

CONSTITUTIONAL LAW
Bar Review Outline (From Lecture)

I. FEDERAL JUDICIAL POWER

A. REQUIREMENT OF CASES AND CONTROVERSIES
JUSTICIABILITY REQUIREMENTS

1. Standing— π shows he is the proper party to bring suit

a. Injury—actual or imminent

- i.** injury must be personally suffered
- ii.** if seeking injunctive relief:
must show likelihood of future harm

b. Causation & redressability

- i.** plaintiff must prove that Δ caused harm
& a favorable decision is likely to remedy the injury

c. No third party standing

Exceptions:

- i.** close relationship between π and 3P
 - doctor/patient; parent/child (but: Pledge case)
- ii.** injured 3P unlikely to be able to assert own rights
- iii. Associational standing** if:
 - **(1) members** would have standing to sue
 - **(2) interests** are **germane** to the organization's purpose
 - **(3) neither claim nor relief reqs participation** of individual members

d. No generalized grievances. Plaintiff can't sue solely as a citizen or taxpayer

- i. Exception.** Taxpayers have standing to challenge *government expenditures* pursuant to federal statutes as violating the *Establishment Clause* only

2. Ripeness—may a federal court grant pre-enforcement review of a statute or regulation? —need to ensure there is a case or controversy

a. Factors:

- i. hardship** π will suffer without pre-enforcement review
 - risk of prosecution vs. cost of conformity
- ii. concreteness**

- fitness of issues in the record for judicial review

3. Mootness—need ongoing injury at all stages of review

Exceptions:

- capable of repetition but evading review
- voluntary cessation, but Δ may resume at any time
- class action suits—not moot as long as one member of the class has an ongoing injury

4. Political questions—nonjusticiable

- The “**republican** form of government” clause
- Challenges to president’s conduct of **foreign** policy
- Challenges to **impeachment**/removal process
- Challenges to partisan **gerrymandering**
 - FRIG**: [f]oreign policy, [r]epublican form, [i]mpeachment, [g]errymandering

B. SUPREME COURT REVIEW

1. Writ of certiorari for most cases

- All cases from state courts of last resort
- All cases from federal courts of appeal

2. Appeals for decisions of three-judge federal district courts

- mandatory review with no stop at the appellate level

3. SCt has original and exclusive jurisdiction over suits between state governments

4. SCt review generally requires final judgment

- of highest state court, federal courts of appeals, 3-judge panels
- generally no interlocutory review

5. Adequate and independent state grounds → no review

- no review if federal-law reversal wouldn’t change result

C. LOWER FEDERAL-COURT REVIEW

1. Federal courts and state courts cannot hear suits against state govts

- Sovereign immunity
 - 11th Amdt bars suits against states in federal court
 - sovereign immunity bars suits against states in state courts/federal agencies
- Exceptions
 - waiver—must be explicit

- ii. pursuant to § 5 of the 14th Amdt
- iii. federal govt may sue state govts
- iv. bankruptcy
- c. Suits against *state officers* okay
 - i. for injunctive relief
 - ii. for money damages out of officer's own pocket
 - iii. no suit if state treasury would pay retroactive damages

2. Abstention

- a. Federal courts may not enjoin pending state-court proceedings

II. THE FEDERAL LEGISLATIVE POWER

A. CONGRESS'S AUTHORITY TO ACT

1. Must be *express* or *implied* congressional power

a. No general police power

- i. *Exceptions*: **MILD**: [M]ilitary, [I]ndian reservations, federal [L]ands and territories, [D].C.

2. Necessary and proper clause

- a. Congress may use any means not prohibited by the Constitution to exercise its authority
- b. Necessary and proper clause isn't really a separate power; just a means by which Congress can use other enumerated powers

3. Taxing/spending and commerce power

a. Congress may tax and spend for the *general welfare*¹

- i. can't otherwise act for general welfare; must be taxing/police power

b. Commerce power

Congress may regulate:

i. **channels** of interstate commerce

- places where commerce occurs—highways, waterways, Internet, etc.

ii. **instrumentalities** of interstate commerce, and persons and things

- trucks, planes, Internet
- radiowaves, electricity, cattle, people
- any *transmission*

iii. **activities** that have a *substantial effect* on interstate commerce

¹ MBE: if answer mentions general welfare, can only be the right answer if the question asks about taxing and spending, or one of the few instances where Congress does have a police power

