

CONSTITUTIONAL LAW

TABLE OF CONTENTS

PART ONE: POWERS OF THE FEDERAL GOVERNMENT 1

I. THE JUDICIAL POWER 1

A. ARTICLE III 1

B. POWER OF JUDICIAL REVIEW 1

 1. Review of Other Branches of Federal Government 1

 a. Separation of Powers and Finality of Court Decisions 1

 2. Federal Review of State Acts 2

C. FEDERAL COURTS 2

 1. Article III Courts 2

 2. Article I Courts 2

 a. Limitation 2

D. JURISDICTION OF THE SUPREME COURT 2

 1. Original (Trial) Jurisdiction 2

 2. Appellate Jurisdiction 2

 a. Statutory Application of Appellate Jurisdiction 3

 1) Writ of Certiorari (Discretionary) 3

 2) Appeal (Mandatory) 3

 b. Limitations on Statutory Regulation 3

E. CONSTITUTIONAL AND SELF-IMPOSED LIMITATIONS ON EXERCISE OF FEDERAL JURISDICTION—POLICY OF “STRICT NECESSITY” 3

 1. No Advisory Opinions 4

 a. Compare—Declaratory Judgments 4

 2. Ripeness—Immediate Threat of Harm 4

 3. Mootness 4

 a. Exception—Capable of Repetition But Evading Review 4

 b. Class Actions 4

 c. Distinguish Ripeness 5

 4. Standing 5

 a. Components 5

 1) Injury 5

 a) Injury Need Not Be Economic 5

 2) Causation 5

 3) Redressability 6

 b. Common Standing Issues 6

 1) Congressional Conferral of Standing 6

 a) States 6

 2) Standing to Enforce Government Statutes—Zone of Interests 6

 3) Standing to Assert Rights of Others 7

 a) Limitation—Family Law Issues 7

 4) Standing of Organizations 7

 5) No Citizenship Standing 8

 6) Taxpayer Standing 8

 a) Generally No Standing to Litigate Government Expenditures . 8

 b) Exception—Congressional Measures Under Taxing and Spending Power that Violate Establishment Clause 8

7) Legislators’ Standing	9
5. Adequate and Independent State Grounds	9
a. “Adequate”	9
b. “Independent”	9
c. Where Basis Is Unclear	9
6. Abstention	10
a. Unsettled State Law	10
b. Pending State Proceedings	10
1) Pending	10
2) Civil and Administrative Proceedings	10
3) Exception	10
7. Political Questions	10
a. Definition	10
b. Compare—“Nonpolitical Controversies”	11
1) Legislative Apportionment	11
2) Presidential Papers and Communications	11
3) “Origination Clause” Cases	11
8. Eleventh Amendment Limits on Federal Courts	11
a. What Is Barred?	11
1) Compare—Sovereign Immunity	12
b. What Is Not Barred?	12
1) Actions Against Local Governments	12
2) Actions by the United States Government or Other State Governments	12
3) Bankruptcy Proceedings	12
c. Exceptions to Eleventh Amendment	12
1) Certain Actions Against State Officers	12
a) Actions Against State Officers for Injunctions	13
b) Actions Against State Officers for Monetary Damages from Officer	13
c) Actions Against State Officers for Prospective Payments from State	13
2) State Consents	13
3) Congressional Removal of Immunity Under the Fourteenth Amendment	13
a) Compare—Article I Powers	13
d. Summary	14
II. LEGISLATIVE POWER	14
A. ENUMERATED AND IMPLIED POWERS	14
1. Necessary and Proper “Power”	14
a. Limitation	14
2. Taxing Power	14
a. Uniformity	15
b. Direct Taxes—Must Be Apportioned	15
c. Export Taxes Not Permitted	15
d. Taxes Are Generally Valid	15
3. Spending Power	15
a. Regulation Through Spending	15
4. Commerce Power	15
a. Definition of Commerce	15

1)	Includes Basically All Activity Affecting Two or More States	15
2)	Includes Transportation or Traffic	16
a)	Vehicular Transportation Not Required	16
b.	“Substantial Economic Effect”	16
1)	Power Not Unlimited	16
a)	Intrastate Activity	16
5.	War and Related Powers	17
a.	Economic Regulation	17
1)	During War	17
2)	Postwar	17
b.	Military Courts and Tribunals	17
1)	Judicial Review	17
2)	Court-Martial of Enemy Civilians and Soldiers Permitted	17
3)	Court-Martial of American Soldiers Permitted	17
4)	Court-Martial of American Civilians Generally Prohibited	18
5)	Detention of Citizen Enemy Combatants	18
c.	Calling Forth the Militia	18
6.	Investigatory Power	18
a.	Authorized Investigation	18
b.	Witnesses’ Rights	19
1)	Fifth Amendment	19
2)	Relevance	19
3)	Procedural Due Process	19
c.	Enforcement of Investigatory Powers	19
7.	Property Power	19
a.	No Limits on Disposition of Property	19
b.	Eminent Domain	19
8.	No Federal Police Power	19
9.	Bankruptcy Power	20
10.	Postal Power	20
a.	Exclusive	20
b.	Scope of Power	20
11.	Power Over Citizenship	20
a.	Exclusion of Aliens	20
1)	Nonresident Aliens	20
2)	Resident Aliens	20
b.	Naturalization and Denaturalization—Exclusive Control of Congress	20
1)	No Loss of Citizenship Without Consent	20
a)	Proof of Intent	21
2)	Rights of Children of Citizens	21
12.	Admiralty Power	21
a.	Exclusive Power	21
b.	Navigable Waterways	21
13.	Power to Coin Money and Fix Weights and Measures	21
14.	Patent/Copyright Power	21
B.	DELEGATION OF LEGISLATIVE POWER	21
1.	Broad Delegation Allowed	21
2.	Limitations on Delegation	22
a.	Power Cannot Be Uniquely Confined to Congress	22
b.	Clear Standard	22
c.	Separation of Powers Limitations	22

