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# LAW SCHOOL ESSENTIALS:
# CONSTITUTIONAL LAW

## Table of Contents

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## PART ONE: POWERS OF THE FEDERAL GOVERNMENT

## I. JUDICIAL POWER

### A. SOURCE AND SCOPE

#### 1. Source—Article III

Article III, Section 1 of the United States Constitution provides that "[t]he judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Federal courts are generally created by the United States Congress under the constitutional power described in Article III. As noted above, Article III requires the establishment of a Supreme Court and permits the Congress to create other federal courts and place limitations on their jurisdiction. Although many specialized courts are created under the authority granted in Article I, greater power is vested in Article III courts because they are independent of Congress, the President, and the political process.

Note that most federal cases are filed in district court and appealed, if at all, to a court of appeals. The jurisdiction of the federal courts is set, within the framework of Article III, by Congress. For example, Congress requires the amount in controversy necessary for federal jurisdiction over a case between citizens of different states (i.e., diversity jurisdiction) to exceed $75,000. 28 U.S.C. § 1332. *[See the Themis Civil Procedure outline for a complete discussion.]*

#### 2. Scope

Article III, Section 2 delineates the jurisdiction of federal courts as limited to **cases or controversies**:

i) Arising under the Constitution, laws, and treaties of the United States;

ii) Affecting foreign countries' ambassadors, public ministers, and consuls;

iii) Involving admiralty and maritime jurisdiction;

iv) When the United States is a party;

v) Between two or more states, or between a state and citizens of another state;

vi) Between citizens of different states or between citizens of the same state claiming lands under grants of different states; or

vii) Between a state, or its citizens, and foreign states, citizens, or subjects.

##### a. Judicial review of congressional and executive actions

The judiciary has the power—although it is not enumerated in the text of the Constitution—to review an act of another branch of the federal government and to declare that act unconstitutional, *Marbury v. Madison*, 5 U.S. 137 (1803), as well as the constitutionality of a decision by a state's highest court, *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). The central ideas of *Marbury v. Madison* are that (i) the Constitution is paramount law, and (ii) the Supreme Court has the final say in interpreting the Constitution.

### b. Judicial review of state actions

The federal judiciary has the power, under the Supremacy Clause (Article VI, Section 2), to review state actions (e.g., court decisions, state statutes, executive orders) to ensure conformity with the Constitution, laws, and treaties of the United States. *Fletcher v. Peck*, 10 U.S. 87 (1810).

## 3. Limitations—Eleventh Amendment

### a. General rule

The Eleventh Amendment is a jurisdictional bar that prohibits the citizens of one state from suing another state in federal court. It **immunizes states**—**but not local governments** (e.g., counties, cities)—from suits in federal court for money damages or equitable relief when the state is a defendant in an action brought by a citizen of another state or a foreign country. The Supreme Court has determined that the Eleventh Amendment also reflects the principles of sovereign immunity, barring citizens from suing their own state in federal court without the state's consent. *Hans v. Louisiana*, 134 U.S. 1 (1890). In addition, the Eleventh Amendment bars suits in federal court against state officials for violating state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S.89 (1984).

Note that the Supreme Court has also barred federal-law actions brought against a state government without the state's consent in its own courts as a violation of **sovereign immunity.** *Alden v. Maine*, 527 U.S. 706 (1999). Similarly, states retain their sovereign immunity from private suits brought in the courts of other states. *Franchise Tax Bd. Of Cal. v. Hyatt*, 587 U.S. 230 (2019) (overruling *Nevada v. Hall,* 440 U.S. 410 (1979)).

### b. Exceptions

There are, however, a few notable exceptions to the application of the Eleventh Amendment.

#### 1) Consent

A state may consent to suit by waiving its Eleventh Amendment protection. *Lapides v. Board of Regents of Univ. System of Ga.*, 535 U.S. 613 (2002) (state removal of case to federal court constituted a waiver).

#### 2) Injunctive relief

When a state official, rather than the state itself, is named as the defendant in an action brought in federal court, the state official may be enjoined from enforcing a state law that violates federal law or may be compelled to act in accord with federal law despite state law to the contrary. *Ex parte Young*, 209 U.S. 123 (1908), *Edelman v. Jordan*, 415 U.S. 651 (1974). *Ex parte Young* does not, however, normally permit federal courts to issue injunctions against state-court judges or clerks because they usually do not enforce state laws like executive officials might, but instead work to resolve disputes between parties. The traditional remedy against such actors has been some form of appeal, not an injunction preventing courts from hearing cases. *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021).

Note: A state also cannot invoke its sovereign immunity to prevent a lawsuit by a state agency seeking to enforce a federal right against a state official. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011).

### 3) Damages to be paid by an individual

An action for damages against a state officer is not prohibited, as long as the officer himself (rather than the state treasury) will have to pay. Such is the case when an officer acts outside the law; the action is against the officer as an individual and not in his representative capacity.

### 4) Prospective damages

As long as the effect of a lawsuit is not to impose retroactive damages on a state officer to be paid from the state treasury, a federal court may hear an action against a state officer, even if the action will force a state to pay money to comply with a court order.

### 5) Congressional authorization

Congress may abrogate state immunity from liability if it is clearly acting to enforce rights created by the remedial provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments (i.e., the Civil War Amendments), and does so expressly. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Congress generally may not abrogate state immunity by exercising its powers under Article I (e.g., Commerce Clause powers, copyright and patent powers). *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Allen v. Cooper*, 589 U.S. 248 (2020).

### 6) Structural waivers

A state may be sued if it implicitly agreed to suit in the plan of the Constitutional Convention. In other words, a state may be sued if the structure of the original Constitution reflects a waiver of states' sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 728 (1999). Accordingly, the Supreme Court has held that the Eleventh Amendment **does not bar** the following actions:

a) Actions brought **by the U.S. government** or other state governments. *United States v. Texas*, 143 U.S. 621 (1892); *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

b) Bankruptcy proceedings that impact state finances. *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

c) Federally approved **condemnation** proceedings brought by private parties. *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482 (2021).

d) Actions by private parties against a state pursuant to a federal statute enacted pursuant to Congress's **war and defense powers**. *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580 (2022).

Native American tribes enjoy sovereign immunity from suit due to their status as "domestic dependent nations." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788–89 (2014). Additionally, the Supreme Court has assumed, but never definitively held, that U.S. territories (e.g., Puerto Rico) enjoy sovereign immunity. *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339 (2023).

## B. JURISDICTION OF THE SUPREME COURT

### 1. Original

Article III, Section 2 gives the Supreme Court "original jurisdiction" (i.e., the case may be filed first in the Supreme Court) over "all cases affecting ambassadors, other public

ministers and consuls and those in which a State shall be a party." Congress may not expand or limit this jurisdiction. *Marbury v. Madison*, 5 U.S. 137 (1803). It may, however, grant concurrent original jurisdiction to lower federal courts, which it has for all cases except those between states. 28. U.S.C. § 1251.

### 2. Appellate

Article III, Section 2 also provides that "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction...with such exceptions, and under such regulations as the Congress shall make." This provision is commonly known as the "Exceptions Clause." (Note that the "other cases" are those listed at I.A.2 Scope, above, excluding those over which the Supreme Court has original jurisdiction.)

#### a. Means

There are two means of establishing appellate jurisdiction in the Supreme Court: certiorari (discretionary review) and direct appeal.

##### 1) Certiorari

Almost all cases now come to the Supreme Court by way of a petition for a writ of certiorari, i.e., discretionary review. The Court takes jurisdiction only if at least four Justices vote to accept the case (the "rule of four").

##### 2) Direct appeal

The Supreme Court **must** hear by direct appeal only a small number of cases—those that come from a decision on injunctive relief issued by a special three-judge district court panel. 28 U.S.C. § 1253. Although these panels (and appeals) were once fairly common, they are now limited to cases brought under a few specific statutes (e.g., the Voting Rights Act).

#### b. Limitations

Congress may limit the Supreme Court's appellate jurisdiction. *Ex parte McCardle*, 74 U.S. 506 (1868) (Congressional repeal of statute on which Supreme Court's jurisdiction was based required court to dismiss pending case). However, Congress may do so only within certain parameters.

For example, the Supreme Court has recognized that Congress may change the law, even if those changes affect the outcome of a pending case, *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) (Congressional change of the law regarding logging regulations applied to pending cases even though the change altered the outcome of those cases). In contrast, the Supreme Court has ruled that Congress may not tell a court to draw a certain conclusion or take a particular action in deciding a case before it, *United States v. Klein*, 80 U.S. 128 (1872) (statute directing the Court to find a presidential pardon as conclusive evidence of disloyalty and dismiss claim for reimbursement violated separation-of-powers doctrine). Nor may Congress alter a final decision of the Supreme Court, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

Furthermore, Congressional denial of appellate jurisdiction regarding a specific matter may run afoul of another Constitutional provision. *United States v. Klein*, *supra* (presidential pardon power); *Boumediene v. Bush*, 553 U.S. 723 (2008) (Suspension Clause in Article I, Section 9, Clause 2 regarding habeas corpus rights).

### c. Adequate and independent state grounds

A final state-court judgment that rests on adequate and independent state grounds may not be reviewed by the U.S. Supreme Court (or it would be an advisory opinion). The state-law grounds must fully resolve the matter (i.e., be adequate) and must not incorporate a federal standard by reference (i.e., be independent). If a state court chooses to rely on federal precedents, the court can avoid federal review by making a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and did not compel the court's judgment. When it is not clear whether the state court's decision rests on state or federal law, the Supreme Court may hear the case, decide the federal issue, and remand to the state court for resolution of any question of state law. *Michigan v. Long*, 463 U.S. 1032 (1983).

Generally, a violation of a state procedural rule that is "firmly established and regularly followed" is an independent and adequate state law ground that forecloses U.S. Supreme Court review. However, in exceptional cases, a procedural rule may be applied in such an arbitrary and unforeseeable manner that renders the state ground inadequate. This includes when a state disregards U.S. Supreme Court precedent in applying a procedural rule. *Cruz v. Arizona*, 598 U.S. 17 (2023).

## C. JUDICIAL REVIEW IN OPERATION

Standing, timing (mootness or ripeness), and other issues of justiciability may dictate whether a case may be heard by a federal court.

### 1. Standing

Article III, Section 2 restricts federal judicial power to "cases" and "controversies." A federal court cannot decide a case unless the plaintiff has standing—a concrete interest in the outcome—to bring it. Congress cannot statutorily eliminate the constitutional standing requirement simply by allowing citizen suits, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), but it can create new interests, the injury to which may establish standing, *Massachusetts v. EPA*, 549 U.S. 497 (2007).

#### a. General rule

To have standing, a plaintiff bears the burden of establishing three elements:

i) **Injury in fact**;

ii) **Causation** (the injury must be caused by the defendant's violation of a constitutional or other federal right); and

iii) **Redressability** (the relief requested must prevent or redress the injury).

*See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

In addition to the Article III requirements, the federal judiciary has also established a "prudential standing" requirement, i.e., that a plaintiff is a proper party to invoke a judicial resolution of the dispute. *Bender v. Williamsport Area School District,* 475 U.S. 534 (1986). Meeting this requirement depends in large part on whether the plaintiff's grievance comes within the "zone of interests" protected or regulated by the constitutional guarantee or statute under consideration. *Bennett v. Spear,* 520 U.S. 154 (1997); *Thompson v. N.Am. Stainless, LP*, 562 U.S. 170 (2011). Generally, a violation of a state procedural rule that is "firmly established and regularly followed" is an independent and adequate state law ground that

forecloses U.S. Supreme Court review. However, in exceptional cases, a procedural rule may be applied in such an arbitrary and unforeseeable manner that renders the state ground inadequate. This includes when a state disregards U.S. Supreme Court precedent in applying a procedural rule. *Cruz v. Arizona*, 598 U.S. ___, 143 S. Ct. 650 (2023).

**1) Injury in fact**

The injury must be both **concrete** and **particularized.**

**a) Individualized injury**

When a plaintiff has been directly injured "it does not matter how many people" were also injured; when "a harm is concrete, though widely shared," there is standing. *Massachusetts v. EPA*, 549 U.S. 497 (2007). However, even though an injury may satisfy the injury-in-fact standard, the court may refuse to adjudicate a claim by the application of the principles of prudence. Under this prudential-standing principle, an injury that is shared by all or a large class of persons (i.e., a generalized grievance) is not sufficiently individualized to give the plaintiff standing. *Warth v. Seldin*, 422 U.S. 490 (1975).

**b) Type of injury**

Article III standing requires a concrete injury, even in the context of a statutory violation. *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) (defendant's violation of the Fair Credit Reporting Act alone was not a concrete injury for purposes of Article III standing unless the violation caused the plaintiff to suffer a real-world injury). The injury need not be physical or economic. *United States v. SCRAP*, 412 U.S. 669 (1973). While a generalized harm to the environment does not confer standing, a harm that affects recreational "or even mere esthetic interests" is sufficient. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

**c) Future injury**

While the threat of future injury can suffice, it cannot be merely hypothetical or conjectural, but must be actual or imminent. An injury in fact requires an intent that is concrete. *Carney v. Adams*, 592 U.S. 53 (2020) (respondent's inability to demonstrate that he was "able and ready" to apply for a judicial vacancy from which he would have been barred for not belonging to a major political party vitiated standing). When a future injury is alleged, damages cannot be obtained, but an injunction can be sought.

**2) Causation**

The plaintiff must show that the injury was fairly traceable to the challenged action—that is, that the defendant's conduct caused the injury. *Warth v. Seldin*, 422 U.S. 490 (1975).

**3) Redressability**

It must be likely (as opposed to speculative) that a favorable court decision will redress a discrete injury suffered by the plaintiff.

**b. Taxpayer status**

Usually, a taxpayer does not have standing to file a federal lawsuit simply because the taxpayer believes that the government has allocated funds in an improper way.

*Frothingham v. Mellon*, 262 U.S. 447 (1923). However, a taxpayer does have standing to litigate whether, or how much, she owes on her tax bill. *See United States v. Windsor*, 570 U.S. 744 (2013) (litigating disallowance of estate tax exemption for surviving same-sex spouse under the Defense of Marriage Act.)

**1) Governmental conduct**

The conduct of the federal government, or of any state government, is too far removed from individual taxpayer returns for any injury to the taxpayer to be traced to the use of tax revenues. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). Long-standing precedent, however, suggests that a municipal taxpayer does have standing to sue a municipal government in federal court. *Crampton v. Zabriskie*, 101 U.S. 601 (1879).

**2) Exception—Establishment Clause challenge**

There is an exception for a taxpayer suit challenging a **specific legislatively authorized expenditure** as a violation of the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83 (1968) (congressional grant to religious schools based on Spending and Tax Clause of Art. I, sec. 8). This exception does not apply to the transfer of property to a religious organization by Congress under the Property Power, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), nor to expenditures made by the President to religious organizations from monies appropriated by Congress to the President's general discretionary fund, *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), nor to a tax credit for contributions to student tuition organizations that provide scholarships to students attending private schools, including religious schools. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

**c. Third-party standing**

A litigant generally has no standing to bring a lawsuit based on legal claims of a third party. The rule is based on prudential or discretionary considerations. However, third-party standing may be found based on a consideration of the importance of the relationship between the litigant and the third party (e.g., physician-patient), the ability of the third party to vindicate their own rights, and the risk that the rights of third parties will be diluted if third-party standing is not allowed. Ronald D. Rotunda and John E. Nowak, 1 Treatise on Const. L. § 2.13(f)(iii)(1) The General Rule.

**Examples:**

(1) A white defendant may raise equal protection and due process objections to discrimination against Black people in the selection of grand juries, *Campbell v. Louisiana*, 523 U.S. 392 (1998).

(2) A private school may assert its students' rights to attend despite a statute requiring attendance at public schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

(3) A beer vendor may raise the equal protection rights of its male customers who are statutorily prohibited from buying beer if they are under 21 years of age while the prohibition applies to females who are under 18 years of age. *Craig v. Boren*, 429 U.S. 190 (1976).

#### 1) Organizational standing

An organization may bring an action when it has suffered an injury. In addition, an organization may bring an action on behalf of its members (even if the organization has not suffered an injury itself) if:

i) Its members would have standing to sue in their own right; and

ii) The interests at stake are germane to the organization's purpose.

*Hunt v. Washington State Apple Adver. Comm'n.*, 432 U.S. 333 (1977). When damages are sought, generally neither the claim asserted nor the relief requested can require the participation of individual members in the lawsuit. But note that the damages limitation is not constitutionally mandated and can be waived by Congress. *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544 (1996).

#### 2) Parental standing

Generally, a parent has standing to bring an action on behalf of the parent's minor child. However, after a divorce, the right to bring such an action may be limited to only one of the child's parents. Moreover, when the right to bring such an action is based on family-law rights that are in dispute, the federal courts should not entertain an action if prosecution of the lawsuit may have an adverse effect on the child. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (noncustodial parent with joint legal custody could not challenge school policy on behalf of his daughter when the custodial parent opposed the action).

### d. Assignee standing

An assignee of a claim has standing to enforce the rights of an assignor, even when the assignee is contractually obligated to return any litigation proceeds to the assignor (e.g., an assignee for collection), provided the assignment was made for ordinary business purposes and in good faith. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269 (2008).

### e. Citizenship standing

Citizens do not have standing to assert a claim to enforce a constitutional provision merely because they are citizens. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). A citizen may bring an action against the government to compel adherence to a specific federal statute, if the citizen has directly suffered an injury in fact.

### f. Standing to assert a Tenth Amendment violation

A party has standing to challenge the constitutionality of a federal statute on the grounds that it exceeds Congress's enumerated powers and intrudes upon the powers reserved to the states by the Tenth Amendment. *Bond v. United States*, 564 U.S. 211 (2011) (defendant prosecuted for violation of federal statute).

### g. Legislator's standing

Generally, a legislator who voted against a bill does not have standing to challenge the resulting statute. *Coleman v. Miller*, 307 U.S. 433 (1939) (state legislators lacked standing); *Raines v. Byrd*, 521 U.S. 811, 823 (1997) (members of Congress lacked standing).

### h. Section 1983 claims

42 U.S.C. 1983 ("section 1983") provides that any person acting under color of state law who deprives any citizen of the United States (or any other person within the United States) of any rights, privileges, or immunities secured by the Constitution and laws can be held personally liable for the deprivation. Section 1983 does not provide any substantive rights. Instead, it provides a method to enforce the substantive rights granted by the Constitution and other federal laws.

#### 1) Proper defendants

Individual government employees at any level of government may be sued under section 1983 in their individual capacities for damages, declaratory or injunctive relief. *Hafer v. Melo*, 502 U.S. 25 (1991); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). This is permitted because a suit against a government employee in his individual capacity does not represent a suit against the government entity. *Kentucky v. Graham*, 473 U.S. 159 (1985). Municipalities and local governments are also considered "persons" subject to suit pursuant to section 1983 for damages and prospective relief. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978).

#### 2) Color of state law

To use section 1983 as a remedy for the deprivation of a federally secured right, a plaintiff must show that the alleged deprivation was committed by a person acting **under color of state law**. The traditional definition of acting under the color of state law requires the defendant to have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988)(quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Purely private conduct is not within the reach of the statute, but a private actor may be found to have acted under color of state law under certain circumstances.

> **EXAM NOTE:** The "color of state law" requirement is functionally identical to the "state action" prerequisite to trigger constitutional liability. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *see* X. "State Action," *infra*.

## 2. Timeliness

An action that is brought too soon ("unripe") or too late ("moot") will not be heard.

### a. Ripeness

"Ripeness" refers to the readiness of a case for litigation. A federal court will not consider a claim before it has fully developed; to do so would be premature, and any potential injury would be speculative.

For a case to be "ripe" for litigation, the plaintiff must have experienced a **real injury** (or imminent threat thereof). Hence, if an ambiguous law has a long history of non-enforcement, a case challenging that law may lack ripeness. *See Poe v. Ullman*, 367 U.S. 497 (1961).

### b. Mootness

A case has become moot if further legal proceedings would have no effect; that is, if there is no longer a controversy. A **live controversy** must exist **at each**

**stage of review,** not merely when the complaint is filed, in order for a case to be viable at that stage.

**Example:** The classic example of mootness is the case of *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The plaintiff was a student who had been denied admission to law school and had then been provisionally admitted while the case was pending. Because the student was scheduled to graduate within a few months at the time the decision was rendered, and there was no action that the law school could take to prevent it, the Court determined that a decision on its part would have no effect on the student's rights. Therefore, the case was dismissed as moot.

#### 1) Exception—capable of repetition, yet evading review

A case will not be dismissed as moot if there is a reasonable expectation that the same complaining party will be subjected to the same action again ("capable of repetition") but that the action will not last long enough to work its way through the judicial system ("yet evading review"). *Turner v. Rogers*, 564 U.S. 431 (2011).

**Example:** The most cited example of this exception is *Roe v. Wade*, 410 U.S. 113 (1973), when the state argued that the case was moot because the plaintiff, who was challenging a Texas statute forbidding abortion, was no longer pregnant by the time the case reached the Supreme Court. Because of the relatively short human gestation period (compared to a lawsuit), abortion litigation was readily capable of being repeated, but also likely to evade review, and the case was not dismissed as moot.

#### 2) Exception—voluntary cessation

A court will not dismiss as moot a case in which the defendant voluntarily ceases its illegal or wrongful action once litigation has commenced. The court must be assured that "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

#### 3) Exception—collateral legal consequences

A case challenging a criminal conviction is not moot, even though the direct legal consequences no longer exist (e.g., the convicted defendant has served his sentence and is now free), if collateral legal consequences can be imposed based on that conviction (e.g., revocation of the right to vote or to serve on a jury). *Sibron v. New York,* 392 U.S. 40 (1968); *But see Spencer v. Kemna*, 523 U.S. 1 (1998) (exception does not apply to a challenge to a parole revocation decision).

#### 4) Exception—class actions

If the named plaintiff's claim in a certified class action is resolved and becomes moot, that fact does not render the entire class action moot. *United States Parole Comm'n. v. Geraghty*, 445 U.S. 388 (1980).

### 3. Justiciability—Further Issues

Federal courts may invoke a variety of other reasons not to decide a case.

#### a. Advisory opinions

Federal courts may not render advisory opinions on the basis of an abstract or a hypothetical dispute. An actual case or controversy must exist.

**EXAM NOTE:** Fact patterns involving a request for declaratory judgment are likely testing advisory opinion prohibition.

### b. Declaratory judgments

The courts are not prohibited from issuing declaratory judgments, however, that determine the legal effect of proposed conduct without awarding damages or injunctive relief. The challenged action must pose a real and immediate danger to a party's interests for there to be an actual dispute (as opposed to a hypothetical one).

### c. Political questions

A federal court will not rule on a matter in controversy if the matter is a political question to be resolved by one or both of the other two branches of government. *Baker v. Carr*, 369 U.S. 186 (1962).

A political question not subject to judicial review arises when:

i) The Constitution has assigned decision making on this subject to a different branch of the government; or

ii) The matter is inherently not one that the judiciary can decide.

**Example:** Details of Congress's impeachment procedures (constitutionally assigned to a branch other than the judiciary) and the President's conduct of foreign affairs (not within judicial competence) are examples of political questions.

**Compare:** The political question doctrine does not bar courts from adjudicating the constitutionality of a federal statute directing that an American child born in Jerusalem is entitled to have Israel listed as her place of birth in her U.S. passport. The Court held that the Constitution did not commit the issue to another branch of government and resolving the case would involve examining "textual, structural, and historical evidence" concerning statutory and constitutional provisions, something within judicial competence. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

## 4. Abstention

A federal court may abstain from deciding a claim when strong state interests are at stake.

### a. *Pullman* doctrine

A court may refrain from ruling on a federal constitutional claim that depends on resolving an unsettled issue of state law best left to the state courts. *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941).

### b. *Younger* abstention

A court will not enjoin a pending state criminal case in the absence of bad faith, harassment, or a patently invalid state statute. *Younger v. Harris*, 401 U.S. 37 (1971). Abstention also may be appropriate with regard to a civil enforcement proceeding or a civil proceeding involving an order uniquely in furtherance of the state courts' ability to perform their judicial functions, such as a civil contempt order. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013).

### c. *Burford* abstention

A court may abstain from hearing a case seeking declaratory or injunctive relief when such relief would interfere with a complex state regulatory scheme that (i)

serves an important state policy and (ii) provides for timely and adequate judicial review by the state's courts. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

#### d. *Colorado River* abstention

A court may also refrain from hearing a case that is "substantially similar" to concurrent litigation in state court. This basis for abstention can be used only in exceptional circumstances (e.g., when a federal constitutional issue would be rendered moot by a state court's determination of state law). *Col. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

## II. THE POWERS OF CONGRESS

Just as the federal courts are courts of limited jurisdiction, the powers of Congress are not plenary or exclusive. As the Tenth Amendment makes clear, the federal government may exercise only those powers specifically enumerated by the Constitution; it is state governments and the people, not the national government, that retain any powers not mentioned in the federal charter. Any action by the federal government must be supported by a source of power originating in the Constitution. Article I, Section 1 vests all legislative powers of the federal government in Congress.

**EXAM NOTE**: Congress may amend or repeal existing law and direct that the change be applied in all related *pending* actions, i.e., those in which a final judgment has not been entered. If an exam question involves application of new legislation, pay attention to the status of any case to which it is to be applied.

**EXAM NOTE:** Congress has no general police power to legislate for the health, safety, welfare, or morals of citizens. The validity of a federal statute in an exam question may not be justified based on "federal police power."

