

Barbri Con Law Outline

I Powers of the Federal Govt

A) Art 3 defines federal judicial power

1) Jx: Supreme Ct

(a) Federal cts interpret Q, fed laws, treaties & admiralty/maritime laws, & state. Adjudicate disputes bw states, states & foreign countries & citizens of diverse states

(b) Sup Ct original jx of cases affecting ambassadors, public ministers & consuls.

B) Federal District Courts permitted to hear all cases & controversies arising under the Q (...) permitted 4 requirements are met:

1) **Standing**: the issue of whether the P is the proper party to bring a matter to court for adjudication.

(a) ***Injury***: P must allege + prove she has been injured OR imminently will be injured. **Tip: frequent**

(i) may only assert injuries they have personally suffered (E.g., Disney – Sierra Club lacks standing to stop park's construction bc members didn't hike there)

(ii) If seeking injunctive or declaratory relief, must show likelihood of future *harm* (E.g., *Lyons*, chokehold. P no stnd bc unlikely to suffer again)

(1) **Tip**: MBE: "Which P has best standing?" Correct choice – where P personally suffered. Best: personally suffered economic loss

(b) ***Causation & Redressability***: P must allege + prove D caused the injury + a favorable ct decision is likely to remedy the injury. Rationale: Art 3 prohibits Sup ct from issuing advisory opinions

(c) ***No 3rd party standing***: P may not assert claims of third parties not before the ct. 3 Exceptions:

(i) Close relationship bw P & injured 3rd party (E.g., doctor bringing abortion case on behalf of patients)

(ii) Injured third party is unlikely to be able to assert her own rights

(iii) An organization may sue for its members if 1) members themselves would have standing to sue 2) interests are germane to organization's purposes & 3) neither claim nor relief requires members' participation. "Associational standing"

(d) ***No generalized grievances*** - P must not be suing solely as a citizen or taxpayer. Exception: taxpayers have standing to challenge govt expenditures under federal statutes as violating Establishment Cl. (E.g., P arguing statute allowing CIA budget to be secret no standing v taxpayer challenging statute giving \$ parochial schools). **Tip**: MBE – "P is suing as a citizen/taxpayer"

2) **Ripeness**: whether a federal ct may grant pre-enforcement review of a statute/reg. Cts consider (2): the hardship that P will suffer w/o pre-enforcement review + the fitness of the issues & record for judicial review. (Usual way: violate statute + prosecuted + then challenge)

(a) Do abstention doctrines apply?

(i) Where state law is vague/ambiguous: fed cts abstain to permit states to interpret statute Q

(ii) Pending state criminal proceedings in suit seeking injunction against the state's prosecution, unless bad faith harassment by D.A

(iii) Pending state civil proceedings or civil contempt hearings

(b) E.g., FDA rule requiring drug ads to state generic drug names. Not ripe. Hardship great. Drug co have to violate statute, possible criminal penalty, & spend \$

- 3) Mootness: If events after the filing of the lawsuit end the P's injury, case must be dismissed as moot. But so long as collateral issue remains, not moot. 3 exceptions to dismissal for mootness:
 - (a) P is suffering a wrong capable of repetition yet evading review- Roe v Wade: P could be pregnant
 - (b) Voluntary cessation by D of challenged activity, but D free to resolve at any time
 - (c) Class action suits: no dismissal as long as 1 member of class suffers ongoing injury
- 4) Issue must not be a political question: Q violations the fed cts wont adjudicate
 - (a) When may apply: textually demonstrable Q commitment of issue to political dept, lack of judicially manageable stnds, entails making policy determination not fit, disrespect other branches, embarrassment potential if diff pronouncement – need to speak w/1 voice
 - (b) Common E.g., of Political Question issues (4)
 - (i) The “republican form of govt” clause
 - (ii) Challenges to the President’s conduct of foreign policy: **Tested**. E.g., war, treaty.
 - (iii) Challenges to impeachment & removal process: Judge objected to Senate committee formed to try him in impeachment proceedings. Dismissed.
 - (iv) Challenges to partisan gerrymandering (where political party that controls legislation draws election districts to maximize seats for their party)

C) Supreme Ct Review

- 1) May hear cases only after final j'ment of highest state ct, fed ct of appeals, or 3 judge fed district panel
- 2) Original & exclusive jx for suits bw govts
- 3) Original jx over cases involving ambassadors, ministers & consuls.
- 4) Virtually all cases come to Supreme Ct by writ of cert – all cases from state & appeals cts. Complete discretion. 4 + votes req for cert.
 - (a) Very limited appeal where Sup Ct must hear: decisions by 3 judge fed district ct panels that grant or deny injunctive relief (skip Ct of Appeal)
 - (b) Supreme Ct review of state ct decisions: must not be an Independent & adequate state ground: If a state ct decision rests on state law & federal law grounds, if Sup Ct's reversal on fed law ground won't change case's result, Sup Ct can't hear it. E.g., P brings 1981 & battery cl in state ct. Identical relief under both & wins. Sup ct can't hear it

D) Lower Federal Ct Review:

- 1) Suits against states in federal ct, federal agencies or state ct barred under 11th A sovereign immunity. Exceptions (5):
 - (a) State may waive sovereign immunity: must be explicit. No implied/constructive.
 - (b) States may be sued pursuant to federal laws adopted under Section 5 of 14th A but Congress can't authorize suits against states under other Q provisions (E.g., Tit 7 applies to states through sect 5 of 14th A so P may sue state. But ADA adopted under commerce cl. States' can't be sued)
 - (c) Fed govt may sue state govts
 - (d) Bankruptcy proceedings (State can't invoke sovereign immunity to keep from being a D)
 - (e) Suits against state officers allowed where: state officers are sued for injunctive relief or money damages out of their own pockets. May not be sued if state treasury will be paying retroactive damages.

