

CONSTITUTIONAL LAW

I. FEDERAL JUDICIAL POWER

a. Requirement for cases and controversies. 4 justiciability doctrines:

i. Standing

1. Definition: issue is whether P is the proper party to bring a matter to the ct for adjudication.

2. Requirements:

a. Injury

i. ***P must allege and prove that he has been injured or imminently will be injured (imminent threat of injury).***

1. Ps only may assert injuries that they personally have suffered.

2. Ps seeking injunctive or declaratory relief must show a likelihood of future harm.

ii. **TIP:** If a question asks which P has the best standing, look for answer where P has *personally* suffered injury. If more than one P suffered injury personally, then look for P that suffered an economic, dollar and cents, injury.

b. Causation and redressability

i. ***P must allege and prove that because of the injury so that a favorable ct decision is likely to remedy the injury.***

1. In other words, no advisory opinions.

c. No third party standing

i. ***A P cannot assert claims of third parties who are not before the ct.***

1. **Exception 1:** third party standing is allowed if there is a close relationship between P and the injured third party.

2. **Exception 2:** third party standing is allowed if the injured party is unlikely to be able to assert his or her own rights

3. **Exceptions 3:** an organization may sue for its members, if:
a. The members would have standing to sue;
b. The interests are germane to the organization's purpose;
c. Neither the claim nor relief requires participation of individual members.

d. No generalized grievances

i. ***P must not be suing solely as a citizen or as a taxpayer interested in having the gov't follow the law.***

ii. **TIP:** question will say P is suing as a "citizen" or as a "taxpayer."

iii. **Exception:** taxpayers have standing to challenge gov't expenditures as pursuant to federal statutes as violating the Establishment Clause.

ii. Ripeness

1. May the federal ct grant pre-enforcement review of a statute or regulation?
2. **TIP**: whenever you see a request for declaratory judgment, always consider ripeness.
3. **2 criteria S Ct looks to in determining ripeness**:
 - a. The hardship that will be suffered without pre-enforcement review; and
 - b. The fitness of the issues and the record for judicial review (does the fed ct have everything it needs to decide the issue?).

iii. Mootness

1. If events after the filing of a lawsuit end the P's injury, the case must be dismissed as moot.
 - a. **Exception 1: wrong capable of repetition but evading review**
 - i. Injury is over before fed ct proceedings are completed. Think of Roe v. Wade. Wrong capable of repetition because she could become pregnant again and seek an abortion.
 - b. **Exception 2: voluntary cessation**
 - i. If D voluntarily halts the offending practice, but is free to resume it at any time, the case will not be dismissed as moot.
 - c. **Exception 3: class action suits**
 - i. A class action will not be dismissed so long as one member of the class has an ongoing injury.

iv. The Political Question Doctrine

1. *Refer to constitutional violations that the federal cts will NOT adjudicate.*
2. Some constitutional claims are left to the political branches to resolve. The following 4 cases are always dismissed as unjudiciable political questions:
 - a. The republican form of government clause
 - b. Challenges to the President's conduct of foreign policy
 - c. Challenges to the impeachment and removal process
 - d. Challenges to partisan gerrymandering

h. Supreme Court review

- i. Virtually all cases come to the S Ct by writ of certiorari.
 1. ALL cases from *state cts* come to the S Ct by writ of certiorari.
 2. ALL cases from the *cts of appeals* come to the S Ct by writ of certiorari.
 3. Appeals exist only for S Ct review of decisions by *3-judge federal district cts*.
 - a. If a federal statute says that there is APPEAL to the S Ct, the S Ct is obligated to hear that case when appellate review is requested.
 4. The S Ct has original and exclusive jdx for suit between state governments.
 - a. Ex. CA suing AZ over water rights
 - ii. Generally, S Ct may hear cases only after there has been a final judgment of the highest state ct, of a US Ct of Appeals, or of a 3-judge federal district ct.
- iii. **For the S Ct to review a state ct decision, there must NOT be an independent and adequate state law ground of decision. If a state ct decision rests on 2 grounds, one state law and one federal law, if the S Ct's reversal of the federal law ground will not change the result in the case, the S Ct cannot hear it.**
 1. Person beat up by LA cops. Victim sues officers in CA state ct. Victim brings 2 claims:
 - a. Federal law civil right claim.