- *aggregate effect*—Wickard v. Filburn
- for noneconomic activity, substantial effect cannot be based on cumulative impact (e.g., sexual-assault laws)

4. **10th Amendment**—all powers not granted to the US, nor prohibited to the states, are reserves to the states or the people
 - a. Congress cannot compel state regulatory or legislative action
 - i. but can attach strings to grants
 - conditions must be expressly stated and related to the purpose of the grant
 - b. Congress may prohibit harmful commercial activity by state governments
5. **Section 5 of the 14th Amendment**—Congress may not create new rights or expand the scope of rights
 - a. may only prevent or remedy constitutional violations through “**proportionate**” and “**congruent**” laws

B. DELEGATION OF POWERS

1. **No limits on Congress’s ability to delegate legislative powers**
 - a. “Intelligible standard”
 - b. No laws invalidated since 1937 as violating nondelegation
2. **Legislative and line-item vetos are unconstitutional**
 - a. Need bicameralism & presentment
 - i. necessary for overturning executive action
3. **Congress may not delegate executive powers to itself or its officers**

III. FEDERAL EXECUTIVE POWER

A. FOREIGN POLICY

1. **Treaties**—agreements between US & foreign country, negotiated by the President and ratified by the Senate
 - a. Treaties prevail over conflicting state laws
 - b. Conflict between treaty and federal statute: last in time controls
 - c. Treaties invalid if conflict with the Constitution
2. **Executive agreements**

- a. Definition: agreements between the US & foreign country, effective when signed by the president and the head of a foreign nation
- b. Executive agreements may be used for any purpose
 - i. never been invalidated as violating treaty power
- c. Executive agreements prevail over conflicting *state* but not *federal* law

3. President has broad powers as Commander-in-Chief to use American troops in foreign countries

B. DOMESTIC AFFAIRS

1. Appointment and removal power

- a. Appointment power
 - i. President appoints ambassadors, federal judges, officers
 - ii. Congress may vest appointment of inferior officers in the President, heads of departments, lower federal courts
 - inferior officers = can be fired by officers
- b. Removal power—unless limited by statute, President may fire any executive-branch officer
 - i. Congress may limit removal if:
 - office is one where independence from the President is desirable *and*
 - statute cannot prohibit removal; only require good cause

2. Impeachment

- a. President, Vice President, federal judges, officers impeachable for:
 - i. treason, bribery, high crimes & misdemeanors
- b. Impeachment does not remove a person from office
 - i. Impeachment requires majority in House
 - ii. Conviction requires $\frac{2}{3}$ vote in Senate

3. President has absolute immunity to civil suits for money damages for actions while in office—but not for actions that occurred prior to taking office

4. Executive privilege for presidential papers and conversations, but such privilege must yield to other important government interests

5. President may pardon those accused or convicted of *federal* crimes

- a. except in cases of impeachment

IV. FEDERALISM

A. **PREEMPTION**—Supremacy clause—Constitution and laws and treaties pursuant = supreme law of the land

1. Express preemption

2. Implied preemption

- a. federal/state law mutually exclusive → state law preempted
- b. st law impedes achievement of fed objective → st law preempted
- c. Congress shows clear intent to preempt state law

3. States may not tax or regulate federal-government activity

- a. Paying state taxes out of federal treasury = unconstitutional
- b. *Federal government need not comply with state envtl regs*

B. DORMANT COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

1. Definitions

- a. Dormant Commerce Clause²
 - i. law is unconstitutional if it places an *undue burden* on interstate commerce
 - ii. *implied power from Commerce Clause*
- b. Privileges and Immunities Clause of Article IV
 - i. No state may deny citizens of other states the privileges and immunities it affords its own citizens
 - ii. *antidiscriminatory*
- c. Privileges and Immunities Clause of the 14th Amdt³
 - i. narrow construction—*Slaughterhouse Cases*
 - ii. right to travel—fundamental right

2. Always ask: Does the state/local law discriminate against out-of-staters?

3. If no discrimination:

- a. Priv & Imm Clause of Art IV ≠ apply
- b. If burdens > benefits, violates D.C.C.

