

# CONSTITUTIONAL LAW

by  
John C. Jeffries, Jr.

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## SEPARATION OF POWERS

### I. THE JUDICIAL POWER.

#### No Advisory Opinions:

Clearest example is –

A statute authorizes federal courts to hear claims against foreign governments, but the judgment of the courts can be set aside if the Secretary of State determines that it is not “fair and reasonable.” Is the statute constitutional?

Why Not?

**A: the USSC is the advisory or has status of a “recommendation”**

#### Ripeness:

Requires actual harm or \_\_\_\_\_

**A: immediate threat of harm**

#### Mootness: (overripe)

Moot cases are dismissed whenever they become moot.

**A: if case becomes moot at any stage of litigation. Remedy = dismissal**

Controversies *capable of repetition yet evading review* are not moot, even though they look like it. Cases in this category always involve disputes with an \_\_\_\_\_.

**A: internal time limit**

Woman challenges restriction on abortion but delivers her baby while appeal is pending. Should the case be dismissed as moot?

**A: No**

Why not?

**A: 1. It would be challenged again and again but pregnancy never lasts that long (through the appeal process). 2. Also, election campaigns.**

In class actions, mootness does not depend on the named or representative party. A class action remains live so long as it is live with respect to \_\_\_\_\_.

**A: any class member**

**Standing:**

*Injury* – virtually anything can constitute injury, particularly if Congress says so. But mere *ideological objection* does not count.

*Causation* – essentially factual: Did the government’s conduct cause or will it cause plaintiff’s injury?

*Redressability* – means a court can do something about the injury. If the injury is past, the remedy is \_\_\_\_\_ **A: damages**. If injury is threatened, the remedy is \_\_\_\_\_ **A: injunction**.

Company A applies for a license and is turned down. Company B applies for a license and is accepted. Company A sues to bar the government from giving a license to Company B. Does Company A have standing to seek that relief?

**A: No**

Why not?

**A: Relief sought does not redress A’s injury**

*Organizations* have standing to challenge injury to their members

<u>Y</u>	if the members would have standing
<u>Y</u>	if their injury is related to the purpose of the organization, and
<u>Y</u>	there’s no reason (such as award of damages to individual members) that requires the presence of individual members in the suit.

*Taxpayers* have standing to challenge their tax liability.

*Taxpayers* have no standing to challenge how the government spends its money after taxes are collected, *except* for Establishment Clause challenges to government funding.

*Legislators* have no standing to challenge properly enacted laws simply because they may be unconstitutional. That's mere *ideological objection*, and legislators have no more *personal stake* than anyone else who thinks that the law is invalid.

*Third-party standing* is generally not allowed. But you can raise the rights of someone else if you have suffered (or will suffer) actual injury and if you and the someone are

\_\_\_\_\_.

**A: connected by an exchange or transaction**

Doctor sues to demand medicare compensation for performing abortions. Can he raise his patients' claim that they have a right to abortion funding?

**A: Yes. Not on his own \$ loss but the impingement of the mothers' right to an abortion**

**Adequate and Independent State Grounds:**

*General Rule:* The Supreme Court can review a state court judgment *only* if

\_\_\_\_\_.

**A: it turned on federal grounds (fed grounds affected outcome)**

No Supreme Court review if federal issue doesn't affect the outcome. That happens when the \_\_\_\_\_ wins anyway under \_\_\_\_\_ law.

**A: Federal/claimant; state**

A state criminal defendant claims an illegal search and seizure. She seeks to have the evidence suppressed under both the state and federal constitutions. The highest state court rules in the defendant's favor on both grounds. Will the Supreme Court review the Fourth Amendment claim?

**A: No**

Why not?

**A: No jurisdiction to review 4<sup>th</sup> because it doesn't affect**

**outcome. Evidence will be suppressed under state law.**

In year 1, the Supreme Court rules that school financing based on local property taxes does not violate Equal Protection. In year 2, a State Supreme Court rules that school financing based on local property taxes does violate that state's Equal Protection Clause. Will the U.S. Supreme Court reverse the state court judgment?

**A: No**

Why not?

**A: If invalid under state constitution, fed court decision has no impact**

**Federal constitutional rights are a floor, not a ceiling.** A state court construing a state constitution can always give you more.

*Independent* state ground does not depend on an interpretation of federal law.

Example: Florida Constitution has been interpreted to prohibit precisely the same searches that the Fourth Amendment prohibits. So every question of state search-and-seizure law is also a question of federal search-and-seizure law. The state ground is not *independent*.

