**Constitutional law outline**

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1. Supreme Court Powers
2. **Judicial Review**
   1. **Marbury v. Madison**
   2. SCOTUS is granted Judicial Review of the Acts of Congress
      1. Article III, § 2 states SCOTUS has original jurisdiction in cases involving AMC and where the state is named a party. Appellate review is granted in other cases (ie ones arising from federal issues), and “under such regulations that Congress shall make”—**Exceptions Clause**
      2. Marshall narrowly interprets EC, stating because Con. defines original and appellate jurisdiction, Congress cannot freely alter categories, therefore, 13 is unconstitutional because it gives SCOTUS OJ to issue Writs of Mandamus
   3. Judicial Review of Executive Conduct test
      1. In declaring that Madison’s refusal to issue the assignment unconstitutional, holding est. SCOTUS power to review cases when President does not have exclusive discretion
   4. Constitution is paramount law of land: “Province of judicial dept is to say what the law is” Ct has power to interpret the Constitution as they interpret ordinary laws, and when two laws conflict, court must decide which law governs. An act contrary to the Con is void.
   5. Marshall’s defense of Judicial Review: JR prevents E & L from exercising unlimited power; Art III, § 2, gives SC power to hear cases arising under Con law; Certain provisions of Con addressed specifically to SC
   6. Standards:
      1. Political decisions—when an executive appoints an officer, there is no power to control the discretion. But when legislature imposes officer with other duties, and rights of individuals are dependent on these duties, exec. cannot act w/ unlimited discretion
3. **Authority to review State Court Judgments**
   1. **Martin v. Hunter’s Lessee**
   2. Facts: VA C of A refuses to obey Supreme Court’s mandate that VA could not seize land
   3. Issue: Does the C authorize federal courts to act directly upon state court rulings or are state courts the final judges?
   4. Judicial powers, as enumerated by the C, extend to cases arising under the constitution and the laws and treaties of the US. SCOTUS does not have OJ, so the cases must be reviewed under appellate
   5. SCOTUS is last resort to 1) avoid state prejudices, interests…to the regular administration of justice 2) ensure a uniformity of decisions
   6. Notes:
      1. **Cohens v. VA** (Marshall)—court sustained its jurisdiction to review the validity of state laws in criminal proceedings
      2. Facts: Cohon brother convicted in VA for selling DC lotto tickets in violation of VA law
      3. Holding: Judicial power extends to all cases arising under the constitution or law of the US, whoever may be the parties.
      4. Principle: Federal judges are insulated from majoritarian pressures while state judges are generally elected for a fixed term, rendering them vulnerable to majoritarian pressure
4. **Judicial Exclusivity in Constitutional Interpretation**
   1. Limited reading of Marbury v. Madison suggests judicial review is a byproduct of a court’s duty to decide cases w/in its jurisdiction. Broad reading is that courts are exclusively competent to consider constitutionality.
   2. **Cooper v. Aaron (Frankfurter)**
   3. Facts: DC grants school board postponement of desegregation program after chaos of Little Rock integration. C of A reverses ruling and SCOTUS affirms.
   4. Issue: Are the Governor and Legislature bound by the holding in Brown?
   5. Article IV §II makes Constitution the “supreme Law of the Land”. Therefore, states are bound by SCOTUS interpretation of the constitution.
   6. Notes: Did Cooper give broader meaning to Marshall’s ruling, and was the judicial authority to interpret the constitution confused w/ judicial exclusiveness?
      1. If the same issues of desegregation had to be litigated to SCOTUS for every school district, would resistance to desegregation prevail?
      2. Dickerson v. United States—can statute overrule a constitutional interpretation?
         1. Facts: Miranda v. Arizona, the court held certain warnings must be given before a suspect’s interrogations are admissible. Congress enacts statute which states admissibility turns on whether statements were voluntary.
         2. Holding (Rehnquist): Congress may modify or set aside judicially created rules of evidence not w/in the constitution, but cannot legislatively supersede decisions interpreting and applying the Constitution. Miranda is a constitutional decision (Due process)
         3. Principle: When deciding if a statute can alter judicial interpretation, look to see if there is a constitutional protected right. If w/in the constitution, Congress must initiate an amendment process.
         4. Court's power to craft nonconstitutional supervisory rules over the federal courts exists only in the absence of a specific statute passed by Congress
         5. Scalia/Thomas dissent: Ruling holds statutes can be disregarded if 1) they violate the constitution 2) new rule: violate what the Court announces is a constitutional rule
            1. Prior holdings have concluded that it is possible for police to violate Miranda w/out violating the Constitution
            2. Interprets Marshall’s ruling in Marbury narrowly to mean that SCOTUS had judicial review, not judicial exclusivity
   7. SCOTUS binding on executive branch?
      1. Dred Scott v. Sandford—AA not considered a US citizen and therefore lacked privilege to sue in federal court o assert freedom from slavery
         1. Lincoln—the decisions of the court should be binding on a case, but

“if policy of the Gov upon vital questions affecting the whole people is to be irrevocably fixed by decisions of SCOTUS…the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” –First Inaugural Address

* 1. Judicial review and democracy: Might overreliance on judicial review damage civic participation by allowing citizens and voters to exempt themselves from the task of constitutional deliberation?