4. If it does discriminate against out-of-staters:

- a. Violates D.C.C. unless *necessary* to achieve an *important government purpose*
 - i. protectionist purpose ≠ important purpose

² MBE may refer to “negative implications of the Commerce Clause,” which is the same thing as the D.C.C.

³ *Always* a wrong answer on the MBE unless the question involves the right to travel

- *Maine v. Taylor*—law against importation of baitfish OK
- ii. *Exceptions*
 - Congressional approval
 - Market-participant exception
gov't may prefer its own citizens in receiving benefits from gov't programs or in dealing with gov't-owned businesses
- b. If discriminates re: ability to earn livelihood, violates Priv & Imm Clause of Art IV *unless* the law is *necessary* to achieve an *important government purpose*
 - i. must discriminate against out-of-staters
 - ii. discrim must be re: civil liberties and important economic activities (namely: *ability to earn a living*)
 - cf. recreational activities—discrimination OK
 - iii. *corporations* and *aliens* cannot invoke this provision
 - iv. discrimination must be *necessary* to achieve an *important government purpose*

C. STATE TAXATION OF INTERSTATE COMMERCE

1. States may not use their tax systems to help in-state businesses
2. States may only tax activities that have a *substantial nexus* to the taxing state
3. State taxation of interstate companies only if taxation is *fairly apportioned*

D. FULL FAITH AND CREDIT TO JUDGMENT OF COURTS IN OTHER STATES

1. Court rendering judgment must have PJ & SMJ
2. Judgment on the merits
3. Judgment final

V. THE STRUCTURE OF THE CONSTITUTION'S PROTECTION OF INDIVIDUAL LIBERTIES

A. IS THERE GOVERNMENT ACTION?

1. **Constitution only applies to government action**
2. **Congress may by statute apply constitutional norms to private conduct**
 - a. 13th Amdt can be used to prohibit private race discrimination

- i. *Only slavery violates the 13th amdt, but discrimination can violate a federal statute adopted by Congress under the 13th Amdt*
- b. C.C. can be used to apply constitutional norms to private conduct
- c. Congress cannot use § 5 of the 14th Amdt to regulate private behavior
 - i. only to regulate state & local governments

3. Exceptions

a. Public functions

- i. private entity performing a task traditionally and exclusively performed by the federal government
 - very narrow exception . . . running utility ≠ public function

b. Entanglement

- i. If gov't affirmatively authorizes, encourages, or facilitates unconstitutional activity
 - gov't must stop, or activity must comply
- ii. Courts may not enforce racially restrictive covenants
- iii. State action when gov't leases premises to a restaurant that racially discriminates
- iv. State action when gov't provides free textbooks to schools that racially discriminate
- v. NO state action when a private school, > 99% funded by gov't, fires a teacher because of her speech
 - gov't subsidy ≠ state action
- vi. NO state action when NCAA orders suspension of a basketball coach at a state university
- vii. State action when private entity regulates interscholastic sports within a state
- viii. NO state action when a private club with a liquor license racially discriminates

B. APPLICATION OF THE BILL OF RIGHTS

1. Applies directly only to the *federal* government

2. Applies to states and local governments through Due Process Clause of the 14th Amendment

Exceptions (not incorporated—don't apply to states)

- a. 2nd Amdt right to bear arms
- b. 3rd Amdt right not to have a soldier quartered in a person's home
- c. 5th Amdt right to grand jury indictment in criminal cases
- d. 7th Amdt right to a jury trial in civil cases

- e. 8th Amdt right against excessive fines

C. LEVELS OF SCRUTINY⁴

1. Rational basis

- a. Law will be upheld if **rationaly related** to a **legitimate government purpose**
 - i. any conceivable purpose, not necessarily actual purpose
- b. **Challenger** has BoP
 - i. very deferential; gov't almost always wins

2. Intermediate scrutiny

- a. Upheld if **substantially related** to an **important government purpose**
 - i. actual government purpose
 - ii. "narrowly tailored"
 - but need not be the best way
 - iii. must be a successful means of achieving the objective
- b. **Government** has BoP