### A. COMMERCE

Article I, Section 8, Clause 3 of the Constitution, known as the Commerce Clause, empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The term "commerce" has been defined to include essentially all activity—including transportation, traffic, or transmission of gas, electricity, radio, TV, mail, and telegraph—involving or affecting two or more states.

#### 1. Interstate Commerce

##### a. Power to regulate

Congress has the power to regulate (i) the **channels** (highways, waterways, airways, etc.) and (ii) the **instrumentalities** (cars, trucks, ships, airplanes, etc.) of interstate commerce, as well as (iii) any activity that **substantially affects** interstate commerce, provided that the regulation does not infringe upon any other constitutional right. *United States v. Lopez*, 514 U.S. 549 (1995).

##### b. Construed broadly

The Supreme Court has upheld acts of Congress seeking to prohibit or restrict the entry of persons, products, and services into the stream of interstate commerce, as well as acts regulating the interstate movement of kidnap victims, stolen vehicles, and telephone transmissions. However, the Commerce Clause does not give Congress the power to mandate that individuals not engaged in commercial activities engage in commerce. *Nat'l Fed'n of Indep. Bus. v. Sebelius (The Patient Protection and Affordable Care Cases)*, 567 U.S. 519 (2012) (requiring individuals not engaged in commercial activities to buy unwanted health insurance could not be sustained as a regulation of interstate commerce).

### 2. "Substantial Economic Effect"

Congress has the power to regulate any activity, intra- or interstate, that in and of itself or in combination with other activities has a "substantial economic effect upon" or "effect on movement in" interstate commerce. When determining if activities have a substantial effect on interstate commerce, courts consider whether:

i) The activities are **economic in nature** (if so, a substantial effect is presumed),

ii) The regulation has a **jurisdictional element** that limits its reach to activities with a direct connection to or effect on interstate commerce,

iii) There are **express congressional findings** concerning the activities' effect on interstate commerce, and

iv) There is a **strong link** between the regulated activities and that effect.

*United States v. Morrison*, 529 U.S. 598, 610–12 (2000).

#### a. Aggregation

With respect to an intrastate activity that does not have a direct economic impact on interstate commerce, such as growing crops for personal consumption, as long as there is a **rational basis** for concluding that the "total incidence" of the activity in the aggregate substantially affects interstate commerce, Congress may regulate even a minute amount of that total. *Gonzales v. Raich*, 545 U.S. 1 (2005) (prohibition on personal cultivation and use of medical marijuana upheld due to effect on overall interstate trade). The practical effect of this rule is that with regard to economic activity, a substantial economic effect is presumed.

**Example:** The Supreme Court upheld congressional restriction of wheat production, even when applied to a farmer growing only 23 acres of wheat, primarily for personal use. The rationale behind the decision was that if every small farmer were allowed to grow an unrestricted amount of wheat, the combined effect could have an impact on supply and demand in the interstate market. *Wickard v. Filburn*, 317 U.S. 111 (1942).

### 3. Non-Economic Activity

Congress's power under the Commerce Clause to regulate **intrastate** activity that is not obviously economic (so-called "non-economic" activity) is limited to some degree by principles of federalism, at least when the regulation involves an area of traditional state concern. The non-economic activity must have a substantial economic effect on interstate commerce. *Nat'l Fed'n of Indep. Bus. v. Sebelius (The Patient Protection and Affordable Care Cases)*, 567 U.S. 519 (2012) (requiring individuals not engaged in commercial activities to buy unwanted health insurance could not be sustained as a regulation of interstate commerce); *United States v. Morrison*, 529 U.S. 598 (2000) (federal civil remedy for victims of gender-motivated violence held invalid); *United States v. Lopez*, 514 U.S. 549 (1995) (federal statute regulating possession of a firearm within 1,000 feet of a public school struck down).

## B. TAXATION AND SPENDING

Article I, Section 8 provides: "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

**EXAM NOTE:** If you see the terms "appropriation bill" or "authorization bill" on the exam, the power to spend is likely a consideration.

### 1. Taxing Power

A tax by Congress will generally be upheld if it has a **reasonable relationship to revenue production**.

**Example:** The Affordable Health Act's individual mandate, requiring individuals to buy health insurance or pay a penalty, merely imposed a tax on those who failed to buy insurance and therefore could be sustained under the taxing power. *Nat'l Fed'n of Indep. Bus. v. Sebelius (The Patient Protection and Affordable Care Cases)*, 567 U.S. 519 (2012).

#### a. Any purpose

Of the three branches of the federal government, Article I, Section 8 of the Constitution gives Congress the plenary (i.e., exclusive) power to raise revenue through the imposition of taxes. The government has no burden to prove that the tax is necessary to any compelling governmental interest. Instead, the General Welfare Clause has been interpreted as permitting Congress to exercise its power to tax for any public purpose. (Note: This clause has been interpreted as having the same effect on the spending power, as discussed at § II.B.2. Spending, *infra.*)

While the General Welfare Clause gives Congress broad power in exercising its spending and taxing powers, it does not give Congress the specific power to legislate for the public welfare in general. Such "police power" is reserved for the states.

#### b. Indirect tax—uniformity

The requirement that indirect federal taxes (i.e., duties, sales taxes, and import & excise taxes) must be uniform throughout the United States has been interpreted to mean **geographical** uniformity only; the product or activity at issue must be identically taxed in every state in which it is found. Differences in state law do not destroy this uniformity. *Fernandez v. Wiener*, 326 U.S. 340 (1945) (federal estate tax on "community property" valid despite variation in state laws regarding marital property).

#### c. Direct tax—apportionment

Article I, Section 2 provides that "[r]epresentatives and direct taxes shall be apportioned among the several states," and Article I, Section 9 provides that "no…direct tax shall be laid, unless in proportion to the Census…." A direct tax (one imposed directly on property or persons, such as an ad valorem property tax) would therefore have to be apportioned evenly among the states. The difficulty of ensuring this outcome explains Congress's reluctance to enact such taxes—or perhaps the Supreme Court's reluctance to find that federal taxes are "direct." The Sixteenth Amendment gave Congress the power to lay and collect **income tax** without apportionment among the states.

#### d. Income tax

The Sixteenth Amendment gave Congress the power to lay and collect **income tax**—including taxes on income from property—without apportionment or uniformity among the states. This gives Congress extraordinary power to tax income in a variety of ways. For example, Congress can choose to tax a partnership or its partners. Congress can also attribute an entity's realized and undistributed income to its shareholders or partners and tax the shareholders or partners instead of the entity itself. *Moore v. U.S.*, 602 U.S. 572 (2024).

#### e. Export tax prohibition

Goods exported to foreign countries may not be taxed by Congress. Article I, Section 9. Under this Export Taxation Clause, a tax or duty that falls on goods during the course of exportation or on services or activities closely related to the export process is prohibited. *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996) (tax on insurance premiums paid to foreign insurers of goods being exported).

#### f. Origination Clause

Article I, Section 7, Clause 1 provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Known as the Origination Clause, this provision is limited to "bills that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990), citing *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897).

### 2. Spending Power

The spending power has been interpreted very broadly. Congress has the power to **spend for the "general welfare"**—i.e., any public purpose—not just to pursue its other enumerated powers. *U.S. v. Butler*, 297 U.S. 1 (1936). For example, Congress can provide for the public funding of presidential nominating conventions as well as election campaigns. *Buckley v. Valeo*, 424 U.S. 1 (1976). Although there are areas in which Congress cannot directly regulate, it can use its spending power to accomplish such regulation indirectly by conditioning federal funding. *See South Dakota v. Dole*, 483 U.S. 203 (1987) (statute upheld withholding federal highway funds from states unless they barred the sale of alcoholic beverages to individuals under the age of 21).

Congress cannot, however, impose unconstitutional conditions, such as requiring distribution of the Ten Commandments to patients as a condition of Medicaid funding. *See id.*, 210-211; *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937); *Nat'l Fed'n of Indep. Bus. v. Sebelius (The Patient Protection and Affordable Care Cases)*, 567 U.S. 519 (2012). Moreover, to be enforceable, conditions must be set out unambiguously. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (parents who prevailed against local school board for violation of Individuals with Disabilities Education Act could not recover expert fees from local school board under a provision providing for recovery of costs).

## C. WAR AND DEFENSE POWERS

Article I, Section 8 gives Congress the power to declare war, raise and support armies, provide and maintain a navy, make rules for governing and regulating the land and naval forces, and provide for the organizing of a militia.

### 1. Providing for the National Defense

The authority granted to Congress under the war power is very broad. Congress may take whatever action it deems necessary to provide for the national defense in both wartime and peacetime. The Court has upheld the military draft and selective service; wage, price, and rent control of the civilian economy during wartime (and even during the post-war period); and the exclusion of civilians from restricted areas.

### 2. Courts and Tribunals

Congress has the power to establish military courts and tribunals under Article I, Section 8, Clause 14 and the Necessary and Proper Clause. These courts may try

enemy soldiers, enemy civilians, and current members of the U.S. armed forces, but they do not have jurisdiction over U.S. civilians. U.S. citizens captured and held as "enemy combatants" are entitled, as a matter of due process, to contest the factual basis of their detention before a neutral decision maker. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Under the Suspension Clause of Article I, Section 9, Clause 2, all persons held in a territory over which the United States has sovereign control are entitled to habeas corpus (or similar) review of the basis for their detention, unless the privilege of seeking habeas corpus has been suspended. *Boumediene v. Bush*, 553 U.S. 723, (2008).

Because military tribunals are not Article III courts, not all constitutional protections apply (such as the right to a jury trial or grand jury indictment).

#### 3. National Guard

National Guard units are under the dual control of the federal and state governments. Under the Militia Clauses (Art. I, Sec. 8, Cl. 15, 16), Congress has the power to authorize the President to call National Guard units to execute federal laws, suppress insurrections, and repel invasions. This constitutional authority extends to use of National Guard units in domestic situations and non-emergency circumstances, and is not subject the approval or veto of the governor of a state. *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990). (Note: By statute, Congress has restricted the exercise of this constitutional authority. 10 U.S.C. §§ 331-335; 18 U.S.C. § 1385.)

### D. INVESTIGATORY POWER

Congress does not have an express power to investigate, but the Necessary and Proper Clause allows Congress broad authority to conduct investigations incident to its power to legislate, which extends to congressional committees. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

#### 1. Scope

The investigatory power may extend to any matter within the "sphere of legitimate legislative activity." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975). Such matters include (i) the administration of existing laws, proposed statutes, and contemplated legislation, (ii) corruption, inefficiency, or waste in federal departments, as well as (iii) defects in social, economic, or political systems that are investigated for the purpose of enabling Congress to remedy those defects. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

##### a. Limitations

While broad, the power to investigate is nevertheless subject to limitations. It cannot be used to expose private affairs unrelated to a valid legislative purpose or to delve into areas beyond Congress's legislative authority. Nor can it be used to perform a law enforcement function, as this power lies with the executive and judicial branches. Individual guarantees found in the Bill of Rights (e.g., the Fifth Amendment privilege against self-incrimination) also limit Congress's power to investigate. *Id.*; *Quinn v. United States*, 349 U.S. 155, 161 (1955).

#### 2. Subpoena Power

The Congressional power to investigate through compulsory process (i.e., a subpoena) is an indispensable ingredient of lawmaking. *Eastland v. Unites States Servicemen's Fund*, *supra* at 504 (1975). "A congressional subpoena is valid only if it is related to, and in furtherance of, a legitimate task of the Congress; the subpoena must serve a valid legislative purpose, and must concern a subject on which legislation could be had." *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020).

#### a. Witness' rights

A subpoenaed witness is entitled to certain rights, including procedural due process (e.g., presence of counsel), the privilege against self-incrimination, and executive privilege. *Id.*

#### b. Contempt citation

A subpoenaed witness who fails to appear before Congress or refuses to answer questions may be cited for contempt.

#### c. Judicial involvement

A court generally may not squash a congressional subpoena prior to its enforcement. *Eastland v. Unites States Servicemen's Fund, supra* (basing this limitation on the judiciary on the Speech and Debate Clause). However, a court may do so when the subpoena is directed at the president. *Trump v. Mazars USA, LLP*, *supra*. In addition, a court may rule on the lawfulness of a subpoena when Congress brings an action to enforce it (e.g., a contempt action). *Eastland v. Unites States Servicemen's Fund, supra.*

## E. PROPERTY POWER

The Federal Property Clause of Article IV, Section 3 gives Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Congress's absolute power over federal lands includes protecting public lands from nuisances erected on adjoining private property. *Camfield v. United States*, 167 U.S. 518, 528 (1897). Under the Fifth Amendment, however, Congress may only **take** private property for public use (eminent domain) with just compensation and in order to effectuate an enumerated power. There is no express limit on Congress's power to **dispose** of property owned by the United States.

## F. POSTAL POWER

Congress has the exclusive power "to establish post offices and post roads" under Article I, Section 8, Clause 7. Congress may impose reasonable restrictions on the use of the mail (such as prohibiting obscene or fraudulent material to be mailed), but the postal power may not be used to abridge any right guaranteed by the Constitution (e.g., the First Amendment).

## G. POWER OVER NONCITIZENS AND CITIZENSHIP

### 1. Noncitizens

Congress has plenary power over noncitizens. *Fiallo v. Bell*, 430 U.S. 787 (1977). Noncitizens have no right to enter the United States and may be refused entry for reasons such as their political beliefs. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). However, this power is subject to the constraints of the Fifth Amendment Due Process Clause for a noncitizen within the United States. *Zadvydas v. Davis*, 533 U.S. 678 (2001). A noncitizen may generally be removed from the United States, but only after notice and a removal hearing. 8 U.S.C. §§ 1229, 1229a.

### 2. Naturalization

Congress has exclusive authority over naturalization. Article I, Section 8, Clause 4 allows Congress to "establish a uniform rule of naturalization."

**Example:** Children born abroad whose parents are U.S. citizens are not automatically entitled to U.S. citizenship. Congress can grant citizenship conditioned on the child's return to the U.S. within a specified timeframe or for a specified duration. *Rogers v. Bellei*, 401 U.S. 815 (1971).

However, while a United States citizen may voluntarily renounce her citizenship, the right of national citizenship in the Fourteenth Amendment (the Citizenship Clause) prevents Congress from taking away a person's citizenship, unless that citizenship was obtained by fraud or in bad faith. *Afroyim v. Rusk*, 387 U.S. 253 (1967) (federal statute that stripped citizenship for voting in a foreign election struck down); *Costello v. United States*, 365 U.S. 265 (1961) (citizen's willful failure to accurately state his occupation on a naturalization application resulted in loss of citizenship).

## H. OTHER ARTICLE I POWERS

Congress has power over **bankruptcies, maritime matters, coining of money,** fixing of **weights and measures,** and **patents and copyrights.**

### 1. Power Over the District of Columbia

Article I, Section 8, Clause 17 provides that Congress has the power to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States." Under this provision, which is known as the "Enclave Clause," Congress has supreme authority over Washington, D.C., and may legislate freely with regard to D.C. law.

### 2. Elections Clause

Article I, Section 4 of the Constitution provides: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed by each state legislature, but Congress may...make or alter such regulations." The Elections Clause explicitly empowers Congress to override state laws concerning federal elections. Additionally, Congress has the sole power to disqualify persons from holding or seeking federal office as a Senator, House member, an elector in the Electoral College, or an officer who previously swore an oath to uphold the Constitution if that person has engaged in insurrection or rebellion against the United States. *Trump v. Anderson*, 601 U.S. 100 (2024).

### 3. Necessary and Proper Clause

Congress is given the power to enact any legislation necessary and proper to execute any authority granted to any branch of the federal government. *McCulloch v. Maryland*, 17 U.S. 316 (1819). The Necessary and Proper Clause is not an independent source of power, but it permits Congress's otherwise designated authority to be exercised fully. This clause permits Congress to enact legislation to execute a treaty. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

## I. POWER TO ENFORCE THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS (CIVIL WAR AMENDMENTS)

Each of the Thirteenth, Fourteenth, and Fifteenth Amendments contains a provision that authorizes Congress to pass "appropriate legislation" to enforce the civil rights guaranteed by those amendments.

### 1. Thirteenth Amendment—Ban on Slavery

Congress has the power to adopt legislation rationally related to eliminating racial discrimination, as it is among the "badges or incidents" of slavery. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968). This power has been broadly interpreted to allow Congress to regulate both private and government action, including racial discrimination by private housing sellers, private schools, and private employers. (This is the only amendment that authorizes Congress to regulate purely private conduct.) This clause also gives Congress the power to eliminate involuntary servitude.

### 2. Fourteenth Amendment—Equal Protection and Due Process

The Fourteenth Amendment, Section 5 Enabling Clause permits Congress to pass legislation to enforce the equal protection and due process rights guaranteed by the amendment, but not to expand those rights or create new ones. Under the separation of powers doctrine, the job of defining such rights falls to the Supreme Court. In enforcing such rights, there must be a **"congruence and proportionality"** between the injury to be prevented or remedied and the means adopted to achieve that end. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act held invalid for failure to show widespread religious discrimination and for disproportion to any purported remedial goal). Congress may override state government action that infringes upon Fourteenth Amendment rights, but it may not under this amendment regulate wholly private conduct. In the exercise of Fourteenth Amendment powers, Congress can override the Eleventh Amendment immunity of states. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But Congress can only override the Eleventh Amendment immunity of states if the "congruence and proportionality" test is satisfied. *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62 (2000).

### 3. Fifteenth Amendment—Voting

The Fifteenth Amendment prohibits both the state and federal governments from denying any citizen the right to vote on the basis of race, color, or previous condition of servitude. The courts have interpreted the right to vote to include the right to have that vote meaningfully counted. In enacting provisions based on the Fifteenth Amendment, Congress cannot treat states differently and thereby impinge on their "equal sovereignty" unless the different treatment is rationally justified by current circumstances. *Shelby Cty. v. Holder*, 570 U.S. 2 (2013).

## J. CONTROL OVER MEMBERS

### 1. Qualification of Members

The qualifications for members of Congress are set forth in Article I and cannot be altered by Congress or the states. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (state-mandated term limits for federal representatives invalid); *Powell v. McCormack*, 395 U.S. 486 (1969) (House of Representatives could not refuse to seat a scandal-plagued member who satisfied constitutional criteria for service).

### 2. Punishment and Expulsion of Members

Each House can punish a member for disorderly behavior and may, upon a two-thirds vote, expel a member. Article I, Section 5, cl. 2.

# III. THE POWERS OF THE PRESIDENT

Article II, Section 1 grants the "executive power" to the President. The extent of the President's executive power has been interpreted broadly by the Supreme Court, and includes the power to enforce federal law and manage the executive branch. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Although the Supreme Court has emphasized that the President has no power to make laws, the President's enforcement power includes the exercise of prosecutorial discretion. *Davis v. U.S.*, 512 U.S. 452 (1994). Presidents may also exercise control over agencies by issuing executive orders. Generally speaking, the President's authority is broader in the area of foreign affairs than in domestic matters.

## A. DOMESTIC POWER

### 1. Pardon Power for Federal Offenses

Article II, Section 2 provides the President with the power to "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This

power applies only to federal cases; the President may not grant pardons for state crimes. The pardon or reprieve may be granted at any time after commission of the offense. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867). The pardon or reprieve may be made subject to conditions and may take or encompass various lesser acts, such as remission of fines, penalties, and forfeitures or commutation of sentences. *Ex parte William Wells*, 59 U.S. (18 How.) 307 (1856). The power may be exercised with respect to groups of people as well as individuals. James Carter, Executive Order 11967, issued Jan. 21, 1977 (amnesty for Vietnam War draft dodgers).

### 2. Veto Power

Once passed by both houses of Congress, a bill must be presented to the President. Upon presentment, the President has 10 days to act on the proposed legislation. If the President signs the bill, it becomes law. Article I, Section 7 also gives the President the power to veto any bill presented to him. The President may also veto the bill by sending it back, with objections, to the house in which it originated. Congress may override the veto and enact the bill into law by a two-thirds vote in each house.

A third option is that the President does nothing at all. If Congress is still in session at the end of the 10-day period, the bill becomes law without the President's signature. If Congress has adjourned during that time, however, the bill does not become law, because the President could not have returned it to its originating house. The President's failure to act on a bill in this situation is known as the "pocket veto" and cannot be overridden.

The President may not exercise a "line item" veto, refusing part of a bill and approving the rest, because it violates the Presentment Clause. *Clinton v. City of New York*, 524 U.S. 417 (1998).

### 3. Appointment and Removal of Officials

#### a. Appointment

Article II, Section 2 authorizes the President, **with the advice and consent of the Senate,** to appoint all "officers of the United States," including ambassadors and Justices of the Supreme Court. Congress may, however, delegate the appointment of "inferior" officials to the President alone (i.e., without Senate approval), the heads of executive departments, or the courts. "Inferior" officials are those supervised by Senate-confirmed appointees. Congress may not itself appoint members of a body with administrative or enforcement powers; such persons are "officers of the United States" and must be appointed by the President. *Buckley v. Valeo*, 424 U.S. 1 (1976) (makeup of the Federal Election Commission invalidated because a majority of its members were to be appointed by the President Pro Tem of the Senate and the Speaker of the House; the FEC's tasks were executive in nature, therefore, Congress had no right to appoint such federal officers).

#### b. Removal

The Constitution says nothing about the President's power to remove executive officers, but it is generally accepted that the President may remove any executive appointee without cause (and without Senate approval). Congress may not shield appointees from removal by the President by imposing a multi-tiered system in which persons at each level may be removed from office only for good cause. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010) (holding 15 U.S.C.S. §§ 7211(e)(6) and 7217(d)(3) unconstitutional and invalid because the multilevel protection from removal of members of the Public Company

Accounting Oversight Board was contrary to Article II's vesting of the executive power in the President and contravened the Constitution's separation of powers).

Federal judges, however, are protected under Article III, Section 1, which provides that they may "hold their offices during good behavior"; they may be removed only by impeachment.

#### 4. Authority as Chief Executive

The scope of the President's power to issue executive orders and to govern domestic affairs is extensive but not clearly delineated. The best-known exposition holds that the President's authority varies with the degree of congressional authorization of the action. Thus, when the President acts:

i) With the express or implied authorization of Congress, presidential authority is at its highest, and the action is strongly presumed to be valid;

ii) When Congress has not spoken, presidential authority is diminished, and the action is invalid if it interferes with the operations or power of another branch of government; and

iii) When Congress has spoken to the contrary, presidential authority is "at its lowest ebb," and the action is likely invalid.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).; *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (military commission (i.e., tribunal) had no jurisdiction to proceed because the executive order authorizing the commission exceeded congressional limitations placed on the President to convene commissions).

#### 5. Duty to Faithfully Execute Laws

Article II, Section 3 imposes on the President the duty to "take care that the laws be faithfully executed." Known as the "Take Care Clause," this section ensures that the President will enforce laws, despite disagreeing with them.

#### 6. Emoluments Clauses

Article II, Section 1, Clause 7, known as the Domestic Emoluments Clause, prohibits a change in the compensation received by a sitting president and precludes the president from receiving other compensation from federal or state governments.

Article I, Section 9, Clause 8, known as the Foreign Emoluments Clause, prohibits any person holding federal office from accepting any "present, emolument, office, or title" from a foreign state.

### B. FOREIGN AFFAIRS

#### 1. Commander in Chief

Although the President is the commander in chief of the military, only Congress may formally declare war. The President may take military action without a declaration of war in the case of actual hostilities against the United States. Congress may in turn limit the President's military activities through exercise of its military appropriation (i.e., funding) power. The questions of whether and to what extent the President may deploy troops overseas without congressional approval is unsettled; presidents routinely do so, and Congress routinely asserts its authority to approve the deployment. The courts have generally left the question to the political branches.

### 2. Treaties

Pursuant to the Treaty Clause (Art. II, Sec. 2. Cl. 2), the President has the exclusive power to negotiate treaties, although a treaty may only be ratified with the approval of two-thirds of the Senators present.

#### a. Effect of a treaty

The Constitution is superior to a treaty, and any conflict is resolved in favor of the Constitution. *Reid v. Covert*, 354 U.S. 1 (1957). A treaty has the same authority as an act of Congress; should the two conflict, the one most recently adopted controls. A non-self-executing treaty (one that requires legislation in order to implement its provisions) does not have the same force of law as an act of Congress until legislation is passed effectuating the treaty. In the absence of implementing legislation by Congress, the President does not have the authority to make a non-self-executing treaty binding on the states. *Medellin v. Texas*, 552 U.S. 491 (2008); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., conc.). A ratified treaty takes precedence over any inconsistent state law. *Missouri v. Holland*, 252 U.S. 416 (1920).

### 3. Executive Agreements

The President has the power to enter into executive agreements with foreign nations (e.g., reciprocal trade agreements) that do not require the approval of two-thirds of the Senate. Although not expressly provided for in the Constitution, executive agreements may be made, without congressional authorization, pursuant to the President's authority over foreign affairs.

Conflicting federal statutes and treaties take precedence over executive agreements, but executive agreements take precedence over conflicting state laws.

### 4. International Affairs

The President represents and acts for the United States in day-to-day international affairs. In addition to appointing and receiving ambassadors, the President has the exclusive power to recognize a foreign government. *Zivotofsky v. Kerry*, 576 U.S. 1 (2015).

## IV. FEDERAL INTERBRANCH RELATIONSHIPS

The separation of powers doctrine, which is inherent in the structure of the Constitution, ensures that the executive, legislative, and judicial branches of government remain separate and distinct in order to provide a system of checks and balances.

