**ConLaw**

**Case or controversy - mootness** – A real live controversy must exist at all stages of review, not merely when complaint was filed. If no longer exists, court will dismiss the case as moot. A case becomes moot when party can no longer be affected by the statute they are challenging. Exceptions to the mootness requirement include (1) wrongs capable of repetition but evading review, (2) voluntary cessation by defendant but can resume them at any time, or (3) class action lawsuits where even one member has an ongoing injury.

**Standing** – A party must have a concrete interest in the outcome of a claim to have it heard in federal court. Requirements: (1) plaintiff must have suffered some injury or show a likelihood of imminent injury, (2) defendant caused the injury and (3) the court can grant a proper remedy. Congress cannot automatically confer standing in a statute but it can create new rights that if violated may give rise to standing. Additionally, plaintiff cannot sue solely as a U.S. citizen or taxpayer except to challenge expenditures pursuant to the Establishment Clause.

**Third Party Standing** – Generally, a party lacks standing to assert the claims of another. However, third party standing will be allowed if (1) there is a special relationship between the plaintiff and the injured party (doctor-patient, owner-customer), (2) the injured party is unlikely or unable to assert his own rights, or (3) if there is organizational standing. Organizations always have standing if the injury is to the organization itself. Additionally, organizations may sue on behalf of members if (a) members would have standing to sue individually, (b) injury is related to the organization’s purpose, and (c) neither claim nor relief requires participation of individual members.

**Ripeness** – A plaintiff is not entitled to review of a regulation before its enforcement unless the plaintiff will suffer some harm or immediate threat of harm.

**Commerce Clause** – The Commerce Clause gives Congress exclusive authority to regulate interstate commerce. Congress may regulate the channels, instrumentalities or economic activities that have a substantial effect on interstate commerce. Congress may also regulate intrastate commerce in certain situations. Congress may regulate commercial or economic activities if the cumulative effect of those activities substantially affects interstate commerce. Congress may only regulate non-economic intrastate activities if the activity individually and substantially affects interstate commerce as a matter of fact.

**Dormant commerce clause** – Under the dormant commerce clause, state and local laws are unconstitutional if they place an undue burden on interstate commerce. (1) A discriminatory state law violates the DCC if it burdens interstate commerce and is not necessary to achieve an important government purpose (not helping local businesses). (2) A non-discriminatory state law violates the DCC if it burdens interstate commerce and its burdens exceed its benefits or promoting legitimate local interests. However a state law burdening interstate commerce is valid if (1) there is express approval from Congress or (2) the state is a market participant favoring their own citizens.

**State Taxation & Intergovernmental Immunity** - A tax will impose an unfair burden unless (1) the activity taxed has a substantial nexus to the taxing state, (2) the tax is fairly apportioned, and (3) the tax fairly relates to services provided by the state. States may not directly tax or regulate federal activity.

**Appointments clause** – Enforcement is an executive act. Congress cannot appoint a commission that has enforcement powers, such as to prosecute violations.

**Tax and spending** – Congress has the plenary power to tax and spend for the general welfare. Taxes must reasonably relate to revenue production.

**Police Power** – Congress has no general police power except for legislation concerning the military, Indian reservations, federal land or territories, and the District of Columbia.

**Supremacy clause and preemption** – Under the Supremacy Clause, federal laws trump conflicting state and local laws. Under express preemption, if a federal law provides that it is the exclusive authority in a given area, it preempts state and local laws in that area. However, preemption provisions are narrowly construed. Under implied preemption, if a federal law is silent on preemption, courts will presume a conflicting state law is valid, unless Congress clearly intended to supersede. This occurs where (1) there is mutual exclusivity, (2) a state law impedes a federal objective, or (3) congress evidences a clear intent to legislate exclusively.

**Privileges and Immunities Clause of Article IV** – Protects against discrimination by a state in favor of its own citizens when it affects a fundamental right, for example the pursuit of a livelihood. Any statute that discriminates in that manner violates the clause unless the state shows that it has a “substantial justification” for the discrimination. They must show that there are no less restrictive means to solve the problem. If the law is non-discriminatory, then there is no P&I Article IV issue but there may be an undue burden on interstate commerce under the dormant commerce clause.

**State action** – First Amendment rights generally are enforceable only against governmental bodies. Private action may be attributable to the government if (1) the government is significantly involved in the private action or (2) the private action constitutes a traditional and exclusive government function (running a company town). Providing essential services, such as fire and police protection are not sufficient to turn private action into state action.

**Equal Protection Clause** – The EPC protects against government acts that draw distinctions between different people based on various classifications. A law facially classifies if on its very terms it draws distinctions. A facially neutral law will be subject to scrutiny under the EPC only if there is proof of both a discriminatory impact and discriminatory intent. Strict scrutiny generally applies to race and national origin classifications. Intermediate scrutiny applies to alienage classifications. All other types of discrimination receive rational basis review.

**Rational Basis** – Under the rational basis test, a law will be upheld if it is rationally related to a legitimate government interest. The challenger has the burden of proof. The court will look to any conceivable purpose, not necessarily the actual purpose.

**Intermediate Scrutiny** – Under intermediate scrutiny, the law will be upheld only if the government can show that it is substantially related to an important government purpose. The Government bears the burden of proof. The actual purpose must be important. The means must be narrowly tailored, but not necessarily the best or least restrictive way.

**Strict Scrutiny** – Under strict scrutiny, the law will be struck down unless the government can show that it is necessary to achieve a compelling government purpose. The Government bears the burden of proof. There can be no less restrictive means available.