II Federal Legislative Power

- A) Congress may exercise those powers enumerated in the Q plus all powers *necessary & proper* to carry out such enumerated powers not prohibited by the Q
- 1) No general federal police power in contrast to states & local govts: plenary power to broadly regulate health, safety & welfare of citizens so long as not prohibited under the Q.
 - (a) Exceptions where Congress has police power “**MILD**”: If legislating for military, Indian reservations, federal lands or territories, or for district of Columbia
 - (b) (**Tip**: necessary & proper cl standing alone can’t support federal law. Only if taxing & spending for general welfare)
- B) Congress Taxing & Spending Powers: Congress may tax & spend for the general welfare. **Tip**: “general welfare” only correct if taxing & spending.
- C) Commerce Clause – Congress has exclusive power to regulate all foreign & interstate commerce.
- 1) For a federal law regulating interstate commerce to be valid under comm clause, it must regulate
 - (a) Channels of interstate commerce (internet, highways, waterways)
 - (b) Instrumentalities of interstate commerce & persons/things in interstate commerce (internet, phones, trucks, electricity, radio waves, ppl traveling interstate – *Mann Act*)
 - (c) Regulate activities that have a substantial effect on interstate commerce
 - (i) If intrastate activity + economic/commercial activity + ct can conceive of rational basis + on which Congress concluded that activity in aggregate affects interstate commerce: upheld (E.g., *Wickard* – wheat)
 - (ii) If intrastate activity + non-commercial/economic + Congress must show a substantial economic effect + effect may not be based on aggregate impact. (*Lopez*- gun, VAWA non-economic. No aggregate impact)
- D) War & related Powers
- 1) Congress Power to declare war, raise & support armies & provide for/maintain navy.
 - 2) Military Cts & Tribunals: Regular fed/state cts have no general power to review ct martial proceedings. Enemy civilians/soldiers may be tried by military cts.
 - 3) Military cts have jx over all offenses committed by members of armed services at time of offense & when charged
 - 4) American civilians may be tried by military cts under martial law only if warfare forces fed cts to shut
 - 5) Detention of Enemy Combatants: Due process requires a US citizen held in US + designated as enemy combatant + to have meaningful pportunity to contest basis for detention + before neutral decisionmaker
- E) Delegation of legislative power
- 1) No limit exists on Congress’ ability to delegate legislative power. **Tip**: wrong answer MBE
 - 2) Congress may NOT delegate executive/administrative/enforcement powers to itself or its officers
 - 3) Legislative vetos: attempt by Congress to overturn executive agency action w/o bicameralism (passage by both houses) or presentment (giving bill to President for signature/veto) is unQ
 - 4) Line item vetoes are unQ because the Pres must sign/veto bill in entirety. Can’t veto part of the bill
 - 5) Pocket vetos: President has 10 days to exercise veto power. If fails to & Congress in session → law. If not in session → automatically vetoed

- 6) Veto Power: If President disapproves act, may veto. But vetoed act still good law if 2/3 vote in each house
- F) 10th A: Limitation on Congressional Power
 - 1) States that all powers not granted to the US nor prohibited to the states are reserved to states or ppl. States have “residual” power.
 - 2) Congress can’t compel state regulatory/legislative action but may induce state govt action by making fed funds conditional + so long as conditions are 1) expressly stated & 2) relate to purpose of spending program. No “commandeering.” **Tip: Essays/MBE Heavily Tested**
 - (a) E.g., Requiring every state to clean up wastes or be liable for harm; Brady act requiring state/local officials to do background checks before issuing arms. Commandeering
Commandeering.
 - (b) E.g., 21 yr old drinking age is condition for highway funds. Permissible inducement
 - 3) Congress may prohibit harmful commercial activity by state govts (Fed law prohibits state DMVs from releasing personal information. Not imposing affirmative burden – upheld)
 - 4) Congress power under Section 5, 14th A: may not create new rights/expand scope of rights. May act only to prevent/remedy violations of rights recognized by cts so long as laws are 1) proportionate & 2) congruent to remedying Q violations.
 - 5) **Tip:** MBE – answer that Ct strikes down action on 10th A wrong.

