

## CONSTITUTIONAL LAW (33 Qs)

### I. Judicial Power – Article III (15% of questions)

#### A. Requirement for Cases and Controversies – *Justiciability Doctrine*

1. **Standing** – whether the plaintiff is the proper party to bring the matter to the court for adjudication
  - a. **Injury**: P must allege & prove that he has been injured or imminently will be injured
    - (i) **Types of injuries** –
      - (a) *violation of common-law rights*; (c) *constitutional rights*;
      - (b) *statutory rights*; (d) *any other harm* court finds substantial, including *aesthetic or environmental*
    - (ii) P only may assert injuries that he *personally suffered*
    - (iii) P seeking injunctive or declaratory relief must show a *likelihood of future harm* – monetary interests are the strongest form of injury  
TIP: If Q asks which has the best standing, look to a P who has personally suffered an injury. Then choose the one who has suffered an economic/monetary loss.
  - b. **Causation & Redressability** – P must allege & prove that D caused the injury, so that a favorable court decision is likely to redress the injury (NO “*advisory opinions*”)
  - c. **NO 3<sup>rd</sup> party standing** – P cannot assert claims of others (3<sup>rd</sup> parties) who are not before the court
    - **EXCEPTIONS**:
      - (a) *Close relationship* between P & the injured 3<sup>rd</sup> party (e.g., abortion cases brought by doctors on behalf of their patients)
      - (b) Injured 3<sup>rd</sup> party is *unlikely to be able to assert his own rights* (e.g., criminal D’s can raise the rights of prospective juror in racial discrimination claim during jury selection)
      - (c) “*Associational*” standing – an organization may sue for its members, provided
        - Members would have standing to sue
        - Interests are germane to the organization’s purpose
        - Neither the claim nor relief requires participation of individual members
  - d. **NO generalized grievances** – P must not be suing solely as a citizen or as a taxpayer interested in having the government follow the law (e.g. sued to disclose CIA budget – no standing b/c suing only as a citizen)  
TIP: Exam will say “P is suing as a taxpayer”
    - (i) **EXCEPTION** – taxpayers have standing to challenge government expenditures as violating the Establishment Clause
    - (ii) **BUT**, taxpayers lack standing to challenge government granting of *property* to religious institutions/ parochial schools
2. **Ripeness** – can you get declaratory judgment that a law is unconstitutional? pre-enforcement review of a statute or regulation?  
TIP: If Q talks about declaratory judgement, this is likely a ripeness issue.
  - a. **Hardship will be suffered without pre-enforcement review**: the greater the hardship, the more likely the court will allow declaratory judgment
  - b. **Fitness of the issues & the record for judicial review** – does the fed court have all it needs to decide the issue, or should it wait for more factual development? Is anything to be gained by waiting for an actual prosecution?
3. **Mootness** – must be an ongoing injury (if events after the filing of the lawsuit end P’s injury, it’s moot)
  - **EXCEPTIONS**:
    - (i) *Wrong capable of repetition but evading review* – e.g. an abortion case was decided after P had her abortion because P could seek an abortion in the future (Roe v Wade)
    - (ii) *Voluntary cessation* of offending practice, but D is legally free to resume it at any time
    - (iii) *Class action suits* won’t be dismissed as long as 1 member of the class has an ongoing injury
4. **Political Question Doctrine** – refers to allegations of constitutional violations that the federal courts (and level) will not adjudicate (matters left to political branch or inherently incapable of judicial resolution); e.g.:
  - a. *Cases under the “republican form of government clause”*
  - b. *Challenges to the President’s conduct of foreign policy*
  - c. *Challenges to the impeachment & removal process*
  - d. *Challenges to partisan gerrymandering*

#### B. Supreme Court Review

1. Appellate Jurisdiction
  - a. Writ of Certiorari – all cases from (i) state courts, & (ii) U.S. federal court of appeals. 4 justices must agree to grant Certiorari in order for the case to be heard (completely discretionary)
  - b. Appeal – for decisions of 3-judge federal district courts (appeals skip the U.S. federal court of appeals). Supreme Court is obligated to take the case.
  - c. The Supreme Court has original and exclusive jurisdiction for suits between state governments.

2. Original Jurisdiction – suits between states & cases involving ambassadors
3. Exclusive jurisdiction – suits between states
4. Final Judgment Rule - NO *interlocutory review* by Supreme Court – may hear cases only after there has been a final judgment.
5. For Supreme Court to review a state court decision, there must NOT be an *independent & adequate state law ground of decision* – Supreme Court will not hear a case only if the independent state ground is adequate by itself to support the decision, so that Supreme Court’s review on federal ground for the decision would have no effect on the outcome of the case.  
TIP: Rodney King sues in state court – state law battery claim and federal law civil rights claim and each claim will result in the same amount of damages. P wins. D sues all the way up to Supreme Court. No good, because same judgment would occur from the state law ground even if the federal ground was overturned.

### C. Lower Federal Court Review

1. **Federal courts may not hear suits against state governments** (11<sup>th</sup> Amendment)
2. Sovereign immunity bars suits against states in state courts or federal agencies.  
– EXCEPT
  - a. Waiver is permitted (i.e., the state consents)
  - b. States may be sued pursuant to federal laws adopted under § 5 of the 14<sup>th</sup> Amendment – Congress may adopt laws “to enforce” the 14<sup>th</sup> Amendment, limiting state sovereignty (like Title VII (1974 Civil Rights Act) cases)
  - c. Federal government may sue state governments – sovereign immunity doesn’t bar this
  - d. Suits against state officers are allowed;
    - (i) State officers may be sued for *injunctive relief*;
    - (ii) State officers may be sued for *money damages* to be paid out of their own pockets
    - (iii) BUT, state officers may *not* be sued if it is the state treasury that will be paying retroactive damages
- **Sovereign immunity bars suits against states in state court, even on federal claims, unless state consents**
3. *Abstention* – federal courts may not enjoin pending state court proceedings
4. NOTE: Congress has *exclusive control* over the jurisdiction except the Supreme Court