### A. CONGRESSIONAL LIMITS ON THE EXECUTIVE

#### 1. Impeachment

Article II, Section 4 states: "The President, Vice President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." The House of Representatives determines what constitutes "high crimes and misdemeanors" and may impeach (i.e., bring charges) by a **majority vote.** The Senate tries the impeached official. A **two-thirds vote** of the senators present is necessary for conviction. Article I, Section 7, Clauses 5-6.

In addition to removal from office, the punishment imposed on conviction may extend to a lifetime ban on holding any federal office. The removal of an officer through the impeachment process does not preclude the subsequent judicial criminal conviction of that officer for conduct for which the officer was removed from office. Article I, Section 7, Clause 7.

The Congressional power to impeach and remove a federal officer extends to judges, as well as executive officers, but not military officers, who instead are subject to removal by a court-martial.

### 2. Appropriation

If Congress explicitly mandates an allocation, distribution, or expenditure of funds, the President has no power to impound those funds (e.g., refuse to spend them or delay the spending). The President is permitted to exercise discretion if the authorizing legislation so provides. *Train v. New York*, 420 U.S. 35 (1975); *Kendall v. United States*, 37 U.S. 524 (1838).

**EXAM NOTE:** Separation of powers questions often center on the President trying to impound funds appropriated by Congress. Remember that if Congress fails to mandate that the funds are to be allocated, distributed, or spent, then impoundment is not a separation of powers violation.

### 3. Legislative Veto

It is unconstitutional for Congress to attempt a "legislative veto" of an executive action—that is, to retain direct control over the actions of an executive agency, rather than going through the proper channels of passing a bill.

**Example:** In *INS v. Chadha*, 462 U.S. 919 (1983), a provision of law permitted either house of Congress to overturn a decision by the Attorney General granting a noncitizen relief from deportation. The Supreme Court held such a one-house congressional "veto" of a matter delegated to the executive to be unconstitutional as violating the carefully wrought legislative procedures set forth in Article I, which require passage of legislation by both Houses of Congress (i.e., bicameralism) and sending to the President pursuant to the Presentment Clauses for his approval or return. Thus, the Court made clear that a two-house legislative veto would be equally unconstitutional.

## B. DELEGATION OF LEGISLATIVE POWER

Because Congress is vested by Article I with "all legislative powers," it may not delegate that power to any other branch of government. This principle is known as the "nondelegation doctrine." However, delegation of some of Congress's authority to the executive branch has consistently been held constitutional, so long as Congress specifies an "intelligible principle" to guide the delegate. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

**Example:** The IRS has been given the power to collect taxes that are assessed under the Internal Revenue Code. Although Congress has determined the amount to be taxed, it has delegated to the IRS the power to determine how such taxes are to be collected.

Almost any legislative delegation passes the "intelligible standards" requirement, so even broadly phrased standards have been upheld.

**Examples:** A delegation of authority to an executive agency to regulate broadcast licenses to the extent that "public interest, convenience, and necessity require" has been upheld. *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943). Similarly, an administrative agency could set "just and reasonable" rates for natural gas sold in interstate commerce. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Certain powers, however, are nondelegable, such as the power of impeachment and the power to declare war. Furthermore, pursuant to the major questions doctrine, an administrative agency may not make "decisions of vast economic and political significance" unless Congress **clearly** gives the agency decision-making authority in that area. *West Virginia v. EPA*, 597 U.S. 697 (2022).

**Example:** Emergency regulation issued by OSHA in response to COVID-19 epidemic that mandated vaccination or testing of almost 85 million employees at an alleged cost of billions to employers exceeded the agency's statutory authority over occupational health and safety because it addressed a public health concern rather than a workplace specific matter. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109 (2022).

**Example:** A statute that gives the Secretary of Education the power to "waive or modify" any statutory or regulatory authority in emergency situations does not clearly authorize the Secretary to cancel upwards of $20,000 of student loan debt for borrowers under a certain income level in response to the COVID-19 pandemic. *Biden v. Nebraska*, 600 U.S. 477 (2023).

## C. JUDICIAL LIMITATION OF CONGRESSIONAL POWER

Under the doctrine of separation of powers, Congress may not reinstate the right to bring a legal action after the judgment in the action has become final.

**Example:** An action brought in federal court under federal question jurisdiction was dismissed with prejudice because it was not timely filed. A statute that revived the plaintiff's right to bring the action was struck down as a violation of the separation of powers doctrine. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

Similarly, Congress cannot prescribe rules of decision to the federal courts in cases pending before it. *United States v. Klein*, 80 U.S. 128 (1872). However, when Congress changes the law underlying a judgment awarding ongoing relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. *Miller v. French*, 530 U.S. 327 (2000).

## D. IMMUNITIES AND PRIVILEGES

### 1. Judicial

A judge is absolutely immune from civil liability for damages resulting from her judicial acts, including grave procedural errors and acts done maliciously or in excess of authority unless there is a clear absence of all jurisdiction. *Butz v. Economou*, 438 U.S. 478 (1987); *Stump v. Sparkman*, 435 U.S. 349 (1978). The judge is not immune, however, to lawsuits regarding nonjudicial activities, such as hiring and firing court employees. *Forrester v. White*, 484 U.S. 219 (1988).

Prosecutors are subject to similar immunity rules. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Court officers who perform ministerial duties, such as court reporters, are entitled only to qualified, not absolute, immunity. *Antoine v. Byers & Anderson*, 508 U.S. 429 (1993).

### 2. Legislative

The Speech or Debate Clause of Article I, Section 6 provides members of Congress with absolute immunity from civil and criminal liability for statements and conduct made **in the regular course of the legislative process,** including a speech given on the floor of Congress, committee hearings, and reports. The activities of congressional aides are also protected if a legislator performing the same acts would be immune. *Gravel v. United States*, 408 U.S. 606 (1972).

**State legislators:** The Speech or Debate Clause does not apply to state legislators, but under the principles of federalism, state legislators are immune from liability for actions within the sphere of legitimate legislative activity (*see* § VI.B.1.b.2, State legislators, *infra*).

This protection does not foreclose prosecution for a crime, including the taking of bribes, when the crime does not require proof of legislative acts or inquiring into the motive behind those acts. *United States v. Brewster*, 408 U.S. 501 (1972). This protection also does not apply to speeches made outside Congress, or the "re-publication" (i.e., repeating) of a defamatory statement originally made in Congress. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

### 3. Executive

#### a. Executive privilege

Executive privilege is a qualified privilege with respect to the disclosure of confidential information by the executive branch to the judiciary or Congress. This privilege and the narrower presidential privilege, which applies to communications made in the performance of a president's responsibilities to shape policies and make decisions, have been recognized by the Supreme Court. The presidential privilege survives an individual president's tenure, but this privilege is not absolute. *Cheney v. United States*, 542 U.S. 367 (2004); *United States v. Nixon*, 418 U.S. 683 (1974).

##### 1) Criminal trial

Presidential communications must be made available in a criminal case if the prosecution demonstrates a need for the information. A judge may examine the communications in camera to determine whether the communications fall within the privilege. *United States v. Nixon*, *supra*.

##### 2) Civil proceedings

An executive branch decision to withhold production of information in civil proceedings will be given greater deference than in a criminal trial because the need for information is "weightier" in the latter case. In a civil case, the court may be required to consider the issue of separation of powers without first requiring the executive branch to assert executive privilege. *Cheney v. United States Dist. Court*, *supra*.

##### 3) Historical preservation

Congress can require the preservation of presidential papers and tape recordings. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

##### 4) State secrets

Claims of privilege based on national security are generally accorded enhanced deference. *United States v. Reynolds*, 345 U.S. 1 (1953) (recognizing a "state secrets" privilege). *But see In re NSA Telcoms. Records Litig.*, 564 F. Supp. 2d 1109 (2008) (the "state secrets" privilege was a common-law privilege that could be limited by congressional action).

### b. Executive immunity

#### 1) Official duties

##### a) President

The President may not be sued for civil damages with regard to any acts performed as part of the President's **official responsibilities.** *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). A president has absolute immunity from criminal prosecution for conduct within the president's "conclusive and preclusive" constitutional authority. Such actions that fall within this sphere of exclusive power include the pardon power, the power to recognize foreign governments, and the power to supervise and remove executive branch officials. For example, the president can remove or threaten to remove the U.S. Attorney General for any reason without fear of prosecution.

There is also a presumption that a president is immune for all other official presidential acts. This immunity extends to the "outer perimeter" of the President's official responsibilities, which covers any actions that are "not manifestly or palpably beyond [his] authority." Additionally, a jury cannot "consider" evidence concerning the president's official acts. The burden is on the prosecution to rebut this presumption of immunity.

A determination as to whether a presidential act is an official or unofficial act requires a fact-intensive examination. In making this determination, the president's motives may not be considered. An official act occurs when the president acts pursuant to "constitutional and statutory authority." For example, the president acts in an official capacity when discussing potential investigations and prosecutions with Justice Department officials to carry out the president's duty to "take Care that the Laws be faithfully executed." It is also an official act for the president and vice president to discuss their official responsibilities, including a president pressuring the vice president to take specific steps regarding the electoral certification process. And most presidential public communications are part of the president's official duties.

However, a president enjoys no immunity from criminal prosecution for unofficial acts. *Trump v. U.S.*, 603 U.S. ___, 144 S. Ct. 2312 (2024).

##### b) Presidential advisor

A senior presidential advisor (e.g., cabinet member) is not automatically entitled to enjoy derivatively the protection of absolute executive immunity. Although the Supreme Court has stated that such an advisor may be entitled to such protection when performing special functions that are vital to national security or foreign policy, the Court has also held that an Attorney General did not qualify for absolute immunity with respect to the authorization of a warrantless wiretap for national security purposes. The burden for establishing such immunity rests with the advisor. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

##### c) Federal officials

A federal official, in performing a discretionary (as opposed to ministerial) act, is entitled to qualified immunity from liability for civil damages when the official's conduct does not violate clearly established statutory and

constitutional rights of which a reasonable person would have known. This is an objective standard; a plaintiff's bare allegations of malice are insufficient to overcome this immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

**Example:** The Attorney General, in authorizing a warrantless wiretap for national security purposes, while not entitled to absolute immunity, was entitled to qualified immunity. The unconstitutionality of this authorization was not clearly established at the time of the authorization. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

**2) Civil action—prior presidential conduct**

The President does not have immunity from a civil action based on conduct alleged to have occurred before the President took office or completely unrelated to carrying out his job. Moreover, the President may be subject to such a suit even while in office. *Clinton v. Jones*, 520 U.S. 681 (1997).

**3) Criminal proceedings—subpoena of president and his records**

The President also does not have immunity from compliance with a subpoena issued in connection with federal or state criminal proceedings. *U.S. v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (federal proceedings); *Trump v. Vance,* 591 U.S.___, 140 S. Ct. 2412 (2020) (state proceedings). In *U.S. v. Burr*, the defendant sought the testimony of the president as well as documents he possessed related to the defendant's treason trial. In *Trump v. Vance*, a prosecutor sought the president's personal documents from his accountant in connection with a grand jury investigation of the president for potential criminal conduct before taking office. In the latter case, the Supreme Court held that the Supremacy Clause does not protect the president from a subpoena issued by a state prosecutor. In addition, the court ruled, the prosecutor is not required to establish a heightened level of need to issue a subpoena for the president's personal documents. However, the court noted that the president may raise challenges to the subpoena on grounds that may be raised by other citizens (e.g., overbreadth, bad faith, harassment) as well as executive privilege when the information relates to the president's official duties. *Trump v. Vance, supra*.

**4) Congressional subpoena of president regarding private matter**

A president may assert executive privilege when a congressional subpoena involves information regarding his official duties (*see* IV.D.3.a. Executive privilege, above). When a congressional subpoena involves personal matters regarding the president, the judiciary may resolve the dispute between the Congress and the executive but must be mindful of separation-of-powers concerns. The court has imposed the following restrictions on such a subpoena:

i) The subpoena is not enforceable if other sources can reasonably provide Congress with the information sought;

ii) The subpoena must be no broader than reasonably necessary to support the Congressional legislative objective;

iii) Congress must offer evidence that establishes that the subpoena advances a valid legislative purpose; and

iv) The court must assess the burden imposed on the president by the subpoena.

*Id.* Congress is not required to promise to keep the information obtained secret. *Trump v. Mazars USA, LLP*, 39 F.4th 774, 810 (D.C. Cir. 2022).

## PART TWO: THE FEDERAL SYSTEM

## V. FEDERAL AND STATE POWERS

The federal system, under which the federal and state governments each have exclusive authority over some areas, yet share authority over other areas, is one of the Constitution's basic checks on governmental power.

### A. EXCLUSIVE FEDERAL POWERS

The Constitution explicitly provides for some powers of the federal government to be exclusive, such as the powers to coin money or enter into treaties. Article I, Sec. 10. Other powers are by their nature exclusively federal, such as the power to declare war and the power over citizenship; a state's attempt to exercise authority in these areas would essentially subvert the power of the federal government.

### B. EXCLUSIVE STATE POWERS

The Tenth Amendment provides that all powers not assigned by the Constitution to the federal government are reserved to the states, or to the people. In theory, this gives the states expansive, exclusive power. In practice, however, given the broad interpretation of the Commerce Clause and the spending power, the federal government has very broad authority, making state power rarely exclusive.

### C. CONCURRENT FEDERAL AND STATE LAWS—SUPREMACY CLAUSE

It is possible (and common) for the federal and state governments to legislate in the same area. When this happens, the Supremacy Clause (Article VI, clause 2) provides that federal law supersedes conflicting state law (*see* § VIII. Federal Preemption of State Law, *infra*).

## VI. INTERGOVERNMENTAL IMMUNITIES

### A. FEDERAL IMMUNITY

#### 1. Regulation by the States

A state lacks the power to regulate the federal government—for example, by imposing state wage-and-hour laws on local federal offices—unless Congress permits the state regulation or unless the state regulation is not inconsistent with existing federal policy. Pursuant to the Supremacy Clause, a state court may not compel the release of an individual detained by the federal government. *Tarble's Case*, 80 U.S. 397 (1871) (state court was without jurisdiction to issue a writ of habeas corpus requiring the U.S. Army to release a minor who had enlisted without parental consent).

#### 2. Taxation by the States

The federal government and its instrumentalities (such as a national bank chartered by the federal government) are immune from taxation by the states. *McCulloch v. Maryland*, 17 U.S. 316 (1819). States may, however, impose generally applicable indirect taxes so long as they do not unreasonably burden the federal government (e.g., state income taxes on federal employees). Note that imposing state sales tax on purchases made by the federal government is often unreasonably burdensome and, therefore, unconstitutional. *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218 (1928).

## B. STATE IMMUNITY

### 1. Federal Regulation

The federal government has virtually unlimited power to regulate the states.

#### a. Congressional action

As long as Congress is exercising one of its enumerated powers and the resulting regulations apply equally to states and private parties, Congress generally may regulate the states. For example, a federal minimum wage and overtime statute enacted under the commerce power can be applied to state employees. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Similarly, Congress can prohibit the disclosure by state officials of personal information obtained from driver's license applications because such information constitutes an article of commerce that is being sold in interstate commerce. *Reno v. Condon*, 528 U.S. 141 (2000). Congress can also require states to implement Congress's regulatory program for the care of Native American children and families through the Indian Child Welfare Act (ICWA). *Haaland v. Brackeen*, 599 U.S. 255 (2023).

If Congress determines that a state is violating a person's civil liberties, it can place limits on that state's activities by using the power of the Fourteenth and Fifteenth Amendments. *See Oregon v. Mitchell*, 400 U.S. 112 (1970).

##### 1) "Commandeering" limitation

Congress cannot "commandeer" state legislatures by commanding them to enact specific legislation or enforce a federal regulatory program, and it may not circumvent that restriction by conscripting a state executive officer directly. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). There is no distinction between compelling a state to enact legislation and prohibiting a state from enacting new laws—in either case Congress is precluded from issuing direct orders to state legislatures. *Murphy v. National Collegiate Athletic Assn*, 584 U.S. 453 (2018) (act preventing states from legalizing sports betting violated anti-commandeering limitation). However, through the use of the taxing and spending powers, Congress may encourage state action that it cannot directly compel.

**Example:** In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court held that Congress could condition a provision of five percent of federal highway funds on the state's raising its drinking age to 21.

##### 2) Requirements for conditioning funding

While, as noted, Congress, through the use of its taxing and spending powers, can encourage states to act in ways in which it cannot directly compel, such Congressional encouragement is subject to five limitations. First, the exercise of spending power must be for the "general welfare," with great deference given to Congress in its judgment. Second, the condition must be unambiguous. Third, the condition must relate to "the federal interest in particular national projects or programs." Fourth, the condition must not induce the states to act in an unconstitutional manner. Finally, the condition may not exceed the point at which "pressure turns into compulsion." *South Dakota v. Dole at 207-11*; *Nat'l Fed'n of Indep. Bus. v. Sebelius (The Patient Protection and Affordable Care Cases)*, 567 U.S. 519 (2012).

### b. Judicial action

#### 1) Remedying constitutional violations

The federal judiciary has broad equitable powers in fashioning a remedy for a constitutional violation. For example, while a court may not directly impose a tax in order to fund a racial-discrimination remedy, it may order a local government with taxing authority to levy such a tax, and it may do so despite a state statutory limitation that would otherwise prevent such action. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

#### 2) State legislators

State legislators are absolutely immune from suit for damages and for declaratory and injunctive relief for actions within the sphere of legitimate legislative activity. *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

## 2. Federal Taxation

Pursuant to the Supremacy Clause of Article VI, the federal government may tax a state; the Tenth Amendment does not protect a state from all federal taxation. *New York v. United States*, 326 U.S. 572 (1946) (excise tax impose on sale of mineral water could be imposed on mineral water from state-owned property); *South Carolina v. United States*, 199 U.S. 437 (1905) (federal licensing tax imposed on sellers of alcohol could be imposed on sellers who were agents of the state even when the tax was paid by the state). However, states have partial immunity from direct federal taxation that would unduly interfere with the performance of the states' "sovereign functions of government." Therefore, the federal government generally may not impose significant taxes directly on states for property used for or income received from the state's performance of basic governmental functions (e.g., public schools, state parks, etc.). *See New York v. United States*, 326 U.S. 572 (1946).

A tax on a payment made by a state to private person that is not directly imposed on the state is constitutional, even though the tax may have a substantial adverse impact on the state. *Id.*, (federal income tax on interest received by holders of state bonds); *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (federal income tax on salaries of state employees).

## 3. Litigation Involving the United States and Its Officers

In suits between a state and the United States, the United States must consent before the state can file suit against it; conversely, the United States does not need to obtain consent from a state to file suit against that state. As between states, no consent is needed for one state to file suit against another state.

Suits against federal officers are limited, and generally prohibited, because such suits are considered to be brought against the United States if payment of the award will be made from the public treasury. However, if the federal officer acted outside the scope of his professional capacity, then a suit may be instituted against the officer individually.

Under 42 U.S.C. § 1983, a damage claim can be brought against a state official personally for violation of constitutional rights. The Supreme Court has recognized that a similar claim can be brought against federal officials. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

## VII. STATE REGULATION AND TAXATION OF COMMERCE

The Constitution contemplates a system of regulation of commerce and taxation that includes both the federal and state governments.

### A. THE DORMANT COMMERCE CLAUSE

The Dormant Commerce Clause (sometimes referred to as the Negative Commerce Clause) is a doctrine that limits the power of states to legislate in ways that impact interstate commerce. The Commerce Clause (Article I, Section 8, Clause 3) reserves to Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; as a corollary, individual states are limited in their ability to legislate on such matters.

#### 1. General Rule

If Congress has not enacted legislation in a particular area of interstate commerce, then the states are free to regulate, so long as the state or local action does not:

i) **Discriminate** against out-of-state commerce;

ii) **Unduly burden** interstate commerce; or

iii) Purposefully regulate **extraterritorial** (wholly out-of-state) activity.

**Note:** Unlike the Comity Clause of Article IV, Section 2, the Dormant Commerce Clause does not exclude corporations and noncitizens from its protection against state or local action. *See* XIV.A.1. "Prohibits State Discrimination Against Nonresidents," *infra*.

#### 2. Discrimination Against Out-of-State Commerce

A state or local regulation discriminates against out-of-state commerce if it protects local economic interests at the expense of out-of-state competitors. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504 (2019) (a durational residency requirement for alcohol retail licenses violated the Dormant Commerce Clause because its predominant effect was to protect local economic interests at the expense of out-of-state competitors); *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982) (mandate that in-state residents be given preferred access to electricity generated from state's natural resources unconstitutionally discriminated against out-of-state consumers); City *of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (state statute prohibiting importation of out-of-state garbage discriminated in favor of local trash collectors); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1959) (state law discriminated against out-of-state milk suppliers by requiring all milk sold in the city to be processed and bottled locally).

##### a. Necessary to important state interest

If a state or local regulation, on its face or in practice, is discriminatory, then the regulation may be upheld if the state or local government can establish that:

i) An important local interest is being served; and

ii) No other nondiscriminatory means are available to achieve that purpose.

*Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). Discriminatory regulation has rarely been upheld. In a few instances, a discriminatory state or local regulation that furthers an important, non-economic state interest, like health and safety, has not been struck down. *Maine v. Taylor*, 477 U.S. 131 (1986) (upheld a prohibition against importation into the state of out-of-state live baitfish that may pose contamination hazards to local waters).

#### 1) Burden exclusively on out-of-state businesses

The mere fact that the entire burden of a state's regulation falls on out-of-state businesses is not sufficient to constitute discrimination against interstate commerce. The Dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id*. pp. 127-128. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (ban on refiner-owned service stations by state in which no refiners were located upheld).

### b. Market-participant exception

A state may behave in a discriminatory fashion if it is acting as a market participant (buyer or seller), as opposed to a market regulator. If the state is a market participant, it may favor local commerce or discriminate against nonresident commerce as could any private business. *E.g., Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (state-owned cement plant may, in times of shortage, sell only to in-state buyers).

The market-participant exception does not apply to challenges pursuant to the Privileges and Immunities Clause of Article IV. *See United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984).

### c. Traditional government function exception

State and local regulations may favor state and local **government** entities, though not local **private** entities, when those entities are performing a traditional governmental function, such as waste disposal. For example, an ordinance may require all trash haulers to deliver to a local **public** waste-treatment facility, but **not** to a local **private** facility. *Compare United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (public facility), *with C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (private facility). Similarly, a state may discriminate against out-of-state interests when raising money to fund state and local government projects. *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008) (upholding state income tax exemption for income earned on state and local bonds, but not out-of-state bonds).

### d. Subsidy exception

A state may favor its own citizens when providing for subsidy. For example, a state may offer in-state residents a lower tuition rate to attend a state college or university than out-of-state residents. *Vlandis v. Kline*, 412 U.S. 441 (1973).

### e. Exception—congressionally permitted discrimination

Because Congress has exclusive authority over interstate commerce, it may explicitly permit states to act in ways that would otherwise violate the Dormant Commerce Clause. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (state tax only on out-of-state insurance companies upheld when Congress had enacted a law permitting states to regulate insurance in any manner consistent with federal statutes). It must be unmistakably clear that Congress intended to permit the otherwise impermissible state regulation; Congress must expressly allow or "affirmatively contemplate" such state legislation. The fact that the state policy appears to be consistent with federal policy or that the state policy furthers the goals that Congress had in mind is insufficient. *South–Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984).

### 3. Undue Burden on Interstate Commerce

A state regulation that is not discriminatory may still be struck down as unconstitutional if it imposes an undue burden on interstate commerce. The courts will balance, case by case, the objective and purpose of the state law against the burden on interstate commerce and evaluate whether there are less restrictive alternatives. If the burden imposed on interstate commerce is clearly excessive in relation to the local benefits, then even nondiscriminatory regulation may be struck down. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This balancing test is not a cost-benefit analysis or a form of close scrutiny of state economic regulation. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

### 4. "Extraterritoriality"

States may not purposefully or deliberately regulate conduct that occurs wholly beyond their borders. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023). Thus, Connecticut could not require that beer sold in Connecticut not be priced higher than beer sold in any of the four neighboring states, because the Connecticut regime deliberately prevented out-of-state firms from engaging in competitive pricing. *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). There may be an exception for the regulation of the internal affairs of corporations. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987).

## B. STATE TAXATION OF COMMERCE

### 1. Interstate Commerce

Much as with regulation, the states may tax interstate commerce only if Congress has not already acted in the particular area and if the tax does not discriminate against or unduly burden interstate commerce.

#### a. *Complete Auto* Test

The Supreme Court applies a four-part test to determine whether a state tax on interstate commerce comports with the Commerce Clause. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

##### 1) Substantial nexus

There must be a **substantial nexus** between the activity being taxed and the taxing state. A substantial nexus requires significant (i.e., more than minimum) contacts with, or substantial activity within, the taxing state. A physical presence within the state is not required. *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018).

##### 2) Fair apportionment

The tax must be fairly apportioned according to a rational formula (e.g., taxing only the state's portion of the company's business), such that interstate commerce does not pay total taxes greater than local commerce by virtue of having to pay tax in more than one state. The burden is on the taxpaying business to prove unfair apportionment.

##### 3) Nondiscrimination

The tax may not provide a direct commercial advantage to local businesses over their interstate competitors (unless Congress specifically authorizes such a tax). A tax that is neutral on its face still may be unconstitutional if its effect is to favor local commerce. *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186 (1994) (tax affecting all milk dealers, the revenue from which went to a fund

used to subsidize in-state dairy farmers, violated the Commerce Clause). In addition, the denial of tax exemption to a state entity unless the entity operates primarily for the benefit of state residents may be unconstitutional. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997).

