



CONSTITUTIONAL LAW

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CONSTITUTIONAL LAW

PART ONE: POWERS OF THE FEDERAL GOVERNMENT

I. THE JUDICIAL POWER

A. ARTICLE III

The federal government is a government of limited powers, which means that for federal action to be legitimate, it must be authorized. The Constitution is the instrument that authorizes the federal government to act. Thus, whenever a question involves action by an entity of the federal government, the action will be valid only if it is authorized by the Constitution. The Constitution authorizes a federal court system in Article III, which provides that federal courts shall have judicial power over all “*cases and controversies*”:

1. Arising under the Constitution, laws, or treaties of the United States;
2. Of admiralty and maritime jurisdiction;
3. In which the United States is a party;
4. Between two or more states;
5. Between a state and citizens of another state;
6. Between citizens of different states;
7. Between citizens of the same state claiming lands under grants of different states; and
8. Between a state or citizens thereof and foreign states, citizens, or subjects.

B. POWER OF JUDICIAL REVIEW

1. Review of Other Branches of Federal Government

The Constitution does not explicitly state that the Supreme Court may determine the constitutionality of acts of other branches of government. However, judicial review of other branches of the federal government was established in *Marbury v. Madison*, 5 U.S. 137 (1803) (per Marshall, C.J.); the Constitution is “law” and it is the province and duty of the judiciary to declare what the law is.

a. Separation of Powers and Finality of Court Decisions

The Constitution separates governmental powers among the branches of government. This separation of powers doctrine prohibits the legislature from interfering with the courts’ *final* judgments. However, Congress may change federal statutes and may direct federal courts to apply those changes in all cases in which a final judgment has not been rendered.

Example: The Supreme Court inferred a limitations period under an ambiguous federal securities law. Because new Supreme Court rulings generally apply to all pending cases, the limitations period imposed by the Court resulted in the dismissal of many pending cases as time-barred.

Congress amended the securities law to provide (i) a different limitations period and (ii) a special motion for reinstating the cases dismissed as time-barred by the Supreme Court's ruling. Because the dismissed cases were final judgments, the statute providing for the reinstatement violated the separation of powers doctrine under the Constitution. [Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)]

2. Federal Review of State Acts

Federal review of state acts (executive, legislative, or judicial) was established by the Marshall Court in a series of decisions. Clear basis exists here in the Supremacy Clause of Article VI, which states that the Constitution, Laws, and Treaties of the United States take precedence over state laws and that the judges of the state courts must follow federal law, anything in the constitution or laws of any state to the contrary notwithstanding. [Fletcher v. Peck, 10 U.S. 87 (1810)]

C. FEDERAL COURTS

Only the actions of Article III courts are the subject of our outline, but you should know that there are two types of federal courts.

1. Article III Courts

Article III courts are those established by Congress pursuant to the provisions of Article III, Section 1. Congress has power to delineate the jurisdictional limits, both original and appellate, of these courts, although it is bound by the standards of judicial power set forth in Article III as to subject matter, parties, and the requirement of "case or controversy." Thus, Congress cannot require these courts to render advisory opinions or perform administrative or nonjudicial functions.

2. Article I Courts

Congress has created certain other courts, however, by way of implementing its various legislative powers; e.g., United States Tax Court, courts of the District of Columbia. Judges of such Article I courts do not have life tenure or protection from salary decrease as do Article III court judges. Article I courts are sometimes vested with *administrative as well as judicial* functions, and the congressional power to create such "hybrid" courts has been sustained by the Supreme Court. [Glidden v. Zdanok, 370 U.S. 530 (1962)]

a. Limitation

Congress may not take cases of the type traditionally heard by Article III courts and assign jurisdiction over them to Article I courts. [Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)—broad grant of jurisdiction to bankruptcy courts, including jurisdiction over contract claims, violates Article III]

D. JURISDICTION OF THE SUPREME COURT

1. Original (Trial) Jurisdiction

Under Article III, Section 2, the Supreme Court has original jurisdiction "in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." This provision is self-executing: Congress may *neither restrict nor enlarge* the Supreme Court's original jurisdiction, but Congress may give concurrent jurisdiction to lower federal courts and has done so regarding all cases except those between states.

2. Appellate Jurisdiction

Article III, Section 2 further provides that “in all other Cases before mentioned [i.e., arising under the Constitution, Act of Congress, or treaty], the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

a. Statutory Application of Appellate Jurisdiction

Congress has provided two methods for invoking Supreme Court appellate jurisdiction: **appeal** (where jurisdiction is mandatory), and **certiorari** (where jurisdiction is within the Court’s discretion). Very few cases fall within the Court’s mandatory appeal jurisdiction; thus, appellate jurisdiction is almost completely discretionary.

1) Writ of Certiorari (Discretionary)

The Supreme Court has complete discretion to hear cases that come to it by writ of certiorari. A case will be heard if four justices agree to hear it. The following cases may be heard by certiorari:

- a) Cases from the **highest state courts** where (i) the constitutionality of a federal statute, federal treaty, or state statute is called into question; or (ii) a state statute allegedly violates federal law [28 U.S.C. §1257]; and
- b) All cases from **federal courts of appeals** [28 U.S.C. §1254].

2) Appeal (Mandatory)

The Supreme Court must hear those few cases that come to it by appeal. Appeal is available only as to decisions made by three-judge federal district court panels that grant or deny injunctive relief. [28 U.S.C. §1253]

b. Limitations on Statutory Regulation

Ex parte McCordle, 74 U.S. 506 (1868), has been read as giving Congress full power to regulate and limit the Supreme Court’s appellate jurisdiction. However, **possible** limitations on such congressional power have been suggested:

- 1) Congress may eliminate specific avenues for Supreme Court review as long as it does not eliminate all avenues. For example, in *McCordle*, two statutes had allowed the Supreme Court to grant habeas corpus to federal prisoners. The Supreme Court upheld the constitutionality of the repeal of one of the statutes because the other statute remained as an avenue for Supreme Court habeas corpus review.
- 2) Although Congress may eliminate Supreme Court review of certain cases within the federal judicial power, it must permit jurisdiction to remain in **some** lower federal court.
- 3) If Congress were to deny **all** Supreme Court review of an alleged violation of constitutional rights—or go even further and deny a hearing before any federal judge on such a claim—this would violate due process of law.

E. CONSTITUTIONAL AND SELF-IMPOSED LIMITATIONS ON EXERCISE OF FEDERAL JURISDICTION—POLICY OF “STRICT NECESSITY”

Even if a federal court has jurisdiction over the subject matter of a case, it still might refuse to

hear the case. Whether the court will hear the case (i.e., whether the case is justiciable) depends on whether a “case or controversy” is involved, and on whether other limitations on jurisdiction are present.

1. No Advisory Opinions

The Supreme Court’s interpretation of the “case and controversy” requirement in Article III bars rendition of “advisory” opinions. Thus, federal courts will not render decisions in *moot* cases, *collusive* suits, or cases involving challenges to governmental legislation or policy whose enforcement is neither actual nor threatened.

a. Compare—Declaratory Judgments

Federal courts can hear actions for declaratory relief. A case or controversy will exist if there is an actual dispute between parties having adverse legal interest. Complainants must show that they have engaged in (or wish to engage in) specific conduct and that the challenged action poses a *real and immediate danger* to their interests. However, the federal courts will not determine the constitutionality of a statute if it has never been enforced and there is no real fear that it ever will be. [Poe v. Ullman, 367 U.S. 497 (1961)—anticontraceptive law not enforced for 80 years despite open public sales]

2. Ripeness—Immediate Threat of Harm

A plaintiff generally is not entitled to review of a state law before it is enforced (i.e., may not obtain a declaratory judgment). Thus, a federal court will not hear a case unless the plaintiff has been harmed or there is an immediate threat of harm.

3. Mootness

A federal court will not hear a case that has become moot; a *real, live controversy* must exist *at all stages of review*, not merely when the complaint is filed. [See, e.g., De Funis v. Odegaard, 416 U.S. 312 (1974)—dismissing as moot a white law student’s challenge to state’s affirmative action program, since the student, although originally passed over for minority applicants with allegedly poorer records, had been admitted to law school while litigation was pending, was about to graduate by the time the case reached the Supreme Court, and would receive the same law degree whether or not the affirmative action program was invalidated]

a. Exception—Capable of Repetition But Evading Review

Where there is a reasonable expectation that the same complaining party will be subjected to the same action again and would again be unable to resolve the issue because of the short duration of the action (i.e., where the controversy is capable of repetition yet evading review), the controversy will not be deemed moot. [See Weinstein v. Bradford, 423 U.S. 147 (1975)]

Examples: 1) Issue concerns events of short duration (e.g., pregnancy, elections, divorce actions); and

2) Defendant voluntarily stops the offending practice, but is free to resume it.

b. Class Actions

A class representative may continue to pursue a class action even though the

representative's controversy has become moot, as long as the claims of others in the class are still viable. [United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)]

c. Distinguish Ripeness

Ripeness and mootness are related concepts in that the court will not hear a case unless there is a live controversy. Ripeness bars consideration of claims *before* they have been developed; mootness bars their consideration *after* they have been resolved.

4. Standing

The Supreme Court will not decide a constitutional challenge to a government action unless the person who is challenging the government action has “standing” to raise the constitutional issue. A person has standing only if she can demonstrate a concrete stake in the outcome of the controversy.

a. Components

A plaintiff will be able to show a sufficient stake in the controversy only if she can show an *injury in fact*—caused by the government—that will be *remedied* by a decision in her favor (i.e., causation and redressability).

1) Injury

To have standing, a person must be able to assert that she is injured by a government action or that the government has made a clear threat to cause injury to her if she fails to comply with a government law, regulation, or order. Some *specific injury* must be alleged, and it *must be more* than the merely theoretical injury that all persons suffer by seeing their government engage in unconstitutional actions.

Example: A Communist Party member would have standing to challenge a statute making it a crime to be a member of the Communist Party because the member's freedom of association is directly infringed, but a non-Party member would have no standing.

a) Injury Need Not Be Economic

The injury does not always have to be economic. In some cases, the Court has found that an individual is harmed because the alleged illegal act or unconstitutional action has an impact on the person's well-being.

Example: Law students were allowed to challenge an Interstate Commerce Commission rate-setting policy on the ground that such policies discouraged recycling and thereby diminished the quality of each student's physical environment. If the ICC rate-setting policy violated congressional statutes, the elimination of those rate-setting policies would have an impact on the students' physical environment. [United States v. SCRAP, 412 U.S. 669 (1973)]

2) Causation

There must be a causal connection between the injury and the conduct complained of—i.e., the injury must be traceable to the challenged conduct of the defendant and not be attributable to some independent third party not before the court.

Example: Plaintiffs claiming that a municipality's zoning policies prevented low income persons from finding housing in the municipality were denied standing because they failed to show a substantial probability that they would be able to afford housing in the municipality even absent the zoning policies. [Warth v. Seldin, 422 U.S. 490 (1975)]

3) Redressability

In determining whether a litigant has a sufficient injury to establish standing, courts ask whether a ruling favorable to the litigant would eliminate the harm to him. If a court order declaring a government action to be illegal or unconstitutional (and ending that government action) would not eliminate the harm to the litigant, then that individual does not have the type of specific injury that would grant him standing to challenge the government action.

Examples: 1) The Supreme Court held that mothers do not have standing to challenge the government's refusal to enforce criminal laws that would require the fathers of their children to pay child support. The enforcement of the criminal laws against a father who is guilty of nonsupport would not necessarily result in the father's providing support to the mother and her children.

2) Indigents have no standing to challenge an Internal Revenue Service policy that allows hospitals to receive favorable tax treatment even though they refuse to provide free or subsidized care for indigents. The indigents could not demonstrate that a different IRS policy would cause hospitals to provide them with free care.

4) Required at All Stages

Standing must be met at all stages of litigation, including on appeal. [Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)]

Example: A district court held unconstitutional a state constitutional amendment that defined marriage as a union between a man and a woman. After trial, the court enjoined state officials from enforcing the provision, and the state officials elected not to appeal. The proponents of the state constitutional amendment sought to appeal. Since the proponents were not ordered to do or refrain from doing anything, they have no injury other than a generalized grievance in vindicating the validity of a generally applicable state law. Such an interest does not give the proponents a concrete stake in the outcome. Therefore, they lack standing to bring the appeal. [Hollingsworth v. Perry, *supra*]

b. Common Standing Issues

1) Congressional Conferral of Standing

Congress has no power to completely eliminate the case or controversy requirement, because the requirement is based in the Constitution. [See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996)]

However, a federal statute may create new interests, injury to which may be sufficient for standing.

2) Standing to Enforce Government Statutes—Zone of Interests

In some instances a plaintiff may bring suit to force government actors to conform their conduct to the requirements of a specific federal statute. Even in such cases, the person must have an “injury in fact.” Often, the Court asks whether the injury caused to the individual or group seeking to enforce the federal statute is within the “zone of interests” that Congress meant to protect with the statute. If Congress intended the statute to protect such persons, and intended to allow private persons to bring federal court actions to enforce the statute, the courts are likely to be lenient in granting standing to those persons.

Example: Persons who sold data processing services to private businesses had standing to challenge a ruling by the Comptroller of Currency that allowed national banks to make data processing services available to other banks and bank customers. These plaintiffs had an injury in fact because the Comptroller’s ruling would hurt their future profits. The plaintiffs were determined to be within the “zone of interests” protected by the federal statutes limiting the authority of the Comptroller and national banks.

3) Standing to Assert Rights of Others

To have standing, the claimant must have suffered or may presently suffer a direct impairment of his *own* constitutional rights. A plaintiff may, however, *assert third-party rights* where he himself has suffered injury and:

- (i) *Third parties find it difficult to assert their own rights* (the NAACP was permitted to assert the freedom of association rights of its members in attacking a state law requiring disclosure of membership lists because its members could not file suit without disclosing their identities) [NAACP v. Alabama, 357 U.S. 449 (1958)]; or
- (ii) *The injury suffered by the plaintiff adversely affects his relationship with third parties*, resulting in an indirect violation of their rights (a vendor of beer was granted standing to assert the constitutional rights of males under 21 in attacking a state law prohibiting sale of beer to them but not to females under 21) [Craig v. Boren, 429 U.S. 190 (1976)].

a) Limitation—Family Law Issues

A divorced father sought to challenge on First Amendment grounds, on behalf of his daughter, the saying of the Pledge of Allegiance at her public school because the Pledge includes the words “under God.” A state court order gave the girl’s mother final authority over decisions regarding the girl’s health, education, and welfare. The mother objected to the lawsuit, and neither the mother nor the daughter objected to the Pledge. The Court held that the father lacked standing to bring the claim. [Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)]

4) Standing of Organizations

An organization (unincorporated association, corporation, union, etc.) has standing to challenge government action that causes injury to *the organization itself*. An organization also has standing to challenge government actions that cause an injury in fact to *its members* if the organization can demonstrate the following three facts:

- (i) There must be an *injury in fact to the members* of the organization that would give individual members a right to sue on their own behalf;
- (ii) The injury to the members must be *related to the organization's purpose*; *and*
- (iii) *Neither the nature of the claim nor the relief requested requires participation of the individual members* in the lawsuit.

[Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)]

Example: The All Dentist Association (“ADA”) is composed entirely of dentists; its purpose is to promote the professional well-being of dentists. Assume that most ADA members make between \$100,000 and \$200,000 per year. The ADA would not have standing to challenge a change in the federal income tax rates that will disadvantage all persons making between \$100,000 and \$200,000 on the basis that the statute deprives all persons (in the income category) of property without due process, because that claim is not related to the organization’s purpose—the representation of dentists as such. But the ADA probably could bring a lawsuit challenging a state regulation of dental practices if the regulation injures ADA members, as long as the injury to ADA members does not vary.

5) No Citizenship Standing

As stated above, if an injury is too generalized, there can be no standing. Thus, people have no standing merely “as citizens” to claim that government action violates federal law or the Constitution. Congress cannot change this rule by adopting a statute that would allow persons to have standing merely as citizens (where they otherwise have no direct, personal claim) to bring suit to force the government to observe the Constitution or federal laws. [Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)]

a) Compare—Tenth Amendment Violation Claims

A person can have standing to allege that federal action violates the Tenth Amendment by interfering with the powers reserved to the states, assuming the person can show injury in fact and redressability. [Bond v. United States, 131 S. Ct. 2355 (2011)]

6) Taxpayer Standing

a) Generally No Standing to Litigate Government Expenditures

A taxpayer, of course, has standing to litigate her tax bill (e.g., whether she

really owes X dollars). However, people generally do not have standing as taxpayers to challenge the way tax dollars are spent by the state or federal government, because their interest is too remote. Nor do taxpayers have standing to challenge a law granting tax credits to persons who contribute to organizations that provide scholarships to students attending private schools. [Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436 (2011)] Note that such tax credits do not fall under the Establishment Clause exception below—even to the extent that the credits are available for contributions used for religious school scholarships—because the program does not involve the transfer of government funds; thus, there is no injury for standing purposes.

b) Exception—Congressional Measures Under Taxing and Spending Power that Violate Establishment Clause

There is an exception to the general rule: A federal taxpayer has standing to challenge federal appropriation and spending measures if she can establish that the challenged measure:

- (i) Was enacted under *Congress’s* taxing and spending power (*see* II.A.2., 3., *infra*); and
- (ii) Exceeds some specific limitation on the power.

To date, the only limit that the Supreme Court has found on the taxing power is the Establishment Clause. (*See* XXII.D., *infra*.)

Note: The measure challenged must arise under the taxing and spending power. Thus, there was no standing to challenge a federal government transfer of surplus property under the Property Clause that allegedly violated the Establishment Clause. [Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)] Neither was there standing to challenge expenditures of executive branch general funds that allegedly violated the Establishment Clause. [Hein v. Freedom From Religion Foundation, 551 U.S. 587 (2007)]

7) Legislators’ Standing

Legislators may have standing to challenge the constitutionality of government action if they have a sufficient “personal stake” in the dispute and suffer sufficient “concrete injury.” [Raines v. Byrd, 521 U.S. 811 (1997)]

Example: A state’s lieutenant governor cast the deciding vote to break a tie in the state senate. Legislators who had voted against the prevailing position had standing to challenge the right of the lieutenant governor to vote because his vote completely nullified theirs and caused the specific legislative enactment to go into effect. [Coleman v. Miller, 307 U.S. 433 (1939)]

Compare: Members of Congress had *no* standing to challenge the Line Item Veto Act authorizing the President to cancel (veto) certain spending

and tax law measures that are part of a bill that he signs into law.

Rationale: Rather than causing a “personal” and “concrete” injury, the challenged statute caused only a type of “institutional” injury to all members of Congress equally. [Raines v. Byrd, *supra*]

8) Assignee Standing

An assignee of a legal claim has standing even if the assignee has agreed to remit any proceeds recovered from the litigation back to the assignor, if this is done pursuant to an ordinary business agreement made in good faith. [Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269 (2008)—a paid collection agent has standing to bring the claims of an assignor even though the collection agent will submit any recovery back to the assignor]

5. Adequate and Independent State Grounds

The Supreme Court will hear a case from a state court only if the state court judgment turned on federal grounds. The Court will refuse jurisdiction if it finds *adequate and independent* nonfederal grounds to support the state decision.

a. “Adequate”

The nonfederal grounds must be “adequate” in that they are fully dispositive of the case, so that even if the federal grounds are wrongly decided, it would not affect the outcome of the case. Where that is the case, the Supreme Court’s review of the federal law grounds for the state court’s decision would have no effect on the judgment rendered by the state court, so that the Supreme Court, in effect, would be rendering an advisory opinion.

b. “Independent”

The nonfederal grounds must also be “independent”: If the state court’s interpretation of its state provision was based on federal case law interpreting an identical federal provision, the state law grounds for the decision are not independent.

c. Where Basis Is Unclear

If it is unclear whether the state court decision turned on federal or state law, the Supreme Court may dismiss the case or remand it to the state court for clarification. However, the Court will usually assume that there is no adequate state ground unless the state court expressly stated that its decision rests on state law.

Example: When a state supreme court relied on *Terry v. Ohio* and other federal cases to suppress evidence from a search and did not cite a single state case to support its holding, although it referred to its state constitution in the opinion, the Supreme Court concluded that the state court had rested its decision on federal law, and therefore refused to dismiss the appeal based on adequate and independent state grounds. [See *Michigan v. Long*, 463 U.S. 1032 (1983)]

6. Abstention

a. Unsettled State Law

When a federal constitutional claim is premised on an *unsettled question of state law*,

the federal court should stay its hand (“abstain” temporarily), so as to give state courts a chance to settle the underlying state law question and thus potentially avoid the needless resolution of a federal constitutional issue. [Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941)]

b. Pending State Proceedings

Generally, federal courts will *not enjoin pending state criminal proceedings*. [Younger v. Harris, 401 U.S. 37 (1971)]

1) Pending

State court proceedings are pending if begun before the federal court begins proceedings on the merits. Hence, the order of filing charges is irrelevant. “Proceedings of substance” must occur first in federal court before an injunction will issue. [Hicks v. Miranda, 422 U.S. 332 (1975)]

2) Civil and Administrative Proceedings

Federal courts should abstain from enjoining pending state administrative or civil proceedings when those proceedings involve an important state interest.

Examples: 1) A federal court should not enjoin a pending state civil action to remove a child from the child’s parents due to alleged child abuse.

2) A federal court should not enjoin: (i) a state court order holding a person or corporation in contempt for failing to pay a civil judgment; or (ii) a state court judgment that permits a plaintiff to execute a lien against a defendant’s property. [Judice v. Vail, 430 U.S. 327 (1977); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)]

3) Exception

An order enjoining state proceedings will be issued in cases of *proven harassment* or *prosecutions taken in bad faith* (without hope of a valid conviction).

7. Political Questions

The Court will not decide political questions.

a. Definition

Political questions are:

- (i) Those issues committed by the Constitution to another branch of government; or
- (ii) Those inherently incapable of resolution and enforcement by the judicial process.

Examples: Political questions include:

1) Questions regarding the conduct of foreign relations or issues as to when hostilities have stopped;

2) Questions relating to which group of delegates should be seated at the Democratic National Convention [O’Brien v. Brown, 409 U.S. 1 (1972)];

- 3) The procedures used by the Senate to “try” impeachments (e.g., the Court refused to rule on the constitutionality of the Senate’s delegation of the duty to take evidence and testimony to a committee of senators prior to the Senate deciding whether to vote for conviction on an impeachment of a federal judge) [Nixon v. United States, 506 U.S. 224 (1993)];
- 4) What constitutes a “republican form of government” guaranteed to the state by Article IV, Section 4 [Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912)];
- 5) Whether the number of votes a candidate for Congress received is sufficient to elect him [Roudebush v. Hartke, 405 U.S. 15 (1972)]; and
- 6) Questions regarding partisan legislative reapportionment (i.e., partisan gerrymandering)—these are effectively nonjusticiable [*see* League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006)].

b. Compare—“Nonpolitical Controversy”

Presidential papers and communications are generally considered to be privileged and protected against disclosure in the exercise of the executive power. But where these documents are necessary to the continuation of criminal proceedings, the question of production is *justiciable and not political*. [United States v. Nixon, 418 U.S. 683 (1974)]

8. Eleventh Amendment Limits on Federal Courts

The Eleventh Amendment is a jurisdictional bar that modifies the judicial power by prohibiting a federal court from hearing a private party’s or foreign government’s claims against a state government. [*See* Hans v. Louisiana, 134 U.S. 1 (1890)]

a. What Is Barred?

The Eleventh Amendment’s jurisdictional bar extends to the following:

- (i) Actions against state governments *for damages*;
- (ii) Actions against state governments for injunctive or declaratory relief *where the state is named as a party*;
- (iii) Actions against state government officers where the effect of the suit will be that *retroactive damages* will be paid from the state treasury or where the action is the functional equivalent of a *quiet title action* that would divest the state of ownership of land; and
- (iv) Actions against state government officers *for violating state law*.

1) Compare—Sovereign Immunity

The Court has also held that the following are barred by the doctrine of *sovereign immunity*:

- a) Suits against a state government in state court, even on federal claims, without the defendant state’s consent [Alden v. Maine, 527 U.S. 706]

(1999)—provision in federal Fair Labor Standards Act creating a private cause of action in state courts against state employers who violate the Act [violates sovereign immunity]; and

- b) Adjudicative actions against states and state agencies before federal administrative agencies [Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002)].

b. What Is Not Barred?

1) Actions Against Local Governments

The Eleventh Amendment protects only state governments. Local governments (e.g., cities or counties) are not protected.

2) Actions by the United States Government or Other State Governments

Actions by the United States Government or other state governments are not barred.

3) Bankruptcy Proceedings

The Eleventh Amendment does not apply to federal laws that are exercises of Congress's Article I power to create bankruptcy laws, and thus does not bar actions of the United States bankruptcy courts that have a direct impact on state finances. [Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004); Central Virginia Community College v. Katz, 546 U.S. 356 (2006)]

c. Exceptions to Eleventh Amendment

1) Certain Actions Against State Officers

The Supreme Court allows the following actions to be brought against *state officials* despite the Eleventh Amendment:

a) Actions Against State Officers for Injunctions

A federal court may enjoin a state officer to refrain from future actions that violate federal law or to take prospective actions to comply with constitutional mandates. [*Ex parte Young*, 209 U.S. 123 (1908)]

b) Actions Against State Officers for Monetary Damages from Officer

A federal court may hear an action for damages against a state officer for violations of *federal law if* the monetary damages are to be paid out of the officer's own pocket. *Rationale*: By acting outside the scope of federal law, the officer is stripped of his representative capacity—the action is not one against a state, but rather is against an individual.

c) Actions Against State Officers for Prospective Payments from State

A federal court may hear an action for damages against a state officer where the effect of the action will be to force the state to pay money in the future to comply with the court order. [*Ex parte Young, supra*] However, federal court jurisdiction is barred if the action will result in retroactive damages to be paid from the state treasury. [Edelman v. Jordan, 415 U.S. 651 (1984)]

Example: P sues the State Commissioner of the Department of Public Welfare for failing to comply with federal welfare regulations. The federal court can order future compliance with the federal regulations, even if this will result in costing the state a large amount of money in the future. However, the federal court cannot award back payments of amounts previously improperly withheld, because the order would require payment from the state treasury for retroactive relief. [Edelman v. Jordan, *supra*]

2) Congressional Removal of Immunity Under the Fourteenth Amendment

Congress can remove the states' Eleventh Amendment immunity under its power to *prevent discrimination under the Fourteenth Amendment*. For example, the Equal Pay Act—based on the Fourteenth Amendment—can serve as a basis for federal suits against a state by its employees. [Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)]

a) Compare—Article I Powers

Unlike its power under the Fourteenth Amendment, Congress's legislative powers under Article I (*see* II., *infra*) do *not* include the power to abrogate state immunity under the Eleventh Amendment. [Seminole Tribe of Florida v. Florida, 517 U.S. 114 (1996)] However, the Supreme Court has held that states may not assert sovereign immunity in proceedings arising under the bankruptcy law. [Central Virginia Community College v. Katz, *supra*]

d. Summary

For most bar exam questions, a key principle to remember is this: The Eleventh Amendment will prohibit a federal court from hearing a claim for damages against a state government (although not against state officers) unless:

- 1) The state has consented to allow the lawsuit in federal court;
- 2) The plaintiff is the United States or another state; or
- 3) Congress has clearly granted federal courts the authority to hear a specific type of damage action under the Fourteenth Amendment (e.g., under a civil rights statute).

II. LEGISLATIVE POWER

A. ENUMERATED AND IMPLIED POWERS

The Constitution grants Congress a number of specific powers, many of which are enumerated in Article I, Section 8. It also grants Congress auxiliary power under the Necessary and Proper Clause.

1. Necessary and Proper “Power”

The Necessary and Proper Clause grants Congress the power to make all laws necessary and proper (i.e., appropriate) for carrying into execution *any* power granted to *any* branch of the federal government.

Example: Congress has the power to charter banks since that power is appropriate to executing Congress's enumerated powers to tax, borrow money, regulate commerce, etc. [McCulloch v. Maryland, 17 U.S. 316 (1819)]

The Necessary and Proper Clause is not itself a basis of power; it merely gives Congress power to execute specifically granted powers. Thus, if a bar exam question asks what is the best source of power for a particular act of Congress, the answer should not be the Necessary and Proper Clause, standing alone.

a. Limitation

Congress cannot adopt a law that is expressly prohibited by another provision of the Constitution.

2. Taxing Power

Congress has the power to lay and collect taxes, imposts, and excises, but they must be uniform throughout the United States. [Art. I, §8] Capitation or other direct taxes must be laid in proportion to the census [Art. I, §9, cl. 4], and direct taxes must be apportioned among the states [Art. I, §2, cl. 3].

a. Determining What Is a Tax

The determination of whether a legislative enactment imposes a tax does not depend on the label Congress gives it, but rather on its function. [National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012)—law requiring individuals to purchase health insurance or to pay an additional amount of money to the IRS when they pay their income tax, the amount of which varies by household income, joint vs. single filing status, number of dependents, etc., and which is estimated to bring \$4 billion annually into federal coffers, functionally is a tax regardless of the fact that Congress labeled it a “penalty”]

b. Uniformity

Requirement of uniformity in the levy of indirect taxes (generally, this means any kind of “privilege” tax, including duties and excises) has been interpreted by the Court to mean *geographical uniformity* only—i.e., identical taxation of the taxed Article in every state where it is found. [Fernandez v. Wiener, 326 U.S. 340 (1945)]

c. Direct Taxes—Must Be Apportioned

A “direct” tax (imposed directly on property or on the person) has seldom been employed by Congress because of the cumbersome *apportionment requirement*; taxes on income from real or personal property were initially held “direct” by the Court, but the resulting need for apportioning such taxes was obviated by the Sixteenth Amendment (income tax amendment).

d. Taxes Are Generally Valid

Absent a specific restriction such as those above, be very hesitant to rule against a tax measure on the exam. A tax measure will be upheld if it bears some *reasonable relationship to revenue production* or if Congress has the *power to regulate* the taxed activity.

Example: Special excise tax levied on dealers in illegal narcotics is valid because it raises revenue. [United States v. Doremus, 249 U.S. 86 (1919)]

3. Spending Power

Congress may spend to “provide for the common defense and general welfare.” [Art. I, §8] This spending may be for **any public purpose**—not merely the accomplishment of other enumerated powers. However, nonspending regulations are not authorized. Remember that the Bill of Rights still applies to this power; i.e., the federal government could not condition welfare payments on an agreement not to criticize government policies.

a. Regulation Through Spending

Note that Congress can use its spending power to “regulate” areas, even where it otherwise has no power to regulate the area, by requiring entities that accept government money to act in a certain manner (i.e., attaching “strings” to government grants). (*See* VI.A.2.b., *infra*.)

4. Commerce Power

Article I, Section 8, Clause 3 empowers Congress to “regulate commerce with foreign nations and among the several states, and with the Indian tribes.”

a. Definition of Commerce

1) Includes Basically All Activity Affecting Two or More States

Chief Justice Marshall, in *Gibbons v. Ogden*, 22 U.S. 1 (1824), defined commerce as “every species of commercial intercourse . . . which concerns more states than one” and included within the concept virtually every form of activity involving or affecting two or more states.

2) Includes Transportation or Traffic

The Court has consistently regarded transportation or traffic as commerce, whether or not a commercial activity is involved.

Example: Interstate transportation of liquor for personal consumption, women for immoral purposes (not necessarily prostitution), and interstate transportation of stolen motor vehicles are all interstate commerce.

a) Vehicular Transportation Not Required

Any **transmission across state lines**, such as electricity, gas, telegraph, telephone, TV, radio, and mail transmission (including educational materials and sale of insurance), will constitute interstate commerce.

b. “Substantial Economic Effect”

The Supreme Court has sustained congressional power to regulate any activity, local or interstate, that either in itself **or in combination with other activities** has a “**substantial economic effect upon**,” or “**effect on movement in**,” interstate commerce.

Example: The classic case is the Court’s holding that Congress can control a farmer’s **production** of wheat **for home consumption**. [Wickard v. Filburn, 317 U.S. 111 (1942)] *Rationale:* Cumulative effect of many instances of such production could be felt on the supply and demand of the interstate commodity market.

1) Power Not Unlimited

The Supreme Court has recently made clear that the power of Congress to regulate commerce, although very broad, does have limits so as not to obliterate the distinction between what is national and what is local. To be within Congress's power under the Commerce Clause, a federal law must either:

- (i) *Regulate the channels* of interstate commerce;
- (ii) *Regulate the instrumentalities* of interstate commerce and persons and things in interstate commerce; or
- (iii) *Regulate activities that have a substantial effect* on interstate commerce.

a) Intrastate Activity

When Congress attempts to regulate *intrastate* activity under the third prong, above, the Court will uphold the regulation if it is of *economic or commercial activity* and the court can conceive of a *rational basis* on which Congress could conclude that the activity *in aggregate* substantially affects interstate commerce. [Gonzales v. Raich, 545 U.S. 1 (2005)—upholding regulation of intrastate cultivation and use of marijuana (permitted by state law for medicinal purposes) because it was part of a comprehensive federal program to combat interstate traffic in illicit drugs] If the regulated intrastate activity is not commercial or economic, the Court generally will not aggregate the effects and the regulation will be upheld only if Congress can show a direct *substantial economic effect* on interstate commerce, which it generally will not be able to do. [See, e.g., United States v. Lopez, 514 U.S. 549 (1995)—federal statute barring possession of a gun in a school zone is invalid; United States v. Morrison, 529 U.S. 598 (2000)—federal civil remedy for victims of gender-motivated violence is invalid]

(1) Activity vs. Inactivity

The Commerce Clause gives Congress power only to regulate existing commercial activity; it does not give Congress power to compel activity, even if failure to undertake the activity may affect interstate commerce. [National Federation of Independent Business v. Sebelius, 2.a., *supra*]

5. War and Related Powers

Article I, Section 8 gives Congress the power to declare war, raise and support armies, provide for and maintain a navy, make rules for the government and regulation of the armed forces, and organize, arm, discipline, and call up the militia. Of course, several other congressional powers may have direct or indirect application to military purposes: tax and spending power, commerce power, Senate's treaty consent power, maritime power, investigatory power, etc.

a. Economic Regulation

1) During War

Regulatory power of Congress, especially in economic matters and mobilization of troops, in support of war effort is *pervasive* (although theoretically limited by

the Bill of Rights); thus, the Court has sustained national price and rent control, as well as conscription and regulation of civilian/military production and services.

2) Postwar

To a considerable extent, this pervasive regulatory power may be validly extended into post-wartime periods both to *remedy wartime disruptions* [e.g., *Woods v. Miller*, 333 U.S. 138 (1948)—rent controls] and to cope with “*cold war*” *exigencies*. Legislation in the field of veterans’ rights and limitations thereon may be extended indefinitely as long as veterans or their relatives may survive.

b. Military Courts and Tribunals

The constitutional basis of courts of military justice (trial and review of offenses by military personnel, including courts-martial and reviewing agencies and tribunals) is not Article III, but rather Article I, Section 8, Clause 14 (congressional power to make rules for government and regulation of armed forces), buttressed by the Necessary and Proper Clause.

1) Judicial Review

The regular federal (or state) courts have *no general power to review* court-martial proceedings. However, in habeas corpus cases, the Article III courts, including the Supreme Court, may make a limited inquiry into the military court’s jurisdiction of the person and offense or the validity of the court’s legislative creation.

2) Court-Martial of Enemy Civilians and Soldiers Permitted

Military courts may try enemy civilians as well as enemy military personnel, at least during wartime.

a) Suspension of Habeas Corpus for Enemy Combatants

Congress does not have the power to deny habeas corpus review to all aliens detained as enemy combatants absent a meaningful substitute for habeas corpus review. A meaningful substitute would allow prisoners to (i) challenge the President’s authority to detain them indefinitely, (ii) contest the military commission’s findings of fact, (iii) supplement the record on review with exculpatory evidence discovered after the military commission’s proceedings, and (iv) request release. [*Boumediene v. Bush*, 553 U.S. 723 (2008)]

3) Court-Martial of American Soldiers Permitted

Military courts have jurisdiction over *all* offenses (not just service connected offenses) committed by persons who are members of the armed services, both when charged and at the time of the offense. [*Solorio v. United States*, 483 U.S. 435 (1987), *overruling O’Callahan v. Parker*, 395 U.S. 258 (1969)]

4) Court-Martial of American Civilians Generally Prohibited

The Supreme Court has denied Congress the power to authorize the court-martial trial of American civilians as long as actual warfare has not forced courts to shut down, even though martial law has been declared [*Ex parte Milligan*, 71 U.S. 2 (1866)]; even though the civilians accused may have been members of the armed forces when committing the alleged offense [*Toth v. Quarles*, 350 U.S. 11 (1955)]

or are dependents of military personnel accompanying the latter overseas [Reid v. Covert, 354 U.S. 1 (1957)] or are civilian employees of the military forces at overseas bases and installations; such trials by court-martial violate the Fifth and Sixth Amendments, particularly the right to trial by jury.

c. Calling Forth the Militia

Under the Militia Clauses [Art. I, §8, cl. 15, 16], Congress has the power to authorize the President to order members of National Guard units into federal service—even in circumstances that do not involve a national emergency (e.g., for training outside of the United States). The President need not obtain the consent of the governor of a unit’s home state to call it into such service. [Perpich v. Department of Defense, 496 U.S. 334 (1990)]

6. Investigatory Power

The power to investigate to secure information as a basis for potential legislation or other official action (such as impeachment or trying impeachments) is a well-established implied power. It is a *very broad power*, in that an investigation need not be directed toward enactment of particular legislation, but the following limitations on its use do exist.

a. Authorized Investigation

The investigatory inquiry must be expressly or impliedly authorized by the congressional house concerned, i.e., by statute or resolution creating or directing the investigating committee or subcommittee.

b. Witnesses’ Rights

1) Fifth Amendment

The privilege against compulsory self-incrimination (the Fifth Amendment) is available to witnesses, whether formal or informal, unless a statutory immunity co-extensive with the constitutional immunity is granted.

2) Relevance

Written or oral information elicited by the investigative body must be “pertinent” to the subject of the inquiry.

3) Procedural Due Process

Witnesses are generally entitled to procedural due process, such as presence of counsel and right of cross-examination; but it is not yet clear whether such rights are constitutionally required or whether some of them are required merely by house rule or statute.

c. Enforcement of Investigatory Powers

Congress can hold a subpoenaed witness in contempt for refusing to appear or answer before Congress.

7. Property Power

Congress has the power to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” [Art. IV, §3] Many other

congressional powers (war, commerce, postal, fiscal, etc.) obviously would be unworkable if the ancillary *power to acquire and dispose of property of all kinds*—real, personal, and intangible—were not also implied from the main grants.

Example: The Property Clause empowers Congress to even protect wildlife wandering onto federally owned lands. [Kleppe v. New Mexico, 426 U.S. 529 (1976)]

a. No Limits on Disposition of Property

There is no express limitation on Congress’s power to dispose of property owned by the United States. The power extends to all species of property, such as leasehold interests and electrical energy, as well as ordinary realty and personalty. Moreover, disposal may involve direct competition with private enterprise and has never been invalidated on that ground.

b. Eminent Domain

Acquisition of property for a public purpose by eminent domain is indirectly recognized by the Fifth Amendment: “. . . nor shall private property be taken for public use, without just compensation.” Federal taking must be for the purpose of *effectuating an enumerated power* under some other provision of the Constitution.

8. No Federal Police Power

Congress has no general police power (i.e., power to legislate for the health, welfare, morals, etc., of the citizens). Thus, on the bar exam the validity of a federal statute cannot rely on “the police power.” However, Congress can exercise police power-type powers as to the District of Columbia pursuant to its power to legislate over the capital [Art. I, §8, cl. 17] and over all United States possessions (e.g., territories, military bases, Indian reservations) pursuant to the property power.

9. Bankruptcy Power

Article I, Section 8, Clause 4 empowers Congress “to establish uniform laws on the subject of bankruptcies throughout the United States.” This power has been interpreted by the Supreme Court as nonexclusive; i.e., state legislation in the field is superseded only to the extent that it conflicts with federal legislation therein.

10. Postal Power

Article I, Section 8, Clause 7 empowers Congress “to establish post offices and post roads.”

a. Exclusive

The postal power has been interpreted as granting Congress a postal monopoly. Neither private business nor the states may compete with the Federal Postal Service absent Congress’s consent. [Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991)]

b. Scope of Power

Congress may validly classify and place *reasonable restrictions* on use of the mails, *but it may not deprive* any citizen or group of citizens of the general mail “privilege” or regulate the mail in such a way as to abridge freedom of speech or press (except under valid standards, such as “obscenity”) or violate the ban of the Fourth Amendment against unreasonable search and seizure.

11. Power Over Citizenship

Article I, Section 8, Clause 4 empowers Congress “to establish a uniform rule of naturalization.”

a. Exclusion of Aliens

Congress’s power to exclude aliens is broad.

1) Nonresident Aliens

Aliens have no right to enter the United States and *can be refused entry* because of their political beliefs. [Kleindienst v. Mandel, 408 U.S. 753 (1972)]

2) Resident Aliens

Resident aliens are entitled to *notice and hearing* before they can be deported.

b. Naturalization and Denaturalization—Exclusive Control of Congress

Congress has exclusive power over naturalization and denaturalization. The Supreme Court has held that this grant gives Congress plenary power over aliens (*see* XVIII.D.2.a., *infra*).

1) No Loss of Citizenship Without Consent

Under the Fourteenth Amendment, Congress may not take away the citizenship of any citizen—native-born or naturalized—without his consent.

Example: The Court held unconstitutional a statute that provided for loss of citizenship upon voting in a foreign election. [Afroyim v. Rusk, 387 U.S. 253 (1967)]

a) Proof of Intent

A citizen’s intent to relinquish citizenship may be expressed by words or conduct—and Congress may provide that such intent may be proven by a preponderance of the evidence. [Vance v. Terrazas, 444 U.S. 252 (1980)]

2) Rights of Children of Citizens

A person born in another country to United States citizen parents does not have a constitutional right to become a United States citizen. Congress can grant citizenship to children born abroad conditioned on their return to live in the United States within a specified period of time or for a specified number of years. Such a child who fails to return to the United States loses his grant of citizenship because he has failed to meet the statutory condition precedent to his final grant of citizenship.

12. Admiralty Power

Although congressional power to legislate in maritime matters is not expressed in the Constitution, the Supreme Court has implied it from the exclusive jurisdiction given the federal courts in this field by Article III, Section 2, supported by the Necessary and Proper Clause of Article I, Section 8.

a. Exclusive Power

The congressional power is plenary and exclusive, except to the extent that Congress may leave (and has left) some maritime matters to state jurisdiction.

b. Navigable Waterways

The federal admiralty power attaches to all navigable waterways—actually or potentially navigable—and to small tributaries that affect navigable waterways. The federal maritime power is not limited to tidewaters or interstate waters.

13. Power to Coin Money and Fix Weights and Measures

Congress has the power to coin money and fix the standard of weights and measures under Article I, Section 8, Clause 5.

14. Patent/Copyright Power

Congress has the power to control the issuance of patents and copyrights under Article I, Section 8, Clause 8.

B. DELEGATION OF LEGISLATIVE POWER

1. Broad Delegation Allowed

Congress has broad discretion to delegate its legislative power to executive officers and/or administrative agencies [*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)], and even delegation of rulemaking power to the courts has been upheld [*Mistretta v. United States*, 488 U.S. 361 (1989)].

Example: Congress can delegate the power to establish sentencing guidelines for criminal cases to a sentencing commission located in the federal courts and made up, in part, of federal judges, as long as the tasks delegated do not undermine the integrity of the judiciary or usurp the powers of the other branches. [*Mistretta v. United States*, *supra*]

2. Limitations on Delegation

a. Power Cannot Be Uniquely Confined to Congress

To be delegable, the power must not be uniquely confined to Congress; e.g., the power to declare war cannot be delegated, nor the power to impeach.

b. Clear Standard

It is said that delegation will be upheld only if it includes intelligible standards for the delegate to follow. However, as a practical matter almost anything will pass as an “intelligible standard” (e.g., “upholding public interest, convenience, or necessity”).

c. Separation of Powers Limitations

While Congress has broad power to delegate, the separation of powers doctrine restricts Congress from keeping certain controls over certain delegates. For example, Congress cannot give itself the power to remove an officer of the executive branch by any means other than impeachment (e.g., if Congress delegates rulemaking power to an executive branch agency (e.g., the FCC), it may not retain the power to fire the agency head). (*See* III.B.1.b.2)a), *infra.*) Similarly, Congress cannot give a government employee who is subject to removal by Congress (other than by impeachment) purely executive powers. (*See* III.B.1.b.2)b), *infra.*)

Example: A federal statute transferred the authority to control two D.C. area airports from the federal government to a local authority. However, the

statute reserved to a review board a veto power over the local authority's decisions. The review board was comprised of nine members of Congress. The statute violates the separation of powers doctrine in one of two ways: (i) If the review board's power is considered to be legislative, the statute created an unconstitutional legislative veto (*see D., infra*). (ii) If the review board's power is considered to be executive, the separation of powers doctrine prohibits members of Congress from exercising it. [Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991)]

d. Important Liberty Interests

If the delegate interferes with the exercise of a fundamental liberty or right, the burden falls upon the delegate to show that she has the power to prevent the exercise of the right and her decision was in furtherance of that particular policy.

Example: In *Kent v. Dulles*, 357 U.S. 116 (1958), the Secretary of State was required to issue a passport to a Communist because he could not show that Congress gave him the power to encroach upon the fundamental right to travel simply because the applicant was a Communist.

e. Criminal vs. Civil Punishment

The legislature may delegate its authority to enact regulations, the violation of which are crimes, but prosecution for such violations must be left to the executive and judicial branches. [See *United States v. Grimaud*, 220 U.S. 506 (1911)] However, agencies may enact and impose civil penalties (i.e., fines labeled as civil fines) without prosecution in court. [*Helvering v. Mitchell*, 303 U.S. 391 (1938)]

C. THE SPEECH OR DEBATE CLAUSE—SPECIAL IMMUNITY FOR FEDERAL LEGISLATORS

Article I, Section 6 provides that “For any speech or debate in either House [members of Congress] shall not be questioned in any other place.”

1. Persons Covered

The immunity extends to aides who engage in acts that would be immune if performed by a legislator. [*Gravel v. United States*, 408 U.S. 606 (1972)]

The Speech or Debate Clause does *not extend to state legislators* who are prosecuted for violation of federal law. [*United States v. Gillock*, 445 U.S. 360 (1980)]

2. Scope of Immunity

Conduct that occurs in the regular course of the legislative process and the motivation behind that conduct are immune from prosecution.

a. Bribes Excluded

Taking of a bribe is not an act in the regular course of the legislative process and is therefore actionable. [*United States v. Brewster*, 408 U.S. 501 (1972)]

b. Speeches Outside Congress

Speeches and publications made outside Congress are not protected.

c. Defamatory Statements

Republication in a press release or newsletter of a defamatory statement originally made in Congress is not immune. [Hutchinson v. Proxmire, 443 U.S. 111 (1979)]

D. CONGRESSIONAL “VETO” OF EXECUTIVE ACTIONS INVALID

A legislative veto is an attempt by Congress to overturn an executive agency action *without* bicameralism (i.e., passage by both houses of Congress) or presentment (i.e., giving the bill to the President for his signature or veto). Legislative vetoes of executive actions are invalid. [Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983)] The legislative veto usually arises where Congress delegates discretionary power to the President or an executive agency. In an attempt to control the delegation, Congress requires the President or agency to present any action taken under the discretionary power to certain members of Congress for approval. If they disapprove, they veto the action and that is the final decision on the action. This is unconstitutional, because, to be valid, legislative action (the veto) must be approved by both houses and presented to the President for his approval (*see* III.B.3., *infra*). In *Chadha*, the Court also noted that the legislative veto violates the implied separation of powers requirements of the Constitution.

Examples: 1) Congress granted to the Immigration & Naturalization Service (“INS”) the power to deport or suspend from deportation illegal aliens. INS decisions to suspend deportations had to be submitted to Congress. Either house could pass a resolution overriding the decision. This legislative veto provision is unconstitutional. [Immigration & Naturalization Service v. Chadha, *supra*]

2) By statute, Congress grants to the President the power to send military troops into combat, without Congress’s prior approval, whenever the United States or its territories are attacked. The statute, however, reserves in Congress the power to force the President to withdraw the troops. The statute does not provide for presidential veto of Congress’s decision to withdraw. The decision in *Chadha* suggests that this statute is unconstitutional.

III. THE EXECUTIVE POWER

A. VESTED IN PRESIDENT

The entire “executive power” is vested in the President by Article II, Section 1 of the Constitution. Various executive functions may be and are delegated within the “executive branch” by the President or by Congress.

B. DOMESTIC POWERS

1. Appointment and Removal of Officers

a. Appointment

Under Article II, Section 2, the President is empowered “with the advice and consent of the Senate” to appoint “all *ambassadors*, other *public ministers* and consuls, *judges of the Supreme Court*, and all *other officers of the United States*, whose appointments are not herein otherwise provided for . . . but the Congress may by law vest the

appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”

1) Appointment of “Independent Counsel” (Special Prosecutor)

A special prosecutor with the limited duties of investigating a narrow range of persons and subjects (e.g., to investigate alleged misconduct of a government employee) is an inferior officer. Therefore, under the Appointment Clause, Congress is free to vest the power to appoint a special prosecutor in the judiciary. [Morrison v. Olson, 487 U.S. 654 (1988)]

2) No Appointments by Congress

Although Congress may appoint its own officers to carry on *internal legislative tasks* (i.e., its staff), it may not appoint members of a body with administrative or enforcement powers; such persons are “officers of the United States” and must, pursuant to Article II, Section 2, be appointed by the President with senatorial confirmation unless Congress has vested their appointment in the President alone, in federal courts, or in heads of departments. [Buckley v. Valeo, 424 U.S. 1 (1976)]

b. Recess Appointments

The Recess Appointments Clause of the Constitution gives the President the power to make appointments for vacancy without Senate approval during any Senate recess of “sufficient duration.” Under the Clause, the Senate is in recess only when it states it is in recess. If the Senate does not declare a recess and it holds pro forma sessions, the Senate is not in recess and the President has no power to make appointments without Senate approval. [NLRB v. Noel Canning, 573 U.S. _____ (2014)]

c. Removal

As to removal of appointees, the *Constitution is silent* except for ensuring tenure of all Article III judges “during good behavior.”

1) By President

Under the Court’s decisions, the President probably can remove high level, purely executive officers (e.g., Cabinet members) at will, without any interference from Congress. However, after *Morrison v. Olson, supra*, it appears that Congress may provide statutory limitations (e.g., removal for good cause) on the President’s power to remove all other executive appointees.

