

1 Constitutional Law

Chapter

导 读

美国宪法规划了法律的整体框架，是美国法律的灵魂（soul）。宪法课上研讨的是美国历史上联邦最高法院所审案件中最富争议的内容。宪法问题还是法院判决书、学术著述和庭审中频繁触及的话题。

宪法的一个核心理念是立法、司法、行政三权分立、相互制衡，这也是宪法的重点内容。

一、司法权（Judicial Power）

美国政府是一个权力有限政府，只有经过宪法授权的行为才是合法行为。宪法第三条设定了联邦法院的体系，规定了联邦法院的管辖范围。

联邦法院有两种：一种称作“第三条法院”（Article III Courts），也就是国会根据联邦宪法第三条第一款的规定设立的法院；一种称作“第一条法院”（Article I Courts），也就是国会为了行使方方面面的立法权而设立的法院，这类法院不但有司法功能，有时候也具有行政功能。

联邦最高法院的管辖权，可以分为初审管辖权（original jurisdiction）和上诉管辖权（appellate jurisdiction）。初审管辖包括涉及大使、驻外高级外交使节与领事的案件以及美国政府是一方当事人的案件。对于涉及宪法、国会制定的法律的案件，涉及国际条约的案件，除了国会规定的例外情况，最高法院都有管辖权。

二、立法权（Legislative Power）

宪法以列举的方式授予国会特定的权力，规定在第一条第8款；同时也通过“必要且适宜”条款（Necessary and Proper Clause）间接授予了国会辅助性的权力。所谓必要且适宜的权力，就是为确保联邦政府任一分支机构权力的实施，国会拥有制定必要

且适宜的法律。

宪法所列举的联邦国会的权力包括税收权、财政开支权、商务管理权（管理对外、州际、与印第安部落之间的商务贸易）、宣战权、调查权、财产处分权、破产规范权、邮政权、与公民身份相关的权力、海事海商权（*admiralty power*）、货币制造与度量衡确定权、专利 / 著作权（*copyright*）权等。

国会可以自行决定将立法权委托行政官员或者行政机关行使，但是必须遵守特定的限制。

三、对个人权利的保护与对政府行为或私人行为的限制

宪法的前 10 条修正案（又称作权利法案（*Bill of Rights*））既是对个人权利的保护，又是对联邦政府权利的限制。第 14 条修正案规定，任何州不经法律规定的正当程序、不提供法律规定的平等保护不得剥夺任何人的生命、自由和财产。

对私人行为的限制主要体现在宪法的商务条款和外州公民权利条款，主要内容是联邦最高法院允许国会通过相关规定限制个人对他人的权力。

宪法中的“合同条款”（*contract clause*）禁止损害合同权利的溯及性立法（*retroactive legislation*）。剥夺公民权法案（*bills of attainder*），即不经司法审判就对个人施以处罚的立法，也是被宪法所禁止的。根据宪法第 5 条和第 14 条修正案，具有溯及力的立法和其他政府行为可能会违背宪法的正当程序（*due process*）条款。

正当程序条款中，第 5 条修正案是适用于联邦政府的，第 14 条修正案是保护个人不受州政府行为侵害的。正当程序条款规定，不经正当法律程序，政府不得剥夺个人的生命、财产和自由。它强调程序的公正，至少要确保当事人有机会向一个公正、中立的裁判者表达异议。

宪法的正当程序条款和平等保护条款（*Equal Protection Clause*）以保障法律公平为目的。实体性正当程序（*substantive due process*）确保法律的合理性和非任意性，平等保护条款确保情况相似的人受到相似的对待。

法院审查（*review*）有关法律是否违反上述条款时，采取了一定的审查标准（*standard of review*）。标准有三：严格审查标准（*strict scrutiny*）、中度审查标准（*intermediate scrutiny*）和最低审查标准（*minimal scrutiny*）。

平等保护条款针对的对象限于各州行为，但是联邦政府明显不合理的歧视显然也是违反平等保护条款的。立法行为或者政府行为仅仅具有歧视效果也并不足以启动严格审查程序或者中度审查程序；政府还必须有歧视的意图。歧视意图的表现方式有三：面部歧视（*facial discrimination*）、适用歧视（*discriminatory application*）和歧视动机（*discriminatory motive*）。

四、基本权利

公民的基本权利包括隐私权（*right of privacy*）、选举权（*right to vote*）、迁徙权（*right to travel*）等。

公民的隐私权多种多样，包括婚姻、堕胎、生子等，都属于基本权利。影响基本权利的法律的审核标准是严格标准；除非为保护极其重要的权益所必需，否则这类法

律很难得到法院支持。

年龄在18岁以上的美国公民都有选举权。选举权也属于基本权利，通过严格审查后法律才能对这些权利予以限制。

迁徙权分为州际迁徙权和国际迁徙权。州际迁徙是基本权利，如果某个州将特定的居住年限规定为州际迁徙的条件，那么这一规定必须按照严格标准进行审查，通过后方为有效。迄今联邦最高法院尚未将国际迁徙宣布为基本权利，但是从正当程序规则中似乎可以推知，联邦政府不得随意干涉个人的国际迁徙权。

Text

The Judicial Power

1. 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 subject.

2. Federal Courts

Only the action 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 powers** to delineate the

plenary powers 全权

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 non-judicial functions.

2) Article I Courts

Congress has created certain others, 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.

3. 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.”

4. Constitutional and Self-Imposed Limitations on Exercise of Federal Jurisdiction-police of “Strict Necessity”

1) No Advisory Opinions

The Supreme Court’s interpretation of the “case and controversy” requirement in Article III bars rendition of “advisory” opinion. Thus, federal courts will not render decisions in moot cases, collusive suits, or cases involving challenges to governmental legislation or policy whose enforcement is neither actual threatened.

2) Ripeness — Immediate Threat of Harm

A plaintiff generally is not entitled to review of a state law before it is enforced (i.e., may not obtain a **declaratory judgment**). Thus, a federal court will not hear a case unless

render 作出(判决); 执行, 实施
concurrent jurisdiction 共同管辖权
declaratory judgment 宣告式判决, 确认判决

the plaintiff has been harmed or there is an immediate threat of harm.