## II. Legislative Power (10% if questions)

### A. Enumerated & Implied Powers

1. Must be *express or implied* Congressional power
  - No *general fed police power* – there is, however, police power for MILD:
    - (i) Military; (ii) Indian reservations; (iii) Fed Lands and territories; (iv) D.C.
2. *Necessary & proper clause* – Congress can use any means not prohibited by the Constitution to carry out its authority (this clause standing alone cannot support law, thus must work in conjunction with other power)
3. *Taxing / Spending Power & the Commerce Clause*
  - a. Congress may tax & spend for the general welfare as it sees fit – Congress may condition grants under spending power even where it cannot directly regulate  
TIP: If Q talks about Congress’s authority to act and about general welfare, correct answer has to be tax/spend or police power.
  - b. **Commerce Power** – includes 3 things:
    - (i) May regulate the *channels* (places) of interstate commerce (highways, waterways, internet); or
    - (ii) May regulate the *instrumentalities* of, and *persons or things* in interstate commerce (trucks, phones, planes); or
    - (iii) May regulate activities that have a *substantial effect* on interstate commerce (it is legal to regulate amt of wheat farmers could grow for their own home consumption (b/c of cumulative effect on commerce), however if it is non-economic activity, Congress cannot base their decision on a cumulative effect)
4. **10<sup>th</sup> Amendment as a limit on Congressional powers** – all powers not granted to the US, nor prohibited to the states, are reserved to the states, or to the people
  - a. **Congress can’t compel state regulatory or legislative action** – BUT Congress can *induce* state action by attaching strings to grants
  - b. Congress may prohibit harmful commercial activity by state governments
  - c. Congress CAN *preempt* state/local actions by setting standards state/local governments must meet
5. **Congress’ power under § 5 of the 14<sup>th</sup> Amendment**
  - a. Congress may *NOT create new rights* or expand the scope of rights under §5 of the 14<sup>th</sup> Amendment
  - b. Congress may only *provide additional remedies* for rights recognized by courts – those remedies must be **narrowly tailored (proportionate & congruent)**

### B. Delegation of Powers

1. *Delegation of legislative powers* – NO limit exists on Congress’ ability to delegate legislative power to executive agencies or even to the judiciary (clear criteria & intelligible principles must be provided).

TIP: On exam, if Q says fed law is unconstitutional, it will never be because of delegation of legislative powers.

2. *Legislative vetoes & Line-item vetoes are Unconstitutional* – to enact a law, need *bicameralism & presentment* to the President, who must then sign or veto the bill in its entirety
  - a. *Legislative veto* – when Congress tries to overturn an executive action without bicameralism or presentment with the vote of just 1 house of Congress (unconstitutional)
  - b. *Line-item vetoes* – President attempts to veto part of a bill and sign the rest of law (unconstitutional)
3. **Congress can't delegate executive power to itself or its officers** – Congress can give its powers but cannot take other's powers (e.g. Congress may NOT appoint members of a commission or agency with administrative powers)

### III. Executive Power (10% if questions)

#### A. Foreign Policy

1. **Commander-in-Chief – President has broad powers to use troops in foreign countries** (case dismissed as *political question* or president wins because *president has broad powers as commander in chief in domestic affairs*)
2. *Foreign affairs* – paramount power, but shared with Congress (*non-justiciable & inappropriate for judicial consideration*); Congress has plenary power over foreign commerce
3. *Treaties* – agreements between the US & a foreign country that are negotiated by the President & are effective when ratified by the Senate
  - State laws that conflict with treaties are invalid - Treaties prevail over conflicting state laws.
  - If a treaty conflicts with a federal statute, the one adopted last in time controls.
  - If a treaty conflicts with the United States Constitution, it is invalid.
4. *Executive agreements* – an agreement between the US & a foreign country that is effective when signed by the President & the head of the foreign nation; NO Senate approval is required
  - Executive agreements can be used for any purpose.
  - Executive agreements prevail over conflicting state laws, but never over conflicting federal laws or the Constitution.

	<i>Senate Approval Required</i>	<i>Conflict with State Law</i>	<i>Conflict with Federal Law</i>	<i>Conflict with Constitution</i>
<b>Treaties</b>	YES	Treaty	<b>Last in time</b>	Constitution
<b>Executive Agreements</b>	NO	Executive Agreement	Federal Law	Constitution

#### B. Domestic Affairs

1. Appointment & removal power
  - a. *Appointment Power*:
    - (i) Officers – Senate must approve (e.g. ambassadors, fed judges, & officers of the US)
    - (ii) Inferior Officers – Congress may vest appointment in the President appointment
      - (a) Congress has some discretion in appointing inferior officers, & **may vest the appointment of independent counsel in the lower federal courts**
      - (b) Congress may not give itself or its officers the appointment power (that power is executive) (i.e. Congress cannot create a new executive agency where Congress appoints some of the members)
  - b. *Removal Power* – unless removal is limited by statute, President may fire any executive branch official
    - (i) For Congress to limit removal power, it must be an office where *independence from the President is desirable* (i.e., it can limit removal of independent counsel, but not cabinet members)
    - (ii) Congress cannot *prohibit* removal, but can *limit* removal to *good cause* – this applies even to officers who should be independent from the President
2. *Impeachment & removal*: (i) the President, (ii) Vice President, (iii) fed judges & (iv) officers of the US can be impeached & removed from office for treason, bribery or for high crimes & misdemeanors
  - a. Impeachment doesn't *remove a person from office* – it just means that there will be a trial in the Senate
  - b. Impeachment by the House requires a majority vote, while conviction in Senate requires 2/3 vote
3. *Executive Immunity* – *absolute immunity to civil suits for money damages while in office* – BUT, President does not have immunity for actions that occurred *prior* to taking office
4. *Executive privilege* – applies to presidential papers & conversations, but such privilege must yield to other government interests (not absolute) i.e. need for evidence in a criminal trial (Watergate)
5. *Power to pardon* – BUT not for impeachment
  - a. President may pardon only for *fed crimes*, NOT *state crimes*
  - b. President may pardon only for *criminal liability*, NOT *civil liability*

