SUPPLEMENTARY MATERIALS

ON CONSTITUTIONAL LAW

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I. Introduction

1) What are the differences between the federal Constitution and a statute?

2) How many federal constitutions has the United States had in the past 200-plus years?

3) How many amendments to the federal Constitution deal directly with speech issues?

4) In 1936, the Court decided Ashwander v. TVA, 297 U.S. 288 (1936), which included a well-known concurrence by Justice Louis D. Brandeis. The gist of the concurrence was that courts should avoid constitutional decision making by deciding cases on non-constitutional grounds (i.e., statutory and rules grounds) wherever possible. What do you think Justice Brandeis was driving at?

5) One hundred people attend a political rally here in Columbia. One speaker stands up and says that Missouri is a terrible place to live because Missourians are scoundrels. The other 99 people are enraged, and they call the police and ask to have the speaker arrested for the incendiary remarks. Does the First Amendment permit the arrest? If not, why not? Don’t we live in a democracy in which majority rules?

6) Where does the Constitution confer authority to ignore the will of current majorities? Why did the Founders create an enduring anti-majoritarian document?

7) What does “due process of law,” found in the Fifth and Fourteenth amendments, mean to you? Would Congress or state legislatures normally write statutes using a similar general term without further definition? What if the legislators were writing a criminal statute?

8) Now that you have read the Constitution, what do you think the Framers at the Constitutional Convention considered to be the document’s primary purposes?

II. Marbury v. Madison (p. 26)

1) Assume you were a delegate to the Constitutional Convention and one of the state conventions called to ratify the Bill of Rights. The Constitution will create a governmental structure, and it will protect individual rights. You also want to assure that the government will actually heed constitutional commands so that the new documents will not simply be words on pieces of paper. How might constitutional mandates be enforced by (and against) the three federal branches of government?
2) How often do you think the President would later find unconstitutional an act he has taken, or that the Congress would later find unconstitutional an act it has taken?

3) Can you make an argument for or against vesting review authority in the executive or legislative branches, or in some combination of them?

4) What does “judicial review” mean to you?

5) Where in the Constitution did the Framers create the power of judicial review as we understand it today?

6) William Marbury filed suit in the Supreme Court directly, and not in some lower court from which the Supreme Court might later have heard an appeal. How could he ever have expected to get away with asking the Supreme Court to act, in effect, as a trial court?

7) How did Chief Justice John Marshall, a Federalist, ever get away with this decision setting forth the power of judicial review? How did he avoid getting impeached and removed from office by the Senate (which was in the hands of the opposition Democratic-Republicans – President Thomas Jefferson’s party – by the time of the Marbury decision)? How did Marshall avoid a constitutional confrontation in which President Jefferson would likely have simply ignored the decision?

8) According to Chief Justice Marshall’s Marbury opinion:

   (a) Did William Marbury have a right to the commission he sought?

   (b) Did the law afford William Marbury a remedy?

   (c) Was mandamus the right remedy, and could the Supreme Court grant it?

9) What is a “judicial activist”?

III. Ex Parte McCardsle (p. 38)

1) A few years ago, the Pledge Protection Act was introduced in the U.S. House of Representatives. The bill, which had 173 co-sponsors, provided that “no court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation.” The aim was to prevent courts from declaring the Pledge’s “under God” phrase unconstitutional for violating the First Amendment Establishment of Religion Clause. If this bill revoking federal court jurisdiction had passed both houses of Congress and was signed into law by the President, would the bill have been constitutional?
2) Most bills to remove lower federal court jurisdiction (or to limit the lower federal courts’ remedial authority) have never passed Congress and become law. Why?

3) The federal courts are a three-tiered system. The federal district courts are the general jurisdiction trial courts; the courts of appeals are the intermediate appellate courts; and the Supreme Court is the court of last resort. Under Article III of the Constitution, which of these court(s) must exist, and which ones may Congress, in its discretion, choose whether to create?

4) Does Article III grant Congress any control over the Supreme Court’s jurisdiction?

5) Does Article III expressly authorize, or impose express restrictions, on congressional authority to limit the jurisdiction of the Supreme Court or the lower federal courts? Do any constitutional provisions outside Article III arguably restrict Congress’ jurisdiction-removal authority?

6) What policy arguments can be stated for and against periodic congressional efforts to remove federal court jurisdiction?

7) Assume that Congress passed the Pledge Protection Act and the President signed it. A parent challenges the constitutionality of the Act’s jurisdiction-removal provision and alleges that the words “under God” violate the Establishment Clause. The government moves to dismiss the challenge on the ground that the court has no jurisdiction to hear and decide it.

In light of the duly enacted statute removing federal court jurisdiction, do the federal courts have jurisdiction to determine the jurisdiction-removal provision’s constitutionality? Can you cite a Supreme Court decision that stands for the proposition that the Court has jurisdiction to determine the constitutionality of a congressional effort to remove federal court jurisdiction?

8) What authority does Congress have to limit the subject matter jurisdiction granted to the federal courts by Article III? Why does congressional authority under Article III § 1 raise so much more controversy than congressional authority under Article III § 2?

IV. Martin v. Hunter’s Lessee (p. 46)

1) Once Marbury established judicial review, why did the Court have to discuss judicial review again in Martin?

2) Why does separation of powers raise different issues than federalism?
3) What is Martin's holding? How did Justice Joseph Story reach this holding?

4) Justice Oliver Wendell Holmes once wrote: “I do not think the United States would come to an end if the Supreme Court lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.” Why do you think Justice Holmes considered the Supreme Court’s authority to review state laws more important than its authority to review federal laws?

V. Adequate and Independent State Grounds (p. 50)

1) In August 2015, the Connecticut Supreme Court held, 4-3, that the death penalty, as currently applied, violates the state Constitution. The state of Connecticut never appealed to the U.S. Supreme Court. How come (assuming that the governor and attorney general disagreed with the decision)?

2) What are the constitutional underpinnings of the adequate-and-independent state ground doctrine?

3) When is a state ground of decision adequate and independent to support a state court judgment, thus barring U.S. Supreme Court review? In which of the following circumstances may the Supreme Court review the final state court decision:

   a) The state supreme court strikes down a state statute on the ground that it violates both the state constitution and the federal Constitution.

   b) In state court, the plaintiff asserts that a state statute violates both the state constitution and the federal constitution. The state supreme court does not reach the federal constitutional question because it holds that the state statute violates the state constitution.

   c) In state court, the plaintiff asserts that a state statute violates both the state constitution and the federal Constitution. The state supreme court does not reach the state constitutional question because it holds that the state statute violates the federal Constitution.

   d) The state supreme court holds that a state statute is valid under the state constitution and valid under the federal Constitution.

   e) The state supreme court holds that a state statute violates the free speech guarantees of both the First Amendment and the state constitution. What if the state supreme court holds that the state constitution’s free speech guarantee means exactly what the First Amendment guarantee means?
f) The state supreme court invalidates a state law as contrary to the federal Constitution.

g) A state statute creates a tort action for damages the plaintiff suffers for violation of a federal safety statute. The state trial court enters final judgment on a jury verdict for the plaintiff, and the state supreme court affirms the judgment.

h) The state legislature enacts a statute retroactively changing public employees’ pension rights. A public employee suits, claiming that the statute violates the Fifth Amendment’s Takings Clause (“nor shall private property be taken for public use, without just compensation”). The state supreme court holds for the state on the ground that under state law, the public employee had no property right in the pension.

i) In the state trial court, the plaintiff raises only a state constitutional claim. On appeal before the state supreme court, the plaintiff tries to raise a federal constitutional claim for the first time. The state supreme court refuses to hear the federal constitutional claim under the settled state procedural rule that an appellate court ordinarily will not hear a claim the appellant failed to preserve in the trial court.

j) The plaintiff claims that a state statute violates the state constitution, and raises no federal constitutional claim. The state courts hold that the statute violates the state constitution.