- d. Important Liberty Interests 22
 - e. Criminal vs. Civil Punishment 22
 - C. THE SPEECH OR DEBATE CLAUSE—SPECIAL IMMUNITY FOR FEDERAL LEGISLATORS 23
 - 1. Persons Covered 23
 - 2. Scope of Immunity 23
 - a. Bribes Excluded 23
 - b. Speeches Outside Congress 23
 - c. Defamatory Statements 23
 - D. CONGRESSIONAL “VETO” OF EXECUTIVE ACTIONS INVALID 23

- III. THE EXECUTIVE POWER 24
- A. VESTED IN PRESIDENT 24
- B. DOMESTIC POWERS 24
 - 1. Appointment and Removal of Officers 24
 - a. Appointment 24
 - 1) Appointment of “Independent Counsel” (Special Prosecutor) 24
 - 2) No Appointments by Congress 24
 - b. Removal 24
 - 1) By President 24
 - 2) By Congress 25
 - a) Limitation on Removal Power 25
 - b) Limitation on Powers of Removable Officers 25
 - 2. Pardons 25
 - 3. Veto Power 25
 - a. Congress May Override Veto by Two-Thirds Vote 25
 - b. President Has Ten Days to Veto 25
 - c. Line Item Veto Unconstitutional 25
 - 4. Power as Chief Executive 26
 - a. No Power to Impound 26
- C. POWER OVER EXTERNAL AFFAIRS 26
 - 1. War 26
 - a. Actual Hostilities 26
 - b. Military Government 27
 - 2. Foreign Relations 27
 - 3. Treaty Power 27
 - a. Supreme Law 27
 - 1) Self-Executing vs. Non-Self-Executing Treaties 27
 - 2) Conflict with Congressional Acts 27
 - 3) Conflict with Constitution 27
 - b. Other Limitations 27
 - 4. Executive Agreements 28
 - a. Conflicts with Other Governmental Action 28
 - b. Example—Power to Settle Claims of United States Citizens 28
- D. EXECUTIVE PRIVILEGE/IMMUNITY 28
 - 1. Executive Privilege 28
 - a. Extent of the Privilege 28
 - 1) National Security Secrets 28
 - 2) Criminal Proceedings 28
 - 3) Civil Trials 28
 - 4) Screening Papers and Recordings of Former President 29

5) Screening by Judge in Chambers	29
2. Executive Immunity	29
a. Absolute Immunity for President	29
b. Immunity May Extend to Presidential Aides	29
E. IMPEACHMENT	29
1. Persons Subject to Impeachment	29
2. Grounds	29
3. Impeachment by the House	29
4. Conviction by the Senate	29
PART TWO: THE FEDERAL SYSTEM	30
IV. RELATIVE SPHERES OF FEDERAL AND STATE POWER	30
A. EXCLUSIVE FEDERAL POWERS	30
1. Power of States Expressly Limited	30
2. Inherent Federal Powers	30
B. EXCLUSIVE STATE POWERS	30
C. CONCURRENT FEDERAL AND STATE POWER—SUPREMACY CLAUSE ..	30
1. Actual Conflict Between State and Federal Laws	31
2. State Prevents Achievement of Federal Objective	31
3. Preemption	31
a. Comprehensiveness	31
b. Agency to Administer	31
D. ABSENCE OF FEDERAL AND STATE POWERS	31
E. INTERSTATE COMPACT CLAUSE	32
F. FULL FAITH AND CREDIT CLAUSE	32
V. INTERSOVEREIGN LITIGATION	32
A. SUITS BY THE UNITED STATES AGAINST A STATE	32
B. SUITS BY STATE AGAINST UNITED STATES—UNITED STATES MUST	
CONSENT	32
C. FEDERAL OFFICER AS DEFENDANT	32
1. Limitation	33
2. Specific Relief Against the Individual Officer	33
D. SUITS BY ONE STATE AGAINST ANOTHER	33
VI. INTERGOVERNMENTAL TAX AND REGULATION IMMUNITIES	33
A. FEDERAL TAXATION AND REGULATION OF STATE OR LOCAL	
GOVERNMENTS	33
1. Tax or Regulation Applying to State and Private Entities—Valid	33
2. Tax or Regulation that Applies Only to States	33
a. Exception—Civil Rights	33
b. Exception—Spending Power Conditions	34
3. Commandeering State Officials	34
B. STATE TAXATION AND REGULATION OF FEDERAL GOVERNMENT	34
1. No Direct Tax on Federal Instrumentalities	34
2. Nondiscriminatory, Indirect Taxes	34
3. State Regulation of Federal Government	35
VII. PRIVILEGES AND IMMUNITIES CLAUSES	35
A. INTRODUCTION	35

