

CONSTITUTIONAL LAW
6 & 7 January 1998

Overview of MBE Constitutional Law

- MBE Con. Law is strange; only an MBE topic since 1978: Lecturer (John Jefferies of UVA, also teaches Crim.) took the MBE Con. & Crim. Law exam. He missed 4 Con. Law questions, including 2 from an opinion he wrote as a law clerk
- Possible to suffer from knowing too much on this portion of the exam
- Law School is creative reasoning to determine why something is a constitutional right: But the Bar exam is sort of a mechanistic, buzz word heavy, and superficial
- MBE follows the Supreme Court: Test doctrines that Supreme Court is currently concerned with; almost never tests topics that are not of interest to the current Supreme Court
- MBE follows Supreme Court at a slight distance, will not test on current events; usually wait for 3 years so that stuff (topics) can get into the law school curriculum
- In MA, as well, Con. Law is also a possible essay topic (about a 50% chance will get a Con. Law Essay on MA bar). The MA Con. Law Essay also includes the MA Civil Rights Statute
- When see a Saint on MBE, will get nothing on Bar Exam
- Topics for Essay + MBE = Standing, State Regulation of Commerce absent Federal Regulation, Procedural Due Process, Takings Clause, 1st Amendment
- Will be 33 MBE questions in one of 3 broad topics
 - I. *Separation of Powers*: the 3 branches of the Federal Government and the relationships between them); about 1/3 of MBE questions will be here (total of 11 questions)
 - II. *Federal System*; Relation of the US to the states, and between the states: maybe 7 questions
 - III. *Individual Liberties*; maybe 1/2 or 17 questions

PART ONE

I : Separation of Powers

Essentially, look at the 3 Main Branches

A – Judiciary (most important one on the bar exam)

B – Legislature

C – Executive

A: Judiciary

- Federal Courts do not render *Advisory Opinions*
 - Unconstitutional to do so: for example, if Court asked to rule on the Constitutionality of a Law not yet enacted, that is unconstitutional
 - MBE question: Federal statute says federal courts have jurisdiction to hear some specific types of claims; but some executive officer needs to approve the court decision (i.e., the executive officer can set aside the decision of the court); That is unconstitutional because the real decision maker is not the court, but the executive officer; further, the role of the court is making a mere advisory opinion and that is unconstitutional; Federal court decide cases, they do not make recommendations

- Cases must have *Ripeness*; there must be actual harm or immediate threat of harm to be ripe (won't decide a remote controversy)
 - For example, 18 USC 1730: it is a criminal law violation to wear, if not one, the uniform of a postal carrier, exception for actors though. Hypothetically, if added an exception to the actor's exception requiring that the actor wearing the uniform could not say anything derogatory about the postal service, would seem to be Unconstitutional: So, if a producer later wants to put on a play, with derogatory mention of postal service, could he go to court to enjoin the government from enforcement of the statute? What would the government's argument be? The MBE answer: well, the statute is unconstitutional, but the government argument could always be *Ripeness, Mootness, or Standing*; Why? Ripeness, Mootness & Standing have nothing to do with the merits; the government could have a loser on the merits, but still win the case under a Ripeness, Mootness, or Standing argument; Since 18 USC 1730 is never really enforced, it cannot be considered ripe; there is no actual harm nor realistic threat of harm. However, if a USA threatens prosecution under the statute, will then be ripe and can go to court, since the producer of the play would be actually threatened
- *Mootness*; most cases are over-ripe: have died on the vine: dismiss when become moot (including during the trial). If become moot during appeal, the judgment below will be vacated and the action dismissed.
 - Most MBE questions here are easy (since it is such a mushy topic)
 - However, '*Controversy Capable of Repetition, yet Evading Review*' is NOT MOOT; Even though look like moot, it is not moot; How to recognize? Always involve an INTERNAL TIME LIMIT; controversy won't last long enough for a court to finally settle the dispute. For example, a woman is pregnant and wants to challenge a law banning an abortion so as to get an abortion. No pregnancy will last long enough to get the case to the Supreme Court. And usually, if case becomes moot, case will be dismissed, and statute will remain, unchallenged, on the books. There will be a recurring controversy, case, mootness; repeated and repeated. Supreme Court, however, says if the controversy is capable of repetition, but can't get final review because of mootness, will not be moot in this type of situation.
 - Also, in a *Class Action*, the named party is not alone, in fact, the entire party is before the court. However, if the named party's case becomes moot, that is immaterial so long as the action is live to the other class members.
- *Standing*; always 1 or 2 Standing MBE questions. Usually part of the essay also. 3 component parts: *injury, causation, redressability*
 - *Injury*; have been or will be injured
 - *Causation*: Defendant caused or will cause injury; essentially a factual issue, not MBE material
 - *Redressability*; Court can do something; either damages or injunction; essentially a non-issue, but some MBE Questions
 - Hypo: Co. A applies for license and gets turned down. Co. B applies for and gets the same license. Co. A sues Government to enjoin the licensing of Co. B. Problem with suit, there was an injury (the improper denial of license), but the proper remedy is the granting of the license to Co. A., not the improper revocation of Co. B's license.

Proper remedy is to cure the injury, not to injure another. MBE says Co. A lacks standing to seek relief. Misery loves company is not a rule of law, Remedy sought must not injure another.