3) Mootness

A federal court will not hear a case that has become moot; a real, live controversy must exist at all stages of review, not merely when the complaint is filed.

4) Standing

A plaintiff will be able to show a sufficient **stake** in the controversy only if he can show an injury in fact — caused by the government — that will be remedied by a decision in his favor (i.e., causation and redressability).

(1) Injury

To be standing, a person must be able to assert that she is injured by a government action or that the government has made a clear threat to cause injury to her if she fails to comply with a government law, regulation, or order. Some specific injury must be alleged, and it must be more than the merely theoretical injury that all persons suffer by seeing their government engage in unconstitutional actions.

(2) Causation

There must be a causal connection between the injury and the conduct complained of — i.e., the injury must be traceable to the challenged conduct of the defendant and not be attributable to some independent third party not before the court.

(3) Redressability

In determining whether a litigant has a sufficient injury to establish standings, courts ask whether a ruling favorable to the litigant would eliminate the harm to him. If a court order declaring a government action to be illegal or unconstitutional (and ending that government action) would not eliminate the harm to the litigant, then that individual does not have the types of specific injury that would grant him standing to challenge the government action.

5) Adequate and Independent State Grounds

The Supreme Court will hear a case from a state court only if the state court judgment turned on federal grounds. The Court will refuse jurisdiction if it finds adequate and independent nonfederal grounds to support the state decision.

(1) “Adequate”

The nonfederal grounds must be “adequate” in that they are fully dispositive of the case, so that even if the federal grounds are wrongly decided, it would not affect the outcome of the case.

(2) “Independent”

The nonfederal grounds must be “independent”: If the state court’s interpretation of its state provision was based on federal case law interpreting an identical federal provision, the state law grounds for the decision are not independent.

6) Abstention

(1) Unsettled State Law

When a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand (“abstain” temporarily), so as to give state courts a chance to settle the underlying state law question and thus potentially avoid the needless resolution of a federal constitutional issue. [*Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941)]

(2) Pending State Proceedings

Generally, federal courts will not enjoin pending state criminal proceedings.

7) Eleventh Amendment Limits on Federal Courts

The Eleventh Amendment is a jurisdictional bar that modifies the judicial power by prohibiting a federal court from hearing a private party’s or foreign government’s claims against a state government. [See *Hans v. Louisiana*, 134 U.S. 1 (1890)]

(1) What Is Barred?

The Eleventh Amendment’s jurisdictional bar extends to the following:

- a. Actions against state governments for damages;
- b. Actions against state governments for injunctive or declaratory relief where the state is named as a party;
- c. Actions against state government officers where the effect of the suit will be that retroactive damages will be paid from the state treasury or where the action is the functional equivalent of a quiet title action that would divest the state of ownership of land; and
- d. Actions against state government officers for violating state law.

(2) What Is Not Barred?

a. Actions Against Local Governments

The Eleventh Amendment protects only state governments. Local government (e.g., cities or counties) is not protected.

b. Actions by the United States Government or Other State Governments

Actions by the United States Government to other state governments are not barred.

Note: Native American tribes are treated as other private parties, and so they are barred from bringing an action against a state government in federal court. [Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)]

(3) Exceptions to Eleventh Amendment

a. Certain Actions Against State Officers

The Supreme Court allows the following actions to be brought against state officials despite the Eleventh Amendment:

- (a) Actions against state officers for injunctions
- (b) Actions against state officers for monetary damages from officer
- (c) Actions against state officers for prospective payment from state

b. State Consents

A state may consent to suit in federal court. However, no consent will be found

unless the state clearly waives its Eleventh Amendment immunity.

c. Congressional Removal of Immunity Under the Fourteenth Amendment

Congress can remove the states' Eleventh Amendment immunity under its power to prevent discrimination under the Fourteenth Amendment.

Legislative Power

1. Enumerated and Implied Powers

The Constitution grants Congress a number of specific powers, many of which are enumerated in Article I, Section 8. It also grants Congress auxiliary power under the Necessary and Proper Clause.

1) Necessary and Proper "Power"

The Necessary and Proper Clause grants Congress the power to make all laws necessary and proper (i.e., appropriate) for carrying into execution any power granted to any branch of the federal government.

2) Taxing Power

Congress has the power to lay and collect taxes, imposts, and excises, but they must be uniform throughout the United States. [Art. I, Section 8] **Capitation** or other direct taxes must be laid in proportion to the census [Art. I, Section 9, cl.4], and direct taxes must be apportioned among the states.

3) Spending Power

Congress may spend to "provide for the common defense and general welfare." [Art. I, Section 8] This spending may be for any public purpose — not merely the accomplishment of other enumerated powers. However, nonspending regulations are not authorized. Remember that the Bill of Rights still applies to this power.

4) Commerce Power

Article I, Section 8, Clause 3 empowers Congress to "regulate commerce with foreign nations and among the several states, and with the Indian tribes."

(1) Definition of Commerce

(a) Includes Basically All Activity Affecting Two or More States

Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. 1 (1824), defined commerce as "every species of commercial intercourse which concerns more states than one" and included within the concept virtually every form of activity involving or affecting two or more states.

(b) Includes Transportation or Traffic

The Court has consistently regarded transportation or traffic as commerce whether or not a commercial activity is involved.

(2) "Substantial Economic Effect"

The Supreme Court has sustained congressional power to regulate any activity, local

capitation 人头税; 按人头计算

or interstate, that either it itself or in combination with other activities has a “substantial economic effect upon,” or “effect on movement in,” interstate commerce.

5) War and Related Powers

Article I, Section 8 gives Congress the power to declare war, raise and support armies, provide for and maintain a navy, make rules for the government and regulation of the armed forces, and organize, arm, discipline, and call up the militia. Of course, several other congressional powers may have direct or indirect application to military purpose: tax and spending power, commerce power, Senate’s treaty consent power, maritime power, investigatory power, etc.

