



## Santa Clara Law Review

---

Volume 28 | Number 4

Article 3

---

1-1-1988

# Basic Constitutional Analysis

Russell W. Galloway Jr.

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Russell W. Galloway Jr., *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775 (1988).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol28/iss4/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# BASIC CONSTITUTIONAL ANALYSIS

Russell W. Galloway, Jr.\*

## I. INTRODUCTION

The United States Constitution is "the Nation's single most fundamentally important document."<sup>1</sup> It sets up the federal government, confers powers upon its branches, and imposes crucial limits on both federal and state governments in order to protect individual liberty. The Constitution is the "supreme Law of the Land"<sup>2</sup> and the foundation of our entire system of government.

But how does constitutional law actually work? What is the structure of constitutional analysis? When judges enforce constitutional limits, how do they proceed?

This article describes the basic structure of constitutional analysis.<sup>3</sup> Its purpose is to help law students, lawyers, and judges understand the common structural elements that run through American constitutional law.<sup>4</sup> The article begins with a background discussion of the nature and the functions of the Constitution. Next, the article presents a basic schema for the analysis of constitutional issues. The body of the article consists of a detailed discussion of this schema. The article concludes with examples of the application of the basic analytical structure to a variety of constitutional issues.

## II. BACKGROUND

The United States Constitution has two main functions. First, it sets up ("constitutes") the federal government and allocates power among the branches of the federal government ("separation of powers") and between the federal and state governments ("federalism").

---

\* 1988 by Russell W. Galloway, Jr.

\* Professor, Santa Clara University School of Law; J.D., 1965, Columbia University School of Law; Director, Supreme Court History Project; member of the California bar.

1. Foreword to U.S. CONST. (U.S. Government Printing Office, 1976).

2. U.S. CONST. art. VI.

3. Future articles by the author will describe, in greater detail, the structure of the basic analysis for the major constitutional limits covered in standard constitutional law courses.

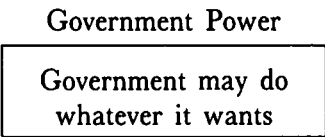
4. Throughout this article references will be made to a hypothetical lawyer who is analyzing a client's constitutional claim. The same analysis should be useful for law students and judges as well.

Second, it restricts the government’s power in order to protect individual liberty.

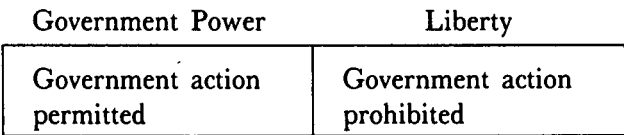
Each of these functions involves imposing limits on governmental power. Limits concerned primarily with the structure of government are grouped under the label “allocation of powers.” Limits concerned primarily with protecting individuals are referred to by the label “individual liberty.”<sup>5</sup> Constitutional law is the set of rules used to enforce these limits.

The premise of American constitutional law is that courts have the power of judicial review, i.e., the power to review the conduct of other government officials and strike it down if it violates an enforceable constitutional limit.<sup>6</sup> Analysis of constitutional claims involves the examination of when courts will exercise judicial review and award relief for conduct found to violate a constitutional limit.

Federal Judge Jerre S. Williams has sketched a pictorial diagram designed to help constitutional lawyers remember the overall structure of the field.<sup>7</sup> First, picture a government that has total, absolute, unqualified power over its subjects. Let that power be represented by a rectangle.



Second, take away some of that power by means of a written constitution that imposes legally enforceable restrictions on government action. Call the activities the government may not undertake “liberty.”



5. The distinction between limits based on the allocation of powers and those based on individual liberty is not always clear. The establishment clause, for example, has been assigned to both categories.