B.	ARTICLE IV—PRIVILEGES OF STATE CITIZENSHIP	35
1.	Corporations and Aliens Not Protected	35
2.	Only “Fundamental Rights” Protected	35
3.	Substantial Justification Exception	36
4.	Note—Relationship to Commerce Clause	36
C.	FOURTEENTH AMENDMENT—PRIVILEGES OF NATIONAL CITIZENSHIP	36
1.	Corporations Not Protected	36
2.	Bill of Rights Not Included	37
3.	Right to Travel and the Privileges and Immunities Clause	37
	PART THREE: STATE REGULATION OR TAXATION OF COMMERCE	37
VIII.	REGULATION OF FOREIGN COMMERCE	37
A.	LIES EXCLUSIVELY WITH CONGRESS	37
B.	MINOR EXCEPTIONS WHERE STATE REGULATION PERMITTED	37
IX.	REGULATION OF INTERSTATE COMMERCE	37
A.	REGULATION OF COMMERCE BY CONGRESS	37
1.	Power of Congress to Supersede or Preempt State Regulation	38
2.	Power of Congress to Permit or Prohibit State Regulation	38
a.	Limitation	38
B.	STATE REGULATION OF COMMERCE IN THE ABSENCE OF CONGRESSIONAL ACTION	38
1.	Discriminatory Regulations	39
a.	Generally Invalid	39
b.	Examples	39
1)	Regulations Protecting Local Businesses	39
2)	Regulations Requiring Local Operations	39
3)	Regulations Limiting Access to In-State Products	39
4)	Regulations Prohibiting Out-of-State Wastes	39
c.	Exceptions	40
1)	Necessary to Important State Interest	40
2)	State as Market Participant	40
a)	Limitation—Interstate Privileges and Immunities Clause	40
b)	Limitation—“Downstream” Restrictions	41
3)	Favoring Local Governments	41
2.	Nondiscriminatory Laws—Balancing Test	41
a.	Less Restrictive Alternatives	41
b.	Absence of Conflict with Other States	41
c.	State Control of Corporations	42
C.	TWENTY-FIRST AMENDMENT—STATE CONTROL OVER INTOXICATING LIQUOR	42
1.	Intrastate Regulations	42
2.	Interstate Regulations	43
3.	Federal Power	43
D.	BAR EXAM APPROACH	43
X.	POWER OF STATES TO TAX INTERSTATE COMMERCE	43

A.	GENERAL CONSIDERATIONS	43
1.	Discriminatory Taxes	43
a.	Finding Discrimination	44
1)	Tax Singles Out Interstate Commerce	44
2)	Tax with In-State Subsidy	44
b.	Choosing the Proper Clause	44
1)	Interstate Privileges and Immunities Clause	44
2)	Equal Protection	44
a)	Where Congress Approves the Discrimination	45
b)	Taxes Based on Suspect Classifications or Infringing on Fundamental Rights	45
2.	Nondiscriminatory Taxes	45
a.	Factors	45
1)	Substantial Nexus	45
2)	Fair Apportionment	46
3)	Fair Relationship	46
B.	USE TAX	46
1.	Permissible in Buyer’s State	47
2.	State May Force Seller to Collect Use Tax	47
C.	SALES TAXES	47
D.	AD VALOREM PROPERTY TAXES	47
1.	No Tax on Commodities in the Course of Interstate Commerce	47
a.	When Is Property “in the Course of” Interstate Commerce?	47
1)	When Does Interstate Transportation Begin?	47
2)	Effect of a “Break” in Transit	48
3)	When Does Interstate Shipment End?	48
b.	No Apportionment Required	48
2.	Tax on Instrumentalities Used to Transport Goods Interstate	48
a.	Taxable Situs (“Nexus”)	48
b.	Apportionment Requirement	48
1)	Proper Apportionment	48
E.	PRIVILEGE, LICENSE, FRANCHISE, OR OCCUPATION TAXES	49
1.	Taxpayer Has Burden of Proof	49
XI.	POWER OF STATES TO TAX FOREIGN COMMERCE	49
A.	IMPORT-EXPORT CLAUSE	49
1.	State Taxation of “Imports” Prohibited Absent Congressional Consent	49
2.	State Taxation of “Exports” Prohibited	50
B.	COMMERCE CLAUSE	50
PART FOUR: INDIVIDUAL GUARANTEES AGAINST GOVERNMENTAL OR PRIVATE ACTION		50
XII.	LIMITATIONS ON POWER AND STATE ACTION REQUIREMENT	50
A.	CONSTITUTIONAL RESTRICTIONS ON POWER OVER INDIVIDUALS	50
1.	Bill of Rights	50
a.	Rights Applicable to States	50
b.	Rights Not Applicable to States	51
2.	Thirteenth Amendment	51
a.	No Requirement of State Action	51

b.	Congressional Power	51
3.	Fourteenth Amendment	51
a.	Requirement of State Action	52
b.	Scope of Congressional Power	52
4.	Fifteenth Amendment	53
5.	Commerce Clause	53
a.	Civil Rights Act	53
b.	Extent of Commerce Power	53
6.	Rights of National Citizenship	54
B.	STATE ACTION REQUIREMENT	54
1.	Exclusive Public Functions	54
a.	Must Be Traditional <i>and</i> Exclusive Function	54
2.	Significant State Involvement—Facilitating Private Action	54
a.	Instances of Significant State Involvement	55
1)	Official Encouragement	55
a)	Judicial Approval	55
(1)	Peremptory Challenges	55
b)	Official Acts	55
(1)	Discriminatory Law Enforcement	55
(2)	Apparent Legal Authority	55
(3)	Public Defenders	55
2)	State Authorization	56
3)	The State as Lessor for a Racially Discriminatory Lessee	56
4)	Administration of Private Discriminatory Trust by Public Officials ..	56
5)	Entwinement of State and Private Entities	56
b.	Instances of Insignificant State Involvement	56
1)	Heavily Regulated Businesses and/or Granting of a Monopoly to a Utility	56
a)	Electric Company	57
b)	Nursing Home	57
c)	School	57
2)	Licensing and Provision of Essential Services	57
3)	Congressional Grant of Corporate Charter and Exclusive Name ..	57
4)	No Government Duty to Protect Individuals from Harm by Private Persons	57
C.	TIPS FOR BAR EXAM	58
1.	State Must Be “Significantly Involved” in Private Entity	58
2.	No Constitutional Mandate to Outlaw Discrimination	58
XIII.	RETROACTIVE LEGISLATION	58
A.	CONTRACT CLAUSE—IMPAIRMENT OF CONTRACT	58
1.	Not Applicable to Federal Government	58
2.	Only Applicable to State Legislation	58
3.	Basic Impairment Rules	58
a.	Private Contracts	58
b.	Public Contracts—Stricter Scrutiny	59
B.	EX POST FACTO LAWS	59
1.	Two Ex Post Facto Clauses	59
a.	What Is “Criminal”	59
b.	Retroactive Alterations	60

