

OUTLINE

FOREWORD TO THE ELEVENTH EDITION	V
TABLE OF CASES	XXI
THE CONSTITUTION OF THE UNITED STATES	XLV
Introduction. Constitutional Principles	1

PART 1. THE ALLOCATION OF POWERS

Chapter 1. Judicial Review and Its Limits	7
A. Foundations of Judicial Review	7
1. Review of Federal Actions	7
2. Review of State Actions	11
B. Foundations of Federal Jurisdiction	14
1. The Constitutional Basis of Federal Jurisdiction	14
2. Bases of Federal Court Jurisdiction	15
3. Statutory Forms of Review	20
C. Constitutional and Policy Limitations on Judicial Review	21
1. Constitutional Limitations	22
a. The Bar of the Eleventh Amendment	22
b. The "Case or Controversy" Requirement	29
2. Policy Limitations	31
D. Specific Doctrines Limiting Judicial Review	33
1. Who May Litigate?—the Problem of Standing	33

a. Constitutional Requirements for Standing	33
b. Federal Taxpayer Standing	61
c. Citizen Standing	68
d. Third Party Standing	70
2. When Can Constitutional Litigation Be Brought? The Problem of Timing	74
a. Rule Against Mootness.....	74
b. Ripeness, Prematurity, and Abstractness.....	78
3. What Can Be Litigated? The Political Question Doctrine	81

Chapter 2. National Legislative Powers 91

A. Scope of Congressional Power	91
B. The Commerce Power	96
1. Establishing the Foundations	96
2. Using the Commerce Clause for Police Power Ends	98
3. The Stream of Commerce	101
4. The Affection Doctrine	102
C. The Taxing Power	117
D. The Spending Power	121
E. Intergovernmental Immunities.....	128
F. The Enumeration Clause and the Decennial Census.....	139

Chapter 3. State Power in American

Federalism..... 143

A. State Power to Regulate Commerce	145
1. The Nature of the Power	145
2. The Subject of the Regulation: The <i>Coolley</i> Doctrine	146

3. The Modern Approach: The Balancing of Interests	147
a. Discrimination: Purpose, Means, Effects.....	150
b. Undue Burdens—Ad Hoc Balancing	165
4. State as Market Participant	168
5. Interstate Privileges and Immunities	171
B. When Congress Speaks.....	178
1. Preemption	178
2. Legitimization	180
C. State Power Concerning Its Electors in the Electoral College	182
D. State Legislative Power Under the Elections Clause	183

Chapter 4. Congress and the Executive

Power.....	189
A. The Domestic Arena.....	192
1. Executive Lawmaking	192
2. Executive Impoundment	194
3. Delegation, the Legislative Veto, and the Line Item Veto	196
4. Appointment and Removal.....	202
5. Separation of Powers Generally	213
B. The Foreign Arena	214
1. Allocating the Foreign Relations Power	215
2. Treaties and Executive Agreements.....	219
3. Allocating the War Power	225
C. Promoting Executive Responsibility	229
1. Executive Privilege	229
2. Executive Immunity	232
3. Government Subpoena Power over Presidential Papers	236

PART 2. INDIVIDUAL RIGHTS AND LIBERTIES

Chapter 5. Due Process of Law	257
A. The Process of Incorporation	257
B. Substantive Due Process	263
1. Traditional Substantive Due Process	263
a. The Early Rise and Demise of Economic Due Process	264
b. Economic Regulation: Substantive Due Process Today	268
c. The Takings Alternative	272
2. Substantive Due Process Revisited: Fundamental Personal Rights	286
a. In General	286
b. Contraception, Abortion, and Sodomy	289
c. Marital and Familial Rights	318
d. Right to Care and Protection	322
e. The Right to Refuse Treatment	325
f. No Right to Assisted Suicide	328
g. Other Fundamental Rights	329
C. Procedural Due Process	330
1. Life, Liberty, and Property Interests	330
a. Property Interests	331
b. Liberty Interests	334
2. The Process That Is Due	340
Chapter 6. Equal Protection	355
A. Traditional Equal Protection	357
B. The New Equal Protection	364
1. Classifying Traits	364
a. Race and Ethnic Origins	370

b. Alienage: The “Sometimes Suspect” Classification	411
c. Gender Classification: Intermediate Review	413
d. Illegitimacy Classification: Intermediate Review	426
e. Discrimination on the Basis of Sexual Preference	429
f. Other Bases of Classification.....	434
2. Fundamental Rights.....	435
a. Interstate Travel.....	437
b. Marriage and Family Life	440
c. Voting	441
d. Access to Justice	455
e. The Limits of Fundamental Rights	460

Chapter 7. Freedom of Expression..... 465

A. The Basic Doctrine	465
1. The Rationale of Speech Protection	465
2. A Doctrinal Overview	468
a. Content Control vs. Indirect Burdens ...	468
b. Vagueness and Overbreadth.....	478
c. The Doctrine of Prior Restraint	482
3. The Clear and Present Danger Doctrine ...	486
4. Symbolic Conduct	493
5. Freedom of Association and Belief.....	501
a. The Source of the Right.....	501
b. Membership and Associational Action.....	502
c. Group Registration and Disclosure	505
d. Public Benefits and Government Employment.....	509

e. The Right Not to Associate— Compelled Speech.....	510
B. The Doctrine Applied	527
1. Expression in the Local Forum	527
a. Controlling Speech Content: Inciting, Provocative, and Offensive Language ...	528
b. Rejecting New Categories of Unprotected Expression	543
c. Access to Public Property—the Public Forum	546
d. Access to Private Property	561
e. Licensing, Permits, and Injunctions	565
2. Commercial Speech.....	568
a. From <i>Valentine</i> to <i>Virginia</i> <i>Pharmacy</i>	568
b. The Advent of the <i>Central Hudson</i> Test	570
c. Lawyer Advertising	580
3. Defamation and Privacy	583
a. Rise of the Public Law of Defamation ...	583
b. The Modern Public Law of Defamation.....	586
c. Identifying the Public Figure Plaintiff	590
d. The Public Law of Privacy	592
4. Obscenity and Indecency	596
5. Freedom of the Press	617
a. Newsgathering.....	618
b. Public Access to the Media.....	625
6. Speech in the Electoral Process	633
7. Government-Funded Speech.....	644

Chapter 8. Freedom of Religion	657
A. The Establishment Clause	658
1. Public Aid to Religion	663
2. Religion in the Schools	672
3. Establishment Outside the Schools	686
B. Free Exercise of Religion	699
 Chapter 9. State Action	 731
A. Introduction.....	731
B. Framing the State Action Doctrine.....	732
C. Finding State Action	735
1. Public Functions	737
2. Significant Involvement/Joint Participation.....	740
3. Encouragement, Authorization, and Approval	742
 Chapter 10. Congressional Legislation in Aid of Civil Rights and Liberties	 753
A. Sources of Congressional Power.....	753
B. Enforcing the Thirteenth Amendment	754
C. Enforcing the Fourteenth Amendment	757
1. Congress' Remedial Powers	757
2. Congress' Substantive Powers	760
3. Reaching Private Conduct.....	770
D. Enforcing the Fifteenth Amendment.....	772
 INDEX.....	 777