- b. State law battery claim.
 - 2. Imagine victim wins in state ct under both claims and entitled to 100k under either the federal or the state claim, but not entitled to 200k.
 - 3. S Ct may only be sought as to the federal law claim. State ct gets the last word on purely state law issues. Even if the S Ct reverses on the federal law ground of decision, P will still win and with an identical amount of money based on the state law claim.
- c. Lower federal ct review
- i. **Federal cts (and state cts) may not hear suits against state governments.**
 - 1. **The principle of sovereign immunity**
 - a. **The 11th Am bars suits against states in federal ct.**
 - i. It doesn't matter if P is from that state or from another state; whether suit is for an injunction or for money.
 - b. **Sovereign immunity bars suits against states in state cts or federal agencies.**
 - 2. **4 exceptions** (states may be sued under the following circumstances):
 - a. Waiver is permitted (must be explicit)
 - b. States may be sued pursuant to federal laws adopted under section 5 of the 14th Am. Congress cannot authorize suits against states under other constitutional provisions.
 - c. The federal gov't may sue state governments.
 - d. Bankruptcy proceedings
 - 3. Suits against state officers are allowed
 - a. For injunctive relief,
 - b. For money damages to be paid out of their own pockets;
 - c. State officers may not be sued if it is the state treasury that will be paying retroactive damages.
 - ii. **Attention (rarely tested)**
 - 1. Federal cts may not enjoin pending state ct proceedings.

II. FEDERAL LEGISLATIVE POWER

a. Congress's authority to act

i. There must be express or implied Congressional power

1. **There is NO general federal police power.**

a. **Exceptions: Indian reservations, military, federal land territories, DC.**

ii. The necessary and proper clause

Congress can choose any means not prohibited by the Constitution to carry out its authority.

iii. The taxing/spending power and the commerce power

1. **Congress may tax and spend for the general welfare**

a. **PIP:** If a question is about Congress' ability to act and answer choice uses the words *general welfare*, that is a correct answer only if Congress is taxing or spending or is dealing with one of the few areas where Congress has police powers.

2. **The Commerce Power**

- a. Congress may regulate the channels of interstate commerce
- b. Congress may regulate the instrumentalities of IC and persons or things in IC.

- c. Congress may regulate **economic activities** that have a **substantial effect** on IC. (In the area of non-economic activity, a substantial effect cannot be based on cumulative impact).
- iv. *The 10th Am as a limit on Congressional powers. The 10th Am states that all powers not granted to the US, nor prohibited to the states, are reserved to the states or the people.*
 - 1. Congress cannot compel state regulatory or legislative action.
 - a. **ALWAYS on MBE.**
 - b. Note: Congress can induce state gov't action by putting strings on grants, so long as the conditions are expressly stated and related to the purpose of the spending program.
 - 2. Congress may prohibit harmful activity by state governments.
- v. *Congress' power under section 5 of the 14th Am.*
 - 1. Congress may not create new rights or expand the scope of rights. Congress may act only to prevent or remedy violations of rights recognized by the 14th and such laws must be **proportionate and congruent** to remedying constitutional violations.

b. Delegation of powers

- i. *No limit exists on Congress' ability to delegate legislative power.*
 - 1. **TIP:** a federal law is unconstitutional because of an excess of delegation of legislative power → always a WRONG answer.
- ii. *Legislative vetoes and line-item vetoes are unconstitutional.*
 - 1. For Congress to act, there always must be **bicameralism** (passage by both the House and the Senate) **and presentment** (giving the bill to the President and sign or veto). The President must sign or veto the bill in its entirety.
 - 2. A legislative veto is where Congress attempts to overturn an executive action without bicameralism and/or presentment.
 - 3. A line-item veto is where President attempts to veto part of the bill while signing the rest into law.
- iii. *Congress may not delegate executive power to itself or its officers.*

III. FEDERAL EXECUTIVE POWER

a. Foreign policy

- i. *Treaties*
 - 1. Agreements between the US and a foreign country that are negotiated by the President and are effective when ratified by the Senate.
 - a. Treaties prevail over conflicting state laws.
 - b. If a treaty conflicts with a federal statute, the one adopted last in time controls.
 - c. If a treaty conflicts with the US Constitution, it is invalid.
- ii. *Executive agreements*
 - 1. Agreement between the US and a foreign country that is effective when signed by the President and the head of the foreign nation.
 - a. No senate approval required.
 - 2. Can be used for any purpose.
 - a. Anything that can be done by a treaty can be done by an executive agreement.
 - 3. They prevail over conflicting state laws, but never over conflicting federal laws or the Constitution.

iii. *The President has broad powers as commander in chief to use American troops in foreign countries.*

- iv. **TIP:**
1. Best answer: political question.
 2. Second best answer: president wins.

	IS SENATE APPROVAL REQUIRED?	CONFLICTS WITH STATE LAW	CONFLICTS WITH FEDERAL STATUTE	CONFLICTS WITH CONSTITUTION
TREATIES	YES	TREATY CONTROLS	WHICHEVER WAS ADOPTED LAST IN TIME CONTROLS	CONSTITUTION CONTROLS
EXECUTIVE AGREEMENTS	NO	EXECUTIVE AGREEMENT CONTROLS	FEDERAL STATUTE CONTROLS	CONSTITUTION CONTROLS

b. Domestic affairs

i. The appointment and removal power

1. The appointment power

The President appoints ambassadors, federal judges and officers of the United States.

