

A Methodology for Teaching Constitutional Law

CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, 5th Edition. By Jerome A. Barron,[†] C. Thomas Dienes,^{††} Wayne McCormack,[‡] and Martin H. Redish.^{‡‡} Charlottesville, Virginia: Michie Law Publishers, 1996. Pp. xxxvii, 1542.

*Reviewed by Constance Frisby Fain**

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I. INTRODUCTION

My approach to teaching constitutional law concepts has become more exciting, interesting and thorough by utilizing Barron, Dienes, McCormack, and Redish's *Constitutional Law: Principles and Policy*.¹ The authors of this casebook are full professors of law whom I respect as distinguished experts in the field of constitutional law. Barron and Dienes are also coauthors of two study aid texts designed to supplement the casebook: a Nutshell Series outline² and a Black Letter Series outline.³ These provide summaries of constitutional law intended to assist the student in recognizing and comprehending the principles and issues of law covered in this casebook and others.

The traditional coverage and format of the Barron, Dienes, McCormack, and Redish casebook is compatible with the teaching methodology I employ in my class, while still allowing for flexibility in the way in which the material is conveyed to the students. I have examined other constitutional law casebooks produced by various publishing companies and have used two others which I found to be enjoyable and of average value. Those two others that I have used, however, were not as detailed and comprehensive as the Barron, Dienes, McCormack, and Redish casebook. In order to adequately prepare students for exams, I had to supplement those texts by having the students read additional materials procured from the Barron, Dienes, McCormack, and Redish casebook, which is the main reason I began using it again. My use of the Barron, Dienes, McCormack, and Redish text, moreover, has proven to be quite effective in preparing my students for law school examinations, the bar exam, and other projects requiring knowledge of constitutional law.

This essay addresses the pedagogical goals, contents, and structure of *Constitutional Law: Principles and Policy* and a method of teaching Constitutional Law from this casebook. The methodology component of the essay provides an overview of the following: pedagogical goals in using the casebook; a consideration of learning modalities and learning styles; levels of student learning; utilization of the case method, problem-solving approach, question-answer approach, oral-

1. JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* (5th ed. 1996 & Supp. 1997).

2. JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW IN A NUTSHELL* (3d ed. 1995).

3. JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* (4th ed. 1995).

argument approach, Socratic method, and lecture approach using illustrations, diagrams, and charts; use of tutorials; use of reviews; and use of practice exams.

II. PEDAGOGICAL GOALS, CONTENTS, AND STRUCTURE OF THE CASEBOOK

In their preface, Barron, Dienes, McCormack, and Redish identify a common theme that applies to all five editions of their book. That theme, which is also referred to as their goal, is "to produce a teaching tool rather than a constitutional encyclopedia."⁴ In addition to this overall goal, the authors' objective is to create in the professor and the student the "excitement and ferment" that is produced by the newer case law and law review literature.⁵ Although the production of law review articles has increased a great deal in recent years, the authors' goal is still to familiarize the readers with some of the scholarly literature related to the issues raised in the casebook. While the selections utilized from this large volume of law review literature is more concise in this latest edition of the textbook, they are still comprehensive.⁶

The authors have attempted, in their editing of the cases, to show distinctions among the current United States Supreme Court justices. Since the nine justices today are not reluctant to write highly individual separate opinions, this has made the process of editing to condense the cases for casebook purposes a more critical and arduous task for the authors.⁷

As I describe the contents and the structure of the casebook, a few more pedagogical goals will be identified as they relate to different chapters throughout the book. This will further establish the authors' objective in this fifth edition of their casebook to place a high value on "teachability and brevity."⁸

The casebook has 1542 pages, including the table of cases and index. The authors describe the text as one of the shorter constitutional law casebooks. Although the users of the book have indicated their preference for a larger typeface, the authors decided to retain the same size typeface a second time in this edition.⁹

4. BARRON ET AL., *supra* note 1, at v. According to the authors, this goal is becoming more and more difficult to achieve.

5. *Id.* at vii.

6. *Id.* at v & vii.

7. *Id.* at v.

8. *Id.* at vii.

9. *Id.* at v.

The text of the "Constitution of the United States" is at the front of the book following the table of contents, which I prefer over the placement in the rear of the book where it was located in previous editions.¹⁰ Following the Constitution is a table entitled "Justices of the United States Supreme Court."¹¹ This table includes the names of all of the justices from 1789 to the present and the names of the presidents who were in office during those years.¹² I find this information to be quite useful in discussing the cases and assigning research projects about the justices.

In an attempt to achieve their pedagogical goals and aid the student in developing an understanding of constitutional law concepts, the authors have compartmentalized the subject in the casebook as follows:

- The *Introduction*, which has proven to be popular with students and professors, provides a ten-page "Brief Overview of American Constitutionalism."¹³ This opening to the casebook contains primarily historical information addressing such topics as rebellion and independence of the English colonies, state constitutions and the Articles of Confederation, drafting and ratifying the United States Constitution, intellectual and structural traditions of the Constitution, stages of American constitutional history, and the process and significance of appointing Supreme Court justices.

- *Chapter I* focuses on judicial review as an instrument of American Constitutionalism.¹⁴ This chapter begins with an examination of the judicial review theory in a democratic society. The three sections comprised in this chapter address the following: (1) *Marbury v. Madison*¹⁵ and *Martin v. Hunter's Lessee*¹⁶ as examples of the decisional sources of judicial review as practiced in the United States and an examination of the history and theory behind *Marbury* and *Martin*; (2) a discussion of the various theories concerning the ways in which the judicial review power may be utilized; and (3) a discussion of the political question concept illustrated by a narrow group of cases in which the Supreme Court declines to exercise its judicial review

10. *Id.* at xxi-xxxvii.

11. *Id.* at xxxix-xlvii.

12. *Id.*

13. *Id.* at 1-10.

14. *Id.* at 11-58.

15. 5 U.S. (1 Cranch) 137 (1803), reprinted in BARRON ET AL., *supra* note 1, at 13.

16. 14 U.S. (1 Wheat.) 304 (1816), reprinted in BARRON ET AL., *supra* note 1, at 23.

authority if either of six factors have been met,¹⁷ as identified in *Baker v. Carr*.¹⁸

• *Chapter II* contains a discussion of the structure or formation of federalism, introducing the fundamental dimensions of the federalism concept.¹⁹ Federalism has been described as including the "interrelationships among the states and relationship between the states and the federal government."²⁰ This chapter emphasizes the ambit of federal powers and some of the structural restrictions on state government authority including such cases as *McCulloch v. Maryland*²¹ and *U.S. Term Limits, Inc. v. Thornton*.²² Since this material is only an introduction to the dimensions of federalism, federal and state powers and the limitation placed on those powers are examined in more detail in other chapters of the casebook.²³ The authors state the basic issue to be considered while one is reading this chapter as "whether the federal government is created by a collection of independent states (implying state dominance) or is instead a creature of all the people (implying that the states are subordinate units)."²⁴

• *Chapter III* explores the national legislative power by emphasizing the commerce power, the taxing and spending powers, and federal legislation in aid of civil rights and liberties.²⁵ The historical development of the commerce power is examined by stressing the establishment of the foundation of the commerce authority, direct and indirect effects tests, the New Deal confrontation, economic regulation, protection of civil rights under the Commerce Clause, and limits on the commerce power. These limitations on the commerce power involve the regulation of state activities and the Tenth Amendment, and the "substantial effects" concept.²⁶

• *Chapter IV* concentrates on the regulatory powers of state and local governments (when local governments act on behalf of the state as agents).²⁷ In addressing the state power in American federalism, the chapter focuses on the ambit of state power, the sources of that power, and the restrictions on the exertion of that power originating

17. BARRON ET AL., *supra* note 1, at 37.

18. 369 U.S. 186 (1962), *reprinted in* BARRON ET AL., *supra* note 1, at 34.

