

A. Structure of the U.S. Constitutional System

a. Federal Judicial Power

i. How Should the Constitution be Interpreted?

- **Originalism (also "Interpretivism")**
- **Non-Originalism ("Pragmatism")**
- **Specific Interpretive Techniques (& Justifications for Decisions & Modes of Argument)**

ii. Limits on Federal Judicial Power - Justiciability

- **Advisory Opinions**
 - ◆ Prohibited
 - ◆ "cases or controversies"
- **Standing**
 - ◆ **Injury**: concrete and particularized that has occurred or is imminent
 - ◆ **Causation**: injury is traceable to D's conduct
 - ◆ **Redressability**: a favorable decision will redress the injury
- **Ripeness**
 - ◆ Determining whether review is appropriate
 - ◆ Seeks to separate matters that are premature b/c injury is speculative
- **Mootness**
 - ◆ Must present a live controversy at all stages
- **Political Question**
 - 1) Text demonstrates commitment
 - 2) Outside of institutional competence and expertise
 - 3) Prudential concerns against judicial intervention

b. Federal Executive Power

i. "Inherent" Presidential Power

- ◆ **Executive Order to seize steel mills**
 - ◇ Valid if directing Executive Branch officials
 - ◇ President can alter prior EOs
- ◆ **Executive Privilege**
 - ◇ President's role vs. Supreme Court's role
 - ◇ Constitutional basis for privilege?
 - ▶ Necessary in order for executive branch to function
 - ◇ Absolute?
 - ◇ Qualified?
 - ▶ Weighing/Balancing Interests

- ◆ **Executive Agreements**
 - ◇ W/out congressional authority
 - ◇ Not inconsistent w/legislation enacted by Congress
 - ◇ Sources of authority:
 - ◆ (a) Chief Executive - to represent the nation in foreign affairs;
 - ◆ (b) To receive ambassadors and other public ministers;
 - ◆ (c) "Commander-in-Chief"
 - ◆ (d) To "take care that the laws be faithfully executed"

ii. Justice Jackson's Analysis

- 1) **When the President acts pursuant to an express or implied authorization of Congress**
 - ◆ *Unless unconstitutional, President will have authority*
- 2) **When President acts in absence of either Congressional grant or denial of authority**
 - ◆ *Small # of cases where inherent powers exist*
- 3) **When acts in ways incompatible w/express or implied will of Congress**
 - ◆ *Least likely to have authority*

iii. 4 Approaches in absence of Congressional & Constitutional authorization

- 1) **No Inherent Authority**
 - ◆ May act only if there is express constitutional or statutory authority [**Black**]
- 2) **Interstitial Executive Power**
 - ◆ Has inherent authority *unless* interferes w/the functioning of, or usurps power of, another branch [**Douglas**]
- 3) **Legislative Accountability**
 - ◆ May exercise powers not mentioned in Constitution so long as the president does not violate a statute or the Constitution [**Jackson**] [**Vinson**]
- 4) **Broad Inherent Authority**
 - ◆ Has inherent powers that may not be restricted by Congress and may act *unless* the Constitution is violated. [**Vinson?**]

c. Federal Legislative Authority and Federal Limitations

i. The Commerce Power (Art. I, sec. 8)

- **1990s to Present: Narrowing of the Commerce Power**
 - ◆ Wide Use by Congress
 - ◆ Narrowing Interpretation by Court
 - ◆ **Lopez, Morrison, Raich Differences of Opinion about Category 3**
 - ◇ Thomas & Scalia - not w/in Commerce Power itself
 - ◆ Need Necessary & Proper clause to reach (they split on whether it does)
 - ◇ Stevens (majority) - broad definition of "economic" activity
 - ◆ Can aggregate
 - ◆ Can reach as part of comprehensive regulation of interstate activities
 - ◇ O'Connor (dissenters) - not economic
 - ◆ Cannot aggregate
 - ◆ Interferes w/state sovereignty

ii. The Taxing and Spending Power (Art. I, sec. 8)

- ... to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;...
- Not limited to enumerated powers of Art. I
- General Welfare is interpreted very broadly
 - ◆ Court defers to Congress
- Conditions on the receipt of federal funds may be attached
 - ◆ Must be unambiguous - state making informed choice