**4) Fair relationship to services provided**

The tax must be fairly related to the services provided by the taxing state. *Evansville-Vanderburg Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (tax on airline passengers was related to benefits the passengers received from the state airport facilities).

**b. Violation of other constitutional provisions**

A state tax may violate more than just the Commerce Clause.

i) A tax that discriminates against nonresident individuals—for example, an income tax that exempts local residents—may violate the **Comity Clause** of Article IV. *Austin v. New Hampshire*, 420 U.S. 656 (1975).

ii) A discriminatory tax on out-of-state businesses, even if authorized by Congress and therefore allowed under the Commerce Clause, may still violate the **Equal Protection Clause** of the Fourteenth Amendment, if it cannot satisfy the rational basis test. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose).

iii) An income-based tax imposed on nonresidents that taxes income earned outside the state's borders may violate the **Due Process Clause** of the Fourteenth Amendment. *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U.S. 307 (1982).

**c. Types of taxes**

**1) Ad valorem property tax**

An ad valorem tax is based on the value of real or personal property and is often assessed at a particular time (e.g., tax day). Such taxes, which may be imposed on the full value of the property, are generally valid, but a state may **not** levy ad valorem taxes on **goods in the course of transit** (from the time the goods are delivered to an interstate carrier or begin their interstate journey until they reach their destination). *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952). However, once the goods are stopped for a business purpose (i.e., obtain a "taxable situs"), they may be taxed.

A state may tax the "instrumentalities of commerce" (airplanes, railroad cars, etc.), provided that:

i) The instrumentality has a **taxable situs** within—or **sufficient contacts** with—the taxing state (i.e., it receives benefits or protection from the state); and

ii) The tax is **fairly apportioned** to the amount of time the instrumentality is in the state.

**2) Sales tax**

A sales tax imposed on the seller of goods is valid as long as the sale takes place within the state. Sales tax generally does not discriminate against interstate commerce as long as there is a substantial nexus between the taxpayer and the state, and the tax is properly apportioned.

It is no longer required that the seller have a physical presence in the state. State sales taxes apply to any sellers (including online retailers) who engage in a significant quantity of business within the state. *South Dakota v. Wayfair, Inc.*, *supra*.

**3) Use tax**

A use tax on goods purchased out of state but used within the taxing state is valid so long as the use tax rate is not higher than the sales tax rate on the same item. Even though a use tax does, on its face, seem to discriminate against out-of-state purchases, the rationale for its validity is that such a tax equalizes the tax on in-state and out-of-state goods. *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937).

**4) "Doing business" taxes**

Taxes levied against companies for the privilege of doing business in a state (made up of privilege, license, franchise, or occupation taxes) are valid as long as they pass the *Complete Auto* test (see B.1.a. "*Complete Auto* Test," above). Such a tax may be measured by a flat annual fee or by a graduated rate proportional to the amount of revenue derived from the taxing state. The burden of showing that a tax is unfairly apportioned is on the taxpayer.

### 2. Foreign Commerce

The Import-Export Clause of Article I, Section 10 prohibits the states, without the consent of Congress, from imposing any tax on any imported or exported goods, or on any commercial activity connected with imported goods, except what is absolutely necessary for executing its inspection laws. *Brown v. Maryland*, 25 U.S. 419 (1827).

In addition, the Commerce Clause vests in Congress the power to regulate international commerce in which the United States is involved. In addition to meeting the same requirements as a tax on interstate commerce (*see* VII.B.1.a. "*Complete Auto* Test," *supra*), a state tax on foreign commerce must not (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).

## C. ALCOHOLIC BEVERAGE REGULATION

The Twenty-First Amendment repealed prohibition and specifically gave states the authority to prohibit the transportation or importation of alcoholic beverages into the state for delivery or use within the state. This amendment has been interpreted as giving a state the authority to regulate or outright ban the distribution and sale of alcoholic beverages within the state. However, this authority is narrowly confined. State regulations concerning alcoholic beverages are subject to the restrictions of the Dormant Commerce Clause, as well as the protections of the First and Fourteenth Amendments. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504 (2019) (two-year residency requirement for retail alcohol license deemed unconstitutional economic protectionism of in-state licensees); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (Equal Protection Clause).

In addition, this amendment does not prevent Congress from exercising control over economic transactions that involve alcoholic beverages under the Commerce Clause or its spending power. *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (Commerce Clause); *South Dakota v. Dole*, *supra* (spending power).

## VIII. FEDERAL PREEMPTION OF STATE LAW

The Supremacy Clause of Article VI, Section 2 provides that the "Constitution, and the laws of the United States" are the "supreme law of the land." Any state constitutional provision or law that directly or indirectly conflicts with a federal law, including federal regulations, is void under this clause. However, the Supreme Court has frequently stated that there is a presumption against preemption, especially in areas in which states have traditionally exercised police power. *Wyeth v. Levine*, 555 U.S. 555 (2009) (health and safety).

### A. EXPRESS PREEMPTION

Federal law **expressly** preempts state law in cases in which the Constitution makes the federal power exclusive (such as the powers to coin money or declare war) or when Congress has enacted legislation that explicitly prohibits state regulation in the same area (e.g., the Federal Cigarette Labeling and Advertising Act forbids state laws that regulate either cigarette labels or the "advertising or promotion" of labeled cigarettes "based on smoking and health," 15 U.S.C. § 1334).

#### 1. Narrow Construction

An express federal preemption must be narrowly construed. *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) (Federal Cigarette Labeling and Advertising Act did not preempt a suit based on a state's general deceptive-practices statute because such a statute was not based on smoking and health).

**Example:** The National Bank Act prohibited states to "exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records," but it was not clear from the Act's language whether it completely prohibited the state from exercising enforcement powers when state law is violated. The Court concluded that the Act's structure and purpose differentiate between the sovereign's "visitorial powers" and its power to enforce the law. While the state could not issue administrative subpoenas to banks, it could file suit to punish violations of state banking laws. *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009).

#### 2. Savings Clause

Federal law may also contain "savings clauses" that explicitly preserve or allow state laws that regulate in the same area. *See, e.g.*, 33 U.S.C. § 1365 (The Clean Water Act preserves "any right which any person (or class of persons) may have under any statute or common law.").

### B. IMPLIED PREEMPTION

#### 1. When Applicable

Federal preemption is **implied** when any of the following circumstances exist:

i) Congress intended for federal law to **occupy the field** (*e.g.*, *Hines v. Davidowitz*, 312 U.S. 52 (1941) (new federal law requiring registration of all noncitizens preempted preexisting state law requiring registration of noncitizens within the state));

Intent to occupy a field can be inferred from a framework of regulation so pervasive that Congress left no room for states to supplement it or when there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, (1947). When Congress occupies an entire field, even complementary state regulation is impermissible. Field preemption

reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. *Arizona v. U.S.*, 567 U.S. 387 (2012) (even if state may make violation of federal law a crime in some instances, it cannot do so in a field, like noncitizen registration, that has been occupied by federal law).

ii) The state law **directly conflicts** with the federal law by, for example, requiring conduct that is forbidden by the federal law or making it impossible (or nearly so) to comply with both, *e.g., Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (federal law providing that federal death benefits for state law-enforcement officers be in addition to other state benefits preempted contrary state law requiring that other benefits be reduced by the amount of death benefits); or

**Example 1:** Under 42 U.S.C. § 1983, all persons who violate federal rights while acting under color of state law may be sued for damages. A state law shielding state corrections officers from liability under § 1983 by excluding claims brought against them from being heard in state court violated the Supremacy Clause. *Haywood v. Drown*, 556 U.S. 729 (2009).

**Example 2:** Although a federal statute provides for preemption of state tort claims with regard to medical devices approved by the Food and Drug Administration, 21 U.S.C. § 360(k), there is no express preemption with regard to prescription drugs. However, a state-imposed duty on generic drug manufacturers to warn users of dangers through labeling was preempted by an FDA rule that required the label on generic drugs to match the label of the corresponding brand name drug. The court found that it was impossible for the generic drug manufacturers to comply with both federal regulations and state law. *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).

**Compare:** The manufacturer of a brand-name drug failed to establish preemption of a state-law duty to warn when the manufacturer was permitted under FDA regulations to change the drug label and then request FDA approval for the change. *Wyeth v. Levine*, *supra*.

**Example 3:** The protections afforded to labor unions and striking workers under the National Labor Relations Act (NLRA) generally preempt state laws that even arguably conflict with these protections. As a result, a state law that provides damages to companies for harm caused by picketing workers is preempted by the NLRA's protections for the right of employees to organize, collectively bargain, and strike. *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 236, 244 (1959).

**Compare:** Striking workers can be liable for conversion and trespass to chattels under state law when they initiated a strike in a manner that was designed to compromise the safety of their employer's concrete trucks and destroy its concrete. That is because the NLRA does not protect striking employees who fail to take reasonable precautions to protect their employer's property from "foreseeable, aggravated, and imminent danger" due to the sudden work stoppage. As a result, the state law and NLRA do not conflict, and the state law is not preempted. *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, 598 U.S. 771 (2023).

iii) The state law **indirectly conflicts** with federal law by creating an obstacle to or frustrating the accomplishment of that law's purpose, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971) (state law suspending licenses of all drivers with unpaid

accident judgments frustrates the purpose of federal bankruptcy laws to provide a fresh start).

The existence of a valid purpose for a state law does not prevent federal preemption. *Id.*

#### 2. Absence of Preemption

If federal law does not preempt state law, a state is free to enact legislation regarding the same issue. *Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963) (state statute prohibiting racial discrimination valid despite the existence of identical federal law). If there has not been federal preemption in a given area, a state is free to set more stringent standards than those imposed by the federal government. In addition, a state may recognize individual rights that exceed those granted by the federal constitution or federal statutes. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980) (California's constitutional grant of greater free speech rights than the federal constitution confers upheld).

**EXAM NOTE:** Under the Supremacy Clause, federal law sets a **floor** below which state law generally cannot go, but it does **not** set a **ceiling** beyond which state law cannot go.

### C. OBLIGATION OF STATE COURTS TO ENFORCE FEDERAL LAW

In general, a state court has jurisdiction to adjudicate federal rights unless Congress expressly delegates exclusive jurisdiction to the federal courts. Moreover, under the Supremacy Clause, a state generally cannot discriminate against rights arising under a federal law by prohibiting its courts from hearing the case when the state courts have jurisdiction to hear similar cases based on state law. *Haywood v. Drown*, 556 U.S. 729 (2009).

## IX. RELATIONS AMONG STATES

### A. INTERSTATE COMPACTS

An interstate compact is an agreement, similar to a treaty or a contract, between two or more states. Article I, Section 10, Clause 3 (the "Interstate Compact Clause") allows states to enter into such agreements only with the consent of Congress. However, the only agreements that qualify as "compacts" requiring the consent of Congress are those that either affect a power delegated to the federal government or alter the political balance within the federal system.

When a compact is silent as to unilateral withdrawal and exclusively calls for ongoing performance on an indefinite basis, a state may unilaterally withdraw from the compact. However, this unilateral withdrawal rule does not apply to compacts that set boundaries, apportion water rights, or convey property interests. *New York v. New Jersey*, 598 U.S. 218 (2023).

### B. FULL FAITH AND CREDIT

The Full Faith and Credit Clause of Article IV, Section 1 provides that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

#### 1. Judgments

Full faith and credit requires that out-of-state **judgments** be given in-state effect. *Baker v. General Motors Corp.*, 522 U.S. 222 (1998). However, to be given full faith and credit, a decision must meet three requirements:

i) The court that rendered the judgment must have had **jurisdiction** over the parties and the subject matter;

ii) The judgment must have been **on the merits** rather than on a procedural issue; and

iii) The judgment must be **final**.

#### 2. Laws (Public Acts)

The Full Faith and Credit Clause is "less demanding" with respect to choice of law and the application of the laws of other states (i.e., which state's law should apply in a situation when either might). *Id.*

## PART THREE: INDIVIDUAL RIGHTS

## X. STATE ACTION

The Constitution generally protects against wrongful conduct by the government, not private parties (with the exception of the Thirteenth Amendment's prohibition against slavery, which applies to private and government action). In other words, state action, which encompasses action by federal as well as local governments, is a necessary prerequisite to triggering constitutional protections. A private person's conduct must constitute state action in order for these protections to apply. For example, state action may exist in cases of private parties carrying out traditional governmental functions or significant state involvement in the activities.

### A. TRADITIONAL GOVERNMENTAL FUNCTION

State action is found when a private person carries on activities that are **traditionally performed exclusively by the state,** such as running primary elections or governing a "company town." *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946). By contrast, a shopping center that is open to the public does not thereby assume or exercise municipal functions, and therefore is not treated as a state actor. *Hudgens v. NLRB*, 424 U.S. 507 (1976) (shopping mall not required to permit picketing on its private sidewalks). Similarly, merely providing a product or service that the government **could** offer is not sufficient to make the provider a state actor. *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978) (statutorily sanctioned but not compelled sale of goods by bailee not state action). However, the use of peremptory challenges, even by private litigants, constitutes state action because the selection of jurors is a traditional state function and because the judge (i.e., the government) plays a significant role in the process. *Edmonson v. Leesville Concrete*, 500 U.S. 614 (1992).

### B. SIGNIFICANT STATE INVOLVEMENT

The Supreme Court has not laid out a test to determine what constitutes significant state involvement, but some general guidelines exist. Mere licensing or regulation of a private party does not constitute state action; the state must **act affirmatively** to facilitate, encourage, or authorize the activity. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Even when the state explicitly prohibits behavior that violates a person's civil rights, state action may exist if it appears the state has sanctioned the violative act.

States are constitutionally forbidden from facilitating or authorizing discrimination, but they are not required to make discrimination illegal.

State action may exist if there are sufficient mutual contacts between the conduct of a private party and the government to find that the government is so pervasively entwined with the private entity that constitutional standards should apply to the private actor. *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001) (athletic association was a

federal actor because the association was pervasively entwined with government policies and was managed and controlled by government officials in their government capacity).

State action also exists if the actions of a private party and the government are so intertwined that a mutual benefit results, such as if the parties are involved in a joint venture. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982) (state action was present when a clerk and sheriff acted together with a private citizen to obtain attachment against a property of the debtor). Similarly, when the government creates a corporation by special law for the furtherance of governmental objectives and retains permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the government for the purposes of the First Amendment even if the enabling statute explicitly states that the corporation is a private entity. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

The Supreme Court has held that a public official's **social media activity** is **private action** unless the state official possessed **actual authority** to speak on the government's behalf and **purported** to exercise that authority when speaking on social media. *Lindke v. Freed*, 601 U.S. 187 (2024).

### C. INSIGNIFICANT STATE INVOLVEMENT

Businesses that the government substantially regulates or to which the government grants a monopoly, such as utility companies, do not exercise state action. Further exclusions include nursing homes that accept Medicaid, schools that receive government funds but are operated by a private corporation, and congressional grants of a corporate charter.

## XI. PROCEDURAL DUE PROCESS

The Due Process Clause of the **Fifth Amendment,** which applies against the **federal government,** provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."

The Due Process Clause of the **Fourteenth Amendment,** which applies against the **states,** provides that "no state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of the law."

### A. DUE PROCESS GENERALLY

These clauses operate at a number of levels to protect the rights of individuals and other "persons"—e.g., corporations—against the government. At the most basic level, each clause ensures that the federal and state governments must follow certain procedures before depriving any person of "life, liberty, or property." These safeguards, like notice and a hearing, are the cornerstone of **procedural due process.**

At another level, the Fourteenth Amendment, through its guarantee of rights respecting life, liberty, and property, has been interpreted to make **most provisions of the Bill of Rights** (which by its terms applies to the federal government) **applicable against the states as well.** That is, the Fourteenth Amendment Due Process Clause **incorporates** the protections of the First, Second, Fourth and Eighth Amendments, as well as most of the protections of the Fifth and Sixth Amendments. (However, the Fifth Amendment right to grand jury indictment is not incorporated.) The Seventh Amendment right to a jury in civil trials has been held not applicable to the states.

Finally, both Due Process Clauses contain a "substantive" component that guarantees certain fundamental rights to all persons. This **substantive due process** acts as something of a catchall for rights not explicitly set forth elsewhere in the Constitution.

## B. PROCEDURAL DUE PROCESS APPLIED

### 1. General Principles

The concept of "fundamental fairness" is at the heart of the right to procedural due process. It includes an individual's right to be **notified** of charges or proceedings against him and the opportunity to be **heard** at those proceedings. When one's liberty or property interests are adversely affected by governmental action, two questions are asked:

i) Is the threatened interest a **protected** one?

ii) If so, **what process** is due?

Note that procedural due process only applies in quasi-judicial or adjudicatory settings, and not with respect to the adoption of general legislation. *See Minnesota State Bd. for Cmty. Colls. V. Knight*, 465 US 271 (1984).

#### a. Neutral decision maker

Due process entitles a person to a fair decision maker. A judge must recuse herself when she has a direct, personal, substantial, pecuniary interest in a case (i.e., actual bias) or there is a serious objective risk of actual bias. In the latter instance, proof of actual bias is not required, and subjective impartiality is not sufficient to justify a refusal to recuse. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

**Example:** An attorney running for a judgeship on the state supreme court had received a $3 million contribution that had a significant and disproportionate influence on the electoral outcome. The contribution exceeded the sum total of all other contributions the attorney had received and exceeded by 50% the combined amount spent by the attorney's and his opponent's campaigns. The contribution was made by the president of a company that had received an adverse $50 million verdict in a lower court of the state prior to the election. It was foreseeable that the judgment would be appealed to the state supreme court at the time that the contribution was made. Consequently, the Due Process Clause required the judge who had received the contribution to recuse himself. *Caperton v. A. T. Massey Coal Co.*, *supra*.

#### b. Intentional conduct

Due process addresses injury that results from an intentional governmental act. Mere negligent conduct by a government employee does not trigger a due process right. *Daniels v. Williams*, 474 U.S. 327 (1986) (prisoner's injury due to correction officer's negligence was not a deprivation of liberty).

### 2. Protected Interests

#### a. Liberty

An impingement on liberty is generally construed to mean **significant** governmental restraint on one's **physical freedom,** exercise of **fundamental rights** (i.e., those guaranteed by the Constitution), or **freedom of choice or action.**

Examples of loss of liberty include commitment to a mental institution, parole revocation, and loss of parental rights. Injury to reputation alone is not a deprivation of liberty, unless the injury is so great that the individual has lost **significant employment or associational rights.**

### b. Property

A cognizable property interest involves more than an abstract need or desire; there must be a "legitimate claim of entitlement" by virtue of statute, employment contract, or custom. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (non-tenured professor with a one-year contract had no liberty or property interest in being rehired).

The rights to government-issued licenses and continued welfare and disability benefits are legitimate property interests. For example, although a patient may have a legitimate property interest in the continued receipt of medical benefits to pay for the patient's stay in a qualified nursing home, there is no legitimate property interest in the patient's continued residence in the nursing home of the patient's choice. As a result, a patient is not entitled to a hearing before the government disqualifies a nursing home from participating in a public benefits program. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980). Additionally, the Supreme Court has held that a deprivation of the continued use and possession of a driver's license through a suspension of that license implicated due process. *Mackey v. Montrym,* 443 U.S. 1 (1979).

#### 1) Public employment

There is a legitimate property interest in continued public employment only if there is an employment contract or a clear understanding that the employee may be fired only for cause. *Arnett v. Kennedy*, 416 U.S. 134 (1974). An "at will" governmental employee has no right to continued employment. *Bishop v. Wood*, 426 U.S. 341 (1976). If, however, the government gives the "at will" public employee assurances of continual employment or dismissal for only specified reasons, then there must be a fair procedure to protect the employee's interests if the government seeks to discharge the employee from his position. Such entitlement to procedural due process can also result from statutory law, formal contract terms, or the actions of a supervisory person with authority to establish terms of employment.

Note, though, that even those employees who lack any entitlement to continued employment cannot be discharged for reasons that in and of themselves violate the Constitution. Thus, an "at-will" governmental employee cannot be fired for having engaged in speech protected by the First Amendment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Similarly, discharge of an "at-will" governmental employee because of the employee's political views or affiliations would violate the employee's right to freedom of expression and association, unless it can be demonstrated that effective performance of the employee's job requires certain political views or affiliations. *Branti v. Finkel,* 445 U.S. 507 (1980). To be entitled to a hearing, however, the employee must make a prima facie claim that she is being discharged for reasons that violate specific constitutional guarantees. Moreover, a dismissal will be upheld if the government can prove that the employee would have been discharged in any event for reasons unrelated to any constitutionally protected activities. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

#### 2) Public education

There is a property right to a public education. *Goss v. Lopez*, 419 U.S. 565 (1975). Although such a right is not specifically recognized by the Constitution, all states recognize the right to a public education. *See, e.g.*, *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); Tex. Const. art. VII. § 1. However, the Supreme

Court has never determined whether a student at a public institution of higher learning has a property (or liberty) interest in her education there. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (Supreme Court assumed without deciding that a medical student had a liberty or property interest; federal appellate court had found that the student had a liberty interest); *See Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (Supreme Court assumed without deciding that a medical student had a liberty or property interest; federal appellate court had found that the student had a property interest).

### 3. Notice and Hearing

If an individual's protected interest is threatened by governmental action, the next step is to determine what type of process is due. The Court considers three factors in determining the amount of process that is due:

i) The **private interest** affected by the governmental action;

ii) The risk of erroneous deprivation of that interest using current procedures and the probable **value of additional or substitute safeguards**; and

iii) The **government's interest**, including the function involved and the **burden (fiscal and administrative cost)** of providing the additional process.

*Mathews v. Eldridge*, 424 U.S. 319 (1976). The greater the importance of the threatened interest, the greater the likelihood that the Court will require extensive procedural safeguards prior to the termination of the interest.

Generally, the person whose interest is being deprived is entitled to **notice** of the government's action by an unbiased decision maker and an **opportunity to be heard,** although the hearing need not necessarily occur before the termination of the interest.

**Example:** While the state must give notice and hold a hearing prior to terminating **welfare benefits,** in cases of terminating **disability benefits or public employment,** the state must give prior notice, but only a post-termination evidentiary hearing is required. *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Mathews v. Eldridge*, *supra*.

When determining what procedures are required, while the government can create a liberty or property interest, the Constitution as interpreted by the Court, not the legislature, determines the minimum procedures required for the deprivation of that interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Regarding the adequacy of notice, the government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

#### a. Enemy combatants

United States citizens held as enemy combatants are entitled to meaningful opportunity to dispute the facts of their detention by a neutral decision maker, albeit the opportunity is adapted to reduce burdens on executive authority brought on by an ongoing military conflict. *Boumediene v. Bush*, 553 U.S. 723, (2008).

#### b. Parental status

Different burdens of proof are applied to termination of parental rights and paternity actions. Because termination of parental rights deprives parents of a

fundamental right, the state must use clear and convincing evidence to support allegations of neglect. *Santosky v. Kramer*, 455 U.S. 745 (1982).

When a mother or child is initiating a paternity suit, due process requires proof by only a preponderance of evidence. *Rivera v. Michigan*, 483 U.S. 574 (1987). In a paternity action initiated by the state, the state must pay for the necessary blood work used in determining paternity. *Little v. Streater*, 452 U.S. 1 (1981).

**c. Forfeitures**

Forfeiture is an involuntary relinquishment of property that the government alleges is connected to criminal activity. Generally, the government is required to provide the owner with notice and a hearing prior to seizure of real property. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). However, the government is not necessarily required to provide notice prior to the seizure of personal property if:

i) The seizure serves a significant government interest;

ii) That interest would be frustrated by advance notice of the seizure; and

iii) The seizure is performed by the government.

*Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (prenotice seizure of yacht containing marijuana justified based on ease of moving yacht); *but see Grimm v. City of Portland*, 971 F.3d 1060 (9th Cir. 2020) (government required to provide notice prior to towing a vehicle violating parking regulations absent strong justification (e.g., car blocking traffic)). Once the government seizes and seeks civil forfeiture of personal property, due process requires a timely forfeiture hearing but does not require a separate preliminary hearing on the matter. *Culley v. Marshall*, 601 U.S. 377 (2024).

**d. Public employees**

A public employee who may be discharged only for cause has a property interest in his job and therefore is generally entitled to **notice** of termination and a **pre-termination opportunity to respond.** A formal hearing is not required, as long as there is pre-termination notice, an opportunity to respond to the decision maker, and a **post-termination evidentiary hearing.** *Cleveland Bd. of Educ. v. Loudermill*, *supra*. If there is a significant reason for immediately removing a "for-cause" employee from the job, a prompt post-suspension hearing with reinstatement and back pay if the employee prevails constitutes sufficient due process. *Gilbert v. Homar*, 520 U.S. 924 (1997).

**e. Public education**

**1) Academic dismissal**

A student is not entitled to a hearing regarding dismissal from a public institution of higher learning. *Board of Curators of University of Missouri v. Horowitz*, *supra* (medical school student was fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment); *See also Regents of University of Michigan v. Ewing*, *supra* (challenge to dismissal of medical student on substantive due process grounds rejected; court refused to override academic decision unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment).

