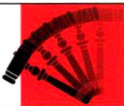


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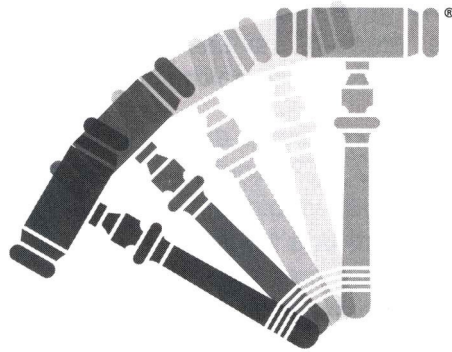
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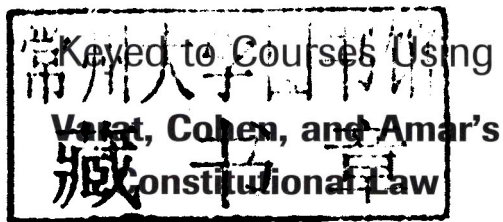
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QUICK COURSE OUTLINE

CONSTITUTIONAL LAW

FEDERAL JUDICIAL POWER

JUDICIAL REVIEW

Definition: The Supreme Court's authority to review the actions of the legislative and executive branches to determine their constitutionality. The doctrine requires courts to interpret and apply the Constitution to acts to determine their validity. The power a federal court has to adjudicate over claims brought before it. *Marbury v. Madison*, 5 U.S. 137 (1803).

1. Original Jurisdiction ARTICLE III § 2:

Federal courts have authority to first hear or try cases involving:

- Ambassadors
- Public ministers and consuls
- Cases in which the state is a party

2. Appellate Jurisdiction ARTICLE III § 2:

Federal courts may also hear other (non-original jurisdictional) cases that come to court by appeal.

3. Supreme Court Review:

a. Discretionary Review/Writ of Certiorari:

Cases may be petitioned for review by writ of certiorari. Supreme Court has discretion to hear or refuse.

b. State Court Review of Federal Issues:

Federal courts may only review final judgments of federal issues made by the highest court in a state.

Exception: On *Adequate Independent State Grounds*, Federal court will not review state decision, that is independent of that state's separate ruling on federal law that may otherwise be incorrect.

c. State Court Refusal to Hear Federal Claims:

States are generally required to hear appropriately presented federal claims, but the state may refuse. Federal courts may review state court's refusal to hear such claims.

JUDICIAL LIMITS ON JUDICIAL REVIEW

- Abstention:** Federal courts will abstain from hearing a case involving an unsettled or unclear state statute on whose construction a federal constitutional issue depends, until a state court interprets it. *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).
- Equitable Restraint:** Federal courts may enjoin state criminal actions to protect constitutional rights. *Ex parte Young*, 209 U.S. 123 (1908).
- Constitutional Question:** A case issue involves the constitutionality of statute. Court will apply rules of statutory construction to avoid passing on constitutional questions:
 - Alternative (nonconstitutional) ground exists to dispose of case.
 - Between several possible interpretations, one exists that permits a finding of constitutionality.
 - Courts will otherwise construe a statute reasonably.
 - Racial Challenges:** Challenger must show there is no circumstance under which the legislative act or administrative regulation would be valid.

CONSTITUTIONAL LIMITS ON JUDICIAL REVIEW ARTICLE III § 2

1. Cases and Controversies: *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

a. Justiciability: A case is justiciable if there is standing to sue, the Constitution permits the issue to be judicially resolvable, and there is no cause for judicial restraint.

b. Standing: To have standing to bring a suit, a plaintiff must meet three criteria:

i. Injury: Plaintiff must show facts demonstrating any injury in fact. Injury can be small or trifling, but must be real. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

ii. Causation: Injury must be proximately and directly traceable to defendant's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

iii. Redressibility: Plaintiff must show facts that demonstrate the relief she is entitled to will substantially eliminate or redress the injury. *Warth v. Seldin*, 422 U.S. 490 (1975).

c. Ripeness: Case must involve concrete disputes between genuine adversaries or will not be heard. A court will not give advisory opinions.

d. Mootness: If underlying controversy is not real or has been resolved/dissolved prior to the adjudication, case is moot and will not be adjudicated. **Exceptions:** cases that appear moot but are not.

i. Cases involving continuing harm.

ii. Harms that have ended but may recur.

iii. Cases capable of repetition but evading review. *Roe v. Wade*, 410 U.S. 113 (1973).

2. Political Question: Even if plaintiff has standing, courts may refuse to decide a "political" question.

a. Constitutionally committed or need exists for deference to another branch of government.

b. There is a lack of judicially discoverable and manageable standards for resolving it.

3. 11th Amendment: State sovereign immunity prevents citizens of a state from suing that state in federal court without that state's consent. *Hans v. Louisiana*, 134 U.S. 1 (1890).

FEDERAL LEGISLATIVE POWER

THE SPENDING POWER ARTICLE I § 8

Congress has the power to spend for the common defense and general welfare. This includes spending done in order to exercise its other powers or for proper public purpose. Congress by conditioning receipt of funds on compliance with federal regulations is able to indirectly regulate what it cannot regulate directly.

TREATY POWER ARTICLE I § 10

Power co-exists with the President's power to make treaties pursuant to the advice and consent of the Senate. Treaties, once ratified, become the law of the land.

1. Treaties take precedent over conflicting state and federal law but are not equal in authority to the Constitution.

2. Treaties pertaining to matters of international concern are binding in the states even if they regulate an area normally under state control. *Missouri v. Holland*, 252 U.S. 416 (1920).

THE TAXING POWER ARTICLE I § 8

Congress can regulate or limit activities by imposing taxes on them, effectively prohibiting them where the tax is substantial. As long as the tax produces revenue, it may be enacted for any motive, even purely regulatory ones that have no genuine money-raising purpose at all.

THE IMMIGRATION POWER ARTICLE I § 8

Congress has exclusive control over immigration.

1. May admit, expel, exclude, or deport noncitizens of the United States.

2. May not treat naturalized citizens differently from native-born citizens.

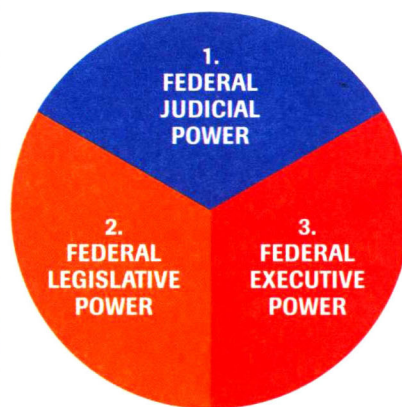
WAR AND MILITARY AFFAIRS POWER ARTICLE I § 8

1. Domestic War Power: Congress has broad power to enact economic or other regulations during wartime or after war to restore the economy.