2.	Distinguish—Procedural Changes	60
3.	Indirect “Application” to Courts	60
C.	BILLS OF ATTAINDER	61
1.	Two Clauses	61
2.	Two Requirements Preclude Finding of Bill of Attainder	61
3.	<i>Nixon Case</i>	61
4.	Draft Registration Case	61
D.	DUE PROCESS CONSIDERATIONS	61
XIV.	PROCEDURAL DUE PROCESS	62
A.	BASIC PRINCIPLE	62
1.	When Is Individualized Adjudication Required?	62
2.	Intentional Deprivation vs. Negligent Deprivation	62
a.	“Deprivation”	62
3.	Protection vs. Creation	62
B.	IS LIFE, LIBERTY, OR PROPERTY BEING TAKEN?	63
1.	Liberty	63
a.	Commitment to Mental Institution	63
1)	Adults	63
2)	Minor Children	63
b.	Injury to Reputation	63
c.	Exercise of Fundamental Constitutional Rights	63
1)	Application—Government Employee’s Freedom of Speech	63
2.	Property	64
a.	Public Education	64
b.	Welfare Benefits	64
c.	Continued Public Employment	64
C.	WHAT TYPE OF PROCESS IS REQUIRED?	64
1.	Welfare Benefits	65
2.	Disability Benefits	65
3.	Public Employment	65
4.	Public Education—Disciplinary Suspension	65
a.	Corporal Punishment in Public School	65
5.	Public Education—Academic Dismissal	65
6.	Creditors’ Remedies	66
7.	Driver’s License	66
8.	Parental Status Litigation and Hearing	66
a.	Termination of Parental Status	66
b.	Paternity Actions	66
c.	Hearings for Men Who Seek to Establish Paternity	66
1)	Unmarried Father Living with Mother	66
2)	Father Who Never Tried to Establish Paternity	67
3)	Mother Married to Another Man	67
9.	Treatment of Patients in Mental Health Care Facilities	67
10.	Notice of Adversary Proceedings	67
11.	Limitation of Attorneys’ Fees for Veterans’ Benefit Hearings	67
12.	Civil Forfeitures	67
13.	Punitive Damages	68
D.	DUE PROCESS RIGHTS ARE SUBJECT TO WAIVER	68
E.	ACCESS TO COURTS—INDIGENT PLAINTIFFS	68

1.	Fundamental Rights—Waiver Required	68
2.	Nonfundamental Rights—Waiver Not Required	68
XV.	THE “TAKING” CLAUSE	69
A.	IN GENERAL	69
1.	Not a Grant of Power	69
2.	Scope of Taking	69
B.	“PUBLIC USE” LIMITATION LIBERALLY CONSTRUED	69
C.	“TAKING” VS. “REGULATION”	69
1.	Actual Appropriation or Physical Invasion	70
a.	Exception—Emergencies	70
2.	Use Restrictions	70
a.	Denial of <i>All</i> Economic Value of Land—Taking	70
1)	Temporary Denials of All Economic Use	70
b.	Decreasing Economic Value—Balancing Test	71
1)	Zoning Ordinances	71
2)	Building/Development Permits—Transfer of Occupation Rights ..	71
3)	Utility Rate Regulation	72
3.	Remedy	72
a.	Who May Sue	72
D.	“JUST COMPENSATION”	72
1.	“Worthless” Property	72
XVI.	INTRODUCTION TO SUBSTANTIVE DUE PROCESS AND EQUAL	
	PROTECTION	73
A.	RELATIONSHIP BETWEEN SUBSTANTIVE DUE PROCESS AND EQUAL	
	PROTECTION	73
1.	Substantive Due Process	73
2.	Equal Protection	73
3.	Examples	73
4.	Note—Clauses Not Necessarily Mutually Exclusive	73
B.	WHAT STANDARD OF REVIEW WILL THE COURT APPLY?	73
1.	Strict Scrutiny (Maximum Scrutiny)	73
a.	Burden of Proof on Government	74
2.	Intermediate Scrutiny	74
a.	Burden of Proof Probably on Government	74
3.	Rational Basis (Minimal Scrutiny)	74
a.	Burden of Proof on Challenger	74
b.	Deference to Legislature	74
XVII.	SUBSTANTIVE DUE PROCESS	74
A.	CONSTITUTIONAL SOURCE—TWO CLAUSES	74
B.	APPLICABLE STANDARDS	75
1.	Fundamental Right—Strict Scrutiny	75
2.	All Other Cases—Mere Rationality	75
a.	Business and Labor Regulations	75
b.	Taxation	75
c.	Lifestyle	75
d.	Zoning	75
1)	Statutes Forbidding Nuisances or Promoting Community’s	
	Preferred Lifestyle	75

