

B L A C K L E T T E R O U T L I N E S

Constitutional Law

by Jerome A. Barron

Harold H. Greene Professor of Law
George Washington University Law School

C. Thomas Dienes

Lyle T. Alverson Professor of Law
George Washington University Law School

E I G H T H E D I T I O N

WEST[®]

A Thomson Reuters business

Mat #40707833

Thomson Reuters created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters does not render legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Black Letter Series and Black Letter Series design appearing on the front cover are trademarks registered in the U.S. Patent and Trademark Office.

COPYRIGHT © 1991, 1995 WEST PUBLISHING CO.

© West, a Thomson business, 1999, 2003, 2005

© 2010 Thomson Reuters

610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-19031-4

Capsule Summary of Constitutional Law

■ PART ONE: THE ALLOCATION OF GOVERNMENTAL POWER: NATIONAL AND STATE

I. JUDICIAL REVIEW

Jurisdiction is the power to hear a case. In addition to jurisdictional rules, there are prudential principles limiting the occasions when a federal court will decide a case on the merits. If jurisdiction is present and these prudential limits are overcome, courts can exercise the power of judicial review.

A. Establishing Judicial Review

1. Judicial Review Defined

Judicial review is the doctrine that the courts have the power to invalidate governmental action which is repugnant to the Constitution.

2. Review of Federal Action

While there is no explicit textual authority for federal court review of the acts of the President and the Congress, this power has been inferred from a number of sources, including the Art. III grant of judicial power to the Supreme Court and inferior federal courts and the principle that it is the judicial power to say what the law, *i.e.*, the Constitution, is.

3. Review of State Action

- a. The Supremacy Clause of Art. VI establishes federal judicial power over the acts of state officials.
- b. Art. VI requires state courts to make decisions in conformity with the U.S. Constitution. These “cases arising under the Constitution” are reviewable by the Supreme Court under Art. III.

B. Source of Judicial Power: Article III Jurisdiction

The “judicial power” is vested by Art. III in the Supreme Court and inferior federal courts created by Congress.

1. Federal “Judicial Power” Defined

- a. Unless a case falls within one of the “cases or controversies” identified in Art. III, § 2, an Art. III federal court (as distinguished from an Art. I court) must dismiss the case for want of subject matter jurisdiction.
- b. Congress exercises broad powers over the existence and jurisdiction of lower national courts, within the limits provided by Art. III.

2. Supreme Court Jurisdiction

a. Original Jurisdiction

Supreme Court original jurisdiction is defined by Art. III. It cannot be enlarged or diminished by Congress.

b. Appellate Jurisdiction—Congressional Power

The Supreme Court’s appellate jurisdiction is vested by Art. III subject to congressional exceptions. This congressional power may

be subject to limitations arising from separation of powers principles and constitutional rights and liberties.

c. Discretionary Review

Supreme Court review of lower court decisions is almost entirely a matter of discretion.

C. Constitutional and Policy Limitations on Judicial Review

Even where an issue concerns the subject matter set forth in Art. III, it may not *necessarily* be heard on the merits. For example, Art. III requires that a “case or controversy” must be present for an Art. III court to have jurisdiction. Further, there are prudential limitations borne of judicial self-restraint limiting the use of judicial review. The jurisdictional requirements and policy restraints are frequently referred to as justiciability.

1. Constitutional Limitations

a. Eleventh Amendment

The Eleventh Amendment, as interpreted, provides that the judicial power does not extend to suits against a state or its agencies by citizens of another state or of a foreign country or by its own citizens. However, there are exceptions:

- (1) local governmental units are not covered;
- (2) states may waive sovereign immunity if clearly done;
- (3) acting under the Fourteenth Amendment, § 5, Congress can grant remedies against state action that violates the Fourteenth Amendment, § 1, if it makes its intent to abrogate state immunity unmistakably clear. The Court has become increasingly restrictive in its interpretation of Congress’ enforcement powers under the Fourteenth Amendment, § 5. Congress may not abrogate Eleventh Amendment immunity using its Commerce Powers;
- (4) unconstitutional acts of state officials are not state acts and may be enjoined by federal courts. But, if a suit involves a

retroactive monetary charge against the state or violation of state law, the Eleventh Amendment is a bar. Prospective relief and ancillary relief are permitted.

b. **Case or Controversy**

A case must be in an adversary form and a context that is capable of judicial resolution and its resolution must not violate separation of powers principles, or an Art. III federal court lacks jurisdiction. Art. III federal courts cannot furnish advisory opinions.

2. Policy Limitations (Judicial Self–Restraint)

- a. Rules for Constitutional Review. The *Ashwander* rules are used to avoid unnecessary constitutional decisions.
- b. Presumption of Constitutionality.
- c. Judicial Restraint to Avoid Unnecessary Use of Judicial Review. The Court follows a policy of “strict necessity” before deciding constitutional questions.
- d. Congressional legislation can override prudential (ie., non-jurisdictional) limitations.

D. Specific Doctrines Limiting Judicial Review

There are specific doctrines, based on the case or controversy requirement and judicial self-restraint, through which Art. III federal courts determine *who* may litigate a constitutional question, *when* the constitutional question may be litigated, and *what* constitutional questions may be litigated.

1. The Standing Limitation—Who Can Litigate?

a. **Constitutional Standing**

- (1) Art. III requires that a plaintiff seeking to litigate a federal constitutional question demonstrate a personal stake in the outcome by establishing (1) injury in fact; (2) fairly traceable to the defendant’s act being challenged; and, (3) redressable by the

requested remedy. This assures the requisite adversity and reflects separation of powers concerns.

- (a) *"Injury in Fact."* Any significant factual injury, economic, aesthetic, etc., will suffice. The injury must be "concrete and particularized and actual or imminent, not conjectural or hypothetical."
- (b) *"Fairly Traceable."* Plaintiffs must establish causation by showing that the injury is "fairly traceable" to the defendant's action being challenged.
- (c) *Redressability.* They must also demonstrate a "substantial likelihood" that the injury is "redressable" if the court grants the requested relief. The focus is on the relation of the injury and the remedy.

