

# Mastering Modern Constitutional Law

MODERN CONSTITUTIONAL LAW, 5th Edition. By Ronald D. Rotunda.<sup>†</sup> St. Paul, Minnesota: West Publishing Company, 1997. Pp. xlv, 1184.

*Reviewed by Thomas E. Baker\**

## TOUGH LAW

What Maitland said about the common law also can be said about the queen subject in American law schools: constitutional law is "tough law."<sup>1</sup> It is tough to master—tough to teach and tough to learn.

There are several reasons for this thorough difficulty. First, it is not an exaggeration to say that the fate of the nation is often at stake in constitutional cases and controversies, and constitutional decisions have shaped our history as a people. Second, we Americans can lay claim to inventing the field, and we have been continuously preoccupied with reinventing it for more than two centuries of applied political philosophy. Third, the Supreme Court is one of the most fascinating institutions inside or outside government. Fourth, there is so much extant material—more than five hundred Talmudic volumes of the *U.S. Reports* full of majority, concurring, and dissenting opinions augmented by the interpretations and implementations of various other constitutional actors in the political branches.<sup>2</sup> Fifth, every October Term's docket presents novel issues for decision, and each new nomination and confirmation renders much of constitutional law indeterminate, so there is a constant sense of uncertainty, anticipation,

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1. "This prepares us for the remark that taught law is tough law." FREDERIC WILLIAM MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* 18 (1901).

2. Thomas E. Baker, *Tyrannous Lex*, 82 *IOWA L. REV.* 689, 698 (1997).

and discovery in the field.<sup>3</sup> Sixth, constitutional analysis—if one thinks deeper and broader than mere doctrine and three-pronged tests—takes on metaphysical, quasi-religious qualities of immanence and transcendence that are far more profound than any other subject in law school. For these and other reasons, constitutional law is the toughest subject in the curriculum.

This review essay will explain why I use Ronald D. Rotunda's casebook, *Modern Constitutional Law*<sup>4</sup> and how I go about teaching Constitutional Law.

### BECOMING A MASTER OF THE SUBJECT

You must master your subject before you can expect to master its teaching. This obliges ability, effort, humility, and an abiding sense of responsibility.<sup>5</sup> To aspire to become a constitutionalist—a true scholar of the Constitution—one must be prepared to think great thoughts or, at least, one must spend time studying the great thoughts of others, in the grand tradition of liberal education.<sup>6</sup> There is all that law to learn, to be sure, which poses a continuing challenge.<sup>7</sup> But you

3. Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L. Q. 325, 327-330 (1995).

4. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* (5th ed. 1997).

5. Thomas E. Baker, *A Law Student's Responsibility for a Liberal Education*, 20 TEX. TECH. L. REV. 1153, 1155-56 (1989). See also Thomas E. Baker & Timothy W. Floyd, *The Role of Religious Convictions in the Teaching of Law Students*, 17 J. LEGAL PROF. 77 (1992).

6. [L]iberal education consists in listening to the conversation among the greatest minds. But here we are confronted with the overwhelming difficulty that this conversation does not take place without our help—that in fact we must bring about that conversation. The greatest minds utter monologues. We must transform their monologues into a dialogue, their "side by side" into a "together." . . . Since the greatest minds contradict one another regarding the most important matters, they compel us to judge of their monologues; we cannot take on trust what any one of them says. On the other hand, we cannot but notice that we are not competent to be judges. LEO STRAUSS, *LIBERALISM ANCIENT AND MODERN* 7 (1968).

7. Alexander Hamilton gave this reason for Article III's "good behaviour" tenure: It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. THE FEDERALIST No. 78, at 464, 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

must also add equal parts of history, political science, and philosophy to your personal curriculum; you must become a citizen of the past yet remain a citizen of the present.<sup>8</sup> As a constitutional scholar, you are haunted by the fear that you will never have anything worthwhile to say. After perhaps a decade of eavesdropping, you may attempt tentatively to join the conversation.<sup>9</sup> But even then there is a considerable risk of embarrassment that what you think is brilliant is simply silly or merely eccentric.<sup>10</sup>

Professor Ronald D. Rotunda is a master of our subject. Indeed, *Rotunda* is a major brand name in constitutional law.<sup>11</sup> First, there

8. I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

LEARNED HAND, *Sources of Tolerance*, in *THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND* 81 (Irving Dilliard ed., 3d ed. 1974). See generally Thomas E. Baker & James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 IOWA L. REV. 739 (1991).

9. [T]he mind needs teachers. . . . But there cannot be an infinite regress: ultimately there must be teachers who are not in turn pupils. Those teachers who are not in turn pupils are the great minds or, in order to avoid any ambiguity in a matter of such importance, the greatest minds. Such men are extremely rare. We are not likely to meet any of them in any classroom. We are not likely to meet any of them anywhere. It is a piece of good luck if there is a single one alive in one's time. For all practical purposes, pupils, of whatever degree of proficiency, have access to the teachers who are not in turn pupils, to the greatest minds, only through the great books. Liberal education will then consist in studying with the proper care the great books which the greatest minds have left behind—a study in which the more experienced pupils assist the less experienced pupils, including the beginners.

LEO STRAUSS, *supra* note 6, at 3.

10. Most theories of constitutional law rest on some notion of the consent of the governed, either through tacit institutional acquiescence or through some kind of social contract theory. A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of. Who would know better than the average person what the average person has consented to? How can someone have consented to a position that is so novel and clever that only one person on earth has ever thought of it?

Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 924 (1986).

11. Professor Rotunda also is a coauthor of one of the leading case books in legal ethics. RONALD D. ROTUNDA & THOMAS MORGAN, *PROBLEMS AND MATERIALS ON PROFESSIONAL*

is the casebook that is the subject of this review, one of the few casebooks edited *solo voce*.<sup>12</sup> Then he is a coauthor of the best hornbook on the subject.<sup>13</sup> He also is a coauthor of the only multi-volume treatise covering the whole field of constitutional law.<sup>14</sup> He has been cited by the Supreme Court.<sup>15</sup> And he is a professor's professor in that his writings are cited so often by other academics.<sup>16</sup> He is a regular quote-meister in the national press.<sup>17</sup> He even has his very own homepage on the World Wide Web.<sup>18</sup> The guy definitely is a player at the national level.<sup>19</sup>

### BECOMING A MASTER TEACHER

What does it take to teach constitutional law to first-year law students? Probably only a good casebook and a teacher's manual.<sup>20</sup>

RESPONSIBILITY (6th ed. 1995). He is a prominent scholar in that field, as well.

12. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* (5th ed. 1997).

13. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* (5th ed. 1995). See also ERWIN CHERMERINKSY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* (1997); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988). See generally Earl M. Maltz, *Trust Betrayed*, 97 HARV. L. REV. 1016 (1983) (book review); William F. Swindler, *Constitutional Law*, 10 N. M. L. REV. 223 (1979-80) (book review); James W. Torke, *A Look at the Constitutional Law Texts*, 31 J. LEGAL EDUC. 688 (1981) (book review).

14. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* (2d ed. 1992). Upon first being published, this work was hailed as the "first definitive account of constitutional law in nearly 100 years." 60 FLA. B. J., Apr. 1986, at 88. See generally Ralph A. Rossum, *Treatise on Constitutional Law: Substance and Procedure*, 4 CONST. COMMENTARY 409 (1987) (review of first edition).

15. See, e.g., *Clinton v. Jones*, 117 S. Ct. 1636, 1649 (1997); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 199 (1996); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 904, 917 (1995); *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 156 (1986); *Florida Dept. HRS v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153 (1981); *Central Hudson Gas & Elec. Corp. v. PSC*, 447 U.S. 557, 575 (1980); *Cousins v. Wigoda*, 419 U.S. 477, 483 (1975).

16. A LEXIS search on August 31, 1997, in the database Lawrev/Allrev, scored nine-hundred hits on "Ronald D. Rotunda."

17. A LEXIS search on August 31, 1997, in the databases News/Curnws and News/Arcnws, respectively, scored 189 and 239 hits on "Ronald pre/3 Rotunda and professor or 'supreme court' or constitution."

18. <<http://www.staff.uiuc.edu/~rrotunda/>> (That he has a sense of humor is illustrated by the fact that his "official photograph" depicts him standing next to Mr. Spock from the U.S.S. Enterprise).

19. Indeed, that he is an international player is demonstrated by the fact that he has served as an adviser to several emerging democracies in Eastern Europe and the former Soviet Union on their constitutions. See <<http://www.staff.uiuc.edu/~rrotunda/bio.html>>.

20. In the generation I have been teaching, teacher's manuals have become *de rigueur*. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *TEACHER'S MANUAL TO CONSTITUTIONAL LAW THIRTEENTH EDITION* (1997) (first edition of a teacher's manual published for the thirteenth edition of the case book).

I am a devout heresiarch against modernity,<sup>21</sup> especially when it comes to the modern educational theory that reigns on college campuses.<sup>22</sup> Technology and multimedia mostly get in the way of teaching and learning.<sup>23</sup> I am convinced beyond peradventure that the best education in constitutional law would be Ron Rotunda on one end of the log and a student on the other.<sup>24</sup> Sitting opposite his casebook is the next best thing for my students. I still believe in books.<sup>25</sup> That brings us to the consideration of what makes a good casebook and why I believe Professor Rotunda's case book is a such a good one.

### MODERN CONSTITUTIONAL LAW

My story with Professor Rotunda's book begins in the spring of 1981, when I first taught Constitutional Law. My book choice came down to Gunther<sup>26</sup> versus Lockhart<sup>27</sup> and I chose Lockhart, mainly because it was the book my teacher and mentor, Fletcher N. Baldwin, Jr., used to teach my first-year course back when I was a law student at the University of Florida. What was good enough for Moses was good enough for me.<sup>28</sup> As a professor, I spent two years trying to

21. "Most new ideas are bad. . . ." RICHARD A. POSNER, *THE FEDERAL COURTS, CRISIS AND REFORM* 195-96 (1985).

22. Cf. D. L. Rosenhan, *On Being Sane in Insane Places*, *SCIENCE*, Jan. 1973, at 250.

23. The constitutional law exception which proves this rule may be Professor Bell's effort to reinvent the casebook, recently published by Anderson Press. DERRICK A. BELL, JR., *CONSTITUTIONAL CONFLICTS* (1997). Part I is a five-hundred page book between two covers that combines a hornbook summary of the law with a workbook of hypotheticals; Part II is a set of disks containing a searchable database of the relevant judicial opinions in edited form. This is a most promising prototype. CD-ROM and HTML technologies already are evolving the traditional casebook. A common problem with some of the amateurish, home-made materials I have seen, however, is that they overload the teacher and the student with a deluge of cases and articles. I also agree with the criticism that hyper-text technology is better-suited for research than for writing and reading. Humans do not think the way hyper-text works. See David Shenk, *Hyper-Text Has Disadvantages* (National Public Radio, Morning Edition, May 14, 1997).

