

Table of Contents

PART I. CONSTITUTIONAL LITIGATION

CHAPTER 1. JUDICIAL REVIEW OF CONSTITUTIONAL ISSUES

§ 1:1 Introduction

I. THE CONTEXT OF CONSTITUTIONAL LITIGATION

- § 1:2 Forums for addressing constitutional issues
- § 1:3 Forms of action for constitutional litigation in civil cases
- § 1:4 Forms of action for constitutional litigation in criminal cases

II. JUDICIAL LIMITS ON CONSTITUTIONAL INTERPRETATION

- § 1:5 Generally
- § 1:6 Statutory interpretation to avoid constitutional doubt
- § 1:7 Statutory interpretation to promote constitutional values
- § 1:8 Severing the constitutional from the unconstitutional
- § 1:9 Retroactivity and finality of judicial decisions

CHAPTER 2. SOURCES FOR CONSTITUTIONAL ADJUDICATION

- § 2:1 Generally
- § 2:2 Constitutional text
- § 2:3 Precedent
- § 2:4 Original meaning and original intent
- § 2:5 The common law
- § 2:6 Historical practices
- § 2:7 Interpretations by Congress and the President
- § 2:8 Interpretations of state constitutions and actions of state legislatures
- § 2:9 Interpretations of foreign constitutions and international covenants
- § 2:10 Constitutional structure and the political process
- § 2:11 Natural law and fundamental rights
- § 2:12 Shared ethical values of the culture
- § 2:13 Concern for impact upon society

§ 2:14 Studies in economics, sociology, and other disciplines

§ 2:15 Sources outside of the traditional mainstream

CHAPTER 3. ENFORCEMENT OF CONSTITUTIONAL RIGHTS

§ 3:1 Introduction

I. LIABILITY BASED UPON FEDERAL CIVIL RIGHTS STATUTES

§ 3:2 Background of 42 U.S.C.A. § 1983

§ 3:3 Suits for injunctive relief

§ 3:4 Municipal liability

§ 3:5 State liability

§ 3:6 Qualified immunity of government officials

§ 3:7 Prosecutorial immunity

§ 3:8 Judicial immunity

§ 3:9 Legislative immunity

§ 3:10 Liability of private parties

§ 3:11 Commerce Clause, Spending Clause, and Supremacy Clause
claims

§ 3:12 Relationship to tort actions

§ 3:13 Relationship to habeas corpus actions

II. LIABILITY BASED UPON OTHER FEDERAL STATUTES

§ 3:14 Equal rights and property rights

§ 3:15 Conspiracy to interfere with civil rights

III. ATTORNEY'S FEES

§ 3:16 Generally

§ 3:17 Scope of liability

§ 3:18 Prevailing parties

§ 3:19 Reasonable compensation

§ 3:20 Expert fees

§ 3:21 Settlement proceedings

IV. ACTIONS AGAINST FEDERAL AGENTS

§ 3:22 Generally

§ 3:23 Special factors that counsel hesitation

§ 3:24 Adequate alternative remedies

§ 3:25 Immunities

TABLE OF CONTENTS

CHAPTER 4. STATE ACTION DOCTRINE

I. OVERVIEW

- § 4:1 Framework
- § 4:2 Actions of the federal government

II. ACTION PURSUANT TO STATE AUTHORITY

- § 4:3 Action by government employees
- § 4:4 Action by courts and judicial officers
- § 4:5 Juror selection
- § 4:6 Action facilitating private conduct that violates the Constitution
- § 4:7 Private regulation of state actors
- § 4:8 Failure to prevent private action

III. PRIVATE PARTIES AS STATE ACTORS

- § 4:9 Generally
- § 4:10 Reliance on government assistance and benefits
- § 4:11 Action pursuant to state licensing and regulation
- § 4:12 Performance of traditional government functions
- § 4:13 Unique aggravation of injury

**PART II. SPEECH, ASSOCIATION,
AND RELIGION**

**CHAPTER 5. FRAMEWORK FOR FIRST
AMENDMENT ANALYSIS**

- § 5:1 Background
- § 5:2 Limitations of the First Amendment text
- § 5:3 Purpose of the First Amendment
- § 5:4 Standards of review
- § 5:5 Content and viewpoint neutrality
- § 5:6 Procedural safeguards
- § 5:7 Matters of public concern

**CHAPTER 6. REGULATION OF SPEECH BY
CONTENT**

- § 6:1 The importance of content

**I. UNLAWFUL INCITEMENT AND DANGEROUS
SPEECH**

- § 6:2 Generally

- § 6:3 Denying benefits to subversive political groups and their members
- § 6:4 Loyalty oaths

II. WORDS THAT PROVOKE A BREACH OF THE PEACE

- § 6:5 The fighting words exception to First Amendment protection
- § 6:6 Incitement to riot
- § 6:7 Coercive or threatening speech

III. DEFAMATION

- § 6:8 Background
- § 6:9 Defamation of public officials
- § 6:10 Defamation of public figures who are not public officials
- § 6:11 Defamation suits by private persons regarding matters of public concern
- § 6:12 Proving falsity and actual malice
- § 6:13 Defamation suits involving matters not of public concern
- § 6:14 Anonymous publications
- § 6:15 Previous restraints upon defamatory publications
- § 6:16 Group libels, hate ordinances, and racist speech
- § 6:17 Application of defamation standards to other tort or property claims

IV. OBSCENITY, INDECENCY, AND CHILD PORNOGRAPHY

- § 6:18 Defining obscenity
- § 6:19 Censorship, seizure, or forfeiture of obscenity or child pornography
- § 6:20 Regulation of nudity and adult entertainment
- § 6:21 Regulation of lewd or indecent speech
- § 6:22 Government funding of indecent speech
- § 6:23 Child pornography
- § 6:24 Protecting children from exposure to sexually explicit material
- § 6:25 Private possession of obscenity
- § 6:26 Seizure by customs officials
- § 6:27 Exclusion of obscenity and child pornography from the mail and from interstate commerce

V. COMMERCIAL SPEECH

- § 6:28 Background
- § 6:29 Regulation of commercial speech activity by lawyers and other professionals
- § 6:30 Protecting against unlawful commercial activities
- § 6:31 Compelled government-sponsored speech

TABLE OF CONTENTS

**CHAPTER 7. PROCEDURAL CONCERNS AND
NEUTRAL REGULATIONS**

§ 7:1 Introduction

**I. PRIOR RESTRAINTS UPON FIRST AMENDMENT
FREEDOMS**

§ 7:2 Prior restraints generally

§ 7:3 Licenses and permits

§ 7:4 Collateral consequences of violating injunctions and other prior
restraints

**II. VAGUE OR OVERBROAD SPEECH
RESTRICTIONS**

§ 7:5 The vice of vagueness

§ 7:6 The vice of overbreadth

III. NEUTRAL REGULATION OF CONDUCT

§ 7:7 Regulating symbolic speech

§ 7:8 Flag desecration

§ 7:9 Picketing, boycotts, and demonstrations

**IV. REGULATING THE TIME, PLACE, AND MANNER
OF SPEECH ACTIVITIES**

§ 7:10 Time, place, and manner controls

§ 7:11 Leaving open ample opportunities and traditional public forums

§ 7:12 Injunctions limiting the time, place, or manner of speech

§ 7:13 Protecting personal privacy and autonomy

**CHAPTER 8. REGULATION OF SPEECH BY
CONTEXT**

§ 8:1 Introduction

**I. REGULATING THE FORUM OF SPEECH
ACTIVITIES**

§ 8:2 Defining traditional, limited, and nonpublic forums

§ 8:3 Government speech

§ 8:4 Individual expression within schools and libraries

§ 8:5 Public school funding and facilities

§ 8:6 Regulation of libraries

§ 8:7 Speech activities in penal institutions

§ 8:8 First Amendment rights and military regulations

§ 8:9 Restricting speech to protect the judicial process

§ 8:10 Regulation of mail

II. REGULATING RECIPIENTS OF GOVERNMENT JOBS, FUNDS, OR BENEFITS

- § 8:11 Speech rights of government employees and contractors
- § 8:12 Regulating speech activities of teachers
- § 8:13 Conditions on recipients of public benefits or employment
- § 8:14 Conditions tied to receipt of government funds
- § 8:15 Restrictions on lobbying activity