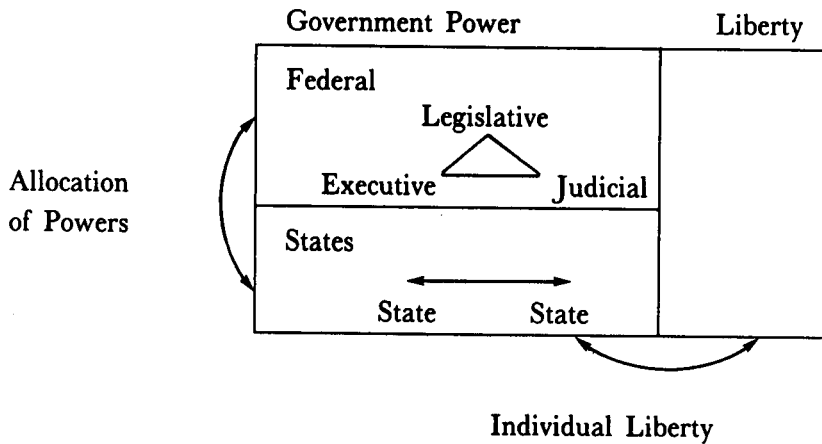
6. The classic case, of course, is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a good account of “the story of judicial review,” see R. McCloskey, *THE AMERICAN SUPREME COURT* (1960).

7. J. WILLIAMS, *CONSTITUTIONAL ANALYSIS IN A NUTSHELL* 33-74 (1979). The model will be described here in modified form.

Third, allocate the government power between the federal government and the States.

Government Power	Liberty
Federal	
States	

Fourth, allocate the federal power among the three branches of the federal government and the state power among the States. Finally, label the limits. Call the limits primarily concerned with governmental structure "allocation of powers" and those primarily concerned with protecting individuals "individual liberty."



At this point, Judge Williams' model summarizes the general structure of constitutional limits. To determine whether the Constitution has been violated, one must scan both allocation-of-powers and individual-liberty limits and analyze whether the conduct that harmed claimant violated any of the limits. The lawyer must ask, first, is the challenged action unconstitutional because the power exercised has been assigned to some other branch of government and, second, is the challenged action unconstitutional because the power has been withheld from the government in order to protect individual liberty.

In short, the following outline summarizes the usual organization of constitutional limits.

Constitutional Limits: Summary

- I. Limits based on allocation of powers
  - A. On the federal government
  - B. On the States
- II. Limits designed to protect individual liberty

The main limits taught in constitutional law courses<sup>8</sup> and involved in constitutional law cases may be summarized by expanding this outline.

Constitutional Limits: Expanded Summary

- I. Limits based on allocation of powers
  - A. On the federal government
    - 1. Delegated powers
      - a. Congress
      - b. President
    - 2. Tenth amendment
    - 3. Separation of powers, etc.
  - B. On state governments
    - 1. Dormant commerce clause
    - 2. Privileges and immunities clause
    - 3. Supremacy clause (pre-emption), etc.
- II. Limits designed to protect individual liberty
  - A. Procedural due process
  - B. Substantive due process
  - C. Equal protection
  - D. Freedom of expression
  - E. Freedom of religion
    - 1. Establishment clause
    - 2. Free exercise clause
  - F. Contract clause
  - G. Eminent domain clause
  - H. Fourth amendment (searches and seizures)
    - I. Privilege against self-incrimination
    - J. Sixth amendment right to counsel, etc.

---

8. Based on personal experience, the author suggests that the constitutional law curriculum in most United States law schools includes constitutional law I that focuses mainly on the allocation of powers; constitutional law II that focuses on individual liberties such as equal protection, freedom of speech, and freedom of religion; and criminal procedure, which may be viewed as constitutional law III, that focuses on procedural due process, the fourth amendment, and the privilege against self-incrimination.

To determine whether a client's constitutional rights have been violated, the lawyer must scan this list and check whether any of the above limits is arguably applicable. If so, the lawyer must analyze the rules developed by the Supreme Court for enforcing that limit in order to determine whether, in fact, the limit is applicable and, if so, whether it has been violated.

But constitutional analysis involves more than the analysis of specific constitutional limits. Preliminary questions must be considered in each case before reaching the merits of the constitutional claim. In addition, issues concerning remedies must be addressed.

### III. BASIC STRUCTURE OF CONSTITUTIONAL ANALYSIS

Fortunately for the constitutional lawyer, the general structure of constitutional analysis is identical for all constitutional limits. This basic structure is summarized in the following outline:

#### Constitutional Law: Basic Analysis

- I. Preliminary questions
  - A. Does the court have jurisdiction?
  - B. Is the claim justiciable?
  - C. Was claimant's harm caused by government action?
- II. On the merits
  - A. Applicability: Is the constitutional limit applicable?
  - B. Compliance: Did respondent satisfy the limit?
- III. Remedies

Let us translate this outline into prose. Constitutional claimants must first satisfy three standard preliminary requirements: jurisdiction, justiciability, and government action. If they fail, the claims should be dismissed without reaching the merits. If they succeed, the analysis on the merits has two standard components regardless of the specific constitutional limit invoked. The court must determine first whether the limit is applicable. If so, the court must determine second whether the government has complied with the limit.<sup>9</sup> If the limit is applicable and the government has not complied, the final set of constitutional questions concerns what remedies are appropriate.

