

INTRODUCTION	xii
I. THE NATURE OF JUDICIAL REVIEW	1
A. ORGANIZATION OF THE COURTS IN THE FEDERAL SYSTEM	1
1. Federal Court System	
a. Source of federal judicial power	
b. Scope of federal judicial power	
c. Limitation of the 11th Amendment on federal court jurisdiction	
d. Exceptions to the application of the 11th Amendment	
(1) Suits against state officials	
(2) Suits against state subdivisions	
(3) Distinction	
(4) Damages barred, not injunctions	
(5) Expansion of 11th Amendment immunity	
(6) Suits to recover under the ADA	
(7) State Consents	
(8) 11th Amendment today	
B. THE UNITED STATES SUPREME COURT	3
1. Jurisdiction of the Supreme Court	
a. Original jurisdiction	
b. Appellate jurisdiction	
(1) Power of judicial review	
(2) Statutory regulation of appellate jurisdiction	
(a) Appeal	
(b) Certiorari	
2. Limitations on Jurisdiction of Federal Courts	
a. Case or controversy requirements	
(1) No advisory opinions	
(2) Declaratory judgments	
b. Mootness	
(1) Collateral legal consequences	
(2) Where injury is capable of repetition	
c. Ripeness	
(1) Absence of real threat of harm	
(2) No claim of harm	
d. Abstention	
(1) Where state law is vague or ambiguous	
(2) Pending state criminal proceedings	
(3) Analogous pending state civil proceedings	
e. Standing	
(1) Injury in fact	
(2) Causation (“But For” test)	
(3) Specialized problems of standing	
(a) Taxpayer’s standing	
(b) Third party standing — Raising the rights of others	
i. Where special relationship exists between the claimant and third party	
ii. Where third party is unable to bring suit on his (or her) own behalf	
iii. Associations	
f. Justiciability—Political Questions	
g. Adequate and independent state ground	

II. SEPARATION OF POWERS	8
A. THE POWERS OF CONGRESS	8
1. Legislative Power — In General	
a. Express powers	
b. Implied powers	
c. Enabling clauses	
2. Commerce Power	
a. Modern view	
(1) Limitations	
b. Regulation of local matters affecting commerce	
c. Racial segregation and discrimination	
d. Criminal statutes	
e. The 10th Amendment as a limitation on the commerce power	
3. Taxing power	
a. Constitutional grant and limitation	
(1) Uniformity limitation	
(2) Direct tax limitation	
(3) Export tax limitation	
b. Use of taxing power for purposes of regulation	
(1) Doctrine of objective constitutionality	
(2) Modern trend	
4. Spending power	
a. Modern view	
b. Use of spending power to regulate	
c. Spending power and election reform	
5. War and Defense Powers	
a. Congressional provisions	
b. Scope of war power	
c. Military courts	
(1) Review by civilian courts	
(2) Jurisdiction	
6. Investigatory Power	
a. Scope of investigatory power	
b. Enforcement of investigatory power	
c. Defenses available to a witness who refuses to answer questions before a congressional committee	
7. Property Power	
8. Power of Eminent Domain	
a. Limitation on power of eminent domain	
9. Admiralty and Maritime Power	
10. Bankruptcy Power	
11. Postal Power	
12. Copyright and Patent Power	
13. Speech and Debate Clause	
a. Scope of immunity	
B. EXECUTIVE POWER	13
1. As Chief Executive	
a. Appointment power	
b. Removal power	

c. Obligation to report	
(1) Veto power	
(2) Override of veto	
(3) No other legislative power	
d. Pardon power	
(1) Caveat	
e. Executive privilege	
2. As Commander-in-Chief	
a. Military powers	
b. Unsettled areas	
3. International Affairs	
a. Treaty power	
(1) Self-executing treaties	
(2) Not self-executing treaties	
(3) Distinction	
b. Executive agreements	
(1) Ratification by Congress unnecessary	
C. INTERBRANCH CHECKS UPON THE EXERCISE OF FEDERAL POWER	16
1. Congressional limits on the executive	
a. Impeachment power	
b. Legislative veto	
c. Investigatory power	
d. Delegation to executive	
e. Appropriations power	
2. The President's power to veto or to withhold action under a statute	
3. Judicial restraints upon President and Congress	
III. THE RELATION OF THE NATION AND THE STATES IN THE FEDERAL SYSTEM	17
A. NATURE AND SCOPE OF FEDERAL AND STATE POWERS	17
1. In General	
a. Exclusive federal powers	
b. Exclusive state powers	
c. Concurrent federal and state powers	
d. No general police power	
(1) General welfare clause	
(2) Necessary and proper clause	
B. INTERGOVERNMENTAL IMMUNITIES	18
1. Immunity of federal government	
a. In general	
(1) Postal service	
b. Taxation of the federal government by the state	
(1) Tax on independent contractors	
(2) State sales tax	
(3) State property tax	
(4) State income tax	
c. Regulation of the federal government by the state	
(1) State regulation of federal lands	
2. Immunity of state government	
a. Immunity against suits	
(1) Suits by the federal government	

