

PEARCE MICRO REVIEW
Constitutional Law

- I. Judicial Review
 - A. Organization and Relationship of State and Federal Courts in a Federal System
 1. Federal Court Jurisdiction
 - a. 11th Amendment prohibits citizen suits vs. a state in federal court
 - b. abstention
 2. State Court Jurisdiction
 - B. Jurisdiction
 1. Constitutional Basis
 - a. original jurisdiction
 - b. appellate jurisdiction over federal court decisions
 2. Congressional Power to Define and Limit
 - a. the Supreme Court
 - b. lower federal courts
 - c. Article I (legislative) Courts
 - C. Judicial Review in Action
 1. “Case or Controversy” Requirement
 - a. standing
 - b. ripeness
 - c. mootness
 2. Justiciability – Political Questions
 3. Appellate Jurisdiction to Review State Court Decisions

4. Burden of Proof
 - a. plaintiff bears the burden to show unconstitutionality
 - b. rational basis is the ordinary standard for due process and equal protection
 - c. compelling state interest is the standard where there is a fundamental right or a suspect class

II. Separation of Powers

A. Congressional Powers – Enumerated and Implied

1. Commerce, Taxing, Spending
2. Power over Federal Territories
3. Article IV, Section 3 gives Congress Power over Federal Property
4. War and Defense Powers
5. Power to Enforce the 13th 14th and 15th Amendments
6. Power to Investigate

B. Executive (Presidential) Powers

1. As Chief Executive
 - a. power and obligation to enforce the laws
 - b. inherent domestic power
 - c. legislative power
 - d. pardon power
 - e. executive privilege
2. As Commander-In-Chief
3. Treaty and Foreign Affairs Powers
4. Appointment and Removal of Officials

- C. Judicial Powers – Judicial Review (see section I)
 - D. Federal Inter-Branch Relationships
 - 1. Congressional Limits on the Executive
 - a. impeachment power
 - b. investigation power
 - c. appropriation power
 - 2. Presidential Power to Veto or to Withhold Action
 - a. power and obligation to execute the laws
 - b. veto power
 - 3. Delegation Doctrine
 - 4. Executive, Legislative and Judicial Immunities
- III. Federalism – The Relationship Between the States and the Nation
- A. Inter-Governmental Immunities
 - 1. Federal Immunity from State Law
 - a. suits against the federal government
 - b. regulation of the federal government
 - c. taxation of the federal government
 - 2. State Immunity from Federal Law
 - a. immunity from suit
 - b. immunity from regulation
 - c. taxation

- B. Authority Reserved to the States
 - 1. Negative Implications of the Commerce Clause and Exceptions
 - 2. Limitations on State Power in Taxation
 - a. foreign commerce
 - b. state power to tax interstate commerce
 - c. due process
 - d. equal protection – privileges and immunities
 - 3. 10th Amendment
 - 4. Specific Limitations on State Power

- C. National Power to Override or Extend State Authority
 - 1. Supremacy Clause – Congress Trumps State Legislation
 - 2. Preemption
 - 3. Authorization of Otherwise Invalid State Action

- D. Relations Among States
 - 1. Interstate Compacts
 - 2. Full Faith and Credit
 - a. enforcement of foreign judgments
 - b. defenses to recognition or enforcement

IV. Individual Rights

A. “State Action” and the Role of the Courts

1. 14th Amendment applies to States and their Political Subdivisions
2. Public Function
3. State Involvement
 - a. judicial involvement
 - b. business involvement
 - c. state services vs. subsidies
 - d. state licensing or regulation
 - e. state encouragement

B. Due Process

1. Substantive Due Process
 - a. family and procreation
 - b. economic interests
 - c. vagueness – criminal law
 - d. retroactive deprivation of vested economic rights
2. Procedural Due Process
 - a. loss of liberty
 - b. fundamental rights
 - c. property interests
3. 5th Amendment “Takings” – and Remedies
 - a. public purpose requirement
 - b. valid regulations vs. government takings