(2) Taxpayer and Citizen Standing

- (a) *Federal Taxpayers.* A federal taxpayer must allege (1) that the enactment being challenged is an exercise of the taxing and spending power, and (2) that the challenged enactment offends a specific limitation on the taxing and spending power.
- (b) *State and Municipal Taxpayers.* State taxpayers have no standing under Art. III to challenge state tax or spending decisions simply by virtue as their standing as taxpayers. But a municipal taxpayer does have standing to challenge municipal spending because the injury is more direct.
- (c) *Citizen Standing.* At least in the absence of congressional legislation authorizing the suit, under Art. III standing a citizen lacks a sufficient personal interest to raise the constitutional claim.
- (d) *State Standing.* A State does not have standing to sue the federal government as *parens patriae* on behalf of its citizens. A State may sue the federal government on its own behalf to protect its own interests.

(3) Statutory Standing

Congress can, by statute, create legal interests, the denial of which constitute injury in fact. However, Congress cannot ignore the Art. III standing requirements of injury in fact, and causation, *i.e.*, fairly traceable and redressability. Congress can remove prudential obstacles to standing.

b. Prudential Standing

(1) *Third Party Standing*. A litigant usually lacks standing to raise the rights of others, but there are exceptions.

(a) The *jus tertii* rule is a rule of judicial self-restraint which can be overcome when the balance of interests warrants hearing the claim.

(2) *Associational Standing*. An association can raise the rights of its members if the members have Art. III standing to sue in their own right, the suit is germane to the organization's interests and there is no need for individual participation.

2. The Timing Limitation—*When Can Constitutional Litigation Be Brought*

a. Mootness

Art. III requires dismissal of a case when, because of changes, the court's determination of the legal issue cannot have any practical effect in achieving the desired result. But there are exceptions to the doctrine:

- (1) voluntary cessation of the allegedly illegal conduct;
- (2) unsettled collateral consequences;
- (3) there is a reasonable likelihood that the constitutional issue is "capable of repetition, yet evading review."

b. Ripeness, Prematurity and Abstractness

(1) The Art. III requirement of ripeness requires that there be *present injury* or an *imminent threat* of injury. In determining if a case is ripe, consider the effect of delay on plaintiffs, the effect

of judicial intervention on administrative actors, and whether courts would benefit from the delay.

- (2) Even if jurisdiction is technically present, judicial self-restraint may dictate dismissal of issues as premature and abstract.

c. Discretionary Abstention

(1) Vagueness

If a state statute is capable of a narrow saving construction, federal courts should exercise restraint and abstain from decisions on constitutional issues.

(2) Pending State Proceedings

Absent a showing of bad faith harassment, a federal court should abstain in a suit seeking declaratory or injunctive relief if state criminal or analogous civil proceedings are pending.

3. The Subject Matter Limitation—*What Can Be Litigated*

a. The Political Question Doctrine

Political questions, which are non-justiciable, have their origin in classic, functional, and prudential considerations.

- (1) Constitutional commitment to another branch;
- (2) lack of judicial resources and capabilities for deciding the case;
- (3) prudential or policy considerations relating to the proper use of judicial power.

b. Adequate and Independent State Grounds

Where adequate and independent substantive or procedural state grounds for a lower court decision clearly exist, the Supreme Court will decline to exercise jurisdiction.

II. NATIONAL LEGISLATIVE POWERS

Congress has only such powers as are granted by the Constitution. Under the Tenth Amendment, powers not granted to the national government are retained

by the states and the people. The crucial inquiry is whether there is a constitutional source of power for congressional legislation.

A. The Scope of the National Legislative Power

1. Express Powers

Art. I, § 8, expressly grants specific powers to Congress.

2. Implied Powers

Under the Necessary and Proper Clause of Art. I, § 8, Congress can enact laws which are reasonably designed to achieve its delegated powers.

3. Inherent Powers

Congress has no inherent domestic legislative powers. This does not preclude the existence of inherent foreign affairs powers.

4. Delegation of Powers

Congress can delegate legislative authority so long as it prescribes some standards to guide use of the granted powers.

5. The Tenth Amendment

Powers that were previously exercised by the states which are not delegated are reserved to the states or to the people. There has been persistent controversy over whether the Tenth Amendment is a substantive limitation on Congress' ability to legislate as to private parties and the states.

6. The Supremacy Clause

Art. IV, cl. 2 establishes that national laws that are constitutional override contrary state laws.

B. Commerce Power

1. Definition

Congress has power to regulate "commerce among the states" which has come to mean interstate commerce. However, the commerce power provides the basis for congressional regulation even of local intrastate activities.

2. Achieving Social Welfare Objectives—A National Police Power

Congress' power to regulate the channels and instrumentalities of interstate commerce and persons and things in interstate commerce is plenary, permitting it to prescribe rules for the protection of commerce. Courts will not probe Congress' purpose in regulating interstate commerce.

- a. While there is no national police power, Congress can achieve social welfare objectives through regulating interstate commerce. If Congress exercises its delegated powers, it may regulate matters traditionally regulated by the states.
- b. *Tenth Amendment*. When Congress regulates *private* action, the Tenth Amendment is not a significant limitation on Congress' regulatory power.

3. Stream of Commerce

Local activities can be regulated if they are part of the "stream" of interstate commerce.

4. Instrumentalities of Commerce

Congress' plenary power to regulate and protect interstate commerce extends even to local activities that threaten the instrumentalities of interstate commerce and persons and things in interstate commerce.

5. The Affection Doctrine

a. Substantial Effects

- (1) Under the Necessary and Proper Clause, Congress can regulate local activities if it can rationally conclude that such activity has a substantial effect on interstate commerce. The courts generally defer to the congressional judgment.
- (2) In assessing the effect, Congress may consider the *cumulative or aggregate impact* of all regulated activities.
- (3) "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it

concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Gonzalez v. Raich* (2005).

b. New Restrictions

There are limits. Consider if the matter regulated is commercial, if there is a jurisdictional nexus to interstate commerce, if there is congressional fact finding, and if the causal relation between the regulated act is remote or attenuated, including whether the regulation intrudes on areas of traditional state concern.

C. The Taxing Power

Congress has the fiscal power of raising monies through taxes. However, this is not a regulatory power and "penalties" may not be imposed in the guise of taxes.

1. Courts today tend to accept any tax as a fiscal measure if, on its face, it is a revenue producing measure.
2. Disclosure requirements will not make a tax into a penalty but such provisions raise problems of self-incrimination.

