



CASES AND MATERIALS ON CONSTITUTIONAL LAW

FIFTH EDITION



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MATTHEW  BENDER

PREFACE

Organization and Methodology. This book is mostly traditional in approach. It begins with judicial review, deals next with legislative and executive powers, and contains coverage of individual rights in the latter half. The landmark cases, from *Marbury v. Madison* to *Brown v. Board of Education* to *Bush v. Gore* and beyond, are present, and coverage in this volume extends through the Court's term ending in July, 2008. Our goal is to provide a comprehensive, traditionally organized set of materials that is presented in a concise and manageable format.

Special Features. However, there is more to the book than traditional organization and approach. The following is a description of some of the special features that we have included.

SPECIAL FEATURES

"Applied" Constitutional Law: Study of Actual Litigation Documents. In addition to traditional case materials, the book includes documents from actual litigation. Complaints and answers, motions, briefs, orders, and record excerpts, all are reproduced for the student to see and study. In Chapter 1, testimony of Professors Tribe and Wright in a legislative hearing concerning the Pennzoil-Texaco dispute is reproduced to show the legislative function in enforcing the Constitution. An Appendix to Chapter 3 contains litigation documents from an actual preemption case; and Chapter 11 is followed by an appendix entitled, "The Story of a First Amendment Case." Finally, Chapter 7, which is entitled "The Anatomy of a Constitutional Case," is unique among constitutional law casebooks: it reproduces major documents from start to finish in a single constitutional case, so that students may see how such a case is developed in the real world. We believe that these materials will give the student a feel for the skills required to litigate constitutional issues. In addition, they show that constitutional law is not made only by the Supreme Court, but also in legislatures, state and federal trial courts, and intermediate appellate courts. And these "real world" materials will help the student to understand the theory of constitutional law better, because each example contains a knotty constitutional question — in its procedural context.

Encouraging Reading of the Constitution: Constitutional Theory and History. We have placed the Constitution at the beginning of the book, not at the end. We want to encourage the student to read the Constitution. Toward that end, we also have inserted reading assignments, with specific references to constitutional text, throughout the book. And in the preface that contains the Constitution, we have included source documents and commentary that will introduce the student to constitutional history. Finally, in Chapters 1 and 9, we have inserted appendices that emphasize constitutional theory.

A "User Friendly" Book. Above all, we have tried to produce a book that makes the fundamentals easy for the student to grasp. Complex chapters (such as those on federalism, equal protection, and the first amendment) are introduced by text that gives the student a "road map" of the issues. The cases are edited with student comprehension in mind, and explanations of difficult principles are inserted in brackets. Our notes and questions are self-contained; they do not require the student to consult outside sources. We know that constitutional law requires intense work in class, and it generates questions than can be appreciated only through Socratic dialogue — but one philosophy is that it is best for the student to come to class having actually understood the material in the book. The class then does not need to consist solely of helping to get across the basics, and the professor can raise more interesting issues.

Problems Taken From Actual Litigation Situations. Most of the Chapters contain from one

PREFACE

to a dozen problems. In almost every instance, the problems are taken from actual litigation situations, such as controversies decided by lower courts. The problems are real. For example, the abortion cases are followed by a problem on forced cesarean sections, which have generated court decisions in more than a dozen states. In the speech chapter, a problem about rap music that allegedly encourages violence, based upon pending litigation, is included. Also included is a problem about the notorious “Hit Man” case, in which a hired assassin followed a manual called “Hit Man,” written so as to give directions to killers. There are also problems about the *Hopwood* case and about Proposition 209, and many, many others.

State Constitutional Law. One chapter contains another coverage of state constitutional law. As the chapter indicates Supreme Court Justice William J. Brennan Jr. has called state constitutionalism the “most important” development in constitutional law of recent years. Our coverage is very brief, because few professors will have time for more. But it should serve at least to introduce the student to the length and breadth of state constitutional law.