- i. Senate must confirm nomination for person to take office, but appointment power is solely with the president.
- b. Congress may vest appointment of inferior officers in the president, the heads of departments or the lower federal courts.
 - i. Inferior officers are those that can be fired by officers of the US.
- c. Congress may not give itself or its officers the appointment power.

2. The removal power

- a. **Rule:** Unless removal is limited by statute, the president may fire any executive branch officer.
 - i. For Congress to limit removal, it must be an office where independence from the President is desirable.
 - ii. Congress cannot prohibit removal; it can limit removal to where there is good cause.

ii. Impeachment and removal

1. The president, the vice president, federal judges and officers of the US can be impeached and removed from the office for treason, bribery, or for high crimes and misdemeanors.
 - a. Impeachment does not remove a person from office.
 - b. Impeachment by the House requires a majority vote; conviction in the Senate requires a 2/3 vote.

- iii. The President has absolute immunity to civil suits for money damages for any actions while in office. However, the president does not have immunity for actions that occurred prior to taking office.
- iv. The president has executive privilege for presidential papers and conversations, but such privilege must yield to other important gov't interests.
- v. The president has the power to pardon those accused or convicted of federal crimes.
 - 1. **Exception:** when there has been an impeachment. If a person is impeached by the House, there can never be a pardon for the offenses that led to the impeachment.
- vi. **TIPS:**
 - 1. President may pardon only as to federal crimes, NEVER as to STATE LAW crimes.
 - 2. President may only pardon as to criminal liability, NEVER as to CIVIL liability.

IV. FEDERALISM

a. Preemption (4-6 MBE)

- i. The Supremacy Clause of Art VI provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land.
- ii. Express preemption
 - 1. If a federal statute explicitly says that federal law is exclusive in a field, then state and local laws are preempted.
- iii. Implied preemption
 - 1. If federal and state laws are **mutually exclusive**, federal law preempts state law.
 - a. States may set environmental standards stricter than federal law unless Congress clearly prohibits this.
 - 2. If state law **impedes the achievement** of a federal objective, federal law preempts state law.
 - 3. If Congress **evidences a clear intent** to preempt state law, federal law preempts state law.

iv. States may not tax or regulate federal gov't activity (inter-governmental immunity).

- 1. Unconstitutional to pass a state tax out of the federal treasury.
- 2. Fact pattern
 - a. Mom and pop store privately owned that operated on federal land. May the state tax it? Yes, since the tax liability is owed by the private owners and not by the federal treasury.
- 3. Another fact pattern
 - a. Describes a store owned by the federal gov't that operates on an army base. State cannot tax that store.

b. DCC and privileges and immunities clause of Art IV (heavily tested)

i. Definitions

- 1. DCC (negative implications of the CC)
 - a. **Principle that state and local laws are unconstitutional if they place an undue burden on IC.**
 - b. **TIP:** the negative implication of the CC → if you see this as an answer, it refers to the DCC.
- 2. Privileges and immunities clause of Art IV

- a. *Provides that no state may deny citizens of other states the privileges and immunities it accords its own citizens.*
- b. **TIP:** applies ONLY when state is discriminating against out-of-staters.
- 3. Privileges or immunities clause of the 14th Am
 - a. *Always a wrong answer UNLESS question involves the right to travel.*
- ii. Does state law discriminate against out-of-staters?
 - 1. Analysis if the law does NOT discriminate:
 - a. *The privileges and immunities clause of Art IV does not apply.*
 - b. *If the law burdens IC, it violates the DCC if its burdens exceed its benefits.*
 - 2. Analysis if the law DOES discriminate against out-of-staters:
 - a. *If the law burdens IC, it violates the DCC unless it is necessary to achieve an important gov't purpose.*
 - i. **Exception 1:** Congressional approval
 - ii. **Exception 2:** the market participant exception. A state or local gov't may prefer its own citizens in receiving benefits from gov't programs or in dealing with government-owned businesses.
 - 1. Less tuition for in-staters and more tuition for out-of-staters. This is ok because in-staters have been paying taxes for much longer. It does not violate the DCC.
 - b. *If the law discriminates against out-of-staters with regard to their ability to earn their livelihood, it violates the privileges and immunities clause of Art IV unless it is necessary to achieve an important gov't purpose.*
 - i. The law must discriminate against out-of-staters.
 - ii. The discrimination must be with regard to civil liberties or important economic activities.
 - iii. Corporations and aliens cannot use the privileges and immunities clause.
 - iv. The discrimination must be necessary to achieve an important gov't purpose.

This state or local government's action DOES discriminate against out-of-staters	This state or local government's action DOES NOT discriminate against out-of-staters
Violates the DCC if it places a burden on IC unless it is necessary to achieve an important gov't purpose. Two exceptions: 1. Congressional approval of discrimination. 2. Market participant exception.	If the gov't is burdening IC, balance the benefit to the state against the burden on IC (if the benefit exceeds the burden, the law is upheld; if the burden exceeds the benefit, the law is struck down).
Violates the Privileges and Immunities Clause of Art IV if it discriminates against individuals with regard to important economic activities or civil liberties unless it is necessary to achieve an important gov't purpose.	Privileges and Immunities Clause of Art IV is inapplicable.