6) Investigatory Power

The power to investigate to secure information as a basis for potential legislation or other official action (such as impeachment or trying impeachments) is a well-established implied power. It is a very broad power, in that an investigation need not be directed toward enactment of particular legislation, but the following limitations on its use do exist.

7) Property Power

Congress has the power to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” [Art.IV, Section 3] Many other congressional powers (war, commerce, postal, fiscal, etc.) obviously would be unworkable if the **ancillary power** to acquire and dispose of property of all kinds — real, personal, and intangible — were not also implied from the main grants.

8) No Federal Police Power

Congress has no general **police power** (i.e., power to legislate for the health, welfare, morals, etc., of the citizens.)

9) Bankruptcy Power

Article I, Section 8, Clause 4 empowers Congress “to establish uniform laws on the subject of bankruptcies throughout the United States.” This power has been interpreted by the Supreme Court as nonexclusive; i.e., state legislation in the field is superseded only to the extent that it conflicts with federal legislation therein.

10) Postal Power

Article I, Section 8, Clause 7 empowers Congress “to establish post offices and post roads.”

(1) Exclusive

The postal power has been interpreted as granting Congress a postal monopoly. Neither private business nor the states may compete with the Federal Postal Service absent Congress’s consent. [*Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991)]

ancillary power 附属权（力）
police power 治安权；警权

(2) Scope of Power

Congress may validly classify and place reasonable restrictions on use of the mails, but may not deprive any citizen or group of citizens of the general mail “privilege” or regulate the mail in such a way as to abridge freedom of speech or press (except under valid standards, such as “obscenity”) or violate the ban of the Fourth Amendment against unreasonable search and seizure.

11) Power over Citizenship

Article I, Section 8, Clause 4 empowers Congress “to establish a uniform rule of naturalization.”

Exclusion of Aliens

Congress’s power to exclude aliens is broad

(a) Nonresident Aliens

Aliens have no right to enter the United States and can be refused entry because of their political beliefs.

(b) Resident Aliens

Resident aliens are entitled to notice and hearing before they can be deported.

12) Admiralty Power

Although congressional power to legislate in maritime matters is not expressed in the Constitution, the Supreme Court has implied it from exclusive jurisdiction given the federal courts in this field by Article II, Section 2, supported by the Necessary and Proper Clause of Article I, Section 8.

13) Power to Coin Money and Fix Weights and Measures

Congress has the power to coin money and fix the standard of weights and measures under Article I, Section 8, Clause 5.

14) Patent / Copyright Power

Congress has the power to control the issuance of patents and copyrights under Article I, Section 8, Clause 8.

2. Delegation of Legislative Power

1) Broad Delegation Allowed

Congress has broad discretion to delegate its legislative power to executive officers and / or administrative agencies [*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)], and even delegation of rulemaking power to the courts has been upheld.

2) Limitations on Delegation

(1) Power Cannot Be Uniquely Confined to Congress

To be delegable, the power must not be uniquely confined to Congress. For example, the power to declare war cannot be delegated, nor the power to impeach.

(2) Clear Standard

It is said that delegation will be upheld only if it includes intelligible standards for the delegate to follow. However, as a practical matter almost anything will pass as an “intelligible standard.” (e.g., “upholding public interest, convenience, and necessity”)

(3) Separation of Power Limitations

While Congress has broad power to delegate, the separation of powers doctrine restricts Congress from keeping certain over certain delegates. For example, Congress cannot give itself the power to remove an officer of the executive branch by any means other than impeachment (e.g., if Congress delegates rulemaking power to an executive branch agency (e.g., the FCC), it may not retain the power to fire the agency head). Similarly, Congress cannot give a government employee who is subject to removal by Congress (other than by impeachment) purely executive powers.

(4) Important Liberty Interests

If the delegate interferes with the exercise of a fundamental liberty right, the burden falls upon the delegate to show that she has the power to prevent the exercise of the right and her decision was in furtherance of that particular policy.

Executive Power

1. Foreign Policy

1) Commander-in-Chief — President has broad powers to use troops in foreign countries (case dismissed as political question or president wins because president has broad power as commander in chief in domestic affairs);

2) Foreign Affairs — paramount power, but shared with Congress (*non-justiciable* & inappropriate for judicial consideration); Congress has plenary power over foreign commerce;

3) Treaties — agreements between the U.S. & a foreign country that are negotiated by the President & are effective when ratified by the Senate

- State laws that conflict with treaties are invalid — Treaties prevail over conflicting state laws.
- If a treaty conflicts with a federal statute, the one adopted last in time controls.
- If a treaty conflicts with the United States Constitution, it is valid.

4) Executive Agreements — an agreement between the U.S. & a foreign country that is effective when signed by the President & the head of the foreign nation; NO Senate approval is required

- Executive agreements can be used for any purpose.
- Executive agreements prevail over conflicting state laws, but never over conflicting federal laws or the Constitution.

	Senate Approval Required	Conflict with State Law	Conflict with Federal Law	Conflict with Constitution
Treaties	YES	Treaty	Last in time	Constitution
Executive Agreements	NO	Executive Agreement	Federal Law	Constitution

2. Domestic Affairs

1) Appointment & Removal Power

(1) Appointment Power:

(i) Officers — Senate must approve (e.g., ambassadors, fed judges, & officers of the U.S.);

(ii) Inferior Officers — Congress may vest appointment in the President appointment;

(a) Congress has some discretion in appointing inferior officers, & may vest the appointment of independent counsel in the lower federal courts;

(b) Congress may not give itself or its officers the appointment power (that power is executive)(i.e., Congress cannot create a new executive agency where Congress appoints some of the members);

(2) Removal Power — unless removal is limited by statute, President may fire any executive branch official;

(i) For Congress to limit removal power, it must be an office where independence from the President is desirable (i.e., it can limit removal of independent counsel, but not cabinet members);

(ii) Congress cannot prohibit removal, but can limit removal to good cause — this applies even to officers who should be independent from the President.

2) Impeachment & Removal

(i) The President, (ii) Vice President, (iii) fed judges & (iv) officers of the U.S. can be impeached & removed from office for treason, bribery or for high crimes & misdemeanors:

(1) Impeachment doesn't remove a person from office — it just means that there will be a trial in the Senate;

(2) Impeachment by the House requires a majority vote, while conviction in Senate requires 2 / 3 vote.

