

## CONSTITUTIONAL LAW

Strict Scrutiny → Must be necessary to achieve a compelling gov't purpose

Intermediate Scrutiny → Must be substantially related to an important gov't purpose

Rational Basis → Must be rationally related to some legitimate gov't purpose

## THE JUDICIAL POWER – HEARING JUSTICIABLE CASES

## 1. ADVISORY OPINIONS

- a. A federal court may not render an advisory opinion. There must be specific present harm or threat of specific future harm.
- b. Parties must show:
  - i. they have engaged in, or wish to engage in, specific conduct,
  - ii. and that the challenged action poses a real and immediate danger to their interests.

## 2. RIPENESS

- a. A case is not yet ripe if there is no immediate threat of harm.

## 3. MOOTNESS

- a. A case is moot if there is no longer any immediate threat of harm.
  - i. Exception:
    1. Controversies capable of repetition, yet evading review, are not moot.
    2. Class actions – if issue becomes moot as to class representative, the class action can still continue if other members' claims are still viable.

## 4. STANDING

- a. A person must have a concrete stake in the outcome of the case to have standing.
  - i. Elements:
    1. Injury
      - a. She has been or will be *directly* and *personally* injured by the allegedly unlawful gov't action. Injury need not be economic.
    2. Casuation
      - a. There must be a causal connection between the injury and the conduct complained of.
    3. Redressability
      - a. A decision in the litigant's favor must be capable of eliminating the harm.
  - b. Common standing issues
    - i. Standing to enforce gov't statutes
      1. Available only if P is within the "zone of interests" Congress meant to protect.
    - ii. Third-party standing to assert the rights of others
      1. Available only when:
        - a. It is difficult for the third party to assert her own rights OR
        - b. A special relationship exists (i.e. doctor-patient)
    - iii. No Taxpayer or Citizen standing
      1. A person cannot get standing merely as a taxpayer or citizen of the U.S. → interest too remote.
      2. Exception: A taxpayer can challenge taxing and spending measures on First Amendment Establishment Clause grounds (spending to establish religion)
        - a. SPENDING power must be involved – not giving surplus property to a religious group.

## 5. ADEQUATE AND INDEPENDENT STATE GROUNDS

- a. The Supreme Court will not hear an appeal if the decision rested on adequate and independent state law grounds, even if federal issues are involved.

## 6. ABSTENTION

- a. Unsettled question of state law
  - i. A federal court will allow states to interpret their own laws first
- b. Pending state proceedings
  - i. Federal courts will not enjoin pending state criminal proceedings (and in some cases pending civil proceedings involving an important state interest).

## 7. POLITICAL QUESTIONS

- a. Criteria for whether it's a political question:
  - i. A "textually demonstrable" constitutional commitment of the issue to the political branches

- ii. Lack of manageable standards for judicial resolution
    - iii. A need for finality in the action of the political branches
    - iv. Difficulty or impossibility of devising effective judicial remedies
  - b. Typical cases that ARE political questions:
    - i. “Republican Form of Gov’t” clause of Art. IV
    - ii. Challenges to congressional procedures
    - iii. President’s conduct of foreign policy
  - c. Typically NOT political questions:
    - i. Legislative apportionment
    - ii. Arbitrary exclusion of a congressional delegate
    - iii. Production of presidential papers and communications
- 8. ELEVENTH AMENDMENT
  - a. Federal courts may not hear a private party’s claims against a state government.
    - i. Exceptions:
      - 1. D state consents
      - 2. Actions against state officers for injunctions or personal damages, but not damages that will come out of state coffers.
  - b. Does not bar suits against county or city gov’ts.
  - c. United States gov’t may sue a state w/o its consent – BUT a state may not sue the US gov’t.
  - d. State gov’ts may sue each other.

