

CONSTITUTIONAL LAW

Preliminary points:

- This is about the MBE, odds of it being in an essay is rare.
- Mindset for con law: it is not debatable – do not let your feelings in.
- Anything from this term of the USSC is not testable.
- Don't need to know case names.

Introduction and outline:

- Federal judiciary power
 - o Authority of federal courts under the Constitution
 - o 15% of questions here
- Federal legislative power
 - o Power of the congress
 - o 10% of questions
- Federal executive power
 - o Power of the president
 - o 10% of questions
- Federalism
 - o Limits that need to be in place on state and local governments because there is a national government and the existence of 49 other states.
 - o 20% of questions
- Structure of the Constitution's protection of individual liberties
- Individual rights and due process
 - o The assurance that neither federal nor state govt can deprive a person of liberty without due process.
 - o 13% of questions
- Equal protection
 - o The assurance that federal or state govt will not deny equal protection under the law.
 - o 12% of questions
- First Amendment
 - o Protections of speech and religion
 - o 20% of questions

1) **Federal judicial power**

- a) Article III – requires cases and controversies and that cases be justiciable.
 - i) This means that fed courts must decide actual cases and controversies and not render advisory opinions.

b) Requirements for justiciability

i) **Standing**

- (1) Whether plaintiff is the proper party to bring the case to court.

(2) Requirements:

- (a) **Injury** – plaintiff must allege and prove that he has been injured or imminently will be injured.

- (i) Not established with only a mere ideological objection.

- (ii) May only assert injuries that plaintiff has personally suffered.

- (iii) If seeking injunctive or declaratory relief, must show likelihood of future harm.

- 1. Example: plaintiff choked by a cop, sued because he wanted to stop cops from using chokehold in the future.

- a. No standing – plaintiff has no likelihood of future harm.

- (iv) Question may ask for whom among plaintiffs has the best standing.

- 1. Look for the answer with the plaintiff who *personally* suffered injury.

- 2. If that is more than one person, look for the one who suffered *economic damages* and that is the best answer.

(b) **Causation and redressability**

- (i) Plaintiff must allege and prove that defendant caused the injury so that a favorable court decision is likely to remedy the harm.

- 1. If a fed court ruling would have no effect, then it is an advisory opinion and not allowed.

- 2. Example: fed statute says to get tax-exempt status, hospital must provide free care to indigents. IRS passes revenue rule saying hospitals do not have to do it. Indigents sue to stop IRS revenue rule.

- a. Court holds that indigents lack standing because they can't show that if the IRS rule is overruled, hospital must still not provide the care.

(c) **No third party standing**

- (i) Plaintiff cannot assert claims of others who are not before the court. Plaintiffs must present personally suffered injuries.

(ii) Exceptions:

1. Close relationship between plaintiff and injured third party which means that plaintiff can be trusted to adequately represent the interests of the third party.
 - a. This is the most tested exception.
 - b. Example: doctor-patient relationship.
 - i. Doctor wants to provide abortions but law says no. Doctor wants to sue because this reduces the # of jobs. But this is not good enough for standing. So doctor argues patient's rights and he is now allowed to sue.
 - c. Example: father sues on daughter's behalf re: pledge of allegiance. Court says no standing, not close enough relationship because he was not the custodial parent.
2. Third party unable to assert his own rights
 - a. Example: right of criminal defendant to raise rights of knocked off jurors, based on race or gender.
3. Organization sues on behalf of members if:
 - a. Members have standing to sue – members have actual injury.
 - b. Interests are germane to the organization's purpose.
 - c. Neither the claim nor relief requires participation of individual members.

(d) **No generalized grievances**

- (i) Plaintiff must not be suing solely as a citizen or as a taxpayer who is interests in have the govt follow the law.

(ii) Exception:

1. Taxpayers have standing to challenge government expenditures as violating the Establishment Clause. (financial support of religion)

- (iii) If fact pattern on exam says plaintiff is suing as a citizen or plaintiff is suing as a taxpayer, this generally means it is a generalized grievance.

ii) **Ripeness**

- (1) This is the question of whether a fed court may grant pre-enforcement review of a statute or regulation.
- (a) Example: statute says you can be punished for wearing badge of postal service unless it is on TV and then it cannot be derogatory. Playwright wants to have play with postal service portrayal as negative. There is no pre-enforcement review of statute.

- (2) Hardship that will be suffered without pre-enforcement review.
 - (a) Greater the hardship, more likely court will grant review.
- (3) Fitness of issues and record for judicial review.
 - (a) Example: FDA requires all drug ads to state the generic name of the drug. FDA filed motion to dismiss drug company's action to strike the rule.
 - (i) Hardship is pretty significant because by violating the rule, company will face criminal penalties and by complying, cost them lots of money.
 - (ii) Fitness is whether the FDA has the authority = question of law.
 - (iii) So this is ripe!
- (4) On exam, whenever there is a plaintiff asking for declaratory relief, always think about ripeness.

iii) **Mootness**

- (1) Plaintiff must present a live controversy.
 - (a) If events after the filing of the lawsuit end plaintiff's injury, the case is dismissed as moot.
 - (b) Note: non-frivolous money damages will keep the claim alive.
 - (c) On exam, if plaintiff is looking for non-money damages, then it is a question about mootness.
- (2) Exceptions:
 - (a) Wrong is capable of repetition but evades review because of its inherently limited time duration.
 - (i) Example: abortion cases because the woman will not be pregnant before the case gets to USSC.
 - (b) Voluntary cessation
 - (i) Where defendant voluntarily stops doing the complained-of act but could start up again.
 - (ii) Example: employer gives hiring test that is allegedly discriminatory. Employer stops giving the test but could start it again.
 - (c) Class action suits
 - (i) So long as one member of the class has an ongoing issue.

iv) **Political question doctrine**

- (1) Constitutional violations that the fed court will not adjudicate because it is best left to the political branches to resolve.
- (2) Types of cases dismissed as non-justiciable political questions:
 - (a) The US shall guarantee to each state a republican form of govt.
 - (i) If there is an answer that it is a challenge to the republican form of govt clause on the exam, it is always the wrong answer.

- (b) Challenges to the president's conduct of foreign policy.
 - (i) Whether president decides to visit a foreign country.
- (c) Challenges to the impeachment and removal process.
- (d) Challenges to partisan gerrymandering.

c) **UCCS review**

- i) For USSC to hear a case, all justiciability requirements must be met.
- ii) Cases get to court by writ of certiorari.
 - (1) Court has complete discretion. 4 justices must agree to hear it.
 - (2) All cases from state courts and US Court of Appeals come to USSC by writ of certiorari.
 - (3) Appeal exists for decisions of 3-judge fed district courts.
 - (a) This is the only time appeal to USSC is mandatory.
 - (b) Question on exam will just say "case heard by 3-judge panel."
 - (4) USSC has original and exclusive jx for suits between state govts.
- iii) Final Judgment Rule
 - (1) Generally, USSC may hear cases only after there has been a final judgment of the highest state court, or of US Court of Appeals, or of a 3-judge fed district court.
- iv) To review a state court decision, there must not be an independent and adequate state law ground for the decision.
 - (1) If a state court decision rests on 2 grounds, 1 state law and 1 fed law, if the USSC's reversal of the fed law ground will not change the result in the case, USSC cannot hear it.
 - (a) Example: person beat up by cops. Person sues cops on CA and fed grounds (civil rights) in state court. He wins on stated fed claims but total \$100k on either claim. Cops appeal through state court of appeals and lose. USSC will not review the state law ground and won't hear fed law ground because even if USSC reverses, victim still gets it.

d) **Lower federal court review**

- i) Sovereign immunity – 11th amendment
 - (1) Fed courts and state courts may not hear suits against state govts.
 - (a) Not local govts.
 - (2) 11th amendment bars suits against states in federal court. States cannot be named as defendants in a federal court case.
 - (3) Bars suits against states in state courts or fed agencies and even on federal law claims. (??)