JUSTICIABILITY

I. Advisory Opinions (p. 56)

1) You are law clerk to a federal district judge, who has asked you to review the pleadings in Smith v. Jones, a newly filed case. Plaintiff Smith seeks a declaratory judgment that a state statute forbidding distribution of anonymous literature (that is, literature that does not identify the proponent) in a political campaign violates the First Amendment Speech Clause. The plaintiff wishes to distribute such literature opposing his Congress member’s position on the war in Afghanistan. Before trial in the declaratory judgment action, the Congress member removed his name from the ballot because the governor named him to an appellate court judgeship. May the court hear and decide Smith’s declaratory judgment action? If not, what should the district court do?

2) If the federal court concludes that a decision would constitute an advisory opinion, may the court hear and decide the case anyway if both sides waive any objection to the court’s subject matter jurisdiction and jointly urge the court to hear the case?

3) What are the constitutional bases of the federal advisory opinion doctrine? What prudential considerations might underlie the ban on advisory opinions in the federal
4) Some state constitutions have provisions conferring general authority on one or more of the state’s courts to issue advisory opinions at the request of the governor or legislature. Most states (including Missouri) have constitutional provisions authorizing their state courts to give advisory opinions at the request of federal courts and highest state courts in litigated cases. What prudential considerations might argue in favor of advisory opinions in these circumstances?

5) What are the differences between a legislative act and a judicial act?

6) When a federal court opinion contains dictum, is the dictum an advisory opinion, and thus forbidden by Article III? Is dictum forbidden (or discouraged) as a prudential matter? What reasons might a court have for writing considered dictum in some cases?

II. Warth v. Seldin (p. 60)

1) Assume that a federal statute provides that “a deceased worker’s surviving spouse shall receive survivors benefits” when the worker dies in a job-related accident on federal property. Construction worker John Smith dies when a crane crushes him at a worksite during his regular shift. Smith is unmarried, but his companion of several years, Sam Jones, files suit in federal court to recover the survivor’s benefits. Does Sam have standing to sue?

2) If you wanted to raise a threshold challenge the plaintiff’s standing in federal court, how would you do it?

3) Assume the plaintiff would lack constitutional standing to maintain an action. May the court hear and decide the case anyway if both sides waive any objection to constitutional standing and urge the court to hear the case?

4) If the defendant does not object to the plaintiff’s constitutional standing, may the court raise the standing issue on its own motion and dismiss the case if it decides the plaintiff lacks standing? Can you cite a decision to support your answer? What if the defendant’s defense is that the plaintiff (who has constitutional standing) does not have statutory standing?

5) Can the Court’s conferral of constitutional standing in United States v. SCRAP (p. 72) be harmonized with the Court’s denial of standing in Warth?

6) What purposes are served by limiting constitutional standing to sue in the federal courts? What purposes are disserved?

7) Where a court dismisses the plaintiff’s suit for lack of constitutional standing,
might some other justiciability doctrine also support the same result?

8) If the *Warth* dissenters are right that the Court denied constitutional standing because it wanted to avoid a decision on the merits, why did the Court simply not deny certiorari?

9) To survive a motion to dismiss for lack of constitutional standing, must the *Warth* plaintiffs *prove* “injury + causation + redressability”?

10) Once the Court shut the door on the *Warth* plaintiffs, can you think of any other person who could have established standing to challenge the constitutionality of this zoning ordinance in federal court?

11) What qualifies as an “injury in fact”? Must it be economic injury, or might other types of injury suffice?

12) Can you think of any reason why Article III’s test for standing might be lower in cases raising only statutory claims than in cases raising constitutional claims?

III. *Craig v. Boren* (p. 68)

1) What are the prudential reasons for the general rule against conferring constitutional standing to assert the claims of third parties who are not before the court? If a third party has an interest in a case and wants to be heard, what might the third party do?

2) Assume that Congress enacts a statute granting a class of plaintiffs standing to sue for injury allegedly suffered by third parties who are not named parties in the action. Would the statute’s conferral of standing necessarily be constitutional? What would the plaintiffs have to allege to establish standing?

3) Did Whitener, the “saloonkeeper,” establish Article III standing?

4) Could the trial court have held that the state waived any objection to Whitener’s constitutional standing?

IV. *Lujan v. Defenders of Wildlife* (p. 72)

1) *Warth* stated that to have constitutional standing, the plaintiff must allege more than a “generalized grievance” widely shared by “all or a large class of citizens.” Assume that Congress enacts a statute forbidding any person from attending any house of worship any place in the nation. The statute would affect millions of Americans. Does the “generalized grievance” standard mean that the courts could deny standing to any person who seeks to challenge the statute in federal court as a violation of the First Amendment
Free Exercise of Religion Clause, which guarantees freedom of worship? What is the difference between a person who wants to worship and the plaintiff in *Frothingham v. Mellon* (page 76)?

2) Did anyone have standing, in federal court, to challenge President Obama’s status as a natural-born American citizen? Would anyone have Article III standing to challenge Ted Cruz’s right to serve as President, given that he was admittedly born in Canada?

3) In 1937, a citizen filed suit to have Justice Hugo L. Black’s appointment to Supreme Court declared unconstitutional. The citizen claimed that the appointment violated the Emoluments Clause (Article I § 6) because as a U.S. Senator, Black had recently voted to increase the Justices’ retirement benefits. Did the citizen have Article III standing to challenge Justice Black’s appointment?

4) What is the difference between taxpayer standing and citizen standing?

5) In *Frothingham v. Mellon* (p. 76), do you think Mrs. Frothingham was really complaining about paying high taxes? What do you think she was really complaining about? What do you think the Court was concerned about in *Frothingham*?

6) Assume that in its upcoming session, Congress enacts a statute that, similar to the Shepard-Towner Maternity Act of 1921, provides federal funding for states that create programs to improve the health and well-being of mothers and newborn children. A taxpayer files suit challenging the new statute’s constitutionality. The government moves to dismiss the complaint for lack of standing. Regardless of the merits of the constitutional challenge, how should the court rule on standing? (Is *Frothingham* still good law?)

7) If you wished to argue that Congress should have a voice in determining whether a citizen or taxpayer with an arguably “generalized grievance” may have standing to challenge the constitutionality of a congressional statute, what would your argument be? Are there any limitations on Congress’ power to confer standing?

8) In the Endangered Species Act, why did Congress think it could confer citizen standing by statute?

9) What if in 2025, Congress enacts a statute fixing the President’s term of office at fifteen years. The statute would clearly violate Article II § 1, cl. 1, but the incumbent President gladly signs the statute into law. Under *Lujan*, would any citizen have standing to challenge the statute in federal court?

V. *Raines v. Byrd* (p. 75)

1) Assume a New York state statute requires local public school districts to loan
textbooks free of charge to all students in grades seven through twelve, including students who attend private religious schools. The state commissioner of education, who has taken an oath to uphold the Constitution, believes that this statute violates the First Amendment Establishment Clause. He sues in federal court to invalidate the statute, claiming imminent personal injury because he must choose between violating the oath and taking a step -- refusal to comply with the statute -- that he says would likely bring his expulsion from office. After *Raines,* would the commissioner have standing to challenge the statute?