III Executive Power

- A) Foreign Relations:
 - 1) President has power to enter into treaties (agreements bw US & foreign country) w/advice & consent of 2/3 of Senate & Executive Agreements (may be for any person & don’t require Senate’s consent. Effective when signed by President & head of foreign nation).
 - 2) Hierarchy of laws: 1) US Q prevails over 2) treaties & federal statutes (bc both are considered the “supreme law of the land” - if conflict, last in time prevails) 3) Executive Agreements & 4) State law.
 - (a) Note: Federal statutes control over conflicting executive agreements but executive agreements prevail over conflicting state law.
 - 3) President’s Power As Chief Executive: if acting w/express or implied Congressional authority, power is at maximum. If acting where Congress is silent, upheld unless usurps another govt branch functions. If acting against express will of Congress, prb invalid. (E.g., Pres has no power to refuse to spend appropriated funds when Congress has expressly mandated they be spent)
 - 4) War Powers: No power to declare war but may act militarily in actual hostilities against US w/o dec. Has broad powers as Commander in Chief to use American troops in foreign countries – never unQ. **Tip:** MBE – Pres uses troops w/o decl. Lawsuit dismissed as political Q.
 - 5) Appointment & Removal Power
 - (a) President alone appoints ambassadors, federal judges & officers of the United States provided Senate confirms.
 - (b) Congress may vest appointment of inferior officers in the President, the heads of depts or lower fed cts. Congress has discretion. (Inferior offices: those who may be fired by Officers. E.g., AG is Officer. U.S. Attorney is inferior officer)

- (c) Congress may not give itself/its officers the appointment power bc can't give executive power (e.g., to appoint) to itself. E.g., unQ for Congress to create a federal agency. **Tip: HEAVILY TESTED**
- (d) Removal power
 - (i) President may fire any executive branch office unless removal limited by statute.
 - (ii) For Congress to limit removal: it must be an office where independence from the President is desirable (E.g, Independent Counsel/Special Prosecutor but not President's Cabinet)
 - (iii) Congress cannot prohibit removal but can merely limit it where good cause.
- (e) Impeachment & Removal:
 - (i) President, Vice President, federal judges & officers may be impeached & removed from office for: treason, bribery, or high crimes/misdemeanors. Impeachment doesn't remove – House impeaches w/majority vote & Senate tries → then removed on 2/3 vote.
- (f) Executive Privilege/Immunity
 - (i) President has absolute immunity to civil suits for \$ damages in any actions while in office but NOT for actions that occurred prior to office (*Clinton v Jones*, governor).
 - (ii) Pres's executive privilege for presidential papers/conversations. Exception: Criminal proceedings, communiqués available where need for information is demonstrated. Nixon
 - (iii) President has power to pardon those accused/convicted of federal but not state crimes + only federally /not civilly + no pardon for impeachment. **Tip: MBE.**

IV Federalism: Limits on state/local govt power.

A) Preemption

- 1) Supremacy Clause: The Q & laws & treaties made pursuant to it are the supreme law of the land. If a state law conflicts w/federal law or treaty, the federal law preempts state law & state law invalid.
- 2) Federal statute/regulation expressly/impliedly preempts conflicting state laws:
 - (a) Express preemption: Federal statute express states that federal law is exclusive
 - (b) Implied preemption:
 - (i) Where federal & state laws are mutually exclusive, federal law preempts state law (E.g, if can't simultaneously comply w/both)
 - (ii) If state law impedes the achievement of a federal objective, federal law preempts (E.g., state law that ppl who file ADA claims don't get benefits conflicts w/fed objective to encourage)
 - (iii) Where Congress evidences a clear intent to 'occupy the field" through comprehensive legislation/creation of agency to administer the law. E.g., immigration.

B) State taxation & regulation of fed govt

- 1) State may not directly tax federal instrumentalities w/o Congress' consent.
- 2) But non-discriminatory indirect taxes permissible if + do not unreasonable burden fed govt (e.g., state income taxes on fed employees)
- 3) States May not tax or regulate federal govt activity: "inter-govt immunity" (*McCulloch* – state tax on US bank unQ bc power to tax is power to destroy)
- 4) UnQ to pay state tax out of federal treasury. E.g., Mom & Pop store privately owned on fed land subject to tax bc not paid out of fed treasury but store operated on arm based owned by fed govt not subject to state tax

- 5) States can't regulate fed govt activity if places a substantial burden on fed activity (e.g., fed govt need not comply w/state pollution laws).

C) Dormant Commerce Clause

- 1) If Congress has not enacted laws regulating commerce, a state/local govt may regulate local aspects of interstate commerce + if does not discriminate against + or unduly burden interstate commerce.
 - (a) **Tip:** Dormant Commerce Clause synonymous w/"Negative Implications/Commerce Cl"
- 2) State/local regulations that discriminate against interstate commerce or unduly burden interstate commerce violate DCC unless necessary to achieve (no reasonable non-discriminatory alternatives available) + an important govt purpose. 2 Exceptions:
 - (a) Congressional approval of discrimination
 - (b) Market Participant Exception: A state may prefer its own citizens when acting as a market participant in receiving benefits from govt programs/dealing w/govt owned businesses. (e.g., when buying/selling, hiring, giving subsidies) Also, favoring a local govt entity v private business not discrimination against interstate commerce
 - (i) E.g., UC charges less tuition to in-staters than out of staters. Market Participant. But private schools can't.
- 3) State/local action that does not discriminate against interstate commerce but that unduly burdens (burden outweighs state's interest) is void.
- 4) Corp & aliens can sue under DCC