- 2) Cannot Prohibit Traditionally Related Families from Living Together 76
- e. Punitive Damages 76
 - 1) Factors Considered 76
 - 2) Rule of Thumb 76
- f. High Speed Chases 76
- g. Compare—Vagueness Doctrine 77
- C. A FEW IRREBUTTABLE PRESUMPTIONS MAY BE INVALID 77

- XVIII. EQUAL PROTECTION 77
 - A. CONSTITUTIONAL SOURCE 77
 - B. APPLICABLE STANDARDS 77
 - C. PROVING DISCRIMINATORY CLASSIFICATION 78
 - 1. Facial Discrimination 78
 - a. Facial Discrimination Absent Racial Language 78
 - 2. Discriminatory Application 78
 - 3. Discriminatory Motive 79
 - D. SUSPECT CLASSIFICATIONS 79
 - 1. Race and National Origin 79
 - a. School Integration 80
 - 1) Remedying Intentional School Segregation 80
 - a) Busing 80
 - (1) Limitation—Interdistrict Busing 80
 - (2) Limitation—Voter Initiatives 80
 - b) Order Limited 80
 - c) Termination of Order 81
 - b. “Benign” Government Discrimination—Affirmative Action 81
 - 1) Remedying Past Discrimination 81
 - 2) Where There Has Been No Past Discrimination by Government .. 81
 - a) Remedial Justifications 82
 - (1) Local Private Discrimination 82
 - (2) Diversity in Public Education 82
 - c. Discriminatory Legislative Apportionment 83
 - d. Private Affirmative Action 84
 - 2. Alienage Classifications 84
 - a. Federal Classifications 84
 - b. State and Local Classifications 84
 - 1) Exception—Participation in Self-Government Process 84
 - c. Undocumented Aliens 85
 - 1) Punitive Laws Against “Illegal” Alien Adults 85
 - 2) Education Rights of Alien Children 85
 - E. QUASI-SUSPECT CLASSIFICATIONS 85
 - 1. Gender 85
 - a. Intentional Discrimination Against Women 85
 - 1) Government Interest Must Be Genuine 86
 - b. Affirmative Action Benefiting Women 86
 - c. Intentional Discrimination Against Men 86
 - 1) Invalid Discrimination 86
 - 2) Valid Discrimination 87
 - 2. Legitimacy Classifications 87

a.	No Punitive Purpose	87
1)	Inheritance from Father	87
2)	Statute of Limitations on Paternity Suits May Be Discriminatory	88
b.	Immigration Preference to Legitimate Children—Permissible	88
F.	OTHER CLASSIFICATIONS	88
1.	Age Not Suspect	88
2.	Wealth Not Suspect	88
a.	Abortions	89
b.	Education	89
XIX.	FUNDAMENTAL RIGHTS	89
A.	INTRODUCTION	89
B.	RIGHT OF PRIVACY	89
1.	Marriage	89
a.	Special Test in Prisoners’ Rights Cases	90
2.	Use of Contraceptives	90
3.	Abortion	90
a.	Pre-Viability Rule—No Undue Burdens	90
1)	Informed Consent—No Undue Burden	90
2)	Waiting Period—No Undue Burden	91
3)	Parental Consent—No Undue Burden	91
4)	Compare—Spousal Consent Is Undue Burden	91
5)	“Physician Only” Requirement—No Undue Burden	91
6)	“Partial-Birth Abortion” Ban—No Undue Burden	91
7)	Other Regulations Uncertain	91
b.	Post-Viability Rule—May Prohibit Abortion Unless Woman’s Health Threatened	92
c.	Remedy	92
d.	Financing Abortions	92
4.	Obscene Reading Material	92
5.	Keeping Extended Family Together	92
6.	Rights of Parents	93
a.	Education	93
b.	Visitation	93
7.	Intimate Sexual Conduct	93
8.	Freedom from Collection and Distribution of Personal Data	93
C.	RIGHT TO VOTE	93
1.	Restrictions on Right to Vote	93
a.	Residency Requirements	93
1)	Members of Armed Forces	94
2)	Compare—Nonresidents	94
b.	Property Ownership	94
c.	Poll Taxes	94
d.	Primary Elections	94
1)	State Regulation of Party Primaries	94
2)	States May Subsidize Primaries of Major Parties	94
2.	Dilution of Right to Vote	95
a.	One Person, One Vote Principle	95
1)	Establishing Voting Districts	95
a)	Congressional Elections—Almost Exactly Equal	95

- 2) Statutes Valid on Face 103
 - 3. Scope of Speech 104
 - a. Includes Freedom Not to Speak 104
 - 1) Mandatory Financial Support 104
 - a) Government Speech 104
 - b) Compare—Private Speech 104
 - (1) Exception—University Activity Fees 105
 - 2) State Can Require Shopping Center to Permit Persons to Exercise Speech Rights 105
 - b. Includes Symbolic Conduct 105
 - c. Excludes Freedom to Bar Military Recruitment 106
 - 4. Prison Speech 106
 - 5. Funding vs. Regulation 106
 - a. Government Encouragement of Private Speech 106