24. "The ideal college was Mark Hopkins on one end of the log and a student on the other." FREDERICK RUDOLPH, *MARK HOPKINS AND THE LOG: WILLIAMS COLLEGE FROM 1836 TO 1872* 27 (1956). This quotation is sometimes attributed to President James A. Garfield, who was one of Hopkins' students.

25. See DANIEL J. BOORSTIN, *THE REPUBLIC OF LETTERS* 56-76 (1989).

26. GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* (13th ed. 1997).

27. WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* (8th ed. 1996).

28. Every good teacher is first and always a student of his subject who, in turn, has many teachers. I have been fortunate, indeed, to have had so many great teachers, both inside and outside the classroom. My own constitutional vocation began when one of my teachers, Professor Fletcher N. Baldwin, Jr., called on a nervous though prepared first-year law student to recite on *Marbury v. Madison*. I never got over it, as is evidenced by this book, which I dedicate to all my teachers. May they find it worthy

overcome the size and scope of that book, which is to say more about me than about the book: in a four-hour, required, first-year, survey course, Gunther and Lockhart are just overwhelming. The third year, I reexamined the available books and switched to Rotunda<sup>29</sup> and I have been using it ever since. This spring semester 1998, I will use the Fifth Edition.<sup>30</sup>

The reasons I first chose the Rotunda casebook are the same reasons I have been so loyal to the Rotunda brand name over the years. I assign the Preface to my students to read for the first class session, and I explain to them that Professor Rotunda's purposes parallel my own goals for our course together. I want a book that is effective at "introducing and exposing students to the underlying principles of constitutional law."<sup>31</sup> I want them to develop "a sound understanding of the basic principles."<sup>32</sup> I want to impart to them "a sense of where the law is moving."<sup>33</sup> And I firmly believe that "it is better to know a few things well than to know many things superficially."<sup>34</sup> Finally, in my course, "[t]he emphasis is on *modern* constitutional law."<sup>35</sup> For the last sixteen years, over five editions and his timely and useful supplements,<sup>36</sup> Professor Rotunda has delivered on these promises.

The chief distinguishing attribute of the Rotunda casebook is its compactness. The Fifth Edition runs fewer than 1200 pages; the book has not grown much over the years.<sup>37</sup> This is an unusual level of discipline in our subject, considering the size of some of the leading competitors. For example, Gunther and Lockhart both run nearly one-third longer. Constitutional law casebooks seem to resemble the old Hungarian saying that "if some is good, more is better." Of course, less is not necessarily better. What is remarkable about Professor Rotunda's casebook is that he manages to include all the important cases yet preserves a fuller set of opinions to guarantee "thoughtful classroom discussion. . . . Socratic dialogue . . . a genuine feeling for

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of their inspiration.

THOMAS E. BAKER, *THE MOST WONDERFUL WORK—OUR CONSTITUTION INTERPRETED* iii (1996).

29. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* (1st ed. 1981).

30. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* (5th ed. 1997).

31. *Id.* at xiii (Preface to the First Edition reprinted in Fifth Edition).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See, e.g.*, RONALD D. ROTUNDA, *1997 SUPPLEMENT TO MODERN CONSTITUTIONAL LAW FIFTH EDITION* (1997).

37. ROTUNDA, *supra* note 30, at v ("The original edition was only 1025 pages long. This edition is only about 150 pages longer.") *Id.*

the case."<sup>38</sup> He accomplishes this primarily by slighting tracts of the tenure track, that is, professorial writings. This is praiseworthy.<sup>39</sup> He also avoids those endless—and endlessly annoying—notes after the cases replete with tons of citations to obscure cases. As an aside, it has always been a small curiosity of mine that in the early parts of the casebook, Professor Rotunda commits some venial sins in these regards, but he avoids their near occasion in the later chapters. It is almost as if he started writing a typical casebook and then had an inspiration toward a more elegant rendition of the subject. Perhaps he wrote the first chapters here in the United States and when he got to Italy, where he finished the casebook, he did not have the materials to include the ordinary minutiae.<sup>40</sup> Whatever the explanation, I offer tribute to his muses.

This is the real strength of Professor Rotunda's book: "a novice teacher and a veteran teacher can use it profitably."<sup>41</sup> I began using it when I was an apprentice and I continue to use it now that I am a long-standing member of the constitutional guild.<sup>42</sup>

38. ROTUNDA, *supra* note 30, at xiv.

39. "[L]aw reviews are to law what masturbation is to sex." Baker, *supra* note 2, at 712.

40. See ROTUNDA, *supra* note 30, at v.

41. Candor, and not immodesty, obliges me to reveal that I furnished the following promotional blurb:

I have used all four previous editions of Rotunda and my "brand loyalty" is stronger than ever for the Fifth Edition. It is eminently user-friendly, i.e., for the teacher and the student. The case selection is excellent. The editing supports Socratic dialogue. The notes do not get in the way. This is still an old-fashioned casebook, not a hornbook masquerading as one. The students appreciate the parallel to West's Nowak & Rotunda hornbook, which I recommend alongside. A novice and a veteran teacher can use it profitably.

Letter from Lisa Dittmann, West Publishing Company, to Constitutional Law Professors (Apr. 8, 1997) (on file with the author).

42. This is the place to note the other books that I have used over the years in teaching various advanced courses in Constitutional Law: DONALD L. DOERNBERG & C. KEITH WINGATE, *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS* (1994); QUARRELS THAT HAVE SHAPED THE CONSTITUTION (John A. Garraty ed. 1987); JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* (2d ed. 1996); *CONSTITUTIONAL THEORY—ARGUMENTS AND PERSPECTIVES* (Michael J. Gerhardt & Thomas D. Rowe, Jr., eds., 1993); *MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY—THE COLONIAL ERA THROUGH RECONSTRUCTION* (Kermit L. Hall, ed. 1992); *MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY—FROM 1870 TO THE PRESENT* (Kermit L. Hall, ed., 1992); *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL DEBATES* (Ralph Ketcham, ed., 1986); *A LESS THAN PERFECT UNION—ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION* (Jules Lobel, ed., 1988); CHARLES T. MCCORMICK, ET AL., *FEDERAL COURTS* (9th ed. 1992); FORREST McDONALD, *NOVUS ORDO SECLORUM* (1985); WALTER F. MURPHY, ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* (2d ed. 1995); *THE FEDERALIST PAPERS* (Clinton Rossiter, ed., 1961); WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT* (2d ed. 1995); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

## THE HONORS SECTION OF CONSTITUTIONAL LAW

Briefly, what follows is how I use Professor Rotunda's casebook to teach my course.<sup>43</sup> I teach a required, first-year course each spring semester. Given the severe limitation of four credit hours, I ignore the catalogue's comprehensive description.<sup>44</sup> I cover the chapters on Judicial Review, Due Process, State Action, Equal Protection, and Freedom of Speech. This is a little over 700 pages in the casebook. I omit the chapters on Implied Powers, State and Federal Powers under the Commerce Clause, President and Congress, Religion, and Constitutional Litigation. Some of these themes come up indirectly, however. For example, we discuss the Commerce Clause power in the context of the state police power under the Due Process Clause. For another example, we discuss separation of powers in the context of the political question doctrine under the power of judicial review. Throughout the course, I emphasize the leitmotif of constitutional interpretation, how judges and lawyers go about the task of giving meaning to the Constitution. Some of the omitted topics come into play in those discussions and exercises, as well. For example, early in the semester, we consider the interpretive question, "May a woman serve as President of the United States?"<sup>45</sup>

Thus, my syllabus is decidedly prejudiced in favor of individual rights. I do not follow the traditional organization of the course and the casebooks—including the Rotunda casebook—to begin with judicial review and then to go into separation of powers and federalism before considering individual rights. This is justifiable pragmatically because individual rights issues are the constitutional issues my students are most likely to encounter in the practice of law. I submit that this is justifiable theoretically, as well. Like all God's Commandments, all constitutional principles can be reduced to two essential inquiries, and one is primary over the other. All constitutional issues involve either

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43. Of course, there are many ways to teach constitutional law and I have tried several myself. See generally George D. Haimbaugh, Jr., *The Teaching of Constitutional Law in American Law Schools*, 31 J. LEGAL EDUC. 38 (1981) (survey of law schools).

44. Constitutional Law 5001. 4 hrs. A study of the federal judiciary's doctrine and practice of judicial review, judicial power, and jurisdiction of the courts, the power of Congress to regulate commerce, the power of the states to regulate commerce, and the protection of private rights, privileges, and immunities under the Constitution which includes the substantive rights of freedom of enterprise, freedom of expression, freedom of religion, and freedom from discrimination.

BULLETIN OF TEXAS TECH. UNIVERSITY, SCHOOL OF LAW CATALOGUE 1997-98 at 13.

45. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 292-93 (1987).



an inquiry into government organization and power or an inquiry into individual liberty versus government power,<sup>46</sup> but the individual liberty inquiry always should come first.<sup>47</sup> Therefore, that is the inquiry with which my course and my students and I myself have been preoccupied, them for fifteen weeks each spring and me for fifteen years each week.

Over the years, I have prepared worksheets for each chapter, which I distribute before we begin the chapter. The worksheets contain reading suggestions in the leading hornbooks and in the secondary literature, hypotheticals for in-class and out-of-class discussion, and questions for further review. Each worksheet includes additional attachments for out-of-class reading that vary every year. These attachments deal with current constitutional events, the Justices and the Court, and law school life. A set of my worksheets is reproduced as the Appendix to this Article.

I also require my students to buy and read David O'Brien's excellent book *Storm Center*.<sup>48</sup> It is *The Brethren* with footnotes.<sup>49</sup> But it is more than that. It gives the students an insider's look at the Supreme Court and fills critical gaps in undergraduate studies in history and political science.<sup>50</sup> I tell them to read it like a novel.

Someone who went to law school when I did would not find my classroom remarkable. Moderns would complain about all the illegitimate hierarchy. For example, I do not allow students to wear

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46. JERRE S. WILLIAMS, *CONSTITUTIONAL ANALYSIS IN A NUTSHELL* 34 (1979). Regrettably, the case discussion—but not the basic analysis—in this book has become dated. I used to assign it as required reading.