 - ◆ Must bear some relationship to the federal interest in the spending program
[South Dakota v. Dole]
 - ◆ Cannot be coercive to the point that becomes compulsion rather than inducement
[Dole; Sebelius]
- Cannot violate another constitutional provision
- May reach/influence activities that Congress could not regulate directly
- **Sabri v. US**
 - ◆ Used in combination w/Necessary and Proper Clause

iii. Constitutionality of the Affordable Care Act

- NFIB v. Sebelius
 - ◆ **Commerce Clause**
 1. Channels of interstate commerce (highways, rivers, harbors, air space)
 2. Instrumentalities of interstate commerce & things or people moving in interstate commerce
 3. Activities that substantially affect interstate commerce
 - ▶ Roberts & Kennedy/Scalia/Thomas/Alito:
 - Can only regulate activity, cannot compel activity;
 - Mandate not necessary to achieve regulation of interstate health care market;
 - ▶ Ginsberg & Breyer/Sotomayor/Kagan:
 - Decision to forego insurance is an economic decision w/substantial effect on interstate commerce;
 - Mandate is **reasonably adapted** to achieve goals of interstate regulation of health care market;
 - ▶ **Key Factors**
 1. What is being regulated?
 - ◆ Activity? (Sebelius)
 - ◆ Economic Activity? (Lopez, Morrison, Raich)
 - ◆ If EA - can aggregate to assess affect on IC
 - ◆ If not EA - cannot aggregate
 2. Attenuated connection btwn activity and IC? (Lopez, Morrison)
 3. Is it **necessary** to reach intrastate activity to effectively regulate interstate commerce? (Wickard, Raich, Sebelius)
 4. Is there a jurisdictional hook/link to IC? (Heart of Atlanta)
 5. Did Congress make findings about the effect on IC?
 6. Interfering w/traditional state function and sovereignty?

B. Constitutional Protection of Individual Rights

a. The Application of the Bill of Rights to the States

i. "Incorporation" of "Fundamental" Rights through the Due Process Clause

□ McDonald v. City of Chicago

◆ **2nd Amendment**

- ◇ Applies to state and local gov'ts
- ◇ Determining fundamental rights
 - ▶ "deeply rooted in this Nation's history and tradition"

b. The Application of the Constitution to Private Conduct

i. The Requirement for State Action

□ **"Public Function"**

- ◆ Private entity must comply w/Constitution if performing function **traditionally and exclusively** done by gov't

□ **"Entanglement"**

- ◆ Private conduct must comply w/the Constitution if the gov't has authorized, encouraged or facilitated the unconstitutional conduct

c. Due Process and the Protection of Fundamental Rights

i. Due Process Protection for Economic Liberties

□ **Two concepts of Due Process**

◆ **Procedural Due Process**

- ◇ Whether the gov't has followed fair procedures (e.g., notice & hearing) when it takes away a person's life, liberty or property

◆ **Substantive Due Process**

- ◇ Whether the gov't has an adequate reason (e.g., rational basis; compelling interest) for taking away a person's life, liberty, or property

□ **Economic liberties Since 1937**

◆ **Rational Basis Test:**

- ◇ Laws regulating business and employment practices will be upheld under the Due Process clause if:
 - ▶ *Rationally related to a legitimate gov't purpose*
- ◇ Ends: Any conceivable purpose, not prohibited by the Constitution
- ◇ Means: A reasonable way of attaining the end (deference to choice of legislature among means to the end)
- ◇ Burden on challenger to prove arbitrary, capricious, irrational, or violate other constitutional provisions

ii. Modern Substantive Due Process: Fundamental Rights

□ **The Concept of Fundamental Rights & Framework for Analysis**

1. **Is There a Fundamental Right?**

- ◇ Validity & Source of Unenumerated Rights
- ◇ Originalism v. Non-Originalism
- ◇ Precedent

2. Is the Constitutional Right Infringed?

- ◇ Direct & Substantial Interference
- ◇ Some regulation may not be considered infringement
- ◇ **Not infringed unless regulation = "Undue Burden"**
- ◇ If a Fundamental Right is infringed: Strict Scrutiny
- ◇ If not a Fundamental Right or if not infringed: Rational Basis Test

3. Is there Sufficient Justification for the Government's Infringement?

- ◇ Rational Basis Test: Must be a **legitimate** gov't purpose; deferential to state; burden on the challenger to prove irrational, arbitrary, capricious
- ◇ Strict Scrutiny: Legislation must be **compelling** gov't interest; burden on state to prove a truly vital interest is served by legislation