III. REGULATING POLITICAL CAMPAIGN EXPENDITURES AND CONTRIBUTIONS

- § 8:16 Regulating elections
- § 8:17 Campaign contributions
- § 8:18 Campaign expenditures
- § 8:19 Corporate or union campaign expenditures
- § 8:20 Ballot referenda

CHAPTER 9. ANCILLARY RIGHTS: PRESS, PETITION, ASSOCIATION, AND ACCESS TO INFORMATION

§ 9:1 Introduction

I. FREEDOM OF THE PRESS

- § 9:2 Defining the press
- § 9:3 Freedom from discriminatory taxation
- § 9:4 Press compliance with generally applicable laws
- § 9:5 Reporters' privilege to protect sources
- § 9:6 Newsroom searches
- § 9:7 Third-party access to print and broadcast media
- § 9:8 Regulating indecency in the broadcast media
- § 9:9 Access to government proceedings

II. RIGHT OF ASSOCIATION

- § 9:10 Association as speech
- § 9:11 Compelled disclosure of individual political relationships and beliefs
- § 9:12 Registration and disclosure requirements of subversive groups
- § 9:13 State listing or ouster of subversive organizations
- § 9:14 Regulating membership of private associations
- § 9:15 Freedom from compelled speech or association
- § 9:16 Association rights of government employees
- § 9:17 Regulation of political parties

TABLE OF CONTENTS

§ 9:18 State controls on political party operations

III. RIGHT TO PETITION

§ 9:19 Right to petition the government

IV. RIGHT TO INFORMATION

§ 9:20 The public's constitutional right of access to information and ideas

CHAPTER 10. RELIGION

§ 10:1 Introduction

§ 10:2 Definition of religion

I. FREE EXERCISE OF RELIGION

§ 10:3 The Free Exercise Clause overview

§ 10:4 Regulation of religious beliefs

§ 10:5 Neutral regulation of religious conduct

§ 10:6 Individualized assessment of free exercise claims

§ 10:7 Religious freedom combined with fundamental rights

§ 10:8 Government discrimination against religious exercise

§ 10:9 Religious freedom within prisons and the military

§ 10:10 Government authority to protect the free exercise of religion

II. ESTABLISHMENT OF RELIGION

§ 10:11 The Establishment Clause overview

§ 10:12 Secular purpose requirement and prohibition of government endorsement

§ 10:13 Effects, entanglement, and aid to religious programs and activities

§ 10:14 Accommodation, equality, and the free exercise of religion

§ 10:15 Coercion to participate in religious exercises

§ 10:16 History and tradition as grounds for government participation in religious exercises

§ 10:17 Government neutrality in religious disputes

§ 10:18 Delegation of state authority to religious organizations

PART III. LIBERTY AND EQUALITY

CHAPTER 11. FRAMEWORK FOR EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS ANALYSIS

I. EQUAL PROTECTION AND SUSPECT CLASSIFICATIONS

- § 11:1 Constitutional sources of the principle of equality
- § 11:2 Introduction to the Equal Protection Clause
- § 11:3 Tiered analysis of suspect classifications
- § 11:4 Criticism of tiered analysis and strategies to overcome it
- § 11:5 Formalism, flexibility, and the evolution of equal protection doctrine

II. FUNDAMENTAL RIGHTS AND LIBERTY INTERESTS

- § 11:6 Substantive due process
- § 11:7 The overlap in equal protection and substantive due process doctrine
- § 11:8 Burdens on fundamental interests

CHAPTER 12. DISCRIMINATION ON THE BASIS OF RACE ANCESTRY OR ALIENAGE

I. IN GENERAL

- § 12:1 Background
- § 12:2 De jure and de facto discrimination

II. EDUCATION

- § 12:3 Generally
- § 12:4 School desegregation remedies
- § 12:5 De jure and de facto school segregation
- § 12:6 Interdistrict school desegregation remedies
- § 12:7 State liability for school desegregation
- § 12:8 Laws restricting school desegregation
- § 12:9 Termination of judicial supervision
- § 12:10 Efforts to increase diversity in public schools
- § 12:11 Desegregation in colleges and universities
- § 12:12 Diversity in colleges and universities
- § 12:13 Segregation in private schools

TABLE OF CONTENTS

III. VOTING AND REAPPORTIONMENT

- § 12:14 Generally
- § 12:15 Tests and devices that restrict minority participation in elections
- § 12:16 Redistricting and voter dilution
- § 12:17 Redistricting to benefit minority candidates
- § 12:18 Special burdens on the use of democratic processes
- § 12:19 Discrimination against minority candidates
- § 12:20 Restrictive practices by political parties and other private groups

IV. JURIES AND TRIAL PROCEEDINGS

- § 12:21 Generally
- § 12:22 Grand juries
- § 12:23 Petit juries
- § 12:24 Peremptory challenges
- § 12:25 Convictions returned by racially biased juries
- § 12:26 Waiver of right to nondiscriminatory jury
- § 12:27 Racially biased prosecution

V. DISCRIMINATION AFFECTING FAMILY RELATIONSHIPS

- § 12:28 Marriage
- § 12:29 Child custody and adoption

VI. RACIAL DISCRIMINATION IN GOVERNMENT EMPLOYMENT, FACILITIES, BENEFITS, AND SERVICES

- § 12:30 Generally
- § 12:31 Government employment and business regulation
- § 12:32 Housing
- § 12:33 Prisons and jails

VII. GOVERNMENT ACTION TO ASSIST RACIAL MINORITIES

- § 12:34 Generally
- § 12:35 Judicial remedies for past discrimination
- § 12:36 State and local contracts and employment
- § 12:37 Federal government contracts and employment
- § 12:38 Native American preferences

VIII. DISCRIMINATION BASED ON ALIENAGE

- § 12:39 Generally

- § 12:40 Economic benefits
- § 12:41 Discretionary government functions
- § 12:42 Discrimination against aliens who have not been lawfully admitted
- § 12:43 Federal discrimination against aliens

CHAPTER 13. DISCRIMINATION BASED UPON GENDER, LEGITIMACY OR SEXUAL ORIENTATION

I. GENDER DISCRIMINATION

- § 13:1 Background
- § 13:2 Gender as a suspect category
- § 13:3 Intermediate scrutiny of gender classifications
- § 13:4 Intent to discriminate
- § 13:5 Presumptions based on traditional stereotypes
- § 13:6 Benign classifications and affirmative action
- § 13:7 Marital and parental status
- § 13:8 Pregnancy and sexual relationships
- § 13:9 Education
- § 13:10 Military service
- § 13:11 Sexual harassment

II. DISCRIMINATION AGAINST CHILDREN OF UNWED PARENTS

- § 13:12 Generally
- § 13:13 Inheritance and wrongful death recovery
- § 13:14 Government benefits
- § 13:15 Parental support
- § 13:16 Paternal interests and relationships
- § 13:17 Immigration

III. SEXUAL ORIENTATION

- § 13:18 Generally
- § 13:19 Government employment
- § 13:20 Military service
- § 13:21 Child custody and adoption
- § 13:22 Domestic partnerships and marriage

CHAPTER 14. FUNDAMENTAL INTERESTS IN CIVIC PARTICIPATION

I. IN GENERAL

- § 14:1 Overview

TABLE OF CONTENTS

II. RIGHTS OF VOTERS

- § 14:2 Generally
- § 14:3 Right to vote in federal elections
- § 14:4 Right to vote in presidential elections
- § 14:5 Prohibition of poll taxes
- § 14:6 Property ownership requirements
- § 14:7 Residence and registration requirements
- § 14:8 Photo identification requirements
- § 14:9 Sex and age requirements
- § 14:10 Write-in ballots
- § 14:11 Felons
- § 14:12 Primaries

III. REDISTRICTING AND EQUAL REPRESENTATION

- § 14:13 Generally
- § 14:14 Federal elections
- § 14:15 State and local elections
- § 14:16 Multimember voting districts
- § 14:17 Judicially promulgated apportionment
- § 14:18 Special purpose elections
- § 14:19 Gerrymandering and designer districts

