

MAGICSHEETS | CONSTITUTIONAL LAW 1/5

I. JUSTICIABLE CASE OR CONTROVERSY

- a. Federal courts may hear based on...
 - i. Law-based federal jurisdiction from Constitution, federal laws and treaties, admiralty and maritime laws
 - ii. Party-based federal jurisdiction where U.S. gov't is a party, State v. State, State v. other State citizen, citizens from different states (diversity jurisdiction), foreign diplomats
- b. Art. III limits fed court jurisdiction to "cases" and "controversies." To avoid dismissal in court, go up **RAAAMPS**:
 - i. Standing: Π must show "personal stake." 1) Π's actual or imminent injury, 2) causation, 3) redressability
 1. There is no "injury" to taxpayers (unless litigating tax bill or fed taxpayer challenging spending on 1A religious grounds), legislators, Constitution lovers (abstract desire to see gov't comply)
 2. Organizational standing requires that 1) individual members have standing + 2) interest asserted is related to organization's purpose + 3) individual member participation in the suit is not required (there is no individualized injury, remedy would be the same to all members, or injunction would solve everyone's problems) (no *damages* because each member would have to show damages)
 - ii. Ripeness (whether suing too soon): Π must show harm or imminent threat of harm. *Proposed law or action not yet taken* are not real cases or controversies
 - iii. Mootness (whether suing too late): A case is moot if the dispute has been resolved (i.e., there is no redressability), unless "capable of repetition, yet evading review" (e.g., pregnancy can recur)
 - iv. Political Q: Fed court will not take issues involving a matter for another branch of gov't that the judicial process is inherently incapable of resolving and enforcing
 1. Textually demonstrable constitutional commitment to other branches (Senate's sole power to impeach), lack of judicial standards (partisan but not racial gerrymandering, foreign affairs)
 - v. Abstention: Fed court will abstain (defer to state courts) if claim is based on an undecided issue of state law
 - vi. Adequate and independent state grounds: *SCOTUS* will not hear a case from a *state high court* if its decision can be supported on state law grounds alone (even if federal Q involved), unless it was unclear whether based on state law alone, or state follows federal constitution (treat as federal law)
 - vii. (No) advisory opinions: Advisory opinions lack an actual dispute b/w pts or any legally binding effect. Matter must be a real and substantive *present* (or specific future) controversy capable of specific relief
- c. 11th Amendment (sovereign immunity): Private pts cannot sue state gov't in fed court for damages (injunctions OK)
 - i. Allowed if v. state officials (incl. for damages), state expressly consents, or based on 13A-15A powers

II. CONGRESSIONAL POWERS (for *federal law* to be constitutional, *enumerated congressional powers* must justify it)

- a. Congress does NOT have regulatory (police) power to promote health, safety, and welfare of residents except in DC
- b. Commerce clause: Broad power to regulate interstate commerce (ISC), i.e., regulate channels, instrumentalities, activities that have a substantial effect on ISC (even *intrastate, economic* activity under cumulative effect doctrine)
 - i. Shared with state and local gov't through dormant commerce clause (see § IV-e for tests)
 - ii. Cumulative effects doctrine: To determine "substantial effect," consider aggregate effect of similar actions
 - iii. Cannot regulate *intrastate non-economic* activity (e.g., guns near school) unless economic effect on ISC
 1. Comprehensive scheme EXCEPTION: If Congress enacts a program that aims at interstate or economic activity, it can sweep up isolated instances of *intrastate non-economic* activity if those are necessary to make the program effective and have a substantial national economic effect
- c. Taxing power: Impose and collect taxes to pay debts and spend *for the general welfare w/ purpose* to raise revenue
- d. Spending power: Spend for any public purpose to provide for general welfare (e.g., education, roads, space program)
 - i. Congress cannot *regulate* for the general welfare except in non-state federal territories
- e. Delegation power: Congress can delegate powers it possesses and create an agency with legislative power to make rules. Intelligible guidelines for carrying out concrete objectives are required (loose standard—think **RB**)
- f. Property power: Regulate (pass any law) and dispose of federal property, including Indian property and wild animals
- g. Speech and debate clause: A member of Congress (+ aides) cannot be punished for anything said on legislative floor
- h. Impeachment power: Congress can remove the president, federal judges, and federal officials through impeachment
- i. Appropriations power: Congress can pass a bill to direct how the president must spend money
 - i. Earmarking funds: Executive branch *must* spend the funds, or obtain Congress approval to refuse spending