- (4) Exceptions: states may be sued only when:
 - (a) Waiver is permitted.
 - (i) A state may, and must expressly, consent to be sued.
 - (b) Pursuant to fed laws adopted under Sec. 5 of 14th amendment.
 - (i) Congress cannot authorize suits against states under any other constitutional provision or power.
 - (c) Fed govt may sue state govt.
 - (i) Sovereign immunity is not a bar to the fed govt suing a state govt.
 - (d) Bankruptcy proceedings
 - (i) 11th amendment does not apply to federal laws exercised pursuant to Congress's bankruptcy power, so it does not bar actions of the US Bankruptcy Courts.
- (5) Suits against state officers are allowed even if the state govt cannot be named as a defendant.
 - (a) State officers
 - (i) Can be sued for:
 - 1. Injunctive relief
 - 2. Money damages to be paid out of their own pockets
 - (ii) May not be sued if it is the state treasury that will be paying retroactive damages.
 - ii) Abstention
 - (1) Fed courts may not enjoin pending state court proceedings.

2) **Federal legislative power – Article II**

- a) **Congress' authority to act**
 - i) Must be express or implied congressional power.
 - (1) Generally no fed police power.
 - (a) Exceptions: [MILD]
 - (i) **M**: military
 - (ii) **I**: Indian reservations
 - (iii) **L**: federal lands
 - (iv) **D**: district of Columbia
 - ii) Congress can adopt all laws that are necessary and proper to exercise its authority.
 - (1) Article 1, sec 8

iii) Powers:

(1) **Taxing and spending**

- (a) Congress may tax and spend for the general welfare.
- (b) Not really a power; it is in the preamble.
- (c) On exam, answer choice of general welfare is only the correct answer where Congress has power to tax and spend in the MILD categories. (??)

(2) **Commerce**

- (a) Congress can regulate commerce with:
 - (i) Foreign nations
 - (ii) Indian tribes
 - (iii) Among the states
- (b) Congress may regulate the channels of interstate commerce.
 - (i) Channels: where commerce occurs, such as highways, waterways, internet, across state lines.
- (c) Congress may regulate the instrumentalities of interstate commerce.
 - (i) Things that facilitate commerce, like trains, cars, planes.
- (d) Congress may regulate the persons or things in interstate commerce.
- (e) Congress may regulate economic activities that have a substantial effect on interstate commerce.
 - (i) In the area of non-economic activity, a substantial effect *cannot* be based on cumulative impact.
 - (ii) Example: Congress passed law limiting wheat grown for home consumption. Farmer challenged and lost. What if all farmers did that? Cumulative effect on prices. (??)
 - (iii) Example: civil damages provision of Violence Against Women Act. Congress found economic cost to violence against women but USSC held that regulating sexual assault is non-economic, so no cumulative effect.

iv) 10th amendment – limits Congressional powers.

- (1) All powers not granted to the US, not prohibited to the states, are reserved to the states or people. So:
- (2) Congress cannot compel state regulatory or legislative action.
 - (a) State can't be forced to enact regulations, but can be induced. Congress can put strings/conditions on grants, so long as:
 - (i) Conditions are expressly stated, and
 - (ii) Conditions are related to the purpose of the spending program.

(b) Example: Congress wanted to set national drinking age at 21, so Congress conditioned the grant of road building funds to states with drinking age of 21. This is ok because related to safety/driving.

(3) Congress may prohibit harmful commercial activity by state govts.

(a) Example: states selling DMV lists. Congress passed law prohibiting the sale. Held ok.

b) Delegation of powers

i) No limit to Congress' ability to delegate legislative power.

(1) On exam, answer choice of "unconstitutional because excessive delegation of legislative power" is always wrong!

ii) Legislative vetoes and line-item vetoes are unconstitutional.

(1) For Congress to act, there must always be:

(a) Bicameralism – passage by both house and senate, and

(b) Presentment – giving bill to president to sign or veto.

(2) President must sign or veto bill in its entirety – line item veto is unconstitutional.

iii) Congress may not delegate executive power to itself or its officers.

(1) It cannot take power away from another branch.

3) Federal executive power

a) Foreign policy (states have no power to affect foreign relations)

i) Treaties

(1) Agreements between the US and a foreign country that are:

(a) Negotiated by the president, and

(b) Are effective when ratified by the senate.

(2) Conflicts with treaties:

(a) State law conflict with treaty:

(i) State law is invalid.

(b) Fed law conflict with fed statute:

(i) The one adopted last in time controls. Earlier one gives way.

(c) Treaty conflict with Constitution:

(i) Treaty is invalid.

(ii) Nothing can violate the Constitution.

ii) Executive agreements

(1) Agreement between the US and a foreign country that is effective when signed by president and a head of foreign country.

(a) No senate approval is needed.

(2) Can be used for any purpose.

(a) Anything you do by treaty can be done by executive agreement.

- (3) Prevail over conflicting state laws, but never over conflicting fed laws or the Constitution.

iii) President has **broad powers as Commander-in-Chief to use troops in foreign countries.**

- (1) On exam, hypo might be that president sends troops to foreign country for a wacky purpose and there is no declaration of war.
 - (a) Best answer: dismissed because it is a political question.
 - (b) Next best answer: president wins.

b) Domestic affairs

i) **Appointment power**

- (1) President appoints:
 - (a) Ambassadors
 - (b) Fed judges
 - (c) Officers of US
- (2) Senate must approve the nomination.
- (3) Congress may vest the appointment of inferior officers in:
 - (a) The president
 - (b) Heads of departments
 - (c) Lower fed courts

ii) **Removal power**

- (1) Unless removal is limited by statute, president may fire any executive branch official.
- (2) Congress may, by statute, limit removal but only if these requirements are met:
 - (a) Must be an office where independence from president is desirable, and
 - (i) Example: special prosecutor investigating president.
 - (b) Removal not prohibited, but can limit removal to when there is good cause shown.

iii) **Impeachment**

- (1) Who:
 - (a) President
 - (b) Vice president
 - (c) Federal judges
 - (d) All officers of the US
- (2) Can be impeached and removed from office
 - (a) Impeachment alone does not remove a person from office.
 - (b)

- (3) For:
 - (a) Treason
 - (b) Bribery
 - (c) High crimes and misdemeanor
 - (i) There is no legal definition of this.
- (4) Impeachment by the House requires a majority vote.
 - (a) Conviction in the Senate requires a 2/3 vote.

