

Law School Survival Guide

Constitutional Law

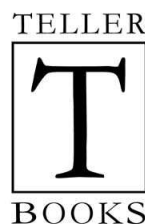
Outlines and Case Summaries

2010
Edition

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CONSTITUTIONAL LAW
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Some judicial decisions discussed in this book, due to their ambiguity, are subject to different interpretations. Other authors may come to conclusions different from those presented herein. No representation is therefore made that these materials reflect a definitive statement of the state of the law or of the views that will be applied by any court in any particular case or jurisdiction.

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)	JT	Joint tenant/tenancy
AGI	Adjusted gross income	K	Knowledge (criminal law) or Contract (all other law)
AP	Adverse possession	K.B.	King's Bench (UK)
A/R	Assumption of the risk	KSC	Knowledge to a substantial certainty
B	Buyer	L	Loss in value
BFP	Bona fide purchaser or bona fide purchase	L1	First landlord
C	Constitution	Lat.	Latin
CIF	Cause-in-fact	LE	Life estate
Cl.	Clause	LED	Life estate determinable
CLEO	State Chief Law Enforcement Officer	LLC	Limited liability company
Court (cap.)	United States Supreme Court	LLP	Limited liability partnership
CP	Court of Pleas (UK)	LRM	Least restrictive means
CR	Contingent remainder	MPC	Model Penal Code
CSD	Common Scheme of Development	MSAJ	Motion to set aside the judgment
CSI	Compelling state interest	N	Negligence
Ct.	Court	N.B.	Nota bene
Ct. App.	Court of Appeals	NIED	Negligent infliction of emotional distress
Ct. Chan.	Court of Chancery (England)	O	Original owner, or grantor (in present estates and future interests)
ED	Emotional distress	OLQ	Owner of the <i>locus in quo</i>
EI	Executory interest	OO	Original owner
Eng.	England	P	Purpose or purchaser
ES	Equitable Servitude	PE	Privity of Estate
FI	false imprisonment	PJ	Personal jurisdiction
FLSA	Fair Labor Standards Act	PJI	Pattern Criminal Jury Instruction
FMLA	Family and Medical Leave Act	PK	Privity of Contract
FQJ	Federal question jurisdiction	Q.B.	Queen's Bench (UK)
FRAP	Federal Rules of Appellate Procedure	R	Recklessness
FRCP	Federal Rules of Civil Procedure	RAP	Rule against perpetuities
FRCrP	Federal Rules of Criminal Procedure	RC	Real Covenant
FRE	Federal Rules of Evidence	Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
FS	Fee simple absolute (fee simple)	RFRA	Religious Freedom Restoration Act of 1993
FSCS	Fee simple on condition subsequent	RIL	Res ipsa loquitur
FSD	Fee simple determinable	RPP	Reasonable prudent person
FS EL	Fee simple on executory limitation	Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
FT	Fee tail	§	Section
H.L.	House of Lords (England)	S	Sublessee or seller
IIED	Intentional infliction of emotional distress	S.Ct.	Supreme Court or US Supreme Court Reporter
IT	Intentional tort	SF	Statute of Frauds
JMOL	Judgment as a matter of law	SJ	Summary judgment
JNOV	Judgment non obstante veredicto	SL	Strict liability, or statute of limitations
J/SL	Joint and several liability, or jointly and severally liable		

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SMJ	Subject matter jurisdiction		(compilation of US Supreme Court opinions)
SP	Specific performance		
T1	First tenant	USC	United States Code
TE	Tenant/tenancy by the entireties	VR	Vested remainder
TO	True owner	VR SD	Vested remainder subject to divestment
UCC	Uniform Commercial Code		
US	United States of America or United States Reports		

I. SEPARATION OF POWERS

A. JUSTICIABILITY IN THE FEDERAL COURTS

1. Overview

- a. A case is justiciable when it is properly brought before a court with subject matter jurisdiction and *is capable of being disposed of judicially*.
- b. This requires that distinct questions of nonjusticiability of political questions, standing to sue, ripeness, and mootness.