III. EXECUTIVE POWERS (partly shared with Congress)

- a. **Congressional authorization 3-prong test**: Where the president acts with Congress's express/implied authority, his power is at its apex, and his action is likely valid. Where Congress is silent, the president's action is upheld as long as the act does not take over another branch's powers or prevent another branch from performing its tasks. Where the president acts against Congress's express will, he has little authority, and his action is likely invalid
- b. Chief executive domestic powers (**EAR PVPs**)
 - i. Enforcement of laws, not making them. May delegate to other executive officers. Attorney general is chief law-enforcement official. May direct federal executive agencies (executive orders) but *not private parties* outside the executive branch unless authorized by Congress. May set up presidential advisory commissions
 - ii. Appointment power: President can appoint officers and high-level officials with consent of Senate
 - iii. Removal power: President can remove high-level, purely executive officials without cause. President may be able to remove other executive officials for good cause based on statute (e.g., corruption, incompetence)
 - iv. Pardon power (plenary): President may grant pardons before charge or after conviction to *federal criminals*

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- v. Veto power: Proposed legislation becomes law unless wholly vetoed within 10 days of passing legislation
 1. Line-item veto is unconstitutional. President may only approve/reject a bill in toto
 2. Legislative veto (Congress changes law by majority vote after president signs) is unconstitutional
- vi. Privileges: Absolute privilege to refuse to disclose national security secrets. Qualified privilege to confidential comm'n between president and advisors (balance confidentiality vs. purpose to reveal or not)
- c. Commander-in-chief (military) powers (**BREW**): Respond to attacks (only Congress has power to initiate war), emergency power (broad discretion to send troops abroad w/o declaration of war, whether or not Congress is in session), wartime power (seize private property in wartime unless Congress denies it), battlefield tactical decisions
- d. International affairs: Treaty power (make agreements between countries with 2/3 Senate consent), executive agreements with foreign nations (Congress ratification not needed)
- e. Hierarchy of laws: U.S. Constitution > treaty / federal statute (last in time prevails) > executive agreement (foreign) / executive order > state constitution > state law

IV. FEDERALISM

- a. Supremacy clause: Constitution, federal laws, and treaties are supreme law
 - i. Express preemption: Federal statute says federal law is exclusive in an area
 - ii. Implied preemption: If state law conflicts with fed law, Congress shows clear intent to occupy the field, or state law impedes federal objectives
 - iii. If no conflict or no impedance of federal objectives, state law may be broader (e.g., higher minimum wage)
- b. Federal function immunity: Federal instrumentalities (gov't and agencies) are immune from...
 - i. State taxation where the "legal incidence" of the tax is on the U.S. without consent of Congress
 1. Nondiscriminatory, indirect taxes OK if no unreasonable burden, e.g., state tax on fed employees
 - ii. State regulation that would interfere with fed functions (fed law would control, per supremacy clause)
- c. Sovereign immunity: Fed gov't (U.S.) cannot be sued w/o consent. U.S. or another state may sue a state w/o consent
- d. 10th Amendment police power: States have broad power to regulate areas traditionally w/in power of states (involving health, safety, welfare, morals), limited by contrary fed power (laws, tax immunity, enumerated powers, foreign affairs, exclusive jx)
 - i. Anti-commandeering doctrine: Under case law, Congress (and likely executive orders) cannot make state legislatures pass a law or require state executive officials (e.g., police) to enforce federal law. However...
 1. Mere prohibitions are not commandeering
 2. Spending power can indirectly regulate state if condition for money is clear + not unduly coercive
- e. Dormant commerce clause (DCC): State may not regulate ISC in a way that is discriminatory or unduly burdensome
 - i. If Congress hasn't enacted legislation, states may regulate local transactions affecting ISC, only if the regulation does not discriminate against out-of-state actors to benefit local economic interests ("economic protectionism") and does not unduly burden interstate commerce (burden < state's interest in the action)
 1. If a state law **does discriminate on its face** against OOS actors, it is invalid unless it serves a compelling state interest + it is necessary to the compelling interest (**SS**—usually invalid)
 - a. EXCEPTION: State may prefer own citizens as a market participant (buy, sell, hire, etc.)
 2. If a state law is **facially neutral** and merely incidentally burdens ISC, use balancing test: Law is invalid only if burden on ISC > promotion of legitimate local interests (i.e., undue burden on ISC)

V.

STATE ACTION REQUIREMENT: The Constitution generally protects against governmental action at any level (federal, state, local), not actions of private individuals (except 13A), UNLESS...

- a. Significant state involvement: Private action is closely encouraged and supported by the state (state hand in private glove); e.g., court seeks to enforce a racially restrictive covenant, or statute requires segregated public toilets
- b. Public function theory: Private actor is delegated a function traditionally reserved to states (company town, not mall)
- c. Mutually beneficial relation derived from unconstitutional behavior; e.g., state gets increased revenues and rents from privately owned restaurant that discriminates

VI.