- iv) President has absolute immunity to civil suits for money damages for any actions while in office.
 - (1) No immunity for actions that occurred prior to taking office.
 - (2) Example: president decides to wiretap telephone of future primary opponent and excuses it as national security. President is immune (but FBI and underlings are liable).
- v) President has executive privilege for presidential papers and conversations.
 - (1) But this privilege must yield to other important govt interests.
- vi) Pardon power
 - (1) President can pardon anyone accused or convicted of fed crimes (not state crimes).
 - (2) Except:
 - (a) Where person to be pardoned has been impeached by House.
 - (i) This person can never be pardoned for the underlying crimes.
 - (b) Does not apply to civil liability.
 - (i) Example: fed judge holds someone in civil contempt and puts him in jail. President wants to pardon, but does not apply – not a criminal matter!

4) **Federalism**

a) **Preemption**

- i) Article VI – supremacy clause.
 - (1) The constitution and the laws and treaties made pursuant to it are the supreme law of the land.
- ii) Preemption can be found in 3 separate ways:
 - (1) Express preemption
 - (a) When Congress has authority to act, it can state that its power is exclusive in a field.
 - (b) If a fed statute says that a fed law is exclusive in a field, then state and local laws are preempted.

(2) Implied preemption

(a) Even if a fed statute is silent about preemption, implied preemption may be found in the following ways:

(i) If person cannot simultaneously comply with both fed and state laws, then state law is deemed preempted.

1. Example: fed law states 90% purity for auto emissions. NY law says 80% purity for auto emissions. NY law fails because you cannot comply with both. If CA law said 95% purity, then CA law is good because you can comply with both.

(ii) If state law impedes the achievement of a fed objective, then state law is deemed preempted.

1. Example: FL law that someone who filed complaint with the National Labor Board cannot collect FL unemployment. FL law would be preempted because it impedes the objective of the fed law of wanting people to report grievances.

(iii) If Congress evidences a clear intent to preempt state law, then state law is deemed preempted.

1. Example: fed immigration law – has the intent to fully occupy the field.

(3) Inter-governmental immunity

(a) Fed govt is immune from unwanted state taxation or regulation.

(b) States may not charge state tax paid out of federal treasury for fed govt activity.

(i) Example: fed govt owns store on military base. State cannot tax.

(ii) Example: can local govt force fed govt who owns buildings in downtown pay property tax? No.

b) **Dormant commerce clause and privileges and immunities clause of Art IV.**

i) State or local law may not place an undue burden on interstate commerce.

ii) Dormant commerce clause

(1) Not an express provision – it is inferred from commerce power.

(2) Sometimes called the negative implications of the commerce clause.

iii) P and I clause:

(1) Of Article IV – no state or municipality may deny citizens of other states the privileges and immunities it affords its own citizens without substantial justification.

(a) Applies to people, not corporations.

(b) OK for states to require residency of police or firefighters, but not lawyers.

(2) Of 14th amendment – used to preserve a person's right to travel from one state to another.

iv) Does law discriminate against out-of-staters?

(1) If law does not discriminate against out-of-staters:

(a) Then P and I clause of Art IV does not apply because this provision only applies if there is discrimination.

(b) If the law burdens interstate commerce, it violates the dormant commerce clause if:

(i) The burden on interstate commerce outweighs the benefits of the law.

1. Example: IL law regulating mud flaps. Other states provided that other mud flaps should be used. Places a substantial burden on interstate commerce. And does not discriminate against out-of-staters because everyone has to comply.

(2) If law does discriminate against out-of-staters:

(a) If law burdens interstate commerce, it violates the dormant commerce clause **unless**:

(i) It is necessary to achieve an important govt purpose, and

(ii) Govt must show that no less discriminatory alternative can achieve its goal.

1. Example: only one: ME adopted law that prohibited out-of-state baitfish because it threatened fish native to ME. Court found it necessary and no less discriminatory alternative.

(iii) Exceptions:

1. If Congress approves it, it is ok.

2. Market participation exception.

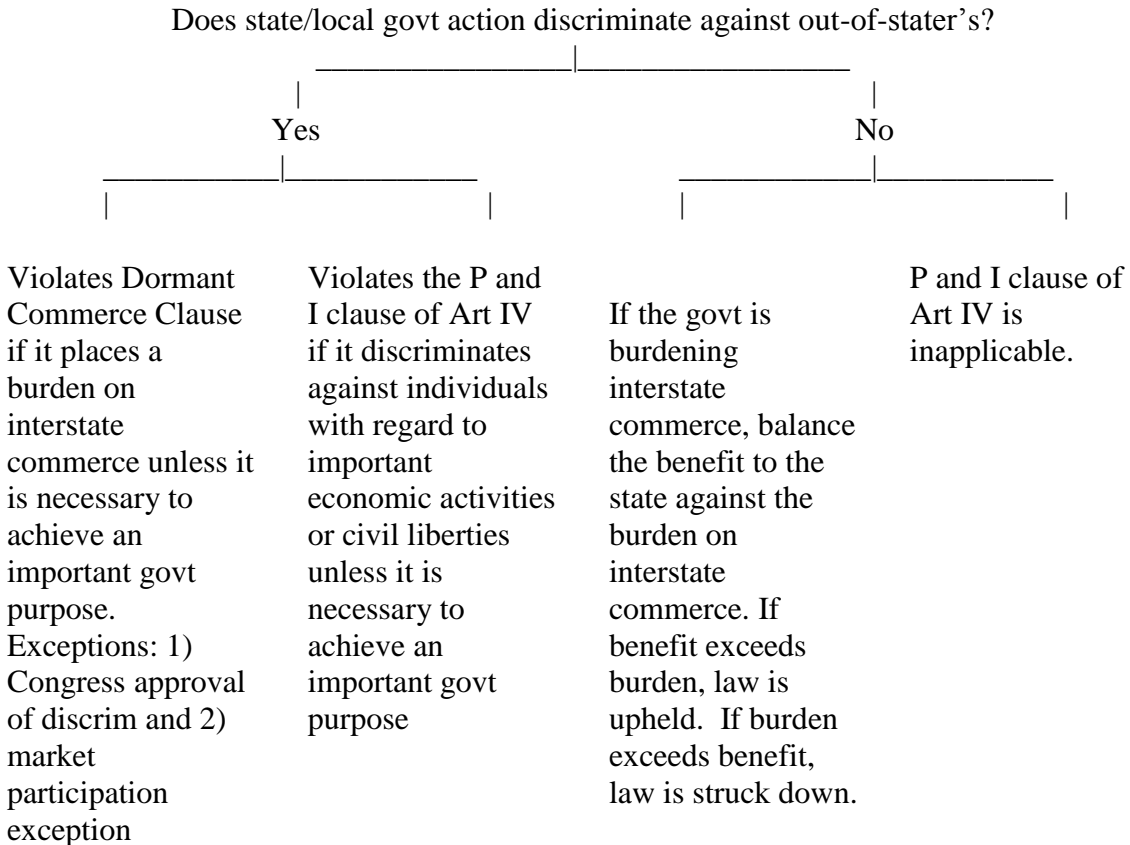
a. A state/local govt may prefer its own citizens in receiving benefits from govt programs or in dealing with govt-owned businesses.

i. Example: state universities can charge lower tuition to in-state residents. Govt benefit program because in-state residents have been paying taxes to support the program.

