

A. Structure of the U.S. Constitutional System

a. Introduction

i. Study of Con Law

- 1) **Importance of historical, political, social and economic contexts**
- 2) **"Timelessness" of issues**
 - ◆ Historical "icons": Marbury, Dred Scott, Brown
 - ◆ But also key issues of today:
 - ◇ NSA surveillance, gun control, same-sex marriage, abortion & contraception, presidential power, Guantanamo, immigration, medical marijuana, women in the military, Obamacare and global warming
- 3) **Often the issue is who gets to decide the merits**
 - ◆ (executive, legislative, judicial branches; federal or state)
- 4) **Decisions by a single, multi-justice court: US Supreme Court**
 - ◆ Effects of judicial philosophies and changes in personnel
- 5) **Methods of Constitutional decision-making**
 - ◆ (basis of decision in the text/language of the Constitution, original intent, precedent, policy considerations, current societal needs, etc.)
- 6) **Is the Constitution a legal document? A political document?**
 - ◆ Are constitutional decisions "law" or "policy"? Or both?

b. Federal Judicial Power

i. Article III

ii. Judicial Review of Executive and Legislative Branches

- Marbury v. Madison
 - ◆ Constitution creates enforceable rights
 - ◇ (Cf. Declaration of Independence; Magna Carta)
 - ◆ Federal Judicial Power is limited and defined by the enumerated jurisdictional bases of Article III
 - ◆ Congress cannot increase jurisdiction of federal courts beyond Article III
 - ◆ Federal courts may review executive branch (non-political) conduct to determine its legality and constitutionality (to decide a case w/in its jurisdiction)
 - ◆ Federal courts may review legislative actions for their constitutionality (to decide a case w/in its jurisdiction)

iii. Judicial Review of State Court Judgments

- Martin v. Hunter's Lessee
 - ◆ What does the decision tell us about the Supreme Court's jurisdiction and the relationship btwn the federal and state courts?
 - ◆ What are the textual or functional justifications for the ruling?
 - ◆ The Supreme Court has appellate jurisdiction over decisions of state courts when the subject matter of the case falls w/in the grant of power in Article III, sec. 2 (e.g., arising under federal treaty, statute or constitution)

iv. How Should the Constitution be Interpreted?

- **Originalism (also "Interpretivism")**
 - ◆ Interpret/enforce what is clearly stated or clearly intended;
 - ◆ Static in meaning
 - ◆ Evolves through amendment, not judicial interpretation
 - ◇ In effect, what did it mean "then"?
 - ◆ Text, public meaning, what is clearly stated or clearly intended by the framers; static in meaning, Constitution evolves through amendment, not judicial interpretation
- **Non-Originalism ("Pragmatism")**
 - ◆ Courts should be guided by language and historical context, but are not limited to just those considerations;
 - ◆ Through judicial interpretation, the Constitution evolves to meet the needs of a changing society
 - ◇ In effect, what does (or should) it mean "today"?
 - ◆ Considers original sources, but in addition - social, economic, political consequences; through interpretation, the Constitution evolves to meet the needs of today
- **Specific Interpretive Techniques (& Justifications for Decisions & Modes of Argument)**
 - ◆ **Textual Analysis** - four corners of the document
 - ◆ **Original Meaning** - text and contemporaneous practices
 - ◆ **Original Intent** - discern the specific intent (purpose) of the framers (and ratifiers) from text, legislative history and historical context
 - ◆ **General Intent** - a broader view of the intent of the framers/ratifiers
 - ◆ **Tradition** - well established practices and values
 - ◆ **Precedent** - prior decisions (primarily of the Supreme Court)
 - ◆ **Natural Law** - values that predate/underlie the written Constitution
 - ◆ **Pragmatism** - considering the consequences of decisions and protecting values that reflect current social, economic, policy considerations (in addition to history, tradition and precedent)
 - ◆ **Foreign Law** - comparison to constitutions and court decisions in other countries
 - ◆ **Process-Based Theory** - guarantee fair and equitable processes of gov't

v. The Second Amendment & Gun Control

- **DC v. Heller (handgun restriction in the home)**
 - ◆ In exercising the judicial power established in Marbury, how does the Court interpret and enforce the Constitution?
 - ◆ Differing perspectives of the Justices on constitutional interpretation
 - ◆ Constitutional Constraints on gov't responses to gun violence

vi. Limits on Federal Judicial Power - Justiciability

- **Justiciability**
 - ◆ General statement: Confines "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution in federal court."
 - ◆ Judicially created doctrines

