

1. BILL OF RIGHTS

By terms, Bill of Rights only limits the federal government, not the State governments (Barron v. Baltimore)

A. 14th Amendment

- Congress intended to protect due process, equal treatment, and privileges & immunities from state infringement
- U.S. supreme court held 14th Amendment does NOT apply all of the Bill of Rights to the States (Slaughterhouse Cases)
- **Incorporation** – Process of the supreme court applying individual provisions of the B of Rights to the States through the 14th Am Due process clause
 - **Test for Incorporation:**
 - 1) Would neither liberty nor justice exist if the rights were sacrificed?
 - 2) Does right involve: principles of justice so rooted in the tradition and conscience of our people as to be fundamental?
 - 3) Is ‘right’ implicit in concept of ordered liberty?
 - 4) Does violation of ‘right’ offend those canons of decency and fairness, which express the notions of justice of English-speaking peoples?
 - If YES, the right is incorporated.
- STATE not FEDERAL government has the general police power. Federal must point to specific section in the Constitution that allows it to regulate for the health, safety, and welfare of the public.

B. State Action Doctrine

- The Constitution’s protection of individual liberties & equal protection only applies to GOVERNMENT (“state”) conduct, NOT to PRIVATE conduct.
 - The 13th Am is the one part that DOES apply to private conduct
 - Federal and state statutes can sometimes apply Constitutional standards on private actors
 - Judicial action = state action
- EXCEPTIONS to State Action Doctrine (ie, where Constitution DOES apply to private conduct):
 - Public Function Exception - Private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government.
 - The more an owner of property opens it up to the public, the more his rights become circumscribed
 - Entanglement Exception - Private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.
 - Must be more involvement than mere licensing
 - Either the government must cease its involvement with the private actor or the private entity must comply with the Constitution.
 - Arise in 4 areas:
 - 1 - judicial and law enforcement actions
 - 2 – government licensing and regulation
 - 3 – government subsidies
 - 4 – voter initiatives permitting discrimination
 - Precedent insists the conduct causing the deprivation of a federal right be “**fairly attributable to the state.**”
 - **TEST:**
 - 1) Deprivation must be caused/created by the State (government)
 - 2) Carried out by a state actor

2. ECONOMIC LIBERTIES

- Due Process Clauses
 - 5th Am – Applies to FEDERAL government
 - 14th Am – Applies to STATE/LOCAL government
 - Contracts Clause (Art. 1, sec. 10)
 - Takings Clause (5th Am)
- A. Due Process Clauses:
- The US supreme court has spoken of two types of “Due Process”:
 - 1) Procedural Due Process – the procedures the government must use if it takes away “life, liberty or property”
 - In particular, government must provide adequate NOTICE and HEARING
 - 2) Substantive Due Process – whether the government has adequate REASON to take life, liberty, or property
 - Substantive Due Process:
 - Economic Substantive Due Process – protects economic liberties – eg, right to contract freely without excessive government interference
 - As of today, Economic SDP does NOT give any extra protection – ie, Court gives RATIONAL BASIS review to laws affecting economic rights
 - Non-Economic Substantive Due Process – eg, protects privacy & autonomy rights
 - As of today, Non-Economic SDP gives extra protection to SOME rights – ie, Court gives HEIGHTENED review (eg, strict scrutiny) to some rights
- B. Contracts Clause (Art. I, sc. 10)
- Applies to:
 - Existing contracts only (not future)
 - STATE/LOCAL governments only
 - Test:
 - When a state or local government interferes with existing private contracts, a three-part test is used:
 1. Is there a substantial impairment of a contractual relationship;
 2. If so, does it serve a significant and legitimate government purpose;
 3. If so is it reasonably related to achieving the public goal?
 - As of today, the Contracts Cl gives little extra protection – ie, the standard of review for the State/Local law affecting a contract is RATIONAL BASIS
 - EXCEPTION: where the government itself is a party to the contract, the Court will apply heightened scrutiny
- C. Takings Clause (5th Am)
- 5th Am: “nor shall private property be taken for public use, without just compensation.”
 - Both federal and state governments have power of EMINENT DOMAIN
 - Eminent Domain: authority to take private property when necessary for government activities.
 - Acts as a limit on the government sovereign power of eminent domain (ie, the government’s authority to seize private property for its own use)
 - Test:
 - 1) Is there a “taking”?
 - yes, where government physically takes property
 - yes, where government regulation deprives virtually all economically beneficial uses
 - 2) Is it for “public use”?
 - If not for public use, must give property back
 - Taking is for public use as long as it meets the rational basis test
 - 3) What is “just compensation”?
 - Just compensation measured in terms of the loss to the owner; the gain to the taker is irrelevant
 - typically, fair market value

