**Constitutional Law Outline**

1. **Federal Judicial Power**: Article III
   1. **Cases & Controversies**: Justiciability Requirements
      1. \***Standing**: is plaintiff proper party to bring matter to court
         1. **Injury**: has been or imminently will be injured
            1. Must be Personally Suffered Injury
            2. Injunctive or Declaratory Relief: must show likelihood of future personal harm.
         2. **Causation & Redressability**: defendant must have caused injury, so that favorable court decision will remedy decision.
         3. **No 3rd** **Party Standing**: plaintiff cannot present the claims of another, unless (and plaintiff must meet all other standing requirements)
            1. **Close Relationship**: between plaintiff and injured party. E.g., doctor-patient
            2. **3rd Party Unlikely to Assert Rights**
            3. **Organizations on Behalf of Members**: so long as individual members have standing, interest is germane to organization’s purpose, and the individuals’ participation is unnecessary.
         4. **No Generalized Grievances**: plaintiff cannot sue solely as citizen or taxpayer objecting to government conduct. **Exception**: taxpayers may challenge government expenditures of money pursuant to statute as violating establishment clause.
      2. **Ripeness**: may the federal court grant pre-enforcement review of a statute or regulation? Courts analyze two factors:
         1. Hardship of No Pre-Enforcement Review
         2. Fitness of Record for Judicial Review
      3. **Mootness**: if events after the lawsuit is filed end plaintiff’s injury, the case should be dismissed, unless
         1. **Wrongs Capable of Repetition Yet Evading Review**: must still have some chance, even remote, of happening to plaintiff.
         2. **Voluntary Cessation**: if defendant halts voluntary practice but can resume at any time, no mootness.
         3. Class Action Suits: if named plaintiff’s claim becomes moot, class not dismissed so long as one member has ongoing injury.
      4. **Political Question Doctrine**: claims of constitutional violations that are left to political branches to resolve:
         1. Republican Form of Government Clause
         2. President’s Conduct of Foreign Policy
         3. Impeachment & Removal Process
         4. Partisan Gerrymandering
   2. Supreme Court Review: requires Case or Controversy, and
      1. Certiorari: discretionary review: all cases from state court or federal circuits.
      2. Direct, Non-Discretionary Appeal: 3-judge district court
      3. Original & Exclusive Jurisdiction: suits between states
      4. Final Judgment required
      5. Cannot be Independent & Adequate Ground of State Court Decision
   3. **Lower Federal Court Review**: requires Case or Controversy, and
      1. **Sovereign Immunity**: 11th Amendment: bars suits against state (bit not local) governments, in state courts, federal agencies, and federal courts, unless
         1. **Waiver**: must be explicit
         2. **14th Amendment**: state can be sued under statute adopted under Section 5 of the 14th Amendment
         3. **Federal Government** may sue state governments
         4. **Bankruptcy Proceedings**: state cannot assert sovereign immunity in a bankruptcy proceeding.
         5. **State Officers** May Be Sued for Injunctive Relief, or for personal liability.
      2. Abstention: instances with jurisdiction but refusal to hear: federal courts may not enjoin pending state court proceedings.
2. **Federal Legislative Power**
   1. **Sources of Congressional Authority**
      1. **Requires Express or Implied Authority**: there is no general federal police power, unless legislating for military, Indian reservations, federal territories, or D.C.
      2. **Necessary & Proper Clause**: Congress can take all actions necessary and proper to carry out its authority, and may choose any means not prohibited to do so.
      3. **Taxing, Spending, & Commerce Clause**
         1. **General Welfare**: congress may create any tax and spend in any way for the general welfare.
         2. **Commerce Clause**: Congress can regulate foreign and interstate by regulating any of the following:
            1. **Channels of Interstate Commerce**: highways, streams, etc.
            2. **Instrumentalities of Interstate Commerce & Persons or Things in Interstate Commerce**: internet, telephones, mails, cattle, etc.
            3. **Activities With Substantial Effect on Interstate Commerce**: intra-state activities with some, even minor, effect on interstate commerce. However, in the area of non-economic activity, “substantial effect” cannot be based on cumulative act (e.g., cannot regulate violence against women even though significant cumulative impact on economy).

**Exception**: laws regulating guns in school zones exceed commerce clause power.

* + 1. **14th Amendment Section 5**: Congress cannot create new rights or expand the scope of rights, but can act (i.e., pass laws) to prevent or remedy violations of rights already recognized by the courts, and such laws must be proportional and congruent to remedying constitutional violations.
    2. **10th Amendment Limitation**: all powers not granted to federal government are reserved to the states.
       1. **Congress Cannot Compel State Activity**: congress cannot compel state legislative or regulatory activity. However, Congress can induce states if conditions are (1) clearly stated, (2) not unduly coercive, and (3) related to program. E.g., reducing federal funding for other related programs.
       2. **Congress May Prohibit Harmful State Commercial Behavior**
  1. **Congressional Delegation of Powers**
     1. **No Limit**: no limit exists on Congressional authority to delegate powers.
     2. **Legislative Vetoes & Line-Item Vetoes Unconstitutional**
        1. Legislative Veto: Congress cannot attempt to overturn an executive branch action without bicameralism and/or presentment
        2. Line Item Veto: president cannot veto part of a bill while signing the rest into law.
     3. **Congress Cannot Delegate Executive Power** to itself or others to implement or enforce the law.