- C. Equal Protection
 - 1. Fundamental Rights
 - a. voting and legislative representation
 - b. travel
 - c. the right to marry
 - d. one criminal appeal and transcript
 - 2. Other Rights
 - a. economic regulation
 - b. social welfare legislation
 - 3. Suspect Classifications
 - a. race
 - b. alienage
 - c. quasi suspect – gender, legitimacy
 - 4. Non Suspect Classifications – poverty, age, mental retardation
- D. Privileges and Immunities Clauses
 - 1. 14th Amendment
 - 2. Article IV, Section 2
- E. Obligation of Contracts
- F. Bills of Attainder
- G. *Ex Post Facto* Laws

H. First Amendment Freedoms

1. Free Exercise of Religion
 - a. freedom of thought and belief
 - b. regulation of activity based on belief
 - c. judicial resolution of church disputes
2. No Establishment of Religion
 - a. secular legislative purpose
 - b. primary effect neither advances nor inhibits religion
 - c. avoid excessive entanglement
3. Freedom of Speech
 - a. regulation of content of expression
 1. definition of speech
 2. definition of regulation of content
 3. content regulation of protected speech
 - a. compelling state interest standard
 - b. clear and present danger
 - c. administration of justice
 - d. election process
 - b. regulation of time, place and manner of expression
 1. public, semipublic or private forum
 2. privacy and tranquility interests
 3. licensing
 4. regulation of the media
 - c. regulation of commercial speech

- d. regulation of unprotected expression
 - 1. obscenity
 - 2. fighting words vs. merely offensive
- e. regulations of defamation and invasion of privacy
 - 1. public officials and public figures
 - 2. private figures
- 4. Freedom of Association
 - a. regulation of association
 - b. regulation of, or impositions upon, public employment, licenses or benefits based on exercise of expressive or association rights
- 5. Special Problems related to the First Amendment
 - a. prior restraint
 - b. overbreadth
 - c. vagueness
 - d. facial invalidity

Constitutional Law Hypothetical #1

City, a municipality in State X, owns and operates a landfill site for household and commercial non-hazardous waste disposal. City finances this operation by charging fees based on a rate formula involving the weight and volume of waste delivered at the site. City's landfill is relatively new and therefore has substantial unused capacity.

Outko, an out-of-state trucking firm engaged in hauling non-hazardous waste, has entered into contracts with various out-of-state municipalities to transport their non-hazardous wastes for disposal to City's landfill. Inko, a State X trucking firm with its offices in City, has been hauling non-hazardous waste from sources within City, from elsewhere in State X, and from outside of State X to City's landfill for disposal.

City has recently enacted an ordinance banning disposal of out-of-state waste in City's landfill and imposing a new rate fee for waste from sources anywhere outside of City, but within State X. This new rate fee is twice that charged for waste of identical weight and volume from sources within City.

The National Association of Waste Truckers (NAWT) is an organization representing waste haulers. Both Outko and Inko are members of NAWT. On behalf of all its members, NAWT plans to bring an action against City in federal district court in State X, challenging the constitutionality of the landfill ordinance.

1. What challenges, if any, under the U.S. Constitution, may be brought against City's landfill ordinance, and how should each be decided? Discuss.
2. May NAWT properly assert those challenges? Discuss.

- I. Constitutional Challenges Against City's Landfill Ordinance
 - A. City relies on its police power.
 - B. The ban on out of state waste:
 1. Commerce Clause
 - a. Discrimination
 - b. Undue Burden
 - c. City is a market participant.
 2. 14th Amendment Equal Protection Clause
 3. Article IV Section 2 Privileges and Immunities Clause
 - C. The higher rate fee for non City waste:
 1. Commerce Clause
 2. 14th Amendment Equal Protection Clause
 3. Contracts Clause

- II. May NAWT Properly Assert Those Challenges? (Standing)
 - A. The members of NAWT have standing as individuals.
 - B. The suit is relevant to the purpose of NAWT.
 - C. Individual members of NAWT will not be required to participate.
 - D. Conclusion: NAWT has standing.

Constitutional Law Hypothetical #2

Ricks County is a rural, sparsely populated county of State X. There have never been enough female prisoners to make it economically feasible to have separate facilities for them in the Ricks County Jail, which is located in Hickory. Consequently, Ricks County has always placed its female prisoners in the Rock County Jail, some thirty miles from Hickory, under a contractual per diem arrangement with Rock County.