The following sections discuss each component of basic constitutional analysis in more detail.

---

9. In most cases, constitutional limits apply only to the government. Therefore, respondent will usually be referred to as the government in this article. The reader should note, however, that in a few cases respondent will be a private party.

### A. *Preliminary Questions*

As a general rule, constitutional claimants are not entitled to a ruling on the merits unless they can show that the government has harmed them sufficiently to create a justiciable claim that is within the jurisdiction of the court.

In other words, claimant must satisfy three preliminary requirements. The court must have jurisdiction over the claim. The claim must be justiciable. And, unless an exception is present, the harm must have been caused by government action. Claimant has the burden to show that each of these requirements is met. If claimant fails to satisfy any of the preliminary requirements, the claim should be dismissed without reaching the merits. The ensuing sections will discuss the three preliminary questions separately.

#### 1. *Does the court have jurisdiction?*

A court should not decide a constitutional claim on the merits unless it first determines that it has jurisdiction over the claim.<sup>10</sup> Although the categories of federal jurisdiction are set forth in the Constitution,<sup>11</sup> issues concerning jurisdiction are mainly statutory rather than constitutional. This is because Congress, exercising its constitutional power to regulate the jurisdiction of the federal courts, has passed statutes enumerating the kinds of cases federal courts may hear, and the Supreme Court has held that the statutory enumeration implies a rejection of all other federal jurisdiction.<sup>12</sup> Thus, jurisdiction to hear constitutional claims is normally a statutory rather than a constitutional issue.<sup>13</sup>

If the court determines that it has no jurisdiction, the claim should be dismissed. If, on the other hand, jurisdiction is present, the analysis proceeds to the next preliminary question.

---

10. Jurisdiction is the power of the courts to hear and decide a claim. The jurisdiction requirement is also applicable to nonconstitutional claims.

11. U.S. CONST. art. III, § 2.

12. *E.g.*, *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810).

13. One important jurisdictional issue does involve constitutional law, however, namely the scope of Congress' power to repeal the appellate jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2 provides, "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Suppose Congress repeals the Supreme Court's jurisdiction to review lower court orders prohibiting abortions or busing or permitting school prayer. In such cases, difficult issues arise concerning whether the jurisdictional regulation is constitutional.

## 2. *Is the claim justiciable?*

A court should not decide a constitutional claim on the merits unless it first determines that the claim is justiciable.<sup>14</sup> The justiciability requirement has many components. First, there must be an actual controversy, i.e., a concrete clash of adverse interests that is ripe and not moot. Second, the claimant must have standing to sue. Third, the issue must be appropriate for judicial resolution. Each of these requirements has its own test, often with numerous prongs.

The justiciability requirement is complex and requires careful analysis.<sup>15</sup> As with the other preliminary questions, claimant has the burden to show that the claim is justiciable. If claimant fails, the claim should be dismissed without reaching the merits. If the claim is justiciable, the analysis proceeds to the final preliminary question.

## 3. *Was claimant's harm caused by government action?*

As a general rule, constitutional limits apply only to the government.<sup>16</sup> Claimant, in other words, must show that the harm complained of was the result of government action.<sup>17</sup> If the harm was caused by conduct of a government official, the government-action requirement is satisfied unless the conduct was unrelated to the official's duties. If the harm was caused by conduct of a private party, the government-action requirement is not satisfied unless the conduct was a public function (i.e., a function traditionally exclusively reserved to the government)<sup>18</sup> or the government either compelled,<sup>19</sup> very substantially encouraged,<sup>20</sup> or was symbiotically entangled in (profited from)<sup>21</sup> the conduct.

---

14. This is also true of nonconstitutional claims.

15. A more detailed discussion of the justiciability requirement will be presented in a separate article in this series.

16. The major exception is the thirteenth amendment ban on slavery and involuntary servitude which is enforceable against private violators as well as government violators.