3) Executive Immunity — absolute immunity to civil suits for money damages while in office — BUT, President does not have immunity for actions that occurred prior to taking office;

4) Executive Privilege — applies to presidential papers & conversations, but such privilege must yield to other government interests (not absolute) i.e., need for evidence in a criminal trial (Watergate);

5) Power to Pardon — BUT not for impeachment

(1) President may pardon only for fed crimes, NOT state crimes;

(2) President may pardon only for criminal liability, NOT civil liability.

UNITED STATES V. NIXON

July 24, 1974

Facts of the Case

A grand jury returned indictments against seven of President Richard Nixon's closest aides in the Watergate affair. The special prosecutor appointed by Nixon and the defendants sought audio tapes of conversations recorded by Nixon in the Oval Office. Nixon asserted that he was immune from the subpoena claiming "executive privilege," which is the right to withhold information from other government branches to preserve confidential communications within the executive branch or to secure the national interest. Decided together with *Nixon v. United States*.

Question

Is the President's right to safeguard certain information, using his "executive privilege" confidentiality power, entirely immune from judicial review?

Legal provision: U.S. Const. Art. II

Conclusion

No. The Court held that neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified, presidential privilege. The Court granted that there was a limited executive privilege in areas of military or diplomatic affairs, but gave preference to "the fundamental demands of due process of law in the fair administration of justice." Therefore, the president must obey the subpoena and produce the tapes and documents. Nixon resigned shortly after the release of the tapes.

Individual Guarantees Against Governmental or Private Action

1. Constitutional Restrictions on Power and State Action Requirement

1) Bill of Rights

The Bill of Rights (first 10 Amendments to the Constitution) is the most important source of limitations on the federal government's power. By its terms, the Bill is not applicable to the states, although most of its safeguards have been held to be applicable to the states through the Fourteenth Amendment Due Process Clause.

2) Fourteenth Amendment

The Fourteenth Amendment prohibits states (not the federal government or private persons) from depriving any person of life, liberty, or property without due process and equal protection of the law. As discussed above, this amendment is a most important source of limitations on the states' power over individuals, since through the Due Process Clause; most of the protections of the Bill of Rights are application to the states.

3) Commerce Clause

The Supreme Court has allowed Congress to use Commerce Clause to limit the power of individuals over other individuals — by adopting legislation barring private

racial discrimination in activities “connected with” interstate commerce. Recall that under the affectation doctrine, almost any activity can be said to be connected with interstate commerce.

4) Rights of National Citizenship

The Supreme Court has also allowed Congress to limit the power of private individuals to infringe upon others’ rights of national citizenship (e.g., the right of interstate travel, the right of assemble to petition Congress for redress), without pointing to any specific constitutional source for the power.

2. State Action Requirement

1) Exclusive Public Functions

The Supreme Court has found that certain activities are so traditionally the exclusive prerogative of the state that they constitute state action even when undertaken by a private individual or organization. To date, only running a town and running an election for public office have been found to be such exclusive public functions.

2) Significant State Involvement — Facilitating Private Action

“State action” also exists whenever a state affirmatively facilitates, encourages, or authorizes acts of discrimination by its citizens. Note, however, that there must be some sort of affirmative act by the state approving the private action; it is not enough that the state permits the conduct to occur.

Due Process

1. Basic Principle

The Due Process Clause of the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states) provide that the government shall not take a person’s life, liberty, or property without due process of law. Due process contemplates fair process / procedure, which requires at least an opportunity to present objections to the proposed action to a fair, neutral decision-maker (not necessarily a judge).

1) When Is Individualized Adjudication Required?

There is a right to procedural due process only when the government acts to deprive an individual of life, liberty, or property (see below). There is no right to individualized adjudication when the government acts generally, even if the action will result in burdening individuals’ life, or property interests.

2) Intentional Deprivation v. Negligent Deprivation

Fair process is required for intentional acts of the government or its employees. If

prerogative 特权
contemplate 仔细考虑, 沉思

an injury is caused to a person through the mere negligence of a government employee, there is no violation of the Due Process Clause. [*Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986)].

2. Is Life, liberty, or Property Being Taken?

Older Supreme Court cases indicated that due process protects “right,” but not “privileges.” This approach is no longer followed; rather the Court will determine whether a legitimate liberty or property interest is being taken.

1) Liberty

The term “liberty” is not specifically defined. It includes more than just freedom from bodily restraints (for example, it includes the right to contract and to engage in gainful employment). A deprivation of liberty occurs if a person:

- (1) Loses significant freedom of action; or
- (2) Is denied a freedom provided by the Constitution or a statute.

2) Property

“Property” includes more than personal belongings and realty, chattels, or money, but an abstract need or desire for (or a unilateral expectation of) the benefit is not enough. There must be a legitimate claim or “entitlement” to the benefit under state or federal law.

3. Relationship Between Substantive Due Process and Equal Protection

Generally where a law limits the liberty of all persons to engage in some activity, it is a due process question.

The Due Process Clause and the Equal Protection Clause guarantee the fairness of laws — substantive due process guarantees that laws will be reasonable and not arbitrary, and equal protection guarantees that similarly situated person will be treated alike. Both guarantees require the Court to review the substance of the law rather than the procedures employed.

4. What Standard of Review Will the Court Apply?

The Court employs one of three tests in reviewing laws under these clauses, depending on the circumstances.

1) Strict Scrutiny (Maximum Scrutiny)

The Court uses the strict scrutiny standard when a suspect classification or fundamental right (these terms will be discussed *infra*) is involved. Under the strict scrutiny standard, a law will be upheld only if it is necessary to achieve a compelling or overriding government purpose. The Court will always consider whether less burdensome means for accomplishing the legislative goal are available. Most government action examined under this test fails.

2) Intermediate Scrutiny

The Court uses intermediate scrutiny when a classification based on gender or

legitimacy is involved. Under the intermediate scrutiny standard, a law will be upheld if it is substantially related to an important government purpose.

