

A large, stylized graphic of the letters 'Q&A' serves as the background for the title. The 'Q' and 'A' are rendered in a gradient of yellow and orange, while the ampersand is a solid dark grey.

QUESTIONS & ANSWERS:
Constitutional Law

Paul E. McGreal
Linda S. Eads



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QUESTIONS & ANSWERS:
Constitutional Law

*Multiple Choice and Short Answer
Questions and Answers*

By

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DEDICATION

To Marianne — wherever we go, you're my home.

P.E.M.

To Madelyn, for all that she is and all that she will become.

L.S.E.

ABOUT THE AUTHORS

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PREFACE

This is an exciting time to study Constitutional Law. While the United States Supreme Court's membership has not changed for the past decade (a modern record!), its doctrine is in almost constant evolution and flux. For example, when the authors of this volume studied the subject as students, virtually the entire topic of federalism could be covered in one class session. It was the doctrinal backwater of Constitutional Law. Over the last decade, however, the Supreme Court has dramatically expanded its role in policing the constitutional boundary between federal and state authority. Indeed, this last term saw several decisions that broke new ground, further elaborated nascent doctrines, and foreshadowed future grounds for dispute. And, the action is not limited to federalism. Recent decisions have added new wrinkles to the Court's approach to hate speech (upholding a state law banning cross burning), equality (a split ruling on the University of Michigan's use of race in undergraduate and law school admissions), and privacy (striking down a state law banning homosexual sodomy). With many of these cases decided by a bare 5-to-4 majority, lively debate is likely to be the rule, rather than the exception.

This book is written for students taking the basic survey course in Constitutional Law. In drafting the questions that follow, we have pitched the breadth, depth, and level of difficulty to those studying the subject for the first time. This approach led to several choices regarding coverage as well as the form of the questions and answers. To help the reader better understand from where we are coming, and thus how best to use this study tool, we offer several observations about our approach.

First, unlike hornbooks and treatises, our coverage is not encyclopedic. We expect that our readers are preparing to take a final exam in a general survey course, and so our coverage is tailored to the topics at the heart of virtually every introductory Constitutional Law course. Specialized issues within each topic are hit upon lightly, and esoteric wrinkles are omitted entirely.

Second, our topic selection is further influenced by the growing tendency to shrink the coverage of the basic Constitutional Law course. With the Court's recent revival of its federalism jurisprudence, and with many schools reducing their Constitutional Law survey courses from six to four hours, it has become impracticable to cram all of the structural and individual rights material into a single course. This has led many schools to shift some topics from the basic survey course to upper level electives. For example, the First Amendment is increasingly covered in a separate course. Similarly, the Takings Clause is often covered in the Property survey course. Consequently, we offer only the type of broad-brush coverage of free speech, religious freedom, and takings that one might expect in the Constitutional Law survey course. More detailed coverage of those subjects will appear in other volumes in the Q&A series.

Third, we caution the reader that this volume differs somewhat from others in the Q&A series. Users of other volumes will notice that the answers are longer than in some of the other books. This is because most of the constitutional law questions worth asking, and thus worth your study time, cannot be answered and explained in a short space. Thus, while our multiple choice questions all list four (A), (B), (C), (D) one-sentence choices immediately

following each question, the true answers — and the ones we would expect to see students produce on our exams — are the explanations we supply in the second half of the volume. Further, our “short answers” are likely longer than you will find in other volumes in the series. Again, the reason is that the types of questions that will best prepare you for a constitutional law exam are rarely susceptible to one-paragraph answers. In the end, we have tried to balance brevity with the need to provide the student with realistic, useful questions. Our practice has been to err on the side of usefulness, resulting in somewhat longer discussions.

While the answers to our short answer questions vary in length, none is more than three paragraphs. And, unless otherwise indicated, the question can be answered in one paragraph. Do not fret if your answer comes in slightly longer or shorter than our answer. As long as the substance is the same, we would give full credit on an exam. If your answer is longer, however, our answer may show how to convey the same substance in fewer words. On time pressure exams, such brevity can be an asset.

Several of the questions that follow do not have easy answers. When this is the case, we identify the question as a close one and then suggest which answer we believe is best. But, that does not mean our preferred answer is the “correct” one. You or your professor may disagree with our chosen answer. Indeed, in a few instances we disagree between ourselves as to the better response. But, that is not our point. In the end, we believe that each answer discusses all of the relevant arguments, and this is what counts on our constitutional law exams. What is much more important than merely choosing the “correct” or “best” answer is that you understand *why* one answer is better than the others. If you reach this understanding and disagree with our choice, so be it.

As with all the subjects in the Q&A series, constitutional law undergoes periodic change. When those changes reach a critical mass, we will produce a revised volume. In the interim, we will revise individual questions as necessary and make those revisions available on the Q&A section of the Lexis-Nexis website. The web address is www.lexisnexis.com/lawschool/resource/supplements.