2) By Congress

a) Limitation on Removal Power

Congress cannot give itself the power to remove an officer charged with the execution of laws except through impeachment. A congressional attempt through legislation to remove from government employment specifically named government employees is likely to be held invalid as a bill of attainder.

b) Limitation on Powers of Removable Officers

Congress cannot give a government employee who is subject to removal from office by Congress any powers that are truly executive in nature. For this

reason, Congress could not give to the Comptroller General (who could be removed from office not only by impeachment but also by a joint resolution of Congress) the function of establishing the amount of automatic budget reductions that would be required if Congress failed to make budget reductions necessary to insure that the federal budget deficit did not exceed a legislatively established maximum amount. [Bowsher v. Synar, 478 U.S. 714 (1986)]

2. Pardons

The President is empowered by Article II, Section 2, “to grant reprieves and pardons for offenses against the United States, *except in cases of impeachment.*” This power has been held to apply before, during, or after trial, and to extend to the offense of criminal contempt, but not to civil contempt, inasmuch as the latter involves the rights of third parties. The pardon power *cannot be limited by Congress*, and includes power to commute a sentence on any conditions the President chooses, as long as they are not independently unconstitutional. [Schick v. Reed, 419 U.S. 256 (1974)]

3. Veto Power

a. Congress May Override Veto by Two-Thirds Vote

Every act of Congress must be approved by the President before taking effect, unless passed over his disapproval by two-thirds vote of *each house*. [Art. I, §7]

b. President Has Ten Days to Veto

The President has 10 days (excepting Sundays) to exercise his veto power. If he fails to act within that time:

- (i) The bill becomes law if Congress is still in session; or
- (ii) The bill is automatically vetoed if Congress is not in session (a “*pocket veto*”). [Pocket Veto Case, 279 U.S. 655 (1929)]

Brief recesses during an annual session create no pocket veto opportunity. [Wright v. United States, 302 U.S. 583 (1938)]

c. Line Item Veto Unconstitutional

The veto power allows the President only to approve or reject a bill in toto; he cannot cancel part (through a line item veto) and approve other parts. *Rationale*: The President’s veto power does not authorize him to amend or repeal laws passed by Congress. [Clinton v. City of New York, 524 U.S. 417 (1998)]

4. Power as Chief Executive

The President’s power over internal (i.e., within the United States) affairs as the chief executive is unclear. Clearly the President has some power to direct subordinate executive officers, and there is a long history of presidents issuing executive orders. Perhaps the best guide for determining the validity of presidential actions regarding internal affairs can be based on Justice Jackson’s opinion in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952):

- (i) Where the President acts with the express or implied authority of Congress, his authority is at its maximum and his actions likely are valid;

- (ii) Where the President acts where Congress is silent, his action will be upheld as long as the act does not take over the powers of another branch of the government or prevent another branch from carrying out its tasks [*see, e.g., United States v. Nixon*, I.E.7.b., *supra*—President’s invocation of executive privilege was invalidated because it kept federal courts from having evidence they needed to conduct a fair criminal trial]; and
- (iii) Where the President acts against the express will of Congress, he has little authority and his action likely is invalid.

Example: Hamdan was captured in the Afghanistan war, sent to Guantanamo Bay, and then tried for war crimes by a military commission that had been created by an Executive Order issued after the 9/11 terrorist attack. Citing Justice Jackson’s *Youngstown* concurrence, the Court held that the military commission could not proceed, because the executive order authorizing the commission went beyond the limitations that Congress had placed on the President. The Court found that the Executive Order was authorized by an act of Congress that was interpreted as limiting the President’s power to convene commissions to those that comply with the Constitution, laws, and rules of war, and that the commission here violated the laws and rules of war in several respects (e.g., it did not require a sufficient showing of the facts justifying the commission’s jurisdiction; it did not provide the accused and his attorney sufficient access to the evidence). [*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)]

a. No Power to Impound and the Take Care Clause

It follows from the above that the President has no power to refuse to spend appropriated funds when Congress has expressly mandated that they be spent. [*Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838)] Some authorities base this result on Article II, Section 3, Clause 4—the Take Care Clause—which provides that the President “shall take care that the laws be faithfully executed”

C. POWER OVER EXTERNAL AFFAIRS

1. War

Although lacking the power to declare or initiate a “formal” war, the President has extensive military powers (essentially an external field, although applicable to civil war as well and to many domestic affairs caught up in military necessities).

a. Actual Hostilities

The President may act militarily under his power as *commander in chief* of the armed forces and militia (when federalized), under Article II, Section 2, in actual hostilities against the United States without a congressional declaration of war. But *Congress* may limit the President under its power to enact a *military appropriation every two years*. (A military appropriation may not be for more than two years.)

b. Military Government

This power includes the establishment of military governments in occupied territories, including military tribunals.

2. Foreign Relations

The President's power to represent and act for the United States in day-to-day foreign relations is paramount. He has the power to appoint and receive ambassadors and make treaties (with the advice and consent of the Senate), and to enter into executive agreements. His power is broad even as to foreign affairs that require congressional consent. No significant judicial control has been exercised over this power.

a. Power to Recognize Foreign States

The power to recognize foreign states lies exclusively with the president. [See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)—legislation requiring the secretary of state, upon request, to designate “Israel” and not “Jerusalem” as the place of birth on the passport of a U.S. citizen born in Jerusalem infringes on the long-time executive branch policy of favoring recognition of Jerusalem]

3. Treaty Power

The treaty power is granted to the President “by and with the advice and consent of the Senate, provided *two-thirds of the Senators* present concur.” [Art. II, §2, cl. 2]

a. Supreme Law

Like other federal law, treaties are the “supreme law of the land.” Any state action or law in conflict with a United States treaty is invalid (regardless of whether it is a state law or a state constitutional provision).

1) Self-Executing vs. Non-Self-Executing Treaties

Some treaties are expressly or impliedly self-executing (i.e., they are effective without any implementation by Congress). Others are not effective unless and until Congress passes legislation to effectuate their ends. If a treaty is not self-executing, it is not treated as the supreme law of the land until Congress acts to effectuate it, but the treaty itself can serve as an independent basis for Congress's power to adopt the required legislation (i.e., Congress need not point to one of its enumerated powers, such as the commerce power, as the basis for the legislation).

a) President Has No Power to Implement Non-Self-Executing Treaties

Based on the *Youngstown* analysis (B.4., *supra*), the President generally does not have any independent power to issue a “memorandum” ordering compliance with a non-self-executing treaty that has not been the subject of effectuating legislation by Congress. [*Medellin v. Texas*, 552 U.S. 491—President had no power to enforce provisions of the Vienna Convention (a non-self-executing international treaty) by issuing a memorandum requiring states to grant habeas corpus petitions to reconsider convictions of criminals who are foreign nationals and who were not informed at the time of their arrest of their right to notify their consulate of their detention]

2) Conflict with Congressional Acts

Valid treaties are on a “supremacy parity” with acts of Congress; a conflict between an act of Congress and a treaty is resolved by order of adoption—*the last in time prevails*.

3) Conflict with Constitution

Treaties are not co-equal with the Constitution. For example, no treaty (or executive agreement) could confer on Congress authority to act in a manner inconsistent with any specific provision of the Constitution. [Reid v. Covert, 354 U.S. 1 (1957)]

b. Other Limitations

Other substantive limitations on the treaty power have not been judicially established; but in one case the Court expressed in dictum the view that a treaty could not upset the basic structure of the United States's federalism, or wield a power barred to the national government by the Constitution, or cede any part of a state to a foreign nation without the state's consent. The Court has *never held a treaty unconstitutional* (Reid v. Covert, *supra*, invalidated an executive agreement for violating the Fifth Amendment), but it is conceivable that the treaty power extends only to subjects plausibly bearing on our relations with other countries.

4. Executive Agreements

The President's power to enter into agreements (i.e., executive agreements) with the heads of foreign countries is not expressly provided for in the Constitution; nevertheless, the power has become institutionalized. Executive agreements can probably be on any subject as long as they do not violate the Constitution. They are very similar to treaties, except that they do not require the consent of the Senate.

a. Conflicts with Other Governmental Action

Executive agreements that are not consented to by the Senate are not the "supreme law of the land." Thus, *conflicting federal statutes and treaties* will prevail over an executive agreement, regardless of which was adopted first. However, executive agreements prevail over conflicting state laws.

b. Example—Power to Settle Claims of United States Citizens

The President, with the implicit approval of Congress, has power to settle claims of United States citizens against foreign governments through an executive agreement. [Dames & Moore v. Regan, 453 U.S. 654 (1981)]

D. EXECUTIVE PRIVILEGE/IMMUNITY

1. Executive Privilege

The executive privilege is not a constitutional power, but rather is an inherent privilege necessary to protect the confidentiality of presidential communications.

a. Extent of the Privilege

Presidential *documents and conversations* are *presumptively privileged*, but the privilege must yield to the need for such materials as evidence in a criminal case to which they are relevant and otherwise admissible. This determination must be made by the trial judge after hearing the evidence.

1) National Security Secrets

Military, diplomatic, or sensitive national security secrets are given great deference by the courts.

2) **Criminal Proceedings**

In criminal proceedings, presidential communiques will be available to the prosecution, where a need for such information is demonstrated. [United States v. Nixon, B.4., *supra*]

3) **Civil Trials**

The Court has avoided ruling on the scope of executive privilege in a civil case. Nevertheless, in *Cheney v. United States District Court*, 542 U.S. 367 (2004), the Court noted that the need for information in a criminal case is “weightier,” and the Executive’s withholding of information in a civil trial would not impair the judiciary’s ability to fulfill its responsibility to resolve cases as much as in a criminal trial. Thus, it appears that an Executive branch decision to withhold information will be given more deference in a civil trial than in a criminal trial.

4) **Screening Papers and Recordings of Former President**

A federal statute requiring the Administrator of General Services to screen presidential papers is valid, notwithstanding the privilege. [Nixon v. Administrator of General Services, 433 U.S. 425 (1977)]

5) **Screening by Judge in Chambers**

The court will determine in an *in-camera* inspection which communications are protected and which are subject to disclosure.

2. **Executive Immunity**

a. **Absolute Immunity for President**

The President has *absolute immunity from civil damages* based on any action that the President took within his *official responsibilities* (even if the action was only arguably within the “outer perimeter” of presidential responsibility). [Nixon v. Fitzgerald, 457 U.S. 731 (1982)] However, the President has *no* immunity from private suits in federal courts based on *conduct that allegedly occurred before taking office*. [Clinton v. Jones, 520 U.S. 681 (1997)] *Rationale*: The immunity is intended only to enable the President to perform his *designated functions* without fear of personal liability.

b. **Immunity May Extend to Presidential Aides**

Presidential aides share in this immunity only if they are exercising discretionary authority for the President in “sensitive” areas of national concern, such as foreign affairs. Other aides are entitled only to a qualified immunity (a “good faith” defense). [Harlow v. Fitzgerald, 457 U.S. 800 (1982)]

Example: The Attorney General does not share the President’s absolute immunity for authorizing a warrantless wiretap on “national security” grounds. The Attorney General would have a defense to a lawsuit regarding such a wiretap if it was shown that he was able to act in good faith because his actions were not violating clearly established or well-settled statutory or constitutional rights. [Mitchell v. Forsyth, 472 U.S. 511 (1985)]

E. **IMPEACHMENT**

1. Persons Subject to Impeachment

The President, Vice President, and all civil officers of the United States are subject to impeachment.

2. Grounds

The grounds for impeachment are treason, bribery, high crimes, and misdemeanors.

3. Impeachment by the House

A *majority vote* in the House is necessary to invoke the charges of impeachment.

4. Conviction by the Senate

A *two-thirds vote* in the Senate is necessary to convict.

PART TWO: THE FEDERAL SYSTEM

IV. RELATIVE SPHERES OF FEDERAL AND STATE POWER

A. EXCLUSIVE FEDERAL POWERS

1. Power of States Expressly Limited

Some powers are exclusively federal because of express constitutional limitation on or prohibition of the states' exercise thereof—such as the treaty power, coinage of money, and duty on imports.

2. Inherent Federal Powers

Others are exclusively federal in view of their nature—such as declaration of war, federal citizenship, naturalization, and borrowing money on the credit of the United States. Any state exercise of these powers would basically subvert the federal system. On the exam, *do not* allow states to take actions that might touch upon *foreign relations*.

Examples: 1) In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court held invalid state statutes that sought to withhold the proceeds of local decedents' estates from heirs living in nations that (i) discriminate against Americans in their probate laws, (ii) impede the transmission of funds to the United States, or (iii) confiscate property inherited by their citizens. The Court concluded that such laws are so potentially disruptive of a nationally conducted foreign policy that they are invalid notwithstanding the traditional commitment of probate law to the states.

2) California adopted an act to aid Holocaust victims that, among other things, required any California insurer that sold insurance policies in Europe between 1920 and 1945 to disclose certain information about those policies. The President of the United States also entered into an agreement with Germany regarding Holocaust victims' claims and informed California that its law would impede the effectiveness of that agreement. Nevertheless, California announced that it would enforce its law. Several insurance companies and a trade association brought suit to enjoin enforcement of the act. *Held:* The act interferes with the President's power over foreign affairs and is

preempted on that ground. [*American Insurance Association v. Garamendi*, 539 U.S. 396 (2003)]

B. EXCLUSIVE STATE POWERS

Whereas the federal government has only those powers granted to it by the Constitution, the state governments are governments of “unlimited” powers, having all powers not prohibited to them by the Constitution. This is recognized by the Tenth Amendment, which provides that all powers not delegated to the federal government by the Constitution are reserved to the states (or to the people). However, given the expansive interpretation of federal powers (e.g., the commerce power; *see* II.A.4., *supra*), little state power is exclusive.

C. CONCURRENT FEDERAL AND STATE POWER—SUPREMACY CLAUSE

Most governmental power is concurrent, belonging to both the states and the federal government. Thus, it is possible for states and the federal government to pass legislation on the same subject matter. When this occurs, the Supremacy Clause provides that the federal law is supreme, and the state law is rendered void if it is preempted. State law may be preempted expressly or impliedly.

1. Express Preemption

A federal law may expressly provide that the states may not adopt laws concerning the subject matter of the federal legislation. Note, however, that an express preemption clause will be narrowly construed. [*See Altria Group, Inc. v. Good*, 555 U.S. 70 (2009)]

Example: A federal law [15 U.S.C. §1334(b)] provides that: “no requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes” that are labeled in conformity with federal law. A smoker brought a state law consumer fraud claim against a cigarette company, claiming that the company’s advertisements that its cigarettes were “light” and contain less tar and nicotine were fraudulent. The cigarette company argued that its advertisements were in conformity with federal law and, therefore, the state law claim was preempted by the federal law. *Held:* The state law claim is not preempted. The state consumer protection law is based on a duty not to deceive rather than on smoking or health, and the federal law preempts only state laws based on smoking or health. [*Altria Group, Inc. v. Good*, *supra*]

2. Implied Preemption

Even if federal law does not expressly prohibit state action, state laws will nevertheless be held impliedly preempted if they actually conflict with federal requirements, they prevent achievement of federal objectives, or Congress has preempted the entire field.

a. Actual Conflict Between State and Federal Law Requirements

A valid act of Congress or federal regulation supersedes any state or local action that actually conflicts with the federal rule—whether by commanding conduct inconsistent with that required by the federal rule, or by forbidding conduct that the federal rule is designed to foster.

Example: Federal law [42 U.S.C. §1983] gives state and federal courts jurisdiction to hear claims for violations of federal rights committed by persons acting under color of state law. New York determined that the majority of suits seeking money damages from corrections officers under section 1983 are

frivolous and therefore divested its trial courts of jurisdiction to hear such cases. *Held*: The state’s policy of shielding corrections officers from suits under section 1983 violates the Supremacy Clause. State courts must hear federal claims. They may apply their own procedural rules as they do to state claims, but they cannot exclude a class of federal claims from being heard in state court. [Haywood v. Drown, 556 U.S. 729 (2009)]

b. State Prevents Achievement of Federal Objective

State law will also be held impliedly preempted if it interferes with achievement of a federal objective. This is true even if the state or local law was enacted for some valid purpose and not merely to frustrate the federal law.

Example: A purpose of the federal bankruptcy laws is to give bankrupts a fresh start, free of their old debts. A state law providing for suspension of the driver’s license of persons who have failed to pay off auto accident judgments, regardless of the judgment debtor’s discharge in bankruptcy, interferes with the federal objective and will fail. [Perez v. Campbell, 402 U.S. 637 (1971)]

c. Field Preemption

A state or local law may also be found to be preempted if it appears that Congress intended to “occupy” the entire field, thus precluding *any* state or local regulation. The courts will look at the federal regulatory scheme to deduce Congress’s intent. For example, if the federal laws are comprehensive or a federal agency is created to oversee the field, preemption will often be found.

Example: Because Congress has enacted extensive regulatory laws concerning registration of aliens and employment of aliens who are in the country unlawfully, states may not make laws concerning these matters (not even a law making it a misdemeanor to fail to comply with federal immigration laws). Neither may a state authorize its officers to arrest a person without a warrant whom the officer has probable cause to believe has committed a public offense that makes the person removable from the United States—because such a law goes beyond the situations in which federal law provides for warrantless arrests for removable offenses. However, a state law requiring officers conducting a stop or detention to verify the detainee’s immigration status if the officers have reasonable suspicion to believe the detainee is an alien unlawfully present in the United States is not necessarily preempted, at least absent a showing that this practice will delay release of the detainees. [Arizona v. United States, 132 S. Ct. 2492 (2012)]

3. Presumption Against Preemption

The Supreme Court has stated that in all preemption cases, especially any involving a field traditionally within the power of the states (e.g., regulations involving health, safety, or welfare), it will start with the *presumption* that the historic state police powers are *not* to be superseded unless that was the *clear and manifest purpose of Congress*. [Wyeth v. Levine, 555 U.S. 555 (2009)]

Example: A person who was injured by a prescription drug that was improperly administered brought a state law tort suit against the drug’s manufacturer,

claiming that the drug's label did not provide adequate warnings. The label was approved by the Food and Drug Administration ("FDA") pursuant to its power to regulate prescription drugs. The drug company claimed that the state tort action was preempted. *Held*: Congress did not intend to preempt the state court action here. The Court held that while Congress enacted the legislation here to protect consumers, it did not provide a remedy for consumers injured by unsafe drugs. Also, Congress had not enacted an express preemption provision within the statute for prescription drugs although it did enact an express preemption provision for medical devices. Moreover, there is no conflict between the FDA approval of a warning label and the state tort failure to warn claim here because the FDA regulation allowed companies to strengthen warnings without preapproval and, thus, the company was free to provide stronger warnings. [See, e.g., *Wyeth v. Levine, supra*]

D. ABSENCE OF FEDERAL AND STATE POWERS

Some powers are denied to both Congress and the states. For example, the Supreme Court has held that the Qualifications Clauses [Art. I, §2, cl. 2; §3, cl. 3], setting the qualifications to serve in Congress, are exclusive and cannot be altered by Congress or the states. [*United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)—state-imposed term limit for members of Congress invalidated; *and see* *Cook v. Gralike*, 531 U.S. 510 (2001)—state law instructing each member of its congressional delegation to support a constitutional amendment for term limits, and providing that failure to do so be noted on the ballot, was held invalid because it imposes a substantive qualification rather than regulates the "manner" in which elections are held]

E. INTERSTATE COMPACT CLAUSE

The Constitution provides that states may enter into agreements or compacts with other states upon the consent of Congress. [Art. I, §10, cl. 3] However, not all agreements between states are "compacts" requiring congressional consent. The Compact Clause reaches only interstate agreements that *increase the political power* of the states at the expense of federal supremacy (e.g., an agreement whereby one state cedes territory to another state). [See *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978)—congressional consent not required for multistate tax compact because the compact does not give member states any powers they could not exercise in its absence] The Supreme Court has the power to interpret such compacts—the member states do not have final authority over interpretation. [*West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951)]

F. FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." By virtue of the Clause, if a judgment is entitled to full faith and credit, it must be recognized in sister states (i.e., a party who loses a case in New York generally may not relitigate it in New Jersey; the New Jersey courts are bound by the New York ruling). However, not every decision is entitled to full faith and credit. There are three requirements:

- (i) The court that rendered the judgment must have had *jurisdiction over the parties and the subject matter* (*Note*: If the issue of jurisdiction was litigated in one state, that court's ruling on jurisdiction is final and must be recognized by other states).

- (ii) The judgment must have been *on the merits*; i.e., on the substance of the plaintiff's claim rather than on a procedural issue, such as improper venue or jurisdiction; and
- (iii) The judgment must be *final*.

Although the Clause itself governs only recognition of state judgments in sister states, a federal statute provides for recognition of state judgments in federal courts as well.

V. INTERSOVEREIGN LITIGATION

A. SUITS BY THE UNITED STATES AGAINST A STATE

The United States may sue a state without its consent.

B. SUITS BY STATE AGAINST UNITED STATES—UNITED STATES MUST CONSENT

Public policy forbids a state from suing the United States without its consent. Congress can pass legislation that permits the United States to be sued by a state in given situations.

C. FEDERAL OFFICER AS DEFENDANT

1. Limitation

Suits against a federal officer are *deemed to be brought against the United States* itself if the judgment sought would be satisfied out of the public treasury or would interfere with public administration and, therefore, are not permitted.

2. Specific Relief Against the Individual Officer

Specific relief against an officer as an individual will be granted if the officer acted ultra vires:

- a. Beyond his statutory powers; or
- b. The valid power was exercised in an unconstitutional manner.

D. SUITS BY ONE STATE AGAINST ANOTHER

One state may sue another state without the latter's consent. The Supreme Court has *exclusive original jurisdiction*.

VI. INTERGOVERNMENTAL TAX AND REGULATION IMMUNITIES

A. FEDERAL TAXATION AND REGULATION OF STATE OR LOCAL GOVERNMENTS

The Tenth Amendment provides that powers not delegated to the United States by the Constitution, nor prohibited to the states, are reserved to the states. This reservation of power is often cited as a restriction on Congress's power to regulate the states.

1. Tax or Regulation Applying to State and Private Entities—Valid

The Supreme Court will not likely strike down on Tenth Amendment grounds a tax or

regulation that subjects states or local governments to regulations or taxes that apply to **both** the public sector and the private sector. It has held that in such cases, the states' interests are best protected by the states' representation in Congress. [Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)]

Example: Congress can require state and local governments to follow the provisions of the Federal Fair Labor and Standards Act requiring minimum wages for all employees. [Garcia v. San Antonio Metropolitan Transit Authority, *supra*]

2. Tax or Regulation that Applies Only to States

However, the Tenth Amendment does limit Congress's power to regulate the states alone by requiring the states to act in a particular way. Congress may not compel states to enact or enforce a regulatory program. [New York v. United States, 505 U.S. 144 (1992)—federal statute requiring states to either regulate radioactive waste or take title to it is beyond Congress's power] Similarly, if Congress passes a tax that does not apply to private businesses but merely taxes state government entities, there is a possibility that the Court would use the Tenth Amendment to prohibit the tax.

a. Exception—Civil Rights

Congress *may* use its power under the Fourteenth and Fifteenth Amendments to restrict state activities that it determines would violate the civil liberties of persons within the state.

Examples: 1) Congress may invalidate state laws establishing a literacy test as a prerequisite to voting in state elections. [Oregon v. Mitchell, 400 U.S. 112 (1970)]

2) Congress may restrict changes in state voting laws that have the effect of diminishing the voting power of racial minorities even though the change in state law was not purposeful racial discrimination that would violate Section 1 of the Fifteenth Amendment. [Rome v. United States, 446 U.S. 156 (1980)]

b. Exception—Spending Power Conditions

Congress may also “regulate” states through the spending power by imposing **conditions on the grant of money to state or local governments** (sometimes referred to as grants with strings attached). Such conditions will not violate the Tenth Amendment merely because Congress lacked the power to directly regulate the activity that is the subject of the spending program if the conditions:

- (i) Are **clearly stated**;
- (ii) **Relate to the purpose** of the program; and
- (iii) Are **not unduly coercive**.

Example: A federal law that would withhold 5% of the federal highway funds otherwise allocable to a state if the state did not set a 21 years' minimum age for the drinking of alcohol was upheld where the funds withheld amounted to less than one-half of 1% of the state's total budget. [South Dakota v. Dole, 483 U.S. 203 (1987)]

1) **What Is “Unduly Coercive”?**

There is a limit to the conditions the Supreme Court will tolerate. A condition that goes beyond mere “incentive” and turns into “compulsion” or “undue influence” violates principles of federalism. However, the Court has not set out a brightline test for making this determination. [National Federation of Independent Business v. Sebelius, II.A.2.a., *supra*—law that threatens to withhold from states current Medicare funding if they do not greatly expand Medicare programs amounts to a “gun to the head,” given that the law threatens to withhold about 10% of an average state’s total budget]

3. **Commandeering State Officials**

The Supreme Court has held that the Tenth Amendment prohibits Congress from adopting a statute that “commandeers” state officials by *requiring states to regulate their own citizens*. [Printz v. United States, 521 U.S. 898 (1997)—striking portions of a federal gun law that required state law enforcement officers to collect from gun dealers reports regarding prospective handgun purchasers and to conduct background checks on them] However, the Court has allowed Congress to *regulate the states by prohibiting them from performing certain acts*. [See Reno v. Condon, 528 U.S. 141 (2000)—upholding federal act that bars states (as well as private resellers) from disclosing personal information required on drivers’ license applications]

B. STATE TAXATION AND REGULATION OF FEDERAL GOVERNMENT

1. **No Direct Tax on Federal Instrumentalities**

A state tax levied directly against the property or operation of the federal government without the consent of Congress is invalid.

2. **Nondiscriminatory, Indirect Taxes**

Nondiscriminatory, indirect taxes on the federal government or its property are permissible if they *do not unreasonably burden* the federal government.

Examples:

1) State income taxes on salaries of federal employees are valid. However, a state tax that imposes a higher tax on federal employees (or retired federal employees) than on state or local government employees (or retired employees) would violate the principle of intergovernmental tax immunity, unless Congress had approved this discriminatory tax. [Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989)]

2) Private contractors, *acting as purchasing agents* for the federal government, cannot be compelled to pay state sales or use taxes on materials purchased on behalf of the federal government. However, state sales or use taxes are valid where the contractor is working for the federal government on a “cost-plus” basis. These extra costs are not characterized as direct taxes.

3. **State Regulation of Federal Government**

The states have no power to regulate the activities of the federal government unless Congress consents to the regulation. Thus, instrumentalities and agents of the federal government are immune from state regulations relating to performance of their federal functions.

- Examples:*
- 1) A state may not require a post office employee to obtain a state driver's license in order to drive a mail truck. [Johnson v. Maryland, 254 U.S. 51 (1920)]
 - 2) A state may not require a contractor to obtain a state license to build facilities on an Air Force base, located within the state, pursuant to a government contract. [Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956)]

VII. PRIVILEGES AND IMMUNITIES CLAUSES

A. INTRODUCTION

There are two Privileges and Immunities Clauses: the Fourteenth Amendment Privileges or Immunities Clause and the Interstate Privileges and Immunities Clause of Article IV. The Fourteenth Amendment clause protects attributes of United States citizenship and is rarely applicable. The Article IV provision prevents some discrimination by states against nonresidents, and is usually more relevant on the bar exam.

B. ARTICLE IV—PRIVILEGES OF STATE CITIZENSHIP

Article IV, Section 2, the Interstate Privileges and Immunities Clause, provides that “[t]he Citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states.” Thus, it prohibits discrimination by a state against nonresidents.

1. Corporations and Aliens Not Protected

Corporations and aliens are *not citizens* of a state for purposes of the Privileges and Immunities Clause.

2. Only “Fundamental Rights” Protected

The Interstate Privileges and Immunities Clause prohibits discrimination by a state against nonresidents of the state when the discrimination concerns “fundamental rights”—i.e., rights relating to important *commercial activities* (such as pursuit of a livelihood) or *civil liberties*. However, the Clause applies only if the discrimination is *intentionally protectionist* in nature. [See *McBurney v. Young*, 133 S. Ct. 1709 (2013)—state law limiting Freedom of Information Act requests to state citizens did not violate the Privileges and Immunities Clause when it interfered with a nonresident’s vocation of obtaining property records for clients, because there was no evidence that the discrimination was protectionist in nature] The following protectionist measures have been struck down:

- a. *Statute charging nonresident commercial fishermen substantially more for commercial fishing license* than resident commercial fishermen (\$2,500 vs. \$25) [Toomer v. Witsell, 334 U.S. 385 (1948); cf. Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978)—vast difference between resident and nonresident *recreational* hunting license constitutional since no essential commercial activity involved];
- b. *Statute giving resident creditors priority* over nonresident creditors as to assets of foreign corporations in receivership proceedings [Blake v. McClung, 172 U.S. 239 (1898)];

- c. **Statute or court rule requiring state residency to be licensed** to practice law within the state [Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988)];
- d. **State income tax only on nonresidents** who earn money within the state [Austin v. New Hampshire, 420 U.S. 656 (1975)]; and
- e. **State law requiring private sector employers to give hiring preference to residents** absent a closely related substantial justification (*see below*) [Hicklin v. Orbeck, 437 U.S. 518 (1978)], but states **may** require a person to be a resident to hold **government employment** [McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) (*per curiam*)].

3. Substantial Justification Exception

A state law discriminating against nonresidents may be valid if the state has a substantial justification for the different treatment. In effect, it must show that nonresidents either cause or are part of the problem it is attempting to solve, and that there are **no less restrictive means** to solve the problem.

Example: The Court held that a city ordinance requiring 40% of employees of contractors and subcontractors working on city construction projects to be city residents was an apparent violation of the Article IV Privileges and Immunities Clause because it gave a preference in private sector employment to city residents. However, the Court found that it could not make a final determination as to **whether the preference was justified** in this case because the record from the lower courts did not allow it to evaluate the city's argument that the preference was necessary **to counteract grave economic and social ills** in urban environments caused by spiraling unemployment and declines in the population base of such cities. [United Building & Construction Trades Council v. Mayor of Camden, 465 U.S. 208 (1984)]

4. Note—Relationship to Commerce Clause

Although the Article IV Privileges and Immunities Clause and the Commerce Clause may apply different standards and produce different results, they tend to mutually reinforce each other. Consequently, they both have to be considered in analyzing bar exam questions.

C. FOURTEENTH AMENDMENT—PRIVILEGES OF NATIONAL CITIZENSHIP

The Fourteenth Amendment Privileges or Immunities Clause prohibits states from denying their citizens the privileges and immunities of national citizenship, such as the right to petition Congress for redress of grievances, the right to vote for federal officers, the right to enter public lands, the right to interstate travel, and any other right flowing from the distinct relation of a citizen to the United States Government.

1. Corporations Not Protected

Corporations are **not citizens** of the United States and are **not protected**.

2. Bill of Rights Not Included

The *Slaughterhouse Cases*, 83 U.S. 36 (1873), held that the fundamental rights protected against federal abuse (first 10 Amendments) are **not privileges or immunities of national citizenship** within the meaning of the Fourteenth Amendment; nor are such other basic

rights as the right to live, work, and eat. Thus, the guarantees of the Bill of Rights are protected from state action only by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

3. **Right to Travel and the Privileges and Immunities Clause**

The right to travel, which is protected by the Fourteenth Amendment, includes the right of newly arrived citizens to enjoy the same privileges and immunities as are enjoyed by other citizens of the state.

Example: A California statute limiting the welfare benefits of first year residents was held unconstitutional under the Fourteenth Amendment Privileges or Immunities Clause. The statute provided that citizens who had lived in California for less than one year could receive only the benefits they would have received in their prior state of residence. The Court noted that the right to travel includes the right to be treated equally in a new state of residence. [Saenz v. Roe, 526 U.S. 489 (1999)]

PART THREE: STATE REGULATION OR TAXATION OF COMMERCE

VIII. REGULATION OF FOREIGN COMMERCE

A. **LIES EXCLUSIVELY WITH CONGRESS**

For all practical purposes, the power to regulate foreign commerce lies exclusively with Congress. “Foreign” commerce has been held to include traffic on the high seas, even though both terminal ports are within the United States. [Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)]

B. **MINOR EXCEPTIONS WHERE STATE REGULATION PERMITTED**

The Supreme Court, however, has recognized a few minor exceptions; thus, the states are free to regulate local aspects of port pilotage and navigation of ships in foreign commerce (e.g., aspects such as safety of handling); and in one case the Court permitted state regulation of excursion boat traffic between Detroit and a Canadian island (state barred racial discrimination among boat passengers) since no Canadians or Canadian products or services were involved. [Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948)]

IX. REGULATION OF INTERSTATE COMMERCE

A. **REGULATION OF COMMERCE BY CONGRESS**

As already seen, Congress’s power over interstate commerce is very broad and pervasive. However, the power is *nonexclusive*—it is shared with the states to some degree.

1. **Power of Congress to Supersede or Preempt State Regulation**

Recall that the Supremacy Clause makes federal law supreme. (*See* IV.C., *supra*.) Thus, if a state law regulating commerce conflicts with a federal law, the state law will be void. Moreover, if Congress desires, it may preempt an entire area of regulation, thus preventing states from making any laws concerning the area preempted. (*See* IV.C.3., *supra*.)

2. Power of Congress to Permit or Prohibit State Regulation

Although Congress’s commerce power is nonexclusive, the states’ power to regulate interstate commerce is restricted by the negative implications of the Commerce Clause, even absent federal legislation—the states generally may *not* discriminate against interstate commerce. (See below.) Nevertheless, Congress is not so restricted; it may allow the states to adopt legislation that would otherwise violate the Commerce Clause.

Example: A state imposed a 3% tax on out-of-state insurance companies for all premiums received from insuring residents of the state. No similar tax was placed on in-state insurance companies. Although such a tax would ordinarily be held invalid under the Commerce Clause—because it discriminates against interstate commerce—the tax here was upheld because Congress had adopted an act permitting the states to regulate insurance in any manner, as long as the state regulation did not conflict with a federal statute specifically regulating insurance. [Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946); and see Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985)]

Note: As indicated above, Congress may also prohibit the states from adopting legislation that would otherwise be permitted under the Commerce Clause.

a. Limitation

While Congress may permit states to adopt regulations that would otherwise violate the Commerce Clause, such consent will not obviate other constitutional objections to the regulation. Thus, Congress may not give states the power to restrict civil liberties. (See X.A.1.b.2)a), *infra*.)

B. STATE REGULATION OF COMMERCE IN THE ABSENCE OF CONGRESSIONAL ACTION

If Congress has not enacted laws regarding the subject, a state or local government may regulate local aspects of interstate commerce if the regulation:

- (i) Does *not discriminate* against out-of-state competition to benefit local economic interests; and
- (ii) Is *not unduly burdensome* (i.e., the incidental burden on interstate commerce does not outweigh the legitimate local benefits produced by the regulation).

If either test is not met, the regulation will be held void for violating the Commerce Clause (sometimes called the “*Dormant Commerce Clause*” or “*Negative Commerce Clause*” under such circumstances).

1. Discriminatory Regulations

a. Generally Invalid

State or local regulations that discriminate against interstate commerce to protect local economic interests are almost always invalid.

b. Examples

1) Regulations Protecting Local Businesses

Laws designed to protect local businesses against interstate competition generally will be invalidated.

Examples:

1) A state cannot place a surcharge on out-of-state milk to make that milk as expensive as (or more expensive than) milk produced in the state.

2) A state cannot exempt local businesses or products from taxation or regulation that it seeks to apply to out-of-state businesses or products that come into the state.

3) A law requiring all locally produced solid waste to be processed at a local waste processing business was held to violate the Commerce Clause because it was a trade barrier against competition from out-of-state waste processors. [*C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994)]

2) Regulations Requiring Local Operations

If a state law requires a business to perform specific business operations in the state to engage in other business activity within the state, the law will normally be held invalid as an attempt to discriminate against other states where the business operations could be performed more efficiently.

Example:

If a state required all businesses that produce melons in the state and all businesses that purchase melons from local producers to wrap or package the melons in the state (before the melons were exported from the state), the law would be invalid as an attempt to force businesses to locate their packaging operations in the state.

3) Regulations Limiting Access to In-State Products

A state law that makes it difficult or impossible for out-of-state purchasers to have access to in-state products (other than products owned by the state itself) is likely to be held invalid.

Examples:

1) A state cannot prohibit in-state owners of “ground water” from selling and exporting the water they own to persons in other states.

2) A state cannot require in-state companies to sell products at a lower price to in-state residents than to out-of-state residents.

4) Regulations Prohibiting Out-of-State Wastes

A state may not prohibit private landfill or waste disposal facilities from accepting out-of-state garbage or waste or surcharge such waste [*Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992)] unless Congress authorizes such discrimination [*New York v. United States*, VI.A.2., *supra*—federal statute allowing states to impose surcharge on certain out-of-state nuclear wastes upheld]. This rule applies even to hazardous wastes. [*Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994)]

c. **Exceptions**

1) **Necessary to Important State Interest**

A discriminatory state or local law may be valid if it furthers an important, noneconomic state interest (e.g., health or safety) and there are *no reasonable alternatives* available.

Example: A state could prohibit the importation of live baitfish (such as minnows) into the state because the state could demonstrate that it had no other way of effectively avoiding the possibility that such baitfish might bring certain parasites into the state or, in other ways, have a detrimental effect on the state's wild fish population. [Maine v. Taylor, 477 U.S. 131 (1986)] However, a state could not prohibit the export of live baitfish to out-of-state purchasers because the sale of such fish to out-of-state purchasers would not impair any interest of the state, except the interest of protecting local purchasers of baitfish from competition by out-of-state purchasers. [Hughes v. Oklahoma, 441 U.S. 322 (1979)]

2) **State as Market Participant**

The Commerce Clause does not prevent a state from preferring its own citizens when the state is acting as a market participant (e.g., buying or selling products, hiring labor, giving subsidies).

Examples: 1) A state may purchase scrap automobiles from its citizens at a higher-than-market rate and refuse to pay nonresidents the same amount. [Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)]

2) Under the market participant exception to the Commerce Clause, a city may require that all construction *projects funded by the city* be performed by contractors using a workforce composed of at least 50% bona fide residents of the city. [White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983)]

a) **Limitation—Interstate Privileges and Immunities Clause**

While a state or local government does not violate the *Commerce Clause* by preferring its own citizens while acting as a market participant, there is no market participant exception to the Interstate Privileges and Immunities Clause. Thus, a regulation that interferes with private sector employment, such as the one in example 2), above, may violate the Privileges and Immunities Clause unless the regulating entity can show a substantial justification for the regulation. (*See* VII.B.3., *supra*.)

b) **Limitation—"Downstream" Restrictions**

While a state may choose to sell only to state residents, it may not attach conditions to a sale that would discriminate against interstate commerce.

Example: Alaska violated the Commerce Clause when it imposed a contractual requirement on purchasers of state-owned timber that the timber be processed in Alaska before being shipped out of state. [South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)—plurality opinion]

3) Favoring Government Performing Traditional Government Functions

The Supreme Court applies a more lenient standard when a law favors government action involving the performance of a traditional government function (such as waste disposal). Discrimination against interstate commerce in such a case is permissible because it is likely motivated by legitimate objectives rather than by economic protectionism.

Examples: 1) A county flow control ordinance that favored a state-created public waste facility by requiring waste haulers to bring the wastes to the state facility rather than to private facilities is valid. [United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007)]

2) A state may exempt from state taxation interest on its own bonds and bonds of its municipalities while taxing bonds of other states and their subdivisions. [Department of Revenue of Kentucky v. Davis, 533 U.S. 328 (2008)—issuing debt securities to pay for public projects is a “quintessentially public function” with a venerable history]

2. Nondiscriminatory Laws—Balancing Test

Sometimes a nondiscriminatory state or local law that regulates commerce may impose a burden on interstate commerce; e.g., a state law regulating the size of trucks within that state may burden interstate commerce because interstate trucking operations will be subject to the law when their trucks enter the state. A nondiscriminatory law will be invalidated only if the burden on interstate commerce outweighs the promotion of legitimate (not discriminatory) local interests. This is a case-by-case balancing test. Thus, some regulations of trucks will be upheld, because they do not impose an undue burden on interstate commerce, whereas other truck regulations will be invalidated, because they would make it extremely difficult for interstate trucking operators to have their trucks travel into or through the state.

a. Absence of Conflict with Other States

State and local laws regulating commerce are more likely to be upheld when there is little chance that states would have conflicting regulations of the same subject matter.

Example: A state could validly apply a state law prohibiting racial or gender discrimination in the hiring of personnel to an airline doing business in the state because the law was not discriminatory against out-of-state businesses, it promoted a legitimate interest, and no other state could validly require or permit racial or gender discrimination by airlines.

b. State Control of Corporations

A different standard may apply to statutes regulating the internal governance of a corporation adopted by the state of incorporation. Because of the states’ long history of regulating the internal governance of corporations that they create, and because of their strong interest in doing so, even a statute that heavily impacts interstate commerce may be upheld.

Example: To protect shareholders of corporations incorporated in Indiana from hostile takeovers, the Indiana legislature adopted a “control share acquisition statute.” The statute provided that once a person acquires shares

that take him across a specified ownership threshold (e.g., one-third ownership of all voting shares), he may not vote those shares unless the other shareholders consent. Even though most hostile takeover bids originate from outside the state, the Supreme Court found that the statute did not violate the Commerce Clause because its aim was to protect current shareholders, it did not discriminate between takeover bidders based on their state of origin, and there is no chance that the state law would conflict with the laws of other states because the internal governance of a corporation is regulated only by the state in which the corporation is incorporated. [CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987)]

C. TWENTY-FIRST AMENDMENT—STATE CONTROL OVER INTOXICATING LIQUOR

1. Intrastate Regulations

The Twenty-First Amendment, which repealed prohibition, gives state governments wide latitude over the importation of liquor and the conditions under which liquor is sold or used within the state. However, state liquor regulations that constitute only an economic preference for local liquor manufacturers may violate the Commerce Clause. The Commerce Clause prohibits both outright economic favoritism for local businesses and attempts to regulate out-of-state transactions in order to guarantee the competitive position of in-state businesses.

Examples: 1) A state law that prohibits out-of-state wineries from shipping wine directly to in-state consumers, but permitting in-state wineries to do so if licensed, discriminates against interstate commerce. [Granholm v. Heald, 544 U.S. 460 (2005)]

2) A state law that requires out-of-state distillers or sellers of alcoholic beverages to affirm that the price the distiller/seller is charging liquor retailers or wholesalers in the state is no greater than the price the distiller/seller is charging in other states violates the Commerce Clause. Such a price affirmation law directly interferes with and burdens interstate commerce. The Twenty-First Amendment does not authorize this type of state interference with commerce. [Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986); Healy v. The Beer Institute, Inc., 491 U.S. 324 (1989)]

2. Interstate Regulations

Transitory liquor (liquor bound for out-of-state destinations) is subject to the Commerce Clause. Thus, a state prohibition on transporting liquor through the state would probably be held unconstitutional as violating the Commerce Clause.

3. Federal Power

The Twenty-First Amendment does not prohibit Congress from controlling economic transactions involving alcoholic beverages under the federal commerce power. Thus, federal antitrust law can prohibit a practice of liquor dealers that has the effect of fixing minimum prices. [324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)] Similarly, as mentioned above, Congress may, without violating the Twenty-First Amendment, “regulate” liquor distribution

by imposing conditions on the grant of federal funds given under the spending power. [South Dakota v. Dole, VI.A.2.b., *supra*]

D. BAR EXAM APPROACH

Whenever a bar exam question involves a state regulation that affects the free flow of interstate commerce, you should proceed as follows:

First, see if the question refers to **any federal legislation** that might be held either to: (i) **supercede** the state regulation or **preempt** the field, or (ii) **authorize** state regulation otherwise impermissible.

Second, if neither of these possibilities is dispositive of the question, ask if the state legislation either **discriminates** against interstate or out-of-state commerce or places an **undue burden** on the free flow of interstate commerce. If the legislation is discriminatory, it will be invalid unless (i) it furthers an important state interest **and** there are no reasonable nondiscriminatory alternatives, or (ii) the state is a market participant. If the legislation does not discriminate but burdens interstate commerce, it will be invalid if the burden on commerce outweighs the state's interest. Consider whether there are less restrictive alternatives.

X. POWER OF STATES TO TAX INTERSTATE COMMERCE

A. GENERAL CONSIDERATIONS

The same general considerations applicable to state regulation of commerce (*supra*) apply to taxation. Pursuant to the Commerce Clause, Congress has complete power to authorize or forbid state taxation affecting interstate commerce. If Congress has not acted, look to see whether the tax **discriminates** against interstate commerce. If it does, it is invalid. If it does not, assess whether the burden on interstate commerce outweighs the benefit to the state. Three tests must be met: (i) there must be a **substantial nexus** between the taxpayer and the state; (ii) the tax must be **fairly apportioned**; and (iii) there must be a **fair relationship** between the tax and the services or benefits provided by the state.

1. Discriminatory Taxes

Unless authorized by Congress, state taxes that discriminate against interstate commerce violate the Commerce Clause. Such taxes may also be held to violate the Interstate Privileges and Immunities Clause (*see* VII.B., *supra*) if they also discriminate against nonresidents of the state [Austin v. New Hampshire, 420 U.S. 656 (1975)], as well as the Equal Protection Clause if the discrimination is not rationally related to a legitimate state purpose [WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968)—denial of tax exemption solely because taxpayer was incorporated in another state is invalid].

a. Finding Discrimination

1) Tax Singles Out Interstate Commerce

If a state tax singles out interstate commerce for taxation, the Court ordinarily will not “save” the tax by finding other state taxes imposed only on local commerce (which might arguably eliminate the “apparent” discrimination against interstate commerce).

Example: The Supreme Court invalidated an Ohio statute that gave a tax credit against the Ohio motor vehicle fuel sales tax (paid by fuel dealers) for each gallon of ethanol sold as a component of gasohol if, but only if, the ethanol was produced in Ohio or in a state that granted a similar tax advantage to ethanol produced in Ohio. The Supreme Court found that this tax credit system constituted discrimination against interstate commerce. [*New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988)]

However, state taxes that single out interstate commerce are considered *nondiscriminatory* if the particular statutory section or scheme *also* imposes the same type of tax on *local* commerce (e.g., sales and use taxes, discussed *infra*).

2) Tax with In-State Subsidy

A seemingly uniform tax may be ruled to be discriminatory if the proceeds from the tax are “earmarked” for subsidies to in-state businesses.

Example: A state imposed a tax on all milk dealers, but the tax law provided that revenue from the tax would be put into a fund that would be used to pay subsidies to in-state dairy farmers. This assessment-subsidy system violates the Commerce Clause because it operates identically to a tax placed only on sales of milk produced outside the state. [*West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994)]

3) Double Taxation on Out-of-State Income

A state must grant a credit against a local tax for income taxed by another state.

Example: Maryland’s personal income tax on residents includes both a state and a county tax. Residents who pay taxes to another state for income earned in that state are allowed a credit against the state tax but not the county tax. Such a tax scheme violates the Dormant Commerce Clause because it leads to double taxation on out-of-state income and discriminates in favor of intrastate over interstate economic activity. [*Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787 (2015)]

b. Choosing the Proper Clause

While a state or local tax that discriminates against interstate commerce generally violates the Commerce Clause, the Clause is not always the strongest argument against the tax.

1) Interstate Privileges and Immunities Clause

If a state or local tax discriminates against a *natural person who is a nonresident*, the Article IV Interstate Privileges and Immunities Clause is the strongest argument against the tax’s validity, because it is more direct than a Commerce Clause argument.

2) Equal Protection

a) Where Congress Approves the Discrimination

Although the Supreme Court normally uses the Commerce Clause to invalidate discriminatory legislation, it may also find that such discrimination violates the Equal Protection Clause. This is important where Congress has

given the states the power to do something that would otherwise violate the Commerce Clause: Congress can give states the power to take actions that otherwise would violate the Commerce Clause, but it *cannot* approve state actions that would violate equal protection. Thus, if Congress has approved a type of state tax that discriminates against out-of-state businesses, that state tax will not be in violation of the Commerce Clause, but it might be found to be a violation of equal protection.

Example: In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), the Court invalidated a state tax on insurance companies that imposed a higher tax on out-of-state insurance companies than was paid by in-state companies. The Court found that federal statutes exempted state regulation of insurance businesses from Commerce Clause restrictions but found that the tax violated equal protection because it did not relate to a legitimate interest of government (i.e., the state does not have a legitimate interest in discriminating against out-of-state businesses simply to protect local economic interests from competition).

b) **Taxes Based on Suspect Classifications or Infringing on Fundamental Rights**

The Court may use equal protection analysis rather than Commerce Clause analysis to strike state taxes that are imposed on the basis of a *suspect classification* or that burden a *fundamental right*. A state tax system giving tax exemptions only to long-time residents of the state and denying a similar tax exemption to newer residents will be held to violate the Equal Protection Clause.

Example: The Court invalidated a state property tax provision that gave an exemption from the property tax only to those Vietnam-era veterans who had been residents of the state before May 1976. [*Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985)]

2. **Nondiscriminatory Taxes**

The Court reviews nondiscriminatory state and local taxes affecting interstate commerce and balances the state need to obtain the revenue against the burden the tax imposes on the free flow of commerce—an approach similar to the one used for examining nondiscriminatory regulations to see whether they impose an undue burden on interstate commerce (*see* IX.B.2., *supra*).

a. **Factors**

The Court generally considers three factors in determining whether the nondiscriminatory tax is valid:

1) **Substantial Nexus**

A state tax will be valid under the Commerce Clause only if there is a substantial nexus between the activity or property taxed and the taxing state. Substantial nexus requires significant or substantial activity within the taxing state.

Examples: 1) A state in which a sale is made may force the seller to pay a sales tax if the seller has some significant contact with the state (e.g., carries on business in the state). However, the state may not force the seller to pay a sales tax if its only contact with the state is the receipt of orders from sales representatives that may be accepted or rejected by the seller.

2) If an interstate seller solicits sales in a state by mail only, with orders shipped to the state by mail or common carrier, the substantial nexus required by the Commerce Clause is not present—the mere mailing of catalogs to the state and shipment by mail or common carrier is not significant activity within the state. [Quill Corp. v. North Dakota, 504 U.S. 298 (1992)]

2) Fair Apportionment

A state or local tax affecting interstate commerce will be valid under the Commerce Clause only if it is fairly apportioned according to a rational formula (i.e., the tax should be based on the extent of the taxable activity or property in the state). Otherwise the activity or property would be subject to cumulative tax burdens.

Examples: 1) State A imposes a 1% tax on gross receipts of all businesses within the state. Harvester is located in State A but makes a number of sales out of state. The tax is invalid as to Harvester’s out-of-state sales since it potentially subjects those sales to cumulative burdens—the tax by the seller’s state and a similar tax by the buyer’s state—without apportioning the tax.

2) Chooch is a resident of State A. It owns railroad cars used in interstate commerce. The cars are in State A three months each year and State B three months each year. For a State B property tax on the railroad cars to be valid, it must fairly apportion the tax, so that the cars will not be subjected to a similar tax by State A, thus cumulating Chooch’s tax burden.

Note: The taxpayer has the burden of proving an unfair apportionment.

3) Fair Relationship

A state or local tax affecting interstate commerce will be valid under the Commerce Clause only if the tax is fairly related to the services or benefits provided by the state.

Example: A state may levy a tax on passengers enplaning at a state airport if the tax is related to the benefits that the passengers receive from the state (e.g., the airport facilities). [See Evansville-Vanderburg Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972)]

B. USE TAX

Use taxes are taxes imposed on the users of goods purchased out of state.

1. Permissible in Buyer's State

Use taxes are not considered to discriminate against interstate commerce even though they single out interstate commerce for taxation (i.e., they are imposed only on goods purchased outside the state), as long as the use tax rate is not higher than the sales tax rate. *Rationale:* The purpose of such a tax is to *equalize* the tax on in-state and out-of-state goods rather than to give in-state goods an advantage. [See *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)]

2. State May Force Seller to Collect Use Tax

Often, states force the user to come forward and pay the state the use tax owed. However, a state may force a nonresident, interstate seller to *collect* the use tax from the local buyer and remit it to the state *if* the seller has the substantial nexus required by the Commerce Clause. The substantial nexus requirement can be met if the seller engages in some *significant activity* in the buyer's state, e.g., maintains offices there. Merely soliciting orders by mail and shipping orders into the state is not sufficient. [*Quill Corp. v. North Dakota*, A.2.a.1), *supra*]

C. SALES TAXES

Sales taxes are taxes imposed on the seller of goods for sales consummated within the state. They generally do not discriminate against interstate commerce; rather the issue usually involves whether there is a substantial nexus (*see* A.2.a.1), *supra*) between the taxpayer and the taxing state, or whether the tax is properly apportioned.