IV. RIGHT TO OBTAIN A PLACE ON THE BALLOT

- § 14:20 Generally
- § 14:21 Petition requirements
- § 14:22 Filing fees
- § 14:23 Other restraints on ballot access
- § 14:24 Interim appointments
- § 14:25 Qualifications for state office

V. DISCRIMINATION BASED UPON DURATION OF RESIDENCE

- § 14:26 Generally
- § 14:27 Freedom of movement within and among states
- § 14:28 Freedom to travel abroad
- § 14:29 Durational residence requirements and public health or welfare
- § 14:30 Durational residence requirements, income, and employment
- § 14:31 Durational residence requirements and voting
- § 14:32 Durational residence requirements and education
- § 14:33 Durational residence requirements for marriage and divorce

VI. ACCESS TO THE COURTS

- § 14:34 Generally

- § 14:35 Court access for criminal appeals
- § 14:36 Court access in divorce and parental rights proceedings
- § 14:37 Court access for claims involving economic and welfare interests
- § 14:38 Government misconduct blocking individual access to courts

CHAPTER 15. FUNDAMENTAL INTERESTS IN PERSONAL AUTONOMY

- § 15:1 Background

I. INTIMATE PERSONAL RELATIONSHIPS AND CHOICES

- § 15:2 Development of contemporary doctrine
- § 15:3 Family relationships and parental rights
- § 15:4 Marriage, procreation, and sexual intimacy
- § 15:5 A woman's decision to have an abortion
- § 15:6 Classifications affecting health care and end of life decisions

II. THE RIGHT TO BEAR ARMS

- § 15:7 Historical treatment of the Second Amendment
- § 15:8 Government regulation of firearms

CHAPTER 16. REVIEW OF SOCIAL AND ECONOMIC REGULATIONS

- § 16:1 Generally
- § 16:2 Over-inclusiveness and under-inclusiveness
- § 16:3 Means/ends and legislative purpose tests
- § 16:4 Illegitimate motives
- § 16:5 Important interests that are not fundamental (education)
- § 16:6 Regulations bordering fundamental interests
- § 16:7 Rejected candidates for suspect categories (age)
- § 16:8 Arbitrary classifications
- § 16:9 Taxation and equal protection
- § 16:10 Class of one challenges

CHAPTER 17. PROPERTY AND CONTRACT RIGHTS

I. THE TAKINGS CLAUSE

- § 17:1 Introduction
- § 17:2 Condemnation of private property
- § 17:3 Just compensation

TABLE OF CONTENTS

§ 17:4	Public use
§ 17:5	Physical intrusion or destruction of all economically beneficial use
§ 17:6	Takings and management of the navigational servitude
§ 17:7	Public necessity
§ 17:8	Regulatory takings
§ 17:9	Judicial takings
§ 17:10	Zoning and land use restrictions
§ 17:11	Conditions applied to development permits
§ 17:12	Government regulation of income or sales
§ 17:13	Temporary takings and regulatory delays
§ 17:14	Taking of intangible property
§ 17:15	Taking the right to exclude others
§ 17:16	The nuisance exception to the Takings Clause

II. DUE PROCESS CONSTRAINTS ON ECONOMIC REGULATIONS, LIABILITY, AND TAXATION

§ 17:17	Substantive due process and the Takings Clause
§ 17:18	Substantive due process and economic liberty
§ 17:19	Laws creating retroactive civil liability
§ 17:20	Punitive damages
§ 17:21	Delegation of regulatory authority to private individuals
§ 17:22	Abandoned property
§ 17:23	Due process limits on taxes and fees
§ 17:24	Due process constraints on jurisdiction to tax
§ 17:25	The public purpose doctrine as a due process limitation on taxes

III. THE CONTRACTS CLAUSE

§ 17:26	Impairment of contract rights
§ 17:27	Scope of the Contracts Clause
§ 17:28	Implied reservation of state police powers
§ 17:29	Restriction on changes to public contracts
§ 17:30	Contracts with the United States government

CHAPTER 18. SLAVERY AND INVOLUNTARY SERVITUDE

§ 18:1	Generally
§ 18:2	Peonage as involuntary servitude
§ 18:3	Legislative attempts to keep workers on their jobs
§ 18:4	Human trafficking as slavery
§ 18:5	Institutionalized persons
§ 18:6	Specific performance of personal service contracts
§ 18:7	Orders controlling activities within industry
§ 18:8	Psychological coercion

- § 18:9 Permissible forced labor
- § 18:10 Badges of slavery
- § 18:11 Other applications of the Thirteenth Amendment

CHAPTER 19. PRIVILEGES AND IMMUNITIES

I. IN GENERAL

- § 19:1 Introduction

II. PRIVILEGES AND IMMUNITIES OF ARTICLE IV, SECTION 2

- § 19:2 The original understanding
- § 19:3 Development of contemporary doctrine
- § 19:4 Pursuit of a livelihood
- § 19:5 Practice of law and other learned professions
- § 19:6 Payment of taxes
- § 19:7 Access to health care
- § 19:8 Access to natural resources
- § 19:9 Access to state courts
- § 19:10 Application to corporations

III. PRIVILEGES OR IMMUNITIES OF NATIONAL CITIZENSHIP

- § 19:11 Generally
- § 19:12 The right to travel
- § 19:13 Additional fundamental privileges or immunities
- § 19:14 Rights based upon federal statutes

CHAPTER 20. ADDITIONAL SOURCES OF THE PRINCIPLE OF EQUALITY

- § 20:1 Introduction

I. EQUALITY UNDER THE COMMERCE CLAUSE

- § 20:2 Generally
- § 20:3 The Commerce Clause and equal protection
- § 20:4 The Commerce Clause and privileges and immunities
- § 20:5 Protection against discrimination based upon race and poverty
- § 20:6 Protection for out-of-state merchants

II. EQUALITY UNDER THE DUE PROCESS CLAUSES

- § 20:7 Fifth Amendment

TABLE OF CONTENTS

§ 20:8 Fourteenth Amendment

**III. EQUALITY PRINCIPLES OF THE FIRST
AMENDMENT**

§ 20:9 Generally

§ 20:10 The religion clauses

§ 20:11 Freedom of speech and press

Table of Contents

PART IV. CIVIL JUSTICE

CHAPTER 21. JURISDICTION OF STATE COURTS

- § 21:1 Generally
- § 21:2 Standards for establishing personal jurisdiction
- § 21:3 General and specific jurisdiction
- § 21:4 Business and commercial activities
- § 21:5 Divorce, custody, and support proceedings
- § 21:6 Physical presence
- § 21:7 Personal jurisdiction and the Internet
- § 21:8 Waiver of personal jurisdiction requirement
- § 21:9 Jurisdiction over property
- § 21:10 Quasi in rem jurisdiction

CHAPTER 22. PROCEDURAL DUE PROCESS

I. IN GENERAL

- § 22:1 Introduction

II. ELEMENTS OF PROCESS

- § 22:2 Adequate notice
- § 22:3 Statutes and regulations that fail to provide adequate notice
- § 22:4 Waiver of due process
- § 22:5 Right to counsel
- § 22:6 Right to a prompt hearing and disposition
- § 22:7 Right to a judicial hearing
- § 22:8 Right to respond and to present evidence
- § 22:9 Res judicata
- § 22:10 Right of confrontation
- § 22:11 Privilege against self-incrimination
- § 22:12 Right to an impartial tribunal
- § 22:13 Right to a jury trial
- § 22:14 Allocation of the burden of proof
- § 22:15 Right to a constitutional remedy
- § 22:16 Right to appeal

III. PROTECTED PROPERTY AND LIBERTY INTERESTS

- § 22:17 Generally

- § 22:18 Government seizure or forfeiture
- § 22:19 Prejudgment replevin, sequestration, or garnishment
- § 22:20 Termination of government benefits
- § 22:21 Nonpayment for services rendered to the government
- § 22:22 Property and liberty interests of public employees
- § 22:23 Regulation of private employers
- § 22:24 Right to reputation
- § 22:25 Students
- § 22:26 Parental rights and family relationships
- § 22:27 Municipal utility services
- § 22:28 Drivers' licenses
- § 22:29 Professional licenses
- § 22:30 Payment of taxes
- § 22:31 Rights before investigatory and accusatory bodies