The “Embarrassing” (or Frightening?) Second Amendment. Our book is unique in covering the militia clauses and second amendment right to bear arms. The Chapter contains *District of Columbia v. Heller*. The second amendment hasn’t been addressed in many other Supreme Court opinions, and it makes an excellent exercise in interpretation. Guns and violence are, moreover, an important societal issue. This coverage will help future attorneys to sort out the conflicting views of the National Rifle Association and gun control forces.

Careful Case Selection and Editing to Produce a Comprehensive, but Compact Book. We have included “major” cases in more complete text, “squib” cases (or paragraph cases) that are more heavily edited, and note cases. Our objective is to produce a book in which major cases can be read and discussed in depth, squib cases provide additional points — and notes provide detail in compact form. We have attempted to provide a “comprehensive” set of materials.

For this Fifth Edition, several Chapters have been partially modified and streamlined. The materials in Chapter 1 on Conditions of Constitutional Adjudication have been reorganized and supplemented. Similarly, part of Chapter 11 (Free Speech) has been changed to reflect current doctrinal developments. Other Chapters have received minor modifications and consolidations. Many Notes have been added. The new reference Notes enhance the opportunities for students to pursue topics further.

It remains our hope that we have produced a book that will be particularly useful to counteract the constitutional law professor’s occupational frustration in not having sufficient time to develop this complex area of law.

We hope that you will enjoy the book as much as we and our students have.

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TABLE OF CONTENTS

Chapter 0	PREFATORY CHAPTER THE CONSTITUTION AND ITS ADOPTION	1
§ 0.01	TEXT OF THE CONSTITUTION	1
§ 0.02	SOURCE DOCUMENTS FROM WHICH CONSTITUTIONAL PRINCIPLES WERE DRAWN	14
	Introductory Note: Separation of Powers, From the Greek Philosophers to Magna Carta to Montesquieu to Madison	14
	Plato, <i>Dialogues</i> (Laws XI)	14
	Magna Carta	14
	C. Walker, <i>Relations and Observations, Historical and Politick, Upon the Parliament Begun Anno Dom. 1640</i>	15
	J. Locke, <i>Second Treatise</i>	15
	11 Montesquieu, <i>Spirit of the Laws</i>	15
	Constitution of the [Pre-Constitutional] State of Virginia	16
	Madison, <i>The Federalist No. 47: Separation of Powers within the Federal Government</i>	16
	Notes and Questions	16
§ 0.03	EVENTS THAT LED TO THE CONSTITUTIONAL CONVENTION	17
	Articles of Confederation (1781)	17
	Notes and Questions	17
	Madison, <i>Statement of the Causes of the Constitutional Convention, 5 Elliot's Debates on the Federal Convention of 1787</i>	18
§ 0.04	THE CONSTITUTIONAL CONVENTION	19
	James Kirby Martin, <i>In the Course of Human Events: An Interpretive Exploration of the American Revolution</i>	19
	Madison, <i>Records of the Federal Convention (1787)</i>	23
§ 0.05	RATIFICATION OF THE CONSTITUTION AND ADOPTION OF THE BILL OF RIGHTS	25
[A]	The Federalists, The Opponents, and The Debates on Ratification	25
	Madison, <i>The Federalist No. 47: Separation of Powers within the Federal Government and Charges of Opponents</i>	25
	Notes and Questions	26
[B]	The Bill of Rights and The Fourteenth Amendment	26
	Hittner, <i>The Bill of Rights and the Ratification of the Constitution</i>	26
	Constitutional History: Suggestions for Further Reading	28
Chapter 1	JUDICIAL POWER AND ITS LIMITS	29
§ 1.01	JUDICIAL REVIEW: ITS NATURE AND ITS APPROPRIATENESS	29
[A]	Can the Courts Overrule Congress?	29
	A. Hamilton, <i>The Federalist No. 78</i>	29