2. Nonjusticiable Political Questions

- a. A nonjusticiable political question is thus one that involves the exercise of **discretionary power** by either the Legislative or the Executive Branch; it does not involve a *judicial* question to be decided by the judiciary.
- b. A question is a nonjusticiable political question when there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” *Baker v. Carr* (U.S. 1962).
- c. Nonjusticiable political questions include, for example, claims that the President’s is mishandling foreign affairs.

3. Standing

- a. To be justiciable, the parties to a case must have standing (*standing to sue*) before the court.
 - i. This refers to a party’s judicial right to make a claim or enforce a duty or right before a court.
 - ii. There are two kinds—constitutional standing and prudential standing, both of which are necessary in any case in federal court (state courts have established their own standing rules).
- b. Constitutional Standing
 - i. Constitutional standing is based on the Article III Case or Controversy requirement. It is therefore not subject to congressional modification.
 - ii. In order to have constitutional standing, the following elements must be met:
 - 1) **Injury**: the plaintiff must have been directly injured in the past or in the imminent future.
 - a) The injury may be economically or otherwise, but may not be excessively indeterminate; it must be more substantial on the plaintiff than on citizens at large.

- b) However, a court may hear a case even if the plaintiff himself has not been injured if: (i) the party that is injured is unable to represent himself; and (ii) the plaintiff has a close relationship or substantial contact with the injured party, who has allowed the plaintiff to represent him.
 - c) In addition, actual injury need not be shown in cases involving the Establishment Clause, since the protection of fundamental freedoms is too important to limit to injured parties;
- 2) **Causation**: the injury must be traceable to the defendant's conduct; and
 - 3) **Remedy**: a favorable court outcome must be able to redress the plaintiff's injury.
- c. Prudential Standing
- i. The common law rules are discretionary and are not dictated by article III of the Constitution. Congress may therefore change them by statute.
 - ii. A plaintiff has prudential standing when he does *not*:
 - 1) Assert the claims of a **third party**. Exceptions:
 - a) When the injured party lacks competence or faces exceptional obstacles and the party bringing the action will effectively represent him; or
 - b) The party bringing the action bears a close relationship to the affected party (*e.g.*, a liquor seller sues on behalf of women wanting to be able to purchase alcohol).
 - 2) Sue as a **taxpayer** with a common grievance with all other taxpayers;
 - a) Rationale: the injury is deemed to be too remote.
 - b) Exception: the plaintiff may bring a tax action if it involves the First Amendment Establishment Clause.
 - c) The Commerce Clause is *not* a part of this exception.
 - i) *See Daimler-Chrysler Corp. v. Cuno* (U.S. 2006), where the plaintiff Cuno and other taxpayers sued when City of Toledo offered the defendant tax benefits. The plaintiffs claimed that the tax breaks increased their own tax burdens. Held: the alleged injury is indefinite and general. If the plaintiffs were granted standing, the separation of powers guaranteed by the Constitution would be eroded as courts begin to redress political and policy questions such as this one. The

plaintiffs argue that the Establishment Clause exception to this rule should be extended to the Commerce clause. The Court refuses to extend this exception.

- 3) Raise a claim *outside of the zone of interests* meant to be regulated by the statutory or constitutional guarantee in question.

4. Ripeness

- a. A case is ripe, or ready to be heard, when a claiming can making a showing of a *direct injury* resulting from the challenged action.
- b. However, courts do not always impose this rule strictness; a case may be considered ripe, even if actual injury has not occurred, when the following two elements are met:
 - i. Great *hardship* would result if it denied judicial review; and
 - ii. The *issues* and *record* are ready for judicial review (*i.e.*, they have been sufficiently developed to allow the court a thorough review).
- c. Generally, a claimant must be prosecuted for the violation of a law before he may challenge it.
- d. However, in the following situations, because waiting for ripeness would incur a great hardship, pre-enforcement review is considered justified:
 - i. When the enforcement of a statute against the plaintiff has not actually begun but is imminent;
 - ii. When the plaintiff wishes to act, but does not want to risk violating the law; and
 - iii. When collateral injury is possible (*e.g.*, plaintiffs may challenge a statute limiting the liability of nuclear power plants in the event of a nuclear accident, even though it has not occurred).

