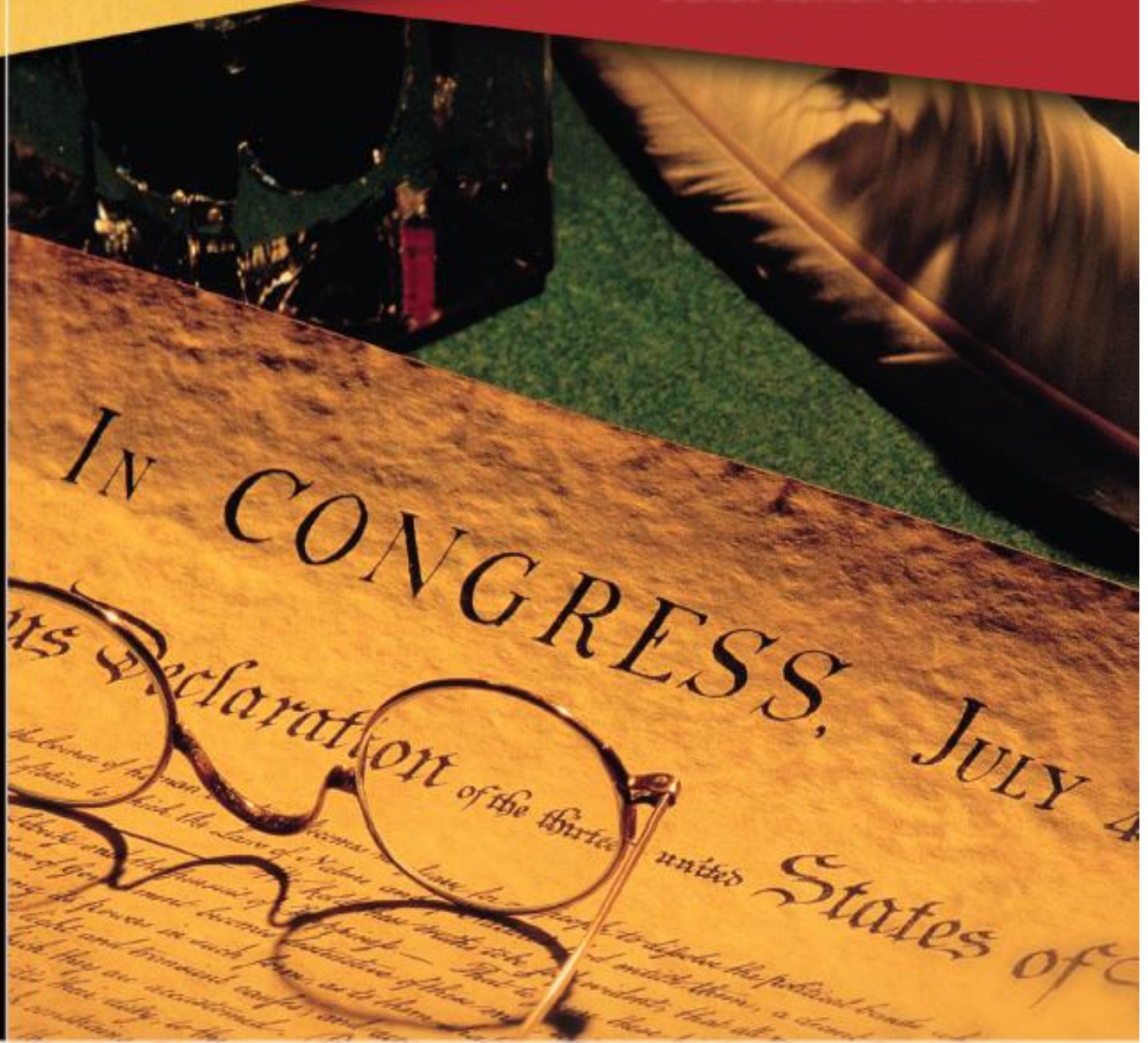


NINTH EDITION

Constitutional Law

Jerome A. Barron
C. Thomas Dienes

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Preface

This “Black Letter” is designed to help a law student recognize and understand the basic principles and issues of law covered in a law school course. It can be used both as a study aid when preparing for classes and as a review of the subject matter when studying for an examination.

Each “Black Letter” is written by experienced law school teachers who are recognized national authorities on the subject covered.

The law is succinctly stated by the authors of this “Black Letter.” In addition, the exceptions to the rules are stated in the text. The rules and exceptions have purposely been condensed to facilitate quick and easy recollection. For an in-depth study of a point of law, citations to major student texts are given.

If the subject covered by this text is a code or code-related course, the code section or rule is set forth and discussed wherever applicable.

FORMAT

The format of this “Black Letter” is specially designed for review. (1) **Text.** First, it is recommended that the entire text be studied and, if deemed necessary, supplemented by the student texts cited. (2) **Capsule Summary.** The Capsule Summary is an abbreviated review of the subject matter which can be used both before and after studying the main body of the text. The headings in the Capsule Summary follow the main text of the “Black Letter.” (3) **Table of Contents.** The Table of Contents is in outline form to help you organize the details of the subject and the Summary of Contents gives you a final overview of the materials. (4)

Practice Examination. The Practice Examination in Appendix B gives you the opportunity to test yourself with the type of questions asked on an exam and compare your answer with a model answer.

In addition, a number of other features are included to help you understand the subject matter and prepare for examinations:

Perspective: In this feature, the authors discuss their approach to the topic, the approach used in preparing the materials, and any tips on studying for and writing examinations.

Analysis: This feature, at the beginning of each section, is designed to give a quick summary of a particular section to help you recall the subject matter and to help you determine which areas need the most extensive review.

Examples: This feature is designed to illustrate, through fact situations, the law just stated. This, we believe, should help you analytically approach a question on the examination.

Glossary: This feature is designed to refamiliarize you with the meaning of a particular legal term. We believe that the recognition of words of art used in an examination helps you to better analyze the question. In addition, when writing an examination you should know the precise definition of a word of art you intend to use.

We believe that the materials in this “Black Letter” will facilitate your study of a law school course and assure success in writing examinations not only for the course but for the bar examination. We wish you success.

THE PUBLISHER

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Capsule Summary of Constitutional Law

■ PART ONE: THE ALLOCATION OF GOVERNMENTAL POWER: NATIONAL AND STATE

I. JUDICIAL REVIEW

Jurisdiction is the power to hear a case. In addition to jurisdictional rules, there are prudential principles limiting the occasions when a federal court will decide a case on the merits. If jurisdiction is present and these prudential limits are overcome, courts can exercise the power of judicial review.

A. Establishing Judicial Review

1. Judicial Review Defined

Judicial review is the doctrine that the courts have the power to invalidate governmental action which is repugnant to the Constitution.

2. Review of Federal Action

While there is no explicit textual authority for federal court review of the acts of the President and the Congress, this power has been inferred from

a number of sources, including the Art. III grant of judicial power to the Supreme Court and inferior federal courts and the principle that it is the judicial power to say what the law, *i.e.*, the Constitution, is.

3. Review of State Action

- a. The Supremacy Clause of Art. VI establishes federal judicial power over the acts of state officials.
- b. Art. VI requires state courts to make decisions in conformity with the U.S. Constitution. These “cases arising under the Constitution” are reviewable by the Supreme Court under Art. III.

B. Source of Judicial Power: Article III Jurisdiction

The “judicial power” is vested by Art. III in the Supreme Court and inferior federal courts created by Congress.

1. Federal “Judicial Power” Defined

- a. Unless a case falls within one of the “cases or controversies” identified in Art. III, § 2, an Art. III federal court (as distinguished from an Art. I court) must dismiss the case for want of subject matter jurisdiction.
- b. Congress exercises broad powers over the existence and jurisdiction of lower national courts, within the limits provided by Art. III.

2. Supreme Court Jurisdiction

- a. **Original Jurisdiction**
Supreme Court original jurisdiction is defined by Art. III. It cannot be enlarged or diminished by Congress.
- b. **Appellate Jurisdiction—Congressional Power**
The Supreme Court’s appellate jurisdiction is vested by Art. III subject to congressional exceptions. This congressional power may be subject to limitations arising from separation of powers principles and constitutional rights and liberties.
- c. **Discretionary Review**
Supreme Court review of lower court decisions is almost entirely a matter of discretion.

C. Constitutional and Policy Limitations on Judicial Review

Even where an issue concerns the subject matter set forth in Art. III, it may not *necessarily* be heard on the merits. For example, Art. III requires that a “case or controversy” must be present for an Art. III court to have jurisdiction. Further, there are prudential limitations borne of judicial self-restraint limiting the use of judicial review. The jurisdictional requirements and policy restraints are frequently referred to as justiciability.

1. Constitutional Limitations

a. Eleventh Amendment

The Eleventh Amendment, as interpreted, provides that the judicial power does not extend to suits against a state or its agencies by citizens of another state or of a foreign country or by its own citizens. However, there are exceptions:

- (1) local governmental units are not covered;
- (2) states may waive sovereign immunity if clearly done;
- (3) acting under the Fourteenth Amendment, § 5, Congress can grant remedies against state action that violates the Fourteenth Amendment, § 1, if it makes its intent to abrogate state immunity unmistakably clear. The Court has become increasingly restrictive in its interpretation of Congress’ enforcement powers under the Fourteenth Amendment, § 5. Congress may not abrogate Eleventh Amendment immunity using its Commerce Powers;
- (4) unconstitutional acts of state officials are not state acts and may be enjoined by federal courts. But, if a suit involves a retroactive monetary charge against the state or violation of state law, the Eleventh Amendment is a bar. Prospective relief and ancillary relief are permitted.

b. Case or Controversy

A case must be in an adversary form and a context that is capable of judicial resolution and its resolution must not violate separation of powers principles, or an Art. III federal court lacks jurisdiction. Art. III federal courts cannot furnish advisory opinions.

2. Policy Limitations (Judicial Self–Restraint)

- a. Rules for Constitutional Review. The *Ashwander* rules are used to avoid unnecessary constitutional decisions.
- b. Presumption of Constitutionality.
- c. Judicial Restraint to Avoid Unnecessary Use of Judicial Review. The Court follows a policy of “strict necessity” before deciding constitutional questions.
- d. Congressional legislation can override prudential (i.e., non-jurisdictional) limitations.

D. Specific Doctrines Limiting Judicial Review

There are specific doctrines, based on the case or controversy requirement and judicial self-restraint, through which Art. III federal courts determine *who* may litigate a constitutional question, *when* the constitutional question may be litigated, and *what* constitutional questions may be litigated.

1. The Standing Limitation—*Who* Can Litigate?

- a. Constitutional Standing
 - (1) Art. III requires that a plaintiff seeking to litigate a federal constitutional question demonstrate a personal stake in the outcome by establishing (1) injury in fact; (2) fairly traceable to the defendant’s act being challenged; and, (3) redressable by the requested remedy. This assures the requisite adversity and reflects separation of powers concerns.
 - (a) “*Injury in Fact.*” Any significant factual injury, economic, aesthetic, etc., will suffice. The injury must be “concrete and particularized and actual or imminent, not conjectural or hypothetical.”
 - (b) “*Fairly Traceable.*” Plaintiffs must establish causation by showing that the injury is “fairly traceable” to the defendant’s action being challenged.
 - (c) *Redressability.* They must also demonstrate a “substantial likelihood” that the injury is “redressable” if the court grants the requested relief. The focus is on the relation of the injury and the remedy.

(2) Taxpayer and Citizen Standing

- (a) *Federal Taxpayers.* A federal taxpayer must allege (1) that the enactment being challenged is an exercise of the taxing and spending power, and (2) that the challenged enactment offends a specific limitation on the taxing and spending power.
- (b) *State and Municipal Taxpayers.* State taxpayers have no standing under Art. III to challenge state tax or spending decisions simply by virtue as their standing as taxpayers. But a municipal taxpayer does have standing to challenge municipal spending because the injury is more direct.
- (c) *Citizen Standing.* At least in the absence of congressional legislation authorizing the suit, under Art. III standing a citizen lacks a sufficient personal interest to raise the constitutional claim.
- (d) *State Standing.* A State does not have standing to sue the federal government as *parens patriae* on behalf of its citizens. A State may sue the federal government on its own behalf to protect its own interests.