TABLE OF CONTENTS

[1]	Inferring Judicial Review from the American Written Constitution:	
	<i>Marbury v. Madison</i>	30
	Note on the Historical Background of <i>Marbury v. Madison</i>	30
	<i>Marbury v. Madison</i>	31
	Notes and Questions on the <i>Marbury</i> Opinion	35
[2]	Judicial Review and the Madisonian Dilemma: Reconciling Democratic	
	Governance with Minority Protection	38
	Bickel, <i>The Least Dangerous Branch</i>	38
	<i>United States v. Carolene Products, Co.</i>	38
	Notes and Questions on the Relationship of Judicial Review to	
	Democracy	39
[3]	The Court's Political Environment: Separation of Powers, Independent Duties	
	of Co-ordinate Branches, and the Problem of Defiance	40
	<i>Cooper v. Aaron</i>	40
	Notes and Questions on the Political Position of the Supreme Court . . .	41
	Problem A	42
	Problem B	42
	Note on Other Nations' Approaches to Judicial Review	43
[B]	Review of State Court Decisions	43
	Introductory Note	43
	<i>Martin v. Hunter's Lessee</i>	44
	Notes and Questions	45
	APPENDIX TO § 1.01: CONSTITUTIONAL LAW IN PRACTICE—THE	
	USE OF CONSTITUTIONAL ARGUMENTS TO SUPPORT AND OPPOSE	
	PROPOSED LEGISLATION RELATING TO THE PENNZOIL-TEXACO	
	DISPUTE	46
	Note on the Use of Constitutional Arguments to Oppose Legislation or Its	
	Enforcement	46
	Note on the Background to the <i>Pennzoil-Texaco</i> Legislative Dispute	46
	Opinion of Professor Laurence Tribe on the Unconstitutionality of S.B.	
	1414	47
	Opinion of Professor Charles Alan Wright on the Constitutionality of S.B.	
	1414	48
	Notes and Questions	49
§ 1.02	LIMITING JUDICIAL POWER	50
[A]	The "Case or Controversy" Requirement	50
[1]	Advisory Opinions and Nonadversary Procedures	50
	Introductory Note: Advisory Opinions	50
	<i>Muskra v. United States</i>	50
	Notes and Questions	51
	Problem C	52
	<i>Webster v. Reproductive Health Services</i>	52
[2]	Other Conditions of Adjudication: Standing	53
	Note on Standing and Related Doctrines	53

TABLE OF CONTENTS

Massachusetts v. Mellon and Frothingham v. Mellon 53

Note on the Liberalization of Constitutional Standing: From *Frothingham* to
the Present Day 53

Bender v. Williamsport Area School District 55

Notes and Questions 55

Lujan v. Defenders of Wildlife 56

Notes and Questions 57

[3] Other Conditions of Adjudication Requirements: Ripeness 59

[4] Other Conditions of Adjudication Requirements: Mootness 60

 Problem D 62

[B] The Political Question Doctrine: An Exception to Judicial Review 63

 Note on the History and Meaning of the Political Question Doctrine: How to
 Read the Case of *Baker v. Carr* 63

Baker v. Carr 64

 Notes and Questions 67

Davis v. Bandemer 68

 Notes and Questions 69

Nixon v. United States 70

 Notes and Questions 73

 Problem E 75

 Problem F 75

[C] Congressional Power to Limit Jurisdiction 76

Ex Parte McCordle 76

 Notes and Questions 77

[D] The Supreme Court’s Jurisdiction under Current Statutes 78

 Note on Supreme Court Jurisdictional Statutes 78

 Note on Procedure for Review by Certiorari or Appeal 79

[E] Stare Decisis 80

Payne v. Tennessee 80

Planned Parenthood v. Casey 81

[F] “Amending the Constitution”: Through Article V and Otherwise 82

 Note on Constitutional Amendments 82

Appendix 1 **THEORIES OF JUDICIAL REVIEW: HOW SHOULD THE
JUDGES READ THE CONSTITUTION? 83**

[A] **ORIGINALISM, NON-ORIGINALISM, AND TEXTUALISM . 83**

 Introductory Note 83

 Meese, *The Supreme Court of the United States: Bulwark of a Limited
 Constitution* 83