3) Rational Basis Review (Minimal Scrutiny)

The rational basis standard is used whenever the other two standards are not applicable (i.e., most legislation). Under the rational basis standard, a law will be upheld if it is rationally related to a legitimate interest. It is difficult to fail this test; so most governmental action examined under this standard is upheld unless it is arbitrary or irrational.

Equal Protection

1. Constitutional Source

The Equal Protection Clause of the Fourteenth Amendment has no counterpart in the Constitution applicable to the federal government; it is limited to state action. Nevertheless, it is clear that grossly unreasonable discrimination by the federal government violates the Due Process Clause of the Fifth Amendment. [*Bolling v. Sharpe*, 347 U.S. 497 (1954) — racial discrimination in the public schools of the District of Columbia holding a violation of due process] Thus, there are really two equal protection guarantees. The Court applies the same standards under either constitutional provision.

2. Proving Discriminatory Classification

The mere fact that legislation or governmental action has a discriminatory effect is not sufficient to trigger strict scrutiny or intermediate scrutiny. There must be intent to discriminate on the part of the government. Intent can be shown in three ways: (i) facial discrimination; (ii) discriminatory application; (iii) discriminatory motive.

1) Facial Discrimination

A law may include a classification on its face. This type of law, by its own terms, makes an explicit distinction between classes of persons (perhaps by race or gender; e. g., all white males 21 or older may serve as jurors [see *Strauder v. West Virginia*, 100 U.S. 303 (1880)]). In such cases the courts merely have to apply the appropriate standard of review for that classification.

2) Discriminatory Application

In some instances, a law that appears to be neutral on its face will be applied in a different manner to different classes of persons. If the persons challenging the governmental action can prove that the government officials applying the law had a discriminatory purpose (and used discriminatory standards based on traits such as race or gender), the law will be invalidated.

3) Discriminatory Motive

Sometimes a government action will appear to be neutral on its face and in its application, but will have disproportionate impact on a particular class of persons (such as a racial minority or women). Such a law will be found to involve a classification (and

be subjected to the level of scrutiny appropriate to that classification) only if a court finds that the lawmaking body enacted or maintained the law for a discriminatory purpose. In such cases, the court should admit into evidence statistical proof that the law has a disproportionate impact on one class of persons. However, mere statistical evidence will rarely be sufficient in itself to prove that the government had a discriminatory purpose in passing a law. Statistical evidence may be combined with other evidence of legislative or administrative intent to show that a law or regulation is the product of a discriminatory purpose.

3. Suspect Classifications

1) Race and National Origin

If governmental action classifies persons based on exercise of a fundamental right or involves a suspect classification (race, national origin, or alienage), strict scrutiny is applied. The result is invalidation of almost every case where the classification would burden a person because of his or her status as member of a racial or national origin minority. The only explicit race discrimination upheld despite strict scrutiny was the wartime incarceration of United States citizens of Japanese ancestry on the West Coast.

(1) School Integration

Recall that only intentional discrimination will be found to create discriminatory classifications calling for strict scrutiny (see *C.*, supra); thus, only intentional segregation in schools will be invalidated under equal protection.

(2) “Benign” Government Discrimination — Affirmative Action

Government action — whether by federal, state, or local governmental bodies — that favors racial or ethnic minorities is subject to strict scrutiny, as is government action discriminating against racial or ethnic minorities.

(3) Discriminatory Legislative Apportionment

Race can be considered in drawing up new voting districts, but it cannot be the predominant factor. If a plaintiff can show that a redistricting plan was drawn up predominantly on the basis of racial considerations (as opposed to the more traditional factors, such as compactness, contiguity, and community interest), the plan will violate the Equal Protection Clause unless the government can show that the plan is narrowly tailored to serve a compelling state interest.

(4) Private Affirmative Action

Private employees, of course, are not restricted by the Equal Protection Clause, since the Clause applies only to the government, and private employers lack state action. Nevertheless, Congress has adopted statutes regulating private discrimination by employers pursuant to its power under the enabling provisions of the Thirteenth and Fourteenth Amendments and the Commerce Clause. Thus, if ask whether private employer discrimination is valid, the answer generally cannot be based on equal protection.

2) Alienage Classifications

(1) Federal Classifications

The standard for review of federal government classification based on alienage are not clear, but they never seem to be subject to strict scrutiny.

(2) State and local classifications

State / local laws are subject to strict scrutiny if based on alienage. A “compelling state interest” must be shown to justify disparate treatment. For example, a state law requiring United States citizenship for welfare benefits, civil service jobs, or a license to practice law will be struck down because there is no compelling interest justifying the requirement.

4. Quasi-suspect Classifications

Classifications based on gender or legitimacy are almost always suspect. When analyzing government action based on such classifications, the Court will apply the intermediate standard and strike the action unless it is substantially related to an important government interest.

1) Gender

The Court has expressly held that government bears the burden of proof in gender discrimination cases and that an “exceedingly persuasive justification” is required in order to show that gender discrimination is substantially related to an important government interest.

(1) Intentional Discrimination Against Women

Gender classifications that intentionally discriminate against women will generally be invalid under the intermediate standard, because the government is unable to show the “exceedingly persuasive justification” that is required.

(2) Affirmative Action Benefiting Women

Classifications benefiting women that are designed to remedy past discrimination against women will generally be upheld.

(3) Intentional Discrimination Against Men

Intentional discrimination against men generally is invalid. However, a number of laws have been held valid as being substantially related to an important government interest.

2) Legitimacy Classification

Distinctions drawn between legitimate and illegitimate children are also reviewed under the intermediate scrutiny standard. Such classifications “must be substantially related to an important governmental objective.”

(1) No Punitive Purpose

When the Court examines a classification based on illegitimacy, it gives greater attention to the purpose behind the distinction. It will not uphold discriminatory

legislation intended to punish the offspring of illicit relationships.

(2) Statute of limitations on paternity suits may be discriminatory

Due to the plenary power over immigration, the Court upheld a federal law granting immigration preferences to legitimate children.