4. Is the Means Sufficiently Related to the Purpose?

- ◇ Rational Basis Test: legislation must be a **reasonable** way to achieve the goal
 - ▶ Rationally related to the legitimate gov't purpose
 - ▶ Deferential to state
- ◇ Strict Scrutiny: legislation must be **necessary** to achieve the compelling governmental interest
 - ▶ Gov't must prove it could not attain its goal through any means less restrictive of the right

Fundamental Right?	Right Infringed?	Govt. Purpose Sufficient Justification?	Means Sufficiently Related to Purpose?
YES or NO	YES or NO	Strict Scrutiny Standard Compelling?	Necessary?
		Rational Basis Standard Legitimate?	Reasonable?

d. Equal Protection

□ **"Modern" Equal Protection Methodology**

1. What is the Classification?

- ◇ Explicit (on its face)
- ◇ **Neutral on its face, but discriminatory impact and purpose**

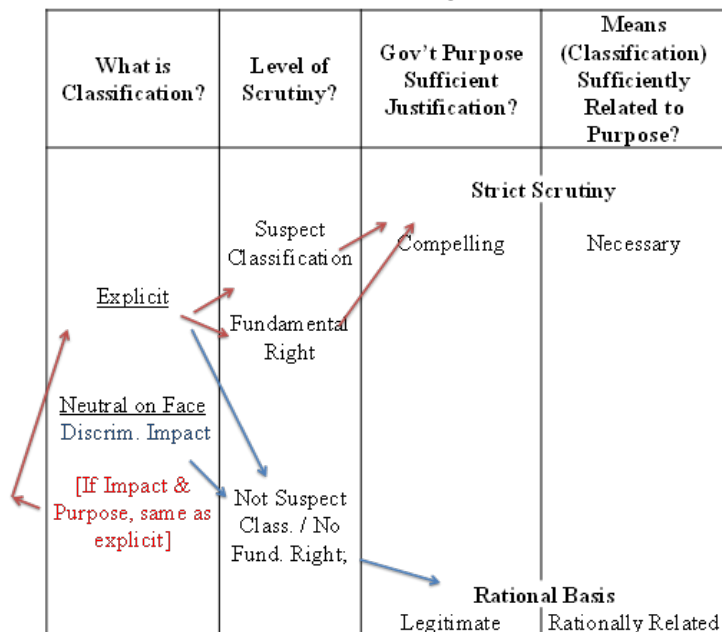
2. What is the Appropriate Level of Scrutiny?

- ◇ Strict Scrutiny (Suspect Class; Fundamental Right)
- ◇ **Intermediate Scrutiny (Gender)**
- ◇ Rational Basis (General Standard)

3. Does the Government's Interest Satisfy the Level of Scrutiny?

- ◇ Ends (Compelling/**Important**/Legitimate)
 - ▶ **RBT**: Must be **legitimate** gov't purpose
 - Deferential to state
 - Burden on the challenger to prove irrational, arbitrary, capricious

- ▶ **Intermediate Scrutiny:** Must be an **important** gov't interest
 - Burden on state to prove importance of interest, not deferential
 - ▶ **Strict Scrutiny:** Must be **compelling** gov't interest
 - Burden on state to prove a truly vital interest is served by legislation
4. **Does the Means (Classification) Used by Gov't Satisfy the Level of Scrutiny?**
- ◇ **Means** (Necessary/**Substantially Related**/Rationally Related)
 - ▶ **RBT:** legislation must be a **reasonable** way to achieve the goal
 - **Rationally related** to the legitimate gov't purpose
 - Deferential to state
 - ▶ **Intermediate Scrutiny:** legislation must be **substantially related to achieving the important government interest**
 - ▶ **Strict Scrutiny:** legislation must be **necessary** to achieve the compelling gov't interest
 - Gov't must prove it could not attain its goal through any means less restrictive of the right



Supreme Court Doctrine	Actual Application	Examples
Strict Scrutiny	Rigorous - fatal	<u>Loving</u> , <u>Redhail</u> , <u>Skinner</u> , <u>Eisenstadt</u>
	Some deference	<u>Korematsu</u>
Intermediate Scrutiny	"Exceedingly persuasive justification"	<u>VMI</u> , <u>Hogan</u>
	[normal]	<u>Craig v. Boren</u> , <u>Orr</u>
Rational Basis	Some deference; "not similarly situated"	<u>Rostker</u> , <u>Michael M.</u>
	"With teeth"; little deference	<u>Reed</u> , <u>O'Connor</u> - <u>Lawrence</u>
	Complete deference	<u>Williamson v. Lee Optical</u>