1. **Federal Executive Power**
   1. **Foreign Policy**
      1. Treaties: requires senate ratification
         1. Supersedes All State Laws
         2. Treaty vs. Federal Statute: most recent control
         3. Constitution Supersedes All Treaties
      2. Executive Agreements: agreements between U.S. & foreign country effective when signed by countries’ leaders
         1. May be Used for Any Purpose (including those for treaties)
         2. Executive Agreements Prevail Over State, But Not Federal, Law.
      3. Commander in Chief: powers to use troops in foreign countries is very broad.
   2. **Domestic Affairs**
      1. **Appointment & Removal Power**
         1. Who Possesses:
            1. President appoints ambassadors, federal judges, and officers of the U.S., and senate must confirm.
            2. Congress may vest appointment of inferior officers in president, federal department heads, or lower federal courts. An inferior officer is someone that can be fired by a superior officer.
            3. Congress cannot give appointment power to itself or its officers.
         2. Removal Power: president may fire any executive branch official unless limited by statute. Congress can limit removal by statute if (1) independence from president is important, and (2) statute merely limits removal to good cause, but but does not prohibit it altogether.
         3. Impeachment & Removal
            1. President, VP, federal judges, and all other officers may be impeached and removed for treason, bribery, or high crimes and misdemeanors.
            2. Impeachment does not remove a person from office. House impeaches (majority vote), then trial in senate. Only if senate convicts (2/3 vote) is officer removed.
      2. **Presidential Civil Immunity**: President has absolute immunity for civil suits for money damages for anything done in carrying out presidency, but no immunity for acts prior to taking office.
      3. **Executive Privilege**: protects papers & conversations with advisors, but yields to overriding need for the information.
      4. **Pardon Power**: president has power to pardon all accused or convicted of federal crimes, but no pardon for impeachment.
2. **Federalism**: limits on state and local government power
   1. **Preemption**: Supremacy Clause: federal law trumps state law
      1. **Express**: states that it is exclusive
      2. **Implied**
         1. **Federal & State Law Mutually Exclusive**
         2. **Impedes Achievement of Federal Objective**
         3. **Congress Evidences Clear Intent to Preempt**: e.g., immigration law.
      3. **State Cannot Tax or Regulate Federal Activity**: state cannot put substantial burden on federal activity.
   2. **Dormant Commerce Clause, Privileges & Immunities Clause**
      1. Definitions
         1. **Dormant Commerce Clause**: state or local law is unconstitutional if it places an undue burden on interstate commerce.
         2. **Art. 4 Privileges & Immunities Clause**: no state may deprive a citizen of another state of the privileges and immunities it accords its own citizens.
         3. **14th Amendment Privileges or Immunities Clause**: no state can unduly burden U.S. citizen’s right to travel.
      2. **If State Law Does Not Discriminate Against Out-of-Staters**
         1. Art. 4 Privileges & Immunities Clause Inapplicable
         2. Dormant Commerce Clause Test: if law puts a burden on interstate commerce, it violates the Dormant Commerce Clause if the burdens outweigh the benefits to state and local governments.
      3. **If State Law Discriminates Against Out-of-Staters**
         1. **Dormant Commerce Clause**:if the law burdens interstate commerce, it violates Dormant Commerce Clause unless it is *necessary* to achieve an *important* state objective. **Exceptions**:
            1. **Congressional Approval**: if Congress approves of state or local law, it is permissible. No more dormancy.
            2. **Market Participant Exception**: state or local government may favor its own citizens in receiving benefits from state government programs or in doing business with the state.
         2. **Art**. **4 Privileges & Immunities Clause**: discrimination permitted if *necessary* to achieve *important government purpose*.
            1. Discrimination Must Regard Civil Liberties or Important Economic Activities: ability to hunt for sport not enough.
            2. Corporations & Aliens: cannot invoke this provision (but can sue under Dormant Commerce Clause).
   3. State Taxation of Interstate Commerce
      1. States may not use their tax systems to help in-state businesses.
      2. State only may tax activities that have substantial nexus to the state
      3. State taxation of interstate companies must be fairly apportioned
   4. Full Faith & Credit: courts in one state must enforce judgments from other states so long as all of the following requirements are met:
      1. Issuing Court Had Subject Matter & Personal Jurisdiction
      2. Judgment on Merits
      3. Final Judgment
3. **Structure of Constitutional Protections for Individual Liberties**
   1. **Is There Government Action?**
      1. **Rule**: Constitution applies to state, not private, action.
      2. **Exceptions**: private conduct to which Constitution applies
         1. **Public Functions Exception**: if private entity is performing task traditionally and exclusively done by government, Constitution applies. Very narrow.
         2. **Entanglement**: if government authorizes, encourages or facilitates private conduct, the Constitution applies. Examples:
            1. Courts Cannot Enforce Racially Restrictive Covenant
            2. State Action Where State Leases Space
            3. State Action By Provision Of Free Textbooks To Schools
            4. No State Action By Private School Despite Government Funding: government subsidy by itself is not enough for state action.
            5. No State Action For Collegiate Sports Decisions
            6. State Action Where Private Entity Regulates Sports Within State
            7. No State Action By Private Club With Liquor Licence
      3. **Constitution vs. Statute**: Congress by statute may apply constitutional norms to private conduct.
         1. 13th Amendment: Congress may prohibit private race discrimination through statute pursuant to 13th Amendment.
         2. Commerce Clause: Congress can use its commerce clause authority to prohibit private discrimination.
         3. 14th Amendment Section 5: when regulating under this section, Congress *only* has authority over state and local governments, not private conduct.
   2. **Application of the Bill of Rights**
      1. General Application: applies directly only to the federal government, but is applied to state governments through the 14th Amendment Due Process Clause. Only 4 provisions have not yet been found to be incorporated:
         1. 3rd Amendment Rights Against Quartering
         2. 5th Amendment Right to Grand Jury Indictment
         3. 7th Amendment Right to Civil Jury Trial
         4. 8th Amendment Right Against Excessive Fines
   3. **Levels of Scrutiny**: a law will be upheld if:
      1. **Strict Scrutiny**: *necessary* to achieve a *compelling* government purpose. Only government’s actual objective will be analyzed. Government has burden of proof.
      2. **Intermediate Scrutiny**: *substantially related* to an *important* government purpose. Only government’s actual objective will be analyzed, not simply conceivable one. Government has burden of proof.
      3. **Rational Basis**: *rationally related* to a *legitimate* government purpose. Any conceivable legitimate purpose is sufficient. Challenger has burden of proof.
4. **Protected Individual Liberties**
   1. Definitions
      1. Procedural Due Process: procedures that government must follow when depriving of life, liberty or property
      2. Substantive Due Process: asks whether government have adequate reason for deprivation
      3. Equal Protection: whether government’s differential treatment are justified
   2. **Procedural Due Process**
      1. **Has There Been Governmental Deprivation of Life, Liberty, or Property**
         1. **Definitions**
            1. **Deprivation of Liberty**: loss of a significant freedom provided by the constitution or statute. However, reputational harm itself does not count.
            2. **Deprivation of Property**: an unfulfilled entitlement. An entitlement is a reasonable expectation of continued receipt of a benefit.
         2. **Government Negligence**: insufficient as a deprivation of due process. However, in emergency situation, liability if conduct “shocks the conscience.”
         3. **Failure to Protect**: government’s failure to protect people from privately-inflicted harm does not deny due process. Exception: custody, or government creates the danger.
      2. **If So, What Procedures Are Required?**
         1. **Test**: balance
            1. Importance of Interest to Individual
            2. Ability of Additional Procedures to Increase Accuracy of Fact-Finding
            3. Government’s Interest
         2. Examples
            1. Welfare Benefits: before termination, must be notice & hearing
            2. Social Security Disability: need only a post-termination hearing
            3. Student Discipline: notice of charges & opportunity to explain
            4. Child Custody: notice & hearing before termination
            5. Punitive Damages: require instructions to jury + judicial review, and grossly excessive punitive damages violate due process
            6. U.S. Citizen Enemy Combatant: must be given due process
            7. Prejudgment Attachment: except in exigent circumstances, must be preceded by notice & hearing. Note: government may seize property used in crime, even if innocent owner.
   3. **Economic Liberties**: money, jobs
      1. **Rational Basis**: deprivation of economic liberties subject to rational basis review.
      2. **Takings Clause**: government may take private property for public use if it provides *just compensation*.
         1. **Is There A Taking**?
            1. **Possessory Taking**: confiscation or physical occupation of property, even if but a single inch.
            2. **Regulatory Taking**: regulation that leaves *no* reasonable economically viable use of the property.