2) In *Raines,* Congress wanted a quick decision on the constitutionality of the line-item veto. How can you tell?

3) Which requirement of Article III standing is at issue in *Raines* (injury, causation or redressability)?

VI. *DeFunis v. Odegaard* (p. 77)

1) Recall *Craig v. Boren* (p. 68). Assume that saloonkeeper Whitener sought only an injunction to enjoin the state from prohibiting future sales of alcoholic beverages to 18-20-year-old males. After Whitener files suit challenging the statute, the state moves to dismiss for lack of standing on the ground that a favorable decision would not necessarily redress her grievance because the state legislature could simply amend the statute and raise the drinking age to 21 for everyone. Should the trial court dismiss for lack of standing?

2) Assume that after Whitener files the injunctive complaint in *Boren* but before the trial court decides the case, the legislature does indeed amend the statute raising the minimum drinking age to 21 for everyone. Is there any other ground for dismissing her injunctive action? What if Whitener sought damage relief alleging past loss of business (in addition to or instead of injunctive relief)? Do your answers suggest any precautions plaintiffs must take in much constitutional “test case litigation”?

3) From what you can tell from the Court’s *per curiam* opinion in *DeFunis,* did Mr. DeFunis move to dismiss for mootness? How could the Court dismiss the case for mootness if no party had requested dismissal?

4) On March 3, 1970, a pregnant woman named Norma McCorvey and her doctor filed suit in federal district court seeking to enjoin enforcement of the Texas statute that prohibited abortion except when a woman’s life was at stake. The case, which became known as *Roe v. Wade,* was not decided by the Supreme Court until 1973, when Ms. McCorvey was obviously no longer pregnant. (She did not have an abortion, but placed the child for adoption.) Why did the Supreme Court not dismiss her injunctive claims as moot in 1973? Why was McCorvey’s case different from De Funis’ on the mootness point?
VIII. Ripeness (p. 80)

What factors should a court examine in determining whether to find a case ripe for initial decision or appellate review?

IX. *Powell v. McCormack* (p. 88) (Political questions)

1) Congress passes new legislation limiting the amount of money that an individual or corporation may donate to a political campaign. An individual plaintiff sues, claiming that the limits violate his First Amendment speech rights in light of the *Citizens United* decision (2010). Should the court dismiss on the ground that the suit presents a political question? (After all, the suit concerns politics.)

2) A few years ago, a citizen sued several defendants (the United States, the President of the United States, and various government officials), challenging the constitutionality of the Iraq war. The plaintiff asked the district court to enjoin the defendants from waging the war. As the district judge, how would you have decided the case?

If the plaintiff was merely a citizen seeking to challenge the constitutionality of the Iraq War, why did the court not dismiss the case for lack of standing (i.e., for raising a “generalized grievance”)? What is the difference between a dismissal for lack of standing and a dismissal for raising a political question?

3) What policies does the political question doctrine serve? What can be said against applying the political question doctrine where the plaintiffs raise otherwise justiciable claims?

**SELECTIVE INCORPORATION**

_The Slaughter-House Cases_ (p. 414)

1) What were the independent butchers’ claims, and how did the five-Justice majority resolve them? In reaching the outcome, did Justice Miller do any judicial sleight-of-hand?

2) Now that the First Amendment Speech Clause, for example, applies to the states through the Fourteenth Amendment, does the Missouri constitution’s free speech clause serve any purpose?

3) Assume that without raising a First Amendment claim, the plaintiff alleges that the Missouri constitution’s free speech clause protects the plaintiff’s conduct. The Missouri Supreme Court agrees and rules for the plaintiff on state constitutional grounds. Now that the First Amendment is binding on the states through Fourteenth Amendment due process, may the defendant appeal to the U.S. Supreme Court on First Amendment
grounds?

4) In the mid-20th century, incorporation became important in the Civil Rights Movement. Why?

**SUBSTANTIVE DUE PROCESS**

I. *Lochner v. New York* (p. 470)

1) According to New York State, why was the maximum-hours legislation constitutional?

2) According to the Court majority, why was the maximum-hours legislation unconstitutional?

3) Did Joseph Lochner claim that the state legislature employed constitutionally insufficient procedures when it considered whether to enact the legislation (e.g., that the legislature refused to hold public hearings or receive any input that Mr. Lochner might have had concerning the advisability of the legislation)?

4) Under *Lochner’s* holding, which branch of government ultimately decides whether an act of state economic regulatory legislation is constitutional?

5) In his dissent, what did Justice Holmes, in dissent, mean by “dominant opinion”? In his view, which branch of government enunciates the “dominant opinion”?

6) What did Justice Holmes mean by “traditions of our people and our law”?

II. *Nebbia v. New York* (p. 477)

Why is *Nebbia* in the book?

III. *United States v. Carolene Products Co.* (p. 479)

1) According to *Carolene Products*, what constitutional provisions did the challenged congressional legislation violate? Why did the company not allege a substantive due process violation?

2) According to the Court, what is now the test for determining the constitutionality of economic regulatory legislation? Does this test require searching review of the legislation’s constitutionality, or does the test permit deferential review? How deferential? Where the Court finds an appropriate basis for economic regulatory legislation, must that basis be the actual basis that the legislators had in mind when they passed the challenged legislation?
3) When courts apply the rational basis test, should they credit only the actual basis on which Congress acted? Or should courts consider any bases the government proffers in litigation, plus any bases the court can think up?

4) Referring to the Caroleine Products footnote, Justice Felix Frankfurter wrote that “A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine.” Kovacs v. Cooper, 336 U.S. 77, 90-91 (1949) (Frankfurter, J., concurring). Why do you think Justice Stone chose to employ a footnote here? How many of the Justices sitting on this case joined the footnote? Was footnote 4 holding or dictum?

5) Once the Court upheld the Filled Milk Act in this otherwise nondescript case, why did Justice Stone feel the need for footnote 4?

6) In Lochner’s heyday, how much deference did the Court give to state and federal legislation? After Carolene Products, how much deference does the Court give to state and federal legislation?

IV. Griswold v. Connecticut (p. 535)

1) What justifications did the various Justices provide for a constitutional right to privacy? Why do you think Justice Douglas disavowed Lochner? Without Lochner, where did Justice Douglas find constitutional authority for striking down the Connecticut statute?

2) According to Justice Douglas, why does this case involve a “fundamental” right of privacy worthy of constitutional protection?

3) Assume that before Griswold, the Court had embraced complete incorporation of the Bill of Rights into Fourteenth Amendment due process. Would complete incorporation have made Justice Douglas’ job any easier?

4) How would Justice Goldberg have determined which rights are “retained by the people”?

5) Was there an alternative constitutional ground for Griswold, one that likely might not have encountered as much controversy then or since?

V. Roe v. Wade (p. 565)

1) Griswold found penumbras emanating from specific Bill of Rights provisions. But what was the Court’s constitutional basis for Roe?

3) What level of scrutiny does the Court apply here to test the constitutionality of the abortion statutes under Fourteenth Amendment substantive due process?
4) Was Chief Justice Burger, concurring in *Roe*, good at predicting the future?

VI. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (p. 576)

1) According to *Casey*, where in the Constitution does the right to an abortion come from?

2) What does the Court say about whether Fourteenth Amendment liberty interests are confined to interests intended by that amendment’s framers? What do the dissenters say?

VII. *Washington v. Glucksberg* (p. 609)

1) Why did Court decide this case under substantive due process and not equal protection?