(b) If law discriminates against out-of-staters with regard to their ability to earn a living, it violates the P and I clause of Article IV unless it is necessary to achieve an important govt purpose.

- (i) Corporations and aliens cannot use or invoke the P and I clause.
 1. If question is where state is discriminatory against out-of-staters and challenge is brought by corp, use only dormant commerce clause.
 2. If challenge is by an individual, use both P and I clause of Art IV and commerce clause.

Chart for dormant commerce clause/P and I clause of Art IV



Comparison of the Dormant Commerce Clause and P and I clause of Art IV

<u>Dormant Commerce Clause</u>	<u>P and I clause</u>
Does not require discrimination against out-of-staters in order to apply.	Requires discrimination against out-of-staters in order to apply.
Requires a burden on interstate commerce.	Requires discrimination with regard to civil liberties or important economic activities.
Corporations and aliens can sue under it.	Corporations and aliens can't sue under it.
Exception: Congress approval and market participant exception	No exceptions.

- c) State taxation of interstate commerce [not tested]
 - i) States may not use their tax systems to help in-state businesses.
 - ii) State may only tax activities if there is a substantial nexus between the product or activity to be taxed and the state.
 - iii) State taxation of interstate businesses or companies must be fairly apportioned.
 - d) Full faith and credit
 - i) Courts in one state must give full faith and credit – must enforce all judgments of courts in another state, so long as:
 - (1) The court that issued the judgment must have personal and subject matter jx.
 - (2) Judgment must be on the merits.
 - (3) Judgment must be final.
- 5) **Structure of the Constitution's protection of individual liberties**
- a) Is there a govt action?
 - i) Constitution only applies to govt action. Private conduct need not comply.
 - ii) However, Congress may, by statute, apply constitutional norms to private conduct.
 - (1) I.e., race discrimination; Congress can adopt statutes that prohibit it in private business hiring.
 - (2) Pursuant to 13th amendment (which prohibits slavery and involuntary servitude), Congress can prohibit private race discrimination and has broad powers to adopt laws to enforce this provision.
 - (a) This is the only provision in the Constitution that applies directly to private conduct.
 - (3) Pursuant to the Commerce Clause, Congress can apply constitutional norms to private conduct.
 - (a) I.e., Civil Rights Act of 1964, which prohibits hotels and restaurants from discriminating on race.
 - (4) Congress cannot use section 5 of 14th amendment to regulate private behavior.
 - (a) This only applies to regulating state and local govts.
 - iii) Exceptions: (where private conduct must comply with the Constitution)
 - (1) Public functions exception: Constitution applies if a private entity is performing a task traditionally, exclusively done by the govt.
 - (a) Example: Town was owned by a company. They kicked out the Jehovah's Witnesses. Can't do this because running a town is a function traditionally done by govt.

(2) Entanglement exception: Constitution applies if the govt affirmatively authorizes, encourages, or facilitates unconstitutional activity.

(3) Examples:

- (a) Courts cannot enforce racially restrictive covenants.
 - (i) Homeowners agree not to sell to blacks and Jews, not allowed.
- (b) There is a state action when the govt leases premises to a restaurant that racially discriminates.
- (c) There is a state action when a state provides free books to private schools that racially discriminate.
- (d) There is no state action when a private school that is over 99% funded by the govt fires a teacher because of her speech.
 - (i) Note: there is no way to reconcile this with (c).
- (e) There is no state action when the NCAA orders the suspension of a basketball coach at a state university.
- (f) There is a state action when a private entity regulates interscholastic sports within a state.
 - (i) Note: there is no way to reconcile this with (e).
- (g) There is no state action when a private club with a liquor license from the state racially discriminates.
 - (i) Moose lodge of PA that refused to serve or admit black people.

b) Application of the **Bill of Rights**

- i) Bill of Rights applies directly only to the fed govt.
- ii) Bill of Rights is applied to state and local govts through its incorporation into the due process clause of 14th amendment.

iii) Exceptions: those not incorporated to state and local govts.

- (1) 2nd amendment right to bear arms.
 - (a) But individuals have a right to own weapons for self-defense, but USSC did not specify a level of scrutiny.
- (2) 3rd amendment right not to have a soldier quartered into someone's home.
- (3) 5th amendment right to grand jury indictment in criminal cases.
- (4) 7th amendment right to jury trials in civil cases.
- (5) 8th amendment right against excessive fees.
 - (a) The other rights of the 8th amendment are applied to the states – bail, cruel and unusual punishment.

c) **Levels of scrutiny**

- i) When the USSC addresses individual liberties under the Constitution, the outcome of the analysis will depend on the level of scrutiny used by the court.

ii) Rational basis test

- (1) A law is upheld if it is rationally related to a legitimate govt purpose.
- (2) The challenger of the law has the burden of proof to show either:
 - (a) That there is no conceivable legitimate purpose, or
 - (b) That the law is not rationally related to it.
- (3) This test is very deferential to the govt.

iii) Intermediate scrutiny

- (1) A law is upheld if it is substantially related to an important govt purpose.
 - (a) This is more than legitimate. The govt's actual purpose must be legitimate.
- (2) The govt has the burden of proof.
- (3) Means chosen by govt must be narrowly tailored.

iv) Strict scrutiny

- (1) A law is upheld if it is necessary to achieve a compelling govt purpose.
 - (a) Must be vital.
- (2) The govt has the burden of proof.
- (3) Means chosen by govt must be the least restrictive alternative available.

Levels of scrutiny

	Means?	Ends?	Least restrictive alternative available?	Burden of proof
Rational basis test	Rationally related	Legitimate conceivable purpose	No	Challenger
Intermediate scrutiny	Substantially related	Important actual purpose	No	Govt
Strict scrutiny	Necessary	Compelling actual purpose	Yes	Govt

6) **Individual rights and Due Process**

a) Procedural due process

i) The procedures govt must follow to take away someone's life, liberty, or property.

ii) Ask:

(1) **Has there been a deprivation of life, liberty, or property?**

(a) Liberty

(i) Deprivation occurs if there is the loss of significant freedom provided by the Constitution or statute.

1. Examples:

- a. Except in an emergency, before an adult can be institutionalized, there must be notice and a hearing.
- b. Harm to reputation by itself is not a loss of liberty.
- c. Prisoners rarely have liberty interests.

(b) Property

(i) Deprivation occurs if a person has an entitlement and that entitlement is not fulfilled

- 1. Entitlement = reasonable expectation of the continued receipt of a benefit.

(c) Negligence is not enough to be deprived of due process.

(i) There must be an intentional govt action or at least reckless action.

- 1. Example: prisoner slips on pillow left on steps. Sues govt for negligence that violated his right to bodily liberty. Prisoner loses.