STANDARDS OF SCRUTINY: Levels of strictness when a court reviews the legitimacy of governmental acts

- a. Strict scrutiny (SS): **Gov't must prove its classification is necessary to achieve a compelling gov't interest**
 - i. Law must discriminate on its face or have actual motive (if facially neutral)
 - ii. Classification is necessary if it is the **least-restrictive means** (no alternative to lessen the burden) or is **narrowly tailored** to serve the compelling gov't interest (difficult test to meet—gov't almost always loses)
- b. Intermediate scrutiny (IS): **Gov't must prove its classification is substantially related to an important gov't interest**. Law must discriminate on its face or have actual motive (if facially neutral)
- c. Rational basis (RB): **Plaintiff must prove classification is not rationally related to any legitimate gov't interest**

VII.

DUE PROCESS CLAUSE (DPC): 5A applies to fed gov't; 14A applies to state and local gov't

- a. Procedural DPC protects persons against *intentional* deprivation of life, liberty or property w/o due process of law
 - i. Persons: All people including aliens and corporations, not just citizens
 - ii. Liberty: Freedom of action (e.g., bodily restraint), constitutional freedom Life: Threat to life
 - iii. Property: More than belongings. Equal protection rights, constitutional freedom, e.g., public education, public employment (no property interest if "at will"), benefit under state law (welfare), licenses
 - iv. If life, liberty, or property entitlement taken, what adequate process is due? Matthews balancing factors: (1) importance of interest to the person (more important → more process needed), (2) gov't interest/burden in

efficiency (more burdensome to get protection → less process needed), (3) value of procedural safeguards (more likely that gov't will make a mistake without procedural protection → more process needed)

