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Constitutional Law

I. Steps In Con Law analysis
   a. **Threshold Issues**
      i. Standing, mootness, ripeness, state action (abstention)
   b. **Applicable Amendment**
      i. Look for issue pairings
      ii. If this a property right or an liberty right?
   c. **Applicable Elements for Claim**
      i. If element missing, facial challenge
         1. facial challenge without injury in fact normally only available for free speech issue
      ii. If all elements addressed in statute, as applied challenge
   d. **Level of Judicial Review**
      i. Strict scruitiny, intermediate scrutiny, rational basis, or a special test
   e. **Closing Issues (sometimes)**
      i. Vagueness, overbreadth, excessive discretion

II. THRESHOLD ISSUES
   a. Art III grants power to hear "cases and controversies"
      i. No advisory opinions
   b. Standing
      i. Elements
         1. Concrete, personalized injury
         2. Fairly traceable to the defendant
         3. Redressable by the court
      ii. Associational Standing
         1. A member of group meets normal elements;
         2. Connection between purposes of organization and the injury; and
         3. individual member participation in lawsuit not required
      iii. Other Standing Issues
         1. Third-party standing
            a. Difficult to assert own rights; and
            b. Close/special relationship between parties
         2. zone of interests
      iv. Abstention
         1. political question
            a. constitutionally committed to another branch of govt; or
            b. inherently incapable of judicial resolution
         2. adequate and independent state grounds for decision
   c. Mootness
      i. A *real and live controversy* must exist throughout lawsuit

1. Exceptions:
    a. capable of repetition yet evading review
    b. class action rep mooted; action can continue

d. Ripeness
    i. An existing dispute that
    ii. Threatens immediate and substantial hardship to the P can be
    iii. Resolved by a final and conclusive judgment
        1. NB: preliminary injunction or declaratory judgment action

e. State Action
    i. State action includes official government conduct *and* private conduct where there is significant governmental involvement with the private party
    ii. Private party actions that are state action:
        1. <u>public function:</u> *traditionally* the *exclusive* prerogative of the state
        2. <u>significant state involvement</u> affirmatively *facilitating* that private action (eg, entwinement) <u>see CMR p. 25</u>

III. LEVELS OF JUDICIAL REVIEW

a. Rational Basis (RBR)
    i. Regulation is rationally related to a legitimate government interest
        1. any *conceivable* relation or interest
        2. BOP on P

b. Intermediate Scrutiny (IS)
    i. Regulation is substantially related to an important government interest
        1. must be *actual* purpose
        2. can't be too overbroad/underbroad
        3. BOP on Govt

c. Strict Scrutiny (SS)
    i. Regulation is narrowly tailored to achieve a compelling government interest
        1. must be *actual* purpose
        2. no under- or overbreadth tolerated
        3. BOP on Govt; Govt almost always loses

IV. PROPERTY RIGHTS GUARANTEES: TAKINGS & CONTRACT CLAUSE

a. Takings: 5th amend (feds) and 14th Amend (states)
    i. Elements
        1. A taking of private property for
        2. Public use
            a. rational basis analysis
            b. includes private property given to private party so long as public benefit to that exchange
        3. Must have just compensation
    ii. The more drastic the reduction in economic value, the more likely a taking
    iii. Clear cases of takings:
        1. Possessory taking: easements, abolishing inheritance, etc
            a. exception: health or safety emergency
        2. Regulatory taking

a. Denial of all economic value of land to owner [if some viable use left, no taking]
b. conditional permits: governments demanded exaction must have a *essential nexus* with legit govt purpose that is *roughly proportional* to burden on society
c. <u>test when economic use of land remains:</u>
i. what social goals are promoted;
ii. what is the diminution in value to owner; and
iii. what are owner's reasonable investment-backed expectations regarding the property

3. Remedy
a. pay compensation OR return property pay interim damages

b. Contracts Clause
i. State and local governmental regulations cannot
1. substantially interfere with the obligations of
2. existing contracts (ie, no retroactive impairment permitted)
ii. Limits
1. N/A to feds, judicial decisions
iii. Judcial Review
1. private contracts: intermediate scrutiny
2. public contracts: strict scrutiny