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- ◆ Based on Constitutional (Art. III, Separation of Powers) as well as prudential considerations
- ◆ Function as jurisdictional limitations on Federal Courts
- ◆ Doctrines can be at tension w/view that an essential function of federal courts is to interpret and enforce federal law and the Constitution
- **Advisory Opinions**
 - ◆ Prohibited
 - ◆ "cases or controversies"
- **Standing**
 - ◆ P must have legitimate conflict
 - ◆ Personal stake in the claim
 - ◆ **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
 - ◆ **MA v. EPA**
 - ◇ Special solicitude - relaxes standard for injury & causation (?) b/c of "stake in protecting its quasi-sovereign interests"
 - ◆ **Clapper v. Amnesty Int'l**
 - ◇ Fear of surveillance too speculative
 - ◇ Future injury must be "certainly impending"
 - ▶ Concrete
 - ▶ Particularized
 - ▶ Actual
 - ▶ "imminent"
- **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
 - ◆ Moot case = no longer has an actual controversy
 - ◆ **Exceptions**
 - ◇ "wrongs capable of repetition but evading review"
 - ◇ Voluntary cessation
- **Political Question**
 - 1) Text demonstrates commitment of the issue to a coordinate political department
 - 2) Resolution would demand Court move outside of institutional competence and expertise
 - ◇ Lack of judicially discoverable and manageable standards for resolving;
 - ◇ Impossibility of deciding w/out an initial policy determination of a kind clearly for non-judicial discretion;
 - 3) Prudential concerns counsel against judicial intervention
 - ◇ Judicial resolution would express lack of the respect due coordinate branches of gov't;
 - ◇ Unusual need for unquestioning adherence to a political decision already made;
 - ◇ Potential for embarrassment from multifarious pronouncements by various departments on one question.

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- ◆ **Criticism:** may be appropriate to show deference to other branches, but should not totally abdicate role when constitutional interpretation is called for
- ◆ **Goldwater v. Carter**
 - ◇ President Carter rescinded treaty w/Taiwan w/o congressional approval
 - ◇ No language in Constitution to interpret how treaties may be rescinded
- ◆ **Zivotofsky v. Clinton**
 - ◇ "Jerusalem, Israel" on passports
 - ◇ Determining constitutionality of Congressional statute w/in the Court's authority

c. Federal Executive Power

i. **"Inherent" Presidential Power**

□ **Youngstown Steel**

◆ ***Executive Order to seize steel mills***

- ◇ Valid if directing Executive Branch officials
- ◇ President can alter prior EOs

□ **US v. Nixon**

◆ ***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

ii. **The Authority of Congress to Increase Executive Power**

□ **Clinton v. New York ("line-item" veto)**

◆ ***Separation of powers***

- ◇ Constitutional mandate
- ◇ Cannot be altered by agreement
- ◇ Role of judicial branch to enforce original intent

◆ ***Constitutional procedure = only way to create legislation***

- ◇ May not be modified or deviated from

iii. **Administrative Power and the Constitution**

□ **INS v. Chadha ("legislative veto")**

◆ ***Separation of powers***

- ◇ Cannot have one-house veto
- ◇ Traditional review of decisions by both houses and president
 - ▶ Cannot review judicial function

iv. **Separation of Powers in Conducting Foreign Policy**

□ **Curtiss-Wright**

- ◆ Conspiring to sell 15 machine guns to Bolivia
- ◆ Congress may not delegate "law-making" powers to President

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- ◆ Can President authorize the ban unilaterally?