#### 2) Disciplinary suspension

When a student is suspended from public school for disciplinary reasons, due process requires that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. *Goss v. Lopez*, *supra*, at 581. However, a student whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school and the necessary notice and rudimentary hearing can follow as soon as practicable. *Id., at 582-3.*

#### 3) Corporal punishment

While state-sanctioned disciplinary corporal punishment by a public-school authority that results in the restraint of the student and the infliction of appreciable physical pain implicates the student's liberty interests, the student is not entitled to notice or a hearing. If the punishment is excessive, the student could seek damages in a civil action. *Ingraham v. Wright*, 430 U.S. 651 (1977).

### f. Government benefits

The state must give notice and hold a hearing *prior to* terminating **welfare benefits**. In cases of terminating **disability benefits,** the state must give prior notice, but only a *post-termination* evidentiary hearing is required. *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Mathews v. Eldridge*, *supra*.

## 4. Court Access—Indigents

### a. Court fees

The government cannot deny an indigent person access to the court system because of his inability to pay the required court fees, if such imposition of fees acts to deny a fundamental right to the indigent. Due process requires such fees to be waived. Conversely, if the matter does not involve a fundamental right, no waiver is required.

### b. Right to counsel

While the Sixth Amendment provides that an indigent defendant has a constitutional right to have counsel appointed in any criminal case, including a non-summary criminal contempt proceeding in which the defendant is sentenced to incarceration (*United States v. Dixon*, 509 U.S. 688 (1993)), there is no similar due process right to have counsel appointed when an indigent defendant is held in contempt in a civil proceeding and incarcerated, but procedures must be in place to ensure a fundamentally fair determination of any critical incarceration-related question (e.g., defendant's ability to comply with order for which the defendant is held in contempt). *Turner v. Rogers*, 564 U.S. 431 (2011) (defendant held in contempt for violation of child support order; the plaintiff, who was the custodial parent seeking enforcement of the child support order, was also not represented by counsel).

# XII. SUBSTANTIVE DUE PROCESS

The guarantee of substantive due process is based upon the idea that laws should be reasonable and not arbitrary.

## A. STANDARD OF REVIEW

The standard of review in substantive due process cases is generally twofold: a governmental action that infringes upon a **fundamental right** is generally subject to **strict scrutiny.** If the interest infringed upon is not fundamental, then there need be only a **rational basis** for the regulation.

### 1. Strict Scrutiny

#### a. Test

The law must be the **least restrictive** means to achieve a **compelling** governmental interest.

##### 1) Least restrictive means

For the law to be the least restrictive means to achieve the government's interest, there cannot be a way to achieve the same interest that is less restrictive of the right at issue. A law will not fail simply because there are other methods of achieving the goal that are equally or more restrictive.

Under strict scrutiny, the law should be neither over-inclusive (reaching more people or conduct than is necessary) nor under-inclusive (not reaching all of the people or conduct intended).

##### 2) Compelling interest

Although there is no precise definition of what is "compelling," it is generally understood to be something that is necessary or crucial, such as national security or preserving public health or safety.

##### 3) Strict in theory, fatal in fact

The strict scrutiny standard is very difficult to meet. The great majority of laws reviewed under strict scrutiny are struck down.

#### b. Burden of proof

The burden is on the government to prove that the law is necessary to achieve a compelling governmental interest.

#### c. Applicability

The strict scrutiny test is generally applied if a **fundamental right** is involved.

### 2. Rational Basis

#### a. Test

A law meets the rational basis standard of review if it is **rationally related** to a **legitimate** state interest. This is a test of minimal scrutiny and generally results in the law being upheld.

#### b. Burden of proof

Laws are presumed valid under this standard, so the burden is on the challenger to overcome this presumption by establishing that the law is **arbitrary or irrational.**

In court, the government's stated interest in enacting the law need not be one that it offered when the law was passed. Any legitimate reason will suffice.

This factor distinguishes rational basis review from strict scrutiny, when the government must defend the interest that it stated at the outset.

### c. Applicability

The rational basis standard is used in all cases to which strict scrutiny or intermediate scrutiny does not apply. *Heller v. Doe*, 509 U.S. 312 (1993). In practice, most legislation related to lifestyle, taxation, zoning, and punitive damages is reviewed under this standard.

Although punitive damages do not violate due process, excessive damages may. The court considers whether the defendant had fair notice of the possible magnitude before it will bar a punitive-damages award.

The government cannot presume facts about an individual that will deprive that individual of certain benefits or rights. By doing so, the government creates an arbitrary classification that may violate due process as well as equal protection.

#### 1) Retroactive legislation

The retroactive application of a statute does not in and of itself violate substantive due process. Consequently, a law that is applied retroactively must merely meet the rational basis test. *United States v. Carlton*, 512 U.S. 26 (1994) (retroactive application of estate tax law that resulted in denial of a deduction upheld). Similar treatment applies to a statutory change that is remedial in nature (i.e., affects a remedy but does not create or abolish a right). *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) (lengthening of statute of limitations that permitted an otherwise time-barred lawsuit to be maintained upheld). Note, however, that the extension of a criminal statute of limitations may violate the prohibition on an ex post facto law (*see* § XVI.B. Ex Post Facto Laws, *infra*).

## B. FUNDAMENTAL RIGHTS

Some rights are so deeply rooted in our nation's tradition and history that they are considered fundamental. These rights include: (i) the right to travel; (ii) the right to vote; and (iii) the right to privacy (including marriage, sexual relations, child rearing, and the right of related persons to live together). Under **strict scrutiny,** a law interfering with the fundamental rights of travel and privacy will generally be upheld only if it is **necessary** to achieve a **compelling governmental interest.** With regard to the fundamental right to vote, the level of scrutiny can depend on the degree to which this right is restricted.

Government infringement upon **nonfundamental rights**—those related to social or economic interests such as business, taxation, lifestyle, or zoning—requires only a **rational relationship** between the law and a **legitimate governmental interest.**

**EXAM NOTE:** If, on a question, a fundamental right is being infringed upon for all persons, the issue is likely one of substantive due process. If the right is being denied to only a particular class of persons, then equal protection is in play.

### 1. Travel

#### a. Interstate

There is a fundamental right to travel from state to state. *Shapiro v. Thompson*, 394 U.S. 618 (1969). This includes the right to enter one state and leave another, to be treated as a welcome visitor, and, for those who wish to become permanent residents, the right to be treated equally to native-born citizens with respect to state benefits. *Saenz v. Roe*, 526 U.S. 489 (1999) (state statute denying full welfare benefits to people who had not resided in the state for one year struck down; state's interests in discouraging fraud and establishing an objective residency test were not compelling).

Reasonable residency restrictions or waiting periods may be imposed on the receipt of some government benefits. *See, e.g.*, *Vlandis v. Kline*, 412 U.S. 441 (1973) (declining to strike down a state statute requiring one year of residence before qualifying for in-state tuition). However, durational residence requirements that impinge on the right of interstate travel by denying newcomers "basic necessities of life" are only permitted if the state can establish that they are necessary to serve a compelling state interest. To justify such a durational residency requirement, the state must do more than show that the policy saves money. *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (holding that a residency requirement of one year as a condition to an indigent's receiving medical care at the county's expense impermissibly burdened the right of interstate travel because fiscal savings were an insufficient state interest to uphold the requirement). Once a person qualifies as a resident, she must be treated equally. *Zobel v. Williams*, 457 U.S. 55 (1982) (division of state royalties from minerals and oil based on length of state residency unconstitutional).

#### b. International

Although there is a right to travel internationally, it is not a fundamental right invoking strict scrutiny. Hence, the U.S. government may limit travel to certain countries as long as it has a rational basis for doing so. *Regan v. Wald*, 468 U.S. 222 (1984).

### 2. Voting and Ballot Access

#### a. Right to vote

Under the Twenty-Sixth Amendment, the right to vote is fundamental to all U.S. citizens who are 18 years of age or older. This right applies to all federal, state, and local elections, including primary elections. Despite being a fundamental right, strict scrutiny does not apply to all laws that restrict this right. The level of scrutiny to which a governmental restriction of this right is subject depends on the degree to which the restriction affects the exercise of this right; the more significant the impact, the greater the degree of scrutiny. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

##### 1) Residency

A restriction on the right to participate in the political process of a governmental unit imposed upon those who reside within its borders is typically upheld as justified on a rational basis; nonresidents generally may be prohibited from voting. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (citizens who lived outside city boundaries could be denied the right to vote in city elections, even though they were subject to business licensing fees imposed by the city).

A person must be given the opportunity to prove residency before being denied the right to vote because of lack of residency. *Carrington v. Rash*, 380 U.S. 89 (1965).

###### a) Length of residency

A person may be required to be a resident of a governmental unit (e.g., state, city) for a short period prior to an election in order to vote in that election. *Marston v. Lewis*, 410 U.S. 679 (1973) (50-day period upheld); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (three-month and one-year periods struck down).

**b) Presidential elections**

Congress can supersede state residency requirements with respect to presidential elections. *Oregon v. Mitchell*, 400 U.S. 112 (1970). For presidential elections, a state may not impose a residency requirement, but may require that an individual register to vote, provided that an individual may register to vote as late as 30 days before the election. 52 U.S.C.S. § 10502.

**2) Poll tax**

Payment of a fee in order to vote (i.e., a poll tax) in an election for federal office is prohibited by the Twenty-Fourth Amendment. More broadly, the imposition of a poll tax in order to vote in any election violates the Equal Protection Clause, as a poll tax is unrelated to voter qualifications. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

**3) Voter ID**

A state may require that a citizen who votes in person present a government-issued photo ID. With regard to this neutral, nondiscriminatory requirement, the Supreme Court declined to apply a strict scrutiny standard. *Crawford v. Marion County Election Bd.*, *supra*.

**4) Felon**

Pursuant to Section 2 of the Fourteenth Amendment, a state may prohibit a felon from voting, even one who has unconditionally been released from prison. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

**5) Write-in voting**

A person's right to vote does not extend to the right to vote for any possible candidate. A state may ban all write-in candidates in both primary and general elections, at least when the state provides reasonable means by which a candidate can get on the ballot. *Burdick v. Takushi*, 504 U.S. 428 (1992) (state's legitimate interests, such as preventing unrestrained factionalism, outweighed the limited burdens placed on the right to vote by the ban).

**b. Public office and ballot access**

There is no fundamental right to hold office through election or appointment, but all persons do have a constitutional right to be considered for office without the burden of invidious discrimination. *Turner v. Fouche*, 396 U.S. 346 (1970).

**1) Property ownership**

The ownership of property cannot be made a condition of holding public office. *Turner v. Fouche*, *supra* (appointment to local school board).

**2) Filing fee**

A candidate for elected public office generally may be required to pay a reasonable filing fee, but an exorbitant filing fee, such as one that imposes the entire cost of the election on the candidates, is unconstitutional. Moreover, alternative provisions must be made for a candidate who is unable to pay the fee. *Lubin v. Parish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

#### 3) Public support requirements

An independent candidate for elected public office can be required to obtain the signatures of voters on a petition in order to appear on the ballot, but such a requirement cannot deny independent candidates ballot access. *Jenness v. Fortson*, 403 U.S. 431 (1971) (state requirement that an independent candidate obtain five percent of the number of registered voters at the last general election for the office in question upheld). State election laws imposing undue burdens on placing new or small parties on the state ballots must serve a compelling state interest in the regulation of a subject within the state's constitutional power. *Williams v. Rhodes*, 393 U.S. 23 (1968) (state election scheme that effectively prohibited independent candidacies in such a way as to exclude virtually all but the two major parties struck down). Unless the requirement imposes such undue burdens on minority groups, a state can deny a candidate access to the general-election ballot if the candidate failed to receive a sufficient number of votes in the primary election. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (minor party senatorial candidate who failed to receive one percent of the votes cast in primary election not entitled to appear on the general ballot).

#### 4) Write-in candidates

A state may ban all write-in candidates in both primary and general elections, at least when the state provides other reasonable means by which a candidate can get on the ballot. *Burdick v. Takushi*, *supra*.

#### 5) Candidate for other office

A state may prohibit a state office holder from becoming a candidate for another state office; the office holder must resign his current office in order to run for another office. *Clements v. Fashing*, 457 U.S. 957 (1982).

#### 6) Replacement of elected official

A state may permit a political party to name a replacement for an elected public official from that party who dies or resigns while in office. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982). The governor must call an election to fill a vacant congressional seat. Article I, Section 2 (House member); Seventeenth Amendment (Senator). (Note: The Seventeenth Amendment permits the state legislature to authorize the governor to appoint a temporary replacement senator.)

### 3. Privacy

Though it has not found that a generalized right to privacy is contained in the Constitution, the Supreme Court has recognized guaranteed "zones of privacy" under the Constitution. *See Roe v. Wade*, 410 U.S. 113 (1973). Various privacy rights have been deemed fundamental.

#### a. Marriage

The right to marry is fundamental. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex couples); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial couples); *Turner v. Safley*, 482 U. S. 78 (1987) (prisoners); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (fathers delinquent in child-support payments). However, there is no fundamental right to have a noncitizen spouse admitted into the country. *Department of State v. Munoz*, 602 U.S. 899 (2024).

### b. Contraception

Married persons have the right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), as do unmarried persons, *Eisenstadt v. Baird*, 405 U.S. 438 (1972). A state may not limit the sale of contraceptives to dispensation only by pharmacists or only to individuals older than age 16. *Carey v. Population Services International*, 431 U.S. 678 (1977).

### c. Intimate sexual behavior

There is no legitimate state interest in making it a crime for fully consenting adults to engage in private sexual conduct—including homosexual conduct—that is not commercial in nature. *Lawrence v. Texas*, 539 U.S. 558 (2003).

### d. Procreation and abortion

The Supreme Court has recognized as fundamental the right to procreate. *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942) (striking down a mandatory sterilization law). However, the Court in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) held that the Constitution does not confer a right to abortion in the privacy provisions of the Due Process Clauses. States have the authority to regulate or prohibit abortion, and challenges to such regulations or prohibitions are subject to rational basis review.

### e. Parental rights

The fundamental parental right to make decisions regarding the care, custody, and control of one's children includes the right to privately educate one's child outside the public school system subject to reasonable educational standards imposed by the state, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to limit visitation of grandparents, *Troxel v. Granville*, 530 U.S. 57 (2000).

### f. Family relations

Related persons, including extended family members, have a fundamental right to live together in a single household. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

### g. Obscene material

There is a fundamental right to possess obscene material in the privacy of one's home, *Stanley v. Georgia*, 394 U.S. 557 (1969), with the exception of child pornography, *Osborne v. Ohio*, 495 U.S. 103 (1990). The state, however, may severely restrict the sale, purchase, receipt, transport, and distribution of obscene material. *Paris Adult Theater v. Slaton*, 413 U.S. 49 (1973).

### h. Right to refuse medical treatment

It is an established liberty interest that a person may not be forced to undergo unwanted medical procedures, including lifesaving measures, but the Court has not ruled on whether this right is "fundamental." *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990).

There is no fundamental right to commit suicide; therefore, the state may ban the assistance of suicide. *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court distinguished this decision from *Cruzan* by stating that forced medication is a battery, and there is a long tradition of protecting the decision to refuse unwanted medical treatment.

#### i. Right to avoid disclosure of personal medical information

Numerous courts include personal medical information within a "zone of privacy." *See, e.g.*, *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991), *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3rd Cir. 1980). Though the right to protect personal, confidential information is not absolute, courts weigh it against competing interests, employing a balancing test that generally includes consideration of the government's need for access to the information and the adequacy of safeguards, as well as the type and substance of the requested records and the potential for harm in non-consensual disclosure. *See C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 178 (3rd Cir.2005).

### 4. The Second Amendment

The Second Amendment guarantees **an individual's right to possess a firearm** unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (ban on handgun possession in the home violates Second Amendment). As mentioned previously, the Second Amendment is applicable to the states through the Fourteenth Amendment. *McDonald v. Chicago*, 561 U.S. 3025 (2010).

Like most rights, the Second Amendment right to bear arms is not unlimited. Examples of lawful regulations include:

i) Imposing conditions and qualifications on the commercial sale of arms; and

ii) Prohibitions on:

a) Concealed weapons;

b) Possession of firearms by persons who have been convicted of felonies;

c) Possession of firearms by persons who have mental illness;

d) Possession of firearms by those who are found to pose a credible threat to others; and

e) Carrying guns in schools, government buildings, and other sensitive places.

*District of Columbia v. Heller*, *supra*; *U.S. v. Rahimi*, 602 U.S. 680 (2024). However, the requirement to demonstrate a "proper cause" (i.e., a special need for self-protection) to apply for an unrestricted concealed-carry handgun permit violates the Second Amendment right to keep and bear arms in public for self-defense. Gun restrictions are constitutional only if there is a "historical tradition" of such regulation in the U.S. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022).

## XIII. EQUAL PROTECTION

### A. GENERAL CONSIDERATIONS

#### 1. Constitutional Basis

##### a. State action

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall … deny to any person within its jurisdiction the equal protection of the laws." This clause applies only to states and localities.

##### b. Federal action

Although there is no federal equal protection clause, the Supreme Court has held that the Fifth Amendment Due Process Clause includes the rights guaranteed by

the Equal Protection Clause, thereby making discrimination by the federal government subject to review under the same standards as discrimination by the states. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

### 2. Standards of Review

When reviewing government action under equal-protection theories, the Court applies one of three levels of review, depending on the classification of persons or the type of right concerned.

#### a. Strict scrutiny

##### 1) Test

The law must be the **least restrictive** means to achieve a **compelling** governmental interest.

##### 2) Burden of proof

The burden is on the government to prove that the law is necessary. Because the strict scrutiny test is a very difficult one to pass, the government rarely meets its burden, and most laws subjected to this standard of review are struck down.

##### 3) Applicability

The strict scrutiny test is applied if a **fundamental right** or a **suspect classification** is involved. The suspect classifications are race, ethnicity, national origin, and, if the classification is by state law, citizenship status. (*See* § XIII.B., *infra,* for a complete discussion of suspect classifications.)

#### b. Intermediate scrutiny

##### 1) Test

To be constitutional, the law must be **substantially related** to an **important** governmental interest.

##### 2) Burden of proof

Although the Court has not clearly stated the rule, the burden appears generally to be on the government to prove that the law in question passes intermediate scrutiny. As with strict scrutiny (and unlike rational basis review), the government must defend the interest(s) it stated when the law was enacted, not just some conceivable legitimate interest.

##### 3) Applicability

Intermediate scrutiny is used when a classification is based on **gender** or status as a **nonmarital child** (legitimacy). Note that in gender cases there must be an "exceedingly persuasive justification" for the classification, which may bring the standard in such cases closer to strict scrutiny. *See United States v. Virginia*, 518 U.S. 515 (1996).

#### c. Rational basis

##### 1) Test

A law passes the rational basis standard of review if it is **rationally related** to a **legitimate** governmental interest. This is a test of minimal scrutiny. It is not required that there is actually a link between the means selected and a legitimate objective. However, the legislature must *reasonably believe* there is a link.

#### 2) Burden of proof

Laws are presumed valid under this standard, so the burden is on the challenger to overcome this presumption by establishing that the law is **arbitrary or irrational.**

#### 3) Applicability

The rational basis standard is used in all cases in which one of the higher standards (intermediate or strict scrutiny) does not apply. Thus, rational basis review applies to laws drawing distinctions based on age, wealth, weight, or most other classifications, as well as to any distinctions drawn for business or economic reasons.

The Court generally gives extreme deference to the legislature's right to define its objectives. In order to determine the legislature's purpose, the Court will look at the statute and the preamble. If the legislative purpose is not clear from the statute, the Court may consider any conceivable purpose that may have motivated the legislature. *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

Some classifications, although nominally subject to rational basis review, in practice receive heightened scrutiny. *See e.g., Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (developmental disability). When the government has acted out of animus toward or fear of a particular group, that action—even if not involving a suspect or a quasi-suspect classification—will be searchingly reviewed and may be struck down even under a rational basis test. *See e.g., United States v. Windsor*, 570 U.S. 744 (2013) (Defense of Marriage Act and same-sex marriage).

### 3. Proving Discrimination

To trigger strict or intermediate scrutiny, there must be **discriminatory intent** on the part of the government. The fact that legislation has a disparate effect on people of different races, genders, etc., without intent, is insufficient. Discriminatory intent can be shown facially, as applied, or when there is a discriminatory motive.

#### a. Facial discrimination

A law that, by its very language, creates distinctions between classes of persons is discriminatory on its face.

**Example:** An ordinance states that only males will be considered for a city's training academy for firefighters.

#### b. Discriminatory application

A law that appears neutral on its face may be applied in a discriminatory fashion. If the challenger can prove that a discriminatory purpose was used when applying the law, then the law will be invalidated.

**Example:** A city's ordinance concerning the police academy says nothing about gender, but in practice only men are considered for admission.

#### c. Discriminatory motive

A law that is neutral on its face and in its application may still result in a disparate impact. By itself, however, a disparate impact is not sufficient to trigger strict or intermediate scrutiny; proof of discriminatory motive or intent is required to show

a violation of the Equal Protection Clause. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

**Example:** A city's paramedic training school is theoretically open to both men and women, but the entrance test includes a height requirement that disproportionately excludes women for the purpose of discriminating against women.

## B. SUSPECT CLASSIFICATIONS

Laws that categorize based on race, ethnicity, national origin, or (in some cases) citizenship status are considered suspect and therefore require closer judicial examination. Such laws are subject to strict scrutiny and are invalid unless they are **necessary** to achieve a **compelling** governmental interest.

### 1. Race, Ethnicity, and National Origin

Laws or regulations that intentionally disadvantage on the basis of race, ethnicity, or national origin have almost always been struck down for failing to advance a compelling state interest. One exception was *Korematsu v. United States*, 323 U.S. 214 (1944), in which the internment of Japanese-Americans during World War II was upheld in the name of national security.

#### a. School integration

Because discrimination must be intentional in order to violate the Constitution, only intentional (de jure) segregation in schools violates the Equal Protection Clause. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). Moreover, a court cannot impose a remedy that involves multiple school districts unless there is evidence of intentional segregation in each district. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (state not compelled to create magnet schools in order to attract students from outside the district).

If a school board does not take steps to eliminate intentional racial segregation of schools, a court can order the district to implement measures, such as busing, to remedy the discrimination. Court-ordered busing is temporary, however, and must be terminated once the "vestiges of past discrimination" have been eliminated. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

#### b. Affirmative action

Programs that favor racial or ethnic minorities are also subject to strict scrutiny. *Adarand Constructors*, *Inc. v. Pena*, 515 U.S. 200 (1995) (overruling application of the intermediate standard to federal discrimination).

##### 1) Past discrimination by government

For a governmental affirmative action program based on race to survive, the relevant governmental entity must show more than a history of societal discrimination. The government—whether federal, state, or local—must itself be guilty of specific past discrimination against the group it is seeking to favor, and the remedy must be narrowly tailored to end that discrimination and eliminate its effects. In other words, the elimination of past discrimination in a particular governmental institution is a compelling state interest; attempting to remedy general societal injustice through affirmative action is not.

##### 2) Diversity in universities and colleges

The use of race in determining whether a student should be admitted to a college or university—whether public or private—must satisfy strict scrutiny,

must not use race as a stereotype or a negative, and must end at some point. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). Furthermore, the use of racial quotas or of race as a determinative criterion violates equal protection and is unconstitutional. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978). Essentially, an applicant's race, standing alone, may not be used as a factor in determining whether to admit that applicant. A university may still consider an applicant's discussion of how race affected the applicant's life and outlook. *Id*.

State laws that commit policy determinations regarding racial preferences to the voters (e.g., ballot issues) do not violate equal protection. Courts may not disempower the voters from choosing whether race-based preferences should be adopted, continued, or ended. The privilege to enact laws is a basic exercise of voters' democratic power. The constitutional validity of the choices made is a separate question. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) (upholding amendment to Michigan's constitution prohibiting state universities from considering race as part of the admission process).

The rules regarding affirmative action apply to private universities that accept federal funds under Title VI, which has protections that are consistent with the protections of the equal protection clause. 42 U.S.C. § 2000d. However, the United States military academies may still use race-based admissions programs due to the unique interests that may be served by such programs at military academies. *Students for Fair Admissions*, 600 U.S. 181 (2023).

**3) Diversity in public elementary and high schools**

A school district may not assign students to schools on the basis of race unless it is necessary to accomplish a compelling interest—e.g., remedy past discrimination. However, a district may use facially race-neutral criteria that may have the same effect, such as strategic site selection for new schools or the redrawing of attendance zones. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

The Equal Protection Clause applies only to governmental action, so private persons generally are not restricted by it (*see* X. State Action, *supra*). Discrimination by private persons in various areas, such as employment, housing, and public accommodations, is nonetheless regulated by federal statute pursuant to Congress's power under the enabling clauses of the Thirteenth and Fourteenth Amendments and the Commerce Clause, as well as in most states by statute.

### c. Racial gerrymandering

Race may not be the predominant factor in determining the boundary lines of legislative districts (*see* § XIII.E.2.a., Racial discrimination, *infra*).

## 2. Citizenship

Classifications based on status as a lawful resident of the United States (as opposed to a citizen) are subject to a variety of different standards, depending on the level of government and the nature of the classification.

### a. Federal classification

Because Congress has plenary power over noncitizens under Article I, a federal classification based on citizenship is likely valid unless it is **arbitrary** and **unreasonable.**

**Example:** Medicare regulations may require a five-year residency period for eligibility despite thereby excluding many lawful resident noncitizens. *Matthews v. Diaz*, 426 U.S. 67 (1976).

#### b. State classifications

##### 1) Generally struck down

The Court will generally apply the strict scrutiny test and strike down state laws that discriminate against noncitizens, such as laws prohibiting noncitizens from owning land, obtaining commercial fishing licenses, or being eligible for welfare benefits or civil service jobs.