5. Mootness

- a. The mootness doctrine requires the plaintiff to have a personal interest from the beginning to the end of the litigation.
- b. If an intervening event removes the plaintiff's interest in the case (*e.g.*, a statute being challenged is repealed), the case becomes moot and is no longer justiciable.
- c. Exceptions:
 - i. Wrongs "capable of repetition yet evading review" (*e.g.*, a pregnant woman claims that an anti-abortion statute is unconstitutional, but before the litigation is completed, she gives birth).

- ii. The defendant ceases the challenged conduct but can resume it at anytime (*e.g.*, the government repeals a problematic statute, but can reinstate it at any time);
- iii. Collateral injuries (*e.g.*, a criminal who completes a prison sentence can challenge his conviction for collateral injuries, such as lost voting rights).
- iv. Class actions: even if the plaintiff's case becomes moot, the action may go forward for the rest of the class.

B. THE JUDICIAL POWER

1. The Question of Lower Federal Courts

- a. After much controversy, the Constitutional Convention decided to leave the question of establishing lower federal courts (the district and circuit courts) to Congress: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
- b. The federal district and circuit courts are thus creatures of Congress, not of the Constitution, that can be abolished at the will of Congress.

2. Subject Matter Jurisdiction of the Federal Courts

- a. Article III § 2 of the Constitution establishes federal subject matter jurisdiction (SMJ) over:
 - i. Cases arising under the Constitution and the laws and treaties of the U.S.;
 - ii. Cases affecting ambassadors, other public ministers and consuls;
 - iii. Cases of admiralty or maritime jurisdiction;
 - iv. Cases in which the U.S. is a party;
 - v. Cases in which a state is a party;
 - vi. Cases between citizens of different states;
 - 1) This is known as "diversity jurisdiction";
 - 2) Congress has limited diversity jurisdiction to those cases involving amounts in controversy of more than \$75,000 (28 USC § 1332).
 - 3) Diversity jurisdiction has further been limited to only those cases in which *all of the plaintiffs* are diverse from *all of the defendants* (*Strawbridge v. Curtis*).
 - vii. Cases between citizens of the same state claiming lands under grants of different states;
 - viii. Cases between a state, or the citizens thereof, and foreign states or citizens.

3. Jurisdiction of the Supreme Court

a. Original Jurisdiction

- i. Under the Constitution, the Supreme Court has *original jurisdiction* over cases involving ambassadors, other public ministers and consuls, or states.¹
- ii. Congress has added by statute the following provisions:
 - 1) The Supreme Court's original jurisdiction is ***exclusive*** in cases involving two or more states;² and
 - 2) The Supreme Court's original jurisdiction is ***concurrent*** in cases involving:
 - a) An ambassador, consul, or public minister of a foreign state; or
 - b) A state against the U.S., citizens of another state, or aliens.³
- iii. Congress ***may not restrict*** the Supreme Court's original jurisdiction.
- iv. Furthermore, according to a majority of sources, Congress also ***may not expand*** the Supreme Court's original jurisdiction (there is some disagreement on this rule; *see Marbury v. Madison, infra.*).

b. Appellate Jurisdiction

- i. Article III of the Constitution states that, "In all the other Cases before mentioned, 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
- ii. Accordingly, the Supreme Court's appellate jurisdiction, unlike its original jurisdiction, ***may be restricted by Congress.***
 - 1) *See Ex Parte McCordle* (U.S. 1868), where McCordle, a southerner opposed to the presence of union troops in control of southern states, was arrested and locked up by a military court. When his writ for *habeas corpus* was denied, he appealed to the United States Supreme Court. While the case was pending, Congress abrogated the Supreme Court's appellate jurisdiction over the case, and the Supreme Court held that it was obligated to dismiss the case, regardless of the merits of McCordle's case, because it lacked jurisdiction.

4. Judicial Review

- a. According to *Federalist* No. 78, written by Alexander Hamilton, the judiciary, not controlling the nation's purse or military, is best suited to interpret the Constitution.

¹ U.S. Const. art. III, § 2, cl. 2.

² 28 USC § 1251(a). Original Jurisdiction.