(ii) Exception:

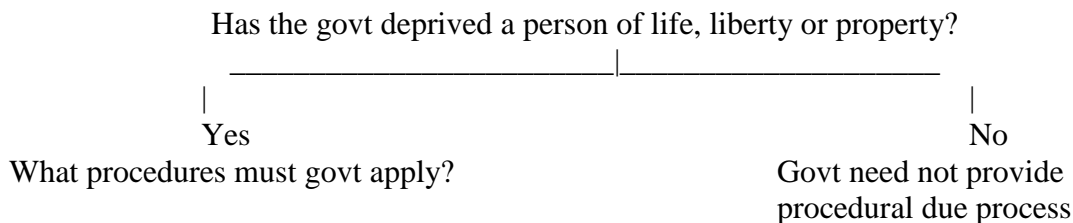
- 1. In emergency situations, the govt is liable under due process only if its conduct shocks the conscious.

(d) Govt's failure to protect people from privately inflicted harms does not deny due process.

(i) Example: child suffered permanent harm inflicted by father. Guardian sues Dept of Social Svcs for failure to respond to previous complaints. Result – no due process deprivation. Govt has not caused the harm.

- (2) **Only if there has been a deprivation, ask: What procedures are required?**
- (a) Balancing test of:
- (i) Importance of the interest to the individual,
 1. The more important the interest to the person, the more procedural protection will be required by the court.
 - (ii) Ability of additional procedures to increase the accuracy of the fact-finding, **and**
 1. The more additional procedures will lead to better and more accurate decisions and reduced erroneous deprivation, the more likely the court will require them.
 - (iii) Govt's interests of efficiency and cost savings.
- (b) Examples:
- (i) Welfare benefits – termination requires both notice and hearing.
 - (ii) Social security disability benefits – termination requires only a post-termination hearing.
 - (iii) Parent's right to custody – termination requires both notice and hearing.
 - (iv) Punitive damage awards – require jury instructions to guide jury's discretion and judicial review to ensure that any award is reasonable.
 - (v) Non-citizen held as enemy combatant is entitled to due process – they have the ability to challenge their continued detention.
 - (vi) US citizens facing criminal charges in a foreign country held by US military can file a habeas corpus petition and seek review of their detention in federal court.
 - (vii) Due process requires recusal of a judge if there is a substantial risk of actual bias.

Procedural Due Process



Balance:

- 1) Import or individ interest;
- 2) Ability of addtl procedures to increase accuracy of fact finding; and
- 3) Govt's interests

On essay, if you conclude no deprivation of due process, say if there were, what procedures should be followed.

b) Substantive due process

- i) Used in areas to protect economic liberties and to safeguard property.
- ii) This asks whether the govt has a adequate reason for taking away a person's life, liberty, or property.

iii) **Economic liberties**

(1) The Constitution provides only minimal protection for economic liberties.

(a) Only a rational basis test is used for law affecting economic rights.

(2) 5th amendment **takings clause**

(a) Govt may take private property for public use if it provides just compensation.

(i) Here, govt does not use levels of scrutiny but uses a separate test:

1. Is there a taking?

a. Possessory taking

- i. Govt confiscation or physical occupation is always a taking. Doesn't matter how small amount of property is taken. Cable box case – was a taking.

b. Regulatory taking

- i. Govt regulation is a taking if it leaves no reasonably economically viable use of the property.
- ii. It is not a taking just because it decreases the value of the property, even if it is significantly.
- iii. Property owner can challenge regulations that existed at time property was purchased, even if they knew about them when purchasing the property.
- iv. Temporarily denying an owner use of property is not a taking as long as the govt's action is reasonable.

c. Govt conditions on the development of property must be justified by a benefit that is roughly proportionate to the burden imposed. Otherwise it is a taking.

2. If there is a taking, is it for public use?

a. Public use is broadly defined.

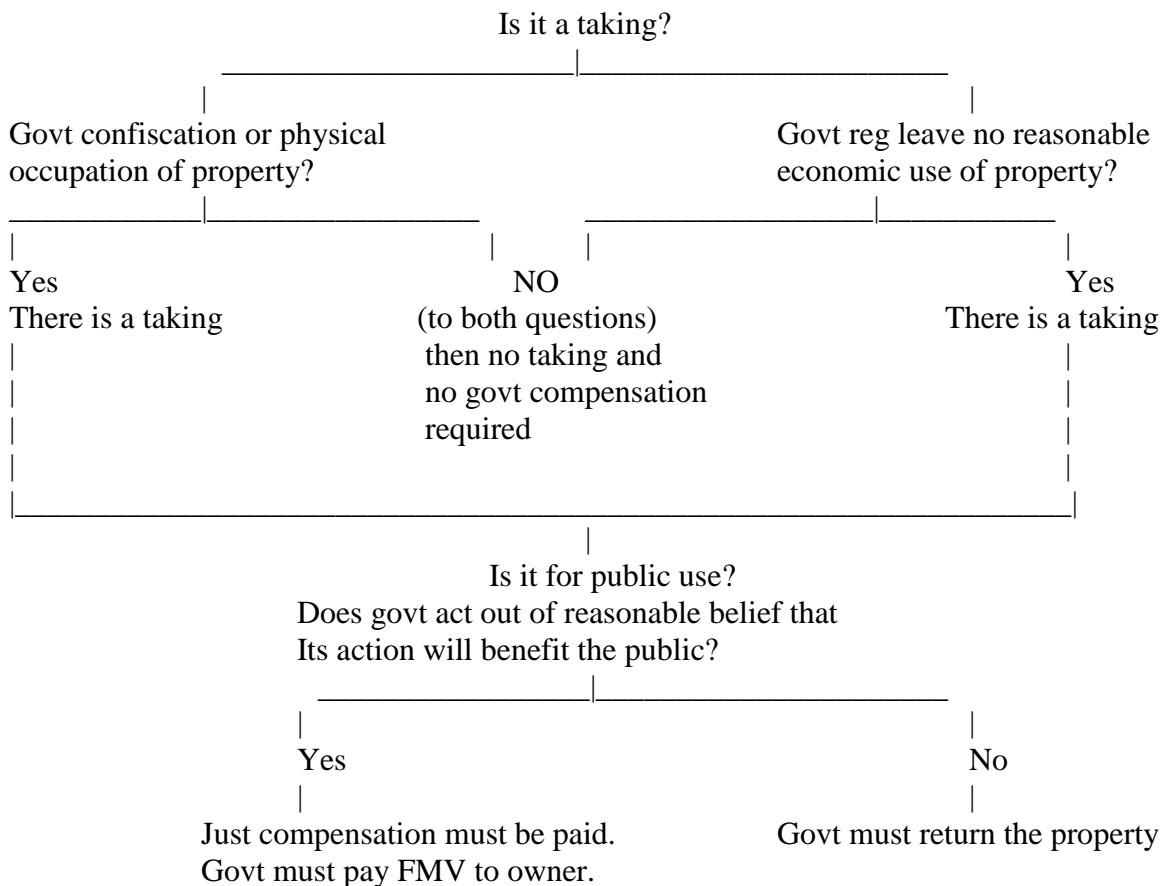
- b. Taking is for public use if govt acts out of reasonable belief that the taking will benefit the public.