3. EQUAL PROTECTION

A. Equal Protection Clause (14th Am)

- “nor Shall any State deny to any person within its jurisdiction the equal protection of the laws.”
- Applies to State AND Federal governments (Boiling v. Sharpe)
- Equal Protection Analysis:
 - **1. What is the classification?**
 - If classification exists on FACE of law, go to 2.
 - If law is facially NEUTRAL, level of scrutiny is RATIONAL BASIS,
 - UNLESS discriminatory PURPOSE is shown (is so, go to 2)
 - **2. What is the appropriate level of scrutiny?**
 - Strict Scrutiny (heightened scrutiny):
 - “Suspect Class” – Race, National Origin, Alienage* (*except when related to “self-government & democratic process”, then rational basis)
 - Fundamental Right – eg, Right to vote, Bill of Rights, etc.
 - Intermediate Scrutiny (heightened scrutiny):
 - “Suspect Class” – Gender, Non-marital children
 - Rational Basis (default standard)
 - Everything else
 - **3. Does the government action meet the level of scrutiny?**
 - Evaluate whether appropriate “means” and “end” are satisfied
 - Government MUST be using the LEAST restrictive alternative in order to win
 - Court focuses on degree to which a law is overinclusive and/or underinclusive
 - Underinclusive – When laws do not regulate all who are similarly situated
 - Overinclusive – Law covers more people than it needs to in order to accomplish its purpose
 - Just because a law is under/overinclusive does not mean it is sure to be invalidated.

B. Standard of Review

- **Rational Basis (default)**
 - Law/action is presumed constitutional, ie, challenger has burden of proof to overcome law
 - **Challenger** must show that the law/action is NOT *rationally related to a legitimate government interest*.
 - TEST:
 - Two questions:
 - 1. Does the law have a legitimate purpose?
 - 2. Is the law rationally related to achieving that purpose?
 - Legitimate Purpose
 - Legit purpose if law advances a traditional “police” purpose
 - Requirement for a “Reasonable Relationship”
 - Significant over/underinclusion is acceptable under rational basis test
 - If challenged law, argue the law is arbitrary and/or unreasonable
 - Age, disability, wealth, and sexual orientation permit only rational basis review
- **Intermediate Scrutiny**
 - Law/action is presumed Unconstitutional; burden of proof shifts to government
 - Government must show that the law/action *substantially advances an important government interest*
- **Strict Scrutiny**
 - Law/action is presumed Unconstitutional; burden of proof shifts to government
 - Government must show that the law/action is necessary (or NARROWLY TAILORED) to accomplish a compelling government interest.
 - If there is any less discriminatory alternative, the law/action FAILS
 - Federal immigration laws wholly occupy the field and preempt state efforts to regulate immigration.
 - **Strict scrutiny is used to evaluate discrimination against non-citizens**
 - Alienage classifications relating to self-government and democratic process only need meet rational basis review
 - Two major principles:
 - 1) laws that provide a benefit to all marital children but NO non-marital children, ALWAYS are declared unconstitutional
 - 2) laws that provide a benefit to SOME non-marital children, while denying the benefit to other non-marital children are evaluated on a case-by-case basis under intermediate scrutiny

- Criteria for determining which level to use:
 - Immutable characteristics warrant heightened scrutiny (no control over characteristics)
 - Race, origin, gender, marital status of parents
 - Ability of the group to protect itself through the political process
 - Minorities
 - History of discrimination against the group
 - Do not need all of these, but usually a combination of these factors

C. Facially Neutral Laws with a Discriminatory Impact or Discriminatory Administration

- Showing a discriminatory purpose requires proof that the government desired to discriminate; not enough to prove the government took action with knowledge that it would have discriminatory consequences
 - Law must be enacted “because of”, not “in spite of” discrimination to be unconstitutional.