D. AD VALOREM PROPERTY TAXES

Ad valorem property taxes are taxes based on a percentage of the assessed value of the property in question. Such taxes are generally valid. However, a Commerce Clause issue arises when the property taxed moves in interstate commerce. Goods in transit are *totally exempt* from taxation. Once the goods come to a halt in a state (i.e., obtain a *taxable situs*), they may be taxed. Then, the issue usually revolves around whether the tax imposes an undue cumulative burden (i.e., apportionment).

1. No Tax on Commodities in the Course of Interstate Commerce

Commodities in the course of interstate commerce are *entirely exempt* from local taxation—since each state could otherwise exact a toll as the goods passed through, imposing an intolerable burden on interstate commerce. [*Standard Oil v. Peck*, 342 U.S. 382 (1952)] Thus, states may not levy an ad valorem property tax on commodities being shipped in interstate commerce, even if the goods happen to be in the state on tax day.

a. When Is Property “in the Course of” Interstate Commerce?

Only property “in the course of” interstate commerce is immune from local property taxation.

1) When Does Interstate Transportation Begin?

Interstate transportation begins when (i) the cargo is delivered to an interstate carrier (the shipper thereby relinquishing further control), *or* (ii) the cargo actually starts its interstate journey. Goods merely being prepared for transit are *not* in the course of interstate commerce.

2) Effect of a “Break” in Transit

Once started, a shipment remains in the course of interstate commerce unless

actually diverted. Breaks in the continuity of transit will not destroy the interstate character of the shipment, unless the break was *intended to end or suspend* (rather than temporarily interrupt) the shipment.

3) When Does Interstate Shipment End?

The interstate shipment usually ends when it *reaches its destination*, and thereafter the goods are *subject to local tax*.

b. No Apportionment Required

The validity of state taxes on goods in interstate commerce is strictly a Commerce Clause question; i.e., either the goods are “in the course of” interstate commerce and exempt from tax or they are not. There is no need for apportionment.

2. Tax on Instrumentalities Used to Transport Goods Interstate

The validity of ad valorem property taxes on instrumentalities of commerce (airplanes, railroad cars, etc.) depends on (i) whether the instrumentality has acquired a “*taxable situs*” in the taxing state (i.e., whether there are *sufficient “contacts” with the taxing state* to justify the tax), and (ii) since the physical situs of the instrumentalities may change from state to state during the year, whether the *value* of the instrumentality has been properly *apportioned according to the amount of “contacts”* with each taxing state. (The taxable situs (“nexus”) is required by the Due Process Clause to establish the state’s power to tax at all, and apportionment is required by the Commerce Clause to prevent an intolerable burden on interstate commerce.)

a. Taxable Situs (“Nexus”)

In general, an instrumentality has a taxable situs in a state if it receives *benefits or protection* from the state. [Braniff Airways v. Nebraska Board of Equalization and Assessment, 347 U.S. 590 (1954)—airplanes have taxable situs in nondomiciliary state where airline company owned no property but made 18 regularly scheduled flights per day from rented depot space, even though same aircraft did not land every day] Note that an instrumentality *may have more than one taxable situs*, upon each of which states can impose a tax subject to the required apportionment (*infra*).

b. Apportionment Requirement

If an instrumentality has only one situs, the domiciliary state can tax at full value. If the instrumentality has more than one taxable situs, a tax apportioned on the value of the instrumentality will be upheld if it fairly approximates the average physical presence of the instrumentality within the taxing state. [Union Tank Line Co. v. Wright, 249 U.S. 275 (1919)] The *taxpayer has the burden* of proving that an instrumentality has acquired a taxable situs outside his domiciliary state.

1) Proper Apportionment

The following methods have been upheld:

- (i) Using the proportion of *miles traveled* within the taxing state to the total number of miles traveled by the instrumentalities in the entire operation. [Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949)]

- (ii) Computing the *average number of instrumentalities* (tank cars) *physically present* in the taxing state on any one day during the tax year and taxing that portion at full value—i.e., as if in the state all year. [Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158 (1933)]

Note: Because different states may use different apportionment formulas to tax the same property, there may still be some double taxation of the same instrumentalities. However, the double taxation should be minimal if proper apportionment formulas have been used.

E. PRIVILEGE, LICENSE, FRANCHISE, OR OCCUPATION TAXES

Privilege, license, franchise, and occupation taxes are cumulatively known as “doing business” taxes. States generally can impose such taxes—on companies engaged exclusively in interstate commerce, as well as on interstate companies engaged in local commerce—for the privilege of doing business within the state. Such taxes may be measured by a flat amount or by a proportional rate based on revenue derived from the taxing state. In either case, the tax must meet the basic requirements—the activity taxed must have a *substantial nexus to the taxing state*; and the tax must be *fairly apportioned*, must *not discriminate* against interstate commerce, and must *fairly relate to services provided* by the state. [Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)—*overruling* Spector Motor Service v. O’Connor, 340 U.S. 602 (1951)]

- Examples:*
- 1) A privilege tax for doing business, based on the gross income derived from transporting goods within the state, can be applied to a trucking company that delivers goods coming from outside the state. [Complete Auto Transit, Inc. v. Brady, *supra*]
 - 2) An occupation tax on all businesses, based on gross income derived within the state, can be applied to a stevedoring company operating within the state that loads and unloads ships carrying goods in interstate commerce. [Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978)—*overruling* Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 442 (1947)]

1. Taxpayer Has Burden of Proof

The taxpayer has the burden of showing that the state’s apportionment formula is unfair. However, a state tax that discriminates against interstate commerce will be held invalid regardless of whether the taxpayer can show that an actual, unfair multiple burden is imposed on his business.

XI. POWER OF STATES TO TAX FOREIGN COMMERCE

A. IMPORT-EXPORT CLAUSE

Article I, Section 10, Clause 2 provides: “No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws”

1. State Taxation of “Imports” Prohibited Absent Congressional Consent

The Import-Export Clause prohibits the states from imposing any tax on imported goods as

such or on commercial activity connected with imported goods *as such* (i.e., taxes discriminating against imports), except with congressional consent. [Brown v. Maryland, 25 U.S. 419 (1827)]

2. State Taxation of “Exports” Prohibited

The Import-Export Clause prohibits the states from imposing any tax on goods after they have entered the “export stream.”

B. COMMERCE CLAUSE

The Commerce Clause gives Congress the exclusive power to regulate foreign commerce and thus inherently limits a state’s power to tax that commerce. Therefore, a state tax applied to foreign commerce must meet all of the Commerce Clause tests that apply to state taxation of interstate commerce. (See X.A., *supra*.) And even if a state tax meets those tests, the tax is invalid if it would (i) create a substantial risk of international multiple taxation or (ii) prevent the federal government from “speaking with one voice” regarding international trade or foreign affairs issues. [Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994)]

PART FOUR: INDIVIDUAL GUARANTEES AGAINST GOVERNMENTAL OR PRIVATE ACTION

XII. LIMITATIONS ON POWER AND STATE ACTION REQUIREMENT

A. CONSTITUTIONAL RESTRICTIONS ON POWER OVER INDIVIDUALS

The Constitution provides individuals with a number of rights that restrict the power of the government (e.g., the right to speak freely). Some rights/restrictions are applicable only to the federal government, some are applicable only to state and local governments, and some are applicable to all governmental bodies. A few even apply to private action. Several constitutional provisions also give Congress the power to adopt legislation to protect individual rights.

Note: The Constitution sets the *minimum level* of protection for individuals. States generally are free to grant broader protections than those granted in the United States Constitution.

1. Bill of Rights

The Bill of Rights (first 10 Amendments to the Constitution) is the most important source of limitations on the federal government’s power. By its terms, the Bill is not applicable to the states, although most of its safeguards have been held to be applicable to the states through the Fourteenth Amendment Due Process Clause.

a. Rights Applicable to States

The Supreme Court has stated that only those safeguards in the Bill of Rights that are “essential to liberty” are applicable to the states through the Fourteenth Amendment. Included in this concept are: *all the First Amendment* guarantees (speech, press, assembly, right to petition, free exercise, and nonestablishment of religion); the *Second Amendment* right to bear arms; the *Fourth Amendment* (unreasonable search and seizure); some *elements of the Fifth Amendment* (privilege against self-incrimination; compensation for taking of private property for public use); the *Sixth Amendment* (speedy and public trial by impartial jury, notice and right of confrontation, compulsory

process, and right to legal counsel in all serious criminal proceedings); and the *Eighth Amendment* (cruel and unusual punishment, excessive bail, and excessive fine provisions are *assumed* to be incorporated but there is no precise ruling).

b. Rights Not Applicable to States

There are four provisions of the Bill of Rights that have not yet been incorporated into the Due Process Clause:

- (i) The *Third Amendment* prohibition against quartering troops in a person's home;
- (ii) The *Fifth Amendment* right to a grand jury indictment in criminal cases; and
- (iii) The *Seventh Amendment* right to a jury trial in civil cases.

[See *McDonald v. Chicago*, 130 S. Ct. 3020 (2010)] The *Tenth Amendment*, by its terms, limits the federal government's power over states, and so is inapplicable to the states.

2. Thirteenth Amendment

The Thirteenth Amendment provides that neither slavery nor involuntary servitude shall exist in the United States.

a. No Requirement of State Action

The amendment contains no language limiting its effect to governmental action (e.g., "no *state* shall . . ."); thus, it is applicable even to *private action*.

b. Involuntary Servitude

The Court has defined involuntary servitude as forcing someone to perform work—whether compensated or not—through the use or threatened use of physical injury or restraint (such as imprisonment), or through the use or threat of legal sanction. Psychological and other forms of coercion alone are generally inadequate to show involuntary servitude.[See *United States v. Kozminski*, 487 U.S. 931 (1988)] The Thirteenth Amendment does not prohibit all forms of labor that one person is compelled to perform for the benefit of another: It does not apply to compulsory military service, civic obligations such as jury duty, convicted prisoners who must perform work as part of their criminal sentence, or even recipients of medical scholarships who are required to work *pro bono*. However, courts are reluctant to order specific performance of a personal service contract because the order would be tantamount to involuntary servitude.

c. Congressional Power

The enabling clause of the Thirteenth Amendment gives Congress the power to adopt appropriate legislation, and the Supreme Court apparently will uphold legislation proscribing almost any private racially discriminatory act that can be characterized as a "*badge or incident of slavery*."

Examples: The Supreme Court has upheld legislation:

- 1) Prohibiting private parties from refusing to rent or sell housing to a person because of race [*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)];

2) Prohibiting private, nonsectarian schools from refusing to admit nonwhite children [Runyon v. McCrary, 427 U.S. 160 (1967)]; and

3) Prohibiting a private employer from discriminating in hiring on the basis of race [Patterson v. McLean Credit Union, 491 U.S. 164 (1989)].

The above are examples of where Congress used its power to adopt statutes prohibiting “badges of slavery”; the proscribed activities would not necessarily be held to violate the Thirteenth Amendment absent the legislation.

3. Fourteenth Amendment

The Fourteenth Amendment *prohibits states* (not the federal government or private persons) from depriving any person of life, liberty, or property without due process and equal protection of the law. As discussed above, this amendment is a most important source of limitations on the states’ power over individuals, because, through the Due Process Clause, most of the protections of the Bill of Rights are applicable to the states.

The meaning of due process and equal protection will be discussed later in this outline.

a. Requirement of State Action

The Fourteenth Amendment applies only if there is action by a state or local government, government officer, or private individual whose behavior meets the requirements for state action (*see* B., below).

b. Scope of Congressional Power

Section 5 of the Fourteenth Amendment is an enabling clause giving Congress the power to adopt *appropriate legislation* to enforce the rights and guarantees provided by the Fourteenth Amendment. Under Section 5, Congress may *not* expand existing constitutional rights or create new ones—it may only enact laws to prevent or remedy violations of rights already recognized by the courts. To adopt a valid law, Congress must point to a history or pattern of state violation of such rights and adopt legislation that is *congruent and proportional* (i.e., narrowly tailored) to solving the identified violation. Note, however, that when Congress is dealing with a type of discrimination that the Supreme Court reviews using heightened scrutiny (i.e., race, national origin, or gender—*see* XVIII.D., E., *infra*), Congress will generally have more power to act.

Examples: 1) The Americans With Disabilities Act (“ADA”) includes provisions that, among other things, prohibit states from discriminating against disabled persons in hiring practices and requires states to make reasonable accommodations for disabled employees. Under the Fourteenth Amendment Equal Protection Clause, the Court has recognized a right of disabled people to be free from irrational state discrimination. In adopting the ADA, Congress did not identify a history or pattern of irrational employment practices by the states. Even if there were such a pattern, the provisions here were not congruent and proportional to remedying irrational discrimination; they are overinclusive, because they prohibit states from making employment decisions that are constitutional under the rational basis test. [Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)] Under similar reasoning,

the Supreme Court has held that Congress has no power under Section 5 to broadly restrict *age discrimination by state employers*. [Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)]

2) The Supreme Court held that there is no violation of the First Amendment, applicable to the states through the Fourteenth Amendment, where a state law incidentally burdens a religious practice. [Employment Division v. Smith, XXII.C.3., *infra*] In response, Congress adopted a statute, purportedly under Section 5, providing that a state may not burden religious practices absent a compelling interest. The statute was held unconstitutional because it sought to expand substantive First Amendment rights beyond those recognized by the Supreme Court. [City of Boerne v. Flores, 521 U.S. 507 (1997)]

Compare: The Court has held that Congress *has* power under Section 5 to provide that state governments may be sued for violating Title II of the ADA (which prohibits state and local government discrimination against people with disabilities in government programs, services, or activities) when the discrimination involves access to the courts. *Rationale:* The right of meaningful access to judicial proceedings is a “fundamental right” under the Due Process Clause, and is thus subject to “heightened judicial scrutiny” much more demanding than “rational basis.” This heightened scrutiny makes it “easier for Congress to show a pattern of state constitutional violations.” [Tennessee v. Lane, 541 U.S. 509 (2004)]

4. Fifteenth Amendment

The Fifteenth Amendment is a limitation on both the *states and the federal government*. It prohibits them from denying any citizen the right to vote on account of race or color. As indicated above, the Fifteenth Amendment contains an enabling clause that allows Congress to adopt legislation protecting the right to vote from discrimination.

a. Limitations

Fifteenth Amendment legislation can be limited by other constitutional principles. For example, the Supreme Court found that the Tenth Amendment and principles of equal sovereignty among the states require Congress to have extraordinary justification to adopt legislation requiring some, but not all, states to obtain federal approval before changing any voting law. [Shelby County v. Holder, 133 S. Ct. 2612 (2013)—subjecting states to pre-clearance based on formula containing decades-old data unconstitutional]

5. Commerce Clause

The Supreme Court has allowed Congress to use the Commerce Clause to limit the power of individuals over other individuals—by adopting legislation barring private racial discrimination in activities “connected with” interstate commerce. Recall that under the affectation doctrine, almost any activity can be said to be connected with interstate commerce. (*See* II.A.4.a.1), *supra*.)

a. Civil Rights Act

Provisions of the Civil Rights Act of 1964 *barring discrimination in places of public accommodation* are proper and valid exercises of commerce power.

b. Extent of Commerce Power

The reach of the commerce power is broad. Any business that is *open to interstate travelers* or that *uses products shipped in interstate commerce* is covered. [Daniel v. Paul, 395 U.S. 298 (1969)—private resort held to be a public place of accommodation encompassed within the Act because drinks and entertainment facilities had been purchased and shipped through interstate commerce]

6. Rights of National Citizenship

The Supreme Court has also allowed Congress to limit the power of private individuals to infringe upon others’ rights of national citizenship (e.g., the right of interstate travel, the right to assemble to petition Congress for redress), without pointing to any specific constitutional source for the power. [Griffin v. Breckenridge, 403 U.S. 88 (1971)]

B. STATE ACTION REQUIREMENT

As indicated above, the Constitution generally prohibits only governmental infringement of constitutional rights. Thus, to find some action unconstitutional, it is generally necessary to attribute the action to the state, which includes government agencies and officials acting under the color of state law. However, this does not mean that the act must be directly by a government actor; “state action” can be found in the actions of seemingly private individuals who (i) perform exclusive public functions, or (ii) have significant state involvement in their activities.

1. Exclusive Public Functions

The Supreme Court has found that certain activities are so *traditionally* the *exclusive* prerogative of the state that they constitute state action even when undertaken by a private individual or organization. To date, only running a town and running an election for public office have been found to be such exclusive public functions.

Examples: 1) The owner of a “company town” with *all* of the attributes of a public town (e.g., homes, sidewalks, streets, police and fire protection, etc.) cannot deny a person’s First Amendment right to distribute religious literature in the town, since the company town is equivalent to a town. [Marsh v. Alabama, 326 U.S. 501 (1946)] However, the owner of a shopping mall can deny people their First Amendment right to picket, since a mall does not have all of the attributes of a town. [Hudgens v. NLRB, 424 U.S. 507 (1976)]

2) Running elections is an exclusive public function, so if a private organization runs a preprimary that has a substantial effect on who is ultimately elected, its actions will be state action. [Terry v. Adams, 345 U.S. 461 (1953)—county political group whose candidate almost always runs unopposed in primary and general election cannot discriminate]

a. Must Be Traditional and Exclusive Function

To be state action, the activity must be *both* a *traditional* and *exclusive* government function. Thus, the Court has held that a warehouseman authorized by statute to sell goods stored with him for unpaid charges is not exercising state action when he makes the sale, because while resolution of private disputes is a traditional public function, it is not exclusive—the bailor had state law remedies to check abuses by the warehouseman. [Flagg Brothers v. Brooks, 436 U.S. 149 (1978)] State action exists, and due process guarantees apply, *only if* the creditor uses judicial or executive agencies to secure properties in the possession of the debtor.

2. Significant State Involvement—Facilitating Private Action

“State action” also exists whenever a state *affirmatively* facilitates, encourages, or authorizes acts of discrimination by its citizens. Note, however, that there must be some sort of affirmative act by the state approving the private action; it is not enough that the state permits the conduct to occur.

a. Instances of Significant State Involvement

1) Official Encouragement

Purportedly private action will be given state action status if the action is encouraged or sanctioned by the state.

a) Judicial Approval

State court enforcement of *restrictive covenants prohibiting sale or lease of property to blacks* constitutes state action even in civil proceedings between private parties. [Shelley v. Kraemer, 334 U.S. 1 (1948)]

(1) Peremptory Challenges

The use of peremptory challenges, even by a private party, constitutes state action, both because jury selection is a traditional public function and because there is overt, significant participation by the government (the judge) in the jury selection process. Thus, private litigants and defendants are prohibited from using peremptory challenges in a discriminatory manner. [See Edmonson v. Leesville Concrete, 500 U.S. 614 (1992); Georgia v. McCollum, 505 U.S. 42 (1992)]

b) Official Acts

State action may be found in the absence of an unconstitutional statute or ordinance if it appears that the state sanctions constitutional violations by its own officers.

(1) Discriminatory Law Enforcement

The Court reversed a conviction of sit-in demonstrators where no statute or ordinance required segregation but the mayor and police had announced publicly that they would invoke trespass and breach of the peace laws to enforce a local custom of racial separation in eating places. [Lombard v. Louisiana, 373 U.S. 267 (1963)]

(2) Apparent Legal Authority

Even if a state forbids officers from acting in a certain way (e.g., depriving persons of their constitutional rights), the forbidden action may still constitute state action if the state puts the actor in a position to commit the unconstitutional act.

Example: A sheriff beat a prisoner to death in an effort to secure a confession. Both the state and the sheriff were held liable. The actions of the sheriff involved “state action” because the sheriff *acted under “the color of state law”*—the state in effect cloaked him with the apparent legal authority.” [Screws v. United States, 325 U.S. 91 (1945)]

(3) Public Defenders

A public defender *does not act for the state* when he represents an indigent client. Therefore, negligence or malpractice by the public defender is not a denial of due process because the public defender's actions are not "state actions." [Polk County v. Dodson, 454 U.S. 312 (1982)]

2) State Authorization

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Court invalidated a state constitutional provision that *repealed* all existing *state laws banning discrimination* in the sale or lease of property and prohibited reenactment of such laws in the future because such laws "authorize" private discrimination.

3) The State as Lessor for a Racially Discriminatory Lessee

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), Delaware was held responsible under the Fourteenth Amendment Equal Protection Clause for the exclusion of blacks from a coffee shop which was located in a public building. The shop was constructed by and leased from the state. The *maintenance* of the facility was *paid for with public funds* and Delaware was able to charge a higher rent because it allowed the restaurant owner to cater to the prejudices of its white customers.

4) Administration of Private Discriminatory Trust by Public Officials

State action exists where city personnel maintain a park, "open to all except blacks," under a private trust. [Evans v. Newton, 382 U.S. 296 (1966)]

5) Entwinement of State and Private Entities

The fact that a state entity helps formulate and adopts the rules of a private entity, and chooses to follow the order of the private entity pursuant to those rules, does not convert the private entity's action into state action. However, a state may be so entwined with a private organization that the organization's actions will be considered state action. [Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001)]

Example: The National Collegiate Athletic Association ("NCAA") is a voluntary association of public and private universities that establishes rules for its members regarding collegiate sports. Pursuant to its rules, the NCAA urged a member college to suspend its coach for recruiting violations. The coach cannot successfully sue the NCAA for violating his constitutional rights because there is no state action. [National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988)]

Compare: An association that regulates high school sports within a single state: (i) to which most public high schools belong; (ii) whose governing body is made up mostly of public school officials; (iii) whose meetings are held during regular school hours; (iv) whose employees may join the state retirement system; and (v) which is funded by gate receipts from the regulated sports is so entwined

with the state that its action can be considered state action.
 [Brentwood Academy v. Tennessee Secondary School Athletic Association, *supra*]

b. Instances of Insignificant State Involvement

1) Heavily Regulated Businesses and/or Granting of a Monopoly to a Utility

a) Electric Company

State action will not be found merely because the state has granted a monopoly to a business or heavily regulates it.

Example: In *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), **no state action** was found where an electric company terminated the user's service without notice and hearing. The state had not directed or ordered the termination and the fact that the company was heavily regulated and the state commission had approved private utility regulations authorizing such termination was not enough.

b) Nursing Home

A nursing home operated by a private corporation did **not exercise state action** when it discharged Medicaid patients, even though its operation was extensively regulated by the government. [Blum v. Yaretsky, 457 U.S. 991 (1982)]

c) School

A school operated by a private corporation did **not** exercise state action when it discharged teachers (allegedly in violation of their First Amendment rights) even though the school had contracts with the state to educate or care for many of its students and it received almost all of its operating funds from the government. [Rendell-Baker v. Kohn, 457 U.S. 830 (1982)]

2) Licensing and Provision of Essential Services

Granting a liquor license and providing essential services (police, fire, water, power, etc.) to a **private club** that imposes racial restrictions on its members and guests are **not** sufficient to constitute state action. [Moose Lodge v. Irvis, 407 U.S. 163 (1972)]

3) Congressional Grant of Corporate Charter and Exclusive Name

Congressional grant of a corporate charter and exclusive use of a name is not sufficient to constitute state action. [San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987)—congressional charter and grant of exclusive name "Olympic" does not clothe United States Olympic Committee with state action]

4) No Government Duty to Protect Individuals from Harm by Private Persons

The mere refusal of government agents to protect a victim from harm by a private person will not result in a finding that the harm was attributable to "state action,"

at least when state law does not give the victim a right to government protection. [DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)—government not responsible for harm inflicted on a child by his father, even though government social worker had reason to believe the child was being abused and did nothing to protect the child] However, if government employees enter into an agreement or conspiracy with private persons to cause harm to a victim, the victim’s injuries are the result of state action; the private persons, as well as the government employees with whom they conspired, will have violated the victim’s constitutional rights. [Screws v. United States, a.1)b(2), *supra*; Dennis v. Sparks, 449 U.S. 24 (1980)]

C. TIPS FOR BAR EXAM

1. State Must Be “Significantly Involved” in Private Entity

The state must be “significantly involved” in the private entity. Merely granting a license or providing essential services is insufficient.

2. No Constitutional Mandate to Outlaw Discrimination

States are not constitutionally required to outlaw discrimination. The Constitution forbids only their encouraging or authorizing it.

XIII. RETROACTIVE LEGISLATION

A. CONTRACT CLAUSE—IMPAIRMENT OF CONTRACT

The Contract Clause limits the ability of states to enact laws that *retroactively* impair contract rights. It does not affect contracts not yet made.

1. Not Applicable to Federal Government

There is no comparable clause applicable to the federal government, although a flagrant contract impairment would be forbidden by the Due Process Clause of the Fifth Amendment.

2. Only Applicable to State Legislation

The provision applies only to state *legislation*, not court decisions. [See Tidal Oil v. Flanagan, 263 U.S. 444 (1924)]

3. Basic Impairment Rules

a. Private Contracts

The Contract Clause prevents only *substantial impairments* of contract (i.e., destruction of most or all of a party’s rights under a contract). However, not all substantial impairments are invalid. In determining whether legislation is valid under the Contract Clause, use a three-part test:

- (i) Does the legislation substantially impair a party’s rights under an existing contract? If it does not, the legislation is valid under the Contract Clause. If it does, it will be valid *only if* it:

- (ii) Serves an important and legitimate public interest; and
- (iii) Is a reasonable and narrowly tailored means of promoting that interest.

Examples:

- 1) A Minnesota statute that imposed a moratorium on mortgage foreclosures during a severe depression did not violate the Contract Clause. [Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934)]
- 2) A state statute that restricted underground coal mining to protect a variety of public and private uses of surface land (and buildings) and that left the owners of subsurface mining rights with some reasonable value in, or return from, their investment does not violate the Contract Clause. [Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987)]

b. Public Contracts—Stricter Scrutiny

Public contracts (i.e., those in which the state or political subdivision is a party) are tested by the same basic test detailed above; however, they will likely receive stricter scrutiny, especially if the legislation reduces the contractual burdens on the state. When applying the three-part test, note the following:

- (i) There is no substantial impairment if the state has reserved the power to **revoke, alter, or amend** either in the contract itself or in a statute or law the terms of which should be considered to be incorporated into the contract [Dartmouth College v. Woodward, 17 U.S. 518 (1819)];
- (ii) In determining whether the law serves as a legitimate public interest, note that the state cannot be obligated by contract to refrain from exercising its police powers necessary to protect the health and safety of its residents; and
- (iii) To be narrowly tailored, the law should not constitute an unnecessarily broad repudiation of contract obligations.

Example: In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Court invalidated state pension reform legislation which increased the obligation of companies under preexisting pension plans to employees who previously had terminated their work for the company or who previously had retired from employment with the company. Because the legislation constituted a substantial impairment of contract by changing the compensation for work already completed and because it was not necessary to remedy an important social problem in the nature of an emergency, it was held to be a violation of the Contract Clause.

B. EX POST FACTO LAWS

1. Two Ex Post Facto Clauses

Neither the state nor the federal government may pass an ex post facto law. [Art. I, §9—federal prohibition; Art. I, §10—state prohibition] An ex post facto law is **legislation** that **retroactively** alters the **criminal law** (not civil regulation, such as denial of professional

licenses) in a *substantially prejudicial* manner so as to deprive a person of any right previously enjoyed *for the purpose of punishing the person for some past activity*.

a. What Is “Criminal”

If a law’s *purpose* is civil rather than punitive, it is not an ex post facto law unless its *effect* is so *clearly* punitive as to negate the legislature’s intention.

Example: A law requiring any sex offender within the state to register and provide his name, address, place of employment, vehicle information, etc., to law enforcement authorities and authorizing law enforcement authorities to make some of this information public is not an ex post facto law, even if noncompliance can be punished criminally, and even if some of the law is contained in the state’s criminal code. The goal of such a law is not to punish or stigmatize. Rather, legislatures have found that sex offenders pose a high risk of reoffending, and the release of the information required under the act is intended to protect the public from sex offenders. [Smith v. Doe, 538 U.S. 84 (2003)]

b. Retroactive Alterations

A statute retroactively alters a law in a substantially prejudicial manner if it:

- (i) Makes criminal an act that *was innocent when done*;
- (ii) Prescribes *greater punishment* for an act than was prescribed for the act when it was committed; or
- (iii) *Reduces the evidence* required to convict a person of a crime from what was required at the time that the act was allegedly committed.

Example: A statute of limitations reflects a legislative judgment that after a certain time, no quantum of evidence is sufficient to convict. Thus, a law that revives the possibility of a criminal prosecution after the previously applicable statute of limitations has expired is an unconstitutional ex post facto law. [Stonger v. California, 539 U.S. 607 (2003)]

2. Distinguish—Procedural Changes

Mere procedural changes in state law will not necessarily trigger the Ex Post Facto Clause. A modified law can be applied to a crime committed before the law’s modification if the defendant had notice of the possible penalty and the modified law does not increase the burden on the defendant.

Example: Florida had a death penalty statute that was invalidated by the Supreme Court because the statute restricted discretion in sentencing. Before a new statute was enacted, D committed a murder. Florida then passed a new death penalty provision that complied with Supreme Court criteria. The new provision was applied at D’s trial, and he was sentenced to death. This was not a prohibited ex post facto law, since the earlier statute (although unconstitutional) gave D notice of the possible penalty and the new provision made it *less likely* that the death penalty would be imposed in a given case. [Dobbert v. Florida, 432 U.S. 282 (1977)]

3. Indirect “Application” to Courts

Although the Ex Post Facto Clauses prohibit only retroactive *legislation*, the Supreme Court has held that due process prohibits courts from retroactively interpreting criminal law in an unexpected and indefensible way. [Rogers v. Tennessee, 532 U.S. 451 (2001)—state supreme court’s abolition of common law “year and a day rule” (which prohibits prosecution for murder if the victim dies more than a year after an attack) was not unexpected and indefensible because medical science has undermined the rule’s usefulness and the rule has already been abolished in most jurisdictions]

C. BILLS OF ATTAINDER

A bill of attainder is a legislative act that *inflicts punishment without a judicial trial* upon individuals who are designated either by name or in terms of past conduct. Past conduct acts to define who those particular persons are.

1. Two Clauses

Both the *federal and state governments* are prohibited from passing bills of attainder.

2. Two Requirements Preclude Finding of Bill of Attainder

These provisions *require both judicial machinery* for trial and punishment of crime and *definition of criminal conduct in such general terms* as not to ensnare within the definition a single individual or small group for punishment because of past behavior.

Example: The Court found a provision in the Landrum-Griffin Act, making it a crime for a member of the Communist Party to act as an officer or employee of a labor union, to be legislative punishment for a party membership, and hence a bill of attainder. [United States v. Brown, 381 U.S. 437 (1965)]

3. Nixon Case

In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), Congress passed legislation to authorize government control of the presidential papers and tape recordings of former President Nixon. The Supreme Court held that this was *not a bill of attainder*. The circumstances of the Nixon resignation made him a unique “class of one” as to the need to control his papers. The act was held “*nonpunitive*” and in pursuance of *important public policy*.

4. Draft Registration Case

In *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), the Court upheld a federal statute denying financial aid for higher education to male students between the ages of 18 and 26 who had failed to register for the draft. The law required applicants for the aid to file a statement with their institutions of higher learning certifying their compliance. Failure to register within 30 days of one’s 18th birthday was a felony, but the regulations allowed men who failed to register in a timely manner to qualify for aid by registering late. The Court found that this was *not a bill of attainder*. The law reasonably *promoted nonpunitive goals* and was *not a legislative punishment* taken on the basis of any irreversible act, since aid was awarded to those who registered late. The Court also found that the statute did not violate the Fifth Amendment privilege against self-incrimination.

D. DUE PROCESS CONSIDERATIONS

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, retroactive legislation

or other governmental action may be, but is not necessarily, a violation of the Constitution. The question of whether a retroactive law (that does not violate the Contracts, Ex Post Facto, or Bill of Attainder Clauses) violates due process is a *substantive due process* issue. If the law does not relate to a fundamental civil right, the retroactive law should be upheld if it is rationally related to a legitimate government interest.

Examples: 1) A retroactive tax law will be upheld as long as the retroactive aspects of the law are rationally related to legitimate government interests. [United States v. Carlton, 512 U.S. 26 (1994)—upholding retroactive modification of the estate tax]

2) Retroactive legislation affecting *merely a remedy* does not violate due process (e.g., repealing or extending a statute of limitations), unless it would oust an already vested property interest. [Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)—permissible to revive a previously dead cause of action]

XIV. PROCEDURAL DUE PROCESS

A. BASIC PRINCIPLE

The Due Process Clauses of the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states) provide that the government shall not take a person's life, liberty, or property without due process of law. Due process contemplates fair process/procedure, which requires at least an opportunity to present objections to the proposed action to a fair, neutral decisionmaker (not necessarily a judge).

1. When Is Individualized Adjudication Required?

There is a right to procedural due process only when the government acts to deprive an *individual* of life, liberty, or property (*see* below). There is no right to individualized adjudication when the government acts generally, even if the action will result in burdening individuals' life, liberty, or property interests.

Example: A state legislature need not provide individuals with an opportunity for a hearing when adopting the general requirements for obtaining a driver's license (e.g., age, residence, ability, etc.), but it must provide individualized process to determine whether a particular person meets the requirements.

2. Intentional Deprivation vs. Negligent Deprivation

Fair process is required for *intentional* acts of the government or its employees. If an injury is caused to a person through the mere *negligence* of a government employee, there is no violation of the Due Process Clause. [Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986)]

a. "Deprivation"

A "deprivation" of life, liberty, or property requires more than a mere denial of certain kinds of remedies. Only when the government affords *no* remedy or *inadequate* remedies may a deprivation of life, liberty, or property result. [Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)]

3. Fair, Neutral Decisionmaker—Judge Bias

The Due Process Clause requires a judge to recuse himself when he has *actual bias* (e.g.,

he has a direct, personal, substantial, pecuniary interest in a case) or when there is merely a *serious risk of actual bias*. A serious risk of actual bias exists when “under a realistic appraisal of psychological tendencies and human weakness,” the judge’s interest poses such a risk of actual bias or prejudice that it must be forbidden. [Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009)]

Example: The chairman of a company spent over \$3 million to support an attorney’s campaign to be elected to the state supreme court after a \$50 million verdict was entered against the chairman’s company, knowing that the supreme court would eventually hear the appeal of the verdict. The \$3 million was more than the total amount spent by all of the other supporters of the attorney, and the attorney won by fewer than 50,000 votes. When the case was appealed, the winner of the verdict asked the newly elected justice to recuse himself. Under these circumstances, recusal was required. [Caperton v. A. T. Massey Coal Co., *supra*]

4. Protection vs. Creation

The due process provisions do not create property or liberty interests; their purpose is to provide *procedural safeguards against arbitrary deprivation*. Hence, the Fourteenth Amendment Due Process Clause does not, for example, give out-of-state attorneys the right to appear in state courts without meeting a state’s bar admission requirements. [Leis v. Flynt, 439 U.S. 438 (1979)]

B. IS LIFE, LIBERTY, OR PROPERTY BEING TAKEN?

Older Supreme Court cases indicated that due process protects “rights,” but not “privileges.” This approach is no longer followed; rather the Court will determine whether a *legitimate* liberty or property interest is being taken.

1. Liberty

The term “liberty” is not specifically defined. It includes more than just freedom from bodily restraints (e.g., it includes the right to contract and to engage in gainful employment). A deprivation of liberty occurs if a person:

- (i) Loses significant freedom of action; *or*
- (ii) Is denied a freedom provided by the Constitution or a statute.

Examples of liberty interests include:

a. Commitment to Mental Institution

1) Adults

Adults are entitled to an *adversary hearing* before they are indefinitely committed to a mental institution against their will. The state must prove the basis for commitment by “clear and convincing” evidence. However, after a person has been acquitted of criminal charges on the basis of an insanity defense, the acquitted defendant can be committed if a court finds by a “preponderance of the evidence” that the person should be committed to a mental health care facility. [Jones v. United States, 463 U.S. 354 (1983)]

2) Minor Children

Minor children have a substantial liberty interest in not being confined unnecessarily for medical treatment. Thus, they are entitled to a *screening by a “neutral factfinder”* before commitment to a mental institution. Mere parental consent to commitment is not enough. [Parham v. J.R., 442 U.S. 584 (1979)]

b. Injury to Reputation

Injury to reputation in itself is not a deprivation of liberty or property. [Paul v. Davis, 424 U.S. 693 (1976)] However, if governmental acts (such as a statement of reasons given for termination of public employment) so injure a person’s reputation that he will have *lost significant employment or associational opportunities*, there is a loss of liberty.

c. Exercise of Fundamental Constitutional Rights

The Due Process Clause protects a person’s freedom to engage in activities that involve fundamental constitutional rights, such as the right to speak and associate, the right to travel, and the right to vote.

1) Application—Government Employee’s Freedom of Speech

A public employee may not be discharged for engaging in *constitutionally protected speech*. (See XXI.C.1., *infra*.) If a government employee is discharged for her speech or writing, a hearing must be held to determine whether the speech was protected. If so, the employee cannot be fired. [See Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)—Court held that teacher could not be fired for privately communicating her grievances about working conditions or opinions concerning public issues to her employer]

2. Property

“Property” includes more than personal belongings and realty, chattels, or money, but an abstract need or desire for (or a unilateral expectation of) the benefit is not enough. There must be a *legitimate claim* or “*entitlement*” to the benefit under state or federal law. [Board of Regents v. Roth, 408 U.S. 564 (1972); Leis v. Flynt, *supra*] Examples of property interests include:

a. Public Education

There is a property interest in public education when school attendance is required. Thus, a significant suspension (e.g., 10 days) requires procedural due process. [Goss v. Lopez, 419 U.S. 565 (1975)]

b. Welfare Benefits

One has a property interest in welfare benefits if she has previously been determined to meet the statutory criteria. [Goldberg v. Kelly, 397 U.S. 254 (1970)]

c. Continued Public Employment

If there is a state statute or ordinance that creates a public employment contract, or there is some clear practice or mutual understanding that an employee can be terminated only for “cause,” then there is a property interest [Arnett v. Kennedy, 416 U.S. 134 (1974)]; but if the employee holds his position only at the “will” of the employer, there is no property interest in continued employment [Bishop v. Wood, 426 U.S. 341 (1976)].

C. WHAT TYPE OF PROCESS IS REQUIRED?

While all intentional governmental deprivations of life, liberty, or property require fair process, what constitutes fair process in terms of the timing and scope of the hearing varies according to the circumstances of the deprivation. The Court will weigh:

- (i) The importance of the *individual interest* involved;
- (ii) The value of specific *procedural safeguards* to that interest; and
- (iii) The *governmental interest* in fiscal and administrative efficiency.

[Mathews v. Eldridge, 424 U.S. 319 (1976)] In all situations, the Court will probably require *fair procedures* and an *unbiased decisionmaker*. Normally, the person whose interest is being deprived should also receive *notice* of the government's action and have an *opportunity to respond before* termination of the interest. However, the court may allow a post-termination hearing in situations where a pre-termination hearing is highly impracticable. The Court has made the following rulings with regard to specific types of deprivations:

1. Welfare Benefits

Due process requires an *evidentiary hearing prior to termination* of welfare benefits. It need not be a judicial or quasi-judicial trial if there is adequate post-termination review; but the recipient must have timely and adequate *notice* of the reasons for the proposed termination, the right to confront adverse witnesses, and the right to present his own arguments and evidence orally. Counsel need not be provided, but must be permitted. Finally, the decision must be based solely on evidence adduced at the hearing and must be rendered by an impartial decisionmaker (thus disqualifying any participant in the termination proposal under review). [Goldberg v. Kelly, *supra*]

2. Disability Benefits

No prior evidentiary hearing is required for termination of disability benefits, as long as there is *prior notice* to the recipient, an opportunity to respond in writing, and a *subsequent evidentiary hearing* (with retroactive payment if the recipient prevails). *Rationale:* Disability benefits (unlike welfare benefits) are not based on financial need and hence are not vital. [Mathews v. Eldridge, *supra*]

3. Public Employment

A public employee who is subject to removal only for "cause" (and who, therefore, has a property interest in his job) generally must be given *notice* of charges against him that are to be the basis for his job termination, and a *pre-termination opportunity to respond* to those charges. The employee does not have to be given a full, formal hearing before his termination, as long as there is a fair system of pre-termination notice, an opportunity to respond (to the person making the termination decision), and a *subsequent evidentiary hearing* regarding the termination (with reinstatement if the employee prevails). [Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)] *But note:* If there is a *significant reason* for not keeping the employee on the job, he may be suspended without pay and without an opportunity to respond, as long as there is a prompt post-suspension hearing with reinstatement and back pay if the employee prevails. [Gilbert v. Homar, 520 U.S. 924 (1997)—police officer suspended after being arrested and formally charged with a felony]

4. Public Education—Disciplinary Suspension

Although no formal evidentiary hearing is required before a student may be temporarily suspended (for 10 days or less), due process usually requires *notice* of the charges and an *opportunity to explain*. However, if the student’s presence poses a danger to persons or property, or threatens to disrupt the academic process, such notice and hearing may *follow* removal as soon as practicable. [Goss v. Lopez, *supra*]

a. Corporal Punishment in Public School

This may involve constitutionally protected “liberty.” However, the traditional common law tort remedies for excessive punishment satisfy procedural due process, and a prior hearing is not required. [Ingraham v. Wright, 430 U.S. 651 (1977)]

5. Public Education—Academic Dismissal

No prior evidentiary hearing is required when a student is dismissed for “academic” deficiencies rather than for “disciplinary” reasons. Due process is satisfied if the student is adequately informed of the deficiency and given an opportunity to respond. [Board of Curators v. Horowitz, 435 U.S. 78 (1978)]

6. Creditors’ Remedies

Pretrial remedies, such as attachment of property or garnishment of wages, that are merely designed to provide a plaintiff with some guarantee that there will be assets to satisfy a judgment against the defendant if the plaintiff eventually wins the case *should not be issued by a court without notice* to the defendant and a *hearing prior to the issuance* of the order. A court may issue a temporary order of this type if: (i) there are exigent circumstances that justify the order; and (ii) the defendant is given a hearing after the order is issued but prior to trial. [Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Connecticut v. Doehr, 501 U.S. 1 (1991)] However, laws authorizing creditors to garnish assets, or a conditional seller to seize or sequester property, will be upheld *without prior notice* to the debtor *if*:

- a. The creditor posts a security bond;
- b. The application is made to a judge, is not conclusory, and documents narrowly confined facts susceptible of summary disposition; *and*
- c. Provision is made for an early hearing at which the creditor must show probable cause.

7. Driver’s License

The state generally must afford a *prior hearing* before a driver’s license is suspended or terminated. [Bell v. Burson, 402 U.S. 535 (1971)] However, a post-suspension hearing satisfies due process where a statute mandates suspension of a driver’s license for refusing to take a breathalyzer test upon arrest for drunk driving. [Mackey v. Montrym, 443 U.S. 1 (1979)]

8. Parental Status Litigation and Hearing

a. Termination of Parental Status

Due process does *not require the appointment of counsel* for indigent parents in every case in which the state seeks to terminate parental status (i.e., take children from their parents), *but* only when “fundamental fairness” requires the appointment. [Lassiter

v. Department of Social Services, 452 U.S. 18 (1981)] To terminate parental rights, the state must prove its allegations of parental neglect or misconduct by “clear and convincing evidence.” [Santosky v. Kramer, 455 U.S. 745 (1982)]

b. Paternity Actions

A state may allow paternity to be established in a support proceeding brought by a mother or child by a *preponderance of evidence*—no greater burden of proof is required by the Due Process Clause. [Rivera v. Minnich, 483 U.S. 574 (1987)] However, due process requires the state to *pay for blood tests* that might exculpate an indigent defendant in a paternity action if the *state is responsible for the lawsuit* (the suit is brought by a state agency or the state requires the mother to bring the civil paternity suit). [Little v. Streater, 452 U.S. 1 (1981)]

c. Hearings for Men Who Seek to Establish Paternity

1) Unmarried Father Living with Mother

If the father of a nonmarital child is a part of a “family unit” that includes the child, the relationship between the father and child will be protected by due process. [Stanley v. Illinois, 405 U.S. 645 (1972)—state cannot take child from father after mother dies, unless state has a fair process to determine whether the parental relationship should be severed]

2) Father Who Never Tried to Establish Paternity

The father of a nonmarital child who has never attempted to establish a legal or personal relationship with the child has no right to notice prior to the adoption of the child by other persons. [Lehr v. Robertson, 463 U.S. 248 (1983)]

3) Mother Married to Another Man

The Supreme Court has upheld a statute that presumed that a child born during wedlock was the husband’s child where the statute allowed an alleged biological father to have a hearing regarding visitation rights, but the Court did not rule on whether a biological father could be denied visitation under these circumstances without a hearing. [Michael H. v. Gerald D., 491 U.S. 110 (1989)]

9. Detention of Citizen Enemy Combatants

Due process requires that a *citizen held in the United States* as an “enemy combatant” have a meaningful opportunity to contest the factual basis for his detention before a neutral decisionmaker. However, due process does not forbid some tailoring of the proceedings to alleviate burdens that they may impose on Executive authority during an ongoing military conflict. This may include accepting some use of hearsay, permitting government rebuttable presumptions, and *perhaps* use of a properly authorized and constituted military tribunal. [Hamdi v. Rumsfeld, 542 U.S. 507 (2004)—effect of views of five Justices in two separate opinions]

Example: Hamdi, an American citizen, was captured in Afghanistan, classified as an “enemy combatant” for allegedly taking up arms with the Taliban, and transported to a naval brig in Charleston, SC. Hamdi’s father brought a habeas corpus petition on his behalf. The appellate court held that because Hamdi was caught in a combat zone, he had no right to refute the government’s

charges. The Supreme Court reversed, holding that Hamdi was at least entitled to some hearing to contest the factual basis for his detention before a neutral decisionmaker. [Hamdi v. Rumsfeld, *supra*]

10. Notice of Adversary Proceedings

When the government seeks to use a judicial or administrative process to take or terminate property interests, it **must give notice** to those persons whose property interests may be taken by that process. The form of notice must be reasonably designed to insure that those persons will in fact be notified of the proceedings.

Example: Personal notice or notice by mail must be given to both mortgagor and mortgagee before a “tax sale” of property for unpaid taxes. [Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)]

11. Civil Forfeitures

Procedural due process limits the government’s ability to seize property allegedly subject to forfeiture (which most often occurs when the government claims that the property was connected to, or was the product of, criminal activity). Absent exceptional circumstances, the government must provide the owner of **real property** notice and an opportunity for some type of hearing **prior** to seizing real property. [United States v. James Daniel Good Real Property, 510 U.S. 43 (1993)] However, the government might be able to seize **personal property prior** to providing the owner a hearing, since personal property can be hidden or destroyed. [Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)]

D. DUE PROCESS RIGHTS ARE SUBJECT TO WAIVER

Due process rights are subject to waiver. However, the Supreme Court has not clearly defined the standard for determining whether someone has validly waived the right to a hearing before governmental deprivation of liberty or property. Presumably, any such waiver must be **voluntary**. Additionally, it is possible that a waiver will be valid only if it is made **knowingly** (with an understanding of the nature of the rights being waived).

E. ACCESS TO COURTS—INDIGENT PLAINTIFFS

There may often be a fee for government services, including a fee for use of courts (e.g., a filing fee). Whether the government must waive such fees for indigents depends on the nature of the rights involved.

1. Fundamental Rights—Waiver Required

The Supreme Court has required a waiver of government fees when the imposition of a fee would deny a fundamental right to the indigent. (Fundamental rights are examined in the substantive due process and equal protection sections of this outline.)

Examples: 1) The government cannot deny an indigent the right to marry or divorce because of the indigent’s inability to pay a marriage license fee or a divorce court filing fee.

2) The government must waive even a reasonable filing fee for candidates for electoral office if it can be shown that the candidate cannot afford to pay the filing fee. The right to be a candidate is connected to the fundamental right of individuals to vote for candidates of their choice.

3) The government may not require an indigent to pay the cost of a transcript in order to appeal from termination of her parental rights. [M.L.B. v. S.L.J., 519 U.S. 102 (1997)]

2. Nonfundamental Rights—Waiver Not Required

When there is no fundamental right regulated by the imposition of a fee, the government can refuse to grant the service to those persons who cannot pay the required fee.

Examples: 1) The federal government can refuse to grant access to bankruptcy courts to persons who cannot pay a filing fee. There is no fundamental right to receive a bankruptcy discharge from debts.

2) A state can limit judicial review of welfare termination hearings to those persons who pay a \$25 fee.

XV. THE “TAKING” CLAUSE

A. IN GENERAL

The Fifth Amendment prohibits governmental taking of private property “for public use without just compensation.” The prohibition is applicable to the states through the Fourteenth Amendment [Chicago Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897)], and taking questions often arise in connection with states’ exercise of their police power (i.e., the power to legislate for the health, welfare, safety, etc., of the people).

1. Not a Grant of Power

The Fifth Amendment is not a grant of power, but rather is a limitation on power (i.e., a taking must be for a public purpose and compensation must be paid). The power for a taking must arise out of some other source (e.g., the police power).

2. Scope of Taking

The concept of a governmental taking probably originally contemplated only physical appropriations of property. Today, however, the term also encompasses some governmental action that significantly damages property or impairs its use (e.g., frequent flyovers by airplanes near airport [United States v. Causby, 328 U.S. 256 (1946)]). Moreover, even personal property and intangibles may be the subject of a taking. [See *Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015)—raisin growers must be paid just compensation for being required to set aside a portion of their crops for the government pursuant to federal regulations, even if the growers retain a contingent interest in the reserved portion; *and see* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)—government requirement that trade secret be disclosed may be a taking where government takes and discloses the secret in such a way that it diminishes the secret’s economic value and interferes with reasonable, investment-backed expectations of its holders]

B. “PUBLIC USE” LIMITATION LIBERALLY CONSTRUED

The Court will not review underlying policy decisions, such as general desirability for a particular public use or the extent to which property must be taken therefor. A use will be held to be “public” as long as it is rationally related to a legitimate public purpose, e.g., health, welfare,

safety, moral, social, economic, political, or aesthetic ends. The government may even authorize a taking by private enterprise, as long as the taking will redound to the public advantage (e.g., railroads and public utilities).

Example: A city adopted an integrated development plan to revitalize its ailing economy by buying up privately held land in its riverfront area, developing some land into parks, and transferring the rest to developers who would open marinas, stores, etc. Pursuant to the plan, the city bought up land from willing sellers and initiated condemnation proceedings against owners who refused to sell. The recalcitrant owners brought suit against the city, claiming that the use for which the city was condemning the land (i.e., to transfer the land to private developers) was not a public use. The Supreme Court held that a taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public, and taking private property to promote economic development has long been accepted as a public use. [*Kelo v. City of New London*, 545 U.S. 469 (2005)]

C. “TAKING” VS. “REGULATION”

While the government must fairly compensate an owner when her property is taken for public use, it need not pay compensation for mere regulation of property. Thus, whether government action amounts to a taking or is merely regulation is a crucial issue. The question is one of degree; there is no clear cut formula for determining whether there has been a taking. The following guidelines have emerged.

1. Actual Appropriation or Physical Invasion

A taking will almost always be found if there is an actual appropriation or destruction of a person’s property or a permanent physical invasion by the government or by authorization of law.

Examples: A taking was found in the following situations:

- 1) Ordinance requiring landlords to allow installation of cable TV in their rental units but limiting to \$1 the fee landlords could charge for this access. [*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]
- 2) Statute **abolishing** rights of descent and devise of property (although government has broad authority to regulate this area). [*Hodel v. Irving*, 481 U.S. 704 (1987)]
- 3) Requirement that public be given free access to a privately developed waterway. [*Kaiser Aetna v. United States*, 444 U.S. 164 (1980)]

a. Exception—Emergencies

A taking is less likely to be found in emergency situations, even where there is destruction or actual occupation of private property.