19. BARRON ET AL., *supra* note 1, at 59.

20. BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

21. 17 U.S. (4 Wheat.) 316 (1819), *reprinted in* BARRON ET AL., *supra* note 1, at 62.

22. 514 U.S. 779 (1995), *reprinted in* BARRON ET AL., *supra* note 1, at 73.

23. BARRON ET AL., *supra* note 1, at 59.

24. *Id.*

25. *Id.* at 89-188.

26. *See id.*

27. *Id.* at 189.

from the division of authority between the federal and state governments. This chapter stresses such topics as the state's authority to regulate commerce and the dormant Commerce Clause doctrine, discrimination against commerce, undue burdens on interstate commerce, the state as a market participant, interstate privileges and immunities, and the preemption of the state power to regulate interstate commerce by Congress or the Constitution.²⁸

• *Chapter V* provides a discussion of executive and congressional relations, and the doctrine of the separation of powers between the executive and legislative branches of the government.²⁹ The dominant focus here is on the national government's task of maintaining the crucial function of separation of powers while carrying out the important functions of the government.³⁰ Additionally, this chapter explains how the separation of powers doctrine has been treated in the interaction between the executive and legislative branches of the government.³¹ The main topics covered in this chapter include executive powers, congressional lawmaking, the foreign affairs power, the war power, executive privilege, and executive and legislative immunity.³²

• *Chapter VI* addresses substantive limitations on governmental power imposed by the Fifth Amendment Due Process Clause and section one of the Fourteenth Amendment (namely the Privileges and Immunities Clause, Due Process Clause, and Equal Protection Clause).³³ Additionally, there are discussions of selected incorporation versus total incorporation of the Bill of Rights into the Fourteenth Amendment Due Process Clause (liberty component), and procedural due process related to civil proceedings.³⁴

• *Chapter VII* explores two forms of substantive due process: economic substantive due process and fundamental rights substantive due process.³⁵ The rise and fall of the economic form of substantive due process is traced. In addition, the authors present recommendations for greater judicial examination of economic regulations by utilizing due process or some other constitutional remedy.³⁶ Cases

28. *Id.* at 189-258.

29. *Id.* at 260-61.

30. *Id.* at 260.

31. *Id.* at 260-61.

32. *See id.* at 259-372.

33. *Id.* at 373-74.

34. *Id.* at 393-401, 373-406.

35. *Id.* at 407-08.

36. *Id.* at 407.

such as *Lochner v. New York*³⁷ and *Nebbia v. New York*³⁸ are included in the economic substantive due process section of Chapter VII, along with additional discussions related to the Takings Clause and the Contracts Clause. The fundamental rights substantive due process component of the chapter traces the evolution of fundamental personal rights doctrine involving rights related to privacy (e.g., contraception and abortion), marriage, and family.³⁹ Topics such as homosexuality and liberty, the right to personal lifestyle choices, rights to treatment and protection, and the right to refuse treatment are also addressed in this chapter.⁴⁰

• *Chapter VIII* examines the meaning of equal protection and contains a wider range of issues for the reader to analyze.⁴¹ The content reveals a great deal of discussion concerning the importance of race in American society. Although it is clear from the cases that the Supreme Court considers race issues significant, the Court is severely divided on how to resolve these issues.⁴² For example, the effect of *Adarand Constructors, Inc. v. Peña*,⁴³ applying the strict scrutiny standard of review to racial preferences in federal government contracts, is examined. A new section was added to this chapter pertaining to racial classifications in voting districts in which the authors report and analyze, for example, *Bush v. Vera*⁴⁴ and *Miller v. Johnson*.⁴⁵ The case of *Romer v. Evans*,⁴⁶ in which the Court rejected Colorado's anti-gay rights constitutional provision, is reported and analyzed reflecting new dimensions for review using the rational basis test and new dimensions for gay rights issues.⁴⁷ Information in the notes concerning discrimination based on sexual preference has been expanded along with the section covering gender-based discrimination.⁴⁸ For instance, extensive treatment is given to the case of *United States v. Virginia*,⁴⁹ in which the Court rejected single-sex education at a publicly-supported military school.

37. 198 U.S. 45 (1905), *reprinted in* BARRON ET AL., *supra* note 1, at 409.

38. 291 U.S. 502 (1934), *reprinted in* BARRON ET AL., *supra* note 1, at 418.

39. BARRON ET AL., *supra* note 1, at 407.

40. *See id.* at 407-558.

41. *Id.* at 559.

42. *Id.* at vi.

43. 515 U.S. 200 (1995), *reprinted in* BARRON ET AL., *supra* note 1, at 687.

44. 517 U.S. 952 (1996), *reprinted in* BARRON ET AL., *supra* note 1, at 706.

45. 515 U.S. 900 (1995), *reprinted in* BARRON ET AL., *supra* note 1, at 701.

46. 517 U.S. 620 (1996), *reprinted in* BARRON ET AL., *supra* note 1, at 570.

47. BARRON ET AL., *supra* note 1, at vi, 570.

48. *Id.* at vi; *see also id.* at 559-886.

49. 518 U.S. 515 (1996), *reprinted in* BARRON ET AL., *supra* note 1, at 750.

In short, Chapter VIII presents a comprehensive treatment of equal protection comprising such topics as: traditional equal protection (rationality review); suspect classifications (race, alienage, national origin); discriminatory purpose and impact; discrimination in education; benign quotas, preferential treatment, and affirmative action related to education and employment; race-conscious voting districts; quasi-suspect classifications (gender, illegitimacy); rational basis "with teeth"; fundamental rights and interests (interstate migration, marriage, family, equal access to the franchise, equal access to courts); and limitations on fundamental rights and interests, such as welfare and abortion funding, and economic inequalities related to a right to an education.⁵⁰

• *Chapter IX* provides a detailed coverage of freedom of expression explaining, among other things, the content-based and content-neutral distinction.⁵¹ The organization of this chapter is different from previous editions, and a new and separate section on freedom of association has been added.⁵² Consequently, the four major components of Chapter IX discuss the free speech doctrine, the calibration or adjustment of First Amendment protection (commercial speech and obscenity), freedom of the press, and freedom of association.⁵³ Specific topics within these categories include: the clear and present danger doctrine; offensive language; symbolic speech; speech in school settings and the military; publicly funded speech; speech in the public forum; time, place and manner regulations; prior restraint doctrine; overbreadth doctrine; commercial speech (advertising and solicitation); obscene and indecent speech; defamation; privacy; media access to information; access to the electronic and print media; and freedom of association related to organizations and associating for election purposes (campaign spending and political patronage).⁵⁴

• *Chapter X* focuses on freedom of religion, emphasizing as its theme the compatibility and conflict of the Establishment and Free Exercise Clauses, two aspects of religious freedom.⁵⁵ This chapter discusses the decline of the *Lemon v. Kurtzman*⁵⁶ test and the differences in the Court's responses to the legality of prayer at a high school

50. See BARRON ET AL., *supra* note 1, at 559-886.

51. *Id.* at 887.