*Special rule for unclear state decisions:* When a state court is unclear on whether its judgment is based on the federal constitution or the state constitution or both, the Supreme Court \_\_\_\_\_ review the federal question.

**A: can**

The Michigan Supreme Court suppressed evidence, but did not make clear whether it thought the search violated the state constitution or the federal constitution or both. Can the Supreme Court review the federal issue?

**A: Yes, unclear state decision**

If the Supreme Court finds that the search violated the federal Fourth Amendment, what should it do?

**A: affirm**

If the Supreme Court finds that the search did not violate the federal Fourth Amendment, what should it do?

**A: Remand so Michigan Supreme Court can see if it violates Michigan law.**

**Political Question:** Political questions are *non-justiciable*, which means they are questions that a court will not decide.

Example: the Republican Form of Government Clause

Example: true *foreign affairs* or *military command* decisions

Example: seating of delegates at a national political convention

Example: impeachment procedures

**Eleventh Amendment:**

**A: You cannot sue a state for money damages unless it consents or U.S. Congress expressly says so to enforce 14<sup>th</sup> Amendment rights.**

- private citizen vs. federal government
- states protected, localities not
- states protected, state officers not
- state consent
- congressional override
  - must be explicit
  - must be to enforce 14<sup>th</sup> Amendment rights, not economic rights

## **II. THE LEGISLATIVE POWER.**

### **Enumerated Powers:**

Enumerated federal powers include the power over federal property; the power over citizenship; the bankruptcy, patent, and copyright power; the war power; the power to raise an army and a navy, etc.

Can courts-martial (rather than Article III courts) be used to punish crimes by service members, even if those crimes were not service-connected?

**A: Yes**

How about civilian employees of the military?

**A: No, must be tried in civilian court**

Or civilians who were in the military when the crimes were committed?

**A: No**

Pick the *taxing power*, if \_\_\_\_\_

**A: there is a tax**

Pick the *spending power*, if \_\_\_\_\_

**A: they spend money**

*Commerce* power supports federal regulation of

-- any product or activity \_\_\_\_\_

**A: if interstate commerce**

-- even intrastate activity having a \_\_\_\_\_ interstate commerce

**A: substantial effect**

*Substantial effect* is judged in the aggregate.

Example: *Wickard v. Filburn*.

However, the Court has been increasingly reluctant to allow Congress to regulate activity that is both *local* and *non-commercial* on grounds of its effect on interstate commerce. It may be that regulation of intrastate activity having a substantial effect on interstate commerce will, in the future, be limited to intrastate *commercial* activity.

*Anti-Commandeering Principle* – Congress cannot *force* states to adopt or enforce

regulatory programs.

Example *Brady Act* case.

What can Congress do?

\_\_\_\_\_

regulate directly through  
federal agents **A: ok**

\_\_\_\_\_

bribe the states with federal  
money **A: ok**

*13<sup>th</sup> Amendment* – Broad power against \_\_\_\_\_

**A: racial discrimination**

*14<sup>th</sup> Amendment* – Broad but not limitless power to *remedy* violations of individual rights, *as those rights have been defined by the courts.*

Remember that 14<sup>th</sup> Amendment rights exist only *against government*. So Congress's 14<sup>th</sup> Amendment enforcement power is similarly limited to rights *against government*.

What's the difference between the power to remedy, which Congress has, and the power to redefine rights, which Congress does not have?

It is well settled that literacy tests for the right to vote are not unconstitutional. Historically, however, literacy tests in the South were administered to prevent voting by African-Americans. Can Congress therefore bar all literacy tests?

**A: Yes**

Why:

**A: Because it is a recognized constitutional violation - racial discrimination in voting.**

Example: Religious Freedom Restoration Act.

The Supreme Court ruled that religious believers have no constitutional right to *accommodation* of their beliefs. They have no constitutional right not to obey generally applicable laws that conflict with their religious scruples.

Congress passed the Religious Freedom Restoration Act, which required government at all levels (federal, state, and local) to accommodate religious belief absent a

*compelling* reason not to do so.

Can Congress, in the exercise of its powers under article I (e.g., power to maintain the army and the navy, power to regulate the District of Columbia, etc.) choose to accommodate religious belief?

**A: Yes, but no constitutional right to “accommodation”**

Can Congress force state and local governments to accommodate religious belief?

**A: No**

Why not?