- ◇ Functional argument
- ◇ Art. II, sec. 2-3 provisions
 - ▶ Extensive power in foreign affairs

- **Dames & Moore (ARGO)**

- ◆ Must be in context of necessary incident to resolution of major foreign policy dispute & Congress acquiesced

- ◆ **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"

- **Zivotofsky II**

- ◆ **Recognition Power:**

- ◇ Signing statements
 - ◆ Not enforceable as law
 - ◆ Statement that executive branch will not follow certain provisions

- ◆ **3rd category of Jackson's tripartite analysis**

- ◇ Must prove power is exclusive to President

- ◆ **Reception clause:**

- ◇ Implicitly gives President power to recognize other states & gov'ts

- ◆ **Precedent & History:**

- ◇ Does not point one way or the other

- **War-Making**

- ◆ **No Supreme Court cases**

- ◇ Issues w/Justiciability

- ◆ **Constitution --> Art. I & II**

- ◇ Roles of Congress & President

- ◆ **War Powers Resolution (1973)**

- ◆ **AUMF 2001**

- ◆ **"War" on ISIS/ISIL**

v. **Presidential Power and the War on Terrorism**

- **Hamdi v. Rumsfeld**

- ◆ **Legality of Detention**

- ◇ Authority to hold Hamdi as an "enemy combatant"?

- ◆ **Non-Detention Act**

- ◇ "No citizen shall be imprisoned or detained by US except pursuant to an act of Congress"

- ◆ **Justification**

- ◇ President has inherent power as commander-in-chief, protect national security
- ◇ Congressional authorization - AUMF Post 9/11

- **Closing of Guantanamo**

vi. 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*

vii. Four 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?**]

d. Federal Legislative Authority and Federal Limitations

i. Article I and Amendment X

ii. The Scope of Congressional Authority

- **Basic Principles:**
 - ◆ Federal gov't may act only when there is express or implied authority in the Constitution
 - ◇ Limited to enumerated powers in the Constitution
 - ◆ State gov't may act *unless* the Constitution (or federal law) prohibits the action
 - ◇ Have plenary power (w/specific expectations)
- **McCulloch v. Maryland**
 - ◆ Seminal case on:
 - ◇ Scope of federal legislative power
 - ◇ Relationship btwn federal and state sovereigns
 - ◆ Affirms "enumerated power" view of Congressional Power
 - ◆ **Necessary and Proper Clause** - appropriate means to legitimate end
 - ◆ Federal gov't empowered by the people, not a compact among sovereign states
 - ◇ Not dependent on delegation by states for its authority
 - ◆ **Supremacy Clause** - state sovereignty yields to federal authority (limited reading of 10th Amendment)
 - ◆ **Originalist and Non-Originalist interpretation**
 - ◇ Even originalist concludes that framers did not intend to limit federal gov't to specifics, but to empower Congress to deal w/unforeseen problems over time

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

- To regulate Commerce...among the several States;

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- **Initial Era**
- **1890s to 1937: Limited Federal Commerce Power**
- **1937 to 1990s: Broad Federal Commerce Power**
 - ◆ Wide Use by Congress
 - ◆ Broad Interpretation by Court
 - ◆ ***Expansive View of Commerce Power after Jones & Laughlin & Filburn***
 - ◇ Rejected distinction btwn "commerce" and other stages of business such as production, manufacturing, mining
 - ◆ Congress can regulate all phases of business
 - ◇ Rejected distinction btwn direct and indirect effects on interstate commerce
 - ◆ Congress can regulate intrastate activity if it has substantial effect on interstate commerce
 - ◇ In determining whether "substantial effect", can consider not just this particular actor, but also the cumulative effect across the country of the regulated activity ("aggregation")
 - ◇ Congress can regulate issues affecting well-being, safety and morals if it is legitimately using commerce power as vehicle, even if that overlaps w/a state's legislative power
 - ◇ 10th amendment is a "truism" -- as long as regulation is w/in the commerce power of Congress
 - ◆ Does not create an additional or independent basis for challenging constitutionality
- **1990s to Present: Narrowing of the Commerce Power**
 - ◆ Wide Use by Congress
 - ◆ Narrowing Interpretation by Court
 - ◆ **Lopez**
 - ◇ Gun-Free School Zones
 - ◆ **Morrison**
 - ◇ Violence Against Women Act
 - ◆ **Raich**
 - ◇ Compassionate Use Act - CA law
 - ◇ Controlled Substances Act - federal law
 - ◆ **Butler**
 - ◇ Agricultural Adjustment Act
 - ◆ ***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