52. *Id.* at vi.

53. *Id.* at 887-1232.

54. *Id.* at vi; *see also id.* at 887-1232.

55. BARRON ET AL., *supra* note 1, at 1233.

56. 403 U.S. 602 (1971), *reprinted in* BARRON ET AL., *supra* note 1, at 1240.

commencement in *Lee v. Weisman*⁵⁷ and to a subsidy for theological speech in the case of *Rosenberger v. University of Virginia*.⁵⁸ The topics explored in this chapter include: public aid to religious schools; religion in the public schools; government acknowledgment of religion; the difference between conduct and belief; free exercise and accommodation; and government accommodations that tend toward establishment.⁵⁹

• *Chapter XI* concentrates on the state action concept examining the courts' and Congress' power to cope with situations involving behavior that is "nominally private," but that is asserted by claimants to be offensive to "constitutional values."⁶⁰ Topics such as the following are explored in this chapter: origins of the state action limitation; the "public function" theory; the "significant state involvement" theory; and legislating against private action under the Thirteenth and Fourteenth Amendments.⁶¹

• *Chapter XII*, the last chapter in the casebook, focuses on limitations on judicial review, some of which are imposed by the Constitution and others that are imposed by the Court itself.⁶² These limitations restrict the Court's power to hear certain cases; thus, the Court may lack jurisdiction to hear a particular case or the case may be nonjusticiable. The topics emphasized in this chapter include: congressional control of federal court jurisdiction; the Eleventh Amendment limitation; the case or controversy requirement; taxpayer and citizen standing; third-party standing; mootness and timing of judicial review; and ripeness, prematurity and abstractness.⁶³

Finally, all twelve chapters of the Barron, Dienes, McCormack, and Redish casebook contain notes with information describing pertinent principles and comments concerning the theories in the cases. These notes preceding and following the principal cases are valuable because they expound on the cases and assist the reader in his or her understanding and analysis of the relevant law.

57. 505 U.S. 577 (1992), *reprinted in* BARRON ET AL., *supra* note 1, at 1268.

58. 515 U.S. 819 (1995), *reprinted in* BARRON ET AL., *supra* note 1, at 1337.

59. *See* BARRON ET AL., *supra* note 1, at 1233-1342.

60. *Id.* at 1343.

61. *See id.* at 1343-1412.

62. *Id.* at 1413.

63. *See id.* at 1413-96.

III. A METHOD OF TEACHING CONSTITUTIONAL LAW FROM THE CASEBOOK

Although I have used two other casebooks over the years, I have used the Barron, Dienes, McCormack, and Redish casebook to teach my Constitutional Law course for at least six years, because I find it to be a good teaching tool in preparing my students for class discussions, law school examinations on constitutional law, the bar exam, and other related projects. This casebook is very compatible with my teaching methodology, and enhances my ability to combine several techniques and approaches of teaching the subject matter in order to maximize the learning benefits to my students. I am not saying that no other constitutional law casebook is compatible with my teaching methodology. In fact, I can work with all of the casebooks I have seen in the area. My reason for preferring the Barron, Dienes, McCormack, and Redish textbook is that it facilitated my teaching methodology by making it easier to integrate various techniques and approaches of teaching constitutional law.

The following sections focus on various things I consider before teaching my course and various methods I utilize to develop in my students the ability to recognize and understand relevant issues and causes of action, as well as to understand, analyze, apply, and synthesize constitutional law principles, cases, and problems (real and hypothetical). This section will address the following: my pedagogical goals in using the casebook; levels of learning; learning modalities; learning styles; use of the casebook, problems, charts and diagrams; use of tutorials; use of review sessions; and use of practice examinations.

A. *Pedagogical Goals*

My pedagogical goals in using the Barron, Dienes, McCormack, and Redish casebook to teach constitutional law are consistent with that of the authors and the levels of learning that are listed in subsection B of this section. The educational objectives that I have developed assist me in determining the most appropriate teaching approaches to employ and the proper course materials to utilize. Those goals are as follows:

1. To communicate a basic knowledge of the United States Constitution, rules and principles, related terminology, and cases.
2. To develop in the student an understanding of the Constitution, rules and principles, related terminology, underlying rationales behind the rules and principles, cases, and public policy rationale.

3. To develop the ability to analyze cases and problems (real and hypothetical) by improving the student's issue-spotting and problem-solving skills.
4. To develop in the student the ability to synthesize the law for purposes of class discussion of cases, problem-solving activities, and answering exams.
5. To familiarize students with the backgrounds and philosophies of the current Supreme Court justices through preparation and presentation of research papers. Students are assigned a Supreme Court justice to research.

In brief, the preceding educational goals are compatible with the content and structure of the casebook. The reason for this compatibility or harmony between my pedagogical goals and the Barron, Dienes, McCormack, and Redish casebook is as follows: The casebook on the whole is complete; the selection of cases is quite good; most of the principal and note cases contain sufficient details; the notes provide relevant questions, historical and current data, references to legal periodical and book information, commentary from other scholars, and information concerning current and former United States Supreme Court justices; and the structure of the book is traditional. Supplementary real and hypothetical problems are employed to provide problem-solving activities which, in turn, enhance the ability to accomplish my pedagogical goals.

B. Levels of Learning

In order to make the most effective use of the Barron, Dienes, McCormack, and Redish casebook, it has been beneficial for me to become familiar with levels of learning. This awareness of learning levels helps me determine which teaching methodology works best for the intellectual development of the students in my class.

According to Bloom's Taxonomy of cognitive learning, there are six levels of intellectual development,⁶⁴ the highest being six and the lowest being one. These learning levels are as follows with level 1 as the easiest and level 6 as the most difficult:

64. 1 MICHAEL JOSEPHSON, *LEARNING AND EVALUATION IN LAW SCHOOL* 53-54 (1984).

BLOOM'S TAXONOMY⁶⁵

- Level 1: Knowledge
- Level 2: Comprehension
- Level 3: Application
- Level 4: Analysis
- Level 5: Synthesis
- Level 6: Evaluation

A law school hierarchy of learning model has been developed which is a variation of Bloom's Taxonomy. It is believed that this Law School Model Taxonomy (modified learning model for law schools) more correctly describes the mental processes that pertain to persons who are attending law school.⁶⁶ The following illustrates the law school intellectual levels of cognitive learning with level 1 as the easiest or least challenging and level 6 as the most difficult or the most challenging:

LAW SCHOOL MODEL TAXONOMY⁶⁷

- Level 1: Knowledge
- Level 2: Understanding
- Level 3: Issue Spotting
- Level 4: Problem Solving
- Level 5: Judgment
- Level 6: Synthesis

Level 1, *knowledge*, is the lowest and least challenging stage of intellectual development. This level requires that the student have "knowledge of specific information" such as constitutional law-related terminology, rules and principles, facts, and data.⁶⁸ Primarily, on this level "the student's study time is devoted to isolating and memorizing the terms, rules, definitions, facts, classifications, criteria, trends, policies, methodologies and forms that he/she must 'know' for the exam."⁶⁹ In addition, this level requires that the student have "knowledge of how information is used and organized."⁷⁰

Level 2, *understanding*, is a combination of comprehension and application. This level entails the student's mental capacity to utilize

65. See *id.* at 53-57 (explaining the levels of intellectual development identified in Bloom's Taxonomy); see also JOSEPH F. CALLAHAN ET AL., *TEACHING IN THE MIDDLE AND SECONDARY SCHOOLS* 43-44 (5th ed. 1995).