- Examples:*
- 1) No compensation was required when the state ordered the destruction of cedar trees that threatened to spread disease to apple orchards. [*Miller v. Schoene*, 276 U.S. 272 (1928)]
 - 2) No compensation was required when federal troops destroyed oil facilities to prevent them from falling into enemy hands. [*United States v. Caltex, Inc.*, 344 U.S. 149 (1952)]

b. Damage from Temporary Interference with Use

Government action that amounts to a temporary appropriation or physical invasion of property may also amount to a taking. For example, temporary flooding caused by government release of dammed up waters can amount to a taking. [Arkansas Game and Fish Commission v. United States, 133 S. Ct. 511 (2013)]

2. Use Restrictions

a. Denial of All Economic Value of Land—Taking

If a government regulation denies a landowner of *all* economic use of his land, the regulation is equivalent to a physical appropriation and is thus a taking unless principles of nuisance or property law that existed when the owner acquired the land make the use prohibitable. [Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)—state’s zoning ordinance, adopted after owner purchased lots, amounted to a taking because the ordinance prohibited owner from erecting any permanent structures on his lots]

1) Temporary Denials of All Economic Use

Temporarily denying an owner of all economic use of property does not constitute a per se taking. Instead, the Court will carefully examine and weigh all the relevant circumstances—the planners’ good faith, the reasonable expectations of the owners, the length of the delay, the delay’s actual effect on the value of the property, etc.—in order to determine whether “fairness and justice” require just compensation. [Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)—finding no taking where there was a 32-month moratorium on land development in the Lake Tahoe Basin while a comprehensive land-use plan was being developed for the area]

b. Decreasing Economic Value

Generally, regulations that merely decrease the value of property (e.g., prohibit its most beneficial use) do not necessarily result in a taking, *as long as they leave an economically viable use for the property*. The Court considers (i) the social goals sought to be promoted; (ii) the diminution in value to the owner; and (iii) whether the regulation substantially interferes with distinct, investment-backed expectations of the owner. [Penn Central Transportation Co. v. New York, 438 U.S. 255 (1978)]

Example: The Court upheld a “landmark” zoning ordinance that prohibited altering the external appearance of Grand Central Station. It found historic preservation to be an important government interest and that certain rights granted to the landmark owners mitigated their loss. [Penn Central Transportation Co. v. New York, *supra*]

1) Building/Development Permits—Transfer of Occupation Rights

Municipalities often attempt to condition building or development permits on a landowner’s (i) conveying title to part, or all, of the property to the government or (ii) granting the public access to the property (e.g., an easement across the property). Such conditions constitute an uncompensated taking unless (i) the government can show that the condition relates to a legitimate government interest and (ii) the adverse impact of the proposed building/development on the area is roughly proportional to the loss caused to the property owner from the forced

transfer of occupation rights. [Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)]

Example: City agreed to approve a permit to expand plaintiff’s retail store and pave a parking lot on the condition that plaintiff dedicate land for (i) a public greenway and (ii) a bike path. The Supreme Court found that City did not show a sufficient relationship between the dedications and the impact that the expansion would have on the area. [Dolan v. City of Tigard, *supra*]

a) Permit Denials

The government’s demand for property with respect to a land-use permit application must satisfy the *Nollan/Dolan* requirements, above, even when the government denies a permit. A refusal to issue a permit based on a refusal to dedicate land under terms that do not satisfy the nexus and/or proportionality requirements of *Nollan* and *Dolan* constitutes a taking. [Koontz v. St. Johns River Water Development District, 133 S. Ct. 2586 (2013)]

2) Utility Rate Regulation

There is no taking where the government sets rates that utility companies can charge, as long as the rates are not set so low that they are unjust and confiscatory. [Duquesne Light Co. v. Barash, 488 U.S. 299 (1989)]

3) Zoning Ordinances

The Court has long held that governments may adopt zoning ordinances that regulate the way real property may be used, pursuant to the police power (e.g., limiting development in a particular area to single-family homes, restricting buildings to a particular height, etc.). Such regulations generally do not amount to a taking—even if they deny an owner the highest and best use of her property—unless they: (i) amount to a physical appropriation, as in *Loretto*, (ii) deny an owner of all economic use, as in *Lucas*, or (iii) unreasonably interfere with distinct, investment-backed expectations as set out in *Penn Central*. [See *Lingle v. Chevron*, 544 U.S. 528 (2005)]

3. Remedy—Inverse Condemnation

When a government acts under the power of eminent domain to take property for public use, it will condemn the property and pay the owner just compensation, as discussed below. When property is taken by occupation or regulation without condemnation proceedings, the landowner can bring an action for inverse condemnation. If the court determines that the government action amounted to a taking, the government will be required to either:

- (i) ***Pay the property owner compensation*** for the taking (*see* below); or
- (ii) ***Terminate the regulation and pay the owner for damages*** that occurred while the regulation was in effect (i.e., temporary taking damages).

[First English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987)]

a. Who May Sue

The right to claim a “taking” is *not* limited to persons who held title to the property at

the time a challenged use restriction was imposed. A person who purchases property after a regulation is in place still may bring a taking claim. [Palazzolo v. Rhode Island, 533 U.S. 606 (2001)]

D. “JUST COMPENSATION”

The owner is entitled to the *fair market value* of her property *at the time of the taking*—not the value it would have if put to its highest and best use. The measure is based on the *loss to the owner*, not the gain to the taker. Increases in value to the owner’s remaining property as a result of the taking cannot be used to offset damages. Due process guarantees notice and hearing, administrative or judicial, on the amount of compensation, but the hearing need not precede the taking.

1. “Worthless” Property

Because just compensation is measured by the loss to the owner and not by the gain to the taker, property that is “worthless” to the owner can be the subject of a taking, but no compensation need be paid when it is taken.

Example: A state law required attorneys to keep clients’ funds in trust accounts on behalf of their clients and to pay to the client any interest earned on the funds. If a client’s funds were too small to earn enough interest to exceed the costs of distributing the interest, the attorneys were required to pay the interest over to a legal aid charity. Although this requirement constitutes a taking, no compensation is due because the clients have not suffered a pecuniary loss. [Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003)]

XVI. INTRODUCTION TO SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

A. RELATIONSHIP BETWEEN SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

The Due Process Clauses and the Equal Protection Clause guarantee the fairness of laws—substantive due process guarantees that laws will be reasonable and not arbitrary, and equal protection guarantees that similarly situated persons will be treated alike. Both guarantees require the Court to review the *substance of the law* rather than the procedures employed.

1. Substantive Due Process

Generally where a law limits the liberty of *all* persons to engage in some activity, it is a due process question.

2. Equal Protection

Where a law treats a person or class of persons differently from others, it is an equal protection question. [See Village of Willowbrook v. Olech, 528 U.S. 562 (2000)—equal protection claims may be brought by a class with as few as one member] However, an at-will government employee who claims to be a victim of arbitrary discrimination cannot use the “class of one” theory to make an equal protection claim. [Engquist v. Department of Agriculture, 533 U.S. 591 (2008)]

3. Examples

If a law prohibits all persons from purchasing contraceptive devices, there is a due process

issue; if the law prohibits only purchases by unmarried persons, there is an equal protection issue. A state's refusal to have any publicly funded schools raises a due process issue; a state law that establishes separate schools for children of different races raises an equal protection issue.

4. Note—Clauses Not Necessarily Mutually Exclusive

Since both clauses protect against unfairness, both may be appropriate challenges to the same governmental act, and a discussion of both may be appropriate in an essay answer. On the MBE, however, the examiners will probably not include both as alternatives in the same question. The above approaches can be used as a rough guideline of when each clause applies.

Example: Petitioners challenged state laws limiting marriage as between one man and one woman and refusing to recognize same-sex marriages from outside the state. The Court held that the fundamental liberties protected by **both** the Due Process and Equal Protection Clauses extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. This includes the right of same-sex couples to marry. [Obergefell v. Hodges, 135 S. Ct. 1039 (2015)]

B. WHAT STANDARD OF REVIEW WILL THE COURT APPLY?

The Court employs one of three tests in reviewing laws under these clauses, depending on the circumstances.

1. Strict Scrutiny (Maximum Scrutiny)

The Court uses the strict scrutiny standard when a suspect classification or fundamental right (these terms will be discussed *infra*) is involved. Under the strict scrutiny standard, a law will be upheld only if it is **necessary** to achieve a **compelling** or **overriding** government purpose. The Court will always consider whether less burdensome means for accomplishing the legislative goal are available. Most governmental action examined under this test fails.

a. Burden of Proof on Government

When the strict scrutiny standard is applied, the **government** will have the burden of proving that the law is necessary. The Court will not allow a loose fitting law (i.e., if a law reaches more people or conduct than is necessary (overinclusive) or does not reach all of the people or conduct sought to be regulated (underinclusive), it will likely be struck down).

2. Intermediate Scrutiny

The Court uses intermediate scrutiny when a classification based on gender or legitimacy is involved. Under the intermediate scrutiny standard, a law will be upheld if it is **substantially** related to an **important** government purpose.

a. Burden of Proof Probably on Government

It is unclear who has the burden of proof when the Court uses the intermediate standard, but in most cases, it appears to be the government.

3. Rational Basis (Minimal Scrutiny)

The rational basis standard is used whenever the other two standards are not applicable (i.e., most legislation). Under the rational basis standard, a law will be upheld if it is **rationality**

related to a legitimate interest. It is difficult to fail this test, so most governmental action examined under this standard is upheld unless it is *arbitrary* or *irrational*.

a. Burden of Proof on Challenger

Under the rational basis standard, laws are presumed valid. Therefore, the challenger has the burden of proof. This is a very difficult burden to meet, given the deference the Court gives to legislatures under the rational basis standard. (*See* below.)

b. Deference to Legislature

Under the rational basis standard, the Court will usually defer to a legislature's decision that a law is rational. Loose fitting laws are permissible here: The law need not be the best law that could have been written to achieve the legislative goal. Indeed, it need not go far at all toward a conceivable legislative goal; the Court will uphold a law taking a "first step" toward any legitimate goal, even if the Court thinks the law is unwise.

Example: City decided that advertisements on motor vehicles are traffic hazards, so it banned such advertisements except for those on vehicles advertising the owner's own product. Even though the excepted advertisements were no less distracting than the banned ones, the Court upheld the "first step" law. [*Railway Express Agency v. New York*, 336 U.S. 106 (1949)]

XVII. SUBSTANTIVE DUE PROCESS

A. CONSTITUTIONAL SOURCE—TWO CLAUSES

There are two separate clauses protecting substantive due process:

- (i) The Due Process Clause of the Fifth Amendment (applies to the federal government); and
- (ii) The Due Process Clause of the Fourteenth Amendment (applies to state and local governments).

As indicated above, *the same tests* are employed under each clause.

B. APPLICABLE STANDARDS

1. Fundamental Right—Strict Scrutiny

Where a law limits a fundamental right, strict scrutiny will be applied, and the law (or other governmental action) will be upheld only if the government can prove that the action is necessary to promote a *compelling or overriding interest*. Fundamental rights include:

- a. Right to travel;
- b. Privacy;
- c. Voting; and
- d. All First Amendment rights.

2. All Other Cases—Mere Rationality

In all other cases, the mere rationality test is applied, and the law will be upheld unless the challenger can prove that the action is *not rationally related to any conceivable legitimate end of government*. Examples include the following:

a. Business and Labor Regulations

The Court will sustain all varieties of business regulation; e.g., “blue sky” laws, bank controls, insurance regulation, price and wage controls, unfair competition and trade practice controls, etc.

b. Taxation

Taxation is also invariably *sustained*. However, discriminatory taxes might still be invalidated.

c. Lifestyle

There is, as yet, *no recognized right* to lead a certain lifestyle. Thus, the Supreme Court will uphold laws: prohibiting drugs (“hard” or “soft”), requiring motorcyclists to wear helmets, or requiring police officers to have short hair. [Kelley v. Johnson, 425 U.S. 238 (1976)]

d. Zoning

Regulation of the ownership or use of property has also been liberally tolerated by the Court.

1) Statutes Forbidding Nuisances or Promoting Community’s Preferred Lifestyle

Statutes forbidding certain uses as nuisances have been sustained, as have all kinds of statutes designed to promote the public’s enjoyment of space and safety or to promote a community’s preferred lifestyle and character. For example, the Supreme Court held that a Long Island suburb could zone out all groups of three or more persons unrelated by blood, adoption, or marriage. [Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)]

2) Cannot Prohibit Traditionally Related Families from Living Together

However, you should know that the Supreme Court held that zoning regulations that prohibit members of traditional families from living together (i.e., zoning excluding cousins or grandchildren) violate due process. [Moore v. City of East Cleveland, 431 U.S. 494 (1977)]

e. Punitive Damages

The Supreme Court has held that punitive damages do not necessarily violate due process. However, “grossly excessive” damages—those that are unreasonably high to vindicate the state’s interest in punishment—are invalid. [TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)]

1) Factors Considered

In assessing whether punitive damages violate due process, the key issue is whether the defendant had *fair notice of the possible magnitude* of the punitive damages. In assessing such notice, the Court will look to:

- (i) The **reprehensibility** of the defendant’s conduct (e.g., whether the defendant caused physical harm rather than merely economic harm, whether the defendant acted with reckless disregard for harm, whether the conduct was repeated rather than isolated, and whether the harm resulted from intentional malice or deceit rather than from an accident);
- (ii) The **disparity between** the actual or potential **harm suffered** by the plaintiff and the **punitive award**; and
- (iii) The **difference between the punitive damages award and the criminal or civil penalties** authorized for comparable misconduct.

[BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)]

2) Rule of Thumb

Except for particularly egregious conduct—especially when the conduct resulted in only a small amount of compensatory damages—punitive damages should not exceed **10 times the compensatory damages**. [State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408 (2003)—punitive damages of 145 times compensatory damages violate due process]

f. Compare—Vagueness Doctrine

Under the Due Process Clause of the Fourteenth Amendment, a law can be held unconstitutional if it fails to provide minimal guidelines to govern law enforcement officers so as to discourage arbitrary and discriminatory enforcement. [Kolender v. Lawson, 461 U.S. 352 (1983); City of Chicago v. Morales, 527 U.S. 41 (1999)—holding unconstitutional on vagueness grounds an ordinance that allowed officers to disperse suspected gang members when they were “loitering,” which was defined as remaining in any one place with no **apparent purpose**]

C. A FEW IRREBUTTABLE PRESUMPTIONS MAY BE INVALID

If the government “presumes facts” against a person so that she is not qualified for some important benefit or right, the irrebuttable presumption may be unconstitutional. Although the Court often characterizes this as a due process question, it is more accurately an equal protection question because the government is creating an arbitrary classification. In any case, if the presumption affects a fundamental right (e.g., right to travel) or a suspect or quasi-suspect classification (e.g., gender), it will likely be invalid under strict scrutiny or intermediate scrutiny analysis, because the administrative convenience created by the presumption is not an important enough interest to justify the burden on the right or class. If some other classification or right is involved, the presumption will likely be upheld under the rational basis standard.

Examples: 1) A state may not presume a teacher incapable of continuous service in the classroom merely because she is four or five months’ pregnant or has a child under age three. [Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)]

2) The government may presume that a marriage entered into within nine months of a wage earner’s death was simply to secure Social Security benefits. [Weinberger v. Salfi, 422 U.S. 749 (1975)]

D. FAIR NOTICE

A fundamental principle of our legal system is that laws that regulate people or entities must give fair notice of conduct that is forbidden or required. A regulation that fails to give fair notice violates the Due Process Clause. [*See, e.g., Federal Communications Commission v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012); *and see XX.A.3.b., infra*]

XVIII. EQUAL PROTECTION

A. CONSTITUTIONAL SOURCE

The Equal Protection Clause of the Fourteenth Amendment has *no counterpart in the Constitution applicable to the federal government*; it is limited to state action. Nevertheless, it is clear that grossly unreasonable discrimination by the federal government violates the *Due Process Clause of the Fifth Amendment*. [*Bolling v. Sharpe*, 347 U.S. 497 (1954)—racial discrimination in the public schools of the District of Columbia held a violation of due process] Thus, there are really two equal protection guarantees. The Court usually applies the same standards under either constitutional provision.

Example: The Supreme Court struck down a federal law defining “marriage” and “spouse” to exclude same sex couples as applied to residents of a state that recognized same sex marriage. The Court found that the liberty protected by the Due Process Clause of the Fifth Amendment contains within it a prohibition against denying any person the equal protection of laws. And a law that discriminates against some married couples recognized by a state in favor of other married couples violates equal protection. It should be noted that the Court did not rely on any of the traditional due process or equal protection tests (i.e., strict scrutiny, intermediate scrutiny, or rational basis) in arriving at the holding. [*United States v. Windsor*, 133 S. Ct. 2675 (2013)]

B. APPLICABLE STANDARDS

As indicated above, the Court will apply one of three standards when examining governmental action involving classifications of persons. If a *suspect classification or fundamental right* is involved, the strict scrutiny standard will be applied and the action will be struck down unless the government proves that it is necessary to achieve a compelling interest. If a *quasi-suspect classification* is involved, the Court will likely require the government to prove that the action is substantially related to an important government interest. If *any other classification* is involved, the action will be upheld unless the challenger proves that the action is not rationally related to a legitimate government interest.

C. PROVING DISCRIMINATORY CLASSIFICATION

The mere fact that legislation or governmental action has a discriminatory effect is not sufficient to trigger strict scrutiny or intermediate scrutiny. There must be *intent* to discriminate on the part of the government. Intent can be shown in three ways: (i) facial discrimination; (ii) discriminatory application; or (iii) discriminatory motive.

1. Facial Discrimination

A law may include a classification on its face. This type of law, by its own terms, makes an explicit distinction between classes of persons (perhaps by race or gender; e.g., all white

males 21 or older may serve as jurors [*see* *Strauder v. West Virginia*, 100 U.S. 303 (1880)]. In such cases the courts merely have to apply the appropriate standard of review for that classification. (The standards for racial classifications and gender classifications are described below.)

a. Facial Discrimination Absent Racial Language

In a few cases, the Supreme Court has held that a law used a racial classification “on its face” even though the language of the law did not include racial language. In these cases, the Supreme Court found that the law could not be explained except in racial terms.

Example: The Court found that a state law establishing districts for the election of Representatives to the United States Congress should be deemed to use a racial classification on its face because one bizarrely shaped district could not be explained except in terms of establishing a district where minority race voters would control the outcome of the election. The Court did not rule on the question of whether this racial classification was narrowly tailored to a compelling interest, such as remedying proven past discrimination, because that question had not been addressed in the lower courts. [*Shaw v. Reno*, 509 U.S. 630 (1993)]

Note: If a legislative districting map could be explained in terms other than race, the Court would not find that the law constituted racial discrimination on its face. In such a case, the persons attacking legislative districts as being based on racial classification would have to show that district lines were drawn for a racially discriminatory purpose. [*Hunt v. Cromartie*, 532 U.S. 234 (2001)—“*Hunt II*”]

2. Discriminatory Application

In some instances, a law that appears to be neutral on its face will be applied in a different manner to different classes of persons. If the persons challenging the governmental action can prove that the government officials applying the law had a discriminatory purpose (and used discriminatory standards based on traits such as race or gender), the law will be invalidated.

Examples: 1) A law prohibited operating a laundry in wooden buildings, but gave a government agency discretion to grant exemptions. It was shown that most such laundries were owned by people of Chinese descent, but the agency granted exemptions only to non-Asian applicants. The law was deemed to involve racial or national origin classification and was invalidated as applied. [*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)]

2) Laws allow attorneys to move to strike potential jurors from a jury either for cause or without cause (a peremptory strike). In either case, there is an equal protection violation when it is proved that an attorney excluded a person from a jury on account of the person’s race or sex. [*See* *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)] Note that because striking potential jurors from a jury significantly involves the state, even attorneys representing private parties are prohibited from discriminatory strikes. (*See* XII.B.2.a.1)a)(1), *supra*.)

3. Discriminatory Motive

Sometimes a government action will appear to be neutral on its face and in its application, but will have disproportionate impact on a particular class of persons (such as a racial minority or women). Such a law will be found to involve a classification (and be subject to the level of scrutiny appropriate to that classification) only if a court finds that the law-making body enacted or maintained the law for a *discriminatory purpose*. In such cases, the court should admit into evidence statistical proof that the law has a disproportionate impact on one class of persons. However, mere statistical evidence will rarely be sufficient in itself to prove that the government had a discriminatory purpose in passing a law. Statistical evidence may be combined with other evidence of legislative or administrative intent to show that a law or regulation is the product of a discriminatory purpose.

- Examples:*
- 1) A police department used results from a written test as a criterion for hiring police officers. Members of identifiable racial minorities consistently got low scores on the test, although there was no proof that the test was written or otherwise employed for the purpose of disadvantaging minority applicants. Because of the absence of nonstatistical proof of discriminatory purpose, there was no equal protection violation. [Washington v. Davis, 426 U.S. 229 (1976)]
 - 2) A state law gave a preference in the hiring and promotion of civil service employees to persons who were honorably discharged from the United States military. The foreseeable and actual impact of this law was to disadvantage the female population of job applicants, because the majority of veterans are men. Because there was no proof (other than the statistical impact of the law) that the legislature enacted the law for the purpose of hurting women (as opposed to the purpose of aiding veterans), the law was upheld.
 - 3) A statistical study showing that black defendants in capital cases are much more likely to receive the death penalty than are white defendants in a state will not in itself establish that a particular black defendant was denied equal protection by being sentenced to death for murder in that state. The statistical study is insufficient to prove purposeful discrimination. [McCleskey v. Kemp, 481 U.S. 279 (1987)]

D. SUSPECT CLASSIFICATIONS

1. Race and National Origin

If governmental action classifies persons based on exercise of a fundamental right or involves a suspect classification (race, national origin, or alienage), strict scrutiny is applied. The result is invalidation of almost every case where the classification would burden a person because of her status as a member of a racial or national origin minority. The only explicit race discrimination upheld despite strict scrutiny was the wartime incarceration of United States citizens of Japanese ancestry on the West Coast. [Korematsu v. United States, 323 U.S. 214 (1944)—found to be necessary to achieve compelling interest of national security]

- Example:* A state could not deny custody of a child from a previous marriage to a white mother merely because her new husband was black, where the mother was otherwise found to be an appropriate parent. Racial prejudice against mixed race couples does not justify taking a child from his mother. [Palmore v. Sidoti, 466 U.S. 429 (1984)]

a. School Integration

Recall that only intentional discrimination will be found to create discriminatory classifications calling for strict scrutiny (*see C., supra*); thus, only intentional segregation in schools will be invalidated under equal protection.

Example: No equal protection violation was found where a school system established attendance zones in a racially neutral manner, but racial imbalance occurred because of housing patterns. [*Keyes v. School District No. 1*, 413 U.S. 189 (1973)]

1) Remediating Intentional School Segregation

If it is proven that a school board has engaged in the racial districting of schools, the board must take steps to eliminate the effects of that discrimination (e.g., busing students). If the school board refuses to do so, a court may order the school district to take all appropriate steps to eliminate the discrimination.

a) Order Limited

A court may not impose a remedy that goes beyond the purpose of remediating the vestiges of past segregation. Thus, it is impermissible for a court to impose a remedy whose purpose is to attract nonminority students from outside the school district when there is no evidence of past segregation outside the district. [*Missouri v. Jenkins*, 515 U.S. 70 (1995)—state not required to fund salary increases and remedial programs to create magnet schools to attract suburban students to urban schools]

b. “Benign” Government Discrimination—Affirmative Action

Government action—whether by federal, state, or local governmental bodies—that *favours* racial or ethnic minorities is subject to strict scrutiny, as is government action discriminating *against* racial or ethnic minorities. [*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)—*overruling* *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), which applied intermediate standard to federal discrimination]

Note: Prior to its ruling in *Adarand*, *supra*, the Supreme Court upheld a federal requirement that 10% of federal grants for public works be set aside for minority businesses. [*Fullilove v. Klutznick*, 448 U.S. 448 (1980)] In *Adarand*, the Court reserved judgment on whether a *Fullilove*-type program would survive strict scrutiny. Some commentators have suggested that it might, because the Court might give Congress more deference than the states based on Congress’s power under the Enabling Clause of the Fourteenth Amendment (*see XII.A.3., supra*), but the continued validity of *Fullilove* is, at best, uncertain.

1) Remediating Past Discrimination

The government has a compelling interest in remediating past discrimination against a racial or ethnic minority. Thus, if a court finds that a governmental agency has engaged in racial discrimination, it may employ a race-conscious remedy tailored to end the discrimination and eliminate its effects. A remedy of this type is permissible under the Equal Protection Clause because it is narrowly tailored to further a compelling interest (the elimination of the illegal or unconstitutional discrimination).

Example: When it has been proven that a public employer engaged in persistent racial discrimination, a court may order relief that establishes a goal for the hiring or promotion of minority persons so as to eliminate the effects of the past discrimination. [United States v. Paradise, 480 U.S. 149 (1987)]

2) Where There Has Been No Past Discrimination by Government

Even where a state or local government has not engaged in past discrimination, it may have a compelling interest in affirmative action. However, the governmental action must be *narrowly tailored* to that interest. [City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)]

a) Remedial Justifications

(1) Local Private Discrimination

Remedying past private discrimination *within* the governmental agency's jurisdiction is a compelling interest, but there is no compelling interest in remedying the general effects of societal discrimination. Thus, for a city to give a preference to minority race applicants for city construction contracts, it must identify the past unconstitutional or illegal discrimination against minority-owned construction businesses that it is now attempting to correct. [City of Richmond v. J.A. Croson Co., *supra*]

Example: In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), the Court upheld New York's revised voting district plan, based solely on racial statistics, because the revisions were made to insure that minorities that had previously been discriminated against in New York would be represented in the legislature.

(2) Diversity in Primary and Secondary Public Education

A school board may not assign students to a public primary or secondary school on the basis of race unless necessary to achieve a compelling interest, such as remedying past unconstitutional (i.e., intentional) discrimination. A majority of the Court has not found diversity itself to be a sufficiently compelling interest. [See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)]

(3) Diversity in Post-Secondary Public Education

The Supreme Court has treated post-secondary educational institutions (e.g., public colleges and universities) differently. It has held that courts should defer to a public university's judgments that diversity is itself a compelling interest in post-secondary education. [Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003)] Thus, the Court held that race and ethnicity could be used as a factor (although not a predominant factor) in determining whether a particular student should be admitted. However, while the Court is willing to grant a public university deference as to the importance of diversity in a student body, it has held that courts should not give universities deference on the issue

of whether a particular scheme for assuring diversity is narrowly tailored to that purpose. Strict scrutiny applies, so to pass constitutional muster, a university must show that no workable race-neutral alternatives would assure the diversity sought. [Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013)]

b) States May Eliminate Race-Based Preferences

States are not required to have affirmative action programs for admission to their universities. Moreover, states may eliminate existing race-based preferences, including by voter initiative. The Court upheld the constitutionality of a Michigan initiative providing that the state and its political subdivisions could not discriminate or give preference based on race or gender in education, contracting, or employment. [Schuette v. Coalition to Defend Affirmative Action (BAMN), 133 S. Ct. 1633 (2014)]

c. Discriminatory Legislative Apportionment

Race can be considered in drawing up new voting districts, but it *cannot be the predominant factor*. If a plaintiff can show that a redistricting plan was drawn up predominantly on the basis of racial considerations (as opposed to the more traditional factors, such as compactness, contiguity, and community interest), the plan will violate the Equal Protection Clause *unless* the government can show that the plan is *narrowly tailored* to serve a *compelling state interest*. [Miller v. Johnson, 515 U.S. 900 (1995)—while eradicating the effects of past discrimination would be a compelling state interest, the redistricting here was driven by the Justice Department’s policy of maximizing the number of districts where racial minority members are the majority, which is not a compelling interest]

d. Private Affirmative Action

Private employers, of course, are not restricted by the Equal Protection Clause, since the Clause applies only to the government, and private employers lack state action. Nevertheless, Congress has adopted statutes regulating private discrimination by employers pursuant to its power under the enabling provisions of the Thirteenth and Fourteenth Amendments and the Commerce Clause. Thus, if an exam question asks whether private employer discrimination is valid, the answer generally cannot be based on equal protection.

2. Alienage Classifications

a. Federal Classifications

The standard for review of federal government classifications based on alienage is not clear, but they never seem to be subject to strict scrutiny. Because of Congress’s plenary power over aliens, these classifications are valid if they are *not arbitrary and unreasonable*. Thus, federal Medicare regulations could establish a five-year residency requirement for benefits that eliminated many resident aliens. [Mathews v. Diaz, 426 U.S. 67 (1976)]

b. State and Local Classifications

State/local laws are *subject to strict scrutiny* if based on alienage. A “compelling

state interest” must be shown to justify disparate treatment. For example, a state law requiring United States citizenship for welfare benefits, civil service jobs, or a license to practice law will be struck down because there is no compelling interest justifying the requirement.

1) Exception—Participation in Self-Government Process

If a law discriminates against alien participation in the functioning of the state government, the *rational basis* standard is applied.

Examples: 1) A state cannot require a notary public to be a citizen. A notary’s responsibilities are essentially clerical and do not fall within the exception for positions related to participation in the governmental process, and there is no compelling government interest justifying such a requirement. [Bernal v. Fainter, 467 U.S. 216 (1984)]

2) A state can validly refuse to hire aliens as police officers and *primary* and *secondary* school teachers (because such teachers influence the attitudes of young minds toward government, the political process, and citizenship, as well as provide an example for civic virtues) and for all other positions that have a direct effect on the functioning of government. [Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982)]

c. Undocumented Aliens

1) Punitive Laws Against “Illegal” Alien Adults

The Supreme Court has *not* held that undocumented (“illegal”) aliens are a suspect classification. Thus, a state law that denies benefits to (or imposes burdens on) persons who are in the United States without the permission of the federal government might be upheld under the rational basis test as long as the law was not totally arbitrary.

2) Education Rights of Alien Children

The Supreme Court has found that undocumented aliens are “persons” within the protection of the Fourteenth Amendment and that it would be fundamentally unfair to punish children for the crimes of their parents (i.e., illegally coming into the United States). Moreover, the Court found that refusing to educate children of undocumented aliens would hinder their lives in a way that would work a punishment on them. Therefore, the Court held that it is not rational for a state to deny children of undocumented aliens a free public education unless the state can show that the denial furthers a substantial state interest. Moreover, the Court held that the cost saved in not educating such children is not a sufficient interest. [Plyler v. Doe, 457 U.S. 202 (1982)]

a) Compare—Children Living Apart from Parents

The Supreme Court upheld a state statute that permitted a school district to deny tuition-free education to any child (whether or not he is a United States citizen) who lived apart from his parent or lawful guardian if the child’s presence in the school district was for the “primary purpose” of attending

school in the district. The state does not have to consider such a child to be a bona fide resident of the school district. [Martinez v. Bynum, 461 U.S. 321 (1983)]

E. QUASI-SUSPECT CLASSIFICATIONS

Classifications based on gender or legitimacy are almost always suspect. When analyzing government action based on such classifications, the Court will apply the intermediate standard and strike the action unless it is *substantially related* to an *important* government interest.

1. Gender

The Court has expressly held that the *government* bears the burden of proof in gender discrimination cases and that an “*exceedingly persuasive justification*” is required in order to show that gender discrimination is substantially related to an important government interest. [United States v. Virginia, 518 U.S. 515 (1996)]

a. Intentional Discrimination Against Women

Gender classifications that *intentionally* discriminate against women will generally be invalid under the intermediate standard, because the government is unable to show the “exceedingly persuasive justification” that is required.

Examples: 1) A statute giving the husband, as head of the household, the right to unilaterally dispose of property jointly owned with his wife violates equal protection. [Kirchberg v. Feenstra, 450 U.S. 455 (1981)]

2) A statute giving preference to males over females to act as administrator of an estate violates equal protection. [Reed v. Reed, 404 U.S. 71 (1971)—ease in determining who should serve is not an important interest]

Compare: 1) A state law that excluded from state disability insurance benefits “disabilities” arising from normal pregnancy and childbirth was upheld on a holding that it did not constitute a gender classification and so did not constitute intentional discrimination. [Geduldig v. Aiello, 417 U.S. 484 (1974)]

2) A state statute granting a hiring preference to veterans was upheld even though the result would disadvantage women since most veterans are men. The Court found that the purpose of the statute was to help veterans, not to discriminate against women. [Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)]

1) Government Interest Must Be Genuine

The “important government interest” advanced to justify categorization on the basis of gender must be *genuine*—not hypothesized for the purpose of litigation defense. Neither may the government’s justification rely on *overbroad generalizations* about males and females that will create or perpetuate the legal, social, and economic inferiority of women. [United States v. Virginia, *supra*]

Example: When a state military school’s policy of admitting only men was challenged, the state justified the policy, claiming that: (i)

offering a diversity of educational approaches within the state (e.g., some schools having men only, some having women only, and some having both) yields important educational benefits, and (ii) females *generally* would not be able to meet the school's physical requirements and would not do well under the school's adversative approach to education. The Supreme Court found these arguments unavailing. There was no evidence that the single-sex school in question was established or had been maintained with a view toward fostering a diversity of educational opportunities, and there was some evidence that *some* women could meet the school's physical requirements and thrive under the school's adversative approach. [United States v. Virginia, *supra*]

b. Affirmative Action Benefiting Women

Classifications benefiting women that are designed to *remedy past discrimination* against women will generally be upheld.

Examples: 1) Social Security and tax exemptions that entitle women to greater benefits to make up for past discrimination in the workplace are valid. [Califano v. Webster, 430 U.S. 313 (1977)]

2) A Navy rule granting female officers longer tenure than males before mandatory discharge for nonproduction is valid to make up for past discrimination against females in the Navy. [Schlesinger v. Ballard, 419 U.S. 498 (1975)]

c. Intentional Discrimination Against Men

Intentional discrimination against men generally is invalid. However, a number of laws have been held valid as being substantially related to an important government interest.

1) Invalid Discrimination

The following have been held invalid under the Equal Protection Clause:

- a) *Denial to admit males to a state university or nursing school* [Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)];
- b) Law that provides that *only wives are eligible for alimony* [Orr v. Orr, 440 U.S. 268 (1979)];
- c) Law that permits *unwed mother, but not unwed father, to stop adoption* of offspring [Caban v. Mohammed, 441 U.S. 380 (1979)]; and
- d) Law providing a *higher minimum drinking age for men* than for women [Craig v. Boren, 429 U.S. 190 (1976)].

2) Valid Discrimination

The following have been upheld under the Equal Protection Clause despite their discriminatory intent:

- a) Law punishing males but not females for *statutory rape* (sexual intercourse with a minor) [Michael M. v. Superior Court, 450 U.S. 464 (1981)—classification was found to be substantially related to important interest of preventing pregnancy of minors];
- b) *Male-only draft registration* [Rostker v. Goldberg, 453 U.S. 57 (1981)—classification was found to be substantially related to important interest of preparing combat troops]; and
- c) A law granting *automatic United States citizenship to nonmarital children born abroad to American mothers*, but requiring American fathers of children born abroad to take specific steps to establish paternity in order to make such children United States citizens. [Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001)—promotes the important governmental interest of avoiding proof of paternity problems, which are more difficult to resolve for fathers]

2. Legitimacy Classifications

Distinctions drawn between marital and nonmarital children are also reviewed under the intermediate scrutiny standard. Such classifications “must be *substantially related* to an *important* governmental objective.” [Clark v. Jeter, 486 U.S. 456 (1988)]

a. No Punitive Purpose

When the Court examines a classification based on illegitimacy, it gives greater attention to the purpose behind the distinction. It will not uphold discriminatory legislation intended to punish the offspring of illicit relationships.

1) Inheritance from Father

A state statute cannot absolutely exclude nonmarital children from inheriting from their intestate fathers. [Trimble v. Gordon, 430 U.S. 762 (1977)]

However, to promote efficient disposition of property at death (an important government interest), a state can require that the paternity of the father be proved before his death, since the requirement is substantially related to the important interest. [Lalli v. Lalli, 439 U.S. 259 (1978)]

2) Statute of Limitations on Paternity Suits May Be Discriminatory

The Supreme Court struck down a state statute that required nonmarital children to bring paternity suits within six years of their birth while allowing marital children to seek support from parents at any time. The Court found that the law was not related to the state interest of preventing stale or fraudulent claims. [Clark v. Jeter, *supra*]

b. Immigration Preference to Legitimate Children—Permissible

Due to the plenary power over immigration, the Court upheld a federal law granting immigration preferences to marital children. [Fiallo v. Bell, 430 U.S. 787 (1977)]

F. OTHER CLASSIFICATIONS

All other classifications are reviewed under the rational basis standard and will be upheld unless

they bear no rational relationship to any conceivable legitimate government interest. Nevertheless, if the government has no interest in denying a benefit or imposing a burden on a group of persons other than a societal fear or dislike of them, the classification will not meet the standard.

Examples: 1) The Court struck down a zoning ordinance that allowed denial of a special use permit to a group of unrelated, mentally retarded persons who wished to share a residential home or apartment building. Retarded persons are not a suspect or quasi-suspect class and the right to housing is not a fundamental right; thus the Court applied the rational basis standard. It found that the sole reason the permit was denied was the applicants' mental condition and that the government has no legitimate interest in prohibiting mentally retarded persons from living together. [Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)]

2) Several municipalities passed ordinances banning discrimination in housing, employment, etc., based on sexual orientation. In response, the state voters adopted a state constitutional amendment prohibiting any state or local action protecting the status of persons based on their homosexual or bisexual orientation. *Held:* A state constitutional provision that identifies persons by a single trait and then denies them the right to seek *any* specific protections from the law—no matter how local or widespread the injury—is so unprecedented as to imply animosity toward such persons and is thus not related to any legitimate state interest. [Romer v. Evans, 517 U.S. 620 (1996)]

1. Age Not Suspect

Age is not a suspect class. Thus, government action based on age will be upheld if there is a conceivable rational basis for the classification. [See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)—police officer can be forced to retire at age 50, even though he is as physically fit as a younger officer; Gregory v. Ashcroft, 501 U.S. 452 (1991)—a state constitution that requires state judges to retire at age 70 does not violate the Equal Protection Clause]

2. Wealth Not Suspect

The Court has never held that wealth alone is a “suspect classification.” However, the lack of wealth, or the inability to pay a governmentally required fee, cannot be the sole basis upon which a person is deprived of a *fundamental* constitutional right.

Example: The government will be required to waive a marriage license fee or divorce court fee for a person who cannot afford to pay that fee. Marriage and divorce rights are part of the right of privacy.

a. Abortions

The Supreme Court upheld the governmental refusal to pay for abortions. The Court found that a woman does not have a fundamental constitutional right to obtain abortion services; rather, a woman has a fundamental right to make her decision to have an abortion without government interference.

b. Education

The Supreme Court has not yet held education to be a fundamental right. The Court has not found that children are denied equal protection when the government provides greater educational opportunities for children who can afford to pay for access to the

best state-operated schools. In fact, the Court has upheld the use of a property tax to fund local schools where the tax system resulted in children in districts with a high tax base getting a significantly better education than children in tax districts that could not afford significant taxes for education. [San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)] The Court has also upheld a statute that authorizes some school districts in the state to charge user fees for bus transportation to the local public schools. [Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988)]

XIX. FUNDAMENTAL RIGHTS

A. INTRODUCTION

Certain fundamental rights are protected under the Constitution. If they are denied to everyone, it is a substantive due process problem. If they are denied to some individuals but not to others, it is an equal protection problem. The applicable standard in either case is strict scrutiny. Thus, to be valid the governmental action must be *necessary* to protect a *compelling interest*.

B. RIGHT OF PRIVACY

Various privacy rights, including marriage, sexual relations, abortion, and childrearing, are fundamental rights. Thus, regulations affecting these rights are reviewed under the *strict scrutiny* standard and will be upheld only if they are *necessary* to a *compelling interest*.

1. Marriage

Although not all cases examining marriage regulations clearly use the compelling interest standard, a law prohibiting a class of adults from marrying is likely to be invalidated unless the government can demonstrate that the law is narrowly tailored to promote a compelling or overriding or, at least, important interest.

Note: The Court has indicated that there is a “marital zone of privacy” [see *Griswold v. Connecticut*, 381 U.S. 479 (1965)], so it will likely grant broader protection to private sexual relations between married persons than it does concerning nonmarried persons.

a. Same-Sex Marriage

The Court has held that the fundamental liberties guaranteed by the Fourteenth Amendment require every state to issue marriage licenses to two people of the same sex and recognize same-sex marriages validly performed elsewhere. However, the Court did not address the standard of review (presumably, strict scrutiny). [*Obergefell v. Hodges*, 135 S.Ct. 1039 (2015)]

b. Special Test in Prisoners’ Rights Cases

A statute or regulation that restricts the constitutional rights of prison inmates will be upheld as long as the statute or regulation “is reasonably related to legitimate penological interests.”

Example: Even under this lenient standard, a prison regulation that prohibited an adult prisoner from establishing a legal marriage relationship with another adult unless the prison superintendent approved the marriage

was held invalid, because the regulation was not reasonably related to any asserted penological interest. [Turner v. Safley, 482 U.S. 78 (1987)]

2. Use of Contraceptives

A state cannot prohibit distribution of nonmedical contraceptives to adults except through licensed pharmacists, nor prohibit sales of such contraceptives to persons under 16 who do not have approval of a licensed physician. [Carey v. Population Services International, 431 U.S. 678 (1977)]

3. Abortion

The Supreme Court has held that the right of privacy includes the right of a woman to have an abortion under certain circumstances without undue interference from the state. [Roe v. Wade, 410 U.S. 113 (1973)] However, because the Court has held that the states have a compelling interest in protecting the health of both the woman and the fetus that may become a child, it is difficult to apply the normal “strict scrutiny” analysis to abortion regulations (since these two compelling interests may conflict with each other and with the woman’s privacy right). Moreover, the Supreme Court has actively been changing the rules regarding abortions and the Justices have not come to agreement on any applicable standard. In the Court’s latest announcement, the plurality opinion adopted two rules: a pre-viability rule and a post-viability rule.

a. Pre-Viability Rule—No Undue Burdens

Before viability (i.e., a realistic possibility of maintaining the fetus’s life outside the womb), a state may adopt regulations protecting the mother’s health and the life of the fetus only if the regulation does not impose an “undue burden” or substantial obstacle to the woman’s right to have an abortion. The Court has not specifically defined what will constitute an undue burden, stating that a state can adopt a statute designed to persuade a woman to choose childbirth over abortion as long as the statute is reasonably related to that purpose and does not put a *substantial* obstacle to abortion in the woman’s path. A statute will not impose a substantial obstacle or an undue burden simply because it has the incidental effect of making it more difficult or more expensive to obtain an abortion. [Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)]

1) Informed Consent—No Undue Burden

States can require abortions to be performed by licensed physicians, and it is not an “undue burden” to require the *physician* to provide the woman with truthful information about the nature of the abortion procedure, the health risks of abortion and childbirth, and the probable gestational age of the fetus. [Planned Parenthood of Southeastern Pennsylvania v. Casey, *supra*]

2) Waiting Period—No Undue Burden

Requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion does not amount to an undue burden. [Planned Parenthood of Southeastern Pennsylvania v. Casey, *supra*]

3) Parental Consent—No Undue Burden

A state may require a minor to obtain her parents’ (one or both) consent to have

an abortion (or give notice to them even if their consent is not required) if there is a “bypass procedure” whereby the minor may obtain the abortion (without notice to or consent of her parents) with the consent of a judge. The judge is required to make a prompt decision as to (i) whether the minor is sufficiently mature to make her own abortion decision, and (ii) if she is not sufficiently mature, whether having an abortion without notice to her parents is in her best interests. [Hodgson v. Minnesota, 497 U.S. 417 (1990); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); Planned Parenthood of Southeastern Pennsylvania v. Casey, *supra*; Lambert v. Wicklund, 520 U.S. 292 (1997)]

4) Compare—Spousal Consent Is Undue Burden

It is an undue burden to require a woman to sign a statement that she has notified her spouse that she is about to undergo an abortion. [Planned Parenthood of Southeastern Pennsylvania v. Casey, *supra*]

5) “Physician Only” Requirement—No Undue Burden

A law restricting the performance of abortions to licensed physicians does not impose an undue burden on a woman seeking an abortion. [Mazurek v. Armstrong, 520 U.S. 968 (1997)—*per curiam*]

6) “Partial-Birth Abortion” Ban—No Undue Burden

A federal law (the Partial-Birth Abortion Ban Act of 2003) prohibiting “intact D&E” (a type of abortion procedure in which a live fetus is partially delivered, killed, and then fully removed from the woman’s body) does not *on its face* impose an undue burden where other abortion procedures are available (e.g., a D&E not involving partial live delivery), the law includes specific anatomical standards and an exception to protect the woman’s life, and there is uncertainty within the medical profession whether banning the intact D&E procedure creates a significant health risk for women. Although the Court generally upheld the statute, it also held that the statute could not be applied in situations wherein the woman’s health would be endangered. [Gonzales v. Carhart, 550 U.S. 124 (2007)—*distinguishing* Stenberg v. Carhart, 530 U.S. 914 (2000)—which invalidated a state partial-birth abortion ban that did not contain clearly defined anatomical standards nor provide any health exception]

7) Other Regulations Uncertain

Prior to *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, the Supreme Court upheld a requirement that abortions be performed in a clinic or medical facility with all of the basic medical equipment that would be found in a hospital surgery room. The Court also upheld a requirement that tissue from an aborted fetus be sent to a pathologist. These holdings surely are still valid. But the Court struck down certain other regulations (e.g., requiring early term abortions to be approved by another doctor or hospital committee). Whether these regulations would be found to be undue burdens is uncertain.

b. Post-Viability Rule—May Prohibit Abortion Unless Woman’s Health Threatened

Once the fetus has become viable, the state’s interest in the fetus’s life can override the woman’s right to choose an abortion, but it does not override the state’s interest in the

woman's health. Thus, after viability the state can prohibit a woman from obtaining an abortion unless an abortion is necessary to protect the mother's life or health. However, viability is itself a medical question, and a state cannot unduly interfere with the attending physician's judgment as to the reasonable likelihood that the fetus can survive outside the womb. [Colautti v. Franklin, 439 U.S. 379 (1979)]

c. Remedy

When a court is faced with a statute restricting access to abortions that may be applied in an unconstitutional manner so as to harm the mother's health, it should *not* invalidate the statute in its entirety if the statute has valid applications. Instead, the court should attempt to fashion narrower declaratory and injunctive relief against the unconstitutional application. [Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006)]

Example: Court should not have invalidated an entire statute requiring minors to give parents notice before obtaining an abortion merely because the statute did not include an exception for cases where the minor's health is at stake; rather, it should be "declared invalid to the extent that it reaches too far, but otherwise left intact." [Ayotte v. Planned Parenthood of Northern New England, *supra*]

d. Financing Abortions

Neither federal nor local governments are required to grant medical benefit payments for abortions to indigent women, even if they grant benefits to indigent women for childbirth services. [Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980)] Moreover, a state may prohibit the public funding of abortions by prohibiting the use of public facilities for abortions and prohibiting any public employee acting within the scope of her public employment from performing or assisting in the performance of abortions. [Webster v. Reproductive Health Services, 492 U.S. 490 (1989)]

4. Obscene Reading Material

The right of privacy encompasses the freedom to read obscene material in your home, except for child pornography. [Stanley v. Georgia, 394 U.S. 557 (1969); Osborne v. Ohio, 495 U.S. 103 (1990)] It does not, however, include the right to sell, purchase, receive, or transport obscene material. [Paris Adult Theatre v. Slayton, 413 U.S. 49 (1973)]

5. Keeping Extended Family Together

The right of privacy includes the right of family members—even extended ones—to live together. Thus, a zoning ordinance cannot prohibit extended families from living in a single household since there is no compelling interest to justify such a rule. [Moore v. City of East Cleveland, 431 U.S. 494 (1977)]

6. Rights of Parents

Parents have a fundamental right to make decisions concerning the care, custody, and control of their children. [Troxel v. Granville, 530 U.S. 57 (2000)]

a. Education

Although the state may prescribe reasonable educational standards, it may *not* require that all children be educated in public schools. [Pierce v. Society of Sisters, 268 U.S.

510 (1925)] Neither may the state forbid education in a language other than English. [Meyer v. Nebraska, 262 U.S. 390 (1923)]

b. Visitation

A state law was found to be overbroad and in violation of parents' rights where it (i) authorized the courts to grant "any person" (including grandparents) a right to visit a child upon finding that this would be in the child's best interests, and (ii) did not allow the judge to give significant weight to the parent's offer of meaningful visitation opportunity and the traditional presumption that a fit parent will act in the child's best interests. [Troxel v. Granville, *supra*]

7. Intimate Sexual Conduct

The state has no legitimate interest in making it a crime for *fully consenting adults* to engage in *private* intimate sexual conduct that is not commercial in nature. Although the Court has not said what standard of review applies, it has indicated that a statute regulating such conduct cannot pass even the rational basis test because of the lack of a legitimate government interest. [Lawrence v. Texas, 539 U.S. 558 (2003)—a state law making it a crime for members of the same sex to engage in sodomy violates the Due Process Clause]

8. Freedom from Collection and Distribution of Personal Data

The right of privacy does not prevent the state from accumulating and computerizing the names and addresses of patients for whom dangerous drugs are prescribed. [Whalen v. Roe, 429 U.S. 589 (1977)] And the state can republish the recording of an official act, such as an arrest. [Paul v. Davis, 424 U.S. 693 (1976)]

C. RIGHT TO VOTE

The right of all United States citizens over 18 years of age to vote is mentioned in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. It extends to all national and state government elections, including primaries. The right is fundamental; thus, restrictions on voting, other than on the basis of age, residency, or citizenship, are *invalid* unless they can pass strict scrutiny.

1. Restrictions on Right to Vote

a. Residency Requirements

Relatively short residency requirements restricting the right to vote (e.g., 30 days) are valid because there is a compelling interest in ensuring that only bona fide residents vote. However, longer residency requirements will probably be held invalid (e.g., one year) because they discriminate against newer residents without a compelling reason, and thus violate the Equal Protection Clause. Such residency requirements might also violate the right to travel interstate. (*See* D.1.b.1), *infra*.) Note also that Congress may override state residency requirements in *presidential* elections. [Oregon v. Mitchell, 400 U.S. 112 (1970)]

1) Members of Armed Forces

The right to vote cannot automatically be denied to members of the armed forces stationed at a particular locality. They must be given an opportunity to prove their bona fide residency. [Carrington v. Rash, 380 U.S. 89 (1965)]

2) Compare—Nonresidents

Laws that prohibit nonresidents from voting are generally valid as long as they have a rational basis. [*See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978)—upholding denial of right to vote in city elections to persons outside of city limits, but within the city’s police and licensing jurisdiction]

b. Property Ownership

Conditioning the right to vote, to be a candidate, or to hold office on property ownership is usually invalid under the Equal Protection Clause, since property ownership is not necessary to any compelling governmental interest related to voting. [*See, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969)—requirement of owning property or having children in schools to vote in school board elections struck] However, certain special purpose elections (e.g., water storage district elections) can be based on property ownership. (*See below.*)

c. Poll Taxes

Poll taxes are prohibited under the Twenty-Fourth Amendment, and the Supreme Court has held that they also violate equal protection because wealth is not related to the government’s interest in having voters vote intelligently. [*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)]

d. Primary Elections

1) State Regulation of Party Primaries

States may exercise some control over primary elections, but such regulation is subject to restrictions under the First Amendment (freedom of political association) and the Fourteenth Amendment (Equal Protection Clause). Thus, to prevent interparty “raiding,” the Supreme Court has held that states can require a person to have been registered with a party for a reasonable time before that party’s primary election in order to be eligible to vote in the primary. [*Rosario v. Rockefeller*, 410 U.S. 752 (1973)—11 months’ registration upheld; *Kusper v. Pontikes*, 414 U.S. 51 (1973)—23 months not upheld] However, if a political party wishes to open its primary elections to anyone, whether or not registered with the party, the state cannot prohibit this because the state interest here is overridden by the right of political association. [*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986)]

2) States May Subsidize Primaries of Major Parties

States may subsidize the primaries of major parties without similarly defraying the costs of mechanisms through which minor parties qualify candidates for the general election [*American Party of Texas v. White*, 415 U.S. 767 (1974)—upholding law requiring new or small parties to proceed by petition or convention at their own expense rather than by publicly funded primary], as long as new or small parties are given some effective way to qualify for the general election [*Williams v. Rhodes*, 393 U.S. 23 (1968)—unduly burdensome petition requirements for new or small parties struck down as not justified].