Government conditions on the development of a property must be justified by a benefit roughly proportionate to burden imposed.

Property owner may bring challenge even as to regulations already in place at the time the property was acquired.

Temporarily denying owner ability to develop property is not a taking, so long as delay is reasonable.

* + - 1. **Is It For Public Use?** So long as government acts out of reasonable belief that taking will benefit the public. Even if property given to private parties.
      2. **Has Just Compensation Been Paid**: measured by *loss to the owner*; gain to taker is irrelevant.
    1. **Contracts Clause**: no *state* shall substantially impair *existing* contracts
       1. Private Contracts: Intermediate Scrutiny: state impairment permitted where reasonably and narrowly tailored to serve legitimate and important government purpose.
       2. State Government Contracts: Strict Scrutiny
       3. Ex post facto clause does not apply in civil cases. It is wrong answer. Retroactive civil need only meet rationale basis.
  1. **Right to Privacy**: fundamental right generally triggering strict scrutiny, including
     1. Marry
     2. Procreate
     3. Custody of One’s Children
     4. Keep Family Together (includes extended family)
     5. Control Children’s Upbringing
     6. Contraceptives
     7. **Abortion**: *not strict scrutiny*
        1. **Prior to Viability**: may not prohibit abortion, but can regulate so long as no *undue burden*. 24-hour wait, and prohibition on partial-birth, is OK.
        2. **Viability** (when fetus can survive outside of womb): may prohibit abortion unless necessary to protect woman’s life or health.
        3. **Subsidization**: no government duty to subsidize or use public facilities for abortions.
        4. **Spousal Consent/Notification** **Unconstitutional**
        5. **Parental Notice/Consent**: state may require parental notice or consent for unmarried minor’s abortion but only if there is alternative procedure where minor can go before judge, who can find maturity or in best interest
     8. Private Consensual Homosexual Activity: but level of scrutiny unclear.
     9. Right to Refuse Medical Treatment: level of scrutiny unclear: competent adults can refuse medical care; state may require clear and convincing evidence that person wants treatment terminated; state may prevent family members from terminating treatment for another.
     10. No Right to Physician-Assisted Suicide
  2. **2nd Amendment**: non-absolute right to guns in home for security. Level of scrutiny unclear.
  3. **Travel**: interstate travel is a fundamental right
     1. Laws preventing people from entering a state must meet strict scrutiny
     2. Durational Residency Requirements: must meet strict scrutiny
     3. Restrictions on Foreign Travel: rational basis scrutiny
  4. **Vote**
     1. Laws preventing some citizens from voting must meet strict scrutiny
     2. One Person, One Vote must be met for all elections, and electoral districts must be roughly equal in population
     3. At-Large elections permitted unless proof of discriminatory purpose
     4. Use of race in drawing election district lines must meet strict scrutiny
     5. Counting uncounted votes without standards in a presidential election violates equal protection
  5. **No Fundamental Right to Education**