- For purposes of standing, *Injury* is almost any harm; not limited to economic/financial/tangible; can include most things; However Mere Ideological Objection is NOT an injury for purposes of standing (i.e., an individual can not challenge the conduct of the government simply because he does not like it)
- *Organizations*: may have standing if members (individually) have standing and injury related to the purpose of the organization. The existence of an organization does not create standing, members must have standing and injury (not a mere ideological objection). Essentially, look through the organization to see if the component members have standing
- *Tax Payer Standing*; This does not deal with litigation over individual tax liability; taxes are real injuries and the tax payer, of course, has standing to challenge the amount of money that the IRS takes. But Tax Payer Standing, in this sense, refers to a tax payer who objects to the way the government spends its money. Generally, there is no tax payer standing to challenge a government expenditure. Why? No real injury to the tax payer. Once the government taxes you and takes your money, the money is theirs and they can pretty much do whatever they want to with the money. This spending of the money will not affect your tax bill, and, ergo, the tax payer has no real injury when the government spends the money in a way the tax payer does not like. Exception; Any tax payer may raise an Establishment of Religion Challenge to a government spending program.
- *Third Party Standing*; raising rights of someone else. To get to court must suffer an injury. Generally, only may raise your own rights and claims. Exception; may raise rights of someone else (so long as you, too, are injured) if you and the other are *parties to an exchange or transaction*. For example, Dr. says Medicare not re-imbursing him for abortions he performs. His injury is not getting paid. Plus, there is Constitutional protection of abortion rights for women. Supreme court gave him standing. Also, people wishing to hear a speaker may raise the rights of the speaker (as parties to an exchange)
- *Adequate and Independent State Grounds*: (AISG): High percentage of times, this will appear on MBE. Concept: Supreme Court can review state court judgments. Supreme court reviews only federal questions (won't second guess the highest state court on questions of state tort law, etc.). Rule: Supreme Court will review a State court judgment only if it turns on federal grounds (Supreme Court will NOT hear a case with AISG). AISG is label for the absence of a decisive federal issue. If the federal issue controls the outcome of the case, there is no AISG and the Federal Supreme court may review the case. There will be AISG where the federal issue does not affect the outcome of the case. This happens where the Federal claimant wins anyway under the state law. The federal claimant is often either a criminal defendant or civil rights plaintiff. If the federal claimant wins anyway under the state law, then the federal issue does not matter (i.e., it won't affect the outcome). For example, a state law criminal defendant is searched. He wants to suppress that evidence. He essentially has 2 arguments. 1. A Federal 4th Amendment and 2. State Constitutional. If the case goes to the highest state court and the highest state court says that the evidence must be suppressed under the state constitution (regardless of the 4th Amendment argument), then if

that evidence is suppressed as a matter of state law, then it is suppressed, the federal claimant wins under the same state law. The federal claim no longer affects the outcome of the case. Supreme court will not hear the case. There is AISG.

- Another example is the Texas public school scheme for financing education. *San Antonio v Rodriguez*. The MBE question on this case/topic would describe the holding of *Rodriguez* and then ask if next year, under the same theory, but using a state law argument under the state constitution, the Texas Supreme Court struck down the public school financing scheme, could the US Supreme Court reverse the Texas Supreme Court's decision? The answer would be no. The Supreme Court of the United States could not hear the case because the proper interpretation of the Texas Constitution is the business of the Texas Supreme Court and there is no controlling federal issue. ERGO, the Texas Court's decision is based on AISG and the case never reaches the federal courts. Remember; Civil Liberties provisions of the Federal Constitution are a floor and not a ceiling. No state can give less than the federal constitution requires (if they do, it is a decisive federal issue and there is no AISG). But a state court can construe a state constitution and can always give more than the federal constitution requires. If state court under state statute/constitution gives more rights than the Supreme Court and Federal Constitution, that is OK, there is AISG and no Federal Supreme Court Review.
- *Doctrine of Political Question* – a political question is a question the court won't decide. It is non-justiciable, beyond judicial review or competence. Since these political question clauses of the constitution cannot be enforced in court, they are essentially worthless. There are really 4 big Political Questions.
 1. *Republican Form of Government Clause (Guarantee)*: This is almost never a right answer to any MBE question.
 2. *True Foreign Affairs, Military Command Decisions*; the president may receive foreign ambassadors, break-off diplomatic relations, attend a summit, send the fleet to the Gulf, go to DefCon 3, all essentially without judicial review since they are deemed political questions.
 3. *Seating of Delegates*; Whether delegates seated; 2 groups show up at convention, which group actually selected and seated is not justiciable. Rather, let the convention decide it.
 4. *Impeachment procedures*. Impeachment is the device by which Senior officers are removed from office. Impeachment is done in the House and it is merely an accusation, or indictment. The Senate conducts the trial, and if 2/3 find guilty, the officer is thrown out of office. Hypo; If the Senate elects a committee to hear the evidence and then to make a recommendation to the rest of Senate for a vote, is that Unconstitutional? Supreme court says that is a political question and as such is non-justiciable.
- *11th Amendment*. Very arcane. The key to understanding it is to avoid actually reading it and rely on the Supreme Court's interpretation. '*Cannot sue a state for money damages in Federal Court unless the State consents OR the US Congress expressly says it can be done to enforce 14th Amendment Rights*'. The 11th Amendment is designed to protect the states and state agencies and NOT LOCAL GOVERNMENT. There is no 11th Amendment immunity for cities, counties, or towns. This is the only place in Constitutional Law where states and localities are treated differently. But, if can't sue the state, who may a grievant sue? May still sue or enjoin a state officer (a § 1983 action). If may enjoin a state officer, basically

enjoin the state (since a state can't act as an abstraction, but rather must act through some agent). Bottom line, can get money damages from State if US Congress expressly says you can sue the state to enforce 14th Amendment rights.