47. It is not analytically sound to consider the organization of the federal government and its relationship to the state governments before considering the constitutional aspects of individual liberty because constitutional questions concerning the protection of individual liberty arise in all constitutional cases, including those allocating governmental power to the national government or the state governments. So any analysis of the cases involving the distribution of powers between the states and federal government postpones the fundamental inquiry contained in all such cases as to whether either government has the power to engage in the regulatory activity involved, or whether, on the other hand, neither the state governments nor the national government can regulate because such regulation would interfere with individual liberty.

*Id.* at 35-36.

48. DAVID M. O'BRIEN, *STORM CENTER—THE SUPREME COURT IN AMERICAN POLITICS* (4th ed. 1996).

49. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN—INSIDE THE SUPREME COURT* (1979).

50. See generally David P. Bryden, *Teaching Constitutional Law: Homage to Clio*, 1 *CONST. COMMENTARY* 131 (1984) (testing law students' knowledge of constitutional history); William H. Rehnquist, *A Comment on the Instruction of Constitutional Law*, 14 *PEPP. L. REV.* 563 (1987) (commenting on the need to understand history and the Supreme Court as an institution).

hats; indeed, my first posted assignment bears the legend, "No hats."<sup>51</sup> And I call on students using the Socratic method to lead them in a Musgrave ritual<sup>52</sup> beginning with the three questions Chief Justice Marshall asked and answered in *Marbury v. Madison*,<sup>53</sup> *et cetera, et cetera, et cetera*, amen. I have varied this from time to time to administer a sign-up system for reciting on cases most frequently at the end of the semester when so many deadlines are falling down around my students' heads. We also go through various exercises, including some trendy role-playing exercises in which individual students try to understand and predict how and why an individual Justice will vote on a realistic hypothetical.<sup>54</sup>

Consistent with our law school's formal policy, I take into account a student's preparation and performance in class for a one-grade up-or-down adjustment in his or her course grade (actual examples, B+ raised to an A or a D lowered to an F). Most professors at my law school announce this *in terrorem* but do not follow through. I do follow through and it is part of my reputation. After all, I announce the first day of classes that mine is the honors section.

This up-or-down adjustment also is based on unannounced quizzes, which I think are very beneficial. Here is how they work. I walk into class and announce we are having a quiz, so the students should close their books and take out a sheet of paper. The question is based on the day's reading. Sometimes it is the question I left them with at the end of the previous class meeting. I state the question and repeat it once. The questions are focused and specific; the emphasis is on the "Rule" in the "Issue-Rule-Analysis-Conclusion" IRAC sequence.<sup>55</sup> They have ten minutes to write an answer. They put

51. Dear Miss Manners,

Would you kindly find out for me the background and reason why hats should not be worn by males in a room of people, e.g., a classroom. Since I teach law, I've had to relax the rule, as students would like a reason for it.

Dear Gentle Reader,

Miss Manners knows those law students. God bless them, they want a practical justification for every rule. There isn't one. Hats are as symbolic as the judge's robes they hope one day to wear.

JUDITH MARTIN, *MISS MANNERS RESCUES CIVILIZATION FROM SEXUAL HARASSMENT, FRIVOLOUS LAWSUITS, DISSING AND OTHER LAPSES IN CIVILITY* 47-48 (1996).

52. A. CONAN DOYLE, *THE ILLUSTRATED SHERLOCK HOLMES TREASURY* 235 (1984).

53. 5 U.S. (1 Cranch) 137 (1803). See generally William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

54. See Paul Gewirtz, *The Jurisprudence of Hypotheticals*, 32 J. LEGAL EDUC. 120 (1982).

55. Questions vary from year to year, of course, but here are some illustrative examples from early in the semester:

What does the Constitution say about "judicial review"?

What are "advisory opinions" and what is the Supreme Court's position on them?

their name on the paper and pass it in. I take the quizzes home and grade them, with the same three categories as the grade adjustment policy (“+” or “0” or “-”). Often I write comments to explain the point of the quiz and to respond to the individual answer. My secretary records the grades and I hand back the papers at the next class meeting. Over the semester I administer between ten and fifteen quizzes. At the end of the semester, I award the plus or minuses based on the quizzes and the notes of in-class participation I make on my seating charts. Usually, the semester compilations describe a slightly-skewed bell-shaped curve with about twenty percent pluses, ten percent minuses, and seventy percent no adjustments.

The only costs of this technique are the lost class time, which totals at most only two or three class meetings over the semester, and the grading time, which amounts to two or three hours for each quiz. The benefits far outweigh the costs. In effect, I manage to “call on” every student to recite on the day’s reading, which is far more fair than calling on random students. It also provides students with personal feedback. Students benefit from knowing sooner rather than later whether what they are doing to learn the material is adequate, in advance of the winner-take-all final examination, after which it is simply too late to regroup or to seek help. They know, if they rack up a series of minuses, that they should come talk to me. The quizzes reward preparation and performance and reinforce professional work habits. They have had the salutary by-product of toning up the overall level of class preparation and participation.

The student’s grade in my course is divided between a final examination, worth 60% of his or her grade, and a group assignment, worth 40%. The adjustment from class participation and quizzes is applied to this grade. For the group assignment, I arrange the students into Supreme Court panels of five members selected randomly. Each panel is responsible for writing one majority opinion and one dissenting opinion (no concurring opinions) in a Supreme Court case that is pending during the current October Term.<sup>56</sup> Last spring semester, for example, I assigned the companion cases dealing with the right to physician-assisted suicide, *Vacco v. Quill*<sup>57</sup> and *Washington v.*

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Define “property” for purposes of the Fifth and Fourteenth Amendments.

56. Recent past examples include *United States v. Virginia*, 518 U.S. 515 (1996), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In other years, I have told the students to imagine that he or she has a following of four other Justices who are prepared to overrule any Supreme Court precedent, and then I assign each student the task of writing a draft opinion overruling the offending precedent.

57. 117 S. Ct. 2293 (1997).

Glucksberg.<sup>58</sup> The students are told about the on-line availability of the briefs and the transcript of the oral argument on Westlaw and Lexis.<sup>59</sup> I furnish them the *Preview*<sup>60</sup> of the case and a general handout on opinion-writing.<sup>61</sup>

The group assignment is scheduled to be due after spring break but before the intensity of the semester's end-game, usually during the first week in March. I collect them at our regularly-scheduled class meeting. One letter grade (for example, C lowered to D+) is deducted from the group assignment grade for each day or fraction of a day it is late, without regard to any explanation or excuse. The minimum length of each opinion (majority and dissent) is ten pages, double-spaced, and the maximum length is twenty pages.<sup>62</sup> The instructions require internal citation<sup>63</sup> following *A Uniform System of Citation*,<sup>64</sup> and I explicitly caution against plagiarism.<sup>65</sup>

I grade the group assignment by panel, that is, each panel member receives the same grade, again worth approximately forty percent of each student's course grade, subject only to the following administrative adjustment to take into account what economists call the problem of the free-rider. Any member of a panel may file a complaint with me, in writing and signed by a second member of the same panel, complaining that another panel member did substantially less than the other members. Then I provide a copy of the complaint to the affected student and request a written response. On the basis of these written submissions, I decide whether or not to lower the group assignment grade of the affected student by as much as two letter grade increments (for example, C lowered to D+ or D). Complaints must be filed on the due date of the group assignment.<sup>66</sup> Finally, so that

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58. 117 S. Ct. 2258 (1997).

59. (SCT-Briefs database) (Genfed/Briefs database).

60. E.g., Douglas W. Kmiec, "To Be or Not to Be": Will the Supreme Court Prescribe Assisted Suicide?, *PREVIEW OF U.S. SUP. CT. CAS.*, Issue No. 4, Dec. 23, 1996, at 243.

61. Dwight W. Stevenson, *Writing Effective Opinions*, 59 *JUDICATURE* 134 (1975).

62. See *FED. R. APP. P.* 32 (form of briefs and appendix).

63. I drop a footnote in the instructions to say "Footnotes are prohibited." See Abner J. Mikva, *For Whom Judges Write*, 61 *S. CAL. L. REV.* 1357, 1367 (1988) ("If footnotes were the preferred mode of writing, Darwinian selection would have produced readers whose eyes are placed on a vertical rather than horizontal plane.").

64. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (16th ed. 1996).

65. See generally Debbie Papay-Carder, Comment, *Plagiarism in Legal Scholarship*, 15 *U. TOL. L. REV.* 233 (1983).

66. Over the years, there have been only two formal complaints. In one case, the complaint process was the occasion for a student who was only going through the motions in all his classes to decide to withdraw from law school. In the other case, I determined that the student was a calculating free-rider and I imposed the two-grade penalty.

all students will have equal access to the same information, I announce that I will answer questions about the group assignment only during plenary class sessions.

I am convinced that this research and writing assignment contributes more to the student's mastery of our subject than anything else I can assign, including the final examination.<sup>67</sup> They are obliged to work through the raw materials of the course—text, history, tradition, precedent, philosophy, et cetera—toward a conclusion. They must deal with a set of real facts with care and particularity.<sup>68</sup> They develop some sense of the responsibility of decision that the Justices necessarily feel. They must work together like judges on collegial courts—and like lawyers in a law firm for that matter—to go along and get along. They develop a deeper understanding of the issue that provides them with an appreciation for the depth of the subject. They practice their research and writing skills, which are central to being a good law student and a good lawyer. And the assignment is inherently interesting to them as they anticipate the end-of-Term headlines.

The final component of a student's grade is my final examination. Over the years, I have experimented with every type of examination technique and several combinations of them: closed-book and open-book exams, in-class and take-home exams, essay questions, short-answer questions, and multiple-choice questions. In recent years, I have relied on multiple-choice questions. This technique allows me to be comprehensive; a three-hour examination of one hundred questions on thirty-four pages achieves considerable coverage and depth. This is the way that the subject of constitutional law is tested on all fifty state bar examinations. This generation of students has grown up with multiple-choice tests. Indeed, to be admitted to law school in the first place they have had to succeed on the Law School Admissions Test.

Anyone who says a multiple-choice examination is a lazy way out is someone who has never put together a good one. To develop a bank of good questions is a great deal of hard work. And a good teacher is always on the lookout for new questions, always noodling on the old questions, always moving and shifting questions around. It helps to start with some questions in the bank. A beginner can obtain sets of other professors' multiple-choice questions through the Institute for

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67. See generally Philip C. Kissam, *Teaching Constitutional Law Differently*, 9 CONST. COMMENTARY 237 (1992) (describing a research and writing regimen).