- B. TIME, PLACE, AND MANNER RESTRICTIONS—REGULATION OF CONDUCT 107
- 1. Public Forums and Designated Public Forums 107
 - a. Test 107
 - 1) Content Neutral 107
 - 2) Narrowly Tailored 107
 - 3) Significant Interest 108
 - 4) Alternative Channels Open 108
 - b. Examples—Residential Areas 108
 - 1) Targeted Picketing 108
 - 2) Charitable Solicitations 109
 - 3) Permits 109
 - c. Example—Designated Public Forum 109
 - d. Injunctions 109
 - 1) Content Based—Necessary to a Compelling Interest 109
 - 2) Content Neutral—Burdens No More Speech than Necessary 110
- 2. Nonpublic Forums 110
 - a. Viewpoint Neutral 110
 - b. Reasonableness 110
 - c. Significant Cases 110
 - 1) Military Bases 111
 - 2) Schools 111
 - 3) Government Workplace or Charity 111
 - 4) Postal Service Property 112
 - 5) Signs on Public Property 112
 - 6) Airport Terminals 112
 - 7) Candidate Debates on Public Television 112
 - 8) Mailboxes 112
- C. UNPROTECTED SPEECH—REGULATION OR PUNISHMENT BECAUSE OF CONTENT 113
- 1. Clear and Present Danger of Imminent Lawlessness 113
 - a. Allows for Sanctions Against Speech 113
 - b. Compelling Justification Test 113
- 2. Fighting Words 113
 - a. True Threats 114
 - b. States May Ban Words Likely to Incite Physical Retaliation 114

- c. Statutes Regulating Fighting Words Tend to Be Overbroad or Vague . 114
- d. Statutes Cannot Be Content-Based—Limits Hate Crime Legislation .. 114
 - 1) Compare—Punishing Racially Motivated Conduct 114
- 3. Obscenity 114
 - a. Elements 115
 - 1) Appeal to Prurient Interest 115
 - a) Average Person 115
 - b) Material Designed for Deviant Group 115
 - 2) Patently Offensive 115
 - a) Community Standard 115
 - b) National Standard Not Required 115
 - 3) Lacking in Serious Social Value 115
 - 4) Standard May Be Different for Minors 116
 - a) Pictures of Minors 116
 - b) Compare—Simulated Pictures of Minors 116
 - b. Question of Fact and Law 116
 - 1) Jury Question 116
 - 2) Independent Review by Appellate Court 116
 - 3) Evidence of Pandering 117
 - 4) Evidence—Similar Published Materials Not Automatically Admissible 117
 - c. Statutes Must Not Be Vague 117
 - 1) Sweeping Language 117
 - 2) Construction May Save Vague Statute 117
 - d. Land Use Regulations 117
 - e. Liquor Regulation 118
 - f. Display 118
 - g. Private Possession of Obscenity 118
 - 1) Exception—Child Pornography 118
- 4. Defamatory Speech 118
 - a. Falsity 118
 - 1) Requirement of Factual Statement 118
 - b. Fault 119
 - 1) Public Official or Public Figure—Malice Required 119
 - a) Malice Defined 119
 - (1) Malice in False Quotation Cases 119
 - (2) Permitted Inquiries by Plaintiff 119
 - (3) Petition Clause Does Not Protect Defamatory Statement Made with Malice 120
 - b) Two Ways to Become a Public Figure 120
 - (1) General Fame or Notoriety 120
 - (2) Involvement in Particular Controversy 120
 - c) Examples of Persons Not Deemed Public Figures 120
 - (1) Spouse of Wealthy Person 120
 - (2) Person Engaging in Criminal Conduct 120
 - (3) Scientist in Federally Funded Program 121
 - 2) Private Individual Suing on Matter of Public Concern—At Least Negligence Required 121
 - a) No Liability Without Proof of at Least Negligence 121
 - b) Presumed or Punitive Damages Allowed Only If Malice Established 121

c)	What Is a Matter of Public Concern?	121
3)	Private Individual Suing on Matter Not of Public Concern	122
c.	Procedural Issues	122
1)	Federal Summary Judgment Standard	122
2)	Judicial Review	122
d.	Recovery for Depiction in a False Light	122
e.	True Privacy Actions	122
1)	Publishing True Fact of Public Record	122
2)	Publishing Name of Juvenile Charged with Crime	122
3)	Publishing Information on Judge's Competency	123
f.	Commercial Privacy—Disclosing a Private Performance Can Violate "Right to Publicity"	123
g.	Copyright Infringement	123
5.	Some Commercial Speech	123
a.	Liquor Price Regulation	124
b.	Commercial Sign Regulation	124
1)	Blockbusting	124
c.	Attorney Advertising	124
d.	Certified Public Accountants' Services	125
D.	PRIOR RESTRAINTS	125
1.	Sufficiency of Governmental Interest	125
a.	National Security	125
b.	Preserving Fair Trial	125
1)	Compare—Grand Jury Prior Restraint	125
c.	Contractual Agreements	126
d.	Military Circumstances	126
e.	Obscenity	126
2.	Procedural Safeguards	126
3.	Obscenity Cases	127
a.	Seizure of Books and Films	127
1)	Single Seizures	127
2)	Large Scale Seizures	127
3)	Forfeiture of Business	127
b.	Injunction	127
c.	Movie Censorship	127
d.	Burden on Government	128
E.	FREEDOM OF THE PRESS	128
1.	Publication of Truthful Information	128
2.	Access to Trials	128
a.	Access to Voir Dire Examination	128
b.	Access to Other Pretrial Proceedings	129
c.	Compelling Interest in Protecting Children	129
d.	Protective Order in Publishing Information Gained in Pretrial Discovery	129
3.	Requiring Members of the Press to Testify Before Grand Juries	129
4.	Interviewing Prisoners	129
5.	Business Regulations or Taxes	130
6.	Monetary Damages for Failure to Keep Identity Confidential	130
7.	Broadcasting Regulations	130
a.	Fairness Doctrine	130