1. **Equal Protection**
   1. Approach:
      1. What is the Classification?
      2. What Level of Scrutiny?
      3. Is Scrutiny Met?
   2. **Classification Based on Race or National Origin**
      1. **Strict Scrutiny** Applies
      2. **How Discriminatory Classification Proven?**
         1. Facial Discrimination: law on its face classifies
         2. Facially Neutral, But Discriminatory Impact & Intent

Note: if neither is met, apply rational basis

* + 1. **Classifications Benefitting Minorities**
       1. Strict Scrutiny Applies
       2. Quotas Require Clear Proof of Past Discrimination
       3. School Admissions: may use race as factor in decisions, but cannot add points to application based on race.
       4. Public School Assignment: race cannot be used in assigning students to schools, unless strict scrutiny is met.
  1. **Gender Classification**
     1. **Intermediate Scrutiny** Applied, but justification must be *exceedingly persuasive*.
     2. **How Classification Proven**
        1. Facial Discrimination
        2. Facially Neutral, But Discriminatory Impact & Intent

Note: if neither is met, apply rational basis

* + 1. **Classifications Benefitting Women**
       1. Intermediate Scrutiny Applies
       2. If based on role stereotypes, unconstitutional.
       3. If designed to remedy past discrimination, likely constitutional.
  1. **Alienage Classifications**: laws discriminating against non-U.S. citizen
     1. Generally, Strict Scrutiny Applies
     2. Relate to Self-Government/Democratic Process: Rational Basis: government can deny non-citizens voting, serving on jury, police officer, teacher, probation officer.
     3. Congressional Discrimination: rational basis
     4. Undocumented Alien Children: Intermediate Scrutiny
  2. **Non-Marital Children**: Intermediate Scrutiny. Laws providing benefit to all marital children but no non-marital children are unconstitutional.
  3. **Rational Basis Classifications**
     1. Age
     2. Disability
     3. Wealth
     4. Economic Regulations
     5. Sexual Orientation
  4. Religion: no case yet. Always has been strict scrutiny under Establishment Clause.
  5. **Equal Protection & Fundamental Rights**: where action burdens a fundamental right, but the classification would otherwise be rational basis, apply strict scrutiny but note how it is based on the fundamental right, not the classification.