CHAPTER 23. INVOLUNTARY CIVIL COMMITMENT

- § 23:1 Introduction

I. STANDARDS FOR COMMITMENT OF THE MENTALLY ILL OR DISABLED

- § 23:2 Commitment criteria
- § 23:3 Standards of proof for involuntary commitment
- § 23:4 Informed consent requirements for voluntary commitments
- § 23:5 Commitment of juveniles by parents or guardians

II. PROCEDURAL PROTECTION AT COMMITMENT PROCEEDINGS

- § 23:6 Right to appointment of counsel or guardian ad litem
- § 23:7 Right to notice
- § 23:8 Right to a hearing
- § 23:9 Right of confrontation
- § 23:10 Privilege against self-incrimination
- § 23:11 Right to a jury trial
- § 23:12 Right to periodic review

III. CONDITIONS OF CONFINEMENT

- § 23:13 The right to treatment
- § 23:14 Least restrictive alternative
- § 23:15 Civil rights of institutionalized persons
- § 23:16 Freedom from cruel and unusual punishment
- § 23:17 Right to refuse medication

TABLE OF CONTENTS

IV. PERSONS CHARGED WITH CRIMINAL BEHAVIOR

- § 23:18 Generally
- § 23:19 Treatment of persons incompetent to stand trial
- § 23:20 Hospitalization in lieu of prison
- § 23:21 Persons found not guilty by reason of insanity
- § 23:22 Commitment and treatment of prisoners
- § 23:23 Treatment of sexual offenders
- § 23:24 Persons with drug or alcohol addictions
- § 23:25 Punishment after release from civil commitment

CHAPTER 24. CITIZENSHIP AND ALIENAGE

I. RIGHT TO CITIZENSHIP

- § 24:1 State citizenship
- § 24:2 United States citizenship
- § 24:3 Citizenship by birth
- § 24:4 Citizenship of Native Americans
- § 24:5 Citizenship by naturalization
- § 24:6 Citizenship and nationality in United States territories
- § 24:7 Revocation of citizenship

II. DUE PROCESS RIGHTS OF ALIENS

- § 24:8 Generally
- § 24:9 Right to admission
- § 24:10 Substantive aspects of deportation
- § 24:11 Procedural aspects of deportation
- § 24:12 Detention and conditions of confinement
- § 24:13 Detention and deportation of juveniles
- § 24:14 Aliens taken into custody outside of United States territory
- § 24:15 Criminal and civil proceedings
- § 24:16 Speech rights of aliens
- § 24:17 Property rights of aliens
- § 24:18 Enemy aliens
- § 24:19 Preemption of state controls

CHAPTER 25. CIVIL AND CRIMINAL CONTEMPT

- § 25:1 Generally
- § 25:2 Distinguishing between civil and criminal contempt
- § 25:3 Distinguishing between direct and indirect contempt
- § 25:4 Constitutional rights of persons charged with criminal contempt
- § 25:5 Constitutional limits on civil contempt powers

§ 25:6 Congressional control of contempt by federal courts

§ 25:7 Contempt of legislature

PART V. CRIMINAL JUSTICE

CHAPTER 26. FRAMEWORK FOR ANALYSIS OF CRIMINAL PROCEDURE AND LEGISLATION

§ 26:1 Introduction

I. CONSTITUTIONAL PROTECTION FOR CRIMINAL DEFENDANTS IN STATE COURTS

§ 26:2 Background

§ 26:3 Incorporation of the Bill of Rights

§ 26:4 Due process protection not specifically identified by the Bill of Rights

§ 26:5 Federalism and enforcement of the rights of criminal defendants

II. THE NEED FOR CLARITY IN CRIMINAL STATUTES

§ 26:6 Generally

§ 26:7 Failure to provide adequate warning

§ 26:8 Discriminatory enforcement

§ 26:9 Statutes threatening First Amendment freedoms

§ 26:10 Vagueness in noncriminal situations

§ 26:11 Questioning by investigatory bodies

III. EX POST FACTO LAWS

§ 26:12 Generally

§ 26:13 Laws imposing criminal punishment

§ 26:14 Laws increasing punishment

§ 26:15 Retrospective changes in rules of evidence or procedure

§ 26:16 Statutes of limitation

§ 26:17 Judicial retroactivity

§ 26:18 Retroactive application of civil penalties

IV. BILLS OF ATTAINDER

§ 26:19 Generally

§ 26:20 Historical background

§ 26:21 Contemporary doctrine and the distinction between punishment and regulation

TABLE OF CONTENTS

**CHAPTER 27. PRETRIAL RIGHTS OF
CRIMINAL DEFENDANTS**

I. GRAND JURY INDICTMENT

- § 27:1 Right to grand jury indictment
- § 27:2 Application and waiver of grand jury indictment requirement
- § 27:3 Composition of the grand jury
- § 27:4 Secrecy of proceedings
- § 27:5 Investigatory powers of grand juries
- § 27:6 Rights of persons called before grand juries
- § 27:7 Sufficiency of evidence
- § 27:8 Adequacy of indictment
- § 27:9 Judicial supervision and review of indictments

**II. PRETRIAL NOTICE, DISCOVERY, AND
DISCLOSURE**

- § 27:10 Notice of the accusation
- § 27:11 Time to prepare a defense
- § 27:12 Pretrial discovery in criminal proceedings generally
- § 27:13 Prosecutors' obligation to disclose exculpatory evidence
- § 27:14 Identification of adverse witnesses
- § 27:15 Constitutional limits on prosecutors' discovery

**III. FREEDOM FROM CONFINEMENT PRIOR TO
CONVICTION**

- § 27:16 Generally
- § 27:17 Limits to the right to bail
- § 27:18 Standards for setting bail
- § 27:19 Revocation of bail
- § 27:20 Constitutional rights at pretrial detention hearing
- § 27:21 Conditions of confinement prior to trial
- § 27:22 Right to bail after conviction
- § 27:23 Pretrial detention of material witnesses

**IV. CONSTITUTIONAL RIGHTS DURING
CUSTODIAL INTERROGATION**

- § 27:24 Generally
- § 27:25 Due process analysis of custodial interrogation
- § 27:26 Protecting the defendant's right to remain silent
- § 27:27 The meaning of custodial interrogation
- § 27:28 Adequacy of *Miranda* warnings
- § 27:29 Public safety exception to *Miranda* warnings
- § 27:30 Assertion of *Miranda* rights

- § 27:31 Protecting the right to counsel when *Miranda* does not apply
- § 27:32 Waiver of *Miranda* rights
- § 27:33 Scope of *Miranda*'s exclusionary rule
- § 27:34 Failure to record defendant's confession

V. THE RIGHT TO COUNSEL

- § 27:35 Generally
- § 27:36 The right to retain counsel of choice
- § 27:37 The right to self-representation
- § 27:38 The right to appointed counsel at state's expense
- § 27:39 Stages of criminal proceedings at which the right to counsel applies
- § 27:40 Ineffective assistance of counsel
- § 27:41 Ineffective representation caused by state actions or procedures
- § 27:42 Ineffective counsel caused by conflicts of interest
- § 27:43 Providing adequate resources for effective assistance of counsel
- § 27:44 Waiver of the right to counsel

VI. WITNESS IDENTIFICATION OF THE ACCUSED

- § 27:45 Generally
- § 27:46 The right to counsel at identification proceedings
- § 27:47 Due process limits on witness identification procedures
- § 27:48 Witness identification through photographs of the accused

VII. COMPETENCE TO STAND TRIAL

- § 27:49 Generally
- § 27:50 Competence to waive constitutional rights
- § 27:51 Treatment of persons deemed incompetent to stand trial
- § 27:52 Use of evidence obtained in competency examination

VIII. ACCEPTANCE OF GUILTY PLEAS

- § 27:53 Generally
- § 27:54 Acceptance of plea bargains
- § 27:55 Withdrawal of guilty pleas
- § 27:56 Affect of guilty plea on other constitutional rights

CHAPTER 28. CONSTITUTIONAL LIMITS ON SEARCHES AND SEIZURES

- § 28:1 Introduction

I. STOPS AND ARRESTS OF PERSONS

- § 28:2 Seizures of persons

TABLE OF CONTENTS

- § 28:3 The definition of seizures
- § 28:4 Investigatory seizures less intrusive than arrests
- § 28:5 Summons and subpoenas to appear before grand juries
- § 28:6 Arrests following witnessing of a crime
- § 28:7 Arrests following hot pursuit
- § 28:8 Arrests based upon probable cause
- § 28:9 Judicial review of arrests without warrants