68. See generally David P. Bryden, *Teaching Constitutional Law: An Eye for the Facts*, 1 CONST. COMMENTARY 225 (1984) (emphasizing the need for careful factual analysis).

Law School Teaching.<sup>69</sup> I developed my own bank of questions by sitting down with the Rotunda casebook, my class notes, handouts, and the hornbook. I keep a file for collecting ideas from all sorts of sources—cases, law reviews, discussion lists, newspapers, and magazines. I am convinced of the overall reliability and validity of this testing technique for evaluating my students' mastery of our subject, in large part, by the fact that the reliability coefficient on my test runs so high.<sup>70</sup> Anything over +0.5 is a good value. Mine run much higher. Last spring semester it was +0.811.

In combination—calling on students, giving unannounced quizzes, assigning a group paper, and administering a multiple-choice final examination—I evaluate each student in terms of his or her mastery of our subject. Besides my own teaching, inside and outside the classroom, the casebook is the single most important resource for achieving this mastery. That is why finding a casebook that facilitates this mastery in synchrony with the teacher is essential. That is why I remain so loyal to the Rotunda casebook.

#### A POSTSCRIPT

Mastering constitutional law is a daunting challenge for teacher and student alike. But that is exactly what makes it so *great* for teacher and student alike. If everyone could do it, it would not be so great.<sup>71</sup> That Professor Rotunda respectfully understands this challenge and has successfully mastered it is demonstrated by his excellent casebook.<sup>72</sup>

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69. Questions are available for all subjects. Various limitations apply to particular sets of questions. Write the Institute for Law School Teaching, Gonzaga University, School of Law, P.O. Box 3528, Spokane, Washington 99220-3528 or call (509) 328-4220, extension 3740.

70. For a textbook explanation of reliability and validity in testing, see generally ANNE ANASTASI, *PSYCHOLOGICAL TESTING* 109-62 (7th ed. 1988). See also *LEARNING & EVALUATION IN LAW SCHOOL, VOLUME 1, PRINCIPLES IN TESTING & GRADING, LEARNING THEORY, INSTRUCTIONAL OBJECTIVES* (Michael Josephson ed., 1984).

71. In the movie *A League of Their Own*, Tom Hanks's character, manager Jimmy Dugan, is arguing with his star player, played by Geena Davis, who is quitting the team to go back home because playing the sport is "too hard." Dugan growls, "It's supposed to be hard. If it wasn't hard, everyone would do it. The hard is what makes it great." *A LEAGUE OF THEIR OWN* (Columbia Pictures Corp. 1992).

72. Like much of legal scholarship, book reviews often are undertaken more to be written than to be read. But reviewing a book obliges the reviewer to do more than read what the author has written. Writing a review—like writing a book in the first place—is the most rigorous form of thinking about your subject. Making the effort to put down your thoughts about a book is a compliment to the book and the book's author.

Thomas E. Baker, *Bob Borks Amerika*, 44 *UCLA L. REV.* 1185 (1997).

## APPENDIX

*What follows are the five 'Worksheets' that I distributed in the spring semester 1997 to my first-year students. They are keyed to the Fourth Edition of the Rotunda casebook. The Worksheets contain reading suggestions in the leading hornbooks and in the secondary literature, hypotheticals for in-class and out-of-class discussion, and questions for further review. Each of these handouts carries additional attachments for out-of-class reading—short articles gathered from various newspapers, magazines, and on-line source—dealing with current constitutional events, the Supreme Court and the Justices, or law school life. The attachments change from year to year.*

CONSTITUTIONAL LAW  
WORKSHEET NO. 1

Chapter 1. Judicial Review

1-1. The Origins

1. "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them." Bishop Hoadly's Sermon, preached before the King, 1717.
2. What was your reaction to reading the Constitution of the United States? What structure is there in the articles? What functions does a written constitution serve? Identify clauses that serve the principles of separation of powers and federalism. What themes have been developed in the 26 amendments? See generally Thomas E. Baker and James E. Viator, *Not Another Constitutional Law Course; A Proposal to Teach a Course on the Constitution*, 76 IOWA L. REV. 739 (1991).
3. Define judicial review.
4. How is judicial review justified? What are some arguments against judicial review?
5. The best single treatment of *Marbury v. Madison* (1) is William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.
6. Is the Court's statement of its own power in *Cooper v. Aaron* (8) truly a statement of settled doctrine? What does this decision add to *Marbury v. Madison* (1)? How is it justified? What is the Court's motive?

7. Consider and review the notes at 10-13. Always make an effort to understand Professor Rotunda's questions and think about how you would answer him.
8. Compare the institutional capacities for constitutional interpretation of Congress, the President, the Supreme Court, and state supreme courts.
9. What is "original intent"? How does the role and power of the Court change with the definition given this term and the importance afforded to this concept?
10. What style of constitutional decision-making characterizes an interpretivist approach? A process-oriented approach? A value-oriented approach? As we go through the course, try to categorize the Justices through their opinions.
11. "Today, as has been true since the earliest days of our Republic, before a federal court may deign to decide, the case or controversy must be determined to fall both within the Article III empowerment and within some particular enabling act of Congress." Thomas E. Baker, *Thinking About Federal Jurisdiction—of Serpents and Swallows*, 17 ST. MARY'S L.J. 239, 240 (1986). What does this mean? What did it mean in 1816 in *Martin v. Hunter's Lessee* (13)?
12. Consider and review the questions at 21-25.
13. Describe the relationship between the Supreme Court and the highest court of a state for interpreting federal and state law. What is "independent"? "Adequate"? How does federalism inform the inquiry? What are the special problems of the ambiguously grounded state court decision? How does *Michigan v. Long* (23) try to solve them? What are the different approaches to reconciling state constitutional law with the power of judicial review under the federal constitution? If Justice Stevens' dissent were followed, how would these relationships and approaches change? What should be the proper role of the Supreme Court? See generally Thomas E. Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. REV. 799 (1985).
14. Consider *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), in which the Court unremarkably held that the Connecticut legislature had not violated the Constitution when it set aside a probate decree. More remarkable was the debate between Justices Chase and Iredell. Justice Chase believed that the framers created limited state and federal governments that were restricted by natural law and the written documents. He saw the judicial role as enforcing



nontextual, as well as textual, principles. Justice Iredell saw no such role for the Court because enforcement of such principles would subject the Constitution and the citizens to the personal views of the Justice. Who was right? As we go through this course, consider which position has been adopted, first, in form and, second, in substance.

NOWAK & ROTUNDA at 1-21.

TRIBE at 23-66; 162-73.

## Chapter 12. Limitations on the Exercise of Judicial Review

### 12-1 Statutory Jurisdiction of the Supreme Court, 28 U.S.C.A., Chapter 81.

1. Consider and review the notes at 25-27.
2. Distinguish an appeal from a petition for a writ of certiorari. What are the criteria for exercise of the Court's jurisdiction?
3. Distinguish the Court's original jurisdiction from its appellate jurisdiction under Article III and the statutes.

### 12-2 Statutory Restrictions

1. Explain the Court's interpretation of the Congressional power under the "with such exceptions" clause of Article III. How do you reconcile *Marbury v. Madison* (1) with *Ex parte McCordle* (27)?
2. Identify the competing views of Article III described in the notes at 29-32.
3. For an informative account of constitutional difficulties raised by bills considered by Congress to restrict federal jurisdiction, see generally Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

NOWAK & ROTUNDA at 22-44.

TRIBE at 42-61.

### 12-3 Advisory Opinions

1. How is the doctrine of separation of powers implicated in the advisory opinion? What is the significance of the "judicial power" definition in Article III in terms of "cases or controversies"?
2. What are the policy objections to advisory opinions? How do they apply to the facts in *Muskrat v. United States* (32)?
3. Consider and review the notes at 36-39.

4. How is the advisory opinion rationale relevant to the independent and adequate state ground doctrine?
5. What school of constitutional interpretation is exhibited in *Ex parte Young* (38)?

NOWAK & ROTUNDA at 54-71.

TRIBE at 67-96; 173-95.

#### 12-4 Political Questions

1. What is a political question?
2. Distinguish "federalism" from "separation of powers." Which is relevant to nonjusticiability and how? Distinguish subject matter jurisdiction and justiciability.
3. List the six categories of political questions and give one example of each.
4. What important principle of nonjusticiability is added by *Powell v. McCormack* (45)? Was the promise of judicial restraint made in *Baker v. Carr* (39) broken in *Powell*?
5. How do you reconcile the principle of judicial review with the principle of nonjusticiability (which seems to suggest that there are provisions of the Constitution that the courts may not independently interpret)?
6. Consider and review the notes at 50-55. Notice that *Gilligan* (50) and *Nixon* (Supp.) are the only decisions since *Baker* was decided in 1962 to hold an issue was nonjusticiable.
7. What is the relevance of the importance or nature of the issue before the Court on the merits to the determination whether the issue is a political question?
8. Suppose Congress passes and the President signs a bill to require mandatory retirement for all members of Congress who will reach the age of 70 years before the beginning of the next Congress. Would the Court decide the constitutionality of the law? Cf. *Gregory v. Ashcroft*, (204, 589) (upheld state requirement for mandatory retirement of appointed judges).
9. Is the 27th Amendment constitutional? Can an amendment be unconstitutional? See Article V.
10. What interpretive methodologies are being used in *Nixon* (Supp.)?

NOWAK & ROTUNDA at 104-14.

TRIBE at 96-107.

CONSTITUTIONAL LAW  
WORKSHEET NO. 2

## Chapter 6. Due Process.

## 6-1. Substantive Economic Due Process

1. Describe and explain the "Williams Diagram." See generally JERRE S. WILLIAMS, *CONSTITUTIONAL ANALYSIS IN A NUT-SHELL* (1979).
2. What are the privileges and immunities of a citizen of the United States? Of a citizen of a state?
3. How does the division of the Court in *The Slaughter-House Cases* (339) follow the debate in *Calder v. Bull* (Worksheet No. 1, question 14)?
4. To hold that corporations are "persons" under the Fourteenth Amendment, as the Court did in *Santa Clara County v. Southern Pacific Railway* (344), what sort of interpretation methodology is being used? See also *Roe v. Wade* (644).
5. Summarize the history of doctrine, i.e., the precedents, of the Due Process Clause from 1873 to 1905 to 1934. How is the power of judicial review in inverse relation to the legislative power? Is there any difference in the role of the Court when reviewing acts of state legislatures and the Congress?
6. Can you reconcile the language in *Lochner v. New York* (345) and *Nebbia v. New York* (352)? Can you reconcile the outcomes in these two cases?
7. Define "police power." Give examples. If there is no federal police power, what clauses in the Constitution come close?
8. What is a so-called "Brandeis Brief"? Why was it an effective tool of appellate advocacy? Would it be effective today?
9. Explain the "purpose-means" test and how it applies in modern economic matters. How rigorous is the analysis? How can it become more rigorous in the hands of a strong-willed jurist?
10. The Court will go to what lengths of analysis or "flights of fancy" to uphold socioeconomic legislation? Why?
11. What role do political and social pressures play in Supreme Court decision-making? Consider the discussion of the F.D.R. Court-packing plan at 158-59. See also D. O'Brien at 92-121.
12. Is there an economic theory behind the modern due process analysis? Does the Constitution contemplate a particular economic theory? Which one? What role does or should the Court have in preserving or changing that system?