**A: Beyond federal legislative power. USSC said no right to accommodation is in existence therefore cannot compel states to adopt**

*Necessary and proper* – **A: addition to some other power - not freestanding**

*Promote the general welfare* – **A: not a power of Congress - it’s only in the preamble. But tax and spend may be to promote general welfare.**

### **Delegation:**

Delegation of legislative power to administrative agencies is permitted, so long, as Congress provides \_\_\_\_\_ for the exercise of the delegated power.

**A: standards**

### **Speech or Debate Clause:**

Federal legislators (or their aides) can never be prosecuted or punished in relation to their *official acts*. Official acts include

-- **A: Voting on legis**

-- **A: Introducing legis**

-- **A: Anything said in speech or debate in a proceeding**

### **Congressional Veto:**

A congressional veto provision authorizes Congress (or one house thereof) to override executive actions by simple resolution. This scheme is unconstitutional because -

**A: not passed as a normal law and not submitted to president for veto**

### **III. THE EXECUTIVE POWER.**

#### **Domestic Powers Generally:**

-- *power to enforce the law*, not to make it and not to break it.

Example: impoundment of funds. Congress unambiguously orders funds to be spent on a certain project or in a certain way. The President cannot countermand that statute.

#### **Exclusively Executive Powers:**

-- *power to prosecute*

-- *power to pardon*, applies to all “offenses against the United States”

-- *power to hire or fire executive officers* (other than impeachment)

An executive officer is anyone who \_\_\_\_\_ on behalf of the United States.

#### **A: takes action**

Congress can hire and fire its own staff and others who perform staff-like functions. That is, Congress can hire and fire those who

-- **A: advise**

-- **A: investigate**

-- **A: monitor**

The same point in reverse: Congress cannot hire or fire an executive officer, and Congress cannot give \_\_\_\_\_ to anyone it can \_\_\_\_\_.

#### **A: executive power; hire or fire**

#### **External Powers of the President:**

-- *Commander in Chief*

## **Impeachment:**

*Bill of Impeachment* is an \_\_\_\_\_, on a vote of \_\_\_\_\_ of the House of Representatives.

**A: accusation; majority**

*Trial* is in the Senate, with conviction on a vote of \_\_\_\_\_.

**A: 2/3**

*Remedy on conviction* is \_\_\_\_\_.

**A: removal from office - only remedy!**

Until removed from office, a President is \_\_\_\_\_ for all official acts.

**A: absolutely immune. Only executive officer with absolute immunity. Other executive officers have a qualified immunity.**

## **THE FEDERAL SYSTEM**

### **I. THE RELATION OF THE UNITED STATES TO THE STATES.**

*Federal superiority, state inferiority.*

## **Preemption:**

*Valid federal law preempts conflicting state law.* That's true of any kind of federal law, including the Constitution itself, federal statutes, administrative agency regulations, even treaties to the extent that they are self-executing.

A federal statute requires that automobile emissions be *at least 90%* free of certain pollutants. Can New Jersey reduce emissions standards in that state to 85% purity?

**A: No**

Can California raise emissions requirements to 95% purity?

**A: Yes**

*Preempting the field –*

**A: “This entire area, Congress declares no state law”. If so, any state law conflicts. Example: labor-management K’s.**

**No State Interference with Foreign Relations:**

**No State Regulation or Direct Taxation of Federal Entities Without Federal Consent:**

Can a state apply its sales tax to goods sold at U.S. Army Post Exchange?

**A: No**

If Congress consents?

**A: Yes**

**Full Faith and Credit:**

Recently, the exams have asked a few questions about the Full, Faith, and Credit Clause. That provision requires that judicial decisions rendered in one state must be respected in the courts of another. Specifically, a final judgment on the merits must be given effect by the courts of other states, if the rendering court had \_\_\_\_\_.

**A: jurisdiction**

**II. STATE REGULATION OF INTERSTATE COMMERCE.**

**Privileges and Immunities of State Citizenship under Article IV (a.k.a. Comity Clause):**

*Forbids serious discrimination against out-of-state individuals.*

*Employment: General Rule – No residency requirement for access to the private job market.*

Can a state require residency for admission to the bar?

**A: No, can require a fee.**

Can a city require that all employers in the city hire a fixed percentage of city residents?

**A: No, discriminates against out-of-state individual**

Can a city require that its *own* employees be city residents?