(3) Statutory Standing

Congress can, by statute, create legal interests, the denial of which constitute injury in fact. However, Congress cannot ignore the Art. III standing requirements of injury in fact, and causation, *i.e.*, fairly traceable and redressability. Congress can remove prudential obstacles to standing.

b. Prudential Standing

- (1) *Third Party Standing.* A litigant usually lacks standing to raise the rights of others, but there are exceptions.
 - (a) The *jus tertii* rule is a rule of judicial self-restraint which can be overcome when the balance of interests warrants hearing the claim.
- (2) *Associational Standing.* An association can raise the rights of its members if the members have Art. III standing to sue in their

own right, the suit is germane to the organization's interests and there is no need for individual participation.

2. The Timing Limitation—*When Can Constitutional Litigation Be Brought*

a. Mootness

Art. III requires dismissal of a case when, because of changes, the court's determination of the legal issue cannot have any practical effect in achieving the desired result. But there are exceptions to the doctrine:

- (1) voluntary cessation of the allegedly illegal conduct;
- (2) unsettled collateral consequences;
- (3) there is a reasonable likelihood that the constitutional issue is "capable of repetition, yet evading review."

b. Ripeness, Prematurity and Abstractness

- (1) The Art. III requirement of ripeness requires that there be *present* injury or an *imminent threat* of injury. In determining if a case is ripe, consider the effect of delay on plaintiffs, the effect of judicial intervention on administrative actors, and whether courts would benefit from the delay.
- (2) Even if jurisdiction is technically present, judicial self-restraint may dictate dismissal of issues as premature and abstract.

c. Discretionary Abstention

(1) Vagueness

If a state statute is capable of a narrow saving construction, federal courts should exercise restraint and abstain from decisions on constitutional issues.

(2) Pending State Proceedings

Absent a showing of bad faith harassment, a federal court should abstain in a suit seeking declaratory or injunctive relief if state criminal or analogous civil proceedings are pending.

3. The Subject Matter Limitation—*What Can Be Litigated*

a. The Political Question Doctrine

Political questions, which are non-justiciable, have their origin in classic, functional, and prudential considerations.

- (1) Constitutional commitment to another branch;
- (2) lack of judicial resources and capabilities for deciding the case;
- (3) prudential or policy considerations relating to the proper use of judicial power.

b. Adequate and Independent State Grounds

Where adequate and independent substantive or procedural state grounds for a lower court decision clearly exist, the Supreme Court will decline to exercise jurisdiction.

II. NATIONAL LEGISLATIVE POWERS

Congress has only such powers as are granted by the Constitution. Under the Tenth Amendment, powers not granted to the national government are retained by the states and the people. The crucial inquiry is whether there is a constitutional source of power for congressional legislation.

A. The Scope of the National Legislative Power

1. Express Powers

Art. I, § 8, expressly grants specific powers to Congress.

2. Implied Powers

Under the Necessary and Proper Clause of Art. I, § 8, Congress can enact laws which are reasonably designed to achieve its delegated powers.

3. Inherent Powers

Congress has no inherent domestic legislative powers. This does not preclude the existence of inherent foreign affairs powers.

4. Delegation of Powers

Congress can delegate legislative authority so long as it prescribes some standards to guide use of the granted powers.

5. The Tenth Amendment

Powers that were previously exercised by the states which are not delegated are reserved to the states or to the people. There has been persistent controversy over whether the Tenth Amendment is a substantive limitation on Congress' ability to legislate as to private parties and the states.

6. The Supremacy Clause

Art. IV, cl. 2 establishes that national laws that are constitutional override contrary state laws.

B. Commerce Power

1. Definition

Congress has power to regulate "commerce among the states" which has come to mean interstate commerce. However, the commerce power provides the basis for congressional regulation even of local intrastate activities. Commerce is limited to economic activity and a majority of the justices have indicated that economic inactivity cannot be regulated by the federal government, even if this inactivity has an effect on interstate commerce. *National Federation of Independent Business v. Sebelius* (2012).

2. Achieving Social Welfare Objectives—A National Police Power

Congress' power to regulate the channels and instrumentalities of interstate commerce and persons and things in interstate commerce is plenary, permitting it to prescribe rules for the protection of commerce. Courts will not probe Congress' purpose in regulating interstate commerce.

- a. While there is no national police power, Congress can achieve social welfare objectives through regulating interstate commerce. If Congress exercises its delegated powers, it may regulate matters traditionally regulated by the states.

- b. *Tenth Amendment*. When Congress regulates *private* action, the Tenth Amendment is not a significant limitation on Congress' regulatory power.

3. Stream of Commerce

Local activities can be regulated if they are part of the "stream" of interstate commerce.

4. Instrumentalities of Commerce

Congress' plenary power to regulate and protect interstate commerce extends even to local activities that threaten the instrumentalities of interstate commerce and persons and things in interstate commerce.

5. The Affection Doctrine

a. Substantial Effects

- (1) Under the Necessary and Proper Clause, Congress can regulate local activities if it can rationally conclude that such activity has a substantial effect on interstate commerce. The courts generally defer to the congressional judgment.
- (2) In assessing the effect, Congress may consider the *cumulative or aggregate impact* of all regulated activities.
- (3) "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Gonzales v. Raich* (2005).
- (4) However, a majority of the justices have indicated that Congress may not regulate individuals not previously involved in commerce even if their failure to become active adversely affects interstate commerce. *National Federation of Independent Business v. Sebelius* (2012).

b. New Restrictions

There are limits. Consider if the matter regulated is commercial, if there is a jurisdictional nexus to interstate commerce, if there is

congressional fact finding, and if the causal relation between the regulated act is remote or attenuated, including whether the regulation intrudes on areas of traditional state concern.

C. The Taxing Power

Congress has the fiscal power of raising monies through taxes. However, this is not a regulatory power and “penalties” may not be imposed in the guise of taxes.

1. Courts today tend to accept any tax as a fiscal measure if, on its face, it is a revenue producing measure.
2. Disclosure requirements will not make a tax into a penalty but such provisions raise problems of self-incrimination.

D. The Spending Power

Congress can spend, but cannot regulate, for the general welfare.

1. General Welfare

The Spending Clause of Art. I, § 8, cl. 1, is an independent fiscal power to spend for general welfare objectives. It is not limited to the regulatory powers of Art. I, § 8. Congress determines the scope of the general welfare.

2. Reasonable Conditions

Congress may impose any reasonable conditions for participation in federal spending programs even if this induces states to conform to federal standards. The courts defer to Congress’ judgment of reasonableness. Such conditions must be explicitly stated so that states can make informed choices.

3. Constitutional Limitations

The Tenth Amendment is not likely to be a barrier to congressional spending so long as the states remain free to reject the federal grant and its conditions. While Congress may create incentives for states to act, if the conditions are so coercive as to compel State conduct, the law is unconstitutional.

4. Spending as a Contract: Explicit Conditions

Conditions on federal grants must be clear and unambiguous to be enforced.

E. Intergovernmental Immunities

The national government has greater immunity from state regulation and taxation and greater power to tax and regulate state functions (Art. VI Supremacy Clause).

1. State Taxation and Regulation

States cannot directly tax or regulate the federal government or federal instrumentalities. They cannot discriminate against the federal government or those who deal with the federal government.

2. Federal Taxation and Regulation

a. Federal Taxation of States

Non-discriminatory federal taxes, which reasonably reflect the benefits provided the state, are constitutional.

b. Federal Regulation of States

(1) *State Sovereignty Limitation*. Principles of state sovereignty, reflected in the Tenth Amendment, limit Congress' Commerce Clause power to regulate state activities.

(2) In *National League of Cities*, subsequently overruled, the national interest in including the states under the regulation was balanced against the intrusion on state sovereignty. Three conditions were used in determining if state sovereignty was violated:

(a) "States as states" (Direct regulation of state or its agencies);

(b) "Traditional state functions";

(c) Impairment of state ability "to structure integral operations in areas of traditional functions".

(3) Today, if Congress enacts a law generally applicable to private parties and the states, there is only a minimal state sovereignty

limitation. The Tenth Amendment and principles of state sovereignty, embodied in our constitutional structure, impose only minimal limits on congressional power, assuming that the national political process is functioning.

- (a) Federal courts should not determine what are “traditional” or “integral” functions of state government.
 - (b) It is the structure of the federal government itself that protects federalism.
- (4) But if congressional regulations impose special burdens on states, state sovereignty and the Tenth Amendment impose limitations. Congress cannot constitutionally command states to regulate or to enforce a federal regulatory program, since this would undermine political accountability and dual sovereignty. In such cases, there is no judicial balancing of national and state interests. But Congress can require states to regulate or face preemption by a federal program.

III. STATE POWER IN AMERICAN FEDERALISM

States have inherent police power to legislate for the public health, morals, and well-being of its citizens. But this power is limited by the constitutional division of powers. The people of the entire nation, through the Tenth Amendment, reserved to the states only such powers as they had prior to ratification.

A. State Power to Regulate Commerce

1. Establishing the Foundations

Where a subject requires national regulation or where the particular state regulation would excessively burden interstate commerce, the state may not regulate absent congressional authorization.

a. The Nature of the Power

The commerce power is, at least partially, a concurrent power.

b. The Nature of the Subject—*Cooley* Doctrine

When subjects of commerce regulation are national in nature, *i.e.*, require a uniform system or plan of regulation, they are not amenable to state regulation. *Cooley v. Board of Wardens* (1851).

2. The Modern Focus: The Dormant Commerce Clause

The Dormant Commerce Clause, as interpreted by the courts, limits state power to enact regulations affecting interstate commerce. States may not discriminate against interstate commerce absent substantial justification. Nor may states place unreasonable burdens on interstate commerce.

a. Rationale

- (1) Common Market Philosophy. No trade barriers.
- (2) Lack of political protection for out-of-state interests.

b. Discrimination

If a state regulation is labeled “discriminatory” against interstate commerce, it is likely to be held unconstitutional. Economic protectionism violates the Dormant Commerce Clause. But laws which benefit public entities over private entities, yet which treat all private companies the same, do not discriminate against interstate commerce.

(1) Intentional Discrimination

A state law which purposefully discriminates against interstate commerce, e.g., by hoarding scarce resources against import or export to other states, is virtually per se invalid.

(2) Discriminatory Means and Effects

Even if a state law serves a legitimate police power objective, the law must regulate evenhandedly. Differential treatment favoring in-state against out-of-state interests constitutes discrimination. A local regulation may be discriminatory even if it curtails commerce by other state subdivisions as well as out-of-state interests. A law using discriminatory means or having a discriminatory impact must serve a legitimate local purpose that cannot be served as well by nondiscriminatory means. Watch for the following:

- (a) Extraterritorial operation of state laws;
- (b) Facial or factual imposition of unequal burdens or benefits;
- (c) But differential impact or effects may be due to market structure rather than discriminatory laws.

c. **Undue Burdens—Ad Hoc Balancing**

In determining if a nondiscriminatory state regulation of interstate commerce is valid, the courts balance the local interests in maintaining the law against the burden on interstate commerce. Some members of the Court reject undue burdens balancing, limiting the Dormant Commerce Clause to a ban on discrimination.

- (1) Important state interests in trade, conservation, and environment weigh heavily in the balance but cannot be achieved by means which excessively impede the free flow of interstate commerce.
- (2) State highway laws enjoy a heavy presumption of validity but, even here, states cannot unreasonably burden our national Common Market system.

d. **State as Market Participant**

When the state acts, not as a regulator, but as a participant in the marketplace, the Dormant Commerce Clause doctrine doesn't apply. Even state discrimination in favor of its own citizens is permissible. Subsidies may involve such nonregulatory market participation. The more state actions affect parties not in privity with the state, the more likely the state will be held to be a regulator.