##### 2) Exception—participation in government functions

A growing exception exists, however, for state laws that restrict or prohibit a noncitizen's **participation in government functions.** Such laws need only have a **rational relationship** to a legitimate state interest. Laws prohibiting noncitizens from voting, serving on a jury, or being hired as police officers, probation officers, or public-school teachers have been upheld as preventing noncitizens from having a direct effect on the functioning of the government.

**EXAM NOTE:** When determining whether a position or license from which noncitizens are excluded falls under the government function or political function exception, consider whether the position or license would allow the noncitizen to "participate directly in the formulation, execution, or review of broad public policy" or would allow the noncitizen to exercise "broad discretion."

#### c. Undocumented noncitizens

Undocumented noncitizens are not a suspect class, but the states may not deny primary or secondary public education benefits to undocumented noncitizens. *Plyler v. Doe*, 457 U.S. 202 (1982).

## C. QUASI-SUSPECT CLASSIFICATIONS

### 1. Gender

Discrimination based on gender is "quasi-suspect" and subject to **intermediate scrutiny,** which is less stringent than strict scrutiny but tougher than the rational basis test. Just as with suspect classifications and fundamental rights, there must be **discriminatory intent** by the government to trigger intermediate scrutiny; disparate impact is not enough. Under intermediate scrutiny, the burden is on the state to show that a statute or regulation that treats the sexes differently is **substantially related** to an **important** governmental interest. This test applies whether the classification is invidious or benign, and it is now applied rather stringently, requiring the government to show that an "exceedingly persuasive justification" exists for the distinction, and that separate facilities (such as separate sports team facilities as state universities) are "substantially equivalent." *United States v. Virginia*, 518 U.S. 515 (1996).

#### a. Discrimination against women

Intentional discrimination through gender classification will generally be struck down under the intermediate scrutiny standard. For example, a state law giving preference to men over women to be administrators of decedents' estates was invalid. *Reed v. Reed*, 404 U.S. 71 (1971) (ease in determining who should serve as administrator is not an important interest). *See also United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute could not exclude women from

admission to public college based on overbroad generalizations about the physical capabilities and preferred educational methods of males and females).

**b. Discrimination against men**

Intentional discrimination against males is generally struck down for violating equal protection. However, there have been some instances of discrimination against men being upheld because of the important governmental interest:

i) Draft registration of males, but not females, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (interest of preparing combat troops); and

ii) A statutory rape law that held only men criminally liable for such conduct, *Michael M. v. Sonoma Cnty. Super. Ct.*, 450 U.S. 464 (1981) (interest in preventing teenage pregnancy).

**c. Affirmative action (benign discrimination)**

The Court has upheld affirmative action regulations granting beneficial treatment to women over men (such as tax exemptions, increased social security benefits, and increased protection from mandatory armed forces discharge) because providing a remedy for past gender-based discrimination is an important governmental interest. *See Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

### 2. Legitimacy

Classifications on the basis of status as a nonmarital child (i.e., those that distinguish between "marital" and "nonmarital" children) are subject to **intermediate scrutiny**—they must be **substantially related** to an **important** governmental interest. The Court will closely examine the purpose behind the distinction, and it will not uphold legislation designed to punish the offspring of a nonmarital relationship. To that end, states may not prohibit children of unmarried parents from receiving welfare benefits, *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973), workers' compensation benefits upon the death of a parent, *Weber v. Aetna Cas. and Sur. Co.*, 406 U.S. 164 (1972), or an inheritance from an intestate father, *Trimble v. Gordon*, 430 U.S. 762 (1977). In addition, a state cannot require a paternity action brought on behalf of a nonmarital child to be commenced within a limited time after birth in order to secure child support, while not imposing a similar time limit on a legitimate child seeking child support from a parent. *Clark v. Jeter*, 486 U.S. 456 (1988).

## D. NONSUSPECT CLASSIFICATIONS

### 1. Age

Age discrimination in violation of the Age Discrimination in Employment Act of 1967 does not provoke heightened scrutiny; laws and other governmental actions classifying on the basis of age are reviewed under the **rational basis** standard. *See*, *e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (police officers may be forced to retire at age 50, even if they are as physically fit as younger officers).

### 2. Poverty

Most statutes and regulations that classify on the basis of wealth (i.e., discriminate against the poor) are subject only to **rational basis** scrutiny and will be upheld. There is an exception for cases in which governmental action prohibits the poor from exercising a fundamental right because of a government-imposed fee; strict scrutiny will usually apply in those situations. For example, the availability of appeal in a criminal case cannot hinge on ability to pay for a trial transcript. *Griffin v. Illinois*, 351

U.S. 12 (1956). Also, poll taxes are unconstitutional because wealth is unrelated to a citizen's ability to vote intelligently. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

### 3. Sexual Orientation

There is currently a division among the federal courts as to the standard of scrutiny that is applicable to discrimination on the basis of sexual orientation. The Supreme Court has struck down bans on same-sex marriage as violations of a fundamental right on both Due Process and Equal Protection grounds, and has ruled that the Civil Rights Act of 1964 protects employees against discrimination because of their sexual orientation or gender identity, *Bostock v. Clayton County*, 590 U.S. 644 (2020), but it has not resolved the issue of whether discrimination based on sexual orientation is subject to heightened scrutiny. The government, however, cannot impose a burden upon or deny a benefit to a group of persons solely based on animosity toward the class that it affects. *Romer v. Evans*, 517 U.S. 620 (1996). Among the rights, benefits, and responsibilities of marriage to which same-sex partners must have access are birth and death certificates, which give married partners a form of legal recognition that is not available to unmarried partners. *Pavan v. Smith*, 582 U.S. 563 (2017), citing *Obergefell v. Hodges*, 576 U.S. 644 (2016).

## E. FUNDAMENTAL RIGHTS UNIQUE TO EQUAL PROTECTION

The fundamental rights guaranteed by substantive due process are often protected by equal protection principles as well. Thus, impingement of the right to vote, to travel, or to marry may trigger an inquiry under either the Due Process Clause or the Equal Protection Clause. However, certain rights and principles are particular to equal protection.

**EXAM NOTE:** The right to ***travel*** and the right to ***vote*** are the most frequently tested fundamental rights in the area of **equal protection.** (Often, both the Due Process Clause and the Equal Protection Clause will apply. Equal protection predominates if the question emphasizes denial of a right to a particular group, and it does not apply if the denial of the right is universal.)

### 1. One Person, One Vote

The principle of "one person, one vote" holds that one person's vote must be essentially equal to any other person's vote. To that end, when the government establishes voting districts for the election of representatives, the number of persons in each district must be approximately equal. *Reynolds v. Sims*, 377 U.S. 533 (1964). Voter approval of a redistricting plan will not justify a violation of the "one person, one vote" rule. *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964).

#### a. Congressional districts

When states establish districts for congressional elections, they must achieve nearly precise mathematical equality between the districts. This restriction is imposed on the states by Article I, Section 2, which requires members of the House to be chosen by "the People of the several States." An unexplained deviation of less than one percent may invalidate the statewide congressional district plan. Variations may be justified by the state on the basis of consistently applied, legitimate state objectives, such as respecting municipal political subdivision boundaries, creating geographic compact districts, and avoiding contests between incumbent representatives. In addition, variations based on anticipated population shifts may be acceptable when such shifts can be predicted with a high degree of accuracy, and population trends are thoroughly documented. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (variation in population of slightly less than six percent violated the "one person, one vote" rule); *Karcher v. Daggett*, 462 U.S.

725 (1983) (variation of slightly less than 0.7 percent violated the "one person, one vote" rule).

#### 1) Congressional apportionment of House members

Congress, in apportioning members of the House among the states pursuant to Article I, Section 2, is not held to the "mathematical equality" standard. The method adopted by Congress is entitled to judicial deference and is assumed to be in good faith. *Dept. of Commerce v. Montana*, 503 U.S. 442 (1992) (Montana's loss of a congressional seat upheld, even though retention of the seat would have placed Montana closer to the ideal population size for a congressional district).

### b. State and local districts

The size of electoral districts may vary much more in the case of state and local elections, as long as the variance is not unjustifiably large. A variation of less than 10% is rebuttably presumed to be a minor deviation that does not constitute a prima facie case for discrimination. *Cox v. Larios*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004); *Brown v. Thompson*, 462 U.S. 835 (1983). When the maximum variation is 10% or greater, the state must show that the deviation from equality between the districts is reasonable and designed to promote a legitimate state interest. *Mahan v. Howell*, 410 U.S. 315 (1973) (maximum difference of 16% in size of population between state legislative districts permitted when the state respected the boundaries of political subdivisions).

#### 1) Bodies performing governmental functions

The "one person, one vote" rule applies to local elections of entities that perform governmental functions, even when the functions are specialized rather than general in nature. *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970) (election of trustees to junior college district).

#### 2) Relevant population

In addition to requiring relative equality with respect to the weight of a person's vote, the Equal Protection Clause generally requires the application of strict scrutiny to a restriction of voting to a particular class of persons, which generally results in the invalidation of the restriction. *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (state law that restricted voting in school board election to property owners and parents with school-aged children struck down). The restriction of voting to a class of persons (e.g., landowners) and the allocation of voting weight on a basis other than personhood (e.g., the amount of land owned) has been upheld only with regard to water-district elections. *Ball v. James*, 451 U.S. 355 (1981); *See Hadley v. Junior College Dist., supra* (determination of districts for junior college trustees based on school age population violated "one person, one vote" rule). (Note: A restriction on the right to participate in the political process of a governmental unit to those who reside within its borders is typically upheld as justified on a rational basis; nonresidents generally may be prohibited from voting. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).)

A state may draw its legislative districts on the basis of total population rather than eligible or registered voters. *Evenwel v. Abbott*, 578 U.S. 937 (2016).

### c. At-large elections

While an election in which members of a governmental unit (e.g., county council members) are elected by all voters within that unit (i.e., an at-large election) does not violate the one-person, one-vote rule, it may conflict with another constitutional provision, such as the Equal Protection Clause. *Rogers v. Lodge*, 458 U.S. 613 (1982) (use of countywide system to elect county board unconstitutionally diluted the voting power of Black citizens).

Note: Federal law bans at-large elections for congressional representatives in states that have more than one House member (i.e., the single-member district rule). 2 U.S.C.S. § 2c.

## 2. Gerrymandering

### a. Racial discrimination

#### 1) Vote dilution

When a state draws election districts for the purpose of scattering a racial or ethnic minority among several districts to prevent the minority from exercising its voting strength, the state's action is a violation of the Equal Protection Clause. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (redrawing city boundaries to exclude Black voters unconstitutional); *Rogers v. Lodge*, *supra*. The plaintiff has the burden to show that race was the predominant factor that motivated the legislature to place voters inside or outside a particular district. As part of this burden, the plaintiff must disentangle race from other factors, particularly partisanship. Courts must also presume that the legislature acted in good faith in creating an electoral map. *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1 (2024).

#### 2) Majority-minority districts

Under the Equal Protection Clause, election districts for public office may not be drawn using race as the predominant factor in determining the boundary lines, unless the district plan can survive strict scrutiny. This restriction applies even when the district is drawn to favor historically disenfranchised groups. The state can use traditional factors—such as compactness, contiguity, or honoring political subdivisions—as the bases for the district, and it may only consider race if it does not predominate over other considerations. *Miller v. Johnson*, 515 U.S. 900 (1995). To be narrowly tailored within the strict scrutiny standard, the legislature must have a "strong basis in evidence" in support of the race-based choice that it has made. Note that the legislature need not show that its action was **actually necessary** to avoid a statutory violation, only that the legislature had **good reasons to believe** its use of race was needed. *Bethune-Hill v. Virginia State Bd. Of Elections*, 580 U.S. 178 (2017), *Alabama Legislative Black Caucus, et al. v. Alabama et al.*, 575 U.S. 254 (2015).

A district's bizarre shape can be used as evidence that race was a predominating factor, but such a shape is not necessary for a finding of racial gerrymandering. *Shaw v. Reno*, 509 U.S. 630 (1993).

##### a) Voting Rights Act

The Voting Rights Act (42 U.S.C. § 1973 et seq.) requires racial gerrymandering to ensure minority success in elections by creating majority-minority districts (i.e., affirmative gerrymandering). Until recently, the Act required federal pre-clearance for changes in voting

rules, including redistricting, for specific southern states and a few other local governmental units. However, the formula used as a basis for subjecting jurisdictions to preclearance has been declared unconstitutional because it no longer reflects current conditions; therefore, it can no longer be used. *Shelby County v. Holder,* 570 U.S. 529 (2013). Receiving federal pre-clearance for a redistricting plan does not ensure that plan will avoid conflicting with the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900 (1995).

The Voting Rights Act does not require a jurisdiction to maintain a particular numerical minority percentage. Instead, it requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. *Alabama Legislative Black Caucus, et al. v. Alabama et al.*, 575 U.S. 254 (2015).

Additionally, Section 2 of the Voting Rights Act prohibits states from imposing any "standard, practice, or procedure" that results in denying or abridging a citizen's right to vote on account of race or skin color. To successfully assert a Section 2 challenge, a minority group must satisfy three preconditions:

i) The minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district.

ii) The minority group must be able to show that it is politically cohesive.

iii) The minority must be able to show that the white majority votes sufficiently as a cohesive bloc to allow the majority to defeat the minority group's preferred candidate.

*Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

The minority group must then demonstrate that the state's political process is not "equally open," such that minority voters do not have the same opportunity as other voters to participate in the political process and elect representatives of their choice. Unlike an equal protection challenge, a challenge under Section 2 of the Voting Rights Act need only show a disparate impact on a minority group—proof of discriminatory intent is not required. As a result, a race-neutral congressional district map generated by a computer program can be successfully challenged under Section 2 of the Voting Rights Act challenge when the generated map packed Black voters, who make up 27% of the state's population, into one of seven congressional districts while dispersing the rest of the Black voters across the rest of the six districts. *Allen v. Milligan*, 599 U.S. 1 (2023).

**b. Political discrimination**

Partisan gerrymandering claims are not justiciable because they present political questions beyond the reach of the federal courts. *Rucho v. Common Cause*, 588 U.S. 684 (2019) (lack of comprehensive and neutral principles for drawing electoral boundaries as well as the absence of rules to confine judicial intervention prevents the Court from adjudicating political gerrymandering claims). However, state courts can still hear partisan gerrymandering claims as well as claims alleging that a state legislature's election laws violate state constitutional provisions. Such state court judgments must conform to federal constitutional requirements. *Moore v. Harper*, 600 U.S. 1 (2023).

## XIV. PRIVILEGES AND IMMUNITIES CLAUSES

### A. ARTICLE IV

Article IV, Section 2, known as the Comity Clause, provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

#### 1. Prohibits State Discrimination Against Nonresidents

The Comity Clause, in essence, prohibits one state from discriminating against the citizens of another state. In this context, the term "citizen" does not include corporations or noncitizens.

#### 2. Rights Protected

Nonresident citizens are protected against discrimination with respect to fundamental rights or essential activities. Examples include the pursuit of employment, transfer of property, and access to state courts.

**Example:** Discrimination against out-of-state residents in setting the fee for a ***commercial*** activity, such as a commercial shrimping license, violates the Privileges and Immunities Clause of Article IV, but similar discrimination for a ***recreational*** activity, such as a recreational hunting license, does not, if there is a rational basis for the fee differential. *Compare Toomer v. Witsell*, 334 U.S. 385 (1948) (fee for out-of-state commercial shrimper that was 100 times greater than the fee for an in-state shrimper unconstitutional), *with Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (fee for out-of-state resident to hunt elk that was 25 times greater than the fee for an in-state hunter constitutional).

The right to access public information is not a fundamental right or privilege. Moreover, if the nondiscriminatory purpose of the state action is merely to provide its own citizens with a mechanism for holding their public officials accountable, and the impact on any fundamental rights is incidental, state discrimination against out-of-state citizens does not violate the Comity Clause. *McBurney v. Young*, 569 U.S. 221 (2013) (access to information about the workings of state and local governments through the state's Freedom of Information Act could be restricted to in-state citizens).

#### 3. Exception—Substantial Justification

Discrimination against out-of-state citizens may be valid if the state can show:

i) A **substantial reason** for the difference in treatment; and

ii) That the discrimination practiced against nonresidents bears a **substantial relationship** to the state's objective.

*Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998). A substantial reason exists if the nonresidents either cause or are a part of the problem that the state is attempting to solve, and the discrimination is reasonably related to that problem. *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (state law that required state citizens to be given preference in hiring with respect to jobs dealing with state's natural resources was unconstitutional).

#### 4. No Market-Participant Exception

Unlike the Dormant Commerce Clause, there is no market-participant exception regarding the Comity Clause. *See United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984).

### B. FOURTEENTH AMENDMENT—NATIONAL CITIZENSHIP

The Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This clause protects citizens (not corporations or noncitizens) from infringement by the states upon the privileges or immunities of **national** citizenship.

The privileges or immunities of national citizenship include the right to travel interstate, to petition Congress for redress of grievances, to vote for national offices, to enter public lands, to be protected while in the custody of U.S. marshals, and to peaceably assemble. *Twining v. New Jersey*, 211 U.S. 78 (1908). The guarantees of the Bill of Rights, however, are not privileges or immunities of national citizenship within the context of the Fourteenth Amendment. *Slaughterhouse Cases*, 83 U.S. 36 (1873). Therefore, those rights are protected from state action only by the Due Process Clause and the Equal Protection Clause.

This provision is seldom successfully invoked; under the limiting interpretation of the *Slaughterhouse Cases,* the rights that the clause provides are redundant to rights provided elsewhere in the Constitution. Although the Supreme Court has since relied on the clause to underscore the right to move freely among states, *Saenz v. Roe*, 526 U.S. 489 (1999) (invalidating a duration requirement for welfare benefits), there has been no subsequent expansion of use; the Fourteenth Amendment's Privileges or Immunities Clause applies, in practice, only to the right to travel.

## XV. TAKINGS CLAUSE

The power of the government to take private property for public purposes is known as **"eminent domain."** The Takings Clause of the Fifth Amendment acts as a check on this power; it provides that private property may not "be taken for public use, without just compensation." The Fourteenth Amendment Due Process Clause makes the Takings Clause applicable to the states.

### A. PROPERTY INTEREST

For a person to challenge a governmental action as an unconstitutional taking, the person must have a property interest. When a person does not have an interest in the property that the government takes, the Takings Clause does not apply.

**Example:** An organization of homeowners challenged a beach restoration project undertaken by a state agency and local governments. The homeowners objected to the creation of land beyond the mean high water line, which represented the boundary of the homeowners' property, because this infringed upon their right as owners of property along a shore to receive accretions and because they lost the right to control public access to the shoreline. However, because the newly created land belonged to the state, and the homeowners did not enjoy property rights with respect to this land, there was no taking of their property rights. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010). (Note: A plurality of the Supreme Court justices also found that the Takings Clause applies to a judicial taking.)

#### 1. Types of Property

Property that may be subject to the protection of the Takings Clause includes not only land and other real property, but also tangible personal property as well as intangible property, such as contract and patent rights and trade secrets. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Lynch v. United States*, 292 U.S. 571 (1934); *James v. Campbell*, 104 U.S. 356 (1882).

#### 2. Types of Interests

In addition to the transfer of a fee simple interest in property, a taking may involve an easement, leasehold interest, or a lien. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825

(1987); *Armstrong v. United States*, 364 U.S. 40 (1960); *United States v. General Motors*, 323 U.S. 373 (1945).

**Example:** A federal statute that prevented the transfer by devise or descent of fractional shares of an interest in tribal land upon the death of the owner and instead provided for such interest to escheat to the tribe constituted an unconstitutional taking when there was no provision for compensation of the owner. *Hodel v. Irving*, 481 U.S. 704 (1987).

A taking may involve the rights of a property owner, such as the right to control access to the property. *Kaiser Aetna v. United States*, 444 U.S. 164 (1980) (federal government's imposition of public-access servitude on a waterway created on private property constituted a taking).

**Example:** County ownership of an airport that resulted in an invasion of the airspace of nearby property owners by planes taking off and landing at the airport constituted a taking. *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

However, a statute that requires an owner of property rights to take action in order to preserve an unused right does not result in a taking if the owner fails to take such action. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

An owner who fails to pay property taxes does not abandon that property and retains an interest in it. The government entity to which the owner failed to pay property taxes may seize the property and sell it to recover the unpaid taxes owed, interests, and penalties. However, the government may not retain an amount in excess of what was owed. Instead, the owner is entitled to any amount that remains after the sale. *Tyler v. Hennepin Cty., Minn.*, 598 U.S. 631 (2023).

**Example:** A county may seize a condominium and sell it to satisfy a $15,000 debt for unpaid taxes, interest, and penalties. However, if the county sells it for $40,000, it is entitled to keep only $15,000. The remaining $25,000 must be given to the owner of the condominium. *Id.*

## B. TYPES OF TAKING

### 1. Seizure of Property

The classic application of the Takings Clause is the seizure of private property for governmental use, such as acquiring privately held land to construct a courthouse or other government building. In such a case, the property owner's primary challenge to the seizure is whether he has received just compensation (*see* § XV.C., Just Compensation, *infra*).

#### a. Public-use challenge

A government may seize private property not only for its own direct use but also to transfer the property to another private party. Although such a seizure is subject to challenge as not being made for a public use, the taking need merely be **"rationally related** to a **conceivable public purpose."** *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). This is a highly deferential standard, and the burden is on the person challenging the taking to prove a lack of legitimate interest or rational basis. In addition to traditional health, safety, and welfare justifications, economic redevelopment goals constitute a sufficient public purpose to justify the seizure. *Kelo v. City of New London*, 545 U.S. 469 (2005). Moreover, a government-mandated transfer of property from one private party directly to another (e.g., from lessor to lessee) may nevertheless be for a public use. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

### 2. Damage to or Destruction of Property

A destruction of property or property rights by the federal, state, or local government can also result in a taking. The destruction need not directly benefit the government. Similarly, physical damage to property or interference with a property owner's rights by governmental action can result in a taking.

#### a. Exception—public peril

The governmental destruction of private property in response to a public peril does not trigger the right to compensation.

**Example:** The owners of infected cedar trees located near apple orchards were not entitled to compensation when the cedar trees were destroyed pursuant to a state statute to prevent the spread of the infection to the orchards. *Miller v. Schoene*, 276 U.S. 272 (1928).

### 3. Re-characterization of Property

The Takings Clause prevents a government from re-characterizing private property as public property.

**Example:** Interest on the purchase price of an insolvent corporation placed by the buyer in an account with the court as part of an interpleader action involving the corporation's creditors was private property. A state court's interpretation of a statutory provision that the interest was public money constituted a taking. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

### 4. Regulatory Taking

Generally, a governmental regulation that adversely affects a person's property interest is not a taking, but it is possible for a regulation to rise to the level of a taking.

In determining whether a regulation creates a taking, the following factors are considered:

i) The economic impact of the regulation on the property owner;

ii) The extent to which the regulation interferes with the owner's reasonable, investment-backed expectations regarding use of the property; and

iii) The character of the regulation, including the degree to which it will benefit society, how the regulation distributes the burdens and benefits among property owners, and whether the regulation violates any of the owner's essential attributes of property ownership, such as the right to exclude others from the property.

*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

#### a. Public-use challenge

In the context of a regulation, a state or local government can act under its police power for the purposes of health, safety, and welfare. In addition, a public purpose can encompass aesthetic and environmental concerns. Moreover, it is generally inappropriate for a court to examine whether a regulation substantially advances a legitimate governmental interest. (Note, however, that an arbitrary or irrational regulation may constitute a due-process violation.) *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

#### b. Per se takings

In two instances, a regulation clearly results in a taking.

**1) Physical occupation**

A taking has occurred when the governmental regulation results in a **permanent physical occupation** of the property by the government or a third party, regardless of the public interest that it may serve. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

**Example:** A law requiring a landlord to permit a cable company to install equipment on the landlord's property that would remain indefinitely constituted a taking, even though the installation had only a minimal economic impact on the landlord. *Id.*

**2) No economically viable use**

When a regulation results in a **permanent total loss of the property's economic value,** a taking has occurred. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (zoning ordinance precluding owner of coastal property from erecting any permanent structure on the land was a taking); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (32-month building moratorium was not a taking).

**Adverse economic impact:** A regulation that results in a dramatic decline in the value of the regulated property does not necessarily constitute a taking.

**c. Post-adoption acquisition—standing**

A person who acquires property rights after the adoption of a regulation that affects those rights may nevertheless challenge the regulation as an unconstitutional taking. *Palazzolo v. Rhode Island.*, 533 U.S. 606 (2001).

**5. Exaction as a Taking**

A local government may exact promises from a developer, such as setting aside a portion of the land being developed for a park in exchange for issuing the necessary construction permits. Such exactions do not violate the Takings Clause if there is:

i) An **essential nexus** between legitimate state interests and the conditions imposed on the property owner (i.e., the conditions substantially advance legitimate state interest); and

ii) A **rough proportionality** between the burden imposed by the conditions on property owner and the impact of the proposed development.

*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (state-required grant of an easement across beachfront property as a condition on the issuance of a building permit was a taking due to lack of essential nexus); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (state-required dedication of land to the city for use as a greenway and pedestrian/bicycle pathway in exchange for permit to expand a store and parking lot was a taking due to lack of rough proportionality).

In determining whether there is rough proportionality between the burden and the impact, the government must make an individualized determination that the conditions are related both in nature and extent to the impact.