13. Most state constitutions contain a due process clause identical or similar to the Fourteenth Amendment, but not all state supreme courts have followed the federal Court's modern approach of deference. *E.g.*, *Gillette Dairy, Inc. v. Nebraska Dairy Products Bd.*, 192 Neb. 89, 219 N.W.2d 214 (1974) (milk price control). Recall the discussion of state constitutions in chapter one (21-25).  
NOWAK & ROTUNDA at 351-82.  
TRIBE at 560-86.

#### 6-2. A Note on the Incorporation of the Bill of Rights

1. Summarize the history of the application of the Bill of Rights to the states. Draw a Williams diagram depicting that history.
2. How do the different theories of incorporation compare with the more general theories of constitutional interpretation?
3. What are "fundamental rights"? How does the due process analysis change for them?
4. Where does the Court find "nontextual rights"? How do we know if they are fundamental?
5. What does the Ninth Amendment mean?
6. Distinguish a constitutional power from a constitutional right.
7. Is there a preference in the Constitution for political rights such as free speech and an indifference toward important daily interests such as food and shelter? What has happened to the freedom of contract, once considered a fundamental part of Fourteenth Amendment liberty?

NOWAK & ROTUNDA at 382-88.

TRIBE at 769-77.

#### 6-3. The New Procedural Due Process

##### 6-3.1 Defining "Liberty" and "Property"

1. Distinguish procedural due process from substantive due process. How does the constitutional analysis change?
2. The test has changed from the "right v. privilege test" to the "weight of the interest test" to the current two-step analysis. Explain each. Has the law become more certain? More objective and less dependent on the will of the Justices? Ask yourself if the more recent cases would have been decided differently under the two earlier versions.
3. How are substantive freedoms of the Bill of Rights affected, if at all, by the procedural due process analysis?

4. Define “property.” Is it constitutionally created? What is the constitutional threshold? Give some examples that you possess of which the government might deprive you.
5. Define “liberty.” Is it constitutionally created? What is the constitutional threshold? Give some examples to which you are entitled and of which the government might deprive you.
6. What is the constitutional policy or reason for the requirement of procedural due process?
7. What sources might substantiate a claim of property? Liberty?
8. Given the importance of state law for defining property and liberty, reconsider the role of the state court in *Michigan v. Long* (23).
9. “It turns out, you see, that whether [the asserted interest is] a property [or liberty] interest is a function of whether you’re entitled to it, which means the Court has to decide whether you’re entitled to it before it can decide whether you get a hearing on the question whether you’re entitled to it.” John Hart Ely, *Democracy and Distrust* 19 (1980).
10. Is there a constitutional definition of the word “life” in the Due Process Clauses?
11. Does Joshua DeShaney have any constitutional rights? Does he have any rights, at all? *DeShaney v. Winnebago Co. Dept. of Social Services* (366).

NOWAK & ROTUNDA at 487-524.

TRIBE at 663-706.

### 6-3.2 Determining What Process is Due

1. Reconcile *Goldberg v. Kelly* (366) with *Mathews v. Eldridge* (371). What were the procedural safeguards that were required in the former and not in the latter?
2. What is the constitutional analysis for determining whether a notice is “adequate” and whether an opportunity to be heard is “meaningful”?
3. “[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.” *Arnett v. Kennedy* (1974) (plurality), *overruled by Cleveland Bd. of Education v. Loudermill* (380). What is wrong with the rejected approach?
4. Compare Justice Black’s dissent in *Goldberg v. Kelly* (370) with Justice Rehnquist’s dissent in *Cleveland Bd. of Education v.*

*Loudermill* (384). How do the respective majorities answer their criticism?

5. What do the note cases at 376-80 add to our understanding of the constitutional adequacy of procedure?
6. "Although one may disagree with the results in [cases decided by juggling the three factors in *Mathews v. Eldridge*], the Court's open analysis of the values at stake . . . and its attempt to accommodate the competing values of liberty and efficient administrative procedures certainly is preferable to the masking of such decisions through vaguely worded opinions or formalistic interpretations of constitutional provisions." John E. Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIM. 397, 403 (1979). How consistent and predictable, however, are the Court's holdings?
7. Suppose a state initiated an ombudsman system in which every citizen complaint about her treatment by any government agency would be independently investigated for accuracy and fairness and, if appropriate, the outcome changed by an ombudsman order. Suppose this system was the exclusive method for challenging all such actions. Would the state have to do even more? Does the Constitution require this? Should it?

NOWAK & ROTUNDA at 524-67.

TRIBE at 706-68.

#### 6-4. Bills of Attainder

1. What are the various tests to determine when a statute is a bill of attainder? What are the implications for the doctrine of separation of powers? Do you see an analogy here to the doctrine of nonjusticiability?
2. How particular must a statute be to violate the Bill of Attainder Clause? What are prohibited "punishments" under the clause: historically, functionally, and motivationally?
3. Is a ban on the practice of medicine by convicted felons a constitutional regulatory measure or an unconstitutional bill of attainder? *Hawker v. New York*, 170 U.S. 189 (1898).
4. Compare the bill of attainder analysis with the traditional equal protection analysis and the review of substantive economic due process. Review the bill of attainder analysis against the so-called strict scrutiny applied to "suspect classifications" and "fundamental rights."
5. Consider the constitutionality of a statute that denied federal higher-education financial assistance to male students who did not

register for the draft. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984).

NOWAK & ROTUNDA at 420-23.

TRIBE at 641-43.

## 6-5. Impairment of Contracts

1. How is *Allied Structural Steel Co. v. Spannaus* (394) foreshadowed in *Home Building & Loan Association v. Blaisdell* (391)? What explains the “desuetude” of the clause between 1934 and 1978? Could a similar renaissance occur in substantive economic due process? Should it?
2. What theory of interpretation does Chief Justice Hughes follow in *Home Building & Loan Association v. Blaisdell* (391)? Compare the methodology in Justice Brennan’s dissent in *Allied Structural Co. v. Spannaus* (398).
3. How and why does the Contract Clause analysis, applicable to state legislation, differ from the due process analysis, applicable to federal legislation?
4. How and why does the contract analysis change from private contracts to government contracts?
5. Consider the questions at 399-401.

NOWAK & ROTUNDA at 394-407.

TRIBE at 607-28.

## 6-6. The Taking of Property

### 6-6.1 Taking By Possession

1. *United States v. Causby* (401). How does the Court reconcile common law property doctrine with the Takings Clause? What is the measure of just compensation?
2. Consider and review the notes at 404-07. Articulate the difference between the majority and the concurring justices in *National Board of YMCA v. United States* (404). Compare *Kaiser Aetna v. United States* (405) with *PruneYard Shopping Center v. Robbins* (406).
3. See generally Thomas E. Baker & Robert E. Wood, Jr., “Taking” a Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts, 14 TEX. TECH L. REV. 327 (1983).

### 6-6.2 Taking by Regulation

1. How much does the Takings Clause diminish the state police power? Compare the Contract Clause analysis. Compare the limit imposed by substantive economic due process.
2. How does the Court analyze zoning restrictions and property use regulations under the Takings Clause? If the analysis is “ad hoc” and “factual,” what are some of the factors considered?
3. How much of the holding in *Village of Belle Terre v. Boraas* (407) survives the plurality’s holding in *Moore v. City of East Cleveland* (409)?
4. Why does the Court tolerate such paradoxes in principles of taking: damaging private property may be a taking, but some instances of total destruction do not require compensation; regulation generally does not require compensation, but a regulation may be so restrictive that it amounts to a taking.
5. When a regulation constitutes a taking by eliminating the economic value of property, is it a sufficient remedy for the government to rescind the regulation or should the government be required to compensate the owner for the diminished value of the property for the period between enactment of the regulation and the judicial finding that a taking occurred?
6. In takings cases, consider four factors: (1) Has the government physically used or occupied a citizen’s property? (2) To what extent has the value of the property been diminished? (3) Balance the individual’s loss against the public gain. (4) Has the individual’s liberty been restricted beyond some limit on activity harmful to others?
7. Consider the notes at 409-13. What, if any, trend do you discern in the more recent Takings Clause decisions?
8. If you want an insight into what the current Justices think is the “modern constitutional law,” take a look at *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2289-92 (1993).

NOWAK & ROTUNDA at 423-51 .

TRIBE at 587-607.



CONSTITUTIONAL LAW  
WORKSHEET NO. 3

Chapter 7. State Action

See generally NOWAK & ROTUNDA at 452-86.  
TRIBE at 1688-1720.

7-1. Introduction

1. Explain the state action analysis in the triangle of "alleged wrongdoer," "aggrieved party," and "government."
2. Of the three Civil War amendments, which require state action and why? Consider what the state action doctrine means for the respective roles of Congress and the Supreme Court in interpreting and enforcing these provisions.
3. How is the state action doctrine derivative of the various substantive constitutional doctrines to which it applies, i.e., is the state action doctrine nothing more than an alternative way of formulating the substantive doctrines?
4. Can you imagine what the Constitution would be like without a state action doctrine? Suppose, for example, that a constitutional amendment prohibited private racial discrimination. Would it be enough to make the provision merely hortatory? Does every constitutional right require some government enforcement? Would the amendment imply a command to government to respond affirmatively in some way to private discrimination?
5. What theory of federalism comes through Justice Bradley's opinion in the Civil Rights Cases (414)? Reconsider the modern state action cases in terms of the diminished role of federalism today.
6. Can state action theory be reconciled with a theory of individual rights to equate individual liberty with the absence of government power so that judicially enforced constitutional limitations should not reach certain private conduct? Reconsider the modern state action cases in terms of this theory of individual rights.

7-2. The Public Function

1. Define the public function doctrine. Give some examples of functions on the private side and on the public side of the doctrine. Are there objective constitutional standards for drawing the line? For placing a particular activity on one side or the other?