  2. Bruce Ackerman: Dualistic conception of political life: “normal politics” factions pursue narrow interests; “constitutional politics” people speak, formally via constitutional amendments and informally through mobilized masses. If constitutional norms are created through participatory process, does judicial review “protect them against erosion during normal times”
  3. Political Restraints on SCOTUS
     1. Judicial Selection—
     2. Nomination and confirmation process. Article II § 2, cl. 2
     3. Impeachment
     4. Court packing;
     5. Article III § 2—Congress granted power to make “exceptions” to SCOTUS appellate jurisdiction, but exceptions power may not interfere with “essential” or “core” functions of the court
        1. Ex Parte McCardle—
           1. Facts: Newspaper writer brings a habeas corpus proceeding to SCOTUS. Congress then passes an act repealing SCOTUS appellate power under the act of 1867.
           2. Holding: court lacks jurisdiction in cases where Congress exercises its power of exception.
     6. Constitutional amendment—Article V permits amendment of every provision—Congress, by a two-thirds vote, may propose amendments for ratification by ¾ of states; or 2/3 of states may apply to congress to call a constitutional convention “for proposing Amendments”

1. **Constitutional Limits on Constitutional Adjudication: “Case or Controversy” Requirements**
   1. Article III § 2, cl. 1—jdicial power shall extend to a list of enumerated “cases” and “controversies”.
      1. C or C defined as concrete, non-hypothetical, and not merely advisory. Must also involve standing (personal and concrete injury), mootnesss, ripeness, and cannot involve a nonjusticiable political question (one that left to the unreviewable discretion of another branch).

**Standing—**"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues"

* 1. **Lujan v. Defenders of Wildlife (Scalia)**
     1. Facts challenge to rule promulgated by Secretary of Interior interpreting ESA to actions applicable only in US.
     2. Article III C or C requirement. Standing requires 3 elements:
        1. Injury in fact—invasion of legally protected interest that is a) concrete and particularized b) actual or imminent, not conjectural
        2. Causal connection between injury and conduct
        3. Redressibility
     3. Holding: More than cognizable interest required, C or C requires that the party seeking review be himself among the injured.
     4. Affidavits: Vague intentions to return to a place is insufficient
     5. Failure to show injury: Animal nexus (anyone w/ interest in seeing animals), vocational nexus (occupational interest) arguments rejected as too general
     6. Redressibility—Ordering S of I to revise orders would not remedy injury unless agency is bound by decision
     7. Plaintiff raising a harm that no more directly and tangibly benefits him than it does the public, does not state an Article III c or c.
     8. Procedural right granted by Congress does not convert the public interest into an individual right and infringes on Executive’s duty to “take Care that the Laws be faithfully executed”
     9. Scalia suggests that citizen standing should be limited to those receiving common-law-like-injuries, but does not receive a majority in the part.
     10. Kennedy Concurring: Decision does not preclude Congress from creating a C or C, but to do so Congress must ID the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit
  2. **Massachusetts v. Environmental Protection Agency (Stevens)**
     1. Facts: Group of states alleges the EPA has abdicated its responsibility under Clean Air Act to regulate emissions of four greenhouse gases, including Co.
     2. Holding: MA case has standing
     3. **Not justiciable w/ political question, advisory opinion, or mootness**
     4. When congress has provided a procedural right to protect a concrete interest (right to challenge agency), the litigant can assert the right without redressibility and immediacy as long as there is some injury and relief will possibly prompt the injuring party to reconsider
     5. Lujan v. MA—individual v. state’s interest to protect territory. MA injury—state owns substantial portion of coastal land🡪particularized injury as landowners
     6. Loose causation—B/c step is incremental does not mean that the group does not have to conform to law
     7. Remedy (not immediate)—reduction, though delayed, would lead to change
     8. Dissent Roberts, Scalia, Thomas, Alito: Global warming injury is not particularized, no causation or redressibility
  3. Constitutional and Prudential Elements of Standing
     1. Personal Injury—requires an actual injury that is particularized and concrete, distinct and palpable. Can be intangible such as vote dilution or loss of opportunity.
        1. Organization may assert associational standing as long as
           1. its members might have done so
           2. claim is germane to org’s purpose
           3. neither claim asserted nor relief requested requires participation of individuals in the suit
     2. Causation—places burden on P to show that harm is “fairly traceable” to the government.
        1. Allen v. Wright
           1. **Fact:** claim by parents of black children attending public schools who asserted IRS had failed to fulfill its obligation to deny tax-exempt status to private schools that were unbalanced or racially discriminating
           2. **Holding**: Case lacks standing b/c of causation—uncertain how many racially discriminatory private schools are receiving tax exemption

Speculative that schools and parents would make decisions that would lead to racial integration

Speculative whether withdrawal would lead to policy changes

* + 1. Redressibility—Linked closely to causation (conduct/injury), but separate doctrine that focuses more on remedy than liability (injury/relief)
  1. **Prudential Standing**--three major prudential (judicially-created) standing principles. Congress can override zone of interest (purely prudential) via statute:
     1. **Prohibition of** [**Third Party Standing**](http://en.wikipedia.org/wiki/Third_Party_Standing)**:** A party may only assert his or her own rights and cannot raise the claims of a third party who is not before the court
        1. Exceptions:
           1. Third party has interchangeable economic interests with the injured party

**Craig v. Boren**—Seller of beer was permitted to challenge as sex discrimination a law imposing a higher age threshold on male than female beer buyers based on interchangeable economic interests

* + - * 1. Over breadth—Person unprotected by a particular law sues to challenge the oversweeping of the law into the rights of others, for example, a party suing that a law prohibiting certain types of visual material may sue because the [1st Amendment](http://en.wikipedia.org/wiki/Amendment_I_to_the_United_States_Constitution) rights of others engaged in similar displays might also be damaged as well as those suing.