2. Draft: Congress can enlist men for war and use state militias to fight foreign enemies.

3. Military Justice/Courts Martial: Congress may establish a system of military courts and justice. Courts are legislatively created and located in the legislative branch; therefore, the Bill of Rights is inapplicable. Jurisdiction extends to all offenses committed by service personnel while in service.

STRUCTURE OF THE GOVERNMENT



THE COMMERCE POWER/CLAUSE

ARTICLE I § 8

Congress has the power to regulate commerce between the states. What may Congress regulate?

1. **"Commerce":** Any activity may be regulated, even if it is not commerce in the traditional sense (the movement of persons or goods), as long as that activity:
 - a. Takes place within interstate commerce.
 - b. Uses the channels or instrumentalities of interstate commerce.
 - c. Affects interstate commerce.
2. **Interstate v. Intrastate:** Congress may clearly regulate any activity that affects interstate commerce. Congress may regulate some activities that take place wholly intrastate, due to their effects on, or relationship to, interstate commerce. *Gibbons v. Ogden*, 22 U.S. 1 (1824).
 - a. Any intrastate activity which has a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).
 - i. **"Substantial effect":** Currently, an intrastate activity will have a substantial effect on interstate commerce only if the matter regulated is economic or commercial.
 - b. Individual activities that have an aggregate effect on interstate commerce.
 - c. All parts of an enterprise, even if only a part of the enterprise affects interstate commerce, where the nonregulated part may adversely impact the part affecting commerce.
3. **Scope of Power:** Congress's control over interstate commerce is plenary. Congress can prohibit or condition the movement of persons or goods regardless of its motive, so long as it does not violate any other constitutional provision.
 - a. May do so to protect the national economy.
 - b. As a means to achieve health, safety, or welfare aims.
 - i. To a degree, Congress can regulate what happens after interstate commerce has taken place. *United States v. Sullivan*, 332 U.S. 689 (1948).
 - ii. Congress may regulate and protect the instrumentalities of interstate commerce, such as vehicles, transportation terminals, even if the threat comes from intrastate activities. *Southern Railway Co. v. United States*, 222 U.S. 20 (1911).
 - iii. Congress's conclusion that an activity affects interstate commerce need only be reasonable. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981).
 - iv. Once Congress finds that a class or aggregate of activities affects commerce, that activity may be regulated regardless of whether any particular instance of that activity affects commerce. *Perez v. United States*, 402 U.S. 146 (1971).

FEDERAL EXECUTIVE POWER

DOMESTIC POWERS

Executive Power: Constitution confers the executive power on the president to administer and carry out the laws, and act in times of national, not domestic, emergencies without authorizing congressional legislation. **ARTICLE II § 1**

1. **Presidential Pardon ARTICLE II § 2:**

Can pardon individuals or whole classes of persons any time after offense is committed. Effect of pardon is to preclude conviction or to mitigate or remove any penalties that result from conviction. The power to pardon cannot be limited by Congress. *United States v. Klein*, 80 U.S. 128 (1871)
2. **Presidential Veto ARTICLE I § 7:**

President has power to disapprove of any legislation passed by Congress. President has power to override, Congress needs a vote of two-thirds of each house.
3. **Power of Appointment ARTICLE II § 2:**

President has the ability to vest executive power in certain government officers through the power of appointment.

 - a. **"Officers of the United States":** President can appoint officers who exercise "significant authority under the laws of the United States." Includes persons who formulate government policy, enact rulemaking and adjudication, or otherwise have broad governmental powers. *Buckley v. Valeo*, 424 U.S. 1 (1976).
 - b. **Inferior Officers:** Power to appoint belongs to Congress, not President. Includes the heads of departments, or officers whose work is "directed and supervised" by persons appointed by the President. *Edmond v. United States*, 520 U.S. 651 (1997).
 - c. **Removal Power:** President has power to terminate at will those officials whose exercise of discretion is essential to the functioning of the executive branch. Congress can create an "independent" executive branch for officials relatively free from presidential control, who may only be removed "for cause." *Morrison v. Olson*, 487 U.S. 654 (1988).

FOREIGN AFFAIRS POWERS

Executive branch has some ability to take action or enter into international commitments on behalf of the United States as a sovereign state among other sovereign states.

1. **Treaties:** President negotiates treaties. For treaty to be effective, Senate must still consent by ratifying it. **ARTICLE II § 2**
2. **Executive Agreements:** President can enter into international agreements without consent of Senate. To be valid, an executive agreement must be:
 - a. Pursuant to the exercise of a presidential power;
 - b. Based on authorizing legislation;
 - c. Based on a prior treaty;
 - d. Adopted by Congress (congressional-executive agreement).
3. **Military Powers and Foreign Affairs:** The President as Commander-in-Chief has the power to take some military actions without authorization by Congress.

PRESIDENTIAL IMMUNITIES AND PRIVILEGES

1. **Executive Liability:** President is absolutely immune from civil damages liability for his official acts. No immunity, or temporary immunity while in office, against civil litigation arising from events that took place before President took office. Criminal proceedings may be brought only after President has been impeached. No immunity from judicial process; court may order the President to comply with a subpoena. *United States v. Nixon*, 418 U.S. 683 (1974).
2. **Executive Privilege:** Communications conducted in exercise of executive function are confidential. Not in Constitution, but inferred by the Supreme Court. Exceptions:
 - a. Disclosure to ensure justice. *United States v. Nixon*, 418 U.S. 683 (1974).
 - b. Disclosure to ensure preservation of records.

GOVERNMENTAL RELATIONS

TWO TYPES

1. **Federalism**
2. **Separation of Powers**
(use chart on Page 4)

1. FEDERALISM—DEFINITION

Constitution balances power between dual sovereign governments; one belonging to the states, and the other to a central, federal government.

1. FEDERALISM—LIMITATIONS OF STATE POWER

1. **Exclusive Federal Power ARTICLE I § 8:**
 - a. **Necessary and Proper Clause:** Congress has the power to make all laws "necessary and proper" for executing its powers and all others given by the Constitution to federal government. Congress has broad authority to choose the means for achieving some legitimate aim of the government. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
 - b. **Enumerated Powers:** Congress may use any of its enumerated powers to achieve any result not forbidden by the Constitution. *McCulloch v. Maryland*, 17 U.S. 316 (1819).
2. **Concurrent State and Federal Power:**
 - a. **Supremacy Clause:** When Congress acts within its powers, it may expressly or implicitly enact laws that preempt state law. Congress acts implicitly to preempt state law if:
 - i. It regulates a subject matter pervasively; or
 - ii. It enacts a law that directly conflicts with a state law.
 - b. **Preemption:** Where Congress has not enacted conflicting law and state action does not interfere with the federal structure, states may exercise nonexclusive federal power.

Preemption questions generally involve determining Congress's intent:

- i. States may not regulate if Congress has "occupied the field";
- ii. *Express preemption*: if Congress has not occupied the field, state laws not consistent with the regulatory scheme may still be valid.
- iii. *Implicit preemption*: Same issues as to extent of preemption must be court-determined.
- iv. *Factors*: In determining the scope of preemption, courts must consider the nature of the subject matter regulated and the comprehensiveness of the regulation in addition to legislative intent and history, plain meaning, and construction.