D) Privilege and Immunities Clauses (2 clauses)

- (a) Privileges and Immunities Clause of Article IV . **Tip: Heavily tested**
 - (i) Reqs for violation: 1) law must discriminate against out of staters 2) discrimination must be w/r/t civil liberties or important economic activities 3) P must be protected under P & I Clause: Corporations & aliens (non- US citizens) can't invoke
 - (1) E.g, charging out of staters fishing licenses for \$2000 v in staters \$20. Invalid. V elk hunting disparity – bc hobby, upheld.
 - (ii) State's defense: If discrimination is necessary (no less discrim alternative) + to achieve an important govt interest
- 2) Equal Protection Privileges and Immunities Clause of 14th A – Fundamental Rights: States may not deny citizens the P & I of national citizenship: the right to interstate travel, right to petition Congress for redress, right to vote for federal officers.
 - (a) Right to travel:
 - (i) Laws that prevent ppl from moving into a state must meet SS (E.g., CA's law – can't move here unless \$ invalid)
 - (ii) Durational residency requirements must meet SS (E.g., 1 yr for welfare benefits unQ) but 50 days is max durational requirement for voting
 - (iii) Restrictions on foreign travel need only meet rational basis bc not a fundamental right
 - (b) Right to vote: 15th A prohibits denying on basis of race
 - (i) Laws that deny some citizens right to vote must meet strict scrutiny (E.g., poll taxes to vote invalid. Property ownership to vote or hold public office not allowed. Property ownership only upheld in voting for water district allocation). **Tip:** MBE
 - (ii) One person-one vote must be for all state & local elections

- (iii) At large elections are Q unless there is proof of discriminatory purpose (E.g., Where all voters for all office holders. Every voter may cast 3 votes etc).
- (iv) Use of race & other suspect classifications in drawing election district lines must meet SS if govt uses race as a predominant factor in drawing districts to make it easier to elect minorities.
- (v) Candidate qualifications: Can't charge candidates a fee that makes it impossible for indigents to run for office. But ballot access regulation must be reasonable, non-discriminatory means of promoting important state interests (may require candidates to show reasonable support to get names on ballots).
- (vi) Counting uncounted votes w/o any pre-existing standards in a presidential election violates equal protection. *Bush v Gore*
- (vii) Campaign funding:
 - (1) Govt may allocate more public funds to 2 major parties than to minor parties
 - (2) Contribution limits in election campaigns permissible but expenditure limits unQ (E.g., may limit amount someone can contribute to a candidate/committee but not the total expended on the campaign)

(c) **Tip:** usually wrong answer.

E) Exam Analysis for Testing Law's Validity under P & I Clauses & DCC:

- 1) If state law does not discriminate against out of staters: Consider DCC (violates unless necessary etc. 2 exceptions) & P & I Art IV.
- 2) If state law does not discriminate against out of staters: Consider DCC (balance benefit to state against burden on commerce). P & I Art IV NA.

F) State taxation of interstate commerce (Tip: Rarely tested)

- 1) States may not use their tax systems to help in-state businesses (E.g., Giving tax credit to consumers who purchase product in state v out of state)
- 2) A state may only tax activities if substantial nexus to the state, (E.g., CA can't tax business in NY)
- 3) State taxation of interstate businesses must be fairly apportioned (E.g., interstate trucking co)
- 4) States power to tax foreign commerce limited by Comm Clause & Import-export cl

G) Full Faith & Credit Clause: Fed/state Cts in one state must enforce j'ments of fed/state cts in another state so long as 1) the ct that rendered the j'ment has jx over both parties & subject matter 2) j'ment was on its merits & 3) j'ment is final

V The Structure of the Q's Protection of Individual Liberties

A) General Rule: Q applies only to govt action – private conduct need not comply w/Q. BUT – Congress by statute may apply Q norms to private conduct

- 1) 13th A: can be used to prohibit private race discrimination (EPC wouldn't apply). 13th A literally prohibits slavery & involuntary servitude & authorizes Congress to enforce 13th A. **Tip:** discrimination doesn't violate 13th A. However, it does violate federal laws adopted by Congress under the 13th A (so wouldn't use 13th A to challenge private race discrimination but fed statutes pursuant to 13th A)
- 2) Commerce Power can be used to apply Q norms to private conduct. E.g., Civil Rights Act 1964
- 3) Section 5 of 14th A: Congress can't use to regulate private behavior – only state/local govts may. E.g., *U.S. v Morrison* (VAWA case – Congress couldn't).