**Alienage Classifications** – Discrimination on the basis of citizenship status is ordinarily subject to strict scrutiny except where (1) there is a congressional law regulating immigration or (2) a state law related to self-government and the democratic process, such as voting, serving on a jury, working as police officer, teacher, or probation officer.

**Right to travel** – Usually subject to strict scrutiny, but some durational residency requirements may be allowed such as 30-days to earn the right to vote or 1-year residency to get a divorce.

**Substantive Due Process** – SDP protects against government interference with fundamental rights. Government interference is subject to strict scrutiny. The fundamental rights include the right to marry, procreate, custody and upbringing of children, family, contraceptives, private homosexual activity, refuse medical treatment, bear arms, travel, and to vote. Abortion is also protected: prior to viability the government may not create an undue burden on the ability to obtain an abortion. After viability, the government may prohibit abortions except where it is necessary to protect the woman’s life or health. There is no fundamental right to education.

**Procedural due process** – A fair process involving notice and a hearing is required for a government agency to take or deprive a person of their life, liberty or property. (1) For the PDP to apply there must be a deprivation of life, liberty or property. (2) Required procedures are determined by balancing (a) the importance of the individual interest involved, (b) the value of procedural safeguards to that interest, and (c) the government’s interest such as fiscal or administrative efficiency.

**Takings Clause** – The government may take private property for public use if it provides just compensation. A possessory taking occurs when there is a confiscation or physical occupation. A regulatory taking occurs only if it leaves no reasonable economically viable use of the property. Public use so long as government acts out of a reasonable belief that the taking will benefit the public. Compensation is measured in terms of the loss to the owner of the reasonable market value. Gain to the taker is irrelevant.

**Prior restraint** – Prior restraints prevent speech before it occurs rather than punish it afterwards. Prior restraints will not be tolerated unless government can show that it is narrowly tailored to achieve a compelling or at least significant government interest.

**Vagueness** – If a regulation fails to give people reasonable notice of what is prohibited, it may violate the due process clause.

**Overbroad** – If regulation of speech punishes a substantial amount of protected speech in relation to the regulations plainly legitimate sweep then it is facially invalid and cannot be enforced against anyone.

**Content-based** – A content-based speech regulation is subject to strict scrutiny, which requires the government to show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

**Content-neutral** – A content-neutral speech regulation is subject to intermediate scrutiny. That is, it must advance an important governmental interest unrelated to the suppression of speech and must not unduly burden substantially more speech than necessary to further those interests.

**Symbolic Speech** – Government can regulate if (1) the regulation furthers an important government interest, (2) that interest is unrelated to the suppression of the message, and (3) the impact on speech is no greater than necessary to further the interest.

**Commercial Speech** – Commercial speech is lesser-protected speech. Commercial speech is not protected if it is false, misleading or deceptive or if it is illegal or concerns illegal activity. The government can regulated protected commercial speech if (1) the government asserts a substantial interest in its regulation, (2) the regulation directly advances the government interest, and (3) the regulation is no more extensive than necessary to advance the government’s substantial interest. It need not be the least restrictive alternative.

**Obscenity** – Government may regulate obscenity which is a lesser-protected form of speech if (1) it appeals to a prurient interests based on community standard, (2) is patently offensive, and (3) taken as a whole, the material lacks serious literary, artistic, political or scientific value based on a national standard.

**Incitement** – Government may regulate speech inciting imminent unlawful activity if (1) there is a substantial likelihood that the speech will bring about imminent illegal activity and (2) the speech is aimed at causing the imminent illegality.

**Fighting Words** – The government may regulate speech if it is likely to cause an immediate violent response against the speaker (very narrow).

**Time, place, and manner restrictions** – Conduct related to speech can be regulated by content-neutral time, place and manner restrictions. The breadth of the government’s power to regulate depends on whether the forum involved is a public or nonpublic forum. Regulations in public forums must be content-neutral, narrowly tailored to serve an important government interest, and leave open alternative channels of communication.

**Public forum** – Public forums are government property that the government is constitutionally required to make available for speech such as sidewalks or parks. Restrictions on speech or conduct related to speech must be (1) content-neutral, (2) serve an important government purpose, and (3) leave open adequate alternative channels of communication. Permit fees that vary depending on the type of speech are content-based and unconstitutional.

**Limited/Designated public forum** – Limited or designated public forums are government properties that the government opens for speech but can close at any time. The same rules apply as for public forum restrictions but only when the property is open for speech.

**Nonpublic forum** – Government property that can be closed to speech, such as military bases, airports, advertising on city buses. The government can regulate speech if the regulation is (1) reasonably related to some legitimate purpose and (2) viewpoint neutral.

**Free exercise clause** – Under the Free Exercise Clause, the government may not punish religious beliefs unless it is necessary to achieve a compelling interest. The Free Exercise Clause applies only if the purpose of the law is to limit or interfere with religious practice. Laws of general applicability are valid.

**Establishment clause** – Under the Establishment Clause, the government may not discriminate against or show a preference for religion. Strict scrutiny applies if the law discriminates against a specific religion or sect. If the law burdens religion without discriminating against a specific faith or group, then courts will apply the Lemon test, in which case a government act burdening religion will only be upheld if (1) there is a primary secular purpose behind the act, (2) the act neither has the effect of advancing nor inhibiting religion, and (3) the act does not create excessive government entanglement with religion.