3. Protecting Personal Mobility

a. **Commerce Clause**

The Commerce Clause protects the free movement of persons from state to state.

b. **Interstate Privileges and Immunities**

Art. IV, § 2, prohibits unreasonable discrimination against out-of-state citizens in regard to fundamental interests basic to the livelihood of the Nation. There must be a substantial reason for the discrimination and the discrimination must bear a close relation to that reason. To justify discrimination in rights fundamental to national unity, it must be shown that out of state citizens are a peculiar source of the evil. Further, there must not be any less burdensome alternatives. The clause provides an alternative to the Dormant Commerce Clause for attacking state discrimination against out-of-state citizens and may be used when the State is acting as a market participant.

4. When Congress Speaks

a. Preemption

- (1) If a state law conflicts with a valid federal law so that it is impossible to comply with both or if it impedes achievement of the federal legislative objective, the state law is invalid under the Art. VI Supremacy Clause.
- (2) Congress may expressly preempt state law.
- (3) If there is no conflict or express preemption, the courts must still determine if Congress intended to occupy the field and exclude the state regulation. Courts consider: (a) need for uniformity; (b) legislative history; (c) the pervasiveness of the federal regulation; (d) historic roles of national and local interest in regulating in the area (presumption of no preemption in areas of traditional state authority); (e) potential for future conflict; (f) availability of a federal agency to maintain continued control.

b. Legitimizing State Burdens on Commerce

In exercising its plenary powers, Congress may authorize the state to regulate even where the state law would otherwise violate the negative implications of the Dormant Commerce Clause. But Congress must expressly and unambiguously manifest such an intent.

5. The Compact Clause

Art. I, § 10, cl. 3, requires congressional consent to any agreement between states if it increases the political power of the states so as to potentially interfere with federal supremacy.

B. State Power to Tax Commerce

1. General Principles

- a. Interstate commerce can be forced to pay taxes which reasonably reflect the benefits derived from the taxing state.
- b. States *may not discriminate* against interstate commerce.

- c. *Due process* requires that the taxpayer have some minimal contacts with the taxing state.
- d. The *Commerce Clause* requires that a state tax be apportioned to reflect the extent of the taxable status the taxpayer has in the taxing situs to avoid *multiple burdens*.

2. Modern Applications

Identify the local incidents being taxed and inquire into the actual economic effect of the tax. The tax is valid if:

- (1) the activity taxed is sufficiently connected to the taxing state;
- (2) the tax is fairly apportioned;
- (3) the tax does not discriminate against interstate commerce;
- (4) the tax fairly reflects the benefits received.

IV. CONGRESS AND EXECUTIVE POWER

When executive and congressional powers conflict, formalist and functional approaches are used. In determining if separation of powers has been violated, consider whether one Branch is invading the constitutional prerogatives of another Branch or is usurping powers properly shared.

A. The Domestic Arena

1. Executive Law-Making

a. Limited Domestic Law-Making Powers

Absent an emergency, the President has no inherent domestic law-making power. His powers as Chief Executive and his power to take care that the laws are faithfully executed may create some emergency powers subject to congressional review. Congressional acquiescence, custom and usage, may augment Executive powers.

b. Veto Power

A presidential refusal to sign an act into law can be overridden by a two-thirds vote of both houses. But the Line Item Veto Act violates

the Presentment Clause of Art. I, § 7. Instead of the law-making procedure outlined in Art. I, § 7, the Act allows the President to cancel or repeal particular spending provisions thus changing the signed law. This is inconsistent with the constitutionally prescribed Veto Power.

2. Executive Impoundment

It has not yet been decided whether a President's withholding or delay in expending appropriations is a constitutional exercise of the Executive power to faithfully execute the laws or an unconstitutional interference in Congress's law-making power.

3. Delegation and Control of Legislative Power

- a. Congress can delegate power to the Executive if it formulates reasonable standards—an "intelligible principle"—to guide discretion. The courts defer to Congress in determining reasonableness.
- b. *The Legislative Veto*. Retention of power by Congress to review and veto executive exercise of delegated power is legislative action which violates the Presentment and Bicameralism provisions of Art. I, § 7.

4. The Appointment and Removal Power

- a. Art. II, § 2, cl. 2, vests the power to appoint federal officials, subject to the Senate's advice and consent, in the President. Congress may vest appointment of inferior officers in the President, courts of law, or heads of departments, but not in the Congress itself.
 - (1) Congress may not vest the appointment power in persons other than those specified in Art. II, § 2, cl. 2.
 - (2) Whether an official is a principal or an inferior officer depends on a functional analysis of her independence, power, jurisdiction, and tenure.
- b. The President has the power to remove quasi-judicial or quasi-legislative officials subject to the standards established by Congress. The President has greater freedom to remove purely executive

officials but it is not absolute. Consider whether Congress' removal restrictions impede the President's ability to perform his constitutional duty.

- c. Congress may not vest executive functions in officials subject to congressional removal by means other than impeachment.

5. Separation of Powers Generally

Consider generally whether the challenged actions excessively intrude on the constitutional functions of another Branch or consolidate powers that should properly be dispersed.

B. The Foreign Arena

1. Foreign Affairs

Foreign affairs powers are shared powers between the President and Congress. States and courts play a limited role.

2. Treaties and Executive Agreements

- a. *Treaties* are made by the President with the advice and consent of two-thirds of the Senators present. They prevail over state law but are subject to constitutional limitations. But a treaty is not binding domestic law unless Congress enacts implementing legislation or the treaty is self-executing. The President cannot unilaterally make treaties binding domestically.
- b. *Executive Agreements*, not requiring Senate concurrence, are legal even though they are not mentioned in the Constitution and prevail over contrary state law.
- c. Congressional legislation, which would not otherwise survive constitutional review, may be a legitimate means of implementing a treaty.

3. The War Power

While Art. I gives the Congress alone power to declare war, the President's Art. II power as Commander-in-Chief affords him power in

making war. But he cannot order the indefinite detention of American citizens arrested on American territory without due process of law. Even aliens detained at Guantanamo are entitled to habeas corpus to test their status as enemy combatants. It is unconstitutional for Congress to authorize use of procedures which fail to provide the protections of habeas corpus to detainees, without suspending the writ.

C. Privileges and Immunities

1. Executive Privilege

The Court has recognized the existence of an executive privilege for internal confidential communications based on the separation of powers principle and Art. II. A claim of privilege is presumptively valid and the judiciary determines whether a sufficient need has been shown by the party seeking disclosure.

2. Impeachment

A President may be impeached by the House and tried by the Senate for "Treason, Bribery, or other high crimes and misdemeanors."

3. Presidential Immunity

The President is absolutely immune from civil liability for actions within the "outside perimeters" of his official responsibility. But the President does not have a general constitutional immunity for unofficial acts allegedly committed prior to assuming office. Presidential aides have a qualified immunity.

4. Congressional Immunity

Members of Congress and their aides enjoy absolute immunity under Art. I, § 6, for "legislative acts."

■ PART TWO: INDIVIDUAL RIGHTS AND LIBERTIES: CONSTITUTIONAL LIMITATIONS ON GOVERNMENT POWER

V. HISTORICAL PERSPECTIVES

A. The Original Constitution

1. Natural Rights

The idea that there are extra-constitutional legally enforceable “natural rights” limiting governmental power has not been accepted by the Court.

2. Express Rights

The original Constitution contains few express rights limiting governmental power.

B. Bill of Rights

The first ten amendments were enacted only to limit the newly created federal government. They do not apply directly against the states. The Due Process Clause is used to apply the guarantees of the Bill of Rights to the states.

C. The Civil War Amendments

1. Thirteenth Amendment

This amendment abolishes slavery and involuntary servitude. Unlike other amendments, it applies to private action.

2. Fourteenth Amendment

Persons born or naturalized in this country are citizens of the United States and of the state of their residence. No citizen of the United States can be denied the privileges and immunities of United States citizenship. No state shall deprive citizens of life, liberty, or property without due process of law or deny any person in the jurisdiction equal protection under the laws.

3. Fifteenth Amendment

Denial of the franchise because of race or previous condition of servitude by the state or federal government is prohibited.

D. Privileges or Immunities of National Citizenship

The Fourteenth Amendment Privileges or Immunities Clause does not make the Bill of Rights applicable to the states. The Clause has been narrowly interpreted to protect only those rights relating to a *U.S. citizen's relationship to the national government, e.g.*, to vote in federal elections. While it is seldom used today, it has recently been used to prevent discrimination against newly arrived residents based on their exercise of the right of interstate travel.

E. The Second Amendment

The Second Amendment confers an individual right to possess and carry weapons in cases of confrontation. The right is not unlimited but the Court has not determined the scope of permissible government regulation or the appropriate standards of judicial review. The Second Amendment right has been incorporated as a limit on states. *McDonald v. City of Chicago* (2010).

VI. DUE PROCESS OF LAW

While there are a few guarantees of liberty and property in the original Constitution, a central source of personal rights has been the Due Process Clause of the Fifth and Fourteenth Amendments. Fourteenth Amendment due process includes: (1) incorporated fundamental rights; (2) substantive rights limiting what government can do; (3) procedural limits on how government acts.

A. Ex Post Facto Laws

Neither the federal (Art. I, § 9) nor the state (Art. I, § 10) government may enact retrospective criminal laws significantly disadvantaging an offender. Civil laws are not covered by the Clauses.

B. Bills of Attainder

Neither Congress (Art. I, § 9) nor a state legislature (Art. I, § 10) may punish an individual without the benefit of judicial trial.

C. Impairment of Obligation of Contract

Art. I, § 10 limits state legislative ability to impair substantive contract obligations and the Fifth Amendment Due Process Clause prevents congress-

sional impairment of substantive contract rights. It is occasionally used to limit government power, but infrequently.

1. Private Contracts

A state law substantially impairing pre-existing contractual relationships violates this guarantee unless the state establishes that the law is a reasonable means for achieving a significant and legitimate public purpose.

2. Public Contracts

A state may contract away its fiscal powers and may impair its contracts only if it is reasonable and necessary to serve important state interests.

D. The Takings Clause

1. Taking Property

“Private property” is generally defined by looking to rules and understandings stemming from an independent source such as state law.

2. Constitutional Text

The Fifth Amendment provides that private property is not to be taken by the federal government without just compensation. The Fourteenth Amendment Due Process Clause has been held to impose a similar obligation on the states.

3. What Is a “Taking?”

a. Regulatory Takings

The concept of taking goes beyond the formal condemnation of property to invalidate any regulation which is functionally equivalent to condemnation.

b. Reasonable Regulation

In determining if a regulation is a taking, factors to be considered include: economic impact of the regulation, effect on investment expectations, and the character of the government action. But the effectiveness of the regulation in furthering government interests is not relevant.

c. **Categorical (Per Se) Takings**

If the government physically invades the property on a permanent basis or denies all economically beneficial or productive use of the land, there is a taking. A moratorium on property development, even for years, is not a categorical taking.

d. **Conditional Takings**

In determining whether government imposition of a condition as a price of land development is a taking, two questions are asked:

- (1) whether there is an “essential nexus” between the legitimate state interest and the condition, and
- (2) whether the government has made sufficient individualized findings establishing that the exaction has a rough proportionality to the impact of the proposed development.

4. Public Use

The taking must be for a public purpose, including economic development. Courts defer to the legislature.

E. Due Process: The Incorporation Process

1. Selective Incorporation

Only those provisions of the Bill of Rights which are “essential to the concept of ordered liberty” or “fundamental in the American scheme of justice” are made applicable to the states through the Due Process Clause. Rights thus far not incorporated as “fundamental rights” include the Third Amendment, Seventh Amendment right to jury trial in some civil cases, grand jury indictment, excessive bail, 12-person juries and a unanimous verdict for conviction.

2. Full Incorporation

The incorporated fundamental right applies against the states in the same manner as the Bill of Rights provision applies against the federal government.

F. Traditional Substantive Due Process

1. The Rise and Fall of Economic Substantive Due Process

Under “Lochnerism,” the courts invalidated federal and state laws as arbitrary and unreasonable interferences with the right of contract

protected by the due process guarantees of liberty and property. Today, this active judicial review of socio-economic legislation has been replaced by judicial deference.