³ 28 USC § 1251(b). Original Jurisdiction.

⁴ U.S. Const. art. III, § 2, cl. 2

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IV. THE PROTECTION OF CONTRACTS AND PROPERTY

A. THE PROTECTION OF CONTRACTS AGAINST STATE IMPAIRMENT

1. Article I, § 10 of the Constitution enumerates the powers prohibited of the states. Among these prohibitions is the adoption of any law “impairing the Obligation of Contracts.”
2. The Contracts Clause *applies only to the states*; the federal government may pass laws impairing contracts.
3. The main purpose behind the Contracts Clause is to prevent retroactive state legislation that alters or modifies substantive contractual rights.
 - a. *See Sturges v. Crowninshield* (U.S. 1819) (Marshall, C.J.), where a NY law that liberated debtors from their debts was held to be invalid because it attempted to discharge contractual obligations. Creditors who entered into a contract, expecting to have their loans repaid, would be prejudiced.
 - b. *N.B.*: just a few years later, in *Ogden v. Saunders* (U.S. 1827), the Court answered the question that *Sturges* left open: may a state pass only a bankruptcy law that prospectively alters contracts? The Court held that it could. The parties from the time of the bankruptcy act onward would have notice of its existence and the terms of the bankruptcy act would become incorporated into the contract.
4. The Court has therefore applied the Contract Clause to prevent governments from altering contracts that retrospectively relieve debtors.
5. Later, the issue arose as to whether this rule applied only between private parties or whether it extended to public contracts, where the state itself was a party. The Court held that the Contract Clause applied to both.
 - a. *See Fletcher v. Peck* (U.S. 1810), where a later Georgia legislature rescinded a deal that the former legislature had entered into granting lands, because the deal was corrupt. The Court held that the legislature could not interfere with the earlier contract, which was protected by the Contracts Clause.
6. *Exception*: state laws rescinding state contracts that undermine morals are valid. States may not contract away their police power.
 - a. *See Stone v. Mississippi* (U.S. 1879) (Waite, C.J.), where the defendant contractually granted the plaintiff lottery company Stone a charter to conduct state lotteries. One year later, in 1868, the new Constitution prohibited state lotteries. The plaintiff sued, arguing that the state was required to honor the charter. Held: one who accepts a lottery charter does so with the understanding that it may be revoked at any time, even if paid for. This is an exception to the rule that the Contract Clause applies to public contracts.

7. In addition, states may alter contractual obligations where an emergency, such as an economic crisis, warrants state action.
 - a. *See Home Building & Loan Ass'n v. Blaisdell* (U.S. 1934), where the plaintiff challenged a Minnesota law that permitted the extension of redemption periods and imposed a moratorium on foreclosures and sales of mortgaged property, as an emergency measure in the Great Depression. Held: the Contract Clause *only prohibits the states from unreasonably modifying the obligations of contracts*. Here, the defendant's act was reasonable for the following reasons:
 - i. A *crisis* justified use of the reserved powers;
 - ii. The legislation protected a *basic public interest*;
 - iii. The relief was *tailored* to the emergency;
 - iv. The conditions are reasonable; and
 - v. The debts were only temporarily suspended.
 - b. *Compare Allied Structural Steel Company v. Spannaus* (U.S. 1978), where a pension funding change was held to fail the *Blaisdell* five-factor test: the importance to a public interest was low and the impairment on contracts was severe.

B. THE PROTECTION OF PROPERTY UNDER THE TAKINGS CLAUSE

1. Introduction
 - a. The Takings Clause of the Fifth Amendment states that private property shall not be "taken for public use, without just compensation."¹⁶
 - b. The government may only therefore take private property if: (i) it is for public use; and (ii) the owner is justly compensated.
 - c. Historically, this restricted only the federal government. *Barron v. Mayor and City Council of Baltimore* (U.S. 1833). However, after the Bill of Rights was incorporated through the Due Process Clause of the Fourteenth Amendment, the Takings Clause came to apply against the states as well.
 - d. Three issues arise in Takings Clause cases:
 - i. Whether property has been taken;
 - ii. How much is just compensation (a question not within the scope of the present text); and
 - iii. Whether there has been a public use.
2. What is a Taking?
 - a. Introduction

¹⁶ U.S. Const. amend. V.