 Brennan, *The Constitution of the United States: Contemporary
 Ratification* 84

 Notes and Questions 85

TABLE OF CONTENTS

[B]	INTERPRETIVISM AND SUPPLEMENTATION (OR NON-INTERPRETIVISM?)	96
	Introductory Note	88
	Problem G	89
	Brest, <i>The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship</i>	90
	Brest, <i>The Misconceived Quest for the Original Understanding</i>	91
	Bork, <i>Styles in Constitutional Theory</i>	91
	Notes and Questions	93
	Note on Professor Bobbit's "Six Modalities" of Constitutional Argument	95
	Notes and Questions	96
	Problem H	96
Chapter 2	CONGRESSIONAL POWER	97
§ 2.01	NATIONAL LEGISLATIVE POWER: ITS NATURE AND LIMITS	97
[A]	The Federalist Vision of Strong Central Government	97
	Madison, <i>The Federalist No. 10: Violence of Parties Restrained by a Stronger Federal Union</i>	97
[B]	Enumerated, Implied, and Inherent Powers	97
	Note: Congress' Powers in a Federal System	97
	Madison, <i>The Federalist No. 44: Limitations On State Powers and a Broad Interpretation of Federal Powers Defended</i>	99
	Problem A	99
	Note on the Background to the National Bank Case	100
	<i>McCulloch v. Maryland</i>	101
	Notes and Questions	104
	<i>City of Boerne v. Flores</i>	105
§ 2.02	THE COMMERCE POWER AND ITS DEVELOPMENT	106
[A]	The Early Commerce Clause: From the Founding to the 1930s	106
	Note on the Origins of the Commerce Power	106
[1]	What is "Commerce among the Several States?": Early Development	106
	<i>Gibbons v. Ogden</i>	107
	Notes and Questions	108
	<i>The Daniel Ball</i>	109
	Notes and Questions	109
[2]	The Commerce Power during the "Dual Federalism" Era: From the Late 1800s to the 1930s	110
	Introductory Note: The Dual Federalism Era	110
	<i>United States v. E.C. Knight Co.</i>	110
	<i>The Shreveport Rate Case (Houston, East & West Texas Ry. v. United States)</i>	110
	Notes and Questions	112
	Note on the Police Power	113

TABLE OF CONTENTS

	<i>Champion v. Ames (The Lottery Case)</i>	114
	Notes and Questions	115
	<i>Hammer v. Dagenhart (The Child Labor Case)</i>	115
	Notes and Questions	116
[B]	The Great Depression, the New Deal, and the Direct-Indirect Effects Doctrine:	
	A Case Study in the Need to Limit Constitutional Law	116
	Note on the Background to the <i>Schechter Poultry Case</i>	116
	<i>A.L.A. Schechter Poultry Corp. v. United States</i>	117
	Notes and Questions	118
[C]	Expansion and Breakthrough: National Economic Problems as Objects of the	
	Commerce Power	119
	<i>NLRB v. Jones & Laughlin Steel Corp.</i>	119
	Notes and Questions	119
	<i>United States v. Darby</i>	120
	Notes and Questions	122
	Problem B	123
[D]	The Modern Commerce Power	123
[1]	Large Accumulations of Small Effects	123
	<i>Wickard v. Filburn</i>	123
	Notes and Questions	125
[2]	Civil Rights Protection and the Commerce Power	126
	<i>Heart of Atlanta Motel, Inc. v. United States</i>	126
	<i>Katzenbach v. McClung</i>	128
	Notes and Questions	129
	Problem C	130
[3]	Criminalizing Local Activities under the Commerce Power	130
	<i>Perez v. United States</i>	130
	Problem D	131
[4]	The Commerce Power Today: What are the Limits?	131
	<i>Hodel v. Virginia Surface Mining and Reclamation Ass'n</i>	131
	<i>Hodel v. Indiana</i>	132
	Notes and Questions	133
	<i>United States v. Lopez</i>	133
	Notes and Questions	139
	Problem E	141
	<i>United States v. Morrison</i>	141
	Notes and Questions	149
	<i>Gonzales v. Raich</i>	150
	Notes and Questions	155
§ 2.03	THE TAXING, SPENDING, AND OTHER POWERS	157
[A]	The Taxing Power as an Instrument of Regulation	157
	<i>The Child Labor Tax Case (Bailey v. Drexel Furniture Co.)</i>	157
	Notes and Questions	157
	<i>United States v. Kahriger</i>	158