iv. **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

- ... to pay 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

v. 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

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i. The Bill of Rights

- Language of Amendments 1-8

ii. Rejection of Application before the Civil War

- Barron v. Baltimore
 - ◆ 5th Amendment only limits Federal Gov't, not states

iii. The Privileges or Immunities Clause and the Slaughter-House Cases

- Slaughter-House Cases
 - ◆ Narrow interpretations of 13th and 14th Amendment
 - ◇ Privileges & Immunities
 - ◇ Due Process
 - ◇ Equal Protection
 - ◆ Maintained relatively intact the Pre-Civil War Federalism and Barron's view of individual rights in relation to the states as matters of state law, not federal law, except:
 - ◇ Slavery abolished
 - ◇ States prohibited from discriminating w/gross injustice and hardship against freed Blacks

iv. "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
 - ◆ **Examples:**
 - ◇ Marsh v. Alabama - Company Town & Free Speech/Religion
 - ◇ State K-ing w/a private company to operate prisons
 - ◆ **Non-Examples:**
 - ◇ Jackson v. Metropolitan Edison - Highly regulated utility company & Due Process before service terminated
 - ◇ Lloyd v. Tanner - Shopping Mall & Free Speech
- "Entanglement"
 - ◆ Private conduct must comply w/the Constitution if the gov't has authorized, encouraged or facilitated the unconstitutional conduct
 - ◆ **Examples:**
 - ◇ Shelley v. Kraemer - judicial enforcement of private racially restrictive covenants
 - ◇ Burton v. Wilmington Parking Authority - racial discrimination by private

- ✓ Burton v. Wilmington Parking Authority - racial discrimination by private restaurant in gov't parking garage

- ◆ **Non-Examples:**

- ◇ Moose Lodge v. Irvis - private association w/state liquor license & race discrimination
- ◇ Rendell-Baker v. Kohn - private school for special needs students, funding over 90% from state & regulated by state

- ii. **Congressional Authority Under Section 5 of the 14th Amendment**

- The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
- **Reaching Private Conduct**
 - ◆ **1964 Civil Rights Act**
 - ◇ Public Accommodations - Heart of Atlanta
 - ◇ Employment - Title VII
 - ▶ (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include
 - ◇ Title VI:
 - ▶ No person in the US shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance
- ◆ **Title IX - Education Amendments of 1972**
 - ◇ No person in the US shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

