

Scott Pearce's Master MBE Method

Constitutional Law

Constitutional Law - Official National Conference of Bar Examiners Outline of Testable Issues

- I. The nature of judicial review
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 - C. Judicial review in operation
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F. First Amendment freedoms

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 - b. Establishment
2. Freedom of expression and association
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 - b. Regulation of time, manner, and place of expression
 - c. Regulation of unprotected expression
 1. Obscenity
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 - d. Regulation of commercial speech
 - e. Regulation of, or impositions upon, public employment, licenses, or benefits based upon exercise of expressive or associational rights
 - f. Regulation of association
 - g. Regulations of defamation and invasions of privacy

Questions 1-2 are based on the following fact situation.

The state of Champlain enacts the Young Adult Marriage Counseling Act, which provides that, before any persons less than 30 years of age may be issued a marriage license, they must receive at least five hours of marriage counseling from a state-licensed social worker. This counseling is designed to assure that applicants for marriage licenses know their legal rights and duties in relation to marriage and parenthood, understand the “true nature” of the marriage relationship, and understand the procedures for obtaining divorces.

Question 1

Pine, aged 25, contemplated marrying Ross, aged 25. Both are residents of the State of Champlain. Pine has not yet proposed to Ross because he is offended by the counseling requirement.

Pine sues in court seeking a declaratory judgement that the Young Adult Marriage Counseling Act is unconstitutional. Which of the following is the clearest ground for dismissal for this action by the court?

- A. Pine and Ross are residents of the same state.
- B. No substantial federal question is presented.
- C. The suit presents a nonjusticiable political question.
- D. The suit is unripe.

Question 2

In a case in which the constitutionality of the Young Adult Marriage Counseling Act is in issue, the burden of persuasion will probably be on the

- A. person challenging the law, because there is a strong presumption that elected state legislators acted properly.
- B. person challenging the law, because the Tenth Amendment authorized states to determine the conditions on which they issue marriage licenses.
- C. state, because there is a substantial impact on the right to marry, and that right is fundamental.
- D. state, because there is a substantial impact in the discrete and insular class of young adults.

Question 3

Congress enacted a statute providing that persons may challenge a state energy law on the ground that it is in conflict with the federal Constitution in either federal or state court. According to this federal statute, any decision by a lower state court upholding a state energy law against a challenge based on the federal Constitution may be appealed directly to the United States Supreme Court.

The provisions of this statute that authorize direct United States Supreme Court review of specified decisions rendered by lower state courts are

- A. constitutional, because congressional control over questions of energy usage is plenary.
- B. constitutional, because Congress may establish the manner in which the appellate jurisdiction of the United States Supreme Court is exercised.
- C. unconstitutional, because they infringe the sovereign right of states to have their supreme courts review decisions of their lower state courts.
- D. unconstitutional, because under Article III of the Constitution the United States Supreme Court does not have authority to review directly decisions of lower state courts.

Question 4

Congress enacts a law providing that all disagreements between the United States and a state over federal grant-in-aid funds shall be settled by the filing of a suit in the federal district court in the affected state. "The judgment of that federal court shall be transmitted to the head of the federal agency dispensing such funds, who, if satisfied that the judgment is fair and lawful, shall execute the judgment according to its terms." This law is

- A. constitutional, because disagreements over federal grant-in-aid funds necessarily involve federal questions within the judicial power of the United States
- B. constitutional, because the spending of federal monies necessarily includes the authority to provide for the effective settlement of disputes involving them.
- C. unconstitutional, because it vests authority in the federal court to determine a matter prohibited to it by the Eleventh Amendment.
- D. unconstitutional, because it vests authority in a federal court to render an advisory opinion.

Question 5

The President of the United States recognizes the country of Ruritania and undertakes diplomatic relations with its government through the Secretary of State. Ruritania is governed by a repressive totalitarian government.

In an appropriate federal court, Dunn brings a suit against the President and Secretary of State to set aside this action on the ground that it is inconsistent with the principles of our constitutional form of government. Dunn has a lucrative contract with the United States Department of Commerce to provide commercial information about Ruritania. The contract expressly terminates, however, "When the President recognizes the country of Ruritania and undertakes diplomatic relations with its government."

Which of the following is the most proper disposition of the Dunn suit by federal court?

- A. Suit dismissed, because Dunn does not have standing to bring this action.
- B. Suit dismissed, because there is no adversity between Dunn and the defendants.
- C. Suit dismissed, because it presents a non-justiciable political question.
- D. Suit decided on the merits.

Questions 6-8 are based on the following fact situation.

The State of Yuma provides by statute, "No person may be awarded any state construction contract without agreeing to employ only citizens of the state and of the United States in performance of the contract."

Question 6

In evaluating the constitutionality of this state statute under the supremacy clause, which of the following would be most directly relevant?

- A. The general unemployment rate in the nation.
- B. The treaties and immigration laws of the United States.
- C. The need of the state for this particular statute.
- D. The number of aliens currently residing in Yuma.

Question 7

If the Yuma statute is attacked as violating the commerce clause, which of the following defenses is the WEAKEST?

- A. The statute will help protect the workers of the State of Yuma from competition by foreign workers.
- B. The statute will help assure that workers with jobs directly affecting the performance of public contracts are dedicated to their jobs.
- C. The statute will help assure a continuously available and stable work force for the execution of public contracts.
- D. The statute will help assure that only the most qualified individuals work on public contracts.

Question 8

Suppose the state supreme court declares the statute to be unconstitutional on the grounds that it violates the Privileges and Immunities clause of the Fourteenth Amendment to the federal constitution and the equal protection clause of the state constitution. If the state seeks review in the United States Supreme Court, which of the following statements is most accurate?

- A. The United States Supreme Court may properly review that decision by certiorari only.
- B. The United States Supreme Court may properly review the decision by appeal only.
- C. The United States Supreme Court may properly review the decision by certiorari or by appeal.
- D. The United States Supreme Court may not properly review that decision.

Question 9

A federal statute sets up a program of dental education. The statute provides that the Secretary of Health and Human Services “shall, on a current basis, spend all of the money appropriated for this purpose” and “shall distribute the appropriated funds” by a specified formula to state health departments that agree to participate in the program. In the current year Congress has appropriated \$100 million for expenditure on this program.

In order to ensure a budget surplus in the current fiscal year, the President issued an executive order directing the various cabinet secretaries to cut expenditures in this year by 10% in all categories. He also orders certain programs to be cut more drastically because he believes that “they are not as important to the general welfare as other programs.” The President identifies the dental education program as such a program and orders it to be cut by 50%. Assume that no other federal statutes are relevant.

To satisfy constitutional requirements, how much money must the Secretary of Health and Human

Services distribute for the dental education program this year?

- A. \$50 million, because the President could reasonably determine that this program is not as important to the general welfare as other programs.
- B. \$50 million, because as chief executive the President has the constitutional authority to control the actions of all of his subordinates by executive order.
- C. \$90 million, because any more drastic cut for the program would be a denial of equal protection to beneficiaries of this program, as compared to beneficiaries of other programs.
- D. \$100 million, because the President may not unilaterally suspend the effect of a valid federal statute imposing a duty to spend appropriated monies.

Question 10

A federal criminal law makes it a crime for any citizen of the United States not specifically authorized by the President to negotiate with a foreign government for the purpose of influencing the foreign government in relation to a dispute with the United States. The strongest constitutional ground for the validity of this law is that

- A. under several of its enumerated powers, Congress may legislate to preserve the monopoly of the national government over the conduct of United States foreign affairs.
- B. the President's inherent power to negotiate for the United States with foreign countries authorizes the President, even in the absence of statutory authorization, to punish citizens who engage in such negotiations without permission.
- C. the law deals with foreign relations and therefore is not governed by the First Amendment.
- D. federal criminal laws dealing with international affairs need not be as specific as those dealing with domestic affairs.

Questions 11-13 are based on the following fact situation.

Congress provides by statute that any state that fails to prohibit automobile speeds over 55 miles per hour on highways within the state shall be denied all federal highway construction funding. The state of Atlantic, one of the richest and most highway-oriented states in the country, refuses to enact such a statute.

Question 11

Which of the following potential plaintiffs is most likely to be able to obtain a judicial determination of the validity of this federal statute ?

- A. A taxpayer of the United States and the state of Atlantic who wants his state to get its fair share of federal tax monies for highways, and fears that, if it does not, his state taxes will be increased to pay for the highway construction in the state of Atlantic that federal funds would have financed
- B. Contractors who have been awarded contracts by the state of Atlantic for specified highway construction projects, which contracts are contingent on payment to the state of the federal highway construction funds to which it would otherwise be entitled.
- C. An automobile owner who lives in the state of Atlantic and regularly uses its highway system.
- D. An organization dedicated to keeping the federal government within the powers granted it by the Constitution.

Question 12

The strongest argument that can be made in support of the constitutionality of this federal statute is that

- A. the states ceded their authority over highways to the national government when the states accepted federal grants to help finance their highways.
- B. the federal government can regulate the use of state highways without limitation because the federal government paid for some of their construction costs.
- C. Congress could reasonably believe that the 55 mile-an-hour speed limit will assure that the federal money spent on highways results in greater benefit than harm to the public.
- D. a recent public opinion survey demonstrates that 90 percent of the people in this country support a 55 mile-per-hour speed limit.

Question 13

The federal statute relating to disbursement of highway funds conditional on the 55 mile-an-hour speed limit is probably

- A. unconstitutional.
- B. constitutional only on the basis of the spending power.
- C. constitutional only on the basis of the commerce power.
- D. constitutional on the basis of both the spending power and the commerce power.

Question 14

A state statute requires that all buses which operate as common carriers on the highways of the state shall be equipped with seat belts for passengers. Transport Lines, an interstate carrier, challenges the validity of the statute and the right of the state to make the requirement. What is the best basis for a constitutional challenge by Transport Lines?

- A. Violation of the due process clause of the Fourteenth Amendment.
- B. Violation of the equal protection clause of the Fourteenth Amendment.
- C. Unreasonable burden on interstate commerce.
- D. Difficulty of enforcement.

Question 15

A statute of the State of Tuscarora made it a misdemeanor to construct any building of more than five stories without an automatic fire sprinkler system.

A local construction company built in Tuscarora a ten story federal office building. It constructed the building according to the precise specifications of a federal contract authorized by federal statutes. Because the building was built without the automatic fire sprinkler system required by state law, Tuscarora prosecutes the private contractor.

Which of the following is the company's strongest defense to that prosecution?

- A. The state sprinkler requirement denies the company property or liberty without due process.
- B. The state sprinkler requirement denies the company equal protection of the laws.
- C. As applied, the state sprinkler requirement violates the supremacy clause.
- D. As applied, the state sprinkler requirement violates the obligation of contracts clause.

Question 16

A newly enacted state criminal statute provides, in its entirety, "No person shall utter to another person in a public place any annoying, disturbing or unwelcome language." Smith followed an elderly woman for three blocks down a public street, yelling in her ear offensive four-letter words. The woman repeatedly asked Smith to leave her alone, but he refused.

In the subsequent prosecution of Smith, the first under this statute, Smith

- A. can be convicted.
- B. cannot be convicted, because speech of the sort described here may not be punished by the state because of the First and Fourteenth Amendments.

- C. cannot be convicted, because, though his speech here may be punished by the state, the state may not do so under this statute.
- D. cannot be convicted, because the average user of a public street would think his speech/action was amusing and ridiculous rather than "annoying", etc.

Question 17

Leonard was the high priest of a small cult of Satan worshippers living in New Arcadia. As a part of the practice of their religious beliefs, a cat was required to be sacrificed to the glory of Satan after a live dissection of the animal in which it endured frightful pain. In the course of such religious sacrifice, Leonard was arrested on the complaint of the local Humane Society and charged under a statute punishing cruelty to animals. On appeal, a conviction of Leonard probably will be

- A. sustained on the grounds that belief in or worship of Satan does not enjoy constitutional protection.
- B. sustained on the grounds that sincere religious belief is not an adequate defense on these facts.
- C. overturned on the grounds that the constitutionally guaranteed freedom of religion and its expression was violated.
- D. overturned on the grounds that the beliefs of the cult members in the need for the sacrifice might be reasonable, and their act was religious.

Question 18

An appropriations act passed by Congress over the President's veto directs that one billion dollars "shall be spent" by the federal government for the development of a new military weapons system, which is available only from the Arms Corporation. On the order of the President, the Secretary of Defense refuses to authorize a contract for the purchase of the weapons system. The Arms Corporation sues the Secretary of Defense alleging an unlawful withholding of these federal funds.

The strongest constitutional argument for the Arms Corporation is that

- A. Passage of an appropriation over a veto makes the spending mandatory.
- B. Congress' power to appropriate funds includes the power to require that the funds will be spent as directed.
- C. The President's independent constitutional powers do not specifically refer to spending.
- D. The President's power to withhold such funds is limited to cases where foreign affairs are directly involved.

Questions 19-20 are based on the following fact situation.

The State of Missoula has enacted a new election code designed to increase voter responsibility in the exercise of the franchise and to enlarge citizen participation in the electoral process. None of its provisions conflicts with federal statutes.

Question 19

Which of the following is the strongest reason for finding unconstitutional a requirement in the Missoula election code that each voter must be literate in English?

- A. The requirement violates Article 1, Section 2 of the Constitution, which provides that representatives to Congress be chosen “by the People of the several States.”
- B. The requirement violates Article 1, Section 4 of the Constitution, which gives Congress the power to “make or alter” state regulations providing for the “Times” and “Manner” of holding elections for senators and representatives.
- C. The requirement violates the due process clause of the Fourteenth Amendment.
- D. The requirement violates the equal protection of the laws clause of the Fourteenth Amendment.

Question 20

The Missoula election code provides that in a special-purpose election for directors of a state watershed improvement district, the franchise is limited to landowners within the district, because they are the only ones directly affected by the outcome. Each vote is weighted according to the proportion of the holding of that individual in relation to the total affected property. The best argument in support of the statute and against the application of the “one man, one vote” principle in this situation is that the principle

- A. applies only to elections of individuals to statewide public office.
- B. does not apply where property rights are involved.
- C. does not apply, because the actions of such a district principally affect landowners.
- D. does not apply because of rights reserved to the states by the Tenth Amendment.

Questions 21-23 are based on the following fact situation.

As part of a comprehensive federal aid-to-education program, Congress included the following provisions as conditions for state receipt of federal funds: (1) Whenever textbooks are provided to students without charge, they must include no religious instruction and must be made available on the same terms to students in all public and private schools accredited by the state educational authority. (2) Salary supplements can be paid to teachers in public and private schools, up to ten percent of existing salary schedules, where present compensation is less than the average salary for persons of comparable training and experience, provided that no such supplement is paid to any teacher who instructs in religious subjects. (3) Construction grants can be made toward the cost of physical plant at private colleges and universities, provided that no part of the grant is used for buildings in which instructions in religious subject matters is offered.

Question 21

Federal taxpayer Allen challenges the provision that allows the distribution of free textbooks to students in a private school where religious instruction is included in the curriculum. On the question of the adequacy of Allen's standing to raise the constitutional question, the most likely result is that standing will be

- A. sustained, because any congressional spending authorization can be challenged by any taxpayer.
- B. sustained, because the challenge to the exercise of congressional spending power is based on a claimed violation of specific constitutional limitations on the exercise of such power.
- C. denied, because there is insufficient nexus between the taxpayer and the challenged expenditures.
- D. denied, because in the case of private schools, no state action is involved.

Question 22

Federal taxpayer Bates also challenges the salary supplements for teachers in private schools where religious instruction is included in the curriculum. On the substantive constitutional issue, the most likely result is that the salary supplements will be

- A. sustained, because the statute provides that no supplements will be made to teachers who are engaged in any religious instruction.
- B. sustained, because to distinguish between private and public school teachers would violate the religious freedom clause of the First Amendment.
- C. held unconstitutional because some religions would benefit disproportionately.
- D. held unconstitutional, because the policing of the restriction would amount to an excessive entanglement with religion.

Question 23

Federal taxpayer Bates also challenges the construction grants to church operated private colleges and universities. The most likely result is that the construction grants will be

- A. sustained, because aid to one aspect of an institution of higher education not shown to be pervasively sectarian does not necessarily free it to spend its other resources for religious purposes.
- B. sustained, because bricks and mortar do not aid religion in a way forbidden by the establishment clause of the First Amendment.
- C. held unconstitutional, because any financial aid to a church-operated school strengthens the religious purposes of the institution.
- D. held unconstitutional, because the grants involve or cause an excessive entanglement with religion.

Question 24

A state accredits both public and private schools, licenses their teachers, and supplies textbooks on secular subjects to all such schools. Country Schoolhouse, a private school that offers elementary and secondary education in the state, denies admission to all non-Caucasians. In a suit to enjoin as unconstitutional the continued racially exclusionary admissions policy of the Country Schoolhouse, which of the following is the strongest argument AGAINST the school?

- A. Because education is a public function, the Country Schoolhouse may not discriminate on racial grounds.
- B. The state is so involved in school regulation and support that the equal protection clause of the Fourteenth Amendment is applicable to the school.
- C. The state is constitutionally obligated to eliminate segregation in all public and private educational institutions within the state.
- D. Any school with teachers who are licensed by the state is forbidden to discriminate on racial grounds.

Question 25

Amy Docent, a state college instructor, was discharged because of her refusal to comply with a state statute requiring public employees to swear or affirm that they will (1) “uphold and defend” the state and federal constitutions and (2) “oppose the overthrow” of the state or federal governments “by force, violence, or by any improper method.” The statute had previously been held constitutional by the state supreme court. Docent filed a complaint in federal district court alleging the unconstitutionality of the statute and seeking an injunction and damages.

Which of the following is the state's strongest argument for sustaining the validity of the statute?

- A. Government employment is a privilege, not a right.
- B. The oath as a whole is only a commitment to abide by constitutional processes.
- C. The First and Fourteenth Amendments permit a state to fix the conditions of state employment.
- D. The state has a compelling need to keep disloyal persons out of governmental positions of trust.

Questions 26-27 are based on the following fact situation.

All lawyers practicing in the state of Erewhon must be members of the State Bar Association, by order of the state supreme court. Several state officials serve on the Bar Association's Board of Bar Governors. The Board of Bar Governors authorizes the payment of dues for two staff members to the Cosmopolitan Club, a private dining club licensed to sell alcoholic beverages. The Cosmopolitan Club is frequented by affluent businessmen and professionals and by legislators. It is generally known that the purpose of the membership of the Bar Association staff is to enable them to go where members of the "elite" meet and to lobby for legislation in which the Bar Association is interested. The State Bar Association has numerous committees and subcommittees concerned with family law, real estate law, unauthorized practice, etc., and its recommendations often influence state policy. Some committee meetings are held at the Cosmopolitan Club. The club is known to have rules which restrict membership by race, religion and sex.