OTHER LIMITS ON STATE REGULATION

1. *Dormant Commerce Clause*: Not expressly provided for, but implied from Constitution (dormant). Limits state regulation of interstate commerce. While Congress has plenary power over interstate commerce, in the absence of congressional action, states can regulate local matters for health, safety or welfare even if it affects interstate commerce. States may not, however, discriminate against or impose unjustifiable state burdens on interstate commerce. **ARTICLE I § 8**
 - a. If state regulation discriminatory:
 - i. *Discriminatory on face*: regulation is unconstitutional.
 - ii. *Discriminatory in effect*: will be upheld where:
 - a. legitimate state interest.
 - b. no other nondiscriminatory alternatives.
 - b. If state regulation nondiscriminatory:
 - i. Benefit to state must outweigh burden.
 - ii. Where substantial burden is to commerce, regulation is unconstitutional. Market Participant exception:
 - a. When a state decides to regulate a particular market, it may enter that market as a participant (such as a trader or manufacturer).
 - b. Dormant Commerce Clause will not apply to that state's regulatory activities.
 - c. It may therefore favor its own citizens over others, subsidize the activities of its citizens and operate a business favoring state citizens. *Exception*: Market participant exception only applies to state activities in a particular market, narrowly defined.
 - d. *Privileges of Immunities Exception* **ARTICLE IV § 2**: A state cannot treat a noncitizen differently than a citizen with respect to the exercise of a privilege without substantial justification.
2. *Contract Clause*: Generally prohibits state law from impairing contracts. Financial contracts may be impaired. **ARTICLE I § 10**
 - a. Where impairment reasonable and necessary to important public purpose.
3. *5th Amendment Takings*: No taking of private property for public use without just compensation.
 - a. *Public Purpose Nexus*:
 - i. Taking is for public use if the means chosen must further a public purpose. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

- b. *Compensable Takings*: the government must pay compensation for a taking that involves:
 - i. Physical invasion/occupation;
 - ii. Denial of economically beneficial use *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); or
 - iii. Public functions.
- c. *Non-compensable Takings*: the government is NOT required to pay compensation for takings that involve:
 - i. Public harm to be prevented; or
 - ii. Economically viable use still exists *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987).
- d. *Temporary Takings*: even if the property taken is returned, the government must pay damages incurred by the property returned.

1. FEDERALISM—INTERGOVERNMENTAL IMMUNITIES

1. *State Taxation/Regulation of Federal Activity*: Supremacy Clause provides that federal government and its properties are immune from state taxation and regulation. *McCulloch v. Maryland*, 17 U.S. 316 (1819). *Exceptions*:
 - a. *Indirect Taxation*: Federal government does not have the direct legal obligation to pay the tax, but pays it incidental to another arrangement.
 - b. Congress consents to state taxation and regulation. *Cleveland v. United States*, 323 U.S. 329 (1945).
 - c. State income taxation of federal employees. *Johnson v. Maryland*, 254 U.S. 51 (1920).
 - d. *State Taxation of Interstate Commerce*: A state may impose a direct tax on interstate business where:
 - i. tax is on activity having a substantial nexus with the state;
 - ii. tax is fairly apportioned between commerce originating in state & commerce from out of state;
 - iii. tax must not discriminate against interstate commerce;
 - iv. tax is related to some service the state provides (e.g., sales tax).
2. *Federal Regulation of States*: Supreme Court recognizes expansive power of Congress to influence or affect almost any state activity. *Exception*: 10th Amendment limits federal power to override state laws concerning traditional governmental "functions essential to the separate and independent existence" of the states.
3. *Federal Taxation of States*: No state immunity from federal taxation. *Exception*: Federal tax which discriminates against a state or unduly interferes with essential state functions is impermissible.
4. *Relations between States*:
 - a. *Full Faith and Credit Clause*: requires that states recognize and give appropriate effect to the legal acts and proceedings of other states. **ARTICLE IV § 1**
 - b. *Interstate Compacts*: states may enter into agreements with other states, including those involving multi-state relationships, without first obtaining the consent of Congress. **ARTICLE I § 10** *Exception*: Those agreements that might increase the political power of member states in a way that might encroach on the supremacy of the federal government.

- c. *Interstate Privileges and Immunities*: states must accord residents and nonresidents equal treatment with regard to certain interests Essential to a national economy and interstate harmony (i.e., "fundamental rights"). **ARTICLE IV § 2**
- i. Equal treatment for fundamental interests: states must give nonresidents the same rights as their own residents for "fundamental rights," including:
 - a. owning, possessing, or disposing of property;
 - b. engaging in employment;
 - c. doing business;
 - d. traveling through and within a state, including changing state residence;
 - e. seeking medical care; and
 - f. equal treatment by justice institutions. *Exception*: States MAY treat a nonresident differently with respect to those rights that are fundamental, if:
 - State has a substantial reason for different treatment;
 - nonresidents are the cause of the problem the state is trying to remedy; and
 - there is no alternative that would be less injurious to the exercise of the nonresident's rights. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).
- ii. If rights infringed are nonfundamental, a state need only show that it did not act arbitrarily.
 - a. *Unconstitutional discrimination*:
 - State may not impose residency requirement on nonresident women seeking abortions: *Doe v. Bolton*, 410 U.S. 179 (1973).
 - State may not require employers to give state residents preference in hiring: *Hicklin v. Orbeck*, 437 U.S. 518 (1978).
 - State may not condition bar admission on residency *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).
 - b. *Constitutional discrimination*: State may charge nonresident hunters higher fees for hunting licenses than residents. *Baldwin v. Fish and Game Commn. of Montana*, 436 U.S. 371 (1978).
 - iii. Clause only applies to "citizens," meaning only natural persons born in or naturalized in the United States. The Clause does not apply to corporations or aliens.

1. FEDERALISM—STATE RELATIONS

1. The Constitution establishes a central federal system of government as well as independent state governments. All citizens are subjects of both governments. Both federal and state governments are sovereign and possess independent governmental power.
2. States' independent powers are defined by:
 - a. Prohibition of exercise by the Constitution;
 - b. Constitution's delegation of exclusively federal power;
 - c. Reservation solely to the states by the 10th Amendment.