- c. **Due Process and the Protection of Fundamental Rights**

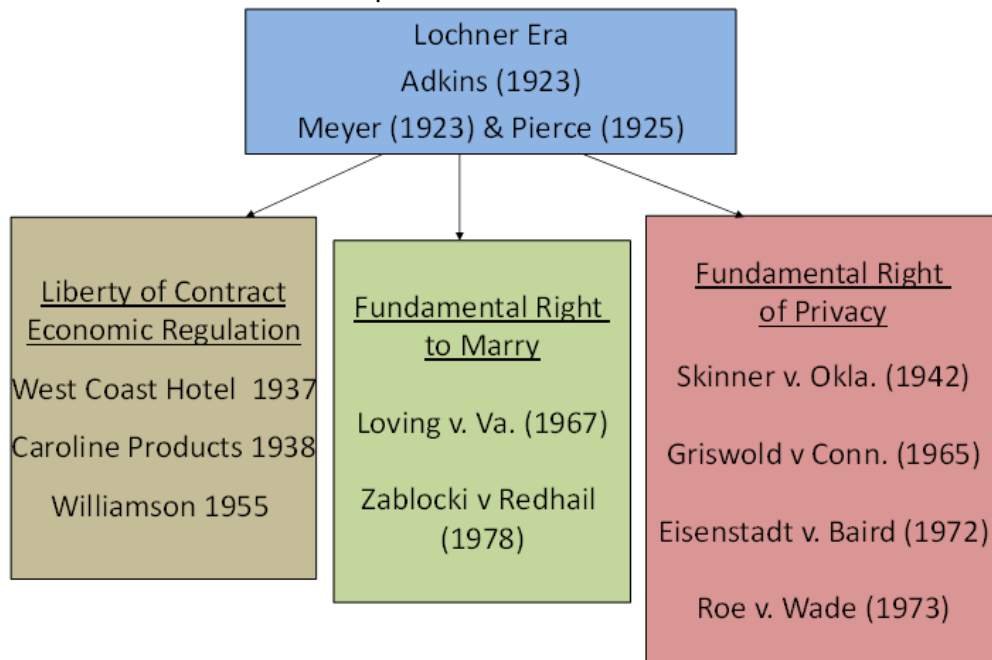
- i. **Due Process Protection for Economic Liberties**

- **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
- **Early History of Economic Substantive Due Process**
 - ◆ Protection of economic rights (e.g., "liberty of K") against gov't regulation and interference w/*laissez-faire* capitalism (1880s - mid-1930s)
- **The Rise of Lochnerism**
- **The Fall of Lochnerism & the Protection of Economic Rights Since 1937**
 - ◆ Individual liberties and protection of "fundamental rights" (e.g., marriage, privacy,

individual liberties and protection of fundamental rights (e.g., marriage, privacy, abortion) against gov't regulation and interference w/personal and family autonomy (1920s to present)

◆ **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?***

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	<p style="text-align: center;">Strict Scrutiny Standard</p> <p style="text-align: center;">Compelling? Necessary?</p>	
		<p style="text-align: center;">Rational Basis Standard</p> <p style="text-align: center;">Legitimate? Reasonable?</p>	

□ **Family Autonomy: Parents' Control of the Upbringing of Their Children**

◆ Meyer v. Nebraska

- ◇ Prohibition of teaching modern foreign languages to grade school children
- ◇ "W/out doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to K, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

□ **Marriage**

◆ Loving v. VA

- ◇ Black woman & white man married in DC, not allowed in VA
- ◇ "the freedom to marry, or not marry, a person of another race resides w/the individual, and cannot be infringed by the State"

◆ Zablocki v. Redhail

- ◇ Denied marriage license b/c owed child support
- ◇ Marriage = fundamental right (part of privacy)

□ **Procreation**

◆ Skinner v. OK

- ◇ Criminal Sterilization Act
 - ▶ "Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may be subtle, far reaching and devastating effects."

□ **Right of Privacy:**

Right of Privacy

◆ **Contraceptives**

◇ Griswold v. CT

- ▶ CT law criminalizing provision of counselling, and other medical treatment, to married persons for purposes of preventing conception
- ▶ "We deal w/a right of privacy older than the Bill of Rights-older than our political parties, older than our school system.
- ▶ Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.
- ▶ It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.
- ▶ Yet it is an association for as noble a purpose as any involved in our prior decisions."