D. The Spending Power

Congress can spend, but cannot regulate, for the general welfare.

1. General Welfare

The Spending Clause of Art. I, § 8, cl. 1, is an independent fiscal power to spend for general welfare objectives. It is not limited to the regulatory powers of Art. I, § 8. Congress determines the scope of the general welfare.

2. Reasonable Conditions

Congress may impose any reasonable conditions for participation in federal spending programs even if this induces states to conform to

federal standards. The courts defer to Congress' judgment of reasonableness. Such conditions must be explicitly stated so that states can make informed choices.

3. Constitutional Limitations

The Tenth Amendment is not likely to be a barrier to congressional spending so long as the states remain free to reject the federal grant and its conditions.

4. Spending as a Contract: Explicit Conditions

Conditions on federal grants must be clear and unambiguous to be enforced.

E. Intergovernmental Immunities

The national government has greater immunity from state regulation and taxation and greater power to tax and regulate state functions (Art. VI Supremacy Clause).

1. State Taxation and Regulation

States cannot directly tax or regulate the federal government or federal instrumentalities. They cannot discriminate against the federal government or those who deal with the federal government.

2. Federal Taxation and Regulation

a. Federal Taxation of States

Non-discriminatory federal taxes, which reasonably reflect the benefits provided the state, are constitutional.

b. Federal Regulation of States

- (1) *State Sovereignty Limitation*. Principles of state sovereignty, reflected in the Tenth Amendment, limit Congress' Commerce Clause power to regulate state activities.

- (2) In *National League of Cities*, subsequently overruled, the national interest in including the states under the regulation was balanced against the intrusion on state sovereignty. Three conditions were used in determining if state sovereignty was violated:
 - (a) “States as states” (Direct regulation of state or its agencies);
 - (b) “Traditional state functions”;
 - (c) Impairment of state ability “to structure integral operations in areas of traditional functions”.
- (3) Today, if Congress enacts a law generally applicable to private parties and the states, there is only a minimal state sovereignty limitation. The Tenth Amendment and principles of state sovereignty, embodied in our constitutional structure, impose only minimal limits on congressional power, assuming that the national political process is functioning.
 - (a) Federal courts should not determine what are “traditional” or “integral” functions of state government.
 - (b) It is the structure of the federal government itself that protects federalism.
- (4) But if congressional regulations impose special burdens on states, state sovereignty and the Tenth Amendment impose limitations. Congress cannot constitutionally command states to regulate or to enforce a federal regulatory program, since this would undermine political accountability and dual sovereignty. In such cases, there is no judicial balancing of national and state interests. But Congress can require states to regulate or face preemption by a federal program.

III. STATE POWER IN AMERICAN FEDERALISM

States have inherent police power to legislate for the public health, morals, and well-being of its citizens. But this power is limited by the constitutional division of powers. The people of the entire nation, through the Tenth Amendment, reserved to the states only such powers as they had prior to ratification.

A. State Power to Regulate Commerce

1. Establishing the Foundations

Where a subject requires national regulation or where the particular state regulation would excessively burden interstate commerce, the state may not regulate absent congressional authorization.

a. The Nature of the Power

The commerce power is, at least partially, a concurrent power.

b. The Nature of the Subject—*Cooley* Doctrine

When subjects of commerce regulation are national in nature, *i.e.*, require a uniform system or plan of regulation, they are not amenable to state regulation. *Cooley v. Board of Wardens* (1851).

2. The Modern Focus: The Dormant Commerce Clause

The Dormant Commerce Clause, as interpreted by the courts, limits state power to enact regulations affecting interstate commerce. States may not discriminate against interstate commerce absent substantial justification. Nor may states place unreasonable burdens on interstate commerce.

a. Rationale

- (1) Common Market Philosophy. No trade barriers.
- (2) Lack of political protection for out-of-state interests.

b. Discrimination

If a state regulation is labeled “discriminatory” against interstate commerce, it is likely to be held unconstitutional. Economic protectionism violates the Dormant Commerce Clause. But laws which benefit public entities over private entities, yet which treat all private companies the same, do not discriminate against interstate commerce.

(1) Intentional Discrimination

A state law which purposefully discriminates against interstate commerce, *e.g.*, by hoarding scarce resources against import or export to other states, is virtually *per se* invalid.

(2) Discriminatory Means and Effects

Even if a state law serves a legitimate police power objective, the law must regulate evenhandedly. Differential treatment favoring in-state against out-of-state interests constitutes discrimination. A local regulation may be discriminatory even if it curtails commerce by other state subdivisions as well as out-of-state interests. A law using discriminatory means or having a discriminatory impact must serve a legitimate local purpose that cannot be served as well by nondiscriminatory means. Watch for the following:

- (a) Extraterritorial operation of state laws;
- (b) Facial or factual imposition of unequal burdens or benefits;
- (c) But differential impact or effects may be due to market structure rather than discriminatory laws.

c. Undue Burdens—Ad Hoc Balancing

In determining if a nondiscriminatory state regulation of interstate commerce is valid, the courts balance the local interests in maintaining the law against the burden on interstate commerce. Some members of the Court reject undue burdens balancing, limiting the Dormant Commerce Clause to a ban on discrimination.

- (1) Important state interests in trade, conservation, and environment weigh heavily in the balance but cannot be achieved by means which excessively impede the free flow of interstate commerce.
- (2) State highway laws enjoy a heavy presumption of validity but, even here, states cannot unreasonably burden our national Common Market system.

d. State as Market Participant

When the state acts, not as a regulator, but as a participant in the marketplace, the Dormant Commerce Clause doctrine doesn't apply. Even state discrimination in favor of its own citizens is

permissible. Subsidies may involve such nonregulatory market participation. The more state actions affect parties not in privity with the state, the more likely the state will be held to be a regulator.

3. Protecting Personal Mobility

a. Commerce Clause

The Commerce Clause protects the free movement of persons from state to state.

b. Interstate Privileges and Immunities

Art. IV, § 2, prohibits unreasonable discrimination against out-of-state citizens in regard to fundamental interests basic to the livelihood of the Nation. There must be a substantial reason for the discrimination and the discrimination must bear a close relation to that reason. To justify discrimination in rights fundamental to national unity, it must be shown that out of state citizens are a peculiar source of the evil. Further, there must not be any less burdensome alternatives. The clause provides an alternative to the Dormant Commerce Clause for attacking state discrimination against out-of-state citizens and may be used when the State is acting as a market participant.