17. The term "state action" is often used to describe the requirement, however "government action" is the better term. The requirement of "government action" applies equally to the federal government and to the States. Further, the requirement applies to local government entities since they are considered subdivisions of the States.

18. *E.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (foreclosure of warehouseman's lien is not a public function); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (operation of a public utility is not a public function).

19. *E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (segregation of a private restaurant is government action because compelled by state law).

20. *E.g.*, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (refusal to rent property to black family is government action because encouraged by state law).

21. *E.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (segregation of a private restaurant in a government parking facility is government action).



If the government-action requirement is applicable and claimant fails to satisfy it, the constitutional claim should be dismissed without reaching the merits.

To summarize, if a constitutional claim is to be presented to a court, the analysis should begin with the preliminary requirements of jurisdiction, justiciability, and government action. If claimant fails to satisfy any of these requirements, the claim should be dismissed. If, on the other hand, all three preliminary requirements are satisfied, the analysis may proceed to the merits of the constitutional claim.

### B. *On the Merits*

If claimant demonstrates that the government has harmed him or her sufficiently to create a justiciable claim that is within the jurisdiction of the court, the next question is whether the government action that harmed the client violated any constitutional limit.<sup>22</sup> The task of the lawyer is to examine the government action, characterize it, and then scan the list of constitutional limits to determine which limits are arguably applicable.<sup>23</sup> For each limit that appears applicable, the lawyer should analyze the claim on the merits to see whether the limit has been violated.

The general structure of analysis is identical for every limit established by the Constitution, whether based on allocation of powers or individual liberty considerations. In each case, the first question on the merits is whether the limit is applicable, i.e., whether the government action that harmed claimant is the kind of government action that is subject to the limit. If the limit is not applicable, the analysis on the merits ends for that limit and there is no need to proceed to the second question. Instead, the lawyer should search for other limits that may be applicable and analyze them.

If, on the other hand, the limit is applicable, the second question on the merits in each case is whether the limit is satisfied, i.e., whether the government complied with the rules developed by the Supreme Court for enforcing that limit. If these rules are satisfied,

---

22. The remainder of this article will assume that the government action requirement is applicable and that the conduct that harmed claimant was government action.

23. This process is akin to the "characterization" step in a conflict of law analysis. In such an analysis, the lawyer examines the facts, determines whether the claim is based on tort, contract, or the like, and then applies the choice-of-law rules for the appropriate body of law. Similarly, in constitutional cases, the lawyer examines the facts, determines whether the government action is subject, for example, to the due process or equal protection requirement, and then applies the body of law for the appropriate limit.

claimant loses on the merits regarding that limit. If, on the other hand, the limit is applicable and the government has not met its requirements, claimant wins on the merits.

The next two sections discuss the two standard questions—applicability and compliance—that must be analyzed in order to determine whether claimant wins or loses on the merits.

1. *Applicability: Does the particular constitutional limit apply to the government action at issue?*

Assume that the lawyer has analyzed the government action that harmed claimant, scanned the list of constitutional limits, and determined that a particular limit may apply. The next step in the analysis is to take a closer look and determine whether, in fact, the limit is applicable, i.e., whether the government action that harmed claimant is the kind of government action that is subject to that limit.

Each constitutional limit restricts a particular type of government action. The delegated powers limit,<sup>24</sup> for example, applies to action by the federal government, especially federal legislation.<sup>25</sup> The dormant commerce clause<sup>26</sup> applies to state action burdening interstate commerce. The due process clauses<sup>27</sup> apply to deprivations of life, liberty, or property. The equal protection clause<sup>28</sup> applies to government classifications, i.e., government conduct conferring a benefit or imposing a burden on one class of persons to the exclusion of others. The free speech clause<sup>29</sup> applies to government infringements of protected expression.

In other words, the body of substantive law developed by the Supreme Court for enforcing each constitutional limit includes a set of rules defining the kind of government action to which the limit applies. The first step in the analysis of any limit on the merits is to apply these rules carefully and determine whether they are met, i.e., whether the government action that harmed claimant is the kind of government action that is subject to the limit.