1) Compare—Grant of Equal Newspaper Space	131
b. Newspaper Ownership of Radio or TV Station	131
c. Prohibiting Indecent Speech	131
d. Political Advertisements	131
e. Elimination of Editorial Speech from Stations Receiving Public Grants ..	131
8. Cable Television Regulation	131
a. Compare—Content-Based Cable Broadcast Regulations	132
9. Internet Regulation	132
XXI. FREEDOM OF ASSOCIATION AND BELIEF	132
A. NATURE OF THE RIGHT	132
B. ELECTORAL PROCESS	132
1. Ballot Regulation	133
a. Signature Requirements	133
b. Primary Voting Regulations	133
c. Single Party Limitation	133
2. Party Regulation	133
3. Limits on Contributions	134
a. To Political Candidate	134
b. To Ballot Referendum Committee	134
c. Disclosure of Contributors or Recipients of Money	134
4. Limits on Expenditures	134
a. Exceptions—Corporations	134
5. Compare—Regulations of Core Political Speech	135
a. Prohibiting Any Election Day Campaigning	135
1) Compare—Hundred-Foot Limit	135
b. Prohibiting Anonymous Campaign Literature	135
c. Prohibiting Judge Candidates from Announcing Their Views	135
d. Distinguishing Political Speech from Candidate Advocacy	136
C. BAR MEMBERSHIP AND PUBLIC EMPLOYMENT	136
1. Restraints on Conduct	136
a. Official Duty Exception	136
b. Participation in Political Campaigns	137
c. Bans on Receiving Honoraria	137
d. Patronage	137
2. Loyalty Oaths	137
a. Overbreadth	137
1) Knowledge of Organization’s Aim Required	137
2) Advocacy of Doctrine Protected	138
b. Vagueness	138
1) Oaths Upheld	138
a) To Support the Constitution	138
b) To Oppose the Overthrow of the Government	138
2) Oath Not Upheld	138
3. Disclosure of Associations	138
a. Fifth Amendment Limitation	138
4. Practice of Law	139
a. Countervailing State Interest Required	139
XXII. FREEDOM OF RELIGION	139

- A. CONSTITUTIONAL PROVISION 139
- B. APPLICABILITY TO THE STATES 139
- C. FREE EXERCISE CLAUSE 139
 - 1. No Punishment of Beliefs 139
 - a. What Constitutes Religious Belief? 139
 - 1) Courts May Not Find Religious Beliefs to Be False 140
 - b. Religious Oaths for Governmental Jobs Prohibited 140
 - c. States May Not Exclude Clerics from Public Office 140
 - 2. No Punishment of Religious Conduct Solely Because It Is Religious 140
 - 3. States Can Regulate General Conduct—Criminal Laws and Other Regulations 141
 - a. Generally No Exemptions Required 141
 - b. Examples 141
 - 4. Unemployment Compensation Cases—Some Exemptions Required 141
 - a. Need Not Belong to Formal Religious Organization 142
 - b. Limitation—Criminal Prohibitions 142
 - 5. Right of Amish Not to Educate Children 142
- D. ESTABLISHMENT CLAUSE 142
 - 1. Sect Preference 142
 - 2. No Sect Preference 143
 - a. Cases Unconnected to Financial Aid or Education 143
 - 1) State Legislature Can Employ a Chaplain 143
 - 2) Displays of Ten Commandments on Public Property 143
 - 3) Some Holiday Displays Are Permissible 144
 - 4) Absolute Right Not to Work on a Sabbath Impermissible 144
 - 5) Exemptions from Antidiscrimination Laws 145
 - b. Cases Involving Financial Benefits to Church-Related Institutions ... 145
 - 1) Recipient-Based Aid 145
 - a) Compare—Tuition Tax Deductions or Credits Limited to Religious School Tuition 146
 - 2) Aid to Colleges, Hospitals, Etc. 146
 - 3) Aid to Religiously Affiliated Grade Schools or High Schools 146
 - a) Aid Upheld 147
 - b) Aid Invalidated 147
 - 4) Tax Exemption for Religious, Charitable, or Educational Property . 148
 - 5) Tax Exemption Available Only to Religions 148
 - c. Religious Activities in Public Schools 148
 - 1) Prayer and Bible Reading 148
 - 2) Posting Ten Commandments in Classroom Is Invalid 148
 - 3) Released-Time Programs 148
 - a) In Public School Building 148
 - b) Nonpublic Building Used 149
 - 4) Accommodation of Religious Students—On-Campus Meetings .. 149
 - 5) Curriculum Controls 149

PART ONE: POWERS OF THE FEDERAL GOVERNMENT

I. THE JUDICIAL POWER

A. ARTICLE III

The federal government is a government of limited powers, which means that for federal action to be legitimate, it must be authorized. The Constitution is the instrument that authorizes the federal government to act. Thus, whenever a question involves action by an entity of the federal government, the action will be valid only if it is authorized by the Constitution. The Constitution authorizes a federal court system in Article III, which provides that federal courts shall have judicial power over all “*cases and controversies*”:

1. Arising under the Constitution, laws, or treaties of the United States;
2. Of admiralty and maritime jurisdiction;
3. In which the United States is a party;
4. Between two or more states;
5. Between a state and citizens of another state;
6. Between citizens of different states;
7. Between citizens of the same state claiming lands under grants of different states; and
8. Between a state or citizens thereof and foreign states, citizens, or subjects.