The government's conditions must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money rather than property rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

These requirements are limited to exactions; they do not apply to regulatory takings. *Lingle v. Chevron U.S.A. Inc., supra* (rent cap was not an exaction taking but instead was a valid regulation under the Takings Clause). However, these requirements apply equally to exactions adopted by administrative agencies and exactions enacted by the legislature. *Sheetz v. County of El Dorado, California*, 601 U.S. 267 (2024).

### C. JUST COMPENSATION

The phrase "just compensation" has been interpreted to mean **fair market value,** which is the reasonable value of the property at the time of the taking. This value is measured in terms of the loss to the owner, not the benefit to the government.

#### 1. Worthless Property

Property that is worthless to the owner but has value to the government may be taken without compensation.

**Example:** Clients whose funds were held by lawyers and deposited in a trust account pursuant to state law to be paid to an entity in order to provide legal services for the poor were not entitled to compensation because each client's funds would not separately have earned interest. *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

#### 2. Only a Portion Taken

When only a portion of an owner's property is taken, the owner may also receive compensation for any diminution in value of the remaining portion that is attributable to the taking but must reduce any compensation by the value of any special and direct benefits (e.g., a highway access) conferred on the remaining portion. Additionally, an owner may receive compensation when the government gives a third party the right to occupy the property (such as when a utility company is permitted to place equipment on a landowner's property). *See Kelo v. City of New London*, 545 U.S. 469 (2005).

#### 3. Return of Property

When governmental action constitutes a taking, the government cannot escape all liability by returning the property to its owner, but instead must pay the owner compensation for the period that the government possessed the property. *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987).

### D. MANNER OF TAKING

Typically, when a property owner objects to the seizure of his property by the government, the government will institute condemnation proceedings, and the property owner can raise the Takings Clause as a defense to this action. When the governmental action that allegedly constitutes a taking is a statute, regulation, or ordinance, the property owner may institute a suit seeking an injunction or a declaratory judgment; this type of legal action is sometimes referred to as an inverse condemnation. Such actions can be brought in federal court without having to first exhaust all state court remedies. *Knick v. Township of Scott, Penn.*, 588 U.S. 180 (2019).

## XVI. PROHIBITED LEGISLATION

### A. BILLS OF ATTAINDER

A bill of attainder is a **legislative** act that declares a person or group of persons guilty of some crime and punishes them without a trial. Article I, Sections 9 and 10 forbid the federal government and the states, respectively, from enacting such "legislative trials." It applies only to criminal or penal measures.

Barring particular individuals from government employment qualifies as punishment under the prohibition against bills of attainder. *United States v. Lovett*, 328 U.S. 303 (1946).

## B. EX POST FACTO LAWS

The constitutional prohibition on an "ex post facto" law is confined to a retroactive change to a **criminal or penal** law. A law that is civil in purpose is treated as a criminal law only if its punitive effect clearly overrides its civil purpose. *Smith v. Doe*, 538 U.S. 84 (2003).

Under Article I, Sections 9 and 10, a **federal or state** statute will be struck down as being ex post facto if it:

i) **Criminalizes** an act that was not a crime when it was originally committed;

ii) Authorizes, after an act was committed, the imposition of a **more severe penalty** on that act;

iii) **Deprives the defendant of a defense** available at the time the act was committed; or

iv) **Decreases the prosecution's burden of proof** required for a conviction to a level below that which was required when the alleged offense was committed.

*Collins v. Youngblood*, 497 U.S. 37 (1990).

**Example:** A change in the relevant statute of limitations that resulted in the revival of a prosecution for an act of sexual abuse for which the statute of limitations had expired violates the prohibition on ex post facto laws; the change retroactively withdrew a complete defense to the crime after it had vested. *Stogner v. California*, 539 U.S. 607 (2003).

**Compare:** The retroactive application of state law that required registration of convicted sex offenders and child kidnappers, and public notification of information about the convicts, including name, current address, and place of employment did not constitute an ex post facto law. The law was a nonpunitive regulatory scheme enacted for the protection of the public. *Smith v. Doe*, *supra*.

## C. OBLIGATION OF CONTRACTS

Article I, Section 10 (i.e., the "contracts clause"), prohibits the states from passing any law "impairing the obligation of contracts." This prohibition applies only to **state legislation**—not state-court decisions and not federal legislation—that **retroactively** impairs contractual rights. It does not apply to contracts not yet entered into.

### 1. Private Contracts

State legislation that **substantially** impairs a contract between private parties is invalid, unless the government can demonstrate that the interference was **reasonable** and **necessary** to serve an **important** governmental interest. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400 (1983). Substantial impairment generally requires that the state legislation destroy most or all of a party's rights under a preexisting contract. *See Home Bldg. and Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934); *Keystone Bituminous Coal Ass'n v. DeBenedictus,* 480 U.S. 470 (1987).

### 2. Public Contracts

Impairment by the state of a **public contract** (one to which the state or local government is a party) is subject to essentially the same "reasonable and necessary" test as private contracts, but with a somewhat stricter application. The state must show that its important interest cannot be served by a less-restrictive alternative and

that the impairment it seeks is necessary because of unforeseeable circumstances. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

Note that there is no substantial impairment if the state reserved—by statute, law, or in the contract itself—the right to revoke, alter, or amend.

## XVII. FREEDOM OF RELIGION

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Both the Establishment Clause and the Free Exercise Clause have been incorporated into the Due Process Clause of the Fourteenth Amendment and are therefore applicable to the states.

### A. ESTABLISHMENT

When a governmental program shows preference to one religion over another, or to religion over nonreligion, strict scrutiny applies. *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (creation of special school district to benefit members of one religion invalid); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (delegating or sharing ability to make discretionary decisions, like zoning decisions, to a religious institution invalid).

#### 1. Standard of Review

Not every governmental action that impacts religion is unconstitutional. To determine whether a particular program violates the Establishment Clause, the Court utilizes a consideration of "historical practices and understandings." *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). *See*, *e.g.*, *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29 (2019) (presumption of constitutionality for longstanding monuments, symbols, and practices); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (permitting Christian organization to use public school cafeteria for after-school meetings did not violate Establishment Clause); *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (creation of school district to serve distinctive religious population violated Establishment Clause).

#### 2. Financial Aid

##### a. Aid to religious institutions

Governmental financial assistance to religious institutions is permitted if the aid is secular in nature, used only for secular purposes, and, when the aid is distributed among secular and religious institutions, the distribution criteria must be religiously neutral. *Mitchell v. Helms*, 530 U.S. 793 (2000) (elementary and secondary school); *Tilton v. Richardson*, 403 U.S. 672 (1971) (college); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (hospital). Aid in the form of secular textbooks, computers, standardized tests, bus transportation, school lunches, and sign language interpreters for deaf students has been upheld. While parochial elementary and secondary schools were at one time considered to be so pervasively sectarian that direct aid to them was not permitted, that is no longer the case. *Mitchell v. Helms, supra*.

##### b. Tax exemptions for religious organizations

Property-tax exemptions for religious institutions have been held valid as being equivalent to exemptions given to other charitable organizations and therefore neither advancing nor inhibiting religion. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Tax exemptions that are available only for religious activities or organizations, however, violate the Establishment Clause as an endorsement of religion. *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

### c. Tax deductions and aid for parochial school expenses

Tax deductions given to reimburse tuition expenses only for parents of students in religious schools are invalid. If such a deduction is available to **all** parents for actual educational expenses of attending any public or private school (including parochial schools), it is valid. *Mueller v. Allen*, 463 U.S. 388 (1983).

In addition, giving parents tuition vouchers to assist them in paying religious-school tuition does not violate the Establishment Clause if the choice of whether to use the vouchers for religious or non-religious private school tuition lies with the parents. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). However, states may deny state funds to a student pursuing a religious career without violating the Free Exercise Clause of the federal constitution. *Locke v. Davey*, 540 U.S. 712 (2004) (denial of state scholarship funds to a student seeking a career in religious instruction did not violate the Free Exercise Clause because the state was free to choose not to fund a distinct category of instruction in order to avoid the establishment of religion).

## 3. Public School Activities

Generally, officially sponsored religious activities in public schools or at public school events violate the Establishment Clause. The following practices have been held invalid as clearly promoting religion:

i) **Prayer** and **Bible reading,** *Engel v. Vitale*, 370 U.S. 421 (1962);

ii) A designated period of silence during the school day for **"meditation or voluntary prayer"** lacking any secular purpose, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *but see Kennedy v. Bremerton Sch. Dist.*, *supra* (First Amendment protects high-school football coach praying on football field after games) *and Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001) (short periods of mandatory silence did not necessarily implicate the establishment of religion, and moment-of-silence requirements with dual legitimate purposes (i.e., a secular purpose along with a purpose to accommodate free exercise of religion) may be constitutional);

iii) **Nondenominational (i.e., nonsectarian) prayer** at school events, *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer led by a cleric at a graduation ceremony); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (school policy of student-led prayer at high school football games);

iv) Posting the **Ten Commandments** on public-school classroom walls, *Stone v. Graham*, 449 U.S. 39 (1980); and

v) **Prohibiting the teaching of Darwinism** (i.e., human biological evolution), or mandating that such teaching be accompanied by instruction regarding "creation science," *Edward v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

## 4. Access to Public Facilities by Religious Groups

If a public school allows student groups or organizations to use its facilities when classes are not in session, allowing a religious organization to use those facilities does not violate the Establishment Clause. Furthermore, to prohibit such a group from using those facilities because religious topics would be discussed would violate the First Amendment guarantee of free speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Widmar v. Vincent*, 454 U.S. 263 (1981). The Court has often responded to public educational institutions' Establishment Clause concerns by focusing on the free speech rights of religious students. *E.g.*, *Rosenberger v. Univ. of Va.*, 515 U.S.

819 (1995) (state university could not refuse to pay for printing of religious student newspaper on Establishment Clause grounds when it funded nonreligious papers).

### 5. Religious Displays

#### a. Ten Commandments

A display of the Ten Commandments on public property is an impermissible violation of the Establishment Clause if the display has a **"predominantly religious purpose."** *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments posted in courthouse impermissible). If the display also communicates a secular moral message, or its context conveys a historical and social meaning, it may be upheld. *Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument on the state capitol grounds displaying 17 monuments and 21 historical markers commemorating the state's "people, ideals, and events that compose its identity" was permitted because the "Ten Commandments have an undeniable historical meaning" in addition to their "religious significance." Because of the unique historical message, which is separate from any religious message, installing the Ten Commandments in a public park did not violate the Establishment Clause). This is a highly context-dependent, case-specific inquiry.

#### b. Holiday displays

Government holiday displays will generally be upheld unless a reasonable observer would conclude that the display is an **endorsement** of religion. The context of the display is key—a nativity scene in a courthouse under a banner reading "*Gloria in Excelsis Deo*" was struck down as endorsing religion, but a nearby outdoor display of a Christmas tree, Chanukah menorah, and other seasonal symbols was upheld as mere recognition that Christmas and Chanukah are both parts of a highly secularized winter holiday season. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

### 6. Legislative Prayer

Legislative prayer is generally permissible. Prayer before sessions of town council did not violate Establishment Clause based on the tradition of such prayers and the lack of coercion with regard to participation by nonbelievers. *Town of Greece v. Galloway*, 572 U.S. 565 (2014). Similarly, holding a daily prayer before opening of each day of a state legislature session did not violate the Establishment Clause because the prayer constituted "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

## B. FREE EXERCISE

The Free Exercise Clause of the First Amendment has been construed to include two freedoms: the freedom to believe and the freedom to act. The degree of protection that individuals are afforded from governmental interference in religion depends on whether religious belief or conduct is involved.

### 1. Religious Belief

The freedom to believe in any religion or none at all is absolutely protected and cannot be restricted by law. The government may not deny benefits or impose burdens based on religious belief, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); it may not require affirmation of a belief, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); and it may not determine the reasonableness of a belief, although it may determine the sincerity of the person asserting that belief, *United States v. Ballard*, 322 U.S. 78 (1944). When there is a property dispute between two religious groups,

a court may not decide questions of religious doctrine, but may apply religiously neutral principles of law to resolve the dispute. *Jones v. Wolf*, 443 U.S. 595 (1979).

### 2. Religious Conduct

Religious conduct, on the other hand, is not absolutely protected. Generally, only state laws that **intentionally target** religious conduct are subject to strict scrutiny. Neutral laws of general applicability that have an impact on religious conduct are subject only to the rational basis test.

#### a. Targeting religious conduct

Strict scrutiny applies when the government purposely targets conduct because it is religious or displays religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinance banning all ritual sacrifice of animals not for the purpose of food consumption struck down as targeting the Santeria religion). A state law that is designed to suppress activity because it is religiously motivated is valid only if it is necessary to achieve a compelling governmental interest.

Other laws that have been struck down as violating the Free Exercise Clause include compulsory school attendance for the Amish, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and denial of unemployment benefits to one whose faith prevented her from taking a job that required her to work on the Sabbath, *Sherbert v. Verner*, 374 U.S. 398 (1963).

#### b. Generally applicable laws

Neutral state laws of general applicability that have the incidental effect of interfering with one's ability to engage in religious practices are subject only to the rational basis test. A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exceptions. *Fulton v. Philadelphia*, 593 U.S. 522 (2021) (refusal of city to contract with Catholic foster-child placement agency unless agency agreed to certify same-sex couples as foster parents violated Free Exercise Clause); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (criminalization of peyote that did not contain an exception for use in Native American religious rituals upheld, as the ban was not motivated by any desire to burden religious conduct).

**Example:** A parent's right to pray over a child who has contracted meningitis, rather than seeking medical assistance, may be limited by state child-neglect and manslaughter laws. Parents do not have the right to endanger the lives of their children on the grounds of freedom of religion. *See Prince v. Massachusetts*, 321 U.S. 158 (1944).

#### c. Access to benefits

Strict scrutiny applies when the government purposely denies a religious entity access to an otherwise available public benefit purely on account of its religious status. The avoidance of entanglement of church and state is not a sufficient governmental interest to justify this denial. *Carson v. Makin*, 596 U.S. 767 (2022) (a "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (church-run preschool could not be denied, solely on the basis of its religious status, a state grant to resurface playground); *but see Locke v. Davey*, *supra* (state not required to fund degree in devotional theology as part of a state scholarship program).

#### d. Religious Freedom Restoration Act (RFRA)

Under the federal Religious Freedom Restoration Act, and similar acts adopted by over 20 states, even neutral laws of general applicability are subject to strict scrutiny if they substantially burden the free exercise of religion. Federal RFRA's express remedies provision permits litigants to obtain money damages against federal officials in their individual capacities. *Tanzin v. Tanvir*, 592 U.S. 43 (2020).

### C. MINISTERIAL EXCEPTION TO DISCRIMINATION LAWS

Religious institutions can rely on a "ministerial exception" to federal and state employment discrimination laws in their decision to hire or fire a minister. The purpose of the ministerial exception, which is based on both the Establishment and Free Exercise Clauses of the First Amendment, is not merely to safeguard a church's decision to discharge a minister when it is made for a religious reason but also to ensure that the authority to select and control who will serve as a minister to the church's faithful, a strictly ecclesiastical matter, is solely the church's decision. The exception operates as an affirmative defense to an otherwise cognizable claim, but not as a jurisdictional bar. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) (employee whose responsibilities included religious instruction was "minister" within scope of ministerial exception, and as such, church and school could not be held liable in E.E.O.C.'s discrimination enforcement action on her behalf).

## XVIII. FREEDOM OF EXPRESSION AND ASSOCIATION

In addition to its religion clauses, the First Amendment provides that "Congress shall make no laws…abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." These aspects of the First Amendment are applicable to the states via the Fourteenth Amendment.

Freedom of expression is not absolute. While governmental regulation of the content of speech is severely constrained, governmental regulation of the time, place, and manner of speech is subject to less restriction.

### A. REGULATION OF SPEECH

#### 1. Expressive Conduct

Protected speech can include not only written, oral, and visual communication, but also activities such as picketing and leafleting. Expressive conduct (or symbolic speech) may also be protected as speech, but it is subject to a lesser degree of protection. Governmental regulation of expressive conduct is upheld if:

i) The regulation is **within the government's power** to enact (e.g., through a local government's police power);

ii) The regulation furthers an **important governmental interest**;

iii) The governmental interest is **unrelated to the suppression of ideas**; and

iv) The burden on speech is **no greater than necessary.**

*United States v. O'Brien*, 391 U.S. 367 (1968) (prohibition against burning draft cards upheld as furthering the important governmental interest in a smoothly functioning draft system).

An example of permissible regulation of expressive conduct includes upholding a ban on public nudity, such as nude dancing in adult entertainment venues, pursuant to the important governmental interest in preventing the "harmful secondary effects" of adult

entertainment on neighborhoods, which is unrelated to the suppression of expression. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

Examples of impermissible regulation of expressive conduct include:

i) A ban against students wearing black armbands to protest the war in Vietnam, because the government's only interest in banning the conduct was prohibiting communication, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969);

ii) A federal prohibition against burning the American flag because the law was intended to suppress messages of disapproval of governmental policy, rather than any conduct-related consequences of the burning of a flag, *United States v. Eichman*, 496 U.S. 310 (1990); and

iii) An ordinance prohibiting leafleting that results in littering on public streets, because the governmental interest in clean streets is insufficient justification, and such a ban on distribution is not narrowly tailored to protect the communication of information and opinion. *Schneider v. State of New Jersey Town of Irvington,* 308 U.S. 147 (1939).

The act of signing a petition constitutes expressive conduct. Public disclosure of the petition, and, thereby, the names of the individuals who signed the petition does not violate the First Amendment because such disclosure is substantially related to the important interest of preserving the integrity of the electoral process. *Doe v. Reed*, 561 U.S. 186 (2010).

### 2. Overbreadth

A law that burdens a substantial amount of speech or other conduct constitutionally protected by the First Amendment is **"overbroad"** and therefore void. A statute's overbreadth must be substantial both in an absolute sense and relative to the statute's plainly legitimate reach. The mere fact that some impermissible applications of a statute can be conceived of is not sufficient to render a statute overbroad. *United States v. Williams*, 553 U.S. 285 (2008). This doctrine does not apply to commercial speech. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

In order to prevent a **"chilling effect"** on protected speech (i.e., frightening people into not speaking for fear of prosecution), overbroad statutes may be challenged as **"facially invalid"** even by those who are validly regulated on behalf of those who are not. *Broadrick v. Okla.*, 413 U.S. 601 (1973). The challenger of a law bears the burden of establishing that substantial overbreadth exists. *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1 (1988).

### 3. Vagueness

A statute is **"void for vagueness"** if it fails to provide a person of ordinary intelligence with fair notice of what is prohibited. *United States v. Williams*, *supra*.

As with overbreadth, vagueness is impermissible for fear that constitutionally protected speech will be "chilled." In addition, the "void for vagueness" doctrine is grounded in the due process requirement of notice. Under due process principles, laws that regulate persons or entities must give fair notice of conduct that is forbidden or required. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012). Statutes that tie criminal culpability to conduct that involves subjective judgments without providing statutory definitions, narrow context, or settled legal meanings have been struck down for vagueness. *Reno v. ACLU*, 521 U.S. 844 (1997) (indecent speech); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (annoying conduct).

### 4. Prior Restraints

A prior restraint is a regulation of speech that occurs in advance of its expression (e.g., publication or utterance). Prior restraints are generally presumed to be unconstitutional, with limited exceptions. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). These rare exceptions require at a minimum that:

i) There is a **particular harm** to be avoided (like publication of troop movements); and

ii) Certain **procedural safeguards** are provided to the speaker. Examples of such safeguards include:

a) The standards must be narrowly drawn, reasonable, and definite, *Butterworth v. Smith*, 494 U.S. 624 (1990);

b) The censoring body must promptly seek an injunction, *Teitel Films v. Cusack*, 390 U.S. 139 (1968); and

c) There must be a prompt and final judicial determination of the validity of the restraint, *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

The **burden is on the government** to prove that the material to be censored is not protected speech. *Freedman v. Maryland*, 380 U.S. 51 (1965).

Prior restraints have been rejected even when national security was at issue, *New York Times v. United States*, 403 U.S. 713 (1971) (Pentagon Papers), and even when press coverage threatened the fairness of a trial, *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976) (prior restraint must be the only way to accomplish a goal).

### 5. Unfettered Discretion

A law or regulation that permits a governmental official to restrict speech (e.g., requires an official to issue a permit before a rally can be held) must provide definite standards as to how to apply the law in order to prevent governmental officials from having unfettered discretion over its application. Such a law or regulation must be related to an important governmental interest and contain the procedural safeguards mentioned above. A statute that gives officials unfettered discretion is void on its face; speakers need not apply for a permit and may not be punished for violating the licensing statute. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

### 6. Freedom Not to Speak

The First Amendment protects not only freedom of speech, but also the freedom not to speak. One such example is a child's right not to recite the Pledge of Allegiance. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Similarly, the private organizers of a parade cannot be compelled by the government to include in the parade a group that espouses a message with which the organizers disagree. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995). Nor can the government mandate as a condition of federal funding that recipients explicitly agree with the government's policy to oppose prostitution and sex trafficking. *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 570 U.S. 205 (2013). The government also cannot compel a business owner engaged in expressive activity to engage in speech with which the business owner disagrees. For example, a state cannot use its public accommodation law that prohibits businesses from discriminating against members of the LGBTQ+ community to force a website designer to design a website for a same-sex couple. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

However, a state can compel a private entity (e.g., a shopping mall) to permit individuals to exercise their own free-speech rights when the private entity is open to

the public and the message is not likely to be attributable to the private entity. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). A state may also require professional fundraisers to file certain public financial disclosures about fundraising activities in order to allow donors to make informed charitable contributions and to prevent fraud. *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

#### a. Compelled financial support

Although one may be compelled to join or financially support a group with respect to one's employment, one cannot be forced to fund political speech by that group. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (lawyer required to join a bar association); *but see Janus v. Am. Fed. of State, Cnty. & Mun. Emps.*, 585 U.S. 878 (2018) (collection of union fees from non-union members in the public sector violates the First Amendment). A student, however, can be required to pay a university activity fee even though the fee may support groups that espouse messages with which the student disagrees, at least when the fee is allocated in accord with a viewpoint-neutral scheme. *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000).

### 7. Government Speech

When the government itself speaks, it is not constrained by the Free Speech Clause of the First Amendment. Therefore, government speech (public service announcements, agricultural marketing campaigns, etc.) need not be viewpoint-neutral. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). This Government Speech Doctrine, however, is subject to the requirements of the Establishment Clause (*See* § XVII.A. Establishment, *supra*). Additionally, a government official can freely and forcefully express her views and criticize certain beliefs to persuade the public on an issue. However, she cannot use her government power to punish or suppress expression or conduct with which she disagrees. This prohibition includes coercing third parties to suppress the rights of others. *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024).

#### a. Monuments on public property

The display of a monument on public property, even if the monument has been donated by a private person, constitutes government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (government installed a Ten Commandments monument donated by a private person in a public park; the Court held that governmental entities may exercise "selectivity" in choosing a monument being offered by a private donor).

#### b. Flagpoles on public property

Whether flags flown from flagpoles outside of a government building constitute government speech is determined based on an analysis of the totality of the circumstances. If the government entity has regularly allowed private groups to fly their flags on the flagpole without meaningful involvement in the selection of the flags or the crafting of their messages, then it is likely that the flags do not constitute government speech, but rather the free expression of the citizens. Denying one group the right to display their flag would, in that case, be a violation of the group's right to free speech. *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) (city's refusal to fly a religious organization's flag depicting a cross on a city flagpole where city had not denied any other group the right was a free-speech violation.)

### c. Specialty license plates

Specialty license plates, even if designed by private individuals, are government speech and, as such, the state may refuse proposed designs based on the content of those designs. *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200 (2015) (rejection of proposed Texas license plate featuring Confederate battle flag).

### d. Funding of private messages

The government may fund private messages. However, it must generally do so on a viewpoint-neutral basis. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The exception to this is when the government decides to fund artists; the decision of which artist to fund is necessarily based on the content of the artist's work. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

### e. Speech by government employees

When a government employee contends that her rights under the Free Speech Clause of the First Amendment have been violated by her employer, the employee must show that she was speaking as a citizen on a matter of public concern. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011). When a government employee is speaking pursuant to her official duties, the employee is generally not speaking as a citizen and the Free Speech Clause does not protect the employee from employer discipline. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In determining whether a government employee is speaking pursuant to her official duties, the critical question is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. *Lane v. Franks*, 573 U.S. 228 (2014).

When an employee is speaking as a citizen on a matter of public concern, the First Amendment interest of the employee must be balanced against the interest of the state, as an employer, in effective and efficient management of its internal affairs. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Borough of Duryea v. Guarnieri, supra*. This approach also applies to a government employee who petitions the government for redress of a wrong pursuant to the Petition Clause of the First Amendment. *Id.*

For purposes of special protection under the First Amendment, speech deals with matters of "public concern" when it relates to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest—that is, a subject of general interest and of value and concern to the public. *Snyder v. Phelps*, 562 U.S. 443 (2011).

## 8. Campaign Related Speech

### a. Political campaign contributions

Statutes limiting campaign contributions are subject to intermediate scrutiny: they must be "closely drawn" to correspond with a sufficiently important interest. *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Randall v. Sorrell*, 548 U.S. 230 (2006). The government's failure to assist a party in exercising a fundamental right does not infringe upon that right and therefore is not subject to strict scrutiny. *Ysursa v. Pocatello Education Association,* 555 U.S. 353 (2009) (state's decision to limit public employer payroll deductions for a union's political purposes did not abridge the union's right to speech).