Last, as many of the questions are difficult and contestable, we are interested in hearing from those who use the book. We welcome any and all suggestions about alternate analyses, confusing discussions, or twists on various questions. You can reach us at the e-mail addresses listed below.

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QUESTIONS

TOPIC 1:
JUSTICIABILITY: STANDING

QUESTIONS

The State of Texana recently enacted the Parental Abortion Liability Act, which provides:

Any person who performs an abortion on a minor without obtaining the prior written consent of both of the minor's parents will be strictly liable to the minor's parents for all medical expenses attributable to the abortion, including expenses incurred for follow-up care.

The Women's Center, an abortion clinic located in Texana, sued the Governor and Attorney General seeking an injunction on the ground that the Act violates a minor's right to choose an abortion.

1. Does The Women's Center have standing to bring this suit?
 - (A) No, because The Women's Center may not litigate the rights of the minors, who are not parties to the lawsuit.
 - (B) No, because The Women's Center has no concrete injury.
 - (C) No, because The Women's Center's injury is not actual or imminent.
 - (D) No, because the lawsuit cannot redress any threatened injury to The Women's Center.

Since Fidel Castro rose to power in Cuba over 40 years ago, Cuban nationals have consistently sought to migrate to the United States. Cubans who cannot meet the stringent requirements to enter the United States as "refugees" occasionally try to enter the United States by the extra-legal means of sailing private boats to the southeastern coast of Florida. Because of the trip's hazards, as well as the Cuban government's active discouragement, such attempts are rare enough that the United States allows survivors to legally immigrate, even if they do not qualify for refugee status.

In January 2002, the Cuban government announced that it would no longer forcibly prevent emigration from Cuba by boat. The announcement prompted a massive flow of Cuban nationals toward the United States. Later that year, Congress enacted the Cuban Immigration Act of 2002, which changed United States policy toward Cuban nationals. In addition to those already legally entitled to enter under current law, the United States would allow 20,000 Cuban nationals to legally enter the United States each year. Under the Act, the 20,000 eligible immigrants are selected by an annual lottery from those Cuban nationals who apply to immigrate under the program. The first lottery was held in January 2003.

The Act further alters prior practice by requiring repatriation of any Cuban national who reaches the United States by boat. The Act also provides, however, that if any section is held unconstitutional, the Act as a whole will be void, and United States immigration law will revert to the rules and practices in effect prior to the Act.

A lawsuit challenging the Act's lottery program has been filed against the United States in the federal District Court for the District of Columbia. The lawsuit seeks a declaration that the lottery violates the Due Process Clause of the Fifth Amendment. The Plaintiff is a Cuban national who participated in the January 2003 Cuban lottery. The Plaintiff was not selected for entry into the United States and does not qualify as a refugee under United States law. He claims, however, that under the pre-Act immigration laws, he would have entered the United States by sailing a private boat from Cuba to Florida.

2. Does the Plaintiff have standing?

- (A) No, because the Plaintiff has not suffered an adequate injury in fact.
- (B) No, because the Plaintiff's injury was not caused by the defendant's conduct.
- (C) No, because the Plaintiff's requested relief will not redress his alleged injury.
- (D) Yes.

Suppose the lawsuit described in Question 2 is brought by the Federation for American Immigration Reform (FAIR), which is an association of Florida citizens concerned about the domestic effects of United States immigration policy. As its injury, FAIR asserts that the lottery program will cause its Miami members to endure overcrowded public schools, decreased access to public medical facilities, reduced police protection, and diminished employment opportunities.

3. Does FAIR have standing to bring this lawsuit?

- (A) No, because FAIR has not suffered an adequate injury in fact.
- (B) No, because FAIR's injury was not caused by the defendant's conduct.
- (C) No, because FAIR's requested relief will not redress its alleged injury.
- (D) Yes.

The Appalachian Society is an environmental advocacy group that draws members from eastern states connected by the Appalachian Trail. The Society has filed a federal court lawsuit against the United States Army Corps of Engineers regarding the Corps' failure to prepare an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act. The Society alleges that the Corps plans to build a dam along the Hastens River, and that federal law requires an EIS for such a project. The Society further alleges that many of its members live near and use the Hastens River for hiking, fishing, and canoeing; and that the proposed dam would drastically alter the river's aesthetics, as well as its suitability for fishing and canoeing. The Society concedes that preparation of an EIS will not necessarily alter the Corps' decision to construct the Hastens River dam project. The Society further concedes that several procedural steps remain after an EIS and before construction of the dam, and that construction would likely begin no sooner than five years from now, if ever.

4. Can the Appalachian Society allege sufficient injury to support standing?

ANSWER:

Consider the lawsuit described in Question 4.

5. Can the Appalachian Society satisfy the standing requirements of causation and redressability?

ANSWER:

