**Constitutional law**

**PROTECTIONS of CIVIL LIBERTIES**

**前提　STATE ACTION** – The Constitution only applies to **government action**

　　EXCEPTIONS (When the constitution applies to private conduct)

**①Statutes** – Congress, by **statute**, may apply constitutional norms to private conduct

1) 13th Amendment can be used to **prohibit private race discrimination**

※ Discrimination never violates the 13th Amendment, only slavery!

Discrimination can **violate laws** created under the 13th Amendment, §2.

**Congress shall have power to enforce this article by appropriate legislation.**

例：ビジネス取引での黒人差別禁止法はmay be justified as enforcing the 13th Amendment.

（ビジネス取引であればinterstate commerceに影響はあり, commerce clauseにも違反しない）

The Supreme Court has held that the 13th **Amendment** empowers Congress to

end any lingering **badges** **and incidents of slavery**.

2) Commerce Clause can be used to apply constitutional norms to private conduct.

(i.e. Civil Rights Act enacted under the commerce clause)

×the 15th Amendment – prevents race and gender discrimination in voting.

Only where some state action is involved

×the 14th Amendment – used only to regulate **state and local governments**

**②Public Function** – If a private entity is performing a task **Traditionally** and

**Exclusively** performed by the government.

⇒ the constitution applies to the private conduct

例 Election primaries(予備選挙), company town, maybe prisons.

NOT a shopping center, education facility or public utility.

**Marsh vs Alabama(1946)**

company townの私有地である道路でビラを配ったエホバ逮捕→1st amendment violation

**Evans vs Newton(1966)**

市が私人に白人だけ利用できる公園管理を委託　×公園の管理は公的な機能

**Jackson vs Metropolitan Edison Co(1974)**

独占権認められた電気会社は適用なし.電力供給はnot exclusively done by government

**③Entanglement** – government affirmatively **Authorizes, Encourages, or Facilitates**

unconstitutional activity. (Mere acquiescence is not enough)

⇒ the constitution applies to the private conduct

1. If an individual or organization merely enters into a contract or asserts a contractual right outside of court it is not state action, but if an individual or organization sues to judicially enforce a contractual right it is state action. Shelley v. Kraemer, (1948);

→　黒人への土地譲禁止covenantで裁判所が占有差止は違憲

2. If the government merely acquiesces in the performance of an act by a private

individual or organization it is not state action, but if the government coerces,

influences, or encourages the performance of the act, it is state action

Rendell-Baker v. Kohn, 457 U.S. 830 (1982);

ほぼ政府助成金で運営している私立学校で教員を解雇 →州の強制も影響もなく憲法は適用無し

3. If the government merely enters into a contract with an individual or organization for

the goods or services, the actions of the private party are not state action, but if the

government and the private party enter into a "**joint enterprise**" or a "**symbiotic**

**relationship**" with each other it is state action.

Burton v. Wilmington Parking Authority, (1961)

黒人が人種を理由にレストランへ入店拒否→建物は州のもの，施設全体は州のagencyが運営，レス

トランの駐車場も州が運営，州は賃料収入をあげていた ⇒ 憲法適用（単に貸しているではダメ）

　　　　　4. If government agencies are simply members of a private organization, the actions of the

organization are not state action, but if the government is "pervasively entwined" with

the leadership of the private organization, the acts of the organization are state action

Brentwood Academy v. Tennessee Secondary School Athletic Association, (2002).

State Action When

・Administering a **private discriminatory trust**

NO State Action When

**・Granting a license** and **providing services** to a private club

**・Granting a monopoly** to a Utility Company

**・Heavily regulating** industry

**・**Private school that is over **99% funded** **by government** fires a teacher

because of her speech

**・NCAA** (private entity that operates all over the country) orders the

suspension of a basketball coach at a state university

**・Private club** with a **liquor license** from the **state racially discriminates**

**BILL of RIGHTS** – Limits Federal power

Applies **directly** ONLY to the **federal government.**

ALL rights have been applied to state and local government through its incorporation

into the **due process clause of the Fourteenth Amendment.**

Except (Rights that do NOT apply to **state and local** governments)

1) Third Amendment right to **not to quarter a soldier**

2) Fifth Amendment right to **grand jury** **indictment** in criminal cases

3) Seventh Amendment right **to jury trial** in CIVIL CASES

4) Eighth Amendment right **against excessive fines**

・2nd Amendment right **to bear arms**-incorporated **McDonald vs. City of Chicago (2010)**.

MBE Trick: 結社の自由を規制する州法は第1修正違反？→×: 州には第14修正違反

**Ex Post Facto** clause 事後的処罰（重罰化・処罰容易化）禁止条項 (私訳)

An **ex post facto law** is a law that:

1) **Criminally punishes** conduct that was **lawful when it was committed**

2) **Increases punishment** for a crime AFTER it was committed, OR

3) **Reduces the Evidence** required to convict after the crime was committed.

※ **does NOT** apply in **Civil Cases**.

※ Retroactive civil liability only need meet a rational basis test under Due Process.

MBE Tip: Usually a wrong answer with respect to the contracts clause.

**Bill of Attainder** 特定私人無裁判処罰法 (私訳)

A law that directs the punishment of a **specific person without a trial**

MBE Tip: Usually appears in a wrong answer for a contract clause question.

※ 刑事罰に限定されない。例: 違法行為した２名の退職金を奪う法案，

テロ行為に関与したとされる公務員３名に罰として連邦で働く権利を奪う法案.

**Taking Clause** (5th Amendment)

– The government may take **private property** for **public use** if it provides **just**

**compensation.** (Applicable to the states via 14th Amendment)

①Taking – Critical issue is whether there has been a **taking** or merely a **regulation**

Possessory taking: Government **confiscation or physical occupation** of

property is a taking (Gov placing a cable box on your property)

Exception : Emergencies　※ confiscation=没収

Regulatory taking: Government regulation is a taking if it causes **Denial of all**

**economic use** unless the use is a nuisance.

i.e. prohibition of any building on the land

**Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886(1992)**

　　　波の浸食や生態系を守るためある島の建築が全面禁止

　　　　　　→原則として，経済的に有益なすべての利用**all economically viable use**を否定する土地利用規制は規制により促進される公益を審査す

までもなく「収用」にあたる。 viable=存続可能な

　・the uses of the property that constitutes a common law nuisanceの

　　 規制は収容に当たらない (ニューサンス例外)

判示例：軟弱な地盤上の原発の除去，洪水の原因となる湖の埋め立て禁止

⇒この点審理させるため差戻 (但し法廷意見は同例外の一般的有用性を否定)

**Palazzolo v. Rhode Island (2001)**

・A property owner may bring a **takings challenge** to **regulations**

that existed at the time the property was acquired

→しかし**Denial of all economically beneficial useではなく**the

upland portion of the property was economically viable.として収

容成立否定(94%の価値減少ではダメ)

　・**Temporarily denying** an owner use of property is NOT a taking

so long as the government **action is reasonable**.

Denial of NEARLY all economic use

Where a regulatory action falls short of eliminating all economically

beneficial use, a taking nonetheless may have occurred, depending on a

complex of factors including (**the Penn Central three-prong test**）

1) The **social goals** of the regulation

2) The **diminution in value**

3) The owners **reasonable expectations** for the use of the property.

(investment-backed expectationsを重視)

**Penn Central Transportation Co. v. New York City, (1978)**

ニューヨークのグランドセントラ駅の上のビル建築計画がラン

ドマーク保護をする法律で否定

⇒空中以外は現状通り利用できるのでありeconomic impact

はsevereではなくreasonable investment-backed expectations

を害するものではないとしてtaking否定 (規範は定立せず)

※Exactions – Things that government seeks in exchange for granting

permission to build.

(宅地開発したいなら橋作れ, スーパー建築許可の際に託児場

併設を条件に)　 ※ exaction = 強請

A proper EXACTION must have an:

1) Essential nexus：**Rationally connected** to an additional burden

2) **Rough Proportionality** – The exactions imposed by City must be **roughly proportionate** to the projected impact of the proposed development.

[**Dolan v. City of Tigard**](http://scholar.google.com/scholar_case?case=8551511773686011796&hl=en&as_sdt=2&as_vis=1&oi=scholarr) **(1994)**,

**“essential nexus” and “rough proportionality”** between conditions on land use development and the government’s underlying objectivesが必要.exactionのみの規範か争い有

まとめ: Government conditions on development of property must be

justified by a benefit that is **roughly proportionate** to the

burden imposed, otherwise it is a taking.

②Public Use **– this requirement is construed** Broadly defined by the

Supreme Court.

**“Rationally related** to a **legitimate public purpose”**

It may be satisfied even when the land is given to a private

developer.

③Just Compensation – Measured in terms of **loss to owner** based on FMV.

(gain to taker is irrelevant)

**Levels of Scrutiny 審査基準**

**rationally** related → **substantially** related → narrowly tailored

legitimate → **important or substantial　　　　　　 → compelling（やむにやまざる）**

①Rational Basis Test 合理性の基準（合憲推定）

The **plaintiff** must show that 1) it's not **rationally** related

2) to any **legitimate** governmental purpose.

②Intermediate Scrutiny 中間審査基準（違憲推定）

The **government** must show that 1) it's **substantially** related

= Must be narrowly tailored to achieve substantial state purpose

but doesn’t have to be least restrictive means (not LRA)

2) to an **important** governmental purpose

Symbolic Speech = content neutral *O’brien test*

前提 **unrelated** to suppression

1) it’s **Substantially** related

2) to an **Important** government purpose

3) **Burden NO more speech than necessary** to achieve the

government purpose

Restriction of speech on the public forum (content neutral)

1)it is **narrowly tailored**

2) to serve **significant governmental interests. (not LRA)**

3)Leaves **Open Ample Alternative** channels of communication

Commercial Speech *Central Hudson test*

1) it serves a **Substantial** government interest

2) Regulation **directly advances** the interest

3) is **not more extensive than necessary** to serve the interest

③Strict Scrutiny 厳格審査基準（違憲推定）

The **government** must show that 1) it's **necessary** (narrowly tailored 厳密に調整)

2) to achieve a **compelling** governmental purpose

= No less Restrictive Alternative **(LRA)**

①: ②③記載以外の事項に基づく差別（年齢，連邦の外国人，宗教）

Non-public forum規制

②: 非嫡出子, 性別(Exceedingly Persuasive justificationが加重)に基づく差別

Content neutral restrictions on speech

③: 人種，州の外国人(例外有り)

Content based restrictions on speech

(Prior Restraints: procedural safeguardsが加重)

**DUE PROCESS**

**１. PROCEDURAL Due Process**

**Due Process Clause prohibit DEPRIVATION of life, liberty or property without due process. Whether process is due depends on circumstances.**

(2 Part Test – Deprivation / Procedures)

**① Has there been a DEPRIVATION of life, liberty or property**?

**1)a) Liberty** – A deprivation of **Liberty** occurs if there is the loss of a **significant**

**freedom** provided by the **Constitution** or a statute.

e.g. physical freedom, right of freedom of speech, restrictions on legal rights

**・Harm** **to reputation** alone is NOT a deprivation of liberty　Paul v Davis

・Although the traditional concept of liberty was freedom from physical

restraint, the Court has expanded the concept.

例: Liberty interests are frequently asserted in connection with a discharge from

public employment accompanied by a false and stigmatic public statement

about the discharged (employment at willだとproperty侵害にならない).

**b)Property** – A deprivation of **Property** occurs if there is an **Entitlement** and

that entitlement is NOT fulfilled.

・The term "property" includes both traditional property rights, 　such as real property or money, or "new" property rights such as statutory entitlements.

**Entitlement** – reasonable expectation to continue to receive a benefit

Entitlements that are treated as property include:

例：① public education ② welfare benefits

③ public employment ④ driver’s license

essential public service, the right to contract with government…

・Protected property rights are established by state or federal law.

They must be grounded outside the federal Constitution. (libertyと違う)

・If the decision to provide a particular benefit or status is discretionary

(such as employment at will or probationary employee), it is not treated as

property.

**2) Deprivation**

**Deprivation requires the INTENTIONAL taking. Negligence is not deprivation.**

To constitute a deprivation, government action must adversely affect a protected

interest. Negligent actions, however, even if tortious, do not amount to a

deprivation for due process purposes.

Emergency – In **emergency situations**, the government is liable under due process only if its conduct "**shocks the conscience**." (i.e. high speed chase not)

Waiver – Individuals may expressly waive due process.

Government Must Create the Danger

– Generally the government’s failure to protect people from **privately inflicted**

**harm** does not violate. Government is only liable if it deprives an interest or if

it **creates** danger or if in government **custody**.

**② If there is a Deprivation, What procedures are required?**

→Balancing Test

1) **The importance of the interest** to the individual.

2) The ability of additional procedures to **increase the accuracy of the fact-finding.**

3) The **government interest** in administrative efficiency.

例　Procedure Requirements:

**Prior Notice** and **Prior Hearing**

・Welfare Benefits terminated

・Resident aliens being deported

・Before rights to a child are permanently removed

・Adult Commitment to Mental Institution

**・**Institutionalize of child by parent (& requires screening by neutral fact finder）

・Termination of a parent’s custody rights

・Real property forfeiture (government seizure)

Except in emergency circumstances (can seize property in an illegal

activity even if it has an innocent owner)

MBE: 床屋の免許奪われる→ the loss is serious. 刑事手続同様のprocedure必要

**Prior Notice** and a **Post Hearing**

・Social Security / Disability benefits terminated

・Public Employment (Tenure / Termination)

Employee is entitled to a pre-termination response / hearing,

but only entitled to full adversarial hearing after termination.

**Subsequent Notice** and a **Subsequent Hearing**

・American citizen captured in foreign war and held as enemy combatant

・Personal Property forfeiture

**Notice and chance to explain**

・Public education discipline / dismissal

**Ingraham vs*.* Wright*,* (1977)**Corporal punishment (体罰）

　　 8th amendment (cruel and unusual punishment)は体罰に適用無し

Hearingは不要

**２. SUBSTANTIVE Due Process** – (5th amendment)

**Due process clause requires the government action to be reasonable**

**for taking life, liberty, or property.**

**Whether the action is reasonable depends on the right involved.**

**Rational basis test is applied to the law affecting non-fundamental rights and Strict scrutiny is applied to the law affecting fundamental rights.**

**(A law affecting a fundamental right will be held to be reasonable only if it**

**passes a strict scrutiny.)**

Due process applies to the states via the 14th Amendment.

※ 個別規程でも保護されているがプライバシー等個別規定がなくても保護される点が重要

　　→ 個別規定　Economic liberties: Taking Clause, Contract Clause.

その他 : Ex post fact clause, Bill of attainder, 1st Amendment.

**Non-Fundamental Rights**

– Apply **Rational basis test**

① Economic Rights – The right to practice a trade or profession

② International travel

**Fundamental Rights**

– Apply **Strict Scrutiny** to the fundamental Rights:

① privacy ② travel ③ vote ④ 1st Amendment (指定なければ各論で論じれば足りる)

① PRIVACY (Strict Scrutiny)

**1) Marry**

**2) Procreate (出産)**

**3) Custody of One's Children**

– State may create irrebuttable presumption that married woman's husband is biological father.

**4) Keep the Family Together**

– Includes extended family, but must be actually related. (cousins, grandma)

**5) Control the upbringing of one’s children** ※ NO right to grandparent visitation

State law requiring children to attend public schools infringes on the right of parents

to control the upbringing of their children (最高裁)

**6) Purchase and Use Contraceptives**

**7) Freedom to receive Obscene Reading Material** – (Except child porno)

**8) Engage in Private Homosexual Activity**

There is never a legitimate interest for a state to regulate sexual orientation

**9) Refuse Medical Treatment**

・Competent adults have the right to refuse medical treatment, even in life-saving situations.

・State may require clear and convincing evidence that a person wanted

treatment terminated before it is ended.

・State MAY prevent family members from terminating treatment for another.

・NO constitutional right to physician-assisted suicide.

**※ Abortion** (not Strict Scrutiny)

Prior to viability (fetus survival outside womb)

※通常viability occurs late in the second, or early in the 3rd trimester

– States may NOT **prohibit** pre viability abortions, but **may regulate** abortions so long as they don’t impose an **undue burden** on the ability to obtain an abortion.

NOT and undue burden

1) 24 hours waiting period

2) Performed by licensed physicians

3) Prohibition of "partial birth abortions"

4) Parental consent with a judicial bypass

undue burden

1) Requiring Spousal consent 2) Requiring spouse to notify husband

3) Recording patient names 4) Parental consent without a judicial bypass

After Viability

– States MAY **prohibit** unless **necessary** to **protect the woman's life** or health.

※ Government has **NO duty** to **subsidize abortions** or provide abortions in **public hospitals.**

② TRAVEL (Strict Scrutiny)

・Laws that **prevent people** from **moving** **into a state**

・**Durational residency requirements** for receiving benefits

例: 1 year residency requirement to get divorced

**Shapiro v. Thompson, 394 U.S. 618 (1969) →** 但し修正１４条の特権免除条項参照

※ Restrictions on **foreign travel** need meet only the **rational basis test**.

③ VOTE (Strict Scrutiny)

　　　　14条違反で争われるのが通常→後述

・2nd Amendment – Right to **bear arms** for protection (no level of scrutiny identified)

・EDUCATION – NO fundamental right to **education** (Rational Basis Test)

そもそも教育を受ける権利は権利性否定

**EQUAL PROTECTION**

**1. Equal Protection Clause prohibits the government from unreasonably treating similarly situated persons in a dissimilar way.**

**2. Whether the classification is reasonable depends on the basis for a**

**classification (and the right involved).**

**3. When the classification is based on race and national origin or alienage (or the fundamental rights are involved), strict scrutiny is applied; when based on gender intermediate scrutiny is applied and;**

**rational basis test is applied to all the other types classification.**

**4. In order to trigger strict of intermediate scrutiny, the plaintiff must**

**prove that the government intended to discriminate. Intent may be**

**shown by a law that is discriminatory on face or discriminatory**

**application of facially neutral law, or a discriminatory motive behind**

**the law.**

Applies to the federal government via the 5th Amendment

to the states via the 14th Amendment

MBE Trick: 連邦の法律や行為が14th Amendment違反になることはない!

検討順番　Approach to equal protection questions

① Did the government have intent to discriminate?

② What is the classification?

③ What level of scrutiny should be applied?

④ Does this law meet the level of scrutiny?

CLASSIFICATIONS based on WHAT

**Race and National Origin** → Strict Scrutiny is applied

⑴ Proving Racial Classification

In order to trigger strict of intermediate scrutiny, the plaintiff must prove that the

government intended to discriminate.

Intent may be shown by

1) a law that is discriminatory on face

2) discriminatory application of facially neutral law, or

i.e. discriminatory use of peremptory challenges

3) a discriminatory motive behind the law

※ Showing a discriminatory effect alone is NOT enough.

例: 人種差別的結果の生じるzoningは合憲 (Arlington Heights, 1977)

結果の平等ではなく, 機会の平等を原則として保証するのみ

　　　　→ 但しdiscriminatory motiveが隠れていればダメ

⑵　Racial discrimination Benefiting minorities (**Strict scrutiny** is still applied)

Government has a compelling interest？

〇 Remedying past discrimination

※ require clear proof of past discrimination.

※ past discrimination must have been persistent and readily identifiable.

〇 Adversity in higher education

Educational institutions may use race as one factor in admissions decisions to help minorities. (Colleges and Universities)

△ Race can be considered in drawing up new voting districts but cannot be the

predominant factor.

**Alienage Classifications** (Non-Citizens) Look to who is discriminating against Aliens?

1. State and Local Government →Apply Strict Scrutiny

　　MBE tip: “only citizens of the United States”は外国人を差別する趣旨

　　　　　　　the law that license only to citizens of the U.S. は厳格基準で審査

EXCEPTIONS

1) Self Government and Democratic Process → apply **rational** basis.

i.e. for①voting②jury duty③employment as police officer, teacher, probation officer

2) Undocumented Alien Children → apply **intermediate** scrutiny

Ex: state making undocumented aliens pay for public school

2. Federal Government (Congress) 　　 　 → apply a **rational** basis test

because Congress has plenary power to **regulate immigration.**

**Gender Classifications**

⑴ Intermediate scrutiny is used

① Substantially related to　②an Important government purpose

③ **Exceedingly Persuasive justification** (高度に説得的な正当化)

⑵ Proving Gender classification (Raceに同じ)

Intent of discrimination

　　 – In order to trigger strict/intermediate scrutiny, you must prove that the government

intended to discriminate.

→ If NO intent can be shown, apply Rational Basis.

Intent may be shown by:

1) A law that is **discriminatory on its face**

2) A **discriminatory application** of a facially neutral law

3) A **discriminatory motive** behind the law

単に女性に不利益な影響を与えるだけでは,equal protectionは問題にならない

例：Height/weight restrictions for police/fire-fighters.

例：生徒全員に膝上5センチのズボン着用を義務付ける条例

　　　 　　 ①文言上は性差別無し②性差別意図がなければ合理性基準で合憲

⑶ Intentional discrimination benefiting Women / Men→ **triggers intermediate scrutiny**

　　　　　 　 違憲例① Woman can be awarded alimony, but men can not

② State supported all male / all female school

③ Discriminatory minimum drinking age  **Craig v. Boren（1976）**

④ Military housing ⑤ estate administration

合憲例・Discriminatory statutory rape laws

・All male draft

　　　　　　Affirmative Action

OK ・Classifications designed to **1) remedy past discrimination** or 2) **promote**

**diversity** in higher education (important government interestになる)

**Same-sex Marriages : Obergefell v. Hodges(2015)**

The fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

**Illegitimacy = Non-Marital Children** (Parents aren’t Married)

**Intermediate scrutiny** is used

Laws that deny a benefit to all non-marital children, but grant it to all marital children

are unconstitutional

※ 非嫡出子の相続権差別は重要政府利益が必要（相続する権利は, privilege and not a right

としても, equal protectionはrightに関わらない差別も禁止）

**Others : Rational basis review** is used for all other types of discrimination.

1) Age – i.e.警察官の50歳定年：Rational basisで合憲 **Massachusetts v. Murgia（1976）**

2) Disability

3) Wealth – (Discrimination against the poor)

4) Economic Regulations (Requiring to work for a certain number of years)

5) Sexual orientation (Only case so far used rational basis)

6) Religion (Strict Scrutiny has been used under religion clauses)

**Fundamental right**

Fundamental rightの差別はstrict scrutiny (選挙権，裁判を受ける権利, 移動の自由等)

→ upheld only if necessary to further a compelling state interest.

　 ※ 他の人より選挙で不利に立場 　→ equal protection

私の選挙を受ける権利が奪われた → due process right

どちらも主張可 (選挙権に限らず常にどちらも主張できる場合が多い)

しかし，北部地域の司法長官だけ選挙でなく知事が任命

　 → 司法長官を選ぶ権利はdue process rightでないのでequal protectionのみ主張可能

MBE: If there is classification, equal protection is stronger argument.

**Voting Right**

　　審査基準→時・場所・方法の制限であれば1) Rational basis, 2) No undue burden

Valid→1) reasonably residency requirement 2) reasonable registration requirement

3) reasonable time and manner regulation 4) felons can be denied the right

Invalid→1) Limiting school board elections only parents and property owners

2) Requiring political party registration for a general election

3) Counting votes using vague standards

**Bush v. Gore(2000):** Counting uncounted votes without standards in

presidential elections violates equal protection

１　選挙資格の制限 Laws that **DENY some citizens the right to vote**

Both [Congress](https://en.wikipedia.org/wiki/US_Congress) and the [states](https://en.wikipedia.org/wiki/US_states)

15th 人種差別禁止denying a citizen the [right to vote](https://en.wikipedia.org/wiki/Suffrage) based on that citizen's "[race](https://en.wikipedia.org/wiki/Race_(human_classification)), [color](https://en.wikipedia.org/wiki/Colored), or

previous condition of servitude"

19th 性差別禁止

24thElectionon payment of a [poll tax](https://en.wikipedia.org/wiki/Poll_tax_(United_States)) or other types of tax.の禁止

26th年齢差別禁止（18歳以上で選挙権）

**判例**　〇 Durational residency requirements up to 50 days are valid

× Property ownership as a qualification to vote

MBE: 人種差別的な選挙権を制限する法を攻撃するなら　15th >> Due Process

２　One-person, One-vote

※ using total population :**Evenwel v. Abbott (2016)**

[**Reynolds v. Sims**](https://en.wikipedia.org/wiki/Reynolds_v._Sims) **(1965)**

one person，one vote rule初適用

Election districts must be relatively equal in population size.

**Avery v. Midland County (1968)**

extended the one person one vote requirement to local government

→ legislative bodyだけでなくadministrative bodyにも適用があることを明確化

例外：Limited-purpose elections一般的な政府権限を行使しない目的が限定された団体→合理性テスト

**Salyer Land Co. v. Tulare Water Dist (1973)**

特別な地域で土地所有者だけに選挙をあげることができるか

violate the Equal Protection Clause of the Fourteenth Amendment?

→“The appellee district in this case, although vested with some typical governmental

powers, has relatively **limited authority**” “Its primary **purpose**...is to provide for the

acquisition, storage, and distribution of water for farming in the Tulare Lake Basin.

It provides **no other general public services** such as schools, housing,

transportation…” **”**We hold, therefore, that the popular election requirements … are

inapplicable to elections” rational nexus有り→合憲

**Ball v.James (1981)**

The Salt River Project Agricultural Improvement and Power District でone-acre, one-vote system → “As in Salyer, supra, the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives.”

上記は80人弱, こちらはアリゾナ州の半分に電気を供給する大きいwater reclamation district

３　その他の問題

・選挙区割りは基本的にpolitical questionであり司法審査の対象外

ただしdiscriminatory intentがあればviolates the Equal Protection Clause. **Rogers v. Lodge (1982)**

・[At-large](https://en.wikipedia.org/wiki/At-large) voting →人種差別目的なければＯＫ（大選挙区だとお金がないと運動できない，少数

派が受かりようもないという問題）

※ 平等原則違反の問題. 投票権自体は侵害されてなくdue process rightで訴えるのはおかしい

**Right To Travel**（14修正の特権免除条項でも訴え可能）

　基本的権利であり元からの自州民との差別はstrict scrutinyで判断

以下1年居住要件durational residency requirementsで問題になった事例

**違憲例**

**Dunn v. Blumstein (1972)**

選挙権につき居住要件はNot LRA

→違憲 Since he requirement deny some citizens the right to vote and travel, the court must

determine “whether the exclusions are necessary to promote a compelling state interest”

Not necessary to further a compelling interest. Violation of the Equal Protectction.

**Memorial Hospital v. Maricopa County (1974)**

無償医療サービスit furthers a compelling state interestの証明無し 　　 → 違憲

**Shapiro v. Thompson (1969)**  社会保障給付を受けるのに1年居住要件 → 違憲

**合憲例**

**Sosna v. Iowa (1975)** 離婚訴訟提起に1年居住要件

　　　　　　　　 　多くの人が離婚を求めて集まるのを防ぐ，矛盾判決を防ぐという目的は正当

Appellant’s claim is not total deprivation of a divorce decree, but only delay.