Fundamental Rights

1. Right to Privacy

Various private rights, including marriage, sexual relations, abortion, and childrearing, are fundamental rights. Thus, regulations affecting these rights are reviews under the strict scrutiny standard and will be upheld only if they are necessary to a compelling interest.

1) Marriage

The right of a male and female to enter into (and, probably, to dissolve) a marriage relationship is a fundamental right. Although not all cases examining marriage regulations clearly use the compelling interest standard, a law prohibiting a class of adults from marrying is likely to be invalidated unless the government can demonstrate that the law is narrowly tailored to promote a compelling or overriding or, at least, important interest.

2) Use of Contraceptives

A state cannot prohibit distribution of nonmedical **contraceptives** to adults except through licensed pharmacists, nor prohibit sales of such contraceptives to persons under 16 who do not have approval of a licensed physician.

3) Abortion

The Supreme Court has held that the right of privacy includes the right of women to have an abortion under certain circumstances without undue interference from the state. [*Roe v. Wade*, 410 U.S.113 (1973)] However, because the Court has held that the states have a **compelling interest** in protecting the health of both the woman and the fetus that may become a child, it is difficult to apply the normal “strict scrutiny” analysis to abortion regulations since these two compelling interests may conflict with each other and with the regarding abortions and the Justices have not come to agreement on any applicable standard.

2. Right to Vote

The right of all United States citizens over 18 years of age is mentioned in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. It extends to all national and state government elections, including primaries. The right is fundamental; thus, restrictions on voting, other than on the basis of age, residency, or citizenship, are invalid unless they can pass strict scrutiny.

contraceptive 避孕用具; 避孕药物

compelling interest 强制性利益

3. Right to Travel

1) Interstate Travel

(1) Nature of the Right

Individuals have a fundamental right to travel from state to state, which encompasses the right: (i) to leave and enter another state, and (ii) to be treated equally if they become permanent residents of that state.

(2) Standard of Review

When a state uses a durational residency requirement (a waiting period) for dispensing benefits, that requirement normally should be subject to the “strict scrutiny” test. This means that the government must show that the waiting period requirement is tailored to promote a compelling or overriding interest. However, in some right to travel cases, the Court has not been clear as to whether it is using this strict scrutiny, compelling interest standard of review. The important point to note is that state residency requirements should not be upheld merely because they have some theoretical rational relationship to an arguably legitimate end of government.

2) International Travel

The Supreme Court has not yet declared that the right to international travel is fundamental, although the right appears to be protected from arbitrary federal interference by the Due Process Clause of the Fifth Amendment. The Court has held that this right is not violated when the federal government refuses to pay Social Security benefits to persons who leave the country. The test is “mere rationality, not strict scrutiny.” [*Califano v. Aznavorian* 439 U.S. 170 (1978)] Congress may give executive branch the power to revoke the passport of a person whose conduct in another country presents a danger to United States foreign policy. [*Haig v. Agee*, 453 U.S. 280 (1981)] The Treasury Department, with congressional authorization, could restrict travel to and from Cuba without violating the Fifth Amendment.

The First Amendment

1. Free Speech Methodology

1) Content-based v. Content-neutral Restrictions:

- (1) Content-based restrictions on speech generally must meet strict scrutiny — 2 types;
 - (i) Subject matter restrictions — application of the law depends on the topic of the speech;
 - (ii) Viewpoint restrictions — application depends on the ideology of the message.

Content-neutral laws burdening speech generally need only meet intermediate scrutiny — must:

- (i) Further a significant government interest;
- (ii) Narrowly tailored, and
- (iii) Leave open alternative channels of communication.

2) Prior Restraints — Judicial orders to stop speech before it occurs (worst form of restraint on free speech)

Court orders suppressing speech must meet strict scrutiny

- (i) Procedurally proper court orders must be complied with until they are vacated or overturned — gag orders on press to prevent prejudicial pretrial publicity are NOT allowed;
- (ii) Collateral bar rule — a person who violates a court order is later barred from challenging it.

3) Vagueness & Overbreadth:

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

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

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

5) Anonymous speech is protected — protect right not to speak

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

1) Incitement of Illegal Activity — government may punish speech if : (i) there’s a substantial likelihood of imminent illegality, AND (ii) the speech is directed at causing the imminent illegality.

2) Obscenity & Sexually-oriented Speech

- (1) Obscenity Test
 - (i) appeal to the prurient interest (a “ shameful or morbid interest in sex”) — local community standard;
 - (ii) patently offensive under the law prohibiting obscenity — local community standard;
 - (iii) lack serious redeeming artistic, literary, political or scientific value — national standard.
- (2) Zoning Permissible — government may use zoning ordinances to regulate the

location of adult bookstores & movie theaters (**Erogenous** Zoning is permissible);

(3) Child pornography — can be completely banned, even if not **obscene**. (To be child pornography, it must be children, not adults that look like children or computer generated images);

(4) Punish private possession of obscene materials NOT allowed — BUT, may punish private possession of child pornography;

(5) Government may seize the assets of businesses convicted of violating obscenity laws

(6) Profane & indecent speech — generally protected by the First Amendment, EXCEPT:

(i) broadcast media — broadcast is uniquely intrusive into the home, CAN censor profanity, (EXCEPT for cable television and internet which people choose to bring into their homes);

(ii) in schools (schools can punish profane and indecent language , including sexual innuendo).