B) Exceptions to the general rule where private conduct must comply w/Q:

- 1) Public function exception: Q applies if a public entity is performing a task traditionally, exclusively done by the govt. **Tip: heavily tested.** E.g., company towns, private parties holding election for govt office. NOT private owned utility companies (due process reqs don't apply, may terminate w/o notice & hearing).
- 2) Entanglement exception: The Q applies if the govt affirmatively authorizes, encourages or facilitates unQ activity.
 - (a) E.g., of state action - 1) Ct can't enforce racially restrictive covenants or state action 2) state action when govt leases premises to entity that racially discriminates bc govt facilitates & authorizes 3) state action when state provides books to schools that racially discriminate (even if provides them to all schools) 4) when a private entity regulates interscholastic sports w/in a state (i.e., entwinement w/public schools – funded by public schools, met on public grounds, members from public schools) 5) allowing state official to act in discriminatory manner under color of law 6) granting corp charter & exclusive name, monopoly to utliy, license & providing essential services to private club
 - (b) E.g., where no state action found 1) when a private school that is over 99% funded by govt fires a teacher bc of her speech – Govt subsidy insufficient for finding state action 2) no state action when NCAA orders suspension of coach at state university bc NCAA is private 3) no state action when a private club w/liquor license from state racially discriminates. Not enough entanglement
 - (c) **Tip:** Cases involving racial discrim, ct more likely to find entanglement

C) Application of the Bill of Rights

- 1) BOR (1st 10 A) limits federal power & applies directly only to fed govt. BOR applied to state/local govt through selective incorporation into the due process clause of the 14th A EXCEPT: 1) 2nd A right to bear arms 2) 3rd A right to not have soldier quarter in home 3) 5th A right to grand jury indictment in criminal cases in fed ct 4) 7th A right to jury trial in civil cases & 5) 8th A right against excessive fines
- 2) 14th A: prevents states from depriving any person of life, liberty or process w/o due process & equal protection of the laws. Requires state action. Due Process cl of the 14th A applies to states. But 5th A due process applies directly to fed govt (incorporation)
- 3) 15th A: prevents both federal & state govts from denying a citizen the right to vote on account of race or color. Requires state action.

VI Procedural Due Process

- A) Determining whether there has been a deprivation of life, liberty or property that requires fair process (notice & a hearing)**
- 1) A deprivation of liberty occurs if there is the loss of a significant freedom provided by the Q or a statute - except in emergency
 - 2) Deprivation of property occurs if there is an "entitlement" & that entitlement is not fulfilled. Property interest in entitlement if a reasonable expectation to continue receipt of benefits.
 - (a) E.g., Govt job promises job security. Fired. Govt required to provide due process v year to year K. Due process for termination of welfare benefits required. E.g., continued public ed

- 3) Govt negligence not sufficient for deprivation of due process. Must be intentional/at least reckless govt action. EXCEPT – emergency conditions. Govt liable under due process cl if conduct “shocks the conscience.”
 - (a) E.g., High speed police chase ends in death of boy. No due process required bc didn’t shock
 - (b) E.g., prisoner slipped on negligently placed pillow. Govt action negligent. No due process req
 - 4) Govt’s failure to protect ppl from privately inflicted harms does not deny due process EXCEPT if 1) govt has person in physical custody or 2) literally created dangers to require protection. E.g., boy suffered brain damage bc DCSS didn’t do anything.
- B)** If there is a deprivation: what procedures are required? Balance 3 factors – give the ct broad discretion
- 1) The importance of the interest to the individual (the more important, the more procedural process required. E.g., death penalty v property taking)
 - 2) The ability of additional procedures to increase the accuracy of the fact finding & reduce erroneous deprivation (E.g., DNA?)
 - 3) The govt’s interest: usually interest is saving money & efficiency
 - (a) Due process rights subject to waiver
 - (b) MBE examples: 1) notice & hearing required for welfare benefits termination & parental rights termination 2) Notice of charges & opportunity to be heard for student disciplined by public school (no ‘trial’ needed) 3) Social Security terminates Disability benefits – need a post terminatin hearing 4) Punitive damage awards require instructions to guide jury’s discretion & judicial review to ensure reasonable. Seriously excessive punitive damages violates due process. 5) US citizen apprehended in foreign country & held as enemy combatant must be given due process *Hamdan*. 6) Pre-j’ment attachment/govt seizure of asserts require notice & hearing – UNLESS exigent circumstances (reason to believe person would get rid of property before notice)
 - (c) Note: govt may always seize property if used in an illegal activity, even if owner innocent. E.g., Husband picks up prostitute in car he jointly owns w/wife. Govt may seize car.
 - (d) **Tip:** Essay – even if no deprivation of procedural due process, say “assuming there is...” balancing

VII No Retroactive legislation

- 1) Ex Post Facto Laws unQ: state/fed govt may not pass an ex post facto law (that retroactively alters criminal offenses/punishments in a substantially prejudicial manner for the purpose of punishing a person for some past activity. Substantially prejudicial manner if 1) makes criminal an act that was innocent when done 2) prescribes greater punishment for an act & 3) reduces the E required to convict a person of a crime from what was required when the act was committed.
- 2) Retroactive civil liability must only meet rational basis test
- 3) Bills of attainder: legislative act that inflict punishment on individuals w/o a judicial trial.