→ does not violate Equal Protection nor the Due Process Clause

**FIRST AMENDMENT** (<Overbroad/Vagueness>は,常に問題となる)

**FREE SPEECH**

**The First Amendment protects the freedom of speech**

**= Congress shall make no law abridging the freedom of speech**

essay tip:1) state action 2) standingを最初に常に論じる(人権問題共通)

**Expressive conduct= symbolic speech, speech plus.**

Expressive conduct is behavior designed to convey a message.

Expressive conduct is recognized as being protected under the First Amendment as a form of

speech.

Essay Tip: 行動規制だからといって，ここでオブライエンテストに飛ぶと以下のissueが書けない。オブ

ライエン無視して，普通の表現の自由規制として書き，余裕があれば，オブライエンに触れる。

**Content-based and Content-neutral restrictions**

Content Neutral: Government regulation of expressive activity is content neutral so long as it

is “**justifiedwithout reference to the content** of the regulated speech.”

**→** content based on faceでない場合は，かなり微妙な判断基準。下記傾向からcontent basedとな

ることはまずないが，essayでは両方の可能性に言及するのが無難

On the Face vs. Justifications

Purpose

Although the Court occasionally mentions that an actual content-based purpose can corrupt a

facially content neutral action, it almost never labels an action according to this determination.

∵ the government will usually be able to articulate plausible legitimate justifications.

Effect

The Court has emphasized that mere **impact on a particular content** of speech does not make

the content neutral action content-based.

1) "**time, place, and manner**” restriction

ほぼcontent neutralと認定

Location Restriction

It has been the general rule that a location restriction on speech is, by itself, content neutral.

A location restriction can have strong content or viewpoint discriminatory effects. For example,

a rule restricting speech outside a medical facility disproportionately impacts abortion protesters.

That does not, however, render the rule content-based.

Type of Activity Restrictions

The Court has found a number of other types of activity restrictions to be content neutral.

e.g., picketing and leafleting,

They have been extended to include lobbying, soliciting, demonstrating, and most recently,

approaching another "for the purpose of ... engaging in oral protest, education, or counseling."

In a number of circumstances, the Court has also recognized that prohibitions of nudity, sexual

explicitness or indecency in speech, although not identified exclusively with a particular subject

matter or viewpoint, are content based.

・In Hill v. Colorado, the majority said, "[t]he statute is not limited to those who oppose abortion.”

⇒content neutral.

他の例

・The Court has struck down flag desecration statutes as content-based.

According to the dissenters, flag burning is a method of conveying a range of different ideas, and does not represent a particular viewpoint or subject matter itself.'

1 .Content Based restrictions on speech

**The content-based restriction is not allowed unless 1) the speech is unprotected or**

**less protected, 2) reasonable regulation on non-public forum or 3) the restriction meets strict scrutiny.**

**To pass strict scrutiny, the government must show the restrictions must be narrowly tailored to achieve the compelling government purpose.**

1) 表現の自由で保護されない特殊なspeechは内容規制可能（名誉棄損，脅迫など，後述）

　 2) In cases concerning whether particular government property is appropriate for expressive

activity, courts have permitted reasonable content-based regulation of speech in locations that

have not been opened to the public for expression (nonpublic fora), provided that such

regulation i) does not discriminate based on a speaker’s viewpoint and ii) is reasonable. (後述）

3)　　　　　Otherwise, the regulation must meet **strict scrutiny.**

It must be 1) **Necessary** to serve 2) **Compelling** Government purpose and

3) is **Narrowly Tailored (LRA)** to achieve the end

種類　**There are two types of content based restrictions**

**Subject matter** restrictions: based on the topic of the message

**Viewpoint** restrictions: based on the ideology of the message

2 .Content Neutral restrictions on speech

**Content Neutral restrictions must meet intermediate scrutiny. It must be substantially related to an Important government purpose unrelated to suppression and, burden NO more speech than necessary. Ward v. Rock Against Racism (1989)**

Standard: “**Intermediate scrutiny** applies to a content-neutral regulation of speech”

(The regulation must be)

1) **narrowly tailored** to serve a **significant** governmental interest (**not LRA**), and

2) **leave open ample alternative channels** for communication of the information.

**Watchtower Bible *&* Tract Society of New York, Inc. v. Village of Stratton, (2002)**

エホバの証人が個別訪問の許可制の条例を違憲として訴え

　⇒目的: ①詐欺・犯罪の防止②プライバシー保護はsignificant

関連: ①寄付を求めない原告が詐欺をすることはない. 犯罪防止効果があるか疑問。

②も「宗教勧誘お断り」サインで足り, より規制の弱い手段がある。 →　違憲

　　 Essay tip: Forum論に言及するなら中間審査基準が適用とだけ述べて上記要件は論じない(被る)

Depending on the forum where the speech is taking place

　　　 　※①内容規制か中立規制か？②中立規制としてforumの分類は？の順でよく論じられるが，内容規制もforum

により異なり①forumの分類は？②どのような規制が許される？と論じた方が流れが良いときも多い。

**The standard used to restrictions in the government property depends on the**

**type of forum.**

**Public forum is government properties historically open to the public for speech, and limited public forum is government properties that the government has selected to open for speech through practice or policy, and the rest is non-public forum**

**The content neutral restriction in public forums and limited public forums must be**

**narrowly tailored to serve a significant government interests, and leaves open ample**

**alternative channels for communication.**

**The restriction in non-public forums need only be reasonable and viewpoint neutral.**

**1. Regulation in Public forums ※forumの複数形はforaもforumsもOK**

= government properties that have **historically been open** to the public for speech

1) The court will apply “strict scrutiny” if regulations are not content neutral. Under

this test, the government must show

a) that it has a compelling state interest for regulating the speech, and

b) that the regulation is narrowly drawn to advance that interest.

2) If a regulation is **Content neutral,** the government must show

a) that it is **narrowly tailored** to serve **significant governmental interests.**

b)and Leaves **Open Ample Alternative** channels of communication.

※ Congress has more leeway with **funding** than **regulations**.

※ City officials cannot have discretion to set **permit fees** for public demonstrations.

**United States v. Grace (1983)**

連邦裁判所前の公道で旗や横断幕の掲示禁止法

規範: Sidewalks “are among those areas of public property that traditionally

have been held open to the public for expressive activities”

→ “public forums”

⇒ the government could enact reasonable time, place, and manner

restrictions so long as

1) they “are content-neutral,

2) are narrowly tailored to serve a significant government interest,

and 3) leave open ample alternative channels of communication.”

当てはめthe Government contends that there are sufficient alternative areas

within the relevant forum, such as the streets around the Court

⇒しかし3)要件以前に2)要件を欠くとして違憲

・the maintenance of peace and tranquilityは重要だが, 他の地域では禁

止されておらずA total banが必要な理由が不明。

・司法の中立性維持は重要だがwe are unconvinced that the prohibitions

…sufficiently serve that purpose. There is nothing to indicate that

these sidewalks are part of the Supreme Court grounds or are in any

way different from other public sidewalks in the city.

**Clark v*.* Community for Creative Non*-*Violence(1982)**

ホームレス救済を訴えるためワシントンのモールにテントで寝泊まり計画。寝泊り

をキャンプ用地に限定する当局の決定が問題に

⇒上記と同じ審査基準。

2) the regulation narrowly focuses on the Government's substantial interest in

maintaining the parks in the heart of the Capital in an attractive and intact

condition. 百万人がキャンプすれば公園は相当に痛む, テント全面禁止でない

3) 他に主張する機会は十分にある　⇒合憲

**Frisby v*.* Schultz (1988)**

中絶を行う医師の家の前でピケ。州は住宅街でのピケを禁止する法を策定

The street constituted a traditional public forum ⇒ strict standards

**1)** The ordinance is content-neutral

**2)** The ordinance serves the significant government interest of protecting

residential privacy. (the protection of unwilling listeners)

The ordinance is narrowly tailored to serve that governmental interest,

∵offensive picketing focused on a "captive" home audience.に限定

**3)** The ordinance leaves open ample alternative channels of communication.

Its use of the singular form of the words "residence" and "dwelling"

suggests that it is intended to prohibit only picketing focused on, and

taking place in front of a particular residence.

**Hill vs Colorado (2000)**

健康管理施設から百フィート内でビラ配り、抗議などを目的に他の人間の８フィート内に近続くことの禁止→(パブリックフォーラム論に言及なしだが)

1) Content neutral, 2) narrowly tailored to serve an important government interest,3) leave open ample alternative of communicationが必要→場所の規制で、プライバシーを保護する利益はアボーション抗議活動の内容と無関係だから内容中立。８フィート以上を通過するのはOKだから**narrowly tailored** (LRAは不要) → 合憲

※**2014**アボーションクリニックの３５フィートを緩衝ゾーンとする法律を違憲判断

∵パブリックフォーラム。親身な会話と資料の配布という伝統的な重要コミュニケーション

方法を奪う。警察の配備・通行妨害禁止でも足りる可能性があり**not narrowly tailored**

**2. Designated (Limited) Public Forums**

= Government properties that the government has selected to open for speech through

practice or policy.

・A limited public forum is created when public property is opened for a limited

purpose. 例：学生だけ自由利用OKとする大学施設

(designated public forumと同じ意味で使われることも多い)

→ **Same rules** apply as to public forums

**Ward v. Rock Against Racism (1989)**

case: New York City, responding to complaints of high-decibel concerts adjoining residential neighborhoods, mandated the use of city-provided sound systems and technicians for concerts in Central Park. Members of rock group claimed

　　 hold:1. The guideline is content-neutral, since it is **justified without reference to the content** of the regulated speech.

2. a)　The guideline is narrowly tailored to serve significant governmental interests.

a substantial interest =protecting citizens from unwelcome and excessive noise

Appeals erred in requiring a "less-restrictive-alternative analysis"

The requirement of narrow tailoring is satisfied so long as the regulation

**promotes a substantial governmental interest** that would be achieved less

effectively absent the regulation, and the means chosen are **not substantially**

**broader than necessary** to achieve that interest.

b) Here, the city's substantial interest in limiting sound volume is served in a

direct and effective way by the requirement that its technician control the

mixing board. Absent this requirement, the city's interest would have been

served less well, as is evidenced by the excessive noise generated by past.

**3. Non-Public Forums** **※** reasonableness standard.

= Government properties that the government **constitutionally can and does close** to speech.

The government does not have an absolute right to prohibit any kind of speech in a nonpublic forum, but a decision to restrict speech need only be 1) **reasonable and 2) viewpoint-neutral.**

1)として，

①A fear that passengers could be subject to violence if advertising is not restricted

②raising revenue, ③avoiding offense to patrons of the facilityが認められている

2) “The principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses.”

→下級審例： The statute prohibited making federal transit grants to any entity “involved directly or indirectly in any activity that promotes the legalization or medical use” of a controlled substanceは違憲　∵麻薬厳罰化の広告を許し，合法化を許さないのはneutralではない。(法律が非中立の例外事例，普通は中立の法を非中立的に運用する場合に問題になる，中立的運用が重要）

※ Unlike in a public forum, a regulation *may* be based on the content of speech, so

long as it is not aimed at a particular viewpoint.

**In International Society for Krishna Consciousness, Inc. v. Lee (1992)**

空港 (non public forum)での寄付要求行為やリーフレット配り禁止→同行為は通行の

妨げになる可能性があり，詐欺や脅迫に及ぶ恐れもありreasonable

**Children of the Rosary v. City of Phoenix(9th Cir. 1998)**

**public forum**でないバス内での中絶反対広告掲載拒否は合憲

∵1) limiting access to the advertising space was reasonable for one of the following reasons—as a means of preserving a revenue source, maintaining a neutral stance, or protecting buses and passengers; and

2) a policy of rejecting noncommercial advertisements in order to protect its interests did not discriminate against particular points of view.

※ 文言上無効の場合はnon-public forumでも無効

**Board of Airport Commissioners v. Jews for Jesus, Inc., (1987)**

LA Airport adopted a resolution banning all “First Amendment activities”

⇒Without ruling on the forum classification, the Supreme Court invalidated

the resolution under the overbreadth doctrine (non-public forumでも無効と明示)

**下級審判例 →**non public forumでも“controversial” “not aesthetically pleasing”な広告

禁止はvagueとして無効

**The Classification**

**Public forum:**

・道路，歩道，公園等 (余り争いにならない)

**Designated public forum**

自由利用黙認では足りず「意図的に」一般大衆に公開されることが必要

**・**Opening schools on weekends for speech

**・**様々な公演の用に供している劇場**Southeastern Promotions, Ltd. v. Conrad, (1975)**

**・**誰でも参加できるとされた教育委員会の会合**Madison Join Scholl District (1976)**

**Non public forum**

・駐車場から郵便局への通路(相対多数)

**In United States v. Kokinda(1990).**

→ “the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum. The Court found that, because a sidewalk between a post office and its parking lot was built for the sole purpose of providing access to the post office, the sidewalk

did not constitute a traditional public forum.

下級審: purposeはintentとは異なりuseの客観的状況から判断すべき

・Airports

**In International Society for Krishna Consciousness, Inc.v. Lee (1992)**

∵歴史はない。“airports are commercial enterprises, whose purpose was the facilitation of air travel. They are not designed or operated as venues for solicitation or other expressive activities.”

・Bus, Subway, and Train Stations

上記判例は駅やバス停等と空港を明示的に区別。下級審は分かれている。

・Advertising Displays at Transit Facilities

public fora *within* a facilityとする裁判例多い。

traditional public forumではない。

**Lehman v. City of Shaker Heights (1974),**

　　　　　　　　 “The car card space is a part of the commercial venture. In the same way that

a newspaper or periodical, need not accept every proffer of advertising a city

transit system has discretion to develop and make reasonable choices”

To determine whether a transit facility has designated a public forum with respect

to its advertising space, courts have examined a transit facility’s prior **practice and policy** ⇒ 規則でpublic forumでないことを明示し，規則通りに厳密に管理しないとpublic forumと認定される（下級審判例の趨勢）

×accepts political speech, dedicates space to public service announcements on

issues of public importance, or appears to be motivated by something other

than the desire to raise revenue.

**Prior Restraints** メインの論点でなければ独立して簡単に論じる

＝Any governmental action that prevents speech before it can be heard.

Any system of prior restraints bears a “heavy presumption” against its validity.

 　There are two common forms of prior restraints.

① The first is a statute or regulation that requires a speaker to acquire a permit or license before speaking,

② A judicial injunction that prohibits certain speech.

①Permit or Licenses

only if 1) there is an **important reason** for licensing

2) and **clear criteria** leaving almost no **discretion to the licensing authority**.

and 3) certain **procedural safeguards** must be provided.

a) there must be prompt determination within a specified time period and

b) a prompt judicial determination must be assured.

　※ 2)≒Unfettered Discretion ※ 最重要論点on prior restraint

**Freedman vs Maryland (1965)**

映画審査委員会の検閲制度→①政府立証責任②迅速許可③迅速裁判所レビュー

(1) the burden of proving that the material is unprotected, must rest on the censor;

(2) any restraint can be imposed only for a specified brief period and

(3) a prompt judicial determination must be assured.

→ Invalid with a lack of statutory provisions for judicial participation.

**Southeastern Promotions, Ltd. v. Conrad, (1975).**

　　CASE: City theater rejected P's request based on the controversial content (musical that

contained obscenities and nudity.)

　　　　　　　　　HOLD:denial of the P's request was a prior restraint, an attempt to prevent it from reaching the

public.→Freedmanと同要件が必要だがprocedural safeguards were lackingとして違憲

**FW/PBS Inc vs Dallas (1990)**

アダルトショップの許可制度。表現だけを対象にしていないので(1)の立証責任はない。しか

し他の２要件を満たさないとして違憲（迅速な司法への道がない）

②Judicial Injunction※ **gag order, preliminary injunction**

**1) the nature of the pretrial publicity**

**2) the availability of alternatives**

**3) the likely effectiveness →などから合憲性は総合判断**

Procedurally proper orders must be complied with until the order is overturned

⇒Person who violates is barred from later challenging it

MBE Tip: Gag orders on press to prevent prejudicial pretrial press are always **unconstitutional**

**Cox Broadcasting Corp. vs Cohn (1975)**

休廷中に起訴状を見ていて入手したレイプ事件の被害者の氏名について, その公表を制限できるか

　　　　→｢公的な裁判記録を通じて公衆に開示された真実の情報の公表を禁止することは許されない｣

｢一旦審理が公開で行われたならば, そこで生じたことを事前抑制にかからしめることはできない｣

**Oklahoma Publishing Co. v. District Court (1977)**

少年の氏名・写真の公表, 放送の全面的差止命令→①裁判官, 検察官, 弁護士が十分に知っている状況で新聞記者が傍聴していた ②新聞記者の傍聴と写真撮影に対して何ら異議がなかった ③少年の身元情報が違法に又は州の黙示の承認を得ずに入手されたものではない→違憲

**Smith vs Daily Mail Publishing CO (1979)**

ウエストバージニア州法(少年事件の容疑者の氏名を新聞が公表することの禁止)違反として新聞社が起訴→事後的な刑事制裁でも合憲とされるためには ｢最も重要な政府利益｣ に仕えるものであることが必要。事前抑制でも合法的に入手された真実情報の公表への事後的な刑事制裁でも同じ。

①匿名性を保護し,更生を促進するという州の利益は, 新聞社の修正１条の権利を上回らない, ②州法は,新聞のみを対象。他メディアでの公表は禁止されておらず,目的を達成不可能, ③州少年の氏名の公表に刑罰を科しているのは５州のみで刑罰が不可欠であるともいえない→違憲

**Vague, Overbroad, Unfettered Discretion** (Void on its face)

Vague – law is void on its face if a **reasonable person** cannot tell what speech is

**prohibited or allowed.** (“reasonable”, “annoying”, “lewd”)

※ unfettered discretionと通常セット ∵vagueな法はどうにでも運用可能

**Coates vs Cincinnati (1971):**通行人に**annoying behavior**禁止は違憲

Overbroad – law is void on its face if it regulates **substantially more speech than the**

**constitution allows** to be regulated. (“All”, “Any” speech)

※ Fighting words are not protected but are always found to be vague and overbroad

**Gooding vs Wilson(1972)：**「町の平和を乱す暴言」禁止という条例。

“I kill you”とfighting wordsを言っても無罪

∵“opprobrious” and “abusive” were broader

than the term “fighting” word.

Unfettered Discretion prior restraintとセット論点，中で論じれば足りる

– Law is void on its face if it gives officials **unfettered discretion**.

(Need definite standards) Ex. City officials **cannot have discretion** to set permit fees

**City of Lakewood vs Plain Dealer Publishing Co (1988)** 新聞自販機許可制を違憲

Facially invalid ∵mayor’s unbridled discretion to discriminate against permit

seekers, based on the content of their publications and viewpoints.

“When a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without first submitting to the licensing process. Such a statute constitutes a prior restraint and may result in …engendering risks to free expression that can be effectively alleviated only through a facial challenge.”

“The press or a speaker may not challenge as censorship every law involving discretion to which it is subject; the law must have a close enough nexus to expression, or to conduct commonly associated with expression”

**UNPROTECTED or LESS PROTECTED Speech**

**Rational basis test適用**

**Unprotected Speech =①Incitement of Illegal Activity ②Fighting Words**

**③True Threats** **④Obscenity**

その他 (学者により分類は異なる)

・Commercial speech that concerns illegal activity or that is false or misleading.

・Defamation (including libel and slander)

・Child pornography

　 ・Perjury, Blackmail, Solicitations to commit crimes

**① Incitement of Illegal Activity** – Government MAY punish speech if there is a:

1) **Purpose to cause Imminent Lawless Action,** and

2) Actions are **Likely to produce** imminent lawless action.

**Brandenburg vs Ohio (1969)**

テロや暴力の唱道を禁ずる州法下で「政府が黒人を排斥しないなら報復する」とのＫＫＫ

演説者が訴追 →imminent Lawless actionを扇動することを要すると判例変更。違憲。

**Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists (Cir2005)**

中絶医師の写真付き「指名手配」のポスターを貼る

⇒**Brandenburg** に言及せずにTrue threatとして損害賠償許容。

**② Fighting Words**

– Abusive words that are inherently likely to provoke an **immediate violent reaction** in an **ordinary person.** 第一修正は保護しない(最高裁）

– Statute banning fighting words cannot be 1) vague and overbroad and

2) cannot punish specific view point.

※ invoke≒provoke. invoke is to call upon (a person, especially a god) for help

provoke is to cause someone to become annoyed or angry.

**Chaplinsky v. New Hampshire (1942)**

Chaplinsky called the town marshal "a God-damned racketeer" and "a damned Fascist." He was convicted under a state law that prohibited intentionally offensive, derisive, or annoying speech to any person who is lawfully in a street or public area.

⇒1) “fighting words”として第1修正の保護の範囲外

2) face-to-face words plainly likely to cause a breach of the peaceに限定

しておりvagueとはいえない

反対意見：暴力的リアクションを罰するべき（ムハンマドをバカにする漫画を規制していいか？）

**③ True Threats**

– statements that a reasonable person would interpret as a serious communication of an **intent to inflict harm**

**Virginia v. Black (2003)**

RULE: 1) “statements where the speaker means to communicate a serious expression of an intent

to commit an act of unlawful violence to a particular individual or group of individuals”,

2) “The speaker need not actually intend to carry out the threat. Rather, a prohibition on

true threats protects individuals from the fear of violence and the disruption that fear

engenders, as well as from the possibility that the threatened violence will occur.”→ “a

type of true threat, where a speaker directs a threat to a person or group of persons with

the intent of placing the victim in fear of bodily harm or death.”

①: Virginia: “to burn...a cross on the property of another” with the intent of intimidating=felony

**→constitutional ∵true threat,** "a State may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."

　　　　　　　　 ②"any such burning..shall be prima facie evidence of an intent to intimidate a person or group."

**→unconstitutional** on its face, the provision renders the statute overbroad because the

probability of prosecution under the statute chills the expression of protected speech.

(バージニア最高裁，連邦最高裁結論同旨)

**④ Obscenity** (Sexually-oriented speech)

Miller Test (1973)

要約: the work, taken as a whole, that

1) appeals to the sexual interest

2) describes sexual conducts in a patently offensive way

3) lacks serious value.

1) Whether the **average person**, applying **Contemporary Community Standards** would find that the work taken as a whole, **must appeal** to the **Prurient Interest in Sex** ※ Prurient – shameful or morbid interest in sex

※ a local community standard may be sufficient.

2) Whether the work depicts or describes in a **Patently Offensive** way, sexual conduct as **specifically defined by the applicable State Law**

3) **Taken as a whole**, the material must **lack serious literary, artistic, political**

**or scientific value. 文学・芸術・政治・科学的価値なし**

**※ vagueness and overbreadthも常に問題になるが，**“**patently offensive descriptions**

**of ultimate sexual act” “lewd exhibition of genitals”などのOK例をMillerは例示**

Obscenity Notes

・Zoning Ordinances – Government may use **zoning ordinances** to regulate the

location of adult bookstores and movie theaters. (substantial gov. interest)

・Child Pornography – Child pornography may be **completely banned**, even if it is NOT obscene.Governments interest is in protecting children, so children must be used in the **material**. (Not computer generated images)

・Private Possession – Government may NOT punish **private possession** of obscene

materials, but MAY punish private possession of **child pornography**.

・Seize Assets – Government may **seize the assets of business** convicted of

**violating obscenity laws**.

**※ Profane and Indecent speech** – (i.e. Cohen – Fuck the Draft)

is generally **protected** unless over 1) the broadcast media or 2) in schools.

・1) only applied to free broad cast media ※They accepted the license with the conditions

※ Cable Television – intermediate scrutiny

※ Fairness doctrine – May be required to allow counter-speech.

・For 2), school officials have discretion in punishing their students’ speech.

**⑤ Commercial Speech** 内容に基づく規制だが緩い基準が許されている

**First Amendment Protection if Truthful ×1) false 2) unlawful 3) misleading**

**TEST** 1) **serves a Substantial government interest**

i.e. conserving energy, protecting kids from cigarette advertising

2) **Regulation directly advances the interest**

3)is **not more extensive than necessary** to serve the interest (not LRA)

**Central Hudson Gas & Electric Corp. v. Public Service Commission (1980)**

電力ガス供給会社の宣伝規制は違憲

　　　 　∵1)エネルギー保護と公共料金適正維持という目的は重要

2)宣伝禁止は前者を直接促進するが，後者は直接的には促進されない

3)前者についても効率的なエネルギー使用すら禁じられており広すぎ

**例** ①May prevent professionals from advertising **under a trade name**.

② May **prohibit an attorney** from in-person solicitation of clients for **profit**.

May send **written solicitation** or solicit for **pro-bono** work.

③ May NOT prohibit **accountants** from **in-person solicitation** of clients.

④ プエルトリコでの住民へのカジノ宣伝禁止は合憲(1986)

→5対4で犯罪抑止や健康維持目的のためという政府の主張認める

⇒ルイジアナでのカジノのテレビ・ラジオ広告禁止は違憲(1999) 自由化の流れ

[**Matal v. Tam**](https://www.supremecourt.gov/opinions/16pdf/15-1293_1o13.pdf) **(2017)**

a provision of trademark law that prohibits trademarks that disparage any “*any person, group*, *or institution*.” disparage=誹謗する　→commercial speechにあたるとしても違憲

∵1.Under *Central Hudson*, a restriction of (commercial) speech must serve “a substantial

interest” and be “narrowly drawn.”

・One purported interest is in preventing speech expressing ideas that offend, but that idea

strikes at the heart of the First Amendment.

・The second interest asserted is protecting the orderly flow of commerce from disruption

caused by trademarks that support invidious discrimination; but the clause, which reaches

any trademark that disparages *any person, group*, *or institution*, is not narrowly drawn.

2. Regardless of whether trademarks are commercial speech, the viewpoint based discrimination

here necessarily invokes heightened scrutiny. 　　　individuous=不愉快な

**⑥ Defamation** – See Torts

**⑦ Privacy**

1 . Government may NOT create liability for the **truthful reporting** of **information**

that was **lawfully obtained** from the **government.** ex. Reporting rape victims name from a police report

→ However, the government may limit **its own dissemination** to protect privacy.

2 . Media is NOT liable for **broadcasting a tape** of an **illegally intercepted call**,

if:a)The media did NOT **participate in the illegality** and

b) It **involves a matter of public concern.**

**⑧ Government official’s speech**

On the job

Speech by **government employees** on the job in the **performance of their duties** is NOT protected by the First Amendment.

Off the job Speaking as private citizens

1) Speaking on a matter of public concern 2) which does not interfere with the

functions of the government → protected by the 1st Amendment

**Garcetti v. Ceballos (2006)**

Terminating or penalizing a government employee for speech involving a

public concern made outside of employment as a citizen is subject to strict

scrutiny.

**Pleasant Grove City vs Summum (2009)**

公園の１５モニュメント（１２は民間寄贈）の中に十戒のモニュメントを建て

我々の宗教のモニュメントを建てないのは表現の自由を侵害すると原告主張

→ 公有地の永久展示のモニュメントは政府言論。修正一条は適用されない。

**Other issues**

**Anonymous Speech / Right NOT to Speak IS protected**

**Anonymous** speech is protected, too.

**Buckley vs American constitutional law foundation (1999)**

イニシアチブ要請につき身分証着用要件，開示要件は違憲 ∵政治言論で匿名性は極めて重要

（一定額以上の寄付をしている人の開示は合憲）

The freedom to speak also includes the **freedom NOT to speak** (“live free or die”)

**Hickman v. Wileman Bros and Elliott, Inc. (1997)**

生産者やブランド名を示せない一般広告での出荷命令

→ 強制言論も厳格審査の対象になるが政治的またはイデオロギー的見解に限定される。合憲

**Symbolic Speech** (Intermediate Scrutiny)

= Conducts that communicates a specific belief without using words.

　　私的論証: **Expressive conduct is protected by the First Amendment. If the restriction is**

**targeting expressive factor, the strict scrutiny is applied, while if the restriction is**

**targeting conduct and impose incidental effect of expression, the intermediate**

**O’Brien test is applied.**

Government can regulate **conduct** that **communicates** if:

1) the regulation **furthers an important** or substantial governmental **interest**; and

2) the interest is **unrelated to the suppression** of free expression (=content neutral) and

3) the restriction is **not greater than is essential** to the furtherance of that interest."

United States vs O’Brien (1968)のDraft card burning事件(合憲)の規範

内容中立規制の一種でありそのための基準という説が有力, 明らかでなければessayで論述不要

　　　 例:規制違憲 　①Flag burning ②Burning cross UNLESS done to intimidate or threaten

規制合憲 　①Draft card burning ②Nude dancing

**Erie v. Pap's A. M., (2000)** 項目分けは私製,文は判例コピペ

1. Speechに該当するか

Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection.

2. Levels of Scrutiny

What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression.

**If the governmental interest is related to the expression's content**…, the ordinance falls outside *O'Brien* and must be justified under the more

demanding, **strict scrutiny standard.**

If the governmental purpose in enacting the ordinance is unrelated to such

suppression, the ordinance need only satisfy the "less stringent,"

**intermediate *O'Brien* standard**.

⇒The ordinance here…is on its face a general prohibition on public nudity. By its terms, it regulates conduct alone. **It does not target** nudity that contains an erotic message.

3. Erie's ordinance satisfies *O'Brien's* four-factor test.

第1要件: そもそも政府に統制権限あるか⇒省略

第2要件: The ordinance furthers the important government interests of

regulating conduct through a public nudity ban and of combating the

harmful secondary effects associated with nude dancing."certain

lewd, immoral activities carried on in public places for profit are

highly detrimental to the public health, safety and welfare .... "

第3要件: the interest is unrelated to the suppression, as discussed supra.

第4要件: The ordinance regulates conduct,よってno greater than is essential

[**Spence v. Washington (1974)**](https://mtsu.edu/first-amendment/article/302/spence-v-washington)Flag burning禁止違憲

The provision that the government interest behind a given regulation must be neutral and unrelated to the suppression of speech. The Court has highlighted this point in cases dealing with [flag burning](https://mtsu.edu/first-amendment/article/1109/flag-desecration), noting in that laws dealing with flag burning or misuse are “**directly related to expression in the context of activity**.”

**Texas v*.* Johnson*,* (1989)** Flag burning禁止違憲

Flag burning was protected. "[t]he expressive, overtly political nature of [Johnson's]

conduct was both intentional and overwhelmingly apparent." It was clear that "Johnson

was convicted for engaging in expressive conduct."

**Tinker v. Des Moines (1969)** 校内腕章禁止違憲

Facts: High school officials had suspended students for wearing black armbands to school

to protest U.S. involvement in the Vietnam War.

Hold: “the wearing of the armbands was "closely akin to 'pure speech' which … is entitled

to comprehensive protection under the First Amendment…" Public school officials

could not ban expression out of the "mere desire to avoid discomfort and

unpleasantness that always accompany an unpopular viewpoint."

**Rumsfeld vs Forum for academic and institutional rights (2006)**

軍リクルーターのキャンバスへの入構を妨げると補助金出さない

(同性愛者を差別する軍が反差別のロースクールのポリシーに反するため入構を妨げた)

→合憲∵1)連邦は軍を設け維持する権限がありキャンバスへの入構も同権限内であり違憲な条件ではない。2)場の提供の強制も,その人のメッセージに影響を与えれば修正１条違反になるが，本件ではロースクールの言論に何の影響も与えていない

マスコミなどへの課税

　　　　　　　　・内容に着目した課税（スポーツ新聞だけへの課税）等は違憲にされている例が多い

・Leathers v. Medlock (1991)

Taxing cable television, but not newspapers. →"differential taxation of speakers,

even members of the press, does not implicate the First Amendment unless the tax

is directed at, or presents the danger of suppressing, particular ideas.

**Freedom of Association**

**Freedom of association is protected by the first amendment.**

**The government must pass strict scrutiny to regulate the freedom of association**

① Laws that **Prohibit** or **Punish Group Membership** must meet **Strict Scrutiny**.

To punish membership in a group, government must prove the person

1) **Actively affiliates** with the group

2) **Knew of its illegal activities**, and

3) **Participated with the specific intent** **furthering those illegal activities**

例：subversive (破壊的) group のメンバーを弁護士会入会拒否

× deny benefit such as bar membership solely on membership in an organization

入会の可否を判断するために尋ねること自体違憲が判例

○ ask a specific intent to further the organization illegal goal

② Laws that **require disclosure** of **group membership**,

Look to see if there is a **substantial burden** on the **right of association**?

If so, Government must prove **Strict Scrutiny**

③ Laws that **prohibit a** **group from discriminating**

are **unconstitutional** unless it passes strict scrutiny.

**The government cannot prohibit discrimination if:**

1)the group is **intimate association** – Small dinner party, person not invited cannot sue.

2)the discrimination is **integral to purpose** of the group

e.g. KKK can exclude blacks

Boy scouts can exclude gays Boy Scouts v. Dale, (2000)

"the presence of that person affects in a significant way the group's ability to

advocate public or private viewpoints"

**Political Patronage**

– government has the ability to demand loyalty of a party that is currently in office.

Test : **Appropriate requirement for the effective performance**

**※** 違法行為を行わない誓約をさせる→OK,swear respect for national flags**→×**

**Freedom of Religion**

**１. Free Exercise clause**

**“Congress shall not prohibit the free exercise of religion”**

**Government cannot prohibit or seriously burden the exercise of religion,**

**but may regulate it if law is of general applicability.**

**Neutral law of General Applicability**

→Free exercise clause **cannot** be used to challenge it

**If a law is not of neutral and general applicability**

**=The law targets the religion in general or single out one religion for disfavored**

**treatment (SC: the law is enacted to with purpose of interfering with the religion)**

**→Strict Scrutiny** is applied

requiring 1) a compelling governmental interest

2) the least restrictive means of doing so

**Oregon v. Smith (1990)** 価値中立規制広く合憲に

Lawprohibiting use of peyote

→neutral to everyone and did not target religion→合憲（ペヨーテ使用者を解雇ＯＫ）

**Church of the Lukumi Babalu Aye, Inc. v. Hialeah (1993)**

　　　　 　　　 Law prohibiting killing of "an animal in a public or private ritual or ceremony”

→**Strict Scrutiny（宗教的として違憲判決）**

“the law is not generally applicable because it effectively applies “only against conduct motivated by religious belief.” narrower regulation would achieve the city's interest in preventing cruelty to animals.

**Sherbert v. Verner (1963) 以前の判例**

土曜日は安息日のためアーミッシュが稼働拒否したら解雇

→厳格審査で違憲判断，しかしペヨーテ事件で判例変更

宗教とは？　最高裁は定義なし

**US v. Ballard(1944)** a belief that is not **sincere** is not protected by the exercise clauseはNO

**US v. Seeger　　　　(1965)** 　 a belief that 1) is **sincere** and meaningful and 2) occupies in the life a place

**parallel to the place** filled by the **orthodox religious belief**は保護される

**２. Establishment clause**

　 The Establishment clause prohibits Government make **a law establishing religion.**

**The government action or regulations will be constitutional if**

1) it has a **secular purpose**

2) the **Primary Effect neither Advances nor Inhibits religion**

Ex: No government **symbolic endorsement** of a **particular religion**

3) there must NOT be **excessive Government Entanglement** with religion

Ex: Government cannot directly pay teacher's salaries in religious schools

Notes

‣Government cannot **discriminate against religious speech** or **religions** unless

**strict scrutiny** is met.

‣Government sponsored **religious activity in public schools** is unconstitutional

i.e. school prayer, moment of silence

But – **Religious students** and **groups** must have the **same access to school facilities** as **non-religious groups.**

問: the statute that states any utterance of blasphemy or sacrilege statement is a crime.

→establishment clauseにも違反する。∵prosecuting them advances the religion.

　 (もちろん表現の自由侵害，vagueなどとしても違憲)

**宗教的掲示**

**OK, if the religious symbols are surrounded with other symbols**

**私的まとめ 宗教的掲示を単独で行うのは違憲（①③）**

**非宗教的なものに囲まれていれば基本的に効果は非宗教的だから合憲（②③⑤）**

**しかし，目的が世俗的といなければ不可(④)，場所(学校＞庁舎＞公園)も要素**

**①Stone v. Graham (1980)**

印刷した十戒を公立小中学校の教室に掲示することを定めるケンタッキー州法

⇒目的と効果の宗教性を理由に違憲

**②Lynch v. Donnelly (1984)**

イエス生誕群像の展示を合憲　∵サンタやツリー等と展示→休日祝う世俗目的

**③County of Allegheny v. ACLU(1989)**

裁判所庁舎の階段単独展示の生誕群像→違憲∵キリスト教を是認する効果を持つ

ユダヤ教にちなむ燭台展示→合憲 ∵ツリーや「自由をたたえる」という掲示とともに展示され

たため、特定宗教or宗教一般を是認するものではない

**④McCreary County v. ACLU (2005)** レモン基準を適用して違憲

庁舎内の人通りの多い場所に十戒を入れた額を掲示

(当初単独→次に独立宣言、州憲法の前文など８つの文書を十戒より小さな額に入れて掲示→さら

にマグナ・カルタ、正義の女神肖像画を加え、額の大きさをそろえて掲示）

・政府行為に宗教目的があることを理由とする違憲判断は少ないが、目的審査は重要

→当初の展示は十戒の文言だけを展示。憲法修正14条の展示がないなど、宗教目的を上回る明確な主題（例えばアメリカ政治の基礎など）を示すには不十分

**⑤Van Orden v. Perry (2005)** Texas State Capitol in Austin

友愛組合が1961年にテキサス州議会議事堂の公園に寄贈した十戒記念碑

→公園にはアラモ砦の英雄、第１次世界大戦、真珠湾、朝鮮戦争の兵士や消防士の像など、州の

歴史に関わる16の記念碑がある。展示の伝統, 十戒が歴史的意義を持つことも否定できない，

「記念碑設置は、小学生が毎日十戒の文言と向き合ったストーン事件よりもずっと消極的に十戒

の文言を用いている」 Lemon test適用せず合憲, the display at issue was a "passive monument. "

**・Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995),**

州議会議事堂広場でKKKの十字架設置許可申請が問題 → 設置拒否は違憲

Traditionally, the square had been recognized as a public forum,

Because the display of religion was purely private it could not violate the Establishment Clause

**・Santa Fe Independent School District v. Doe (2000)**

フットボール試合前の祈りを違憲　∵従来は学校区が祈りを主導する生徒を指定していた

**Aid to religious school**

違憲 ㋐Money for religious instruction

㋑Money for **secular teachers** at religious schools (Lemon 1971)

合憲 ①Bus fair (Mueller 1983) 最終受益者が子供であれば

②Interpreters for deaf student (Zobrest 1993)

③Secular textbooks, (Agostini 1997)

④Vouchers to low-income parents (Zelman 2002)

⑤Instructional materials and equipment, including computers (Mitchell 2000)

⑥construction aid of non-religious school facilities. (Tilton 1971)

私的まとめ

　最終受益者が子供であれば基本ＯＫ(①②④), 直接支給でも世俗的な物又は世俗目的で利

用される金員であれば, セーフガード条項があればＯＫ(③⑤⑥) but NO Salary(㋑)

㋑[**Lemon v. Kurtzman**](https://en.wikipedia.org/wiki/Lemon_v._Kurtzman) **(1971) → "excessively entangled" with religion,**㋑

case**:** one permitting the state to "purchase" services in secular fields from religious schools,

the other permitting the state to pay a percentage of the salaries of private school

teachers, including teachers in religious institutions.

**The Demise of Strict Separationism.1 ~ Indirect Aid for Religious Institutions**

①[**Mueller v. Allen**](http://www.oyez.org/cases/1980-1989/1982/1982_82_195) **(1983)　 by a 5-4 vote**

rule: the child-benefit theory=the government may give aid to religious organizations if the

**purpose and effect of the aid is to benefit children**.

case: Minnesota statute that allowed parents to deduct from their state income taxes any money

they spent on “tuition, textbooks and transportation” for their children (elementary and

secondary schools.)

②[**Zobrest v. Catalina Foothills School District**](http://www.oyez.org/cases/1990-1999/1992/1992_92_94) **(1993)**

**case:** involving a hearing-impaired student who asked the school district to provide him

with a sign language interpreter at his religious high school, pursuant to a state

program. The school district denied the student’s request because the interpreter

would need to communicate any religious material taught in his classes.

rule: The interpreter did not provide an independent source of religious content.