2. Dilution of Right to Vote

a. One Person, One Vote Principle

The Equal Protection Clause of the Fourteenth Amendment has been interpreted to prohibit state dilution of the right to vote, and Article I has been interpreted to place the same type of restriction on the federal government.

1) Establishing Voting Districts

Whenever a governmental body establishes voting districts for the election of representatives, the number of persons in each district may not vary significantly. This is commonly referred to as the one person, one vote principle.

a) Congressional Elections—Almost Exactly Equal

States establish the districts for congressional elections. However, the Supreme Court requires *almost exact mathematical equality* between the *congressional* districts within a state; thus, deviations of even a few percentage points between the congressional districts within a state may result in the invalidation of the congressional district plan.

(1) Compare—Apportionment Among the States

Congress apportions representatives among the states “according to their respective number.” [Art. I, §2] Congress’s good faith choice of method in so apportioning the representatives commands far more deference than state districting decisions and is *not* subject to the same precise mathematical standard as state plans. [United States Department of Commerce v. Montana, 503 U.S. 442 (1992)]

b) State and Local Elections—Variance Not Unjustifiably Large

The variance in the number of persons included in districts for the purpose of electing representatives to a *state or local governmental body* must not be unjustifiably large, but the districts need not be within a few percentage points of each other: If a state can show that the deviation from mathematical equality between districts is reasonable and tailored to promote a legitimate state interest, the law establishing the districts may be upheld. [Mahan v. Howell, 410 U.S. 315 (1973)—16% variance in district populations was upheld in light of state’s interest in preserving political subdivisions, although 30% variance would be excessive]

c) Scope

The one person, one vote principle applies to almost every election where a person is being elected to perform normal governmental functions. [Hadley v. Junior College District, 397 U.S. 50 (1970)—trustees for junior college district] However, there are a few exceptions to note:

(1) Exception—Appointed Officials and Officials Elected “At Large”

The apportionment requirement is inapplicable to appointed officials. Neither is it applicable in at-large systems of election, because in such a system there are no electoral districts to violate the one person, one vote principle. However, if an at-large voting system were established or maintained for the purpose of suppressing the voting power of minority race voters, it would be unconstitutional.

(2) Exception—Special Purpose Government Units (Water Storage Districts)

The government can limit the class of persons who are allowed to vote in an election of persons to serve on a special purpose government unit *if* the government unit has a special impact on the class of enfranchised voters. To date, the Supreme Court has found only “water storage districts” to be so specialized that their governing boards are not subject to the one person, one vote principle. [Salyer Land Co. v. Tulane Water District, 410 U.S. 719 (1973); Ball v. James, 451 U.S. 355 (1981)—apportionment rules do not apply to water district even if the district is major supplier of electricity in the state]

2) Standardless Recount

Counting uncounted ballots in a presidential election without standards to guide ballot examiners in determining the intent of the voter violates the Fourteenth Amendment Equal Protection Clause. [Bush v. Gore, 531 U.S. 98 (2000)]

b. Gerrymandering

1) Racial Gerrymandering

As indicated above, race (and presumably other suspect classifications) cannot be the predominant factor in drawing the boundaries of a voting district unless the district plan can pass muster under strict scrutiny. [See Miller v. Johnson, XVIII.D.1.c., *supra*] Moreover, a district’s bizarre shape can be used to show that race was the predominant factor in drawing the district’s boundaries [see Shaw v. Reno, XVIII.C.1.a., *supra*], although a bizarre shape is not necessary to such a finding. Note that the person challenging the reapportionment has the burden of proving the race-based motive. [Shaw v. Hunt, 517 U.S. 899 (1996)]

2) Political Gerrymandering

The Court has *never* ruled that a legislative redistricting map should be overturned on the basis of political gerrymandering, and a number of Justices have suggested that political gerrymandering is a nonjusticiable issue. [Vieth v. Jubelirer, 541 U.S. 267 (2004); *and see* League of United Latin American Citizens v. Perry, I.E.7.a., *supra*—refusing to find a constitutional violation when there was mid-decade redistricting for partisan political reasons]

c. Multi-Member Districts

A state is generally free to have some multi-member districts together with some single-member districts, as long as the number of members representing a district is proportional to its population. However, single-member or multi-member districts will be held to violate equal protection (even though they meet the one person, one vote principle) if the district lines were drawn on the basis of unconstitutional criteria, such as to suppress the voting power of racial minorities or an identifiable political group.

d. States May Use Independent Commissions to Draw Districts

To avoid gerrymandering, states may use independent commissions to adopt congressional districts, rather than allowing the state legislature to redistrict. [Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S.Ct. 2652 (2015)]

3. Candidates and Campaigns

a. Candidate Qualifications

1) Fee Must Not Preclude Indigents as Candidates

States may not charge candidates a fee that results in making it impossible for indigents to run for office. An unreasonably high filing fee (which was not tailored to promote a substantial or overriding state interest) might be held totally invalid so that no candidate would have to pay the fee. A reasonable, valid fee would have to be waived for an indigent candidate who could not pay the fee.

2) Restrictions on Ability of Person to Be a Candidate

Restrictions on the ability of persons to be candidates must be examined to see if they violate either the First Amendment right of political association or the Fourteenth Amendment Equal Protection Clause. Such regulations are judged on a sliding scale of scrutiny. (*See XXI.B., infra.*)

Example: The Court invalidated a March deadline for filing a nominating petition for independent candidates for a November election where the state allowed the major political parties to name their candidates later in the year. [*Anderson v. Celebrezze*, 460 U.S. 780 (1983)]

Note: A state may require candidates to show reasonable support (signatures or votes) to qualify to have their names placed on the ballot. [*Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)—upholding requirement of receipt of at least 1% of the votes cast in the primary election]

3) Required Resignation of Office Is Permissible

A state may require state officials to resign their office if they enter an election for another government office. [*Clements v. Fashing*, 457 U.S. 957 (1982)]

b. Campaign Funding, Contributions, and Expenditures

Government *may* allocate more public funds to the two “major” parties than to “minor” parties for political campaigns, and may withhold public funding from candidates who do not accept reciprocal limits on their total campaign expenses; but such expenses cannot otherwise be limited, unlike campaign contributions to political candidates, which may be limited if government chooses. (*XXI.B., infra.*)

4. Extraordinary Majorities—Referendum Elections

The government may require a supermajority vote for voter referendums, even though such a requirement might give a minority disproportionate power. [*Gordon v. Lance*, 403 U.S. 1 (1971)—upholding 60% requirement for referendum approval; *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977)—upholding requirement that new county charter be approved by separate majorities of city and noncity voters]

5. Replacement of Incumbent Legislators

A state may validly give to a political party the right to name an interim appointee to the legislature to fill out the unexpired term of a legislator from that political party who left office. No voter is denied equal protection by this system. [*Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982)]

D. RIGHT TO TRAVEL

1. Interstate Travel

a. Nature of the Right

Individuals have a fundamental right to travel from state to state, which encompasses the right: (i) to leave and enter another state, and (ii) to be treated equally if they become permanent residents of that state. [Saenz v. Roe, VII.C.3., *supra*—striking California law that limited welfare benefits for new residents to what they would have received in their prior state of residence]

b. Standard of Review

When a state uses a durational residency requirement (a waiting period) for dispensing benefits, that requirement normally should be subject to the “strict scrutiny” test. This means that the government must show that the waiting period requirement is tailored to promote a compelling or overriding interest. However, in some right to travel cases, the Court has not been clear as to whether it is using this strict scrutiny, compelling interest standard of review. The important point to note for the bar exam is that state residency requirements should not be upheld merely because they have some theoretical rational relationship to an arguably legitimate end of government.

1) Examples

Because of the ad hoc nature of these rulings, we will list four examples of Supreme Court decisions in this area:

- a) A one-year waiting period before a person may receive subsistence welfare payments is *invalid*. Similarly, a law providing that persons residing in the state for less than a year may receive welfare benefits no greater than those paid in the state of prior residence is also invalid. [Saenz v. Roe, *supra*]
- b) A one-year waiting period for state subsidized medical care is *invalid*.
- c) A one-year waiting period to get a divorce is *valid*.
- d) A state may require a voter to register to vote in a party primary 10 months before the primary election (to avoid interparty “raiding”). However, a 23-month registration period would be *invalid*.

c. Distinctions Between Old and New Residents

Some state laws that have an adverse impact on new residents do not involve a waiting period. For example, a state may attempt to dispense state benefits on the basis of the length of time a person has resided in the state. A state law that distinguishes between residents of the state on the sole basis of their length of residency will serve no legitimate state interest. This type of law should be *stricken* under the rational basis test because it has *no rational relationship* to any legitimate state interest.

Examples: 1) A state statute that dispensed differing amounts of state money to residents of the state based on each resident’s length of residence was held invalid.

2) A state statute that grants an annual property tax exemption to a veteran of military service only if he resided in the state before a specific date (May 1976) is invalid.

3) A state law that grants a hiring preference (for civil service employment) to a veteran only if he was a resident of the state prior to joining the armed services is invalid.

2. International Travel

The Supreme Court has not yet declared that the right to international travel is fundamental, although the right appears to be *protected from arbitrary federal interference* by the Due Process Clause of the Fifth Amendment. The Court has held that this right is not violated when the federal government refuses to pay Social Security benefits to persons who leave the country. The test here is “mere rationality, not strict scrutiny.” [Califano v. Aznavorian, 439 U.S. 170 (1978)] Congress may give the executive branch the power to revoke the passport of a person whose conduct in another country presents a danger to United States foreign policy. [Haig v. Agee, 453 U.S. 280 (1981)] The Treasury Department, with congressional authorization, could restrict travel to and from Cuba without violating the Fifth Amendment. [Regan v. Wald, 468 U.S. 222 (1984)]

E. RIGHT TO REFUSE MEDICAL TREATMENT

The Supreme Court had held that the right to refuse medical treatment is a part of an individual’s “liberty” that is protected by the Fifth and Fourteenth Amendment Due Process Clauses. However, the Supreme Court has not ruled that this aspect of liberty is a “fundamental right” and *has not* explained which standard of review should be used. Nevertheless, the Court has ruled on the validity of several types of legislation.

1. Vaccination

An individual can be made to submit to vaccination against contagious diseases because of the governmental and societal interest in preventing the spread of disease. [Jacobsen v. Massachusetts, 197 U.S. 11 (1905)]

2. Refusal of Medical Treatment

The Supreme Court has assumed (without deciding) that a mentally competent adult has the right to refuse lifesaving medical treatment (including lifesaving nutrition). [Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)]

a. Compare—No Right to Assisted Suicide

There is no general right to commit suicide; thus, a state may ban persons from giving individuals assistance in committing suicide. [Washington v. Glucksberg, 521 U.S. 702 (1997)] It is not irrational to permit competent persons to refuse life-sustaining treatment but prohibit physicians to assist in suicide because there is a logical, rational, and well-established distinction between letting someone die and making someone die. [Vacco v. Quill, 521 U.S. 793 (1997)]

b. Compare—Criminal Defendants

Under the Due Process Clause, the government may *involuntarily* administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to make

him competent to stand trial if: (i) the treatment is medically appropriate, (ii) the treatment is substantially unlikely to cause side effects that may undermine the fairness of the trial, and (iii) considering less intrusive alternatives, the treatment is necessary to further important governmental trial-related interests. [Sell v. United States, 539 U.S. 166 (2003)]

PART FIVE: FIRST AMENDMENT FREEDOMS

The First Amendment prohibits Congress from establishing a religion or interfering with the exercise of religion, abridging the freedom of speech or the press, or interfering with the right of the people to assemble. These prohibitions have been made applicable to the states through the Fourteenth Amendment. The freedoms, however, are not absolute, and exam questions often focus on their boundaries. The following material will outline the scope of each freedom.

XX. FREEDOM OF SPEECH AND ASSEMBLY

A. GENERAL PRINCIPLES

The freedoms of speech and assembly protect the free flow of ideas, a most important function in a democratic society. Thus, whenever the government seeks to regulate these freedoms, the Court will weigh the importance of these rights against the interests or policies sought to be served by the regulation. When analyzing regulations of speech and press, keep the following guidelines in mind:

1. Government Speech

The Free Speech Clause restricts government *regulation of private speech*; it does not require the government to aid private speech nor restrict the government from expressing its views. The government generally is free to voice its opinions and to fund private speech that furthers its views while refusing to fund other private speech, absent some other constitutional limitation, such as the Establishment Clause or Equal Protection Clause. Because government speech does not implicate the First Amendment, it is not subject to the various levels of scrutiny that apply to government regulation of private speech (*see infra*). [Pleasant Grove City, Utah v. Sumnum, 555 U.S. 460 (2009)] Generally, government speech and government funding of speech will be upheld if it is *rationally related to a legitimate state interest*.

Examples:

- 1) The government may choose to aid a union representing government employees by providing for payroll deductions of general union dues while refusing to allow payroll deductions that will be used by unions to fund political activities. The decision not to collect funds for political activities is rationally related to a legitimate government interest (i.e., avoiding the appearance of favoritism), and thus the refusal to collect such funds is constitutional. [Ysursa v. Pocatello, 555 U.S. 353 (2009)]

- 2) The government may fund family planning services but except from funding services that provide abortion information. [Rust v. Sullivan, 500 U.S. 173 (1991)]

3) The government may refuse to fund artists whose work it finds offensive. [National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)]

4) The government may reject proposed specialty license plate designs submitted by private individuals while accepting others. Since license plates are issued by the state and bear the state name, this is a form of government speech, and states are entitled to refuse to issue plates featuring certain messages or images. [Walker v. Texas Division, Sons of Confederate Veterans, 135 S.Ct. 2239 (2015)]

a. Limitation

Spending programs may not impose conditions that limit First Amendment activities of fund recipients outside of the scope of the spending program itself. For example, while the government could prohibit the use of federal funds to advocate for or support abortion [Rust v. Sullivan, *supra*], it could not require recipients of federal funds given to organizations to combat HIV/AIDS to agree in their funding documents that they oppose prostitution. [Agency for International Development v. Alliance for Open Society International, Inc., 133 S. Ct. 2321 (2013)]

b. Public Monuments

A city's placement of a *permanent* monument in a public park is government speech and thus is not subject to Free Speech Clause scrutiny. This is true even if the monument is privately donated. By displaying the monument, the government is disseminating a message, and the message is not necessarily the message of the donor(s). As a corollary, the government cannot be forced to display a permanent monument with a message with which the government disagrees, and the government's refusal to display a proffered monument likewise is not subject to Free Speech Clause scrutiny.

Example: A city with a Ten Commandments monument in its park was not required to display a religious monument of another religion (the "Seven Aphorisms" of the Summum faith). The Ten Commandments monument, although privately donated, was deemed government speech. When the government is the speaker, it may engage in content-based choices. [Pleasant Grove City, Utah v. Summum, *supra*] (*Note:* While an Establishment Clause issue was not raised in *Summum*, a concurring opinion suggested that the Ten Commandments monument did not violate the Establishment Clause because it was one of 15 monuments in the park recognizing the historical roots and morals of the community. [And see Van Orden v. Perry, XXII.D.2.b., *infra*])

c. Compare—Government Funding of Private Messages

In contrast to government funding of speech for the purpose of promoting its own policies (such as the family planning services involved in *Rust v. Sullivan, supra*), when the government chooses to fund private messages, it generally must do so on a viewpoint neutral basis. [See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)—state university exclusion of religious magazine from program financially supporting many other types of student publications violates the First Amendment]

1) Exception—Funding of the Arts

From a financial standpoint, the government cannot fund all artists, and choosing among those it will fund and those it will not inevitably must be based on the content of the art. [National Endowment for the Arts v. Finley, *supra*]

2. Content vs. Conduct

A regulation seeking to forbid communication of specific ideas (i.e., a *content* regulation) is less likely to be upheld than a regulation of the *conduct* incidental to speech.

a. Content

It is presumptively unconstitutional for the government to place burdens on speech because of its content. To justify such content-based regulation of speech, the government must show that the regulation (or tax) is *necessary* to serve a *compelling* state interest and is narrowly drawn to achieve that end. [Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991)—striking a law requiring that proceeds to criminals from books and other productions describing their crimes be placed in escrow for five years to pay claims of victims of the crimes]

Example: A state may not prohibit the sale or rental of violent video games to minors. Such a prohibition is content-based, and the Supreme Court found that the prohibition was not narrowly tailored to serve a compelling interest. It found the law both underinclusive, because psychological studies show that such games have only a small effect on youth violence, and overinclusive, because only some parents object to them. The Court also declined to add violence as an additional area of unprotected speech (*see below*). [Brown v. Entertainment Merchants Association, 131 S. Ct. 2729 (2011)]

1) Exception—Unprotected Categories of Speech

The Supreme Court has previously determined that certain categories of speech (e.g., obscenity, defamation, and “fighting words”; *see C., infra*) generally are proscribable despite the First Amendment. Even in these cases, however, the Court is less likely to uphold a prior restraint (i.e., a regulation prohibiting speech before it occurs) than a punishment for speech that has already occurred.

a) Falsity in and of Itself Does Not Make Speech Unprotected

A statute criminalizing speech merely because it is false is a content regulation. And while some categories of false speech are unprotected (e.g., defamation, false advertising, fraud, and perjury), those categorical exceptions are based on the harm caused. Speech is not unprotected merely for being false. [United States v. Alvarez, 132 S. Ct. 2536 (2012)—Stolen Valor Act making it a crime to falsely claim to have received military decorations is unconstitutional; while the government may have a compelling interest in maintaining the integrity of military honors, nothing indicates that the law here is necessary to that purpose]

2) Content-Neutral Speech Regulations

While content-based regulation of speech is subject to strict scrutiny, content-neutral speech regulations generally are subject to *intermediate scrutiny*—they

will be upheld if the government can show that: (i) they advance *important* interests unrelated to the suppression of speech, and (ii) they *do not burden substantially more speech than necessary* or are *narrowly tailored* to further those interests. [Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)]

b. Conduct

The Court has allowed the government more leeway in regulating the conduct related to speech, allowing it to adopt content-neutral, *time, place, and manner* regulations. Regulations involving public forums (i.e., forums historically linked with the exercise of First Amendment freedoms) must be *narrowly tailored* to achieve an *important* government interest (e.g., a prohibition against holding a demonstration in a hospital zone). Regulations involving nonpublic forums must have a reasonable relationship to a legitimate regulatory purpose (e.g., a law prohibiting billboards for purposes of traffic safety).

3. Reasonableness of Regulation

a. Overbroad Regulation Invalid

Since the purpose of the freedoms of speech and assembly is to encourage the free flow of ideas, a regulation will not be upheld if it is overbroad (i.e., prohibits *substantially* more speech than is necessary). If a regulation of speech or speech-related conduct punishes a *substantial amount of protected speech*, judged in relation to the regulation's plainly legitimate sweep, the regulation is *facially invalid* (i.e., it may not be enforced against anyone—not even a person engaging in activity that is not constitutionally protected) unless a court has limited construction of the regulation so as to remove the threat to constitutionally protected expression. [Virginia v. Hicks, 539 U.S. 113 (2003)] If a regulation is not substantially overbroad, it can be enforced against persons engaging in activities that are not constitutionally protected.

Examples:

1) The Supreme Court struck down as overbroad an ordinance that prohibited speech that “*in any manner*” interrupts a police officer in the performance of her duties. [Houston v. Hill, 482 U.S. 451 (1987)]

2) An airport authority rule that bans “*all* First Amendment activities” within the “central terminal area” is invalid as being substantially overbroad. [Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987)]

3) A law banning *all* door-to-door solicitations will be struck as being overbroad [Martin v. City of Struthers, 319 U.S. 141 (1943)], but a law requiring solicitors to obtain a homeowner's consent to solicit is valid. [Breard v. City of Alexandria, 341 U.S. 622 (1951)]

4) An ordinance that prohibited *all* canvassers from going onto private residential property to promote *any* cause without first obtaining a permit was overbroad. While the government may have an interest in preventing fraud from door-to-door solicitation, the permit requirement here went beyond cases where fraud was likely to occur, and applied to religious proselytization, advocacy of political speech, and enlisting

support for unpopular causes. [Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002)]

5) A city ordinance that prohibits homeowners from displaying *any sign* on their property except “residence identification” or “for sale” signs is invalid because the ordinance bans virtually all residential signs. [Ladue v. Gilleo, 512 U.S. 43 (1994)]

b. Void for Vagueness Doctrine

If a criminal law or regulation fails to give persons reasonable notice of what is prohibited, it may violate the Due Process Clause. This principle is applied somewhat strictly when First Amendment activity is involved in order to avoid the chilling effect a vague law might have on speech (i.e., if it is unclear what speech is regulated, people might refrain from speech that is permissible for fear that they will be violating the law). Vagueness issues most often arise in relation to content regulations, but the same principles would apply to time, place, and manner restrictions.

Examples:

1) A municipal ordinance that prohibited vagrants was held void for vagueness when it defined vagrants as “rogues and vagabonds . . . lewd, wanton, and lascivious persons . . . persons wandering or straying around from place to place without any lawful purpose or object . . .” [Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)]

2) A statute that prohibits attorneys representing clients in a pending case from making statements that would have a substantial likelihood of prejudicing a trial, but that also allows attorneys to make public statements regarding the “general nature of the defense” they will present at trial, is void for vagueness, because it does not give fair notice of the types of trial-related statements that are punishable. [Gentile v. State Bar, 501 U.S. 1030 (1991)]

1) Burden on Challenger

The person challenging the validity of the regulation has the burden of showing substantial overbreadth. [Virginia v. Hicks, *supra*]

2) Funding Speech Activity

Greater imprecision is allowed when the government acts as a patron in funding speech activity than when enacting criminal statutes or regulatory schemes, because speakers are less likely to steer clear of forbidden areas when only a subsidy is at stake. [National Endowment for the Arts v. Finley, 1., *supra*— requirement that NEA consider standards of “decency” and “respect for values of American people” is not invalid on its face]

c. Cannot Give Officials Unfettered Discretion

A regulation cannot give officials broad discretion over speech issues; there must be *defined standards* for applying the law. The fear, of course, is that the officials will use their discretionary power to prohibit dissemination of ideas that they do not agree with. This issue usually arises under licensing schemes established to regulate the time, place, and manner of speech. To be valid, such licensing schemes must be related to an

important government interest, contain procedural safeguards (*see* D.2., *infra*), and not grant officials unbridled discretion.

Example: County required persons desiring to hold a parade, march, or rally to first obtain a permit from the county administrator. The administrator was empowered to charge up to \$1,000 for the permit, but could adjust the fee to meet the necessary expenses of administration and police protection. This scheme is invalid because it gives the administrator unbridled discretion despite the \$1,000 limit. It also is unconstitutional because it is a content-based restriction (the administrator theoretically would adjust the costs based on the popularity of the subject at issue—an unpopular subject would require greater police protection). [Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992)]

1) **Unlimited Discretion—Void on Face**

If a statute gives licensing officials unbridled discretion, it is *void on its face*, and speakers need not even apply for a permit. They may exercise their First Amendment rights even if they could have been denied a permit under a valid law, and they may not be punished for violating the licensing statute. [Lovell v. City of Griffin, 303 U.S. 444 (1938)]

Examples: 1) An ordinance vesting officials with the power to grant or deny parade permits based on their judgment as to the effect of the parade on community “welfare” or “morals” is unconstitutional on its face. [Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)] Similarly, ordinances giving officials broad discretion as to who may place magazine racks on public property or who may obtain licenses to solicit door to door are invalid. [City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Lovell v. City of Griffin, *supra*]

2) A statute prohibiting excessively loud sound trucks is valid [Kovacs v. Cooper, 336 U.S. 77 (1949)], but an ordinance giving officials discretion as to who may use sound trucks is invalid [Saia v. New York, 334 U.S. 558 (1948)].

2) **Statutes Valid on Face**

If the licensing statute is valid on its face because it contains adequate standards, a speaker may not ignore the statute, but must seek a permit. If he is denied a permit, even if he believes the denial was incorrect, he must then seek reasonably available administrative or judicial relief. Failure to do so precludes later assertion that his actions were protected by the First Amendment. [Poulos v. New Hampshire, 345 U.S. 395 (1953)]

4. **Scope of Speech**

a. **Includes Freedom Not to Speak**

The freedom of speech includes not only the right to speak, but also the right to refrain from speaking or endorsing beliefs with which one does not agree—the government may not compel an individual personally to express a message with which he disagrees.

- Examples:*
- 1) A state **cannot force school children to salute** or say a pledge to the flag. [West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)]
 - 2) A motorist **could not be punished** for blocking out the portion of his automobile license plate bearing the motto “Live Free or Die”; as long as he left the license plate in a condition that served its auto identification purpose, he did not have to display a slogan endorsed by the state. [Wooley v. Maynard, 430 U.S. 705 (1977)]
 - 3) A state may not require private parade organizers to include in their parade groups with messages with which the organizers disagree. [Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)]

1) Mandatory Financial Support

Although the government may not compel a person to express a message, the government may tax people and use the revenue to express a message with which people disagree.

a) Government Speech

The Court has held that compelled support of government speech does **not** raise First Amendment concerns. [Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005)—beef producers can be required to pay an assessment to support generic advertising of beef approved by a semi-governmental producers’ board and ultimately by the Secretary of Agriculture—even if they think generic advertising is a waste of money—because the advertisements are governmental speech]

b) Compare—Private Speech

On the other hand, it appears that people **cannot** be compelled to subsidize **private** messages with which they disagree.

Examples: The Court has held that while teachers may be forced to pay union dues to a private union representing a majority of their fellow teachers, and attorneys may be forced to join a mandatory bar association, people may not be forced to pay sums that will be used to support political views that, or candidates whom, they do not endorse. [Abood v. Detroit Board of Education, 431 U.S. 209 (1977); Keller v. State Bar of California, 496 U.S. 1 (1990)]

(1) Exception—University Activity Fees

The government can require public university students to pay a student activity fee even if the fee is used to support political and ideological speech by student groups whose beliefs are offensive to the student, as long as the program is viewpoint neutral (*see* B.2.a., *infra*). [Board of Regents v. Southworth, 529 U.S. 217 (2000)]

2) State Can Require Shopping Center to Permit Persons to Exercise Speech Rights

Note that the freedom not to speak does not prohibit a state's requiring a large shopping center (that is open to the public) to permit persons to exercise their speech rights on shopping center property—at least as long as the particular message is not dictated by the state and is not likely to be identified with the owner of the shopping center. [Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)]

b. Includes Symbolic Conduct

Speech includes not only verbal communication, but also conduct that is undertaken to communicate an idea. Of course, not all regulation of symbolic conduct is prohibited. The Court will uphold a conduct regulation if: (i) the regulation is within the constitutional power of the government; (ii) it furthers an important governmental interest; (iii) the governmental interest is *unrelated to suppression of speech*; and (iv) the incidental burden on speech is no greater than necessary. [United States v. O'Brien, 391 U.S. 367 (1968)—upholding a prohibition against burning draft cards to protect the government's important interest in facilitating the smooth functioning of the draft system] Note, however, that a regulation is *not* invalid simply because there is some imaginable alternative that might be less burdensome on speech. [Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47 (2006)—statute requiring schools of higher education to grant the military access to recruit on campus is not invalid merely because the military could take out ads in newspapers, on television, etc.]

Example: A state may prohibit public nudity, even as applied to nude dancing at bars and places of adult entertainment. Although nude dancing is marginally within the protections of the First Amendment—because it involves the communication of an erotic message—the government has a “substantial” interest in combating crime and other “secondary effects” caused by the presence of adult entertainment establishments that is unrelated to the suppression of free expression. [Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Erie v. Pap's A.M., 529 U.S. 277 (2000)—city council made findings regarding secondary effects]

Compare: 1) A prohibition against students wearing armbands to protest the war in Vietnam was struck because it had no regulatory interest other than prohibiting the communicative impact of the conduct. [Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)]

2) A prohibition against mutilating a United States flag (except in cases of proper disposal of a soiled flag) was held invalid as an attempt to restrain speech; the Court found that no imminent breach of the peace was likely to result, and the government has no other interest in prohibiting such burnings. [United States v. Eichman, 496 U.S. 310 (1990)]

c. Excludes Freedom to Bar Military Recruitment

Requiring schools of higher education to allow military recruiters to recruit on campus or risk losing federal funding does not implicate free speech rights. This is so even if the schools disagree with the military's ban against homosexuals. School recruitment receptions are not inherently expressive from the schools' standpoint; they are merely

a way to help students obtain jobs. Schools are not being asked to say or refrain from saying anything, and neither are they being asked to associate with the military in any significant way. Moreover, there is little chance that a person would attribute the military's positions to the schools. Therefore, there is no First Amendment violation. [Rumsfeld v. Forum for Academic and Institutional Rights, *supra*]

5. Prison Speech

A regulation concerning the activities of prison inmates, including *any* First Amendment speech activities, is governed by a different standard in order to facilitate prison order: The regulation will be upheld if it is *reasonably related to legitimate penological interests*. [Shaw v. Murphy, 532 U.S. 223 (2001)] Thus, a restriction on *incoming* mail will be upheld if it is rational; a restriction on *outgoing* mail must be narrowly tailored because there is less of a penological interest involved. [See Thornburgh v. Abbott, 490 U.S. 401 (1989)]

B. TIME, PLACE, AND MANNER RESTRICTIONS—REGULATION OF CONDUCT

All speech is conveyed through physical action (e.g., talking, writing, distributing pamphlets, etc.), and while the freedom of belief is absolute, the freedom to convey beliefs cannot be. The extent to which government may regulate speech-related conduct depends on whether the forum involved is a public forum, a designated public forum, a limited public forum, or a nonpublic forum.

1. Public Forums and Designated Public Forums

Public property that has historically been open to speech-related activities (e.g., *streets*, *sidewalks*, and *public parks*) is called a public forum. Public property that has not historically been open to speech-related activities, but which the government has thrown open for such activities on a permanent or temporary basis, by practice or policy (e.g., school rooms that are open for after-school use by social, civic, or recreation groups), is called a designated public forum. The government may regulate speech in public forums and designated public forums with reasonable time, place, and manner regulations.

a. Test

To be valid, government regulations of speech and assembly in public forums and designated public forums must:

- (i) Be *content neutral* (i.e., subject matter neutral and viewpoint neutral);
- (ii) Be *narrowly tailored* to serve an *important* government interest; and
- (iii) Leave open *alternative channels* of communication.

Remember: Even if a regulation meets the above conditions, it might still be struck down on other grounds (e.g., overbreadth, vagueness, unfettered discretion; see A.3., *supra*).

1) Content Neutral

The regulation cannot be based on the content of the speech—i.e., it must be subject matter neutral and viewpoint neutral—absent substantial justification (*see C., infra*).

Examples: 1) The Court held invalid an ordinance allowing peaceful *labor* picketing near schools, but prohibiting all other picketing, since

it was a content-based restriction. [Chicago Police Department v. Mosely, 408 U.S. 92 (1972)]

2) A law may not forbid only those signs within 500 feet of a foreign embassy that are critical of the foreign government. [Boos v. Barry, 485 U.S. 312 (1988)]

2) **Narrowly Tailored**

The regulation must be narrowly tailored (i.e., it may not burden *substantially* more speech than is necessary to further the significant government interest). However, the regulation *need not be the least restrictive means* of accomplishing the goal.

Example: A law requiring persons performing at a city's theater to use the city's sound equipment is narrowly tailored to the city's interest in preventing excessive noise. [Ward v. Rock Against Racism, 491 U.S. 781 (1989)]

Compare: An ordinance that prohibited *all* canvassers from going onto private residential property to promote *any* cause without first obtaining a permit was not narrowly tailored to the interest of preventing fraud because it included too much speech that was not likely to give rise to fraud (e.g., religious proselytization, advocacy of political speech, and enlisting support for unpopular causes). [Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, A.3.a., *supra*]

Note: A regulation that is not narrowly tailored might also fail on overbreadth grounds. (See A.3.a., *supra*.)

3) **Important Interest**

The regulation must further an important government interest. Such interests include: traffic safety, orderly crowd movement, personal privacy, noise control, litter control, aesthetics, etc.

4) **Alternative Channels Open**

The law must leave open alternative channels of communication; i.e., other reasonable means for communicating the idea must be available.

b. **Examples—Residential Areas**

1) **Targeted Picketing**

The Supreme Court upheld a statute that prevented focused residential picketing (i.e., picketing in front of a single residence). The street/sidewalk involved was a public forum, but the ordinance passed the three-part test: (i) it was content neutral because it regulated the location and manner of picketing rather than its message; (ii) it was narrowly tailored to the important interest of protecting a homeowner's privacy (because it applied only to focused picketing); and (iii) alternative means of communications were available because the protesters could march *through* the neighborhood in protest. [Frisby v. Schultz, 487 U.S. 474 (1988)]

2) Charitable Solicitations

Charitable solicitations for funds in residential areas are within the protection of the First Amendment. However, they are subject to reasonable regulation.

Example: A state cannot require professional fundraisers (before making an appeal for funds) to disclose to potential donors the percentage of contributions collected over the previous year that were actually turned over to the charity. The disclosure is not necessary to promote the state interest of protecting the public from fraud. However, the state can require a fundraiser to disclose her professional status. [Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988)] In *Riley*, the Court also invalidated a restriction on the fees that professional fundraisers could charge a charity, because the particular statute was not narrowly tailored to protect either the public or the charities.

Compare: States have a significant interest in preventing fraudulent charitable solicitations. This interest justifies charging a telemarketing firm with fraud for telling persons solicited that the firm pays “a significant amount of each donation” to the charity, when in fact the firm keeps 85% of gross receipts. [Illinois *ex rel.* Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003)]

3) Permits

A state may not require persons to obtain permits in order to canvass door to door for noncommercial or nonfundraising purposes. [Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, *supra*]

c. Example—Buffer Zones

Laws and injunctions restricting expression within so-called “buffer zones” are often found in the context of cases dealing with demonstrations on streets and sidewalks outside abortion clinics. These laws typically set boundaries of a specified number of feet from clinic entrances within which anti-abortion protestors may not approach women entering the clinics, in order to ensure unobstructed access and maintain public safety and the free flow of vehicular and pedestrian traffic.

1) Content-Neutral/Important Government Interest

The Supreme Court has for the most part found buffer-zone laws to be reasonable, content-neutral regulations of speech that further the important state interest of preserving access to healthcare facilities and maintaining public order.

Example: The Court upheld the constitutionality of a state law prohibiting persons within 100 feet of a clinic from approaching within eight feet of those seeking access to the clinic for purposes of oral protest, education, or counseling. [Hill v. Colorado, 530 U.S. 703 (2000)—statute upheld against challenge by petitioners who wished to “counsel” women as they enter abortion clinics]

2) Narrowly Tailored

Under the second prong of the time, place, and manner test, buffer-zone laws

will be upheld only if they burden no more speech than necessary to achieve the purpose of protecting access to healthcare facilities and maintaining order on public rights-of-way. Moreover, the right of access does not amount to a right to be free from all communication in the vicinity of a facility that might be unwelcome. Court decisions in this area tend to be very fact-specific, and the Court has indicated it is more likely to find a buffer-zone law narrowly tailored if the state has first tried less-restrictive measures to address the problems created by anti-abortion protests.

Example: A targeted injunction establishing a 36-foot buffer zone between specific protesters and abortion clinic entrances was upheld where previous measures had failed to achieve the goal of ensuring public order and safety. [*Madsen v. Women’s Health Center*, 512 U.S. 753 (1994)]

Compare: 1) An injunction providing for a “floating buffer zone” of 15 feet between protesters and persons entering and leaving an abortion clinic was held to violate the First Amendment. The floating zone barred all verbal and written communication from a normal conversational distance on public sidewalks, and thus burdened more speech than necessary to ensure ingress and egress from the clinic. [*Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997)]

2) Anti-abortion pamphleteers challenged a state law that made it a crime for anyone except clinic patients and workers to “enter or remain in” an area within 35 feet of entrances to abortion clinics. The Court held that this provision of the law violated the Free Speech Clause because it was not narrowly tailored to achieve the interests of public safety and access to healthcare facilities. The law burdened more speech than necessary because only one clinic in the state was the site of disruptive abortion demonstrations one day a week; the state had not first tried “less intrusive” measures (e.g., enforcing an unchallenged section of the law prohibiting harassment and intimidation, or seeking a targeted injunction as in *Madsen, supra*); and the asserted rationale that the law made the jobs of police “easier” was not sufficient to justify such a sweeping restriction on speech. [*McCullen v. Coakley*, 134 S.Ct. 2518 (2014)]

d. Example—Designated Public Forum

Schools generally are not public forums. However, if a public school or university allows private organizations and members of the public to use school property for meetings when school programs or classes are not in session, the property is a designated public forum for that time, and the school cannot deny a religious organization permission to use the property for meetings merely because religious topics will be discussed. Such a restriction would be content discrimination. [*Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)]

e. Injunctions

Injunctions that restrict First Amendment activity in public forums are treated differently from generally applicable ordinances because injunctions present a greater risk of censorship and discriminatory application. The test to be used to determine whether an injunction that restricts speech or protest is constitutional depends on whether the injunction is content neutral.

1) Content Based—Necessary to a Compelling Interest

If the injunction is content based, it will be upheld only if it is necessary to achieve a compelling government interest.

2) Content Neutral—Burdens No More Speech than Necessary

If the injunction is content neutral, it will be upheld only if it burdens no more speech than is necessary to achieve an *important* government purpose.

2. Limited Public Forums and Nonpublic Forums

Other than streets, sidewalks, parks, and designated public forums, most public property is considered to be a limited public forum (e.g., government property opened up for a specific speech activity, such as a school gym opened on a particular night to host a debate on a particular community issue) or a nonpublic forum. The government can regulate speech in such forums to *reserve them for their intended use*. Regulations will be upheld if they are:

- (i) *Viewpoint neutral*; and
- (ii) *Reasonably related to a legitimate government purpose*.

a. Viewpoint Neutral

Regulations on speech in nonpublic forums need not be content neutral; i.e., the government may allow speech regarding some subjects but not others. However, such regulations must be *viewpoint* neutral; i.e., if the government allows an issue to be presented in a nonpublic forum, it may not limit the presentation to only one view.

Example: If a high school newspaper is a nonpublic forum, a school board could decide to prohibit articles in the paper regarding nuclear power. However, it may not allow an article in favor of nuclear power and prohibit an article against nuclear power.

Similarly, the government may discriminate based on the identity of the speaker in nonpublic forums (e.g., a school board might limit speakers to licensed teachers).

b. Reasonableness

Regulation of speech and assembly in nonpublic forums need only be rationally related to a legitimate governmental objective.

Example: A city bus is not a public forum. The city, therefore, may constitutionally sell space for signs on the public buses for commercial and public service advertising while refusing to sell space for political or public issue advertising in order to minimize the appearance of favoritism and the risk of imposing on a captive audience. [Lehman v. Shaker Heights, 418 U.S. 298 (1974)]

c. Significant Cases

1) Military Bases

Military bases are not public forums; thus, on-base speech and assembly may be regulated, even during open houses where the public is invited to visit. [See *United States v. Albertini*, 472 U.S. 675 (1985)] However, if the military leaves its streets open as thoroughfares, they will be treated as public forums. [*Flower v. United States*, 407 U.S. 197 (1972)]

2) Schools

Generally, schools and school-sponsored activities are not public forums. Thus, speech (and association) in schools may be reasonably regulated to serve the school's educational mission.

Examples:

1) Schools can control the content of student speeches or student newspapers for legitimate pedagogical concerns. [See, e.g., *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)—student suspended for sexually explicit speech at school assembly] Similarly, a school may prohibit student speech that may be interpreted as advocating or celebrating the use of illegal drugs (“BONG HiTS 4 JESUS”) during a school-supervised activity (e.g., a field trip). [*Morse v. Frederick*, 551 U.S. 393 (2007)]

2) To be given access to the platform of official school recognition and school funding, a public law school may require extracurricular student groups to accept all students regardless of their “status or beliefs.” [*Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)—school could deny funding to group that limited membership to persons who were willing to sign a statement of faith based on Christianity and excluded persons who supported homosexuality and premarital sex; and see XXI.D., *infra*]

3) A state association that regulates interscholastic high school sports of schools that *voluntarily join* may prohibit certain recruiting statements to middle-school students for athletic programs. Even if the message involves a matter of public concern, the rule is *necessary* for managing an effective high school athletic league. [*Tennessee Secondary School Athletic Association v. Brentwood Academy*, 551 U.S. 291 (2007)]

Compare:

A school was forbidden to prohibit the wearing of black armbands in the school (to protest government policies), because that prohibition was designed to suppress communication, i.e., not related to regulatory interest. [*Tinker v. Des Moines Independent Community School District*, A.4.b., *supra*]

3) Government Workplace or Charity

Neither a government workplace (including a court building and its grounds) nor a government controlled charity drive constitutes a public forum.

Examples: 1) The government may conduct an annual fundraising drive that includes some charities but excludes others on some ideologically neutral basis (e.g., all charities that lobby). However, it cannot exclude a charity merely because it disagrees with the organization's political views. [Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985)]

2) A state may develop a system for meeting with and hearing the views of a select group of its employees (e.g., union representatives) while denying the ability to voice opinions at such restricted meetings to other government employees. [Minnesota State Board v. Knight, 465 U.S. 271 (1984)]

Compare: In a public forum, the government cannot restrict the ability to participate in public speech on the basis of union membership. Thus, the Court has held that a teacher cannot be constitutionally prohibited from speaking at a meeting of the school board that was open to the public. [City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976)]

4) Postal Service Property

Although sidewalks generally are public forums, sidewalks on postal service property are not public forums. [United States v. Kokinda, 497 U.S. 720 (1990)]

5) Signs on Public Property

The Supreme Court has upheld a city ordinance prohibiting posting signs on public property (including sidewalks, crosswalks, street lamp posts, fire hydrants, and telephone poles), even if the sign is temporary in nature and could be removed without damage to the public property. [Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)]

6) Airport Terminals

Airport terminals operated by a public authority are *not* public forums. Thus, it is reasonable to ban *solicitation* within airport terminals, since it presents a risk of fraud to hurrying passengers. [International Society of Krishna Consciousness v. Lee, 505 U.S. 672 (1992)] However, it is *not* reasonable to ban *leafletting* within multipurpose terminals having qualities similar to a shopping mall [Lee v. International Society of Krishna Consciousness, 505 U.S. 830 (1992)]; although such leafletting can still be subject to reasonable time, place, and manner regulations (*see* B.1., *supra*).

7) Candidate Debates on Public Television

A public television station debate for congressional candidates from major parties or who have strong popular support is not a "public forum" because such debates are not open to a class of speakers (e.g., all candidates), but rather to selected members of the class. Exclusion of candidates who are not from a major party and who lack popular support is permissible because these criteria are (i) viewpoint

neutral and (ii) reasonable in light of the logistics for an educationally valuable debate. [Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998)]

8) Mailboxes

A letter/mailbox at a business or residence is *not* a public forum. Thus, the government may prohibit the placing of unstamped items in post boxes to promote efficient mail service. [United States Postal Service v. Council of Greenburgh Civic Association, 453 U.S. 114 (1981)]

C. UNPROTECTED SPEECH—REGULATION OR PUNISHMENT BECAUSE OF CONTENT

Restrictions on the content of speech must be necessary to achieve a compelling government interest. As indicated above, very few restrictions on the content of speech are tolerated. The Court allows them only to prevent grave injury. The following is a list of the only reasons for which the Court has allowed content-based restrictions on speech (i.e., the following are categories of unprotected speech):

- (i) It creates a *clear and present danger* of imminent lawless action.
- (ii) It constitutes “*fighting words*” as defined by a narrow, precise statute.
- (iii) The speech, film, etc., is *obscene*. (This category includes “child pornography.”)
- (iv) The speech constitutes *defamation*, which may be the subject of a civil “penalty” through a tort action brought by the injured party in conformity with the rules set out *infra*.
- (v) The speech violates regulations against *false or deceptive advertising—commercial speech is protected* by the First Amendment and it cannot be proscribed simply to help certain private interests.
- (vi) The government can demonstrate a “*compelling interest*” in limitation of the First Amendment activity.

Recall that even if a regulation falls within one of the above categories, it will not necessarily be held valid; it might still be held to be void for vagueness or overbreadth. (*See* A.3., *supra*.)

1. Clear and Present Danger of Imminent Lawlessness

A state cannot forbid advocating the use of force or of law violation unless such advocacy (i) *is directed to producing or inciting imminent lawless action*, and (ii) *is likely to produce or incite such action*. [Brandenburg v. Ohio, 395 U.S. 444 (1969)]

Example: The “clear and present danger” test has been applied to hold that a state may not punish as contempt out-of-court utterances critical of a judge, absent special circumstances showing an extremely high likelihood of serious interference with the administration of justice. [*See* Wood v. Georgia, 370 U.S. 375 (1962)]

a. Allows for Sanctions Against Speech

The test allows for sanctions against speech causing demonstrable danger to important

government interests. Disclosure of United States intelligence operations and personnel is “clearly not protected” speech. [Haig v. Agee, 453 U.S. 280 (1981)]

b. Compelling Justification Test

A similar test—one of “compelling justification”—was employed to hold unconstitutional the Georgia legislature’s refusal to seat Julian Bond, an elected black representative, where Bond’s speeches, critical of United States policy on Vietnam and the draft, led the legislature to doubt his fitness and his ability to take the oath of office in good faith. [Bond v. Floyd, 385 U.S. 116 (1966)]

2. Fighting Words

a. True Threats

The First Amendment does not protect “true threats”—statements meant to communicate an intent to place an individual or group in fear of bodily harm. [Virginia v. Black, 538 U.S. 343 (2002)]—a state may ban cross burning done with an intent to intimidate; because of cross burning’s long history as a signal of impending violence, the state may specially regulate this form of threat, which is likely to inspire fear of bodily harm]

b. States May Ban Words Likely to Incite Physical Retaliation

States are free to ban the use of “fighting words,” i.e., those personally abusive epithets that, when addressed to the ordinary citizen, are inherently likely to incite immediate physical retaliation. [Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)] *Chaplinsky* has, however, been narrowly read. Thus, in *Cohen v. California*, 403 U.S. 15 (1971), the Court held that the state may not punish the defendant for wearing a jacket bearing the words “Fuck the Draft,” pointing out that “while the four-letter word displayed by Cohen in relation to the draft is commonly employed in a personally provocative fashion, in this instance, it was clearly not directed to the person of the hearer.”

c. Statutes Regulating Fighting Words Tend to Be Overbroad or Vague

While this classification of punishable speech continues to exist *in theory*, the Court rarely upholds punishments for the use of such words. Statutes that attempt to punish fighting words will tend to be overbroad or vague; the statute will define the punishable speech as “opprobrious words,” “annoying conduct,” or “abusive language.” Such statutes will fail, as their imprecise terms could be applied to protected (nonfighting words) speech. Such a statute could not be used to punish a person for saying to a police officer, “White son of a bitch, I’ll kill you.” [Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974)]

d. Statutes Cannot Be Viewpoint-Based—Limits Hate Crime Legislation

Although the general class of “fighting words” is proscribable under the First Amendment, the Supreme Court generally will not tolerate in fighting words statutes restrictions that are designed to punish only certain viewpoints (i.e., proscribing fighting words only if they convey a particular message). [R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)]—ordinance that applies only to those fighting words that insult or provoke violence on the basis of race, religion, or gender is invalid]

1) Compare—Punishing Racially Motivated Conduct

The First Amendment does not protect conduct simply because it happens to be

motivated by a person's views or beliefs. Thus, a state can increase a convicted defendant's sentence for aggravated battery based on the fact that the defendant selected the victim of his crime because of the victim's race. [*Wisconsin v. Mitchell*, 508 U.S. 476 (1993)] However, punishment may not be increased merely because of the defendant's abstract beliefs. [*Dawson v. Delaware*, 503 U.S. 159 (1992)]—unconstitutional to increase defendant's sentence merely because it was proved that he belongs to an organization that advocates racism]

3. Obscenity

Obscenity is *not protected* speech. [*Roth v. United States*, 354 U.S. 476 (1957)] The Court has defined "obscurity" as a description or depiction of sexual conduct that, taken *as a whole*, by the *average person*, applying *contemporary community standards*:

- (i) Appeals to the *prurient interest* in sex;
- (ii) Portrays sex in a *patently offensive* way; and
- (iii) *Does not have serious literary, artistic, political, or scientific value*—using a national, reasonable person standard, rather than the contemporary community standard. [*Miller v. California*, 413 U.S. 15 (1973); *Pope v. Illinois*, 481 U.S. 497 (1987)]

a. Elements

1) Appeal to Prurient Interest

The dominant theme of the material considered as a *whole* must appeal to the prurient interest in sex of the average person. The Supreme Court has found this to include that which appeals to *shameful or morbid interests* in sex, but not that which incites *lust* (insofar as lust may include a *normal* interest in sex). [*Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)] For exam purposes, it is probably sufficient merely to know the standard (since its application is a fact determination).

a) Average Person

Both sensitive and insensitive adults may be included in determining contemporary community standards, but children may not be considered part of the relevant audience.

b) Material Designed for Deviant Group

Where the allegedly obscene material is designed for and primarily disseminated to a clearly defined deviant sexual group (e.g., sadists), rather than to the public at large, the prurient appeal requirement is satisfied if the *dominant theme* of the material, taken as a whole, *appeals to the prurient interest of that group*. [*Mishkin v. New York*, 383 U.S. 502 (1966)]

2) Patently Offensive

a) Community Standard

The material must be patently offensive in affronting contemporary community standards regarding the description or portrayal of sexual matters.

b) National Standard Not Required

A statewide standard is permissible but not mandatory. A juror may draw on knowledge of the community or vicinity from which he comes, and the court may either direct the jury to apply “community standards” without specifying the “community,” or define the standard in more precise geographic terms. [Hamling v. United States, 418 U.S. 87 (1974); Jenkins v. Georgia, 418 U.S. 153 (1974)]

3) Lacking in Serious Social Value

The fact that the material may have some redeeming social value will not necessarily immunize it from a finding of obscenity. It must have serious literary, artistic, political, or scientific value, using a national standard. [Pope v. Illinois, *supra*]

4) Standard May Be Different for Minors

The state can adopt a specific definition of obscenity applying to materials sold to minors, even though the material might not be obscene in terms of an adult audience. [Ginsberg v. New York, 390 U.S. 629 (1968)] However, government may not prohibit the sale or distribution of material to adults merely because it is inappropriate for children.