B: Legislative Power

- Supposed limited powers, but Federal government can pretty much do just about anything so long as do not violate individual rights. MBE usually gives you a federal statute and then asks you to tell from which power the government is authorized to make that statute.
- Several Powers
 - War Powers
 - Bankruptcy, Patent, Copyright
 - Army/Navy
 - DC
 - Federal property ownership
 - Immigration & naturalization
- The Big 3, though, are **Taxing, Spending, Commerce**
- Pick the taxing power when a tax, the spending power when the government spends, and commerce for the rest. For example, Congress passes a law saying no state receiving federal highway funds may have a speed limit greater than 55 m.p.h. This comes under the spending power. Virtually nothing exceeds Congress's power under the Commerce Clause. This covers interstate commerce, and virtually everything falls under interstate commerce. Congress may even regulate *Intrastate Activity* that has a *Substantial Effect* on Interstate Commerce. This means virtually everything. Remember Wicker v. Filburn where growing wheat and feeding it to the hogs on own farm, which were then slaughtered for consumption on same farm was deemed to have a substantial effect on interstate commerce. Test, if 100 million people did it all at once. Under that test, nearly all intrastate commerce will fall under interstate commerce and regulations of the federal government.
 - Note, though, the Lopez Case where Congress made it a crime to possess a weapon within 1000 feet of a school. Supreme court struck that law down. Congress did not establish substantial effect on interstate commerce. Could have, and if want to change the law, should make it illegal to hold an interstate weapon within 1000 feet of school (for interstate commerce clause purposes)
- *Regulatory*; Remember, Congress can't force states to adopt or enforce regulatory programs. But it may bribe states to do it (force compliance through disbursement or withholding of federal spending). Plus, Congress could even create a federal regulatory agency/program.
- *13th Amendment*; Eliminate Slavery and gave Congress a Comprehensive power to legislate against racial discrimination
- *Necessary and Proper*; it is an Add-on to other powers (not independent, stand-alone power). Allow Regulations to be enacted to enforce the other powers.
- *Delegate*; Congress may delegate and does so when create and Administrative Agency; Congress must give criteria for conduct.
- *Power to Promote the General Welfare*; This, too, is a Bad Answer; Standing alone, it is not a power of Congress. It is in the Preamble and does not count

- *Speech or Debate Clause*; For example, if Senator is bribed. Constitution does not give a right to solicit or take bribes. However, Speech or Debate clause is an evidentiary privilege. Allows for legislators to exclude certain evidence. Rule; Federal Legislators and Aides can never be prosecuted or punished in relation to their official acts. This means that the prosecutors cannot use an official act as evidence in a court of law. Need to prove some other way. An official act = introducing or voting on legislation, speeches on floor or in committee hearings. Does not apply to speeches made in hotel rooms caught on hidden video tapes, a la Abscam.
- *Legislative Veto*: Unconstitutional. For example, law states some executive officer can do X, but if legislature does not like it, the House/Senate can overrule the executive decision by majority vote. Why is this Unconstitutional? Congress is trying to veto executive decisions by simple resolutions (simple majority votes). How can congress control the executive? Change the law. Difference between resolution and change of law. The *Presentment Clause*. To become law, the bill must be presented to the President, and if vetoed, cannot become law without a 2/3 override. So if Congress wants to change the law, the President must get involved. That is the Constitutionally prescribed way of doing things. If legislature wants to control the executive, Constitution specifies the way to do it. And a Legislative Veto is not a way in which it can be done.

C: Executive Power

- The president has the power to enforce the law, not to make it nor break it. Must obey the statute, in general
- Certain presidential powers cannot be overridden by the Congress.
 - Congress can't compel *Criminal Prosecution* of anyone. A federal criminal prosecution is usually begun by a US Attorney or Special Prosecutor (Exec. Or Court), not legislative branch.
 - Congress can't control the *Pardon* power. President may pardon whomever the president wishes.
 - Congress can't hire or fire *Executive Officers*. An executive officer = anyone who takes action on behalf of the United States. Congress can hire/fire its own staff and people performing staff like functions (investigative, recommendation, advise). Way that MBE tests this is backwards. Congress can't give Executive power to any person it may hire or fire. No Executive power to any person Congress controls. Executive power can't be given to an officer under the control of the legislature.
- Executive Power is at its Zenith in *Foreign Relations*;
- Executive Privilege: All claims of Executive Privilege resolved by a *Balancing Test*. Weigh the need for material against the presidential desire for confidentiality. MBE, remember balancing. Categorical answers here are usually wrong. Look for a balancing answer.

II – Federal System

Essentially, 2 dimensions to look at

Vertical; the Relation between the US and individual states

Horizontal; the Relation between States

Vertical; US-State

- Federal superiority and state inferiority. Valid federal law pre-empts inconsistent state law. State law is pre-empted not simply because on same topic as federal law. But pre-empted only if conflict or inconsistency. On MBE, for example, federal auto emissions standards, must be at least 90% free of certain pollutants. However, a New Jersey statute requires only 85% free. That statute is pre-empted. Whereas a CA statute requiring 95% is still valid and not pre-empted because no conflict with federal statute. The key question for pre-emption is to read law carefully to see if conflict. Pre-emption of field, Congress statute wants no state law in certain area. Then any state law in that area is inconsistent with federal legislation and is pre-empted.
- No state interference with foreign relations; states must have same policy as the United States
- State Regulation and Taxation of Federal Entity: no state regulation or direct taxation of federal entity without federal consent

Horizontal: State-State

- There will be up to 4 MBE questions on this. There are 2 similar but distinct clauses; 1. Privileges and immunities of state citizenship under Article IV and 2. Negative (dormant) commerce clause.
- *Privileges & Immunities of State Citizenship Under Article IV* (NOT = 14th Amendment Privilege & Immunities of National Citizenship). Bars serious discrimination against out of state Individuals (not corporations). What is a Serious discrimination? Generally in the employment context. State may not require state citizenship or residency for employment in state or for an employment license (for example, to take the bar exam or be a member of the bar, need not be a resident of the state). However, state may require residency for government workers if good reason (for example cops living within jurisdiction). Cops may have a residency requirement, but can't have the same residency requirement for private employees, like security guards.
- *Negative (Dormant) Commerce Clause* (will be on MBE and Essay). Concerns state regulation of commerce in absence of federal action. States may not regulate if federal government already regulating. But, if unexercised federal regulation, states may regulate with some limitations. General Rule; No state discrimination against out of state interests. How can there be discrimination against out of state interests? Prevent out of state company from doing business within the state. That is illegal. So is taxing out of state products at higher rates. Exceptions; Some times, state has good reason to discriminate, usually involve live organisms (fruits & vegetables). Also Subsidies; when state hands out money, the state may always require residency (welfare, in-state tuition at a state university are subsidies and may require residency), also State as Market Participant; Can buy from or sell to whomever it wishes. For example, South Dakota used to own 5 cement plants and would sell only to South Dakota buyers. And if New Jersey owns a large land-fill, can accept only NJ garbage from NJ, but NJ could not prevent private landowners from accepting out of state garbage.