1. \***First Amendment**
   1. **Free Speech Methodology**
      1. **Content-Based v. Content-Neutral Laws**
         1. **Content-Based Laws**: Strict Scrutiny. Two types:
            1. Subject-Matter Restriction: application of the law depends on the content of the speech.
            2. Viewpoint Restriction: application of law depends on ideology of the message.
         2. **Content-Neutral Laws**: Intermediate Scrutiny
      2. **Prior Restraint**: **Generally**: disfavored, and requires *narrowly tailored* measure to protect against *special societal harm*
         1. Court Orders Preventing Speech: Strict Scrutiny. However, procedurally proper court orders must be complied with until overturned. Person can be punished for violating a court order, and is barred from challenging.
         2. Licensing/Permit Systems: permitted if government has important reason for licensing, clear criteria giving agency little discretion, and procedural safeguards.
      3. **Vagueness & Overbreadth**
         1. Vagueness: laws regulating speech must be clear about what is prohibited.
         2. Overbreadth: regulates substantially more speech than permitted under 1st Amendment.
         3. Fighting Words Laws: always vague and unconstitutional.
      4. **Symbolic Speech**: government may regulate communicative *conduct* if it has an important interest unrelated to suppression of the message and impact on communication is no greater than necessary. Burning flag OK, but not draft card.
      5. **Campaigns**: may limit contributions, but not expenditures.
      6. **Anonymous Speech**: protected
      7. Government Speech: cannot be challenged under 1st Amendment.
   2. **Unprotected & Less-Protected Speech**
      1. **Incitement of Illegal Activity**: government may punish speech if there is a substantial likelihood of imminent illegal activity and the speech is directed to causing it.
      2. **Obscenity**
         1. Rule: obscenity is material that (1) appeals to prurient interest; (2) is patently offensive under law at issue; and (3) taken as a whole, material must lack serious redeeming artistic, literary, political, or scientific value (measured nationally).
         2. Zoning Ordinances: may be used to regulate location of adult stores.
         3. Child Pornography: may be banned, even if not obscene
         4. Private Possession of Obscenity: cannot be prohibited.
         5. Asset Seizure: government may seize all assets of businesses convicted of violating obscenity laws.
         6. Profane & Indecent Speech: generally protected unless in free media or school
      3. **Commercial Speech**
         1. False/Deceptive Advertising unprotected
         2. True Ads: may be regulated if inherently risks deception
            1. Government May Prohibit Professional Advertising/Trade Names
            2. May Prohibit Attorney In-Person Solicitation for Profit
            3. Cannot Prohibit Accountant In-Person Solicitation for Profit
         3. Other Regulation: Intermediate Scrutiny
      4. **Defamation**
         1. **Public Official or Figure**: can recover for defamation only by proving falsity and actual malice (knows falsity or acted recklessly).
         2. Private Figure, Public Concern: can recover by proving falsity and negligence. To get presumed or punitive damages, actual malice required.
         3. Private Figure, Private Concern: can recover presumed or punitive damages without proving actual malice.
         4. Intentional Infliction of Emotion Distress: cannot evade defamation requirements by suing for IIED. Must meet standards for defamation, and no IIED for protected speech.
      5. **Privacy**
         1. Truthful Reporting of Lawfully Obtained Information: no liability
         2. Media Broadcast of Illegally Intercepted Communication: no liability if media did not participate and involves matter of public importance.
         3. Government Disclosure: government may limit its dissemination of information to protect privacy.
         4. Access to Trials: right to access criminal trials, but may be limited by *overriding interest articulated in findings by trial judge*
      6. **Government Employee Speech**: no protection for speech on the job in performance of their duties.
   3. **Places Available for Speech**
      1. **Public Fora**: places government is required to make available for speech. Regulation permitted, but only if the regulation is (1) subject-matter and viewpoint neutral, and (2) a time, place, or manner regulation that serves an important government purpose and leaves open alternative places for communication. Need not use least-restrictive alternative. Cannot have discretion to set permit fees for demonstrations. E.g., sidewalks.
      2. **Designated Public Fora**: government properties that could be closed to speech but government chooses to open to speech. Same rules as public fora. E.g., schools after hours.
      3. **Limited Public Fora**: government properties that government opens only to some groups and for some topics. Regulation permitted if reasonable and viewpoint neutral. E.g., bus advertisements.
      4. **Non-Public Fora**: government properties can and does close to speech. Regulation permitted if reasonable and viewpoint neutral. E.g., courtrooms, military bases, areas outside prisons and jails, sidewalks on post-office property, airports (ok to prohibit solicitation of money, but not distribution of literature).
      5. **Privately Owned Property**: no right. E.g., private shopping center.
   4. **Freedom of Association**:Fundamental Right,Strict Scrutiny
      1. **Membership in a Group**: may be punished only if the defendant is (1) actively affiliated with the group, (2) knows of the group’s activities; and (3) has the specific intent of furthering those illegal activities.
      2. **Laws Requiring Disclosure of Group Membership**: where disclosure would chill association, Strict Scrutiny.
      3. **Prohibiting Group From Discriminating**: constitutional unless interfere with intimate association or expression activity.
   5. **Freedom of Religion**
      1. **Free Exercise Clause**
         1. **What Constitutes Religious Belief**? Need not recognize supreme being nor be a traditional, major, or recognized religion, so long as belief is genuine/sincere and occupies place in life similar to regular religious belief
         2. Cannot be used to challenge a *neutral law of general applicability*.
         3. Government may not deny benefits to individuals who quit their jobs for religious reasons.
      2. **Establishment Clause**
         1. **Sect Preference**: Strict Scrutiny
         2. **No Sect Preference**: law is constitutional if (1) secular purpose for the law; (2) effect neither advances nor inhibits religion; and (3) no excessive entanglement with religion.
         3. Government generally cannot pay teachers salaries in parochial schools, as it would then have to monitor whether they taught religion, and this would be excessive entanglement.
         4. Discrimination Triggers Strict Scrutiny
         5. Government-sponsored religious activities in public schools unconstitutional. E.g., school prayer, even if voluntary.
         6. Government may give aid to parochial schools so long as not actually used for religious instruction. Government may provide vouchers that parents can use in public schools.

Essay Tips

1. If question involves plaintiff seeking declaratory judgment, look to both standing and ripeness.

2. On a Commerce Clause issue, if the actor is Congress, look at its authority to act; if the actor is a state, analyze the Dormant Commerce Clause.

3. Always start by asking who the actor is: Congress, president/executive branch, federal courts, states, private individuals.

4. If a right is not fundamental, or a discrimination not subject to strict or heightened scrutiny, apply the rational basis test. That is, if nothing else, always apply rational basis to any deprivation, burden, or differential treatment.

5. Even if a law fails because it is vague or overbroad, also discuss how it would fail under strict scrutiny. This overlaps, and is a good way to get extra points.

**Constitutional Law Checklist Outline & Hard Sheet**

1. **Federal Judicial Power**: Article III
   1. **Cases & Controversies**: Justiciability Requirements
      1. \***Standing**
         1. **Injury**: has been or imminently will be personally injured
         2. **Causation & Redressability** favorable court decision will remedy decision.
         3. **No 3rd** **Party Standing**, unless
            1. **Close Relationship**
            2. **3rd Party Unlikely to Assert Rights**
            3. **Organizations on Behalf of Members**: so long as individual members have standing, interest is germane to organization’s purpose, and the individuals’ participation is unnecessary.
         4. **No Generalized Grievances**: cannot sue solely as citizen or taxpayer, but taxpayers may challenge government expenditures of money pursuant to statute as violating establishment clause.
      2. **Ripeness**: courts analyze two factors:
         1. Hardship of No Pre-Enforcement Review
         2. Fitness of Record for Judicial Review
      3. **Mootness**: dismiss, unless
         1. **Wrongs Capable of Repetition Yet Evading Review**: must still have some chance, even remote, of happening to plaintiff.
         2. **Voluntary Cessation**:
         3. Class Action Suits: so long as one member has ongoing injury.
      4. **Political Question Doctrine**: courts will not address
         1. Republican Form of Government Clause
         2. President’s Conduct of Foreign Policy
         3. Impeachment & Removal Process
         4. Partisan Gerrymandering
   2. **Lower Federal Court Review**: requires Case or Controversy, and
      1. **Sovereign Immunity**: 11th Amendment: bars suits against state (*but not local*) governments, in state courts, federal agencies, and federal courts, unless
         1. **Explicit Waiver**
         2. **Statute Under 14th Amendment § 5**
         3. **Suit By Federal Government**
         4. **Bankruptcy Proceedings**
         5. **State Officers** for injunctive relief, or for personal liability.
      2. Abstention: federal courts don’t enjoin pending state court proceedings.
2. **Federal Legislative Power**
   1. **Sources of Congressional Authority**
      1. **Requires Express or Implied Authority**: no general police power
      2. **Necessary & Proper Clause**
      3. **Taxing, Spending, & Commerce Clause**
         1. **Tax for General Welfare**
         2. **Commerce Clause**: may regulate
            1. **Channels of Interstate Commerce**
            2. **Instrumentalities of Interstate Commerce & Persons or Things in Interstate Commerce**
            3. **Activities With Substantial Effect on Interstate Commerce**: intra-state activities with even minor, effect on interstate commerce. **However**, in the area of non-economic activity, “substantial effect” cannot be based on cumulative act (e.g., cannot regulate violence against women even though significant cumulative impact on economy).