4. When Congress Speaks

a. Preemption

- (1) If a state law conflicts with a valid federal law so that it is impossible to comply with both or if it impedes achievement of the federal legislative objective, the state law is invalid under the Art. VI Supremacy Clause.
- (2) Congress may expressly preempt state law.
- (3) If there is no conflict or express preemption, the courts must still determine if Congress intended to occupy the field and exclude the state regulation. Courts consider: (a) need for uniformity; (b) legislative history; (c) the pervasiveness of the federal regulation; (d) historic roles of national and local

interest in regulating in the area (presumption of no preemption in areas of traditional state authority); (e) potential for future conflict; (f) availability of a federal agency to maintain continued control.

b. Legitimizing State Burdens on Commerce

In exercising its plenary powers, Congress may authorize the state to regulate even where the state law would otherwise violate the negative implications of the Dormant Commerce Clause. But Congress must expressly and unambiguously manifest such an intent.

5. The Compact Clause

Art. I, § 10, cl. 3, requires congressional consent to any agreement between states if it increases the political power of the states so as to potentially interfere with federal supremacy.

B. State Power to Tax Commerce

1. General Principles

- a. Interstate commerce can be forced to pay taxes which reasonably reflect the benefits derived from the taxing state.
- b. States *may not discriminate* against interstate commerce.
- c. *Due process* requires that the taxpayer have some minimal contacts with the taxing state.
- d. The *Commerce Clause* requires that a state tax be apportioned to reflect the extent of the taxable status the taxpayer has in the taxing situs to avoid *multiple burdens*.

2. Modern Applications

Identify the local incidents being taxed and inquire into the actual economic effect of the tax. The tax is valid if:

- (1) the activity taxed is sufficiently connected to the taxing state;

- (2) the tax is fairly apportioned;
- (3) the tax does not discriminate against interstate commerce;
- (4) the tax fairly reflects the benefits received.

IV. CONGRESS AND EXECUTIVE POWER

When executive and congressional powers conflict, formalist and functional approaches are used. In determining if separation of powers has been violated, consider whether one Branch is invading the constitutional prerogatives of another Branch or is usurping powers properly shared.

A. The Domestic Arena

1. Executive Law-Making

a. Limited Domestic Law-Making Powers

Absent an emergency, the President has no inherent domestic law-making power. His powers as Chief Executive and his power to take care that the laws are faithfully executed may create some emergency powers subject to congressional review. Congressional acquiescence, custom and usage, may augment Executive powers.

b. Veto Power

A presidential refusal to sign an act into law can be overridden by a two-thirds vote of both houses. But the Line Item Veto Act violates the Presentment Clause of Art. I, § 7. Instead of the law-making procedure outlined in Art. I, § 7, the Act allows the President to cancel or repeal particular spending provisions thus changing the signed law. This is inconsistent with the constitutionally prescribed Veto Power.

2. Executive Impoundment

It has not yet been decided whether a President's withholding or delay in expending appropriations is a constitutional exercise of the Executive power to faithfully execute the laws or an unconstitutional interference in Congress's law-making power.

3. Delegation and Control of Legislative Power

- a. Congress can delegate power to the Executive if it formulates reasonable standards—an “intelligible principle”—to guide discretion. The courts defer to Congress in determining reasonableness.
- b. *The Legislative Veto*. Retention of power by Congress to review and veto executive exercise of delegated power is legislative action which violates the Presentment and Bicameralism provisions of Art. I, § 7.

4. The Appointment and Removal Power

- a. Art. II, § 2, cl. 2, vests the power to appoint federal officials, subject to the Senate’s advice and consent, in the President. Congress may vest appointment of inferior officers in the President, courts of law, or heads of departments, but not in the Congress itself.
 - (1) Congress may not vest the appointment power in persons other than those specified in Art. II, § 2, cl. 2.
 - (2) Whether an official is a principal or an inferior officer depends on a functional analysis of her independence, power, jurisdiction, and tenure.
- b. The President has the power to remove quasi-judicial or quasi-legislative officials subject to the standards established by Congress. The President has greater freedom to remove purely executive officials but it is not absolute. Consider whether Congress’ removal restrictions impede the President’s ability to perform his constitutional duty.
- c. Congress may not vest executive functions in officials subject to congressional removal by means other than impeachment.

5. Separation of Powers Generally

Consider generally whether the challenged actions excessively intrude on the constitutional functions of another Branch or consolidate powers that should properly be dispersed.

B. The Foreign Arena

1. Foreign Affairs

Foreign affairs powers are shared powers between the President and Congress. States and courts play a limited role.

2. Treaties and Executive Agreements

- a. *Treaties* are made by the President with the advice and consent of two-thirds of the Senators present. They prevail over state law but are subject to constitutional limitations. But a treaty is not binding domestic law unless Congress enacts implementing legislation or the treaty is self-executing. The President cannot unilaterally make treaties binding domestically.
- b. *Executive Agreements*, not requiring Senate concurrence, are legal even though they are not mentioned in the Constitution and prevail over contrary state law.
- c. Congressional legislation, which would not otherwise survive constitutional review, may be a legitimate means of implementing a treaty.

3. The War Power

While Art. I gives the Congress alone power to declare war, the President's Art. II power as Commander-in-Chief affords him power in making war. But he cannot order the indefinite detention of American citizens arrested on American territory without due process of law. Even aliens detained at Guantanamo are entitled to habeas corpus to test their status as enemy combatants. It is unconstitutional for Congress to authorize use of procedures which fail to provide the protections of habeas corpus to detainees, without suspending the writ.

C. Privileges and Immunities

1. Executive Privilege

The Court has recognized the existence of an executive privilege for internal confidential communications based on the separation of powers

principle and Art. II. A claim of privilege is presumptively valid and the judiciary determines whether a sufficient need has been shown by the party seeking disclosure.

2. Impeachment

A President may be impeached by the House and tried by the Senate for “Treason, Bribery, or other high crimes and misdemeanors.”