2. Modern Substantive Due Process: Non-fundamental Rights

In reviewing federal (Fifth Amendment) and state (Fourteenth Amendment) laws, the courts usually defer to the legislative judgment. If there is any *rational* basis that the legislature might have had for concluding that a law would further permissible legislative objectives, it does not violate due process. This deferential standard is used in reviewing most social and economic legislation.

a. Burden of Proof

The law is presumed constitutional and the burden of proof (which is essentially insurmountable) is on the challenging party.

b. Legitimate Objective

Any permissible government objective will suffice.

c. Rational Means

In assessing the rationality of the law in achieving the government's objective, the courts will not second-guess legislative fact finding or question the wisdom of the law.

d. Fundamental Rights Exception

Due Process challenges based on fundamental personal rights invoke a more searching judicial scrutiny.

G. Substantive Due Process Revisited: The Right of Privacy and Other Unenumerated Rights

1. Fundamental Rights

When laws burden the exercise of "fundamental rights" protected by the Due Process guarantee, the courts apply stricter scrutiny. The government bears the burden of showing that the law is narrowly tailored to further an overriding government interest. Often the review is "strict," requiring a showing that the means are "necessary" to a "compelling government interest."

2. Express, Implied, and Unenumerated Rights

A more stringent standard of review is used for all express rights, those rights implied from the express rights or the constitutional structure, and other unenumerated fundamental rights recognized by the courts. When the Court holds that a law burdens a significant or special liberty right, the Court uses strict scrutiny or employs a “particularly careful scrutiny.”

3. Contraception and Abortion

a. The Privacy Right

There is no express right of privacy in the Constitution, but in early cases involving contraception and abortion, the Court held there is a constitutional right of privacy which limits the power of the government to regulate sexual activities involving marriage and family life.

b. The *Roe v. Wade* Revolution and Reaction

In *Roe v. Wade* (1973), the Court extended the fundamental right of privacy to protect a woman’s decision to terminate a pregnancy. The Court found the privacy right in the Fourteenth Amendment guarantee of personal liberty and applied a “trimester test” to determine whether strict scrutiny was met.

c. *Casey*: The Essentials of *Roe*

(1) In *Planned Parenthood of S.E. Pennsylvania v. Casey* (1992), the Court verbally reaffirmed the “essential holding” of *Roe* including:

- (a) the right of a woman to choose to have an abortion before viability without undue interference from the state;
- (b) the state’s power to restrict abortion after viability as long as there is an exception for the mother’s life and health;
- (c) the state’s legitimate interests in protecting the health of the woman and the life of the fetus.

(2) The plurality in *Casey* did not discuss a right of privacy or fundamental rights, nor did it adopt strict scrutiny. Rather the

“undue burdens” test was used. A law is invalid “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

d. **Abortion After *Casey***

A federal law banning partial birth abortion was upheld against a facial challenge despite the absence of any provision exempting mothers whose health was at risk. The Act did not impose an undue burden because there was medical uncertainty as to whether the prohibition on partial birth abortion created significant health risks and because other procedures were available. The prohibition is subject to as-applied challenges.

e. **Rights of Minors**

The minor woman’s right of privacy also protects her contraception and abortion decisions. However, the greater state interest in minors and their usual lesser capacity permit a greater amount of state regulation. Parents cannot be given an absolute veto over the minor’s decisions but requiring parental consent or notification, if a judicial by-pass is provided, has been upheld.

f. **Abortion Funding**

There is no right to abortion funding. Neither the right of privacy nor equal protection requires the state to make the abortion right effective even if maternal funding is provided.

4. Sodomy Laws

A state law criminalizing homosexual sodomy violates due process liberty. Liberty protects intimate decisional choices involving consensual adult sexual conduct in the privacy of the home. The state has no legitimate interest sufficient to justify the intrusion into the personal and private life of the individual.

5. Rights to Marriage and Family Life

The institutions of marriage and family, which are deeply rooted in our nation’s history and traditions, are fundamental rights subject to the stricter form of judicial review. The Court has protected the right to marry, parents’ right to the care, custody and control of their children and the right of close relatives to live together free from excessive

government regulation. Particular associations and relationships may be held not to constitute a constitutionally-protected family or marriage.

6. Right of Travel

a. Interstate Movement

While the source of the right of interstate travel is unclear, it is a fundamental personal right subject to more stringent judicial protection.

b. Foreign Travel

The right to travel abroad guaranteed by Fifth Amendment due process is subject to reasonable regulation by the national government.

7. The Right to Care and Protection

Government has no affirmative constitutional duty, absent special circumstances, to provide care and protection for individuals. A limited duty may arise if government assumes custody of an individual.

8. The Right to Refuse Treatment

A person has a liberty interest in avoiding unwanted medical treatment. The government's interest may justify the regulatory burden on liberty, *e.g.*, the state's interest in preserving life justifies imposing a heightened evidentiary standard before life support is terminated.

9. The Right to Die

There is no fundamental right to commit suicide nor any fundamental right to assisted suicide. Such interests are neither traditionally protected nor implicit in the concept of ordered liberty as to be deemed fundamental. Criminal prohibition of such practices is rationally related to legitimate state interests such as preserving life, protecting the depressed and vulnerable groups, and avoiding euthanasia.

10. Rights in Restricted Environments

Stricter standards of due process review usually do not apply in special contexts such as the military, prisons, schools, and mental institutions. Balancing of the competing interests tends to reflect greater judicial deference.

H. Procedural Due Process

Whenever the government deprives a person of a significant life, liberty, or property interest, it must afford due process. Whether the interest is a right or a privilege, if it is a due process interest and is presently enjoyed, it is protected.

The question of what process is due is a matter of federal constitutional law for the courts. It is not determined by state law. In determining what procedures are required to assure due process, courts balance the competing interests, usually considering three factors:

- (1) the severity of the harm to the litigant if the procedures are not provided;
- (2) the risk of error if the procedures are not afforded; and,
- (3) the administrative difficulty and other costs of providing the requested procedures.

1. What Is Property?

Property is limited to interests recognized by government, *e.g.*, entitlements.

2. What Is Liberty?

Liberty is not limited to freedom from confinement. It includes marriage, raising a family, etc. But reputation, without more, does not constitute a sufficient liberty interest.

3. What Is a “Deprivation”

Negligent injury by government officials to life, liberty or property interests does not constitute a deprivation.

4. Due Process Contexts

a. Welfare Benefits

Welfare benefits, once received, constitute a property entitlement. Courts balance the state interest in conserving resources against the recipient’s interest in uninterrupted benefits.

b. Use and Possession of Property

Wages or a purchaser’s interest in goods received under a contingent sales contract constitute property. Normally, notice and hearing are required prior to depriving the property interest.

c. **Public Employment Rights**

The mere subjective expectancy of continued employment or employment terminable at will are not property interests. There must be a state-created entitlement. A state-created cause of action is a property entitlement. The state may so condition an employment interest that it does not constitute property. But the court determines what procedures are due once a property interest exists—"No bitter with the sweet."

d. **Institutional Due Process**

While officials in public institutions do exercise broad discretion, liberty interests resulting from compulsory attendance at a school or involuntary confinement in a hospital require due process to be satisfied. Parole revocation or revocation of pre-parole conditional release involve liberty interests. The appropriate procedures are determined by balancing the liberty interest against institutional considerations.

e. **Parental Rights**

The important liberty interests of natural parents in the care, custody, and management of their children require significant procedural protection.

f. **Student Rights**

Due process does protect the liberty and property interests of a student. But the courts are reluctant to intrude on academic decision-making and the discretion afforded school authorities.

g. **Access to Courts**

Due process does not require that indigents be given free access to the courts in civil cases absent state monopoly of processes affecting fundamental due process interests. But once a state affords a right of access or significantly burdens fundamental rights, imposition of filing fees may violate due process (and equal protection). Procedures available in civil proceedings are determined by the balancing test, although there is a presumption against a right to appointed counsel in civil proceedings.

h. **Fair Trial/Judicial Bias**

While matters of judicial bias are normally dealt with through local rules and statutes, the Due Process Clause imposes some basic

restrictions on when a judge must recuse himself from a case. If the judge has a direct, personal, substantial pecuniary interest in the outcome, recusal is constitutionally required. If an objective appraisal indicates that there is a serious risk of actual bias, the Due Process Clause requires that the judge recuse himself in the interest of a fair trial in a fair tribunal.

5. Conclusive Presumptions

When critical due process interests are lost through government action, due process generally requires that the individual be afforded an opportunity to prove that the facts presumed are not true in the particular case. But if the case involves a non-contractual claim to public benefits, it is possible that no liberty or property interest is involved.

VII. EQUAL PROTECTION

A. General Standards

The Fourteenth Amendment Equal Protection Clause and the Fifth Amendment Due Process Clause (which is read to guarantee equal protection) prohibit the state and federal government respectively from using unreasonable classifications. Reasonableness is dependent on: (1) the basis of the classification; (2) the character of the interests burdened by the classification; and (3) the government objectives supporting the classification. The courts generally use three principal standards of review: (1) the traditional rational basis test; (2) an intermediate standard requiring that the classification be substantially related to an important government interest; and (3) strict scrutiny requiring that the classification be necessary to a compelling state interest.

B. Traditional Equal Protection

1. The Rational Basis Test

In most cases, a classification will be upheld if it is rationally related to any permissible government objective. The fact that a classification is under- or over-inclusive will not result in its unconstitutionality.

a. Burden of Proof

The law is presumed valid and the burden of proof of its invalidity is on the challenger. The burden is usually insurmountable.

b. **Permissible Government Objective**

If the classification is rationally related to a permissible government objective, even if it is not the actual objective, it will be upheld.

c. **Rational Means**

If any facts can be ascertained that will sustain the classification, the existence of such fact finding by the legislature will be assumed. Only arbitrary classification is proscribed.

2. Rationality With Bite

In some cases, the Court has engaged in a more demanding balancing of the competing interests in determining the reasonableness of the challenged classification. This may reflect judicial concern with possible prejudice or animus against the disfavored class.

C. Heightened Review Equal Protection

1. Suspect Classifications

When a law purposely employs a suspect classification, the classification is subject to strict scrutiny. The ordinary presumption of validity no longer applies and the burden is on the government to demonstrate that the classification is necessary to a compelling government interest.

2. Criteria of Suspectness

Factors which have been considered in labeling a classification suspect include: the historical purpose of the Equal Protection Clause; the history of discrimination against the class; the stigmatizing effect of discrimination; classification based upon a status which the person cannot control; discrimination against a politically insular minority.

3. Purpose, Not Effect

Before strict scrutiny is used, the challenger must prove that the discrimination was purposeful, either overtly or covertly. While discriminatory impact or effect may be evidence of discriminatory purpose, it is usually not sufficient in itself to prove discriminatory purpose. Even if discriminatory purpose is shown, government can avoid strict scrutiny if it can prove that it would have taken the same action even apart from the discriminatory purpose.

4. Legislation and Administration

Legislation or administrative action which is purposely discriminatory is subject to strict scrutiny. A law or policy may be overtly or covertly discriminatory in purpose. Even if a law or policy is neutral, it may be administered or enforced in an intentionally discriminatory fashion (unconstitutional "as applied").

5. The Rationale and Limits of Suspectness

a. Race and National Origin

Racial, ethnic and national origin classifications are suspect, subject to strict scrutiny review.

(1) Segregation in Education

- (a) *De Jure Segregation*. Intentional racial segregation in public schools is inherently unequal and violates equal protection.
- (b) *De Facto Segregation*. Government has no affirmative constitutional duty to remedy segregation it has not created.
- (c) *Duty to Desegregate*. A *de jure* segregated school system is under an affirmative constitutional duty to desegregate. Action having a discriminatory *effect* impeding desegregation is prohibited.
- (d) *Desegregation Remedies*. In remedying *de jure* segregation, equal protection does not require racial balancing, although racial composition may be used in measuring desegregation. District courts have broad equity powers, including the use of busing. Remedies must reflect the nature of the constitutional violation.
- (e) *Interdistrict Segregation*. Segregation between school districts in a state does not violate equal protection unless it is caused by the government.
- (f) *Resegregation*. A school district desegregates if it complies in good faith with the desegregation decree and eliminates vestiges of past discrimination to the extent practicable. There is no duty to remedy subsequent unintentional resegregation.