DORMANT COMMERCE CLAUSE <ul style="list-style-type: none"> • Does not require discrimination against out-of-staters in order to apply. • Requires a burden on IC. • Corporations and aliens <i>can</i> sue under it. 	PRIVILEGES AND IMMUNITIES CLAUSE <ul style="list-style-type: none"> • Requires discrimination against out-of-staters in order to apply. • Requires discrimination with regard to civil liberties or important economic activities.
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- Exceptions: congressional approval and the market participant exception

- Corporations and aliens *cannot* sue under it.
- No exceptions.

- c. State taxation of IC (rarely tested on the bar exam)
 - i. States may not use their tax systems to help in-state businesses.
 - ii. A state may only tax activities if there is a substantial nexus to the state.
 - iii. State taxation of interstate businesses must be fairly apportioned.
- d. Full faith and credit. Courts in one state must give full faith and credit to judgment of courts in another state, so long as:
 - i. The ct that rendered the judgment had jdx over the parties and the subject matter.
 - ii. The judgment was on the merits.
 - iii. The judgment is final.

V. THE STRUCTURE OF THE CONSTITUTION'S PROTECTION OF INDIVIDUAL LIBERTIES

a. Is there gov't action?

- i. The constitution applies only to gov't action. Private conduct need not comply with the Constitution.
- ii. **Congress, by statute, may apply constitutional norms to private conduct.**
 - 1. The 13th Am can be used to prohibit private race discrimination.
 - 2. The commerce power can be used to apply constitutional norms to private conduct.
 - 3. Congress cannot use section 5 of the 14th Am to regulate private behavior.
- iii. **Exceptions:** situations where private conduct must comply with the Constitution:
 - 1. *The public function exception*
 - a. *The Constitution applies if a private entity is performing a task traditionally, exclusively done by the government.*
 - 2. *The entanglement exception*
 - a. *The Constitution applies if the government affirmatively authorizes, encourages, or facilitates the constitutional activity.*
 - b. *Key examples:*
 - i. Courts cannot enforce racially restrictive covenants.
 - ii. There is state action when the government leases premises to a restaurant that racially discriminates.
 - iii. There is state action when a state provides books to schools that racially discriminate.
 - iv. There is no state action when a private school that is over 99% funded by the government fires a teacher because of her speech.
 - v. There is no state action when the NCAA orders the suspension of a basketball coach at a state university.
 - vi. There is state action when a private entity regulates interscholastic sports within a state.
 - vii. There is no state action when a private club with a liquor license from the state racially discriminates.

b. The application of the Bill of Rights

- i. The Bill of Rights applies directly only to the federal gov't.
- ii. The Bill of Rights is applied to state and local governments through its incorporation into the due process clause of the 14th Am.

1. **Except:**

- a. The Second Amendment right to bear arms.
- b. The Third Amendment right to not have a soldier quartered in a person's home.
- c. The Fifth Amendment right to grand jury indictment in criminal cases.
- d. The Seventh Amendment right to jury trial in civil cases.
- e. The Eighth Amendment right against excessive fines.

c. **Levels of scrutiny**

- i. **Rational basis test:** law upheld if rationally related to a legitimate gov't purpose.
 - 1. Rationally related means
 - 2. Legitimate *conceivable* purpose
 - 3. Burden of proof on challenger
- ii. **Intermediate scrutiny:** law upheld if substantially related to an important gov't purpose.
 - 1. Substantially related means
 - 2. Important *actual* purpose
 - 3. Burden of proof on gov't
- iii. **Strict scrutiny:** law upheld if necessary to achieve a compelling gov't purpose.
 - 1. Necessary means
 - 2. Compelling *actual* purpose
 - 3. Must ask whether this is least restrictive alternative
 - 4. Burden of proof on gov't

	Means?	Ends?	Least restrictive alternative analysis?	Burden of proof
Rational basis test	Rationally related	Legitimate conceivable purpose	No	Challenger
Intermediate scrutiny	Substantially related	Important actual purpose	No	Government
Strict scrutiny	Necessary	Compelling actual purpose	Yes	Government

IV. **DUE PROCESS**

a. **Procedural due process**

Has there been a deprivation of life, liberty, or property?

- 1. A deprivation of liberty occurs if there is the loss of a significant freedom provided by the Constitution or a statute.
 - a. **Ex:** except in an emergency, before an adult can be institutionalized, there must be notice and a hearing.
 - b. **Ex:** when it's a parent institutionalizing a child, there only has to be a screening by a neutral fact finder.
 - c. **Ex:** harm to reputation by itself is not a loss of liberty.
 - d. **Ex:** prisoners rarely have liberty interests.
- 2. A deprivation of property occurs if there is an entitlement and that entitlement is not fulfilled.
 - a. **TIP:** on every MBE, there is at least an answer that distinguishes between rights and privilege – always a WRONG answer.