3. Strict scrutiny

- a. Upheld if **necessary** to achieve a **compelling government purpose**
 - i. vital, crucial, *actual* government purpose
 - ii. "least restrictive alternative"
 - necessary = no less restrictive alternative would meet the goal
 - more than narrowly tailored
- b. **Government** has burden of proof
 - i. usually loses

VI. INDIVIDUAL RIGHTS

A. DEFINITIONS

1. Procedural due process

- a. Procedures that gov't must follow when gov't takes away life, liberty, or property (*esp. notice & hearing*)
- b. *plaintiff will be seeking a procedural remedy*

2. Substantive due process

⁴ Must precisely define in essays

- a. Is there an **adequate justification** for taking away a person's life, liberty, or property?
- b. *gov't must show reason*

3. Equal protection

- a. treatment of people relative to each other
- b. similarly situated should mean similar treatment

B. PROCEDURAL DUE PROCESS

1. Has there been a deprivation of life, liberty, or property?

a. Definitions

- i. Deprivation of liberty occurs if there is a loss of a significant freedom provided by the Constitution or a statute

Examples

- Except in an emergency, before an adult can be institutionalized, need notice and hearing first
- When parent institutionalizes a child, only need a screening by a neutral factfinder
- Harm to reputation by itself \neq loss of liberty
- Prisoners rarely have liberty interests

- ii. Deprivation of property occurs if there is an **entitlement** and that entitlement is not fulfilled

- No distinction between rights and privileges for D.P.
- Entitlement = reasonable expectation of continued receipt of benefits

- b. Gov't negligence \neq sufficient for deprivation of D.P.; generally must be intent or recklessness.

- i. But in emergency situations, gov't liable under D.P. only if its conduct "shocks the conscience"

- c. Generally, gov't failure to protect from privately inflicted harms \neq denial of D.P.

- i. Only if gov't creates danger, or has custody, does gov't have a duty to protect

2. What procedure is required?

a. Balancing test

- i. importance of interest to the individual
- ii. ability of additional procedures to increase accuracy of factfinding/decrease risk of erroneous deprivation
- iii. gov't interest (usually saving \$)

b. Examples

- i. Welfare benefits—notice & hearing before termination

- ii. SS disability—post-termination hearing
- iii. Student disciplined by public school—need notice of charges and opportunity to explain
- iv. Custody termination—need notice & hearing
- v. Punitive damages—requires instructions to jury and judicial review
- vi. American citizen detained as enemy combatant must be accorded D.P.
- vii. Except in exigent circumstances, pre-judgment attachment or gov't seizure of assets must be preceded by notice & hearing
 - exigent circumstances = reason to believe person would get rid of property if they had notice
 - gov't may seize property used in illegal activity even if owner is innocent holder

C. ECONOMIC LIBERTIES

1. **Rational-basis review**—minimal constitutional protection
2. **Takings clause**—5th Amdt—gov't may take private property for public use *if* gov't provides just compensation
 - a. Is there a taking?
 - i. possessory taking—gov't confiscation or occupation—amount of taking unimportant
 - ii. regulatory taking—if leaves no reasonable economically viable use of property
 - decrease in value ≠ taking
 - iii. miscellanea
 - gov't conditions on development must be justified by a benefit that is roughly proportionate to the burden imposed (otherwise is a taking)
 - property owner may bring a takings challenge to regulations that existed before the property was acquired
 - temporary denial of use of property ≠ taking as long as gov't action is reasonable
 - b. Is the taking for public use?
 - i. Public use = gov't must act with a reasonable belief that the taking will benefit the public
 - c. Is just compensation paid?
 - i. Measured in terms of *loss to the owner*
 - ii. reasonable market value
3. **Contracts clause**—no state shall impair the obligations of contracts

- a. Applies only to *state* or *local* interference with existing Ks
 - i. no application to the federal gov't
- b. State & local gov'ts must meet "intermediate scrutiny" to interfere with private Ks
 - i. Does the legislation *substantially impair* a party's right under an existing K?
 - ii. If so, is the law a *reasonably and narrowly tailored* means of promoting an *important and legitimate* public interest?
- c. State & local interference with gov't Ks must meet S.S.
- d. Ex post facto clause applies only in criminal cases
 - i. law that criminally punishes conduct lawful when done, or increases criminal punishment after act committed
 - ii. retroactive civil liability only need meet r.b. test
 - iii. bill of attainder = law directing punishment of an individual without trial