(2) Affirmative Action

- (a) Federal, state and local affirmative action programs are reviewed under the strict scrutiny test.
- (b) In applying strict scrutiny, a narrowly-drawn race-based program designed to remedy specific, identified racial discrimination is likely to be upheld.
- (c) An institution of higher education has a compelling interest in the diversity of its student body, which can include racial and ethnic diversity. A race conscious admissions program must be narrowly tailored; the process must be individualized, not mechanical. Quotas or racial balancing are unlikely to be upheld. Race may be a “plus” factor; it must not be determinative of the admissions decision. Narrow tailoring does not require exhaustion of every possible race-neutral alternative. Time limits to race conscious policies are relevant.
- (d) Race-based student placement programs by elementary and secondary schools were held to be unconstitutional because they were not narrowly-tailored. The Court did not decide whether the schools’ interest in the benefits of racial diversity would be a compelling interest.
- (e) Congressional districting, where race is the predominant factor, is subject to strict scrutiny. Race is the predominant factor when the state subordinates traditional race-neutral districting considerations to race.

b. Alienage—The “Sometimes Suspect” Classification

(1) Strict Scrutiny

When a state classifies on the basis of alienage, strict scrutiny normally applies.

(2) Political Function Exception

Only rationality is required when the state sets voter qualifications or defines the qualifications for appointment to important government positions involving governance of the political community, *e.g.*, state police, teachers, probation officers.

(3) Preemption

State classifications involving aliens are preempted if they interfere with national policies regarding immigration and naturalization.

(4) Federal Discrimination

Action by the national government does not violate the Fifth Amendment if it is a reasonable means of implementing its immigration and naturalization powers.

c. “Almost Suspect” Classifications—Gender and Illegitimacy

When reviewing gender and illegitimacy classifications, courts generally use an intermediate standard of review. The classification must be substantially related to an important government interest.

(1) Gender Classification

(a) Sex Discrimination

In gender discrimination cases, the Court has referred to intermediate review as requiring “exceedingly persuasive justification.” This may include consideration of alternatives available to government, making the review closer to strict scrutiny. Use of classifications that intentionally discriminate against women based on stereotypes seldom survive intermediate review. If the classification reflects real differences between the sexes, it is more likely to be upheld.

(b) Discriminatory Purpose

While a discriminatory impact on women is evidence of impermissible intent, it is only a discriminatory government purpose that will trigger use of the intermediate standard of review.

(c) Non-sex Classifications

Not all classifications that disadvantage only women will be treated as discriminatory sex classifications.

(d) Affirmative Action

Classifications providing benefits only to women which are actually designed to remedy past discrimination are

likely to be upheld using intermediate review if they are narrowly tailored to achieve an actual remedial objective.

(e) Mothers and Fathers

A law which discriminates against fathers, in favor of mothers, where the parents are similarly situated, is subject to intermediate review and generally violates equal protection. But there may be real difference between mothers and fathers that justify the discrimination.

(2) Illegitimacy Classifications

An intermediate standard of review is also used for classifications burdening illegitimates—the classification must be substantially related to an important government interest. The more that it appears that a law is based on prejudice against illegitimates, the more likely it is that the law will be held unconstitutional.

d. Other Classifying Traits

Other classifying traits, *e.g.*, those which operate to disadvantage the poor, the aged, the mentally retarded or gays and lesbians (sexual persuasion) without more, are reviewed under the traditional rational basis test. But if the law suggests prejudice or animus, it may be reviewed using “rationality with bite.”

6. Fundamental Rights

When a classification significantly burdens the exercise of fundamental personal rights, the government usually must prove that the classification is necessary to a compelling governmental interest.

- a. In cases where the law does not deter, penalize, or otherwise *significantly* burden the constitutional right, the Court applies the traditional rational basis test.
- b. Increasingly, the Court has moved to a variable standard of review. The more significant the burden on fundamental rights, the greater the degree of scrutiny used.
- c. Examples of fundamental rights include:
 - (1) First Amendment Rights—When government classifications significantly burden the exercise of fundamental First Amendment rights such as freedom of speech or religion, the classification is closely scrutinized.

- (2) The Right of Interstate Travel—When the government imposes a classification which deters, penalizes or otherwise significantly burdens the fundamental right to travel, the strict scrutiny standard of judicial review applies. In some cases, the Court has held that the law could not satisfy even rationality review. Recently, the Court has used the Privileges and Immunities Clause of the Fourteenth Amendment to prevent discrimination against newly arrived citizens of the state.
- (3) The Right of Privacy and Marriage—Only if a fundamental right is significantly burdened will heightened scrutiny apply.

7. Fundamental Interests

The Court also has used a stricter standard of review to prevent discrimination in access to certain fundamental interests that are not technically constitutional rights but are protected by the Equal Protection Clause when discrimination is involved. This use of stricter review has been applied to the following interests:

a. Voting

- (1) When the government discrimination significantly burdens the *exercise of the franchise*, in general or special purpose elections, strict scrutiny is applied.
 - (a) *Special Purpose Districts*. A district may be so special purpose and its effects on citizens so disproportionate that strict scrutiny will not be applied.
 - (b) *Durational Residency Requirements*. While reasonable residency requirements are constitutional, durational residency requirements burden the vote and the right of interstate travel.
- (2) *Diluting the Franchise*. Dilution of the effectiveness of a vote of a particular class will often be reviewed under a more stringent standard of review than rationality.
 - (a) *Access to the Ballot*. The requirements must be fair and not virtually exclusionary of independents and minority parties.

- (b) *Reapportionment*. The one-person-one-vote principle is applied to congressional districting as a command of Art. I, § 2, and to both houses of a bicameral state legislature as a mandate of equal protection.
- (c) *Multi-member Districts*. Multi-member districting violates equal protection and the Fifteenth Amendment if it is a purposeful device to exclude racial minorities from effective political participation.
- (d) *Political Gerrymanders*. While equal protection challenges to political gerrymanders are presently justiciable, the Court is sharply divided as to whether judicially manageable standards are possible. Political gerrymanders that are proven to be intentionally discriminatory and which have actual discriminatory effects on an identifiable political group violate equal protection.
- (e) *Vote Processes*. In *Bush v. Gore* (2000), the Court held that equal protection may be violated by arbitrary and disparate treatment in the processes by which votes are counted but this may be limited to the unique circumstances involved in *Bush v. Gore*.

b. Access to Justice

Differences in wealth should not determine the ability of a person to secure criminal justice. Similarly, some civil cases involve matters of such fundamental concern, e.g., termination of parental rights, that equal protection requires equal access.

c. Education

While education is an important social and individual interest, the rational basis test is generally used for reviewing classifications burdening the interest in education. But when education is totally denied to a discrete underclass of children, the Court has required government to prove substantial justification.

8. Other Interests

Classifications burdening other social and economic interests, such as welfare, housing and medical care, are reviewed under the traditional rational basis test.

VIII. FREEDOM OF EXPRESSION

A. The Basic Doctrine

While the First Amendment is addressed only to Congress, its guarantees, express and implied, have been incorporated in due process liberty and have been applied to the states. When these fundamental rights are burdened, the courts employ heightened judicial scrutiny.

1. First Amendment Rationale

a. Marketplace of Ideas

Government must not prevent the free exchange of ideas in the marketplace. Free competition is the best test of an idea's worth.

b. Citizen Participant

Free expression is necessary so that citizens can perform their democratic obligation of discussing public officials and public policy.

c. Individual Liberty

Freedom of expression promotes individual autonomy and furthers self-determination.

2. First Amendment Methodology

The Court employs a variety of methodologies designed to reconcile freedom of speech with other legitimate public interests.

a. Categories of Speech

At times the Court has held that certain categories of speech are not entitled to First Amendment protection, requiring only rationality in lawmaking. These categories of speech can be regulated because of their constitutionally proscribable content. The Court has held that such categories are subject to First Amendment review when the law discriminates on the basis of content within the category of proscribable speech.

b. Strict Scrutiny

On other occasions, the Court uses a test which imposes a heavy burden of justification on the government when it seeks to regulate

speech content, making the law presumptively invalid. Strict scrutiny requires government to prove that the law is necessary to a compelling interest.

c. **Balancing**

If the law indirectly or incidentally burdens freedom of speech, the Court is more likely to engage in some less stringent form of balancing to determine if the law is reasonable, weighing the interests of the government in regulating the activity against the burden on free speech interests. The degree of judicial scrutiny varies widely.

3. Content-Based v. Content-Neutral Regulation

a. **Content-Based Regulation**

When government undertakes to regulate expression because of the content of the speech, the law is presumptively invalid. Laws are content-based if they discriminate on the basis of viewpoint or if they categorize speech based on its subject matter. The courts apply the most exacting scrutiny to such laws and the government must either show that the law falls into a category of proscribable speech or that it is narrowly drawn to serve a compelling state interest.

b. **Content-Neutral Regulation**

Government regulations that are unrelated to the content of speech are subject to a lesser degree of judicial scrutiny, even though speech may be incidentally burdened. If a law is justified without reference to the content of the speech, it may be held to be content-neutral.

- (1) The courts generally apply a less demanding form of balancing analysis to content-neutral time, place and manner regulations. Generally the law must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.
- (2) The *O'Brien* standard, which is essentially the same as the above balancing standard, is often used. The law must further an important government interest unrelated to the suppression of speech and the incidental restriction of speech must be no greater than essential to further that

interest. This requires only that the law directly and effectively further the interest.

4. The Doctrine of Prior Restraint: Forms of Control

Prior restraints involve government regulations of freedom of expression which operate prior to the time that the expression enters the marketplace of ideas. This form of regulation is highly suspect, both substantively and procedurally, and there is a heavy presumption against the law's constitutionality; the Court imposes a demanding standard of justification in reviewing prior restraints. But if an injunction only incidentally affects expression and is content-neutral, the prior restraint doctrine does not apply. The court will ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."

5. First Amendment Vagueness and Overbreadth

Laws may be facially invalid or invalid as applied in a particular case. The former generally results in invalidation of the law itself.

a. Vagueness

A law is facially invalid under freedom of expression and due process if it is not drawn with sufficient clarity and definiteness to inform persons of ordinary intelligence what actions are proscribed.

b. Overbreadth

A law may be void on its face if it is overbroad, in that the law indiscriminately reaches both constitutionally protected and unprotected activity. Substantial overbreadth is required. A litigant may challenge the constitutionality of an overbroad statute even if her activities could be reached under a properly drawn statute.

B. Freedom of Association and Belief

The First Amendment guarantees a right of expressive association for First Amendment objectives, not a general right of social association. The validity of government burdens on the implied rights of association and belief is usually determined by a balancing test. A law is reasonable if the government interest outweighs the individual's right to associate and hold particular political, economic, or social beliefs. Increasingly the Court has employed more stringent forms of interest balancing, including strict scrutiny.

1. Restraints on Membership and Associational Action

- a. Membership in an organization cannot be penalized or punished unless the law is limited to active membership, which requires:
 - (1) membership knowing of the group's illegal objectives (*scienter*);
 - (2) specific intent to further those illegal objectives.
- b. The right includes the freedom to engage in legitimate group activity to further associational objectives but does not impose any constitutional duty on government to promote the group.

2. Group Registration and Disclosure Requirements

These requirements only indirectly restrain free association. The Court will balance the extent of the interference with the right to associate against the interests of government in the regulation. Deference to legislative judgement has often been given when subversive or extremist groups are involved.

3. Restraints on Government Employment and Benefits

Civil penalties for group membership and activities must satisfy First Amendment standards; the right-privilege distinction has been rejected. Government may not condition the receipt of government benefits on the surrender of First Amendment rights (*i.e.*, Unconstitutional Conditions). When reviewing restraints on expression by government employees, the courts employ a balancing test, weighing the interest of the government as employer against the burden on First Amendment rights.

a. Loyalty Programs

Programs designed to review the loyalty of government employees must be narrowly drawn to serve the government interest in security.

b. Loyalty Oaths

While narrowly drawn oaths are constitutional, broader oaths probing associational activities must be clear (vagueness) and narrowly drawn to include *scienter* and specific intent (overbreadth).

c. Individual Membership Disclosure: Bar Admission Requirements

- (1) Failure to cooperate with a bar commission's inquiry, when the questions are narrowly drawn and have a substantial relevance

to determining an applicant's fitness and competence to practice law, is a grounds for denying bar admission.