        2. N[ext friend](http://en.wikipedia.org/wiki/Next_friend) doctrine if the third party is an infant, mentally handicapped, or not a party to a contract.
    1. **Generalized Grievances:** A plaintiff cannot sue if the injury is widely shared in an undifferentiated way with many people. General rule is that there is no federal taxpayer standing, as complaints about the spending of federal funds are too remote from the process of acquiring them. Such grievances are ordinarily more appropriately addressed in the representative branches.
       1. Exception: Hein v. Freedom from Religion—**Flast v. Cohen** (allows taxpayers to challenge statute granting aid to religious schools) exception limited to challenges under Establishment clause against expenditures pursuant to an express congressional mandate and specific appropriation but inapplicable to executive branch funds
    2. **Zone of Interest Test (make sure to watch for this in citizen suit cases):** There are in fact two tests used by the United States Supreme Court for the Zone of Interest
       1. Zone of Injury - The injury is the kind of injury that Congress expected might be addressed under the statute.
       2. Zone of Interests - The party is within the zone of interest protected by the statute or constitutional provision.
          1. Bennett v. Spear--Z of I obstacle can be negated by statute/provision. Ranchers objected that gov failed to take economic impact into account when listing two species on property as in jeopardy. ESA provision provides any person may commence a civil suit if provision is violated
    3. Congressional power to confer standing
       1. FEC v. Akins—Ex. Of Congress’ ability to issue broad conferrals of standing.
          1. Fact: voters file complaint w/ FEC stating AIPAC is a political group and subject to disclosure of requirements.
          2. Case deciding that an individual could sue for a violation of a federal law pursuant to a statute enacted by the U.S. Congress which created a general right to access certain information.
          3. Interest: informed voting. If an injury is concrete, there is an injury-in-fact even if it’s a widely shared right
       2. Vermont agency of Natural Resources v. United States—qui tam suit—permits a private party to sue fraudulent gov contractors in the name of the federal gov. Congress can legislatively assign the claim of injury to a private P, who would have standing according to the doctrine of assignee.
  1. Standing and Separation of Powers—see Scalia’s opinion in Lujan that conferring standing on citizens to compel enforcement infringes on executive powers. Courts have traditional, undemocratic role of protecting individuals and minorities against impositions of majority, while excluding courts from prescribing how the other two branches should function

# Justiciability—concerns the limits upon legal issues over which a court can exercise its judicial authority. It is not to be confused with standing, which is used to determine if the party bringing the suit is a party appropriate to establishing whether an actual adversarial issue exists. Essentially, justiciability in American law seeks to address whether a court possesses the ability to provide adequate resolution of the dispute; where a court feels it cannot offer such a final determination, the matter is not justiciable.

1. Mootness and Ripeness—Limits based on timing of lawsuits
   1. Mootness—requires that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed
      1. Exceptions
         1. Capable of repetition yet evading review e.g. Roe v. Wade
            1. Such a short duration that full judicial consideration is not likely
            2. Wrong may recur w/ respect to specific party raising the action
         2. Collateral consequences—significant aspect of controversy has dissipated b/c of change in law or fact but there remains a residual aspect which judicial remedy may provide relief. Ex: Prisoner—conviction has the effect of robbing him of employment opportunities
         3. Voluntary cessation—no reasonable expectation that party will return to his old ways. Promise of cessation not enough. Significant action required
         4. Class actions—where a case is certified but becomes moot w/ respect to named rep, action will not be moot if there remains a controversy b/w any members of P class and D.
   2. Ripeness prevents premature adjudication—dispute is undeveloped and is too remote or speculative to warrant judicial action. Contingent upon future occurrences.
      1. Three factors
         1. Probability that predicted harm will take place
         2. Hardship of parties if immediate review is denied
         3. Fitness of record for resolving legal issues presented.
      2. Laird v. Tatum—Surveillance of lawful activity. Speculative apprehension of misuse of info to cause harm.
2. Political Questions
   1. Principle that some matters are 1) unreviewable discretion of the political branches 2) some otherwise legal questions ought to be left to the other branches (lack of judicial discoverable and manageable standards for resolving issues)
   2. Baker v. Carr (Brennan)—
      1. Facts: Voters of TN claim a violation of equal right protections, alleging debasement of vote b/c Assembly had not reapportioned votes since 1901 despite substantial growth and redistribution. Under current district lines, rural voters had greater power than urban ones. Sought an injunction and either an election at large or reapportionment.
      2. Issue: Is there a political question?
      3. Two Qs need to be answered in the affirmative
         1. Does the issue implicate separation of powers? Important threshold question.
         2. Does the constitution commit the resolution of the issue to either the President or congress?
      4. One of these factors need to be in place for a political question:
         1. Textually demonstrable constitutional commitment of the issue to a coordinate political dept
         2. Lack of judicially discoverable and manageable standards for resolving it
         3. Impossibility of deciding w/out an initial policy determination of a kind clearly for nonjudicial discretion
         4. Impossibility of a court’s undertaking independent resolution w/out expressing lack of respect due coordinate branches of gov
         5. Unusual need for unquestioning adherence to a political decision already made
         6. Potentiality of embarrassment from multifarious pronouncements by various dept on one question
      5. Argument for republican form of government—Guaranty Clause Article IV § 4
         1. Luther v. Borden—Guaranty Clause (republican form of gov) is not a repository of judicial standard for court to identify lawful government.
            1. Facts: court asked to decide which of two rival factions represented a legitimate gov of RI. Outsider gov claimed violation of Guaranty Clause.