**A: Yes, different when government is paying the bill? Also, can do so for city projects**

**Dormant Commerce Clause:** applies *in the absence of federal action*.

**General Rule: No Discrimination Against Out-of-State Interests:**

States cannot *forbid* outsiders from competing with in-state interests.

Can a state forbid out-of-state garbage from being disposed of in in-state landfills?

**A: No**

States cannot *tax* outsiders more heavily than in-state competitors.

Can Hawaii tax all alcoholic beverages sold in the state, *except* a locally manufactured beer?

**A: No**

What can Hawaii do?

**A: Tax all or nothing**

States can discriminate against out-of-state interests only in the unusual case where there is an *important health or safety interest* and *no reasonable alternative*.

Can a state ban importation of live bait-fish if they carry a parasite that had not yet infested in-state waters?

**A: Yes**

**Exception #1 – Subsidies:**

*General Rule:* \_\_\_\_\_

\_\_\_\_\_

**A: When a state give \$ subsidies it can limit to in-state persons**

Can a state university charge lower tuition to in-state students?

**A: Yes, they subsidize local students**

**Exception # 2 – State as Market Participant:**

*General Rule:*

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**A: State can buy from or sell to only its own residents**

Can a state limit sales from state-owned cement plants to in-state customers?

**A: Yes, market participant**

Can a state limit state-owned landfills to in-state garbage?

**A? Yes, state is a landfill owner and thus a market participant**

**Non-Discriminatory Regulation Valid Unless *Unduly Burdensome*:**

*Balancing Test:* The courts balance the \_\_\_\_\_ against the \_\_\_\_\_. If the costs are grossly higher than the benefits, the law will be struck down as *unduly burdensome*.

**A: benefit of regulation; cost of compliance**

Can a state set flammability standards for clothing sold in-state, even though it is manufactured elsewhere?

**A: Yes, non-discriminatory.**

**Congressional Consent to State Regulation of Commerce:**

General Rule: \_\_\_\_\_  
\_\_\_\_\_

**A: When Congress authorizes state regulation of commerce, nothing state does will violate the commerce clause.**

A federal statute authorizes states to regulate the industry of insurance. Can South Carolina tax out-of-state insurers at twice the rate of in-state companies?

**A: Yes**

Why?

**A: Because Congress said so**

**21<sup>st</sup> Amendment:** States, not the federal government, have the power to control consumption of alcohol within their borders.

**Summary:** When asked about a state's power to regulate commerce, follow three steps:

1. **Look for a *federal law on point*.** A valid federal law preempts inconsistent state regulation. Equally, a valid federal law can authorize any state regulation.
2. **If no federal law on point, ask whether the state regulation *discriminates against out-of-state interests*.** If so, it will be struck down unless it's a *subsidy* or involves the state as *market participant*.
3. **If the state regulation is not discriminatory, ask whether it is *unduly burdensome*.**

### III. STATE TAXATION OF INTERSTATE COMMERCE.

#### Overview:

State taxation is like any other kind of state regulation of interstate commerce:

*Discriminatory* taxation –

**A: unconstitutional**

*Non-discriminatory* taxation –

**A: Valid with limits**

*congress* has power –

**A: to forbid or consent to any kind state tax power**

**General Requirements for Non-Discriminatory Taxation:**

*Substantial nexus:* There must be a substantial nexus between the taxing state and the activity or property to be taxed.

May a state force an in-state seller to collect a sales tax?

**A: Yes, Nexus if seller in state**

May a state force an out-of-state seller to collect a sales tax?

**A: No**

May state impose a “unitary tax” on the worldwide income of a corporation doing substantial business in that state?

**A: Yes, if business is “substantial = substantial nexus”**

*Fair apportionment:* There must be fair apportionment of tax liability among states with a substantial nexus.

If a state imposes a “unitary tax” on the worldwide income of a corporation doing substantial business in that state, how much of the income can be taxed?

**A: some fraction = fraction of in-state revenue**

**Ad Valorem Taxes on Personal Property:**

*Commodities in interstate commerce:*

*Tax Day:* A state chooses one or more days during the year and taxes all personal property within its borders on that day.

*General Rule:*

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**A: You pay full tax to every state where goods are stopped for a business purpose on tax day.**

*No Liability:*

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**A: Where goods are merely passing through or transportation**

*Instrumentalities of interstate commerce:* Review general principles.

Every state with a substantial nexus can tax an instrumentality of interstate commerce.

Each state must have some scheme of fair apportionment of tax liability.