VIII Substantive Due Process

- A)** Definition: Issue is whether the govt has adequate reason to take someone’s life, liberty or property. Distinguish bw EPC: Substantive due process – if a law limits *all* persons
- 1) Q provides only minimal protection for economic liberties:

(a) Only a rational basis test is used for govt regulations affecting economic rights Post-Lockner. E.g., due process challenge to minimum wage law not upheld, may regulate trade, professions, consumers' protection laws

2) Takings clause: the govt may take private property for public use if it provides a just compensation

(a) Stp 1 – Determining if there is a taking – 2 ways (Takings require just compensation, regulations don't)

(i) Is it a possessory taking: Govt confiscation OR physical occupation of property is a taking – exception is emergency situations. (E.g., **Tip:** MBE. *Loretto* – Requires apt building to give 1 ft space. Taking)

(ii) Or a regulatory taking: Gov regulation is a taking if it leaves no reasonable economically viable use of the property. Consider social goals to be promoted, diminution in value to owner, & owner's reasonable expectations. **Tip:** not enough to just decrease value of investment/moratorium.

(1) Govt conditions on development of property must be justified by benefit that is roughly proportionate to burden imposed. If not → taking. Burden on owner not excessive to govt benefit

(2) A property owner may bring a takings challenge to regulations that existed at time the property was acquired. E.g., buy property knowing development restricted by ordinance.

(3) Temporarily denying owner use of property not a taking so long as govt's action is reasonable

(b) Stp 2: Is it for 'public use'? – Rational belief that the taking will benefit the public. Broad. (E.g., *Kelo* - creating new jobs). If not, must return the property.

(c) Stp 3: Is just compensation paid? Compensation measured in terms of loss to owner – gain to taker irrelevant. Pay Reasonable market value. **Tip:** Person's property FMV \$100K. Govt's benefit 10 Mill. Just compensation for taking is \$10K

(d) E.g., Takings v Regulations: Abolishing inheritance rights, creating public access easement on private property, condemnation: takings. Zoning ordinances merely prohibiting the most beneficial use of property, ordering destruction of diseased trees, landmark ordinances - regs

B) Access to Cts: Indigent Ps. Govt fees (ct filing fees) must be waived when imposition would deny fundamental right (Marriage/divorce, voting). Fees ok for non-fundamental rights (welfare termination, bankruptcy discharge)

C) Contracts Clause: No STATE shall impair the obligations of Ks.

1) Applies only to STATE/LOCAL interference with already existing contracts. Regulating future Ks permissible. Never applies to fed govt (rational basis review)

2) State or local interference w/private Ks must meet an "intermediate scrutiny" like test:

(a) Does the legislation substantially impair a party's right under an existing K?

(b) If so, is the law a reasonably & narrowly tailored means of promoting an important & legitimate public interest?

3) State/local interference w/GOVT Ks must meet strict scrutiny.

IX Equal Protection Clause of 14th A limited to STATE/LOCAL govts. Never applies to fed govt. **Tip:** MBE – never applies to fed. But incorporated to fed govt through due process clause of 5th A.

A) Levels of Scrutiny

- 1) Rational Basis Test: Law is upheld if 1) rationally related 2) to a legitimate conceivable purpose. Burden of proof on Challenger. No least restrictive analysis. Usually upholds laws.
- 2) Intermediate scrutiny: Law is substantially related/narrowly tailored to an important actual purpose. No least restrictive analysis. Burden of proof is on the govt
- 3) Strict Scrutiny: Law upheld if necessary to a compelling actual purpose. Must be no less restrictive alternative to achieve the objective. Burden is on govt.

B) If fundamental right/suspect classification involved → Strict scrutiny. Substantive due process fundamental rights

- 1) Right to marry (E.g., Requiring counselor's ok impermissible)
- 2) Right to procreate - E.g., involuntary sterilization gets SS
- 3) Right to custody of children: Parental termination.
 - (a) **Tip:** Irrebutable presumptions not treated differently from other regulations/classifications so answer "invalid bc irrebutable presumption" is wrong. Acceptable irrebutable presumption that woman's husband is father of child
- 4) Right to control upbringing of children: Govt may interfere w/parenting decisions. May send kids to parochial private school & prohibit grandparent visitation
- 5) Right to keep the family together: includes extended family – but must be related (Zoning ordinance can limit college students living together but not grandkids)
- 6) Right to purchase & use contraception
- 7) Right to an abortion: but no Strict Scrutiny
 - (a) Prior to viability: states may not prohibit abortions but may regulate abortions so long as regulations don't create an undue burden on the ability to obtain abortions. E.g., regulations not creating an undue burden. 24 hr waiting period, only licensed physicians can perform, prohibition of partial birth abortions.
 - (b) After viability: states may prohibit abortions UNLESS necessary to protect women's life or health
 - (c) Govt has no duty to subsidize abortions/provide them in public hospitals
 - (d) Consent & notification laws:
 - (i) Spousal consent/notification unQ
 - (ii) Parental notice & consent laws for unmarried minors Q so long as alternative procedure where minor can obtain abortion by going before a judge who 1) approves the abortion by finding it in her best interest or 2) finds she is mature enough to decide for herself
 - (e) Fundamental rights where level of scrutiny unknown
 - (i) Right to refuse medical treatment: **Tip:** heavily tested
 - (1) Competent adults have the right to refuse medical tx, even life-saving tx (e.g., food, water)
 - (2) But a state may require clear & convincing that a person wanted tx terminated before it is ending.
 - (3) A state may prevent family members from terminating tx for another.
 - (4) No Q right to physician assisted suicide.
 - (ii) Right to engage in private consensual homosexual activity. *Lawrence*
 - (f) Rights that get rational basis review: Right to practice in trade/profession (E.g., Bar), right to physician assisted suicide, right to education.