## THE LEGISLATIVE POWER

- 1. SOURCES OF POWER
  - a. COMMERCE CLAUSE
    - i. Congress has the exclusive power to regulate all foreign and interstate commerce.
    - ii. Can regulate anything that has a “substantial effect” on interstate commerce.
  - b. SPENDING
    - i. Congress may spend for any public purpose → “for the common defense and general welfare.”
  - c. TAXING
    - i. For tax to be valid, must bear some reasonable relationship to revenue production – can’t be a veiled attempt to regulate.
  - d. WAR
    - i. Power to declare war extends to economic regulations in the postwar period to avoid wartime disruptions.
    - ii. Can raise armies, create military tribunals
  - e. INVESTIGATORY POWER
    - i. Congress can investigate anything it has power to legislate over.
  - f. PROPERTY POWER
    - i. Congress has power over the properties of the U.S.(including Washington D.C.)
    - ii. Congress can also take property for public use (eminent domain)
  - g. CITIZENSHIP
    - i. Congress can establish uniform rules of naturalization.
  - h. POWER TO OUTLAW BADGES OF SLAVERY
    - i. 13<sup>th</sup> Amend – so can outlaw private action discriminating against blacks
- 2. NECESSARY AND PROPER CLAUSE
  - a. Power to make all laws “necessary and proper” to carrying out its enumerated powers.

## THE EXECUTIVE POWER

- 1. DOMESTIC POWERS
  - a. Appoint all ambassadors, consuls, and Supreme Court justices w/ Senate approval
  - b. Right to remove all high-level, purely executive officers
    - i. BUT Congress may limit President’s power to remove all other appointees (cannot be absolute bar, but can be for cause)
  - c. Right to pardon for federal crimes
  - d. Veto acts of congress (can be overridden by 2/3 vote of each house)
- 2. EXECUTIVE ORDERS
  - a. Most likely to be valid if with consent of Congress
  - b. If against express will of Congress – may be invalid as violating separation of powers

## 3. EXTERNAL AFFAIRS

- a. Pres cannot declare war, but can deploy armies
- b. Pres has supreme power to represent the U.S. in foreign relations.
- c. Power to enter into treaties w/consent of 2/3 of the Senate.
- d. Executive agreements = agreements btwn Pres and a foreign head of state
  - i. Need not get consent of Senate
  - ii. Can be used for any purpose that treaties can be used for

## STATE v. FEDERAL SYSTEM

## 1. PREEMPTION

- a. If a state law conflicts with a federal law, the state law is invalid.
- b. If there is not a federal law on point, but the state law prevents achievement of a federal objective, it will be invalidated.
- c. If there is not a federal law on point, but if Congress intended to “occupy the field,” the state law will be invalidated.
  - i. Factors showing intent to occupy the field:
    - 1. Comprehensive federal scheme
    - 2. Creation of an agency to administer the laws
    - 3. Historically federally-regulated subject matter
    - 4. Need for uniform national regulation

## 2. INTERSTATE COMPACT CLAUSE

- a. If states make an agreement that increases their power at the expense of federal power (banding together) it must get congressional approval.

## 3. TAXATION/REGULATION ISSUES

- a. Federal taxation/regulation of state entities
  - i. Valid if applies to both public and private sector (i.e. minimum wage laws)
  - ii. Invalid if applied ONLY to state activity – violates 10<sup>th</sup> Amendment (i.e. forcing states to take title to nuclear waste)
    - 1. Exception: Civil rights
    - 2. Exception: Conditions on federal grants, if state has option to accept or decline the \$\$\$
  - iii. States may not commandeer state officials to enforce federal laws (gun law case)
- b. State taxation of federal gov’t
  - i. Nondiscriminatory, indirect taxes are permissible if they do not unreasonably burden the federal gov’t (i.e. state tax on federal workers’ wages)
  - ii. States may not regulate federal workers while performing their federal functions.

4. PRIVILEGES & IMMUNITIES CLAUSE, ART. IV AND 14<sup>TH</sup> AMENDMENT

- a. Difference:
  - i. Art IV – prohibits discrimination by a state against non-residents.
  - ii. 14<sup>th</sup> Amend – states may not deny their citizens privileges & immunities of *national* citizenship (i.e. right to travel)
- b. Corporations and aliens not protected here
- c. Only “fundamental liberties” are protected:
  - i. Civil liberties
  - ii. Right to earn a livelihood (commercial activity)
- d. A law that discriminates against out of staters may be valid if:
  - i. The state has a substantial justification for the different treatment, AND
  - ii. There are no less restrictive means to solve the problem.
  - iii. NOTE: Protecting in-staters’s interest is not a justifiable reason.