V. PROPERTY/LIBERTY RIGHTS: SUBSTANTIVE AND PROCEDURAL DP
a. Substantive DP
i. When rights are *fundamental*, courts generally apply SS; when rights are *non-findamental*, courts apply RBR.
ii. Fundamental rights
1. Abortion
a. Undue Burden Test
i. Before viability, regulation can't place undue burden on right to abortion
ii. After viability, may prohibit all abortions unless necessary to protect the woman's life or health
iii. Viability = fetus lives outside womb WITH medical assistance
b. Undue burdens
i. Spousal notification; ban all partial birth
c. Not Undue burden
i. 24 hr waiting; only MD can do it; parental notification (but must have judicial bypass textually included in statute)
2. Right to Interstate Travel
a. Usually tested with *residency waiting reqs* for benefits
i. If long periods and life necessities, then struck on strict scrutiny
ii. If short period for other than fundamental rights, then may be upheld

3. Fundamental Right to Vote
    a. Federal Election districts: one person, one vote
    b. State/local elections: no unjustifiably large disparities in number of voters per district
4. Economic Activites
    a. Get RBR only

b. Procedural DP
    i. Analysis:
        1. is this a liberty or property interest for which process is due?
        2. if yes, then what process is due?
    ii. Property
        1. land, personal property, and
        2. any *existing entitlement* to a specific benefit under state or federal law for which there is a
            a. legitimate expection that the benefit will continue
    iii. Liberty
        1. freedom from bodily injury and restraint, and
        2. freedom to exercise *fundamental rights* that have been impaired by
            a. ***intentional*** government action *[no DP for negligent acts]*
                i. NB: defamation: gives rise to PDP claim if intl govt act involved
    iv. What process is due?
        1. <u>notice</u> and
        2. <u>fair hearing</u> before
        3. an <u>unbiased decisionmaker</u>
    v. Use *Mathews* balancing test for type and timing:
        1. Importance of the interest to the P and
        2. The ability of additional procedures to increase the accuracy of the fact finding *against*
        3. Government interest in administrative efficiency and cost
    vi. *Mathews* test is highly fact-specific:
        1. if benefit is a life necessity (eg, welfare), the likely need pre-deprivation trial-type hearing
        2. if public danger involves, no pre-deprivation hearing needed (eg, violent public school student gets suspended)
        3. public employees get notice and pre-termination response, but full hearing only after termination

VI. EQUAL PROTECTION (5th and 14th Amends)

a. Analysis
    i. What trait or basis for classification? Suspect, quasi-suspect, or fundamental right
    ii. What level of judicial review?
    iii. What is needed to prove *intentional discrimination*?
    iv. Apply scrutiny

b. Race or National Origin: Suspect
    i. Intentional discrimination gets SS

ii. **Proving intentional discrimination** (BOP on P):
    1. law is discriminatory on its face;
    2. patently discriminatory application of facially neutral law; or
    3. prove discriminatory motive behind law or action
    4. NB: negligent behavior does not give rise to EP claim
iii. Affirmative Action Cases:
    1. AA laws/policies get SS
    2. Only 2 compelling interests have been found:
        a. Remedy persistent discrimination affecting readily identifiable individuals
        b. Achieve diversity within public school student body
            i. Assuming individualized consideration and race is merely a plus
    3. Look for:
        a. Proportionality
        b. Flexibility (ie, can the program ever end?; no quotas)
        c. No burden on innocent 3rd parties (eg, seniority systems)

c. Alienage: Sometimes suspect
    i. Federal Govt: intentional discrim against aliens gets RBR
    ii. State/Local: intentional discrim against:
        1. resident aliens gets SS
            a. Exceptions: participation in self-government process OR positions in *political functions*
        2. undocumented aliens gets RBR

d. Gender: Quasi-Suspect
    i. Intentional gender discrimination gets IS
        1. must show an "exceedingly persuasive justification" for the discrimination
    ii. Areas of gender discrimination:
        1. law based on gender stereotypes
        2. prefers one gender over another for jobs

e. Illegitimacy: Quasi-suspect
    i. Intentional discrimination against non-marital children gets IS

f. Fundamental Rights Restrictions: Suspect
    i. Where governement restricts SOME persons in exercise of fundamental rights, then examined with SS
        1. NB: if burdens ALL society, then analyze under SDP

g. Non-Suspect
    i. Always gets RBR,
        1. EXCEPT if only possible motive was <u>hatred</u> of group, this fails because hatred is irrational