- (2) Broad-ranging inquiries into associational memberships which are not limited by scienter and specific intent requirements violate freedom of expression.

d. **Political Patronage**

Government may not discharge public employees or deny benefits to independent contractors for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job or benefit in question. Government cannot unconstitutionally condition the exercise of fundamental rights.

4. Legislative Investigations and Forced Disclosure

a. **Investigatory Power**

The government can investigate in order to legislate pursuant to the necessary and proper clause, as long as the grant of authority is specific and explicit.

b. **First Amendment Limitations**

The Court often balances the government interests against the individual interests. More recently, the Court has held that when an investigation intrudes on First Amendment rights, the government must show a substantial relation between the information being sought and a subject of overriding and compelling government interest.

c. **Disclosure Requirements and Self-Incrimination**

Employees cannot be required to forgo their right against self-incrimination as a condition of employment. But if an employee is given immunity from prosecution, he may not refuse to answer questions specifically, directly and narrowly relating to the performance of his official duties.

5. Group Litigation

Group litigation, a form of expressive and associational conduct, can be regulated only for substantial reasons and only by specific regulations.

6. Support for Organizations

Regulations restricting support for lawful activities of organizations are constitutional if they are reasonable in imposing only a limited burden on associational rights and where the support endangers significant national security interests.

C. Freedom From Compelled Expression

The First Amendment protects the freedom to speak freely and the right to refrain from speaking. The constitutional right to associate and believe implies a correlative right to be free of compelled association and beliefs. If freedom to engage in expressive activity is significantly burdened by requiring support, compulsory fees or dues, or forced association, strict scrutiny applies.

1. Compelled Speech

“[F]reedom of speech prohibits the government from telling people what they must say.” However, conduct can be regulated even if speech is incidentally burdened.

2. Compelled Association

If an organization engages in “expressive activity,” being forced to accept certain persons as members may be inconsistent with that expression and can involve a significant burden on the right not to associate. However, mere forced interaction may not constitute association, which is focused largely on whether a group is forced to accept someone as a member.

3. Compulsory Fees and Dues

Being compelled to provide financial support for messages and programs that one opposes implicates the First Amendment right not to speak or associate. But reasonable fees and charges reflecting comparable benefits are generally constitutional.

4. Compelled Market Assessments

The freedom from compelled expression includes the right to refuse support for advertising with which one disagrees. However, the extent of the compulsion and the identity of the speaker bear on whether the First Amendment is violated.

D. The Electoral Process

Speech involving the electoral process is at the core of the First Amendment. The rigor of judicial review of electoral regulation depends on the extent to which the challenged provision burdens freedom of speech, association, and belief.

1. Political Speech and Association

Direct restrictions on what is said during an election campaign, including the electoral speeches of judges, are tested under strict scrutiny. The restriction must be necessary to achieve a compelling government interest or be a form of unprotected expression. But if there is only a “reasonable, non-discriminatory” restriction, the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

2. Regulating Political Parties

A heavy burden of justification is imposed when states seek to legislate extraterritorially by regulating national political parties. Limiting access to party primaries only to members of the party imposes a severe burden on association and is generally unconstitutional. But some limitations on access to primaries impose only a minimal burden on association and are reasonable and constitutional.

3. Limitations on Contributions and Expenditures

a. Campaign Spending

(1) Noncorporate Spending

Restrictions on *expenditures* by individuals and groups violate freedom of speech. Reasonable limitations on *contributions* by individuals and groups are permissible since such laws further the interest in avoiding the actuality or appearance of corruption.

(2) Political Party Spending

Expenditures by political parties that are independent of the candidate’s control may not be limited. But expenditures that are coordinated with a candidate are deemed “contributions”

subject to limitation. Regulation of soft money is a limitation on contributions. The regulation need only be “closely drawn to serve an important interest.”

(3) **Corporate Spending**

Government prohibition of a corporation’s independent expenditures for political speech is an unconstitutional restriction on a corporation’s First Amendment freedom of speech. Such a prohibition cannot be justified under strict scrutiny review. *Citizens United v. Federal Election Commission* (2010).

b. **Ballot Referenda**

Limitations on contributions in ballot referenda disputes are generally invalid.

c. **Disclaimer and Disclosure Requirements**

Disclaimer and disclosure requirements are subject to “exacting scrutiny,” which requires a “substantial relation between the requirements” and a “sufficiently important governmental interest.” They are upheld if they are narrowly drawn to inform the public about sources of election-related spending.

E. Speech in the Local Forum

When government regulates speech protected by the First Amendment because of harms associated with the speaker’s message, the law is presumptively invalid and must pass strict scrutiny. If the regulation is unrelated to content, a balancing test is used.

1. Controlling Speech Content

a. **The Clear and Present Danger Test**

Advocacy of illegal conduct, without more, is constitutionally protected. Only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action may the speech be suppressed because of its content.” *Brandenburg v. Ohio* (1969).

(1) **The Early Formulation**

The original test focused on the danger of illegal conduct under the circumstances at the time of the speech. An alternative test,

offered by Judge Learned Hand, focused on the language of incitement used by the speaker.

(2) The Doctrine Distorted

In *Dennis v. United States* (1951), the Court looked at the gravity of the evil discounted by its improbability in order to determine whether the First Amendment was violated.

(3) Advocacy vs. Incitement

Later, the Court retreated and declared that only advocacy of unlawful action was prohibited, not advocacy of abstract doctrine.

(4) The Modern Test: Incitement and Danger

The modern formulation of the clear and present danger test focuses on both the nature of the speech and the danger it presents. First, only incitement of unlawful conduct, not advocacy of abstract doctrine, can be punished. Second, only incitement to “imminent lawless action” which is “likely to incite or produce such actions,” may be reached. *Brandenburg v. Ohio* (1969).

(5) Advocacy Supporting Lawful Activity

But the government may be able to proscribe advocacy even of lawful activity if it reasonably determines that a limited regulation is needed to protect critical national security interests. *Holder v. Humanitarian Law Project* (2010).

b. The Fighting Words Doctrine

Government can impose content-based regulation when the speech constitutes fighting words—“which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire* (1942). Government has the power to punish the use of fighting words under carefully drawn statutes not susceptible of application to protected expression.

(1) Rationale

The fighting words doctrine is based upon the theory that these verbal assaults are of such slight social value as a step to truth as to merit little or no First Amendment protection.

(2) Overbreadth and Vagueness

Rather than defining what are fighting words, courts have often held that the relevant statute is not limited to fighting words and therefore is overbroad or so unclear as to be unconstitutionally vague.

(3) “Protected” Fighting Words

Even if a law regulates fighting words, if it discriminates on the basis of subject matter or viewpoint to create subcategories of fighting words, government must demonstrate that the discrimination is necessary to a compelling government interest. However, when the content discrimination does not create the possibility that government is seeking to drive certain ideas from the marketplace, strict scrutiny does not apply.

c. Hostile Audiences

If the source of the impending violence is a crowd of listeners hostile to the speaker’s lawful message, the police must proceed against the crowd and protect the speaker.

d. Offensive and Abusive Language

Government has no power to punish the use of words that are merely offensive, abusive, profane or vulgar.

e. True Threats

Statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group is a category of speech subject to regulation consistent with the First Amendment.

f. Equal Protection as a First Amendment Doctrine

Discrimination against certain speakers in the public forum usually involves content-based distinctions. Such content-based controls are subject to strict scrutiny.

g. Hate Speech

Some states, localities and public colleges have enacted laws or codes prohibiting expression that incites hatred of, or which is insulting or derogatory towards, traditionally vulnerable groups. *R.A.V. v. City of St. Paul* (1992) raises serious doubts about the

constitutionality of such laws. Laws which punish racially motivated harmful conduct or which simply enhance the penalty for crimes when inspired by racial bias have been held to be constitutional.

2. Regulating Public Property

There is a right of access and a right of equal access to the public forum. But not all government controlled property is part of the public forum. And speech in the public forum is subject to reasonable regulation.

If government regulates speech in the public forum, content-based regulation must fall into a category of proscribable speech or be justified using strict scrutiny. Content-neutral regulation of speech in the public forum is constitutional if the law is narrowly-tailored to serve an important governmental interest and leaves open alternative channels for communication of information.

If government regulates speech in a nonpublic forum, the regulation must be viewpoint-neutral and reasonable. "Reasonableness" usually means "rational;" courts tend to defer to the regulators.

a. The Nature of the Forum

A categorical approach to determining the nature of the forum draws a strict line between government's proprietary and regulatory functions. It gives the government almost unlimited authority to restrict speech on its property. The minority approach focuses on the objective, physical characteristics of the property and the actual public access and uses which have been permitted to determine if speech is compatible with the ordinary use of the forum.

(1) Traditional Public Forum

A traditional public forum is public property that has been used primarily for the free exchange of ideas and which has historically been associated with expressive activity. Government cannot bar all speech activity from a traditional public forum.

(2) Designated Public Forum

When the practice or policy of government is to open a nontraditional forum for public speech, it is a designated public forum.

(3) Limited and Nonpublic Forums

Public property which is not by tradition or designation a forum for public communication is a nonpublic forum. Selective access for a class of speakers who must individually obtain permission to enter creates only a limited forum.

(4) Privately–Owned Property

Only when privately owned property has taken on all the attributes of public property can it become part of the public forum. Speech on private property can be restricted by reasonable means, such as trespass statutes.

b. The Demand for Reasonable Regulation

(1) The *O'Brien* Standards

The Court often employs the *O'Brien* standards, which are essentially the same as the standards used for content-neutral regulation of the public forum, in reviewing public forum regulation.

(2) Determining Reasonableness

When government regulates speech in the public forum, it must be done without reference to the content of the speech. The regulation must be narrowly drawn to further a substantial government interest but need not be the least restrictive or least intrusive means of achieving the interest. It is sufficient if the regulation is a direct and effective means of achieving the government's important interests. The *O'Brien* test is the same test as that used for content-neutral regulation of the public forum.

(a) Speech Plus

The Court frequently has suggested that when expression takes the form of speech plus conduct, it is not entitled to the same degree of protection as pure speech.

(b) Sound Amplification

Communication in the public forum can be subjected to content—neutral regulation in the interest of privacy and tranquility.

(3) Protecting the Homeowner

Canvassing, handbilling and solicitation of homeowners are constitutionally protected but may be subjected to clear, narrowly-drawn, non-discriminatory regulation protecting the privacy of homeowners, *e.g.*, targeted picketing, or to avoid fraud.

(4) Licensing, Prior Restraint and the Duty to Obey

Prior restraints on access to the public forum, *e.g.*, permit systems, licensing, injunctions, are constitutional if they are clear, narrowly-drawn, content-neutral, time, place and manner regulations.

(a) Facial Validity—Vagueness and Overbreadth

Laws vesting discretion in administrators must be drawn with precision, specificity, and clarity. They must not vest excessive discretion in administrators.

(b) The Duty to Obey

If a statute is not a prior restraint, its constitutionality may be tested in an enforcement action. If a licensing law is valid on its face, it must be obeyed, and its application must be judicially determined. However, if a licensing law is transparently invalid, it may be ignored and its invalidity established at the time of prosecution.

(c) Procedural Standards

A content-neutral permit system must contain adequate standards to guide administrative discretion and render the permit official's actions subject to judicial review.

F. Symbolic Speech (Expressive Conduct)

When conduct is alleged to embody the idea itself, the Court employs a two-part inquiry: (1) Is the conduct communicative? (2) If so, is the speech protected under First Amendment law?

1. Is the Conduct Communicative?

The nature, factual context, and environment are examined to determine if the actor has an intent to communicate and whether the viewing audience would understand the communication.