It was **the child**, not the religious school, **that benefited** from the interpreter.

→such indirect aid would not make the state responsible for the religious instruction.

④[**Zelman v. Simmons-Harris**](http://www.oyez.org/cases/2000-2009/2001/2001_00_1751) **(2002)**

case: giving vouchers to low-income parents who chose to send their children to eligible

private schools.

rule: a program that funds religion indirectly is constitutional **if the funding goes to**

**individuals** who have true private choice in deciding whether to use the funding for

religious purposes.

**3. The Demise of Strict Separationism.2 ~ Direct Aid for Religious Institutions**

　　　　　 ⑥[**Tilton v. Richardson**](http://www.oyez.org/cases/1970-1979/1970/1970_153) **(1971) 5-4 majority**

case: the Higher Education Facilities Act, provided construction grants to church-sponsored higher

educational institutions. The grants were to be used for the construction of non-religious school facilities. The Act also stipulated that twenty years after the grant had been given, schools were free to use the buildings for any purpose.

rule: Only the 20year limitation portion of the Act violated the Religion Clauses ,subsidizing

the construction of facilities used for non-secular purposes would have the effect of advancing religion.

The Court held that the Act did not excessively entangle the government with religion no ∵college students were less susceptible to religious indoctrination, and one-time grants

did not require constant state surveillance.

③[**Agostini v. Felton**](http://www.oyez.org/cases/1990-1999/1996/1996_96_552) **(1997)**

the government may directly provide aid to religious schools as long as the aid itself is secular, such as secular textbooks, and **as long as the government provides safeguards to ensure** that the school uses the aid for secular purposes.

⑤[**Mitchell v. Helms**](http://www.oyez.org/cases/1990-1999/1999/1999_98_1648) **(2000)**

case: a federal program that provided all schools, both public and private, with

instructional materials and equipment, including computers and film projectors.

rule:4名the program was constitutional because it provided secular benefits to schools

without regard to whether they had a religious affiliation. 　↓説が有力化

2名the Agostini ruling allowed the government to provide secular aid to any institution

as long as the aid **did not directly support religious activities**.

→must take reasonable steps to **ensure** that aid recipients use the aid only for secular acts

政教分離と宗教的表現の自由

私的論証パターン　1) content-based, public forum →strict scrutiny

2) not violating establishing clause →compelling interest

violate the establishing clause?

a) purpose 　 →secular ∵差別防止目的

b)　effect 　 →ケースバイケース

　　　　　　　　　　c) entanglement →ケースバイケース

3) If no violation of establishing clause, no compelling interest →unconstitutional

**Widmar v. Vincent (1981)**

ミズリー州立大学の規則: 一般に施設の利用を広く認める一方、学生グループの「宗教上の礼拝や教義の教授を行う目的」での大学施設利用に関しては、これを認めていなかった。

1. パブリック・フォーラムを開催→厳格な審査基準

当該規則が必要不可欠の州の利益を達成するために必要であり、かつ同規則がその目的を達成するために厳

格に規定されていることの証明が必要

→大学：国教条項から導かれる教会と国家との厳格な分離を維持することが必要不可欠の利益

2.　政教分離

世俗目的テストと過度の関わり合いテストは、明白に充たされる

「付随的（incidental）利益」を享受することは「主要な効果」としての宗教の促進にはあたらない。

当該フォーラムには、百以上の登録学生団体が存在し、宗教グループのみならず、広範囲の非宗教グルー

プがフォーラムを利用。宗教促進にもならない→必要不可欠な利益無く違憲

**Board of Education of Westside Community Schools v. Mergens (1990)**

ネブラスカ州Omahaの公立高校：キリスト教クラブの設立を宗教を理由に不許可 (補助もらえない)

生徒側：連邦助成で「限定的なオープン・フォーラム」を設けた公立中高校に「宗教的、政治的、哲学的、またはその他の内容」に基づき平等利用を否認することを禁じた「平等利用法」に違反

裁判所：上記判決が平等利用法解釈にも妥当。政教分離のためという正当目的はなく違法

1) 世俗目的は明白にある（差別防止）

2) 宗教を促進する主要な効果：学校が非差別のため言論を許可することは是認や支持を意味しない。

教職員の積極的な参加もない→宗教促進効果なし

3) 過度の関わり合い：教職員の参加、学外者の恒常的な参加，学校の後援などを禁止→なし

**Lamb's Chapel v. Center Moriches Union Free School District (1993年)**

学校施設を広く地域社会の各種グループの諸活動に利用させる権限を認められた学校区教育委員会が、「キリスト教的な家族の価値」を唱道する映画シリーズの上映を宗教利用禁止規則に基づき拒否

1. 教育委員会規則は第１修正に違反するか

原審 ：宗教目的の学校施設の利用に対して平等に利用させないという形で適用→見解中立的規則

　　　 最高裁 ：「政府が、他の点で話し手が表明する見解を抑圧するためだけの理由から、話し手に当該フォーラム利用を認めないことは、第１修正違反となる」→見解に基づく差別。第１修正違反

　2. 学校施設の宗教目的での利用許可は、国教条項に違反するか→しない

1) 問題の映画上映が, 学校時間外であり,2) 学校の後援を受けておらず, 3) 教会メンバーだけでなく公衆に開かれており, 3)さらに当該施設は多様な種類の私的団体により繰り返し利用されてきた.

→ 宗教または教会に対する利益も付随的なものに過ぎない.

**Rosenberger v. Rector and Visitors of the University of Virginia (1995)**

バージニア大学は学生から納付金を徴収し学生活動基金を設立していたが，キリスト教系の学生団体発行のキリストを唱道する雑誌印刷費用支払を拒否

1. 学生活動基金＝パブリック・フォーラムと認定した上で、本件とLamb's Chapel事件とを比較し、本件にお

いてもLamb's Chapel (use of public school buildings)同様の基準がthe use of school moneyでも該当。

2. 見解に基づく差別という言論の自由の侵害が、国教条項の遵守義務によって免責されるか

→「重要な要素は宗教に対する当該計画の中立性であること」。レモンテストに言及せず合憲

**Good News Club**判決

市民に開放されている学校施設の利用。子供のための聖句の朗誦、聖歌の斉唱をする集会利用を拒否

1. 学校区のクラブの申請不許可はクラブの言論の自由を侵害したか→した∵limited public forum

2. 国教条項がそうした侵害を正当化するかどうか

①宗教的中立②endorsementなし∵インストラクターは学校の教師でない,通常の教室の様子と違う・・　⇔ 反対意見：礼拝や改宗活動を公立学校で行うことを許すべきでない。

**JUDICIAL POWER**

**1. Requirement for Cases & Controversies**

**US constitution requires “case and controversy” for federal courts to hear the case.**

**Federal courts will hear the case if**

**① P has standings, ② the case or issue is ripe, ③ the case or issue is not moot, and**

**④ the case or issue does not involve the political question.**

**① STANDING**

Before a plaintiff may sue in federal court, Plaintiff must show that

(1) **Injury-in-fact** **:** P has suffered or imminently will suffer a **concrete injury in fact**,

※ P seeking injunctive or declaratory relief must show a likelihood of future harm.

(2) **Causation** **:** There must be **a causal connection** between the injury and the conduct.

(3) **Redressability** **:** That **can be remedied** by the court.

No Advisory opinion

例：連邦と州で補助金について紛争が生じたfederal district courtに訴訟を提起し，

同裁判所の判断がfair and lawfulと考えれば連邦は従うという法

⇒ 違憲 ∵ advisory opinion

No generalized grievances

– P must NOT be suing solely as a **citizen** or **taxpayer** interested in having

the **government follow the law**.

Exception: taxpayers have standing to **challenge government expenditures**

in violation of the **Establishment Clause**.

※ 政府が飛行機を教会にＦＭＶで売却→tax payerはstandingない

∵expenditure = spending powerと関係なし

**Third-party Sanding**

P can’t assert claims of 3rd parties.

UNLESS 1: there is a special relationship.

(e.g. doctor-patient, 養育する父，解雇された者の妻は×)

・両親は子の侵害につき本項に基づくStandingだけでなく, parental rights侵害として独

自のStandingも持つ

2:the third party is unlikely to be able to assert his rights.

(陪審員選択の差別につき被告人，未婚者中絶禁止につき医者)

Associational Standing **もちろんcan sue for an injury to itself**

An **organization** may sue for its **members**, if:

a) The individual **members** would have **standing** to sue;

(essayでは個人につき各要件を満たすことを論じる) b) The injury is (closely) **related** to the organization’s **purpose**; and

c) **Individually** **participation** is not required

（e.g. Tax Payer団体，環境保護団体の差止）

**② RIPENESS** **essay tip: prior restraintなら忘れずに指摘**

"a claim(lawsuit) is not ripe for adjudication if it rests upon contingent future

events that may not occur as anticipated, or indeed may not occur at all."

**Texas v. United States, 523 U.S. 296 (1998)**

When it is not ripe the court cannot hear the case.

Ripeness is measured by

1) **Hardship** that will be suffered without pre-enforcement review, and

2) **Fitness** for judicial review.

(=Does federal court have everything it needs to decide the question?)

MBE Tip: to request for **declaratory judgment** is a ripeness question.

**③ MOOTNESS**

A lawsuit is moot when there is no longer **actual controversy** (and any ruling by the court would have no actual, practical impact.)

When it is moot, the court must dismiss the case provided it does not fall within

one of the recognized exceptions.

(defer decision＝「決定を延期」するときもある)

Exceptions

**1) Capable of repetition but evading review**

**Roe v. Wade-pregnancy (1973)**: 出産終わっても妊娠中絶を禁止する立法を争える

**2) Voluntary cessation** – D halts offending practice but is free to resume at any time

[**Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.**](https://en.wikipedia.org/wiki/Friends_of_the_Earth,_Inc._v._Laidlaw_Environmental_Services,_Inc.)**(2000),**

An industrial polluter, against whom various deterrent civil penalties were being pursued, could not claim that the case was moot, even though the polluter had ceased polluting and had closed the factory responsible for the pollution.

**3) Class action suits** – As long as **one member** of the class has ongoing injury

**④　POLITICAL QUESTION DOCTRINE**

Federal Courts will NOT adjudicate political questions that have **constitutionally committed** to another branch or **inherently incapable of judicial resolution**.

"Republican form of government clause"

Foreign Policy – Challenges of the **President's conduct** of foreign policy.

Including presidents ability to **rescind treaties**, even though Senate must ratify

Impeachment or Removal

– Challenges to **impeachment** or **removal process**

例:whether persons elected meet age, residency or voting requirements.

Partisan Gerrymandering

– Challenges to **Partisan Gerrymandering**

×：Drawing Voting district lines for republicans / democrats

OK：for anything **other** than partisan purposes (Race)

**2. ELEVENTH AMENDMENT** (Sovereign Immunity) **essay tip:州が被告なら忘れずに指摘**

Private individual cannot sue the States (does not include city, counties, state officials) for money damages. (例外: congress can use its enforcement powers to authorize private suit against states for violations 13th,14th,15th Amendment.)

Rule – Prevents **Federal AND State** courts from hearing suits involving **citizens** suing their

own **state** or **another state** government. (look for **an individual against a state**)

Exceptions

1) **State waives its immunity** (MUST be **express**)

2)lawsuit brought pursuant to federal laws adopted under **Section 5 of the 14th**

**Amendment (×commerce clause)**

3) **Plaintiff is the Federal Government** suing a state

4) **Bankruptcy proceedings**

※ Suits against state officials are ALLOWED for:

**・Injunctive relief** (Even if it will require prospective payment from the state)

**・Money damages** to be **paid by them personally**

but: May NOT be sued if the **state treasury** will be **paying retroactive damages**

**3. ABSTENTION**

**・** Federal courts will temporarily abstain from resolving a **constitutional claim** when the

disposition rest on an **unsettled question of State Law.**

・ Federal courts may NOT **enjoin pending State** **Court proceedings**

except where **the prosecution is in bad faith** or part of some **pattern of harassment**

against an individual＝in cases of proven **harassment** or **prosecutions taken in bad faith**.

・基本刑事事件対象。刑事事件に関連する民事事件にも拡大

・州裁に起訴されていれば, 連邦裁は同手続の差止できないが, bad faithでなされていればOK

**※　SUPREME COURT REVIEW** (Generally MBE)

**Original Jurisdiction** – SC has original and exclusive jurisdiction for suits一審が最高裁

1) between **state governments**,

2) cases affecting **Ambassadors** other **public ministers (外交使節) or Consuls**

・憲法上は州が当事者の事件すべてSCがoriginal jurisdictionだが第11

修正で州が被告となる事件は連邦裁へ訴訟提起不能.

※ 州の境界紛争を上院が解決する法案は違憲。SCのみ。

**Appellate Jurisdiction**

**the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, …under such Regulations as the Congress shall make.　ArticleⅢ section3**

**連邦議会の定める規則に従い、法律問題および事実問題の双方について上訴管轄権を有する。**

・もっとも一切の上訴管轄をなくすのは，50の憲法解釈が生じるためfrustrate the establishment

of a supreme and uniform body of federal lawで違憲と解されている。

・ Original jurisdictionのない事件の一審管轄を最高裁に付与することは違憲。上訴管轄のみ。

**Writ of Certiorari** 1) Supreme Court has **discretion** to grant Writs of Certiorari.

ALL cases from **State Courts** and the **U.S. Court of Appeals** to

the Supreme Court are by Writ of Certiorari.

2) SC **MUST** hear cases that come to it by appeal from decision of a

**three-judge** **federal district courts** (appeals skip appellate review)

State Law Grounds

・ The SC will hear State Cases regarding the **constitutionality of a federal statute**, or

whether a State Statute **violates a federal law**.