### IV. Federalism (20% of questions)

#### A. Preemption – under *supremacy clause* federal law preempts state law, even if non-conflicting (4-6 questions on BAR)

1. *Express preemption* – if federal law is exclusive in a field, state & local law deemed preempted
2. *Implied preemption* – even if text of federal law is silent, implied preemption in 3 ways:

- a. If federal & state law are *mutually exclusive*, fed law preempts state law – can’t comply with both state & federal law, the fed law wins
    - ONE EXCEPTION – *states can establish environmental (or health and safety) regulations stricter than federal law unless Congress clearly forbids it.*
  - b. If state law *impedes* the achievement of a *federal objective*, fed law preempts state law
  - c. If Congress evidences a *clear intent to preempt state law*, fed law preempts state (i.e. Immigration Law – any attempt by a state of local gov’t to regulate immigration is preempted))
  - 3. *States may not tax or regulate federal government activity* –
    - a. “Inter-governmental immunities” means that the fed government is immune to unwanted state taxation
    - b. Unconstitutional to pay a state tax out of the fed treasury**
    - c. States can’t regulate federal government if this places a significant burden on fed activity (i.e. Fed gov’t never has to comply with state pollution laws)
- B. Full Faith & Credit** – courts in one state must give full faith & credit to another state court judgments, so long as:
1. Court that rendered the judgment *had jurisdiction* over the parties and the subject matter
  2. Judgment was on the *merits*
  3. Judgment is *final*
- C. The Dormant Commerce Clause and the Privileges & Immunities Clause of Article IV** (2 or 3 Qs)
1. Definitions:
    - a. **Dormant Commerce Clause (DCC)** – principle that state/local laws are unconstitutional if they place an undue burden on interstate commerce (negative implication of Commerce Clause)
    - b. **Privileges & Immunities Clause of Article IV (PIC)** – “no state shall deprive citizens of other states the privilege & immunities it accords its own citizens” (anti-discrimination against out-of-staters)
    - c. *Privileges & Immunities Clause of the 14<sup>th</sup> Amendment* – always a wrong answer choice UNLESS the question involves the *right to travel*
  2. **ANALYSIS** – *Does the state or local law discriminate against out-of-staters?*
    - a. Law does NOT discriminate:
      - (i) PIC – NOT applicable
      - (ii) DCC – balancing test: *if the law burdens interstate commerce*, it violates the DCC if its *burdens exceed its benefits* (even if the law doesn’t discriminate, it can be stricken down as being too burdensome)
    - b. Law discriminates against out-of-staters:
      - (i) DCC violation if the law **burdens interstate commerce**,
        - (a) UNLESS it’s *necessary to achieve an important government purpose*
        - (b) Strong presumption against burdensome state law; helping in-staters is NEVER an important government purposes; no less discriminatory alternative could achieve its important gov’t objective
        - (c) Exceptions
          - *Congressional approval*
          - *Market participant exception* (state/local government may prefer its own citizens in receiving benefits from government programs, or in dealing with government-owned businesses). Examples:
            - State Universities in NY can charge less tuition to NY residents – b/c regarded as gov’t benefit program
            - Cement factory owned by state charged less to in-state purchasers – ok b/c state is market participant
      - (ii) PIC violation if the law discriminates against out-of-staters with regard **(a) important economic activities (ability to earn a livelihood)**, or **(b) civil liberties**,
        - Examples: To be admitted to NH bar, you had to be a resident of NH – VIOLATION OF PIC
        - For a license related to work, in-stater paid a small fee, while out-of-stater paid a large fee – VIOLATION OF PIC
        - For a license related to hobby, in-stater paid a small fee, while out-of-stater paid a large fee – THIS IS OK
        - (a) UNLESS it’s *necessary to achieve an important government purpose*:
        - (b) Corporations & aliens cannot use the privileges & immunities clause (only DCC could apply)
        - (c) No less discriminatory means to achieve that purpose
  3. Comparison of the DCC & the Privileges & Immunities Clause of Article IV:

<i>DCC:</i>	<i>Privileges &amp; Immunities Clause:</i>
– Not require discrimination against out-of-staters order to apply	– Requires discrimination against out-of-states in order to apply
– Requires burden on interstate commerce	– Requires discrimination with regard to (i) civil liberties or (ii) important economic activities
– Corporations & aliens can sue under it	– Corporations & aliens can NOT sue under it
– EXCEPTIONS:	– NO exceptions
(i) Congressional approval	
(ii) market participant exception	

## CONSTITUTIONAL LAW - CHART 2

### DORMANT COMMERCE CLAUSE/PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

DOES THE STATE OR LOCAL GOVERNMENT'S ACTION DISCRIMINATE AGAINST OUT-OF-STATERS?

YES

Violates the Dormant Commerce Clause if it places a burden on interstate commerce unless it is necessary to achieve an important government purpose. Two exceptions:  
a) Congressional approval of discrimination.  
b) Market participant exception.

Violates the Privileges and Immunities Clause of Article IV if it discriminates against individuals with regard to important economic activities or civil liberties unless it is necessary to achieve an important government purpose.

NO

If the government is burdening interstate commerce, balance the benefit to the state against the burden on interstate commerce (if the benefit exceeds the burden, the law is upheld; if the burden exceeds the benefit, the law is struck down).

Privileges and Immunities Clause of Article IV is inapplicable.