2. Is the Speech Protected?

- a. Government regulation of expressive conduct is permissible if:
 - (1) it furthers an important or substantial government interest;
 - (2) the governmental interest is unrelated to the suppression of the idea; and,
 - (3) the incidental restriction on alleged First Amendment freedom is no greater than is essential to furtherance of that interest. It is sufficient if the means are direct and effective.
- b. If the regulation is based on the content of the symbolic speech, *e.g.*, flag burning, the most exacting scrutiny applies.

G. Commercial Speech

1. Regulation of commercial speech, *e.g.*, lawyer advertising, is constitutional if it satisfies a four-part test:
 - (1) the speech is actually or inherently misleading or related to unlawful activity since such speech is not protected by the First Amendment.
 - (2) the asserted government interest must be substantial (paternalistic regulation of truthful commercial speech is seldom sufficient).
 - (3) the government regulation must directly advance the governmental interest asserted. It must be shown that the potential harms are real and that the regulation will alleviate them in a material way.
 - (4) the regulation must not be more extensive than is necessary to serve that interest. It is sufficient if there is a "reasonable fit," but the Court has become increasingly demanding, requiring the use of available alternatives.
2. Note that the overbreadth doctrine does not apply to commercial speech. Its greater hardness and objectivity make a chilling effect on protected speech from overbroad regulations less likely.
3. Lawyer advertising of routine legal services is constitutionally protected commercial speech. While total bans on lawyer advertising are uncon-

stitutional, more limited regulations, *e.g.*, a ban on in-person solicitation for economic gain or a 30-day ban following an accident on direct mail solicitation of victims and relatives, have been upheld.

4. Regulation of advertising harmful activity (*e.g.*, smoking, gambling, alcohol) is subject to the *Central Hudson* test. While early cases suggested a deferential approach, later cases apply a “closer look” at paternalistic regulation of truthful commercial speech.

H. Freedom of the Press

The Press Clause is read with the Speech Clause as a single guarantee. The press enjoys no privileges or immunities beyond those afforded the ordinary citizen. While the media is subject to generally applicable laws, discrimination which threatens to suppress particular ideas is prohibited.

1. Defamation

a. Public Officials and Public Figures

Public officials and public figures may be awarded damages for publication of a defamatory falsehood only if they prove by clear and convincing evidence that the publication was made with actual malice, *i.e.*, subjective knowledge of its falsity or reckless disregard of its truth or falsity.

- (1) In all matters of public interest, the plaintiff also bears the burden of proving falsity.
- (2) A public figure may be an all-purpose public figure (*i.e.*, general fame or notoriety) or a limited purpose (vortex) public figure (*i.e.*, voluntary involvement in a public controversy).

b. Private Figures

- (1) So long as a state does not impose strict liability, it may define for itself the appropriate standard of liability for a publisher or broadcaster in defamation actions by a private figure.
- (2) Presumed and punitive damages cannot be recovered, absent a showing of actual malice, unless the subject of the defamation is a matter purely of private concern.

(3) The private figure plaintiff also bears the burden of proving falsity, at least where the statements involve matters of public concern.

c. **Opinion**

There is no constitutional privilege for opinion, although there cannot be liability if the publication cannot reasonably be interpreted as stating a defamatory fact.

2. Privacy

a. **False Light Privacy**

At least at present, a privacy action against the media cannot be maintained solely on the basis that the report was false—actual malice must be shown.

b. **Disclosure of Private Facts**

State laws providing civil damages for truthful publication of private facts are not necessarily unconstitutional. But accurate reporting of matters of public record is protected. And, if a newspaper lawfully obtains truthful information about matters of public significance, government may not constitutionally punish publication of the information absent a need to further a state interest of the highest order.

c. **Disclosure of Illegally Obtained Information**

Where the press plays no part in the illegal activity and the information is lawfully obtained, the disclosure of truthful information of public concern is constitutionally protected absent a need of the highest order.

3. Intentional Infliction of Mental Distress

Public officials and public figures must show that the defendant published with actual malice.

4. Newsgathering

Newsgathering is protected by the First Amendment. The protection available generally reflects a balancing of interests.

a. **Journalist's Privilege**

The First Amendment affords journalists no privilege, qualified or absolute, to refuse to give evidence to a grand jury at least so long as it is conducted as a good faith law enforcement effort. The Supreme Court has not decided whether a qualified First Amendment-based journalist's privilege is available in the context of other proceedings. Lower courts have recognized a First Amendment-based reporter's privilege in a variety of proceedings. The First Amendment does not prohibit civil damages awarded for breach of a journalist's promise of confidentiality.

b. **Access to Public Information and Institutions**

(1) **Prisons**

(a) Censorship of prisoners' outgoing mail is permitted only when the censorship is no greater than necessary to further a substantial public interest. Incoming and internal mail may be regulated if the law reasonably furthers legitimate penological objectives.

(b) A non-discriminatory, reasonable regulation limiting press interviews with prisoners is constitutional.

(2) **Judicial Proceedings**

(a) In determining if there is a right of public access, the courts consider whether the proceedings have traditionally been open and whether access would aid the functioning of the process.

(b) If there is a presumption of openness, closure must be based on specific findings that denial of access is essential to preserve higher values and that the closure order is narrowly-tailored to serve those interests.

c. **Newsroom Searches and Seizures**

The press, like the public, may be subjected to reasonable searches but warrant requirements are to be applied with searching exactitude.

d. **Cameras in the Courtroom**

Due process is not violated by broadcast media coverage of trials, absent a showing of prejudice to the defendant depriving him of a fair trial.

e. Copyright

The First Amendment does not protect the publishing of as yet unpublished copyrighted expression of a public figure from copyright liability.

f. Silencing Trial Participants

A rule prohibiting lawyers from making extrajudicial statements “if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding” is constitutional. *Gentile v. State Bar of Nevada* (1991).

g. Media Ride Alongs

Law enforcement officers violate the Fourth Amendment by allowing the media to accompany them into private homes in executing an arrest warrant.

5. Regulation of the Electronic Media

a. Regulating Broadcasting

Full First Amendment protection does not extend to broadcasting. Scarcity and the pervasiveness and influence of broadcasting allow greater content-based regulation and even government licensing. Compare telephone communications where a prohibition on indecent speech was held unconstitutional using strict scrutiny.

b. Regulating Cable Television

While the Court has not clearly held that cable is subject to the same standards as the print media, it has rejected application of the deferential broadcast standards, closely scrutinizing cable regulations.

c. Regulating the Internet

The Court has said that precedent provides no basis for qualifying the level of First Amendment scrutiny that should be applied to regulation of speech on the Internet. It is not a scarce resource and is not as invasive as broadcasting (it requires affirmative action to receive the communication and there are ways to avoid exposure). Overbroad regulation of indecent speech to minors was held unconstitutional.

6. Public Access to the Media

The First Amendment protects the public's right to receive suitable access to ideas and experiences.

a. Public Access to the Electronic Media

Government can require broadcasters to discuss public issues and provide balanced coverage or provide for a limited reasonable statutory right of access to broadcast time. But the First Amendment does not afford a constitutional right of public access to broadcasting.

b. Public Access to the Print Media

Since the First Amendment protects journalistic integrity and the editorial process, the print media cannot be compelled to publish that which they do not choose to publish.

I. Obscenity

1. No First Amendment Protection

Lewdness, indecency, offensiveness, and profanity are not excluded from First Amendment protection, but obscenity, which lacks social importance, is generally entitled to *no* protection under the First Amendment. But content-based discrimination within the category of obscene speech may be subject to strict scrutiny.

2. Defining Obscenity

Each element of a three-part test must be satisfied in order to define material as obscene:

- (1) whether the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest;
- (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and,
- (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California* (1973).

3. Applying the Standards

a. No National Community Standard

- (1) In determining pruriency and patent offensiveness, the jury may apply “contemporary community standards.” Community standards may be used in regulating the internet.
- (2) Sensitive persons, but not children, are part of the community.
- (3) No expert testimony is constitutionally required.
- (4) Jury determinations are subject to appellate review to assure constitutional requirements are met.

b. Defining the Relevant Audience

(1) The Average Person

Obscenity is to be judged by the effect of the material on a person of average susceptibility.

(2) Variable Obscenity: Minors and Deviants

But if the material is directed at a particular audience, obscenity may be judged by its probable effects on that audience.

c. The Demand for Specificity

- (1) *Vagueness*. If the three-part test is satisfied, a vagueness challenge to a law will fail.
- (2) *Overbreadth*. The conduct to be proscribed must be specifically defined by applicable state law, but this specificity may be satisfied by judicial construction of state law in conformity to the *Miller* obscenity standards. Only the overbroad provisions of the statute are to be invalidated.
- (3) *Pandering*. In determining whether the material is obscene, the circumstances of the presentation and dissemination of the material may be considered.
- (4) *Serious Value*. “Serious” value (which is not judged by local community standards) can save material from being labeled obscene.

4. Privacy and Obscenity

The mere possession of obscene material cannot constitutionally be made a crime but possession of child pornography can be criminalized.

5. Civil Control of Obscenity and Indecency

- a. Zoning laws, usually treated as time, place and manner regulations, must be reasonably designed to achieve a substantial government interest and leave open reasonable alternative channels of communication.
- b. Civil controls of obscene material, *e.g.*, nuisance laws, must satisfy the three-part *Miller* test; indecent expression is protected. But if a regulation is directed to unlawful activity and does not significantly burden protected expression, only rationality is required.

6. Broadcasting and Indecency

FCC regulation of indecent, although not obscene, material in broadcasting is constitutional. However, regulation of indecent speech in other media contexts has been reviewed using more demanding standards and has often been held unconstitutional.

7. Child Pornography

Sexually indecent live productions or reproductions of sexually indecent live productions involving minors is not protected speech. Knowing distribution of such material may be criminally punished. But “virtual obscenity,” not involving the actual use of minors in production of the materials, may not be proscribed unless obscenity standards are satisfied. However, the pandering or transaction of materials that the owner believes, or attempts to make others believe, contain real children can be made criminal.

8. Administrative Censorship

a. Procedural Fairness

Prior restraints on publication, alleged to be obscene, are burdened procedurally. Content-based censorship must satisfy the following requirements:

- (1) burden on censor;
- (2) prompt judicial proceeding;
- (3) censor must secure judicial approval.

b. **Search and Seizure**

While seizure of a single copy of an allegedly obscene work, pursuant to a warrant for use as evidence is permissible even without a prior adversary determination of obscenity, large scale seizure for purposes of suppression must be preceded by a determination of obscenity.

J. Special Contexts

In certain “restricted environments,” like the military, government employment, schools and prisons, and subsidized speech, First Amendment protection of expression is diminished.

1. Government Employees and Independent Public Contractors

- a. First, when government employee speech or the speech of contractors involves matters of private interest rather than public concern, the courts exercise deference and apply a rationality test. This limitation applies to both the Speech and Petition Clauses.
- b. Second, in determining if a restraint on speech on matters of public concern by government employees and contractors is constitutional, the courts normally balance the interests of the employee as citizen against the government’s interest as employer. The courts look at the facts as the employer reasonably found them to be after investigation. However, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
- c. The employee or contractor must prove that the protected activity was a cause of the adverse government action.

2. The Academic Forum

a. **Library Censorship**

The First Amendment does impose limits on library book removal in an effort to limit student access to offensive ideas.

b. Student Speech

- (1) Schools can bar speech or expressive action which intrudes on the work of the schools and their educational mission or which violates the rights of other students. Schools can also restrict student speech that reasonably can be understood as promoting illegal activity, at least in the context of illegal drug use.
- (2) Schools are public forums only if school officials have by policy or practice opened those facilities for general public use or for use by some segment of the public.
- (3) Schools can regulate “school sponsored” student speech that occurs in “curricular” activities if there is some pedagogical reason for the regulation.

c. Academic Freedom

The First Amendment embraces a concept of academic freedom but it does not protect against all incidental burdens.

3. Subsidized Speech

When government acts as a speaker or funds a selected private group to express its message, it need not fund alternative viewpoints. When government provides grants to selected speakers, *e.g.*, in creating a limited public form, it cannot discriminate on the basis of viewpoint. The Unconstitutional Conditions Doctrine applies.