            2. Holding: Nonjusticiable—Constitution states Congress should determine legitimacy and republican nature of the state gov. Since Luther, court has consistently held claims under Guaranty Clause are nonjusticiable—political must be enforced by Gov.
            3. Article IV§ 4 Guaranty Clause textual commitment of issue to congress: Congress will decide what gov is the est. one in a State
            4. Pragmatic concerns over potential instability that would result if court ruled against existing government. Measure of chaos invalidating laws created, taxes collected
            5. When laws relate to state’s constitutional laws, Federal court has to follow state court decisions unless they are unconstitutional
            6. Guaranty Clause only provision that spoke to choice of gov—up to discretion of Congress.
            7. Article IV § II gives Congress authority to deal w/ domestic issues: In cases of insurrection it is lawful for the exec to call forth militia.
            8. Other factors: 1) president’s unambiguous recognition of gov by calling forth militia; 2) lack of criteria for court to determine if gov was republican
      6. Holding. Case is not a Guaranty Clause claim, but instead on 14th amendment🡪Equal Protection of Rights. Therefore, there is no political question.
         1. Question is if state action is consistent w/ the constitution. No question to be decided by a coequal branch. No separation of powers issue, risk of embarrassment, and judicial standards for equal protection are clearly est.
   3. Dissent: Frankfurter and Harlan—Present case is a guarantee clause masquerading under a different label.
      1. Court is being asked to choose among competing bases of representations in order to est. an appropriate form of gov for TN and by extension all states.
      2. Same factors in Luther v. Borden present
      3. When determining justiciable questions, look to see if the court is a fit instrument for decision-making. Is it a Q traditionally decided in non-judicial forums? Consider: Is there a broad issue of political organization historically committed to other institutions?
3. Distinguishing Legal from Political Q
   1. Powell v. McCormack (congressional qualifications)—issue justiciable b/c article I only committed decision of three qualifications to House—“age, citizenship and residency”. Powell’s assertion was based on finding of wrongful diversion of funds.
   2. Goldwater v. Carter (treaty abrogation)—case which was the result of a [lawsuit](http://en.wikipedia.org/wiki/Lawsuit) filed by Senator [Barry Goldwater](http://en.wikipedia.org/wiki/Barry_Goldwater) and other members of the United States Congress challenging the right of President Jimmy Carter to unilaterally nullify the Sino-American Mutual Defense Treaty, which the [United States](http://en.wikipedia.org/wiki/United_States) had signed with the [Republic of China](http://en.wikipedia.org/wiki/Republic_of_China), so that relations could instead be established with the [People's Republic of China](http://en.wikipedia.org/wiki/People%27s_Republic_of_China).
   3. Holding: Nonjusticiable political question b/c it involved a dispute b/w coequal branches and authority of President in foreign relations
   4. Nixon v. United States (Impeachment Proceedings)
      1. Facts: Impeachment of Walter Nixon🡪Judge of US District Court. Claimed that he was entitled to trial by body of Senate and not the committee alone. House sole power of impeachment. Senate sole power to try impeachment.
      2. Holding: Nonjusticiable case—political question. Textual sole Senate authority. Constitution explicitly states that
         1. Two sets of proceedings for trials criminal and impeachment should be separate to avoid bias
         2. Checks and balances system
      3. Prudential—lack of finality and difficulty of fashioning relief, chaos.
      4. Impeachment is only check of senate on judicial system (Coleman v. Miller).
   5. Bush v. Gore—Controversy over method of voting. Florida State Ct rules that there could be different recount procedures.
      1. Holding: Must have uniform basis for voting across all counties as mandated by 14th amendment (EP clause). FL is then barred from conducting any further recounts on grounds that the safe harbor period had elapsed.
      2. Dissent—Souter states that decision should have been made by State Court. Article II: “each state should appoint a number of electors”.
         1. 12th amendment—designated Congress in the role of tie breaker
      3. Difference w/ Baker v. Carr—Express textual support that Congress is the tie-breaker as opposed to voter allocation, which can fall under Equal Protection or Guaranty Clause
4. The Nation States in the Federal System
5. Article I § 8 grants two important powers🡪power to levy taxes and regulate interstate and foreign commerce
   1. Necessary and Proper Clause (cl. 18) also stated. Congress shall have powers to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
      1. Limitation: 10th amendment: powers not delegated to US by constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”. Unlike Articles of Confederation, 10th omitted the word “expressly”.
   2. Double Security—Separation of powers b/w nation and states and separate branches w/in
   3. Limitations on State Gov—Article I § 10
6. McCulloch v. Maryland (Marshall)
   1. Facts: Controversy over Maryland’s right to tax 2nd Bank of US. MA act imposes tax on all Banks or branches in ML not chartered by legislature. Any bank operating in ML w/out authority from state could only issue bank notes stamped paper furnished by state upon payment of fee.
   2. Issue: Does Congress have the power to incorporate a bank?
   3. Sovereignty: Power emanates from the people and not the state. National gov is not subordinate to the state. Constitution submitted to a convention of delegates who convened in each state, but the delegates were elected by the people. In adopting the Cons., states were bound. Powers of the Con are granted by and benefit the people
   4. Unenumerated Powers: Gov Can only exercise enumerated powers, but are supreme in the sphere of action. Est. of bank is not enumerated, but implied. Incidental power not excluded b/c 10th does not include the term “expressly”
      1. Constitution is a mere outline. Proof limitations found in Article I § 9🡪 everything else is permitted. In answering the question of what power is delegated to which branch “we must never forget that it is a constitution we are expounding.”