## 5. DORMANT COMMERCE CLAUSE

- a. A state may not *discriminate against* or *unduly burden* interstate commerce.
- b. To be valid, a state regulation that *substantially* affects interstate commerce:
  - i. Must pursue a legitimate end,
  - ii. Must be rationally related to that legitimate end,
  - iii. And the regulatory burden imposed by the state on interstate commerce, and any discrimination against interstate commerce, must be outweighed by the state’s interest in enforcing the regulation.
  - iv. NOTE: If no *substantial* effect, no need to apply this test → law is valid.
- c. For laws that discriminate against out of staters:
  - i. Law will be invalid UNLESS

- ii. It furthers an important, noneconomic state interest AND
- iii. There are no reasonable, nondiscriminatory alternatives, OR
- iv. The state is a market participant.
- d. For laws that treat in-staters and out-of-staters alike, but which burden interstate commerce (truck tires):
  - i. Will be valid UNLESS
  - ii. The burden outweighs the promotion of a legitimate state interest, AND
  - iii. There are no less restrictive alternatives available.
- e. A TAX that affects interstate commerce will be valid IF:
  - i. There is a substantial nexus to the taxing state (significant or substantial activity in the taxing state) AND
  - ii. The tax is fairly apportioned according to a rational formula, AND
  - iii. The tax is fairly related to the services or benefits provided by the state.
- f. Commodities in interstate transit may NOT be taxed along the way, except for when they start and where they begin.
  - i. Instrumentalities of interstate commerce (trucks, planes) may be taxed if:
    - 1. They have a taxable situs in the state (like an airline hangar) AND
    - 2. The tax is fairly apportioned (big users pay more than small users).

## INDIVIDUAL RIGHTS

### 1. SOURCES

- a. 14<sup>th</sup> Amendment applies the Bill of Rights to the states
- b. The 13<sup>th</sup> Amendment prevents badges of slavery and involuntary servitude
- c. The 14<sup>th</sup> Amendment prevents states from depriving any person of life, liberty or property without due process of law.
- d. 15<sup>th</sup> Amendment prevents both federal and state gov'ts from denying a citizen the right to vote b/c of race.
- e. Sec. 5 of the 14<sup>th</sup> Amendment gives congress the power to adopt appropriate legislation to enforce rights guaranteed by the Bill of Rights.
- f. Under the Commerce Clause, Congress can prohibit private racial discrimination that might have a substantial effect on interstate commerce.
- g. Congress also has inherent power to protect the rights of nat'l citizenship.

### 2. STATE ACTION – ANALYZE FIRST

- a. There will be state action if:
  - i. The entity is performing a traditionally exclusive public function (even if the state itself is not doing it) OR
  - ii. The state affirmatively facilitates, encourages, or authorizes acts of discrimination by its citizens.

### 3. SPEECH

#### a. PRIOR RESTRAINT ON SPEECH

- i. Heavy burden to justify
- ii. Must show that some *special societal harm* will result w/o the prior restraint.
- iii. Any *system* for allowing prior restraints must:
  - 1. Have standards that are narrowly drawn, reasonable, and definite AND
  - 2. Injunction must promptly be sought, AND
  - 3. There must be prompt and final determination of the validity of the restraint.

#### b. VAGUENESS OR OVERBREADTH

- i. If a regulation punishes a substantial amount of protected speech in addition to its plainly legitimate sweep it is invalid as overbroad.
  - 1. If the regulation is not *substantially* overbroad, it can be enforced against persons engaging in activities that are NOT constitutionally protected.
- ii. If a reasonable person could not tell what speech is prohibited and what is not, it is unconstitutionally vague.
  - 1. This is also the case with laws that give unfettered discretion to officials in applying them.

#### c. CONTENT-NEUTRAL REGULATION

- i. Content neutral regulations must:
  - 1. Advance important interests unrelated to the suppression of speech AND
  - 2. must not burden substantially more speech than necessary to further those interests.