- v. Due process rights may be waived if voluntary and made knowingly
 - b. **Substantive DPC** (sDPC) is a source of fundamental individual rights not spelled elsewhere in the Constitution. Gov't may not infringe on these fundamental rights ("CAMPERD STOVF"). Standard of review is **SS** unless noted:
 - i. **Contraception** (privacy): State cannot prohibit distribution of contraceptives, whether single or married
 - ii. **Abortion** (privacy): State reg is unconstitutional if it imposes **undue burden** on choice to abort, up to the point fetus is viable (realistic possibility of survival outside womb—pre-viability is gray area, 1st trimester)
 - 1. Considered undue burden: requiring spousal notice about abortion
 - 2. Not undue burden: parental consent w/ judicial bypass, 24-hour waiting period, ban unsafe method
 - 3. Any abortion restriction, even post-viability, must have exception to protect mother's life or health
 - iii. **Marriage** (privacy): Right to enter into (and likely, to dissolve) marriage is deemed fundamental
 - iv. **Parentage/Procreation** (privacy): Reproductive rights, and child rearing, care, custody, control
 - v. **Education (private)**: Parents have a right to privately educate children outside of the public school system
 - vi. **Relatives** (family relations)
 - 1. Gov't cannot prohibit members of an extended family from living in a single household
 - 2. Gov't can ban unrelated persons from living together in a single-family residence
 - vii. **Death**: Right to refuse medical procedures, even if life-extending. No right to suicide or assisted suicide
 - viii. **Sexual orientation (strict RBR)**: Gov't cannot criminalize same-sex sexual activity (no legitimate interest)
 - ix. **Travel**: Right to travel interstate and to set up residency in a new state, subject to reasonable restrictions
 - x. **Obscene material**: Right to possess in one's home. No right to buy, sell, transport. No right to child porn
 - xi. **Vote**: 15A (no race discrimination in voting), 19A (no sex discrimination in voting), 24A (no poll taxes)
 - 1. Total ban (on *picking/voting* for a candidate) via, e.g., redistricting primarily based on race? **SS**
 - 2. Regulation of process that makes voting harder? **Undue burden balancing** (gov't interest/burden)
 - 3. Reasonable restriction (on *being* a candidate: age, residency, filing fee, voting districts)? **RB**
 - a. Traditional one-person one-vote principle does not apply to special, limited-purpose voting districts, such as a water-storage district where voting is limited to landowners
 - xii. **Free association** (1st Amendment): Right to belong to political groups
 - c. **Takings clause** (provided by 5A, applicable to states via 14A)
 - i. **Gov't cannot take private property for public use without just compensation**
 - 1. Public use means "public purpose." Burden on gov't to show the action is rationally related to any legitimate purpose (such as health, welfare, safety, aesthetic reasons)
 - 2. "Just compensation": **loss of FMV to owner**, not gain to taker (not comped if worthless property)
 - ii. If the action is a "taking," just compensation is required; mere "regulation" does not require compensation
 - 1. Examples of reg: zoning ordinance, ordering destruction of diseased trees, landmark ordinance
 - iii. **Actual/physical taking**: If gov't takes one's property by actual or physical appropriation, it is a taking
 - 1. Includes permanent, physical invasion no matter how minor (e.g., running cable lines)
 - 2. **Temporary taking**: Not a *per se* taking. Balance the circumstances (e.g., planners' good faith, reasonable expectations of owners, length of delay, actual economic impact) to determine whether fairness and justice require just compensation
 - iv. **Regulatory taking**: A regulation that decreases the value of property. Per *Lucas*, it is not a taking unless it **deprives all economically beneficial use of land** (e.g., disallowing land development).
 - 1. **Partial taking** occurs when only a portion of the property owner's land is rendered economically useless through an intrusion or regulation. **Penn Central balancing test**: 1) regulation's economic impact on the claimant, 2) extent to which the regulation interferes with distinct investment-backed expectations (purpose of property?), 3) character of the government action (for welfare?)
- VIII. **EQUAL PROTECTION CLAUSE** (EPC: applicable to states via 14A and to fed via 5A DPC for gross discrimination)
- a. Applies where a statute or gov't action treats similarly situated people in a dissimilar manner or singles out one *class of persons* (i.e., classifies people). Compare sDPC protection of fundamental rights of *everyone*
 - b. **Race discrimination** – suspect classification subject to **SS**
 - i. *De jure* (by law) segregation almost always unconst'l, e.g., school segregation, banning interracial marriage
 - ii. *De facto* OK (happens through private choice and social factors, e.g., different races live in different areas)
 - iii. **Affirmative action**: Overt classifications may pass **SS** review in affirmative action
 - 1. Compelling interests: Remedy state's own (not general societal) past discrimination w/ narrow tailoring of benefits to those actually affected, or diversity in higher education (post-secondary)
 - c. **Alienage discrimination** (treating citizens & non-citizens differently) – suspect classification subject to **SS**
 - i. **Public function EXCEPTION**: State may require citizenship for state jobs that directly affect politics – **RB**
 - ii. **Illegal (undocumented) aliens** not a protected classification – **RB** **Illegal alien children** – **IS**
 - 1. *Fed law* may adopt immigration policy (e.g., 5yr residency req for fed Medicare benefits) – **RB**
 - d. **Gender discrimination** – **IS** (gov't must show "exceedingly persuasive justification," closer to **SS**)
 - i. **Affirmative action**: Remedial (even for past, societal reasons) or benign discrimination satisfies **IS**
 - e. **Illegitimacy** (treating illegitimate children differently) – **IS**

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- IX. PRIVILEGES & IMMUNITIES CLAUSES (applies to **out-of-state discrimination** against *citizens only*)
- Article IV comity clause (basic rights): State gov't cannot discriminate against *non-residents* of the state if *economic* discrimination affects "fundamental rights" or "important economic activities," unless the discrimination is closely related (no less discriminatory alternative could be achieved) to a substantial gov't interest (IS)
 - Non-resident discrimination cannot affect rights including civil liberties and right to work and pursue livelihood, e.g., higher license fees or taxes for out-of-staters, abortions or employment for locals only
 - 14th Amendment (narrow scope, rarely used): State cannot deny citizen rights of national citizenship, e.g., to travel state lines and establish residency in a new state
 - N/A to aliens and corporations ("persons"). But can protect from discrimination via DCC, 14A DPC, or 14A EPC

Strict Scrutiny (SS)	Intermediate Scrutiny (IS)	Rational Basis Review (RB/RBR)
Race, alienage (state), national origin, voting, domestic travel, most sDPC rights, DCC (discriminate on face)	Gender, illegitimacy, undocumented alien children, P&I under Art. IV	Age, alienage (fed), disability, sexual orientation, social, economic, all else (non-suspect classifications (EPC) or non-fundamental rights (DPC))

- X. RETROACTIVE LEGISLATION
- Contracts clause: Prohibits *state legislation* from *substantially* impairing the obligation of existing public/private K
 - EXCEPTION: Regulation of **private K** is reasonably and narrowly tailored to promote important and legitimate public interest. Regulation of **public K** receives stricter scrutiny
 - Ex post facto law: State/fed may not retroactively alter criminal offense or punishment that puts Δ in worse position
 - Bill of attainder: State/fed may not pass a legislative act that inflicts punitive punishment without a trial on named individuals or an easily ascertainable group for past conduct