      2. Although enumerated powers do not include “bank or incorporation”, it can be inferred that a gov entrusted w/ vast powers, must be trusted w/ ample means to execute in the interest of the nation. Power to incorporate bank is incidental to the expressed power of regulating commerce.
   5. Necessary and Proper Clause
      1. Must think of necessary in its common usage, where it imports what is convenient, useful, or essential to an end. Does not have to be indispensible.
      2. Textual—compared w/ Article I § 10 “absolutely” necessary
      3. Implied intent—must be adaptable, flexible standard and to the discretion of Congress to accommodate for current circumstances. Ex: Est. of post offices and roads🡪carrying mail is an inferred power
      4. NP contained in powers of congress not among limitations. Therefore, the terms enlarge, not diminish power of Congress.
   6. Conclusion: Congress should have discretion in choosing the means to exercise its vested powers. Contrast in limitations of powers and expansion. Est. a band is an appropriate measure to execute vested power (regulation of commerce).
      1. Caveat: If Congress should adopt measures prohibited by, or under pretext of executing is powers, pass laws not constitutionally granted, it is up to the SC to say what is the law of the land
   7. Issue 2: Is it constitutional for MA to tax the branch?
      1. Constitution and laws made in pursuance are supreme
         1. Power to create is power to preserve
         2. Power to destroy if wielded by a different hand is incompatible w/ power to create and preserve
         3. Where contradiction exists, supreme power perseveres
      2. Application: State has power to destroy w/ power to tax. Power to tax by the states is subordinate to the Constitution.
      3. Accountability—Power to tax is essential to existence of government and may be exercised to the utmost extent. Safety valve is that the tax imposition is upon constituents who have the power to vote against oppressive taxation. Gov of Union has no such security and therefore there is no right to tax (power over people whom they claim no control)
      4. Power to control operations of government should not be entrusted to one state
      5. Holding: Law passed by MA is unconstitutional and void. Should not retard, impede, or control operations of congressional law
   8. 1st holding supported by NP clause. 2nd is a structural inference from the constitution w/out any textual support, prohibiting state power to tax federal institutions. Based on rational that states would have an incentive to make a play for power.
7. Background and Notes
   1. Jefferson (strict reading) v. Hamilton any means necessary that is constitutionally permissible to achieve the ends . Also consider if the proposed measure abridges any pre-existing right of the people or state. Hamilton argument: What is deemed necessary In one person’s view is different than another’s.
   2. Debate over whether sovereignty is located w/in state or people
      1. Nationalist view (one single nation see Martin v. Hunter’s Lessee: “The constitution of the US was ordained and est., not by the states in their sovereign capacities, but…by the people of the united States.”); State centered view; middle ground—division into discrete populaces of states
   3. McCulloch’s two holdings:
      1. Broad view of Congress’s implied powers inferred by the broad and general nature of document: “it is a constitution we are expounding” and “a constitution is intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”
      2. Structural argument on why MA lacked the power to tax the national bank. State government’s main concern is its constituents and if MA had power of taxation, they have every incentive to soak the citizens of other states.
         1. Representation—reinforcement argument. Is the purpose of SCOTUS to make up for flaws in the operation of representative government or breakdowns in the political process? Similar to Bush v. Gore?
8. U.S. Term Limits, Inc. v. Thornton (Stevens majority opinion)(1995)
   1. Background Federalist papers 39—Madison suggests people are acting in discrete, independent states. State action w/ people as the ultimate authority.
   2. Facts: Arkansas has an amendment that prohibits an eligible candidate from appearing on general election ballot if he has served 3X as H or Rep or 2X in Senate
   3. Issue: Can state alter or add to the qualifications?
   4. Holding: Amendment is contrary to original constitution—fundamental principle that the people should choose whom they please to govern them
   5. Principle: Interpretation of 10th—state retains all of their original powers, except for those the Con exclusively delegates to the US. States cannot exercise any powers, which exclusively spring out of the existence of a nat gov, and which the Con does not delegate to them. See McCulloch state had no original right to tax.
   6. Reasoning
      1. Powell v. McCormack🡪Congress may not alter or add to the qualifications in the Constitution
      2. The power to add qualifications is not in the “original powers” of the states. 10th only acts to reserve original state powers
         1. 10th: Powers not delegated to the US, or prohibited by it to the States, are reserved to the States respectively, or to the people
      3. Even if the state possessed original power, the Framers intended the Con to be the exclusive source of qualifications, and thereby divested States of any power to add qualifications
      4. Power to vote on National Leg was a new right, arising from constitution.
      5. Fed Gov is directly responsible to the peoples, US not a confederation of nations where sep sovereigns are represented by delegates,
   7. Kennedy Concurring: National Gov must be controlled by the people w/out collateral interference from the states
   8. Thomas, Scalia, O’Connor Dissent—Constitution is silent on states’ rights to add qualifications, and where it is silent there is no ban to the state.
      1. Sovereignty—ultimate source of Constitution’s authority is the consent fo the people of each Sate, not the consent of the undifferentiated people of the Nation as a whole
      2. Fed gov powers are limited and enumerated (no authority beyond what the Constitution confers). State can exercise any power not withheld.
      3. 10th—default rule—where con is silent (either expressly or by nec. implication) Fed gov lacks power and states enjoy it.
      4. Majority misinterprets McCulloch’s original holding (10th does not reserve all unenumerated powers to the states) to mean that taxing a charter bank is impermissible because it is not w/in the state’s original power
      5. Only support of majority’s view comes from Story’s treatise on constitutional law
      6. Does the majority opinion render’s 2nd holding (structural argument on why MA cannot tax) dicta? According to majority the power does not fall into the category of reserved powers.