3. Presidential Immunity

The President is absolutely immune from civil liability for actions within the “outside perimeters” of his official responsibility. But the President does not have a general constitutional immunity for unofficial acts allegedly committed prior to assuming office. Presidential aides have a qualified immunity.

4. Congressional Immunity

Members of Congress and their aides enjoy absolute immunity under Art. I, § 6, for “legislative acts.”

■ PART TWO: INDIVIDUAL RIGHTS AND LIBERTIES: CONSTITUTIONAL LIMITATIONS ON GOVERNMENT POWER

V. HISTORICAL PERSPECTIVES

A. The Original Constitution

1. Natural Rights

The idea that there are extra-constitutional legally enforceable “natural rights” limiting governmental power has not been accepted by the Court.

2. Express Rights

The original Constitution contains few express rights limiting governmental power.

B. Bill of Rights

The first ten amendments were enacted only to limit the newly created federal government. They do not apply directly against the states. The Due Process Clause is used to apply the guarantees of the Bill of Rights to the states.

C. The Civil War Amendments

1. Thirteenth Amendment

This amendment abolishes slavery and involuntary servitude. Unlike other amendments, it applies to private action.

2. Fourteenth Amendment

Persons born or naturalized in this country are citizens of the United States and of the state of their residence. No citizen of the United States can be denied the privileges and immunities of United States citizenship. No state shall deprive citizens of life, liberty, or property without due process of law or deny any person in the jurisdiction equal protection under the laws.

3. Fifteenth Amendment

Denial of the franchise because of race or previous condition of servitude by the state or federal government is prohibited.

D. Privileges or Immunities of National Citizenship

The Fourteenth Amendment Privileges or Immunities Clause does not make the Bill of Rights applicable to the states. The Clause has been narrowly interpreted to protect only those rights relating to a *U.S. citizen's* relationship

to the national government, *e.g.*, to vote in federal elections. While it is seldom used today, it has recently been used to prevent discrimination against newly arrived residents based on their exercise of the right of interstate travel.

E. The Second Amendment

The Second Amendment confers an individual right to possess and carry weapons in cases of confrontation. The right is not unlimited but the Court has not determined the scope of permissible government regulation or the appropriate standards of judicial review or the issue of incorporation.

VI. DUE PROCESS OF LAW

While there are a few guarantees of liberty and property in the original Constitution, a central source of personal rights has been the Due Process Clause of the Fifth and Fourteenth Amendments. Fourteenth Amendment due process includes: (1) incorporated fundamental rights; (2) substantive rights limiting what government can do; (3) procedural limits on how government acts.

A. Ex Post Facto Laws

Neither the federal (Art. I, § 9) nor the state (Art. I, § 10) government may enact retrospective criminal laws significantly disadvantaging an offender. Civil laws are not covered by the Clauses.

B. Bills of Attainder

Neither Congress (Art. I, § 9) nor a state legislature (Art. I, § 10) may punish an individual without the benefit of judicial trial.

C. Impairment of Obligation of Contract

Art. I, § 10 limits state legislative ability to impair substantive contract obligations and the Fifth Amendment Due Process Clause prevents congressional impairment of substantive contract rights. It is occasionally used to limit government power, but infrequently.

1. Private Contracts

A state law substantially impairing pre-existing contractual relationships violates this guarantee unless the state establishes that the law is a reasonable means for achieving a significant and legitimate public purpose.

2. Public Contracts

A state may contract away its fiscal powers and may impair its contracts only if it is reasonable and necessary to serve important state interests.

D. The Takings Clause

1. Taking Property

“Private property” is generally defined by looking to rules and understandings stemming from an independent source such as state law.

2. Constitutional Text

The Fifth Amendment provides that private property is not to be taken by the federal government without just compensation. The Fourteenth Amendment Due Process Clause has been held to impose a similar obligation on the states.

3. What Is a “Taking?”

a. Regulatory Takings

The concept of taking goes beyond the formal condemnation of property to invalidate any regulation which is functionally equivalent to condemnation.

b. Reasonable Regulation

In determining if a regulation is a taking, factors to be considered include: economic impact of the regulation, effect on investment expectations, and the character of the government action. But the effectiveness of the regulation in furthering government interests is not relevant.

c. Categorical (Per Se) Takings

If the government physically invades the property on a permanent basis or denies all economically beneficial or productive use of the

land, there is a taking. A moratorium on property development, even for years, is not a categorical taking.

d. **Conditional Takings**

In determining whether government imposition of a condition as a price of land development is a taking, two questions are asked:

- (1) whether there is an “essential nexus” between the legitimate state interest and the condition, and
- (2) whether the government has made sufficient individualized findings establishing that the exaction has a rough proportionality to the impact of the proposed development.

4. Public Use

The taking must be for a public purpose, including economic development. Courts defer to the legislature.

E. Due Process: The Incorporation Process

1. Selective Incorporation

Only those provisions of the Bill of Rights which are “essential to the concept of ordered liberty” or “fundamental in the American scheme of justice” are made applicable to the states through the Due Process Clause. Rights thus far not incorporated as “fundamental rights” include the Second and Third Amendments, Seventh Amendment right to jury trial in some civil cases, grand jury indictment, excessive bail, 12-person juries and a unanimous verdict for conviction.

2. Full Incorporation

The incorporated fundamental right applies against the states in the same manner as the Bill of Rights provision applies against the federal government.

F. Traditional Substantive Due Process

1. The Rise and Fall of Economic Substantive Due Process

Under “Lochnerism,” the courts invalidated federal and state laws as arbitrary and unreasonable interferences with the right of contract

protected by the due process guarantees of liberty and property. Today, this active judicial review of socio-economic legislation has been replaced by judicial deference.

2. Modern Substantive Due Process: Non-fundamental Rights

In reviewing federal (Fifth Amendment) and state (Fourteenth Amendment) laws, the courts usually defer to the legislative judgment. If there is any *rational* basis that the legislature might have had for concluding that a law would further permissible legislative objectives, it does not violate due process. This deferential standard is used in reviewing most social and economic legislation.

a. Burden of Proof

The law is presumed constitutional and the burden of proof (which is essentially insurmountable) is on the challenging party.

b. Legitimate Objective

Any permissible government objective will suffice.

c. Rational Means

In assessing the rationality of the law in achieving the government's objective, the courts will not second-guess legislative fact finding or question the wisdom of the law.

d. Fundamental Rights Exception

Due Process challenges based on fundamental personal rights invoke a more searching judicial scrutiny.