3. Is just compensation paid?

a. Just compensation is measured in terms of loss to owner in reasonable market value terms. Gain to the govt is irrelevant.

- b. Example of typical fact pattern: property at FMV is \$100k. Govt takes property and gets \$10mil in value. Property owner only gets \$100k.

The takings clause – govt may take private property for public use if it pays just compensation



(3) **Contracts clause** – Art I, section 10 of Constitution

(a) No state shall impair the obligations of contracts.

(b) Applies only to state or local interference with already existing contracts.

(i) Does not apply to fed govt.

(c) State and local govt may interfere with existing private contracts if intermediate scrutiny is met.

(i) Exact language for test:

1. Does the legislation substantially impair a party's rights under an existing contract?
2. If so, is the law a reasonably [rational basis language] and narrowly tailored [strict scrutiny language] means of promoting an important and legitimate public interest?

- (d) State and local govt interference with govt contracts must meet strict scrutiny.
- (e) Constitution does not allow fed or state govt to adopt ex post facto laws.
 - (i) Only applies to criminal cases.
 - (ii) Ex post facto law – criminally punishes conduct that was lawful when it was done or that increases punishment for a crime after it was committed.

iv) **Privacy**

- (1) Fundamental rights under substantive due process – strict scrutiny is used.
- (2) Includes:
 - (a) Right to marry
 - (i) Example: state passes law that couple can only get a license from counselor stating that they are compatible. State must meet strict scrutiny.
 - (b) Right to procreate
 - (i) Example: govt can impose involuntary sterilization only if strict scrutiny is met.
 - (c) Right to custody of one's children.
 - (i) This is a fundamental right that can only be terminated if it proves a compelling reason, such as parental abuse or neglect.
 - (ii) Note: state may create an irrebutable presumption that a married woman's husband is the father of her child.
 - (d) Right to keep family together.
 - (i) Includes extended family.
 - (e) Right of parents to control the upbringing of their children.
 - (f) Right to purchase/use contraception.
 - (g) Right to abortion.
 - (i) Standard changed from strict scrutiny to the undue burden test:
 1. Prior to viability, states cannot prohibit abortions but may regulate them as long as they do not create an undue burden on the ability to obtain abortions.
 - a. 24 hour waiting period – not undue burden/constitutional
 - b. performed by licensed doctors – not undue burden/constitutional
 - c. prohibition of partial birth abortions – not undue burden/constitutional
 - d. spousal consent and notification laws – unconstitutional
 - e. parental consent for minors – states may require this for unmarried minors if there is also an alternative procedure for minor to go to judge to approve it by finding it is in minor's best interests or can decide for herself.

2. After viability, states may prohibit abortions unless necessary to protect the woman's life or health.
 - (ii) Govt has no duty to subsidize abortions or provide them in public hospitals.
- (h) Right to engage in private consensual same-sex activity.
- (i) Right to refuse medical treatment.
- (i) Competent adults have the right to refuse medical treatment, even if it is life-saving.
 1. Court did not specify level of scrutiny.
 - (ii) State has compelling interest in protecting the sanctity of life and so may require clear and convincing evidence that a person wanted treatment terminated before it is ended.
 - (iii) State may prevent family members from terminating treatment for another.
 - (iv) There is no constitutional right to physician-assisted suicide.
- (j) Right to travel
- (i) Strict scrutiny:
 1. Laws that prevent people from moving into a state.
 2. Durational residency requirements (to live in state for time prior to getting benefits).
 - a. For voting, 50 days is the maximum durational requirement.
 - (ii) There is no fundamental right to international travel, so restrictions on it need to meet only the rational basis test.
- (k) Right to vote
- (i) Fundamental right – 1-person, 1-vote must be met for all state and local elections.
 1. For any elected body, each representative must represent roughly the same # of people.
 - (ii) Laws that deny some citizens right to vote must meet strict scrutiny.
 1. Such as poll tax or property ownership requirement to vote.
 - (iii) At-large elections (here all voters cast a vote for all officeholders) are constitutional unless there is proof of a discriminatory purpose.
 1. Example: Mobile, AL had 3 person council. Used at-large election where everyone voted for 3 people. At time, Mobile was 2/3 white and 1/3 black. This proof of discrim impact is not enough. Must show discrim purpose/intent.
 - (iv) Use of race to draw election district lines must meet strict scrutiny.
 - (v) Counting uncounted votes without standards in a presidential election violates equal protection.
 1. Bush v. Gore

- (l) There is no fundamental right to education under Equal Protection or the Constitution.
 (i) Only rational basis

Key Examples of Fundamental Rights

Rights = strict scrutiny	Rights = undue burden test	Not a fundamental right = rational basis	Level of scrutiny unknown
Right to marry	Right to abortion	Right to practice a trade or profession	Right to engage in private consensual homosexual activity
Right to procreate		Right to physician-assisted suicide	Right to refuse medical treatment
Right to custody of children		Right to education	Right to possess firearms
Right to keep family together			
Right to control raising of children			
Right to purchase and use contraceptives			
Right to travel (under EP)			
Right to vote (under EP)			
Freedom of speech (under 1 st amend)			
Freedom of association (under 1 st amend)			
Free exercise of religion (if law burdening religion is not a neutral law of general applicability) (under 1 st amend)			

- 7) **Equal Protection** (when govt draws distinctions between people)
- a) Steps:
 - i) What is the classification?
 - (1) How is the govt discriminating among people?
 - ii) What level of scrutiny should be applied?
 - (1) Most MBE questions are answered under rational basis.
 - iii) Does this law meet the level of scrutiny?
 - b) Constitutional provisions concerning EP
 - i) State and local govt:
 - (1) Through the 14th amendment.
 - ii) Federal govt:
 - (1) Through the due process clause of the 5th amendment.
 - c) **Race and national origin:**
 - i) Strict scrutiny
 - ii) Racial classification proven:
 - (1) It exists on the face of the law.
 - (2) If law is neutral on its face, then must prove discriminatory impact and intent.
 - (a) Example: D.C. had requirement for police officers to pass test. Blacks failed test more than whites. This discriminatory impact was not enough, so rational basis used.
 - (3) Discriminatory use of peremptory challenges (removing jurors) denies equal protection.
 - iii) Laws benefiting minorities
 - (1) Strict scrutiny
 - (2) Numerical set-asides require clear proof of past discrimination.
 - (3) Educational institutions may use race as one factor in admission decisions to benefit minorities and enhance diversity.
 - (a) Univ. Michigan – colleges have a compelling interest in having diverse student bodies. But can't add points to admission score for solely race.
 - (4) Public school systems may not use race as a factor in assigning students to schools unless strict scrutiny is met.
 - d) **Gender:**
 - i) Intermediate scrutiny
 - (1) Discrim based on gender can only be allowed if there is an exceedingly persuasive justification.
 - ii) Gender classification proven:
 - (1) It exists on the face of the law.
 - (2) If neutral on its face, then must prove discriminatory impact and intent.
 - (a) Example: requirement for cops to be at least 5'10" and 150 lbs. Court used rational basis because must show intent, not just impact.