66. JOSEPHSON, *supra* note 64, at 57.

67. *Id.* at 58.

68. *Id.* at 60-61.

69. *Id.* at 66.

70. *Id.* at 62; see also *id.* at 60-69 (explaining level of learning 1 in detail).

and store data.⁷¹ Comprehension comprises, for example, the student's ability to paraphrase, interpret, apply, compare, and make predictions concerning rules, principles, policies, and court holdings.⁷²

Level 3, *issue spotting*, and level 4, *problem solving*, are two separate intellectual skills that constitute the ability to analyze. Consequently, these two skills may be referred to as the analysis level of learning. Issue spotting pertains to "finding and defining problems,"⁷³ whereas problem solving involves the "discussion and resolution of those problems."⁷⁴ Since the development of issue-spotting and problem-solving skills results in the enhancement of analytical ability, the student who masters these skills will be able to diagnose a problem, engage in systematic analysis, apply knowledge to new situations, reason by analogy, and reach sound conclusions.⁷⁵

Level 5, *judgment*, exemplifies the highest use of the analytical and evaluative skills required by the issue-spotting and problem-solving levels of learning. Here the student is required to develop three skills: (1) "[the] ability to *perceive nonlegal aspects of a problem*"; (2) [the] ability to *integrate nonlegal aspects into the problem-solving process*; and (3) [the] ability to *critically analyze individual problems in the context of the legal process*."⁷⁶

Level 6, *synthesis*, is the most difficult and advanced stage of learning. This skill is evidenced "by an ability to rationalize previously irreconcilable positions, reorganize, categorize, classify, and otherwise 'pull together' information, policies and concepts. Perspective, creativity, and wisdom are needed."⁷⁷ Since synthesis is such an advanced intellectual skill, it requires, for example, an essay or a term paper format. Seldom can a student demonstrate his or her synthesis ability under exam conditions.⁷⁸

In sum, the accomplishment of the preceding levels of intellectual development is normally necessary for the student to consistently demonstrate the greatest level of competence in law school courses. Since the Barron, Dienes, McCormack, and Redish text provides a thorough coverage of the concepts included in the basic constitutional law course using cases and notes, the text aids in the development of

71. *Id.* at 69.

72. *See id.* at 69-74 (describing level of learning 2 in detail).

73. *Id.* at 91.

74. *Id.*

75. *See id.* at 74-93 (explaining levels of learning 3 and 4 in detail).

76. *Id.* at 93-94; *see also id.* at 93-96 (explaining level of learning 5 in detail).

77. *Id.* at 97.

78. *Id.* at 97-98 (explaining level of learning 6 in some detail).

one's knowledge, understanding, issue spotting, problem solving, judgment, and synthesis.

C. *A Consideration of Learning Modalities and Learning Styles*

Familiarity with the "learning modalities" and "learning styles" of my students helps me to determine which teaching methodology will be the most effective and which approaches work the best with the Barron, Dienes, McCormack, and Redish casebook. It has been stated that the most effective teachers are "those who adapt their teaching styles and methods to their students. Such teachers use approaches that interest the students, that are neither too easy nor too difficult, that match the students' learning styles, and that are relevant to the students' lives."⁷⁹ In other words, the professor should be aware of a broad range of teaching methods and use those that are most beneficial and successful with the students in that professor's class.

A "learning modality" has been defined as "the way students prefer to receive sensory reception, called *modality preference*, or the actual way a student learns best, called *modality adeptness* or strength."⁸⁰ Four learning modalities that have been identified are visual modality, auditory modality, kinesthetic modality, and tactile modality.⁸¹ *Visual modality* means that a student prefers to learn "by seeing."⁸² *Auditory modality* means that a student prefers to learn "through instructions from others or self."⁸³ *Kinesthetic modality* means that a student prefers to learn by "doing and being physically involved."⁸⁴ Finally, *tactile modality* means that a student prefers to learn "by touching objects."⁸⁵ Sometimes a student's preference for a certain learning modality may not be his or her modality strength. Furthermore, a student may have a mixture of modality strengths which may be altered as the person matures intellectually and has different experiences.⁸⁶ In using the casebook and supplementary materials in my course, I consider all four of the preceding learning modalities in order to achieve optimal results, mastery of constitutional law concepts, and enhanced performance on exams.

79. CALLAHAN ET AL., *supra* note 65, at 49; see also James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389 (1996/1997).

80. CALLAHAN ET AL., *supra* note 65, at 49.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 49-50.

Learning style is closely related to learning modality in that *learning style* pertains to "the way a student learns best in a given situation"⁸⁷ and how he or she "mentally process[es] . . . information once it has been received."⁸⁸ An example of a classification of learning styles (containing four categories of learners) includes the following:

1. *Concrete sequential learners*, who prefer direct, hands-on experiences presented in a logical sequence.
2. *Concrete random learners*, who prefer more wide-open exploratory kinds of activities, such as games, role playing, simulations, and independent study.
3. *Abstract sequential learners*, who are skilled in decoding verbal and symbolic messages, especially when presented in logical sequence.
4. *Abstract random learners*, who can interpret meaning from nonverbal communications and consequently do well in discussions, debates, and media presentations.⁸⁹

In sum, the learning modalities and learning styles of one's students should be considered in deciding how to use the Barron, Dienes, McCormack, and Redish casebook and in choosing the most effective methodology to convey constitutional law concepts and theories.

*D. Using the Casebook, Problems, Charts, and Diagrams:
My Teaching Methodology*

I employ a variety of techniques and approaches which I combine to form my methodology of teaching constitutional law from the Barron, Dienes, McCormack, and Redish casebook. My semester-long class meets four days a week for an hour each day. Students are required to read the entire Constitution, all of the principal cases and note cases, and other textual material in the casebook in order to adequately prepare for class discussions, exams, and other projects. The casebook allows me the flexibility to convey the material using the case method, question-answer approach, problem-solving approach, lecture method, visual-aid approach, and the Socratic-questioning approach.

Since I teach constitutional law to first-year students, I normally use a comprehensive briefing method for about three weeks at the

87. *Id.* at 50.

88. *Id.*

89. *Id.* at 50-51.

beginning of the course in order to do a thorough dissection of the cases, and then I move to a more condensed briefing format. As with most other constitutional law casebooks I have seen, the editing of the cases by the authors allows for the use of both comprehensive and condensed briefing techniques. The thoroughness of most of the principal and note cases in the Barron, Dienes, McCormack, and Redish casebook is very pleasing to me, especially since I have an aversion to most cursory educational materials.