Here is an example. In the 1987 case *Miller v. Florida*,<sup>30</sup> the Supreme Court described the kind of government action that is sub-

---

24. U.S. CONST. amend. X.

25. Other limits which apply to federal legislation include the bicameralism and presentment requirements. U.S. CONST. art. I, § 7; see *INS v. Chadha*, 462 U.S. 919 (1983).

26. U.S. CONST. art. I, § 8.

27. *Id.* amends. V, XIV.

28. *Id.* amend. XIV, § 1.

29. *Id.* amend. I.

30. 107 S. Ct. 2446 (1987).

ject to the ex post facto clauses,<sup>31</sup> namely penal legislation that is retrospective, disadvantaging, and not merely procedural. Assume the lawyer suspects the client may have been harmed by an ex post facto law. To determine whether the ex post facto limit is applicable, the lawyer must analyze the facts carefully to determine whether the government action that harmed the client was (1) legislation (a statute, ordinance, or administrative regulation), (2) penal, (3) retrospective, (4) disadvantaging, and (5) not merely procedural. If any of these five elements is missing, the government action is not an ex post facto law, the clauses are inapplicable, and no violation of those particular limits has occurred. If, on the other hand, all five elements are present, one of the ex post facto clauses is applicable, and the lawyer should proceed to determine whether the government has complied with the limit.

The same approach applies with regard to each constitutional limit the lawyer thinks is arguably applicable. One must first read the Supreme Court's cases carefully to determine the rules the Court uses to define the kind of government action that is subject to the limit. If these rules are not met, the limit is not applicable, and the client loses that claim on the merits. If the rules are met, the analysis proceeds to the second standard question, namely whether the government has complied with the limit.

## 2. *Compliance: Did the government satisfy the limit?*

Assume that a particular constitutional limit is applicable, i.e., that the government action that harmed claimant is subject to the limit. The next question is whether the government has complied with the rules developed by the Supreme Court for enforcing that limit.

The body of substantive law developed for enforcing each constitutional limit includes not only rules defining what kind of government action is subject to the limit but also rules defining when, if ever, that kind of government action is permitted and when it is not. The second and final question on the merits of any constitutional claim is whether these rules are satisfied.

The Court uses a wide variety of rules for enforcing different constitutional limits. Sometimes the limit is an absolute ban. If the government action is an ex post facto law, for example, the rule is

---

31. U.S. CONST. art. I, §§ 9 and 10. The former applies to Congress while the latter applies to the States.

that the government simply may not enforce it.<sup>32</sup> Since there is no way the government may permissibly enforce an ex post facto law, the claimant wins if this limit is applicable.

In contrast, many constitutional limits are enforced by using means-end scrutiny.<sup>33</sup> In these cases, the government action is constitutional if the government has a sufficiently strong justification to satisfy the applicable level of means-end scrutiny. For example, even racial classifications that harm minorities are constitutional if "strict scrutiny" is met, i.e., if the government action is necessary to further a compelling government interest.<sup>34</sup> Similarly, economic statutes conferring burdens on the elderly are subject to the equal protection clause but are constitutional if rationally related to a legitimate government interest.<sup>35</sup>

Moreover, many other kinds of tests are used to enforce other constitutional limits. The clear and present danger test is used in cases involving advocacy of illegal acts.<sup>36</sup> The actual malice test is used in public defamation cases.<sup>37</sup> Sometimes the Court uses ad hoc balancing tests.<sup>38</sup> And so on.

In each case, the lawyer's job is to determine the precise test used by the Court in enforcing the particular constitutional limit in question and then to apply that test to the facts and determine whether the test is met. If a limit is applicable but the test is met, the government has complied with the limit and claimant loses on the merits. If, on the other hand, the limit is applicable and the test is not met, the government has not complied with the limit, so claimant wins on the merits and the analysis may proceed to questions concerning remedies.

---

32. *Miller v. Florida*, 107 S. Ct. 2446 (1987).

33. For example, means-end scrutiny is used to enforce the delegated powers limit, the equal protection clause, the contract clause, the free exercise of religion clause, the privileges and immunities clause, and the substantive requirements of the due process clauses. *See* Gallo-way, *Means-End Scrutiny in American Constitutional Law*, 21 *LOY. L.A.L. REV.* 449 (1988).

34. *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (exclusion of Japanese persons from the West Coast during World War II does not violate equal protection clause).

35. *E.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (law requiring police officers to retire at the age of fifty does not violate equal protection clause).

36. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ohio Criminal Syndicalism Act violates freedom of speech).

37. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation award against the New York Times violates freedom of speech).

38. *E.g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (eminent domain clause).

### C. Remedies

If claimant has satisfied the preliminary requirements and the government has failed to comply with an applicable constitutional limit, the lawyer must determine which remedies are available.

The Supreme Court has developed a variety of rules governing remedies for constitutional violations. These rules vary depending on the specific violation present. When the government has violated constitutional limits designed to protect criminal defendants, for example, the rules often concern when derivative evidence must be excluded and when convictions must be reversed.<sup>39</sup> Often the rules concern the kinds of damage awards that are permitted against government officials who violate constitutional rights.<sup>40</sup> Sometimes the rules concern the permissible scope of injunctions to prevent future violations.<sup>41</sup> Thus, as a final step in the analysis, the lawyer must identify and apply the appropriate rules concerning remedies for the constitutional claim.

In order to make the reader more comfortable with the basic structure of constitutional analysis, illustrative examples will be presented in the following section. In each example, a constitutional claim will be put through the analytical process from beginning to end.

## IV. EXAMPLES

### A. *Ex Post Facto Clause*

First, consider an example chosen because it is simple and has been discussed earlier. To set the stage, here is an outline of the basic structure of ex post facto analysis.

---

39. *E.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (fourth amendment exclusionary rule); *Chapman v. California*, 386 U.S. 18 (1967) (harmless error rule).

40. *E.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (President has absolute immunity from civil damages liability); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (executive officials other than the President have only qualified immunity from civil damages liability).

41. *E.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974) (scope of remedy in school desegregation case is determined by the nature and extent of constitutional violation); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (injunction requiring intrusive monitoring of state agencies by federal courts is improper).

Ex Post Facto Clause: Basic Analysis

- I. Preliminary questions
  - A. Jurisdiction
  - B. Justiciability
  - C. Government action
- II. On the Merits
  - A. Applicability
    - 1. Legislation
    - 2. Penal
    - 3. Retrospective
    - 4. Disadvantaging
    - 5. Not merely procedural
  - B. Compliance (absolute ban)
- III. Remedies

Miller was convicted of several crimes. Under the guidelines in effect at the time of the crimes, the presumptive sentence was five and one-half years. New guidelines enacted after the commission of the crimes raised the presumptive sentence to seven years. The judge applied the latter and sentenced Miller to seven years.<sup>42</sup>

The issue is whether the sentence violated the Constitution. Analysis begins with the preliminary questions. Assume that the court has jurisdiction pursuant to an applicable statute. Miller's claim is justiciable: he has been seriously harmed by a prison sentence; the dispute over the sentence is concrete and actual; his claim is ripe and not moot; he has standing to sue on his own behalf; and the issue is capable of judicial resolution. The harm was caused by government action, namely a sentence of imprisonment imposed by a judge pursuant to a statute. Therefore, the preliminary requirements are met.

Scanning the list of constitutional limits, the lawyer determines that the best shot is the ex post facto clause.<sup>43</sup> On the merits, the first question is whether the clause is applicable, i.e., whether the government action is the kind that is subject to the clause. The five-prong *Miller* test is controlling. The government action involves legislation (a statute). The legislation is penal (criminal). The legislation was applied retrospectively, because it "change[d] the legal consequences of acts completed before its effective date."<sup>44</sup> The new law disadvan-

---

42. The facts are taken from *Miller*, 107 S. Ct. 2446 (1987). See *supra* notes 32-33 and accompanying text.

43. U.S. CONST. art. I, § 10.

44. *Miller*, 107 S. Ct. at 2451.

tagged Miller, because it resulted in a "more onerous" sentence than under prior law.<sup>45</sup> The change was not merely procedural; it affected Miller's substantive rights in a significant way. Thus, the Court's five-prong test is met and the ex post facto clause is applicable.

The next question is whether the government complied with the clause. The ex post facto clause imposes a ban on ex post facto laws, so the government cannot comply with the limit except by eliminating the retrospective application.

Therefore, the Constitution has been violated, and Miller is entitled to a remedy. The retrospective application of the sentencing guidelines must be eliminated. Miller's sentence must be vacated and his case remanded for sentencing under the old guidelines.