Example: Because of the present lack of “gateway” technology that would permit speakers on the Internet to block their communications, a federal statute’s bar on transmitting “indecent” or “patently offensive” messages to minors effectively amounts to a total ban and thus violates the First Amendment right of adults to receive such materials. [Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)]

Compare: To prevent minors from getting harmful material, the government *may* condition its support of Internet access in public libraries on their installing software to block obscenity and child pornography—at least when the library will unblock filtered material on any adult user’s request. [United States v. American Library Association, Inc., 539 U.S. 194 (2003)]

a) Pictures of Minors

To protect minors from exploitation, the government may prohibit the sale or distribution of *visual* depictions of sexual conduct involving minors, even if the material would not be found obscene if it did not involve children. [New York v. Ferber, 458 U.S. 747 (1982)] The government may also prohibit *offers* to provide (and requests to obtain) material depicting children engaged in sexually explicit conduct when the prohibition requires scienter and does not criminalize a substantial amount of protected speech. Such offers of material that is unlawful to possess have no First Amendment protection. [United States v. Williams, 553 U.S. 285 (2008)]

b) Compare—Simulated Pictures of Minors

The government may not bar visual material that only appears to depict

minors engaged in sexually explicit conduct, but that in fact uses young-looking adults or computer-generated images. [Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)] A holding otherwise would bar speech that is not obscene under the *Miller* test and that does not involve the exploitation of children as in *Ferber*.

b. Question of Fact and Law

1) Jury Question

The determination of whether material is obscene is a question of fact for the jury. Of course, the judge can grant a directed verdict if the evidence is such that a reasonable, unprejudiced jury could not find that all parts of the test have been met.

2) Independent Review by Appellate Court

Appellate courts will conduct an independent review of constitutional claims, when necessary, to assure that the proscribed materials “depict or describe patently offensive ‘hard core’ sexual conduct.” [Jenkins v. Georgia, *supra*]

3) Evidence of Pandering

In close cases, evidence of “pandering”—commercial exploitation for the sake of prurient appeal—by the defendant may be probative on whether the material is obscene. Such evidence may be found in the defendant’s advertising, his instructions to authors and illustrators of the material, or his intended audience. In effect, this simply accepts the purveyor’s own estimation of the material as relevant. [Ginzburg v. United States, 383 U.S. 463 (1966)]

4) Evidence—Similar Published Materials Not Automatically Admissible

The state need not produce expert testimony. Evidence that similar materials are available on community newsstands, or that the publication has acquired a second-class mailing privilege, does not necessarily show that the material is not obscene and hence is not automatically admissible. Nor is there any automatic right to have other materials held not to be obscene admitted into evidence. [Hamling v. United States, *supra*]

c. Statutes Must Not Be Vague

1) Sweeping Language

Attempts to define obscenity broadly have encountered difficulties before the Court.

Examples: 1) A statute banning publication of news or stories of “bloodshed or lust so massed as to become vehicles for inciting crime” is unconstitutionally vague and uncertain. [Winters v. New York, 333 U.S. 507 (1948)]

2) The Court held invalid a statute prohibiting the sale of any book “tending to the corruption of the morals of youth.” [Butler v. Michigan, 352 U.S. 380 (1957)]

2) Construction May Save Vague Statute

A state statute will be upheld if it meets the tests as construed by the courts of the state. Thus, a seemingly vague obscenity statute may be saved by a state supreme court opinion that limits it to a proscription of depictions of specific types of sexual conduct. [Ward v. Illinois, 431 U.S. 767 (1977)]

d. Land Use Regulations

A land use (or zoning) regulation may limit the location or size of adult entertainment establishments (i.e., businesses that focus on sexual activities) if the regulation is designed to reduce the secondary effects of such businesses (e.g., rise in crime rates, drop in property values and neighborhood quality, etc.). However, regulations may not ban such establishments altogether. [City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)]

Example: A city ordinance limiting adult entertainment establishments to one corner of the city occupying less than 5% of the city's area was deemed constitutional. [City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)]

e. Liquor Regulation

The Twenty-First Amendment grants states more than the usual regulatory authority with respect to intoxicating beverages. Therefore, regulations prohibiting explicit live sexual entertainment and films in establishments licensed to sell liquor by the drink, even though proscribing some forms of visual presentation that would not be obscene under *Miller*, do not violate the First Amendment as long as they are not "irrational."

f. Display

The Court has suggested that the state *may regulate* the display of certain material, to prevent it from being so obtrusive that an unwilling viewer cannot avoid exposure to it. [Redup v. New York, 386 U.S. 767 (1967)]

g. Private Possession of Obscenity

Private possession of obscenity at home cannot be made a crime because of the constitutional right of personal privacy. [Stanley v. Georgia, 394 U.S. 557 (1969)] However, the protection does not extend beyond the home. Thus, importation, distribution, and exhibition of obscene materials can be prohibited.

1) Exception—Child Pornography

The state may make private possession of child pornography a crime, even private possession for personal viewing in a residence. [Osborne v. Ohio, 495 U.S. 103 (1990)]

4. Defamatory Speech

When a person is sued for making a defamatory statement, the First Amendment places restrictions on the ability of the government (through its tort law and courts) to grant a recovery where the person suing is a *public official or public figure*, or where the defamatory statement involves an issue of *public concern*. In these cases, the plaintiff must prove not only the elements of defamation required by state law, but also that the statement was *false* and that the person making the statement was at *fault* to some degree in not ascertaining the truth of the statement.

a. Falsity

At common law, a defamatory statement was presumed to be false; to avoid liability for an otherwise defamatory statement on the ground that it was true, the defendant had to assert truth as an affirmative defense. The Supreme Court has rejected this presumption in all public figure or public concern cases. In these cases, the plaintiff must prove by clear and convincing evidence that the statement was false. [Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)]

1) Requirement of Factual Statement

To be defamatory, the false statement must be viewed by a reasonable person as a statement of fact, rather than as a statement of opinion or a parody. Furthermore, a public figure cannot circumvent the First Amendment restrictions by using a different tort theory to collect damages for a published statement about him that is not a false statement of fact.

Example: Even though a publisher may have intended to cause psychological distress to a public figure by publishing statements about him that were derogatory, the public figure cannot receive a judgment for “emotional distress” damages if a reasonable person who read or viewed the publication would not understand it to contain a statement of fact about that public figure. [Hustler Magazine Inc. v. Falwell, 485 U.S. 46 (1988)]

Note: The fact that a publisher labels a statement as “opinion” will not provide First Amendment protection if the statement would reasonably be understood to be a statement of fact. [Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)]

b. Fault

At common law, a defendant who had no reason to know that the statement he was making was false and defamatory could still be liable for defamation. Now, however, a plaintiff in a public figure or public concern case must prove fault on the part of the defendant. The degree of fault required is higher when the plaintiff is a public official or public figure than when the plaintiff is a private person suing on a matter of public concern.

1) Public Official or Public Figure—Actual Malice Required

A public official may not recover for defamatory words relating to his official conduct or a matter of public concern without clear and convincing evidence that the statement was made with “actual malice” (defined below). [New York Times v. Sullivan, 376 U.S. 254 (1964)] This rule has since been extended to public figure plaintiffs. (Note that while the Supreme Court has not specifically held that all statements regarding public officials or public figures necessarily involve matters of public concern, a case to the contrary should be rare.)

a) Actual Malice Defined

Actual malice was defined by the Supreme Court in *New York Times v. Sullivan* as:

- (i) **Knowledge** that the statement was false, *or*

- (ii) **Reckless disregard** as to its truth or falsity.

The plaintiff must show that the defendant was subjectively aware that the statement he published was false or that he subjectively *entertained serious doubts* as to its truthfulness.

(1) Actual Malice in False Quotation Cases

Proof that a defamation plaintiff was inaccurately quoted does not, by itself, prove actual malice, even if the quotation was intentionally altered by the defendant. If the published “quotation” is substantially accurate, the plaintiff may not collect damages. To show actual malice, the public figure plaintiff must prove that the defendant’s alteration of the quotation materially changed the meaning of the actual statements made by the plaintiff. [Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)]

(2) Permitted Inquiries by Plaintiff

In attempting to prove knowing or reckless disregard of the truth, the plaintiff may inquire into the state of mind of those who edit, produce, or publish (i.e., conversations with editorial colleagues). [Herbert v. Lando, 441 U.S. 153 (1979)]

(3) Petition Clause Does Not Protect Defamatory Statement Made with Actual Malice

The First Amendment guarantees individuals the right to “petition government for a redress of grievances.” However, this right to petition the government does not grant absolute immunity to persons who make defamatory statements about public officials or public figures in their communications with government officials. The defamed individual may prevail by meeting the *New York Times* requirements. [McDonald v. Smith, 472 U.S. 479 (1985)]

b) Two Ways to Become a Public Figure

(1) General Fame or Notoriety

A person may be a public figure for all purposes and all contexts if he achieves “*general fame or notoriety* in the community and pervasive involvement in the affairs of society,” although “a citizen’s participation in community and professional affairs” does not render him a public figure for all purposes.

(2) Involvement in Particular Controversy

A person may “*voluntarily inject* himself or be drawn into a particular controversy to influence the resolution of the issues involved” and thereby become a public figure for a limited range of issues. [Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)]

Note that *Gertz* appears to allow for the possibility of a person’s being an involuntary public figure for a limited range of issues, although such a case would be “exceedingly rare.”

c) **Examples of Persons Not Deemed Public Figures**

(1) **Spouse of Wealthy Person**

Marriage to an extremely wealthy person and divorcing such a person does not amount to voluntarily entering the public arena, even though press conferences are held by the plaintiff, because going to court is the only way she could dissolve her marriage. [Time, Inc. v. Firestone, 424 U.S. 448 (1976)]

(2) **Person Engaging in Criminal Conduct**

A person who engages in *criminal conduct* does not automatically become a public figure even when the defamatory statements relate solely to his conviction. [Wolston v. Reader's Digest Association, 443 U.S. 157 (1979)]

(3) **Scientist in Federally Funded Program**

A behavioral scientist engaged in *federally funded* animal research studies is not a public figure because he applies for federal grants and *publishes* in professional journals. [Hutchinson v. Proxmire, 443 U.S. 111 (1979)]

2) **Private Individual Suing on Matter of Public Concern—At Least Negligence Required**

When a private individual is defamed, there is less of a need to protect freedom of speech and press and more of a need to protect private individuals from injury from defamation because they do not have opportunities as effective for rebuttal as public figures. Accordingly, defamation actions brought by private individuals are subject to constitutional limitations only when the defamatory statement involves a matter of public concern. And even in those cases, the limitations are not as great as those established for public officials and public figures. [Gertz v. Robert Welch, Inc., *supra*] When the defamatory statement involves a matter of public concern, *Gertz* imposes two restrictions on private plaintiffs: (i) it prohibits liability without fault, and (ii) it restricts the recovery of presumed or punitive damages.

a) **No Liability Without Proof of at Least Negligence**

The plaintiff must show that the defendant was negligent in failing to ascertain the truth of the statement. If the plaintiff establishes negligence but not actual malice, which is a higher degree of fault, he also has to provide competent evidence of "actual" damages. (This changes the common law rule that damages would be presumed by law for injury to reputation and did not need to be proved by the plaintiff.) Actual damages may be awarded not only for economic losses but also for injury to the plaintiff's reputation in the community and for personal humiliation and distress.

b) **Presumed or Punitive Damages Allowed Only If Actual Malice Established**

If the plaintiff establishes that the defendant made the statement with actual malice, the actual damage requirement is extinguished. The plaintiff can

recover whatever damages are permitted under state law (usually presumed damages and even punitive damages in appropriate cases). In other words, there is no constitutional protection for statements made with actual malice, even though a matter of public concern is involved.

c) What Is a Matter of Public Concern?

The courts decide on a case-by-case basis whether the defamatory statement involves a matter of public concern, looking at the content, form, and context of the publication. [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)]

Example: In *Dun & Bradstreet*, the Court determined that a credit agency’s erroneous report of plaintiff’s bankruptcy, distributed to five subscribers, was speech solely in the private interest of the speaker and its specific business audience. Therefore, because a matter of public concern was not involved, the First Amendment restrictions did not apply and the state court award of presumed and punitive damages was upheld.

d) Intentional Infliction of Emotional Distress

Damage actions by private individuals for intentional infliction of emotional distress are subject to the First Amendment rights of defendants if the speech relates to a matter of public concern, despite its “outrageous” and “particularly hurtful” quality. [*Snyder v. Phelps*, 131 S. Ct. 1207 (2011)—peaceful picketing accompanied by signs critical of government policy regarding the political and moral conduct of the United States and homosexuality in the military that was conducted in a public place near, but not visible from, nor disruptive of, a military funeral is protected speech]

3) Private Individual Suing on Matter Not of Public Concern

The Supreme Court has not imposed constitutional restrictions on defamation actions brought by private individuals that do not involve a matter of public concern. Hence, presumed and punitive damages can be recovered even if actual malice is not established.

c. Procedural Issues

1) Federal Summary Judgment Standard

When ruling on a motion for summary judgment in a federal court defamation action in a case involving an issue of public concern, a judge must apply the clear and convincing evidence standard (i.e., the judge should grant the motion *unless* it appears that the plaintiff could meet his burdens of proving falsity and actual malice at trial by clear and convincing evidence). However, the Supreme Court has not clearly held that state courts must follow this practice under similar circumstances.

2) Judicial Review

An appellate court must review a defamation case by conducting an independent review of the record to determine if the finder of fact (the jury) could have found

that the malice standard was met in the case. [Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)]

d. Recovery for Depiction in a False Light

To recover damages for depiction in a false light (as opposed to a defamatory injury to reputation) arising out of comments directed at activities of public interest, an individual must establish *falsity* and *actual malice* whether or not he qualifies as a public figure under *Time, Inc. v. Hill*, 385 U.S. 374 (1967). However, it is *assumed* that the Court would now modify this to mirror the *Gertz* negligence rule for private plaintiffs.

e. True Privacy Actions

1) Publishing True Fact of Public Record

A newspaper or broadcaster cannot be sued for publishing a true fact once it is lawfully obtained from the public record or otherwise released to the public. [Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)—rape victim’s name already in court records open to the public; *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989)—rape victim’s name inadvertently given to the press by police]

2) Publishing Name of Juvenile Charged with Crime

A state cannot require judicial approval before the media can print the name of a juvenile charged with murder where the name of the juvenile was obtained through legal means (reporter heard name of defendant over police frequency radio and questioned witnesses to the crime). [Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)]

3) Publishing Information on Judge’s Competency

A state cannot make it a crime to publish information, released in a confidential proceeding, concerning the competency of members of the state judiciary. [Landmark Communications v. Virginia, 435 U.S. 829 (1978)]

f. Commercial Privacy—Disclosing a Private Performance Can Violate “Right to Publicity”

In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court held that state law could award damages to an entertainer who attempted to restrict the showing of his act to those who paid admission, when a television station broadcast his entire act. Here the “human cannonball” had his entire 15-second act broadcast over his objection.

g. Copyright Infringement

The First Amendment does not require an exception to copyright protection for material written by a former President or other public figures. Magazines have no right to publish such copyrighted material beyond the statutory fair use exception. [Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985)]

5. Some Commercial Speech

False advertising is not protected by the First Amendment, although commercial speech in general does have some First Amendment protection. In determining whether a regulation

of commercial speech is valid, the Supreme Court asserts that it uses a four-step process. However, it may be easiest to think about this as an initial question followed by a three-step inquiry. *First*, determine whether the commercial speech concerns a lawful activity and is not misleading or fraudulent. Speech proposing an unlawful transaction (e.g., “I will sell you this pound of heroin for X dollars”) and fraudulent speech may be outlawed. If the speech regulated concerns a *lawful activity* and is *not misleading or fraudulent*, the regulation will be valid only if it:

- (i) Serves a “*substantial*” government interest;
- (ii) “*Directly advances*” the asserted interest; and
- (iii) Is *narrowly tailored* to serve the substantial interest. This part of the test does *not* require that the “least restrictive means” be used. Rather, there must be a *reasonable fit* between the legislation’s end and the means chosen. [Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989)]

[Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980)]

Examples:

1) A city could not prohibit the use of newsracks on sidewalks for the distribution of commercial publications (such as free publications advertising products or real estate for sale) if the city allowed sidewalk newsracks for the distribution of newspapers. There is no “reasonable fit” between the category of commercial speech and any substantial interest. Commercial newsracks do not cause any physical or aesthetic harm different from that caused by newspaper newsracks. [Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)]

2) Similarly, a law prohibiting beer bottle labels from displaying alcohol content was held invalid because, although the government has a substantial interest in preventing “strength wars,” the government did not show that the label prohibition advanced this interest in a material way. [Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)]

3) The Court struck down a statute prohibiting pharmacies from selling information about doctors and the medications they prescribe “for marketing or promoting a prescription drug” without the prescriber’s consent. The statute also prohibited pharmaceutical companies from using such information in marketing drugs without the prescriber’s consent. This is a content-based, viewpoint-based, and speaker-based restriction and is subject, at the least, to the scrutiny applied in commercial speech cases. Even assuming that the state has a substantial interest in protecting prescription confidentiality, the law is not narrowly tailored because it allows pharmacies to disclose prescriber information to anyone for any reason other than marketing. [Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011)]

a. Complete Bans

Complete bans on truthful advertisement of lawful products are very unlikely to be upheld due to a lack of tailoring. Thus, the Court has *struck down* total bans against advertising:

- (i) Legal abortions;
- (ii) Contraceptives;
- (iii) Drug prices;
- (iv) Attorneys' services; and
- (v) Liquor prices.

Note that the Twenty-First Amendment—giving states the power to regulate liquor commerce within their borders—does not give states power to override First Amendment protections.

1) **Commercial Sign Regulation**

It is unclear whether billboards may be totally banned from a city. However, they can be regulated for purposes of traffic safety and aesthetics.

a) **Blockbusting**

A town could not prohibit the use of outdoor “for sale” signs by owners of private homes as a way of reducing the effect of “blockbusting” real estate agents (i.e., encouraging homeowners to sell at reduced prices because of the threat of a sudden influx of minorities). [Linmark Associates v. Willingboro Township, 431 U.S. 85 (1977)]

b. **Required Disclosures**

Commercial speech is protected largely because of its value to consumers. Thus, the government may require commercial advertisers to make certain disclosures if they are not unduly burdensome and they are reasonably related to the state's interest in preventing deception. [See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)—advertisements by lawyers (and others) as debt relief agencies may be required to include information about their legal status and the nature of the assistance provided, as well as the possibility of the debtor's filing for bankruptcy]

c. **Special Attorney Advertising Rules**

The Court has upheld prohibitions against in-person solicitation by attorneys for pecuniary gain [Ohralik v. Ohio State Bar, 436 U.S. 447 (1978)—state interest in protecting laypersons from fraud and overreaching is substantial, and prohibition here is narrowly tailored and directly advances that interest] and sending mail solicitations to accident victims and their relatives within 30 days following an accident [Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)—state interest in protecting lawyers' reputation is substantial, and ban here is narrowly tailored and directly advances that interest].

D. **PRIOR RESTRAINTS**

A prior restraint is a court order or administrative system that keeps speech from occurring (e.g., a licensing system, a prohibition against using mails, an injunction). Prior restraints are not favored in our political system; the Court would rather allow speech and then punish it if it was unprotected. However, the Court will uphold prior restraints if some special harm would otherwise result. As with other restrictions on speech, a prior restraint must be narrowly tailored to achieve

some compelling or, at least, significant governmental interest. The Court has also required that certain procedural safeguards be included in any system of prior restraint.

1. Sufficiency of Governmental Interest

The Supreme Court has not adopted a brightline standard for determining when a prior restraint is justified, but it has said that the government's burden is heavy. For exam purposes, you should ask whether there is some *special societal harm* that justifies the restraint.

a. National Security

National security is certainly a sufficient harm justifying prior restraint. Thus, a newspaper could be prohibited from publishing troop movements in times of war. [Near v. Minnesota, 283 U.S. 697 (1931)] However, the harm must be more than theoretical. Thus, the Court refused to enjoin publication of *The Pentagon Papers* on the basis that publication might possibly have a detrimental effect on the Vietnam War. [New York Times v. United States, 403 U.S. 713 (1971)]

b. Preserving Fair Trial

Preserving a fair trial for an accused might be a sufficient basis for prior restraint. However, the restraint will be upheld only if it is the only sure way of preserving a fair trial. [Nebraska Press Association v. Stewart, 427 U.S. 539 (1976)]

1) Compare—Grand Jury Prior Restraint

A state law prohibiting a grand jury witness from ever disclosing the testimony he gave to the grand jury (even after the grand jury term had ended) violates the First Amendment. Such a law is not narrowly tailored to a compelling interest, since any such interest that the government may have in protecting the grand jury process can be protected by a nonpermanent prohibition. [Butterworth v. Smith, 494 U.S. 624 (1990)]

c. Contractual Agreements

The Supreme Court has held that prior restraint is permissible where the parties have contractually agreed to the restraint. [Snepp v. United States, 444 U.S. 507 (1980)—CIA agent contractually agreed to give agency a prepublication review of any item related to his employment]

d. Military Circumstances

The Supreme Court has held that the interests of maintaining discipline among troops and efficiency of operations on a military base justify a requirement that persons on a military base obtain the commander's permission before circulating petitions.

e. Obscenity

The Court has held in a number of cases that the government's interest in preventing the dissemination of obscenity is sufficient to justify a system of prior restraint.

2. Procedural Safeguards

The Supreme Court has held that no system of prior restraint will be upheld unless it provides the persons whose speech is being restrained certain procedural safeguards. The safeguards arose in the context of movie censorship for obscenity, but the court has held that similar safeguards must be provided in all prior restraint cases:

- (i) The standards must be “*narrowly drawn, reasonable, and definite*,” so as to include only prohibitable speech (e.g., improper to permanently enjoin witness from disclosing grand jury testimony; government interest can be protected by nonpermanent injunction [Butterworth v. Smith, *supra*]);
- (ii) If the restraining body wishes to restrain dissemination of an item, it must *promptly seek an injunction* (e.g., improper to allow 50 days before seeking injunction [Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968)]); and
- (iii) There must be a *prompt and final judicial determination* of the validity of the restraint (e.g., improper to leave an injunction in place pending an appeal that could take up to a year; government must either lift the injunction or expedite the appeal [National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977)]).

A number of other cases, especially in the area of movie censorship, also provide that the **government bears the burden** of proving that the speech involved is unprotected. [Freedman v. Maryland, 380 U.S. 51 (1965)]

Example: A federal statute authorized the Postmaster General (i) to deny use of the mails and postal money orders for materials found to be obscene in an administrative hearing, and (ii) to obtain a court order, upon a showing of probable cause, to detain incoming mail pending completion of the administrative hearing. The Court found that this denial of use of the mails violated the First Amendment: The procedures did not require the government to initiate proceedings to obtain a final judicial determination of obscenity, failed to assure prompt judicial review, and failed to limit any restraint in advance of a final judicial determination to preserving the status quo for “the shortest fixed period compatible with sound judicial resolution.” [Blount v. Rizzi, 400 U.S. 410 (1971)]

3. Obscenity Cases

Much of the case law in the area of prior restraint has arisen in connection with banning obscenity.

a. Seizure of Books and Films

As with any seizure by the government, seizures of books and films may be made only upon probable cause that they contain obscenity or are otherwise unlawful. (*See* Criminal Procedure outline.)

1) Single Seizures

Seizures of a single book or film (to preserve it as evidence) may be made only with a warrant issued by a neutral and detached magistrate. And even here, a prompt post-seizure determination of obscenity must be available. If other copies of a seized film are not available to the exhibitor, he must be allowed to make a copy so that he may continue showing the film until a final determination has been made. [Heller v. New York, 413 U.S. 483 (1973)] Of course, if the materials are available for sale to the general public, an officer may enter into the establishment and purchase the book or film to use it as evidence in a later prosecution without obtaining a warrant. [Maryland v. Macon, 472 U.S. 463 (1985)]

2) Large Scale Seizures

“Large scale” seizures of allegedly obscene books and films—“to destroy them or block their distribution or exhibition”—must be *preceded* by a *full adversary hearing* and a judicial determination of obscenity. [Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)]

3) Forfeiture of Business

The First Amendment does not prohibit forfeiture of a defendant’s adult entertainment business after the defendant has been found guilty of violating the Racketeer Influenced and Corrupt Organizations Act and criminal obscenity laws, even though the business assets included nonobscene books and magazines, where the entire business was found to be part of the defendant’s racketeering activity. [Alexander v. United States, 509 U.S. 544 (1993)]

b. Injunction

After seizing material, the government may enjoin its further publication only after it is determined to be obscene in a *full judicial hearing*. [Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957)]

c. Movie Censorship

The Court has noted that movies are different from other forms of expression, and that time delays incident to censorship are less burdensome for movies than for other forms of expression. Thus, the Court allows governments to establish censorship boards to screen movies *before* they are released in the community, as long as the procedural safeguards mentioned above are followed. The censor bears the burden of proving that the movie is unprotected speech.

d. Burden on Government

When the government adopts a content-based, prior restraint of speech, the government has the burden of proving that the restriction is the least restrictive alternative to accomplish its goal. [Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004)—upholding a preliminary injunction against enforcement of a statute requiring age verification for access to Internet websites with sexually explicit material, and criminalizing the failure to obtain age verification, because less restrictive alternatives (e.g., parents installing filters) are available]

E. FREEDOM OF THE PRESS

As a general rule, the press has no greater freedom to speak than does the public. However, a number of issues have arisen in the freedom of press context.

1. Publication of Truthful Information

Generally, the press has a right to publish information about a matter of public concern, and this right can be restricted only by a sanction that is narrowly tailored to further a state interest of the highest order. The right applies even if the information has been unlawfully obtained in the first instance, as long as (i) the speech relates to a matter of public concern, (ii) the publisher did not obtain it unlawfully or know who did, and (iii) the original speaker’s privacy expectations are low. [Bartnicki v. Vopper, 532 U.S. 514 (2001)]

Example: During heated collective bargaining negotiations between a teachers' union and a school board, an unknown person intercepted a cell phone call between a union negotiator and the union's president. The tape was forwarded to a radio commentator, who played it on the radio. The commentator was sued for damages under civil liability provisions of state and federal wiretap laws that prohibited intentional disclosure of the contents of an electronically transmitted conversation when one has reason to know that the conversation was intercepted unlawfully. The Supreme Court held that the statute violated the First Amendment as applied under these circumstances. [*Bartnicki v. Vopper, supra*]

2. Access to Trials

The First Amendment guarantees the public and press a right to attend criminal trials. But the right may be outweighed by an overriding interest articulated in findings by the trial judge. [*Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980)—no majority opinion] The right probably applies to civil trials, although the Supreme Court has not conclusively resolved that issue.

a. Access to Voir Dire Examination

The First Amendment guarantee of public and press access to criminal trials also includes access to proceedings involving the voir dire examination of potential jurors. In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), the Court found that a trial court could not constitutionally close voir dire examination of potential jurors without consideration of alternatives to closure even though, in some circumstances, there may be a compelling interest in restricting access to such proceedings to protect the privacy of potential jurors or the fairness of the trial.

b. Access to Other Pretrial Proceedings

Pretrial proceedings are presumptively subject to a First Amendment right of access for the press and public. Thus, a law requiring that all preliminary hearings be closed to the press and public violates the First Amendment. [*El Vocero de Puerto Rico (Caribbean International News Corp.) v. Puerto Rico*, 508 U.S. 147 (1993)—per curiam] If the prosecution and defense counsel seek to have a judge close pretrial proceedings, the judge would have to make specific findings on the record demonstrating (i) that closure was essential to preserve "higher" or "overriding" values, and (ii) that the closure order was narrowly tailored to serve the higher or overriding value. [*Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)]

If the prosecution seeks to have a pretrial hearing or trial closed to the public and the defendant objects to the closure, there will be a Sixth Amendment violation if the judge excludes the public and the press from the hearing or trial without a clear finding that a closure order was necessary to protect an overriding interest.

c. Compelling Interest in Protecting Children

The government has a compelling interest in protecting children who are victims of sex offenses. Portions of trials wherein such children testify may be closed to the public and press, but only if the trial court makes a finding that such closure is necessary to protect the child in the individual case. A state statute, however, violates the First Amendment

if it requires closure of the trial during testimony of a child victim of a sex offense without a finding of necessity by the trial judge. [*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)]

d. Protective Order in Publishing Information Gained in Pretrial Discovery

The Supreme Court has upheld a state trial court “protective order” prohibiting a newspaper defendant in a defamation suit from publishing, disseminating, or using information gained through pretrial discovery from the plaintiff in any way except where necessary for preparation for trial. [*See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)]

3. Requiring Members of the Press to Testify Before Grand Juries

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court held that requiring a journalist to appear and testify before state or federal grand juries **does not abridge freedom of speech or press**, despite the claim that such a requirement would so deter the flow of news from confidential sources as to place an unconstitutionally heavy burden on the First Amendment interest in the free flow of information to the public. The Court’s opinion refused to create—and even rejected—a conditional privilege not to reveal confidential sources to a grand jury conducting a good faith inquiry. This position was affirmed in *New York Times v. Jascaveich*, 439 U.S. 1331 (1978).

4. Interviewing Prisoners

Although the First Amendment protects prisoners, and especially those corresponding with them by mail, from a sweeping program of censorship [*Procurier v. Martinez*, 416 U.S. 396 (1974)], it does not permit journalists to insist upon either interviewing specified prisoners of their choice [*Pell v. Procurier*, 417 U.S. 817 (1974)] or inspecting prison grounds [*Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)].

5. Business Regulations or Taxes

Press and broadcasting companies can be subject to general business regulations (e.g., antitrust laws) or taxes (e.g., federal or state income taxes). Thus, a tax or regulation applicable to both press and non-press businesses will be upheld, even if it has a special impact on a portion of the press or broadcast media, as long as it is not an attempt to interfere with First Amendment activities. However, no tax or regulation impacting on the press or subpart of the press may be based on the content of the publication absent a compelling justification.

Examples: 1) State tax on publisher’s use of more than \$100,000 of paper and ink products annually violates the First Amendment. [*Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983)]

2) State sales tax or “receipts tax” on the sale of general interest magazines that exempts newspapers and religious, professional, trade, and sports journals from the tax violates the First Amendment. [*Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987)]

3) A state sales tax that exempted the sales of newspapers and magazines from the tax but did not give a similar exemption to the sale of broadcast services (cable or subscription television) did not violate the First Amendment. The tax was not based on the content of broadcasts and did not

target a small category of publishers. The tax was applicable to all cable or satellite television sales. (There is no comparable sale of “free TV” such as network broadcasts.) [Leathers v. Medlock, 499 U.S. 439 (1991)]

6. Monetary Damages for Failure to Keep Identity Confidential

When a reporter or publisher promises a “source person” to keep his identity confidential and then publishes the source person’s name, state contract law or promissory estoppel law may allow the source person to recover from the reporter or publisher any damages caused by the publication of his identity. [Cohen v. Cowles Media Co., 501 U.S. 663 (1991)]

7. Broadcasting Regulations

Radio and television broadcasting may be more closely regulated than the press. *Rationale:* Due to the limited number of frequencies available, broadcasters have a special privilege—and, consequently, a special responsibility to give suitable time to matters of public interest and to present a suitable range of programs. The paramount right is the **right of viewers and listeners** to receive information of public concern, rather than the right of broadcasters to broadcast what they please.

a. Fairness Doctrine

Accordingly, the Court has upheld, under a regulatory “fairness doctrine” (which is no longer enforced), FCC orders requiring a radio station to offer free broadcasting time (i) to opponents of political candidates or views endorsed by the station, and (ii) to any person who has been personally attacked in the course of a broadcast, for a reply to the attack. [Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)]

1) Compare—Grant of Equal Newspaper Space

A statute granting political candidates a right to equal space to reply to criticism by the newspaper *violates* First Amendment freedom of the press. Decisions respecting size and content of a newspaper are forbidden to government. [Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)]

b. Newspaper Ownership of Radio or TV Station

Similarly, to promote the diversity of information received by the public, the FCC may forbid ownership of a radio or television station by a daily newspaper located in the same community. [FCC v. National Citizens Committee, 436 U.S. 775 (1978)]

c. Prohibiting Indecent Speech

Because of a broadcast’s ability to invade the privacy of the home, the First Amendment does not forbid imposing civil sanctions on a broadcaster for airing a full monologue (in contrast to isolated use of a few such words) of “patently offensive sexual and excretory speech,” even though it is not “obscene”—at least at those times when children are likely to be listening. [FCC v. Pacifica Foundation, 438 U.S. 726 (1978)]

d. Political Advertisements

The First Amendment does *not* require broadcasters to accept political advertisements.

e. Elimination of Editorial Speech from Stations Receiving Public Grants

Congress violated the First Amendment when it forbade any noncommercial educational station receiving a grant from the Corporation for Public Broadcasting from

engaging in “editorializing.” [FCC v. League of Women Voters, 468 U.S. 364 (1984)] This was the *suppression of speech* because of its content; the elimination of editorial speech from stations receiving public grants of this type was not narrowly tailored to promote an overriding government purpose regarding the regulation of broadcasting in general or noncommercial broadcasters in particular. Congress could deny persons receiving the federal funds the right to use those funds for editorial activities, but it could not condition the receipt of those funds upon a promise not to engage in any such speech.

8. Cable Television Regulation

While generally regulations of newspapers are subject to strict scrutiny, and regulations of the broadcast media are subject to less critical review, regulations of cable television transmissions are subject to review by a standard somewhere between these two. *Rationale*: The physical connection to a viewer’s television set makes the cable subscriber a more captive audience than a newspaper reader and distinguishes cable from newspapers, which cannot prevent access to competing newspapers. On the other hand, unlike broadcast media, which is limited to a small number of frequencies (*see 7., supra*), there is no practical limitation on the number of cable channels; thus, the government’s interest in protecting viewers’ rights is weaker with regard to cable. [Turner Broadcasting System, Inc. v. FCC, A.2.a.2), *supra*]

Example: A law requiring cable operators to carry local stations is subject to “intermediate scrutiny” since it is content neutral (*see A.2.a.2), supra*). Since a “must carry” provision directly serves the important interest of preserving economic viability of local broadcasters and promotes the dissemination of information to noncable viewers, it is constitutional. [Turner Broadcasting System, Inc. v. FCC, *supra*]

a. Compare—Content-Based Cable Broadcast Regulations

A content-based cable broadcast regulation will be upheld only if it passes muster under the strict scrutiny test. [United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)—law requiring cable operators to limit “sexually oriented” programs to after 10 p.m. is invalid because of the less restrictive alternative of enabling each household to block undesired channels]

9. Internet Regulation

The strict standard of First Amendment scrutiny, rather than the more relaxed standard applicable to broadcast regulation, applies to regulation of the Internet. *Rationale*: In contrast to broadcasting, there is no scarcity of frequencies (*see 7., supra*) on the Internet and little likelihood that the Internet will unexpectedly invade the privacy of the home (*see 7.c., supra*). [Reno v. American Civil Liberties Union, C.3.a.4), *supra*]

XXI. FREEDOM OF ASSOCIATION AND BELIEF

A. NATURE OF THE RIGHT

Although the First Amendment does not mention a right of freedom of association, the right to join together with other persons for expressive or political activity is protected by the First Amendment. However, the right to associate for expressive purposes is *not absolute*. It may

be infringed to serve a **compelling government interest**, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms, at least when the infringement would not significantly affect an association's right to express its viewpoints. However, in some cases, as noted below, a more lenient standard will apply.

Examples: 1) A state's interest in ending invidious discrimination justifies prohibiting private clubs that are large and basically unselective in their membership, or that are often used for business contacts, from discriminating on the basis of race, creed, color, national origin, or sex—at least when it is not shown that this would impede the individual members' ability to engage in First Amendment activity. [New York State Club Association, Inc. v. New York City, 487 U.S. 1 (1988); Board of Directors of Rotary Club International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984)]

2) A federal statute making it a crime to provide “material **support** or resources” of any kind to a **foreign terrorist** organization with **knowledge** of its being designated a foreign terrorist organization by the federal government does not violate the freedom of association (or speech). The statute does not forbid mere membership or association with the organization, only material support (which was defined in the statute). Moreover, given the difficulty of obtaining information about terrorist threats, any burden that the statute places on a person's freedom of association is justified. [Holder v. Humanitarian Law Project, 561 U.S. 1 (2010)]

Compare: 1) A state antidiscrimination law may not bar the Boy Scouts from excluding an openly gay assistant scoutmaster from membership. Forced inclusion would **significantly burden** the right of expressive association of the Boy Scouts, since one of the **sincerely held** purposes of the Scouts is to instill certain moral values in young people, including the value that “homosexual conduct is not morally straight.” [Boy Scouts of America v. Dale, 530 U.S. 640 (2000)]

2) A city ordinance that restricted admission to certain dance halls to persons between the ages of 14 and 18 was constitutional; it did not have to be justified with a compelling interest because the associational activity of meeting in a dance hall is not an activity within the protection of the First Amendment. [Dallas v. Stanglin, 490 U.S. 19 (1989)]

B. ELECTORAL PROCESS

Laws regulating the electoral process might impact on First Amendment rights of speech, assembly, and association. The Supreme Court uses a **balancing test** in determining whether a regulation of the electoral process is valid: If the restriction on First Amendment activities is severe, it will be upheld only if it is narrowly tailored to achieve a compelling interest, but if the restriction is reasonable and nondiscriminatory, it generally will be upheld on the basis of the states' important regulatory interests. [Burdick v. Takushi, 504 U.S. 428 (1992)—upholding prohibition against write-in candidates]

Example: A state may require in-person voters to show a government-issued voter ID. This is an “evenhanded” protection of the integrity of the electoral process and is justified by “sufficiently weighty” interests of detecting voter fraud and protecting public confidence in elections. Thus, the requirement is plainly legitimate and is not “**facially invalid**.” [Crawford v. Marion County Election Board, 553 U.S. 181 (2008)]

1. Ballot Regulation

a. Signature Requirements

The Court has found that the interest of running an efficient election supports a requirement that candidates obtain a reasonable number of signatures to get on the ballot. [Munro v. Socialist Workers Party, 479 U.S. 189 (1986)—1%] Similarly, a state's interest in promoting transparency and accountability in elections is sufficient to justify public disclosure of the names and addresses of persons who sign ballot petitions. [Doe v. Reed, 561 U.S. 186 (2010)] However, the Court struck down a severe ballot restriction requiring new political parties to collect twice as many signatures to run for county office as for state office. [Norman v. Reed, 502 U.S. 279 (1992)]

b. Primary Voting Regulations

A state may enforce a party rule requiring that a person be registered as a member of the party within a reasonable amount of time prior to a primary to be able to vote. [Rosario v. Rockefeller, 410 U.S. 752 (1973)] It may also require that voters in a party's primary be registered either in the party *or as independents*. *Rationale*: The burden on the party's associational rights is *not severe*. Thus, strict scrutiny does not apply and the state's important regulatory interests (e.g., in preserving political parties as viable identifiable groups, preventing party raiding, etc.) are sufficient to justify the restriction. [Clingman v. Beaver, 544 U.S. 581 (2005)] However, a state may not prohibit a party from allowing independent voters to vote in the party's primary if the party wishes to allow independent voters to participate; such a requirement constitutes a severe burden on the associational rights of the party and can be justified only if it is narrowly tailored to serve a compelling interest. [Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)]

c. Single Party Limitation

A state law that prohibits an individual from appearing on the ballot as the candidate of more than one party does *not* impose a severe burden on the association rights of political parties. The state's interest in ballot integrity and political stability are "sufficiently weighty" to justify the law. [Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)]

d. "Nonpartisan" Blanket Primary

A state primary ballot law providing that candidates *self-identify* their party preference and that the two top vote getters advance to the general election does not *on its face* violate the association rights of political parties. *Rationale*: (i) The law does not state that any candidate is a party's nominee, (ii) there was no evidence that voters would be confused by the self-identifications, and (iii) the state may design a ballot that will make this clear. [Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008)]

2. Party Regulation

The state has less interest in governing party activities than in governing elections in general. Thus, the Court has held invalid a statute prohibiting the governing committee of a political party from endorsing or opposing candidates in primary elections. [Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); *and see* California Democratic

Party v. Jones, 530 U.S. 567 (2000)—state cannot require political parties to allow nonparty members to vote in the party’s primary election] Similarly, it has held invalid state regulations concerning the selection of delegates to a national party convention and the selection of candidates at such elections. [*Cousins v. Wigoda*, 419 U.S. 477 (1975); *Democratic Party v. LaFollette*, 450 U.S. 107 (1981)]

a. Judicial Candidate Selection

A state law that permits political parties to choose nominees for state judgeships at state conventions does not violate the freedom of association rights of candidates for judgeships simply because the historic domination of party leaders results in strongly favoring those that they support. *Rationale*: This process “has been a traditional means of choosing party nominees.” [*New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008)]

3. Limits on Contributions

A statute limiting election campaign contributions is not tested under a strict scrutiny standard; rather, it must be “closely drawn” to match a “sufficiently important interest”—an intermediate scrutiny standard. [*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)]

a. To Political Candidate

Laws limiting the amount of money that a person or group may contribute to a political candidate are *valid*, since the government has a sufficiently important interest in stopping the fact (or appearance) of corruption that may result from large contributions. Moreover, such laws do not substantially restrict freedom of expression or freedom of association (as long as the contributor may spend his money directly to discuss candidates and issues). [*Buckley v. Valeo*, 424 U.S. 1 (1976)]

1) Equalizing Large Expenditures

A law increasing contribution limits for a candidate whose wealthy opponent achieves an advantage by spending personal funds (exceeding \$350,000) violates the First Amendment. *Rationale*: Although Congress may raise contribution limits for both candidates in situations of this kind, “penalizing” a self-financing candidate who robustly expresses the right to advocate his own election cannot be justified by leveling opportunities for candidates of different personal wealth. [*Davis v. Federal Election Commission*, 554 U.S. 724 (2008)]

b. To Ballot Referendum Committee

The government may *not* limit contributions to a political committee that supports or opposes a ballot referendum (as opposed to one that supports a political candidate). Such a limitation on contributions to influence referendum elections violates the freedoms of speech and association. [*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1982)]

c. Disclosure of Contributors or Recipients of Money

The government may require a political party or committee to disclose the names of contributors or recipients of money to or from the party or committee. However, if the party or committee can show a “reasonable probability” that disclosure will cause harm

to the party, committee, or private individuals, they have a First Amendment right to refuse to make such disclosures. [Brown v. Socialist Workers '74 Campaign Committee, 454 U.S. 1122 (1982)]

d. Aggregate Contribution Limits Unconstitutional

The government may not limit the *aggregate* amount one person or entity contributes to political candidates or committees during an election even though it may limit the amount given to a single candidate. Aggregate limits violate the First Amendment's protection of political speech because unlike individual contribution limits, they do not further the government's interest in preventing *quid pro quo* corruption or the appearance of such, and they seriously restrict participation in the democratic process. Spending large sums of money in connection with elections, but not in an effort to control the exercise of a specific officeholder's duties, does not give rise to such corruption, nor does the possibility that the contributor may garner "influence over or access to" elected officials or political parties. [McCutcheon v. Federal Election Commission, 572 U.S. ____ (2014)]

4. Limits on Expenditures

As discussed above, the government *may* limit the amount that a person is permitted to *contribute* to another's campaign. However, the government *may not* limit the amount that a person *expends* on his own campaign. [Buckley v. Valeo, *supra*] Neither may the government limit the amount that a person spends to get a candidate elected, as long as the expenditures are not contributed directly to the candidate nor coordinated with that of the candidate—i.e., the expenditures must be independent of the candidate and not disguised contributions. Thus, corporations, unions, etc., may spend whatever they desire to get a candidate elected. [See, e.g., Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)]

5. Compare—Regulations of Core Political Speech

Regulation of "core political speech" must be distinguished from regulation of the process surrounding elections. Regulation of "core political speech" will be upheld only if it passes muster under strict scrutiny. [McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)]

a. Prohibiting Any Election Day Campaigning

A state law prohibiting *any* campaigning on election day has been held *invalid* as applied to a newspaper urging people to vote in a certain way. The right to comment on political issues is one of the most essential elements of free speech, and such conduct by newspapers would pose little danger to conducting elections. [Mills v. Alabama, 384 U.S. 214 (1966)]

1) Compare—Hundred-Foot Limit

A law prohibiting campaign activity within 100 feet of a polling place is *valid*. Even though the law is content based and concerns an essential element of free speech, it is *necessary* to serve the *compelling* interest of preventing voter intimidation and election fraud. [Burson v. Freeman, 504 U.S. 191 (1992)]

b. Prohibiting Anonymous Campaign Literature

Laws prohibiting distribution of anonymous campaign literature involve core political

speech and have been stricken because they were not narrowly tailored to a compelling state interest. [McIntyre v. Ohio Elections Commission, *supra*; Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999)]

c. Prohibiting Judge Candidates from Announcing Their Views

A rule prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. This is both a content-based restriction and a restriction on core political speech. In either case, it can be justified only if it is necessary to a compelling state interest. Two state interests were suggested to support the rule here: It is necessary to maintain an impartial judiciary and it is necessary to preserve the appearance of impartiality. The Court found that the rule is “woefully underinclusive” and so is not tailored at all toward achieving these goals. For example, it allows candidates to show bias toward political parties while it prohibits them from stating an opinion about political issues. The Court also found that finding judges without any preconceptions in favor of particular legal views is not a compelling interest because it would be both impossible to find such a person and undesirable. [Republican Party of Minnesota v. White, 536 U.S. 765 (2002)]

d. Distinguishing Political Speech from Candidate Advocacy

An ad concerning a political issue, even if sponsored by a corporation, run during an election campaign will be considered to be core political speech—rather than candidate advocacy—unless it is susceptible of no reasonable interpretation other than one as an appeal to vote for or against a particular candidate. [Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007)—ad urging voters to contact their senators to encourage them to end a filibuster of federal judicial nominations was core political speech—and could not be banned—even when one of the senators was running for re-election]

e. Solicitation of Campaign Funds by Judicial Candidates

A state may ban personal solicitation of campaign funds by judicial candidates. *Rationale*: If judicial candidates personally ask for money, individuals might feel obligated to donate in the hopes of garnering a favor from the candidates or from fear of retribution for not donating. The ban withstands strict scrutiny because it “advances the state’s compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech.” [Williams-Yulee v. Florida Bar, 135 S.Ct. 1656 (2015)]

C. BAR MEMBERSHIP AND PUBLIC EMPLOYMENT

The government often requires persons who accept government jobs to submit to loyalty oaths and refrain from certain conduct (e.g., campaigning). Such regulations often impact upon the freedom of speech and association.

1. Restraints on Speech Activities of Government Employees

Under the First Amendment, speech generally cannot be regulated or punished based on the content of the speech unless the regulation or punishment is necessary to achieve a compelling government interest. However, special rules apply when the government seeks to punish a government employee for speech or speech-related activities.

a. Speech Made Pursuant to Official Duties

A government employer may punish a government employee’s speech whenever the speech is made on the job and pursuant to the employee’s official duties. This is true even if the speech touches on a matter of public concern. [*Garcetti v. Ceballos*, 547 U.S. 410 (2006)]

Example: P, a district attorney, reviewed a case, concluded that there were irregularities in an underlying search warrant, contacted his supervisors, and suggested dismissing the case. P’s supervisors nevertheless proceeded with the prosecution. At a hearing challenging the warrant, P again raised his concerns about the warrant, but the court rejected the challenge. P claims that he was then subjected to retaliatory employment actions because of his testimony and sued his employer for violating his First Amendment rights. P’s employer denied undertaking any retaliatory actions, but even if such actions did occur, no First Amendment violation could occur here because the speech was undertaken as part of P’s job—a government employer may evaluate an employee based on any writing or speech that the employee undertakes as part of his official duties. [*Garcetti v. Ceballos*, *supra*]

b. Other Speech

If speech is not made pursuant to an employee’s official duties, two tests apply. If a government employee’s speech does ***not involve a matter of public concern***, the courts give the government employer a wide degree of deference and allow the employer to punish the employee if the speech was disruptive of the work environment. However, if a ***matter of public concern is involved***, courts must balance the employee’s rights as a citizen to comment on a matter of public concern against the government’s interest as an employer in efficient performance of public service.

Examples: 1) A teacher cannot be fired for writing a letter to a newspaper attacking the school superintendent’s handling of proposals to raise new revenue for the school—a matter of public concern. [*Pickering v. Board of Education*, 391 U.S. 563 (1968)]

2) The Court held invalid the firing of a clerical employee from a constable’s office for expressing her disappointment that an assassination attempt on President Reagan did not succeed, because in context the statement could not be understood to be an actual threat or an action that would interfere with the running of the office; rather, the Court viewed it as a commentary on the public issue of the President’s policies. [*Rankin v. McPherson*, 483 U.S. 378 (1987)]

Compare: The Court upheld the firing of an attorney for circulating in the office a petition regarding transfer policies. [*Connick v. Myers*, 461 U.S. 138 (1983)]

1) Petition Clause Claims Treated Similarly

A government employee’s right under the First Amendment to petition the government for redress is governed by the principles discussed above. Thus, unless a government employee’s grievance relates to a matter of public concern, it is not a

constitutionally protected activity, and the employee may not bring a constitutional tort suit (under 42 U.S.C. section 1983) alleging that his employer took retaliatory actions in violation of the employee's right to petition. [*Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011)]

c. Participation in Political Campaigns

The federal government *may* prohibit federal executive branch employees from taking an active part in political campaigns. The rationale is twofold: to further nonpartisanship in administration and to protect employees from being coerced to work for the election of their employers. [*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)]

d. Bans on Receiving Honoraria

A provision of the Ethics in Government Act banning government employees from accepting an honorarium for making speeches, writing articles, or making appearances was held to violate the First Amendment when applied to "rank and file" employees. Such a rule deters speech within a broad category of expression by a massive number of potential speakers and thus can be justified only if the government can show that the employees' and their potential audiences' rights are outweighed by the necessary impact the speech would have on actual operation of the government. The government failed to cite any evidence of misconduct related to honoraria by the rank and file employees, and so failed to meet the burden here. [*United States v. National Treasury Employees Union*, 513 U.S. 454 (1995)]

e. Patronage

The First Amendment freedoms of political belief and association forbid the hiring, promotion, transfer, firing, or recall of a public employee because of the person's political views or political party affiliation unless the hiring authority demonstrates that party affiliation or beliefs are appropriate requirements for the effective performance of the public office involved, e.g., "policymaking" or "confidential" nature of work. [*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)]

2. Loyalty Oaths

It is permissible for the federal government to require employees and other public officers to take loyalty oaths. However, such oaths will not be upheld if they are overbroad (i.e., prohibit constitutionally protected activities) or are vague so that they have a chilling effect on First Amendment activities.

a. Overbreadth

1) Knowledge of Organization's Aim Required

Public employment cannot be denied to persons who are simply members of the Communist Party because only knowing membership with "specific intent to further unlawful aims" is unprotected by the First Amendment. [*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)]

2) Advocacy of Doctrine Protected

A political party may not be denied a place on the ballot for refusing to take a loyalty oath that it does not advocate violent overthrow of the government as an

abstract doctrine. The First Amendment forbids “statutes regulating advocacy that are not limited to advocacy of action.” [Communist Party v. Whitcomb, 414 U.S. 441 (1974)]

b. Vagueness

1) Oaths Upheld

Compare the following oaths that have been upheld:

a) To Support the Constitution

An oath that required public employees and bar applicants to “support the Constitution of the United States” and the state constitution has been upheld. [Connell v. Higgenbotham, 403 U.S. 207 (1971)]

b) To Oppose the Overthrow of the Government

An oath required of all state employees “to oppose the overthrow of the government . . . by force, violence, or by an illegal or unconstitutional method” has also been upheld. The Court read this oath as akin to those requiring the taker simply to “support” the Constitution, “to commit themselves to live by the constitutional processes of our system.” Moreover, the oath provided fair notice, because its violation could be punished only by a prosecution for perjury, which required proof of knowing falsity. [Cole v. Richardson, 405 U.S. 676 (1972)]

2) Oath Not Upheld

A loyalty oath for public employees that they “promote respect for the flag and . . . reverence for law and order” is void for vagueness, since a refusal to salute the flag on religious grounds might be found in breach thereof. [Baggett v. Bullitt, 377 U.S. 360 (1964)]

3. Disclosure of Associations

Forcing disclosure of First Amendment activities as a condition of public employment, bar membership, or other public benefits may have a chilling effect. Thus, the state cannot force every prospective government employee to disclose *every* organizational membership. Such a broad disclosure has *insufficient relation* to loyalty and professional competence, and the state has available *less drastic means* to achieve its purpose. [Shelton v. Tucker, 364 U.S. 479 (1960)] The state may inquire only into those activities that are relevant to the position. If the candidate fails to answer relevant questions, employment may be denied. [Konigsberg v. State Bar of California, 366 U.S. 36 (1961)]

a. Fifth Amendment Limitation

If the job candidate refuses to answer on a claim of the privilege against self-incrimination, denial of the job violates the Fifth and Fourteenth Amendments. [Spevack v. Klein, 385 U.S. 511 (1967)] However, if individuals are ordered by appropriate authorities to answer questions “specifically, directly, and narrowly relating to their official duties,” and they refuse to do so by claiming the privilege against self-incrimination, they may be denied the job or discharged without violating the Fifth Amendment, if they were given immunity from the use of their answers or the fruits thereof in a

criminal prosecution. [Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968)]

4. Practice of Law

Regulation of the legal profession may conflict with the freedom of association rights of certain groups because it may impair their ability to band together to advise each other and utilize counsel in their common interest.

a. Countervailing State Interest Required

To overcome a group's right to exercise its First Amendment rights, the state must show a substantial interest, such as evidence of objectionable practices occurring or an actual or clearly threatened conflict of interest between lawyer and client.