- b. **An entitlement exists if there is a reasonable expectation to continue receipt of a benefit.**
- c. **Ex:** person promised job will be hers for a year. She gets fired a few months later. Person had a reasonable expectation that the job would be there for a year, so property was deprived when she was fired before the end of the year. Due process was required.
- 3. Government negligence is NOT sufficient for a deprivation of due process. Generally, there must be **intentional** government action or at least **reckless** action for liability to exist. However, in emergency situations the gov't is liable under due process only if its conduct **shocks the conscience**.
- 4. Generally, the government's failure to protect people from *privately* inflicted harms does not deny due process.
 - a. Only if a person is physically in gov't custody or if the gov't literally creates the danger does the gov't have any duty to provide protection.

ii. **What procedures are required?**

- 1. **TEST** → Balance:
 - a. The importance of the interest to the individual
 - b. The ability of additional procedures to increase the accuracy of the fact-finding
 - c. The government's interests
- 2. **Examples**
 - a. Before welfare benefits can be terminated, there must be notice and a hearing.
 - b. When social security disability benefits are terminated, there only has to be a post-termination hearing.
 - c. When a student is disciplined by a public school, there must be notice of the charges and an opportunity to explain.
 - d. Before a parent's rights to a child can be permanently terminated, there must be notice and a hearing.
 - e. Punitive damage awards require instructions to the jury and judicial review.
 - i. Grossly excessive punitive damages violate due process.
 - f. An American citizen apprehended in a foreign country and held as an enemy combatant must be given due process.
 - g. Except in urgent circumstances, pre-judgment attachment or government seizure of assets must be preceded by notice and a hearing.

Was the government deprived a person of life, liberty (a significant freedom secured by the Constitution or Statute), or property (an entitlement to a continued receipt of a benefit)?

YES	NO
What procedures must government supply? BALANCE: <ol style="list-style-type: none"> 1. Importance of the interest to the individual; 2. Ability of additional procedures to increase the accuracy of the fact finding; and 3. The government's interests. 	Government need not provide procedural due process.

b. Substantive due process

- i. Does gov't have an adequate reason for taking away a person's life, liberty, or property?
- ii. Constitution provides only minimal protection for economic liberties.
1. Only a RB test is used for laws affecting economic rights.
 2. **The takings clause** – the gov't may take private property for public use if it provides just compensation.
 - a. Is there a taking?
 - i. **Possessory taking** – gov't confiscation or physical occupation of property is a taking.
 - ii. **Regulatory taking** – gov't regulation is a taking if it leaves no reasonable economically viable use of the property.
 - b. Notes
 - i. Gov't conditions on development of property must be justified by a benefit that is roughly proportionate to the burden imposed; otherwise it is a taking.
 - ii. A property owner may bring a takings challenge to regulations that existed at the time the property was acquired.
 - iii. Temporarily denying an owner use of property is not a taking so long as the government's action is reasonable.
 - c. Is it for public use?
 - i. Virtually every taking will meet this requirement. A taking is for public use so long as the gov't acts out of a reasonable belief that the taking will benefit the public.
 - d. Is just compensation paid?
 - i. Measured in terms of the loss to the owner. The gain to the taker is irrelevant.
 3. **Contracts clause** (No state shall impair the obligations of contracts)
 - a. Applies only to state and local interference with already existing contracts.
 - i. Never applies to the federal government.
 - b. State or local interference with private Ks must meet IS.
 - i. Does the legislation substantially impair a party's rights under an existing K?
 - ii. If so, is the law a reasonably and narrowly tailored means of promoting an important and legitimate public interest?
 - c. State or local interference with government Ks must meet SS.
 - d. The ex post facto clause does not apply in civil cases.
 - i. Retroactive civil liability only need meet a RB test.
 - ii. A bill of attainder is a law that directs the punishment of a specific person or persons without a trial.
- iii. **Privacy is a fundamental right protected under substantive due process.**
1. The right to marry – FR.
 - a. Gov't interference must meet SS.
 2. The right to procreate
 3. The right to custody of one's children.
 4. The right to keep the family together.
 5. The right to control the upbringing of one's children.
 6. The right to purchase and use contraceptives.
 7. The right to abortion.