(2) Suits by a sister state	
(3) Suits by a private citizen	
b. Immunity against federal regulation	
c. Immunity against federal taxation	
C. THE AUTHORITY RESERVED TO THE STATES	20
1. Source of power	
a. Constitutional limitations	
2. State regulation of interstate commerce	
a. Basic test	
(1) Discrimination	
(2) Nature of activity regulated	
(3) Balance of interests test	
b. Factors determining constitutionality of state regulation	
(1) Police power	
(2) Burden cannot outweigh state interest	
(3) Public health measures	
D. RESERVED STATE POWER IN TAXATION	21
1. General Principles	
a. Nexus requirement	
b. Apportionment	
c. Discrimination	
(1) Privileges and immunities clause	
d. Relationship to services rendered	
2. Various types of state taxes	
a. Ad valorem property taxes	
b. Sales and use taxes	
(1) Sales tax	
(2) Use tax	
c. "Doing Business" taxes	
d. Net income taxes	
e. Flat license fee on "drummers"	
f. License tax on "peddlers"	
E. NATIONAL POWER TO OVERRIDE STATE AUTHORITY	23
1. Supremacy clause	
a. Similarity between state and federal statutes	
b. Greater state protection permitted	
IV. PROTECTION OF INDIVIDUAL RIGHTS	24
A. "STATE ACTION" AND THE ROLE OF THE FEDERAL JUDICIARY	24
1. 14th Amendment	
a. Application	
b. 13th Amendment	
2. State Action Requirement	
a. Where the private activity performs an exclusive public function	
(1) Company towns	
(2) Elections	
b. State involvement	
(1) No significant state involvement	

V. DUE PROCESS AND THE INCORPORATION OF PORTIONS OF THE BILL OF RIGHTS	25
A. INCORPORATION OF THE BILL OF RIGHTS	25
1. 14th Amendment Privileges and Immunities Clause	
a. New revival	
2. 14th Amendment Due Process Clause	
3. Scope of the Due Process Clause	
a. Person	
b. Corporation	
c. Aliens	
4. Procedural due process	
a. Deprivation of liberty	
(1) Freedom from bodily restraints	
(2) Defamation by government	
(3) Physical punishment	
(4) Commitment to a mental institution	
(5) Injury to reputation	
(6) Competency to stand trial	
b. Property interests	
(1) Public education	
(2) Continued welfare benefits	
(3) Retention of driver's license	
(4) Public employment	
(5) Prejudgment garnishment	
(6) Distinguish	
(7) Forfeiture of property	
(8) Business licensing	
c. Type of process required	
d. Irrebuttable presumptions	
(1) Civil proceedings	
(2) Criminal cases	
5. Substantive due process	
a. Economic regulation	
b. Fundamental rights	
(1) Contraceptives	
(2) Abortion	
(a) Consent requirements	
(b) Public funding	
(c) Late-term abortion	
(3) Family relations	
(4) Private education	
(5) Marriage	
(6) Obscene material	
(7) The right to die	
c. Right to travel	
(1) Travel abroad	
d. Right to vote	
(1) Basic principles	
6. "Takings" Clause	
a. Taking v. Regulation	
b. Land use restrictions	
(1) Temporary restriction	

VI. EQUAL PROTECTION OF THE LAWS	33
A. CONSTITUTIONAL BASIS	33
1. Source	
2. Relationship between Substantive Due Process and Equal Protection	
a. Substantive due process	
b. Equal protection	
B. THREE STANDARDS OF REVIEW	33
1. Strict Scrutiny	
2. Middle-tier, or Intermediate, Scrutiny	
3. Rational Basis Scrutiny	
C. PROVING DISCRIMINATORY CLASSIFICATIONS	34
1. Intentional Discrimination Required	
a. Facial discrimination	
b. Discriminatory application	
c. Discriminatory motive	
D. SUSPECT CLASSIFICATIONS	34
1. Race and National Origin	
a. Racial (or ethnic) classifications	
b. School segregation	
(1) Busing	
c. Affirmative Action	
d. Racial gerrymandering	
2. Alienage	
3. Illegitimacy	
a. Wrongful death	
b. Workmen's compensation	
c. Welfare benefits	
d. Intestate succession	
4. Gender	
a. Discrimination against women	
b. Discrimination against men	
c. Benign sex discrimination	
5. Age	
6. Poverty	
7. Mental retardation	
VII. PRIVILEGES AND IMMUNITIES CLAUSES	38
A. PRIVILEGES AND IMMUNITIES UNDER THE 14TH AMENDMENT	38
1. Constitutional provision	
2. Scope	
B. PRIVILEGES AND IMMUNITIES UNDER ARTICLE IV, SECTION 2	38
1. Constitutional provision	
2. Scope	
a. Improper discrimination	
b. Permissible discrimination	
VIII. RETROACTIVE LEGISLATION	40
A. THE CONTRACT CLAUSE	40
1. Constitutional provision	
a. Retroactive state legislation	