In addition to having students brief cases (some of which are assigned to particular persons in advance), I ask specific questions about the principal cases, note cases, and other information in the introductory and note material. Since the authors have included a number of questions in the notes following the cases, I utilize some of those in my question-answer approach. For example, the authors have identified the following questions as difficult and perplexing to the student who is studying the modern law of equal protection: "How is the reasonableness of a classification to be determined? What is the rationale, if any, for different standards of equal protection review? . . . When does a classification 'significantly burden' a 'fundamental right' and how does this form of equal protection review relate to substantive due process analysis?"⁹⁰ These and other questions concerning the cases require the students to exercise their knowledge, understanding, analysis, and synthesis skills with respect to the cases, principles, and issues. Being able to understand and analyze the cases and principles and apply them to different problems is crucial.

The problem-solving approach requires issue spotting and resolution of those issues. With this approach, I ask students to analyze hypotheticals in the casebook, problems distributed in class from other books, and real factual situations reported in the newspaper. For instance, the following problem is included in the notes of the casebook:

In November 1994, the California voters passed Proposition 187. The effect of the measure was to add a provision to the California Constitution prohibiting the use of state funds for provision of various services to illegal aliens. Among the services included were education (both K-12 and higher education), health care, welfare, and a variety of social services. Thus far, the lower courts have enjoined operation of Proposition 187 on the basis of *Plyler v. Doe*;

90. BARRON ET AL., *supra* note 1, at 560.

but does *Plyler* dictate the results on all aspects of this measure, extending beyond education and children?⁹¹

In order to resolve this problem, the student must be able to analyze *Plyler v. Doe*⁹² and apply it to the problem.

Usually, I distribute copies of problems from outside sources along with an essay outline form on the same day or at least one or two days before the students discuss the problems in class. Individuals may volunteer or be assigned to present informal oral arguments in front of the class with the rest of the students acting as members of the advocates' law firms or as judges who ask questions at the end of the presentations. Students are expected to use the Constitution and cases in the casebook as authorities to support their propositions. Sometimes the class is divided in half, placing students in two separate law firms for the purpose of having them argue opposite sides of the issues. I also use this approach with some of the cases in the text, which permits the student to present arguments from the majority, concurring, and dissenting opinions, as well as arguments from related cases in the casebook that are cited in the case being argued. The editing of the cases by Barron, Dienes, McCormack, and Redish makes the cases concise yet leaves enough details and relevant information in the majority, concurring, and dissenting opinions for the student to get a complete understanding of the concepts and the Court's rationale. Consequently, this facilitates the problem-solving approach.

Discussing real and hypothetical problems in class and having students present oral arguments in front of the class enhances the student's knowledge, understanding, issue-spotting, problem-solving, judgment, and synthesis skills.⁹³ I have found that students enjoy the problem-solving approach, probably because it stimulates them, makes them think about the case law and the Constitution, and requires that they exercise their application skills.

I have found the combination of the lecture method and the visual-aid approach to be quite effective in communicating concepts and enhancing the students' intellectual development. When I begin a new subject presented in a chapter, I give an overview of that area using examples, charts, and diagrams that I create.⁹⁴ Since I make

91. *Id.* at 885. See also *Plyler v. Doe*, 457 U.S. 202 (1982), reprinted in BARRON ET AL., *supra* note 1, at 873.

92. 457 U.S. 202 (1982), reprinted in BARRON ET AL., *supra* note 1, at 873.

93. For information concerning these six levels of intellectual development, see section III.B. *supra* and accompanying notes.

94. See the Appendix *infra* for samples of some of the diagrams and charts I have developed to use in class and in review sessions to dissect the concepts. Students have utilized these charts

transparencies of these visual aids, they are shown on an overhead projector while I am summarizing the material. My charts and diagrams illustrate the concepts, principles, and cases in the casebook, which I rely on as one of the sources of the information included in the charts and diagrams. For example, the following are three of the many charts and diagrams I have developed that illustrate concepts, principles, and cases directly from the casebook: (1) Equal Protection Analysis (illustrating discriminatory purpose and impact, rational basis standard of review, intermediate standard of review, and strict scrutiny standard of review); (2) *Brown v. Board of Education*⁹⁵ (*Brown I*) (illustrating various aspects of the case); and (3) Reverse Discrimination (State) (illustrating various aspects of *Regents of the University of California v. Bakke*⁹⁶).⁹⁷ I also utilize the blackboard for illustration purposes.

Students have told me that the utilization of charts and diagrams, in conjunction with the casebook and lectures, enhances their knowledge, understanding, and analytical skills. The reason behind the students' positive response to the lecture and visual-aid approaches may be due in large part to the fact that many students prefer to learn by seeing and hearing, which is consistent with the "visual modality" (seeing) and the "abstract sequential learners" (hearing) style of learning.⁹⁸

Finally, I do some Socratic questioning along with the case method, but the Socratic method is not a dominant technique in my class. In short, I have found that my students have learned best and have performed better on exams as a result of my utilization of the case method, question-and-answer approach, problem-solving approach, lecture approach, visual-aid approach, review sessions, tutorials, and practice exams.

and diagrams as study aids in their study of Constitutional Law.

I have also created diagrams and charts for use in my Torts class and review sessions, and they appear to be quite useful there as well.

95. 347 U.S. 483 (1954).

96. 438 U.S. 265 (1978).

97. See Appendix *infra* containing these charts and diagrams. See generally BARRON ET AL., *supra* note 4, at 559-662.

98. For information concerning learning modalities and learning styles, see section III.C. *supra* and accompanying notes.

E. Use of Tutorial and Review Sessions

1. Tutorial Sessions

In addition to the four days that my class meets to cover the large mass of material comprised in a basic Constitutional Law course, I hold my own weekly or biweekly nonmandatory tutorial hour, if needed, to: (1) review concepts covered in the casebook and in class that week that need clarification; (2) answer questions that were not asked in class about the notes in the casebook and constitutional law in general to clear up misunderstandings; (3) outline and discuss hypothetical and real problems; (4) discuss selected practice exam questions; and (5) provide any other assistance related to the course.

Thurgood Marshall School of Law also provides a tutorial program for all first-year courses which is designed to assist the students in their law studies. There are at least four sections of each course. Each section of each course is assigned a second- or third-year student tutor to review substantive materials, discuss hypotheticals, administer and discuss practice exam questions, and provide other study assistance. These sessions meet on a weekly basis, and tutorial assistance is provided on an individual basis upon request. Although all of the students do not take advantage of these sessions, most of the tutors who have worked in the program have been diligent and effective in helping those students who do participate in the tutorials. On the whole, tutorial sessions have proven to be very beneficial and worthwhile.

2. Review Sessions

Since I administer several practice exams and real exams during the semester, it is imperative that I schedule review sessions to explain all of the concepts covered in the course. These sessions are similar to bar review sessions, except they are more thorough. Since the Barron, Dienes, McCormack, and Redish casebook is so comprehensive, it aids greatly in my coverage of the concepts and the integration of case examples from the text. I hold three to four reviews a semester on the weekends and sometimes at night, lasting approximately three to six hours each. They are open to all first-year students who wish to attend. I utilize the lecture format explaining all or most constitutional law concepts, and use a number of illustrations displaying my diagrams

and charts⁹⁹ on the overhead projector to break down the complexities of the subject matter. Materials in the casebook are also referenced. Since breaks are given throughout the session, students are asked to hold their questions until just before the break in order to complete the review within the specified three- to six-hour time frame.