#### D. State Taxation of Interstate Commerce (RARELY RESTED)

1. Non-discriminatory state tax requirements
  - a. *Substantial nexus* to the state
  - b. *Fair apportionment*
  - c. **May NOT** use tax systems to *help in-state business*
2. Types of taxes
  - a. *Use Tax* – tax on goods purchased outside of state, but used within state
  - b. *Sales Tax* - tax on sale of goods consummated within the state
  - c. *Ad valorem taxes* – taxes on assessed value of the property
    - (i) Commodities – valid if no longer in interstate commerce
    - (ii) Instrumentalities - (i) whether there is a taxable situs (or nexus), & (ii) whether the tax is fairly apportioned
  - d. “*Doing business*” taxes (privilege, occupation, franchise, occupational tax) – tax placed on some activity

#### V. Structure of the Constitution’s Protection of Individual’s Liberties (8% of questions)

##### A. Is There Government Action?

1. *State action doctrine* – the Constitution applies only to government action; private conduct need not comply with the Constitution
  - a. Exclusive public functions
  - b. *Significant state involvement* – state must affirmatively *facilitate, encourage or authorize* an allegedly unconstitutional act in order for it to be state action
2. Congress, by statute, may (but not required) apply constitutional norms to private conduct:
  - a. *13<sup>th</sup> Amendment can be used to prohibit race discrimination*
    - (i) The **ONLY** Constitutional provision that directly applies to private conduct
    - (ii) TIP: Private discrimination doesn’t violate 13<sup>th</sup> Amendment itself **but violates federal law adopted under this Amendment** – only slavery can violate the 13<sup>th</sup> Amend.
  - b. *Commerce power can be used to apply Constitutional norms to private conduct* – Congress can pass federal statutes pursuant to 13<sup>th</sup> Amend., justifying them with the power to regulate interstate commerce
  - c. *Congress can NOT use § 5 of 14<sup>th</sup> Amendment to regulate private behavior* – Congress can only regulate state/local governments
3. **EXCEPTIONS** – situations where private conduct must comply with the Constitution
  - a. *Public function exception* (very narrow exception, doesn’t apply to private utilities since they are not **traditionally, exclusively** run by the govt) – the Constitution applies if a private entity is performing a task **traditionally, exclusively** done by the government (e.g. Company owned all the land in the town – Jehovah witnesses were kicked out of the town, Here running the town is traditionally done by the gov’t)
  - b. **Entanglement exception** – Constitution applies if the government affirmatively (i) authorizes, (ii) encourages, or (iii) facilitates unconstitutional activity
    - (i) In such situations,
      - (a) **EITHER** the government must stop what it’s doing, OR
      - (b) The private party must be bound by the Constitution

- (ii) Consider 7 examples
  - (a) Courts can't enforce racially restrictive covenants
  - (b) State action when government leases premises to a restaurant that racially discriminates
  - (c) State action when government gives free books to private schools that racially discriminate
  - (d) NO state action when a private school, almost totally subsidized by government (99% funded), fired a teacher because of her speech (*government subsidy insufficient for a finding of state action*). Govt subsidy is insufficient for finding a state action.
  - (e) NO state action when the NCAA suspended a basketball coach in a state school, because the NCAA is a private organization so it doesn't have to comply with the constitution.
  - (f) State action when a private entity regulates the state's interscholastic sports – this was an intertwining with government, because most of the schools were public (it's different from the NCAA case, because NCAA impacts all states, while the organization in this case regulated only Tennessee's sports)
  - (g) NO state action when private club with state liquor license discriminated based on race

**B. Application of the Bill of Rights**

1. Bill of Rights applies directly *only to the federal government*, BUT, it's applied to state/local governments through its *incorporation into the due process clause of the 14<sup>th</sup> Amendment*
2. *Selective in-corporationists* think only some apply to the states
3. *Total in-corporationists* think that ALL of the Bill of Rights applies to the state/local governments – this doctrine won the debate, BUT, the following **DO NOT** apply to the states:
  - a. 2<sup>nd</sup> Amendment right to bear arms (states can adopt any type of gun control they want)
  - b. 3<sup>rd</sup> Amendment right to not have soldiers quartered.
  - c. 5<sup>th</sup> Amendment right to grand jury indictment in criminal cases
  - d. 7<sup>th</sup> Amendment right to jury trial in civil cases
  - e. 8<sup>th</sup> Amendment right to excessive fines

**C. Levels of Scrutiny**

1. **Rational basis test** – a law is upheld if it's "*rationally related to a legitimate government purpose*" – Challenger has the burden of proof. Govt usually wins
2. **Intermediate scrutiny** – a law is upheld if it's "*substantially related to an important government purpose*" – The Means must be narrowly tailored but the best way is not required. Gov't has burden of proof law is substantially related to achieving an important gov't purpose.
3. **Strict scrutiny** – a law is upheld if it's "*necessary to achieve a compelling government purpose*" – Must be least restrictive alternative (the best way). The gov't usually loses.

	MEANS	PURPOSE	Least Restrictive Alternative Analysis?	Burden of Proof?
<b>Rational Basis</b>	Rationally related	Legitimate Conceivable	NO	Challenger
<b>Intermediate Scrutiny</b>	Substantially related	Important Actual	Uncertain (probably yes)	Government
<b>Strict Scrutiny</b>	Necessary	Compelling Actual	YES	Government

**VI. Due Process (8% of questions)**

**A. Procedural Due Process** ⇒ a fair process is required for government to individually take a person's "*life, liberty, or property.*"