◇ Eisenstadt v. Baird

- ▶ MA law against providing contraceptives to unmarried men or women
- ▶ "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

◆ **Abortion**

◇ Roe v. Wade:

- ▶ DP fundamental right of women
- ▶ Trimester approach

◇ Planned Parenthood v. Casey:

- ▶ Roe "central holding" affirmed
- ▶ Viability replaces trimester approach
- ▶ Post-Viability --> state cannot prohibit, but can regulate for health of mother, informed decision, respect of life of unborn
- ▶ **Undue Burden** test replaces/modifies 4 step analysis?
 - For how many justices?
- ▶ Most of PA law upheld as constitutional

◇ Whole Woman's Health v. Cole

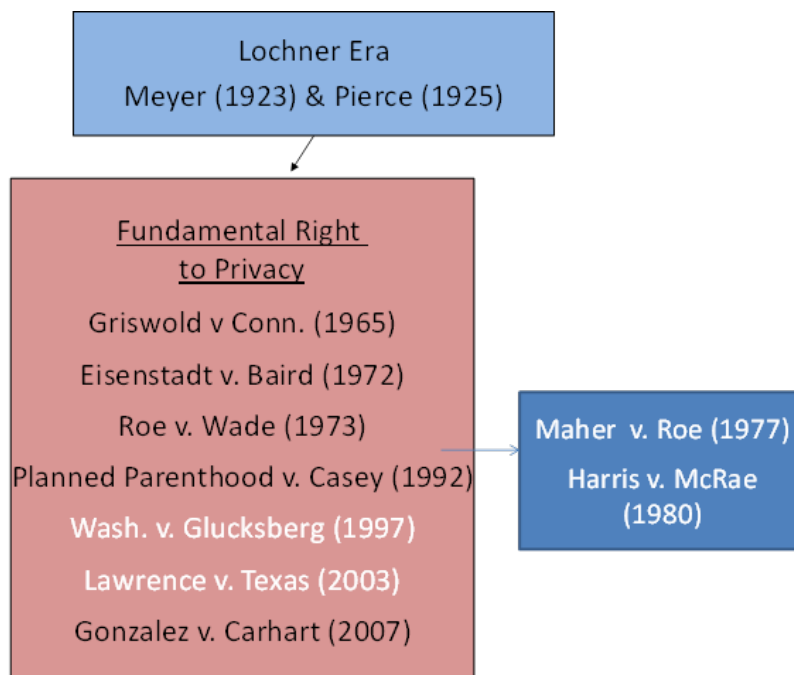
◆ **Gov't Regulation of Abortion**

◇ Gonzales v. Carhart - Kennedy Opinion

- ▶ Before viability, gov't may not **prohibit** any woman from making the ultimate decision to terminate her pregnancy
 - (Implicit: fundamental right of privacy protects)
- ▶ In regulating abortion, gov't may not impose upon this right an "undue burden
- ▶ "Undue burden" exists if a regulation's purpose or effect is to place a substantial obstacle in the path of woman seeking an abortion before viability
- ▶ Not "undue burden" for state to express "profound respect for life of the unborn", to prohibit certain methods of abortion if safe alternatives exist, and to regulate availability to assure fully informed decision (and to discourage decision)
- ▶ If no "undue burden", rational basis standard of review

- ▶ If "undue burden", presumably strict scrutiny
- ◆ **Gov't Restrictions on Funds and Facilities for Abortions**
 - ◇ Maier v. Roe
 - ▶ Limited state Medicaid benefits for first-trimester abortions to those that were "medically necessary"
 - ◇ Harris v. McRae
 - ▶ "Hyde Amendment" - limits use of federal funds to reimburse cost of abortions under Medicaid
 - ◇ Interpretation of the "liberty" right recognized in Roe:
 - ▶ Constitutional right to abortion / right to contraceptives
 - "positive right" - affirmative obligation of gov't
 - OR
 - ▶ Constitutional right to privacy
 - "negative right" - freedom from gov't action
- ◆ **Physician Assisted Suicide**
 - ◇ Washington v. Glucksberg - Rehnquist
 - ▶ [W]e "ha[ve] always been reluctant to expand the concept of substantive due process b/c guideposts for responsible decision-making in this unchartered area are scarce and open-ended."
 - ▶ By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.
 - ▶ We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.
 - ▶ Our established method of substantive-due-process analysis has two primary features:
 - First, we have regularly observed that the liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."
 - Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.
 - ▶ Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision-making," that direct and restrain our exposition of the Due Process Clause.
- ◆ **Sexual Orientation**
 - ◇ Bowers v. Hardwick
 - ▶ *Majority*: No fundamental right to engage in consensual homosexual sodomy
 - Not supported by the Constitution's text, framer's intent or tradition
 - Rational Basis satisfied
 - ◆ Belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable constitutes rational basis for criminalizing conduct
 - ▶ *Dissent*: Fundamental right defined more broadly - right to make