4. SUBSTANTIVE DUE PROCESS

A. Due Process Analysis

1. Is there a Fundamental Right (or Constitutionally-protected liberty interest)?
 - Ie, Is it deeply rooted in traditions and conscience of our people?
 - If YES, strict scrutiny applies, go to 2.
 - If NO, rational basis applies, go to 3.
2. Is the Constitutional Right infringed?
 - Ie, is infringement “substantial & direct”?
 - If YES, go to 3
 - If NO, rational basis applies, go to 3.
3. Is the Standard of Review met?
 - Is there sufficient justification (purpose) for government action?
 - Is the means sufficiently related to the purpose?

B. Fundamental Rights

- Rights/Interests recognized by Supreme Court
 - Rights expressly protected in the Bill of Rights
 - Family Autonomy
 - Right to Marry
 - Right to Custody of One’s Own Children
 - Right to Keep Family Together
 - Right to Control Upbringing of Children
 - Reproductive Autonomy
 - Right to Procreate
 - Right to Purchase/Use Contraceptives
 - Contraception is a constitutionally protected right (not fundamental per se) because it falls within the right of privacy, located in the penumbra of the Bill of Rights, also in the Due Process Clause.
 - Right to Abortion (applies hybrid test)
 - Medical Care Decisions
 - Right to Refuse Unwanted Medical Treatment (applies undefined form of heightened scrutiny)
 - Right to Physician-Assisted Suicide (NO – THIS IS NOT A FUNDAMENTAL RT)
 - Sexual Activity
 - Right to Privacy of Sexual Activity (applies undefined form of heightened scrutiny)
 - Implicit right of privacy
 - Travel
 - Vote
 - Access to Courts
 - Supreme Ct has REFUSED to recognize a fundamental right to education

C. Right to Abortion

- Test for abortion:
 - Does the law impose an “UNDUE BURDEN” on a woman’s ability to make this decision?
 - If yes, unconstitutional
 - To determine undue burden:
 - Purpose or effect of the law is to impose a “SUBSTANTIAL OBSTACLE”
- While a woman has the right to CHOSE abortion, she does not have the right TO abortion in the sense that the states do not have an obligation to fund abortions
- Spousal notice is an undue burden because of potential domestic violence
- State may require parental notice or consent for unmarried minor’s abortion, ONLY IF there is a judicial alternative where a judge can approve if in the minor’s best interest is mature enough to decide for herself

D. Right to Medical Care Decisions

- Right to Refuse Treatment
 - Not absolute and can be regulated by the states.
 - State may require clear and convincing evidence that a person wanted treatment terminated. Court does not indicate what type of evidence might be sufficient to meet this proof.
- Right to Physician-Assisted Suicide
 - NOT a fundamental right or liberty interest

5. PROCEDURAL DUE PROCESS

A. Procedural Due Process Analysis

- 1. Is there a Deprivation?
 - Governmental Negligence – NO
 - Governmental Failure to Act – NO
 - Governmental Reckless Indifference – YES
 - UNLESS there is an emergency – NO
 - UNLESS there is arbitrary government action that shocks the conscience –YES
 - Ie, a purpose to cause harm unrelated to legitimate government interest
- 2. Is it a deprivation of life, liberty, or property?
- 3. What procedures are required?
 - Adequate Notice & Hearing
 - To determine “Adequacy of Hearing”, ask:
 - A. What is the PRIVATE interest? (Importance of the interest involved)
 - B. What is the risk of error with the current process, and probable value of additional process? (Degree to which the procedure will make a difference)
 - C. What is the GOVERNMENT interest?
- For government employee, a full hearing is not necessary when firing an employee from a government job.