- C) Classifications Based on Suspect Classes - Race, National Origin or Alienage: SS**
- 1) 2 ways to prove the existence of a racial classification:
 - (a) The classification is discriminatory on its face. E.g., only whites on juries, segregation
 - (b) If the law is facially neutral: proving a racial classification requires demonstrating BOTH 1) discriminatory impact & 2) discriminatory intent. (E.g., Police officers required to take a test. Disparate impact on black not sufficient to trigger SS).
 - 2) Discriminatory use of peremptory challenges based on race is denial of equal protection in both civil/criminal proceedings.
 - 3) Benign (v invidious) racial classifications benefitting minorities: E.g., Affirmative action. SS
 - (a) Govt must have a compelling interest in remedying past discrimination. Past discrimination must be persistent & readily identifiable. General past 'societal discrimination' not enough.
 - (b) Numerical set asides require clear proof of past discrimination (E.g., *Crosen* – setting aside 30% jobs for minorities. Only based on general discrimination. Invalid).
 - (c) Educational institutions may use race as one factor in admissions decisions to help minorities.
 - (i) Diversity is a compelling interest in public university/colleges (but not elementary/2ndary schools).
 - (ii) But may not add points to applicant's score based on race & no set asides.
 - (d) Public schools must satisfy SS to use race as a factor in assigning students to schools – even to achieve desegregation
 - 4) Alienage Classifications
 - (a) Federal alienage classifications get rational basis. Valid if not arbitrary/unreasonable. Congress plenary power
 - (b) State & Local classifications get SS. US Citizenship can't be required to get welfare, be lawyer, or civil service jobs. EXCEPTIONS (**Tip**: heavily tested)
 - (i) If a law discriminates against alien participation in state govt or non-elective offices involving important public policy, rational basis stnd applied. E.g., voting, jury service, elective office, job as a teacher, police officer or probation officer.
 - (c) Undocumented:
 - (i) Undocumented alien children: standard like intermediate scrutiny. Entitled to free public education.
 - (ii) Undocumented: rational basis
- D) Classifications based on 'quasi-suspect classes' – Gender & Legitimacy. Intermediate Scrutiny**
- 1) Type of intermediate scrutiny used: Gender classifications must be substantially related to an important govt purpose. Govt bears burden of showing "exceedingly persuasive justification"
 - 2) How existence of gender classification can be proven:
 - (a) If the classification is discriminatory on its face (E.g. beer for women but not men)
 - (b) If law is facially neutral, proving a gender classification requires demonstrating BOTH discriminatory impact & discriminatory intent. If not → Rational basis. E.g., Reqs to be Police officer. 150 lbs. Disparate impact on women. But no discriminatory intent. Rational basis. (**MBE**)
 - 3) Discriminatory use of peremptory challenges based on gender denies equal protection
 - 4) Benign gender classifications benefitting women: Still get intermediate scrutiny
 - (a) Must be designed to remedy past discrimination & differences in opportunity

- (i) E.g., Social Security administration uses a different formula for calculating benefits for women. Upheld bc of history of wage discrimination. Navy: if man doesn't get promoted in 6 yrs he's let go but women have 10 yrs. Valid bc women have less opportunity for combat – a way to get promoted. E.g., Requiring fathers but not mothers to prove parentage to get citizenship for kids. E.g., statutory rape & draft.
- (ii) Must not be based on role stereotypes (E.g., alimony to women but not men. **Tip:** MBE. Gender based benefits, state supported all male/all female schools, discriminatory drinking age)

5) Discrimination against non-marital kids: Intermediate Scrutiny

- (a) Laws that deny a benefit to all non-marital children but grant it to all marital children are unQ (E.g., only marital kids can inherit invalid but requiring paternity to be established prior to death upheld under intermediate scrutiny)

E) Other Classifications: Get Rational Basis Review

- 1) Age (**Tip:** Heavily tested. Not a violation for govt mandatory retirement), Disability discrimination, wealth discrimination (poverty not a suspect class), economic regulations (e.g., to be a vendor must have been selling for 8 yrs), & sexual orientation discrimination (but law repealing all laws protecting gays & lesbians doesn't survive even rational basis review).