G. Substantive Due Process Revisited: The Right of Privacy and Other Unenumerated Rights

1. Fundamental Rights

When laws burden the exercise of "fundamental rights" protected by the Due Process guarantee, the courts apply stricter scrutiny. The govern-

ment bears the burden of showing that the law is narrowly tailored to further an overriding government interest. Often the review is “strict,” requiring a showing that the means are “necessary” to a “compelling government interest.”

2. Express, Implied, and Unenumerated Rights

A more stringent standard of review is used for all express rights, those rights implied from the express rights or the constitutional structure, and other unenumerated fundamental rights recognized by the courts. When the Court holds that a law burdens a significant or special liberty right, the Court uses strict scrutiny or employs a “particularly careful scrutiny.”

3. Contraception and Abortion

a. The Privacy Right

There is no express right of privacy in the Constitution, but in early cases involving contraception and abortion, the Court held there is a constitutional right of privacy which limits the power of the government to regulate sexual activities involving marriage and family life.

b. The *Roe v. Wade* Revolution and Reaction

In *Roe v. Wade* (1973), the Court extended the fundamental right of privacy to protect a woman’s decision to terminate a pregnancy. The Court found the privacy right in the Fourteenth Amendment guarantee of personal liberty and applied a “trimester test” to determine whether strict scrutiny was met.

c. *Casey*: The Essentials of *Roe*

(1) In *Planned Parenthood of S.E. Pennsylvania v. Casey* (1992), the Court verbally reaffirmed the “essential holding” of *Roe* including:

- (a) the right of a woman to choose to have an abortion before viability without undue interference from the state;
- (b) the state’s power to restrict abortion after viability as long as there is an exception for the mother’s life and health;

(c) the state's legitimate interests in protecting the health of the woman and the life of the fetus.

(2) The plurality in *Casey* did not discuss a right of privacy or fundamental rights, nor did it adopt strict scrutiny. Rather the "undue burdens" test was used. A law is invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

d. **Abortion after *Casey***

A federal law banning partial birth abortion was upheld against a facial challenge despite the absence of any provision exempting mothers whose health was at risk. The Act did not impose an undue burden because there was medical uncertainty as to whether the prohibition on partial birth abortion created significant health risks. The prohibition is subject to as-applied challenges.

e. **Rights of Minors**

The minor woman's right of privacy also protects her contraception and abortion decisions. However, the greater state interest in minors and their usual lesser capacity permit a greater amount of state regulation. Parents cannot be given an absolute veto over the minor's decisions but requiring parental consent or notification, if a judicial by-pass is provided, has been upheld.

f. **Abortion Funding**

There is no right to abortion funding. Neither the right of privacy nor equal protection requires the state to make the abortion right effective even if maternal funding is provided.

4. Sodomy Laws

A state law criminalizing homosexual sodomy violates due process liberty. Liberty protects intimate decisional choices involving consensual adult sexual conduct in the privacy of the home. The state has no legitimate interest sufficient to justify the intrusion into the personal and private life of the individual.

5. Rights to Marriage and Family Life

The institutions of marriage and family, which are deeply rooted in our nation's history and traditions, are fundamental rights subject to the

stricter form of judicial review. The Court has protected the right to marry, parents' right to the care, custody and control of their children and the right of close relatives to live together free from excessive government regulation. Particular associations and relationships may be held not to constitute a constitutionally-protected family or marriage.

6. Right of Travel

a. Interstate Movement

While the source of the right of interstate travel is unclear, it is a fundamental personal right subject to more stringent judicial protection.

b. Foreign Travel

The right to travel abroad guaranteed by Fifth Amendment due process is subject to reasonable regulation by the national government.

7. The Right to Care and Protection

Government has no affirmative constitutional duty, absent special circumstances, to provide care and protection for individuals. A limited duty may arise if government assumes custody of an individual.

8. The Right to Refuse Treatment

A person has a liberty interest in avoiding unwanted medical treatment. The government's interest may justify the regulatory burden on liberty, *e.g.*, the state's interest in preserving life justifies imposing a heightened evidentiary standard before life support is terminated.

9. The Right to Die

There is no fundamental right to commit suicide nor any fundamental right to assisted suicide. Such interests are neither traditionally protected nor implicit in the concept of ordered liberty as to be deemed fundamental. Criminal prohibition of such practices is rationally related to

legitimate state interests such as preserving life, protecting the depressed and vulnerable groups, and avoiding euthanasia.

10. Rights in Restricted Environments

Stricter standards of due process review usually do not apply in special contexts such as the military, prisons, schools, and mental institutions. Balancing of the competing interests tends to reflect greater judicial deference.

H. Procedural Due Process

Whenever the government deprives a person of a significant life, liberty, or property interest, it must afford due process. Whether the interest is a right or a privilege, if it is a due process interest and is presently enjoyed, it is protected.

The question of what process is due is a matter of federal constitutional law for the courts. It is not determined by state law. In determining what procedures are required to assure due process, courts balance the competing interests, usually considering three factors:

- (1) the severity of the harm to the litigant if the procedures are not provided;
- (2) the risk of error if the procedures are not afforded; and,
- (3) the administrative difficulty and other costs of providing the requested procedures.

1. What Is Property?

Property is limited to interests recognized by government, *e.g.*, entitlements.

2. What Is Liberty?

Liberty is not limited to freedom from confinement. It includes marriage, raising a family, etc. But reputation, without more, does not constitute a sufficient liberty interest.

3. What Is a “Deprivation”

Negligent injury by government officials to life, liberty or property interests does not constitute a deprivation.