Betty recently moved to Hickory from the state capital of State X. She had worked there for five years as a guard in the large State X prison. Betty has applied for one of two vacant positions as a deputy jailer at the Ricks County Jail. She is thirty-four years old, five feet five inches tall, weighs one hundred forty-five pounds, and is a junior college graduate.

Marie, who has just returned to Hickory after a four-year enlistment in the Marine Corps following graduation from high school, has also applied for one of the deputy jailer jobs. Marie was a corporal in the military police for the last two years of her Marine Corps enlistment. She is twenty-two years old, five feet seven inches tall, and weighs one hundred fifty-five pounds.

Dan, the Ricks County sheriff, has stated that he will not hire either Betty or Marie as deputy jailer because of their gender. Dan said that having a woman inside the Ricks County Jail would create unmanageable security problems for two reasons. First, a woman would not be strong enough to deal with unruly inmates, and second, there would be the danger to her of sexual assaults by male prisoners. Dan also claims that having a woman as a jailer would infringe on the privacy interests of the male inmates who must use toilet and shower facilities in full view of the jailers. Finally, Dan claims that Betty did not meet the minimum height and weight requirements for deputy jailers under State X law: five feet six inches and one hundred fifty pounds. These requirements have always been enforced.

Dan agreed that both women applicants met the age and educational requirements of State X law: being at least twenty years old, and having a high school diploma or its equivalent. Both Betty and Marie have letters from their supervisors in their previous employment stating that each was a competent, reliable, good-to-average employee, with no job performance problems.

Betty and Marie have each filed a complaint in federal district court in State X against Ricks County and Dan. The complaints seek injunctive relief requiring defendants to approve plaintiffs' job applications and to employ them as deputy jailers, under rights guaranteed by the U.S. Constitution. Given the similarity of major issues, the actions have been consolidated.

How should the court rule on the claims of Betty and Marie? Discuss.

- I. Betty and Marie's Equal Protection Claims against Ricks County and Dan.
 - A. Standing: Betty and Marie have been denied employment because they are female.
 - B. State Action: Sheriff Dan is an agent of State X.
 - C. The 14th Amendment and gender discrimination:
 - D. Dan's justifications for not hiring Betty and Marie:
 - 1. Women are not strong enough to deal with unruly inmates.
 - 2. The danger of sexual assaults by inmates:
 - 3. The threat to the privacy of male inmates:
 - E. Conclusion: Marie will win the injunctive relief she seeks.
- II. Betty's failure to meet the State X height requirement is unrelated to her gender.
 - A. Betty must rely on the 14th Amendment.
 - B. The rational basis standard will be applied to Betty's challenge to the height and weight requirements.
 - C. Conclusion

Constitutional Law Hypothetical #3

In desert areas, wildlife use dry stream beds, commonly called washes, to move from one feeding location to another. Washes are therefore critical to wildlife survival in such areas. Puma County (County) in State X, with substantial desert areas, is concerned about preserving its washes in their natural condition to protect wildlife. To that end, County enacted an ordinance in 1988 that requires the preservation, in their natural condition, of all washes in specified desert areas within the county.

American National, Inc. (ANI) is a housing developer that has owned a 120-acre tract of land in one of the specified desert areas in County since 1985. Since 1980, County has also had a zoning ordinance that restricts development of the tract and surrounding area to not more than one house per acre. In 1990, ANI filed with the County Planning Commission an application for development of the 120-acre tract, calling for the construction of 120 homes, each on a one-acre lot in the tract.

However, because of the terrain, which included two major washes, 17 of the proposed housing lots would be suitable for building only if ANI took action to change radically the location and reinforce the banks of the two washes, in order to prevent flooding during heavy rains. This action would materially impede wildlife mobility in the washes. The County Planning Commission ruled against ANI's application and the County Board of Supervisors upheld the ruling.

ANI has filed an action against County in State X court. ANI seeks to compel County to grant it the right to build the 120 homes in accordance with its development plan or, in the alternative, to pay damages equal to the fair market value of the 120 acre tract. ANI also seeks damages equal to the fair rental value of its land during the period between the filing of its development application with the Planning Commission and the decision in this lawsuit.

What rights arising under the United States Constitution should ANI assert in its claim for relief, and how should the Court rule? Discuss.