II. WARRANTS AND GENERAL EXCEPTIONS TO WARRANT REQUIREMENTS

- § 28:10 Probable cause to issue search and arrest warrants
- § 28:11 Descriptions of particular persons or things
- § 28:12 Execution of search and arrest warrants
- § 28:13 Searches made in good-faith reliance upon defective information or warrants
- § 28:14 Exceptional situations where search warrants are not required
- § 28:15 Searches in response to emergencies
- § 28:16 Searches following consent
- § 28:17 Searches incident to arrests
- § 28:18 Seizures of items in plain view

III. VARIATIONS BASED UPON PLACES AND PERSONS SUBJECT TO SEARCH

- § 28:19 A person's home
- § 28:20 Temporary dwellings
- § 28:21 The open fields doctrine
- § 28:22 Invasions of the defendant's body
- § 28:23 Eavesdropping, wiretapping, and invasions through technical innovations
- § 28:24 Border searches
- § 28:25 Newsroom searches
- § 28:26 Searches involving minimal expectations of privacy
- § 28:27 Administrative searches generally
- § 28:28 Business property, employees, and records
- § 28:29 Searches of pervasively regulated businesses and activities
- § 28:30 Home visits of public welfare recipients
- § 28:31 Public school searches
- § 28:32 Mandatory searches of candidates and government officials
- § 28:33 Searches by probation and parole officers
- § 28:34 Searches of prisoners
- § 28:35 Orders to produce evidence

IV. VEHICLE SEARCHES AND SEIZURES

- § 28:36 Motor vehicle searches generally

- § 28:37 Vehicle searches supported by probable cause
- § 28:38 Vehicle searches incident to custodial arrests
- § 28:39 Vehicle seizures
- § 28:40 Checkpoint stops
- § 28:41 Passenger searches and seizures
- § 28:42 Inventory searches of vehicles
- § 28:43 Stopping of motor vehicles and questioning occupants
- § 28:44 Police chases

V. REMEDIES FOR UNLAWFUL SEARCHES AND SEIZURES

- § 28:45 The exclusionary rule generally
- § 28:46 Limits on proceedings in which the exclusionary rule applies
- § 28:47 Impeachment use of unlawfully obtained evidence
- § 28:48 The good-faith exception to the exclusionary rule
- § 28:49 Standing to object to unlawfully seized evidence
- § 28:50 Application of the exclusionary rule to private searches
- § 28:51 Excluding the fruit of the poisonous tree
- § 28:52 Administration of rules to suppress evidence
- § 28:53 Damage actions and equitable remedies following unlawful searches and seizures

CHAPTER 29. PRIVILEGE AGAINST SELF-INCRIMINATION

- § 29:1 Introduction
- § 29:2 Who is entitled to the privilege
- § 29:3 Where the privilege may be claimed
- § 29:4 A defendant's freedom from self-incrimination in a criminal prosecution
- § 29:5 Invocation of the privilege by witnesses other than criminal defendants
- § 29:6 Scope of the privilege in other contexts
- § 29:7 Invocation of the privilege to avoid civil liability
- § 29:8 Application of the privilege to registration and reporting forms
- § 29:9 Application of the privilege to public and quasi-public records
- § 29:10 Nontestimonial evidence, actions, and utterances
- § 29:11 Waiver of the privilege
- § 29:12 The "immunity bath"
- § 29:13 Compliance with court orders to produce evidence
- § 29:14 The need for public officials to warn persons of the privilege
- § 29:15 Comments in court about those who claim the privilege
- § 29:16 Revocation of jobs or contracts of those who claim the privilege

TABLE OF CONTENTS

**CHAPTER 30. PROTECTION OF CRIMINAL
DEFENDANTS AT TRIAL**

I. DUE PROCESS—GENERALLY

- § 30:1 Generally
- § 30:2 The government's burden of proving elements of crime beyond a reasonable doubt
- § 30:3 Use of presumptions to aid the prosecution
- § 30:4 Failure to give adequate jury instructions
- § 30:5 Shifting the burden of proving an affirmative defense
- § 30:6 Insufficient evidence to convict
- § 30:7 Misconduct by the prosecution
- § 30:8 Fairness of trial proceedings
- § 30:9 Waiver of rights
- § 30:10 Entrapment

II. RIGHT TO A SPEEDY TRIAL

- § 30:11 Generally
- § 30:12 Protection limited to those who have been accused
- § 30:13 Length of delay
- § 30:14 Reasons for delay
- § 30:15 Assertion of right by the defendant
- § 30:16 Prejudice to the defendant
- § 30:17 Waiver of speedy trial rights
- § 30:18 Unreasonable delay in sentencing
- § 30:19 Relief from speedy trial violations

III. RIGHT TO A PUBLIC TRIAL

- § 30:20 Generally
- § 30:21 Proceedings subject to open trial requirements
- § 30:22 The necessity of specific findings and case-by-case review
- § 30:23 Alternatives to closure of trials
- § 30:24 Remedies when trial proceedings are wrongly closed
- § 30:25 Access to trials by the broadcast media

IV. RIGHT TO TRIAL BY JURY

- § 30:26 Generally
- § 30:27 Essential components of right to a jury trial
- § 30:28 Extraneous influences upon juries
- § 30:29 Judicial conduct that violates due process rights
- § 30:30 Jury resolution of all elements of an offense
- § 30:31 Restriction to trial of serious crimes
- § 30:32 Waiver of right

V. RIGHT TO AN IMPARTIAL AND REPRESENTATIVE TRIBUNAL

- § 30:33 Generally
- § 30:34 Selection of representative jurors
- § 30:35 Selection of an impartial jury
- § 30:36 Selection of death-qualified jurors
- § 30:37 Posttrial review of juror impartiality
- § 30:38 A jury from the district where the crime was committed
- § 30:39 Impartiality of judges
- § 30:40 Discriminatory prosecution

VI. JOINDER AND SEVERANCE OF PARTIES AND CHARGES

- § 30:41 Generally
- § 30:42 Prejudicial joinder of charges or parties
- § 30:43 Joinder of defendants in violation of the right of confrontation
- § 30:44 Failure to join related charges

VII. FREEDOM FROM DOUBLE JEOPARDY

- § 30:45 Generally
- § 30:46 Proceedings to which the Double Jeopardy Clause applies
- § 30:47 Attachment of jeopardy
- § 30:48 Termination of jeopardy
- § 30:49 Second trial after acquittal
- § 30:50 Double jeopardy when trial ends without conviction or acquittal
- § 30:51 Implied acquittal doctrine
- § 30:52 Retrial after reversal of conviction
- § 30:53 Multiple trials for the same offense
- § 30:54 Cumulative punishment
- § 30:55 Collateral estoppel
- § 30:56 The dual sovereignty exception to double jeopardy

VIII. RIGHT TO COMPULSORY PROCESS

- § 30:57 Generally
- § 30:58 Right to subpoena witnesses
- § 30:59 Right to obtain testimony
- § 30:60 Restricting defense testimony to sanction misconduct
- § 30:61 Protection of the defendant's right to testify

IX. RIGHT OF CONFRONTATION

- § 30:62 Generally
- § 30:63 Statements of codefendants who are unavailable to testify
- § 30:64 Use of prior testimony when witness is unavailable at trial

TABLE OF CONTENTS

- § 30:65 Application to hearsay and nontestimonial evidence
- § 30:66 Right to be present at trial
- § 30:67 Limitations on the right to cross-examine witnesses
- § 30:68 Testimony of vulnerable witnesses
- § 30:69 Confrontation in pretrial and posttrial proceedings
- § 30:70 The right to confront adverse witnesses in noncriminal proceedings
- § 30:71 Waiver of right

CHAPTER 31. POSTCONVICTION CONSTITUTIONAL RIGHTS

I. SENTENCING AND PUNISHMENT IN NONCAPITAL CASES

- § 31:1 Due process limits on sentencing generally
- § 31:2 Self-incrimination privilege at sentencing
- § 31:3 Ban on cruel and unusual criminal penalties
- § 31:4 Ban upon excessive or discriminatory fines
- § 31:5 Imprisonment for failure to pay fines or other assessments
- § 31:6 Recoupment of attorney's fees
- § 31:7 Situations where any punishment is unconstitutional