2. How is precedent used and abused in this line of cases? How much should stare decisis mean in constitutional interpretation?
3. Are these decisions better recast to say that in some matters government may not constitutionally leave certain decisions to private actors?
4. Identify the government actor behind the alleged wrongdoer in each of these cases.
5. Apply the state action triangulation analysis to *Cousins v. Wigoda* (430).
6. Reconsider whether a private university is a company town and, if so, for what purposes.

### 7-3. Court Enforcement of Private Agreements

1. Can *Shelley v. Kraemer* (432) be read so broadly as to hold that any judicial decree that disadvantages a member of a racial minority or the exercise of a fundamental right is state action and, therefore, violates the Fourteenth Amendment? Has it been read so broadly? Should it be?
2. Consider the questions at 434. How are the questions on the merits related to the threshold state action issue?
3. How do you reconcile *Evans v. Newton* (434) with *Evans v. Abney* (436)? Was there a way to decide the former so that the latter case would not arise? What did these two decisions do to the doctrine in *Shelley v. Kraemer*?
4. Suppose an individual homeowner observes that two persons, one white and one black, walk across his property on a regular basis. Pursuant to state law, the owner posts on the property "No Trespassing" yet both continue to trespass, even after personal warnings. Suppose the owner, motivated solely by racial discrimination, files a complaint against only the black trespasser who is prosecuted under a neutral and otherwise constitutional trespass statute. Does the black defendant have a constitutional defense? Cf. *Whitney v. California* (729) (Brandeis, J., concurring) (discussing incitement to trespass).

### 7-4. Symbiotic and Financial Relationships

1. "[S]ifting the facts and weighing the circumstances," what details of a relationship between government and an alleged wrongdoer render the latter the constitutional alter ego of the former?
2. What does the Court mean to say in *Norwood v. Harrison* (443):

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination. . . . Invidious private discrimination

may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. . . .

3. How much of this state action theory survives *Rendell-Baker v. Cohn* (444) and *Blum v. Yaretsky* (444), both decided the same day?
4. When a public defender acts as an attorney, she is not a state actor; when a public defender acts as an employer, she is a state actor. Can you reconcile these holdings?
5. Consider what Justice Scalia once observed about “totality of the circumstances” tests in constitutional law:

Today’s decision . . . extends into the very heart of our most significant constitutional function the “totality of the circumstances” mode of analysis that this Court has in recent years become fond of. . . . This is not analysis; it is ad hoc judgment. . . . The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be.

*Morrison v. Olson*, 487 U.S. 654, 733-34 (1988).

#### 7-5. Licensing

1. What notion of causation do these cases add to state action theory? How and when is it satisfied? Is causation always a factor in the state action analysis?
2. How are these cases true to the analysis of *The Civil Rights Cases* (414)? Was Justice Harlan’s dissent there the better path not chosen?
3. When may the Court conceptually isolate and then surgically remove an offending state action to protect the otherwise private nature of an alleged wrongdoer? Reconsider the quotation, *supra*, from *Norwood v. Harrison* (443).
4. Why is the Court willing to distinguish among private actors, limited-purpose state actors and all-purpose state actors? What, if anything, would be lost by eliminating the middle category?
5. In *Jackson v. Metropolitan Edison Co.* (448) Justice Marshall dissents and observes: “The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented.” Is he correct?

## 7-6. State Nonfinancial Facilitation of Private Acts

1. Consider the following possible descriptions of the holding in *Reitman v. Mulkey* (450). Which are consistent with the plurality's opinions? Which are explicitly or implicitly disavowed? Which best justifies the holding under the Fourteenth Amendment? Which are consistent with prior case law not questioned or overruled by the *Reitman* Court? Which are consistent with subsequent decisions in this area?
  - (1) The state has an affirmative duty to prevent private discrimination under some circumstances;
  - (2) A state may not authorize private discrimination;
  - (3) A state may not encourage private discrimination;
  - (4) Once a state has prohibited private discrimination, it may not backtrack;
  - (5) A state may not disable its agencies and subdivisions from prohibiting private discrimination;
  - (6) State provisions that have the effect of disadvantaging a racial minority demand an extraordinary justification, and neither freedom of contract nor free association are a sufficient justification.
2. Would the holding in *Anderson v. Martin* (455) extend to a state voting regulation that required a candidate to indicate on the ballot the candidate's membership in any political party? What about gender?
3. How would Justice Powell reconcile *Washington v. Seattle School District No. 1* (455) with *Crawford v. Board of Education* (458)? Would any other Justice agree? Would you?
4. After *Flagg Bros., Inc. v. Brooks* (460) and *Lugar v. Edmondson Oil Co., Inc.* (462) can you draft a self-help repossession statute in the law of sales, U.C.C. Article 2, that would not be state action or, if the Constitution applied, would be upheld? Take another look at the procedural due process cases (376-78).
5. Is the state action analysis "[i]nvariably bankrupt" as Professor Tribe suggests? See Thomas E. Baker & Robert E. Wood, Jr., "Taking" a Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts, 14 TEX. TECH L. REV. 327, 336-39 (1983).
6. Can you reconcile *Edmonson v. Leesville Concrete Co., Inc.* (463) with the holdings in *Polk County v. Dodson* (445) and *Branti v. Finkel* (445)? Reconsider the implications of *Edmonson* after we study suspect classifications and fundamental rights.

## 7-7. "Mirror Image" Cases

1. Explain how the state action doctrine serves the three constitutional principles of individual liberty, federalism, and separation of powers. To serve these principles, what cost do we extract from the balanced side of individual liberty? Why not simply acknowledge reality and perform a balancing analysis of the two individual interests—the aggrieved party's right to be free from the restraint involved versus the constitutional power of the government to allow the alleged wrongdoer to be free to engage in the conduct?
2. Where is the state action in *San Francisco Arts & Athletics Inc. v. U.S. Olympic Committee* (904)?
3. Draw a Williams diagram of state action theory in the so-called "mirror image" cases. Is this surreal modeling?

Is Professor Tribe much help?

If the usual premise is reversed—if the state action cases are assumed not to reveal any general rule, and if the inquiry is redirected to consider why this anarchy prevails—it is possible to construct an "antidoctrines," an analytical framework which, in explaining why various cases differ from one another, paradoxically provides a structure for the solution of state action problems.

TRIBE at 1691.

Thus, if constitutional law is understood as a snapshot of the deepest norms by which we govern our political lives, the state action problem is its negative. It is a problem, or rather a series of problems, whose solutions must currently be sought in perceptions of what we do not believe particular constitutional provisions should be read to control.

*Id.* at 1720. Will this be on the final examination?

CONSTITUTIONAL LAW  
WORKSHEET NO. 4

Chapter 8. Equal Protection

See generally Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447 (1989); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

8-1. Traditional Equal Protection

1. Distinguish among substantive due process, procedural due process, and equal protection as alternate constitutional analyses.
2. From a judicial review orientation at deference to the legislative process, how does equal protection compare to other constitutional provisions?
3. Consider the logic of the "one step at a time" corollary. How long can the government wait to take "the second step" before the Constitution is violated? See Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 YALE L.J. 1777 (1981).
4. Is *Metropolitan Life Insurance Co. v. Ward* (479) a return to the *Lochner* era, a kind of "substantive equal protection"?
5. Why should a corporation be able to claim equal protection of the law? Reconsider the question whether the Constitution presupposes any particular economic theory. Reconsider *Railway Express Agency, Inc. v. New York* (475) as a commercial speech case.

NOWAK & ROTUNDA at 568-90.

TRIBE at 143-651.

8-2. Suspect Classes and Other Classifications

8-2.1 Race

1. Distinguish between a facial challenge and an as-applied challenge. What problems of proof does each present?
2. Summarize the separate-but-equal doctrine and its demise. Consider this development in the context of your understanding of the proper methodology for interpreting the Constitution.
3. What is meant by "strict scrutiny" review? How is it applied?
4. Reconsider *Edmonson v. Leesville Concrete Co., Inc.* (463) as an equal protection case.
5. With what impressions are you left of footnote 11 in *Brown I* at 489? Reconsider your reaction at the end of the course.

6. Explain "reverse incorporation." Is this an example of legal realism caricatured: make up your mind how you want the case to come out and then think up some rationalization? Can this concept be compared to finding the equivalent of the Contract Clause in the Fifth Amendment or finding a variation of the Takings Clause in the Fourteenth Amendment?
7. What are the constitutional powers of a federal court to order equitable relief for a violation of the Constitution? What are the limits, constitutional and nonconstitutional, on those powers?
8. Explain the distinction between de jure and de facto. Of what significance is it today? How does it relate to state action theory? What are the possible alternative approaches and what reasons has the Court given for maintaining the distinction? What are some of the problems with the Court's approach and with the alternatives?
9. *Bd. of Education v. Dowell* (497), *Freeman v. Pitts* (498), and *United States v. Fordice* (498) represent the last words from the Supreme Court on school desegregation remedies. What comes next?
10. If a state adopted a state constitutional amendment today with the same provisions as the Alabama Constitution in *Hunter v. Underwood* (511), how would the Court rule and why? Of what relevance are the decisions on the fundamental right to vote?
11. Consider the different decisions on reverse discrimination. How far has the Supreme Court majority moved from *Regents of the University of Cal. v. Bakke* (512)?
12. Study *Richmond v. J.A. Croson Co.* (529). What does it mean for the locus of power to remedy past discrimination and for federalism? For separation of powers? What is your sense of the Supreme Court's decisional momentum on affirmative action? How does the decision in *Metro Broadcasting, Inc. v. FCC* (537) affect your answers?
13. Is the Texas Tech University School of Law Summer Entering Program constitutional?
14. Define "overinclusive," "underinclusive," "perfectly rational," and "perfectly irrational," and explain how the same statute can be both overinclusive and underinclusive. Give examples. How does all this relate to the due process and equal protection analysis of purpose versus means?

NOWAK & ROTUNDA at 591-698.

TRIBE at 1465-1544.

### 8-2.2 Alienage

1. Distinguish among three categories of alien discriminations: (1) state police power, (2) state government function, and (3) federal programs.
2. How do you explain *Plyler v. Doe* (548) on a judicial review level? On a “public policy” level? How should the two levels be kept distinct?
3. Give the division and analysis in *Plyler v. Doe* (548) a careful look. Predict the Justices’ voting alignment in a hypothetical challenge to a state statute denying subsistence welfare benefits to illegal aliens. Is there a right to travel into the United States that might apply?
4. How many areas of constitutional analysis scrutinize federal and state measures in different ways? Why?

NOWAK & ROTUNDA at 698-718.

TRIBE at 154-453.