**Exception**: regulating guns in school zones exceed commerce clause power.

* + 1. **14th Amendment § 5**: Congress cannot create new rights or expand the scope of rights, but can pass *proportional & congruent* laws to prevent or remedy violations of recognized rights, and laws bind state & federal government.
    2. **10th Amendment Limitation**: all powers not granted to federal government are reserved to the states.
       1. **Congress Cannot Compel State Activity**: congress cannot compel state legislative or regulatory activity. However, Congress can induce states if conditions are (1) clearly stated, (2) not unduly coercive, and (3) related to program. E.g., reducing federal funding for other related programs.
       2. **Congress May Prohibit Harmful State Commercial Behavior**
  1. **Congressional Delegation of Powers**
     1. **No Limit** On Delegation of Own Powers
     2. **Legislative Veto Unconstitutional**: Congress cannot attempt to overturn an executive branch action without bicameralism and/or presentment
     3. **Line Item Veto** **Unconstitutional**: president cannot veto only part of a bill
     4. **Congress Cannot Delegate Executive Power** to itself or others

1. **Federal Executive Power**
   1. **Foreign Policy**
      1. **Treaties**: requires senate ratification
         1. Supersedes All State Laws
         2. Treaty vs. Federal Statute: most recent control
      2. **Executive Agreements**: agreements between U.S. & foreign country effective when signed by countries’ leaders
         1. May be Used for Any Purpose
         2. Executive Agreements Prevail Over State, But Not Federal, Law.
   2. **Domestic Affairs**
      1. **Appointment Power**
         1. President appoints ambassadors, federal judges, and officers of the U.S., and senate must confirm. Congress cannot give itself this power.
         2. Congress may vest appointment of inferior officers in president, federal department heads, or lower federal courts.
      2. **Removal Power**: president may fire any executive branch official unless limited by statute. Congress can limit removal by statute if (1) independence from president is important, and (2) statute merely limits removal to good cause, but does not prohibit it altogether.
      3. Impeachment & Removal
         1. President, VP, federal judges, and all other officers may be impeached and removed for treason, bribery, or high crimes and misdemeanors.
         2. House impeaches by majority vote, then trial in senate, and removal only if convicted by 2/3 vote
      4. **Presidential Civil Immunity**: for civil suits for money damages for anything done in carrying out presidency, but no immunity for acts prior to taking office.
      5. **Executive Privilege**: but yields to overriding need for the information.
      6. **Pardon Power**: but no pardon for impeachment itself
2. **Federalism**: limits on state and local government power
   1. **Preemption**: Supremacy Clause: federal law trumps state law
      1. **Express**: states that it is exclusive
      2. **Implied**
         1. **Federal & State Law Mutually Exclusive**
         2. **Impedes Achievement of Federal Objective**
         3. **Congress Evidences Clear Intent to Preempt**: e.g., immigration law.
      3. **State Cannot Tax or Regulate Federal Activity**: state cannot put substantial burden on federal activity.
   2. **Dormant Commerce Clause, Privileges & Immunities Clause**
      1. Definitions
         1. **Dormant Commerce Clause**: state law unconstitutional if it places an undue burden on interstate commerce.
         2. **Art. 4 Privileges & Immunities Clause**: no state may deprive a citizen of another state of the privileges and immunities it accords its own citizens.
         3. **14th Amendment Privileges or Immunities Clause**: no state can unduly burden U.S. citizen’s right to travel.
      2. **If State Law Does Not Discriminate Against Out-of-Staters**
         1. Art. 4 Privileges & Immunities Clause Inapplicable
         2. Dormant Commerce Clause Test: violated if burden on interstate commerce outweighs benefits to state governments
      3. **If State Law Discriminates Against Out-of-Staters**
         1. **Dormant Commerce Clause**:violated unless burden on interstate commerce *necessary* to achieve an *important* state objective. **Exceptions**:
            1. **Congressional Approval** (i.e., no more dormancy)
            2. **Market Participant Exception**: state may favor own citizens in receiving benefits from state programs or doing business with state
         2. **Art**. **4 Privileges & Immunities Clause**: discrimination permitted if *necessary* to achieve *important government purpose*.
            1. Discrimination Must Regard Civil Liberties or Important Economic Activities: ability to hunt for sport not enough.
            2. **Corporations & Aliens**: cannot invoke this provision (but can sue under Dormant Commerce Clause). \*Be careful any time a corporation is being injured by economic regulation.
   3. State Taxation of Interstate Commerce
      1. States may not use their tax systems to help in-state businesses.
      2. State only may tax activities that have substantial nexus to the state
      3. State taxation of interstate companies must be fairly apportioned
   4. Full Faith & Credit: courts in one state must enforce judgments from other states so long as issuing court had SMJ and PJ and judgment was final and on the merits
3. **Structure of Constitutional Protections for Individual Liberties**
   1. **Is There Government Action?**
      1. **Rule**: Constitution applies to state, not private, action.
      2. **Exceptions**: private conduct to which Constitution applies
         1. **Public Functions Exception**: private entity performing task traditionally and exclusively done by government
         2. **Entanglement**: if government authorizes, encourages or facilitates private conduct, the Constitution applies. Examples:
            1. **Government Action**