Example: Truck Licenses

**INDIVIDUAL RIGHTS**

**I. STATE ACTION.**

**State Action Means Government Action, Whether State or Local:**

- e.g., municipal ordinance
- e.g., sheriff's decision to fire a deputy
- e.g., county zoning variance

**Facilitating Private Discrimination:**

Government cannot *encourage* or *facilitate* private discrimination.  
Government cannot *profit from* – i.e., be a financial partner in – private discrimination.  
Government cannot *enforce a private agreement* to discriminate.

**Not Required to Prevent Private Discrimination:**

Generally speaking, the government is acting constitutionally when it is acting evenhandedly.

Example: Trespass laws.

Is it unconstitutional for the government to enforce trespass laws when the landowner refuses to allow access on the basis of race?

**A: No, trespass laws are handled evenhandedly**

Is it unconstitutional for government to issue a liquor license to a racially exclusive private club?

**A: No, licensure is non-discriminatory through government**

**Distinguish Anti-Discrimination Statutes:**

When there is anti-discrimination legislation, state action is \_\_\_\_\_.

**A: irrelevant**

Title VII of the 1964 Civil Rights Act prohibits racial (and certain other) discrimination by employers. Is there state action when a private company refuses to hire blacks (or women)?

**A: No**

Is it illegal for a private company to refuse to hire blacks (or women)?

**A: Yes, under C.R.A., when Congress says so**

**II. RETROACTIVE LEGISLATION.**

**Ex Post Facto Laws:**

Expand criminal liability retroactively, either by \_\_\_\_\_ or by \_\_\_\_\_.

**A: creating new crimes; increasing punishment**

**Bill of Attainder:**

Inflicts punishment without a judicial trial.

**Contract Clause:**

Forbids retroactive impairment of contracts, unless there is an \_\_\_\_\_.

**A: overriding need**

Can a city that has contracted to build a highway cancel the contract because it doesn't have enough money to fund both the highway and a new park?

**A: No**

### III. PROCEDURAL DUE PROCESS.

#### Overview: Two Questions.

1. \_\_\_\_\_
2. \_\_\_\_\_

- A: 1. Is life, liberty or property being taken.  
2. If so, what process is due.**

#### Life, Liberty, Property:

*Life.*

**A: Death penalty - mut give hearing**

*Liberty* includes:

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**A: Being locked up**

**A: Physical/punishment or injury**

**A: curtailment of your legal right**

#### Property:

*Entitlement* is property. Mere *expectation* is not.

*Entitlement* to a government job or benefit is created when \_\_\_\_\_.

**A: government says so**

County attorney is hired "at will." Three months later she is fired, without notice or explanation. Is she entitled to notice and a hearing?

**A: No**

Why not?

**A: She has not lost life, liberty or property because she was told up front it was at will**

County attorney is hired for five years and told that she will not be discharged before that time except "for cause." Three months later she is fired. Is she entitled to notice and a hearing?

**A: Yes**

Why?

**A: She had entitlement from government for five years and through prop interest**

**Deprivation:**

Example: Death by garbage truck.

Due process is triggered by \_\_\_\_\_ deprivation, not accidents.

**A: intentional**

**What Process is Due? Balance Three Factors:**

- **A: Importance of individual interest at stake**
- **A: Value of procedure in**
- **A: The cost of the government's interest and sufficiency**

Recurring issue concerns the *timing of hearings*, especially for discharge of public employees.

Generally, a tenured public employee is entitled to some opportunity to be heard prior to discharge, unless \_\_\_\_\_.

**A: there is a significant reason not to keep the individual on the job**

Example: Police officer charged with felony.

**IV. ACCESS TO COURTS FOR INDIGENTS.**

*Bottom Line:* Government has to waive filing fees for divorce but not for bankruptcy.

Example: *United States v. Kras*.

Waiver of filing fees for indigents is constitutionally required when charging the fee would deny a \_\_\_\_\_.

**A: fundamental right**

Can an indigent be required to bear the cost of a transcript in order to appeal a

termination of parental rights?

**A: No**

Why not?

**A: parental right is a fundamental**

**V. TAKING AND JUST COMPENSATION.**

**Overview: Private Property shall not be taken for public use, without just compensation.**

Private property --

Public use --

Just compensation -- **A: any use**  
**A: F.M.V. at time of taking**

**Taking vs. Regulation:**

As a general rule, a taking requires \_\_\_\_\_.

**A: physical occupation**

If the government occupies only a tiny portion of your property, \_\_\_\_\_

**A: owes only that amount**

If the government forces you to allow others physically to occupy your property, \_\_\_\_\_.