6. FREEDOM OF SPEECH

A. Analysis

- 1. Does it regulate “speech”?
 - a. Is “conduct” communicative?
 - Spence v. Washington Test – Communicative (expressive) when:
 - Speaker intends to convey a particular message
 - Likelihood is great that message is understood by those who view it
 - If no, 1st Am doesn’t protect it
 - If yes, go to b.
 - b. When may government regulate communicative conduct? (US v. O’Brien Test)
 - within power of the government
 - furthers an important, substantial government interest
 - government interest is unrelated to suppressing speech
 - restriction is no greater than essential
- 2. Is it content-based or content-neutral?
 - a. if content-based, strict scrutiny applies
 - Content-based can be based either on:
 - The SUBJECT of the speech, and/or
 - The VIEWPOINT of the speech
 - b. if content-neutral, intermediate scrutiny applies
 - reasonable time, place, and manner restrictions (alternatives) may be used
 - Knotty issues:
 - Secondary effects
 - Where government must make choices based on content (eg, subsidy) – cannot be viewpoint based
 - 1st Am does not apply to government speech (eg, permanent monument in park)
- 3. Is it vague and/or overbroad?
 - Vague – if a reasonable person cannot tell what is and is not being regulated
 - Overbroad – if it regulates substantially more speech than the Constitution allows
- 4. Is it a prior restraint?
 - A court order or administrative order that prevents speech from occurring in advance of the time the speech occurs (eg, licensing or injunction)
 - Collateral Bar Rule – A person violating an unconstitutional law may not be punished, but a person violating an unconstitutional prior restraint generally may be punished.
 - Provides that a court order must be obeyed until it is set aside, and that persons subject to the order who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional.
 - National security is an instance when prior restraints are justified.
 - Licensing will be permitted only if:
 - 1) important reason for licensing
 - 2) clear standards leaving almost no discretion to the licensing authority
 - 3) procedural safeguards – prompt review
 - Full and fair hearing before the denial of the permit (based on subsequent cases, in cases where the distinction is content-based)
 - Do not have to have a full and fair hearing if content-neutral
- 5. Does it regulate less-protected or unprotected speech?
 - a. Unprotected:
 - incitement of illegal activity
 - Clear and Present Danger Test:
 - Likelihood (with intent) of causing:
 - Imminent, seriously harmful,
 - Lawless action
 - fighting words; hate speech

- Likely to cause a violent response against speaker
 - An insult likely to inflict immediate emotional harm
 - obscenity; child pornography
 - Miller Test:
 - a. Whether average person, apply local community standards, would find the work, as a whole, appeals to prurient interest;
 - b. Whether the work depicts, in patently offensive way, sexual conduct specifically defined by state law; AND
 - c. whether the work, as a whole, lacks serious literary, artistic, political, or scientific value (Using a national standard)
 - Defamation and libel
 - NY Times – speaker may be liable in speaking about a PUBLIC OFFICIAL (ie, speech is unprotected) only IF:
 - a. P has clear & convincing evidence
 - b. P proves falsity of D’s statement
 - c. P proves D had actual malice – D knew statement was false or acted with reckless disregard of the truth
 - b. Less protected
 - low-value sexual speech (eg, nude dancing, zoning context)
 - Court has upheld ability of local governments to use zoning ordinances to regulate the location of adult bookstores and movie theaters.
 - Government may completely ban nude dancing.
 - Profanity and indecent speech (but only in some media – eg, broadcast)
 - Commercial speech
 - Is it commercial speech?
 - Does it advertise?
 - Does it refer to a specific product?
 - Is there an economic motivation?
 - And if YES,
 - Is the regulation acceptable? (reviewed under a form of intermediate scrutiny)
 - a. Does speech advertise illegal activity or convey false/deceptive message?
 - If yes, speech is unprotected
 - If no, following intermediate scrutiny applies:
 - b. is there a substantial government interest?
 - c. does law directly advance the government interest?
 - d. is restriction no more extensive than necessary?
 - Interpreted as “narrowly-tailored” NOT “least restrictive”
- 6. Forum analysis
 - 1. Public Forum – full 1st Am protection
 - Eg, public parks and sidewalks
 - Government regulation:
 - Must be CONTENT-NEUTRAL (or if content-based, overcome strict scrutiny)
 - Must be reasonable time, place, manner restrictions that serves:
 - Important government interest, and
 - Leaves open adequate alternatives
 - If licensing/permit, must meet requirements
 - Must be narrowly-tailored (but need not be least-restrictive alternative)
 - 2. Designated Public Forum – full 1st Am protection
 - Eg, public property that hasn’t traditionally been open for speech, but which government voluntarily opens for speech
 - 3. Limited/Non-Public Forum – LIMITED 1st Am protection
 - Eg, public property not traditionally open for speech, and which government either does not open for speech or opens only to certain groups or dedicated solely to certain subjects