#### B. *Dormant Commerce Clause*

For a second illustration, let us consider a run-of-the-mill federalism case involving commerce clause barriers to state burdens on interstate commerce. Here is an outline of the standard dormant commerce clause rules.

---

45. *Id.* at 2452.

Dormant Commerce Clause: Basic Analysis

- I. Preliminary questions
  - A. Jurisdiction
  - B. Justiciability
  - C. Government action
- II. On the Merits
  - A. Applicability (state burdens on interstate commerce)
    - 1. General rule: State burdens on interstate commerce must comply with the requirements of the dormant commerce clause.
    - 2. Exceptions
      - a. Market participant or
      - b. Congressional consent or
      - c. Twenty-first amendment
  - B. Compliance
    - 1. Urgent need for national uniformity? (If so, the burden is unconstitutional.)
    - 2. Discrimination against interstate commerce?
      - a. Discrimination?
        - 1) Facial, or
        - 2) In effect
      - b. Justification: unconstitutional unless
        - 1) The government action serves a legitimate government interest.
          - a) Legitimate government interest and
          - b) Substantially effective means and
        - 2) No nondiscriminatory alternatives exist.
    - 3. Nondiscriminatory burden on interstate commerce? (If so, constitutional unless the burden clearly outweighs the need. Balancing test.)
      - a. Need vs.
      - b. Burden
- III. Remedies: State may not impose burden.

Hughes bought minnows in Oklahoma and sold them out of State. He was convicted and fined for violating an Oklahoma statute banning out-of-State sales of Oklahoma minnows.<sup>46</sup> You are a lawyer retained by Hughes to challenge the constitutionality of the conviction on appeal.

---

46. The facts are from *Hughes v. Oklahoma*, 441 U.S. 322 (1979), a leading case on the dormant commerce clause.



First, the preliminary questions. Assume the appellate court has jurisdiction over the appeal. Hughes stands convicted and owes the fine, so he has a justiciable claim for the same reasons discussed in the ex post facto illustration. The conviction and fine are government action.<sup>47</sup> So it is appropriate to reach the merits: if the government action that harmed Hughes falls within a constitutional limit, Hughes may prevail.

Examining the list of constitutional limits, you conclude the dormant commerce clause is the best bet. The limit is applicable, because the Oklahoma statute imposes a substantial burden on interstate commerce, Oklahoma is not a market participant, Congress has not consented to the burden, and the regulation does not concern alcoholic beverages.

Is the limit satisfied? The Court uses three different tests. There is no need for national uniformity, so the *Cooley* test doesn't help.<sup>48</sup> The next question is whether the burden is discriminatory, i.e., whether the Oklahoma statute discriminates against interstate commerce. This statute discriminates on its face, because it allows sales in Oklahoma but prohibits sales elsewhere. Therefore, the action is unconstitutional unless the government can show that the statute is a substantially effective means for advancing a legitimate local interest and that no nondiscriminatory alternative exists. Here the interest in conserving minnows is legitimate, but nondiscriminatory alternatives exist (e.g., nondiscriminatory taking limits or limits on sales in and out of Oklahoma). Thus, the government has not complied with the dormant commerce clause, and Hughes wins on the merits.<sup>49</sup>

Since the Oklahoma statute violates the dormant commerce clause, it may not be enforced against Hughes, and Hughes is entitled to reversal.

### C. *Substantive Due Process/Right of Privacy*

Next consider one of the most interesting open questions in the field of substantive due process, the right of marital sexual privacy. Assume that Jane and John Doe, a married couple, were convicted and fined for having oral sex in their bedroom in Atlanta, Georgia,

---

47. Note that the dormant commerce clause only applies to state government action; because this is state government action, the requirement is met.

48. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

49. Since the burden is discriminatory, the test for nondiscriminatory burdens does not apply.

in violation of a Georgia law prohibiting sodomy (sex involving contact between the genitals of one partner and the mouth or anus of the other partner).<sup>50</sup> The Does exhaust their state remedies, and the Supreme Court grants their certiorari petition. You are retained to represent them before the Court.