B. POWER OF JUDICIAL REVIEW

1. Review of Other Branches of Federal Government

The Constitution does not explicitly state that the Supreme Court may determine the constitutionality of acts of other branches of government. However, judicial review of other branches of the federal government was established in *Marbury v. Madison*, 5 U.S. 137 (1803) (per Marshall, C.J.); the Constitution is “law” and it is the province and duty of the judiciary to declare what the law is.

a. Separation of Powers and Finality of Court Decisions

The Constitution separates governmental powers among the branches of government. This separation of powers doctrine prohibits the legislature from interfering with the courts’ final judgments.

Example: The Supreme Court inferred a limitations period under an ambiguous federal securities law. Because new Supreme Court rulings generally apply to all pending cases, the limitations period imposed by the Court resulted in the dismissal of many pending cases as time-barred. Congress amended the securities law to provide (i) a different limitations period and (ii) a special motion for reinstating the cases dismissed as time-barred by the Supreme Court’s ruling. The Supreme Court held that the statute providing for the reinstatement of the dismissed cases

violated the separation of powers doctrine under the Constitution. [Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)]

2. Federal Review of State Acts

Federal review of state acts (executive, legislative, or judicial) was established by the Marshall Court in a series of decisions. Clear basis exists here in the Supremacy Clause of Article VI, which states that the Constitution, Laws, and Treaties of the United States take precedence over state laws and that the judges of the state courts must follow federal law, anything in the constitution or laws of any state to the contrary notwithstanding. [Fletcher v. Peck, 10 U.S. 87 (1810)]

C. FEDERAL COURTS

Only the actions of Article III courts are the subject of our outline, but you should know that there are two types of federal courts.

1. Article III Courts

Article III courts are those established by Congress pursuant to the provisions of Article III, Section 1. Although Congress has plenary power to delineate the jurisdictional limits, both original and appellate, of these courts, it is bound by the standards of judicial power set forth in Article III as to subject matter, parties, and the requirement of “case or controversy.” Thus, Congress cannot require these courts to render advisory opinions or perform administrative or nonjudicial functions.

2. Article I Courts

Congress has created certain other courts, however, by way of implementing its various legislative powers; *e.g.*, United States Tax Court, courts of the District of Columbia. Judges of such Article I courts do not have life tenure or protection from salary decrease as do Article III court judges. Article I courts are sometimes vested with *administrative as well as judicial* functions, and the congressional power to create such “hybrid” courts has been sustained by the Supreme Court. [Glidden v. Zdanok, 370 U.S. 530 (1962)]

a. Limitation

Congress may not take cases of the type traditionally heard by Article III courts and assign jurisdiction over them to Article I courts. [Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)—broad grant of jurisdiction to bankruptcy courts, including jurisdiction over contract claims, violates Article III]

D. JURISDICTION OF THE SUPREME COURT

1. Original (Trial) Jurisdiction

Under Article III, Section 2, the Supreme Court has original jurisdiction “in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” This provision is self-executing: Congress may *neither restrict nor enlarge* the Supreme Court’s original jurisdiction, but Congress may give concurrent jurisdiction to lower federal courts and has done so regarding all cases except those between states.

2. Appellate Jurisdiction

Article III, Section 2 further provides that “in all other Cases before mentioned [*i.e.*, arising under the Constitution, Act of Congress, or treaty], the Supreme Court shall have appellate

jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

a. Statutory Application of Appellate Jurisdiction

Congress has provided two methods for invoking Supreme Court appellate jurisdiction: *appeal* (where jurisdiction is mandatory), and *certiorari* (where jurisdiction is within the Court’s discretion). Very few cases fall within the Court’s mandatory appeal jurisdiction; thus, appellate jurisdiction is almost completely discretionary.

1) Writ of Certiorari (Discretionary)

The Supreme Court has complete discretion to hear cases that come to it by writ of certiorari. A case will be heard if four justices agree to hear it. The following cases may be heard by certiorari:

- a) Cases from the *highest state courts* where (i) the constitutionality of a federal statute, federal treaty, or state statute is called into question; or (ii) a state statute allegedly violates federal law [28 U.S.C. §1257]; and
- b) All cases from *federal courts of appeals* [28 U.S.C. §1254].

2) Appeal (Mandatory)

The Supreme Court must hear those few cases that come to it by appeal. Appeal is available only as to decisions made by three-judge federal district court panels that grant or deny injunctive relief. [28 U.S.C. §1253]

b. Limitations on Statutory Regulation

Ex parte McCardle, 74 U.S. 506 (1868), has been read as giving Congress full power to regulate and limit the Supreme Court’s appellate jurisdiction. However, *possible* limitations on such congressional power have been suggested:

- 1) Congress may eliminate certain avenues for Supreme Court review as long as it does not eliminate all avenues. For example, in *McCardle*, two statutes had allowed the Supreme Court to grant habeas corpus to federal prisoners. The Supreme Court upheld the constitutionality of the repeal of one of the statutes because the other statute remained as an avenue for Supreme Court habeas corpus review.
- 2) Although Congress may eliminate Supreme Court review of certain cases within the federal judicial power, it must permit jurisdiction to remain in *some* lower federal court.
- 3) If Congress were to deny *all* Supreme Court review of an alleged violation of constitutional rights—or go even further and deny a hearing before any federal judge on such a claim—this would violate due process of law.

E. CONSTITUTIONAL AND SELF-IMPOSED LIMITATIONS ON EXERCISE OF FEDERAL JURISDICTION—POLICY OF “STRICT NECESSITY”

Even if a federal court has jurisdiction over the subject matter of a case, it still might refuse to hear the case. Whether the court will hear the case (*i.e.*, whether the case is justiciable) depends