Court Enforcing Racially Restrictive Covenant

Government Leases Office Space

Government Provides Free Textbooks to School

Private Entity Regulates Sports Within State

* + - * 1. **No Government Action**

Private School Despite Government Funding: government subsidy by itself is not enough for state action

Collegiate Sports Decisions

Private Club With Liquor License

* + 1. **Statutory Constitutional Norms**: Congress may *enact statute* pursuant to following provision to apply constitutional norms to private conduct:
       1. 13th Amendment: to prohibit private race discrimination
       2. Commerce Clause: to prohibit private discrimination
       3. NO: 14th Amendment Section 5: under this section, Congress *only* has authority over state and local governments, not private conduct.
  1. **Application of the Bill of Rights**
     1. General Application: applies directly only to the federal government, but is applied to state governments through the 14th Amendment Due Process Clause. Only 4 provisions have not yet been found to be incorporated:
        1. 3rd Amendment Rights Against Quartering
        2. 5th Amendment Right to Grand Jury Indictment
        3. 7th Amendment Right to Civil Jury Trial
        4. 8th Amendment Right Against Excessive Fines
  2. **Levels of Scrutiny**: a law will be upheld if:

|  |  |  |
| --- | --- | --- |
| **Scrutiny** | **Standard** | **Burden** |
| Strict | *Necessary* to achieve *compelling* purpose | Gov’t |
| Intermediate | *Substantially related* to *important* purpose | Gov’t |
| Rational Basis | *Rationally relates* to any conceivable *legitimate* purpose | Plaintiff |

1. **Protected Individual Liberties, Rights & Property**
   1. **Procedural Due Process**
      1. **Has There Been Governmental Deprivation of Liberty or Property?**
         1. Liberty: significant freedom provided by constitution or statute
         2. Property: entitlement (reasonable expectation of continued receipt of benefit)
         3. Government Negligence: insufficient unless “shocks the conscience”
         4. Failure to Protect: insufficient unless custody or gov’t creates danger
      2. **If So, What Procedures Are Required?** Balance
         1. Importance of Interest to Individual
         2. Ability of Additional Procedures to Increase Accuracy of Fact-Finding
         3. Government’s Interest (typically efficiency)
   2. **Economic Liberties & Property**: money, jobs
      1. **General Rule**: Rational Basis is default for any economic deprivation
      2. **Takings Clause**: requires for *public use* + *just compensation*
         1. **Is There A Taking?**
            1. Possessory Taking: even a single inch
            2. Regulatory Taking: leaves *no* reasonable economically viable use

Property Development Conditions: must be justified by benefit roughly proportionate to burden imposed.

Property Owner May Challenge Pre-Purchase Regulations

Temporary Denial of Development Ability not a taking if reasonable

* + - 1. **Is It For Public Use?**  Yes if *reasonable belief* that taking will benefit public
      2. **Has Just Compensation Been Paid?** Measured *only* by loss to owner.
    1. **Contracts Clause**: no *state* may substantially impair *existing* contracts
       1. Private Contracts: Intermediate Scrutiny
       2. State Contracts: Strict Scrutiny
  1. **Fundamental Rights**
     1. Marry
     2. Procreate
     3. Contraceptives
     4. Custody of One’s Children

Strict Scrutiny

* + 1. Keep (Extended) Family Together
    2. Control Children’s Upbringing
    3. Vote
    4. Interstate Travel

* + 1. Private Consensual Homosexual Activity

Scrutiny Unclear

* + 1. Refuse Medical Treatment
    2. 2nd Amendment Right to Gun
    3. Abortion
       1. Prior to Viability: No *Undue Burden*: cannot prohibit, but may regulate.
       2. Viability: can prohibit abortion unless necessary to protect life or health
       3. No Government Duty to Subsidize/Provide Facility
       4. Spousal Consent/Notification Unconstitutional
       5. Parent Notice/Consent: can be required only if alternative procedure before judge.

Note: no fundamental right to education, foreign travel, practice trade, physician-

assisted suicide, and so apply rational basis.

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| **1. Types of Classifications** | | |
| 1. Facial Classification 2. Facially Neutral But Discriminatory Impact + Intent   If neither, go straight to rational basis | | |
| **2. Levels of Scrutiny** | | |
| Strict Scrutiny  Race  National Origin  Alienage (with exceptions) | Intermediate Scrutiny  Gender  Non-Marital Children  Undocumented Alien Kids | Rational Basis Scrutiny  Alienage – Self-Government  Congr. Regulation of Aliens  Age  Disability  Wealth  All Other Classifications |