X First Amendment (**Heavily Tested**)

A) Free Speech methodology – Determining Standard of Review

- 1) Content based v content neutral regulations:
 - (a) Content based restrictions on speech must meet SS. 2 types:
 - (i) Subject matter restrictions: application of the law depends on the topic of the msg (E.g., can't picket if labor protest).
 - (ii) Viewpoint restrictions: application of the law depends on the ideology of the msg (E.g., Pro war demos ok but not anti-war, msgs embarrassing to embassy not w/in 500 ft).
 - (b) Content neutral regulations burdening all speech generally need to meet only intermediate scrutiny. E.g., no parades after 8 PM
- 2) Prior Restraints: Ct ordering suppression of speech (e.g., granting injunction) must meet strict scrutiny. E.g., Fed govt's attempt to stop publication of Pentagon Papers re Vietnam struck down.
 - (a) If violate a statute/ordinance, may argue it's unQ & conviction reversed BUT procedural proper ct orders (i.e., suppressing speech) must be complied with until vacated/overturned + a person who violates a ct order is barred from later challenging it.
 - (b) **Tip: MBE** – Gag orders on press to prevent prejudicial pretrial publicity never allowed, even if highly sensationalized crime & concerns for due process.
- 3) Govt Requiring a License/Permit for Speech: Only permissible if 1) important reason for licensing & 2) clear criteria leaving almost no discretion to licensing authority & 3) procedural safeguards such as prompt determination of requests for licenses & judicial review
- 4) Regulations that are Invalid bc Vague and/or overbroad
 - (a) Void for vagueness doctrine: A law is unQ vague if a reasonable person cannot tel what speech is prohibited and what speech is permitted. Deny due process bc chill Q protected expression. E.g., prohibition of books tending to corrupt youth morals.

(b) Overbreadth: a law is unQ overbroad if it regulates substantially more speech than the Q allows to be regulated. E.g., regulation prohibits all live entertainment. States can prohibit live dancing but this prohibits poetry readings.

(i) Laws that attempt to punish fighting words are vague & overbroad. **Tip:** Invalid.

B) Freedom to speak includes the freedom not to speak: Symbolic acts

1) Govt can regulate conduct that communicates if 1) it has an important interest unrelated to the suppression of the msg & 2) if the impact on the communication is no greater than necessary to achieve the gov't's purpose.

(a) E.g., burning flag is valid symbolic conduct but burning draft cards isn't bc gov't's imp interest to facilitate emergency military mobilization. Nude dancing isn't protected symbolic speech & local/state govts can ban; burning cross is symbolic speech unless fighting words/true threats.

2) Anonymous speech protected: E.g., right to circulate election literature w/o disclosing identity

3) Although gov't may not compel person to express msg ("live free or die") may tax/use revenue to express a msg w/which ppl disagree (e.g., beef producer required to pay for gov't ads for generic beef). But can't be compelled to pay sums to private associations used to support political views (Bar).

(a) Exception: Gov't can require public university students to pay a student activity fee even if fee is used to support political/ideological beliefs that are offensive to student, so long as program is viewpoint neutral

C) Speech that's unprotected/less protected by the 1st A:

1) Incitement of illegal activity: The gov't may punish speech if 1) there is a substantial likelihood of imminent illegal activity & 2) if the speech is directed to causing imminent illegality.

2) Obscenity/Sexually Oriented Speech: **TIP: MBE heavily tested.** Speech is obscene if it describes or depicts sexual conduct that, taken as a whole, by the avrg person:

(a) Appeals to the prurient interest in sex – using a community stnd

(b) Is patently offensive to contemporary community stnds &

(c) Lacks serious "LAPS" (literary, artistic, political & scientific value) using a national RPP standard.

(i) Gov't may use zoning ordinances to regulate the location of adult bookstores & movie theaters if regulation designed to reduce secondary effects of such businesses (rise in crime rates, drop in property values etc) but may not ban such establishments altogether

(ii) 21st A – states have broad power to regulate liquor

(iii) Child porn may be completely banned, even if not obscene. To be child porn – kids must be used in production of material. Compelling interest: protecting children.

(1) Computer generated images of kids ok bc no compelling interest

(iv) Gov't may not punish private possession of obscene materials – but MAY punish private possession of child porn.

(v) Gov't may SEIZE assets of businesses convicted of violating obscenity laws (**TIP: Heavily tested.** E.g., - P owned chain of sex stores- 9 M merchandise. Only 7 obscene items. 9 M merchandise burned. Ok).

3) Profane & indecent speech generally protected by the 1st A (E.g., "fuck the draft" jacket. The power to censor words is the power to censor ideas, Communication Decency Act on internet invalid).

Exceptions: 1) over the broadcast media (TV & Radio bc intrudes in home. But not cable bc ppl

choose) & 2) Schools have broad discretion to proscribe speech. E.g., 'bong hits for jesus' & speech making sexual innuendos – student suspended.

4) Commercial Speech: Limited 1st A protection.

(a) Commercial speech that proposes unlawful activity or misleading/fraudulent may be burdened.

Truthful commercial speech upheld if:

(i) Serves a substantial govt interest

(ii) Directly advances the interest AND

(iii) Is narrowly tailored to serve that interest (does not require least restrictive mean – only reasonable fit bw goal & means chosen).

I.