**A: that's a taking**

What about regulations that merely restrict the owner's use of his or her property? E.g., zoning laws, historic preservation laws, environmental statutes. Such regulation is valid if it

substantially advances a \_\_\_\_\_ state interest, and leaves an \_\_\_\_\_ use for the property.

**A: legitimate; economically viable**

Example: Grand Central Station

**Conditional Permits:**

Condition must be \_\_\_\_\_ to the \_\_\_\_\_ of the proposed development.

**A: reasonably related; impact**

**VI: INTRODUCTION TO THE 14<sup>TH</sup> AMENDMENT.**

**Privileges and Immunities of National Citizenship:**

**A: means nothing. Cannon fodder answer - never correct!**

**Federal and State Distinguished:**

*Two Due Process Clauses:*

5<sup>th</sup> Amendment –

**A: National government**

14<sup>th</sup> Amendment –

**A: States and localities**

*One Equal Protection Clause:*

**A: 14<sup>th</sup> Amendment, protects against states and localities. No equal protection clause for national government. Technically, same thing. For feds=5th Amendment due process**

**Standards of Review:**

*Strict Scrutiny –*

**A: “compelling” interest is necessary**

Burden of proof on \_\_\_\_\_.

**A: government**

Applies when the law involves a suspect classification or a fundamental right.

*Intermediate Scrutiny*

Burden of proof on \_\_\_\_\_.

**A: government**

Applies to legitimacy and sex classifications.

*Rational Basis*

Burden of proof on \_\_\_\_\_.

**A: challenger**

Applies to everything else.

**VII. EQUAL PROTECTION.**

**Suspect Classifications: Race or Ethnicity.**

When is a law a racial or ethnic classification? When there is proof of

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**A: discriminatory purpose**

A rich, and virtually all-white bedroom community outside Chicago maintains only one zoning classification: single-family housing, two-acre minimum. The effect is to keep minorities out of the community. Does that law trigger strict scrutiny?

**A: No, rational basis Q - economic purpose**

What if you could show that the facially-neutral zoning law was passed with the purpose of keeping minorities out? Would the law then trigger strict scrutiny?

**A: Yes, racial purpose**

*School Desegregation*

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segregation is unconstitutional.

**A: De jure**

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segregation is not.

**A: De facto**

*Busing -*

**A: Scope of remedy is limited by the scope of the violation, i.e. only guilty city required to bus only if suburbs also guilty, may a metro plan be instituted.**

*Affirmative action:*

Test –

**A: Strict scrutiny (necessary for compelling interest)**

Results –

**A: Mixed**

Always valid where –

**A: It specifically corrects past discrimination against minorities (narrowly tailored). “Specific” - to cure that offender’s past history, not national trends.**

## Suspect Classifications: Alienage

For federal laws: Any reasonable regulation of alines will be upheld.

For state and local laws:

**A: alienage is sometimes suspect**

*No legal requirement of U.S. citizenship for access to the private job market or government benefits.*

Can a state require U.S. citizenship for admission to the bar?

**A: No, violation of equal protection**

Can a state require U.S. citizenship for in-state tuition?

**A: No, discriminates against lawfully residents paying taxes.**

*U.S. citizenship can be required for certain government jobs, namely \_\_\_\_\_ or \_\_\_\_\_ officials. This includes all law-enforcement personnel.*

**A: policy making; implementing**

Can a city require U.S. citizenship for police officers?

**A: Yes**

For jail guards?

**A: Yes**

For parole officers?

**A: Yes**

## Quasi-Suspect Classifications: Legitimacy

Law must be \_\_\_\_\_ related to \_\_\_\_\_ government interests.

**A: substantially; important**

**Quasi-Suspect Classifications: Sex**

Law must be \_\_\_\_\_ related to \_\_\_\_\_ government interests.

**A: substantially; important**

Recent decisions add language suggesting that scrutiny of sex-based classifications is *almost*, but not quite, strict. Specifically, the court has said that substantially related to important government interest requires that the state show an **exceedingly persuasive justification** for treating males and females differently.

Consequently, most sex-based classifications fail intermediate scrutiny. Two exceptions are:

1. \_\_\_\_\_  
**A: statutory rape**
  
2. \_\_\_\_\_  
**A: Draft (for combat arms)**

**Rational Basis Test:**

Law must be \_\_\_\_\_ related to \_\_\_\_\_ government interests.