Plaintiffs, husband and wife, who are members of Erewhon Bar Association, petition the Board of Bar Governors to adopt a resolution prohibiting the payment of club dues to and that no holding of meetings of the Bar or its committees at places which discriminate on the basis of race, religion, or sex. After substantial public discussion, the Board of Bar Governors, by a close vote, fails to pass such a resolution. These events receive extensive coverage in the local newspapers. Plaintiffs bring an action in federal court seeking an injunction against such payments and the holding of meetings in such places as the Cosmopolitan Club.

Question 26

The strongest argument for the plaintiffs is

- A. private rights to discriminate and associate freely must defer to a public interest against discrimination on the basis of race, religion, or sex.
- B. the failure of the State Bar Association to pass a resolution forbidding discrimination on the basis of race, religion, or sex constitute a denial of equal protection.
- C. the State Bar Association is an agency of the state and its payment of dues to such private clubs promotes discrimination on the basis of race, religion, and sex.
- D. the State Bar Association's payment of dues to such private clubs promotes discrimination on the basis of race, religion, and sex.

Question 27

Which of the following actions should a federal district court take with respect to jurisdiction?

- A. Hear the case on the merits, because a federal claim is presented.
- B. Hear the case on the merits, because the expenditure of state funds in support of segregation is forbidden by the Fifth Amendment.
- C. Abstain from jurisdiction, because the constitutional issue should be litigated first in a state court.
- D. Dismiss the case for lack of jurisdiction, because the issue of the Bar Association activities is solely within the domain of state law.

Question 28

Doe is prosecuted for giving his 14-year-old daughter a glass of wine in violation of a state statute prohibiting any person from serving any alcoholic beverage to a minor. Doe defends on the ground that the state statute as applied in his case unconstitutionally interferes with his free exercise of religion.

In determining the constitutionality of this application of the state statute, the court may NOT properly

- A. require the state to bear the burden of persuading the court that the statute is constitutional as applied to Doe.
- B. determine the reasonableness of Doe's religious beliefs.
- C. ascertain whether Doe's religious beliefs require him to serve wine to his child.
- D. decide whether Doe is sincere in his religious beliefs that is, whether he really believes them.

Question 29

A federal statute requires United States civil service employees to retire at age 75. However, that statute also states that civil service employees of the armed forces must retire at age 65. Prentis, a 65-year-old service employee of the Department of the Army, seeks a declaratory judgement that would forbid his mandatory retirement until age 75.

The strongest argument that Prentis can make to invalidate the requirement that he retire at age 65 is that the law

- A. denies him a privilege or immunity of national citizenship.
- B. deprives him of a property right without just compensation.
- C. is not within the scope of any of the enumerated powers of Congress in Article 1, §8.
- D. invidiously discriminates against him on the basis of age in violation of the Fifth Amendment.

Question 30

Congress enacts a criminal statute prohibiting "any person from interfering in any way with any right conferred on another person by the equal protection clause of the Fourteenth Amendment."

Application of this statute to Jones, a private citizen, would be most clearly constitutional if Jones with threats of violence coerces

- A. a public school teacher to exclude Black pupils from her class, solely because of their race.
- B. Black pupils, solely because of their race, to refrain from attending a privately owned and operated school licensed by the state.
- C. the bus driver operating a free school bus service under the sponsorship of a local church to refuse to allow Black pupils on the bus, solely because of their race.
- D. the federal office in charge of distributing certain federal benefits directly to students from distributing them to Black pupils, solely because of their race.

Question 31

A state statute provides that persons moving into a community to attend a college on a full-time basis may not vote in any elections for local or state officials that are held in that community. Instead, the statute provides that for voting purposes all such persons shall retain their residence in the community from which they came. In that state the age of majority is eighteen.

Which of the following is the strongest argument to demonstrate the unconstitutionality of this state statute?

- A. A state does not have an interest that is sufficiently compelling to justify the exclusion from voting of an entire class of persons.
- B. There are less restrictive means by which the state could assure that only actual residents of a community vote in its elections.
- C. Most persons moving to a community to attend college full-time are likely to have attained the age of majority under the laws of this state.
- D. On its face this statute impermissibly discriminates against interstate commerce.