1. Deprivation of life, liberty, or property?
  - a. Definitions:
    - (i) **Deprivation of liberty** – occurs if there is the *loss of a significant freedom* provided by the Constitution or a statute – less obvious examples of liberty include
      - (a) *Except in an emergency, before an adult can be civilly committed, there must be notice and a hearing*
      - (b) *When a parent institutionalizes a child, there only has to be a screening by a mutual factfinder.*
      - (c) *Harm to reputation:* by itself, is NOT a loss of liberty. Must show a tangible loss on top of harm.
      - (d) *Prisoners* – rarely have liberty interests. Usually always lose
    - (ii) **Deprivation of property** – occurs if there is an entitlement & that *entitlement isn't fulfilled*
      - (a) Discarded the rights/privileges distinction. If an answer choice takes about privilege and rights, it is a wrong answer.
      - (b) Entitlement – reasonable expectation of continued receipt of a benefit.
  - b. **Must be intentional or reckless government action for liability to exist**
    - (i) *Government negligence* is NOT sufficient to state a claim under the due process clause.
    - (ii) "*Shocks the conscience*" – in emergency situations, the government is liable under due process only if the conduct

shocks the conduct (reckless high speed chase by police not a violation of due process – must shock)

- c. **Government’s failure to protect people from privately inflicted harms does NOT deny due process** – the government must literally create the danger in order for a duty to exist (Child beaten by father is not violation of due process by Social Services)
2. What procedures are required? – **balancing test**
  - a. *Importance of interest to the individual* – the more important, the more procedure required;
  - b. *Ability of additional procedures to increase the accuracy of the fact-finding*; and
  - c. Government interest in *administrative efficiency*
3. Examples
  - a. Types

Interests	NOTICE	OPPTY TO EXPLAIN	HEARING	
			Prior	Subsequent
Institutionalization (adult)	Yes	-	Yes	-
// (child)	Prior screening by “neutral factfinder”			
Welfare benefits	Yes	-	Yes	-
Disability benefits	Yes	Yes	-	Yes
Public employment	Yes	Yes	-	Yes
Public education (disciplinary)	Yes	Yes	-	-
Termination of child custody	Yes	-	Yes	-
Civil Forfeitures	Yes	-	Yes (real P)	Yes (personal P)

- b. Other Examples:
  - (i) Punitive damages require instructions to the jury, & judicial review to ensure reasonableness
  - (ii) American citizen held as enemy combatant in another country is afforded due process.
  - (iii) Pre-judgment attachment & government seizure of assets requires notice & a hearing, except in exigent circumstances – Due Process does not require an innocent owner defense to government seizure.

## B. Substantive Due Process

1. Definition – whether government has adequate reason for taking away an individual’s life, liberty or property
2. Constitutional Source
  - a. 14<sup>th</sup> Amendment *applies only to state/local governments*, NEVER to federal
  - b. Equal protection is applied to the fed government through the 5<sup>th</sup> Amendment
3. **Economic liberties** – Constitution provides only minimal protection for economic liberties
  - a. **Rational basis test** – used for laws affecting economic rights (e.g., minimum wage, other regulations, state law regulating trades or professions, consumer protection laws)
  - b. **Takings clause** (separate test) – government may take private property for public use, but must provide just compensation
    - (i) *Is there a taking?*
      - (a) **Possessory taking** – government confiscation or physical occupation of property is a taking, regardless of size or amount (1 cubic foot for a cable box is a taking)
      - (b) **Regulatory taking** – government regulation is a taking if it leaves no reasonable economically viable use of the property
        - Not enough to show merely a *decrease in the value* of the property
        - NOTE: apply *rational basis* PLUS the “*roughly proportionate*” test
          - Government conditions on development must be justified by a **benefit to the government that is roughly proportionate to the burden imposed** – otherwise, it’s a taking.
          - A property owner may bring a takings challenge to regulations that existed at the time the property was acquired
          - Temporarily denying an owner use of property is not a taking so long as the government’s action is reasonable (moratoriums)
    - (ii) *Is it for public use?*
      - (a) If not, the government must give property back
      - (b) BUT, *public use* defined **broadly** as anything government **reasonable believes** the taking will benefit public
    - (iii) *Is just compensation paid?*
      - (a) Measured in terms of the loss to the owner (i.e., reasonable market value)
      - (b) Gain to the taker is irrelevant
  - c. **Contracts clause** – “No state shall impair the obligations of contracts”
    - (i) Prohibits states from enacting any law that *retroactively* impairs contract rights
      - (a) *Applies only to state/local interference with existing contracts* – NEVER applies to federal government, which can be challenged only on due process grounds

- (b) Affects only *already-existing contracts*
- (ii) State/local interference with *private contracts* must meet **intermediate scrutiny** (plus combining elements of rational basis):
  - (a) “Does the legislation substantially impair a party’s rights under an existing contract?”
  - (b) “If so, is the law a *reasonably & narrowly tailored* means of promoting an important & legitimate public interest?”
- (iii) State/local interference with *government contracts* must meet **strict scrutiny**
- (iv) *Ex post facto clause does not apply in civil cases* – retroactive civil liability only need meet a rational basis test (Ex post facto applies only to criminally cases) If question is about contracts clause, and an answer choice is ex post facto, the answer is wrong.

4. **Privacy** – fundamental rights protected under substantive due process (generally **strict scrutiny test**)

<i>Strict Scrutiny (compelling reason)</i>	Not a fundamental right <i>(Rational Basis review)</i>
<ul style="list-style-type: none"> <li>– right to marry</li> <li>– right to procreate</li> <li>– right to custody of children - Caveat: If a married woman has a child, it is an irrefutable child that the woman’s husband is the father of the child. This is OK.</li> <li>– right to keep family together (must be related to one another)</li> <li>– right to control raising of children – violates due process to order grandparent visitation over parent’s objection</li> <li>– right to purchase &amp; use contraceptives</li> <li>– right to travel (covered under Equal protection § VII-H)</li> <li>– right to vote (covered under Equal protection § VII-H)</li> <li>– freedom of speech (covered under Equal protection § VIII)</li> <li>– freedom of association (covered under Equal protection § VIII)</li> <li>– free exercise of religion (covered under Equal protection § VIII)</li> </ul>	<ul style="list-style-type: none"> <li>– right to practice a trade or profession</li> <li>– <i>right to physician-assisted suicide</i></li> <li>– right to education</li> </ul>

a. **Undue Burden Test (right to abortion)**

- (i) *Prior to viability* – states may not prohibit abortions, but may regulate abortions so long as they do not create an *undue burden* on the ability to obtain abortions (24 hour waiting period, or requirement that abortions be performed by licensed doctors are not unconstitutional)
- (ii) *After viability* – states may prohibit abortions unless necessary to protect the woman’s life or health
- (iii) Government has *no duty to subsidize* abortions or provide them in public hospitals
- (iv) *Spousal consent & notification laws are unconstitutional*
- (v) *Parental notice & consent laws for unmarried minors* – state may require parental notice &/or consent for an unmarried minor’s abortion so long as it creates an alternative procedure where a minor can obtain an abortion by going before a judge.