TABLE OF CONTENTS

	Notes and Questions	159
[B]	The Spending Power: “Insurance” Plans, Transfer Payments, and Inducements for State Regulation	160
	<i>United States v. Butler</i>	160
	Notes and Questions	161
	<i>Steward Machine Co. v. Davis</i>	161
	<i>South Dakota v. Dole</i>	162
	Notes and Questions	164
[C]	Other Congressional Powers	166
	Notes and Questions	166
Chapter 3	FEDERALISM: NATIONAL POWER AS AFFECTING THE POWERS OF THE STATES	169
	Note: What This Chapter Is About	169
§ 3.01	PREEMPTION OF STATE POWER BY CONGRESSIONAL ACTION: THE SUPREMACY CLAUSE	169
	The Concept of Preemption	169
[A]	Implied Preemption	170
	<i>Pennsylvania v. Nelson</i>	170
	<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission</i>	170
	Notes and Questions	172
	Problem A	174
[B]	Express Preemption	175
	<i>Ingersoll-Rand Co. v. McClendon</i>	175
	<i>Cipollone v. Liggett Group, Inc.</i>	176
	Notes and Questions	178
§ 3.02	THE NEGATIVE COMMERCE CLAUSE: RESTRICTIONS ON STATE POWER TO AFFECT INTERSTATE COMMERCE	180
	Introductory Note: The Two Faces of the Commerce Clause	180
	Madison, <i>The Federalist No. 42: Powers over Foreign and Interstate Affairs</i>	181
[A]	The Early Development of the Negative Commerce Clause	181
	Note on the Police Power in the Era of “Selective Exclusivity”	181
	<i>Gibbons v. Ogden</i>	182
	Notes and Questions	183
	<i>Cooley v. Board of Wardens of the Port of Philadelphia</i>	184
	Notes and Questions	185
	Problem B	186
[B]	The Modern Standard under the Negative Commerce Clause	187
	Note on (1) Discrimination and (2) The <i>Pike</i> Formulation	187
[1]	Discrimination Against Interstate Commerce: The “Strictest Scrutiny” Standards	187

TABLE OF CONTENTS

	Introductory Note	187
	<i>Dean Milk Co. v. City of Madison</i>	188
	Notes and Questions	188
	<i>City of Philadelphia v. New Jersey</i>	189
	Notes and Questions	189
	<i>Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon</i>	190
	Notes and Questions	193
[2]	Embargoes	195
	Problem C	195
	<i>C & A Carbone, Inc. v. Town of Clarkstown</i>	196
[3]	The Prohibition upon "Projecting Legislation into other States"	196
	<i>Brown-Forman Distillers Corp. v. New York Liquor Authority</i>	196
	Notes and Questions	197
[4]	"Nondiscriminatory" Regulation: The Balancing Test	197
	<i>Bibb v. Navajo Freight Lines, Inc.</i>	197
	<i>Southern Pacific Co. v. Arizona</i>	197
	Notes and Questions	199
	Note on How to Read the <i>Pike</i> Case	200
	<i>Pike v. Bruce Church, Inc.</i>	200
	Notes and Questions	201
	Problem D	202
	Notes and Questions	203
[5]	Subsidies to In-State Residents	204
	<i>West Lynn Creamery, Inc. v. Healy</i>	204
	Problem E	205
[6]	The Importance of Fact Litigation as to Burdens	205
	<i>Raymond Motor Transportation, Inc. v. Rice</i>	205
	<i>Kassel v. Consolidated Freightways Corp.</i>	205
	Notes and Questions	206
	Problem F	206
[7]	The States' Own Purchases, Sales, and Resources in the Marketplace	207
	<i>Reeves, Inc. v. Stake</i>	207
	<i>South-Central Timber Development, Inc. v. Wunnicke</i>	209
	Notes and Questions	210
[8]	Should the Dormant Commerce Clause Jurisprudence Be Abandoned?	211
	<i>American Trucking Associations, Inc. v. Smith</i>	211
	Notes and Questions	211
§ 3.03	THE SOVEREIGNTY ISSUE AND THE TENTH AMENDMENT: STATES "AS STATES"	213
[A]	Just What is the Place of a State in the Constitutional Hierarchy?: The Original Understanding	213
	Barbash, <i>The Founding</i>	213
	Notes and Questions	214