2. SEPARATION OF POWERS

	...TO LEGISLATIVE	...TO JUDICIAL	...TO EXECUTIVE
LEGISLATIVE IN RELATION...	• Delegation of Powers • Bicameralism • <i>INS v. Chadha</i>, 462 U.S. 919 (1983) • Removal of Legislative Officers	• Assignment of Non-Judiciary Tasks • Article I Legislative Courts • Privilege against Congressional Arrest • Judicial Inquiry into Congressional Doings • Legislative Re-opening of Final Judgments	• Removal of Executive Officers • Presentment • Executive Inquiry into Congressional Doings • Executive Immunities and Privileges
JUDICIAL IN RELATION...	• Will not Re-open Final Judgments • Political Question	• Independence, Impartiality • Life Tenure	• Judicial, not Executive Duties • <i>Marbury v. Madison</i>, 5 U.S. 137 (1803) • Executive Immunities and Privilege • Political Question
EXECUTIVE IN RELATION...	• Removal of Presidential Officers • Congress cannot override, unless for cause • Veto power (Presentment) • Cannot Inquire into Congressional Doings • Executive Immunities and Privileges	• Executive Immunities and Privileges • Political Question	• Removal of Executive Officers

DUE PROCESS

TWO TYPES

1. Substantive Due Process
2. Procedural Due Process

1. SUBSTANTIVE DUE PROCESS

1. States cannot act to affect certain rights.
In re Slaughter-House Cases, 83 U.S. 36 (1876).
2. State legislation affecting fundamental rights subject to review similar to strict scrutiny: regulation must be narrowly tailored to meet a compelling state interest. *Exception: Economic substantive due process legislation that involves governmental regulation of social and economic matters is subject to the rational basis test.*
3. Applies only to fundamental rights (some of which are not expressly stated in the Constitution).

2. PROCEDURAL DUE PROCESS

No taking of life, liberty, or property without adequate procedures. What Procedures are appropriate? To determine "adequate procedures," examine several factors that must be balanced against each other:

1. What private interest is affected? The more important the affected interest, the more careful the applied procedures must be.
2. What risk of error is inherent in procedure? The higher the risk, the more careful and specific the applied procedures must be.
3. Weigh interest of government against alternatives? The greater the government interest, the greater likelihood of using a procedure that will achieve government aims and reduce administrative costs. Interests protected by procedural due process:
 - a. Life—criminal procedure for death penalty cases.
 - b. Liberty—liberties contained in the Bill of Rights: right to privacy, family relationships, and unlawful incarceration.
 - c. Property—usually any property interest.

Fundamental Rights

1. Right to Privacy:

- a. Create, maintain, or change family relationships *Zablocki v. Redhail*, 434 U.S. 374 (1978);
- b. Procreate, educate and nurture children *Meyer v. Nebraska*, 262 U.S. 390 (1923);
- c. Maintain parent-child relationship;
- d. Engage in consensual sexual practices within marriage *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Griswold v. Connecticut*, 381 U.S. 479 (1965);
- e. Refuse involuntary medical treatment *Washington v. Harper*, 494 U.S. 210 (1990);
- f. NOT including the right of family members to withdraw life-sustaining treatment for an incapacitated person *Cruzan v. Dir., Missouri Dept. of Health*, 497 U.S. 261 (1990);
- g. *Abortion*: fundamental right of women to terminate a pregnancy without undue state interference. Balance against state interests, formula devised to weigh woman's right against state interests and life of fetus; *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992):
 - i. *First trimester*: state cannot interfere; strict scrutiny applied;
 - ii. *Second trimester*: state interest in health of mother is compelling; state may regulate to protect mother's health and safety;
 - iii. *Third trimester*: fetus is viable and state interest in that life is compelling; may regulate to prevent abortion, except where health or life of mother is at issue.

2. Right to Vote:

- a. *Two-part analysis*: Court balances state restriction of voting rights against state's interest in imposing the restriction:
 - i. if effect to voting rights outweighs the state's interest, regulation must be narrowly drawn to advance a compelling government interest;
 - ii. if state interest outweighs restriction, regulation will be upheld if it is reasonable and nondiscriminatory, and the state interest is important.
- b. *Types of vote regulations*: Qualifying or restricting votes, vote dilution *Reynolds v. Sims*, 377 U.S. 533 (1964), and gerrymandering.

3. Right to Travel (Interstate):

State imposition of penalties for a nonresident traveling from one state to relocate to another is subject to fundamental rights analysis. Types of travel regulations:

- a. *Deter immigration*: states may not save state funds by preventing nonresidents from receiving state benefits. Cannot deter indigent immigrants in this manner *Shapiro v. Thompson*, 394 U.S. 618 (1969).
- b. *Durational residency requirements*: denial of basic necessities of life is subject to strict scrutiny. May not apportion funds based on length of residency. May not grant preferential treatment based on date of residency. *Exceptions: (no right exists).*

4. Right to Education:

- a. There is no fundamental right to education *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973).
- b. States are not required to ensure that equivalent financial resources are devoted to the education of each child. *Plyler v. Doe*, 457 U.S. 202 (1982).

5. Right to Basic Necessities of Life:

Welfare benefits are a matter of social/economic legislation, subject to rational basis review, not strict fundamental rights scrutiny. There is no fundamental constitutional right to the basic necessities of life requiring strict scrutiny review in welfare benefits legislation *Dandridge v. Williams*, 397 U.S. 471 (1970).

FREEDOM OF SPEECH

TWO CONCERNS

1. Types of Protected Speech
2. Speech Regulations

DANGEROUS SPEECH

1. **Unlawful Activity:** The state may prohibit speech advocating unlawful or subversive action.
 - a. **Clear and Present Danger:** Words used in a manner and specific context where they would bring about a criminal harm. *Schenck v. United States*, 249 U.S. 47 (1919).
 - b. **Overthrow of Government by Force:** Words that may cause harm by influencing others to undertake harmful acts, even those taught as advocacy of a certain doctrine. *Gitlow v. New York*, 268 U.S. 652 (1925).
2. **Incitement:** The urging of a group or person to take immediate action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
 - a. Likely to cause harmful action;
 - b. Speaker intends to incite or produce imminent lawless action and is likely to do so;
 - c. Applies only where speaker urges illegal action in opposition to government, government policies, or private parties.
3. **Fighting Words:** Direct personal insults likely to cause a person to react violently. Other injurious insults are not prosecuted. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
4. **Group Libel:** False and derogatory statements tending to produce hate or prejudice about a particular group. *Example: Statements that a certain race, creed, or religion is depraved.* *Beauharnais v. Illinois*, 343 U.S. 250 (1952).
5. **Defamation:** False and derogatory statements, tending to harm the reputation of the subject discussed. *New York Times v. Sullivan*, 376 U.S. 254 (1964).
 - a. **Public Figures:**
 - i. **Actual malice required:** statement made with knowledge of falsity or in reckless disregard for the truth. *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990).
 - ii. Applies to statements of fact. *Exception: where reasonable person would interpret statement of opinion as based on fact.*
 - b. **Private Persons:**
 - i. Malice required if private persons voluntarily place themselves into a particular controversy. Private person becomes a "public figure" for a limited range of issues.
 - ii. Malice is NOT required for private persons not involved in public issue, or involuntarily involved in a public matter. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
6. **Invasion of Privacy:** Disclosure of true facts that are private or harm to reputation based on false impression created by statement. *Exception:*
 - a. Disclosure of private information that is already publicly known because it is:
 - i. in public record; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).
 - ii. otherwise publicly apparent. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

CONTENT REGULATION

First Amendment prevents regulation of speech based on its content or the viewpoint expressed by the speaker. Laws that regulate speech on the basis of content or viewpoint are unconstitutional.