- a. Prior to viability, states may not prohibit abortions, but may regulate abortions so long as they do not create an *undue burden* on the ability to obtain abortions.
 - i. A 24-hr waiting period is not an undue burden.
 - ii. Requirement that abortion be performed by a licensed physician is not an undue burden.
 - iii. The prohibition of partial birth abortions is not an undue burden.
- b. After viability, states may prohibit abortions unless necessary to protect the woman's life or health.
- c. The government has no duty to subsidize abortions or provide abortions in public hospitals.
- d. **Spousal consent and notification laws** are unconstitutional.
- e. State may require **parental notice and/or consent** for an unmarried minor's abortion so long as it creates an alternative procedure where a minor can obtain an abortion by going before a judge who can approve the abortion by finding it would be in the minor's best interests or that she is mature enough to decide for herself.
- f. The right to privacy protects a right to engage in private consensual homosexual activity.
- g. **The right to refuse medical treatment**
 - i. Competent adults have a right to refuse medical treatment, even life-saving medical treatment.
 - ii. A state may require clear and convincing evidence that a person wanted treatment terminated before it is ended.
 - iii. A state may prevent family members from terminating treatment for another.
- h. There is no constitutional right to physician-assisted suicide.

Rights triggering STRICT SCRUTINY	Rights triggering UNDUE BURDEN test	Not a fundamental right (only RATIONAL BASIS review)	Level of scrutiny unknown
<ul style="list-style-type: none"> • Right to marry • Right to procreate • Right to custody of children • Right to keep family together • Right to control raising of children • Right to purchase and use contraceptives • Right to travel • Right to vote • Freedom of speech • Freedom of association • Free exercise of religion 	<ul style="list-style-type: none"> • Right to abortion 	<ul style="list-style-type: none"> • Right to practice a trade or profession • Right to physician-assisted suicide • Right to education 	<ul style="list-style-type: none"> • Right to engage in private consensual homosexual activity • Right to refuse medical treatments

VII. EQUAL PROTECTION

- a. An approach to equal protection questions
 - i. *What is the classification?*
 - ii. *What level of scrutiny should be applied?*
 - iii. *Does this law meet the level of scrutiny?*
- b. Constitutional provisions concerning equal protection
 - i. The EPC of the 14th Am applies only to state and local governments.
 1. **TIP:** the 14th Am NEVER applies to the federal gov't.
 - ii. EP is applied to the federal gov't through the DPC of the 5th Am.
- c. **Race and national origin classifications**
 - i. SS is used
 - ii. How is the existence of a racial classification proven?
 1. The classification exists on the face of the law.
 2. If the law is facially neutral, proving a racial classification requires demonstrating both *discriminatory impact AND discriminatory intent*.
 - a. **Ex:** discriminatory use of peremptory challenges based on race denies EP.
 - iii. **How should racial classifications benefiting minorities be treated?**
 1. SS is used
 2. Numerical set-asides require clear proof of past discrimination.
 3. Educational institutions may use race as one factor in admissions decisions to help minorities.
 4. Public school systems may not use race as a factor in assigning students to schools unless SS is met.
- d. **Gender classifications**
 - i. IS is used
 1. In addition, allowed only if it is an exceedingly persuasive justification.
 - ii. How is the existence of a gender classification proven?
 1. Classification exists on the face of the law.
 2. If the law is facially neutral, proving a gender classification requires demonstrating both *discriminatory impact AND discriminatory intent*.
 - a. **Ex:** discriminatory use of peremptory challenges based on gender denies equal protection.
 - iii. How should gender classifications benefiting women be treated?
 1. IS is used
 2. Gender classifications benefiting women that are based on role stereotypes will not be allowed.
 3. Gender classifications benefiting women that are designed to remedy past discrimination and differences in opportunity will be allowed.
- e. **Alienage classifications** (expect at least 1-2 questions about this)
 - i. Generally, SS is used
 - ii. Only a RB test is used for alienage classifications that concern self-government and the democratic process.
 1. Voting, serving on a jury, being a police officer, a teacher, or a probation officer.
 - iii. Only a RB test is used for Congressional discrimination against aliens.
 - iv. It appears that IS is used for discrimination against undocumented alien children.
 1. **Ex:** Law that said that children of citizens and documented aliens receive public education for free, but children of undocumented aliens must pay for it was held unconstitutional.
- f. **Discrimination against non-marital children**

- i. IS is used
- ii. Laws that deny a benefit to all non-marital children, but grant it to all marital children are unconstitutional.
- g. RB review is used for all other types of discrimination under the Constitution**
 - i. Age discrimination
 - ii. Disability discrimination
 - iii. Wealth discrimination
 - iv. Economic regulations
 - v. Sexual orientation discrimination
- h. Fundamental rights protected under EP**
 - i. The right to travel**
 - 1. Laws that prevent people from moving into a state must meet SS.
 - 2. Durational residency requirements must meet SS.
 - a. 50 days is the longest amount allowed for voting durational residency.
 - 3. Restrictions on foreign travel need meet only the RB test.
 - ii. The right to vote**
 - 1. Laws that deny some citizens the right to vote must meet SS.
 - a. ONLY one instance where SCt approved a property ownership requirement: water district election.
 - 2. One-person – one-vote must be met for all state and local elections.
 - 3. At-large elections are constitutional unless there is proof of a discriminatory purpose.
 - 4. The use of race in drawing election district lines must meet SS.
 - a. If gov uses race as a predominant factor in drawing up election district lines, the gov't must meet SS.
 - 5. Counting uncounted votes without standards in a presidential election violates EP.
 - iii. There is no fundamental right to education**