b. Police power limitation	
c. Modern applications	
B. EX POST FACTO LAWS	40
1. Constitutional provision	
a. Retroactive effects	
C. BILLS OF ATTAINDER	40
1. Constitutional provision	
2. Definition	
a. Application	
IX. 1ST AMENDMENT FREEDOMS	41
A. FREEDOM OF RELIGION AND SEPARATION OF CHURCH AND STATE	41
1. Constitutional provision	
2. General application	
3. Aid to parochial school students	
a. Textbooks	
b. Furnishing standardized tests	
c. Essential municipal services	
d. Health services	
e. Furnishing remedial and therapeutic services	
f. State income tax deduction for education expenses	
(1) Contrast	
g. Sign-language interpreters	
4. Direct aid to parochial schools and church-related institutions	
a. Hospitals	
b. Colleges	
c. Elementary and secondary schools	
(1) Teacher salaries	
5. Tax consequences	
a. Property tax exemptions	
b. Tax deductions	
c. Tax exemptions	
d. Vouchers	
6. Religious activities in public schools	
7. Incidental government action benefiting religion	
8. Ceremonies and displays	
a. Opening prayers	
b. Religious displays	
B. SCOPE OF FREE EXERCISE CLAUSE	45
1. In general	
2. Balancing test	
a. Strong state interest overriding “free exercise” claims	
(1) Polygamy	
(2) Child labor	
(3) Selective service	
(4) Denial of veterans’ benefits to conscientious objectors	
(5) Sunday closing laws	
(6) Taxes	
(7) Wearing religious attire	
(8) College Scholarships	

- b. "Free exercise" claims overriding weak state interest
 - (1) Compulsory school attendance
 - (2) Unemployment compensation
 - (3) Door-to-door solicitation
- 3. Status of Free Exercise Clause today
 - a. Intentional interference with religion
 - b. Unintentional interference with religion

C. FREEDOM OF EXPRESSION

47

- 1. Constitutional provision
 - a. Application to states
- 2. Distinction between regulation of speech content and regulation of time, place, and manner of speech conduct
- 3. Regulation of speech content
 - a. Symbolic speech
 - (1) Example
 - (2) Compare
 - b. Clear and present danger
 - (1) Symbolic speech
 - c. Fighting words
 - (1) Overbreadth and vagueness
 - (2) Hate crimes
 - d. Defamation
 - (1) Defamation of public officials and public figures
 - (2) Nonmedia defamation of a private individual
 - (3) Invasion of privacy
 - (4) Opinion
 - e. Obscenity
 - (1) Pandering
 - (2) Methods of regulating related areas
 - (a) Zoning ordinances
 - (b) 21st Amendment
 - f. Child pornography
 - (1) Sale and distribution
 - (2) Private possession
 - (3) Virtual child pornography
 - g. Commercial speech
 - (1) Modern test
 - (2) Examples
 - (a) Drug prices
 - (b) Contraceptives
 - (c) Attorney advertising
 - (d) "Board Certified"
 - (e) Billboards
 - (f) Illegal or deceptive advertising
 - (g) Newsracks
 - (h) Beer bottle labels
 - (3) Advertisement of harmful, yet lawful, products
 - h. Funding restrictions
 - i. Restrictions about discussing abortion

4. Regulation of the time, place and manner of speech
 - a. Public forums
 - b. Nonpublic forums
 - c. Private property
 - (1) Use of loudspeakers
 - (2) Solicitation
 - (3) Unwanted mail
 - d. Requirement to include all political candidates in debates
 - e. Licensing
 - (1) Statute “void on its face”
 - (2) Statute valid on its face
 - f. Injunctions
 - (1) Ex parte injunctions
5. Special procedural rules/Facial attacks
 - a. Prior restraints
 - (1) Presumption
 - (2) Forms of prior restraint
 - b. Exceptional cases in which prior restraints allowed
 - (1) National security
 - (2) Classified military information
 - (3) Obscenity
 - (4) Film censorship
 - c. Overbreadth doctrine
 - d. Vagueness doctrine
6. Freedom of Association
 - a. Regulations upon public employment
 - (1) In general
 - (2) Modern test
 - b. Examples
 - c. Loyalty oaths
7. Freedom of the Press
 - a. Right to attend trials
 - b. “Gag” orders
 - c. Newspersons’ privilege
 - d. Broadcasting regulations
 - e. Cable programming
 - f. Publication of illegally obtained information
 - g. Prior restraints
8. Bar membership

SUMMARY QUESTIONS	60
Question by Question Capsule Outline	60
Constitutional Law Questions	66
Constitutional Law Explanatory Answers	137
MULTISTATE ISSUE GRAPHS	171