TABLE OF CONTENTS

[B]	The Extent of State Immunity from National Regulation	214
	State Sovereignty Prior to the <i>National League of Cities</i> Case	215
	<i>National League of Cities v. Usery</i>	215
	Notes and Questions	216
	<i>Garcia v. San Antonio Metropolitan Transit Authority</i>	217
	Notes and Questions	219
	<i>New York v. United States</i>	220
	Notes and Questions	224
	<i>Alden v. Maine</i>	226
	<i>Federal Maritime Commission v. South Carolina Ports Authority</i>	227
§ 3.04	THE INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE	228
	Introduction to Article IV: The Privileges and Immunities Clause	228
	<i>Supreme Court of New Hampshire v. Piper</i>	228
	Notes and Questions	230
§ 3.05	THE ELEVENTH AMENDMENT	232
	Introductory Notes	232
	<i>Seminole Tribe of Florida v. Florida</i>	234
	Notes and Questions	236
§ 3.06	ATTEMPTS BY THE STATE TO CONTROL THE FEDERAL GOVERNMENT	237
	Note on the Federal Government's Immunity From Efforts by the States to Disadvantage It	237
	<i>U.S. Term Limits, Inc. v. Thornton</i>	237
	Notes and Questions	241
Appendix 3	CONSTITUTIONAL LAW IN PRACTICE—NEGATIVE COMMERCE CLAUSE AND PREEMPTION ARGUMENTS IN <i>PENNZOIL CO. v. TEXACO, INC.</i>	243
	Background to the Pennzoil-Texaco Dispute	243
	Texaco's Complaint	244
	Affidavit Supporting Prayer for TRO	246
	Notes and Questions	248
Chapter 4	STATE TAXATION OF INTERSTATE COMMERCE	251
§ 4.01	THE HISTORICAL CONCERNS: DISCRIMINATION, MULTIPLE BURDENS (APPORTIONMENT), JURISDICTION, AND FAIR RELATIONSHIP	251
	Introductory Note	251
	<i>Western Live Stock v. Bureau of Revenue</i>	251
	Notes and Questions	252
	<i>Braniff Airways, Inc. v. Nebraska States Board of Equalization and Assessment</i>	253
	Notes and Questions	253
§ 4.02	THE MODERN CASES AND THE FOUR-PART TEST	254