VIII. THE FIRST AMENDMENT

a. Free speech methodology

- i. Content-based v. content-neutral restriction**
 - 1. **Content-based restrictions on speech generally must meet SS.** Two types of content based laws:
 - a. Subject matter restrictions (application of the law depends on the topic of the message)
 - b. Viewpoint restrictions (application of the law depends on the ideology of the message)
 - 2. **Content-neutral laws burdening speech generally need only meet IS.**
- ii. Prior restraints (judicial order or an administrative system that stops speech before it occurs)**
 - 1. **Ct orders suppressing speech must meet SS.** Procedurally proper ct orders must be complied with until they are vacated or overturned. A person who violates a ct order is barred from later challenging it.
 - a. **TIP:** Gag orders on the press to prevent prejudicial pre-trial publicity are NOT allowed.
 - 2. The gov't can require a license for speech only if there is an **important reason for licensing** and clear criteria leaving **almost no discretion** to the licensing authority. Licensing schemes must contain procedural safeguards such as prompt determination of requests for licenses and judicial review.
- iii. Vagueness and overbreadth**

1. Vagueness

- a. A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is allowed.

2. Overbreadth

- a. A law is unconstitutionally overbroad if it regulates substantially more speech than the constitution allows to be regulated.

3. Fighting words laws are unconstitutionally vague and overbroad.

- a. **TIP:** Law protecting fighting words is unconstitutionally vague and broad – always pick this answer if fact pattern has sympathetic victim and nasty speaker.

iv. Symbolic speech

1. *The gov't can regulate conduct that communicates if it has an important interest unrelated to suppression of the message and if the impact on communication is no greater than necessary to achieve the government's purpose.*

- 2. **Ex:** flag burning is constitutionally protected speech
- 3. **Ex:** draft card burning is NOT protected speech.
- 4. **Ex:** nude dancing is NOT protected speech.
- 5. **Ex:** burning a cross is protected speech unless done with intent to threaten.
- 6. **Ex:** contribution limits in election campaigns are constitutional, but expenditure limits are unconstitutional.

v. Anonymous speech is protected

b. What speech is unprotected or less protected by the First Amendment?

i. Incitement of illegal activity

1. *The gov't may punish speech if there is a substantial likelihood of imminent illegal activity and if the speech is directed to causing imminent illegality.*

ii. Obscenity and sexually-oriented speech (favorite MBE)

1. TEST

- a. The material must appeal to the **prurient interest**
- b. The material must be **patently offensive** under the law prohibiting obscenity
- c. Taken as a whole, the material must **lack serious redeeming artistic, literary, political or scientific value**
- 2. The gov't may use zoning ordinances to regulate the location of adult bookstores and movie theaters.
- 3. Child pornography may be completely banned, even if not obscene (to be child pornography, children must be used in production of the material).
- 4. The gov't may not punish private possession of obscene materials; but the gov't may punish private possession of child pornography.
- 5. The gov't may seize the assets of businesses convicted of violating obscenity laws.

6. Profane and indecent speech is generally protected by the First Amendment

a. **Exception:** over the broadcast media

- i. Less discretion with cable media because people choose to bring cable into their homes.

b. **Exception:** in schools

iii. Commercial speech

1. *Advertising for illegal activity, and false and deceptive ads are not protected by the First Amendment.*

2. **True commercial speech that inherently risks deception can be prohibited.**
 - a. The gov't may prevent professionals from advertising or practicing under a trade name.
 - b. The gov't may prohibit attorney, **in-person** solicitation of clients for profit.
 - i. Unless lawyer is offering free representation 1st Am also protects right of lawyer to send letters to clients.
 - c. The gov't may NOT prohibit accountants from in-person solicitation of clients for profit.
3. **Other commercial speech can be regulated if 1st Am met.**
4. **Gov't regulation of commercial speech must be narrowly tailored, but it does not need to be the least restrictive alternative.**

iv. **Defamation**

1. If the P is a public official or running for public office, P can recover for defamation by proving **FALSITY** of the statement and actual **MALICE**.
2. If P is a public figure, P can recover for defamation by proving **FALSITY** of the statement and actual **MALICE**.
3. If P is a private figure and the matter is of public concern, that state may allow P to recover for defamation by proving falsity and negligence by D. However, P may recover presumed or punitive damages only by showing actual **MALICE**.
4. If P is a private figure and the matter is **NOT** of public concern, P can recover presumed or punitive damages without showing actual malice.