VII. EXPRESSIVE FREEDOMS: SPEECH, PRESS, ASSOCIATION, RELIGION

a. Analytical Steps
    i. Content-based or content-neutral?
        1. content-based:

            a. type of speech: unprotected, less protected, govt fund, or protected?
            b. Apply proper scrutiny
            c. Apply issue trio (vague, overbroad, excessive discretion) and prior restraint analysis
        2. content-neutral
            a. what type of forum?
            b. Facial or as applied challenge
            c. Time, place, manner issues
            d. Viewpoint based?
            e. Apply scrutiny
            f. Apply issue trio and prior restraints

b. Content-based vs. content-neutral
    i. Content-based restrictions on
        1. the subject matter or
        2. the viewpoint of speech must meet SS
    ii. Content-neutral laws that burden expressive conduct
        1. need only meet IS
    iii. Exceptions
        1. categories of unprotected, less protected, and govt funded speech
            a. may be regulated by subject matter, so long as
            b. the regulation is viewpoint-neutral

c. Prior restraints
    i. Preventing speech before it occurs must meet SS and must have
        1. clear, narrowly-drawn standards;
        2. injunction must be promptly sought;
        3. no discretion; and
        4. opportunity for prompt judicial review
    ii. Examples:
        1. gag order, injunction, permit
    iii. NB: P must obey prior restraint until court deems it unconstitutional

d. Vague, Overbroad, Unduly Discretionary
    i. A regulation is **void for vagueness** if a *reasonable person* cannot tell from the terms of the law what is prohibited and what is permitted
    ii. A regulation is **overbroad** if it affects *substantially more speech* than is necessary to serve the govt's legitimate purposes.
    iii. A regulation is **unduly discretionary** if it gives officials *inadequate standards* for applying the law's requirements

e. Scope of First Amend protections
    i. Freedom to speak
    ii. Freedom not to speak
        1. no flag salute; no displaying disagreeable messages
        2. can charge general tax and use money for disagreeable purpose
    iii. Symbolic speech
        1. govt may regulate symbolic speech only if it has
            a. an important purpose

b. that is unrelated to the suppression of the message and
c. if burden on communication is no greater than necessary to achieve that purpose

iv. Anonymous speech
1. forcing disclosure can have a serious *chilling* effect on discourse

VIII. UNPROTECTED/LESS PROTECTED SPEECH

a. Incitement of Illegal Conduct
i. To punish as incitement, the illegal conduct must be
1. likely;
2. imminent; and
3. intended by the speaker
ii. if any of these elements missing from statute, make facial challenge

b. Fighting Words
i. Words that are
1. abusive
2. directed personally to the hearer
3. likely to produce immediate and physically violent reactions in the *average* person
ii. NB: hate speech laws are valid, UNLESS they only regulate *certain disfavored viewpoints*

c. True Threat
i. A statement that a
1. reasonable person would interpret
2. as the D's serious declaration of intent to
3. murder or inflict bodily harm
ii. can be direct/indirect, said in private, and someone else communicates it to P

d. Obscenity and Sexually-oriented speech
i. The material *taken as a whole* by the average person
1. appeals to the prurient interest in sex (community standards)
2. is patently offensive (community standards) and
3. lacks serious value of literary, artistic, political or scientific nature (national reasonable person standard)
ii. <u>Child porn</u>
1. if actual minors, can be completely forbidden
2. if virtual minors, use normal obscenity test
iii. Zoning adult businesses
1. can't entirely zone out from community
2. secondary effects
3. nude dancing: can't expressly target, but could ban all public nudity

e. Defamation (see Torts)

f. Commercial Speech
i. Soliciting for illegal activity or false or misleading advertising may be prohibited

ii. Truthful advertising with inherent risk of deceiving or misleading the public can be prohibited
iii. Otherwise, regulation of truthful advertising of lawful products and services gets IS
1. upheld if serves a substantial govt interest;
2. directly advances that interest; and
3. is narrowly tailored to serve that interest (ie, "*reasonable fit*")

IX. FREEDOM OF SPEECH: TIME, PLACE, MANNER
a. Forum Rules
i. Public or limited forums
1. time, place, manner regulations are permitted if
a. the regulation is content-neutral to subject matter and viewpoint,
b. is narrowly tailored to serve a
c. *significant* govt interest, and
d. leaves open alternative avenues of communication
ii. Nonpublic forums
1. regulations are permissible if they are
a. viewpoint neutral and
b. meet RBR
iii. Private property
1. govt may adopt reasonable regulations to limit access to private property for speech and assembly purposes