The issue is whether the conviction and fine violate the Constitution. Scanning the list of constitutional limits, you conclude that substantive due process is worth arguing. Here is the basic analysis of a substantive due process claim:

### Substantive Due Process: Basic Analysis

- I. Preliminary questions
  - A. Jurisdiction
  - B. Justiciability
  - C. Government action
- II. On the Merits
  - A. Applicability: Did the State "deprive any person of life, liberty, or property"?
    - 1. Protected interest: life, liberty, or property?
    - 2. Deprivation?
  - B. Compliance: Did the State have a sufficient justification to withstand the appropriate level of means-end scrutiny?
    - 1. Intensified scrutiny (applicable if the government infringed a fundamental right)
      - a. Infringement of fundamental right?
        - 1) Fundamental right (e.g., marital privacy)?
        - 2) Infringement?
      - b. If so, is strict scrutiny satisfied?
        - 1) Does the government action further a compelling interest?
          - a) Compelling interest and
          - b) Substantially effective means, and
        - 2) Is the government action necessary?
    - 2. Rationality review (applicable if the government did not infringe a fundamental right)
      - a. End scrutiny: legitimate government interest, and
      - b. Means scrutiny: rational means
- III. Remedies

---

50. The facts are a variation on those of *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), in which the Court upheld the statute as applied to two gay men who engaged in sodomy in their bedroom.

The preliminary requirements are met. The Court has jurisdiction. The claim is justiciable for the same reasons as in the two prior illustrations: live, concrete dispute; the Does have standing; the issue is capable of judicial resolution. The state convictions and fines are government action. The Does are therefore entitled to a ruling on the merits and will prevail if you can show that substantive due process requirements are applicable and that the government failed to comply with these requirements.

The first question is whether substantive due process is applicable. Clearly it is. The fine is a deprivation of property. This is precisely the kind of government action that is subject to the requirements of substantive due process.

The next question—whether substantive due process requirements are satisfied—is more complex. The test is two-tier means-end scrutiny. If the government infringed a fundamental right, strict scrutiny applies. If not, rationality review applies.

Did the conviction and fine infringe any fundamental right? The key question is whether the fundamental “right of privacy” recognized in the contraception/abortion line of cases includes a right of married couples to engage in oral sex in their bedrooms. *Bowers v. Hardwick*<sup>51</sup> held that the right of privacy does not protect consensual sodomy by gay men. But *Bowers* was a 5-4 decision; Powell, the fifth vote, is off the Court; and the opinions in *Bowers* strongly suggested that sex between married partners would be treated differently. For these reasons, your brief would focus on this issue.

If married couples do have a fundamental right to engage in oral sex, the convictions and fines are clearly substantial infringements, so the government would have to satisfy strict scrutiny. It would have to prove that enforcement of the statute is necessary to further a compelling interest. The brief would therefore need to identify any arguably compelling interests. For each such interest, one would then analyze whether the government action is substantially effective and necessary. It is doubtful that the government could carry this burden, so the Does would probably win.

If, on the other hand, the right of married couples to engage in oral sex is not part of the right of privacy, the rational basis test is controlling. The burden, then, would be on claimants to show that the statute cannot withstand rationality review because the statute is not a reasonable method for advancing any legitimate government interest. Under this test, the Does would lose, because the statute is a

---

51. *Id.*

rational means for furthering several conceivable ends.

If the Does win because strict scrutiny is applicable, the remedy is to reverse the convictions and order that the charges be dismissed.

## V. CONCLUSION

The United States Constitution provides for the proper functioning of government and the protection of individual liberties by establishing a number of limits on governmental power. This article set out a basic structure for analyzing claims involving the violation of constitutional limits.

The basic structure of analysis applies in all constitutional cases. In each case, claimant must first satisfy three preliminary requirements: (1) the court must have jurisdiction; (2) the claim must be justiciable; and (3) the government action requirement must be met. If these requirements are satisfied, the lawyer must scan the list of constitutional limits and determine which limits are arguably applicable. For each such limit, analysis of the claim on the merits involves two questions: (1) is the government action subject to that limit, i.e., is the limit applicable? and, if so, (2) did the government comply with the rules concerning the limit? If the limit is applicable and the government did not comply, the analysis proceeds to questions involving remedies. If, on the other hand, the preliminary questions are not met, or the limit is inapplicable, or the government has complied with the limit, claimant loses and no remedies are appropriate.

Careful use of this basic analytical structure will help lawyers, law students, and judges arrive at a correct evaluation of constitutional claims.