The advantage of holding these reviews is to cover the subject without having to stop and brief cases, as is done in class, and to pull together an entire area of the law in a very thorough fashion. In daily classes, the student hears bits and pieces of a particular area or concept, whereas in a review, the student is able to hear and see the whole concept along with many examples and diagrams clarifying and applying the relevant principles.

In brief, these review sessions have been in great demand, and, according to the feedback I have received, they have aided students significantly in their ability to understand and analyze constitutional law principles. This, in turn, has enhanced the students' performance on exams.

F. *Use of Practice Exams*

My law school administers uniform comprehensive multiple-choice examinations at the end of the semester for Constitutional Law and the other first-year substantive law courses, constituting fifty percent of the students' grades in each course. This comprehensive exam is similar to a bar exam, the purpose being to better prepare students for the real bar exam. A valuable tool I use to enhance the students' ability to perform competently on the comprehensive exam in Constitutional Law is the practice exam. Five practice exams are administered throughout the semester at a time when the students have two- or three-hour breaks. Each exam is cumulative for reinforcement purposes. The number of questions may range from twenty to one hundred as the semester progresses and more information is covered in class.

On the first practice exam, the students receive 1.7 or 1.8 minutes per question to answer the exam similar to the amount of time they will have to answer the multistate portion of the bar exam; however, I decrease the time per question with each succeeding exam to force the students to read and analyze faster and apply multiple-choice exam techniques more quickly and effectively. Students also receive materials and hear lectures on strategies for answering multiple-choice

99. See the Appendix *infra* for samples of some of the diagrams and charts I have developed to use in review sessions and in class.

law questions. Since the learning process involved here also requires that students be aware of why they selected or rejected certain answers, my tutor is normally responsible for discussing the answers to practice exams in his or her tutorial session. I am also available to discuss the questions in my office or at my tutorials.

In sum, the students receive two minutes per question on the two real interim exams I administer, and that same amount of time on the comprehensive exam administered at the end of the semester. Consequently, reducing the time for each of the five practice exams, and providing opportunities to review those exams, have helped considerably in increasing my students' chances for success on all of their real exams, especially the comprehensive examination. Mandatory reviews of my two interim exams have also helped significantly in correcting deficiencies.

IV. CONCLUSION: AN EVALUATIVE NOTE

The Barron, Dienes, McCormack, and Redish casebook is traditional, detailed, comprehensive, organized, and well researched. Clearly, it helps the reader to understand, analyze, and synthesize the law. The selection of cases is very good in that it provides the student with sufficient information to prepare for law exams, the bar exam, and projects requiring an understanding of constitutional law principles. The notes after the principal cases are very informative and extensive, providing the reader with summaries of related cases, background data, excerpts from law review articles and books, opinions from other scholars, questions raising hypothetical situations, explanations of court holdings and law in the cases, and comments concerning the philosophies of the Supreme Court justices. The only suggestion I would like to make to the authors to enhance this casebook further would be the inclusion of hypothetical problems throughout the chapters. In short, I enjoy using this casebook in my course, and it clearly works well with my pedagogical goals and teaching methodology.

APPENDIX

Sample Constitutional Law Diagrams and Charts
Illustrating the Casebook

SOURCES FOR APPENDICES

BAR BRI BAR REVIEW (1997).

JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY (5th ed. 1996).

JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW (4th ed. 1995).

BLACK'S LAW DICTIONARY (6th abr. ed. 1991).

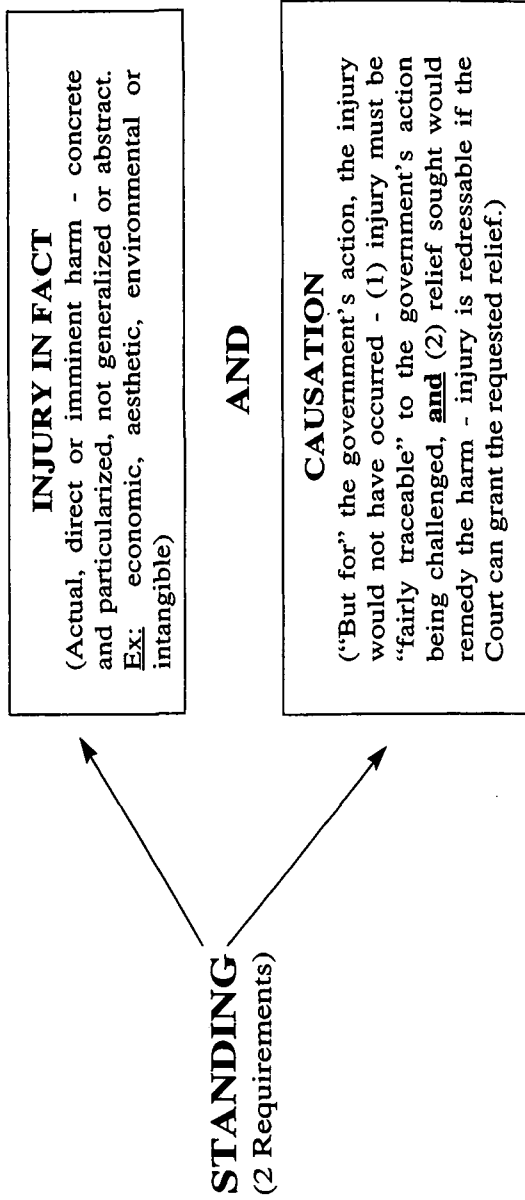
JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (5th ed. 1991).

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997).

PHIL PRYGOSKI, CONSTITUTIONAL LAW (2d ed. 1996).

WEST BAR REVIEW, CONSTITUTIONAL LAW (1995).

STANDING CONCEPT



THIRD PARTY STANDING [PRUDENTIAL STANDING]

PRUDENTIAL STANDING RULE	EXCEPTIONS TO THIRD PARTY STANDING RULE
<p>1. Rule: A litigant usually lacks standing to assert the rights of a third party, who is not in court as a party to the lawsuit (Applied in <i>Warth v. Seldin</i>, 422 U.S. 490 (1975)).</p> <p>2. This is a rule of judicial self-restraint that is subject to many exceptions. - Not a requirement of Art. III.</p> <p>3. The party whose rights are at risk or who has been injured should be a party to the suit as the most effective advocate of the rights at issue.</p>	<p>The following exceptions were created to protect the civil rights of third parties:</p> <p>1. The bar to asserting the legal rights of third parties may be removed by enactment of legislation by Congress so long as the requirements of Art. III have been met. (Ex. federal statute that provides for third party standing)</p> <p>2. One may litigate the rights of a third party if it would be difficult or impossible for the third party to assert his own legal rights (Ex. comatose person; mentally ill or retarded person; etc.)</p> <p>3. One may litigate the rights of a third party if there is a close personal relationship between the two persons or a special relationship (Ex: doctor-patient relationship; husband-wife relationship; commercial relationship; etc.)</p> <p>4. One may litigate the rights of a third party if there is a risk that the third party's rights will be diluted if third party standing is not allowed.</p>

MOOTNESS CONCEPT

MOOTNESS

MOOTNESS

- Pertains to a person seeking judgment in a case where the issues no longer exist, therefore no controversy to be resolved.
- No subject matter on which the Court's judgment can operate.
- Mootness Doctrine** - When a court's resolution of an issue is no longer necessary to compel the result sought by a litigant, the case is moot, and Federal courts do not have authority to decide the issue(s). (In other words, since the issues no longer exist, there is no controversy to be resolved).
- Example - DeFunis v. Odegaard, 416 U.S. 312 (1974).