1. **Content Neutral:** A law that doesn't distinguish between types of speech on the basis of what the speech is about, is constitutional.
2. **Viewpoint Neutral:** A law that regulates an entire topic or speech regardless of the opinions or views expressed about that topic is constitutional.
2. **Content-based Regulation:** Government may regulate speech on the basis of content if:
 - a. The government has a compelling interest to do so and the means of regulation are necessary to achieve that interest.
 - b. The law regulates conduct and not the content of the speech associated with it.

PRIOR RESTRAINT

1. Government regulation of speech before it has taken place is generally unconstitutional.
2. Prior restraint on speech is permissible where:
 - a. National security interests are affected by the publication of particular subject matter. *Near v. Minnesota (ex rel. Olson)*, 283 U.S. 697 (1931).
 - b. Government interest exists in securing a fair trial. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

VAGUENESS AND OVERBREADTH

Government regulations that are vague or overbroad are unconstitutional as regulating more or less speech than they purport to proscribe.

1. **Vagueness:** A statute is vague if persons of common intelligence cannot guess what type of behavior is being regulated. *Connally v. General Construction Co.*, 269 U.S. 385 (1926).
2. **Overbreadth:** A statute is overbroad if it is worded in such a way that permits a state to regulate both matters that it may constitutionally proscribe, and those that it may not constitutionally regulate or proscribe.

OBSCENE SPEECH

Miller v. California, 413 U.S. 15 (1973)

1. To the average person applying contemporary community standards, the expression is obscene if:
 - a. It appeals to the prurient interest;
 - b. Work is patently offensive; and
 - c. Taken as a whole, lacks serious literary, artistic, political, or scientific value.

INDECENT AND OFFENSIVE SPEECH

Government cannot prohibit the use of specific words in a public place where speech is not legitimately restricted. Words so protected are not obscene; but are merely indecent, vulgar, or offensive. Risk of censorship in specific words is the possibility of a government ban on the expression of an unpopular message. *Cohen v. California*, 403 U.S. 15 (1971).

Regulation of Conduct Associated with Speech

1. **Symbolic Speech (Expressive Conduct):** If law regulates expression based on its content, strict scrutiny will be applied to uphold regulation. If regulation incidentally affects expression, or government has important aim unrelated to the expression, balancing test is applied: government interest is weighed against the impact of the law on expression. *United States v. O'Brien*, 391 U.S. 367 (1968).
2. **Discriminatory Conduct:** First Amendment does not protect speech and attendant conduct that is motivated by bias or discrimination.
3. **Time, Place, and Manner Regulations:** The government may regulate the time, place, and manner of access to locations that may be used for expressive purposes. Laws regulating access to property on the basis of the speech that is to be made on such property are generally unconstitutional.
 - a. **Public Forums:** Specific types of public property traditionally associated with the act of speech or expression. Laws regulating speech in public forums may be upheld if they are:
 - i. content neutral;
 - ii. narrowly tailored to serve a compelling governmental interest; and
 - iii. allow for alternative channels of communication.
 - b. **Nonpublic Forums:** Property that is not traditionally associated with speech, or whose primary use is not for expressive activity. Laws regulating speech in non-public forums may be upheld if they are:
 - i. viewpoint neutral; and
 - ii. reasonably related to a legitimate government purpose.
 - c. **Private Forums:** Property that is not open to the public at large, or otherwise in the hands of private parties. Laws regulating speech in private forums may be upheld if states allow access to shopping centers for expression, but otherwise the Constitution does not apply to private property.

COMMERCIAL SPEECH

Any speech that is economically motivated or which does nothing more than propose a commercial transaction is protected. Commercial speech also provides information helping consumers make choices about products or services. *Exception:* Government may regulate commercial speech that is likely to deceive or that is related to an illegal activity.

FREEDOM OF THE PRESS

IN GENERAL

Press has special rights beyond those conferred by the free speech guarantee. *New York Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713 (1971).

1. **Government Inquiry:** Press not immune from subpoena or search warrants.
2. **Access to Information:**
 - a. Government must ensure that places traditionally open to the public remain open unless government has a compelling interest in closing.
 - b. Press only has same right of access as the public itself.

EQUAL PROTECTION

EQUAL PROTECTION

Fourteenth Amendment requires that no state shall deny any person the equal protection of the laws. Equal protection analysis determines whether a state is constitutionally permitted to differentiate between persons.

TYPES OF JUDICIAL REVIEW

To determine whether state legislation affecting certain rights in constitutional, a court must examine that state's goals and the means used to achieve its goal.

1. **Rational Basis:** State regulation will be upheld if it is rationally related to achieving a legitimate state purpose. Applies primarily to social and economic regulations. *Dandridge v. Williams*, 397 U.S. 471 (1970).

- a. **Taxation:** States have great latitude in creating taxation schemes as long as the schemes bear a rational relationship to a plausible policy justification. *Williams v. Vermont*, 472 U.S. 14 (1985).

- b. Over-inclusive and under-inclusive classifications are not per se unconstitutional in violation of equal protection. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

- c. Prohibits arbitrary, unreasonable, and irrational classifications:

- i. Unlikely to lead to any discernable and understandable legitimate purpose.

- ii. Regulates similarly-situated parties differently, without legitimate reason. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

2. **Intermediate Review (Heightened Scrutiny):** State regulation will be upheld if it is substantially related to an important government purpose. Applies primarily to gender, alienage, and illegitimacy cases.

- a. Gender classifications must fairly and substantially relate to the achievement of an important and articulated government objective. Government must provide an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Unconstitutional types of gender-based classifications:

- i. Statutes presuming greater male competency. *Reed v. Reed*, 404 U.S. 71 (1971).

- ii. Statutes presuming women are dependent.

- iii. Statutes presuming gender bias (peremptory challenges). *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

- b. **Alienage Classifications:**

- i. Congress has plenary power to regulate immigration and naturalization and its decisions are subject to rational basis review.

- ii. States do not have constitutional authority to regulate immigration and naturalization; state classifications based on alienage are inherently suspect and subject to strict scrutiny review.

- c. **Illegitimacy Classifications:** Classifications of children based on nonmarital status of parents; intermediate scrutiny applies. These include:

- i. Qualification for awards or benefits (wrongful death, workers' compensation, social security survivor's benefits, parental support, paternity suit statutes of limitations).

- ii. Interstate inheritance.

3. **Strict Scrutiny:** State regulation will be upheld if it is necessary to achieve a compelling government interest. Strict scrutiny is applied to:

- a. **Suspect Classifications:**

- i. Suspect Classes—race, national origin, ethnicity. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

- ii. Proving Discrimination—must show discriminatory intent or purpose. If disproportionate impact, intent to maintain activity is sufficient. *Washington v. Davis*, 426 U.S. 229 (1976).