- *Non-discriminatory State Regulation of Commerce.* Routinely upheld as Constitutional, but not always. Non-discriminatory regulations of commerce will be struck down if it unduly burdens interstate commerce. Test for Unduly Burdensome is a Balance of interest served by the law against the cost of compliance. For example, (of a non-discriminatory law found to be too burdensome) Truck Mud Flaps. Most states have rectangular ones on the trucks, but one state decides to permit only rounded mud flaps (so have to change mud flaps when cross state lines). Too expensive to change mud flaps between states. Supreme Court said this unduly burdens interstate commerce and is invalid.
- *Congressional Consent.* What happens if Congress consents to state regulation of commerce? Rule: When Congress authorizes state regulation of commerce, nothing the state does will violate the commerce clause (even if discriminatory). For example, many banking and insurance regulations (permit SC to discriminate against out of state insurance companies because
- *21st Amendment.* Repeals prohibition. No Constitutional Right to Drink. But gives state the right to control consumption of alcohol within borders. Exception (to most Constitutional law). Gives states power which federal government does not have. State cannot interfere with interstate transportation of booze, but it can regulate consumption as it pleases. Age used to be 18. But Congress bribed states. Said that in order to get Highway money, had to raise drinking age to 21. (Part of the Spending Power of Congress).
- *Power of States to Tax Interstate Commerce.*
 - *Non-discriminatory taxation* is usually upheld and Congress may consent to or prohibit virtually any kind of state taxation of interstate commerce. No Discriminatory taxation is permitted
 - *2 Requirements for Non-Discriminatory Taxation.*
 1. Substantial nexus between state & entity to be taxed
 2. Fair Apportionment (don't want multiple taxation by every revenue agency)
 - *Substantial Nexus between State & Entity to be Taxed.* In a sales tax state, the seller is responsible to the state for money collected. All states can tax sales made in state. However, the state may not tax an out-of-state seller (for example, catalogues). However, may impose a *Use (Purchase) Tax* on in-state purchasers.
 - *Fair Apportionment.* Think about unitary taxation of a MNC operating in many jurisdictions. For example, GM, has a substantial nexus in every state. There may be 2 ways to tax.
 1. Tax income earned or property held in that state (tax local incidence)
 2. Unitary Tax: state taxes the world wide income, but only by a certain percentage reflecting the percentage of revenue earned in that state. The tax on the percentage of global income = percentage of income earned within the state.
 - *Ad Velorum Tax.* Taxes on personal property.
 - *Commodities* (= goods made in 1 state & sold in another v. instrumentalities, which are the transportation modes). The key concept in the tax of commodities is the *TAX DAY*. Pay the full tax to every state where goods are stopped for a business purpose on Tax day. No taxes are due where the commodities are merely passing through the

state (within the state only due to incident of transportation). Does not matter if sit in warehouse, if only reason in state is transportation, then the goods will not be taxable on tax day.

- *Instrumentalities of Interstate Commerce*. Treated differently than commodities. Instrumentalities are things like trucks, or the vehicles that transport the goods interstate. Rule: Non-discriminatory tax valid if there is a substantial nexus between the state and the entity to be taxed + fair apportionment. Every state through which a truck passes has a substantial nexus with the truck (though not the goods/commodities contained therein) but there must be fair apportionment. For example, if 2% of the miles that a truck travels in a year are in Rhode Island, Rhode Island may tax only 2% of the value of the truck. This is different from the commodities rule.

PART TWO

III – Individual Rights

- Concept of **State Action**
 - Bill of Rights originally applied only to the federal government. Today, Bill of Rights applies to States & localities via 14th Amendment
 - State Action means government action, whether state or local.
 - If no State action, no Constitutional Right Violation
 - Must show state action to show violation of Constitutional rights (with rare exceptions)
 - Usually presence or absence of state action will be clear. If there is a commingling of state and private action, the court will look at and weigh each. On exam, important to identify the issue, see presence or absence of state action.
 - Most major state action precedents involve racial discrimination
 - Government can't discriminate against minorities
 - Government can't facilitate private discrimination against minorities
 - Government can't profit financially from discrimination
 - Government can't enforce a private agreement to discriminate (racially restrictive covenants). But the government does not have to prevent or forbid private discrimination. Government may allow private discrimination so long as own conduct is even handed.
 - *For Example*. Boston ordinance requires people to be registered Democrats to use the Common. Pretty clear that it is state action, violate 1st Amendment right to be a Republican. Therefore, it is unconstitutional. But, some private person with a big house invites only Democrats to his party. If Republicans show up, he calls the cops and tries to have the Republicans arrested. Did the Boston Cops violate the Republicans' constitutional rights? Private citizen can choose to keep Republicans out, but City of Boston, arresting the Republican, is it a state actor? Does it violate any constitutional rights? Supreme Court says that the law of trespass protects all landowners against trespassers so long as trespass laws are applied even handedly.
 - *For Example*. Moose Lodge Case. Black guy applies for membership to Moose Lodge, turned down on account of race. Black guy sues claiming Constitutional Right violated. State Actor? Not the Moose Lodge, but guy sues State + Moose Lodge because State gave Moose Lodge a liquor license. Argument is that when government gave racist club a liquor license, government became a violator.

Supreme Court rules that so long as liquor license given even handedly treatment by the government, Government acts Constitutionally.