b. **Unknown level of scrutiny**

- (i) *Right to private, consensual homosexual sex*
- (ii) **Right to refuse medical treatment:**
  - (a) **Competent adults have right to refuse medical treatment**, even life-saving treatment or food and water
  - (b) **Ending treatment** – state may require clear & convincing evidence that a person wanted treatment terminated before it ended
  - (c) **Terminating family members’ treatment** – state may prevent family members from cutting off treatment, because family members might have different interests than the patient himself
  - (d) No right to physician assisted suicide.

**VII. Equal Protection** (8% of questions)

A. Constitutional Provisions Concerning Equal Protection (**5<sup>th</sup> for fed government, 14<sup>th</sup> for states**). Steps (1) What is the classification (2) What is the scrutiny (3) Does the law meet the level of scrutiny

1. 14<sup>th</sup> Amendment *applies only to state/local governments*, **NEVER** applies to federal govt
2. Equal protection is applied to the fed government through the Due Process clause of the 5<sup>th</sup> Amendment

**B. Classifications Based on Race and National Origin** – **strict scrutiny** is used

1. Proving existence of a racial classification
  - a. Classification exists *on the face of the law*; OR
  - b. If the law is *facially neutral*, proving a racial classification requires demonstrating both (i) *discriminatory impact* & (ii)

*discriminatory intent*

2. *Racial classifications benefiting minorities* – strict scrutiny is applied
    - a. Numerical set-asides (i.e., quotas) require *clear proof of past discrimination*. (Rarely allowed – only upheld once by Supreme Court – Every time a white person was hired, a black person had to be hired – this was OK)
    - b. Educational institutions may use race as one factor among many in admissions to help minorities. However, they cannot set-aside slots or add points to admission scores solely based on race.
    - c. *Seniority systems* (“last hired, first fired”) may not be disrupted for affirmative action
- C. Gender Classifications** – *intermediate level of scrutiny* is used – must be exceedingly persuasive justification.
1. Proving gender classification
    - a. Classification exists *on the face of the law*
    - b. If the law is *facially neutral*, proving gender classification required demonstrating both (i) *discriminatory impact* & (ii) *discriminatory intent*
    - c. Preemptory challenges based on gender violate equal protection.
  2. *Gender classifications benefiting women*
    - a. Gender classifications benefiting women that are based on *role stereotypes* is NOT be allowed (i.e. woman always gets survivor benefits but men only if they need it – UNCONSTITUTIONAL)
    - b. Gender classifications *designed to remedy past discrimination & differences in opportunity* is allowed
- D. Alienage Classifications** – favorite area (1-2 questions)
1. Generally, *strict scrutiny* is used (e.g., law said only US citizens could receive social security benefits or hold civil service jobs or practice law – stricken down on strict scrutiny analysis), BUT:
  2. *Intermediate scrutiny* is used for *discrimination against undocumented alien children*.
  3. *Rational basis* is used for:
    - a. **Alienage classifications that concern self-government & the democratic government** – some privileges can be reserved for US citizens only, namely: (i) voting, (ii) serving on a jury, (iii) being a teacher, (iv) cop or (v) probation officer . Here the gov’t can discriminate against aliens.
    - b. *Congressional discrimination against aliens* – Congress has *plenary power to regulate immigration*. If Congress discriminates against non-citizens, only a rational basis review.
- E. Discrimination Against Non-Marital Children**
1. *Intermediate scrutiny* is used (but almost always stricken down)
  2. Laws that deny a benefit to all non-marital children (kids whose parents are not married), but grant it to all marital children, are unconstitutional.
- F. Rational Basis Review (used for all other types of discrimination)**
1. **Age discrimination** – mandatory retirement laws are often challenged, & *government usually wins*
  2. **Disability discrimination** – one of the few times government lost in rational basis review (ban of mental homes in towns was struck down by the courts under rational basis review)
  3. **Wealth discrimination** – poverty is NOT a suspect classification. Discrimination against poor is only rational basis
  4. **Economic regulation** – hot dog owners have to be there for 8 yrs - constitutional
  5. **Sexual orientation discrimination** -
- G. Fundamental Rights Protected under Equal Protection**
1. *Right to travel*
    - a. Laws that *prevent people from moving into a state* must meet strict scrutiny
    - b. *Durational residency requirements* (person must live in a jux for a specified amt of time in order to get a benefit) must meet strict scrutiny – for voting, 50 days is maximum allowed durational residence requirement
    - c. *Restrictions on foreign travel* need meet only the rational basis test – NOT a fundamental right
  2. *Right to vote*
    - a. Laws that *deny some citizens the right to vote* must meet strict scrutiny (e.g., poll taxes or property ownership requirements are unconstitutional)
    - b. Only time the courts have ever upheld property ownership as a condition for voting or for holding public office was a water district election.
    - c. **One-person-one-vote** must be met for all state/local elections – **voter approval doesn’t justify deviation from one-person-one-vote**
    - d. *At-large elections* (all the voters vote for all the office holders) *are constitutional* – UNLESS there’s proof of a discriminatory purpose
    - e. *Use of race* in drawing election district lines (to benefit minorities by redrawing districts) must meet strict scrutiny.
    - f. Counting uncounted votes without standards in a presidential election violates equal protection (Gore-Bush).
  3. *Right to be a candidate* – NOT constitutionally guaranteed
  4. *Right to education* – NOT a fundamental right