Examples: 1) The NAACP encouraged, instructed, and offered to represent parents of black children to litigate against school segregation. This was held to be protected political expression. The state's ban on solicitation of legal business was inapplicable because the NAACP sought no monetary gain. [NAACP v. Button, 371 U.S. 415 (1963)]

2) A railroad labor union recommended a specific lawyer to pursue rights of members injured on the job, and also obtained a fee from a lawyer for performing investigative services. This was held protected. [Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964)]

D. SCHOOL SPONSORSHIP OF EXTRACURRICULAR CLUBS

The Supreme Court has held that the compelling interest test does not apply to infringement cases involving public school sponsorship of extracurricular clubs; instead, the test used in limited-public-forum-speech cases applies—sponsorship of associations can be subject to regulation that is *viewpoint neutral* and *reasonably related to a legitimate government interest*. (See XX.B.2.c.2), *supra*.)

Example: A public law school officially recognized student groups and gave them funding from mandatory student activity fees only if the groups accepted all students regardless of their "status or beliefs" (i.e., the "all comers" policy). A group that required students to sign a statement of faith based on Christian beliefs and denied membership to persons who supported homosexuality and premarital sex sought an exemption from the "all comers" policy and was denied. The group sued the school, claiming that the policy violated members' associational rights. *Held:* The "all comers" policy is constitutional. It is viewpoint neutral in that it draws no distinctions on point of view. Moreover, it is reasonably related to school purposes such as encouraging tolerance and providing leadership, educational, and social opportunities to all students. [Christian Legal Society v. Martinez, XX.B.2.c.2), *supra*]

XXII. FREEDOM OF RELIGION

A. CONSTITUTIONAL PROVISION

The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

B. APPLICABILITY TO THE STATES

Both the Establishment and Free Exercise Clauses of the First Amendment apply to the states under the Fourteenth Amendment.

C. FREE EXERCISE CLAUSE

1. No Punishment of Beliefs

The Free Exercise Clause prohibits the government from punishing (denying benefits to, or imposing burdens on) someone on the basis of the person's *religious beliefs*. It is sometimes said that the government can engage in such activity only if it is necessary to achieve a compelling interest; sometimes the rule is stated as a total prohibition of such government actions. In any case, the Supreme Court has never found an interest that was so "compelling" that it would justify punishing a religious belief.

a. What Constitutes Religious Belief?

The Supreme Court has not defined what constitutes a religious belief. However, it has made clear that religious belief does not require recognition of a supreme being [Torcaso v. Watkins, 367 U.S. 488 (1961)], and need not arise from a traditional, or even an organized, religion [see Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989)]. One possible definition is that the "belief must occupy a place in the believer's life parallel to that occupied by orthodox religious beliefs." [United States v. Seeger, 380 U.S. 163 (1965)—interpreting statutory, rather than constitutional, provision] In any case, the Court has never held an asserted religious belief to be not religious for First Amendment purposes.

1) Courts May Not Find Religious Beliefs to Be False

The courts may not declare a religious belief to be "false." For example, if a person says he talked to God and that God said the person should solicit money, he cannot be found guilty of fraud on the basis that God never made such a statement. However, the court may determine whether the person is sincerely asserting a belief in the divine statement. [United States v. Ballard, 322 U.S. 78 (1944), as described in Employment Division v. Smith, 494 U.S. 872 (1990)]

b. Religious Oaths for Governmental Jobs Prohibited

The *federal* government may not require any federal office holder or employee to take an oath based on a religious belief as a condition for receiving the federal office or job, because such a requirement is prohibited by Article VI of the Constitution. State and local governments are prohibited from requiring such oaths by the Free Exercise Clause. [Torcaso v. Watkins, *supra*]

c. States May Not Exclude Clerics from Public Office

A state may not exclude clerics (persons who hold an office or official position in a religious organization) from being elected to the state legislature, or from other governmental positions, because that exclusion would impose a disability on these persons based upon the nature of their religious views and their religious status. [McDaniel v. Paty, 435 U.S. 618 (1978)]

2. No Punishment of Religious Conduct Solely Because It Is Religious

The Supreme Court has stated that the Free Exercise Clause prohibits the government

from punishing conduct merely because it is religious or displays religious belief (e.g., the state cannot ban the use of peyote only when used in religious ceremonies). [Employment Division v. Smith, *supra*—dicta] A law that is designed to suppress actions only because the actions are religiously motivated is not a neutral law of general applicability. Such a law will be invalid unless it is necessary to promote a compelling interest.

Example: A city law that prohibited the precise type of animal slaughter used in the ritual of a particular religious sect violated the Free Exercise Clause because the Court found that the law was designed solely to exclude the religious sect from the city. The law was not a neutral law of general applicability; nor was the law necessary to promote a compelling interest. [Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)]

Compare: A state law that excluded pursuit of a degree in *devotional theology* from a college scholarship program for all students did *not* violate the Free Exercise Clause. Although a school *could* provide such scholarships without violating the Establishment Clause (*see infra*), the Free Exercise Clause does not require such scholarships. The exclusion from scholarship eligibility does not show animus toward religion, but rather merely reflects a decision not to fund this activity. Moreover, the burden that the exclusion imposes on religion is modest, and there is substantial historical support against using tax funds to support the ministry. [Locke v. Davey, 540 U.S. 712 (2004)]

3. States Can Regulate General Conduct—Criminal Laws and Other Regulations

Of course, states may prohibit or regulate conduct in general, and this is true even if the prohibition or regulation happens to interfere with a person's religious practices. The Free Exercise Clause cannot be used to challenge a law of general applicability unless it can be shown that the law was motivated by a desire to interfere with religion. [Employment Division v. Smith, *supra*]

a. Generally No Exemptions Required

The Free Exercise Clause does not require exemptions from criminal laws or other governmental regulations for a person whose religious beliefs prevent him from conforming his behavior to the requirements of the law. In other words, a law that regulates the conduct of all persons can be applied to prohibit the conduct of a person despite the fact that his religious beliefs prevent him from complying with the law.

1) Federal Statutory Exemption—Outside the Scope of Exam

The Religious Freedom Restoration Act ("RFRA") allows a person to challenge federal laws of general applicability as burdening his religious beliefs and practices. If there is a substantial burdening of religious free exercise, under RFRA the government must meet strict scrutiny. In *Burwell v. Hobby Lobby, Inc.*, 573 U.S. ____ (2014), the Court found that a federal requirement that businesses include contraceptive coverage in their insurance coverage for employees violates RFRA for close corporations whose owners object to this on religious grounds. However, RFRA is statutory in nature and is outside the scope of a constitutional law question.

b. Examples

The Supreme Court has held that no religious exemption was required from the

following religiously neutral regulations, even though certain groups objected because the regulation interfered with conduct inspired by sincerely held religious beliefs:

- 1) Prohibition against *use of peyote* [Employment Division v. Smith, *supra*—challenged by person whose religious beliefs require use of peyote during religious ceremony];
- 2) *Denial of tax exempt status to schools that discriminate* on the basis of race [Bob Jones University v. United States, 461 U.S. 574 (1983)—challenged by religious school whose tenets require certain separations of races];
- 3) Requirement that employers comply with *federal minimum wage laws* [Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985)—challenged by employer that argued minimum wages interfere with members’ religious desires to work without compensation];
- 4) Requirement that employers pay *Social Security taxes* [United States v. Lee, 455 U.S. 252 (1982)—challenged by person whose religious beliefs prohibited payment and receipt of Social Security type payments]; and
- 5) *Sales and use taxes* [Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990)—challenged as applied to sales of goods and literature by religious group].

c. Cases in Which Exemptions Were Required

1) Ministerial Exemption

The Supreme Court has held that religious organizations must be granted an exemption from suits alleging employment discrimination by ministers against their religious organizations. The government may not interfere with a decision of a religious group to fire one of its ministers. Imposing an unwanted minister would infringe on the Free Exercise Clause, which protects a religious group’s right to shape its own faith through appointments. And allowing the government to determine who will minister within a faith also violates the Establishment Clause by interfering with ecclesiastical decisions. Moreover, this ministerial exception is not limited to the head of a religious congregation; it can extend to others in positions considered by the congregation to be ministerial. [Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S. Ct. 694 (2012)—ministerial exemption applied to parochial school teacher considered to be “called,” who trained by taking a number of college level courses and was given a diploma with the title “Minister of Religion,” who occasionally led school worship, and whom the congregation prayed for as a minister]

2) Unemployment Compensation Cases—Some Exemptions Required

Many state unemployment compensation programs make payments only to persons who are involuntarily unemployed (i.e., were fired or laid off rather than resigned), and who are available for work (i.e., willing to accept offered employment). Here, however, unlike other areas of regulation, the Supreme Court has held that the

states must grant religious exemptions. Thus, if a person resigns from a job or refuses to accept a job because it conflicts with her religious beliefs, the state must pay her unemployment compensation if she is otherwise entitled.

Examples: 1) A state cannot deny unemployment compensation merely because the applicant quit a job rather than work on a “holy day” on which religious beliefs forbid work. [Sherbert v. Verner, 374 U.S. 398 (1963)]

2) A state cannot deny unemployment compensation merely because the applicant quit his job rather than work on production of military equipment after his factory converted from nonmilitary to military production. [Thomas v. Review Board, 450 U.S. 707 (1981)]

a) Need Not Belong to Formal Religious Organization

A person does not have to be a member of a formal religious organization to receive the above exemptions from unemployment compensation requirements. All that is required is that the person *sincerely hold* religious beliefs that prevent him from working on a certain day or on military products. [Frazee v. Illinois Department of Employment Security, 1.a., *supra*]

b) Limitation—Criminal Prohibitions

The unemployment compensation cases do not give individuals a right to disregard criminal laws due to their religious beliefs. Thus, unemployment compensation laws may disqualify persons fired for “misconduct” (which includes any violation of criminal law).

Example: A person was fired from his job as a counselor at a private drug abuse clinic when it was discovered that he used peyote (at times when he was not at work) for religious reasons. All use of peyote was illegal in the state (even if the use was part of a religious ceremony). The Supreme Court held that unemployment compensation could properly be denied here. [Employment Division v. Smith, *supra*]

3) Right of Amish Not to Educate Children

The Supreme Court has required an exemption for the Amish from a neutral law that required school attendance until age 16, because a fundamental tenet of Amish religion forbids secondary education. The Court found that the Amish are productive and law-abiding, and ruled that the right to educate one’s children (*see* XIX.B.6., *supra*) and the Free Exercise Clause outweighed the state’s interest here. [Wisconsin v. Yoder, 406 U.S. 205 (1972)]

D. ESTABLISHMENT CLAUSE

The Establishment Clause, along with the Free Exercise Clause, compels the government to pursue a course of neutrality toward religion. Government action challenged under the Establishment Clause will be found invalid unless the action:

- (i) Has a *secular purpose*;

- (ii) Has a *primary effect* that neither advances nor inhibits religion; *and*
- (iii) Does not produce *excessive government entanglement* with religion.

[*Lemon v. Kurtzman*, 403 U.S. 602 (1971)—the “*Lemon*” test] (Note that some recent cases have simply focused on whether the action is neutral as between the religious and nonreligious when there is no endorsement of a particular religion.) The Establishment Clause cases can be grouped into four categories: (i) cases preferring one religious sect over others; (ii) a limited group of cases unconnected to financial aid or education; (iii) cases involving financial aid to religiously affiliated institutions; and (iv) cases concerning religious activities in public schools. The details regarding the Supreme Court rulings are given below.

1. Sect Preference

Government action that prefers one religious sect over others violates the Establishment Clause, at least if such action is not necessary to achieve a compelling interest. The Court generally will not even resort to the *Lemon* test in such a case, although such action would fail the first two prongs of the *Lemon* test, because if the government is favoring one religious sect, it is acting with the purpose of and having the primary effect of aiding that religion.

Example: A state law created a public school district whose boundaries were intentionally set to match the boundaries of a particular Jewish neighborhood (so that several handicapped students would not have to be sent outside their neighborhood to attend special education classes that the state required and which the students’ private school could not adequately provide). The Supreme Court found the law unconstitutional. [*Board of Education v. Grumet*, 512 U.S. 687 (1994)]

2. Cases Unconnected to Financial Aid or Education

In cases unconnected to financial aid or education, a good rule of thumb is that a law favoring or burdening religion or a specific religious group in particular will be invalid, but a law favoring or burdening a larger segment of society that happens to include religious groups will be upheld.

Example: The government may not delegate governmental power to religious organizations because such action would involve excessive governmental entanglement. [*Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982)—statute gave church-affiliated schools power to veto nearby liquor licenses]

Compare: The IRS may deny tax exemptions claimed for religious donations when the sums were paid to the church *in exchange for services* (e.g., classes) since this is a general rule that applies to all charities. [*Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989)]

a. State Legislature Can Employ a Chaplain

Despite the principle of separation of church and state, the Court has held that a state legislature could employ a chaplain and begin each legislative day with a prayer. [*Marsh v. Chambers*, 463 U.S. 783 (1983)] This decision was based on the history of legislative prayer in America; it does not modify the “Religious Activities in Public Schools” rulings examined below.

b. Town Board Can Begin Town Meetings with a Prayer

Extending *Marsh v. Chambers, supra*, the Court has held that a town board may begin its meetings with prayers led by clergy members listed in the town’s congregation directory, even if the clergy is predominately Christian. The Court found the practice is consistent with the tradition of legislative prayer and does not discriminate against minority faiths nor coerce the participation of nonadherents, and therefore does not violate the Establishment Clause. The Constitution requires only that the town is equitable in drawing from available clergy, not that it ensure equal representation of all faiths. [*Town of Greece v. Galloway, 572 U.S. _____ (2014)*]

c. Displays of Ten Commandments on Public Property

If a display of the Ten Commandments is shown to have a “*predominantly religious purpose*,” it violates the Establishment Clause; otherwise, the Ten Commandments may be displayed. [*McCreary County v. ACLU, 545 U.S. 844 (2005)*]

Example: Two counties posted large copies of the Ten Commandments in their courthouses. After complaints based on the Establishment Clause, each county adopted a resolution calling for a more extensive exhibit showing that the Commandments are Kentucky’s “precedent legal code” and noting the state legislature’s acknowledgment of Christ as the “Prince of Ethics.” The displays were then modified to add smaller copies of other historic texts with religious references (e.g., the “endowed by their creator” clause of the Declaration of Independence). A district court found the displays invalid under the *Lemon* test because they lacked any secular purpose. The counties again modified the displays—without any guiding resolutions—to include eight equally sized items around the Ten Commandments (including the Bill of Rights and a picture of Lady Justice) and the title “Foundations of American Law and Government.” The ACLU moved to enjoin these displays, claiming that their purpose was still religious rather than secular. Given the displays’ history, the Supreme Court agreed, finding that the taint from the earlier displays had not been dissipated even though, on their faces, the most current displays appeared not to have a religious purpose. [*McCreary County v. ACLU, supra*]

Compare: A monument of the Ten Commandments on a 22-acre State Capitol ground displaying 17 monuments and 21 historical markers commemorating the state’s “people, ideals, and events that compose its identity” communicated not only a religious message but also a secular moral message, and its setting suggested that the state intended the secular message to predominate. [*Van Orden v. Perry, 545 U.S. 677 (2005)*]

d. Some Holiday Displays Are Permissible

If the *government* maintains a holiday-Christmastime display that does not appear to endorse religion, the display will survive review under the three-part Establishment Clause test. If a government’s holiday display includes religious symbols (e.g., a nativity scene or a menorah) as well as other holiday decorations (e.g., a Christmas tree or a Santa Claus figure), the courts will hold that the display: (i) has a secular purpose (based on the history of government recognition of holidays); (ii) has a primary

nonreligious effect (it does not endorse religion); and (iii) does not create excessive entanglement between government and religion. If the display includes only the religious symbols (e.g., only a nativity scene), it will violate the Establishment Clause because it has a religious effect (it “endorses” religion). [County of Allegheny v. ACLU, 492 U.S. 573 (1989)]

e. Absolute Right Not to Work on a Sabbath Impermissible

The state may not force employers to grant all employees an absolute right to refrain from working on their sabbath, because the primary effect of such a law is to advance religion. [Estate of Thornton v. Caldor, 472 U.S. 703 (1985)] However, a state may require employers to make reasonable efforts to accommodate employee religious practices.

f. Exemptions from Antidiscrimination Laws

The federal government may exempt religious organizations from the federal statutory prohibition against discrimination in employment on the basis of religion, at least regarding their nonprofit activities. Thus, a janitor can be discharged from his employment at a gymnasium owned by a religious organization (which was open to the public and run as a nonprofit facility) because he was not a member of that religious organization. [Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)]

3. Cases Involving Financial Benefits to Church-Related Institutions

A statute authorizing governmental aid to a religiously affiliated institution (hospital, school, etc.) must be tested under the general test detailed above (secular purpose, primary effect, and excessive entanglement). However, the Supreme Court applies these tests with greater strictness when the government aid is going to a religiously affiliated grade school or high school than it does when the aid is going to another type of religiously affiliated institution (such as a college or hospital).

a. Recipient-Based Aid

The government may give aid in the form of financial assistance to a defined class of persons as long as the class is defined without reference to religion or religious criteria. Such a program is valid even if persons who receive the financial assistance are thereby enabled to attend a religiously affiliated school.

Examples: 1) The Supreme Court upheld a state program that made education subsidy payments directly to a blind or disabled student even though a student used his aid to study at a Christian college for the purpose of becoming a pastor or missionary. The class of persons who received the aid was defined without reference to any religious criteria; only an incidental benefit would go to the religiously affiliated college or vocational training institution. The aid program thus passed review under the purpose, effect, and entanglement tests. [Witters v. Washington Department of Services, 474 U.S. 481 (1986)]

2) The Court held that the Establishment Clause would not prevent a public school district from paying for a sign language interpreter for a deaf student at a religious high school under a religiously neutral

program of aid to all handicapped school children in both public and private schools. [*Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)]

3) The Supreme Court upheld a program that provided tuition vouchers to parents of poor children in kindergarten through the eighth grade which could be used to pay for attending participating public or private schools of their parents' choice, even though a very high percentage of the recipients chose to attend religiously affiliated schools. The program was part of a larger program that also created publicly funded magnet schools and community schools that were independent from the local school district. The Court found that the program did not have the purpose or effect of advancing religion. Its purpose was secular—to provide educational assistance to poor children in a failing public school system. Its primary effect was to provide poor children with funds to attend other schools. Any benefit to the religious schools resulted from parents choosing to send their children to those schools and was not attributable to the government. [*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)]

1) **Compare—Tuition Tax Deductions or Credits Limited to Religious School Tuition**

A state may not use a system of statutory grants, tax credits, or tax deductions to reimburse parents or students for tuition paid *only to religiously affiliated schools*. However, a tax deduction to all students or parents based on the actual expenditures for attending any public or private school (including religious schools) has been upheld. [*Mueller v. Allen*, 463 U.S. 388 (1983)]

It would appear that a valid tax deduction statute must allow a deduction for: (i) expenditures for public as well as private schools; and (ii) some expenditures other than tuition (such as expenditures for school supplies or books) so that public school students or their parents may benefit from the deduction.

b. **Aid to Colleges, Hospitals, Etc.**

The Court will uphold a government grant of aid to the secular activity of a religiously affiliated hospital or college (such as a grant to build a new hospital ward or a laboratory-classroom building) as long as the government program requires that the aid be used only for *nonreligious purposes*, and the recipient so agrees in good faith. [*Tilton v. Richardson*, 403 U.S. 672 (1971); *Bradfield v. Roberts*, 175 U.S. 291 (1899)]

Example: The Adolescent Family Life Act—which provides for grants of government funds to a variety of public and private (including religiously affiliated) agencies to provide counseling and educational services to young people regarding sexual activity—has been upheld. The Act has a secular purpose (dealing with problems of teenage pregnancy). The Act does not on its face advance religion because a religiously affiliated organization could contractually be required to use the funds for nonreligious counseling. And the Act does not give rise to excessive entanglement because there is no reason to assume that a significant percentage

of the funds would be granted to pervasively sectarian institutions.
[Bowen v. Kendrick, 487 U.S. 589 (1988)]

c. Aid to Religiously Affiliated Grade Schools or High Schools

Programs of aid to these institutions are subject to the same three-part test as are all other laws under the Establishment Clause. Most of the time, such programs will have a secular purpose—to aid in education. However, if significant aid is given to the religious school, the program may be deemed to have a primary effect that advances religion. If the government program has detailed administrative or legislative regulations that are designed to ensure that the aid does not result in a primary effect of advancing religion, the law may be stricken as giving rise to an excessive entanglement between government and religion.

1) Aid Upheld

The Supreme Court has upheld state programs that:

- a) Provide state-approved *textbooks* to *all* students [Board of Education v. Allen, 392 U.S. 236 (1968)] (but note that the state may not loan textbooks to students attending schools that discriminate on the basis of race, since this would violate the Fourteenth Amendment [Norwood v. Harrison, 413 U.S. 455 (1973)]);
- b) Lend religiously neutral instructional materials (e.g., library books, computers) to parochial schools as well as to public and other nonprofit private schools, where the program did not define recipients by reference to religion and the *challenger did not prove* that the neutral aid was used for religious indoctrination. [Mitchell v. Helms, 530 U.S. 793 (2000)—*overruling* Meek v. Pittenger, 421 U.S. 349 (1975)];
- c) Provide *transportation to and from school* to *all* students [Everson v. Board of Education, 330 U.S. 1 (1947)];
- d) Reimburse private schools for the expenses of *compiling state-required data*, such as student attendance records, or administering and grading *standardized* state educational achievement tests [Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980)]; and
- e) Provide “*auxiliary services*” (e.g., remedial education, guidance, or job counseling) to all disadvantaged children at their school, including children at parochial schools [Agostini v. Felton, 521 U.S. 203 (1997)].

2) Aid Invalidated

The Supreme Court has struck down the following state programs, either because they had a primary effect that advanced religion or because they involved excessive entanglement between government and religion:

- a) Programs paying a portion of private school *teachers’ salaries* (for their secular classes), since the primary effect would be to advance religion and a system to ensure that the money/teachers not be used for religious purposes would involve excessive entanglements. [Lemon v. Kurtzman, D., *supra*]; and

- b) Programs reimbursing private schools for *writing achievement tests* (this would have the primary effect of advancing religion since the schools could write tests advancing their religious mission) [Levitt v. Community for Public Education, 413 U.S. 472 (1973)].

d. Tax Exemption for Religious, Charitable, or Educational Property

An exemption from property taxation for “real or personal property used exclusively for religious, educational, or charitable purposes” does not violate the Establishment Clause. Neither the purpose nor the effect of such an exemption is the advancement or the inhibition of religion, and it constitutes neither sponsorship nor hostility, nor excessive government entanglement with religion. The “government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state” [Walz v. Tax Commission, 397 U.S. 664 (1970)]

e. Tax Exemption Available Only to Religions

Although religious schools or religious associations may be included in tax exemptions available to a variety of secular and religious organizations, a tax exemption that is available only for religious organizations or religious activities violates the Establishment Clause. [Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)—an exemption from the sales and use tax for religious magazines or books (but no other publications) violates the Establishment Clause]

4. Religious Activities in Public Schools

a. Prayer and Bible Reading

Prayer and Bible reading in school are invalid as establishments of religion. [Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963)] It does not matter whether participation is voluntary or involuntary, and neither does it matter that the prayer period is designated as a period of silent prayer or meditation. [Wallace v. Jaffree, 472 U.S. 38 (1985)] This rule extends to prohibit public school officials from having clerics give invocation and benediction prayers at graduation ceremonies. [Lee v. Weisman, 505 U.S. 577 (1992)] Similarly, a school policy authorizing students to elect whether to have a student invocation before varsity games, to select a student to deliver it, and to decide its content *violates* the Establishment Clause. Unlike student speeches at an open public forum (*see d.*, below), this policy’s purpose is to encourage religious messages. [Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)]

b. Posting Ten Commandments in Classroom Is Invalid

Posting the Ten Commandments on the walls of public school classrooms plainly serves a religious purpose and is invalid, despite the legislature’s statement that it was for a secular purpose. [Stone v. Graham, 449 U.S. 39 (1980)]

c. Released-Time Programs

1) In Public School Building

Programs in which regular classes end an hour early one day a week and religious instruction is given in public school classrooms to students who request it are invalid. [McCollum v. Board of Education, 333 U.S. 203 (1948)]

2) Nonpublic Building Used

Programs in which participating children go to religious classes conducted at religious centers away from the public school do not violate the Establishment Clause. [Zorach v. Clauson, 343 U.S. 306 (1952)]

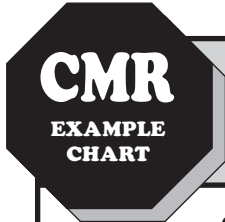
d. Accommodation of Religious Students—On-Campus Meetings

As discussed at XX.B.1.c., *supra*, under the Free Speech Clause, if a public school allows members of the public and private organizations to use school property when classes are not in session, it cannot deny a religious organization permission to use the property for meetings merely because religious topics will be discussed. Such an “equal access rule” does not violate the Establishment Clause because the primary purpose of such programs is secular (to accommodate all interests), people are not likely to assume that the government endorses the religious ideas discussed, and there is no excessive government entanglement, at least where the meetings are not run by school personnel. [Good News Club v. Milford Central School, 533 U.S. 98 (2001)]

e. Curriculum Controls

A government statute or regulation that modifies a public school curriculum will violate the Establishment Clause if it fails the secular purpose test, primary effect test, or excessive government entanglement test.

Example: A state statute that prohibited the teaching of human biological evolution in the state’s public schools was held to violate the Establishment Clause because the Supreme Court found that the legislature had a religious purpose for enacting the statute. [Epperson v. Arkansas, 393 U.S. 97 (1968)] Similarly, the Court invalidated a state statute that prohibited instruction regarding “evolution science” (the theory of human biological evolution) in the public schools unless that instruction was accompanied by instruction regarding “creation science,” because the Court found that the legislature enacted this statute for the purpose of promoting religion. [Edwards v. Aguillard, 482 U.S. 578 (1987)]



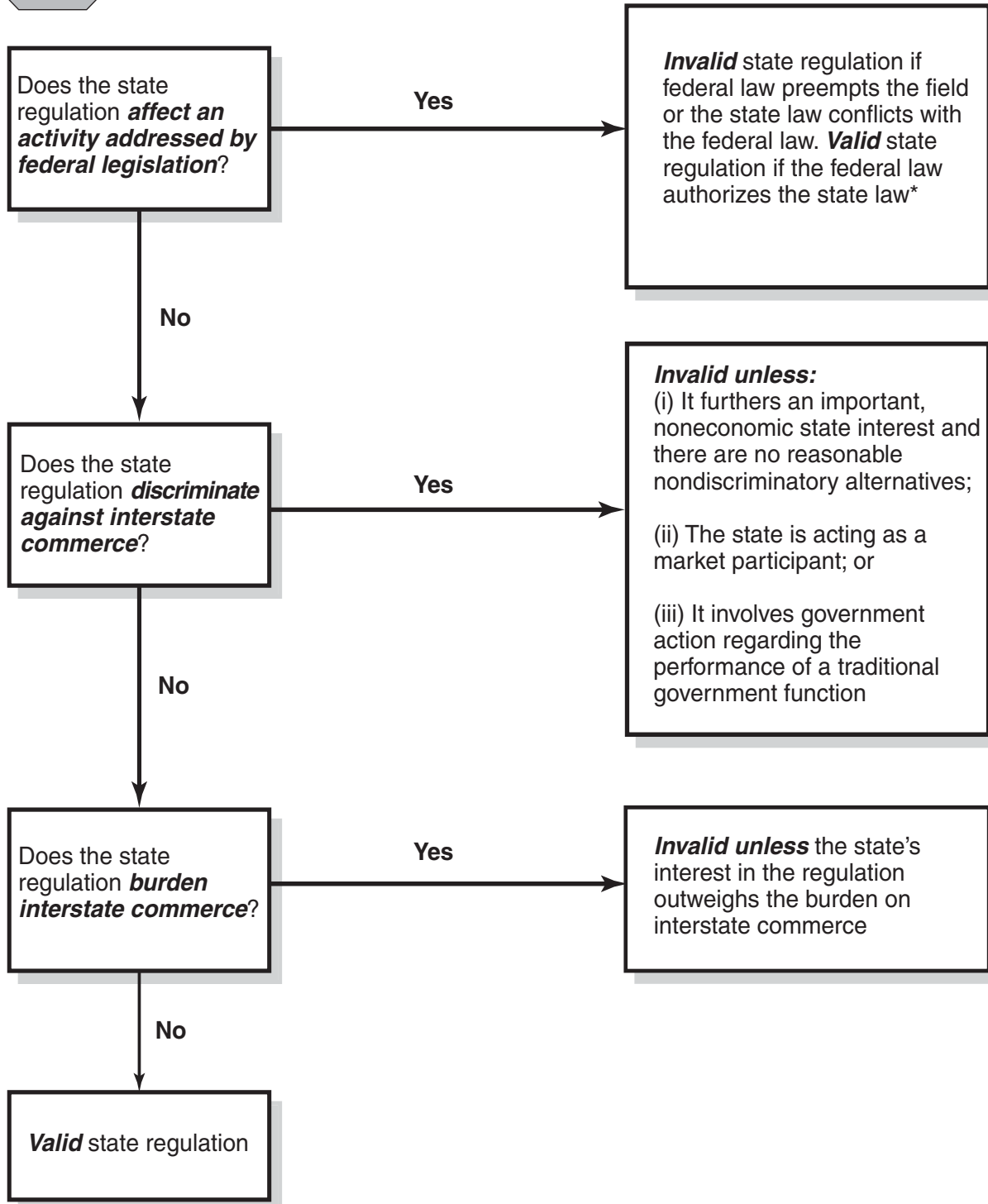
SOURCES OF CONGRESSIONAL POWER

<u>Government Action</u>	<u>Source of Power</u>
1. Congress enacts divorce laws for the District of Columbia.	General federal police power for D.C. (as well as military bases and federal lands).
2. Congress pays for highways.	Spending Power and Commerce Clause.
3. Federal income tax.	Sixteenth Amendment Taxing Power.
4. Congress conditions aid to states for medical programs on state funding of AIDS research.	Spending Power.
5. Congress adopts a tax to regulate banknotes rather than to raise revenue.	Power to coin money.
6. Congress prohibits hunting on federal lands.	Property Power.
7. Congress bars racial discrimination at places of public accommodation.	Commerce Clause.
8. Congress requires all employers, including state governments, to comply with federal minimum wage and overtime provisions.	Commerce Clause.

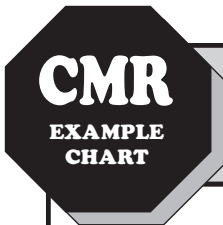
Note: The Amendments to the Constitution may also be a source of power (e.g., the Thirteenth Amendment gives Congress power to outlaw badges of slavery; thus Congress may require a private seller to sell land to blacks as well as whites).



STATE REGULATION OF INTERSTATE COMMERCE

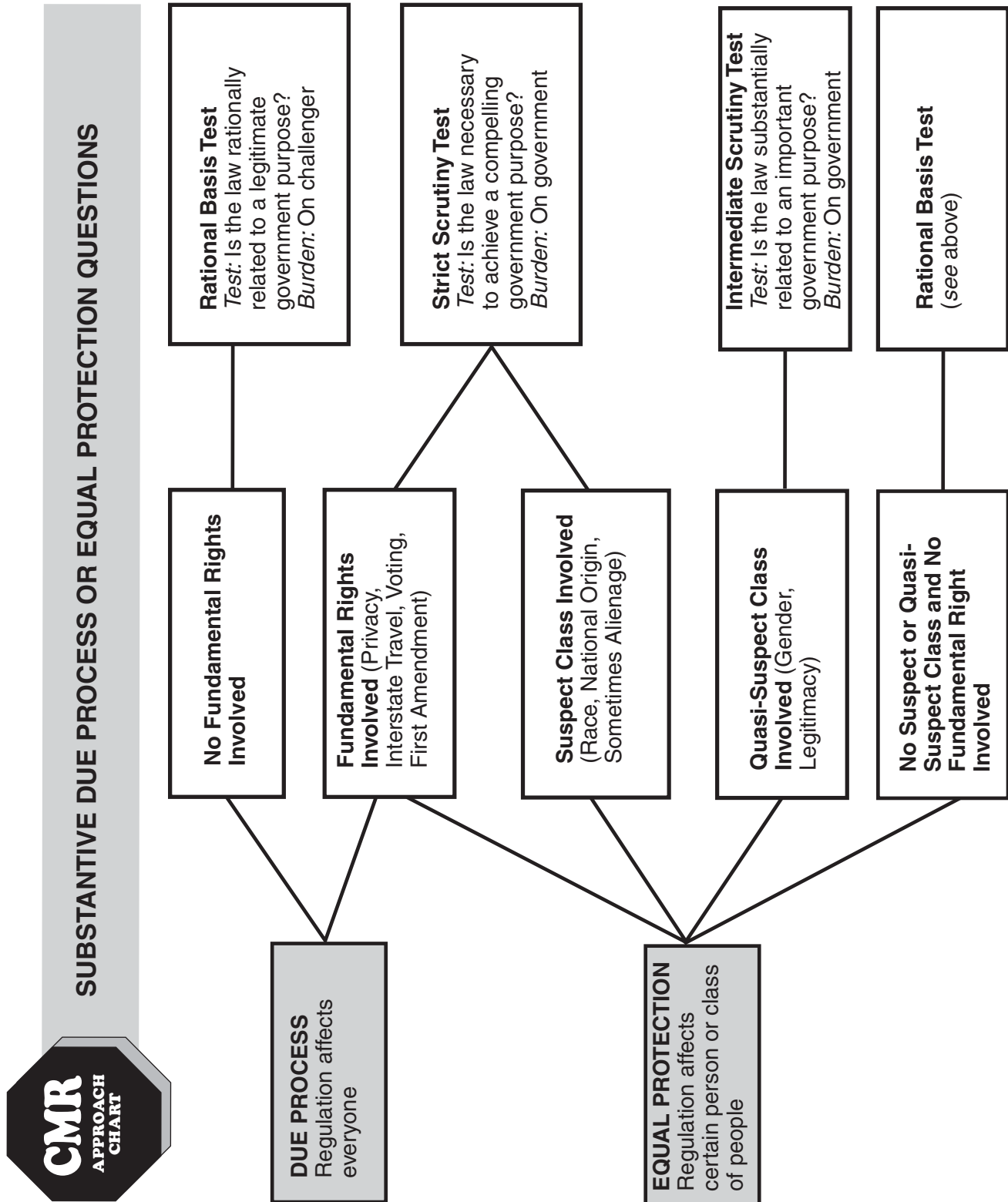


*Of course, Congress has no power to authorize legislation that would violate other constitutional provisions, such as the Privileges and Immunities Clause of Article IV.



STATE ACTION VS. NO STATE ACTION

<u>State Action</u>	<u>No State Action</u>
<i>Public Function</i>	
Running a town	Running a shopping mall (does not have all the attributes of a town)
Conducting an election	Holding a warehouseman's lien sale
<i>Significant State Involvement</i>	
Enforcing restrictive covenants prohibiting sale or lease of property through use of state courts	Granting a license and providing essential services to a private club
Leasing premises to a discriminatory lessee where state derives extra benefit from the discrimination (i.e., symbiotic relationship exists)	Granting a monopoly to a utility
Allowing state official to act in discriminatory manner under "color of state law"	Heavily regulating an industry
Administering a private discriminatory trust by public officials	Granting a corporation its charter and exclusive name



CONSTITUTIONAL LAW MULTIPLE CHOICE QUESTIONS**INTRODUCTORY NOTE**

You can use the sample multiple-choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. To do more questions, access StudySmart Law School software from the BARBRI website.

Question 1

A 15-year-old sophomore high school student became pregnant, and the school board required her to attend a special program for pregnant students instead of her regular classes. The girl did not want to attend a special program; rather, she wanted to attend her regular classes.

She sued the school district in federal district court, demanding that she be allowed to attend her regular classes. Before her case came to trial, the girl gave birth to the child. Subsequently, the district reinstated her in her regular classes.

When her suit comes before the federal district court, what should the court do?

- (A) Dismiss the action, because she is no longer pregnant.
- (B) Dismiss the action, because she is no longer required to attend the special classes.
- (C) Hear the case on the merits, because she may get pregnant again before she graduates from the high school.
- (D) Hear the case on the merits, because it impacts the right to privacy, which is an important federal issue.

Question 2

The owner of a chain of natural food stores located within a particular state contracted with landowners and construction firms in a neighboring state in preparation for the opening of several new stores in the neighboring state. The chain's products are stored and sold in bulk within the stores. Consumers remove the amount of product they want from bins within the stores, place the product in plastic bags, and then present their bags at a checkout counter. Statutes in the neighboring state in which the chain owner would like to open its new stores prohibit the sale of food in bulk due to the health hazards associated with bulk storage and contamination from consumer access to food sold from bins. The state has prosecuted other grocers' violations of the statute in the past.

The chain store owner seeks an injunction against state officials in the federal district court with jurisdiction over the matter. The state officials move to dismiss the suit on the ground that the corporation lacked standing to sue.

What would be the probable outcome?

- (A) The suit would be dismissed, because the owner has suffered no injury.
- (B) The suit would be dismissed, because the challenged state legislation has no effect on civil liberties.
- (C) The federal court would hear the suit, because a federal question—interstate commerce—is involved.
- (D) The federal court would hear the suit, because the owner has undertaken substantial steps to open outlets in the state.

Question 3

Congress enacted a statute that provided for direct money grants to the various states to be distributed by them to police agencies within their jurisdictions for the purpose of purchasing gas-efficient patrol vehicles. One of the objectives of the statute was to help reduce the dependency of the United States on imported oil.

Which of the following would provide the best constitutional justification for the statute?

- (A) The Commerce Clause.
- (B) The power to tax and spend for the general welfare.
- (C) The Necessary and Proper Clause.
- (D) The power to conduct the foreign relations of the United States.

Question 4

To gain progress on critical treaty negotiations with another country, the President issued an official pardon to the leader of a radical group who was in a state prison after being convicted of a violent crime in the state. The President directed the governor of the state to free the leader but the governor refused. The Justice Department brought an action in federal district court seeking an order compelling his release.

How is the federal court most likely to rule?

- (A) For the state, because a state official acting pursuant to his state's constitution need not obey inconsistent orders from a federal official.
- (B) For the state, because the President's constitutional power to pardon prisoners extends only to those convicted of federal offenses.
- (C) For the state, because the President's order and the pardon given to the convicted leader violate his duty to see that the laws of the United States are faithfully executed.
- (D) For the federal government, because the President's actions are authorized by his power to enter into treaties with other nations.

Question 5

A state statute prohibited the sale or possession of any food product containing more than one part per billion of a dangerous pesticide. An out-of-state driver taking her recreational vehicle through a corner of the state was stopped at a state inspection station. When the state trooper learned that the pantry of her RV was stocked with food, he asked to test a few samples of her baked goods. The samples contained about 600 parts per billion of the prohibited pesticide, and all of the other baked goods in her possession were tested and found to have the same level of pesticide. All of her baked goods, worth about \$150, were confiscated and destroyed.

The state in which the driver lived has no laws governing the pesticide level of baked goods. A federal law designed to protect agricultural workers requires that any food product containing more than 500 parts per billion of the toxic pesticide must be labeled as such and be in special containers. The driver brings an action in federal court asserting that the state statute is invalid because it is preempted by the federal law.

How should the court rule as to this claim?

- (A) For the state, because the purposes of the federal law are different from those of the challenged statute.
- (B) For the state, because regulation of food quality is a power reserved to the states by the Tenth Amendment.
- (C) For the driver, because the federal law does not expressly permit states to enact more stringent pesticide level controls.
- (D) For the driver, because the federal law and the state statute regulate the same subject matter.

Question 6

A state located in the southern half of the United States experienced a strong influx of retirees, due in part to its mild winters and in part to the generous health benefits that the state historically provided to its elderly residents who fell below the federal poverty line. The state's Office of Budget Management determined that the influx of retirees would bankrupt the state's health care benefit fund within five years. To preserve the fund and ensure the health of its citizens, the state revised its health care statute to make persons ineligible for coverage until they have lived in the state for at least one year.

If a retiree who was denied benefits because she just moved to the state challenges the constitutionality of the statute in federal court, is she likely to prevail?

- (A) No, because the state has a compelling interest in maintaining the fiscal integrity of its health care fund.
- (B) No, because the states do not have a constitutional duty to provide health care benefits to retirees even if they fall below the federal poverty line.
- (C) Yes, because the requirement improperly burdens the right of interstate travel in violation of the Equal Protection Clause of the Fourteenth Amendment.
- (D) Yes, because the requirement deprives some retirees of certain privileges and immunities in violation of the Privileges and Immunities Clause of Article IV.

Question 7

A state's pension program provided supplemental state pension benefits to surviving spouses and children of state employees. The program provided that when the spouse remarried, that spouse's benefits would be gradually terminated based on a statutory formula. Because of statistics showing past disparities between the household income levels of male surviving spouses and female surviving spouses, different formulas were used for the termination schedule depending on whether the surviving spouse was male or female.

A widower of a state employee was informed after he remarried that his pension benefits would be terminated in 90 days according to the applicable formula. Upon learning that a similarly situated widow would have continued to receive benefits for six months after remarriage, the widower decided to file suit in federal court, alleging that the state program is unconstitutional because it is discriminatory and it unfairly burdens his right to marry.

Which of the following best states the burden of persuasion in this case?

- (A) The state must demonstrate that the program is narrowly tailored to achieve a compelling government interest.
- (B) The state must demonstrate that the program is substantially related to an important government interest.
- (C) The widower must demonstrate that the program is not substantially related to an important government interest.
- (D) The widower must demonstrate that the program is not rationally related to a legitimate government interest.

Question 8

An abortion provider in a city closed her clinic after protestors picketed in front of her home for long periods of time. The city was left with just one other clinic providing abortions. The city then adopted an ordinance prohibiting any picketing on a public sidewalk or street adjacent to and directed at a specific residence.

A group that wished to picket in front of a business owner's home because of his labor practices challenged the constitutionality of the ordinance in federal court.

Will the group's challenge to the ordinance likely prevail?

- (A) No, because the ordinance is a permissible regulation of the location and manner of picketing.
- (B) No, because the ordinance is a means of preserving a woman's fundamental right of access to clinics providing abortion services.
- (C) Yes, because the government cannot show that the ordinance is necessary to achieve a compelling government interest.
- (D) Yes, because sidewalks and streets in residential neighborhoods are public forums.

Question 9

On completion of a major expansion project, a city's public library board adopted a usage policy for the new meeting room that was added to the facility. To alleviate the scheduling burden on the staff if the meeting room were open to all groups, the policy provided that the meeting room was to be used only for "library purposes" by the library staff, the library board, or groups affiliated with the library, such as the library's teen advisory group or volunteer "Friends of the Library" group. A local organization that promoted the political interests of an ethnic minority in and around the city requested use of the meeting room for an informational meeting that would be open to the public. Although no other event was scheduled for the meeting room at the time requested, the library director declined the organization's request, citing the meeting room policy adopted by the library board. The organization filed suit in federal district court, challenging the library's policy and seeking access to the meeting room.

How is the court likely to rule?

- (A) The library's policy is valid, because limiting the meeting room's use to library purposes is reasonably related to a legitimate government purpose.
- (B) The library's policy is valid, because limiting the meeting room's use to library purposes is narrowly tailored to serve a significant government interest.
- (C) The library's policy is not valid, because limiting the meeting room's use to library purposes is restricting speech based on its content.
- (D) The library's policy is not valid unless there are alternative facilities in the area available for groups to hold meetings.

Question 10

The legislature of a state was concerned that the numerous and strident television, radio, and newspaper advertisements by auto dealerships annoy and mislead the public. Therefore, it enacted comprehensive legislation regulating the timing and content of such ads, limiting their duration, frequency, and the types of claims and information made and given.

Which of the following statements is most accurate as to the constitutionality of the state's ad regulation?

- (A) It is unconstitutional, because it infringes on the First and Fourteenth Amendment rights of auto dealers to free speech.
- (B) It is constitutional if it does not prohibit the dissemination of truthful information about price and the availability of products, and is narrowly tailored to serve a substantial government interest.
- (C) It is constitutional, because it is within the police power of the state and no federal constitutional rights are infringed.
- (D) It is unconstitutional, because it infringes on the rights of the auto dealers to enter into contracts for advertising.

Question 11

To combat fraud and misuse of driver's licenses, a state's department of motor vehicles enacted new regulations for the issuance of driver's licenses. One of the regulations, which were authorized by state law, required for the first time that driver's licenses display a photograph of the person whose name is on the license. The regulations did not provide for any exemptions from this requirement. Living entirely within the state was a religious sect whose followers devoutly believed that allowing oneself to be photographed was sinful. However, because much of the state was rural and sparsely populated, members of the sect needed to travel by automobile to obtain necessary services and to gather for worship. A member of the sect who was refused a driver's license because he would not allow himself to be photographed challenged the state regulation in federal court.

Is the court likely to uphold the application of the regulation to the religious group?

- (A) Yes, because exempting the church's members from the regulation would not have a secular purpose and would constitute improper state advancement of, and entanglement with, religion.
- (B) Yes, because enactment of the regulation was not motivated by a desire to interfere with religion.
- (C) No, unless the state shows that the regulation is necessary to promote a compelling governmental interest.
- (D) No, because the opposition to the regulation arises from a sincerely held religious belief.

Question 12

The mayor of a small city decided that he would like to start each city council meeting with a nonsectarian prayer. Several city council members and citizens objected to the proposal, claiming that it would violate the Establishment Clause of the First Amendment. The mayor argued that it would not constitute the establishment of a religion because he would invite clerics from all of the different religious sects to take turns giving the prayer at the meetings. When the council members still objected, the mayor asked the city attorney to research the constitutionality of his proposal.

How should the attorney advise the mayor?

- (A) The proposal is constitutional, because by varying the clerics who will give the prayer, it does not constitute an establishment of religion.
- (B) The proposal is constitutional, because there is a long history in this country of allowing prayer at legislative sessions.
- (C) The proposal is unconstitutional, because it has no secular purpose.
- (D) The proposal is unconstitutional, because its primary effect advances religion.

ANSWERS TO MULTIPLE CHOICE QUESTIONS

Answer to Question 1

- (C) The court should hear the case on the merits. A real, live controversy must exist at all stages of review, not merely when the complaint is filed. If a true controversy no longer exists, the court will dismiss the complaint as moot. A case becomes moot, for example, when a party can no longer be affected by the challenged statute. Here, even though the girl is no longer pregnant, she can get pregnant again, at which time she will be affected by the policy once again. Thus, the harm to the girl (being taken out of regular classes) is capable of repetition but evading review because by the time the case comes to trial, the girl may have given birth, miscarried, or had an abortion. (C) is therefore correct. (A) is incorrect because, as discussed, she may become pregnant again prior to graduation from high school. (B) is incorrect because, as discussed, the harm is capable of repetition. Specifically, if the girl gets pregnant again prior to graduation from high school, she will be required to attend the special classes again. (D) is incorrect because it is irrelevant. The fact that an important federal issue might be involved does not negate the “case or controversy” requirement.

Answer to Question 2

- (D) The owner has standing to sue because it can demonstrate a concrete stake in the outcome of the controversy and an impairment of its rights by the state statute. Federal courts will not consider a constitutional challenge to government action unless the person challenging the action has “standing” to raise the constitutional issue. Under the Supreme Court test, the person must have an injury in fact—“such a personal stake in the outcome of the controversy as to ensure the concrete adverseness which sharpens the presentation of issues.” Here, the store owner has taken substantial steps to open outlets in the state by contracting with landowners and construction firms in that state, but cannot begin to operate these outlets without violating the state statutes; obtaining the injunction against enforcement will eliminate the problem. The court will therefore hear the suit. (A) is incorrect even though the store owner has not yet been prosecuted for violating the statute. A person challenging the constitutionality of a statute does not need to violate it and await prosecution as the sole means of seeking relief. Where there exists a clear threat of prosecution if the person fails to comply with the statute (such as previous prosecutions of others), injury in fact is established. (B) is incorrect because threatened economic injury as well as threatened injury to civil liberties will create standing. (C) is incorrect. Although it is true that a federal question is involved, it is not enough that a federal court has jurisdiction over the subject matter of the question. Federal courts are authorized to hear cases and controversies, and the Supreme Court has interpreted this language to require the plaintiff to have standing—an injury in fact; a concrete stake in the outcome. The motion to dismiss here was made on standing grounds. Choice (D) reflects the standing challenge, while choice (C) does not. If the court accepts the state official’s claim that the store owner lacked standing to sue, it would dismiss the suit regardless of the federal issues involved.

Answer to Question 3

- (B) The statute is authorized by Congress’s spending power. Article I, Section 8 gives Congress the power to spend “to provide for the common defense and general welfare.” This power allows Congress to spend for any public purpose as long as it does not infringe on other specific constitutional restrictions (such as the Bill of Rights). The statute here is clearly for a public purpose and is not otherwise unconstitutional; it is therefore within Congress’s spending power. (A) is not as

good a choice as (B). The statute arguably does involve the commerce power because Congress has very broad power to regulate interstate commerce, including any kind of commerce or transportation within a state that has a substantial economic effect on interstate commerce. However, that power is generally invoked for federal legislation that directly regulates the state activity. Here, no government action is involved except for the grant of money, which more closely implicates the spending power. (C) is incorrect because the Necessary and Proper Clause is not by itself a basis of power; it merely gives Congress power to execute specifically granted powers. The grant of money falls within a specific enumerated power of Congress; the Necessary and Proper Clause is not the primary source of authority here. (D) is incorrect because the power to conduct foreign relations is vested in the President. Congress shares some of this power in such cases as approval of treaties, but the President's power to act for the United States in day-to-day foreign relations is paramount.