- I. ANI's 5th Amendment Taking Claim
 - A. ANI's claim is not ripe.
 - 1. There has not been a final local decision.
 - 2. State compensation remedies may not have been exhausted.
 - B. County's ordinance is probably not a taking.
 - 1. The ordinance substantially advances a legitimate government purpose.
 - 2. The ordinance does not deprive ANI of all economically viable uses of its property.
 - C. ANI's remedies for a successful taking claim:
 - 1. Permanent Taking
 - 2. Temporary Taking
- II. ANI's Substantive Due Process Claim

Constitutional Law Hypothetical #4

Because teenage pregnancies have increased the number of school dropouts, the Board of Education of City (Board) adopted an "Alternative Education Program" (AEP) for unmarried students under age eighteen who become pregnant. All such students must participate. AEP offers a special core educational curriculum supplemented with personal counseling and instruction on prenatal and infant care designed to alleviate the educational, emotional, social and health problems confronting unmarried teenage mothers. Once placed in AEP, the student remains a participant through the term of her pregnancy and until the end of the school year in which her pregnancy terminates.

Pam, an unmarried sixteen year old eleventh grader at City High School, is pregnant. She wants to remain in her regular classes at City High School but has been assigned to AEP. She has sued the Board in federal district court for declaratory and injunctive relief, seeking return to her original classes. Pam's complaint alleges that being assigned to AEP violates her right to equal protection of the law guaranteed by the United States Constitution and penalizes her for exercising a fundamental right protected by the substantive due process provision of the Constitution.

Shortly after Pam's suit was filed, the school year ended and during the summer Pam suffered a miscarriage. The Board has transferred Pam back to her regular high school classes and has moved to dismiss her complaint on the grounds that : (1) the action is moot; and (2) the complaint fails to state a claim for relief under the Constitution.

How should the court rule on the issues raised by the Board's motion?
Discuss.

- I. The Board alleges that Pam's action is moot.
 - A. Standing and Ripeness
 - B. Mootness
 - C. Conclusion: Pam's suit will not be dismissed for being moot.

- II. The Board alleges that Pam's complaint fails to state a Constitutional claim.
 - A. Pam claims that her assignment to AEP violates her right to equal protection.
 1. Pam's gender discrimination claim: Intermediate Scrutiny
 2. Is Board's action substantially related to an important government interest?
 3. Pam's age discrimination claim: Rational Basis
 4. Conclusion: Pam's equal protection claim should not be dismissed.
 - B. Pam claims her assignment to AEP violates her substantive due process rights.
 1. Privacy is a fundamental right.
 2. Strict Scrutiny
 3. Conclusion: Pam's substantive due process claim should not be dismissed.

Constitutional Law Hypothetical #5

A new State X-owned office building has an interior ground floor mall area, with spaces for leasing to privately owned retail businesses on the perimeter of the mall. Each lease with State X as lessor incorporates Office Building Rules, provided by State X. One rule permits each lessee to display floor advertising at designated spaces throughout the mall, limited to only commercial advertising. Another rule provided that another designated space in the mall, next to the main entrance of the building, is the only place available in the mall for public demonstrations. This space is to be assigned to the first group of demonstrators to arrive each day. The office building has two side entrances as well.

The Olde Tobacco Shoppe (OTS), a mall lessee, has set up large signs in all designated commercial advertising areas of the mall, advertising its sales of cigarettes at discount prices.

Citizens for Clean Air (CCA), a citizens' group protesting air pollution, began picketing at the mall with placards protesting both the leasing of State X property to OTS, and OTS' advertising in the mall. The first day the CCA picketers, including Dan, appeared they were not allowed to use the one designated space for public demonstrations, because a small anti-nuclear group had arrived earlier and had been assigned use of the space. CCA members therefore began picketing at the two side entrances. The building manager called State X police who, after some resistance from the protesters, succeeded in escorting them from the premises.

Later that same day, the State X Attorney General obtained an ex parte order from a State X court prohibiting members of CCA from picketing at any place in the mall, other than in the one designated area. The following day, CCA picketers were first to arrive at the mall and were assigned use of the designated area. The picketers, including Dan, were each given copies of the ex parte order. However, Dan left the designated area and stood in front of one of the OTS' mall advertisements near one of the side entrances. He held a poster with a graphic description of a fully nude, terminally ill cancer patient with tubes projecting from the patient's body and a caption which read "The Governor Sticks It To You By Supporting Smoking."