      7. Dissent default rule overturns McCulloch? Where the constitution is silent, would the state how the power to tax?
   9. Notes
      1. Big Bang theory—once constitution was formed state could only enjoy powers over federal gov that were constitutionally delegated. To dissent, state has all powers except those delegated to the federal government.
      2. Policy argument—state’s imposition imposes negative externalities on citizens of other states
9. Commerce Power and Federalism Basis—Central basis for the assertion of national regulatory authority. State v. National power
10. Article I § 8, cl. 3 grants Congress power “To regulate commerce with foreign Nations, among the several states and with the Indian tribes”
11. Gibbons v. Ogden (Marshall)
    1. Facts: NY leg granted 2 parties exclusive right to operate steamboats in NY. Parties licensed Ogden. Ogden’s former partner, Gibbons, then began to operate steamboat services in violation of Ogden’s monopoly using a federal statute which licensed “vessels to be employed in coastal trading”
    2. Holding: Fed statute pre-empted NY monopoly under Supremacy Clause Article VI.
    3. Definition: Commerce is the intercourse b/w nations and includes navigation. Is not limited to buying and selling.
    4. Commerce does not stop at external boundary line, but may be introduced into the interior
    5. Completely internal commerce of state—e.g. those that do not affect other states, should be left to the governance of the state
    6. Commerce power is power to regulate. Power has no boundaries except the restrictions of the constitution. Restrictions are wisdom and discretion of Congress, as influenced by the people
12. Judicial Limits on the Commerce Power
    1. Interstate Commerce Act and Sherman Anti-Trust Act (1890) led to challenges on judicial limitations on congressional authority over commerce
    2. Direct v. Indirect Test—
       1. United States v. EC Knight—Sugar Trust Case
       2. Holding—Affirmed dismissal of gov action against America sugar co. that had acquired 4 companies and controlled 98% of sugar distribution.
       3. Claim under Sherman Act, prohibiting monopolies
       4. Congress could not constitutionally reach a monopoly in “manufacture” under commerce clause
       5. Exercise of commerce is secondary/incidental. K to buy, sell, or exchange goods to be transported and transportation falls under commerce clause
       6. Intent of manufacturer to trade the product does not matter
       7. Conspiracies and monopolies may have an effect on interstate commerce, but the effect is indirect.
       8. Policy: If national gov is allowed to regulate all transactions involving trade, there would be little room for state regulation
       9. Transaction in case referred only to acquisition of Philadelphia refineries
       10. Dissent: Any combo that disturbs freedom of buying or selling directly affects persons in other states and not incidentally
       11. “General governance is not placed by the constitution in such a condition of helplessness…while capital combines to destroy competition.”
    3. Substantial Economic test—emphasizes the practical physical or economic effects of the regulated intrastate activities on interstate commerce
       1. Houston v. US Shreveport Railroad—
       2. Facts: Court sustained congressional authority to regulate intrastate rail rates that discriminated against interstate railroad traffic. Railroads rates w/in TX lower than rates b/w TX and LA.
       3. Issue: Unjust discrimination in favor of traffic w/in TX.
       4. When interstate commerce is enmeshed and economically tied w/ intrastate commerce, Congress has the power to foster and protect interstate commerce through all measures necessary
       5. Railroads are instruments of interstate commerce
    4. Stream of commerce test—local activities can be regulated b/c they are an integral part of commerce or “in” commerce
       1. Swift & Co. v United States (Holmes)—
       2. Facts: A "meat trust" developed in Chicago, in which major dealers of meat agreed not to bid against one another in order to control prices. The trust also pressured the railroads into charging them lower-than-normal rates. The U.S. government attacked the trust as an unlawful economic monopoly.
       3. Holding: In a unanimous decision, the Court held that congressional power under the Commerce Clause justified regulations of the meat trust. Effect of the trust on commerce among states was not "accidental, secondary, remote or merely probable," but rather a direct attempt to monopolize commerce. Business done at the stockyards was found to be one part of a continuous stream of commerce. The Court drew a distinction between manufacturing monopolies, which had only indirect effects on commerce, and sales monopolies, which had direct and intended effects on commerce.
    5. National police regulation—increase of non-economic use of commerce power. Stemmed from 10th century concern w/ prostitution and gambling. Morality issue—legislation of objectionable transactions
       1. Champion v. Ames (Lottery Case)
          1. Lottery tickets are subjects of commerce, and Congress may properly decide that commerce will not be polluted with the deleterious effects of lottery tickets
       2. Hammer v. Dagenhart (The Child Labor Case) (Day)(1918)
          1. Facts: Congressional law barred transportation in interstate commerce of goods produced in factories employing children under 14 or 14-16 for more than 8 hrs
          2. Holding: Act is unconstitutional—In prior cases such as Champion power over interstate commerce was used to prevent commerce from distributing evil. Here, the evil (child labor) has already been accomplished, and goods shipped are harmless. It is up to the state to enact regulations.
          3. Commerce power is power to control the means by which commerce is carried, Lottery Case, Hipolite Egg (label failed to disclose egg contained a deleterious ingredient), Hoke v. US (Court upholds Mann Act, prohibiting the transportation of women in interstate commerce for immoral purposes) show that power to regulate extends to prohibiting the use of facilities of interstate commerce to effect evil.