- Don't confuse state action with Anti-discrimination Statutes. To show constitutional violations, must show state action. But state action is irrelevant if violate state anti-discrimination statute. Legislators may control private conduct (which has nothing to do with state action) through statutes which must be obeyed. *For Example*, private club refusing to admit women. No violation of Constitutional rights (no state action), but may violate state law if there is an anti-discrimination statute. 1964 Civil Rights Act; forbids discrimination in employment. MA has a broad Civil Rights Statute which covers both private and state action. So, even if no Constitutional challenge due to absence of state actor, also may have MA state Civil Rights case against the private discrimination.
- Concept of **Retroactivity**
 - **Ex Post Facto**. It is unconstitutional to have an ex post facto law. That is, to create a new crime out of a previously legal activity, and apply the new law retroactively, or to increase the punishment for an existing crime
 - **Bill of Attainder**. Legislative Conviction without Judicial Trial is unconstitutional.
 - **Contract Clause**. Forbid retroactive impairment of contracts unless there is an overriding need (= nature of an emergency; it is not good enough for the government to change its preference. An emergency is something like the Great Depression)
- Concept of **Procedural Due Fairness**
 - Right to Notice + Hearing, Protect only Life, Liberty, & Property
 - **Life**; easy, like the death penalty
 - **Liberty**: locked up in prison, physical punishment, corporal punishment (spanking school child), withdrawal of a legal opportunity. For example, a woman was 'posted' in Wis. (couldn't buy liquor). That is a loss of liberty. However, a mere injury to reputation is not a loss of liberty
 - **Property**; usually pretty clear. However, there are some gray areas. Like Government Jobs and Government Benefits. For these to be *property interests*, require Entitlement. 'Mere Expectations' are not property interests. Must distinguish between Entitlement & Mere Expectation. For the Bar exam, an Entitlement is what the government says is an entitlement. At will employment is a mere expectancy and not an entitlement. If give a government job (state college professor) for 5 years, which is guaranteed unless terminate for good cause, and fire the guy 3 months later, he should be entitled to a Notice + Hearing, since that job was an entitlement. A typical MBE question will be: a state statute requires tenure after 5 years. Professor is let go after 3 years. What is the professor's strongest argument for Notice + Hearing? What is the Government's Best Argument? Well, this may be a loss of property only if it is an entitlement. Entitlement comes from the government terms of employment (or race, religion, speech). Best Argument is that the President of the College (a state government officer) made a promise of re-employment, thereby creating an entitlement. The property interest comes from the entitlement (for purposes of procedural due fairness) Best argument against professor (and for

government) is that the statute requires 5 years of service, and there is no entitlement after only 3 years.

- Procedural Due Process requires, 1. State Action, 2. Loss of life, liberty or property, and 3. Notice + Hearing.
 - Deprivation of life, liberty, or property means intentional deprivation, and NOT accidents. If an accidental loss of life, liberty, or property occurs, then it is an ordinary tort claim, and not a Constitutional Claim.
 - When Government Intentionally takes life, liberty, or property what happens? How much procedural process is due? It depends on the circumstances
 - Analysis; Balance the importance of the individual interest (life, liberty, property) at stake and the Value of procedure claimed in protecting that interest (right to an attorney, etc.) against the Government's Interest in Efficiency
 - Hence: Importance of Issue + Value of Procedure – Govt. Interest in Efficiency
 - Big Issue in Due Process is the *Timing* of the Hearings (before or after the deprivation). Welfare benefit termination requires Pre-deprivation hearings. Academic Dismissal permits post-deprivation hearings. For *Tenured Public Employees* (more than just college professors, but anyone who can be terminated only for cause, which creates an entitlement and property interests), some type of hearing is required before termination (though may not be a big, formal hearing).
 - *Access to Courts by Indigents*. Some times, courts require a fee for litigation. No problem for those who can afford it. But must the government waive fees for indigents? Bottom line, yes (for divorce, though not bankruptcy). Supreme court requires a waiver of the fee for litigation when the litigation involves a *Fundamental Right*. Bankruptcy is not a fundamental right. Marriage (and divorce) is a fundamental right. Can't be too poor to be married or divorced, but can be too poor to be bankrupt.
- Concept of the ***Takings Clause***.
 - Private property shall not be taken for public use without just compensation.
 - Private property = property not owned by the government, Public use = whatever the government wants to do with the property, Just compensation = Fair Market Value (at time of taking).
 - Big Issue: What constitutes a Taking of Private Property?
 - Can get screwed, but not taken (for example, if put a prison next to your house). There must be a taking, and not just a devaluation. Usually a taking requires *Physical Occupation*. If government forces you to allow others to occupy your property, then that is a taking (requiring a landowner to allow continuing occupation, like pedestrian use, is a taking)
 - Can there be a taking without physical occupation? In theory, yes, in practice, no. All the government need to do (to avoid a taking) is leave you with an economically viable use for the property (need not be the most valuable or best use)
 - Now, if zoning or preservation or other regulations affect the value of the property, usually they are legitimate. For example, the Grand Central case. Grand Central originally was built to have an office tower, which was to be built at a later date. Unfortunately, the Great Depression hit, and the tower was never built. Six Decades go by, and a developer wants to put up the office tower. City of New York objects

and says that it can't be further developed because of its landmark status. Developer says, OK, if I can't put it up, you, the city, should compensate me for the foregone profits (which was determined to be \$123 Million. Still, no loss and no taking because there was still an economically viable use for the property (namely a train station). In essence, to have a takings, must leave the property with no economically viable use.