4. Due Process Contexts

a. Welfare Benefits

Welfare benefits, once received, constitute a property entitlement. Courts balance the state interest in conserving resources against the recipient’s interest in uninterrupted benefits.

b. Use and Possession of Property

Wages or a purchaser’s interest in goods received under a contingent sales contract constitute property. Normally, notice and hearing are required prior to depriving the property interest.

c. Public Employment Rights

The mere subjective expectancy of continued employment or employment terminable at will are not property interests. There must be a state-created entitlement. A state-created cause of action is a property entitlement. The state may so condition an employment interest that it does not constitute property. But the court determines what procedures are due once a property interest exists—“No bitter with the sweet.”

d. Institutional Due Process

While officials in public institutions do exercise broad discretion, liberty interests resulting from compulsory attendance at a school or involuntary confinement in a hospital require due process to be satisfied. Parole revocation or revocation of pre-parole conditional release involve liberty interests. The appropriate procedures are determined by balancing the liberty interest against institutional considerations.

e. Parental Rights

The important liberty interests of natural parents in the care, custody, and management of their children require significant procedural protection.

f. Student Rights

Due process does protect the liberty and property interests of a student. But the courts are reluctant to intrude on academic decision-making and the discretion afforded school authorities.

g. Access to Courts

Due process does not require that indigents be given free access to the courts in civil cases absent state monopoly of processes affecting fundamental due process interests. But once a state affords a right of access or significantly burdens fundamental rights, imposition of filing fees may violate due process (and equal protection). Procedures available in civil proceedings are determined by the balancing test, although there is a presumption against a right to appointed counsel in civil proceedings.

h. Fair Trial/Judicial Bias

While matters of judicial bias are normally dealt with through local rules and statutes, the Due Process Clause imposes some basic restrictions on when a judge must recuse himself from a case. If the judge has a direct, personal, substantial pecuniary interest in the outcome, recusal is constitutionally required. If an objective appraisal indicates that there is a serious risk of actual bias, the Due Process Clause requires that the judge recuse himself in the interest of a fair trial in a fair tribunal.

5. Conclusive Presumptions

When critical due process interests are lost through government action, due process generally requires that the individual be afforded an opportunity to prove that the facts presumed are not true in the particular case. But if the case involves a non-contractual claim to public benefits, it is possible that no liberty or property interest is involved.

VII. EQUAL PROTECTION

A. General Standards

The Fourteenth Amendment Equal Protection Clause and the Fifth Amendment Due Process Clause (which is read to guarantee equal protection)

prohibit the state and federal government respectively from using unreasonable classifications. Reasonableness is dependent on: (1) the basis of the classification; (2) the character of the interests burdened by the classification; and (3) the government objectives supporting the classification. The courts generally use three principal standards of review: (1) the traditional rational basis test; (2) an intermediate standard requiring that the classification be substantially related to an important government interest; and (3) strict scrutiny requiring that the classification be necessary to a compelling state interest.

B. Traditional Equal Protection

1. The Rational Basis Test

In most cases, a classification will be upheld if it is rationally related to any permissible government objective. The fact that a classification is under- or over-inclusive will not result in its unconstitutionality.

a. Burden of Proof

The law is presumed valid and the burden of proof of its invalidity is on the challenger. The burden is usually insurmountable.

b. Permissible Government Objective

If the classification is rationally related to a permissible government objective, even if it is not the actual objective, it will be upheld.

c. Rational Means

If any facts can be ascertained that will sustain the classification, the existence of such fact finding by the legislature will be assumed. Only arbitrary classification is proscribed.

2. Rationality With Bite

In some cases, the Court has engaged in a more demanding balancing of the competing interests in determining the reasonableness of the challenged classification. This may reflect judicial concern with possible prejudice or animus against the disfavored class.

C. Heightened Review Equal Protection

1. Suspect Classifications

When a law purposely employs a suspect classification, the classification is subject to strict scrutiny. The ordinary presumption of validity no longer applies and the burden is on the government to demonstrate that the classification is necessary to a compelling government interest.

2. Criteria of Suspectness

Factors which have been considered in labeling a classification suspect include: the historical purpose of the Equal Protection Clause; the history of discrimination against the class; the stigmatizing effect of discrimination; classification based upon a status which the person cannot control; discrimination against a politically insular minority.

3. Purpose, Not Effect

Before strict scrutiny is used, the challenger must prove that the discrimination was purposeful, either overtly or covertly. While discriminatory impact or effect may be evidence of discriminatory purpose, it is usually not sufficient in itself to prove discriminatory purpose. Even if discriminatory purpose is shown, government can avoid strict scrutiny if it can prove that it would have taken the same action even apart from the discriminatory purpose.

4. Legislation and Administration

Legislation or administrative action which is purposely discriminatory is subject to strict scrutiny. A law or policy may be overtly or covertly discriminatory in purpose. Even if a law or policy is neutral, it may be administered or enforced in an intentionally discriminatory fashion (unconstitutional "as applied").

5. The Rationale and Limits of Suspectness

a. Race and National Origin

Racial, ethnic and national origin classifications are suspect, subject to strict scrutiny review.

(1) Segregation in Education

- (a) *De Jure Segregation*. Intentional racial segregation in public schools is inherently unequal and violates equal protection.
- (b) *De Facto Segregation*. Government has no affirmative constitutional duty to remedy segregation it has not created.
- (c) *Duty to Desegregate*. A *de jure* segregated school system is under an affirmative constitutional duty to desegregate. Action having a discriminatory *effect* impeding desegregation is prohibited.
- (d) *Desegregation Remedies*. In remedying *de jure* segregation, equal protection does not require racial balancing, although racial composition may be used in measuring desegregation. District courts have broad equity powers, including the use of busing. Remedies must reflect the nature of the constitutional violation.
- (e) *Interdistrict Segregation*. Segregation between school districts in a state does not violate equal protection unless it is caused by the government.
- (f) *Resegregation*. A school district desegregates if it complies in good faith with the desegregation decree and eliminates vestiges of past discrimination to the extent practicable. There is no duty to remedy subsequent unintentional resegregation.

(2) Affirmative Action

- (a) Federal, state and local affirmative action programs are reviewed under the strict scrutiny test.
- (b) In applying strict scrutiny, a narrowly-drawn race-based program designed to remedy specific, identified racial discrimination is likely to be upheld.
- (c) An institution of higher education has a compelling interest in the diversity of its student body, which can include racial and ethnic diversity. A race conscious admissions

program must be narrowly tailored; the process must be individualized, not mechanical. Quotas or racial balancing are unlikely to be upheld. Race may be a “plus” factor; it must not be determinative of the admissions decision. Narrow tailoring does not require exhaustion of every possible race-neutral alternative. Time limits to race-conscious policies are relevant.