- Rule:
 - Time, place and manner restrictions are okay;
 - Government may BAN speech, so long as ban is:
 - Reasonable; and
 - Not viewpoint-based
 - 1st Am protection is limited in some environments
 - eg, military, prisons, schools
 - Schools: students retain (lesser) 1st Am protection
 - School may punish/ban speech that:
 - 1. Substantially interferes with the work of the school; OR
 - 2. Impinges upon the rights of other students
- Laws that significantly burden speech are ones that:
 - Allow civil liability for expression,
 - That prevent compensation for speech,
 - That compel expression,
 - That condition a benefit on a person's foregoing speech, and
 - That pressure individuals not to speak
- Laws that regulate conduct might have an incidental effect on speech because of the communicative content of behavior.

7. FREEDOM OF ASSOCIATION

- Public Accommodation/human rights laws generally ARE held to be constitutional
 - Ie, even though they do infringe association rights, they DO satisfy strict scrutiny
 - Does not need to be a State actor to apply strict scrutiny
- Some Associations can avoid complying with public accommodation laws
 - Ie, they CAN discriminate when:
 - 1. Intimate Association – small, selective, secluded; OR
 - 2. Expressive “integral to the message” Association – the very purpose of the association would be compromised if it couldn’t discriminate (eg, Klu Klux Klan)
- Government may punish membership only if it proves:
 - That a person actively affiliated with a group,
 - Person knows of its illegal objectives, and
 - Has specific intent to further those objectives

8. FREEDOM OF RELIGION

- Two religion clauses in 1st Am:
 - 1. Establishment Clause
 - 2. Free Exercise Clause
- For purposes of the Constitution, what is religion?
 - Where a given belief is sincere and meaningful, and occupies a place in the life of its possessor or parallel to that filled by the orthodox belief in God. (**United States v. Seeger (1965)**)

A. Free Exercise Clause

- Involves 2 concepts:
 - Freedom to believe – absolute
 - Freedom to act – not absolute
 - Statutes invariably regulate conduct, either by:
 - Prohibiting conduct that the religion requires (eg, polygamy – prohibition is upheld)
 - Requiring conduct that the religion prohibits (eg, Amish refusal to pay taxes or to get SS# - requirement is upheld)
 - Making difficult or burdening religious observances (eg, denying benefits to individuals who quit job for religious reasons – denial is struck down; but see Smith)
- Test:
 - Smith Test: neutral, generally applicable laws restricting free exercise of religion are NOT subject to strict scrutiny (test is, by default, intermediate scrutiny) (**Employment Div, DHR of Oregon v. Smith (1990)**)

B. Establishment Clause

- Theories:
 - Strict Separation – to the greatest extent possible government and religion should be separated
 - Neutrality – government can't favor religion over secularism or one religion over others
 - Some justices advance a “symbolic endorsement” test – government violates establishment clause if it symbolically endorses a particular religion or if it generally endorses either religion or secularism
 - Accommodation – Court should interpret the Establishment Clause to recognize the importance of religion in society and accommodate its presence in government
 - Government violates only if it literally establishes a church or coerces religious participation
- Test:
 - If government action is facially discriminatory, ie, prefers one religion or sect over others, apply strict scrutiny.
 - If government action is not discriminatory, apply Lemon Test
 - Lemon Test: to survive establishment clause, the law must have:
 - Secular purpose;
 - Secular effect;
 - No excessive government entanglement with religion
 - If you violate any one, it gets thrown out