Answer to Question 4

(B) The federal court will rule for the state. The President is empowered by the Constitution to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Here, the President seeks to pardon a person who has been convicted of a violent crime in a state. Thus, the President's pardon power does not extend to this prisoner, and the state will not be compelled to release him. (A) is incorrect because, pursuant to the Supremacy Clause of the Constitution, the Constitution, laws, and treaties of the United States take precedence over state laws. Any state law that is inconsistent with federal law will be superseded by the federal law. Although a state official may be acting pursuant to his state's constitution, that constitution may be in conflict with the United States Constitution or with other federal law. In such an instance, the state official will be required to abide by proper directives of a federal official issued in furtherance of the enforcement and execution of federal law. (C) is incorrect. As noted above, the President does have the power to pardon those convicted of federal offenses. Thus, an attempted pardon of a federal offender does not violate the President's sworn duty to see that the laws of the United States are faithfully executed; i.e., the President is not "subverting" the law by issuing a pardon. It is in issuing a pardon for a crime that falls outside the scope of his pardon power that the President runs afoul of the Constitution. (D) is incorrect because the President's treaty power does not authorize his actions here. Although the Constitution gives the President the power to make treaties, he is not given the authority to use unconstitutional means to facilitate the making of a treaty. The President is acting here with the goal of advancing negotiations on a critical treaty. However, in doing so, the President may not disregard the Constitution by issuing a pardon that is outside the limits of his constitutionally derived pardon power.

Answer to Question 5

(A) The court should rule for the state because the purpose of the federal law is different from the purpose of the state law. The question here is whether the state law is preempted by the federal law. Implied preemption will be found where it was the intent of the federal government to occupy the entire field with its regulation, the state law directly conflicts with the federal law, or the state provisions prevent achievement of federal objectives. Because the federal law here is aimed only at occupational safety, no conclusion can be drawn that the federal government intended to occupy the entire field of regulation of pesticides, and the state law does not interfere with the federal law. For regulations involving health, safety, and welfare, the Court will presume that state police powers are not preempted unless that was the clear and manifest purpose of Congress when it enacted the federal law. Hence, the state law is not preempted, and (A) is correct and (D) is incorrect. (B) is incorrect because the Tenth Amendment reserves to the states only those powers not granted to the federal government by the Constitution, and the federal government has the power

to regulate pesticides under the Commerce Clause, which gives Congress very broad power to regulate any activity that, either in itself or in combination with other activities, has a substantial economic effect on, or effect on movement in, interstate commerce. The production and distribution of food products containing pesticides would be such an activity. (C) is incorrect because there need be no specific authorization for a state to regulate, as long as federal preemption does not apply. While congressional power over interstate commerce is very broad, it is not exclusive—states may regulate local aspects of interstate commerce under certain conditions.

Answer to Question 6

- (C) The court will likely find that the one-year residency requirement is unconstitutional because it burdens the right to travel. An individual has a fundamental right to travel from state to state, and a state law that is designed to deter persons from moving into the state is likely to violate the Equal Protection Clause (as well as the Fourteenth Amendment Privileges or Immunities Clause). When a state uses a durational residency requirement (a waiting period) for dispensing benefits, that requirement normally should be subject to the strict scrutiny test, and usually will be found not to have satisfied the test. One such requirement that has been invalidated on this basis is a one-year waiting period for state-subsidized medical care, such as the one here. [*See Memorial Hospital v. Maricopa County* (1974)] (A) is incorrect. The Supreme Court has specifically held that a state's interest in fiscal integrity is not sufficient to justify a one-year waiting period for welfare or health benefits. (B) contains a true statement—the states have no constitutional duty to provide health care benefits for those below the poverty line. However, once a state chooses to provide such benefits, it may not do so in a manner that violates the Constitution, and, as explained above, the restriction here violates the right to travel. (D) is incorrect because the privileges and immunities protection of Article IV prohibits discrimination by a state against nonresidents when fundamental national rights are involved. Here, the restriction differentiates between residents. While that could violate the Fourteenth Amendment Privileges or Immunities Clause, Article IV is not implicated.

Answer to Question 7

- (B) The state has the burden of proving that the program is substantially related to an important government interest. When analyzing government action based on gender, the courts will apply an intermediate standard of review and strike the legislation unless it is substantially related to an important government interest. In these cases, the government bears the burden of proving this substantial relationship. Here, because the formula used to calculate termination of pension benefits depended on whether the surviving spouse was male or female, the legislation discriminates on the basis of gender. Thus, an intermediate scrutiny standard will be applied. (A) is wrong because the court will not apply the strict scrutiny standard in this case. A suspect class is not involved, and the program does not improperly burden a fundamental right. While marriage is a fundamental right, strict scrutiny applies only to legislation that directly and substantially interferes with the right to marry. Laws terminating certain benefits upon marriage do not directly and significantly interfere with that right, and thus are not subject to strict scrutiny. (C) is wrong because the government, rather than the challenger, bears the burden of proof in gender discrimination cases. (D) is wrong for the same reason and also because it applies the incorrect standard; an intermediate scrutiny standard is applied rather than the minimal scrutiny of the rational basis test.

Answer to Question 8

- (A) The group's challenge is not likely to prevail. To be valid, government regulations of speech and assembly in public forums (such as streets and sidewalks) must (i) be content neutral, (ii)

be narrowly tailored to serve an important government interest, and (iii) leave open alternative channels of communication. A regulation such as the one here satisfies this test. The statute is content neutral because it regulates the location and manner of picketing without regard to its content. It is narrowly tailored to serve the important interest of protecting the privacy of homeowners when they are in their homes. It leaves open alternative channels of communication because it does not ban marching through residential areas or other means of protesting. Hence, the group's challenge is not likely to prevail. [See *Frisby v. Schultz* (1988)] (B) is incorrect. The Court has upheld limited "buffer-zone" restrictions on protestors at clinics providing abortions, deeming the restrictions a reasonable time, place, and manner regulation that served the important interest of preserving access to health care facilities. [Hill v. Colorado (2000)] However, unlike an ordinance regulating picketing directly at the clinics, an ordinance regulating residential picketing is not a narrowly tailored means of achieving that interest. (C) is incorrect because time, place, and manner regulations of speech need only be narrowly tailored to serve an *important* government interest as long as they are content neutral; the government does not need to show a *compelling* interest. (D) is incorrect because, as discussed above, the ordinance here is a permissible regulation of speech in a public forum.

Answer to Question 9

- (A) The court is likely to rule that the library board's meeting room policy is valid because it is reasonably related to a legitimate government interest. The library board, as a government body, may reasonably regulate speech-related conduct in public forums and designated public forums through reasonable time, place, and manner regulations. Some public property, such as streets, sidewalks, and parks, is so historically associated with the exercise of First Amendment rights that it is categorized as a traditional public forum. Other public property may become a designated public forum when the government, by policy or practice, opens it for expressive activity. However, most locations other than streets, sidewalks, and parks are not public forums and may be reserved by the government for their intended activity. When a limited or nonpublic forum is involved, government regulations designed to reserve the forum for its intended use will be upheld if they are (i) viewpoint neutral, and (ii) reasonably related to the intended purpose of the nonpublic forum (which must be a legitimate government purpose). Here, a library meeting room is not a traditional public forum, and the library board has not designated it as a public forum because its use is limited to library groups for library purposes. Thus, the court would likely characterize it as a limited public forum or nonpublic forum. The restriction is viewpoint neutral (i.e., it is not an attempt to limit the presentation of issues to only one viewpoint), and it is rationally related to the legitimate objective of alleviating the staff's scheduling burden. Hence, the library's policy would probably be upheld by the court. (B) is incorrect because it states part of the standard for restricting speech in public forums. Speech in public forums may be regulated by reasonable time, place, and manner regulations if the regulation (i) is content neutral (i.e., subject matter neutral and viewpoint neutral), (ii) is narrowly tailored to serve an important government interest, and (iii) leaves open alternative channels of communication. Here, as discussed above, the library meeting room probably would not be characterized as a public forum. (C) is incorrect because the library, as a limited public forum or nonpublic forum, is permitted to restrict speech based on content (i.e., subject matter) as long as the restriction is not based on the viewpoint of the speech. (D) is incorrect because the requirement of alternative channels of communication is a component of the public forum standard. Here, because the library meeting room is not a public forum, the policy is valid regardless of the availability of alternative meeting facilities.

Answer to Question 10

- (B) Of all the alternatives, statement (B) most accurately reflects the balance between the scope of First Amendment protection for the dissemination of truthful commercial speech and the state's ability to enact narrowly drawn regulations to advance substantial governmental interests. Although commercial speech is protected by the First Amendment, it is subject to significant regulation. A state may outlaw commercial speech that proposes an unlawful transaction or that is misleading or fraudulent. If commercial speech concerns a lawful activity and is not misleading or fraudulent, the government regulation, to be valid, must directly advance a substantial governmental interest and must be no more extensive than necessary to serve that interest. The regulation must be narrowly drawn and there must be a reasonable fit between the legislation's end and the means chosen. If, as (B) states, the legislation here at issue does not prohibit the dissemination of truthful information about prices and product availability, and is otherwise narrowly tailored to serve a substantial state interest, the legislation probably will constitute a valid regulation of commercial speech. (A) is incorrect because it would overly limit the ability of the state to reasonably regulate commercial speech. This legislation does not necessarily violate auto dealers' rights of free speech. If it does not prohibit the dissemination of truthful information and is otherwise reasonable, the legislation is sufficiently narrow to pass constitutional muster. (C) incorrectly implies that the state's police power is broader than it actually is. This legislation does in fact potentially infringe the federal constitutional right of free speech (which extends to commercial speech). If the legislation does not satisfy the test for reasonable regulations of commercial speech, the police power of the state would not save it from being found invalid. (D) is a misstatement of the law. The Constitution prohibits any state from passing any law impairing the obligation of contract. This Contract Clause limits the ability of states to enact laws that *retroactively* impair contract rights. (D) refers to infringement of the right to enter into a contract rather than impairment of a currently existing contract. This is outside the purview of the Contract Clause.

Answer to Question 11

- (B) The law will be upheld because it is a neutral law that is applicable to all drivers in the state. The Free Exercise Clause does not require exemptions from government regulations for a person whose religious beliefs prevent him from conforming his behavior to the requirements of the law. Unless the law was motivated by a desire to interfere with religion, it can be applied to regulate the conduct of one whose religious beliefs conflict with the law. Here, the sect member must allow his photograph to be taken if he wants to obtain a driver's license; the state is entitled to enforce this regulation because it is a neutral law of general applicability. (A) is incorrect because it may be possible for a state to make accommodations for groups objecting to a particular state regulation without violating the Establishment Clause, even though it is not *required* to do so under the Free Exercise Clause. The state here could permit an exemption from the photograph requirement for persons who present legitimate reasons for it; such an accommodation would not be an impermissible advancement of religion. (C) is incorrect because the "compelling interest" test is not currently used to judge the validity of neutral laws that happen to interfere with a person's religious practices. (D) is incorrect because the sincerity of the sect member's beliefs does not provide a basis for avoiding application of the law to them.

Answer to Question 12

- (B) The attorney should advise the mayor that the proposal is constitutional. The First Amendment prohibits government establishment of religion, and this prohibition has been applied to the states through the Fourteenth Amendment Due Process Clause. Generally, under the Establishment

Clause, if government action involving religion does not include a sect preference, it is tested under the *Lemon* test: It will be valid only if (i) it has a secular purpose; (ii) its primary effect neither advances nor inhibits religion; and (iii) it does not produce excessive government entanglement with religion. While it may seem that starting a legislative meeting with a prayer would not pass the *Lemon* test, the Supreme Court has held that, because of the long history of legislative prayer in America, such prayers do not constitute an establishment of religion, and it is permissible for a legislative body, including a municipality, to invite members of the clergy to begin sessions with a prayer. [Town of Greece v. Galloway (2014)] (A) is incorrect because it is incomplete; the mere fact that government action does not have a sect preference does not alone make it constitutional under the Establishment Clause. (C) and (D) are incorrect because they run counter to the Supreme Court decision discussed above.

APPROACH TO EXAMS

CONSTITUTIONAL LAW

IN A NUTSHELL: The study of Constitutional Law is the study of the history of how the Supreme Court has interpreted the Constitution. For purposes of law school, the Constitution can be divided into a few main parts: the main body, the Bill of Rights, and the Civil Rights Amendments. Among other things, the main body of the Constitution establishes a federal government with limited power (i.e., only the power provided for in the Constitution) and divides that power among three branches—the legislature (Article I), the executive (Article II), and the judiciary (Article III). Basically, the legislature makes laws, the executive enforces laws, and the judiciary applies laws and determines their constitutionality. This division of power provides the basis for the separation of powers doctrine; i.e., one branch may not usurp the power of another branch—at least not without the other branch’s permission (i.e., a delegation of power). Fearing a strong central government, the drafters of the Constitution included the Bill of Rights, a statement of the rights of individuals against the federal government. About 80 years later, after the Civil War, our country adopted the Civil Rights Amendments (i.e., the 13th, 14th, and 15th Amendments), which primarily guarantee individual rights against states.

I. IS THERE A CASE OR CONTROVERSY?

Federal courts are courts of limited jurisdiction/doctrine of strict necessity

A. No Advisory Opinions

1. Ripeness—harm must actually be threatened
2. Mootness—must be real, live controversy at all stages; if issue has been resolved, court will not hear
 - a. Exception—situation capable of repetition yet evading review
3. Standing—plaintiff must have a concrete stake in the outcome at all stages of litigation
 - a. Injury in fact—specific injury, not theoretical
 - 1) Taxpayers—too remote/abstract
 - a) *Exception:* Taxing and spending measure violating Establishment Clause
 - b. Remediable by court decision
4. Adequate and independent state grounds—court will not hear appeal from state court if adequate and independent nonfederal grounds support state decision

B. Abstention

If action already going on in state court on unsettled question of state law, federal court will abstain so state can settle issue

C. Political Question

Court will not decide issue that is not suitable for judicial branch

D. 11th Amendment and Sovereign Immunity

Generally cannot sue state in federal court for damages (without state’s permission)

1. *Exceptions:* Actions against state officers and removal of immunity under 14th Amendment

II. IS LAW WITHIN CONGRESS’S POWER?

A. Necessary and Proper Clause

Congress has the power to make laws necessary and proper for executing any power granted to any branch of federal government

B. Taxing Power

If revenue raising, generally valid

C. Spending Power

Spending may be for any public purpose; Congress may regulate beyond enumerated powers by attaching strings to a grant as long as the strings are: (i) clearly stated, (ii) related to the purpose of the grant, and (iii) not unduly coercive

D. Commerce Power

Congress may regulate:

1. Channels of interstate commerce—roads, rails, waterways, phones, etc.
2. Instrumentalities of interstate commerce—trucks, trains, planes, etc.
3. Activities having a substantial economic effect on interstate commerce
 - a. Generally must be economic or commercial activity

E. Property Power

Includes power of eminent domain, to dispose of federal property, and to make rules/laws regulating federal lands and Indian reservations

F. Miscellaneous Other Powers

War (including power to declare war and fund war), investigatory, bankruptcy, postal, citizenship, admiralty, coin money, fix weights and measures, and grant patents and copyrights

G. Delegation

1. Congress may delegate its power to other branches
 - a. Intelligible standard “requirement” for delegation (almost anything suffices)

H. Speech or Debate Clause

Immunity for speech made within Congress

I. Legislative Veto

Congress cannot make a law reserving to Congress the right to overturn discretionary executive action without passing a new law and presenting it to the President for approval

III. IS PRESIDENT ACTING WITHIN EXECUTIVE POWER?

A. Domestic Powers of President

1. Appointment and removal of officers and Supreme Court Justices with advice and consent of Senate
2. Pardon—federal crimes only
3. Veto power—10 days to veto; if President does not do so and:
 - a. Congress in session = approval
 - b. Congress out = pocket veto
 - c. No line item veto
4. Power as chief executive/executive orders—*Youngstown* guidance from Justice Jackson:
 - a. If express or implied authority from Congress—action likely valid
 - b. If Congress silent—action valid if it does not impinge on powers of another branch
 - c. If against Congress’s will—action likely invalid

B. Power Over External Affairs

1. President may commit troops but power to “declare war” belongs to Congress
2. Treaty power—signs treaties with approval of two-thirds of Senate
 - a. Treaty is on par with other federal laws (“supreme law of land”)
 - b. Treaties cannot conflict with Constitution
3. Executive agreements—enforceable if not in conflict with federal law, treaties, or Constitution

C. Executive Privilege/Immunity

1. Privilege extends to documents and conversations but must yield if court decides information needed in criminal case
2. Immunity
 - a. President immune from suits for civil damages for actions taken as President
 - b. Immunity extends to aides exercising discretionary authority of President

D. Impeachment

President, vice president, and all U.S. civil officers may be impeached for treason, bribery, high crimes, and misdemeanors by majority vote of the House; are tried by Senate; and conviction requires two-thirds vote of Senate

IV. FEDERAL VS. STATE POWER

A. Supremacy Clause

1. Most governmental power shared between state and federal government
2. Federal law supreme, and conflicting state law is invalid
 - a. Actual conflict—state law invalid
 - b. Interference with federal objectives—state law invalid
 - c. Preemption—no room for state legislation; Congress controls entire field
 - 1) Express preemption—narrowly construed
 - 2) Field (implied) preemption—if federal law comprehensive or a federal agency oversees area, preemption may be found
 - 3) Presumption that historic state police powers not intended to be preempted unless that is the clear and manifest purpose of Congress
3. Dormant Commerce Clause (negative implications of Commerce Clause)
 - a. Congress may delegate commerce power to states
 - b. Absent delegation, states may not intentionally discriminate against interstate commerce
 - 1) *Exception*: Necessary to achieve an important state interest (i.e., no reasonable alternatives available)
 - 2) *Exception*: State acting as a market participant
 - a) Might still violate the Privileges & Immunities Clause
 - b) No downstream restrictions—state cannot control what happens to goods after state sells them
 - 3) Traditional government function
 - c. Nondiscriminatory state law—may not be unduly burdensome (burden on interstate commerce cannot outweigh promotion of the legitimate state interest sought to be served)
 - 1) Nondiscriminatory state tax affecting interstate commerce—must be:
 - a) Substantial nexus between object of tax and taxing state

- b) Fair apportionment according to rational formula
 - c) Fair relationship to services or benefits provided by state
- 4. 21st Amendment—liquor regulation—states can regulate sale of liquor, but cannot favor local businesses

B. Suits

- 1. The United States may sue states without their consent
- 2. States cannot sue the United States without its consent
- 3. State can sue state in federal court; Supreme Court has exclusive jurisdiction

C. Federal Taxation/Regulation of States—10th Amendment Concerns

- 1. Tax/regulation applying to both private and state entities—valid
- 2. Tax/regulation of states as states—generally invalid
 - a. Commandeering state officials—cannot require states to regulate their own citizens
 - b. *Exceptions*: Strings on federal grants of money and civil rights

D. State Taxation/Regulation of Federal Government

- 1. State cannot directly tax federal government
- 2. State cannot directly regulate federal government
- 3. State may tax federal employee and contractor salaries (indirect tax)

V. INDIVIDUAL RIGHTS

A. State Action Limitation

- 1. The Constitution limits actions of government, so there must be state (i.e., government) action in order to find action unconstitutional
- 2. Private action can sometimes be attributed to government:
 - a. Traditional and exclusive government function (e.g., running a town or election)
 - b. Significant state involvement
 - 1) Official encouragement or use of judicial machinery
 - 2) Entwinement of state and private actors
 - 3) But mere regulation, provision of public services, or licensing *not* enough

B. Article IV Privileges and Immunities

- 1. Prohibits states from discriminating against citizens of other states with respect to “fundamental” rights (*Note*: Corporations and aliens are not citizens)
- 2. Mainly used to prevent substantially unequal treatment regarding commercial activities
- 3. Substantial justification exception if nonresidents are part of problem and there are no less restrictive means to solve problem

C. 14th Amendment Privileges or Immunities Clause

- 1. Prohibits states from denying their own citizens rights of national citizenship (corporations are not citizens)

D. Prohibitions Against Retroactive Legislation

- 1. Contracts Clause—applies only to states
 - a. Prevents only substantial impairment of a party’s rights under an existing contract
 - b. *Exception*—law valid if:

- 1) Serves an important interest; and
 - 2) Is narrowly tailored to promote that interest
 - c. Public contracts subject to stricter scrutiny
 - 1) State cannot be obligated to refrain from exercising its police power
 - 2) Law should not broadly repudiate government contractual obligations
2. Ex post facto laws—prohibited
 - a. Makes criminal an act that was innocent when done
 - b. Prescribes greater punishment than what was prescribed when act was committed
 - c. Reduces evidence required to convict
 - d. Specifically applies only to legislation, but due process prohibits similar changes by the courts
3. Bills of attainder—prohibits laws inflicting punishment without a trial on people by name or past conduct

E. Procedural Due Process

1. Two Due Process Clauses: 5th Amendment (federal government); 14th Amendment (states)
2. Requires fair process/procedure when government acts intentionally to deprive a person individually of life, liberty, or property
 - a. Both actual bias and serious risk of actual bias unconstitutional
 - b. Liberty includes losses of significant freedom of action
 - c. Property includes legitimate claims/entitlements to government benefits
 - 1) Public employment is a property right if claim to entitlement through contract, policy, law, etc.
3. Balancing test for determining fair process in terms of timing (pre- vs. post-deprivation) and scope of hearing. The Court weighs:
 - a. Importance of individual right
 - b. Value of specific procedural safeguard involved
 - c. Governmental interest in fiscal and administrative efficiency

F. Takings

1. If government takes land for public purpose, it must provide just compensation
2. Public purposes liberally construed
3. Actual or physical appropriation almost always a taking, even if property taken is small
 - a. *Exception*: Emergencies
4. Use restrictions (action for inverse condemnation)
 - a. Denial of all economic value—taking
 - b. Decrease in economic value—generally not a taking if economically viable use remains
 - c. Dedications—cannot condition building permits on forced dedication unless:
 - 1) Government can show legitimate interest, and
 - 2) Adverse impact of development roughly proportional to owner's loss
5. Just compensation—reasonable (fair market) value of property taken at time of taking

G. Substantive Due Process

1. Two Due Process Clauses: 5th Amendment (federal); 14th Amendment (states)
2. Prohibition against unreasonable laws
3. Reasonableness test depends on interest involved
 - a. Fundamental right (voting, interstate travel, privacy, 1st Amendment rights)—strict scrutiny

- 1) Government must prove action is necessary to achieve a compelling government interest
- b. All other interests—rational basis
 - 1) Challenger must prove action not rationally related to any legitimate government interest
4. Requires laws to give fair notice of conduct that is forbidden or required

H. Equal Protection

1. 14th Amendment prohibition against unreasonable discrimination by states
2. Test for reasonableness depends on criteria used to classify (suspect or quasi-suspect class) and nature of right (fundamental right)
 - a. Discriminatory intent by government:
 - 1) Law discriminatory on its face
 - 2) Discriminatory in application
 - 3) Discriminatory motive
 - 4) If facially neutral, no discriminatory application, and no discriminatory motive, then rational basis test applies
 - b. Suspect classification (race and national origin) or fundamental right—strict scrutiny
 - 1) Government must prove action is necessary to achieve a compelling government interest
 - 2) Affirmative action (favoring minorities) invalid unless:
 - a) Seeking to remedy past discrimination within jurisdiction
 - 3) Race can be a factor considered in admission of students in institutions of higher education to achieve a diverse student body
 - a) Cannot be a special/weighty factor
 - 4) Alienage can be considered for state employment positions involving the self-government process—including police officers and primary and secondary school-teachers
 - c. Quasi-suspect classification (sex and legitimacy)—intermediate scrutiny
 - 1) Government must show discrimination is substantially related to an important government interest
 - 2) Sex discrimination—exceedingly persuasive justification required
 - a) Interest must be genuine and not hypothesized
 - d. All other classifications—rational basis standard

I. Abortion

1. Competing interests—mother’s right to privacy vs. fetus’s interest in becoming a child
2. Pre-viability—no undue burdens on right to obtain an abortion
3. Post-viability—may prohibit abortion except when woman’s health threatened
4. No right to government funding of abortion services

J. Other Privacy Rights—marriage, use of contraceptives, obscene reading material in the home (except child pornography), living with extended family, to educate and raise children

1. Limitations generally subject to strict scrutiny or at least intermediate scrutiny but language in cases not consistent
2. Intimate private, noncommercial sexual contact between fully consenting adults—not a right, but court found no legitimate government interest in regulating

K. Voting Rights

1. Short residency requirement (e.g., 30 days)—valid
2. One person, one vote
 - a. Congressional elections—almost exact mathematical equality required (a few percentage points may be fatal)
 - b. State and local elections—variance not unjustifiably large (16% variance upheld)
3. Fees—cannot preclude indigent candidates

L. Right to Travel Interstate

1. Durational residency requirements for dispensing benefits ordinarily subject to strict scrutiny (30-day period probably okay; one year invalid)
2. Distinctions between old and new residents—invalid

M. Freedom of Speech

1. 1st Amendment limits government regulation of *private* speech
2. 1st Amendment inapplicable to government speech
 - a. Permanent monuments on government property a form of government speech
 - b. Government funding of private speech—generally must be viewpoint neutral
 - 1) *Exception*: Government funding of the arts
3. Regulation of speech based on content—generally prohibited
 - a. *Exceptions*: Unprotected categories (*see 7., infra*)
 - b. Speech of government employees
 - 1) Official duties—government may punish public employee for unwanted speech made as part of employee’s official duties
 - 2) Private speech of government employee
 - a) Matter of public concern—balance employee’s right as a citizen to comment against government’s interest as employer in efficient performance of public service
 - b) Not a matter of public concern—employer has broad discretion to punish employee’s disruptive speech
4. Overbreadth and vagueness
 - a. Prohibition against substantially more speech than necessary voidable as to affected person for overbreadth
 - b. Prohibition including a substantial amount of protected speech compared to its legitimate sweep—void as to everyone
 - c. Regulation failing to give reasonable notice of what is prohibited has chilling effect on speech and violates due process
 - d. Official cannot have unfettered discretion over speech issues
5. Scope of speech—includes freedom to refrain from speaking
 - a. Mandatory financial support of government speech—no 1st Amendment concerns
 - b. Mandatory financial support of private speech—protected
 - c. Speech includes symbolic conduct
6. Time, place, and manner regulation
 - a. Public forums (e.g., sidewalks and parks) and designated public forums (e.g., school-rooms open for use after school for social events)—regulation valid if:
 - 1) Content neutral
 - 2) Narrowly tailored to serve an important government interest
 - 3) Leaves open alternative channels of communication

- b. Limited public forums (i.e., public property open for expressive activities only on a certain topic) and nonpublic forums (i.e., public property not open for expressive activities)—regulation valid if:
 - 1) Viewpoint neutral
 - 2) Reasonably related to a legitimate government purpose
- 7. Unprotected speech—some speech is not protected by 1st Amendment:
 - a. Clear and present danger of imminent lawless action
 - b. Fighting words (including true threats)
 - 1) Statutes often overbroad or vague
 - c. Obscenity
 - 1) Test:
 - a) Appeals to the prurient interest in sex;
 - b) Portrays sex in a patently offensive way; and
 - c) Does not have serious literary, political, or scientific value judged from a national standard
 - 2) Standard for minors may be different
 - 3) Can prohibit pictures of minors engaging in sex that would not be obscene if engaged in by adults
 - 4) Zoning ordinances may limit the location of adult entertainment establishments if designed to reduce the secondary effects of such businesses (e.g., rise in crime, reduction of property values)
 - d. Defamation
 - 1) Public official or figure—plaintiff must prove actual malice
 - a) Actual malice = knowledge of falsity or reckless disregard as to truth
 - 2) Private individual suing on matter of public concern—must prove at least negligence
 - 3) Privacy torts—media defendant cannot be sued for publishing a true fact about a public record lawfully obtained
- 8. Commercial speech
 - a. If speech about unlawful activity or untrue or misleading speech—unprotected
 - b. Speech regarding lawful activity and not false or misleading—regulation valid if it:
 - 1) Serves a substantial government interest
 - 2) Directly advances that interest
 - 3) Is narrowly tailored to serve that interest
 - c. Complete bans usually invalid
- 9. Prior restraints
 - a. Invalid unless justified by a special societal harm or pursuant to contract
 - b. Procedural safeguards
 - 1) Standards must be narrowly drawn, reasonable, and definite
 - 2) Injunction must be sought promptly
 - 3) There must be a prompt and final determination of validity of restraint
 - c. Broadcast media may be more closely regulated than press; cable TV between the two; Internet regulation subject to strict scrutiny

N. Freedom of Association and Belief

- 1. Electoral process—sliding scale to judge restrictions on electoral process
 - a. Severe restriction on 1st Amendment activity must be narrowly tailored to achieve a compelling purpose

- b. Reasonable and nondiscriminatory regulations generally valid
- 2. Government employees may be sanctioned for speech undertaken as part of official duties; balancing test determines whether other speech may be sanctioned—right to comment on matter of public concern vs. government interest in efficient and orderly workplace
- 3. Loyalty oaths for federal employees and public officials permissible if not overbroad
 - a. Oath to support the Constitution and to oppose illegal overthrow of government okay
- 4. Disclosure of associations for government benefits/employment
 - a. Permissible if relevant to position
- 5. School sponsorship of extracurricular clubs
 - a. Can be content based if viewpoint neutral and reasonably related to a legitimate government interest

O. Freedom of Religion

- 1. Free Exercise Clause
 - a. No punishment of beliefs—total freedom to believe as desired
 - b. Conduct cannot be punished solely because religious
 - c. General conduct regulation that incidentally burdens religious practice—generally valid
 - d. Religious exemptions for religious belief generally not required except:
 - 1) Amish from mandatory secondary education
 - 2) Conscientious objectors who refuse munitions work from unemployment compensation laws requiring applicants to accept any job
- 2. Establishment Clause—government action/law respecting the establishment of religion valid if action/law:
 - a. Has a secular purpose
 - b. Has a primary effect that neither advances nor prohibits religion
 - c. Does not cause excessive entanglement between government and religion
 - 1) Prayer in public schools generally prohibited
 - 2) Invocation prayer at legislative sessions and town hall meetings generally valid (recognizes long history of prayer in America and adults not of tender impressionable years)
 - 3) Religious symbols in Christmastime displays valid if accompanied by nonreligious symbols (recognizes historic roots of American Christmas holiday)
 - 4) Displays of 10 Commandments on public property invalid if shown to have a predominantly religious purpose

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 60 minutes. You should spend 15 to 20 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. *If* you organize your thoughts well, 40 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the “CIRAC” method:

- C — State your *conclusion* first. (In other words, you must think through your answer *before* you start writing.)
- I — State the *issue* involved.
- R — Give the *rule(s)* of law involved.
- A — *Apply* the rule(s) of law to the facts.
- C — Finally, restate your *conclusion*.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does *not* have to match the model one, but it should cover most of the issues presented and the law discussed and should *apply the law to the facts* of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

Sierra Toxics, Inc. (“Sierra”), is a privately owned company engaged in the business of disposing of toxic waste generated by chemical and pharmaceutical plants. Sierra operates pursuant to a license issued by the Commissioner of Ecological Preservation of the state of Alpha. This license authorizes Sierra to contract with such plants to provide the following services: (i) collection of toxic waste at the plant site; and (ii) transportation of that waste to Sierra’s disposal station, which is located in Alpha, three miles from the border with the state of Beta.

Pursuant to the authority granted by its license, for the past 10 years Sierra has contracted to provide services to plants in Alpha, and, a few years ago, expanded its business to serve plants just across the border in Beta. The Beta plants that contract with Sierra dispose of approximately one-half their toxic waste output through that company and the remainder of their waste through disposal companies located in Beta.

Shortly after Sierra extended its services to the Beta plants, the residents of the town in which Sierra’s disposal station is situated became alarmed at the amount of toxic waste stored there. These residents were concerned about the proximity of such toxic waste, both to their homes and to the reservoir located in their town which supplies water to households in the immediate surrounding area.

The residents petitioned the Commissioner of Ecological Preservation to close Sierra’s disposal station. Sierra objected. The Commissioner held an open hearing on the matter at which numerous witnesses testified. After that hearing, the Commissioner resolved the dispute by issuing an order that, effective immediately, use of Sierra’s disposal station would be limited to toxic waste removed from chemical and pharmaceutical plants in Alpha only. The Beta plants were barred from disposing of their toxic waste through Sierra.

Both Sierra and the state of Beta have filed suit against the Alpha Commissioner of Ecological Preservation, seeking to rescind that order. The two lawsuits have been consolidated for trial before the judge for whom you serve as law clerk. The judge has asked you to prepare a memorandum identifying the claims raised and the defenses asserted, and analyzing the legal bases for all such claims and defenses.

Prepare the memorandum.

EXAM QUESTION NO. 2

State University has had a nationally prominent football program for many years. A recent investigation by the American Athletic Association (“AAA”), consisting of public and private educational institutions nationwide, including State University, uncovered serious violations of the rules and regulations of the Association. These included recruiting infractions which implicated the head football coach. After a hearing conducted by the Association in which State University participated and in which Coach was a witness, the Association placed State University on probation for two years. It ordered that further sanctions will be imposed unless Coach is suspended for the probationary period. The president of State University has notified Coach of his intent to impose the required suspension.

As part of his fight against the suspension, Coach granted an interview to the sports editor of the student newspaper in which he disputed the Association’s charges. The president has directed the paper not to publish the resulting article, and the editorial staff has complied.

Frustrated by his inability to tell his side of the story and threatened by loss of his job, Coach has retained your law firm to institute appropriate action.

Prepare a legal memorandum setting forth Coach’s causes of action, the legal basis for each, and the defenses to be anticipated.

EXAM QUESTION NO. 3

A bill has been introduced in the legislature of the state of Uphoria which would limit appointment of members of the state police force to male citizens of the United States who are over the age of 20 years.

Senator Strate is chairman of the committee to which this bill has been referred, and he requires a carefully written summary analyzing the legal principles implicated by this bill. He retains you to prepare this summary in clear and concise language so that it may be used by members of his committee in their consideration of the merits of the bill.

Comply with the senator's request.

EXAM QUESTION NO. 4

Irma LaTouche and Lester DeJacques were employed as dancers at a Fun City cocktail lounge. Both dancers received a weekly salary plus commissions on drinks purchased for them by customers between performances. Police officers observed Irma and Lester socializing with lounge patrons and brought charges against them under a local ordinance which provided:

Entertainers in business premises where alcoholic beverages are sold are prohibited from mingling with customers.

The stated purpose of the ordinance was to prevent disorderly conduct in premises where liquor is sold, to encourage temperance, and to discourage opportunities for the solicitation of prostitution or engaging in any other immoral activity.

At the trial before the local municipal court, the dancers testified that the commissions were earned for socializing with the clientele, which involved conversation and casual companionship with men and women who patronized the club. They both admitted that the main purpose of this activity was to get the customers to buy more drinks. It was stipulated that there had been no disorderly conduct in the lounge and that neither defendant had solicited any act of prostitution or engaged in any other immoral activity. The court found both dancers guilty as charged and imposed a fine as provided in the ordinance.

Irma and Lester have now consulted you. They desire to appeal their convictions. Prepare a brief in support of Irma and Lester as petitioners.

ANSWERS TO ESSAY EXAM QUESTIONS**ANSWER TO EXAM QUESTION NO. 1**

To: Judge
From: Law Clerk
Re: Sierra Toxics

Commerce Clause: The Commissioner of Ecological Preservation's ("CEP's") order violates the Commerce Clause. At issue is whether a state may prohibit hazardous waste disposal facilities within the state from accepting hazardous wastes from outside the state.

The Commerce Clause gives Congress plenary power to regulate commerce among the states. This power is not exclusive; the states may also regulate commerce. However, state regulation that discriminates against interstate commerce usually will be stricken as violating the Commerce Clause unless the regulation is necessary to achieve an important state interest.

Here, the CEP's order clearly discriminates against interstate commerce since it prohibits disposal of out-of-state wastes but allows disposal of wastes generated within the state. The Commission would no doubt argue that the state's interest in the safety of residents around Sierra's disposal facility necessitates the limitation, but this argument will fail. A nondiscriminatory regulation (e.g., limiting the amount of hazardous waste that may be disposed of at Sierra's plant, regardless of where the hazardous waste was generated) could provide the same protection as the prohibition here. Thus, the regulation discriminates against interstate commerce without valid justification and so violates the Commerce Clause.

Contracts Clause: The order of the CEP might also violate the Contracts Clause. At issue is whether a state order that prohibits a waste disposal facility from accepting wastes from certain customers violates the Contracts Clause.

The Contracts Clause generally prohibits states from acting to retroactively and substantially impair existing contracts rights. However, the bar is not absolute; even if a state act substantially impairs existing contract rights it still will be upheld if the impairment serves an important public interest and the law is reasonable and narrowly tailored to promote that interest.

Here, it is not clear whether the CEP's order substantially impairs any existing contract rights. Although we are told that the order prohibits Sierra from accepting hazardous wastes from outside the state, and that Sierra has contracted with out-of-state customers in the past, we are not told whether Sierra has any continuing contracts that would be impaired by the CEP's order. Assuming such contracts exist, the order would violate the Contracts Clause. Since the CEP is a state agency, there is action by the state. And while safeguarding the community from toxic wastes is clearly an important interest, as discussed above the order here is not a reasonable way to deal with the problem because it does nothing to prevent wastes generated within the state from jeopardizing the community's safety. Accordingly, the order violates the Contracts Clause.

Privileges and Immunities Clause of Article IV: The CEP order might violate the Privileges and Immunities Clause of Article IV, at least with respect to the citizens of state Beta. At issue is whether a state may prohibit nonresidents from contracting for commercial services in the state.

The Privileges and Immunities Clause of Article IV prohibits states from discriminating against nonresidents in matters concerning fundamental rights, which include important commercial activities and civil liberties. However, even if a state discriminates against nonresidents, the discrimination can be upheld if the state has a substantial justification for the different treatment and there are no less restrictive means to accomplish the state's goal. In any case, the Privileges and Immunities Clause is available only to natural persons; corporations cannot take advantage of its protections.

Here, we are not told whether any of Sierra's customers are natural persons; they might all be corporations. If Beta is allowed to represent the interests of natural persons who are being discriminated against by the CEP's order, the order probably violates the Privileges and Immunities Clause. Contracting for commercial waste disposal services probably is an important commercial activity, and the CEP's order discriminates against nonresidents by completely prohibiting them from contracting on an equal basis with residents of Alpha. And while there probably is substantial justification for the order (to protect the community from hazardous wastes), as discussed above, the order is not the least restrictive means of protecting that interest. Thus, the order could violate the Privileges and Immunities Clause of Article IV.

Procedural Due Process: Finally, it could be argued that Sierra was denied its right to procedural due process. At issue is whether Sierra had an adequate opportunity to present its case.

The Due Process Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that the government shall not take a person's life, liberty, or property without due process of law. Due process contemplates fair procedures, which requires at least an opportunity to present objections to the proposed action and a fair and neutral decisionmaker. The timing and scope of the hearing due depend on the circumstances of the deprivation. In most cases, the person being deprived of life, liberty, or property should receive notice of the government's proposed action and have an opportunity to respond before the deprivation.

Here, the CEP has limited Sierra's right to contract, a liberty interest. The facts state that a public hearing was held, but we are not told whether Sierra was given individual notice of the meeting or was given an opportunity to speak. Presumably, sufficient notice and an opportunity to respond were given, and thus Sierra was afforded adequate procedural due process.

ANSWER TO EXAM QUESTION NO. 2

To: Partner
From: Associate
Re: Coach's Causes of Action

Coach v. AAA: Coach most likely has no constitutional claims against AAA because AAA is not a state actor. The first issue is whether the action of AAA constitutes state action.

To find state action, an actor must perform public functions or have significant involvement with the state. It appears, under this standard, that AAA is not a state actor; regulating sports at public and private institutions nationwide is not a function traditionally reserved to the states and neither are its activities so involved with the state as to rise to the level of state action. [*Compare: Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001)—state action found where, among other things, “private” regulating body operated in a single state, was made up mostly of public school officials, and met during school hours]

Furthermore, AAA has given State University a choice of what to do, albeit a coercive choice. State University does not have to suspend Coach; it could choose to accept further sanctions and not suspend Coach. Therefore, no causes of action will lie against AAA because it merely made findings and left it to State University to decide what actions to take. [*See National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988)]

Coach v. State University: Coach can make a due process claim against State University. The actions of State University through its president, constitute state action. The university is an institution of the state, as indicated by its name, and the president is a state actor. The question, then, is what constitutional rights Coach has, and whether these rights were infringed by the university.

The Due Process Clause, applicable to the states through the Fourteenth Amendment, requires that a person receive adequate notice and a fair hearing before being deprived of life, liberty, or property by the government. Public employees have been found to have a property interest in their jobs and must receive due process before being deprived of them. Coach is a public employee because he works for a state university. Whether Coach suffered a deprivation of his due process rights depends on whether he was removable for cause. An employee removable only for cause has a property interest in his job, and thus is entitled to due process before the state deprives him of it.

Assuming Coach is removable only for cause, due process requires that he be given notice of the charges against him, as well as a pretermination opportunity to respond to the charges. An evidentiary hearing regarding the termination decision must be provided either before or after the termination, with reinstatement if he prevails. If no cause is required for removal, Coach is an employee at will and is not due any process before or after termination.

We should move to secure the above procedural safeguards for Coach. While Coach participated in the AAA hearing, he appeared only as a witness and not as a party. Coach is entitled to a more substantial opportunity to respond to the charges against him. Coach has received notice of the decision to suspend him. He may respond to the president's notification of suspension and is entitled to an evidentiary hearing regarding his termination.

The university may assert that a two-year suspension is not the same as a termination. However, our position is that a two-year loss of job and salary is an infringement of Coach's property rights serious enough to warrant a hearing.

Should we bring this claim, the university may raise a defense of ripeness. It could claim that no action has been taken against Coach and that his claim is premature. However, an action is ripe for review when there is the immediate threat of harm. Here, the president has notified Coach of its intent to suspend him. Thus, Coach's claim will not fail for lack of ripeness.

Coach's First Amendment claim: Coach likely has no claims against the university for directing the school newspaper not to publish its interview with him, because his constitutional rights probably have not been violated. Under the Free Speech Clause of the First Amendment, applicable to states through the Fourteenth Amendment, government may not restrict freedom of speech or of the press. In a public forum that has traditionally been open to speech activities, government restrictions on the content of speech must be necessary to serve a compelling state interest. Further, the state may not impose a prior restraint on the press by preventing publication of content that it finds objectionable, absent extraordinary circumstances. Public schools and universities, however, have not traditionally been considered public forums open to free speech activities, although the Supreme Court has found that students at a public institution do not shed all First Amendment rights at the schoolhouse door. Additionally, the contents of a school-funded newspaper can be regulated because the Court has found that such papers are not public forums, but merely educational devices. If the student publication is part of a class taught at the educational institution, its content may be regulated by the school for legitimate pedagogical purposes.

In this case, even if the newspaper were a public forum, it would not give rise to a cause of action by Coach. Generally, a party cannot assert the constitutional rights of others. To have standing, the claimant must have suffered a direct impairment of his own constitutional rights. Here, a prior restraint has been placed on the newspaper. This is a burden on the newspaper's rights. And while Coach is affected, it is not a direct impairment of his rights. Thus, he lacks standing to bring a suit based in the First Amendment.

ANSWER TO EXAM QUESTION NO. 3

The state of Uphoria's bill would be valid as to its age and citizenship requirements, but would be unconstitutional due to its gender classification.

Under the Equal Protection Clause of the Fourteenth Amendment, government may not treat similarly situated people in a dissimilar manner without a sufficient reason. The sufficiency of the reason depends on the basis of the classification. There are three tests:

The first test is the strict scrutiny or compelling state interest test. This test is used if when government action treats people differently based on a suspect classification, such as race, national origin, or alienage. Under this test, the law is considered to be invalid unless the government can prove that it is necessary to achieve a compelling state objective.

The second test involves intermediate scrutiny. Under this test, the court will strike down a law unless the government can show that the law bears a substantial relation to an important government interest. This is the test used when there is a classification based on gender. Gender classifications will be struck down absent an exceedingly persuasive justification, and the government may not rely on overbroad generalizations about males and females that will perpetuate the legal, social, and economic inferiority of women.

The third test is the rational basis test (minimum scrutiny). Under this test, the government action is valid if the action is related to achieving any conceivable legitimate governmental interest. In other words, the person challenging the classification must prove that it is arbitrary or irrational. This is a very “loose” test, and it is very difficult for a law to fail it. This test is used for all classifications relating to matters of economics or social welfare.

The gender designation of Uphoria’s bill limiting the appointment of state police officers to males would be subject to intermediate scrutiny review due to its facial gender classification. Therefore, this component will only be upheld if it is substantially related to an important governmental interest.

This gender classification is not related to an important governmental interest. As in *United States v. Virginia, supra*, the government will not be able to show that all women are incapable of performing the duties of a state trooper. If Uphoria claims that its bill is based on ability to do the work, it can design a test of each individual’s (male or female) ability to perform the work required of a state police officer, and not unfairly discriminate against women. Accordingly, under the intermediate scrutiny test, this bill would be found invalid due to the fact that it discriminates against women without an exceedingly persuasive justification.

The bill also limits appointment of police officers to citizens of the United States. Since this component of the bill is based on alienage, it ordinarily falls under the strict scrutiny-compelling interest test. However, there is an exception to this rule which provides that if, as here, the law discriminates against alien participation in the functioning of state government, the rational basis test is applied. Under rational basis, a state can validly refuse to hire aliens as police officers, or for other positions which have a direct effect on the function of government. [*Ambach v. Norwick*, 441 U.S. 68 (1979)] Accordingly, the bill would be valid as far as its citizenship requirement is concerned.

The bill sets the age for appointment of a police officer to be over 20 years. The Supreme Court has held that age is not a suspect classification, so a rational basis analysis can be applied. The 20-year-old minimum age requirement in this statute would be held constitutional under the rational basis test because of the state’s interest in having police officers who are physically and emotionally mature enough to handle the stress of police work.

ANSWER TO EXAM QUESTION NO. 4

A. FIRST AMENDMENT ISSUES

Irma and Lester have several winnable First Amendment challenges to the ordinance. Under the First Amendment, “Congress shall make no law abridging the freedom of speech, or of the press” This guarantee has been held applicable to the states through the Due Process Clause of the Fourteenth Amendment.

1. Freedom of Association and Belief: The First Amendment protects freedom of association. First Amendment rights are considered fundamental rights, and government attempts to restrict them are subject to strict scrutiny analysis. The government must show the restrictions are necessary to promote a compelling interest. Under this standard, very few state restrictions on speech are upheld by courts. Here, it appears that the ordinance impinges on the rights of the entertainers to talk and mingle with the customers. As such, the ordinance has the effect of chilling their right to freely associate. Thus, on this ground the ordinance is unconstitutional unless the government can show it is needed to serve a compelling interest. While the town could argue that curbing disorderly conduct, prostitution, and intemperance is a compelling interest, it would have a harder time showing that restricting the free association rights of Irma and Lester in such a way is necessary to promote it and that there are no less restrictive means available. The town's position is further weakened by the fact that the parties have stipulated that no actual prostitution, disorderly conduct, or immoral activity took place as a result of Irma's and Lester's behavior.

2. The Ordinance is Overbroad: If a regulation of speech or speech-related conduct punishes a substantial amount of protected speech judged in relation to the regulation's plainly legitimate sweep, the regulation is facially invalid (i.e., it cannot be enforced against anyone—not even a person engaging in activity that is not constitutionally protected). Here, the stated purposes of the ordinance are to (i) prevent disorderly conduct; (ii) encourage temperance; (iii) discourage prostitution; and (iv) prevent any other immoral activity. While these purposes are legitimate government interests, the ordinance as written restricts expression and conduct that have only a peripheral connection with prostitution, immoral activity, etc. Accordingly, the ordinance chills speech and conduct that are protected under the First Amendment. Certainly, the ordinance could be worded to restrict only the activities that are the focus of its basic purposes, i.e., preventing prostitution and drunkenness. Prohibiting mingling of customers and entertainers goes beyond these legitimate purposes. Therefore, the ordinance is unconstitutionally overbroad and cannot be enforced against anyone.

3. The Ordinance is Vague: Laws regulating speech-related activities are unconstitutional if they are too vague to give notice of what conduct they forbid. To the extent their vagueness suggests that they prohibit constitutionally protected speech, they have a chilling effect on speech. Here, the ordinance prohibits the entertainers from “mingling” with customers. The word “mingling” is too vague to define what conduct is proscribed by the ordinance. Thus, it appears that the entertainers may be forced to refrain from conduct and expression protected by the First Amendment in order not to be considered “mingling” with the customers. Because this ordinance has, in this manner, the effect of chilling activity and expression that is protected by the First Amendment, it is unconstitutional.

4. Effect of Twenty-First Amendment on First Amendment Rights: The Twenty-First Amendment gives the states much control over the sale and use of intoxicating liquor within their borders. Thus, Fun City's attorneys could argue that the ordinance is a valid exercise of the state's constitutionally granted powers with respect to intoxicating liquors. However, this argument fails because, as a general rule, individual rights guaranteed by the Bill of Rights and the Fourteenth Amendment outweigh state liquor control laws. Here, the ordinance, which constitutes a liquor control regulation, chills First Amendment rights made applicable, to states under the Fourteenth Amendment. Accordingly, the ordinance is unconstitutional.

B. SUBSTANTIVE DUE PROCESS ISSUES

Irma and Lester can also challenge the ordinance as a violation of their rights under the Due Process Clause of the Fourteenth Amendment, which applies to state and local governments. Substantive due process protects certain fundamental rights not articulated within the text of the Constitution and prohibits arbitrary government action.

Under substantive due process principles, where a fundamental right is limited, the law (or other government action) must be necessary to promote a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, and all rights implied under the First Amendment.

Here the ordinance, as discussed above, chills the entertainers' First Amendment rights of association and speech. From the facts, Fun City has shown no compelling or overriding interest to do so. Accordingly, on this ground, the ordinance violates the substantive due process rights of Irma and Lester.

C. EQUAL PROTECTION ISSUES

Irma and Lester have a strong Equal Protection argument as well. Under the Equal Protection Clause of the Fourteenth Amendment, governmental acts that classify people for differential treatment may be invalid. It is unconstitutional for the government to treat similarly situated people in a dissimilar manner absent sufficient justification. Where a suspect classification is involved (i.e., race, national origin, or alienage), the differential treatment is subject to the strict scrutiny test and must be necessary to promote a compelling state interest. For nonsuspect classifications of individuals, a law need only be rationally related to a legitimate government purpose, and will be upheld unless unreasonable or arbitrary,

Here, the ordinance seeks to prevent people who work as entertainers in establishments where alcohol is served from socializing with patrons of the business. Ordinarily, a law that singles out people in a certain line of work for differing treatment would be subject only to the rational basis test, as entertainer is not a suspect classification. However, when a classification affects the exercise of a fundamental right, it is subject to strict scrutiny. Irma and Lester are being prevented from exercising their fundamental First Amendment right to freely associate. Thus, to sustain the classification, Fun City must show that it has a compelling interest to impose such restraints on entertainers and no less restrictive means of achieving the interest. Clearly, Fun City does not have a compelling interest in so restricting Irma and Lester's rights and, therefore, the ordinance violates equal protection.

D. CONCLUSION

For the foregoing reasons, Irma's and Lester's convictions should be reversed. Irma and Lester have been charged with violation of an ordinance which is constitutionally overbroad and infringes on their First and Fourteenth Amendment rights.