2) According to the majority, what Fourteenth Amendment liberty interest did the plaintiff physicians seek to invoke?

3) Why did the trial court not dismiss the physicians’ complaint for lack of Article III standing?

4) The majority says that it begins “as we do in all due process cases,” by looking at the nation’s history, legal traditions and practices. Can you cite any decisions in which the Court did not look at these traditions?

5) In *Michael H.*, Justice Scalia’s footnote 6 said that the Court must state the liberty interest at its “most specific level of abstraction.” Did *Glucksberg*, decided eight years later, do that?

6) What level of scrutiny does the Court apply to the challenged Washington statute?

7) Assume that New Mexico enacts a statute forbidding physician-assisted suicide under all circumstances. Jane Smith, suffering from a terminal disease, alleges that the statute violates her due process liberty interest because a team of physicians has found her fully competent to decide to die. The federal district court has calendared a hearing on her claim. Under *Glucksberg*, can Smith prevail?

8) In *Glucksberg*, did the plaintiffs mount (and did the Court decide) a facial challenge or an as-applied challenge? Were the three deceased individual plaintiffs competent or incompetent?

VIII. *Lawrence v. Texas* (p. 600)

1) What level of scrutiny did *Lawrence’s* majority apply?
2) We have now read several substantive due process decisions. Assume that you are delivering a guest lecture to an undergraduate constitutional law class here at Mizzou. You would like to explain the sorts of cases that lend themselves to substantive due process claims in contemporary law. What would you say?

**EQUAL PROTECTION (ECONOMIC REGULATION AND SUSPECT CLASSES)**

I. Introduction

1) Assume two statutes:

Statute # 1 – “No woman may serve on a jury.”

Statute # 2 – “All police officers to be at six feet tall and weigh at least 160 pounds.”

Would either or both of these statutes be vulnerable to equal protection attack for gender discrimination?

2) The city council enacts this ordinance: “No position whose salary is paid with city funds shall be held by a person with blond hair.” Could the city council get away with this?

3) Assume that a state statute sets the minimum driving age at sixteen. A 14-year-old says that he can handle himself behind the wheel, and he files suit claiming that the statute violates equal protection. Does the statute classify people? If you were the state’s lawyer seeking to uphold the statute, what government purposes support the statute? Is the statute underinclusive, overinclusive, or both? Should the court strike down the statute for violating equal protection?

II. *Railway Express Agency v. New York* (p. 641)

1) What level of scrutiny does the Court apply to this New York City regulation?

2) According to the city’s lawyer on oral argument in Supreme Court, what legitimate state purpose did this regulation serve? Did the City have a rational basis for this regulation? Did the Supreme Court majority determine what that purpose was, or did it not care?

3) Considering the evident legislative purpose, was the New York City regulation overinclusive or underinclusive?

III. Suspect classifications (p. 656)

1) Assume that the Columbia city council enacts this regulation: “It shall be unlawful for any person to sleep on a bench in a public park from 7:00 pm to 7:00 am.” Does this
statute discriminate?

2) Why shouldn’t proof of disparate impact based on race establish an equal protection violation, without proof that the state action was motivated by a discriminatory purpose? What might be the policy reasons for requiring the plaintiff to prove discriminatory purpose? Does requiring proof of discriminatory purpose raise any practical problems? Does requiring proof of discriminatory purpose really mean that the government may discriminate, as long as it is careful about what it does?

3) Should the court readily accept the state’s race-neutral explanation for action that has a discriminatory effect based on race? What if the director of a city park, explaining why he assigned one softball field to white players and the other field to black players, says, “I just think the park looks better that way.” Should the court find a racially discriminatory purpose?

IV. Gender classifications (p. 729)

1) Assume this statute: “No person may serve as a serve as a juror unless he is a male over 18 years of age.” Men and women are indisputably different as a matter of biology. The Equal Protection Clause commands that the government accord similar treatment to people who are similarly situated; the Clause permits the government to accord dissimilar treatment to persons who are dissimilar. Why, then, should a gender classification such as the one created by the jury statute implicate equal protection?

2) Did the Fourteenth Amendment’s framers intend equal protection to remedy gender discrimination?

3) Assume that an Alabama statute provides that a divorce court may award a woman alimony from her ex-husband in an appropriate case, but that a man may not receive alimony from his ex-wife. Does this statute constitute gender discrimination that violates Equal Protection? If we conclude that the statute advantages women and disadvantages men, does this conclusion matter?

V. City of Cleburne v. Cleburne Living Center (p. 829)

1) What classification did the City of Cleburne’s ordinance create?

2) Now that the plaintiffs have won their lawsuit here, may the City of Cleburne ever deny a special use permit to maintain a group home for mentally disabled persons? May any other city in the United States ever deny such a permit?

3) The Supreme Court has now invalidated the City of Cleburne’s permit requirement insofar as it applies to this group home for the mentally disabled. Assume that the city now passes a new ordinance requiring a special use permit for all persons who wish to establish multiple dwellings for any reason. Could the city constitutionally apply the ordinance to
persons who wanted to maintain group homes for the mentally disabled? Could the city constitutionally apply the ordinance to the Cleburne Living Center, the same people who wanted to maintain this particular group home for the mentally disabled? Could mentally disabled persons ever successfully challenge the new ordinance on equal protection grounds?

4) The next time a city denies a special use permit for persons who want to operate a group home for the mentally disabled, what level of scrutiny will a court use to decide an equal protection challenge to that denial?

5) The Fifth Circuit found mental disability to be a “quasi-suspect” classification, but the Court rejected the court of appeals’ rationale. What does “quasi-suspect classification” mean?

6) According to the Court, what level of scrutiny applied in this case?

7) Did the Court really apply the rational basis test here? When you read Parts I and II of Justice Byron White’s majority opinion, what appears odd immediately about the case’s outcome?

8) Assume you were a law clerk to Justice White. If you were writing the draft opinion, would you cite a decision like Railway Express Agency or Williamson v. Lee Optical (p. 754), which were also rational-basis decisions?

9) As applied to the mentally disabled in light of the evident public purpose for the ordinance, was the ordinance underinclusive? Was the ordinance overinclusive? If you were representing the city, what would you say the purpose of this ordinance was?

10) The Court was unanimous for the result. What is the core issue that divides the majority from concurring Justices Marshall, Brennan and Blackmun?

11) What justifications did the majority give for using rational basis scrutiny, rather than heightened scrutiny, to test classifications involving the mentally disabled? Do you find these justifications persuasive?

VI. Wealth Classifications (p. 842)

1) If you wanted to criticize the Court’s failure to make poverty a suspect classification, what would you say, based on your understanding of the Carolene Products footnote? If you wanted to support the Court’s approach based on that footnote, what would you say?

2) What might be the practical ramifications if the Court held that poverty was a suspect classification, or that people have a fundamental right to a minimal level of subsistence?
I. Introduction

In recent years, the Court has been loath to recognize new fundamental rights. What do you think explains this reluctance?

II. The First Amendment As a Limitation (p. 901)

1) In the 2014 Republican U.S. Senate primary in Mississippi, incumbent Senator Thad Cochran held off a strong challenge. He openly appealed to Democrats to vote for him, and he reportedly won on the strength of Democratic votes. Mississippi has an open-primary system. His defeated challenger announced plans to challenge the primary election. Would the challenger have any constitutional basis for a claim that the open-primary system violated his constitutional rights?

2) When state law requires a person to register with a particular political party as a condition for voting in that party’s primary election, what compelling interest does the state seek to advance?

3) If you wanted to raise a constitutional challenge to primary-registration laws, what would you say?