1. **Equal Protection**
   1. **Race or National Origin**: Strict Scrutiny
      1. Quotas Require Clear Proof of Past Discrimination
      2. School Admissions: may be factor, but cannot be point-based system
      3. Public-School Assignment: cannot be factor unless strict scrutiny met
   2. **Gender**: substantially relayed to *exceedingly persuasive* purpose
      1. Gender-Role Stereotypes: even to benefit women, usually unconstitutional
      2. If designed to remedy past discrimination, likely constitutional
   3. **Alienage** (non-U.S. citizens): Strict Scrutiny unless:
      1. Self-Government/Democratic Process: Rational Basis: police officers, voting, jury service, teacher, probation officer.
      2. Congressional Discrimination: Rational Basis, plenary immigration power
      3. Undocumented Alien Kids: Intermediate Scrutiny
   4. **\*Equal Protection & Fundamental Rights**: where action burdens a fundamental right for only a specific group, but the classification would otherwise be rational basis, apply strict scrutiny, but note that it is based on fundamental right, not classifications. However, this is not the same as substantive due process, which applies where all are deprived of the fundamental right.
2. **First Amendment**
   1. **Free Speech Methodology**
      1. **Content-Based Laws**: Strict Scrutiny
         1. Subject-Matter Restriction
         2. Viewpoint Restriction
      2. **Content-Neutral Law**: Intermediate Scrutiny. If conduct is regulated, assess Intermediate scrutiny in context of Time, Place & Manner restrictions chart.
      3. **Prior Restraint**:disfavored, and requires *narrowly tailored* measure to protect against *special societal harm*
         1. Court Orders: Strict Scrutiny, but *must* *comply* until overturned
         2. Licensing/Permit Systems: ok if (1) important reason, (2) clear criteria with little discretion, and (3) procedural safeguards
      4. **Vagueness & Overbreadth**
      5. **Symbolic Speech**: government may regulate *conduct* if (1) important interest unrelated to speech, and (2) impact no greater than necessary. Burning flag is protected, but not draft card.
      6. **Campaigns**: may limit contributions to, but not expenditures
      7. **Anonymous Speech**: protected
   2. **Unprotected & Less-Protected Speech**
      1. **Incitement of Illegal Activity**: if substantial likelihood of imminent illegal activity.
      2. **Obscenity**: material that (1) appeals to prurient interest, (2) is patently offensive under law at issue; and (3) lacks serious redeeming artistic, literary, political, or scientific value.
         1. Zoning Ordinances OK to regulate location of adult store
         2. Private Possession: cannot be prohibited
         3. Asset Seizure: permitted for all assets of business violating obscenity
         4. Profane/Indecent Speech: protected unless in free media or school
      3. **Commercial Speech**
         1. False/Deceptive Advertising: unprotected
         2. True Ads: may be regulated if inherently risks deception
         3. Random rules: gov’t may prohibit professional advertising/trade names and attorney in-person solicitation for profit, but cannot prohibit same for accountant.
      4. **Defamation**

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| --- | --- | --- | --- |
| **Plaintiff** | **Liability Standard** | **Damages** | **Burden of Proof** |
| Public Official (or running for it) | Actual Malice | Compensatory & Punitive | P must prove Falsity & Actual Malice |
| Public Figure | Actual Malice | Compensatory & Punitive | P must prove Falsity & Actual Malice |
| Private Figure, Public Concern | Negligence & Actual Injury | Compensatory (punitive only if Actual Malice) | P must prove Falsity & Negligence |
| Private Figure, Private Concern | Unclear - Negligence | Compensatory & Punitive | Burden on D to Prove Truth |

* + 1. **Privacy**
       1. Truthful Reporting of Lawfully Obtained Information: protected
       2. Media Broadcast of Illegally-Intercepted Communication: protected if media did not participate and concerns matter of public importance
       3. Access to Trials: right to access criminal trials, but may be limited by *overriding interest articulated in findings by trial judge*
    2. **Government-Employee Speech**: no protection for speech on-the-job in performance of duties.
  1. **Places Available for Speech**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Subject Matter Neutral? | Viewpoint Neutral? | Regulation Allowed? | Gov't Interest Required |
| Public Forums (sidewalks, parks) | Yes | Yes | Time, Manner, Place | Important |
| Limited Public Forums (non-public forums that government opens to speech |
| Non-Public Forums (military bases, courtrooms, airports) | No, need not be | Yes | Reasonable regulations | Legitimate |

Note: if private forum, consider whether exception to state actor requirement.

* 1. **Freedom of Association**: Fundamental Right, Strict Scrutiny
     1. Membership in Group: punishable only if defendant (1) actively affiliated, (2) knows of its illegal activities, and (3) has specific intent of furthering them.
     2. Laws Requiring Disclosure of Membership: if chills association, strict scrutiny.
     3. Prohibiting Group From Discriminating: constitutional, unless interferes with intimate association or expression activity.
  2. **Freedom of Religion**
     1. **Free Exercise Clause**: cannot punish/burden religious belief
        1. **What Constitutes Religious Belief**? Need not recognize supreme being nor be a traditional, major, or recognized religion, so long as belief is genuine/sincere and occupies place in life similar to regular religious belief
        2. **Rule**: permissible if *neutral law* of *general applicability*, even if incidental effect.
        3. Government may not deny benefits to individuals who quit jobs for religious reasons.
     2. **Establishment Clause**: prohibits laws respecting establishment of religion
        1. **Sect Preference**: Strict Scrutiny
        2. **No Sect Preference**: law constitutional if (1) secular purpose, (2) effect neither advances nor inhibits religion, and (3) no excessive entanglement.
        3. Government cannot pay teachers in parochial schools.
        4. Government-sponsored religious activities in schools unconstitutional, even if voluntary.
        5. Government may aid parochial schools so long as not used for religious purposes, and may give parents vouchers.