D. RIGHT TO PRIVACY—Fundamental rt protected under substantive D.P. → S.S.

1. **Right to marry**
2. **Right to procreate**
3. **Right to custody of one's children**
 - a. gov't may create an irrebuttable presumption that a married woman's husband is the father of her child
4. **Right to keep the family together**
 - a. family: must be related
5. **Right to control the upbringing on one's children**
6. **Right to purchase and use contraceptives**
7. **Right to abortion** (no longer S.S.)
 - a. Prior to viability: states may not prohibit—but may regulate as long as no *undue burden*
 - i. 24-hour waiting period ≠ undue
 - ii. Reqmt that abortion be performed by licensed physician ≠ undue
 - iii. Prohibition on "partial birth" abortion ≠ undue
 - iv. After viability, states may prohibit unless necessary to protect woman's life or health
 - b. Gov't has no duty to subsidize abortions or provide facilities for them
 - c. Spousal consent & notification laws unconstitutional
 - d. Parental notice/consent laws OK for unmarried minor's abortion *if* alternative procedure provided whereby minor may appear before a judge who can approve the abortion by finding it would be in the minor's best interests *or* that she is mature enough to decide for herself

8. **Right to privacy protects right to engage in private homosexual activity**
 - a. Level of scrutiny unspecified
9. **Right to refuse medical care**
 - a. Competent adults have a right to refuse medical care, even if life-saving
 - i. no level of scrutiny specified
 - b. State may require clear & convincing evidence that a person wanted treatment terminated before it is ended
 - c. State may prevent family members from terminating treatment for another
10. **No constitutional right to physician-assisted suicide**

E. 2ND AMDT RIGHT TO BEAR ARMS

1. **Level of scrutiny unspecified**
2. **Gov't may regulate who has weapons & locations where allowed**
3. **For purposes of self-defense**

F. THE RIGHT TO TRAVEL—E.P. and Priv & Imm 14th Amdt

1. **Laws that prevent people from moving into a state must meet S.S.**
2. **Durational residence requirements must meet S.S.**
 - a. worry of chilling interstate travel
 - b. for voting, 50 days = maximum residency requirement
3. **Restrictions on int'l travel = R.B.**

G. THE RIGHT TO VOTE—15th Amdt; E.P. fundamental right

1. **Laws that keep some voters from voting must meet S.S.**
 - a. poll taxes; property ownership requirements
2. **Regulations on electoral process to prevent voter fraud need only be on balance, desirable**
3. **One person, one vote must be met for all state/local elections**
 - a. Voting districts within an area must be about the same in population
4. **At-large elections constitutional unless proof of a discriminatory purpose**
 - a. more than just discriminatory impact
5. **Use of race in drawing election districts must meet S.S.**
6. **Counting uncounted votes without standards in a presidential election violates E.P.**

H. NO FUNDAMENTAL RIGHT TO EDUCATION

VII. EQUAL PROTECTION

A. AN APPROACH TO E.P. QUESTIONS

1. What is the classification?
2. What is the level of scrutiny?
3. Does the law meet that level of scrutiny?

B. CONSTITUTIONAL PROVISIONS CONCERNING E.P.

1. E.P. of 14th Amdt applies only to *state* and *local* gov'ts
 - a. *not* federal
2. E.P. applies to federal gov't through the 5th Amdt D.P. clause

C. CLASSIFICATIONS BASED ON RACE/NATIONAL ORIGIN

1. **Strict scrutiny**
2. **How is existence of racial classification proven?**
 - a. Classification exists on the face of the law
 - b. If facially neutral, must prove discriminatory *impact* and *intent*
3. **How should racial classifications benefiting minorities be treated?**
 - a. **Strict scrutiny**
 - b. Numerical set-asides (quotas) require clear proof of past discrimination
 - c. Educational institutions may use race as one factor in admissions decisions to help minorities
 - i. No adding points to applications based on race
 - d. Public school systems may not use race as a factor in assigning students to schools unless S.S. met