**・**The SC will NOT hear the case if reversal of the **federal law** ground will NOT change

the result because of a **state law ground**. (Can’t overrule state law decisions)

例: Residents file injunction under state and federal environmental law. The State SC holds both

violate, the SC cannot review, because reversal of fed law would not change the outcome.

**CONGRESS**

**CONGRESS' Authority to Act (aka Federal Legislative Power)**

前提１: Power must be based on an Express or Implied power.

NO General Federal police power.

Exceptions– **M**ilitary Bases, **I**ndian Reservations, Federal **L**ands, **D**istrict of Columbia

前提２: Necessary and Proper Clause

– Congress has the power to make ALL laws **necessary and proper** for executing ANY

power granted to ANY branch of the federal government.

× Standing alone: It must work in conjunction with another federal power.

**1　Taxing and Spending Power** – Congress may tax and spend **for the general welfare.**

①Taxing 　– Must raise some revenue

②Spending – Spending may be for **anything** remotely related to the **general welfare**

※ they are still limited by all other constitutional provisions.

MBE: If the answer states general welfare, then must be tax and spending or police power.

※ congressがspendingをmandateすれば大統領も従う義務がある

**2　The Commerce Clause**– Congress may regulate the:

**1) Channels of interstate commerce**; i.e. highways, waterways, internet

**2) Instrumentalities** of interstate commerce and

3) **Person or Things** (moving) in interstate commerce

ANYTHING crossing state lines – Trucks, planes, trains, phones, internet, stocks, insurance, radio signals, cattle, people.

4) **Economic Activities** that have a **Substantial Effect** on interstate commerce

Intrastate Activity: (OK if economic and rational)

If congress attempts to regulate intrastate activity

the court will uphold the regulation if:

1) It involves **economic or commercial** activity (growing wheat or medical marijuana),

& 2) Congress can conceive a **rational** basis that it has a **cumulative effect on** interstate

commerce.

i.e. ×possessing a gun in a school zone ×gender motivated violence

・元々，差別が州際の旅行者に相当の影響を与えるとして公民権法を認めたり，最低賃金法，環境保護法等を是認してきた（但し, 規制はeconomic activityだった）

・result of a comprehensive schemeの一部としての非経済的行為規制は許容される

**United States v. Alfonso D. Lopez, Jr., (1995)**

CASE: a 12th grade high school student, carried a weapon into his San Antonio high school. He was charged under Texas law with firearm possession on school premises.

→Congress may regulate

(1) use of the channels of interstate commerce,

(2) the "instrumentalities" (for example, vehicles) used in interstate commerce, and

(3) activities that **substantially affect interstate commerce.**

(the Court stressed "enumerated powers")

The law is a criminal statute that has nothing to do with "commerce".

“To uphold the Government's contentions here, we have to pile inference upon inference”.

**United States v. Morrison,** [**529**](https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases,_volume_529)[**U.S.**](https://en.wikipedia.org/wiki/United_States_Reports) **598 (2000)** DV規制→違憲

[Violence Against Women Act of 1994](https://en.wikipedia.org/wiki/Violence_Against_Women_Act_of_1994) was meant to remedy had only an "attenuated" effect, not a substantial one, on interstate commerce.

**Gonzales v. Raich, 545 U.S. 1 (2005)** 自家用マリファナ栽培規制→合憲

Within Congress’ commerce power ∵**production of the commodity** meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

The likelihood that the high demand in the interstate market will draw such marijuana

**National Federation of Independent Business v. Sebelius, (2012),**

　　　　オバマケア（国民皆保険）もcommercial activityと関わらずcommerce clauseの範囲外

Requiring people to buy health insurance or else penalty went beyond Commerce

Clause Power. (ただし，taxing powerの範囲内として，結論は合憲）

**3 War and Treaty Powers**

– Congress has the power to

1) declare war, 2) raise and support armies, 3) provide for and maintain an army.

**4 Power to Coin Money**  　　– Congress has the power to coin money and fix weights and measures.

**5 Power Over Citizenship**　– Congress may establish uniform rules of naturalization.

This gives congress plenary powers over aliens.

**6** **14th Amendment, § 5 powers = enforcement clause**

The Congress shall have power to enforce, by appropriate legislation,

the provisions of this article.

Congress may act to prevent or remedy violations of rights recognized by the courts and such laws must be proportionate and congruent to remedy the violations.

BUT Congress may NOT create new rights or expand the scope of rights.

例: 賃貸借での差別を禁止するfederal law

　　　×　the enforcement clause of 14th amendment ∵limits only state action

〇　If such acts, taken in aggregate, have a **Substantial Economic Effect** on interstate commerce.

例: 賃貸借で差別に罰金を科す

→上記同様×

Welfare clause ArticleⅠsection 8も×

∵“penalty” はtaxing for general welfareとはいえない where a tax is primarily to generate revenue but

a penalty has the characteristics of regulation and punishment。

但し，人種差別禁止の時は奴隷制の象徴と付随物attackとして13th amendmentの適用有り得る。

The Supreme Court has held that the Thirteenth **Amendment** prohibits slavery or

involuntary servitude and also empowers Congress to end any lingering **badges** **and**

**incidents of slavery**.

※: 平等条項だけでなく14条のdue process clauseを実行化するための法律作成もOK

7 **統一的な帰化に関する規則、および合衆国全土に適用される統一的な破産に関する法律**

※　破産手続は連邦が掌握。州は破産手続中の者に対する訴訟を中断の必要がある。

**Tenth Amendment Limit on Congress Power**

The powers not delegated to the United States by the Constitution, nor prohibited by it to

the states, are reserved to the states respectively, or to the people.

1) Anti-Commandeering Doctrine

**The federal government cannot**

**1) compel the state to pass law 2) enforce federal law.**

**・**州が任意に連邦法を強制することも違憲

**・**No prohibition on prohibition→“No state shall do X”という法律はＯＫ (2018変更？)

MBE: 小学校から100フィート以内で麻薬の運搬を禁止する法律制定を要求する法律は

10条違反で違憲

New York v. United States, (1992)

　 連邦法の規制に従わないと放射性廃棄物につき州がtake titleという法は

・the "take title" incentive as an attempt to "commandeer" the state governments

"crossed the line distinguishing encouragement from coercion."

"directly force states to legislate according to their scheme" →違憲

In [Murphy v. National Collegiate Athletic Association](https://en.wikipedia.org/wiki/Murphy_v._National_Collegiate_Athletic_Association) (2018)

The law prohibiting state authorization of sports gambling schemes→違憲

Fact: PASPA does not make sports gambling itself a federal crime. Instead, it allows

the Attorney General, as well as professional and amateur to bring civil actions

to enjoin violations.

Hold: “Congress may not simply com­mandeer the legislative process of the States by

directly compelling them to enact and enforce a federal regulatory program..”

“The distinction be­tween compelling a State to enact legislation and

prohibiting a State from enacting new laws is an empty one.”

“Nor does the anti-authorization provision constitute a valid preemption

provision.”

補助金で事実上強制できる？※string=付帯条件

But, Congress can **induce state government action** by attaching conditions on the

receipt of federal funds,

so long as the condition　a) is **clear**ly stated

b) **relates to** the purpose of the spending program and

c) is not unduly **coercive.**

**South Dakota v. Dole** **(1987)**

上記基準を明確化し飲酒年齢を21歳に引き上げる州に補助金交付してOK

**US v. Butler (1936)**

農家に課税し減反協力業者に補助金として配分

1. Did Congress exceed its constitutional taxing and spending powers?

Taxing and spending for the general welfare →OK

2. coercive→The Agricultural Act was unconstitutional because by the 10th Amendment

2) Congress MAY prohibit **harmful commercial activity** by state governments,

i.e., Prevent state from **releasing or selling private information**

but, may not command state officials directly.

（but OK if imposed by statutes of general applicability that applies to both private and state actors）

**Garcia v. San Antonio Transit Auth., (1985)**

州の公務員は連邦の最低賃金法に服するか？→従来判例 the Commerce Clause does not empower Congress to enforce such requirements against the States "**in areas of traditional governmental functions**. Such regulation would violate the 10th amendment

を変更し, federalismからそのような限界はないと判示

**Printz v. United States**, **(1997),**

州シェリフに武器売買時のバックグランド調査を行わせる連邦法を適用するのは違憲

“commandeering of the sheriffs to perform background checks violated the 10th

amendment …the Court held that the Tenth Amendment categorically forbids the Federal

Government from **commanding state officials directly**.”

(ましてや州議会における行為を連邦法違反で起訴できない)

**Delegation of Powers**

1) Legislative powers MAY be delegated so long as “**intelligible standards**” are set.

Generally : Congress may **Delegate ANY Legislative Power**

(no limit exists on Congress’ ability to delegate legislative power)

Exception : Powers uniquely confined in Congress (declare war, impeachment)

MBE Tip: Federal law is unconstitutional because it is in **excess of**

**delegation of legislative powers** is always **wrong.**

**∵** no limits exists Congress’s ability to delegate

2) **Legislative Vetos** and **Line-item Vetos** are ALWAYS Unconstitutional.

Congress MUST use:

a) **Bicameralism** – passage by both the House and Senate, AND

b) **Presenting** the bill to the **president** for his **signature or veto.**

・President must sign or veto the bill in its entirety.

※ 予算執行時に国会の承認を要するという法案は違憲

　 原発建築について国会の承認を条件とすることも違憲

∵all resolution, order, or vote that the House and Senate vote on shall be presented to the President.

3) Congress may NOT delegate **executive powers** to itself or its officers.

※ Senators are immune to suit for any speech she makes in the Senate.

判例ではnot only to a Member but also to his assistant.

**Federal EXECUTIVE Power**

・The executive branch carries out and enforces laws.

・ The president can issue rules, regulations, and instructions called executive orders.

The President's executive power is subject to two important limitations.

1) The President lacks executive authority explicitly granted to Congress.

**✕**　declare war, grant letters of marque（私掠免許状）, or regulate commerce

2) Specific constitutional provisions may check customary executive authority.

**✕**make treaties or appointments without the advice and consent of the Senate.

**Foreign Policy**

**Foreign Relations** – President has paramount power to represent the U.S. in day to day

foreign relations.

※大使にＡ国にformal letterを送るよう指示する法律は違憲,

President alone has the authority to represent the U.S. in foreign affairs(最高裁)

**Treaties**– Agreements between the U.S. and foreign country that are

negotiated by President and are effective when ratified by the Senate

Power – President has the power to ENTER into treaties

with the consent of two thirds of the Senate.

1) **Prevail** over conflicting **State Laws.**

2) Conflict between **Treaty** and **Federal Law**, the LAST one adopted controls.

3) Conflict between **Treaty** and **Constitution**, treaty is INVALID.

**Executive agreements**

– Agreement between U.S. and foreign country that is EFFECTIVE

when signed by President and head of foreign country.

※ **NO Senate approval** required

1) Can be used for **ANY purpose** that treaties can be used for.

2) **Prevail** over conflicting **State Laws**.

3) NEVER prevail over conflicting **Federal law** or the **Constitution.**

**Commander in Chief**

President has broad powers as Commander-in-Chief to use **American troops** in

**foreign countries**.

MBE Tip: Lawsuit to challenge use of troops – dismissed as political question.

**DOMESTIC Affairs**

**1. Appointment Power**

1) [the President] shall nominate, and by and with **the Advice and Consent of the Senate,** shall **appoint** Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers. ※　principal officerは大統領が上院の助言と承認で任命

2)　　but the Congress may by Law vest the Appointment of such inferior Officers… in the

President alone, in the Courts of Law, or in the Heads of Departments.

**(**inferior officersは法律で承認を不要にし，任命権を大統領のみに付与し, または, 裁判所も

しくは各部門の長官に付与することができる)

Inferior Officer – those that can be fired by an officer of the U.S.

(i.e. U.S. attorneys can be fired by the Attorney General)

※Congress may NOT **give** itself or its officers **the appointment power**;

its functions are limited to the Senate’s role in advice and consent ∵三権分立

Buckley v. Valeo

Congress created new agency – gives appointment rights to President for some,

to Congress for some, and to others - WRONG! (President must appoint)

MBE Tip: 上院選出の外交官候補３名から大統領が任命。上院の異議がなければ同人に確定

×大統領の指名権限を不当に制限 & ×must be affirmatively approved

　　　　　　　　・しかし，調査のための特別委員会の委員などは任命できると考えられている。

**2. Removal Power**

President may remove any executive branch office at will **unless limited by statute.**

・Congress can’t prohibit but may limit removal, if an office where independence

from President is desirable & good cause.

Ex - Congress can’t limit removal of a cabinet member.

Congress can remove executive officers through **impeachment.**

**3. Veto Power** – President has the power to veto acts of congress.

Override – If the president disapproves (vetoes) an act of congress, the act may still

become law if the veto is overridden by a **two-thirds vote of each** **house**.

Pocket Veto – The president has 10 days to exercise the veto power.

If he fails to act, then the bill

1) becomes law if congress is in session,

2) but is automatically vetoed if Congress is NOT in session.

Line Item Veto – ALWAYS unconstitutional.

**4. Power to Pardon** those accused or convicted of **FEDERAL crimes**

※ 大統領のpower to pardonを法で規制するのは違憲

Exceptions 1) **Impeachment** – can’t be pardoned for the offenses that led to impeachment

2) **Civil Contempt** – pardon power doesn’t apply.

MBE Tip: Federal ONLY! Criminal Liability ONLY!

**※ Impeachment and Removal**

– The president, vice president, federal judges and officers of the U.S. can be **impeached** from the office for **treason, bribery, or for high crimes and misdemeanors.**

・Impeachment does NOT **remove person** from office.