4) What interests does the state have in setting requirements to appear on the ballot as a candidate?

5) Could a state constitutionally impose a modest fee (say, $10) on voters themselves as a condition of the right to vote?

6) Besides filing fees, what other methods might the state use to achieve its interest in limiting access to the ballot?

III. Shapiro v. Thompson (p. 903) and Bona Fide Residency Requirements

1) Were the Shapiro plaintiffs shackled, bound or otherwise physically restrained from moving from one state to another?

2) If the Shapiro plaintiffs were free to move to and fro, what right of theirs was violated? (What injury did the plaintiffs allege here?)

3) If the state of Missouri denies John and Susie Jones public assistance benefits because the Jones family moves from Columbia to Joplin, will Shapiro help the Jones’ if they file suit?
4) What if Susie Jones wants to travel to Cuba and the State Department denies her a passport for the trip? Does Shapiro help Jones in this situation? Should the right to travel encompass the right of international travel?

5) Does Shapiro stand for the proposition that when a person moves from state # 1 to state # 2, state # 2 may never impose a durational residency requirement on the person?

6) In Rosario v. Rockefeller (1973), the Supreme Court upheld a residency requirement of almost one year before a newcomer may vote in a state primary election. Shapiro strikes down a one-year residency requirement for receipt of state welfare assistance. Why the different results?

7) Why did the Court decide Shapiro under equal protection rather than under substantive due process?

8) According to Shapiro, what was the government classification here? What justifications did the state proffer here in defense of the classification?

9) John and Susie Smith and their family travel from Columbia to Lawrence, Kansas for a month-long vacation. During the vacation, one of their children gets sick and is admitted to a hospital in Lawrence. The Smiths do not have health insurance, and the state of Kansas refuses to use state funds to pay for the hospital stay. Has Kansas violated the Smiths’ fundamental right of interstate travel? Are the Smiths’ circumstances different from the circumstances of the Shapiro plaintiffs?

10) Why did McCarthy v. Philadelphia Civil Service Commission (p. 914) involve a bona fide residency requirement, and not a durational residency requirement? What rational bases may a city have for maintaining residency requirements, which are quite common? What if Philadelphia enacted a regulation that limited employment as a city firefighter to persons who were residents of the city for one year? For one month?

IV. Saenz v. Roe (p. 924)

1) According to the majority, is Saenz a right-to-travel case?

2) Justice Stevens says that the right to travel has at least three components. According to the Court, which constitutional provisions support the various components?

3) Now that the Court pinpoints that the Article IV Privileges and Immunities Clause requires Missouri to treat non-residents as welcome visitors and not unfriendly aliens, may the University of Missouri System charge nonresident students higher tuition than it charges Missouri residents?

4) Assume three Nicaraguans come to southern Arizona, assume permanent residency (and thus become lawful resident aliens), but are denied public assistance benefits during
their first year residing in the state. Will Saenz help them? Would any other constitutional provision help them?

5) Saenz is only the second Supreme Court decision to invoke the Fourteenth Amendment Privileges and Immunities Clause in about 130 years. What did the Court cite for authority?

6) What level of scrutiny would the state durational requirement receive under the Fourteenth Amendment Privileges and Immunities Clause?

7) Part V of the majority opinion rejects California’s justifications of its durational residency requirements. From this discussion, do you think a state could ever again scale first-year welfare benefits for newcomers, as California tried to do here?

8) What if John and Susie Smith travel with their children from North Carolina to California, stay with relatives for two months, and then apply for California public assistance benefits. Assume California has administrative regulations which specify that to establish state residence, a person must purchase or rent real property, register to vote in California, and secure employment in California. Assume the Smiths have done none of these things. Does Saenz necessarily give them a successful claim under the Fourteenth Amendment Privileges and Immunities Clause? What if California enacted administrative regulations which specify that an adult can become a permanent state resident only by maintaining employment in the state with one employer for one year?

9) After Saenz, assume that another state seeks to establish a durational residency requirement before a U.S. citizen may receive a government benefit. Would the Court decide the case under the Equal Protection Clause, as it did in Shapiro?

**PROCEDURAL DUE PROCESS**

I. *Board of Regents v. Roth* (p. 978)

1) How much procedure did Professor Roth get, and how much procedure did he want?

2) In the trial court, did Roth ask for only procedural relief?

3) Assume that when Roth applied for a position on the university faculty, the university had rejected his application and did not hire him. Would Roth have had a due process property interest in a hearing about why he was not hired, with a statement of reasons by the university?

4) Professor Roth was hired for a one-year term from September 1, 1968 to June 30, 1969. If the university had dismissed him without stating any reasons on November 1, 1968, would Fourteenth Amendment due process have guaranteed him a statement of
reasons, and a hearing?

5) Why would Roth have a property interest in November, 1968 but not in July, 1969? What field of state law determines whether Roth has a property interest here?

6) What if Roth’s employment contract promised him a hearing if the university decided not to renew his contract for a second year? Would Fourteenth Amendment due process guarantee him a hearing?

7) What if Roth had been teaching at the university for seven years and had tenure, which guarantees him lifetime employment during good behavior? If the university decided not to renew his contract after June 30, 1969, would due process have guaranteed him a hearing?

8) Assume you were counsel to the University of Wisconsin system. The University president has decided not to renew Professor Roth’s one-year contract, and the president wants to announce at a press conference that Roth would not be rehired for a second year because he often provided illicit drugs to students at fraternity and sorority parties. What advice would you give the president?

9) Assume that on April 1, 1969, near the end of his one-year appointment, the untenured Professor Roth addressed a student anti-war rally and urged his listeners to “resist the University’s complicity with the war machine.” On May 15, the University tells Roth that he will be terminated effective at the end of his one-year appointment but gives no reason. Does Roth have any basis for filing suit to enjoin the University from terminating him on that date?

10) Under Roth’s definition of property, would due process permit the state of Missouri to deprive a person of public assistance benefits, without any reason and without a hearing, if the legislature amended the state code to include the following provision: “Public assistance benefits are granted to needy persons at the state’s discretion, and the state may terminate these benefits at any time without providing any reason or a hearing”?

11) When Missouri state employees are threatened with termination, many actually get a hearing. If Bishop v. Wood (p. 1175) does indeed stand for the proposition that the state may create at-will employment, where does the right to a hearing (notice and opportunity to be heard before an impartial decisionmaker) come from? Why might a state not create categories of at-will employment, even though the Constitution says they may do so?

II. Daniels v. Williams (p. 998)

1) Assume that the state executes John Smith for first-degree murder after Smith had exhausted all his state and federal appeals. Six months after the execution, three witnesses recant and Bill Jones confesses to the killing. The state convicts Jones, thus acknowledging that Smith was innocent. Smith’s widow files suit against the state,
alleging that it deprived Smith of life without due process of law, in violation of the Fourteenth Amendment. What result after Daniels v. Williams?

2) Do you sense any problems with a hard-and-fast rule that the state does not “deprive” a person of life, liberty or property under Fourteenth Amendment if an adequate state remedy (e.g., a tort remedy) is available?

3) What will be the likely long-term effect of Daniels v. Williams?

III. Lane v. Franks (email)

1) Did Mr. Lane have a Fourteenth Amendment property entitlement to a hearing before he was terminated?

2) Did Mr. Lane have a Fourteenth Amendment liberty entitlement to a hearing before he was terminated?

3) Did Mr. Lane have a hearing? Where?

III. Conclusion

1) What are the basic goals of procedural due process?