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XI. FIRST AMENDMENT (1A also applicable to states through 14A)

- a. Free speech clause (speech = words, symbols, expressive conduct intended and reas. likely perceived as a message)
- i. Restricts gov't regulation of *private* speech. Does not constrain gov't from voicing its opinions or funding only certain private speech, subject to other constitutional limitations
 - ii. Facial attacks—analyze these first when expression is being regulated
 1. Prior restraint: Gov't action restricting speech before it occurs (rather than punishing after) is disfavored. Such restriction must be narrowly drawn and show special societal harm will result
 2. Overbreadth: Ordinance invalid as overbroad if it prohibits activities that may be constitutionally forbidden and also those that may be protected under 1A (allowable under another standard)
 3. Vagueness: Regulation is void as vague if ordinance is so unclear that reasonably intelligent persons would have to guess at its meaning and would differ as to its application
 4. Unfettered discretion: A regulation cannot give officials unfettered discretion over determining speech issues (e.g., power to raise permit fee, or require review); there must be defined standards
 - iii. Content-based regulation: **Strict scrutiny** triggered if gov't regulates content- or viewpoint-based speech. That is, there are few restrictions on *content* of speech. But there are unprotected speech EXCEPTIONS:
 1. Obscenity: Regulation valid only if the work 1) appeals to prurient (sexual) interests based on local community standards, 2) depiction or description is patently offensive per local standards, 3) as a whole lacks serious literary, artistic, political, scientific (LAPS) value to a reasonable person
 2. Defamation: See *Defamation* in Torts Magicsheets. Additional constitutional issues apply for public matters: falsity and fault. Public info may be protected if newsworthy and not offensive
 3. Unlawful advocacy: May prohibit if the speaker (subjectively) intends to produce “imminent, unlawful action” + speech is (objectively) likely in fact to produce “imminent, unlawful action”
 4. Hostile audience: Speech eliciting imminent, violent reaction from the crowd. But police must make reasonable efforts to protect the speaker
 5. Fighting words: Likely to incite ordinary citizen to acts of immediate, violent retaliation to speaker
 6. True threats: Intended to convey serious threat of bodily harm (e.g., cross burning to intimidate)
 - iv. Content-neutral regulation / time, place, manner (TPM) regulation: Regulation of public forums (historically open to speech-related activities, e.g., sidewalk, park) and designated public forums (not historically open to speech but designated for it, e.g., classroom for after-school civic activities) must be **content- and viewpoint-neutral + narrowly tailored (no total bans) to serve an important interest + leave open alternative channels of communication** (most legitimate interests meet importance standard)
 1. Limited public forums (not historically linked to speech but open for a purpose, e.g., school gym for town debate) and non-public forums (not open to public, e.g., military base, school in session) may be TPM regulated only if **viewpoint-neutral + reasonably related to a legitimate interest**
 - v. Quasi-protected speech: Commercial speech is protected if it 1) is not false or deceptive and 2) does not relate to unlawful activity. But gov't can still regulate if it 1) serves a substantial gov't interest + 2) directly advances that interest + 3) narrowly tailored to achieve that interest (reasonable fit b/w goals and means)
- b. Freedom of religion
- i. Establishment clause: Prohibits gov't from preferring one religion over another or establishing a religion
 1. If regulation on its face prefers a religion over others or religion generally over non-religion → **SS**
 - a. If speech involved, can also raise viewpoint discrimination under the free speech clause
 2. If law or program is facially neutral (no sect preference), valid under *Lemon* test if it 1) has a secular (nonreligious) purpose, 2) has a primary effect that does not advance or inhibit religion, 3) does not foster excessive gov't entanglement with religion
 - a. Gov't financial assistance to defined class of persons is valid if the class is defined w/o reference to religion or religious criteria (even if recipients use to attend religious school)
 - ii. Free exercise clause: Gov't may not prohibit the free exercise of any religion
 1. Genuine belief (threshold issue)? Sincere religious beliefs are absolutely protected. The belief must parallel orthodox religious beliefs; it cannot be a purely political or philosophical view
 2. Generally applicable? Gov't may regulate (under **RB**) an activity if the regulation is neutral w/r/t religion and is of general applicability, even if it incidentally burdens religious conduct
 - a. EXCEPTION: If person quits job for sincere religious reason, gov't cannot refuse unemployment benefits
 3. If law is not generally applicable and was motivated by intent to interfere with religion → **SS**
 - a. EXCEPTIONS: Sabbath observance unemployment benefits, start Amish schooling at 16

Regulation likely invalid for being overbroad or vague