- ◊ Present: Fundamental right defined more broadly - right to make decisions, free from gov't intrusion, regarding intimacies of their relationships (citing Loving, Griswold, Eisenstadt, and Roe)
 - Strict scrutiny should be applied and state's morals justification is not sufficient
- ◇ Lawrence v. Texas
 - ▶ TX statute forbidding two persons of the same sex to engage in certain intimate sexual conduct



d. Equal Protection

i. Racial Classifications

- **Dred Scott & the Post-Civil War Amendments**
 - ◆ **Scott v. Sanford**
 - ◇ Scott not a citizen - no jurisdiction
 - ◇ Found Missouri Compromise unconstitutional
 - ◇ Upheld Fugitive Slave Clause
 - ◇ Not given 5th Amendment Due Process (EP)
- **Laws Requiring Separation of the Races**
 - ◆ **Plessy v. Ferguson**
 - ◇ "separate but equal"
- **"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

What is Classification?	Level of Scrutiny?	Gov't Purpose Sufficient Justification?	Means (Classification) Sufficiently Related to Purpose?
<p><u>Explicit</u></p> <p><u>Neutral on Face Discrim. Impact</u></p> <p>[If Impact & Purpose, same as explicit]</p>	<p>Suspect Classification</p> <p>Fundamental Right</p> <p>Not Suspect Class. / No Fund. Right;</p>	<p>Compelling</p>	<p>Strict Scrutiny</p> <p>Necessary</p>
		<p>Legitimate</p>	<p>Rational Basis</p> <p>Rationally Related</p>

- **Race Classifications that Disadvantage Racial Minorities**
 - ◆ **Strict Scrutiny**
 - ◆ **Korematsu only S. Ct. Precedent Upholding**
- **Attack on "Separate But Equal"**
 - ◆ **Plessy overruled by Brown**
 - ◇ Separate inherently unequal, treat as race classification/strict scrutiny (implicit)
- **Neutral Laws w/a Discriminatory Impact**

□ **Racial Laws w/ a Discriminatory Impact**

- ◆ **Washington v. Davis**
 - ◇ Laws or other official acts that had racially disproportionate impacts did not automatically become constitutional violations
 - ◇ DC Police Dept. recruiting procedures
- ◆ **Personnel Administrator v. Feeney**
 - ◇ Hiring preference for honorably discharges veterans applying for state civil service positions
 - ◇ "legitimate and worthy purposes"
- ◆ **Village of Arlington Heights v. MHDC**
 - ◇ Failed to show discriminatory intent or purpose

ii. **Gender Classifications**

□ **Level of Scrutiny**

- ◆ **Reed**
 - ◇ "males must be preferred to females" in appointing administrators of estates
 - ◇ Dissimilar treatment of men and women is unconstitutional
 - ◇ "the choice in this context may not lawfully be mandated solely on the basis of sex."
- ◆ **Frontiero - Brennan's Plurality: Justifications for Heightened Scrutiny**
 - ◇ History of sex discrimination
 - ▶ Romantic paternalism: put on a pedestal/in a cage
 - ▶ Stereotyped distinctions btwn sexes
 - ▶ Women's rights analogous to Blacks prior to 13th & 14th Amendments
 - Not get right to vote until 50 years after Blacks
 - ◇ Immutable characteristic
 - ◇ No relationship btwn gender and ability to perform or contribute
 - ◇ Classifications relegate entire class to inferior status w/out regard to individual capabilities
 - ◇ Gender classifications, like ones of race, are inherently suspect
- ◆ **Craig v. Boren**
 - ◇ OK law w/difference in drinking age for males and females
 - ◇ Statistics insufficient to show a substantial relationship btwn the law and the maintenance of traffic safety
- ◆ **US v. Virginia**
 - ◇ Exclusively male public undergraduate higher learning institution
 - ◇ Unconstitutional b/c failed to show "exceedingly persuasive justification"