2) Why the big deal about a hearing? If a federal or state agency wants to reach a particular decision, or even be arbitrary, can’t the agency usually provide a hearing, reject or ignore the claimant’s arguments, and then just make the decision it planned to make in the first place? For example, do you think that a hearing would have done Professor Roth any good?

3) If due process guarantees a hearing to a person who is threatened with loss of a property or liberty interest, who cares whether the hearing comes before or after the government action (i.e., before or after the license suspension, firing, termination of benefits, etc.)?

STATE ACTION

I. Introduction

1) Two Little League baseball teams for 14-year-olds were playing a state tournament game in Methuen, Massachusetts. One team’s coaches began giving field instructions to their players in Spanish. The umpire called “time out” and instructed the coaches that only English could be spoken on the field. The coaches challenged the ruling but kept their team on the field. (The incident reached the national media, and Little League International instructed local officials to suspend the umpire from officiating at any further playoff games because no such English-only rule existed.)
A few days later, the *Arizona Republic* carried this letter-to-the-editor from a reader:

“Our First Amendment gives every person . . . the right to free speech. Those boys had the right to speak Spanish during the game, just like every other team has the right to give hand signals for pitching.”

If the letter writer was a friend of yours and asked you to review his letter before he sent it, what would you say to him?

2) What is the practical effect of holding that challenged conduct does not involve state action?

II. Company Towns and Shopping Centers (p. 1019)

1) If police in an ordinary town (such as Columbia, Missouri) arrest someone for leafletting on a street corner, would the arrest implicate state action?

2) What are the differences between a company town and a shopping mall?

III. *Flagg Bros., Inc. v. Brooks* (p. 1021)

1) After this decision, will plaintiffs find it easier or harder to invoke the public-function exception to the state action doctrine?

2) In recent years, many states and localities have privatized many government functions, such as juvenile detention systems. Under contract with the state, delinquent children are confined in these private facilities, many of which are the harshest and worst run juvenile prisons in the country. Assume that guards beat the children and deprive them of adequate food, and that the children sue for damages and injunctive relief, claiming that the conditions of confinement violate due process and the Eighth Amendment’s ban on cruel and unusual punishment. What does *Flagg Bros.* say about whether state action is present?

IV. *Burton v. Wilmington Parking Authority* (p. 1039)

Why did the Supreme Court strain to find state action in close cases throughout the 1960s?

Why was state action present in *Burton* but not in *Rendell-Baker v. Kohn* (p. 1044)?

V. *Moose Lodge No. 107 v. Irvis* (p. 1044)

1) Assume that the Warren Court heard this case a day after it decided *Burton* in 1961. What facts mentioned in the *Moose Lodge* opinions might have led the Court to find state action based on entanglement?
2) What effect does Moose Lodge have on later efforts to find state action based on the fact that the government has issued one or more licenses to the assertedly private applicant?

VI. Brentwood Academy v. TSSAA (p. 1034)

1) Assume that you are counsel to Missouri State High School Athletic Association (MSHSA), which is based here in Columbia. What advice would you give concerning whether the organization’s conduct is state action, subjecting it to the constraints of the federal Constitution?

2) Does the Brentwood Academy decision turn on the facts or the law?


FREEDOM OF EXPRESSION

I. Introduction (p. 1119)

1) Why should our society care whether people enjoy free expression? What purposes does freedom of expression serve in our polity?

2) Nearly all Supreme Court First Amendment free-expression law is 20th century law. The Court decided very few First Amendment speech cases before the end of World War I. Why?

II. Brandenburg v. Ohio (p. 1151)

1) What is the Brandenburg test?

2) Did Clarence Brandenburg threaten violence here? Do you think Mr. Brandenburg would have had much trouble carrying out his threats for “revenge” at, or shortly after, the Klan rally?

3) Why did the Court overturn Mr. Brandenburg’s conviction under the test enunciated in the opinion?

4) Are there limits to Brandenburg’s protection of expression, particularly in the Internet age? Could the government prosecute a person for merely publishing instructions for manufacturing illegal drugs? For publishing a manual on how to be a “hit man”? For publishing instructions for how to build a nuclear bomb? In each case, assume that the person does not urge anyone to make imminent use, or indeed any use, of the published materials.
5) Does Brandenburg’s statement of the holding (p. 1153: “These later decisions have fashioned the principle that . . . .”) apply to imminent, but relatively trivial, crimes? What if a speaker exhorts a small crowd to protest the local littering ordinance by crumbling up a piece of paper and throwing it on the ground on the way home. The speaker does not take this action, but other people in the crowd do. Could the city fine the throwers themselves for littering? Could the city jail the speaker for inciting imminent lawless action?

III. Coates v. Cincinnati (p. 1171)

1) According to the majority, which of the void-for-vagueness doctrine’s two requirements was at stake in Coates?

2) Was the Cincinnati ordinance unconstitutionally overbroad?

3) Suppose I stand on Main Street and shout obscenities at the top of my lungs. I am arrested and prosecuted under a statute that prohibits public expression that is “annoying to passersby.”

   a) Should the First Amendment permit the state to prosecute people who shout obscenities on the street corner at the top of their lungs?

   b) Should a reasonable person know that shouting obscenities on Main Street is something the state should be able to punish, indeed that this activity is inevitably “annoying to passersby”?

   c) But can I successfully challenge the prosecution under the First Amendment on the ground that even if my shouting is not constitutionally protected, the statute criminalizing “annoying” conduct would be vague or overbroad when applied to protected activity by others? What about the general rule that a person does not have standing to argue the legal rights of third parties? Should there be an exception for First Amendment claims?

   d) The three Coates dissenters recognize the First Amendment exception to third-party standing, so what is their argument?

4) Many towns and localities have considered enacting statutes or ordinances making it a misdemeanor or an infraction for adults to spew vulgarities or insults at others during youth sports games. The “others” might include coaches, referees, other adults, or one or more of the children? In light of Coates, and especially Justice Black’s opinion, what advice would you give the city council if it wanted to curb the problem with an enactment that would pass constitutional muster?

5) After Stevens (p. 1179), how might Congress now redraft the statute to reach videos of unlawful dogfighting?
IV. Miller v. California (p. 1225)

1) What is the difference between pornography and obscenity? Assume a scale of 1 to 10, with 1 being “Snow White and the Seven Dwarfs,” and 10 being hard-core smut. Where does pornography fall? Where does obscenity fall?

2) How do judges know when something crosses the line from First Amendment-protected pornography to unprotected obscenity?

3) If you were a distributor of materials that might approach or cross the line from pornography to obscenity, would Miller’s “contemporary community standards” approach cause you any practical problems?

4) What if the government seizes copies of a medical textbook that contains two pages of photographs graphically depicting two adults having sexual intercourse? Could these two pages constitute obscenity?

5) What if police in Mizzou City seize the medical textbook, which has outraged every citizen in Mizzou City? Is that outrage enough to qualify the textbook as obscenity?

6) Assume the city of Columbia wants to ban manufacture and distribution of a video game that depicts non-stop blood, guts, machine guns, and maimed bodies. Could a court invoke Miller, classify the violent game as obscenity, and deny First Amendment protection?

7) Assume that the Village Gazette, a daily newspaper, plans to publish obscene material next week. Obscenity is outside First Amendment protection. May a court enjoin publication today?

V. “Fighting Words” (p. 1268)

1) As applied to Walter Chaplinsky, was the New Hampshire statute unconstitutionally overbroad? (p. 1269)

2) When a locality arrests and prosecuted someone for “fighting words,” what interests is the locality trying to protect? What outcome is the locality trying to avoid? Does the locality have a way to avoid this outcome without prosecuting the speaker?