IX. FREEDOM OF RELIGION

The First Amendment guarantees of free exercise of religion and freedom from religious establishment are applicable to the states as part of Fourteenth Amendment due process liberty. The basic command is government neutrality.

A. The Meaning of the Establishment Clause

The Establishment Clause is not limited to a command of equal treatment of religions. While the Court has increasingly asked whether the challenged law *endorses* religion, the three-part *Lemon* test is usually used to determine if the Establishment Clause is violated. *Lemon v. Kurtzman* (1971):

- (1) the government action must have a secular legislative purpose;

- (2) the primary effect of the government action must neither advance nor inhibit religion (this often involves consideration of whether there is an endorsement or coercion of religion);
- (3) the government must not foster an excessive entanglement with religion.

1. Religion in the Schools

a. Released Time

While released time for religious education is a constitutional accommodation of religion, on-premises religious instruction has the primary effect of advancing religion.

b. Prayers, Bible Reading, and Devotional Exercises

Required prayers, including moments of silent prayer, even when non-denominational and where objectors are excused, have the purpose and primary effect of aiding religion.

c. Teaching Religious Values

While a state has broad discretion over its curriculum and may foster the teaching of basic values and tradition, a state-sponsored program violates the Establishment Clause if it is primarily religious in character or has the purpose of advancing religion.

d. Equal Access

Discrimination among groups in the use of the public forum based on the fact that they are engaged in religious expression can be justified only by a compelling government interest. While compliance with the Establishment Clause can be a compelling interest, the *Lemon* test must be satisfied, e.g., there is an endorsement of religion. Laws promoting equal access to public schools by religious groups do not violate the Establishment Clause.

2. Financial Assistance to Religious Schools

a. Public Benefits

If the state provides public benefits to private school children only for the secular purpose of serving the public welfare, the incidental benefit to religion does not condemn the program.

b. **Financial Aid for Schools**

While financial aid usually is considered to be for a secular purpose, it may be found to have a primary effect that is sectarian, involving excessive government entanglement with religion. Specifically the Court today asks whether the program results in indoctrination, whether it defines recipients by reference to religion, and whether the aid creates excessive entanglement.

(1) **Elementary–Secondary v. Higher Education**

Since pupils in lower levels of education are likely to be more impressionable and political divisiveness is more common, aid to such schools is more likely to be held unconstitutional.

(2) **Testing, Recordkeeping, and Other Services and Equipment**

The dangers of religious indoctrination from a particular form of aid and the location where it occurs influence the constitutional validity of the program. But instruction by public employees on the premises of sectarian schools where safeguards were provided against indoctrination was upheld. A secular, neutral and nonideological program is constitutional.

(3) **Tax Relief and Tuition Benefits**

Aid directly to the religious institution rather than to citizens is more likely to be held unconstitutional but not all aid that directly benefits the educational activities of sectarian schools is unconstitutional. Financial support directed only to parents having children in private schools has the primary effect of aiding religion. A tuition benefits program (vouchers) which is neutral and which provides true free choice to parents on how tuition assistance benefits are to be directed is constitutional.

3. Other Establishment Contexts

a. **Blue Laws**

Thus far, Sunday closing laws have been upheld against Establishment Clause challenge on grounds that they serve the secular purpose of promoting a common day of rest.

b. **Tax Exemptions**

Tax exemptions for religious and other charitable institutions are constitutional given the historical experience with such benefits. But

an exemption from sales and use taxes solely for religious activities has been held violative of the Establishment Clause.

c. **Social Welfare Programs**

If religious institutions are incidentally benefitted as participants in a generally applicable, secular governmental social welfare program, there is no Establishment Clause violation. However, if a significant portion of funds go directly to sectarian institutions, the Establishment Clause could be violated.

d. **Legislative Prayer**

History and tradition support the conclusion that opening prayer at the state legislature, led by government paid clergy, does not violate the Establishment Clause.

e. **Public Displays**

Public recognition of traditional holidays is permissible when the religious effect is only indirect, remote, and incidental. However, if the display endorses religious beliefs, the anti-establishment principle is violated.

f. **Denominational Preference**

When government provides benefits to only selected religions, it must demonstrate that the law is narrowly tailored to further a compelling public interest. The *Lemon* test must be satisfied.

g. **Internal Church Disputes**

While courts may not decide purely internal church disputes, they can decide legal questions when they involve only application of neutral principles of law.

h. **Institutionalized Persons**

A federal law intended to protect religious exercise by institutionalized persons was held to be a permissible accommodation of religion. It did not violate the Establishment Clause.

B. The Meaning of the Free Exercise Clause

If a law directly and significantly burdens the free exercise of religion by compulsion or coercion, government must demonstrate a compelling or

overriding government interest. The availability of less burdensome alternatives will be considered. General First Amendment law will be applied.

A law that is generally applicable and religion-neutral, which imposes only incidental burdens on a particular religion, will not be judged by strict scrutiny. Incidental discriminatory impact on a religious practice or belief, even if it is significant, is subject only to rationality review since the First Amendment right is not implicated. *Employment Div. v. Smith* (1990).

1. Belief–Conduct

While religious belief is absolutely protected, religious conduct must be accommodated to valid government interests.

2. Centrality and Sincerity

While the courts cannot probe the truth or falsity of a religious belief, they can probe whether the belief is sincerely held. While courts have also probed the centrality of a belief or practice to a religion, there are indications that this approach may be eliminated from free exercise review.

3. General Indirect Burdens

Absent some significant burden on a claimant's free exercise of religion, strict scrutiny is not appropriate.

4. Blue Laws

Thus far, the Court has upheld Sunday closing laws against free exercise challenges by characterizing the burden as only an indirect economic hardship, outweighed by the public interest in a uniform day of rest.

5. Conditioning Public Welfare Benefits

The government cannot condition the receipt of public benefits on the surrender of constitutional rights, such as free exercise of religion. Loss of such benefits constitutes a significant burden on religion, requiring government to demonstrate a compelling interest which cannot be satisfied by less burdensome means. Benefits can be denied if this is only an incidental effect of applying a generally applicable and otherwise valid religion-neutral criminal law.

6. **Compelled Action**

Outside of the military context, when government requires an individual to engage in practices contrary to central tenets of his or her religion, only the showing of a compelling interest will justify such a direct (significant) burden on religion.

7. **Noncoercive Laws**

If the government regulation has the incidental effect of making it significantly more difficult to practice a religion, but does not compel or coerce action contrary to a religious belief, strict scrutiny does not apply. Government is not required to accommodate its internal practices to religious needs and desires.

8. **Proscribed Religious Practices**

Strict scrutiny is not used for a generally applicable, religion-neutral criminal law which has the incidental effect of prohibiting a religious practice. Application of the law is constitutional, even if the practice is central to a religion. Congressional legislation declaring that strict scrutiny does apply even to generally-applicable laws, if the free exercise of religion is significantly burdened, was held unconstitutional as applied to state laws because Congress lacked remedial power under the Fourteenth Amendment, § 5, to enact the law. *City of Boerne v. Flores* (1997). However, the congressionally-mandated strict scrutiny test was applied to actions of the federal government. The Government failed to demonstrate a compelling interest justifying prohibition of the groups communal use of *hoasca*, a banned hallucinogen. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006).

C. **The Meaning of Religion**

1. **Defining Religion**

While “religion” is not limited to theistic beliefs and practices, the Court has not yet defined the outer limits of religion.

2. **Conscientious Objection—Parallel Beliefs**

In conscientious objector cases, the Court has asked whether a given belief which is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.

X. STATE ACTION

Most of the rights and liberties protected by the Constitution require a showing of “state action.” It is government wrongdoing, not private misconduct, that is the focus of constitutional judicial review.

A. The State Action Requirement

1. The Civil War Amendments

While the Thirteenth Amendment prohibits the imposition of slavery or involuntary servitude regardless of its source, the Fourteenth and Fifteenth Amendments, at least in the absence of congressional legislation, require that governmental action be present in order to establish a violation.

2. The Present Standard—State Responsibility

It is only when government is so significantly involved in the challenged action that it can be said that government is actually responsible for it, that the state action threshold is satisfied. There must be a close nexus between government and the particular action being challenged. These requirements have become harder to satisfy.

B. Official Misconduct and Joint Action

1. Action Contrary to State Law

Laws and official action pursuant to law involve state action. Even if a state official acts contrary to state law, the state action requirement is satisfied since government has put the official in a position of power.

2. Public Administration

Official supervision, control, or management of a facility, even where the government is only indirectly entwined in the management, constitutes state action.

3. Joint Action

If a private individual engages in joint activity with government officials, state action is established.

C. Public Functions

If performance of a function is traditionally and exclusively a function of government, it will constitute state action, *e.g.*, white primaries, company towns.

D. Significant State Involvement

1. Symbiotic Relationships

In weighing the facts and circumstances to determine the significance of a public-private relationship, the existence of mutual benefits and supports (*i.e.*, symbiotic relationship) is critical. If the acts of the private actor may fairly be treated as the acts of the government itself, *i.e.*, they are entwined, there is state action.

2. Government Regulation and Licensing

Even licensing and extensive government regulation of a private activity will not, without more, constitute state action.

3. Government Financial Support

Financial support of a private activity, unless it makes the government responsible for the challenged private action by encouraging, authorizing, or approving it, does not constitute state action.

E. Encouragement, Authorization, and Approval

1. Neutral Law Enforcement

Neutral state enforcement of state laws, without a showing of encouragement, authorization, or approval of the particular action being challenged, does not constitute state action.

2. Involuntary Discrimination

However, even a neutral enforcement of state laws cannot be used to force racial discrimination on unwilling parties.

3. Significant Encouragement

When the challenged private actions are overtly or covertly encouraged by government, state action is present.

4. Authorization and Approval

- a. While acquiescence in conduct is not enough to establish state action, government compulsion or authorization of the particular act being challenged, whereby the state becomes responsible for it, is state action.
- b. The Court has indicated that the challenger must show that the action being challenged is borne of a state policy, rule, right or privilege, and that the party charged with the action reasonably may be said to be acting for the state.

XI. CONGRESSIONAL LEGISLATION IN AID OF CIVIL RIGHTS AND LIBERTIES

A. In General: Federal Legislative Jurisdiction

1. Pursuant to the commerce and spending powers, Congress has power to legislate for social welfare purposes, including the protection of civil rights and liberties.
2. Congress can also legislate to protect “federal rights” against state or private interference.
3. The Civil War Amendments and a number of other amendments grant Congress power to enact legislation, which is reasonably appropriate, to enforce the rights secured by the amendments.

B. Enforcing the Thirteenth Amendment

1. Under the Thirteenth Amendment, § 2, Congress has power to enact legislation which is rationally related to eliminating all badges and incidents of slavery in the United States.
2. Pursuant to the power, Congress can legislate against even private conduct.

C. Enforcing the Fourteenth Amendment

The Fourteenth Amendment, § 5, authorizes Congress to enact legislation which is rationally related to protecting the privilege and immunities, due process and equal protection guarantees.

1. Scope of the Enforcement Power

- a. The enforcement power is a remedial or corrective power, not a power to define the substantive rights.
- b. There must be a congruence and proportionality between the injury to be prevented or remedied and the means Congress has used.
- c. Congress may prohibit conduct which is not itself unconstitutional and even regulate conduct in areas reserved to the states.

2. Constitutional Limits on Enforcement Powers

Congress cannot violate other constitutional provisions in exercising its enforcement powers. The Tenth Amendment, however, does not limit Congress' powers under the Fourteenth Amendment, § 5. Congress can abrogate state sovereign immunity only if the law is congruent and proportional to the state's constitutional violation. Such a law is more likely to be upheld in situations where the state would be subject to more demanding standards of judicial review than rationality review.

3. Private Action

Under the Fourteenth Amendment, § 5, Congress is limited to remedying or preventing unconstitutional State action, not private misconduct.

D. Enforcing the Fifteenth Amendment

The Fifteenth Amendment, § 2, gives Congress power to enact legislation which rationally implements the Fifteenth Amendment's prohibition against racial discrimination in voting.