- (d) Race-based student placement programs by elementary and secondary schools were held to be unconstitutional because they were not narrowly-tailored. The Court did not decide whether the schools’ interest in the benefits of racial diversity would be a compelling interest.
- (e) Congressional districting, where race is the predominant factor, is subject to strict scrutiny. Race is the predominant factor when the state subordinates traditional race-neutral districting considerations to race.

b. Alienage—The “Sometimes Suspect” Classification

(1) Strict Scrutiny

When a state classifies on the basis of alienage, strict scrutiny normally applies.

(2) Political Function Exception

Only rationality is required when the state sets voter qualifications or defines the qualifications for appointment to important government positions involving governance of the political community, *e.g.*, state police, teachers, probation officers.

(3) Preemption

State classifications involving aliens are preempted if they interfere with national policies regarding immigration and naturalization.

(4) Federal Discrimination

Action by the national government does not violate the Fifth Amendment if it is a reasonable means of implementing its immigration and naturalization powers.

c. “Almost Suspect” Classifications—Gender and Illegitimacy

When reviewing gender and illegitimacy classifications, courts generally use an intermediate standard of review. The classification must be substantially related to an important government interest.

(1) Gender Classification

(a) Sex Discrimination

In gender discrimination cases, the Court has referred to intermediate review as requiring “exceedingly persuasive justification.” This may include consideration of alternatives available to government, making the review closer to strict scrutiny. Use of classifications that intentionally discriminate against women based on stereotypes seldom survive intermediate review. If the classification reflects real differences between the sexes, it is more likely to be upheld.

(b) Discriminatory Purpose

While a discriminatory impact on women is evidence of impermissible intent, it is only a discriminatory government purpose that will trigger use of the intermediate standard of review.

(c) Non-sex Classifications

Not all classifications that disadvantage only women will be treated as discriminatory sex classifications.

(d) Affirmative Action

Classifications providing benefits only to women which are actually designed to remedy past discrimination are likely to be upheld using intermediate review if they are narrowly tailored to achieve an actual remedial objective.

(e) Mothers and Fathers

A law which discriminates against fathers, in favor of mothers, where the parents are similarly situated, is sub-

ject to intermediate review and generally violates equal protection. But there may be real difference between mothers and fathers that justify the discrimination.

(2) Illegitimacy Classifications

An intermediate standard of review is also used for classifications burdening illegitimates—the classification must be substantially related to an important government interest. The more that it appears that a law is based on prejudice against illegitimates, the more likely it is that the law will be held unconstitutional.

d. Other Classifying Traits

Other classifying traits, *e.g.*, those which operate to disadvantage the poor, the aged, the mentally retarded or gays and lesbians (sexual persuasion) without more, are reviewed under the traditional rational basis test. But if the law suggests prejudice or animus it may be reviewed using “rationality with bite.”

6. Fundamental Rights

When a classification significantly burdens the exercise of fundamental personal rights, the government usually must prove that the classification is necessary to a compelling governmental interest.

- a. In cases where the law does not deter, penalize, or otherwise *significantly* burden the constitutional right, the Court applies the traditional rational basis test.
- b. Increasingly, the Court has moved to a variable standard of review. The more significant the burden on fundamental rights, the greater the degree of scrutiny used.
- c. Examples of fundamental rights include:
 - (1) First Amendment Rights—When government classifications significantly burden the exercise of fundamental First Amendment rights such as freedom of speech or religion, the classification is closely scrutinized.

- (2) The Right of Interstate Travel—When the government imposes a classification which deters, penalizes or otherwise significantly burdens the fundamental right to travel, the strict scrutiny standard of judicial review applies. In some cases, the Court has held that the law could not satisfy even rationality review. Recently, the Court has used the Privileges and Immunities Clause of the Fourteenth Amendment to prevent discrimination against newly arrived citizens of the state.
- (3) The Right of Privacy and Marriage—Only if a fundamental right is significantly burdened will heightened scrutiny apply.

7. Fundamental Interests

The Court also has used a stricter standard of review to prevent discrimination in access to certain fundamental interests that are not technically constitutional rights but are protected by the Equal Protection Clause when discrimination is involved. This use of stricter review has been applied to the following interests:

a. Voting

- (1) When the government discrimination significantly burdens the *exercise of the franchise*, in general or special purpose elections, strict scrutiny is applied.
 - (a) *Special Purpose Districts*. A district may be so special purpose and its effects on citizens so disproportionate that strict scrutiny will not be applied.
 - (b) *Durational Residency Requirements*. While reasonable residency requirements are constitutional, durational residency requirements burden the vote and the right of interstate travel.
- (2) *Diluting the Franchise*. Dilution of the effectiveness of a vote of a particular class will often be reviewed under a more stringent standard of review than rationality.
 - (a) *Access to the Ballot*. The requirements must be fair and not virtually exclusionary of independents and minority parties.

- (b) *Reapportionment*. The one person-one vote principle is applied to congressional districting as a command of Art. I, § 2, and to both houses of a bicameral state legislature as a mandate of equal protection.
- (c) *Multi-member Districts*. Multi-member districting violates equal protection and the Fifteenth Amendment if it is a purposeful device to exclude racial minorities from effective political participation.
- (d) *Political Gerrymanders*. While equal protection challenges to political gerrymanders are presently justiciable, the Court is sharply divided as to whether judicially manageable standards are possible. Political gerrymanders that are proven to be intentionally discriminatory and which have actual discriminatory effects on an identifiable political group violate equal protection.
- (e) *Vote Processes*. In *Bush v. Gore* (2000), the Court held that equal protection may be violated by arbitrary and disparate treatment in the processes by which votes are counted but this may be limited to the unique circumstances involved.

b. Access to Justice

Differences in wealth should not determine the ability of a person to secure criminal justice. Similarly, some civil cases involve matters of such fundamental concern, e.g., termination of parental rights, that equal protection requires equal access.

c. Education

While education is an important social and individual interest, the rational basis test is generally used for reviewing classifications burdening the interest in education. But when education is totally denied to a discrete underclass of children, the Court has required government to prove substantial justification.

8. Other Interests

Classifications burdening other social and economic interests, such as welfare, housing and medical care, are reviewed under the traditional rational basis test.

The remainder of this outline has been omitted.

Please see the book for the full outline.