II. THE DEATH PENALTY

- § 31:8 Generally
- § 31:9 Ban on mandatory death sentences
- § 31:10 Notice and disclosure prior to death penalty sentencing
- § 31:11 Proportionality of death penalty to the offense
- § 31:12 Persons who may not be sentenced to death
- § 31:13 Racial disparities in death penalty sentencing
- § 31:14 Definition of aggravating factors
- § 31:15 Consideration of mitigating factors
- § 31:16 Consideration of victim impact information
- § 31:17 Additional limits on arguments or instructions to jurors
- § 31:18 Role of judge and jury in death penalty sentencing
- § 31:19 Methods of execution
- § 31:20 Appellate review of death sentences
- § 31:21 Death penalty following reversal of conviction and life sentence
- § 31:22 Federal habeas corpus review of death sentences
- § 31:23 Due process rights in clemency proceedings

III. APPELLATE REVIEW OF CRIMINAL CONVICTIONS

- § 31:24 Generally

- § 31:25 Right to appeal convictions
- § 31:26 DNA testing in postconviction proceedings
- § 31:27 The role of counsel on appeal
- § 31:28 Waiver of the right to appellate review

IV. HABEAS CORPUS

- § 31:29 Generally
- § 31:30 Habeas corpus jurisdiction
- § 31:31 Habeas corpus for state and federal prisoners
- § 31:32 The substantive scope of federal habeas corpus actions
- § 31:33 Deference to state court decisions
- § 31:34 Review of prior convictions used to enhance sentences
- § 31:35 Persons in custody
- § 31:36 Exhaustion of state remedies
- § 31:37 Adequate and independent state procedural bars to federal habeas corpus
- § 31:38 Cause, prejudice, and actual innocence exceptions to state procedural bars
- § 31:39 Delayed or successive habeas petitions
- § 31:40 Application of new constitutional rulings
- § 31:41 Right to an evidentiary hearing
- § 31:42 Right to representation and court access in habeas corpus proceedings
- § 31:43 Habeas corpus in civil confinement cases
- § 31:44 Suspension of the writ of habeas corpus

V. HARMLESS ERRORS AND STRUCTURAL ERRORS

- § 31:45 Generally
- § 31:46 Structural errors requiring automatic reversal
- § 31:47 Constitutional errors at trial subject to harmless error analysis
- § 31:48 Plain error analysis when defendants fail to register objections at trial
- § 31:49 Harmless error analysis of habeas corpus petitions

VI. RIGHTS ASSOCIATED WITH PROBATION OR PAROLE

- § 31:50 Generally
- § 31:51 Parole revocation
- § 31:52 Revocation of probation
- § 31:53 Revocation of probation or parole for failure to pay fines
- § 31:54 Protecting the right to early release from prison

VII. THE RIGHT OF PRISONERS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

- § 31:55 Generally

TABLE OF CONTENTS

- § 31:56 Use of force or corporal punishment
- § 31:57 Duty to protect health and safety
- § 31:58 Maintaining adequate conditions of confinement
- § 31:59 Isolation of inmates
- § 31:60 Pretrial detainees
- § 31:61 Remedies for cruel and unusual punishment
- § 31:62 Habeas corpus, section 1983, and exhaustion of administrative remedies
- § 31:63 Protecting the liberty interests of prisoners

CHAPTER 32. RIGHTS OF JUVENILE DEFENDANTS

- § 32:1 Generally
- § 32:2 Right to clarity in the law
- § 32:3 Right to know the nature and the cause of the accusation
- § 32:4 Interrogation of juveniles
- § 32:5 Waiver of juvenile court jurisdiction
- § 32:6 Right to counsel
- § 32:7 Pretrial detention of juveniles
- § 32:8 Right to a speedy trial
- § 32:9 Ban upon double jeopardy
- § 32:10 Right to a public trial
- § 32:11 Right to a jury trial
- § 32:12 Privilege against self-incrimination
- § 32:13 Rights to call, confront, and cross-examine witnesses
- § 32:14 Exclusion of evidence procured by unlawful means
- § 32:15 Standards of proof
- § 32:16 Constitutional limits on punishment of juveniles

CHAPTER 33. MILITARY JUSTICE

- § 33:1 Generally
- § 33:2 Military justice system
- § 33:3 Jurisdiction of the military courts
- § 33:4 Due process
- § 33:5 Right to counsel and defense resources
- § 33:6 Ban upon double jeopardy
- § 33:7 Grand and petit juries
- § 33:8 Right to a properly constituted and impartial panel and judge
- § 33:9 Right to a speedy trial
- § 33:10 Right to a public trial
- § 33:11 Privilege against self-incrimination
- § 33:12 Use of evidence secured by improper means
- § 33:13 Use of coerced confessions
- § 33:14 Right of confrontation and cross-examination
- § 33:15 Right to remain free prior to trial

MODERN CONSTITUTIONAL LAW

- § 33:16 Ban upon cruel and unusual punishments
- § 33:17 Remedies for constitutional violations

Table of Contents

PART VI. FEDERALISM

CHAPTER 34. POWERS AND LIMITATIONS OF STATE GOVERNMENTS

I. INTRODUCTION

- § 34:1 States as sovereigns
- § 34:2 Aspects of state sovereignty
- § 34:3 Sovereign immunity

II. EXPRESS LIMITATIONS

- § 34:4 Generally
- § 34:5 Entering into treaties, agreements, and compacts with foreign nations
- § 34:6 Granting letters of marque and reprisal
- § 34:7 Coining money or emitting bills of credit
- § 34:8 Keeping troops and organizing the militia
- § 34:9 Entering into agreements or compacts with other states without the consent of Congress
- § 34:10 Other express limitations

III. IMPLIED LIMITATIONS

- § 34:11 Generally
- § 34:12 Naturalization
- § 34:13 Bankruptcy
- § 34:14 Admiralty
- § 34:15 Patents and copyrights
- § 34:16 National defense
- § 34:17 Foreign affairs

IV. SUPREMACY OF THE FEDERAL GOVERNMENT

- § 34:18 Generally
- § 34:19 Express preemption
- § 34:20 Implied preemption resulting from conflict with federal statute, rule, or policy
- § 34:21 Exclusive federal regulation of a field of activity
- § 34:22 Preemption in fields that Congress traditionally controls

V. STATE REGULATION OF INTERSTATE COMMERCE

- § 34:23 Generally
- § 34:24 Discrimination against interstate commerce
- § 34:25 Excessive burdens upon interstate commerce
- § 34:26 Regulation of activities beyond state borders
- § 34:27 State inspection of goods traveling across state lines
- § 34:28 Quarantine of interstate products
- § 34:29 Regulation of interstate transportation to protect health and safety
- § 34:30 Protection of consumers
- § 34:31 Restricting interstate businesses
- § 34:32 Regulation of natural resources
- § 34:33 Control of transport and sale of alcohol
- § 34:34 Market participant exception
- § 34:35 Discrimination that favors local government functions

VI. STATE TAXATION OF INTERSTATE AND FOREIGN COMMERCE

- § 34:36 Generally
- § 34:37 Nexus between state and activities being taxed
- § 34:38 Fair apportionment of state taxes
- § 34:39 Apportionment of income taxes
- § 34:40 State taxes that discriminate against interstate commerce
- § 34:41 Discrimination resulting from taxes that burden interstate commerce
- § 34:42 Taxes fairly related to state services
- § 34:43 Tonnage duties on vessels
- § 34:44 Due Process and Equal Protection Clause constraints on state taxation
- § 34:45 State taxation of foreign commerce

VII. POWER TO REGULATE AND TAX THE FEDERAL GOVERNMENT AND FEDERAL EMPLOYEES, INSTRUMENTALITIES, AND CONTRACTORS

- § 34:46 Generally
- § 34:47 State regulation of federal employees
- § 34:48 State regulation of federal instrumentalities
- § 34:49 State regulation of activities on federal enclaves
- § 34:50 State regulation of “nonexclusive” federal enclaves
- § 34:51 State taxation of federal property
- § 34:52 State taxation of the use of federally owned property
- § 34:53 State taxes on federal obligations