□ **When is it a Gender Classification?**

- ◆ **Geduldig**
 - ◇ CA Disability Fund - denied benefits to women whose disabilities resulted from pregnancy
 - ◇ Distinction btwn pregnant women and non-pregnant women + men, not gender classification
- ◆ **Feeney**
 - ◇ Distinction btwn veterans and non-veterans, not on the basis of sex

□ **Gender Classifications Benefiting Women**

- ◆ **Based on Role Stereotypes**

- ◊ Orr
 - ▶ Requires only husbands to pay alimony, but not wives
 - ▶ Gender not an "accurate proxy" for financial need
 - ◊ Hogan
 - ▶ Mississippi University for Women School of Nursing - oldest state-supported all-female college in US
 - ▶ Women have not lacked opportunities to enter nursing
 - "tends to perpetuate the stereotyped view of nursing as exclusively women's job"
 - ◆ **Men and Women are not "Similarly Situated" (e.g., biological differences)**
 - ◊ Michael M.
 - ▶ "statutory rape" law made men alone criminally liable
 - ▶ Young men and women not similarly situated wrt problems and risks of sexual intercourse
 - Strong interest in preventing "illegitimate pregnancy"
 - ◊ Rostker
 - ▶ Draft constitutionality - only men register
 - ▶ Women not allowed to fulfill combat roles
 - ◆ **Remedying Past Discrimination**
 - ◊ Califano
 - ▶ Difference btwn method for calculating old-age insurance benefits for men and women
 - ▶ Historical wage gap btwn men and women - attempt to remedy this discrimination
 - ◊ Cf. Racial Classifications Remedying Discrimination

iii. Other Types of Discrimination

- Age, Disability, Wealth
 - ◆ Rational Basis Test
 - ◆ **Age**
 - ◊ Murgia
 - ▶ MA law requiring state police officers to retire at age 50
 - ▶ Sufficiently justified as a means of protecting the public "by assuring physical preparedness of uniformed police"
 - ◆ **Wealth**
 - ◊ Maher v. Roe
 - ▶ Limits state Medicaid benefits for 1st-trimester abortions to those "medically necessary"
 - ▶ Financial need alone did not identify a suspect class

iv. Classifications Based on Sexual Orientation

- Lawrence v. Texas
 - ◆ TX statute forbidding two persons of the same sex to engage in certain intimate sexual conduct
 - ◆ O'Connor concurring - "bare desire to harm a politically unpopular group" - not legitimate state interests

v. **"Capstone" cases**

- **US v. Windsor (DOMA) & Obergefell v. Hodges (state laws against granting & recognizing same-sex marriage)**
 - ◆ *Due Process - Fundamental Rights*
 - ◆ *Equal Protection*
 - ◆ *Methods of Constitutional Interpretation*
 - ◆ *Judicial Power*
 - ◇ [Standing]
 - ◆ *Congressional Power & Federalism*
 - ◆ *[Presidential Power - faithfully execute/defend the law]*

vi. **Supreme Court Doctrine on Levels of Scrutiny**

- **Strict Scrutiny**
 - ◆ Race, National Origin [Alienage]
 - ◆ Fundamental Right Infringed
- **Intermediate Scrutiny**
 - ◆ Gender, Illegitimacy
- **Rational Basis**
 - ◆ Age, Disability, Wealth
 - ◆ All others

Sexual Orientation??

Gun Control Statutes??

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> , O'Connor - <u>Lawrence</u>
	Complete deference	<u>Williamson v. Lee Optical Co.</u>