- *Extortion Cases.* If want to build something, required to get permits. If the fee permit bears a reasonable relation to the cost to the community, then it will be permissible and not a takings. For example, if build a subdivision, you the developer need to pay the town for the connection to the highway, including stop sign, sewer extension, etc. However, if the fee bears no relation to the cost to the community, it is not proper and will be considered a taking.
- **Concept of Substantive Due Process and Equal Protection**
 - 14th Amendment consists of Equal Protection, Due Process, Privileges & Immunities of National Citizenship
 - PINC. Really means nothing. Historical importance, but no contemporary significance. If see it on exam, usually a Bad Answer. Reject instantly and move on.
 - 2 Due Process Clauses in Constitution:
 - 5th Amendment: Applies to National Government
 - 14th Amendment: Applies to States and Localities
 - Technically, there is no equal protection Clause for the national government, but Federal Government officials do not get a free ride for EP. Must play by the same EP rules, but under a different label. Called 5th Amendment Due Process.
 - Equal Protection and Due Process have the same 3 Standards of Review (*Magic Language*)
 1. **Strict Scrutiny.** Is the law *Necessary* for a *Compelling State Interest*. Also the Least Restrictive Means = for law to be *necessary*, there is no other better alternative. Government bears the burden of proving that the interest is compelling and that the means chosen were strictly necessary. Strict Scrutiny is used whenever there is a *Suspect Classification* or a *Fundamental Right* involved. (i.e., those are the triggers).
 2. **Intermediate Scrutiny.** Is the law *Substantially Related* to an *Important Government Interest*. Substantially is a little less than necessary and Important is a little less than compelling. Used for *Legitimacy* and *Sex Classifications*.
 3. **Rational Relationship.** Is the law *Rationally Related* to a *Legitimate End of Government*? This analysis is used for all other laws (beside suspect class, fundamental right, legitimacy, and sex)
- **Suspect Classification.** Triggers Strict Scrutiny and always raises Equal Protection Issues. Prime Suspect Classification is *Race & Ethnicity*. A racial or ethnic classification that burdens a minority will be struck down (unless the government can show a compelling reason, which it never can). This is usually straight forward. *For Example*, suburb of Chicago, white, bedroom community, with a zoning law that requires 100% of residents to have 2 Acres, single family homes. A developer wants to put in an Apartment Building. He argues that the effect of the zoning law is to keep the town white. Thinks this is an equal protection case which should trigger strict scrutiny. Town says that race has nothing to do

with the zoning law, and mere Rational Relationship analysis should be applied. Who wins? The town does. In order to show racial classification (not statute) under Constitution, must show a *Discriminatory Purpose*. It is not Sufficient to show a *Disproportionate Impact*. Note, though, that the Discriminatory/Racial Purpose need not appear on the face of the law. A facially neutral law can trigger discriminatory/racial classification if there was a racially discriminating purpose behind it. The plaintiff, though, must *Prove* the discriminatory purpose. This is essentially the law of *School Desegregation*. *De Jure Desegregation* is Unconstitutional, while *De Facto Desegregation* is permissible. De Jure Desegregation has been proved in Boston where there were no Segregation laws, but the purpose of certain laws was to separate the races. De Facto Segregation occurs where there was no discriminatory purpose that could be proved, and it usually occurs due to residential housing patterns for which the government is not immediately responsible.

- ***Affirmative Action***. Current Law is Unclear so the Bar will test on the Standard of Review. The test for Affirmative Action is Strict Scrutiny. In this area, *uniquely*, the test is Often met. The Supreme Court agrees that it is a *Compelling State Interest* to *Specifically Correct Prior Discrimination Against Minorities*. It is not good enough to say that the US has historically been a racist country. Instead, require specificity, i.e., the Boston Police Force historically has discriminated against blacks and needs affirmative action to correct. Only a specific target for affirmative action is good enough for a compelling state interest.
- ***Alienage***. Sometimes a suspect classification. Rule: No Requirement of US citizenship for Private employment or Government Benefits. (like membership to the bar or in-state tuition). Exception: 1. May Require US citizenship for certain government jobs (in the policy making or implementing positions, such as law enforcement personnel or public school teachers). 2. At the federal level, any reasonable regulation regarding alienage will be upheld (due to overriding federal interest in immigration).
- Note. In Massachusetts, there is the Civil Rights Statute § 151(b). This is a very broad statute, and applies to housing, employment, credit & services. Forbids discrimination based on race, religion, sex, pregnancy, (disability, sexual orientation). § 151(b) has no relevance to MBE, but relevant for the essay. Effect of § 151(b) is to provide strict scrutiny analysis in Massachusetts for all classifications (not just race and alienage).
- ***Quasi-Suspect Classification***. Intermediate Scrutiny. For *Sex & Legitimacy*.
 - Test: Substantially related to an Important Government Interest.
 - ***Legitimacy***. Whether parents married at the time of birth. Most Legitimacy laws have been swept off the books within the past generation (no real governmental interest in your legitimacy).
 - ***Sex***. More important in real life than on the bar. Test: whether substantially related to an important governmental interest. Most of the time, sex based classifications fail. No sex based employment benefits are permitted. 2 Exceptions: 1. Statutory Rape & 2. Draft. *Statutory Rape*: consensual intercourse with someone too young to consent. Usually laws are gender biased making it a felony for a man to commit and not a crime for a woman to commit. Supreme Court said that this bias was OK (owing to likelihood of underage girl getting pregnant, I suppose.) *Draft*: Supreme Court has OK'd the all

male draft. However, Supreme Court has found it Unconstitutional to have *Different Drinking Ages* for boys and girls (in Oklahoma). Most things, to pass muster, ought to have the same age requirement for both males and females.

- All other non-race, alienage, legitimacy, sex laws are judged by the *Rational Relationship* test. Is the law Rationally related to a Legitimate end of Government. Most laws pass this test. Law need not be wise, simply just not be insane. A few exceptions, but these are real odd ball cases.
- **Fundamental Rights.** The Other half of Strict Scrutiny. Both Due Process and Equal Protection.