REASONS CASES BECOME MOOT

1. The law in question has changed.
2. Defendant has paid money owed and no longer wishes to appeal.
3. A party has died.
4. The allegedly wrongful conduct stopped and can not reasonably be expected to recur - This must be proven by the defendant.
- Ex: DeFunis v. Odegaard, 416 U.S. 312 (1974).
5. A party to the case can no longer be affected by the challenged statute.
- Ex: Minor who is no longer within the age bracket governed by the statute being challenged. He has reached the legal drinking age required by the statute. Craig v. Boren, 429 U.S. 190 (1976).

EXCEPTIONS TO MOOTNESS

1. Repetition Issues
 2. Collateral Consequences
 3. Voluntary Cessation
- These Cases Are Not Moot**
1. **Repetition Issues Rule** - When a controversy is "capable of repetition, yet evading review," it will not become a moot case.
Ex: a) issue concerns events of short duration (Ex: pregnancy; elections; divorce actions)
 2. **Collateral Consequences Rule** - If there remains unresolved important collateral consequences which will adversely affect the litigant, a case will not be rendered moot. (unresolved additional effects as to the litigant). (Ex: joint tortfeasor from whom contribution is sought).
 3. **Voluntary Cessation Rule** - Where it is reasonable to expect that the wrong will recur the voluntary cessation of allegedly illegal conduct will not make a case moot.

PROCEDURAL DUE PROCESS

Principle:

No person shall be deprived of life, liberty or property without due process of law (5th and 14th Amendments)

General Rule:

In order for the government to take a person's "life, liberty or property, a fair process or procedure is required.
Ex: notice, hearing, impartial decision maker,
etc. may be required depending on the situation.

WHAT ARE LIFE, LIBERTY, AND PROPERTY INTERESTS? (What Do These Mean?)

- A. **Life** - pertains to the interval between life and death; the period of a person's existence; being; living.
- B. **Liberty** - pertains to freedom from bodily restraints imposed by the criminal process; freedom to contract; right to engage in gainful employment; right to acquire knowledge; right to marry; right to worship God; right to establish a home and raise children; etc.
- C. **Property** - pertains to ownership of realty, chattels or money; an entitlement - something a person is entitled to.

IS THERE A DEPRIVATION OF LIFE, LIBERTY OR PROPERTY? (Have These Been Restricted?)

- A. **Life** - life protected by the Constitution includes all personal rights and enjoyment of one's faculties; acquiring useful knowledge, the right to marry, establish a home, and rear children, etc.
- B. **Liberty** - pertains to imprisonment; family rights (parental rights); commitment to a mental institution; right to contract (See also "Liberty" in 1st Box - left)
- C. **Property** - interests already acquired in specific benefits (a legitimate claim to a benefit under state or federal law; public employment; government benefits, such as welfare, social security, disability, etc.; licenses; public school education (disciplinary and academic suspensions)).

WHAT PROCESS OR PROCEDURE IS DUE UNDER THE CIRCUMSTANCES? (What Type Of Process Or Procedural Protection Is Required?)

- A. **Minimum Procedures May Include Any Of The Following:** 1) notice; 2) evidentiary hearing; 3) cross examination of witnesses; 4) independent decision maker; 5) a written statement of the grounds for decision; 6) effective and timely notice of one's rights; and 7) availability of legal counsel furnished by the state if an inmate is indigent.
- B. **Procedure In Criminal Cases:** 1) notice of charges; 2) opportunity for accused to hear witnesses against him; 3) opportunity to present witnesses and evidence; 4) assistance of counsel; 5) rules of evidence; 6) impartial judge; 7) decision by a jury based upon the facts; 8) transcript; and 9) appeal based on the record.

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3/21/98

SUBSTANTIVE DUE PROCESS

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1. Two due process clauses in the Constitution
 - a) 5th Amendment - applies to the federal government
 - b) 14th Amendment - applies to state and local governments
2. The substantive component of due process comes mainly from the meaning of the word "liberty". (No person shall be deprived of life, liberty or property without due process of law - 5th and 14th Amendments)
3. Two Types of Substantive Due/Process (D/P) (Economic and Fundamental Rights)

ECONOMIC AND OTHER SUBSTANTIVE NON-FUNDAMENTAL DUE PROCESS RIGHTS

1. Rational Basis Test applies - a) the government's objective must be legitimate, and b) the means chosen to achieve the objective must be reasonably related to that objective (any conceivable basis for the law).

2. Burden of proof is on the challenger.

3. Examples of Non-Fundamental Rights:

- a) economic regulations
- b) most social welfare legislation upheld
- c) right to keep prescription information private or secret.
- d) business and labor regulations (ex: insurance regulations; "blue sky" laws; bank regulations; unfair competition and trade practice controls)
- e) taxation

Exception - { discriminatory tax will be found unconstitutional

- f) no recognized right to live a certain lifestyle (ex: prohibition on the use of illegal drugs; requirement that police officers wear short hair; requirement that motor cyclists wear helmets)

- g) zoning laws (ex: through zoning, a suburban community may eliminate all groups of three or more persons unrelated by blood, adoption or marriage)

Exception - { D/P Clause is violated if zoning regulation prohibits members of traditional families from living together (i.e. cousins or grandchildren) *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)

Generally, these laws will be upheld by the Court as legitimate.

FUNDAMENTAL RIGHTS SUBSTANTIVE DUE PROCESS

1. Strict Scrutiny Test applies - a) the government's objective must be compelling, and b) the means chosen to achieve that objective must be necessary (there must not be any less burdensome or restrictive means of accomplishing the same result).

2. These are basic rights.

3. Compelling interest is an overriding interest.

4. Burden of proof is on the government because a fundamental right is involved.

5. Examples of Fundamental Rights:

- a) privacy rights (ex: rights related to sex, marriage, child-bearing, child-rearing - abortion)
- b) right to travel
- c) right to vote
- d) 1st Amendment rights
- e) right to an abortion
 - pre-viability rule
 - informed consent rule
 - post-viability rule
 - funding of abortion not permitted by state or federal governments

- f) The right of a parent to educate his child outside of public schools is contained within the right of privacy.

- g) There may be a fundamental liberty interest in refusing unwanted medical treatment.
 - If the patient is not competent, the state may require life saving measures unless there is "clear and convincing" evidence that the patient would not have wanted such measures taken. (*Cruzan* (1990)).