<b>1. What is the classification:</b> (a) Classification is on the <i>face of the law</i> ; OR (b) If law is facially neutral, there is both (i) <i>discriminatory intent</i> , AND (ii) <i>discriminatory impact</i>		
<b>2. What is the level of scrutiny:</b>		
<b>Strict Scrutiny:</b> <i>Law must be <b>necessary</b> to achieve a <b>compelling</b> government purpose</i>	<b>Intermediate Scrutiny:</b> <i>Law must be <b>substantially</b> related to an <b>important</b> government purpose</i>	<b>Rational Basis Test:</b> <i>Law must be <b>rationally</b> related to a <b>legitimate</b> government interest</i>
<ul style="list-style-type: none"> <li>- Race</li> <li>- National origin</li> <li>- Alienage (generally)</li> <li>- Travel (but not foreign travel)</li> <li>- Voting</li> </ul>	<ul style="list-style-type: none"> <li>- Gender</li> <li>- Legitimacy</li> <li>- Undocumented alien children</li> </ul>	<ul style="list-style-type: none"> <li>- Alienage classifications related to self-government &amp; the democratic process</li> <li>- Congressional regulation of aliens</li> <li>- Age    - Handicap    - Wealth</li> <li>- All other classifications</li> </ul>
<b>3. Does the law meet the level of scrutiny?</b>		

**VIII. The First Amendment** (20% of questions and usually if there is ever an essay)

**A. Free Speech Methodology**

**1. Content-based v. Content-neutral restrictions:**

- a. **Content-based** restrictions on speech generally must meet *strict scrutiny* – 2 types
  - (i) *Subject matter restrictions* – application of the law depends on the *topic* of the speech
  - (ii) *Viewpoint restrictions* – application depends on the *ideology* of the message
- b. **Content-neutral** laws burdening speech generally need only meet *intermediate scrutiny* – must:
  - (i) Further a significant government interest,
  - (ii) Narrowly tailored, AND
  - (iii) Leave open alternative channels of communication

**2. Prior restraints** – Judicial orders to stop speech before it occurs (worst form of restraint on free speech)

- a. Court orders suppressing speech must meet strict scrutiny
  - (i) Procedurally proper court orders must be complied with until they are vacated or overturned – gag orders on press to prevent prejudicial pre-trial publicity are NOT allowed
  - (ii) *Collateral bar rule* – a person who violates a court order is later barred from challenging it
- b. Government can require a *license for speech*, only if there is an important reason for licensing, & clear criteria leaving almost no discretion to the licensing authority – licensing schemes must contain procedural safeguards such as prompt determination of requests for licenses & judicial review

**3. Vagueness & overbreadth:**

- a. *Vagueness* – a law is unconstitutionally vague if not give *reasonable notice* of what is prohibited
- b. *Overbreadth* – a law is unconstitutionally overbroad if it regulates *substantially more speech* than is necessary
- c. **Fighting words** (likely to provoke a violent response) laws are unconstitutionally vague & overbroad. HYPOTHESIS: Appealing victim and nasty speaker – Answer is always that law prohibiting fighting words is unconstitutional.

**4. Symbolic speech** – the government can regulate conduct that communicates IF (i) it has an important interest unrelated to suppression of the message, & (ii) the impact on communication is no greater than necessary to achieve the government’s purpose

<i>Constitutionally protected:</i>	<i>Constitutionally NOT protected:</i>
<ul style="list-style-type: none"> <li>- Flag burning</li> <li>- Burning of cross (unless there is intent to threaten)</li> <li>- Contribution limits for election campaigns</li> </ul>	<ul style="list-style-type: none"> <li>- Draft card burning</li> <li>- Nude dancing</li> <li>- Expenditure limitations</li> </ul>

**5. Anonymous speech** is protected – protect right not to speak

**B. What Speech is Unprotected or Less Protected by the First Amendment**

- 1. *Incitement of illegal activity* – government may punish speech if: (i) there’s a substantial likelihood of imminent illegality, AND (ii) the speech is directed at causing the imminent illegality
- 2. **Obscenity & sexually-oriented Speech:**
  - a. Obscenity Test
    - (i) *appeal to the prurient interest* (a “shameful or morbid interest in sex”) – local community standard;
    - (ii) *patently offensive under the law prohibiting obscenity* – local community standard; AND
    - (iii) *lack serious redeeming artistic, literary, political or scientific value* – national standard
  - b. *Zoning Permissible* – government may use zoning ordinances to regulate the location of adult bookstores & movie theaters (Erogenous Zoning is permissible)
  - c. *Child pornography* – can be completely banned, *even if not obscene*. To be child pornography, it must be children, not adults that look like children or computer generated images)

- d. Punish private possession of obscene materials NOT allowed – BUT, may punish private possession of child pornography
  - e. Government may *seize the assets of businesses convicted of violating* obscenity laws
  - f. *Profane & indecent speech* – generally protected by the 1<sup>st</sup> Amendment, EXCEPT:
    - (i) *broadcast media* – broadcast is uniquely intrusive into the home, CAN censor profanity, (EXCEPT for cable television and internet which people choose to bring into their homes)
    - (ii) *in schools* (schools can punish profane and indecent language, including sexual innuendo)
3. **Commercial speech:**
- a. *False & deceptive ads* – NOT protected by the 1<sup>st</sup> Amendment
  - b. *True commercial speech that inherently risks deception can be prohibited:*
    - (i) Government may prohibit professionals from advertising or practicing under a trade name
    - (ii) Government may prohibit attorney, in-person solicitation of clients for profit – BUT, if lawyers offer services for free or by letters, they can solicit
    - (iii) Government may NOT prohibit accountants from in-person solicitation of clients for profit
  - c. *Other commercial speech can be regulated if intermediate scrutiny is met* (cannot solicit accident victims for 30 days was upheld)
  - d. Commercial speech regulation must be *narrowly tailored*, but NOT need to be *least restrictive alternative*
4. **Defamation** – not protected, but the ability of a state to limit recovery is limited  
actual malice – knew the statement was false or acted with reckless disregard for the truth