1. **Privacy.** Really an Umbrella term covering several rights

- **Marriage** (or dissolution of marriage). Fundamental at Core (but not all marriage and divorce laws trigger strict scrutiny). Only the core is fundamental.
- **Contraception.** Right to BUY contraceptives (for all people). But no Constitutional right to use them. Only lawfully married couples have a fundamental right to use them.
- **Abortion.** Women can abort for any or no reason until the fetus is viable (state has no interest in life of fetus until viable). MBE will ask about procedural regulations. A procedural regulation is valid unless it places an undue burden on a woman's right to terminate pregnancy. OK: informed consent, 24 hour waiting period, parental notification, (parental consent or judicial consent); but, parental consent (alone) places an undue burden on a woman's right to choose. No government financing of abortion is required.
- **Obscenity in Home.** There is a right to read, but no right to sell, purchase or transport such obscene materials.
- **Family.** Parents right to raise kids as see fit. Includes elective medical care (until situation becomes life threatening, at that point courts and state will intervene). Also, a right to live together for close relatives if so elect. However, no right to group living with non-relatives.
- **NO Homosexual.** There is no Fundamental right to Sodomy
- **NO Hide.** There is no fundamental right to hide. State can investigate and snoop on you as it chooses.

2. **Voting.** Under the 14th and 15th Amendments, there is a fundamental right to vote. Strict Scrutiny, thus, applies. Laws struck down under strict scrutiny include *Poll Taxes*, *Property Qualifications*. VIP: One Person, One Vote. Means districts of equal size, so far as practicable, so votes are about equally weighted. Only known exception is the *Agricultural Improvement District* which had 1 acre 1 vote for body which regulated irrigation. Supreme court said that would be unconstitutional for a city government, but made sense and was constitutional in that case.

- **Gerrymandering.** Arrange voters to screw 1 side (race or party).
 - **Racial.** Can gerrymander districts to disadvantage a minority, create voter dilution. If this is done on-purpose, to disadvantage, it is unconstitutional. Today, gerrymander so as to favor a minority. Create majority-minority districts.

Voting Rights Act even requires racial gerrymandering in favor of minorities. Supreme court uses an affirmative action analysis. (to rectify specific past discrimination). However, the final district cannot be too bizarre looking. Rule: can racially gerrymander so long as don't create real bizarre districts.

- **Political**. This is done all the time. Virtually never struck down. But theoretically, could be struck down by one person, one vote.

3. **Interstate Travel**. Never really directly infringed, but comes up in connection with *Residency Requirements*. Long-term Residency Requirements burden the right of interstate travel and violate equal protection. How long is too long? For most purposes, 1 Year Residency Requirement is too long (except *Divorce & In-state Tuition*). Nothing more than 1 year is ever allowed.

- **MBE on Fundamental Rights**. Often try to give a non-existent fundamental right to fuck you up. For example, a school requires boys to trim their hair short, while there is no restriction on the length of the hair on girls. What is the best argument that this is Unconstitutional? (1) Violates Immunities & Protections of Federal Citizenship -> **Wrong**, (2) Violates Free Speech -> **Wrong**, (3) Violates Fundamental Due Process Right to Control one's Own Body -> **Wrong (sucker answer, no such fundamental right)**, (4) Violates Equal Protection **Right, applies to boys and not girls**, quasi-suspect class, not substantially related to an Important government purpose.
- **FIRST AMENDMENT ISSUES** (Up to 7 MBE questions, and almost certain Essay)
 - Required to Know Vocabulary:
 - **Vagueness**: If law gives no clear notice of what is prohibited, it is void for vagueness
 - **Overbreadth**: If law burdens substantially more speech than necessary for a compelling interest, it is over-broad
 - *For Example*: Nudity at drive-in movies: some may be obscene and legally prohibited, but some nudity is not obscene. Thus, if law bans all nudity from drive-ins, it is over-broad (since it prohibits both obscene and legal nudity)
 - Right NOT to Speak: People also have a right not to speak or say what they do not believe. The government may not force you to endorse and symbol or slogan. For example, you need not recite the pledge of allegiance. Also, *Pacific Gas & Electric Case*. The Utilities Commission wanted to order Pacific Gas to include in its bill a statement from an anti-nuclear power group. Supreme Court said Pacific Gas need not sponsor speech of its opponent.
 - Fundamental distinction. **Content Neutral Regulation of Speech v. Content Based Restrictions of Speech**. KEY: this is crucial. Every free speech question on MBE, must begin by asking self whether Content neutral or Content based restriction on speech.

- **Content Neutral.** Regulation on the *Time, Place or Manner* of speech (not its content). 3 Requirements:
 1. Law must be *Content Neutral*. For example, a non-content neutral regulation was a DC law banning the picketing, within 500 feet, of a foreign embassy if the picketing brings the foreign government into disrepute. (that is content based). The law must be Neutral on its face. Also, must have even handed administration. There can be no Executive Discretion (since that invites content bias). For example, if a parade permit gives the police chief any discretion to allow or disallow a group, whether or not they comply with the other regulations, then that will be unconstitutional. Statutes giving executive officers discretion will be struck down on ground that they are not content neutral.
 2. Law must allow *Substantial Alternative Opportunities for Speech* to take place.
 3. Law must *Narrowly Serve a Significant State Interest* (not compelling state interest, just a significant state interest). Significant is anything that makes sense to a judge.
- For example, All airports had an absolute ban on political and religious activities. The Hari Krishnas objected, challenged the regulation, and won in court. Since there was no Significant interest in banning that speech. Too general. Then, later, the airports said no political/religious speech in the control tower, baggage claim, ticket line (captive audience problem), bathrooms. Those regulations were upheld since courts found a significant interest. Then there were some more problems. Finally, regulations required the Hari Krishnas to stay in a booth (note: if on MBE, won't use religious groups, but rather some sort of environmental activist groups). For example, at a fairground, there was a midway. Activity was confined to booths along the midway. Can the Hari Krishnas be required to stay at a booth along the midway? Is it content neutral? Yes, if applies to all participants. Is there a substantial opportunity to speak? Yes, speak to people as they go by the booth. There is no constitutional right to an audience. Is there a Significant state interest? Well, the pedestrian traffic argument. Supreme Court upheld this regulation. For a Content Neutral Regulation of Time, Manner, or Place, only need a Significant State Interest (not a great reason)
- **Public Forums:** Streets, Parks, Public Sidewalks (at perimeter of government property), NOT airports. Speech can be restricted at these public forums only if content neutral.
- **Non-Public Forums:** Speech can be restricted in ANY reasonable way. Reasonableness depends on use of property. Airports, though allow speech at airport, may ban Cash Solicitation (risk of fraud is significant interest)