**A: rationally; legitimate**

**VII. FUNDAMENTAL RIGHTS**

**Due Process and Equal Protection:**

*Same strict scrutiny and same fundamental rights* under both.

**Privacy:**

*Marriage and divorce*, but only –

**A: The core opportunity only  
(can't charge you if cannot pay)**

*Contraception* –

**A: To buy  
contraceptives but - use of them is not  
fundamental**

*Abortion* –

**A: Term for**

**any reason until viability of fetus.  
Procedural regs are valid as long as do  
not “unduly”**

*Procedural regulations* are valid so long as they do not \_\_\_\_\_ the woman’s right to terminate her pregnancy.

**A: unduly burden**

Informed consent – **A: ok, concerns abortion**

24-hour waiting – **A: ok**

Parental notification – **A: ok, for underaged female**

Parental consent – **A: no, but may be ok if a judicial bypass is created and ct must approve if she understands action**

Spousal consent – **A: no**

Government financing – **A: no, even if pays for live birth**

*Obscenity in the home* – **A: ok, no right to purchase such materials**

*Certain family relationships* –

-- right to raise and education children

-- right to live together with close relatives

*No right to homosexual relations.*

*No right to hide.*

**Voting:**

*One person/one vote* applies – **A: “Districts of equal size”**

-- U.S. House of Representatives

-- both houses of a state legislature

-- local governments, if a ward system

-- not to elections for mayor of each city or a judge of each county.

*Gerrymandering: racial and political.*

Racial gerrymandering to disadvantage minorities –

**A: vote  
dilution**

Racial gerrymandering to advantage minorities –

**A: create minority districts to assure victory. Required by voting rights act but if done too much, violates E.P. - race cannot be “the factor” issue - how funny does it look**

Political gerrymandering –

**A: In theory violates E.P. (one person/one vote). Must actually show it was effective and permanent so never really occurs**

### **Right to Travel:**

*Long-term* residency requirements burden the fundamental right of interstate travel and violate Equal Protection.

*How long is too long? --*

**A: 1 year is too long for most purposes div and in-state tuition - 1 year is ok**

### **Other Possibilities:**

Wealth? -- **A: No, rational basis**

Education? -- **A: No, use rational relation test. Texas case, some basic public education is fundamental**

*Don't Add to the List.*

If it isn't here, don't add to it

## **IX. FREEDOMS OF SPEECH AND PRESS.**

### **Vagueness and Overbreadth:**

*Vagueness* – **A: If law gives no clear notice of what is prohibited**

*Overbreadth* – **A: If law burdens substantially more speech than necessary for a compelling interest**

Example: Nudity in drive-in movies

**Freedom Not to Speak:** The government cannot force you to endorse any symbol or slogan.

Example: “Live Free or Die.”

Example: Statements from anti-nuclear power activists.

## OVERVIEW

### Fundamental Distinction: Content-Neutral vs. Content-Based.

## CONTENT NEUTRAL

### Time, Place, and Manner Regulations: Three Requirements.

1. **Content Neutral.**

Example: D.C. anti-picketing ordinance.

*As administered*, as well as on its face.

*No executive discretion.*

Parade permit ordinance requires everyone to apply for a permit 24 hours in advance and to avoid routes used by emergency vehicles. Is the ordinance constitutional if permits are given first-come, first-served?

**A: Yes, content neutral, no preference**

If permits are issued when the chief of police finds it in the public interest?

**A: No, executive discretion**

2. **Substantial Other Opportunities** for speech to take place.

Would it be constitutional for a city to ban soundtrucks in residential neighborhoods between 11:00 pm and 7:00 am?

**A: Yes**

At all times and places?

**A: No**

3. **Law must *narrowly* serve a *significant* state interest.**

### Public Forum Doctrine:

*Public Forum*: Government property traditionally open to a wide range of speech activities. The public forums are

- streets
- parks
- public sidewalks
- *not* airports

In a public forum, only content-neutral regulations of time or manner are allowed.

*Non-Public Forum*: One area where relaxed scrutiny applies even to content-based regulation is speech in a non-public forum. A non-public forum is simply government property not traditionally open to speech activities.

### CONTENT BASED

Generally require a *compelling* state interest and generally are *invalid*.

Example: Flag desecration.

#### Exception 1 – Incitement:

**A: to immediate violence, here and**

**now**

#### Exception 2 - Fighting Words or Hate Speech:

In theory, not protected speech. In practice, all laws banning fighting words or hate speech are unconstitutionally vague and/or overbroad.