          4. Congressional interference would
             1. Transcend delegated authority
             2. Exert power on a purely local matter
          5. Unfair competition—economic advantage conferred—“There is no power vested in Congress to require states to exercise police power to prevent unfair competition. Commerce clause is not intended to be an equalizer
          6. Holmes Dissent: If an act is conferred upon Congress, power should not be qualified by the fact that it may interfere w/ domestic state policy. If we exert our moral conceptions on one case, we should apply it here too.
13. Commerce Power and New Deal
    1. Series of New Deal legislation passed using Commerce Clause as justification
    2. Railroad Retirement Act🡪rejection of argument that pensions were related to efficiency of railroad
    3. National Industrial Recovery Act—“sick chicken” case
       1. Schechter Poultry Corp v. US
          1. Facts: Convictions for violating wage, hr, and trade practice provisions of federal statute
          2. Holding: Act is an unconstitutional delegation of legislative power and application of the Act to intrastate activities exceeded commerce power
          3. Hughes rejects both stream of commerce (interstate transaction ends when chicken reaches slaughter house) and sub economics test. Also federal motive to remedy declining wages and falling prices is an insufficient reason.
          4. Cordozo and Stone concurring—Causation b/w wages and commerce is too tenuous. Activities local in their immediacy do not become interstate and national b/c of distant repercussions
       2. Carter v. Carter Coal—Court invalidates law regulating maximum hrs and min wages in coal mines. Effect of labor provision falls upon production and not commerce. Direct/Indirect
14. Commerce After the New Deal
    1. Courts stance toward commerce power changed in 1937
    2. **NLRB v. Jones & Laughlin Steel (Hughes)**
       1. Facts: NLRB found J&L had engaged in unfair labor practices by discharging employees for union activity. NLRB ordered the Co to end coercion, and sought judicial enforcement of order. NLRB multi-state ties, 75% of its product is shipped out of PA. PA is “likened to the heart of a self-contained, highly integrated body”
       2. Holding: Act is constitutional as it prevents any unfair labor practice affecting commerce
       3. Whether a particular action affects commerce in such a close and intimate manner as to be subject to federal control is to be determined on a case-by-case basis
       4. Although activities may be intrastate in nature, if they have such a close and substantial relation to interstate commerce that control is essential or appropriate to protect commerce from burdens and obstructions, Congress cannot be denied the power to exercise control.
       5. Facts applied: Labor strife effects would be immediate and catastrophic. Industry operates at a national scale and interstate commerce is the dominant factor in activities. Right of employees to self organize is an essential condition of industrial peace
       6. Dissent: 10 men out of 10,000 were discharged. Effect is remote and indirect to the highest degree.
    3. **United States v. Darby (Stone)(1941)**
       1. Facts: Darby—GA lumbar manufacturer challenges indictment charging him of violating Fair Labor Standards Act of 1983
       2. Issues:
          1. Does Congress have constitutional power to prohibit the shipment in interstate commerce of lumbar manufactured by employees whose wages are less than min and hrs are greater than max? E.g. Goods that are not inherently bad (see Hammer v. Dagenhart)
          2. Power to prohibit the employment of workmen in production of goods for “interstate” commerce at other than proscribed wages and hrs?
       3. Holding Issue One
          1. 15(a)(1) (prohibition of shipment of proscribed goods in interstate commerce) is w/in constitutional power of Congress:
          2. Motive of regulation of interstate commerce are matters for legislative judgment upon which the constitution places no restriction and are not outside the scope of purview unless it is constitutionally prohibited
             1. Overrules Hammer: Like Hammer, case presents a pretext: regulation of interstate commerce w/ motive of regulating wages and hrs. Pretext cannot deprive Congress of their authority unless there is a secondary constitutional prohibition.
       4. Issue Two: 15(a)(2)—validity of wage requirements—requires employees who engage in production of goods for interstate commerce to conform to wage and hr provisions
          1. Substantial effect test: Is wage so related w/ commerce to permit Congress to intervene?
          2. Historically legislation has been permitted when means chosen, although not w/in granted power, are appropriate ends to accomplish a goal—e.g. Shreveport
          3. 15(a)(2) is sustainable independent of 15(a)(1). Congressional purpose is to suppress a method of competition in interstate commerce that is unfair. Means adopted is reasonable and related.
          4. In present day industry, competition by a small part may affect the whole and that total affect of competition may be great
          5. Decision in US v. carter is limited to decisions under NLR act and Sherman Act.
          6. 10th is but a truism that all is retained which has not been surrendered
       5. Notes: Did the holding in Darby represent a final rejection of the pretext limitation of McCulloch.
    4. Wickard v. Filburn (Jackson)(1942)—case demonstrates the outer limits of “substantially affecting commerce”
       1. Facts: Filburn (OH dairy farmer) sues Wickard Sec of Agriculture to prevent enforcement of a penalty imposed on him for exceeding the quota of wheat for his farm.
       2. Challenge: Market Agricultural Adjustment Act exceeds commerce power
       3. Holding: Act does not exceed Congressional power. Even if activity is local and not considered commerce, Congress may still regulate if it has a substantial effect on interstate commerce, regardless of whether it is indirect or direct.
       4. Facts applied: Excess of wheat production has led to a decrease in prices. Act’s purpose is to inc price by lim supply. Indirect effect of Filburn using the excess wheat is that he is not purchasing it on the market, thereby compromising the effects of the act.
       5. Aggregation test: appelle’s own contribution may seem trivial but his contribution, taken w/ others similarly situated, is not trivial.