**2/3 vote** from **Senate** is necessary to **convict and remove.**

**・**A **majority vote** of the **House of Representatives** is necessary to invoke the

charges of impeachment. (Impeachment does not remove)

**※ Executive Privilege / Immunity**

Privilege – President has executive privilege to keep certain communications

secret. (National security secrets are given great deference by the courts.)

Exception – In criminal proceedings, presidential communication will be

available to the prosecution.

Immunity – President has **Immunity from Civil Suits** for **money damages**

involving **actions** that occurred while **in office**.

※ NO immunity for actions that occurred **prior to taking** office

※ as a chief executive officer, may direct actions of federal agencies by executive order

but can’t direct the actions of persons outside the branch unless authorized by Congress

**STATE POWER** (FEDERALISM)

State law must meet a 3 part test

1) within a State power

2) must not violate any person’s constitutional right

3) must not improperly burden interstate commerce

**①　PREEMPTION** (Supremacy Clause of Article VI)

The Supremacy Clause of Article VI

**Constitution, and Laws made pursuant to it, are the Supreme Law of the land.**

**Under the Supremacy Clause, a federal law that conflicts with a state law**

**invalidate or “preempts” that state law**

"Congress may indicate pre-emptive intent" in two ways: "through a statute's express

language or through its structure and purpose. Jones v. Rath Packing Co., (1977).

**Express Preemption**

Express preemption occurs only when a federal statute explicitly confirms Congress's

intention to preempt state law. [English v. General Elec. Co.](https://en.wikipedia.org/wiki/English_v._General_Electric), (1990).

**Implied Preemption**

Implied preemption can occur in two ways: field preemption or conflict preemption.

**Conflict Preemption**

Conflict arises when

1) it is impossible to comply with both the state and federal regulations, or

2) the state law is an obstacle to the achievement of Congress's objectives.

※通称1)はActual conflict 2)はObstacle

Minimum safety standard vs. uniform safety standard

※一般にmore extensive regulationは合憲 ∵grant more protectionが普通

MBE: may set **stricter environmental** standards than EPA, unless Congress prohibits

Congressional intent may be to allow States to pass laws that will "establish greater safety than t**he minimum safety** achieved by a federal regulation intended to provide a floor".

Alternatively, the purpose of a federal law could be to set **a uniform national standard**.

Geier v. American Honda Motor Co.,(2000)

連邦行政規制ではエアバッグの装備規制はないが，州法上の不法行為で免責

になるのか？→基準の作成経緯に照らしpreemption認める。

the statute "reflects a desire to subject the industry to a single,

uniform set of federal safety standards.

**Field Preemption**

Congress clearly intends to occupy the fields. (Ex: Immigration laws)

The courts will infer an intention to preempt state law if the federal regulatory scheme is so pervasive as to "occupy the field" in that area of the law.

"[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied', ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'

※ preemptionは通常legislative powerとセット論点

　　　　　例: Sperry v. Florida (1963),

SC determined that a patent agent authorized to practice before the U.S.

Patent Office pursuant to a federal statute couldn’t be barred by Florida Act.

SC affirmed the constitutionality of the law authorizing the Patent Office to

regulate patent agents, finding it within the scope of what was necessary

and proper for Congress to exercise its authority under the [Patent Clause](https://en.wikipedia.org/wiki/Patent_Clause)

and therefore did not violate the Tenth Amendment.

**※ Inter-governmental immunity**

States may not **tax or regulate** federal government activity.

※ Unconstitutional to pay a state tax out of federal treasury.

(i.e. a store owned and operated by federal government, state cannot tax)

　　　　　　　　　　　例・空気清浄機設置義務を課す州法 → 陸軍施設に適用ない(同施設長を起訴不可)

　　　　　 ・連邦労働部の従業員が上司の指示でセミナー勧誘チラシを個別に配布

→ 州の広告規制違反で逮捕はできない

・State cannot regulate U.S. agency's transportation of nuclear materials by the statute

prohibiting transportation of such materials for the citizen’s health.

・連邦公務員の私的な自動車私用に課税はOK

∵not out of federal treasury, not the part of federal government activity.

※ No state shall, without the consent of the Congress, lay any imposts or duties

on imports or exports. (Articl1 1,§10,clause2)　 imposts = 関税，輸入税

→ 州は外国輸入肉のレストランでの利用制限はできない

∵ the power to regulate foreign commerce lies exclusively with Congress

**②　Dormant Commerce Clause ＝ Negative implications of the commerce clause**.

**State laws are unconstitutional, if they place undue burden on interstate commerce**.

① **If the law is discriminatory, it is unconstitutional unless it is necessary to achieve an important government purpose**

If the law is discriminate against out-of-state parties

＝1) Facially Discriminatory or 文言上差別

2) that is Discriminatory in Effect or 効果差別的

3) that is motivated by local economic protectionism 目的差別的

→ unconstitutional.

UNLESS 1) No Reasonable Nondiscriminatory **Alternative** : **LRA**

2) to achieve an **important** government purpose.

**違憲例**[**City of Philadelphia v. New Jersey, (1978)**](http://usconstitutionjp.blogspot.com/2012/09/city-of-philadelphia-v-new-jersey-437.html)

ニュージャージー州が他州からの廃棄物の流入禁止

∵文言上差別。州民の健康と環境を守る目的でもＬＲＡではない。

検疫法はどこで生じたものでも害悪を生じる物を移入禁止する点で違う

**オクラホマ(1979)**：「ひめはや」の州外持出し禁止。

∵文言上差別。州内での捕獲規制がなく、他にとりうる手段がないとはいえない

[**Dean Milk Co. v. City of Madison, (1951)**](http://usconstitutionjp.blogspot.com/2012/09/dean-milk-co-v-city-of-madison-wis-340.html)

5 mile内低温殺菌未了の牛乳販売禁止。

∵文言中立でも効果差別的。州内事業者も排除されるが他州の業者が強く排除

[**Hunt v. Washington State Apple Adver. Comm'n**](http://usconstitutionjp.blogspot.com/2012/09/hunt-v-washington-state-apple-adver.html) **(1977)**

ノースカロナイナ州ＷＡでの厳しい品質表示をリンゴに付すこと禁止

∵文言中立でも効果差別的⇒違憲

**合憲例**[**Maine v. Taylor, (1986)**](http://usconstitutionjp.blogspot.com/2012/09/maine-v-taylor-477-us-131-106-s-ct-2440.html)  （文言上差別で合憲とした例外）

メーン州 生きた餌魚の州外から持ち込み禁止。

∵文言上差別→but目的重要(寄生虫被害から州防),他に差別少ない手段ない

② **If the law is not discriminatory, it violates the dormant commerce provided that**

**its burden exceed its benefits**

　　(= If the law only incidentally burdens interstate commerce)

＝Balancing test is used. You must weigh the **state's interest** against the **burden on interstate commerce**, (andconsider whether **other alternatives** could be less burdensome)

**違憲例(1987)** 州内通行トラックにアクセル税∵違憲: 平等でも全州が採用すれば州際通

商トラックへの課税は膨大なものとなり明らかに州際通商を阻害する.

**(1935)** ニューヨーク州で牛乳取得価格の最低金額決めた。

∵ 他州の酪農家までその効果を催している

**合憲例(1973)** メリーランド州 州内で石油精製会社がガソリンスタンド経営を禁止

∵ 州内に石油精製会社ない→×自州産業保護目的×ガソリン流入妨害効果

**(1981)** ミネソタ州 リサイクルできない牛乳容器は紙製品を除き禁止

∵ 紙製品はミネソタの主産業だが,プラスチック業者の負担が過大ではない

**(2007)** [**United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt.**](http://usconstitutionjp.blogspot.com/2012/09/united-haulers-assn-inc-v-oneida.html)

ニューヨーク州 自治体内で処理施設を作りそこでの処理を義務付け。

∵ゴミ処理は典型的な自治体の機能。州外事業者だけに義務付けていない

（1994 C&A Carbone v Clarkstownで民間処理施設での義務付け条例は違憲とした）

Exception: a) Congressional approval.

b) Market participant exception

– A state or local government may prefer its **own citizens**

when acting as a market participant.

(1983)**ボストン:公共工事受注者差別〇**

入札で最低額の州外業者でなく二番目の州内業者に発注しても良い

※ 州内企業だけに補助金出すのは⭕、州外企業だけに課税は×

**(1988)** オハイオ州で生産された時だけガソリン税控除　違憲∵税の特典はダメ

[**(1984)**](http://usconstitutionjp.blogspot.com/2012/09/s-cent-timber-dev-inc-v-wunnicke-467-us.html) [**S.-Cent. Timber Dev., Inc. v. Wunnicke,**](http://usconstitutionjp.blogspot.com/2012/09/s-cent-timber-dev-inc-v-wunnicke-467-us.html)

アラスカ州が公有林の販売相手に搬出前に「州内」加工を義務付け

→州は材木の売主として市場参加者の地位。しかし販売後の加工の部分に条件づけを

するのは、別の市場に介入する行為である。→市場参加者の例外法理の適用がない。

**(1994)** [**W. Lynn Creamery, Inc. v. Healy**](http://usconstitutionjp.blogspot.com/2012/09/w-lynn-creamery-inc-v-healy-512-us-186.html)

MA州が州内で販売の全生乳に課税。その収入を州内の酪農家に補助金として付与

→違憲。州の補助金だけであれば、市場参加者としての州という例外が認められるが、

特別課税とリンクされた形をとると眠れる通商条項が復活する。

　　　　　　　　　　　　　※1) Due process clause, 2) The equal protection clause,

3) The privilege and immunity clause (法人でなければ)等もだいたい常に同時に問題

**③ Privileges and Immunities Clause**

1．Privileges &Immunities Clause of the 14th Amendment

– No State may deny their citizens the privileges or immunities of national citizenship.

Interpreted as the **right to travel** (and the right to **vote for** **federal officers).**

MBE Tip: Always wrong answer unless it involves the **right to travel.**

※もともとは経済的差別禁止を意図した条項であったが最高裁は他州へ移動する権利と狭

く理解し死文化 (**Saenz vs Roe, 1999**で居住要件問題に適用し適用範囲は混迷)

The right is protected by Due process clause & Equal protection and they are usually

stronger arguments.  
**2．Privileges & Immunities Clause of Article IV**

**If the law discriminates by state against out-of-state residents with regard to an important economic activities or fundamental right, it violates the privileges and immunities clause unless there is substantial justification.**

– Prohibits discrimination by a **State** against **Non-Residents**. (3 Part test)

1) Residents

– The law MUST discriminate against **Out-of-State Residents**

**※ Corporations** and **aliens** cannot use this privilege

(MAY use Dormant Commerce Clause or Equal Protection clause)

2) Fundamental Rights : デュープロセスでいう基本的と権利と異なり歴史的権利

– Only **Civil Liberties** **or Important Economic Activities** are protected.

・i.e. ability to earn a living, access to courts, emergency services,

purchase property, medical care.

・not Elk hunting or recreational activities.

※ constitutional non-resident discriminationの少数例

1) charging more for recreational licenses

2) treating differently to preserve in-state natural resource

**Baldwin v. Montana (1978)** ヘラジカ漁で他州人の許認可料高額は⭕∵not 基本権

・旅行権利,居住権利,事業を営む権利,財産取得権利等

・州立大学入学優先権,市民のみ授業料低額は不適用 ∵福祉教育はnot歴史的基本権

3) Substantial Justification

A version of intermediate scrutiny

A State may discriminate against nonresidents only where its reasons are "substantial" and the difference in treatment bears a close or substantial relationship to those reasons.” Supreme Court of New Hampshire v. Piper (1985)

**United building vs Camden (1973)**

4割の労働者を市内の人にするという法律で解雇 →fundamental right侵害

Substantial reasonあるか認定させるためremand

**Toomer vs Witsell (1948)**

エビ漁認可料の州外格差

→ 違憲(なお法人は主張不可,commerce clause違反が普通）

**Hicklin v. Orbeck (1978)**　　　　　　　アラスカ州の油田での自州民優先雇用法は×

→ 最高裁は一律他州民雇用禁止は一貫して違憲判断

一方で政府機関における雇用差別，公的資金を供給する際に自州民を優先雇用

することは原則合憲判断

※ There is no exception when the state is acting as a market

participant→dormant commerce clauseでは合憲差別も違憲になる.

**④　FULL FAITH and CREDIT**

Courts in **one state** must give **full faith and credit** to **judgments in another** state if:

1) Court that rendered judgment had **jurisdiction** over the parties and subject matter

2) Judgment was on the **merits**.

3) Judgment is **final**

**⑤　CONTRACTS CLAUSE**

原則**No STATE** shall **impair the obligations** of **contracts**

・Applies ONLY to 1)**State or Local** interference 2)with **existing contracts**

→NEVER applies to **Federal Government**

→NEVER applies to **Future** contracting rights

※flagrant (言語道断の) contract impairment would violate the due process clause

Interference with PRIVATE contracts must meet "**intermediate scrutiny**"

1) **Substantially Impairment** of a party's rights under an **existing contract**

2) **Important and Legitimate Public Interest**

3) **Reasonable and Narrowly tailored** means of promoting that interest

Interference with PUBLIC (government) contracts must meet **strict scrutiny**

1) **Necessary** to achieve

2) **Compelling** government purpose

3) N**o less Restrictive Alternative** (Means must be necessary)

→事実上，政府が自ら行った契約を破棄するときにのみ問題になる。

※ 常に実体的デュープロセス違反と併せて問題になる。1937年以降デュープロセス違反と

しての経済的規制律法の違憲判断はなく，契約条項違反の判断も一件だけ