- i. Most government takings are actual appropriations.
 - ii. However, state regulations may become so unduly burdensome that they become Fifth Amendment “takings” as well.
- b. Government Appropriations (Actual Takings)
- i. Actual government appropriations may take on two forms: (i) actual takings of property; or (ii) permanent physical invasions of the property.
 - ii. In both cases, the act is a taking that requires just compensation.
- c. Government Regulations
- i. A three-part balancing test is implemented for determining whether a restriction is merely a **regulation** that decreases economic value or a **taking** requiring just compensation:
 - 1) The economic impact on the owner;
 - 2) The extent of interference with investment-backed expectations; and
 - 3) The character of the government action. *Penn Central Transportation Company v. City of New York* (U.S. 1978).
 - ii. An example of a *mere regulation* would be a *landmark preservation project*. It is a valid exercise of police power that does not require just compensation.
 - 1) *See Penn Central Transportation Company v. City of New York* (U.S. 1978) (Brennan, J.), where the plaintiff owner Penn Central Transportation Company was prohibited from constructing an office building over an historic landmark and argued that its constitutional right to property was violated. Held: landmark preservation regulations are legitimate exercises of *state police power* that do not require compensation.
 - 2) Dissent (Rehnquist J.): if this regulation is for the public good, then it should be the general public, not the plaintiff, that takes the brunt of the decision.
 - iii. However, if the regulation *unduly burdens contractual obligations*, it will be considered a taking.
 - 1) *See Pennsylvania Coal Co. v. Mahon* (U.S. 1922) (Holmes, J.), where the plaintiff Mahon, while purchasing land, recognized that there might be subsidence, but waived all rights to recover damages. The Pennsylvania legislature then passed an act prohibiting such sales. Held: the subsidence law *so severely interferes with contractual obligations that it is virtually an appropriation*. It therefore requires just compensation.
 - 2) Dissent (Brandeis, J.): the state law is a valid exercise of the *state police power* prohibiting a noxious use. The

IV. THE PROTECTION OF CONTRACTS AND PROPERTY

restriction is a temporary one not requiring just compensation.

- iv. Similarly, if the regulation denies the property all *economically viable use* it will be a taking.
 - 1) *See Lucas v. South Carolina Coastal Council* (U.S. 1992) (Scalia, J.), where a zoning law prohibited the plaintiff from building any habitable structure on lots he recently purchased. Held: the law is so burdensome that it is effectively a taking requiring just compensation.
 - 2) Dissent (Blackmun, J.): this regulation did not deny the plaintiff *all economic utility*: he could use, possess, or sell the lots.

3. Public Use

- a. There are three situations in which the government effects a taking:
 - i. *The government becomes the owner*. This is the traditional case, in which the government appropriates private property in order to build roads, public schools, etc.
 - ii. *The government transfers ownership to private hands for public use*. The government could transfer ownership of private property to private entities, such as railroad companies, common carriers, or hospitals.
 - iii. The government transfers ownership to private hands for a *public purpose*. This is the most controversial of the categories.
 - 1) The Court headed down a slippery slope as it embraced this third category.
 - 2) First, it permitted the transferring of private property from one private owner to another for *addressing blighted areas*.
 - a) *See Berman v. Parker* (U.S. 1954), where Congress appropriated property from landowners in a blighted area in Washington, D.C., to give to private owners as part of a redevelopment plan to build apartments and generate revenues. Held: although the appropriation of the property was not aimed at a public use, there was a *public purpose* of developing a blighted area, which justifies the taking.
 - 3) Then the Court permitted takings in order to remedy land oligarchy structures.
 - a) *See Hawaii Housing Authority v. Midkiff* (U.S. 1984) (O'Connor, J.), where the Court held that the taking of property in Hawaii that was predominantly held by a small oligarchy for the redistribution of title was constitutional, since it was a *legitimate public purpose* affecting health, safety, and welfare.