3) Commercial Speech

(1) False & deceptive ads — NOT protected by the First Amendment;

(2) True commercial speech that inherently risks deception can be prohibited:

(i) Government may prohibit professionals from advertising or practicing under a trade name;

(ii) Government may prohibit attorney, in-person solicitation of clients for profit — BUT, if lawyers offer services for free or by letters, they can solicit;

(iii) Government may NOT prohibit accountants from in-person solicitation of clients for profit;

(3) Other commercial speech can be regulated if intermediate scrutiny is met (cannot solicit accident victims for 30 days was upheld);

(4) Commercial speech regulation must be narrowly tailored, but NOT need to be least restrictive alternative;

4) Defamation — not protected, but the ability of a state to limit recovery is limited

actual malice — knew the statement was false or acted with reckless disregard for the truth

Plaintiff	Liability Standard	Damages	Burden of Proof
Public official (or running for office)	actual malice	compensatory presumed / punitive	P must prove falsity by clear and convincing evidence

(To be continued)

erogenous 唤起情欲的; 性感的
obscene 淫秽的; 令人厌恶的
actual malice 实际恶意

(Continued)

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

5) Privacy

(1) Government may NOT create liability for the truthful reporting of information that was lawfully obtained from the government;

(2) Liability is NOT allowed if the media broadcasts a tape of an illegally intercepted call, IF: (i) the media did not participate in the illegality, & (ii) it involves a matter of public importance;

(3) Government may limit its dissemination of information to protect private, but NOT in criminal trials — only the press has First Amendment right in pre-trial criminal proceeding.

6) Other Government Restrictions Based on the Content of Speech — must meet strict scrutiny

3. What Places Are Available for Speech

1) **Public Forums** — government properties that the government is required to make available for speech (e.g., streets, sidewalks & parks):

(1) Regulations must be subject matter & viewpoint neutral

(2) Regulations must be a time, place, or manner regulation that serves an important government purpose & leaves open adequate alternative places for communication (e.g., No trucks with sound amplification equipment allowed in residential areas at night — UPHELD)

(3) Narrowly tailored — government regulation of public forums need not use the least restrictive alternative (e.g., city ordinance said concert in the park required city engineers for sound system — this is ok, because need not be least restrictive alternative)

(4) City officials can NOT have discretion to set permit fees for public demonstrations

2) **Limited / Designated Public Forums** — government property that the government could close off to speech, but chooses voluntarily to open to speech; so long as government chooses to open property for speech, it must follow all of the above rules (e.g., school facilities are non-public forums in the evenings and on the weekends — Congress can open the place as a limited public form.)

3) **Non-public Forums** — government property that the government constitutionally can & does close to speech:

(1) Government can regulate so long as the regulation on time, place & manner is (i) reasonable (rational basis), (ii) viewpoint neutral;

(2) Non-public forums include:

(i) Military bases;

(ii) Areas outside prisons & jails;

(iii) Advertising space on city buses;

(iv) Sidewalks on post office property;

(v) Airports — may prohibit money solicitation; can NOT

(vi) prohibit distribution of literature (fails rational basis review);

4) **Private Property** — NO First Amendment right of access to private property (i.e., shopping centers) for speech purposes

	Subject Matter Neutral	Viewpoint Neutral	Method of Regulation Allowed	Interest Required
Public forums & Limited / designated public forums	YES	YES	Time, place, or manner (i) open adequate alternative place (ii) narrowly tailored (NOT least restrictive)	Important
Non-public forums	NO	YES	Reasonable	Legitimate
Private property	NO First Amendment Right to use private property for speech purposes			

4. Freedom of Association

1) Laws that *prohibit or punish group membership* must meet *strict scrutiny* to punish a membership in a group, it must be proven that the person (i) actively affiliated with the group, (ii) knowing of its illegal activities, & (iii) with the specific intent of furthering those illegal activities;

2) Laws that require *disclosure of group membership*, where such disclosure would chill association, must meet strict scrutiny;

3) Laws that *prohibit a group from discriminating are constitutional, UNLESS* they are

a. Intimate association (e.g., if you're not invited to a small dinner party, you can't sue), OR

b. Expressive activity discrimination is an integral part of the association (e.g., the KKK who have an anti-black messenger or Boy Scouts who had anti-gay message).

5. Freedom of Religion

1) Free Exercise Clause:

(1) Prohibits government from interfering with religious beliefs

Member of the clergy can hold government office;

(2) Allows regulation of general applicability (conduct).

Exception Unemployment compensation (government may not deny benefits to individuals who quit their jobs for religious reasons).

2) Establishment Clause:

(1) Prohibits laws respecting the establishment of religion;

(2) Test (LEX)(if any of these three are violated, it violates the Establishment Clause):

(i) Must be a secular purpose for the law (e.g., 10 commandments can't be posted on public schools);

(ii) Effect must be neither to advance nor inhibit religion government can't symbolically endorse religion, or a particular religion;

(iii) Must not be excessive entanglement with religion government can't pay salaries of parochial school teachers because that would require too much supervision;

(3) Government can't discriminate against religious speech or *among* religions, unless strict scrutiny is met;

(4) Government sponsored religious activity in public schools is unconstitutional (e.g., school prayer, even moments of silence are unconstitutional, clergy delivered prayers at school graduations not allowed, student delivered prayers at football games not allowed), BUT religious students & community groups must have the same access to school facilities as non-religious groups;

(5) Government may give assistance to *parochial* schools — so long as the money isn't used for religious instruction;

SCHENCK V. UNITED STATES

March 3, 1919

JUSTICE OLIVER WENDELL HOLMES, JR.: This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917..., by causing and attempting to cause insubordination, etc., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to wit, that the defendant [Charles T. Schenck] willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917..., a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offense against the United States, to wit, to use the mails for the transmission of matter declared to be non-mailable by... of the Act of June 15, 1917, to wit, the above mentioned document... The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. Schenck was found guilty on all the counts. He set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech or of the press, and, bringing the case here on the ground, has argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20 the general secretary's report said, "Obtained new leaflets from the printer and started work addressing envelopes," etc.; and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men... no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about ...

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established ... The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch street and it would seem that the documents technically were not even in the defendants' possession... the notion that evidence even directly proceeding from the defendant in a

criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a [249 U.S. 47, 51] convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, 'Do not submit to intimidation,' but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed 'Assert Your Rights.' It stated reasons for alleging that any one violated the Constitution when he refused to recognize 'your right to assert your opposition to the draft,' and went on, 'If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.' It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, You must do your share to maintain, support and uphold the rights of the people of this country. Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution... We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917... punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime... But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It is not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are 'obstruct the recruiting or enlistment service,' and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, ... of course, does not affect the present indictment and would not, even if the former act had been repealed.

Judgments affirmed.