PLAINTIFF	LIABILITY STANDARD	DAMAGES	BURDEN OF PROOF
Public official	Actual malice	Compensatory presumed/punitive	P must prove falsity
Public figure	Actual malice	Compensatory presumed/punitive	P must prove falsity
Private figure, matter of public concern	Negligence and actual injury	Compensatory for actual injury; presumed or punitive damages require actual malice	P must prove falsity
Private figure, matter of private concern	Unclear - negligence	Compensatory for actual injury; presumed or punitive damages do not require actual malice	Unclear – burden on D to prove truth

5. **Privacy**

- a. The gov't may not create liability for the truthful reporting of information that was lawfully obtained from the gov't.
- b. Liability is not allowed if the media broadcasts a tape of an illegally intercepted call, if the media did not participate in the illegality and it involves a matter of public importance.
- c. The gov't may limit its dissemination of info to protect privacy.
6. Speech by gov't employees on the job in the performance of their duties is not protected by the 1st Am.
7. Other governmental restrictions based on the content of speech must meet SS.

c. What places are available for speech?

- i. **Public forums** (gov't properties that the gov't is constitutionally required to make available for speech)
 1. **Regulations must be subject matter and viewpoint neutral, or if not, SS must be met.**
 2. Regulations must be a time, place, or manner regulation that serves an important gov't purpose and leaves open adequate alternative places for communication.
 3. Gov't regulation of public forums need not use the least restrictive alternative.
 4. City officials cannot have discretion to set permit fees for public demonstrations.
- ii. **Limited public forums** (gov't properties that the gov't could close to speech, but chooses to open to speech).
 1. **The same rules apply as for public forums.**
 2. **Ex:** Schools are non-public forums on nights and weekends, but if they choose to open for speech, they are limited public forums on nights and weekends.
- iii. **Non-public forums** (gov't properties that the gov't constitutionally can and does close to speech)
 1. **The gov't can regulate speech in non-public forums so long as the regulation is reasonable and viewpoint neutral.**
 2. **Ex:**
 - a. Military bases
 - b. Areas outside prisons and jails
 - c. Advertising space on city buses
 - d. Sidewalks on post office property
 - e. **Airports**
 - i. **Gov't can prohibit solicitation of money, but CANNOT prohibit distribution of literature.**
- iv. There is no 1st Am right of access to private property for speech purposes.
 1. This includes privately-owned shopping centers.

	Subject matter neutral?	Viewpoint neutral?	Method of regulation allowed?	Interest required?
Public forums (sidewalks, parks)	Yes	Yes	Time, place, or manner	Important
Limited public forums (non-public forums that gov't opens to speech)	Yes	Yes	Time, place, or manner	Important
Non-public forums (military bases, airports)	No	Yes	Reasonable	Legitimate
Private property	NO 1 ST AMENDMENT	RIGHT TO USE	PRIVATE PROPERTY	FOR SPEECH PURPOSES

d. Freedom of association

- i. **Laws that prohibit or punish group membership must meet SS.** To punish membership in a group, it must be proven that the person:

1. Actively affiliated with the group;
 2. Knowing of its illegal activities; and
 3. With the specific intent of furthering those illegal activities.
- ii. **Laws that require disclosure of group membership, where such disclosure would chill association, must meet SS.**
- iii. Laws that prohibit a group from discriminating are constitutional unless they interfere with intimate association or expressive activity.

e. Freedom of religion

i. The free exercise clause

1. The free exercise clause cannot be used to challenge a neutral law of general applicability (tested more often than the other).
2. The gov't may NOT deny benefits to individuals who quit their jobs for religious reasons.

ii. The establishment clause

1. TEST

- a. There must be a **secular purpose** for the law
- b. The **effect** must be neither to advance nor inhibit religion
- c. There must not be **excessive entanglement** with religion

2. **The gov't cannot discriminate against religious speech or among religions unless SS is met.**

3. Gov't sponsored religious activity in public schools is unconstitutional. But religious student and community groups must have the same access to school facilities as non-religious groups.

- a. School prayers are not allowed. Clergy delivered school prayers at public school graduations are not allowed. A moment of silent prayer is not allowed.

4. The gov't may give assistance to parochial schools, so long as it is not used for religious instruction. The gov't may provide parents vouchers which they use in parochial schools.

<u>Congress</u>	<u>President or federal executive branch</u>	<u>Federal courts</u>	<u>State/local government</u>	<u>Private (non-government actor)</u>
The issue is either or both: 1. Does Congress have the authority to act? 2. Has Congress violated a limit on its power?	The issue is either or both: 1. Has the President/executive branch exceeded the scope of executive powers? 2. Has the President/executive branch violated a limit	The issue is: Does the federal ct have the authority to hear the case?	The issue is: Has the state/local gov't violated a limit on its power?	The issues are: 1. Is there state action? and, if so, 2. Does it violate the Constitution?

	on gov't power?			
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