D. GENDER CLASSIFICATIONS

1. **Intermediate scrutiny**
 - a. and “**exceedingly persuasive justification**”
2. **How is existence of gender classification proven?**
 - a. Exists on the face of the law
 - b. Facially neutral → must show discriminatory *impact* and *intent*
3. **How should gender classifications benefiting women be treated?**
 - a. **Intermediate scrutiny**
 - b. Gender classifications that are based on role stereotypes ≠ allowed

- c. " " designed to remedy past discrimination/differences in opportunity *will* be allowed

E. ALIENAGE CLASSIFICATIONS

1. Generally S.S. when government discriminates against noncitizens
2. R.B. for alienage classifications re: “important government functions” (self-government and the democratic process)
 - a. Voting, serving on jury, being a police officer, public-school teacher, probation officer (jvpopot?)
3. R.B. for *congressional* discrimination against aliens
4. Intermediate scrutiny for discrimination against undocumented alien children

F. DISCRIMINATION AGAINST NONMARITAL CHILDREN (ILLEGITIMACY)

1. Intermediate scrutiny
2. Laws denying benefits to all nonmarital kids, but granted to all marital kids = unconstitutional
 - a. More difficult if benefit given to *some* nonmarital kids

G. OTHER DISCRIMINATION → R.B.

1. Wealth discrim
2. Age discrimination
3. Disability discrim
4. Economic regulations
5. Sexual orientation discrim

VIII. THE FIRST AMENDMENT

A. FREE SPEECH METHODOLOGY

1. Content-based vs. content-neutral
 - a. Content-based → generally S.S.
 - i. Subject-matter restrictions (regulated *topics*)
 - ii. Viewpoint restrictions (regulated *ideologies*)
 - b. Content-neutral → generally intermediate scrutiny
2. **Prior restraints**—judicial order or administrative system stops speech before it occurs
 - a. Court order preventing speech must meet S.S.

- i. Procedurally proper court orders must be complied with until vacated or overturned
 - Person who violates *court order* is barred from later challenging
- ii. gag orders on press preventing pretrial publicity = unconstitutional
- b. Gov't can require a license for speech only if there is an *important reason* for licensing and there are *clear criteria* leaving almost no discretion to the licensing authority.
 - i. Licensing schemes must contain procedural safeguards such as prompt determination of requests for licenses & judicial review

3. Vagueness and overbreadth

- a. **Unconstitutionally vague** if a reasonable person cannot tell what speech is prohibited and what speech is permitted
 - i. e.g., a law prohibiting sale of books that “tend to corrupt morals”
- b. **Unconstitutionally overbroad** if regulates substantially more speech that is constitutionally allowable
 - i. e.g., a law prohibiting all live entertainment
- c. “Fighting words” laws are always unconstitutionally vague and overbroad
 - i. Fighting words ≠ protected under the Constitution, but SCt always finds such laws unconstitutionally vague and overbroad

4. Symbolic speech

- a. Gov't can regulate conduct that communicates if it has an *important interest unrelated to suppression* of the message and if the impact on communication is *no greater than necessary* to achieve gov't's purpose
 - i. flag-burning is constitutionally protected
 - ii. draft-card burning *not* constitutionally protected
 - iii. nude dancing not protected
 - iv. cross-burning protected
 - *unless* proof of intent to threaten or intimidate
 - v. election campaigns
 - contribution limits = constitutional
 - expenditure limits = unconstitutional
 - vi. ballot initiatives
 - contribution & expenditure limits = both unconstitutional

5. Anonymous speech is constitutionally protected

B. UNPROTECTED/LESS PROTECTED SPEECH

1. Incitement of illegal activity

- a. Punishable if *substantial likelihood* of *imminent illegal activity* and speech is *directed* to causing imminent illegality

2. Obscenity and sexually oriented speech

- a. The test
 - i. material must appeal to the *prurient interest*
 - “shameful” or “morbid” interest in sex
 - ii. material must be *patently offensive* under the law prohibiting speech
 - local standard
 - iii. taken as a whole, the work must lack serious redeeming Artistic, Literary, Political, or Scientific value
 - national standard
- b. Gov’t may use zoning ordinances to regulate the location of adult bookstores and movie theaters
 - i. “erogenous zoning is permissible”
- c. Child pornography may be completely banned, even if not obscene
 - i. material must use children in the production
- d. Gov’t may not punish private possession of obscene materials, but may punish private possession of child porn
- e. Gov’t may seize assets of businesses convicted of violating obscenity laws
- f. Profane and indecent speech is generally protected by the 1st Amdt
 - i. exception: over the (free) broadcast media
 - cable, etc. treated differently b/c voluntary invasion of home
 - ii. exception: in schools