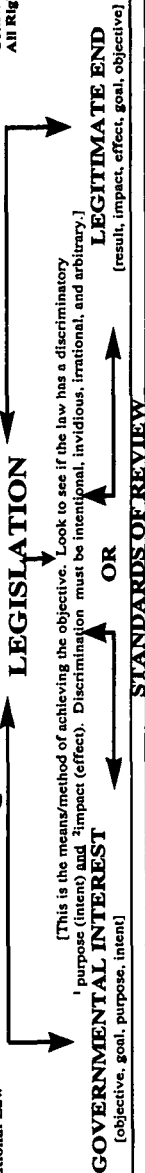
6. Right of consenting adults to engage in sodomy is not a fundamental right.

7. Sexual activity outside of marriage is not fundamental.

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EQUAL PROTECTION ANALYSIS



GOVERNMENTAL INTEREST

[objective, goal, purpose, intent]

LEGISLATION

LEGITIMATE END

[result, impact, effect, goal, objective]

STANDARDS OF REVIEW

1. Rational Basis/Rational Relationship Test

Minimal Scrutiny

[slight examination of government classification]
Presumption of constitutionality as to gov't classification.

a) Relationship between the government's interest and legislation or between the classification and a legitimate end must be **reasonable**.

b) Examine the government's action for a **rational relationship** between the classification and a **permissible** government objective.

c) Must be a **rational/reasonable basis** for the classification/legislation - any conceivable basis - Ex: police powers, etc.

d) **Burden of proof** is on the challenging party to prove the lack of a **reasonable basis** for the legislation (must show that the law is arbitrary or irrational).

e) Traditional test is characterized by extreme judicial deference to the legislature's judgment.

f) **Rational Basis "With Teeth" or "With Bite"**: Court is looking more closely at rational basis. A closer fit may be required. Government's burden of justification is more onerous. Less judicial deference is given. This reflects a modern approach after *City of Cleburne* (1985) and some other cases.

g) **Classifications**: 'social welfare and economic regulations/statutes'; 'age'; 'poverty'; 'wealth'; 'health'; 'handicap'; 'mental retardation'; 'access to housing'; 'education'; 'alienage'. **Political Function Extension** - Rational basis test "applies to laws that exclude aliens from positions intimately related to the process of democratic self-government." Ex: product of officers, teachers, etc. *Bernal v. Felner*, 407 U.S. 216 (1964).

2. Intermediate Test

Moderate Scrutiny

[average examination of government classification]

a) No presumption of constitutionality.

b) Must be a **substantial relationship** between **important** government objectives and the legislation.

c) This is a **quasi-suspect classification**.

d) Not a formally adopted test like the rational basis and strict scrutiny tests.

e) **Burden of persuasion** is on the government.

f) **Classifications**: 'gender'; 'illegitimacy'.

3. Strict Scrutiny/Compelling Governmental Interest Test

Maximum Scrutiny

[close examination of government classification]

a) No presumption of constitutionality

b) Focuses on whether the classification/law is **necessary** to achieve the government's objective. - Are there alternative means of achieving the same objectives that are less burdensome on the individual? - **NARROWLY TAILORED OR DRAWN** (is there a good fit between the purpose and the classification/law?)

c) Statutory scheme must be **necessary** to promote **compelling governmental interest** - is the interest an **exceeding** one?

d) This is a **suspect classification**.

e) **Suspect Classifications**: When the government disadvantages a protected class by imposition of a special hardship ("the basis on which governmental benefits are awarded or penalties imposed").

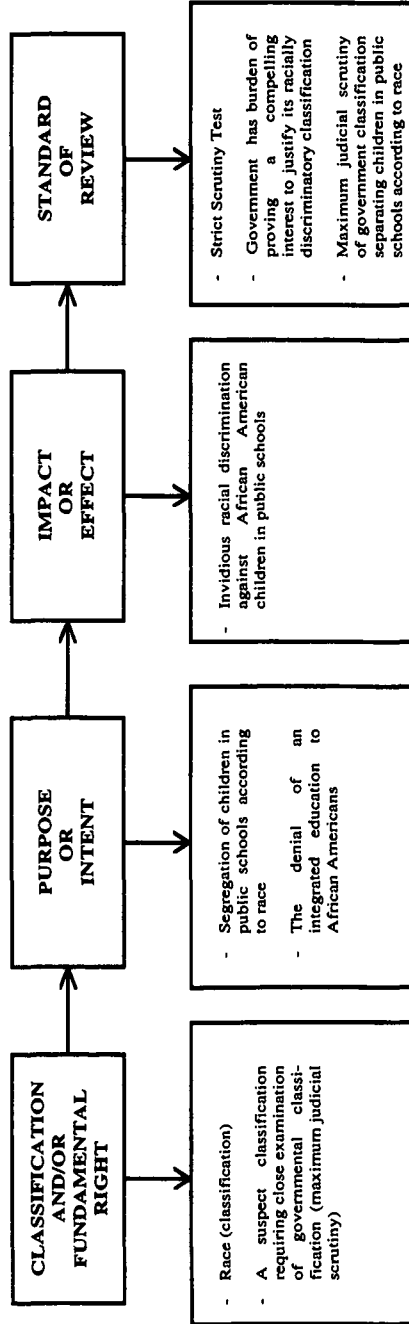
f) **The government has the burden** of justifying its differential treatment of groups by showing that the classification is necessary to achieve a **compelling governmental interest** - if any **less burdensome alternative** is available, the government must use the less onerous means to accomplish its goal.

g) **Classifications**: 'race'; 'national origin'; 'alienage (usually)'. Laws based on these classifications are **inherently suspect** and warrant **close judicial scrutiny**.

h) **Fundamental Rights**: When the government classification scheme burdens the exercise of a **fundamental right**, the strict scrutiny test applies. Ex: '1st Amendment rights'; 'marriage'; 'procreation'; 'interstate travel'; 'voting'; 'sexual privacy'; 'access to courts (criminal justice)'; etc.

BROWN V. BOARD OF EDUCATION (BROWN I), 347 U.S. 483 (1954)

Law or Conduct Being Challenged - State enforced segregation which prohibited African Americans and Anglos from attending public schools together.



Court's Conclusion and Holding - Court concluded "that in the field of public of education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." Brown I (1954).

REVERSE DISCRIMINATION* (STATE)

University of California -
Special Admissions Program
Regents of the University of California v. Bakke,
438 U.S. 265 (1978)

Intent/Purpose

- to promote increased diversity in student body.
- affirmative action.
- to reduce historic deficit of traditionally disfavored minorities in medical schools and the medical profession.
- to increase the number of physicians who will practice in communities currently underserved.
- to counter the effects of societal discrimination.
- to obtain the educational benefits that flow from a ethnically diverse student body.

Classification

- race

Standard of Review

- strict scrutiny **if** the discrimination is intentional and has a discriminatory effect.
- classification must be necessary to achieve school's objectives.

Effect/Impact

- denial of admission to some qualified whites

**Title VI -
Civil Rights
Act of 1964
violated**

***Reverse Discrimination** - This occurs when a person exercises bias or prejudice against a person or class of persons with the objective of correcting a pattern of discrimination that has existed against another person or class. *West's Legal Thesaurus/Dictionary* 663 (1985). "A type of discrimination in which the majority groups are purportedly discriminated against in favor of minority groups, usually via affirmative action programs." *Black's Law Dictionary* 1319 (6th ed. 1990).