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- a. RFRA requires the CSI/LRM test to be applied in all cases against the federal government (*not* against states).
- b. RLUIPA requires the CSI/LRM in all cases against states involving:
 - i. Land use decisions; and
 - ii. Prisoners.
- 3. State Law
 - a. Some state constitutions have free exercise clauses requiring the CSI/LRM test.
 - b. Some states have adopted state RFRA's.

VII. FIRST AMENDMENT SPEECH

A. PRIOR RESTRAINT AND CRITICISM OF THE GOVERNMENT

- 1. A *prior restraint* is an administrative requirement or judicial order that suppresses speech *before it is published* or otherwise made.
- 2. There is a strong presumption against prior restraints, which the government generally may not issue, because they put too much power into the hands of officials granting licenses.
- 3. In order to prevent the publication of materials that it considers threatening to national security, the government must meet a *heavy burden of justification* (similar to strict scrutiny).
 - a. *See New York Times Co. v. United States* (U.S. 1971) (*per curiam*), where the government sued to enjoin the New York Times from publishing a classified study on U.S. policy in Vietnam (the Pentagon Papers). Held: the proposed government action must be a narrowly tailored means (similar to LRM) to pursuing a compelling state interest, which the government failed. The government has failed to meet its heavy burden of justification.
 - b. Concurrence (White, J.): there was no clear showing of an emergency and no statute supports the plaintiff's position.
 - c. Dissent (Burger, C.J.): this Court is deciding too hastily a case whose facts require more time for analysis.

B. PUBLIC FORUMS: THE THREE CATEGORIES OF GOVERNMENT-OWNED PROPERTY

- 1. Traditional Public Forums
 - a. These forums have traditionally been used for public expression.
 - b. Examples include sidewalks, streets, and public spaces in front of city halls.
 - c. If the government imposes a *time, place, and manner restriction* that is *content neutral* (does not regulate the subjects to be

addressed) and **viewpoint neutral** (does not regulate the perspectives advocated),²⁰ intermediate scrutiny applies.

- i. Example: a regulation prohibiting the use of amplifiers after 9 p.m.
 - d. If a restriction is content-based, it is subject to **strict scrutiny**.
2. Designated Public Forums
- a. These forums are opened up by the government for the *specific purpose of allowing for public expression* (e.g., an auditorium opened up to the public).
 - b. Like traditional public forums, the **strict scrutiny** test (LRM to a CSI) is applied. However, in contrast to traditional public forums, designated public forums may be closed down completely.
 - c. Time, place, and manner restrictions are subject to intermediate scrutiny.
 - d. Limited Designated Public Forums
 - i. A designated public forum may be opened by the government for a limited purpose (e.g., a public forum at a public school for school groups only).
 - ii. The restrictions must be **content** and **viewpoint neutral**.
 - iii. A school may not, for example, discriminate against a school group because it is religious.
3. All Remaining Government Property
- a. Remaining government property includes the Houses of the Senate and Congress, the Oval Office, naval bases, and the like.
 - b. When the government restricts speech in these places, the **rational basis test** is applied and the ban needs only to be rationally related to a legitimate state interest.
 - c. The restrictions must be reasonable and not viewpoint-based.
 - i. *See International Society for Krishna Consciousness, Inc. ("ISKCON") v. Lee* (U.S. 1992) (Rehnquist, J.), where the plaintiffs "ISKCON" challenged a regulation prohibiting the distribution of literature and the solicitation of money in airports. Held: airports have not been historically available for the expression of free speech and are **neither traditional nor designated public forums**. The government thus only needs a **rational basis** to restrict speech. Since solicitation in airports may cause disruptions and delays, it may be prohibited. However, *the distribution of literature is permitted*.
 - ii. Dissent (Souter, J.): airports fit the archetype of traditional public forums. Strict scrutiny should have therefore applied.

²⁰ A restriction based on the viewpoints expressed is never permitted.