### 8-2.3 Illegitimacy

1. Review the quiz.

NOWAK & ROTUNDA at 719-35.

TRIBE at 155-358.

### 8-2.4 Gender

1. Summarize the relevant equal protection analysis for gender discriminations. Does the analysis change when the government actor is federal rather than state?
2. How does gender discrimination analysis differ from analysis for race discrimination? For economic regulations?
3. How do male discriminations and female discriminations compare as far as constitutionality is concerned? What are sex-role stereotypes and when are they unconstitutional?
4. Justice Stevens, concurring in *Craig v. Boren* (566) at 569, says, “There is only one Equal Protection Clause.” What does he mean? How is he right? How is he wrong?
5. How does the equal protection analysis change when gender and illegitimacy classifications overlap?
6. Of what applicability is the distinction between de jure and de facto in gender classifications? How is the de jure requirement defined?
7. Can the government practice gender discrimination to overcome the past effects of its own discrimination? What about remedying past private discrimination in the general society?



8. Can you articulate the classification in each of the cases in this section that triggers equal protection analysis?
9. How should a federal court go about ordering a remedy in a gender discrimination case? What difference does it make whether the statute is state or federal?
10. Review the hypothetical state university arrangements. State One: Male State University and Female State University. State Two: Male State University, Female State University, and State University.

NOWAK & ROTUNDA at 736-53.

TRIBE at 155-888.

### 8-2.5 Wealth and Age

1. What are the applicable standards of equal protection for young and old and rich and poor?
2. Define a suspect class. Give some examples of suspect classifications. Give some examples of classifications that are not suspect.
3. What theory of judicial review underlies the protection of "discrete and insular" minorities?
4. Explain the nexus theory and why the Court rejected it in *San Antonio Indep. Sch. Dist. v. Rodriguez* (584). Reconsider the theory with *Griswold v. Connecticut* (635).
5. Was Justice Black correct when he wrote, "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours"? *Ferguson v. Skrupa* at 355. How about Karl Marx? Does the Constitution guarantee a particular economic system?
6. Compare *City of Cleburne v. Cleburne Living Center* (590) with *Plyler v. Doe* (548). How do these holdings fit into the equal protection framework?

NOWAK & ROTUNDA at 753-57.

TRIBE at 1588-1627.

### 8-3. Fundamental Rights

1. What are fundamental rights? What rights are not fundamental? Think about the Privileges-and-Immunities Clause analysis in *The Slaughter-House Cases* (339).
2. How does equal protection analysis apply to fundamental rights? Reconsider substantive due process.
3. What attributes of access to courts are fundamental? Why? Why should the government be required to guarantee such rights?

4. How is the right of access to the courts different from Bill of Rights guarantees like the Sixth and Fourteenth Amendments' right to counsel?
5. Define indigency, the trigger for state subsidy of fundamental rights. When does the state have a duty to subsidize? Why may the state interfere with the attorney-client liberty to contract?
6. Why is the right to vote so important?
7. Explain the justifications for the "one person, one vote" requirement. When does it apply? How exact must it be? Why is it constitutionally impossible to "waive" this right? How are state apportionments different from congressional apportionments and why?
8. Compare Justices Douglas's and Black's views on equal protection in *Harper v. Va. State Bd. of Elections* (606).
9. Define the special election exception. Give some examples.
10. Distinguish the right to vote from the right to be a candidate. What different state interests apply? How may they be achieved?
11. Distinguish among the rights to travel interstate, intrastate and internationally. What are the sources of each? What are the individual's interests and the governmental interests in each?
12. In *Zobel v. Williams*, (622) what is controlling: the level of scrutiny, the validity of the purpose, or the fit between the means and the purpose?
13. What are the interests sought to be protected by the constitutional right to privacy?
14. Trace the Supreme Court's evolution of attribution of the privacy right within and without the Constitution.
15. Review *Griswold v. Connecticut* (635). Summarize the Justices' differing views of judicial review. Can the Court overrule *Roe v. Wade* (644) and still preserve the ruling in *Griswold*?
16. What are the differences between textual and nontextual rights? Is there a hierarchy of rights in which some are "more preferred"?
17. Use the cases in our books to draft a model state abortion regulatory statute. Would your statute change if you were asked to draft a federal statute? How would you draft a statute if you wanted to restrict the right of privacy as much as constitutionally possible? How would it read if you wanted to protect the right of privacy as much as constitutionally possible?
18. Reconsider your answer to question 5 supra with *Harris v. McRae* (654).
19. Is *Rust v. Sullivan* (655) an equal protection case, a due process case, or a free speech case?

20. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (656) is decided on many levels of analysis. Consider separately: stare decisis in constitutional law; nontextual versus textual rights; fundamental rights and strict scrutiny; federalism; constitutional supremacy and uniformity; judicial review versus judicial supremacy; the role of the Supreme Court; interpretation methodology; the right of privacy; the role of public opinion; the rule of law; and the responsibility of the Court and individual Justices for the integrity of constitutional law.
21. Notice the debate among the Justices over the role of the Supreme Court and interpretative methodology in *Bowers v. Hardwick* (684).
22. Answer Professor Rotunda's implicit question: "[Is there] a [federal constitutional] right to die?" Does *Cruzan v. Director, Missouri Dept. of Health* (692) provide much of an answer?

NOWAK & ROTUNDA at 757-907.

TRIBE at 162-973.

CONSTITUTIONAL LAW  
WORKSHEET NO. 5

## Chapter 10. Freedom of Speech.

See generally Kent R. Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

## 10-1. Advocacy of Illegal Conduct

1. Identify the distinct interests of government and individual in each of these cases.
2. Review the evolution of the First Amendment analysis from *Schenk v. United States* (725) to *Abrams v. United States* (726) to *Gitlow v. New York* (727) to *Brandenburg v. Ohio* (733) to *Hess v. Indiana* (735). How does your understanding of "the law as it is" improve when you look back over this history? How would you rate the performance of the Supreme Court over the years? Can you draw a Williams diagram to summarize these precedents?
3. Explain Justice Holmes's falsely-yelling-fire-in-a-crowded-theater analogy in terms of the modern Supreme Court view of the issue.
4. In the modern analysis, what, if any, is the relevance of the category of speech, the content of the particular statement, the speaker's subjective intent, the audience's reaction, and the view of an omniscient observer? What is the significance of the doctrine of constitutional fact?
5. How important to the First Amendment analysis is the identity of the decision-maker, judge, or jury? Why?
6. How should the Court decide the hypothetical case of a speaker who advocates violence through the use of speech that does not literally or explicitly advocate action, such as Marc Antony's funeral oration for Caesar in Shakespeare's *Julius Caesar*, Act III, scene ii?

NOWAK & ROTUNDA at 957-69.

TRIBE at 841-49.

## 10-2. Prior Restraint

1. Distinguish between a subsequent punishment of speech and a prior restraint. Give some examples. What is so important about the distinction for purposes of the First Amendment?
2. If prior restraints are so pernicious, why are they not unconstitutional per se? When are they constitutional?

3. Consider *New York Times Co. v. United States* (737). Does the decision make any law, good or bad? Does it explain when the press may be enjoined from publishing information in its possession? What outcome if Congress had passed a statute authorizing federal courts to issue national security injunctions? How may the case be viewed as a decision on the doctrine of separation of powers?
4. How narrow is the holding in *Snepp v. United States* (746)?
5. How does the analysis change when the press is the burglar instead of the recipient of the burglar's take?
6. How has the Court protected the government's ownership in the information it generates, collects, and preserves? How narrow are the rights of access and dissemination? Does the analysis change moving from a general public right of access to a press right of access?

NOWAK & ROTUNDA at 969-78.

TRIBE at 1039-54.

### 10-3. Time, Place, and Manner Restrictions and the Public Forum

NOWAK & ROTUNDA at 1082-1106.

TRIBE at 977-1010.

#### 10-3.1 The Procedural Context

1. Distinguish generally between facial challenges and challenges as applied.
2. Describe the content and distinguish among the First Amendment concepts of "vagueness," "overbreadth," and "least restrictive means."
3. Explain "reasonable time, place, and manner restrictions." What about content neutrality? Can government excise whole types of speech?
4. A refuses to apply for a permit, marches, and is convicted. B applies for but is denied a permit, marches, and is convicted. C, under an injunction not to march, marches and is held in contempt. What are the differences among the three? Are there any constitutional limits on the state's power to punish C?
5. Would a parade ordinance that charged a \$1.50 registration fee be constitutional?

### 10-3.2 Protection of the Public From Fraud and Annoyance

1. Distinguish the new substantial overbreadth doctrine from the former overbreadth doctrine. How is overbreadth analysis related to standing? See generally Tribe at 1024-30.

### 10-3.3 Defining the Public Forum

1. Justice Roberts once wrote, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). Justice Holmes, when a state judge, once wrote, "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Commonwealth v. Davis*, 162 Mass. 510, 511 (1895), *aff'd sub nom., Davis v. Massachusetts*, 167 U.S. 43 (1897). Who was correct?
2. What is a "public forum?" Where are they found? What First Amendment rules apply there? Why? Reconsider *Marsh v. Alabama* (420) as a public forum case. Reconsider *Hudgens v. N.L.R.B.* (422) as a public forum case. Is the state constitution a better basis upon which to proceed?
3. Explain the three categories used in *Perry Educational Ass'n v. Perry Local Educators' Ass'n* (768). Apply this analysis to the previously decided cases in the notes at 776-84.
4. How is equal protection doctrine related to the public forum analysis?

### 10-3.4 Government Subsidization of Speech

1. Does *Rust v. Sullivan* (792) make more (or less) sense as a First Amendment decision? Recall that the regulations at issue there have since been set aside.

### 10-3.5 Injunctions and the Public Forum

1. Is the holding in *Madsen v. Women's Health Center, Inc.* (Supp.) best understood as an equal protection decision? How does Chief Justice Rehnquist reconcile his vote here with his vote in *Rust* (792)? Is this just another judicial-injunctions-are-different holding like *Shuttlesworth v. City of Birmingham* (756)? Does this decision have anything to do with the early commercial speech cases, *see* note 2 at 859-60?

## 10-4. Fighting Words and Hostile Audiences

1. How are conduct convictions and speech convictions distinguished?
2. Define the fighting words doctrine. How is it justified? How broad is the exception?
3. Why does the first amendment protect the emotion of the speaker but not the state's efforts in favor of the listener's emotions?
4. Distinguish among the following: one-on-one confrontations; a speaker versus a hostile audience; a group protest versus a single heckler; two groups in simultaneous, mutually hostile protest; a speaker exhorting a receptive audience to action.
5. What is the uncertain relevance of human emotion in constitutional law generally? See William J. Brennan, Jr., *Reason, Passion and "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988).
6. What does Justice Scalia's opinion in *R.A.V. v. St. Paul* (805) add to the fighting words doctrine? What implications does his opinion have for the phenomenon commonly referred to as "political correctness"?
7. Can you reconcile *Wisconsin v. Mitchell* (Supp.) with *R.A.V.*? NOWAK & ROTUNDA at 1057-62. TRIBE at 849-56.