X. OTHER EXPRESSIVE ACTIVITIES
a. Freedom of Press
i. General regulations or taxes imposed on businesses apply to the media as well. BUT
1. special regulations or tax *targeting* the media must meet SS
ii. Publication of Unlawfully Obtained Information
1. may publish if;
a. information is truthful
b. a matter of public concern
c. the media did not obtain it unlawfully or know who did; and
d. original speaker of the truthful information had *reduced expectations of privacy* (eg on cell phone)
iii. Judicial Review
1. content-based regulations
a. always get SS
2. content-neutral regulations
a. of print, internet, cable TV get SS
b. of radio and TV get IS
b. Freedom of Association
i. Implied by text of 1st Amend
ii. Association for political activities is a fundamental right:
1. restrictions always gets SS

iii. Association for Illegal Activities
    1. May be prohibited if govt proves person
        a. Actually participated in the group
        b. Knowing of its illegal activities, and
        c. Specifically intended to further those illegal activities
iv. Anonymous Association
    1. laws req disclosure of members that may chill expression get SS
v. Discriminatory Membership
    1. laws forbidding groups from discriminating are invalid IF they interfere with the *group's expressive activity*
        a. No gays/lesbians in Scouts or St Pattie's Day parade
vi. Govt Employees
    1. A public employee or ind contractor cannot be fired/disciplined for
        a. Expressing opinon
        b. *In public as a citizen*
        c. On matters of public interest, UNLESS
        d. It undermines the employer's authority or
        e. Disrupts the employer's policies.
    2. Govt may punish/fire employees if
        a. speech is not on matter of public interest **or**
        b. is done pursuant to employee's official duties
    3. Thus, speaking in workplace in official capacity can be infringed
vii. Loyalty oaths
    1. permitted if not vague or overbroad

c. Freedom of Religion
i. Free Exercise Clause
    1. Govt can't specifically punish or interfere with religious beliefs, but can
        a. Incidently burden religious practice by
        b. Neutral laws of general applicability
    2. EXCEPTIONS:
        a. Religiously based denials of unemployment compensation benefits are impermissible
        b. Religious education outside public school systems can't be burdened (Amish pulling kids out)
ii. Establishment Clause
    1. Govt discrimination against or among religions must meet SS
    2. A non-discriminatory regulation must meet the *Lemon* test:
        a. It must serve a *secular purpose*;
        b. Its *primary effects* must not advance or inhibit religion; and
        c. It must not create *excessive govtal entanglement* with a religious administration or bureaucracy
    3. Financial benefits to Religions:
        a. If govt money flowing to schools, upheld if
            i. Flows through private choices; and

ii. Govt plan remains neutral as to whatever choice made by parents

4. Religious activity in public schools:
    a. If school lets other similarly situated groups use its grounds (eg, student groups), then it must let in religious groups (eg, student prayer group)

XI. FEDERAL EXECUTIVE POWERS; Article II

a. Conflict of laws hierarchy
    i. US Const
    ii. Federal Law vs. Treaty (last in time trumps)
    iii. Executive Agreement
    iv. State Const
    v. State Law
b. Warmaking Power
    i. President may introduce troops into foreign hostilities when
        1. Congress has expressly or implicitly granted authority to do so; or
        2. the national interest requires such action, PROVIDED that Congress has not explicitly disapproved of the specific action
    ii. NB: political question
c. Appointment and Removal of Officers
    i. Appointment
        1. all high officers
        2. inferior: Congress has discretion with whom to vest the power of appointment, but may reserve power to itself
    ii. Removal
        1. president has absolute authority to fire high level officers
        2. president may fire other officers at his discretion, UNLESS removal is expressly limited by federal statute
d. Impeachment, conviction, removal:
    i. Legal grounds: treason, bribery, or high crimes and misdemeanors
    ii. The House of Rep impeaches on majority vote
    iii. Pres is then tried by Senate and convicted only with a 2/3 majority
e. Executive Immunity and Privilege
    i. Immunity
        1. absolute immunity from civil suit for acts during office
    ii. Privilege
        1. presumptive privilege for presidential papers and communications, BUT
            a. must yield to more important govt interests
f. Pardon power
    i. May pardon those accused OR convicted of
    ii. FEDERAL crimes [not civil], except impeachment
    iii. Congress cannot limit this power