3. Commercial speech

- a. *Central Hudson* test
 - i. Regs on speech that is truthful & not misleading upheld if:
 - **(1)** reg serves **substantial** gov’t interest
 - **(2)** reg **directly advances** the gov’t interest
 - **(3)** law is **narrowly tailored** to serve the interest
- b. Ads for illegal activity, and false or deceptive ads, not protected by the 1st Amdt
- c. True commercial speech that inherently risks deception can be prohibited
 - i. Gov’t may prevent professionals from advertising or practicing under a trade name

- ii. Gov't may prohibit atty in-person solicitation of clients for profit
 - letters OK; in-person OK if offering free services
- iii. State may not prohibit accountants from in-person solicitation of clients for profit
- d. Gov't regulation of commercial speech must be narrowly tailored, but need not be the least restrictive alternative

4. Defamation

- a. If π is a public official/running for public office, π may recover with **clear and convincing evidence** of **falsity and actual malice**
 - i. actual malice = known falsity or reckless disregard for truth
- b. Same for "public figure"
 - i. public figure = achieved widespread fame or notoriety, or voluntary cast oneself into a central role in a particular public matter
- c. Private figure, public concern: falsity & negligence re: truth
 - i. presumed/punitive damages require proof of actual malice
- d. Private figure, private concern
 - i. presumed/punitive damages without actual malice

5. Privacy

- a. Gov't may not create liability for truthful reporting of information lawfully obtained from the gov't
- b. No liability if media broadcasts a tape of an illegally intercepted call, if media didn't participate in the illegality and the matter is of public importance
- c. Gov't may limit its dissemination of information to protect privacy
 - i. 1st Amdt right of public to attend criminal trials

6. 1st Amdt doesn't protect speech by gov't employees on the job in the performance of their duties

7. Other gov't restrictions based on content must meet S.S.

C. WHAT PLACES ARE AVAILABLE FOR SPEECH?

- 1. **Public fora**—gov't properties that gov't is constitutionally required to make available for speech (classic examples: sidewalks and parks)
 - a. Regulations must be subject-matter and viewpoint neutral, else S.S.
 - b. If subject-matter and viewpoint neutral:
 - i. Regulations must be reasonable time/place/manner restrictions
 - ii. Serve important government interest

- iii. Leave open adequate alternative places for communication
 - c. Gov't reg of public fora need not use least restrictive alternative
 - i. just narrowly tailored
 - d. City officials cannot have discretion to set permit fees for public demonstrations
 - i. otherwise risk of content-based discrimination
- 2. **Limited public fora (designated fora)**—gov't properties that gov't could close to speech, but voluntarily leaves open
 - a. Same rules as for public fora
 - b. School facilities—nonpublic fora evenings & weekends
 - i. unless school opened to public at this time
- 3. **Nonpublic fora**—gov't properties that gov't constitutionally can and does close to speech; gov't can regulate as long as regulation is reasonable and viewpoint-neutral
 - a. Military bases = nonpublic fora
 - b. Areas outside prisons and jails
 - c. Advertising space on city buses
 - d. Sidewalks on post-office property (often tested on MBE)
 - e. airports
 - i. can prohibit solicitations for money
 - ii. cannot prohibit leafletting
- 4. **No 1st Amdt right to use private property for speech purposes**
 - a. Including shopping centers
 - i. *but CA constitution does allow*

D. FREEDOM OF ASSOCIATION

- 1. **Laws that prohibit/punish membership in a group → S.S.**
 - a. To punish, must show:
 - i. **active affiliation** with a group
 - ii. **knowledge** of illegal activities
 - iii. **specific intent** of furthering those illegal activities
 - b. Gov't may require disclosure of membership, where such disclosure would chill association, only if S.S. met
 - c. Laws that prohibit a group from discriminating are constitutional unless they interfere with intimate association or expressive activities

E. FREEDOM OF RELIGION

- 1. **Free exercise clause**
 - a. Cannot be used to challenge a neutral law of general applicability