4) If an onlooker says, “I want to punch you in the nose and I’m going to get my friends to help me,” can you cite a Supreme Court decision for the proposition that the onlooker may be prosecuted?

5) In the normal case, who would make the initial decision about whether expression is so provocative as to cross the line and become “fighting words” likely to incite an
immediate breach of the peace?

6) Under Chaplinsky, must the state prove an actual breach of the peace? Or is a reasonably perceived threat sufficient?

7) The Court upheld Walter Chaplinsky’s conviction under a statute that sounds very much like the statute the Court found unconstitutionally vague in Coates v. Cincinnati (p. 1171). Why did the Court uphold Chaplinsky’s conviction and overturn Coates’?

8) Assume that the state enacts a statute making it a crime “on any street or other public place, to address any offensive, derisive or annoying word critical of U.S. foreign policy.” John Jones is arrested for making a street corner speech opposing the Afghanistan War before a hostile audience that is yelling threats at him. Would the First Amendment permit the state to convict Jones under the statute?


1) Were these free-expression cases at all? As far as we can tell, the perpetrators never uttered any words.

2) What is the difference between a “threat” and a “true threat”?

3) After Black, would the First Amendment permit a state to enact a hate-crime statute (with significantly enhanced penalties) that proscribes burning a Bible during a public demonstration?

5) Why should the state be able to punish a “true threat,” even when the violence does not happen – and perhaps was not intended to happen?

VII. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (p. 1288)

1) Why does it matter whether expression is commercial speech rather than ordinary speech?

2) What is “commercial speech”? Which if the following, if any, concern commercial speech?:

   a) Ford Motor Company runs an ad campaign opposing proposed federal fuel emissions standards.

   b) Ford Motor Company begins running advertisements saying, “When you drive a Ford pickup, people will know you’re tough.” The ads feature mood music and show a Ford pickup driving on a picturesque country road, but do not advertise prices or urge anyone to go to their local dealer.
c) The Sierra Club begins running ads saying that if you buy pickup trucks, you are contributing to environmental pollution and you are supporting terrorists by spiking America’s need for foreign oil.

3) As we saw when we studied *Carolene Products*, economic regulation seemingly neutral on its face may actually be designed to protect some businesses at the expense of others. In *Virginia State Board of Pharmacy*, which pharmacists were likely to be protected by the advertising prohibition, and which were likely to be hurt?

4) According to Justice Blackmun, whose rights were at stake in this commercial speech case (and thus in commercial speech cases generally)?

5) On the day after this decision, could the state of Virginia lawfully continue to license pharmacists and regulate their conduct by de-licensing ones who violated professional standards unrelated to advertising?

VIII. Time, Place or Manner Restrictions (p. 1329)

1) Does a person often have a First Amendment right of expression (demonstrations, rallies, picketing, etc.) on *private* property owned by others who refuse to permit the person to speak on that property?

2) Would the First Amendment permit a city simply to close its streets and parks to all expressive activity?

3) May the government ever regulate or prohibit expression in a public forum?

4) What compelling government interests justify a time, place or manner restriction?

5) Assume that a city ordinance prohibits any person, while standing on public or private property adjacent to a school, from making noises or diversions that tend to disturb the school’s operation. An anti-war group wishes to hold a demonstration across the street from a public school to protest the Afghanistan War, but the city denies them a permit. Did the city act constitutionally? What if the anti-war group wants to protest across the street from the school because the school board has allowed military recruiters to set up booths in the school’s hallways but has denied hallway access to the anti-war group?

6) May a city prohibit all billboards in any area zoned for residential use?

7) May a city prohibit all use of sound trucks on public streets or other public places between 5:00 pm and 7:00 am?

8) Assume that a congressional statute bans display of any “flag, banner or device” in front of any federal court building. Congress says its aim is to prevent disruption of court proceedings. Does this statute create a reasonable time, place or manner restriction?
9) Would the First Amendment permit a city to enact an ordinance that imposes a fee on applicants for demonstration or parade permits, and allows the city to vary the fee depending on the city’s estimate of how much police protection would cost?

IX. *Frisby v. Schultz* (p. 1330)

1) If you were the city attorney, would you have drafted the ordinance in the way it originally appeared? What would you have written?

2) Does the Brookfield, Wisconsin ordinance restrict expression? Does the ordinance create a prior restraint on expression? Does the restriction on expression operate in a public forum? Is the ordinance content-neutral?

3) As interpreted and applied by the Supreme Court, would the First Amendment guarantee the right of the anti-abortion protesters to march through the entire neighborhood in which the target doctor lives? Could the protesters march up and down the doctor’s block?

4) Is the city ordinance a reasonable time, place and manner restriction? What standard of review does the Court apply to determine the reasonableness of the restriction?

5) A few years ago, people tried to solicit signatures on petitions for ballot initiatives on the steps leading up to the front doors of the Columbia Public Library. The Library asked them to leave. The question was whether the front steps were a public forum, a designated public forum, or a nonpublic forum. What kind of forum is the library’s front steps? The library’s reading room? The streets on which the library faces (Broadway and Garth)?

X. *United States v. O’Brien* (p. 1435)

1) Assume that David O’Brien stood in front of a microphone at a rally on these same courthouse steps, denounced the Vietnam War, and called for President Lyndon B. Johnson’s impeachment, but did not burn his draft card. Assume that local authorities granted a permit for the rally, and that there was no violence or incitement to imminent lawless action. Would the First Amendment have protected O’Brien’s speech?

2) What if instead of burning his draft card or making a speech on the courthouse steps, David O’Brien took out a full-page advertisement in the *Boston Globe* to denounce the war and call for President Johnson’s impeachment? Would the First Amendment have protected the ad?

3) Why do you think Mr. O’Brien burned his draft card, rather than merely make a speech or take out a newspaper ad?
4) On its face, was the congressional draft-card-burning statute content-neutral, or was it content-based?

5) Did Mr. O’Brien’s act of burning his draft card qualify as symbolic speech, according to the test later enunciated in Spence v. Washington, 418 U.S. 405 (1974)? (Spence established a two-part test: Did the speaker intend to convey a particularized message, and was there a great likelihood that the message would be understood by those who viewed it?)

6) Assume that I do not like your politics, and that I want to tell you so. Without your permission, I break into your house, enter your living room in the middle of the night and begin making a speech that wakes you up. What if I enter your living room, remain totally silent, and simply hold a picket sign until you wake up? Under O’Brien’s test for determining when government may regulate or punish symbolic speech (i.e., conduct that meets the Spence test), may I be prosecuted for a crime, or does the First Amendment symbolic-speech doctrine protect me?

7) Does the First Amendment accord symbolic speech as much protection as it accords pure speech?

8) What if the city passes an ordinance prohibiting littering in public parks and providing for a $25 fine. You want to protest the ordinance because you often eat box lunches in a local park and you find that littering is much more convenient than cleaning up and carrying the refuse to the nearest trash can. You protest this ordinance by throwing a paper napkin on the ground, and you are ticketed by a police officer who happened to see you do so, though you had not seen him. No one else was nearby. In municipal court, you claim that throwing the napkin was symbolic speech protected by the First Amendment. Was your conduct symbolic speech?

   a) What if a few people were watching and as you threw down the napkin, you said loudly, “This littering ordinance stinks. This is a free country, and I will litter if I want to.” Is your napkin throwing now symbolic speech? Will your littering and statement enable you to raise a First Amendment claim that beats the $25 fine?

   b) What if you made the statement but did not throw the napkin? Would your statement be protected?

   c) What if the city ordinance prohibited only littering by Democrats?