Exercises

I. Choose the best answer to the following questions:

1. **Standing is _____.**
 - A. abbreviation of "notwithstanding"
 - B. the ability to bring a lawsuit because of a party's actual injury for which the court can provide a remedy
 - C. the ripeness of a case or controversy
 - D. the status of a person, group, or organization appearing as a "friend of the court"
2. **The judiciary is one of the three separate and independent branches of government established by _____ of the United States Constitution.**
 - A. Article I
 - B. Article II
 - C. Article III
 - D. Article IV
3. **Congress passes a law that makes it a crime for a member of the Communist Party to serve as an officer of a labor union. The purpose of the law is to protect the national economy by minimizing the danger of political strikes. Is the law an unconstitutional bill of attainder?**
 - A. Yes.
 - B. No, because it does not list individuals, but rather defines a class.
 - C. No, because the purpose of the law is preventive, rather than retributive.
 - D. No, because Congress may make the determination that communists are more likely than others to instigate a political strike.
4. **Congress has recently enacted a federal law which prohibits racial discrimination in the sale, transfer, or rental of real estate, either privately or publicly. Which of the following constitutional provisions would provide the best rationale for the enactment of this federal statute?**
 - A. Under Article I, Congress has the power to enact laws that are "necessary and

- proper” to the general welfare.
- B. The enforcement provision of Section 2 of the 13th Amendment.
 - C. The enforcement provision of Section 5 of the 14th Amendment.
 - D. The Due Process Clause of the 5th Amendment.
5. Which of the statements below most accurately describes the intentions of the framers with respect to whether the Supreme Court should be given the power to invalidate acts of Congress?
- A. Some delegates thought that the Court should have the power to strike down acts of Congress inconsistent with natural law, even where no constitutional provisions had been violated.
 - B. Some delegates believed that the Court should not be given the power to invalidate acts of Congress.
 - C. Many delegates probably never gave the issue of judicial review serious consideration because they thought it unlikely that Congress would ever act unconstitutionally.
 - D. All of the above statements are true.
6. A city adopts an ordinance requiring the operators of massage parlors to receive licenses from the city. In the absence of more complete information, what would you say about the chances of successfully challenging the ordinance on constitutional grounds?
- A. Weak — the Court probably will uphold after applying the rational basis test.
 - B. Strong — the Court will probably strike down on “right of privacy” grounds.
 - C. Strong — the Court will probably strike down on equal protection grounds unless the city also licenses most other businesses.
 - D. Fairly strong — the court will probably apply middle-tier scrutiny since sex is involved.
7. The U.S. Constitution has as its most significant purposes _____ .
- A. conferring power on national and state governments
 - B. conferring power on the national government and limiting the power of national and state government
 - C. limiting the power of national and state government
 - D. conferring power on national government and limiting the power of national and state governments and private individuals
8. As interpreted by the Supreme Court in *Marbury*, which of the following statements can be made about Art. III, Section 2?
- A. The original jurisdiction of the Supreme Court is set by the Constitution; Congress can neither add to it nor subtract from it.
 - B. Congress can add to the Supreme Court’s original jurisdiction, but it can’t subtract

from it.

- C. Congress can subtract from the Supreme Court's original jurisdiction, but it can't add to it.
- D. Congress can make "any exceptions" to the Supreme Court's jurisdiction it desires.

9. Which of the following statements best describes the process of ratification of the Constitution?

- A. Ratification probably would not have occurred without the promise to swiftly propose a Bill of Rights.
- B. Ratification was a foregone conclusion given the stature of those attending the Philadelphia Convention.
- C. Ratification became possible only because of the efforts of George Washington, author of The Federalist Papers.
- D. Ratification occurred largely because opposition to the Constitution was weak and disorganized.

10. The Ninth Amendment to the U.S. Constitution _____ .

- A. repeals the Seventh Amendment
- B. imposes a specific limitation on the power of the states to intrude into matters of privacy
- C. prohibits the quartering of soldiers in private homes
- D. provides that the specification of rights in the first eight amendments isn't meant to be exhaustive

11. The City School Board required all schools to open a "Bible Study" course. Many parents of the students sued. What will be the most probable result?

- A. The parents will lose because this course will help students learn more knowledge.
- B. The parents will lose because most of the students are Christians.
- C. The parents will win because the school has the freedom of speech.
- D. The parents will win because the Establishment Clause is violated.

12. Ira owns the land close to a big river and there are always many people coming to see the river during summer. The City required Ira to allow public to use his land every summer for camping purposes. Ira sued. Which of the following statements is true?

- A. The City violated the Taking Clause.
- B. The City violated the Contracts Clause.
- C. The City violated the Commerce Clause.
- D. The City violated the Supremacy Clause.

13. Ira is a candidate for the position of city court judge. The local newspaper published an article criticizing Ira for paying bribery to the chief judge. If Ira sued the local newspaper but lost, the most probable reason would be that _____ .

- A. Ira did not pay the bribery

- B. the local newspaper believed that Ira had paid the bribery although it was not true
- C. Ira's reputation has been harmed by the article
- D. the article contained untrue information

14. Ira is a candidate for the position of city court judge. The local newspaper published an article criticizing Ira for not willing to open his land to public, and also accusing him for paying bribery to the chief judge. Suppose Ira had never paid bribery to the chief judge and sued the local newspaper Ira will _____ .

- A. win because he did not pay bribery to the chief judge
- B. lose because he did refuse to open his land to public
- C. win because the writer knew that he never paid bribery to the chief judge
- D. lose because the writer knew that he did not want to open his land to public

15. A state law prohibits the distribution of "handbills" on any street, sidewalk, or park within the city. The asserted purpose is the prevention of littering. If this law's constitutionality is successfully challenged, the probable reasons will include the following but _____ .

- A. the law is excessively vague and overbroad
- B. the law is not narrowly tailored to advance a significant governmental interest
- C. the law completely bans a time-honored mode of communication and does so in a manner much more intrusive than necessary to advance the proffered interest
- D. there is no less restrictive alternatives to advance the proffered interest

II. Translate the following English into Chinese:

Article V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.