- (3) Discriminatory use of peremptory challenges (removing jurors) denies equal protection.
- iii) Laws benefiting women
 - (1) Intermediate scrutiny
 - (2) Classifications benefiting women based on role stereotypes are not allowed.
 - (a) Law that in a divorce, women could get alimony but men could not was unconstitutional – based on stereotype.
 - (3) If classification benefiting women is designed to remedy past discrimination or differences in opportunity are allowed.
 - (a) Social security admin is allowed to use a different formula to calculate benefits for women than men.
- e) **Alienage** (laws that discriminate against non-US citizens)
 - i) Generally, strict scrutiny.
 - ii) But, certain privileges can be reserved for just citizens, and then rational basis would be used:
 - (1) Voting
 - (2) Serving on a jury
 - (3) Being police officer or probation officer
 - (4) Also, rational basis used when Congress discriminates against aliens.
 - iii) Notary public cannot be required to be a US citizen. States cannot require citizenship to get welfare.
 - iv) Intermediate scrutiny is used for discrimination against undocumented alien children.
- f) **Non-marital children** (the legitimacy classifications)
 - i) Intermediate scrutiny
 - ii) Laws that deny a benefit to all non-marital children, but grant it to all marital children are unconstitutional.
- g) **Rational basis** review is used for all other types of discrimination under the constitution:
 - i) Age discrimination law
 - (1) I.e., mandatory retirement law
 - ii) Disability discrimination
 - (1) Example: TX town had zoning ordinance that prohibited a mental disability home from being built in town. Govt lost under rational basis test.
 - iii) Wealth discrimination
 - iv) Govt economic regulations
 - v) Sexual orientation discrimination
 - (1) Example: CO law prohibiting passage of any law protecting people on basis of sexual orientation as found unconstitutional under rational basis.

Equal Protection – 3 questions:

1) What is the classification? Two ways to determine existence of classifications: a) Classification is on the face of the law, or b) There is both a discriminatory intent and a discriminatory impact.		
2) What is the level of scrutiny?		
<u>Strict scrutiny</u>	<u>Intermediate scrutiny</u>	<u>Rational Basis</u>
Law must be necessary to achieve a compelling govt purpose.	Law must be substantially related to an important govt purpose.	Law must be rationally related to a legitimate govt purpose.
- Race	- Gender	- Alienage classifications related to self-govt and the democratic process
- National origin	- Illegitimacy	- Congressional regulation of aliens
- Alienage – generally	- Undocumented alien children	- Age
- Travel (not international travel)		- Disability
- Voting		- Wealth
		- All others
3) Does this law meet the level of scrutiny?		

8) First Amendment

a) General rules to free speech:

i) **Content based**

(1) Generally, strict scrutiny

(2) Determining if content based:

(a) Subject-matter restriction – application of the law depends on the topic of the message.

(i) Example: MN law that candidates for judicial office could not talk about matters of cases of judicial controversy.

(b) View-point restriction – application of the law depends on the ideology of the speech.

(i) Example: City says pro-war demonstrations are ok but not anti-war demonstrations.

ii) **Content neutral**

(1) Generally, intermediate scrutiny

(2) Content neutral means that it burdens all speech, no matter what the content, topic, or ideology.

iii) **Prior restraints** (stopping speech before it occurs)

(1) Strict scrutiny

- (a) Court order suppressing speech – such as an injunction.
- (b) Proper court orders must be complied with until vacated or overturned.
- (c) Person who violates a court order to be barred later from challenging it.
- (d) Gag orders on press to prevent prejudicial pretrial publicity are not allowed.
 - (i) Not even to protect the defendant's right to a fair trial.

(2) Govt can require a license for speech only if:

- (a) There is an important reason for licensing, and
- (b) Clear criteria for issuance of it, leaving almost no discretion to the licensing authority.
- (c) There must also be procedural safeguards, such as prompt determination of requests for license and judicial review of license denials.

iv) **Vagueness**

(1) If a reasonable person cannot tell what speech is prohibited and what is allowed, it is unconstitutionally vague.

- (a) Example: laws prohibiting the sale of books with a tendency to corrupt the morals of youth.

(2) Fighting words

- (a) Directed at someone that is likely to provoke a violent reaction.
- (b) Not protected speech.

v) **Overbreadth**

(1) If law regulates substantially more speech than the constitution allows to be regulated, it is unconstitutionally overbroad.

- (a) Example: city tried to use law that prohibits live entertainment to shut down strip clubs.

vi) **Symbolic speech**

(1) Govt may regulate conduct that communicates if:

- (a) It has an important interest unrelated to the suppression of the message, and
- (b) The impact on communication is no greater than necessary to achieve the govt's goal.

(2) Flag burning – constitutionally protected speech

(3) Draft card burning – not constitutionally protected speech

(4) Nude dancing – not protected

- (5) Burning a cross – protected speech unless done in a threatening way or to intimidate.
 - (a) So you can't burn a cross on someone's lawn but you can do it in an isolated field among like-minded people.
- (6) Contribution limits in election campaigns are allowed.
 - (a) Expenditure limits in campaigns are not allowed.

vii) **Anonymous speech**

- (1) Protected by the 1st amend.
- (2) So you can send out anonymous brochures.

viii) **Govt speech**

- (1) Speech by govt cannot be challenged as violating the 1st amend.
- (2) 1st amend does not require govt to aid private speech
- (3) Govt can disseminate its own speech.

b) Speech that is unprotected or less protected

i) Incitement of illegal activity

- (1) Test: govt may punish speech if:
 - (a) There is a substantial likelihood of imminent illegal activity, and
 - (b) If the speech is directed to causing imminent illegality.

ii) Obscenity and sexually-oriented speech

- (1) Test:
 - (a) The material appeals to the prurient interest or a “shameful or morbid interest in sex”
 - (b) The material must be patently offensive under the law prohibiting obscenity.
 - (i) Any regulation must set forth examples of what must be patently offensive.
 - (c) Taken as a whole, material must be lacking serious redeeming artistic, literary, political, or scientific value as determined by a national standard.
- (2) Govt can use zoning ordinances to regulate number or locations of adult bookstores/theaters.
 - (a) Govt can seize assets of businesses convicted of violating obscenity laws.
- (3) Child porn may be completely banned, even if not obscene.
 - (a) To be child porn, children must be used in the production of the material – using adults with child-like appearances not enough, or computer-generated images not enough.
- (4) Possession:
 - (a) Govt may not punish private possession of obscene materials.
 - (b) Govt can punish private possession of child porn.