### 1) Contributions to candidates

The government may limit contributions to individual candidates because excessive contributions to candidates create a danger of corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). However, because aggregate limits on the amount a donor may contribute to candidates for federal office, political parties, and political action committees restrict participation in the political process and do little to further the prevention of "quid pro quo" corruption or the appearance of such corruption in campaign financing, they are invalid under the First Amendment. *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014); *see Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981) (holding that limits on campaign contributions to committees concerning ballot measures, as opposed to contributions to individuals, violated the First Amendment's right of association).

Limits on campaign contributions to candidates for state office ranging from $275 to $1,000 have been upheld. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). However, the government cannot set differential contribution limits that penalize a candidate who finances his own campaign. *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

### 2) Contributions to political parties

The government may limit contributions to a political party that are used to expressly advocate for the election or defeat of a particular candidate (also known as "hard money") as well as contributions that are used for other purposes, such as promoting the party itself (also known as "soft money"). *McConnell v. Federal Election Commission*, *supra*. In addition, the government may require a political party to disclose contributors and recipients unless the party can show that such disclosure would cause harm to the party. *Brown v. Socialist Workers '74 Campaign Committee*, 454 U.S. 112 (1982).

### 3) Contributions to political action committees (PACs)

The government may limit contributions to a political action committee (PAC). *California Medical Assn. v. FEC*, 453 U.S. 182 (1981).

## b. Political campaign expenditures

In contrast to campaign contributions, restrictions on expenditures by individuals and entities (including corporations and unions) on communications during an election campaign regarding a candidate are subject to strict scrutiny. So long as the source of the funding is disclosed, there is no legal limit to the amount that corporations and unions may spend on "electioneering communications." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). In addition, expenditures by a candidate on her own behalf cannot be limited. *Buckley v. Valeo, supra*; *Davis v. Federal Election Commission*, *supra.*

## c. Political speakers

In addition to individuals, corporations (both nonprofit and for-profit) enjoy First Amendment protection with regard to political speech. *Citizens United*, *supra*. Similarly, a candidate for a judgeship has a First Amendment right to express his views on disputed legal or political issues. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). A state law banning judicial candidates from personally soliciting campaign funds, however, does not necessarily violate the First Amendment. *Williams-Yulee v. The Florida Bar*, 575 U.S. 433 (2015).

## B. REGULATION OF TIME, PLACE, AND MANNER OF EXPRESSION

The government's ability to regulate speech varies with the forum in which the speech takes place.

### 1. Three Categories of Forums

The Supreme Court has sorted government property that is open for speech into three categories: traditional public forums, designated public forums, and nonpublic (or limited public) forums. Speech restrictions in traditional and designated public forums are subject to the same strict scrutiny analysis, while there is a lower standard when analyzing restrictions in nonpublic forums. *Christian Legal Society v. Martinez*, 561 US 661 (2010).

### 2. Public Forums

A **"public forum"** may be **traditional** or **designated.** Traditional public forums are those that are historically associated with expression, such as sidewalks, streets, and parks. A designated public forum is one that has not historically been used for speech-related activities, but which the government has opened for such use, such as civic auditoriums, publicly owned theaters, or school classrooms that the public is allowed to use afterhours. The practical difference between the two is that the government can change a designated forum to a nonpublic forum, but it cannot do the same with a traditional forum.

Generally, in either type of public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions:

i) Are **content-neutral** as to both subject matter and viewpoint (i.e., it does not apply to particular speech based on the topic, idea, or message expressed);

ii) Are **narrowly tailored** to serve a **significant governmental interest**; and

iii) Leave open ample **alternative channels for communication** of the information.

When dealing with time, place, or manner regulations, the requirement that the regulation be "narrowly tailored" does not mean that the regulation must employ the "least restrictive means" (or "least intrusive means" or "least drastic means") that will vindicate the significant governmental interest. The regulation need only promote a substantial government interest that would be achieved less effectively absent the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The Court has held that both aesthetic preservation and traffic safety are substantial government interests under this test. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984).

Additional restrictions, such as an absolute prohibition of a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest, i.e., only if they satisfy strict scrutiny. *United States v. Grace,* 461 U.S. 171 (1983); *see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *United States v. Kokinda*, 497 U.S. 720 (1990) (considering a ban on all solicitation in a public forum). Restrictions that are not content-neutral are also subject to **strict scrutiny** (*see* § XVIII.C., Regulation of Content, *infra*).

#### a. Residential areas

There is no right to focus picketing on a particular single residence. However, a person may solicit charitable funds in a residential area. Door-to-door solicitation

does not require a permit, as long as the solicitation is for noncommercial or nonfundraising purposes. *Cantwell v. Conn.*, 310 U.S. 296, 306 (1940).

**b. Injunctions**

The test for the constitutionality of injunctions in public forums depends on whether the injunction is content-neutral or content-based. If an injunction is **content-neutral**, then the test is whether it burdens **no more speech than is necessary** to achieve an **important** governmental interest. On the other hand, if the injunction is **content-based,** it must be **necessary** for the government to achieve a **compelling** governmental interest.

**c. Public schools**

When a public school, as a designated (or limited, see below) public forum, permits the public to use its facilities, it cannot discriminate against organizations based on their beliefs. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (religious organizations); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972) (political organization). Similarly, a public school may provide funding and other benefits (e.g., free use of facilities) to student groups, but it must do so on a viewpoint-neutral basis.

**Example 1:** A university that provided funds to various student publications could not withhold funds from a student religious publication on the grounds that the publication espoused religion. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

**Example 2:** A public university law school could adopt an "all comers policy" with which student organizations must comply in order to receive school funding and other benefits. Under the policy, a student organization had to admit any student as a member and permit any student to hold office in the organization. Because the policy was viewpoint-neutral, its application to a religious organization was constitutional. *Christian Legal Soc'y Chapter of Univ. of California, Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010).

**3. Nonpublic Forum**

A nonpublic forum (also known as a "limited public forum") is essentially all public property that is not a traditional or designated public forum. The state need not allow persons to engage in every type of speech, and may reserve the forum for certain groups or for the discussion of certain topics. Examples include government offices, jails, military bases, airport terminals, and polling places. The government may regulate speech-related activities in nonpublic forums as long as the regulation is (i) **viewpoint-neutral** and (ii) **reasonably related to a legitimate governmental interest.**

Note that a governmental fundraising campaign is a nonpublic forum for the expression of speech. The decision to exclude some charities (but not others) cannot be made because the government disagrees with a particular organization's political views; such a decision must be ideologically neutral. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

**a. Viewpoint-neutral**

The regulation need not be content-neutral, but it must be viewpoint-neutral. In other words, the government may prohibit speech on certain issues altogether, but it may not allow only one side of an issue to be presented. For example, while

a restriction on all public speeches in airports related to firearms regulation would likely be upheld, a restriction only on pro-NRA speeches would not.

**Contrast this** with restrictions on speech in a public forum, which must be both content- and viewpoint-neutral.

**b. Reasonable**

The restriction on speech-related activities in nonpublic forums must only be rationally related to a legitimate governmental interest. A restriction need not be the least-restrictive means or even the most reasonable restriction to pass muster as "reasonable." For example, a city may sell commercial advertising space inside city buses but refuse to sell such space for political advertising in order to avoid the appearance of favoritism and imposition on a captive audience. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

**4. Personal Property**

Governmental regulation of speech on a person's own private property will rarely be upheld, particularly content-based regulations. While the government has some limited powers to regulate speech on private property, outright bans on certain types of speech, such as signs in a person's yard or window, are impermissible. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (statute banning all residential signs in order to fight "visual clutter" was found unconstitutional). Further, there is no First Amendment right to express oneself on someone else's private property (though a state's own constitution may protect such expression). *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

## C. REGULATION OF CONTENT

Any governmental regulation of speech that is **content-based on its face** will only be upheld if the regulation is necessary to achieve a compelling governmental interest and is narrowly tailored to meet that interest (i.e., the **strict scrutiny** test). A law is content-based if it applies to certain speech because of the subject discussed or the idea expressed. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (ordinance that singled out signs bearing a particular message were content-based); *see Barr v. American Ass'n of Political Consultants, Inc.,* 591 U.S. ___, 140 S. Ct. 2335 (2020) (holding federal law prohibiting robocalls to cell phones was content-based because of an exemption available for calls made to collect debts).

However, regulations that are not content-based on their face may still be **content-based in application or in intent**, and these laws, too, will generally be subject to strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 564 U.S 786 (2011) (state law that prohibited the sale of violent video games to minors is an unconstitutional content restriction on speech); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). The government must identify an actual problem, and the regulation of speech must be necessary to solve that problem. This standard is incredibly stringent and is not often met. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000).

However, the government may restrict speech on the basis of content if the speech falls into one of the following historic and traditional categories: obscenity, subversive speech, fighting words, defamation, or commercial speech. *U.S. v. Alvarez*, 567 U.S. 709 (2012). States are not free to create new categories of content-based restrictions without persuasive evidence that such restrictions have a long-standing history of proscription. *Brown v. Entm't Merchs. Ass'n*, *supra*.

### 1. Obscenity and Child Pornography

Neither obscene speech nor child pornography is protected by the First Amendment Free Speech Clause. *Roth v. United States*, 354 U.S. 476 (1957).

#### a. Obscenity test

To be considered obscene, speech must meet each part of a three-prong test developed in *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller* test, the **average person,** applying **contemporary community standards,** must find that the material, **taken as a whole**:

i) Appeals to the **"prurient interest"**;

ii) Depicts sexual conduct in a **patently offensive** way; and

iii) **Lacks serious literary, artistic, political, or scientific value.**

> **EXAM NOTE: *Standards Distinguished* –** The first two prongs of this test use a contemporary **community** standard, which may be national but is generally considered to be local or statewide. A **national** standard must be applied, however, to the third prong of the test—determining the value of the work—because the work may merit constitutional protection despite local views to the contrary. *Pope v. Illinois*, 481 U.S. 497 (1987). With regard to the third prong, the judge, not the jury, determines whether this standard has been met.

Courts have recently begun to distinguish legally obscene speech from pornography. Merely establishing that speech constitutes pornography is generally insufficient to establish that the speech is obscene. Therefore, content-based restrictions on pornography are generally subject to strict scrutiny. *United States v. Playboy Entm't Grp. Inc.*, 529 U.S. 803 (2000).

Either an appellate court or a jury can assess whether the material is obscene. Evidence of similar material on newsstands is not automatically admissible, nor is expert testimony required to make such a determination.

#### b. Prohibited activities

The sale, distribution, and exhibition of obscene material may be prohibited. *Stanley v. Georgia*, 394 U.S. 557 (1969). However, the right to privacy generally precludes criminalization of possession of obscenity in one's own home. *Stanley v. Georgia*, *supra*.

#### c. Land-use restrictions

Narrowly drawn zoning ordinances may be used to restrict the location of certain adult entertainment businesses (e.g., adult theaters, adult bookstores, strip clubs) if the purpose of the regulation is to reduce the impact on the neighborhood of such establishments, but they may not be used to ban such establishments entirely. It does not matter that such establishments may be found in adjoining jurisdictions. *Los Angeles v. Alameda Books*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

#### d. Minors

Material that appeals to the prurient interests of minors may be regulated as to minors, even if it would not be considered obscene to an adult audience. *Ginsberg v. New York*, 390 U.S. 629 (1968). The government may not, however, block

adults' access to indecent materials in order to prevent them from reaching children. *Reno v. ACLU*, 521 U.S. 844 (1997).

**e. "Scandalous" trademarks**

The United States Patent and Trademark Office cannot deny registration of trademarks on the basis that they are "immoral" or "scandalous" (as previously allowed by the Lanham Act of 1946). Such provisions are unconstitutional, as they permit the USPTO to engage in viewpoint discrimination, violating the freedom of speech clause in the First Amendment. *Iancu v. Brunetti*, 588 U.S. 388 (2019).

**f. Child pornography**

The First Amendment also does not protect child pornography, which is material depicting children engaged in sexually explicit conduct. Because of the state's compelling interest in protecting minor children from exploitation, the sale, distribution, and even private possession of child pornography may be prohibited, even if the material would not be obscene if it involved adults. *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

Simulated child pornography (i.e., pornography using young-looking adults or computer-generated images) may not be banned as child pornography. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). However, pandering (e.g., offers to sell or buy) simulated child pornography, including actual depictions of children even though the sexually explicit features are simulated, may be criminalized when the material is presented as actual child pornography. *United States v. Williams*, 553 U.S. 285 (2008).

**g. Violence**

Violence is not included in the definition of obscenity that may be constitutionally regulated. *Brown v. Entm't Merchs. Ass'n*, *supra*; *Winters v. New York*, 333 U.S. 507 (1948).

### 2. Incitement to Violence

A state may forbid speech that advocates the use of force or unlawful action if:

i) The speech is **directed to inciting or producing imminent lawless action**; and

ii) It is **likely to incite or produce such action** (i.e., creates a clear and present danger).

*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Advocacy requires the use of language reasonably and ordinarily calculated to incite persons to such action. *Yates v. United States*, 354 U.S. 298 (1957). The abstract expression of ideas, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as the actual incitement of violence. There must be substantial evidence of a strong and pervasive call to violence. *Noto v. United States*, 367 U.S. 290 (1960).

### 3. Fighting Words

A speaker may be criminally punished for using "fighting words," which are words that **by their very nature** are likely to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Words that are simply annoying

or offensive are not fighting words; there must be a genuine likelihood of imminent violence by a hostile audience. *Cohen v. California*, 403 U.S. 15 (1971).

**EXAM NOTE:** Attempts to forbid fighting words almost always fail as vague, overbroad, or otherwise constitutionally infirm.

Statutes designed to punish only fighting words that express certain viewpoints are unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (the Court struck down an ordinance that applied only to fighting words that insulted or provoked on the basis of race, religion, or gender).

However, actual threats of violence are outside the protection of the First Amendment, given the need to protect individuals from (i) the fear of violence, (ii) the disruption that fear engenders, and (iii) the possibility that the threatened violence will occur. *R.A.V. v. City of St. Paul*, 505 at 388. To convict a person for threatening language, a prosecutor must prove that the speaker purposefully, knowingly, or recklessly made the threatening language—i.e., the prosecutor must show that the speaker at the very least consciously disregarded a substantial and unjustifiable risk that a person could regard the language as threatening violence. *Counterman v. Colorado*, 600 U.S. 66 (2023).

### 4. Defamation

Limits on punishment for defamatory speech may apply in cases in which the plaintiff is a public official or public figure, or when a defamatory statement involves a matter of public concern. In addition to the elements of a prima facie case of defamation, the plaintiff must in these cases prove both **fault** and the **falsity** of the statement.

#### a. Public figure or official

A public figure is someone who is known to the general public and includes any person who has voluntarily injected herself into the public eye. The plaintiff must prove that the defendant acted with **actual malice,** i.e., knowledge of the statement's falsity or reckless disregard for whether it was true or false. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Scientists who publish in scientific journals, criminals, and spouses of wealthy persons are not considered public figures.

#### b. Public concern

If the plaintiff is a private figure but the defamatory statement involves a matter of public concern, then the standard is lower, but the plaintiff still must establish negligence with respect to the falsity of the statement. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

*[See the Themis Torts outline for a full discussion of defamation actions.]*

### 5. Commercial Speech

Commercial speech—advertising and similarly economically oriented expression—is entitled to an intermediate level of First Amendment protection. Only commercial speech that **concerns lawful activity** and is **neither false nor misleading** is protected. Fraudulent speech or speech which proposes an illegal transaction is not protected and may be prohibited. Restriction on protected commercial speech must meet three requirements:

i) The asserted governmental interest must be **substantial**;

ii) The regulation must **directly advance** the asserted interest; and

iII) The regulation must be **narrowly tailored** to serve that interest. In this context, narrowly tailored does not mean the least restrictive means available; rather, there must be a **"reasonable fit"** between the government's ends and the means chosen to accomplish those ends. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989).

*Central Hudson Gas & Elec. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980). Under this test, the Court has struck down laws prohibiting truthful advertising of legal abortions, contraceptives, drug prices, alcohol prices, and attorneys' fees and regulation of billboards on the basis of aesthetic value and safety.

**Example:** A Massachusetts regulation that prohibited tobacco billboards within 1,000 feet of a school was struck down because the means—effectively barring most outdoor tobacco advertising in urban areas—were not narrowly tailored to the ends of protecting children. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Note that solicitation of funds for charitable purposes, however, is recognized as a form of protected speech. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). However, fraudulent charitable solicitations, such as false or misleading representations designed to deceive donor as to how donations will be used, are not protected. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, (2003). Additionally, because there is a strong government interest in preventing fraud and allowing donors to make informed choices about their charitable contributions, the government may require professional fundraisers to file certain public financial disclosures about fundraising activities. *Village of Schaumberg v. Citizens for a Better Env't*, *supra*; *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

## D. REGULATION OF THE MEDIA

Although the First Amendment specifically mentions freedom of the press, the media has no greater First Amendment rights than the general public.

### 1. General Considerations

The press has the right to publish information about matters of public concern, and the viewers have a right to receive it. This right may be restricted only by a regulation that is narrowly tailored to further a compelling governmental interest (i.e., strict scrutiny applies).

#### a. Gag orders

A gag order is a judicial order prohibiting the publication of information about court proceedings. Such orders are subject to prior-restraint analysis. Gag orders are almost always struck down because they are rarely the least restrictive means of protecting the defendant's right to a fair trial. The trial judge has other alternatives available, such as change of venue, postponement of the trial, careful voir dire, or restricting the statements of lawyers and witnesses. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1972) (gag order on media). The media has standing to challenge a gag order placed on the litigation participants. *See, e.g.*, *Davis v. Capital City Press*, 78 F.3d 920, 927 (5th Cir. 1996); *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975).

#### b. Attending trials

The public and the press both have the right to attend criminal trials, but this right is not absolute. It may be outweighed if the trial judge finds an **overriding** interest that cannot be accommodated by less restrictive means. The Supreme Court has not determined whether this right also applies to civil trials. However,

the Supreme Court has held that the defendant's right to a public trial extended to voir dire, and the trial court must consider reasonable alternatives to closing the voir dire to the public in addressing the trial court's concerns. *Presley v. Georgia*, 558 U.S. 209 (2010).

**c. No constitutional privilege to protect sources**

A journalist has no First Amendment right to refuse to testify before a grand jury regarding the content and source of information relevant to the criminal inquiry. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

**d. Illegally obtained and private information**

The First Amendment shields the media from liability for publishing information that was obtained illegally by a third party so long as the information involves a matter of public concern and the publisher did not unlawfully obtained it. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Similarly, the First Amendment shields the media from liability for publication of a lawfully obtained private fact, e.g., the identity of a rape victim, so long as the news story involves a matter of public concern. *See Florida Star v. BJF*, 491 U.S. 524 (1989); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975).

**e. First Amendment conflict with state right of publicity**

Some states recognize a right of publicity—the right of a person to control the commercial use of his or her identity. The right is an intellectual property right derived under state law, the infringement of which creates a cause of action for the tort of unfair competition. In *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), the Supreme Court considered a conflict between the First Amendment and a person's state-law right of publicity. A news program had televised a videotape of a daredevil's entire 15-second performance at a local fair when he was shot out of a cannon. The lower court held that the First Amendment protected the telecast from a tort suit regarding the right of publicity. The Supreme Court reversed, holding that the First and Fourteenth Amendments do not immunize the news media from civil liability when they broadcast a performer's entire act without his consent, and the Constitution does not prevent a state from requiring broadcasters to compensate performers. Note that a state government may pass a law shielding the press from liability for broadcasting performers' acts.

**f. No immunity from laws of general applicability**

As mentioned previously, the press has no greater First Amendment rights than does the general public, i.e., there is no special privilege allowing the press to invade the rights of others. As such, members of the press are not immune from the application of generally applicable laws, even if the application of such laws has a negative incidental effect on the ability to gather and report the news. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

**Example:** A reporter who trespasses on another's property while investigating a story is not shielded from liability by the First Amendment.

**2. Broadcast**

Because the broadcast spectrum is a limited resource, radio and television broadcasters are said to have a greater responsibility to the public, and they therefore can be more closely regulated than print and other media. Broadcasters may be sanctioned, therefore, for airing "patently offensive sexual and excretory speech," even

if such speech does not qualify as obscene under the *Miller* test, in the interest of protecting children likely to be listening. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

However, public access stations are not considered to be state actors, and are thus not expected to protect free speech in the way that the government would be. *Manhattan Community Access Group v. Halleck,* 587 U.S. 802 (2019).

#### 3. Cable Television

The First Amendment protection provided to cable television falls somewhere between the extensive protection given to print media and the more limited protection for broadcasting. As such, a law requiring cable operators to carry local television stations is subject to intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

**Content-based** regulations of cable broadcasts are subject to **strict scrutiny,** however. *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803 (2000).

#### 4. Internet

Because the Internet is not composed of scarce frequencies as are the broadcast media, and because of the reduced risk of an unexpected invasion of privacy over the Internet, any regulation of Internet content is subject to strict scrutiny. *Reno v. ACLU*, 521 U.S. 844 (1997).

### E. REGULATION OF ASSOCIATION

Freedom of association generally protects the right to form or participate in any group, gathering, club, or organization. An infringement upon this right, however, may be justified by a compelling state interest. *See, e.g., Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (discrimination against women was not in furtherance of or necessary for any of the expressive activity undertaken by the organization); *but see Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (requiring the Boy Scouts to accept leaders who acted in a manner contrary to Boy Scout principles would unduly intrude upon the Boy Scouts' expressive associational rights).

#### 1. Public Employment

An individual generally cannot be denied public employment based simply upon membership in a political organization. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

##### a. Test

A person may only be punished or deprived of public employment based on political association if that individual:

i) Is an active member of a **subversive organization**;

ii) Has **knowledge** of the organization's illegal activity; and

iii) Has a **specific intent** to further those illegal objectives.

*Scales v. United States*, 367 U.S. 203 (1961) (conviction based on active, knowing, and purposive membership in an organization advocating the violent overthrow of the government upheld).

##### b. Loyalty oaths

Public employees may be required to take loyalty oaths promising that they will support the Constitution and oppose the forceful, violent, or otherwise illegal or unconstitutional overthrow of the government. *Connell v. Higgenbotham*, 403 U.S.

207 (1971). However, oaths that forbid or require action in terms so vague that a person of common intelligence must guess at the oath's meaning and differ as to its application are often found to be so vague or overbroad as to deprive an individual of liberty or property without due process. *E.g.*, *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (striking down as vague a statute requiring public employees to swear that they have not and will not lend "aid, support, advice, counsel, or influence to the Communist Party"); *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down as overbroad a statute requiring teachers to file an affidavit listing every organization to which they have belonged or regularly contributed during the past five years).

### 2. Bar Membership

Although the state can inquire into the character of a candidate for bar admission, such admission cannot be denied on the basis of political association unless the candidate knowingly belongs to a subversive organization with specific intent to further its illegal ends. *Schware v. Board of Bar Exam'rs*, 353 U.S. 232 (1957). The state may, however, deny bar membership to a candidate who refuses to answer questions about political affiliations if that refusal obstructs the investigation of the candidate's qualifications. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

### 3. Elections and Political Parties

#### a. Voters in primary elections

A state cannot require a local political party to select presidential electors in an open primary (i.e., a primary in which any voter, including members of another party, may vote) when the national party prohibits nonparty members from voting. *Democratic Party v. LaFolette*, 450 U.S. 107 (1981). A state can require a semi-closed primary system, in which only registered party members and independents can vote in the party's primary, even if the party wants to permit anyone to vote. *Clingman v. Beaver*, 544 U.S. 581 (2005). On the other hand, a state may not prohibit a political party from allowing independents to vote in its primary. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

##### 1) Blanket primary

A state may adopt a blanket primary system (i.e., a primary in which all voters regardless of party affiliation or lack thereof vote) that is nonpartisan. Under a nonpartisan primary system, the voters choose candidates for the general election without regard for their party affiliation. A nonpartisan blanket primary system in which a candidate identifies his own party preference or his status as an independent and that identification appears on the ballot has withstood a facial challenge, despite assertions that this self-designation violates the party's First Amendment rights as compelled speech and forced association. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). By contrast, a partisan blanket primary system in which a party's nominees are chosen violates the party's First Amendment rights of free speech and association. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

#### b. Ballot access to general election

A state may refuse to grant a political party's candidate access to the general-election ballot unless the party demonstrates public support through voter signatures on a petition, voter registrations, or previous electoral success. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

### c. Fusion candidate

A state may prohibit a fusion candidate (i.e., a candidate who is nominated by more than one political party) from appearing on the general-election ballot as a candidate of multiple parties. This limitation on the associational rights of political parties is justified by the state's interests in ballot integrity and political stability. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

### d. Replacement candidate

When a state gives a political party the right to select an interim replacement for an elected state official who was a member of that party, the party may select the replacement through an election at which only party members may vote. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982).

## 4. Criminal Penalty

A statute that purports to criminally punish mere membership in an association violates the First and Fourteenth Amendments. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Instead, such membership may only be criminalized if (i) the group is actively engaged in unlawful activity, or is engaging in advocacy that passes the *Brandenburg* "clear and present" danger test (i.e., speech directed to inciting or producing imminent lawless action that is likely to incite or produce such action); and (ii) the defendant knows of and specifically intends to further the group's illegal activity. *See, e.g.*, *Whitney v. California*, 274 U.S. 357 (1927).