TABLE OF CONTENTS

- § 34:54 State taxes on the operations and property of federal instrumentalities
- § 34:55 State taxes on the income and property of federal employees
- § 34:56 State taxes on firms doing business with the federal government
- § 34:57 State taxes within federal enclaves

VIII. FULL FAITH AND CREDIT TO THE JUDGMENTS OF OTHER STATES

- § 34:58 Generally
- § 34:59 Enforcement of full faith and credit obligations
- § 34:60 Exceptions to full faith and credit for judgments that are not final
- § 34:61 Exceptions to granting full faith and credit to invalid judgments
- § 34:62 Successive judgments which do not violate full faith and credit
- § 34:63 Exceptions to full faith and credit due to events occurring after rendition of the judgment

IX. OBLIGATIONS TO RESPECT THE STATUTES OF OTHER STATES

- § 34:64 Generally
- § 34:65 Application of full faith and credit and due process to choice of laws

X. EXTRADITION OBLIGATION

- § 34:66 Source of the extradition obligation
- § 34:67 When a person is charged with a crime
- § 34:68 Who is a fugitive from justice
- § 34:69 Governors' obligations to arrest and deliver fugitives
- § 34:70 Judicial review of the decision to extradite
- § 34:71 Consequences of extradition

CHAPTER 35. POWERS OF THE NATIONAL GOVERNMENT

I. INTRODUCTION

- § 35:1 Traditional approaches to questions about federal power
- § 35:2 The Necessary and Proper Clause and implied congressional power
- § 35:3 Inherent or essential powers of a sovereign nation
- § 35:4 Enforcement of political and structural limits on national power
- § 35:5 Protection of individual rights

II. CONGRESSIONAL POWER OVER COMMERCE

- § 35:6 Generally

- § 35:7 Navigation and navigable waters
- § 35:8 Transportation
- § 35:9 Excluding persons and products from interstate and foreign commerce
- § 35:10 Regulation of intrastate commercial activities
- § 35:11 Power to address labor relations and working conditions
- § 35:12 Power to protect civil rights
- § 35:13 Power to protect the environment
- § 35:14 Power to enact criminal laws to regulate activities unrelated to commerce
- § 35:15 Impairment of state sovereignty
- § 35:16 Federal coercion of state government
- § 35:17 Power to regulate foreign commerce
- § 35:18 Power to authorize state interference with interstate commerce
- § 35:19 Constitutional restraints upon the power of Congress over commerce

III. SPENDING AND FISCAL POWERS

- § 35:20 Generally
- § 35:21 Spending for the general welfare
- § 35:22 Conditions placed upon recipients of federal funds
- § 35:23 The requirement that conditions be expressed with unambiguous clarity
- § 35:24 Other constitutional provisions that limit spending power
- § 35:25 Appropriation Clause limits on federal spending
- § 35:26 Appropriations riders to limit legal rights
- § 35:27 Power to coin money and to regulate and protect its value
- § 35:28 Power to borrow money
- § 35:29 Power to establish and regulate banks

IV. POWER TO TAX

- § 35:30 Generally
- § 35:31 Regulation by means of taxation
- § 35:32 Apportioning direct taxes among the states on the basis of population
- § 35:33 Uniformity of duties, imposts, and excises throughout the United States
- § 35:34 Taxation of exports
- § 35:35 Limits on power to tax the states
- § 35:36 Constitutional limits of taxes imposed on private parties
- § 35:37 Relief from unconstitutional taxation

V. PROPERTY POWER

- § 35:38 Power to acquire property

TABLE OF CONTENTS

- § 35:39 Power to dispose of federal property
- § 35:40 Power of control over exclusive enclaves
- § 35:41 Control over federal property outside of exclusive enclaves
- § 35:42 Power over military and naval bases
- § 35:43 Navigational servitude of the United States
- § 35:44 Offshore submerged lands

VI. POWER OVER TERRITORIES AND THE DISTRICT OF COLUMBIA

- § 35:45 Generally
- § 35:46 Delegation of power to territorial governments
- § 35:47 Power over lands of foreign nations leased to the United States
- § 35:48 Discrimination against citizens living in territories
- § 35:49 Constitutional limits on congressional power over territories
- § 35:50 Power over the District of Columbia
- § 35:51 Delegation of power to the District of Columbia
- § 35:52 Constitutional limits on congressional power over the District of Columbia

VII. POSTAL POWERS

- § 35:53 Generally
- § 35:54 Creation of the United States Postal Service and delegation of power to a Postmaster General
- § 35:55 Protecting the mails
- § 35:56 Policing the mail
- § 35:57 Constitutional limitations
- § 35:58 Permissible state controls of the postal system

VIII. POWER OVER PATENTS, COPYRIGHTS, AND TRADEMARKS

- § 35:59 Generally
- § 35:60 Traditional scope of congressional patent power
- § 35:61 Traditional scope of copyright power
- § 35:62 Exclusiveness of patent, copyright, and trademark power
- § 35:63 Contemporary sources of congressional power to regulate patents, copyrights, and trademarks
- § 35:64 Other constitutional limits on congressional power to regulate patents, copyrights, and trademarks

IX. POWER OVER BANKRUPTCIES

- § 35:65 Generally
- § 35:66 Uniformity requirement
- § 35:67 Fifth Amendment limitations
- § 35:68 State sovereignty

- § 35:69 Exclusiveness of federal power
- § 35:70 Jurisdiction of bankruptcy courts

X. POWER OVER ADMIRALTY

- § 35:71 Generally
- § 35:72 Separation between federal and state jurisdiction
- § 35:73 Constitutional limitations
- § 35:74 Exclusiveness of federal admiralty authority
- § 35:75 Federal and state judicial authority

XI. POWER OVER ELECTIONS

- § 35:76 Generally
- § 35:77 Regulating campaign contributions and expenses
- § 35:78 Protecting the voter
- § 35:79 Protecting the vote
- § 35:80 Power flowing from implementing clauses of the Fourteenth and Fifteenth Amendments

XII. POWER TO PROTECT CIVIL RIGHTS

- § 35:81 Generally
- § 35:82 Thirteenth Amendment
- § 35:83 State action limits to enforcement of the Fourteenth Amendment
- § 35:84 Congressional power to determine the scope of the Fourteenth Amendment
- § 35:85 Congressional power to protect federal rights, privileges, and immunities
- § 35:86 Commerce Clause protection of civil rights
- § 35:87 Spending and Taxing Clause protection of civil rights
- § 35:88 The Treaty Clause as a source of authority to protect civil rights

XIII. POWER OVER INTERNATIONAL RELATIONS

- § 35:89 Generally
- § 35:90 Honoring obligations under international law to foreign countries
- § 35:91 Negotiating, implementing, and modifying treaties
- § 35:92 Regulating citizens abroad and on the high seas
- § 35:93 Regulating United States vessels on the high seas and in foreign ports
- § 35:94 Regulating aliens

XIV. WAR POWERS

- § 35:95 Generally

TABLE OF CONTENTS

§ 35:96	Compulsory military service
§ 35:97	Governing military personnel and installations
§ 35:98	Protecting members of the armed services
§ 35:99	Seizure of industry
§ 35:100	Requisition of the property of citizens
§ 35:101	Closing nonessential industries in wartime
§ 35:102	Enemy aliens
§ 35:103	Price controls and rationing of goods
§ 35:104	Curfews, evacuations, and internment
§ 35:105	Military trials of civilians
§ 35:106	Renegotiating war contracts
§ 35:107	Neutrality acts, embargoes, and nonintercourse acts
§ 35:108	Declaration and termination of a state of war

CHAPTER 36. INDIAN NATION SOVEREIGNTY

I. RELATIONSHIP WITH THE FEDERAL GOVERNMENT

§ 36:1	Generally
§ 36:2	Tribal sovereignty
§ 36:3	Property rights
§ 36:4	Regulation of commerce
§ 36:5	Civil rights
§ 36:6	Canons of construction

II. RELATIONSHIP TO STATE GOVERNMENTS

§ 36:7	Generally
§ 36:8	Criminal law
§ 36:9	Civil jurisdiction
§ 36:10	State regulation of tribal activities
§ 36:11	State and tribe taxation
§ 36:12	Tribal and state immunity