Dan was arrested by State X police and charged in State X court with criminal contempt of the ex parte order, with criminal trespass, and with violation of a State X statute proscribing the "public display" of an "obscene picture."

In the prosecution of Dan, what defenses should Dan assert under the United States Constitution to charges of 1) contempt of the ex parte order, 2) trespass, and 3) violation of the statute, and how should they be decided? Discuss.

- I. Dan's Defenses to Charges of Contempt of the Ex Parte Order:
 - A. The licensing regulation is Facially Void.
 - B. Dan had no time to appeal the Ex Parte Order.
 - C. Conclusion

- II. Dan's Defense to the Criminal Trespass Charge:
 - A. The Charge Violates Dan's 1st Amendment Free Speech Rights.
 1. Content-Neutral Regulation
 2. Designated Public Forum
 - a. Significant government interest?
 - b. Narrowly tailored regulation?
 - c. Alternate forums for expression?
 3. Content-Based Regulation
 - B. Conclusion

- III. Dan's Defense to the Charge of Violating the Obscenity Statute:
 - A. The Charge Violates Dan's 1st Amendment Free Speech Rights.
 1. Prurient interest in sex?
 2. Patently offensive?
 3. Lacking in serious social value?
 - B. Conclusion

Constitutional Law Hypothetical #6

A group known as "Citizens Against Tax Suppression" (CATS) planned to stage a parade down Main Street of City, in State A, at noon on April 15 of this year, in protest against income taxes. Absent an extension, both State A and federal income tax returns must be postmarked for filing by midnight on April 15.

Another group known as "Veterans Against Communism" (VAC), was to hold its annual convention in City during the week of April 15. VAC applied for and received a permit from City to parade down Main Street also at noon on April 15, pursuant to a City "Parade Permit Ordinance" ("parade law"), which authorizes the Mayor to issue a parade permit if he determines that it is in the public interest to do so. The city's parade law makes it a crime to parade on public streets in City without such a permit. CATS, however, neither sought nor obtained such a permit for its planned parade.

While members of CATS were gathering for their group parade on April 15, one of them, Kate, completely naked, rode a horse down Main Street. She said she chose this mode of individual protest because "the original Lady Godiva" had acted in a similar manner as a protest against excessive taxation, centuries ago.

Members of both groups gathered next to each other on Main Street to parade at noon on April 15. The leader of CATS, Dan, made a speech to stir his followers as they started their parade, urging all "right thinking citizens" to refuse to pay income taxes because "taxation was slavery" in violation of the Thirteenth Amendment, and because "taxes were used to fuel the war-making machine." Some of the members of VAC, angered by Dan's speech, then began to push and hit him.

At that point, City police arrived and arrested both Kate and Dan. Kate was charged with violating the City's "Indecent Exposure Ordinance" ("public nudity law") which makes it a crime to engage in public nudity in the presence and view of others who may be offended by such conduct. Dan was charged with violating City's parade law. He was also charged with violating a State A criminal statute which made it unlawful for anyone to advocate the violation of any law in circumstances tending to cause or causing a breach of the peace ("State A statute").

What defenses, if any, are available under the First Amendment to the US Constitution to:

1. Kate, in prosecution in State A court against her for violating City's public nudity law? Discuss.
2. Dan, in a prosecution in State A court, for:
 - a. violating City's parade law; and
 - b. violating the State A statute?

Discuss.

- I. Kate's Defenses to Prosecution On The Public Nudity Law
 - A. City relies on its police power.
 - B. Kate's defenses come from the First Amendment.
 1. Vagueness
 2. Content-Based Ordinance Analysis
 3. Content-Neutral Ordinance Analysis
 - a. Kate's conduct is symbolic speech.
 - b. Is the prohibition narrowly tailored?
 - C. Conclusion: Kate probably cannot be convicted.

- II. Dan's First Amendment Defense To Prosecution On The Parade Law
 - A. The Mayor has unfettered discretion.
 - B. The statute is void on its face.
 - C. Conclusion: Dan cannot be convicted.

- III. Dan's First Amendment Defense To Breach Of The Peace
 - A. Dan's speech was not intended to cause violence.
 - B. The police should have protected Dan.
 - C. Vagueness
 - D. Conclusion: Dan cannot be convicted.