare be served; there is no ***independent*** federal power to provide for the general welfare.

C. "Necessary and Proper" Clause: In addition to the very specific powers given to Congress by the Constitution, Congress is given the power to "make all laws which shall be ***necessary and proper*** for carrying into execution" the specific powers.

CAPSULE SUMMARY