#### d. TIME, PLACE, MANNER RESTRICTIONS

- i. For public forums, must be:
  - 1. Content-neutral,

2. Are narrowly-tailored to serve an important gov't interest, AND
3. Leave open alternative channels of communications.
- ii. For non-public, gov't-owned forums, must be:
  1. Viewpoint-neutral AND
  2. Reasonably related to a legitimate gov't purpose.
- e. COMMERCIAL SPEECH
  - i. Commercial speech is covered by the 1<sup>st</sup> Amend, but may be regulated if the regulation:
    1. Directly advances
    2. A substantial gov't interest
    3. In a way that is reasonably tailored to achieve that objective.
  - ii. BUT if it proposes unlawful activity or is fraudulent, no protection
- f. SYMBOLIC ACTS AS SPEECH
  - i. Can be regulated if:
    1. Gov't has an important interest in the regulation independent of the speech aspects AND
    2. The incidental burden on speech is no greater than necessary.
- g. CAMPAIGN CONTRIBUTIONS AS SPEECH
  - i. Gov't can limit election campaign contributions IF:
    1. The rules are closely drawn to match a "sufficiently important interest."
  - ii. Laws may limit donations to a political *candidate* BUT not donations to supporting a political *issue* (i.e. ballot referendum).
  - iii. Laws may not limit the amount a candidate or group can spend on a campaign.
- h. SPEECH THAT DOESN'T GET 1<sup>ST</sup> AMEND PROTECTION
  - i. Fraudulent/misrepresentational commercial speech
  - ii. Commercial speech that proposes an unlawful activity
  - iii. Speech that creates a clear and present danger of imminent lawless action
    1. Must show that imminent illegal conduct is **LIKELY** and
    2. that the speaker **INTENDED** to cause it.
  - iv. Fighting words
    1. Personally abusive words that are likely to incite imminent physical retaliation in an average person
    2. BUT can't punish only fighting words of a certain viewpoint (i.e. insults on the bases of race)
  - v. Obscenity
    1. Appeals to the prurient interest in sex, using a local standard,
    2. Is patently offensive and an affront to contemporary local standards AND
    3. Lacks serious artistic, literary, political, or scientific value, using a nat'l reasonable person standard.
  - vi. Non-obscene, adult material as to children
    1. Gov't can't completely ban non-obscene material b/c children might get it, BUT can restrict sale to children.
    2. Also, can completely ban child porn even though not obscene.
  - vii. Liquor-related ads
    1. Under the 21<sup>st</sup> Amend, states have broad power to regulate liquor. Regs in this area usually set aside only if irrational.
4. FREEDOM OF ASSOCIATION
  - a. Infringement of this right is OK if:
    - i. It is justified by a compelling state interest, unrelated to the suppression of ideas, AND
    - ii. It's the least restrictive means of achieving that interest.
  - b. Loyalty oaths
    - i. OK if they are not overbroad or vague:
      1. Promise not to advocate overthrow of the gov't is *too vague*
      2. Promise not to advocate **UNLAWFUL** overthrow of the gov't is **NOT** too vague
  - c. Restrictions on behavior of gov't employees
    - i. Can prohibit them from taking an active part in political campaigns
    - ii. Cannot fire them for belonging to a political party (except where it's relevant, i.e. working for a political campaign).
  - d. Disclosure of membership lists
    - i. Gov't cannot force disclosure of every member in exchange for a gov't benefit.

5. RIGHT TO PROPERTY – TAKINGS CLAUSE (5<sup>TH</sup> AMEND)

- a. Allows gov't to take private property for public use, if just compensation is paid.
  - i. Public use = rationally related to a legitimate public purpose
- b. Taking vs. merely burdening w/ regulation
  - i. An actual, physical appropriation or physical invasion is almost always a taking.
  - ii. Use restrictions that deny ALL economic use of the land are a taking.
  - iii. Regulations that merely decrease the value of property may or may not be a taking, the court will apply a 3-part balancing test:
    - 1. The social goals to be promoted
    - 2. The diminution in value to the owner
    - 3. The owner's reasonable expectations regarding the property
- c. If there is a taking, the gov't must pay FMV as determined by the *loss* to the owner, not the *gain* to the gov't.

## 6. RELIGION

## a. ESTABLISHMENT CLAUSE

- i. Prevents gov't from preferring one religion over another UNLESS:
  - 1. It is narrowly tailored
  - 2. To promote a compelling interest (interest almost never compelling)
- ii. Gov't religious displays or other endorsements of religion are OK ONLY if it:
  - 1. Has a secular purpose,
  - 2. Has a primary effect that neither advances nor inhibits religion, AND
  - 3. Does not produce excessive gov't entanglement w/ religion.
- iii. Grants to religious schools
  - 1. The Court will apply the 3-part test above *more strictly* if the school involved is a grade or high school, than colleges etc.

## b. FREE EXERCISE CLAUSE

- i. This clause prevents the state from punishing someone on the basis of religion.
- ii. Cannot deny benefits or impose a burden based on religion absent a *compelling interest* – BUT the Supreme Court has NEVER found an interest to be compelling enough.
- iii. Laws of general application can be applied to religious people UNLESS it was specifically designed to interfere with religion (goat sacrifice v. peyote).
  - 1. No requirement that they be given exemptions.
- iv. Gov't cannot deny unemployment benefits to people who are forced to quit their jobs for religious reasons.