XI. City of Erie v. Pap’s A.M. (p. 1442)

1) According to the Court, did the Erie, Pennsylvania ordinance regulate expressive conduct? Did the nude dancers (or the establishment’s owners) intend to convey particularized message? Was the message likely to be understood by the people in the audience?
2) What if a “streaker” dances down Main Street naked but totally silent? What if the streaker dances down Main Street naked but shouting “Vote Republican”? Consistent with the First Amendment, could the naked dancer be prosecuted for public indecency under either scenario?

3) Under the O'Brien test, why does the Erie ordinance comport with the First Amendment?

4) If Mr. Pap or one of his nude dancers (with her clothes on) made a speech at a rally supporting nude dancing, would the First Amendment have protected their expression?

**Freedom of Association**

I. Introduction

The First Amendment does not expressly address a right of expressive association. How can this right be justified?

II. *Boy Scouts of America v. Dale* (p. 1457)

1) A few years ago, a nine-year-old girl tried to enroll in a summer baseball league conducted by a local private youth sports program in Illinois. All players in the baseball league were boys, and the program had a separate softball league for girls her age. The program’s commissioner refused to enroll her in the baseball league because she is a girl. The girl’s family has just hired you as their lawyer. What claim would you raise? What constitutional defense might the youth sports program raise? Would the youth sports program likely prevail on its constitutional defense?

2) What is the right of “intimate association,” and what sorts of groups enjoy it? What is the right of “expressive association,” and what sorts of groups enjoy it?

3) What if the Ku Klux Klan wanted to exclude blacks, or the American Nazi Party wanted to exclude Jews? Can you cite any decisions for the proposition that First Amendment freedom of association would likely permit exclusion? By excluding prospective members, have these groups practiced racial or religious discrimination, or does the First Amendment protect their exclusionary practices? Should the First Amendment permit groups like the Klan or the Nazi Party to reject members who might be inconsistent with the group’s expressive message?

4) According to Dale’s majority, why did the First Amendment protect the Boy Scouts’ right to exclude gay members?
CONGRESSIONAL POWERS

I. United States v. Morrison (p. 151)

1) According to defendant Morrison (and to the Court), which prong of Commerce Clause jurisdiction determined the outcome?

2) To prove a substantial effect on interstate commerce, what showing must the government make?

3) According to Congress in the Violence Against Women Act (VAWA), why did this federal damages remedy substantially affect interstate commerce? According to the Morrison majority, why weren’t these congressional findings sufficient?

4) Now that the Court has struck down the VAWA civil damages remedy, does the victim have any other potential remedy?

5) After Lopez and Morrison, how do you think the courts would rule on challenges to these federal criminal statutes?:

   a) 18 U.S.C. § 2423(b), which makes it a federal crime to cross state lines with intent to engage in any of a wide range of sexual acts with a person under eighteen.

   b) 18 U.S.C. § 2252, which makes it a federal crime to transport, ship or receive in interstate commerce for the purpose of selling, any "obscene visual or print medium" if its production involved use of a minor engaging in sexually explicit conduct.

   c) 18 U.S.C. § 2261(a)(1), which makes it a federal crime to travel across state lines with intent to injure or intimidate the defendant’s spouse or intimate partner, and who intentionally commits and act of violence that causes bodily injury.

   d) 21 U.S.C. § 860(a) – Distributing, possessing with intent to distribute, or manufacturing a “controlled substance” (illegal drug) within 1,000 feet of a school.

   e) 16 U.S.C. §§ 1531-44 – Killing an “endangered species” or “threatened species” of animal, even if the species is found within only one state and has no significant commercial or economic value.

CONGRESSIONAL POWER (OFTEN OVER AGAINST STATE SOVEREIGNTY)

I. New York v. United States (p. 231)

1) Why did the Court approve of the incentive involved in this case?
2) Does the Commerce Clause, taken by itself, authorize Congress to regulate disposal of radioactive wastes?

3) What constitutional provision does the majority say the “take title” provision violates?

4) If the Commerce Clause concededly grants Congress authority to regulate disposal of radioactive waste, is the Court’s Tenth Amendment holding here consistent with Chief Justice Marshall’s conclusion in *McCulloch* that the Constitution derives from the people and not from the states?

5) According to Justice O’Connor, why does the 1985 Act violate the Tenth Amendment if the Commerce Clause concededly grants Congress authority to regulate disposal of radioactive waste?

6) According to the majority, what prudential reasons underlie the decision to prohibit the federal government from forcing states to administer a federal program directly?

7) Does this decision leave Congress powerless in the effort to secure state cooperation in administering a federal program? What might Congress constitutionally do if it wants state cooperation in disposing of radioactive wastes?

II. *City of Boerne v. Flores* (p. 1084)

1) *Employment Division v. Smith* was a constitutional decision (an interpretation of the First Amendment Free Exercise Clause), so how could Congress ever expect to overrule that decision with a statute?

2) Because *Smith* was decided under the First Amendment’s Free Exercise Clause, how could § 5 of the Fourteenth Amendment ever authorize Congress to enact the Religious Freedom Restoration Act? What is the constitutional connection between the Fourteenth Amendment and the church’s free exercise claim?

3) According to the majority, what is the key word in § 5 of the Fourteenth Amendment?

4) What did the *Boerne* dissenters (Justices O’Connor, Souter, Breyer) say about § 5? Did they agree or disagree with the majority’s interpretation of the section?

III. *Nevada Dep’t of Human Resources v. Hibbs* (p. 1100)

1) Who won the trial below? Was William Hibbs properly or improperly fired from his state job?

2) What is the test for determining what is valid prophylactic legislation?
3) What was the underlying constitutional violation alleged by Mr. Hibbs?

4) Why was the Family and Medical Leave Act (FMLA) different from the age discrimination act and section 1 of the disabilities act?

**STATE REGULATION OF COMMERCE (THE DORMANT COMMERCE CLAUSE)**

I. *Pike v. Bruce Church, Inc.* (p. 278)

1) Assume that a month after *Pike*, Congress enacts a statute authorizing states to require that fruits and vegetables grown in-state be packed in that state rather than in another state, provided that the state legislature recites that the measure is a necessary public health measure. Would the congressional statute be constitutional?

2) Now assume that five years before *Pike*, Congress enacted a statute expressly forbidding states from requiring that fruits and vegetables grown in-state be packed in that state rather than in another state. Would a state statute imposing that packing requirement be constitutional, would it run afoul of the dormant commerce clause, or would it be unconstitutional for some other reason?

**SUPREMACY CLAUSE (PREEMPTION)**

1) What if the Supreme Court holds that particular congressional legislation preempts state legislation, but Congress then disagrees and wants to make the state legislation operative? What can Congress do if the decision found express preemption? If the decision found implied preemption?

2) In 2003, the Supreme Judicial Court of Massachusetts decided *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). *Goodridge* upheld, 4-3, the right of same-sex couples to marry in that state. “We declare,” said the majority, “that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts constitution.”

The decision immediately evoked both praise and protest, and it led several states to pass legislation or state constitutional amendments designed to deny recognition of same-sex marriages performed in Massachusetts. (Missouri and some other states did both.) In 2015, the U.S. Supreme Court held that the Fourteenth Amendment guarantees persons of the same sex the right to marry, and that a state must recognize marriages by same-sex couples performed in another state. Are the Missouri denial statute and constitutional provision still good law in Missouri?