## 10-5. Special Problems of the Broadcast Media

1. Suppose a state statute guaranteed that the poor be informed on public issues by obligating newspapers to give copies away to indigents. How would the constitutional issue be decided and why?
2. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Miami Herald Co. v. Tornillo* (819, 820). What does this observation mean for the theory of the First Amendment? Does it describe the provision's history?
3. How far can Congress go in creating a statutory right of public access to the electronic media?
4. What is the "fairness doctrine"? What is its source and justification? Is it constitutional? Does the Constitution require it?
5. Explain the captive audience problem.
6. What is the doctrine of unconstitutional conditions?
7. Looking ahead, what constitutional issues do you contemplate will arise in future regulation of the cable television industry? *Turner Broadcasting System, Inc. v. FCC* (Supp.).

NOWAK & ROTUNDA at 978-94.

TRIBE at 944-55.

#### 10-6. The Press and the Criminal Justice System

NOWAK & ROTUNDA at 997-1011.

TRIBE at 856-61 & 955-77.

##### 10-6.1 Protection of Confidential Sources

1. Suppose a reporter writes a story about homosexual conduct—which is illegal under the penal code of the state—between an unidentified, sitting state judge and two practicing attorneys, who the reporter claims admitted to the conduct in confidential interviews. When the state judicial affairs commission investigates, the reporter refuses to cooperate. How much of a precedent is *Branzburg v. Hayes* (833)? If the reporter discloses the identity of his two sources, may they sue and recover under a breach-of-contract theory? If the report proves to be untrue, may the judge sue and recover under a false-light tort theory?
2. What are the speech model and the structural model of the Free Press Clause? Is there a constitutional difference between the Free Speech and Free Press Clauses? Define “the press.”
3. If you were a magistrate, what questions would you ask and what answers would satisfy you before you issued a warrant to search Dan Rather’s office? Consider the Constitution and the Privacy Protection Act of 1980.

##### 10-6.2 Fair Trial and Free Press

1. What are “sensational trials”? What values in conflict yield what analysis? Distinguish between after-the-fact and before-the-fact remedies.
2. Describe the narrowing of the prior restraint analysis in this area. How are limits on publication different from limits on access here?
3. What interests compete within the question whether criminal trials should be televised live? What about state executions?
4. How and why are civil trials differently analyzed?
5. Is there a constitutional right of access to televise the oral arguments at the Supreme Court of the United States? Is this a public forum issue? Would it be a good idea?
6. Does an attorney representing a defendant in a criminal case have a greater or a lesser First Amendment protection for speech relating to the case?



## 10-7. Commercial Speech

1. What is commercial speech? What are the arguments for inclusion and exclusion in First Amendment doctrine?
2. What are the differences between commercial speech and fully protected speech and how are those differences handled in the theory?
3. What issues remain undecided in the area of legal advertising? Do *Edenfield* (Supp.) and *Ibenez* (Supp.) taken together portend a rethinking of the Supreme Court's assumptions regarding the First Amendment and bar restrictions on attorney in-person solicitation?
4. When can advertising be banned? How can it always be regulated? Is *Ladue v. Gilleo* (Supp.) a commercial speech case?
5. Apply the test in *Central Hudson Gas & Elec. Corp. v. P.S.C.* (855) to the bans on alcohol and smoking advertisements on television. Would the analysis be different for condom commercials?
6. In what direction is the Court heading, considering *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico* (866)? Do the Supplement cases follow in the same direction?

NOWAK & ROTUNDA at 1011-35.

TRIBE at 890-904.

## 10-8. Defamation and Privacy

NOWAK & ROTUNDA at 1035-57.

TRIBE at 861-90.

## 10-8.1 Defamation

1. Review the class discussion of *New York Times Co. v. Sullivan* (874).
2. Define these terms: actual malice, public official, general public figure, and limited public figure. Give examples of each.
3. Describe the federal rule established in *Gertz v. Robert Welch, Inc.* (882).
4. Why was Mrs. Mary Alice Firestone not a public figure? Is Dean Newton a public figure? Professor Baker?
5. How does *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (887) change constitutional law? Apply the analysis to the facts in *Sullivan* and *Gertz*. Is *Rosenbloom v. Metromedia, Inc.* (891) somehow still a viable precedent?

6. If there is no dichotomy between "opinion" and "fact" (*Milkovich* (894)), then what does the First Amendment have to do with fabricated quotations in *Masson v. New Yorker Magazine* (881)?

#### 10-8.2 Privacy

1. May a state allow a tort recovery for publication of true information which is highly personal and private? What is the relevance of *Shelley v. Kraemer* (432)?
2. Does the First Amendment protect sports and other entertainments? How? Why? Are they only commercial speech? How may state law protect the athletes' and performers' proprietary commercial interests in such activities?
3. What are the First Amendment concerns in private suits regarding (1) false light situations, (2) appropriations of name or likeness, (3) publication of private details, and (4) commercial publicity about performers?
4. How does *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (887) affect holdings in this area?
5. How has the Supreme Court reconciled the Copyright Clause with the First Amendment?
6. Why is there no distinction between "opinion" and "fact" in the constitutional law of defamation?

#### 10.9. The Right of Association

NOWAK & ROTUNDA at 1062-82.

TRIBE at 1400-35.

#### 10-9.1 Inquiries into Associations

1. What is the derivation of the right of association? Compare *Roe v. Wade* (644), *Bowers v. Hardwick* (684), *San Antonio Independent School District v. Rodriguez* (584), *Plyler v. Doe* (548), and *NOW v. Scheidler* (Supp.).

#### 10-9.2 Loyalty Oaths

1. What is the meaning of the following questions from the Declaration of an Intention to Study Law? Are they constitutional?
  8. (a) Can you conscientiously, and do you, affirm that without mental reservation, you are loyal to and ready to support the Constitution of the United States and of the State of Texas? (Yes or No) If not, please explain.
  - (b) Have you ever organized or helped to organize or become a member of an organization or group of persons which, during

the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or political subdivision thereof should be overthrown by force, violence, or any unlawful means? (Yes or No) If your answer is in the affirmative, state the facts.

2. Reconcile the cases here with the cases in Section 10-1, Advocacy of Illegal Conduct.
3. If the Texas Bar would take the same pro-choice position as the A.B.A. has taken on the issue of the Right of Privacy, what constitutional objection could be raised by a pro-life member?

#### 10-9.3 Patronage Dismissals

1. What is patronage and how does the Constitution limit the practice? Why?
2. How do you explain the power of the government to prohibit its employees from engaging in certain types of partisan political activities which otherwise would be fully protected for private citizens?

#### 10-9.4 Regulating the Membership of Associations

1. Distinguish freedom of intimate association from the freedom of expressive association.
2. Reconsider the question in Worksheet No. 4 about gender restrictions at hypothetical state universities.

#### 10-10. Symbolic Speech

1. Can you draw bright lines between conduct, symbolic speech, and pure speech? What are the justifications for each category?
2. How can the Court require motivational analysis in *Brd. of Education v. Pico* (936) having rejected it in *United States v. O'Brien* (931)?
3. Is *Tinker v. Des Moines Independent Community School District* (934) a symbolic speech case or a public forum case? See *Hazelwood School District v. Kuhlmeier* (781).
4. Is *Wayte v. United States* (938) a symbolic speech decision or a selective prosecution decision?
5. After *Texas v. Johnson* (938) and *United States v. Eichman* (946), what does symbolic speech mean?

NOWAK & ROTUNDA at 1106-17.

TRIBE at 594-601.

## 10-11. Campaign Financing

1. What is the dilemma in regulation of campaign speech?
2. Distinguish, as did the Court, among contribution limits, expenditure limits, disclosure requirements, and public subsidies.
3. Review the notes at 957-60. Is there any relevance to the "access to ballot" principles in Chapter 8, §8-3.24? Is there any constitutional way for Congress to respond meaningfully to the problems of campaign financing?
4. What is the state's role in this area? What are the First Amendment limits on the police power? What is the relevance of republican political theory to the constitutional issues?

NOWAK & ROTUNDA at 1117-28.

TRIBE at 113-253.

## 10-12. Obscenity

1. How is the obscene defined so as to place such material beyond any protection of the First Amendment?
2. Explain the difficulty in defining and applying the concept.
3. What are the alternatives between no protection and complete protection for all erotic material?
4. What is "variable obscenity"? How does the constitutional analysis change? What about "pandering"?
5. Is there a right-to-privacy argument in viewing pornography?
6. What is the role of the jury in deciding the scope of the First Amendment?
7. How may zoning be used to regulate erotic material?
8. How does prior-restraint analysis bend for obscenity?
9. What impact on the constitutional analysis is felt from the Twenty-First Amendment?
10. How would you predict the Court's future review of antipornography statutes that define and prohibit material that is harmful and coercive of women and reinforces false notions of male supremacy?
11. Consider the constitutionality of Pub. L. No. 101-121, 103 Stat. 740, which provides in part:

(a) None of the funds authorized to be appropriated for the National Endowment of the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children,

or individuals engaged in sex acts and which, when taken as a whole, do not have a serious literary, artistic, political, or scientific value.

12. Does Justice Stewart really only know it when he sees it? Is John Mortimer (author of the Rumpole stories) correct in saying, "We used to be told that, in America, obscenity was that which would give Mr. Justice Frankfurter an erection. As Mr. Justice Frankfurter got older, the definition became slightly more relaxed." Robert F. Henley, *A Conversation with John Mortimer*, *Litigation*, Winter 1989, at 22. Is this ultimately and simply the "rule of 5"?
13. Can you reconcile the holding in *Alexander v. U.S.* (Supp.) with what the Court said about punitive civil damages in *Honda Motor Co., Ltd. v. Oberg* (Supp.)?
14. Read Circuit Judge Richard A. Posner's opinion in *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (997). Is nude dancing symbolic speech?

NOWAK & ROTUNDA 1134-56.

TRIBE at 904-28.

P.S. Now, at the end of the course, what do you think Professor Mark Tushnet meant when he ended his book *Red, White and Blue—A Critical Analysis of Constitutional Law* 318 (1988) with this conclusion: Critique is all there is.