- **Content Based Restrictions:** Almost always struck down. Require a **Compelling** Government interest. Test which can rarely be met. 5 Major Exceptions. 1. Fighting Words, 2. Incitement, 3. Obscenity, 4. Defamation, 5. Commercial Advertising.
 1. **Fighting Words.** Must be directed toward someone who might hit back. Hate speech is an extension of fighting words. IN theory, fighting words are not protected speech. IN fact, all fighting word statutes are constitutionally vague or overbroad and struck down. Right answer on test is unenforceable vague and overbroad.
 2. **Incitement.** If incite immediate violence, here & now, it is punishable
 3. **Obscenity.** The 4 S's
 - a. **Sexy.** Appeal to prurient interest
 - b. **Sickening.** (to average member of community) Patently offensive. Community can either be national or local.
 - c. **Standards.** Right standard to determine what is legally obscene. If lack a standard, regulation will be vague & overbroad.
 - d. **No Serious Value.** (artistic, educational, scientific, or political). If have serious value, not obscene, regardless of what a jury thinks. If there is serious value, a judge should find a directed verdict for the defendant. Generally, good reviews mean no obscenity.
 - **7 Dirty Words:** Can Ban Broadcast (not Print) of the 7 dirty words during hours when children might hear them (technically it is more of a vulgarity thing, rather than an obscenity thing)
 - **Child Pornography:** All bets are off. Can be banned whether or not legally obscene. Also illegal to possess in home.
 - **Zoning of Adult Theatres.** Cannot legislate adult theatres out of existence (vague & overbroad). But can zone adult theatres, whether together in one location or spread apart.
 4. **Defamation.** Will be covered in Torts
 5. **Commercial Advertising.** Has been a Favorite MBE question. Commercial speech may be suppressed if:
 - *Misleading*
 - *Pertains to Illegal Product*
 - *Law Directly advances a Substantial State Interest with suppression no greater than is reasonably necessary.*
 - A substantial state interest is a test Unique to Commercial Speech (not significant nor compelling). There is a substantial state interest in the regulation of advertising for alcohol, tobacco, and Gambling.
- Concept of **Freedom of the Press**
 - Who's freedom is it? It is the freedom of the owner, not the public consumer. No special privileges for the press under the first amendment. Same rights as rest of citizens, no more no less. *For Example*, Stanford paper had photos of illegal activity. Cops had a warrant to search so could see pictures to get a look at wrongdoers. Stanford claimed a special right for press, with no Search & Seizure. Supreme Court said NO, same rights as everyone else.

- Concept of ***Speech by Government Employees***
 - In General, Government employees have freedom of speech rights. That is, they may not be hired or fired based on *political party affiliation, philosophy, or act of expression*. But, they may be fired for not properly doing their job. The crucial question is whether the speech activity affected their job. If speech makes them fail at job, they can be fired. *For Example*, when Reagan was shot, there was a time he was in surgery. After it was broadcast that he was alright, a woman working for the Houston Police Department said that if he gets shot again, 'I hope next time they get him'. She was fired. Supreme Court says this termination was unconstitutional because her speech had no impact on her job. People may be terminated only for performance. May not be fired for unattractive views. Of course, this analysis does NOT apply to *High Level Policy Makers and their Confidential Advisors*.

- Concept of ***Freedom of Religion***
 - **Free Exercise:** protects religious belief absolutely. Sort of protects religious conduct. Religious Conduct can't be suppressed because it is religious (though certain conduct may be repressed for other reasons)
 - On Bar, exam is usually whether religious person gets special privilege (exemption from obeying law rest of citizens must follow). Called *Accommodation*.
 - Some old accommodation cases involved the Amish. Amish kids didn't need to go to school 'til 16. (The Amish get exemption from compulsory school attendance.)
 - But, in General, if the government has a legitimate reason for regulating conduct, everyone must obey the law (there is generally no accommodation). Whether or not it, the regulated behavior, conflicts with religious belief.
 - No constitutional right to Special treatment due to religion, but there may be some statutory protections. The *Religious Freedom Restoration Act* requires government at all levels to accommodate religious belief unless there is a *Compelling State reason* not to. Statute is currently under challenge. Issue over whether Congress may regulate localities. But statute does not Change the Constitutional Rule on Accommodation. Just a statute adding rights that the Constitution does not Guarantee.
 - *Campus Access*. State University or Public High School (state action) allows student groups to use facility after hours, must allow student religious groups to have the same access. Principal of Equal Access.
 - **Establishment Clause:** Recently, Supreme Court returns to Concept of *Endorsement*. It violates the Establishment clause for the government to endorse religion (in general, not just a particular religion).
 - Now, the government certainly endorses religion in some formal ceremonies and in some symbols, but the Supreme Court, when talking about endorsement, means a coercive action. Want to forbid Coercive endorsement of religion (Making non-believers feel excluded or treated differently). Means there will never be official sponsored school prayer in school (including non-denominational prayers). But, allow the reading of the Bible in public schools, so long as not *inspirational*. (Can read as literature, or as a document of Western Civilization). But can't be a devotional exercise. Sort of like Hearsay, can't use it to prove the truth of the matter.

- *Nativity Scenes*. 1st time in court, Justice Berger says Christmas no longer religious, just a commercial activity. Now, Nativity scene on public property is OK so long as something else is there to dilute it (such as Rudolph, or Frosty).

General Final Advice

- What about rest of outline (the lecture only covered about 1/2 of the material)? He says that 90% of the questions asked on the MBE have been covered in this lecture. Will only be 3 or 4 questions that aren't in the lecture. If want to, read the outline once (the big one) just to get something that may stick later. But should focus on the material covered in lecture and Conviser. Focus on Priority setting. Better to know the core material backward and forward.