## 7. RETROACTIVE LEGISLATION

## a. IMPAIRMENT OF CONTRACT

- i. Only stop states from enacting a law that substantially impairs contracts already in existence – feds aren't bound by this.

## b. EX POST FACTO LAWS

- i. A state cannot retroactively change *criminal* laws if it:
  - 1. Makes criminal an act that was innocent when done
  - 2. Prescribes greater punishment than when the act was done
  - 3. Reduces the evidence required to convict a person from when the act was done

## c. BILLS OF ATTAINDER

- i. A legislative order to criminally punish someone (without a trial)

## 8. EQUAL PROTECTION

Remember! Equal Protection only limits STATE action... but grossly unreasonable discrimination by the FEDERAL gov't may violate Due Process.

## a. CLASSIFICATION OR FUNDAMENTAL INTEREST

## i. FUNDAMENTAL RIGHT

- 1. Burdens a fundamental right for some but not others → Strict Scrutiny
  - a. If it burdens a fundamental right for EVERYONE it's a substantive due process problem (still strict scrutiny).
- 2. Fundamental rights:
  - a. Right to interstate travel
    - i. Includes right to be treated equally after moving to a new state
  - b. Right to vote
    - i. Residency requirements of 30 days or less are OK

- ii. Requirement of property ownership usually not OK (except water dist. Etc.)
        - iii. Restrictions on right to get on ballot → Must be a reasonable, nondiscriminatory means of promoting important state interests.
      - c. Right to privacy
        - i. Marriage
        - ii. Use of contraceptives
        - iii. Abortion
        - iv. Sexual relations
        - v. Right to raise one's children a certain way
        - vi. Right to read obscene material in one's home
    - 3. Special rules for abortion:
      - a. Pre-viability → No undue burden on right to abortion
      - b. Post-viability → May prohibit abortion unless woman's life is threatened
  - ii. CLASSIFICATION
    - 1. Suspect class → Strict scrutiny
      - a. Race
      - b. National Origin
      - c. Legal aliens
        - i. EXCEPTION: participation in gov'tal processes/public policy (cops, teachers)
    - 2. Quasi-suspect → Intermediate scrutiny
      - a. Gender (gov't must also show an *exceedingly persuasive justification* for the law)
      - b. Legitimacy
      - c. Education for illegal alien children
    - 3. Other classes → rational basis
      - a. National origin IF issue is participation in gov'tal processes
      - b. Illegal aliens
      - c. Age
      - d. Disability
      - e. Wealth
  - b. SCRUTINY
    - i. Strict scrutiny → necessary for a compelling gov't interest, least restrictive means
    - ii. Intermediate Scrutiny → substantially related to an important gov't purpose
    - iii. Rational basis → rationally related to some legitimate gov't purpose
  - c. To get strict scrutiny based on discrimination based on a suspect class or quasi-suspect class, INTENT to discriminate MUST be shown by:
    - i. Discriminatory intent on the face of the law OR
    - ii. Discriminatory application of a law that is facially neutral OR
    - iii. A discriminatory motive behind the law.
    - iv. A law that merely happens to have an unintentional, discriminatory effect does NOT count as intent!!
  - d. Remember – affirmative action gets strict scrutiny BUT the state's interest in remedying particular, specific instances of past discrimination is “compelling.”
  - e. Federal alienage classifications are NOT subject to strict scrutiny, need only NOT be arbitrary and unreasonable.
9. PROCEDURAL DUE PROCESS
  - a. LIFE, LIBERTY OR PROPERTY INTEREST
    - i. Must be some legitimate claim or “entitlement” to the benefit to make it a property right
  - b. LEVEL OF PROCESS DUE
    - i. Three part balancing test:
      - 1. The importance of the interest to the individual,
      - 2. The value of specific procedural safeguards to that interest,
      - 3. The government interest in fiscal and administrative efficiency.
10. SUBSTANTIVE DUE PROCESS
  - a. Burdens a fundamental right for EVERYONE → substantive due process → strict scrutiny
    - i. Burdens a fundamental right for some but not others → Equal protection problem → still strict scrutiny.
  - b. Fundamental rights:

- i. Right to interstate travel
  - 1. Includes right to be treated equally after moving to a new state
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  - 5. Right to raise one's children a certain way
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- c. Special rules for abortion:
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