C. GOVERNMENT SPEECH

1. Government must allow all viewpoints equal access when it creates a forum, *not when the government undertakes speech*.
2. The government may endorse and express certain viewpoints without expressing alternate viewpoints.
3. When government undertakes speech by subsidizing one constitutionally-protected category of programs, it is not required to equally fund other related constitutionally-protected programs.
 - a. *See Rust v. Sullivan* (U.S. 1991) (Rehnquist, C.J.), where a federal statute *subsidized family planning clinics*, but prohibited doctors of the clinics from even discussing abortion with clients. The statute was held to be constitutional, even though abortion is constitutionally protected: the government need not subsidize every constitutionally protected program just because it subsidizes one.
4. Thus, citizens may be compelled to fund government speech. However, government may not compel citizens to carry, support, or adopt its speech.
 - a. *See Wooley v. Maynard* (U.S. 1977), where the motto “Live Free or Die” on N.H. license plates was held to be an impermissible compulsion of expression.
5. Furthermore, private law schools may be compelled by the government to allow military recruiters onto their campuses even if the law schools disagree with the policies of the government and of the recruiters.
 - a. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (“FAIR”)* (U.S. 2006), where Congress, in passing the Solomon Act, required law schools to give military recruiters the same rights that other recruiters had on their campuses, despite many law schools’ opposition to the military’s homosexuality policy. The law schools challenged the act and the Court held that: (i) the statute did *not* require the plaintiff to engage in speech; (ii) the fact that schools were letting recruiters on campus to speak with students did *not* mean that the schools were being compelled to support the government speech; and (iii) Congress was *not* prohibiting expressive conduct, since exclusion of the recruiters could be interpreted to mean, *inter alia*, the recruiters decided not to come that year.

D. TERMINATION OF PUBLIC EMPLOYEES AS A RESULT OF SPEECH

1. Private employers have free reign in telling their employees what they may and may not talk about on the job. Normally, such employees have no legal recourse.
2. The government, however, is *bound by the First and Fourteenth Amendments* when dealing with employees.

3. The government may not restrict the speech of its employees when they speak as citizens on matters of public concern. The speech, when balanced against the interests of employers, must not be very harmful.
4. However, there is *no constitutional protection* for the speech of government employees undertaken within the scope of their employment.
 - a. *See Garcetti v. Ceballos* (U.S. 2006), where the plaintiff Ceballos, a deputy district attorney, questioned via intra-office memorandum an affidavit used to obtain a warrant. Claiming that his employer retaliated by firing him, the plaintiff sued. Held: the plaintiff is not protected under the First Amendment, because his speech was made pursuant to his official capacity: he was speaking not as a citizen, but as an employee. Factors to consider: the conversations occurred inside the office rather than in the public (not dispositive); it concerned his employment (not dispositive); and the expression was made pursuant to his duty as a deputy (controlling factor).
 - b. *N.B.*: this case gives employees incentive to go to the newspapers and outside channels, where their speech will be protected under the First Amendment. They will then be within the realm of citizens speaking on matters of public concern.

E. THE IMPERMISSIBILITY OF GOVERNMENT CONTENT AND VIEWPOINT DISCRIMINATION

1. When a statute is merely a time, place, and manner restriction on free speech, *intermediate scrutiny applies*.
 - a. *See Hill v. Colorado* (U.S. 2000) (Stevens, J.), where the Court upheld a Colorado statute restricting speech made within one hundred feet of entrances to health care facilities and prohibiting protesters from approaching within eight feet of persons entering such facilities. Because the restriction addressed not the content of speech but rather, its location and manner, *intermediate scrutiny* applies: the restriction must be substantially related to an important government objective and it must *leave open alternative means of communication*. Here, the statute serves the important governmental objective of protecting the right to be left alone and protestors have an alternative means of communication (*e.g.*, holding placards from across the street).
 - i. Dissent (Scalia, J.): these restrictions are not content-neutral; they clearly target pro-life advocates. Strict scrutiny should have therefore been applied. Furthermore, the government interest cited by the Court is not legitimate; the right to be left alone was only declared in a dissent by Justice Brandeis and it was referring to the people's rights to be left alone *from the government*, not from private protesters.
 - ii. *Comment*: the Court failed to see through the nature of this statute, which, like that of *Church of the Lukumi Babalu Aye, Inc. v. City*

of Hialeah, was facially neutral but targeted anti-abortion groups, the only groups that generally protest outside of health care facilities.