- (5) Material that is profane and indecent is generally protected.
 - (a) Example: jacket that says “fuck the draft” is protected.
 - (b) Exceptions:
 - (i) Free, over-the-air broadcast media.
 - 1. I.e., tv and radio. It is uniquely intrusive into the home.
 - 2. Does not apply to cable tv, satellite radio.
 - (ii) In schools
 - 1. Schools are responsible for teaching civilized discourse to our youth, so they can regulate it.

iii) Commercial speech

- (1) Not protected by the 1st amend: advertising for illegal activity and false and deceptive ads.
- (2) Even true commercial speech that inherently risks deception can be prohibited:
 - (a) States may prevent professionals from advertising or practicing under a trade name.
 - (b) States may prohibit attorney, in-person solicitation of clients for profit.
 - (i) This does not apply to accountants.
- (3) Can be regulated if intermediate scrutiny is met.
 - (a) Regulation must be narrowly tailored, but it does not need to be the least restrictive alternative.

iv) Defamation

- (1) If plaintiff is a **public official** or running for public office:
 - (a) P can recover for defamation only by proving with clear and convincing evidence:
 - (i) The falsity of the statement, and
 - (ii) Actual malice.
 - 1. This means that the defendant knew the statement was false or acted with reckless disregard of the truth.
- (2) If plaintiff is a **public figure**:
 - (a) P can recover for defamation by proving:
 - (i) The falsity of the statement, and
 - (ii) Actual malice.
 - 1. Same as above.
- (3) If plaintiff is a **private figure and matter is of public concern**:
 - (a) P can recover compensatory damages by proving:
 - (i) The falsity of the statement, and
 - (ii) Negligence by the defendant.
 - 1. This means that the speaker was not as careful as a reasonable speaker should have been.
 - (b) P can recover presumed or punitive damages only by showing actual malice.

- (4) If plaintiff is a **private figure and matter is not a public concern**:
- (a) P can recover presumed or punitive damages without proving actual malice.

Defamation chart

Plaintiff	Liability standard	Damages	Burden of proof
Public official	Actual malice	Compensatory Presumed/punitive	Prove falsity
Public figure	Actual malice	Compensatory Presumed/punitive	Prove falsity
Private figure, matter of public concern	Negligence and actual injury	Compensatory for actual injury. Presumed/punitive require actual malice.	Prove falsity
Private figure, matter of private concern	Unclear – negligence	Compensatory for actual injury. Presumed/punitive do not require actual malice.	Unclear – burden on defendant to prove truth

- v) Privacy and 1st amendment
- (1) State may not create liability for the truthful reporting of information that was legally obtained from govt records.
 - (a) Example: law prohibited rape victim's identity without her consent. Reporters obtained name from police reports.
 - (2) Media may not be held liable for broadcasting a tape of an illegally intercepted and recorded call, so long as:
 - (a) Media did not participate in the illegality, and
 - (b) It involves a matter of public importance.
 - (3) Govt may restrict its own dissemination of information to protect privacy.
 - (a) Only right where public has a 1st amend right to attend govt proceeding and access to govt papers is for criminal pre-trial and trial proceedings.
- vi) Speech by govt employees on the job in the performance of their duties is not protected by the 1st amendment.
- vii) Other govt restrictions based on content of speech must meet strict scrutiny.

c) **Places for speech**

i) Public forums – govt properties that the govt is constitutionally required to make available for speech.

- (1) I.e., parks and sidewalks
- (2) Regulations must be subject matter and viewpoint neutral. If not, strict scrutiny.
- (3) Regulations must be a time, place, or manner regulation that serves an important govt purpose and leaves open adequate alternative places for communication.
 - (a) Example: ordinance that prohibits use of sound amplification in a residential neighborhood at night is ok.
- (4) Govt regulation of speech in public forums need not use the least restrictive alternative.
- (5) Permit fee requirements are unconstitutional if city officials have discretion in setting the amount of the fee.

ii) Limited public forums

- (1) Govt properties that govt could close off to speech but chooses to voluntarily open to speech.
 - (a) I.e., school facilities on weekends and at night.
- (2) Same rules apply as for public forums.

iii) Non-public forums – govt properties that govt constitutionally can and does close off to speech.

- (1) Govt can regulate speech here so long as rational basis – regulation is reasonable and viewpoint neutral.
- (2) Examples:
 - (a) Military bases
 - (i) Even areas open to the public on the bases.
 - (b) Areas outside of prisons/jails
 - (i) For sake of security
 - (c) Advertising space on city buses
 - (i) Ad space is a non-public forum. No political ads on buses.
 - (d) Sidewalks outside of post office or on post office property.
 - (e) Airports
 - (i) Can prohibit solicitation of money
 - (ii) Cannot prohibit distribution of literature

iv) Private property

- (1) There is no 1st amendment right of access to private property for speech purposes.
 - (a) I.e., shopping centers.

Places available for speech

	Subject matter neutral?	Viewpoint neutral?	Method of regulation allowed?	Interest required?
Public forums	Yes	Yes	Time, place, or manner	Important
Limited public forums	Yes	Yes	Time, place, or manner	Important
Non-public forums	No	Yes	Reasonable	Legitimate
Private property	No 1 st amendment right to use private property for speech purposes			

d) **Freedom of association**

- i) Strict scrutiny
- ii) To punish membership in a group it must be proven that the person:
 - (1) Is actively affiliated with the group;
 - (2) Has knowledge of the group's illegal activities; and
 - (3) Has the specific intent of furthering those illegal activities or objectives.
- iii) Includes laws that require disclosure of group membership, where such disclosure would chill association = strict scrutiny.
- iv) This does not protect a right to discriminate, unless it is an intimate association where the discrimination is integral to an expressive activity.
 - (1) Exceptions:
 - (a) Intimate association – i.e., small dinner party.
 - (b) Where discrim is integral to the expressive activities of the group – i.e., KKK, Nazi party, Boy scouts and gays.

e) **Freedom of religion**

- i) **Free exercise clause**
 - (1) Cannot be used to challenge a neutral law of general applicability.
 - (a) So it is ok because the purpose of the law was not aimed or targeted at religion.
 - (2) Govt may not deny benefits to people who quit their jobs for religious reasons.
- ii) **Establishment clause**
 - (1) Remember, this is the one time you can sue as a taxpayer.
 - (2) Test: "SEX"
 - (a) **S**: Secular purpose for the law.
 - (b) **E**: Effect – primary effect must be to neither advance nor inhibit religion (not symbolically endorse religion)
 - (c) **X**: Excessive – there must not be excessive govt entanglement with religion.

- (3) Govt cannot discrim against religious speech or among religions unless strict scrutiny is met.
- (4) Govt sponsored religious activity in public schools is unconstitutional.
 - (a) But religious student and community groups must have the same access to school facilities as non-religious groups.
 - (b) School prayer, even if voluntary, is not allowed. Not even a moment of silent prayer is allowed.
- (5) Govt may give assistance to parochial schools, so long as it is not used for religious instruction.
 - (a) Govt may provide parents vouchers that they can use in parochial schools.

Approach to con law questions

Ask: Who is the actor in the question?

<u>Congress</u>	<u>President or federal executive branch</u>	<u>Federal courts</u>	<u>State/local govt</u>	<u>Private (non-govt actor)</u>
The issue is either or both:	The issue is either or both:	The issue is:	The issue is:	The issues are:
1) Does Congress have the authority to act?	1) Has the President/Exec branch exceeded the scope of executive powers?	Does the fed court have the authority to hear the case?	Has the state/local govt violated a limit on its power?	1) Is there state action?
And/or	And/or			And, if so,
2) Has Congress violated a limit on its power?	2) Has the President/Exec branch violated a limit on govt power?			2) Does it violate the Constitution?