TABLE OF CONTENTS

	Note on the Demise of the “Privilege Tax” Doctrine	254
	<i>Complete Auto Transit, Inc. v. Brady</i>	254
	Notes and Questions	255
Chapter 5	PRESIDENTIAL POWER AND RELATED POWERS OF CONGRESS; SEPARATION OF POWERS	259
§ 5.01	EXECUTIVE VERSUS LEGISLATIVE POWER	259
[A]	Chapter Introduction: Imperial Presidency or Imperial Congress?	259
	Notes and Questions	259
[B]	Sources of Executive Power	261
	Notes and Questions	261
	<i>Youngstown Sheet & Tube Co. v. Sawyer [The Steel Seizure Case]</i>	262
	Notes and Questions	266
[C]	The President’s Exercise of Quasi-Legislative Powers	267
	Introductory Note	267
[1]	The Presidential Veto	267
[2]	The (Statutory) Line-Item Veto	268
	<i>Clinton v. City of New York</i>	268
	Notes and Questions	272
[3]	The Pocket Veto	273
[4]	Impoundment	273
[D]	The Legislature’s Exercise of Quasi-Executive Powers: Bicameralism and Presentment	275
	Introductory Note	275
	<i>I.N.S. v. Chadha</i>	276
	Notes and Questions	280
[E]	Congressional Delegation of Quasi-Legislative Power to “Independent Regulatory Agencies” or Officers	281
	Introductory Note	281
	<i>Yakus v. United States</i>	282
	Notes and Questions	282
	<i>Bowsher v. Synar</i>	283
	Notes and Questions	286
	Eugene Gressman, <i>Separation of Powers: The Third Circuit Dimension</i> . .	287
	<i>Morrison v. Olson</i>	287
	<i>Mistretta v. United States</i>	291
	Notes and Questions	296
§ 5.02	JUDICIAL EXERCISE OF QUASI-LEGISLATIVE POWERS	297
	Notes and Questions	297
§ 5.03	FOREIGN OR EXTERNAL AFFAIRS	298
[A]	The Treaty Power	298
	Introductory Note	298
	<i>Missouri v. Holland</i>	298

TABLE OF CONTENTS

	Notes and Questions	299
[B]	Executive Proclamations and Agreements	300
	Introductory Note	300
	<i>United States v. Curtiss-Wright Export Corp.</i>	300
	Notes and Questions	301
[C]	Executive Agreements Based on Unclear Congressional Authority	301
	Introductory Note	301
	<i>Dames & Moore v. Regan</i>	302
	Notes and Questions	304
[D]	The Limits of Executive Power	304
	<i>Medellín v. Texas</i>	304
§ 5.04	THE WAR AND MILITARY POWERS AND THE COMMANDER-IN-CHIEF	306
[A]	The Extent of the War Power	306
	<i>Woods v. Cloyd w. Miller Co.</i>	306
[B]	Separation of Powers and the War Power	306
	Introduction to the War Powers Resolution	306
	The War Powers Resolution	307
	Notes and Questions	308
§ 5.05	EXECUTIVE AND LEGISLATIVE PRIVILEGE; IMMUNITIES	312
[A]	Legislative Immunity	312
	Note on the Speech or Debate Clause	312
[B]	Executive Privilege for Confidential Information	312
	Introductory Note	312
	<i>United States v. Nixon</i>	313
	Notes and Questions	315
[C]	Executive Immunity against Liability for Damages	316
	<i>Nixon v. Fitzgerald</i>	316
	<i>Clinton v. Jones</i>	316
§ 5.06	THE APPOINTMENTS POWER, POWER OVER PERSONNEL, AND NATIONAL PROPERTY POWER	317
[A]	The Appointments Power	317
	Introductory Note	317
	<i>Buckley v. Valeo</i>	317
[B]	Presidential Power over Personnel and Property	318
	Notes and Questions	318
§ 5.07	THE PARDON POWER	319
	Note on the Pardon Power	319
§ 5.08	THE ELECTORAL COLLEGE AND PRESIDENTIAL ELECTIONS	320
	Notes on the Electoral College	320
	<i>Bush v. Gore</i>	321
	Notes and Questions	330