- iii. Benign Racial Classifications—Affirmative Action:

- a. subject to strict scrutiny;

- b. race is only one factor to show compelling state interest.

- b. **Fundamental Rights:** Strict scrutiny used to uphold laws infringing on rights.

FREEDOM OF ASSOCIATION

IN GENERAL

Definition: The First Amendment provides for the right to associate with others for the advancement of beliefs, ideas and opinions, to communicate and to engage in all activities protected by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958).

1. **Compelled Disclosure:**

- a. **Lawful associations:** law is unconstitutional if it compels disclosure of membership in a lawful association where disclosure subjects members of the organizations to sanctions, reprisals, or public embarrassment. *NAACP v. Alabama*, 357 U.S. 449 (1958).

- b. **Exception:** If there is a compelling state interest implicated. *Buckley v. Valeo*, 424 U.S. 1 (1976).

2. **Public Employees:**

- a. Inquiry into fitness or competence: inquiry into fitness or competence of applicants for public employment may be unconstitutional because it chills freedom of association.

- b. **Exception:** if inquiry is narrowly tailored to the government interest in fitness or competence.

3. **Freedom not to Associate:** The freedom of association also entails a freedom not to associate.

- a. State cannot require persons to provide for support of organizations or causes with which they disagree. *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990).

- b. **Limitation:** application of rule is limited to political or ideological associations.

FREEDOM OF RELIGION

ESTABLISHMENT CLAUSE

States should not provide aid to religion, favoring any one religion over and above the others. If state statute aids religion, may still be upheld if:

1. It has a secular purpose.

2. Its principal or primary effect neither advances nor inhibits religion.

3. It doesn't promote excessive state entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Aid to sectarian or religious schools:

- a. **Impermissible aid:** tuition, building funds.

- b. **Permissible aid:** bus transportation, secular book loans.

FREE EXERCISE CLAUSE

State must permit people to believe and practice their religious beliefs without interference. State may not deny benefits to or burden persons based on their beliefs. *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). **Exceptions:**

1. **Unemployment compensation:** denial of compensation following discharge for refusing to work on Sabbath or resigning because of religious beliefs violates strict scrutiny, compelling state interest test, and is an unconstitutional burden. *Sherbert v. Verner*, 374 U.S. 398 (1963).

2. **Religious Freedom Restoration Act (RFRA):** Congress's attempt to restore the compelling state interest test.

CONSTITUTIONAL ACTION AGAINST PRIVATE PARTIES

STATE ACTION

Cannot bring action against private individuals for constitutional violations unless state action is shown.

A private party will be treated as a state actor, and thus subject to constitutional restrictions, in the following circumstances:

The Civil Rights Cases, 109 U.S. 3 (1883).

1. **Public Functions:** private party exercises powers traditionally reserved to the state. *Marsh v. Alabama*, 326 U.S. 501 (1946).

2. **State Involvement:** private party has a "close nexus" to state activity that injured plaintiff, such as the use of state courts to enforce a private action, or use of state funds. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

- a. Private party's use of state enforcement of racially restrictive covenants constitutes state action. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

3. **State Authorization or Encouragement:** private action pursuant to an affirmative state act designed to encourage private violations of civil rights.

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Format for the Casenote Legal Brief

Nature of Case: This section identifies the form of action (e.g., breach of contract, negligence, battery), the type of proceeding (e.g., demurrer, appeal from trial court's jury instructions), or the relief sought (e.g., damages, injunction, criminal sanctions).

Palsgraf v. Long Island R.R. Co.

Injured bystander (P) v. Railroad company (D)

N.Y. Ct. App., 248 N.Y. 339, 162 N.E. 99 (1928).

Party ID: Quick identification of the relationship between the parties.

Fact Summary: This is included to refresh your memory and can be used as a quick reminder of the facts.

NATURE OF CASE: Appeal from judgment affirming verdict for plaintiff seeking damages for personal injury.

FACT SUMMARY: Helen Palsgraf (P) was injured on R.R.'s (D) train platform when R.R.'s (D) guard helped a passenger aboard a moving train, causing his package to fall on the tracks. The package contained fireworks which exploded, creating a shock that tipped a scale onto Palsgraf (P).

though unintended, could have been averted or avoided by observance of such a duty. The scope of the duty is limited by the range of danger that a reasonable person could foresee. In this case, there was nothing to suggest from the appearance of the parcel or otherwise that the parcel contained fireworks. The guard could not reasonably have had any warning of a threat to Palsgraf (P), and R.R. (D) therefore cannot be held liable. Judgment is reversed in favor of R.R. (D).

Concurrence/Dissent: All concurrences and dissents are briefed whenever they are included by the casebook editor.

Rule of Law: Summarizes the general principle of law that the case illustrates. It may be used for instant recall of the court's holding and for classroom discussion or home review.

RULE OF LAW
The risk reasonably to be perceived defines the duty to be obeyed.

FACTS: Helen Palsgraf (P) purchased a ticket to Rockaway Beach from R.R. (D) and was waiting on the train platform. As she waited, two men ran to catch a train that was pulling out from the platform. The first man jumped aboard, but the second man, who appeared as if he might fall, was helped aboard by the guard on the train who had kept the door open so they could jump aboard. A guard on the platform also helped by pushing him onto the train. The man was carrying a package wrapped in newspaper. In the process, the man dropped his package, which fell on the tracks. The package contained fireworks and exploded. The shock of the explosion was apparently of great enough strength to tip over some scales at the other end of the platform, which fell on Palsgraf (P) and injured her. A jury awarded her damages, and R.R. (D) appealed.

DISSENT: (Andrews, J.) The concept that there is no negligence unless R.R. (D) owes a legal duty to take care as to Palsgraf (P) herself is too narrow. Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. If the guard's action was negligent as to those nearby, it was also negligent as to those outside what might be termed the "danger zone." For Palsgraf (P) to recover, R.R.'s (D) negligence must have been the proximate cause of her injury, a question of fact for the jury.

Analysis: This last paragraph gives you a broad understanding of where the case "fits in" with other cases in the section of the book and with the entire course. It is a hornbook-style discussion indicating whether the case is a majority or minority opinion and comparing the principal case with other cases in the casebook. It may also provide analysis from restatements, uniform codes, and law review articles. The analysis will prove to be invaluable to classroom discussion.

Facts: This section contains all relevant facts of the case, including the contentions of the parties and the lower court holdings. It is written in a logical order to give the student a clear understanding of the case. The plaintiff and defendant are identified by their proper names throughout and are always labeled with a (P) or (D).

ISSUE: Does the risk reasonably to be perceived define the duty to be obeyed?