- Examples
- words tending to a breach of the peace
  - offensive or abusive language
  - hate speech

#### Exception 3 – Obscenity: Material must be

1. **Sexy** -- **A: erotic, appeal to prurient interest “itch or long”**
2. **Sickening** -- **A: Grossly offensive to average person in community, national or community**
3. **Standards** -- **A: a) sexy  
b) sickening  
c) must lack serious value - “good reviews”**

Can the law prohibit as obscene material that “excites lust”?

**A: No**

Can a city impose a tax on all films that show frontal nudity?

**A: No**

*Communications Decency Act*: A federal ban on “*indecent*” or “*patently offensive*” but not legally obscene internet communications to minors was struck down because there was no practical way to assure that communications sent through the internet would not be received by minors.

4. **Serious Value** -- **A: Good reviews - serious value**

**Footnotes to Obscenity:**

*Seven Dirty Words* -- **A: can ban during broadcast when children might hear**

*Child pornography* -- **A: may be punished even if has serious value**

*Zoning adult theaters* – **A: can zone them together or apart**

**Exception 4 – Defamation:** Covered in torts.

**Exception 5 – Commercial Speech:**

Must be allowed if *truthful* and *informational*. Can be suppressed in three circumstances:

1. **Misleading** - **A: causes average consumer to believe something not true**

2. **Pertaining to Illegal Product** -

3. **If the law *directly* advances a *substantial* state interest and the degree of suppression is *no greater than is reasonably necessary*.** The law must be *well crafted*.

Can the U.S. Postal Service prohibit mailings of unsolicited advertisements for condoms on the ground that many recipients would find the ads offensive?

**A: No, Not misleading, lawful and no substantial state interest served.**

*Substantial state interests* include alcohol, tobacco, and gambling.

### **Freedom of the Press:**

Generally, freedom of the press is the freedom of the *owner* or *publisher*.

Can the government force newspapers to publish replies when someone's reputation is attacked?

**A: No, constricts owner's freedom of what to publish**

Do the press have special rights under the 1<sup>st</sup> amendment? -- **A: No**

No right to \_\_\_\_\_

**A: specially advantageous treatment**

The press are protected against \_\_\_\_\_

**A: specially disadvantageous treatment**

Example: Search of newsroom --

**A: OK**

### **Electoral Process:**

*Contributions* (and coordinated expenditures) -- **A: can be limited**

*Expenditures* (if direct) -- **A: cannot be limited**

### **Speech by Government Employees:**

In general, public employees cannot be hired or fired based on *political party*, *political philosophy*, or *any act of expression*.

Example: "I hope they get him." -- **A: Reagan shooting**

Of course, public employees can be fired for not doing the job. The crucial issue is always *impact on the job*.

*Exception: High-level policymakers and their confidential advisers.*

## **X. FREEDOM OF RELIGION.**

### **Free Exercise:**

<i>Religious belief</i>	--	<b>A:</b>
	<i>protected absolutely</i>	
<i>Religious conduct</i>	--	<b>A:</b>
	<b>protected against laws aimed at religion</b>	
<i>Accommodation</i>	--	<b>A: no</b>
	<b>constitutional right to accommodation of belief</b>	

Examples: Snake handling, plural marriage, peyote

The Air Force prohibited all personal additions to the uniform. An Air Force officer wanted to wear a yarmulke in order to affirm his identity as an observant Jew. Does he have a constitutional right not to abide by the Air Force regulation?

**A: No**

*Religious Freedom Restoration Act:* Struck down as beyond federal legislative power in attempting to require accommodation of religious belief by states and localities.

<i>Campus access</i>	--	<b>A: A public education inst that allows student groups to use campus after hours must allow student religious groups to use campus as well. If student activity fee funded, must give to religious group</b>
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### **Establishment of Religion:**

*Three part test:* The law must have a

- non-religious purpose;
- a non-religious primary effect; and not produce
- excessive government entanglement with religion.

*Endorsement:* Government cannot *endorse a particular religion or religion generally*, at least not in circumstances where the endorsement might be \_\_\_\_\_.

**A: coercive**

Examples.

Officially sponsored school prayer

-- **A: coercive to students**

Bible reading in school

-- **A: OK if not inspirational; history, cultural**

Legislative prayer

-- **A: not coercive**

Nativity scenes on public property

-- **A: OK is something else there to dilute the religious method**