<i>Plaintiff</i>	<i>Liability Standard</i>	<i>Damages</i>	<i>Burden of Proof</i>
Public official (or running for office)	actual malice	compensatory presumed/punitive	P must prove falsity by clear and convincing evidence
Public figure	actual malice	compensatory presumed/punitive	P must prove falsity by clear and convincing evidence
Private figure (matter of public concern)	negligence actual malice	compensatory for actual injury; Presumed/punitive damages require actual malice	P must prove falsity and negligence on the part of the speaker
Private figure (matter of private concern)	unclear (negligence)	compensatory for actual injury Presumed/punitive damages do not require actual malice	Unclear (burden on D to prove truth)

5. **Privacy**
- a. Government may NOT create liability for the truthful reporting of information that was lawfully obtained from the government
  - b. Liability is NOT allowed if the media broadcasts a tape of an illegally intercepted call, IF: (i) the media did not participate in the illegality, & (ii) it involves a matter of public importance
  - c. Government may limit its dissemination of information to protect private, but NOT in criminal trials – *only the press have 1<sup>st</sup> Amendment right in pre-trial criminal proceeding*
6. Other government restrictions based on the content of speech – must meet *strict scrutiny*

**C. What Places are Available for Speech**

1. **Public forums** – government properties that the government is required to make available for speech (e.g. *streets, sidewalks & parks*)
  - a. Regulations must be *subject matter & viewpoint neutral*
  - b. Regulations must be a *time, place, or manner regulation* that serves an important government purpose & leaves open *adequate alternative places* for communication (i.e. No trucks with sound amplification equipment allowed in residential areas at night -UPHELD)
  - c. **Narrowly tailored** – **government regulation of public forums need not use the least restrictive alternative** (e.g., city ordinance said concert in the park required city engineers for sound system – this is ok, because need not be least restrictive alternative)
  - d. City officials can NOT have *discretion to set permit fees* for public demonstrations
2. **Limited/designated public forums** – government properties that the government *could* close to speech, but chooses to open to speech; so long as government chooses to open property for speech, it must follow all of the above rules (i.e. school facilities are non-public forums in the evenings and on the weekends – Congress can open the place as a limited public forum)
3. **Non-public forums** – government properties that the government constitutionally can & does close to speech
  - a. Government can regulate so long as the regulation on time, place & manner is (i) *reasonable* (rational basis), & (ii) *viewpoint neutral*
  - b. Non-public forums include:

- ilitary bases
- (ii) areas outside prisons & jails
- (iii) advertising space on city buses
- (iv) **sidewalks on post office property**
- (v) airports – may prohibit money solicitation; can NOT prohibit distribution of literature (fails rational basis review)

4. **Private property** – NO 1<sup>st</sup> Amendment right of access to private property (i.e. Shopping centers) for speech purposes

	<i>Subject matter neutral</i>	<i>Viewpoint neutral</i>	<i>Method of regulation allowed</i>	<i>Interest required</i>
Public forums & Limited/designated public forums	YES	YES	time, place, or manner (i) open adequate alternative place (ii) narrowly tailored (NOT least restrictive)	important
Non-public forums	NO	YES	reasonable	legitimate
private property	NO 1 <sup>st</sup> Amendment Right to use private property for speech purposes			

#### D. Freedom of Association

1. Laws that *prohibit or punish group membership* must meet *strict scrutiny* – to punish membership in a group, it must be proven that the person (i) actively affiliated with the group, (ii) knowing of its illegal activities, & (iii) with the specific intent of furthering those illegal activities.
2. Laws that require *disclosure of group membership*, where such disclosure would chill association, must meet *strict scrutiny*
3. Laws that *prohibit a group from discriminating are constitutional*, UNLESS they are
  - a. Intimate association (e.g., if you’re not invited to a small dinner party, you can’t sue), OR
  - b. Expressive activity – discrimination is an integral part of the association (e.g., the KKK who have an anti-black message or Boy Scouts who had anti-gay message)

#### E. Freedom of Religion

1. **Free exercise clause:**
  - a. Prohibits government interference with religious *beliefs*
    - Members of the clergy *can* hold government office
  - b. Allow regulation of *general applicability (conduct)*
    - Exception – Unemployment compensation (government may not deny benefits to individuals who quit their job for religious reasons)
2. **Establishment clause:**
  - a. Prohibits laws respecting the establishment of religion
  - b. Test (SEX) (if any of these three are violated, it violates the Establishment Clause):
    - (i) Must be a Secular purpose for the law (e.g., 10 commandments can’t be posted on public schools)
    - (ii) Effect must be neither to advance nor inhibit religion – government can’t symbolically endorse religion, or a particular religion
      - “plastic reindeer rule” – if there are religious symbols accompanied by symbols from other religions, AND secular symbols (i.e plastic reindeer), that’s ok
    - (iii) Must not be excessive entanglement with religion – government can’t pay salaries of parochial school teachers because that would require too much supervision
  - c. Government can’t discriminate *against* religious speech or *among* religions, unless *strict scrutiny* is met
  - d. *Government sponsored religious activity in public schools is unconstitutional* (i.e., school prayer, even moments of silence are unconstitutional, clergy delivered prayers at school graduations not allowed, student delivered prayers at football games not allowed), BUT religious student & community groups must have the same access to school facilities as non-religious groups
  - e. *Government may give assistance to parochial schools* – so long as the money isn’t used for religious instruction