HOLDING AND DECISION: (Cardozo, C.J.) Yes. The risk reasonably to be perceived defines the duty to be obeyed. If there is no foreseeable hazard to the injured party as the result of a seemingly innocent act, the act does not become a tort because it happened to be a wrong as to another. If the wrong was not willful, the plaintiff must show that the act as to her had such great and apparent possibilities of danger as to entitle her to protection. Negligence in the abstract is not enough upon which to base liability. Negligence is a relative concept, evolving out of the common law doctrine of trespass on the case. To establish liability, the defendant must owe a legal duty of reasonable care to the injured party. A cause of action in tort will lie where harm,

ANALYSIS
The majority defined the limit of the defendant's liability in terms of the danger that a reasonable person in defendant's situation would have perceived. The dissent argued that the limitation should not be placed on liability, but rather on damages. Judge Andrews suggested that only injuries that would not have happened but for R.R.'s (D) negligence should be compensable. Both the majority and dissent recognized the policy-driven need to limit liability for negligent acts, seeking, in the words of Judge Andrews, to define a framework "that will be practical and in keeping with the general understanding of mankind." The Restatement (Second) of Torts has accepted Judge Cardozo's view.

Quicknotes

FORESEEABILITY A reasonable expectation that change is the probable result of certain acts or omissions.

NEGLIGENCE Conduct falling below the standard of care that a reasonable person would demonstrate under similar conditions.

PROXIMATE CAUSE The natural sequence of events without which an injury would not have been sustained.

Issue: The issue is a concise question that brings out the essence of the opinion as it relates to the section of the casebook in which the case appears. Both substantive and procedural issues are included if relevant to the decision.

Holding and Decision: This section offers a clear and in-depth discussion of the rule of the case and the court's rationale. It is written in easy-to-understand language and answers the issue presented by applying the law to the facts of the case. When relevant, it includes a thorough discussion of the exceptions to the case as listed by the court, any major cites to the other cases on point, and the names of the judges who wrote the decisions.

Quicknotes: Conveniently defines legal terms found in the case and summarizes the nature of any statutes, codes, or rules referred to in the text.

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How to Brief a Case

A. Decide on a Format and Stick to It

Structure is essential to a good brief. It enables you to arrange systematically the related parts that are scattered throughout most cases, thus making manageable and understandable what might otherwise seem to be an endless and unfathomable sea of information. There are, of course, an unlimited number of formats that can be utilized. However, it is best to find one that suits your needs and stick to it. Consistency breeds both efficiency and the security that when called upon you will know where to look in your brief for the information you are asked to give.

Any format, as long as it presents the essential elements of a case in an organized fashion, can be used. Experience, however, has led *Casenotes* to develop and utilize the following format because of its logical flow and universal applicability.

NATURE OF CASE: This is a brief statement of the legal character and procedural status of the case (e.g., “Appeal of a burglary conviction”).

There are many different alternatives open to a litigant dissatisfied with a court ruling. The key to determining which one has been used is to discover *who is asking this court for what*.

This first entry in the brief should be kept as *short as possible*. Use the court’s terminology if you understand it. But since jurisdictions vary as to the titles of pleadings, the best entry is the one that addresses who wants what in this proceeding, not the one that sounds most like the court’s language.

RULE OF LAW: A statement of the general principle of law that the case illustrates (e.g., “An acceptance that varies any term of the offer is considered a rejection and counteroffer”).

Determining the rule of law of a case is a procedure similar to determining the issue of the case. Avoid being fooled by red herrings; there may be a few rules of law mentioned in the case excerpt, but usually only one is *the* rule with which the casebook editor is concerned. The techniques used to locate the issue, described below, may also be utilized to find the rule of law. Generally, your best guide is simply the chapter heading. It is a clue to the point the casebook editor seeks to make and should be kept in mind when reading every case in the respective section.

FACTS: A synopsis of only the essential facts of the case, i.e., those bearing upon or leading up to the issue.

The facts entry should be a short statement of the events and transactions that led one party to initiate legal proceedings against another in the first place. While some cases conveniently state the salient facts at the beginning of the decision, in other instances they will have to be culled from hiding places throughout the text, even from concurring and dissenting opinions. Some of the “facts” will often be in dispute and should be so noted. Conflicting evidence may be briefly pointed up. “Hard” facts must be included. Both must be *relevant* in order to be listed in the facts entry. It is impossible to tell what is relevant until the entire case is read, as the ultimate determination of the rights and liabilities of the parties may turn on something buried deep in the opinion.

Generally, the facts entry should not be longer than three to five *short* sentences.

It is often helpful to identify the role played by a party in a given context. For example, in a construction contract case the identification of a party as the “contractor” or “builder” alleviates the need to tell that that party was the one who was supposed to have built the house.

It is always helpful, and a good general practice, to identify the “plaintiff” and the “defendant.” This may seem elementary and uncomplicated, but, especially in view of the creative editing practiced by some casebook editors, it is sometimes a difficult or even impossible task. Bear in mind that the *party presently* seeking something from this court may not be the plaintiff, and that sometimes only the cross-claim of a defendant is treated in the excerpt. Confusing or misaligning the parties can ruin your analysis and understanding of the case.

ISSUE: A statement of the general legal question answered by or illustrated in the case. For clarity, the issue is best put in the form of a question capable of a “yes” or “no” answer. In reality, the issue is simply the Rule of Law put in the form of a question (e.g., “May an offer be accepted by performance?”).

The major problem presented in discerning what is *the* issue in the case is that an opinion usually purports to raise and answer several questions. However, except for rare cases, only one such question is really the issue in the case. Collateral issues not necessary to the resolution of the matter in controversy are handled by the court by language known as “*obiter dictum*” or merely “*dictum*.” While dicta may be included later in the brief, they have no place under the issue heading.

To find the issue, ask *who wants what* and then go on to ask *why did that party succeed or fail in getting it*. Once this is determined, the “why” should be turned into a question.

The complexity of the issues in the cases will vary, but in all cases a single-sentence question should sum up the issue. *In a few cases*, there will be two, or even more rarely, three issues of equal importance to the resolution of the case. Each should be expressed in a single-sentence question.

Since many issues are resolved by a court in coming to a final disposition of a case, the casebook editor will reproduce the portion of the opinion containing the issue or issues most relevant to the area of law under scrutiny. A noted law professor gave this advice: "Close the book; look at the title on the cover." Chances are, if it is Property, you need not concern yourself with whether, for example, the federal government's treatment of the plaintiff's land really raises a federal question sufficient to support jurisdiction on this ground in federal court.

The same rule applies to chapter headings designating sub-areas within the subjects. They tip you off as to what the text is designed to teach. The cases are arranged in a casebook to show a progression or development of the law, so that the preceding cases may also help.

It is also most important to remember to *read the notes and questions* at the end of a case to determine what the editors wanted you to have gleaned from it.