PART VII. SEPARATION OF POWERS

CHAPTER 37. CONGRESS AND ITS RELATIONSHIP WITH THE COORDINATE BRANCHES

I. INTRODUCTION

§ 37:1	Generally
--------	-----------

§ 37:2 Separation of powers in state governments

II. CONTROL OVER MEMBERSHIP IN CONGRESS

§ 37:3 Qualifications of members

§ 37:4 Discipline and expulsion of members

III. PROTECTING THE INDEPENDENCE OF CONGRESS

§ 37:5 Freedom of speech and debate

§ 37:6 Privilege from arrest

§ 37:7 Restraints from holding office in the executive branch

IV. THE PROCESS OF LAWMAKING

§ 37:8 Rules of procedure and practice

§ 37:9 Bicameralism and presentation

V. INVESTIGATORY AND CONTEMPT POWERS

§ 37:10 Congressional power to investigate

§ 37:11 Power to punish those who refuse to cooperate with investigations

§ 37:12 Constitutional limits upon the power of investigation

§ 37:13 Congressional oversight of coordinate branches of government

VI. DELEGATION OF CONGRESSIONAL POWER

§ 37:14 Delegation to the executive branch

§ 37:15 Delegation to the judiciary

§ 37:16 Delegation to agents controlled by Congress

§ 37:17 Delegation to independent agencies or private parties

§ 37:18 Delegation to state officials

VII. CONGRESS AND THE PROCESS OF CONSTITUTIONAL AMENDMENT

§ 37:19 Generally

§ 37:20 Proposing amendments by Congress

§ 37:21 Proposing amendments by convention

§ 37:22 Time for ratification

§ 37:23 Manner of ratification

§ 37:24 Ratification and rescission by the states

§ 37:25 Determining whether an amendment has been ratified

CHAPTER 38. POWERS OF THE PRESIDENT

I. EXERCISE OF DOMESTIC POWERS

§ 38:1 Power to execute the laws

TABLE OF CONTENTS

§ 38:2	Executive orders
§ 38:3	Presidential proclamations
§ 38:4	Legislative delegation
§ 38:5	Executive delegation
§ 38:6	Judicial review of executive decisions
§ 38:7	Executive privilege to avoid disclosure
§ 38:8	Control over public lands
§ 38:9	Control over the economy
§ 38:10	Seizure of property and industry
§ 38:11	Suppression of insurrection and domestic violence
§ 38:12	Control of independent agencies

II. POWER OVER FEDERAL PERSONNEL

§ 38:13	Appointments
§ 38:14	Recess appointments
§ 38:15	Control over federal employees
§ 38:16	Dismissal
§ 38:17	Invalid appointments
§ 38:18	Constitutional constraints on appointment and removal

III. VETO POWER

§ 38:19	Generally
§ 38:20	Presentment
§ 38:21	Time to exercise the veto
§ 38:22	Adjournment by Congress
§ 38:23	Return of bills to Congress
§ 38:24	Overriding the veto
§ 38:25	Line-item veto

IV. PARDONING POWERS

§ 38:26	Generally
§ 38:27	Applicable offenses
§ 38:28	Conditions
§ 38:29	Revocation
§ 38:30	Effect of a pardon
§ 38:31	Relationships with the legislature and judiciary

V. WAR POWERS

§ 38:32	Generally
§ 38:33	Waging war before declaration by Congress
§ 38:34	Conduct of the war
§ 38:35	Governing occupied territory
§ 38:36	Regulating the armed forces

- § 38:37 Declaring martial law
- § 38:38 Suspension of the writ of habeas corpus
- § 38:39 Convening military tribunals
- § 38:40 Seizure of property and industry
- § 38:41 Control of enemy aliens and enemy combatants
- § 38:42 Exclusion orders and preventive detention
- § 38:43 Efforts to avoid war
- § 38:44 Terminating wars

VI. FOREIGN AFFAIRS POWERS

- § 38:45 Generally
- § 38:46 Communicating with foreign governments
- § 38:47 Recognition of foreign governments
- § 38:48 Negotiating and making treaties
- § 38:49 Senate ratification
- § 38:50 Limitations upon the power to make treaties
- § 38:51 Treaties as self-executing
- § 38:52 Treaties in conflict with federal statutes
- § 38:53 Effect of treaties on state power
- § 38:54 Termination of treaties
- § 38:55 Power to make executive agreements
- § 38:56 Limitations upon the power to make executive agreements
- § 38:57 Effect of executive agreements
- § 38:58 Congressional delegation to the President

VII. SELECTION AND TENURE OF THE PRESIDENT

- § 38:59 Qualifications and qualifying for office
- § 38:60 Presidential electors
- § 38:61 Tenure
- § 38:62 Succession

CHAPTER 39. STRUCTURE AND JURISDICTION OF FEDERAL COURTS

I. THE FEDERAL COURT SYSTEM

- § 39:1 Generally
- § 39:2 Article I or legislative federal courts
- § 39:3 Separation of powers of legislative and constitutional courts
- § 39:4 Appointment and tenure of federal judges
- § 39:5 Compensation of federal judges
- § 39:6 Removal of federal judges

II. SUBJECT-MATTER JURISDICTION OF FEDERAL COURTS

- § 39:7 Generally

TABLE OF CONTENTS

- § 39:8 Diversity of citizenship
- § 39:9 Federal question jurisdiction
- § 39:10 Supplemental jurisdiction over ancillary or pendent state claims
- § 39:11 Original jurisdiction of the United States Supreme Court

III. APPELLATE JURISDICTION OF THE UNITED STATES SUPREME COURT

- § 39:12 Generally
- § 39:13 Adequate and independent state grounds
- § 39:14 Finality of state court decisions
- § 39:15 Failure to comply with adequate procedures of state courts
- § 39:16 Other prudential grounds for declining review

IV. RELATIONSHIP OF STATE AND FEDERAL TRIAL COURTS

- § 39:17 Removal of cases from state to federal courts
- § 39:18 Abstention from resolving state law generally
- § 39:19 Abstention to avoid constitutional rulings; the *Pullman* doctrine
- § 39:20 Abstention to prevent interference with state policy
- § 39:21 Abstention from interference with state enforcement proceedings
- § 39:22 Concurrent state and federal jurisdiction

V. ELEVENTH AMENDMENT LIMITS ON FEDERAL JURISDICTION

- § 39:23 Generally
- § 39:24 State as real party in interest
- § 39:25 Suits for injunctive relief against state officials
- § 39:26 Claims against property held by state
- § 39:27 Arm-of-the-state doctrine
- § 39:28 Waiver of Eleventh Amendment immunity
- § 39:29 Congressional power to abrogate Eleventh Amendment immunity

VI. THE CASE OR CONTROVERSY LIMITATION

- § 39:30 Generally
- § 39:31 Constraints applicable to Article III courts
- § 39:32 Advisory opinions, hypothetical questions, and declaratory judgments
- § 39:33 Ripeness
- § 39:34 Exhaustion of administrative remedies and finality of administrative action
- § 39:35 Mootness

- § 39:36 Cases capable of repetition yet evading review
- § 39:37 Mootness of challenges to criminal convictions
- § 39:38 The need for adverse parties
- § 39:39 Need for finality of judicial action

VII. STANDING TO RAISE CONSTITUTIONAL QUESTIONS

- § 39:40 Generally
- § 39:41 Distinct and traceable injury in fact capable of legal redress
- § 39:42 Standing of citizens and taxpayers
- § 39:43 Standing of voters
- § 39:44 Standing of the states
- § 39:45 Standing of legislators and public servants
- § 39:46 Standing of groups
- § 39:47 Third-party standing

VIII. REFUSAL TO ADJUDICATE POLITICAL QUESTIONS

- § 39:48 Generally
- § 39:49 Guarantee of a republican form of government
- § 39:50 Regulation of foreign affairs
- § 39:51 Surveillance of military affairs
- § 39:52 Ratification of amendments to the Constitution
- § 39:53 Management of impeachment proceedings
- § 39:54 Apportionment decisions

APPENDICES

Appendix A. Supreme Court Justices

Appendix B. Enforcement of Constitutional Rights: Selected Federal Statutes

Table of Laws and Rules

Table of Cases

Index