XII. FEDERAL LEGISLATIVE POWERS: Article I

a. Enumerated Powers and Necessary and Proper
    i. Art I, sec 8

ii. N&P clause allows Congress to make
    1. all laws *appropriate* to further any power that
    2. the Constitution grants to any branch of the federal govt
    3. NB: N&P clause alone can NEVER be sufficient to permit Congress to enact a law

b. Commerce Power
    i. Congress may regulate
        1. channels of interstate commerce
        2. persons and instrumentalities in interstate commerce
        3. activities that have a *substantial effect* on interstate commerce
    ii. Substantial effect
        1. if local, *intra*state economic activity, then look to *cumulative effect* and say yes
        2. if non-economic activity, then no power (eg, domestic violence act; possessing gun at school)

c. Taxing and Spending Power
    i. Very few limits
    ii. Taxing
        1. Valid if a reasonable means to produce revenue OR if Congress has power to regulate the taxed activity
    iii. Spending
        1. need only serve any legitimate public purpose
        2. conditional grants-in-aid may indirectly regulate those activities that Congress may not directly regulate otherwise under enumerated powers

d. Civil Rights Enforcement (14th Amend, sec 5)
    i. Can pass remedial legislation only (no creation of substantive rights); and
    ii. Remedies must be *congruent and proportional* to the scope of consitutional violations

e. TENTH AMEND [reserves non-enumerated powers to states or the people] limits on congressional powers
    i. Congress cannot compel state/local legislatures to pass laws that serve federal regulatory purposes
    ii. Congress cannot "commandeer" state/local executive or adiminstrative officers to regulate their citizens according to federal requirements
    iii. Congress cannot subject public sector alone to taxes or regulations that do not apply evenhandedly to similar activities in the private sector
    iv. EXCEPTIONS:
        1. grant-in-aid enticements
        2. use of amend 14, sec 5 to override 10th in certain areas.

f. ELEVENTH AMEND limits on Congressional Powers
    i. State governments cannot be sued by private P in federal court or federal administrative agencies
    ii. EXCEPTIONS:
        1. express and unequivocal consent of state to be sued

2. future injunctive relief against state officer acting in official capacity
3. damages suit against state officers in personal capacity (so long as state would not indemnify officer)
4. suit against state under federal statute enacted under section 5 of the 14th Amendment

g. Legislative and Line item veto
   i. Congress can't overturn executive action without
      1. bicameralism and
      2. presentment
   ii. Congress can't give president power to veto only some parts of a bill

XIII. PREEMPTION, DORMANT COMMERCE CLAUSE, P&I DOCTRINES

a. Preemption (from Supremacy Clause)
   i. Express preemption
   ii. Conflicting regulations
      1. federal and state regs are mutually exclusive
   iii. Frustration of Federal Purposes
      1. state/local law disrupts federal purposes
   iv. Occupation of the Field
      1. Congress reserves a regulatory area for exclusive federal control (eg, NLRB)

b. Dormant Commerce Clause
   i. In absence of federal action, state/local govt may regulate interstate commerce provided that
      1. the regulation does not <u>discriminate against</u> or
      2. <u>unduly burden</u> interstate commerce
   ii. State/local regulations that *intentionally* discriminates against out-of-state economic actors must meet
      1. Test:
         a. Must further an important, noneconomic state interest; and
         b. There are no reasonable nondiscriminatory alternatives
      2. BOP of P to show intention [EP test]
   iii. A non-discriminatory regulation is invalid if the
      1. burdens on interstate commerce outweigh the
      2. benefits in furthering a state's legitimate govt interest
   iv. State taxes
      1. if discriminate against out-of-state businesses, get SS
      2. if non-discriminatory on out-of-state business, then valid only if:
         a. taxed activity has substantial nexus with state;
         b. tax is fairly apportioned to apply only to business activities;
            i. govt likely prevails here
         c. tax is fairly related to services/benefits provided by the state
   v. EXCEPTIONS:
      1. Congress authorizes local discriminatory legislation
      2. state/local govt in *market participant*,

a. BUT can only discrim in business it is active in . . . CAN'T regulate *downstream*

vi. **NB: dormant CC often paired with P&I clause; conduct dual analysis on essays**

c. Privileges & Immunities Clause (Article IV, sec2)

i. State and Local govts cannot *expressly* discriminate against out-of-state citizens [n/a to aliens or corporations] as to *fundamental rights*

ii. Analysis

1. is there a law textually discriminating?
2. is there a fundamental right? (eg, buy land vs. cheap tuition)
3. apply SS: no exceptions

XIV. MISC

a. Distinguish ex post facto and bill of attainder:

i. Ex post facto: creates a **criminal** punishment for previously legal behavior (reqs trial to impose punishment)

ii. Attainder: results in **civil** OR **criminal** punishment by legislature without a trial

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