HOLDING AND DECISION: This section should succinctly explain the rationale of the court in arriving at its decision. In capsulizing the "reasoning" of the court, it should always include an application of the general rule or rules of law to the specific facts of the case. Hidden justifications come to light in this entry; the reasons for the state of the law, the public policies, the biases and prejudices, those considerations that influence the justices' thinking and, ultimately, the outcome of the case. At the end, there should be a short indication of the disposition or procedural resolution of the case (e.g., "Decision of the trial court for Mr. Smith (P) reversed").

The foregoing format is designed to help you "digest" the reams of case material with which you will be faced in your law school career. Once mastered by practice, it will place at your fingertips the information the authors of your casebooks have sought to impart to you in case-by-case illustration and analysis.

B. Be as Economical as Possible in Briefing Cases

Once armed with a format that encourages succinctness, it is as important to be economical with regard to the time spent on the actual reading of the case as it is to be economical in the writing of the brief itself. This does not mean "skimming" a case. Rather, it means reading the case with an "eye" trained to recognize into which "section" of your brief a particular passage or line fits and having a system for quickly and precisely marking the case so that the passages fitting any one particular part of

the brief can be easily identified and brought together in a concise and accurate manner when the brief is actually written.

It is of no use to simply repeat everything in the opinion of the court; record only enough information to trigger your recollection of what the court said. Nevertheless, an accurate statement of the "law of the case," i.e., the legal principle applied to the facts, is absolutely essential to class preparation and to learning the law under the case method.

To that end, it is important to develop a "shorthand" that you can use to make margin notations. These notations will tell you at a glance in which section of the brief you will be placing that particular passage or portion of the opinion.

Some students prefer to underline all the salient portions of the opinion (with a pencil or colored underliner marker), making marginal notations as they go along. Others prefer the color-coded method of underlining, utilizing different colors of markers to underline the salient portions of the case, each separate color being used to represent a different section of the brief. For example, blue underlining could be used for passages relating to the rule of law, yellow for those relating to the issue, and green for those relating to the holding and decision, etc. While it has its advocates, the color-coded method can be confusing and time-consuming (all that time spent on changing colored markers). Furthermore, it can interfere with the continuity and concentration many students deem essential to the reading of a case for maximum comprehension. In the end, however, it is a matter of personal preference and style. Just remember, whatever method you use, underlining must be used sparingly or its value is lost.

If you take the marginal notation route, an efficient and easy method is to go along underlining the key portions of the case and placing in the margin alongside them the following "markers" to indicate where a particular passage or line "belongs" in the brief you will write:

- N (NATURE OF CASE)
- RL (RULE OF LAW)
- I (ISSUE)
- HL (HOLDING AND DECISION, relates to the RULE OF LAW behind the decision)
- HR (HOLDING AND DECISION, gives the RATIONALE or reasoning behind the decision)
- HA (HOLDING AND DECISION, APPLIES the general principle(s) of law to the facts of the case to arrive at the decision)

Remember that a particular passage may well contain information necessary to more than one part of your brief, in which case you simply note that in the margin. If you are using the color-coded underlining method instead of margin notation, simply make asterisks or

checks in the margin next to the passage in question in the colors that indicate the additional sections of the brief where it might be utilized.

The economy of utilizing “shorthand” in marking cases for briefing can be maintained in the actual brief writing process itself by utilizing “law student shorthand” within the brief. There are many commonly used words and phrases for which abbreviations can be substituted in your briefs (and in your class notes also). You can develop abbreviations that are personal to you and which will save you a lot of time. A reference list of briefing abbreviations can be found on page xii of this book.

C. Use Both the Briefing Process and the Brief as a Learning Tool

Now that you have a format and the tools for briefing cases efficiently, the most important thing is to make the time spent in briefing profitable to you and to make the most advantageous use of the briefs you create. Of course, the briefs are invaluable for classroom reference when you are called upon to explain or analyze a particular

case. However, they are also useful in reviewing for exams. A quick glance at the fact summary should bring the case to mind, and a rereading of the rule of law should enable you to go over the underlying legal concept in your mind, how it was applied in that particular case, and how it might apply in other factual settings.

As to the value to be derived from engaging in the briefing process itself, there is an immediate benefit that arises from being forced to sift through the essential facts and reasoning from the court’s opinion and to succinctly express them in your own words in your brief. The process ensures that you understand the case and the point that it illustrates, and that means you will be ready to absorb further analysis and information brought forth in class. It also ensures you will have something to say when called upon in class. The briefing process helps develop a mental agility for getting to the *gist* of a case and for identifying, expounding on, and applying the legal concepts and issues found there. The briefing process is the mental process on which you must rely in taking law school examinations; it is also the mental process upon which a lawyer relies in serving his clients and in making his living.

Abbreviations for Briefs

acceptance	acp	offer	O
affirmed	aff	offeree	OE
answer	ans	offeror	OR
assumption of risk	a/r	ordinance	ord
attorney	atty	pain and suffering	p/s
beyond a reasonable doubt	b/r/d	parole evidence	p/e
bona fide purchaser	BFP	plaintiff	P
breach of contract	br/k	prima facie	p/f
cause of action	c/a	probable cause	p/c
common law	c/l	proximate cause	px/c
Constitution	Con	real property	r/p
constitutional	con	reasonable doubt	r/d
contract	K	reasonable man	r/m
contributory negligence	c/n	rebuttable presumption	rb/p
cross	x	remanded	rem
cross-complaint	x/c	res ipsa loquitur	RIL
cross-examination	x/ex	respondeat superior	r/s
cruel and unusual punishment	c/u/p	Restatement	RS
defendant	D	reversed	rev
dismissed	dis	Rule Against Perpetuities	RAP
double jeopardy	d/j	search and seizure	s/s
due process	d/p	search warrant	s/w
equal protection	e/p	self-defense	s/d
equity	eq	specific performance	s/p
evidence	ev	statute of limitations	S/L
exclude	exc	statute of frauds	S/F
exclusionary rule	exc/r	statute	S
felony	f/n	summary judgment	s/j
freedom of speech	f/s	tenancy in common	t/c
good faith	g/f	tenancy at will	t/w
habeas corpus	h/c	tenant	t
hearsay	hr	third party	TP
husband	H	third party beneficiary	TPB
in loco parentis	ILP	transferred intent	TI
injunction	inj	unconscionable	uncon
inter vivos	l/v	unconstitutional	unconst
joint tenancy	j/t	undue influence	u/e
judgment	judgt	Uniform Commercial Code	UCC
jurisdiction	jur	unilateral	uni
last clear chance	LCC	vendee	VE
long-arm statute	LAS	vendor	VR
majority view	maj	versus	v
meeting of minds	MOM	void for vagueness	VFV
minority view	min	weight of the evidence	w/e
Miranda warnings	Mir/w	weight of authority	w/a
Miranda rule	Mir/r	wife	W
negligence	neg	with	w/
notice	ntc	within	w/i
nuisance	nus	without prejudice	w/o/p
obligation	ob	without	w/o
obscene	obs	wrongful death	wr/d