2. Content-based regulations of speech are subject to strict scrutiny.
3. Viewpoint-based regulations of speech are not permitted.
 - a. Example: a public university excludes a student publication from receiving funds for printing, on the grounds that the publication endorses a religious viewpoint (*Rosenberger v. Rector* (U.S. 1995)). This is impermissible viewpoint discrimination.

F. COMMERCIAL SPEECH

1. Commercial speech is speech proposing a commercial transaction.
2. The Court considers the First Amendment to offer less protection for commercial speech than for non-commercial speech.
3. General rule: commercial speech is protected *unless* it: (i) is *false or misleading*; or (ii) *supports illegal activities*.
4. There is a four-part analysis for determining whether the regulation of commercial speech is constitutional:
 - a. The expression must be *protected* (it may not be untruthful or misleading or support unlawful activities);
 - b. There must be a *substantial asserted government interest*;
 - c. The regulation must *directly advance* the government interest;
 - d. The regulation must *not be overbroad*.
 - i. See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (U.S. 1980), where the defendant Public Service Commission's regulation prohibiting electric utilities from advertising in a way that would increase electricity consumption was held to be unconstitutional. Although there was an energy shortage, the ban prohibited the defendant from providing information on electric devices that would not affect overall energy consumption. *The regulation was overbroad*. Judgment for the defendant is reversed.

G. WORDS VERSUS CONDUCT

1. An act becomes *symbolic speech* when it conveys a message.
2. When an act involves both speech and conduct, the conduct element may be regulated even if it burdens free speech, as long as the regulation furthers an *important government interest*.
3. The following *O'Brien* four-prong test is to be used:
 - a. The regulation is within *constitutional authority*;
 - b. It furthers an *important government interest*;

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GUIDELINE CHART FOR DETERMINING STANDARDS OF SCRUTINY

	STRICT SCRUTINY	INTERMEDIATE SCRUTINY	RATIONAL BASIS SCRUTINY
Burdens:	<i>The burden is on the state to show that the challenged measure is necessary²⁶ to protect a compelling state interest.</i>	<i>The burden is on the state to show that the challenged measure is substantially related to an important state interest.</i>	<i>The burden is on the challenger to show that the challenged measure is not rationally related to a legitimate state interest.</i>
When the standard is used:	<i>Discrimination based on suspect classifications: race²⁷; national origin; alienage²⁸; fundamental rights²⁹; illegitimacy (sometimes).</i>	<i>Discrimination based on quasi-suspect classifications: Gender (sometimes subject to a hybrid level of scrutiny between intermediate and strict scrutiny); illegitimacy (generally).</i>	<i>Discrimination based on all other classifications: Homosexuality/ sexual conduct; illegal alienage and children of illegal aliens; handicap; mental retardation; age; social and economic classes; poverty; state residency; alienage.³⁰</i>
	<i>Restrictions on express and implied fundamental rights: First Amendment rights; interstate travel; privacy; criminal due process; voting.</i>	<i>Time, place, manner speech restrictions/ symbolic speech (the <i>O'Brien</i> “quasi intermediate scrutiny” test is used when the restrictions are content-neutral).</i>	<i>No fundamental rights burdened: the right of illegal aliens to vote; the right to recreational hunting.</i>

²⁶ “Necessary” means it is a narrowly tailored means; in statutes, it is sometimes referred to as the “least restrictive means.”

²⁷ Affirmative action is also subject to strict scrutiny.

²⁸ For state classifications not going to the “heart of representative democracy.”

²⁹ When classifications are drawn that unduly burden some fundamental right.

³⁰ *N.B.*: alienage is subject to rational basis scrutiny when Congress creates the classification or when a state creates a classification going to the “heart of representative democracy.”

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GLOSSARY

Ad coelum doctrine Under this doctrine, for the purpose of immovable minerals, “to whomever the soil belongs, he also owns to the sky and to the depths.” It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An unconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the “but-for” test (*i.e.*, “but for A, B would not have occurred”). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion See *RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow See CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff’s claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

Ex post facto law (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malice aforethought *and* premeditation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

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