TABLE OF CONTENTS

Chapter 6	CONSTITUTIONAL PROTECTION OF ECONOMIC RIGHTS	333
§ 6.01	CONSTITUTIONAL PROTECTION OF ECONOMIC, AS OPPOSED TO PERSONAL OR POLITICAL, RIGHTS	333
	Note: Do Economic Rights Have a Status Similar to that of other Personal and Political Rights?	333
§ 6.02	SUBSTANTIVE DUE PROCESS AND BUSINESS REGULATION	335
[A]	Early Conceptions: Justice Chase's "Natural Rights" Theory	335
	<i>Calder v. Bull</i>	335
	Notes and Questions	336
[B]	The Fourteenth Amendment	336
	Note: Substantive Due Process and the Historical Basis of the Fourteenth Amendment	336
	<i>The Slaughter House Cases</i>	337
	Notes and Questions	339
	<i>Munn v. Illinois</i>	340
	Notes and Questions	341
[C]	"Liberty of Contract": A Case Study in the Need for Judicial Restraint	341
	<i>Lochner v. New York</i>	341
	Notes and Questions	344
	Note: From <i>Lochner</i> to <i>Schechter Poultry</i> : The Court Uses the Commerce Clause and Substantive Due Process to Control Legislatures	346
[D]	Substantive Due Process Recedes: The "Rational Basis" Test	347
	<i>Nebbia v. New York</i>	347
	Notes and Questions	349
	<i>Williamson v. Lee Optical of Oklahoma, Inc.</i>	350
	<i>Duke Power Co. v. Carolina Environmental Study Group, Inc.</i>	350
	Problem A	351
	Notes and Questions	351
	Problem B	352
[E]	Equal Protection in the Economic Context	353
§ 6.03	TAKING OF PROPERTY WITHOUT JUST COMPENSATION	353
	Introductory Note on the Taking Clause Doctrine	353
	Note on the Purposes of the Taking Clause	354
[A]	Taking by Physical Invasion or by Destruction	355
	<i>Loretto v. Teleprompter Manhattan CATV Corp.</i>	355
	<i>Nollan v. California Coastal Commission</i>	355
	Notes and Questions	358
	<i>Phillips v. Wash. Legal Foundation</i>	358
	<i>Dolan v. City of Tigard</i>	360
	Notes and Questions	361
[B]	Taking by Regulation of Use	361
[1]	When Does "Regulation" Become "A Taking"?	361

TABLE OF CONTENTS

	<i>Penn Central Transportation Co. v. City of New York</i>	361
	Notes and Questions	366
	<i>Lucas v. South Carolina Coastal Council</i>	368
	<i>Eastern Enterprises v. APFEL</i>	369
	Notes and Questions	370
	Problem C	371
[2]	Remedies for Takings: Inverse Condemnation	371
	<i>First English Evangelical Lutheran Church v. County of Los Angeles</i> ..	371
	Notes and Questions	372
[C]	Problems Associated with Price Regulation	373
	Note: Price Regulation and The Takings Clause	373
	<i>Duquesne Light Co. v. Barasch</i>	374
	Notes and Questions	375
[D]	The Public Purpose Requirement	376
	<i>Hawaii Housing Authority v. Midkiff</i>	376
	Notes and Questions	377
	APPENDIX TO §§ 6.02–.03: CONSTITUTIONAL LAW IN PRACTICE—DUE PROCESS AND TAKING CLAUSE ISSUES IN <i>BALL DEVELOPMENT CO. V. CITY OF VIRGINIA CITY</i>	378
	Background to the Dispute: <i>Ball Development Co. v. City of Virginia City</i>	378
	Plaintiff's Complaint Asserting Taking, Due Process, and Other Claims ..	379
	Note on Defendant's Answer	381
	Plaintiff's Motion for Summary Judgment on Constitutional and Other Claims	381
	Note on the Defendant City's Cross-Motion for Summary Judgment and Supporting Factual Material	384
	Notes and Questions	384
§ 6.04	THE CONTRACT CLAUSE	386
[A]	The Original Understanding	386
	Note on the Historical Purpose of the Contract Clause	386
	<i>Fletcher v. Peck</i>	389
	Notes and Questions	389
[B]	The Long Dark Age of the Contract Clause	390
	<i>Charles River Bridge Co. v. Warren Bridge Co.</i>	390
	<i>Stone v. Mississippi</i>	390
	Notes and Questions	391
[C]	The Renaissance of the Contract Clause	392
	<i>United States Trust Co. v. New Jersey</i>	392
	<i>Allied Structural Steel Co. v. Spannaus</i>	393
	Notes and Questions	396
	Problem D	396
[D]	Reburial of the Contract Clause?	397
	<i>Energy Reserves Group v. Kansas Power & Light Co.</i>	397