15. Commerce and Civil Rights 1964 (Title II)
    1. Prohibited discrimination on the grounds of race, color religion or national origin. Congress and admin focused on commerce power to cover any establishment that :
       1. Offers to serve interstate commerce
       2. A substantial amount of food it serves has moved in commerce
    2. Heart of Atlanta Motel v. US🡪Title II
       1. Facts: Atl hotel wished to uphold its practice of refusing rooms to AA
       2. Holding: Upheld the law under the Commerce Clause. Voluminous testimony presents evidence that discrimination in hotels impedes travel
       3. Determinative test: Whether the activity sought to be regulated is commerce which concerns more States than one and has a real and substantial relation to the national interest
    3. Katzenbach v. McClung—Title II
       1. Facts: Ollie’s BBQ—11 blocks from interstate and 46% of meat purchased out of state.
       2. Issue: Whether application of Title II to a restaurant that had purchased 70K worth of food is a valid exercise of Congress. Testimony shows diminutive spending in areas of discrimination, Negros decrease in traveling, and professionals deterred from moving in to the areas. Direct evidence of economic effect not necessary
       3. Concurring: Justice Black🡪Relying on aggregation theory of Wickard found Title II to be a valid ex of national power
16. Commerce and Crime
    1. Perez v. US🡪Outer limits of commerce clause for crime
       1. Facts: Perez lent money to butcher and threatened violence when debt went unpaid.
       2. Issue: Should a federal prohibition of “extortion credit transactions” be upheld?
       3. Holding: Loan shark money funds a national, interstate system of organized crime
17. Revival of Internal Limitations on Commerce Power—Rehnquist
    1. For 60 yrs the court did not hold a single congressional act as violating the Commerce Clause—substantial effects test
    2. **US v Lopez (Rehnquist)(1995)**
       1. Facts: §922Q—Gun Free School Zone Act—federal offense for any individual who knowingly possess a firearm in any region person knows or should know is a school zone. Lopez is a 12th grader who brings a gun to his high school
       2. 3 previous ways commerce clause was permissibly used
          1. Regulate the use of channels of interstate commerce
          2. Regulate instrumentalities of interstate commerce even if threat comes from intrastate activities🡪Shreveport
          3. Intrastate has “substantial effect” on interstate commerce
       3. Holding:
          1. Exercise of power under 922Q is an overreach of the commerce clause.
          2. Commercial/Noncommercial test: 922(q) is a criminal statute that has nothing to do with “Commerce” or any sort of economic enterprise and is not a part of a larger regulatory scheme
          3. No requirement of an additional nexus to commerce unlike US v. Bass—crime for a felon to receive, possess or transport in commerce or affecting commerce any firearm
          4. No congressional hearing/finding on effects upon interstate commerce of gun possession
       4. Overly Broad
          1. Gov argues violent crimes are costly. Ruling: Too broad of an argument, many types of violent crimes, cannot restrict all
          2. Reduces willingness to travel and inhibits educational process also too broad, no limits
          3. To allow 922(q) would be to extend Congress’ enumerated powers—no longer a distinction b/w what is national and local
       5. Kennedy and O’Connor concurring
          1. Court and legal system have a stake at the evolution of commerce clause. Separation of powers, checks and balances in jeopardy. Two gov system creates stability and unless boundaries are clearly defined, there is no accountability. Judicial power must intervene when one level of gov has tipped the scales too far.
       6. Thomas concurring—substantial effects test is a 20th century invention, skews original understanding of commerce clause
       7. Dissent (Breyer, Stevens, Souter, Ginsberg)
          1. Aggregate test should be used
          2. In determining if a local activity would have a significant affect, Congress should be given great leeway b/c constitution gives commerce power directly to Congress and Congress is in best position to make an empirical judgment
          3. Q then becomes whether Congress has a rationale basis for finding a significant/practical connection
             1. Effect on education linked w/ economy
          4. Argues 3 problems arise w/ substantial test
             1. There have been more tenuous links b/w acts and interstate commerce in the past
             2. Distinction b/w commercial and noncommercial—contradicts the earlier “formula” argument of Wickard and this is arguably a commercial transaction based on the amount Congress spent of the GDP on schools
             3. Legal uncertainty created
          5. Souter—Congress accountable for its own acts, SCOTUS should ex judicial restraint
          6. Stevens—market for guns is substantial
18. Commerce Clause After Lopez
    1. Congressional findings—how much do the investigations have to reveal? Is true standard plausibility or is a greater degree of rigor required? Maybe Lopez is a reminder to Congress to take greater account of federalism when enacting legislation
       1. **Jurisdictional nexus principle**: Unlike other statutes (see Atlanta Motel) 922(q) does not expressly refer to or require proof of interstate movements of persons or instruments
    2. Areas of traditional state autonomy: Q to ask “Is there a reason we cannot leave the matter to the states?”
19. United States v. Morrison (Rehnquist)(2000)
    1. Facts: VA Poly student Brzonkala was allegedly raped by the defendants.  She sued the defendants in federal court under 42 U.S.C. § 13981.  The defendants responded by claiming that the statute was unconstitutional.  The district court agreed and dismissed the complaint.  Brzonkala appealed.  The Fourth Circuit affirmed en banc, and Brzonkala appealed to the U.S. Supreme Court.
    2. Statute: Violence Against Women’s Act of 1994: All persons w/in US have a right to be free from crimes motivated by gender
    3. Issue**:** Did Congress have constitutional authority to enact § 13981 under the Commerce Clause?
    4. Holding and Principle:
       1. Lopez provides proper framework—activity in question needs to be some sort of economic question
       2. Leaves open the Q of aggregating effects of noneconomic activity
       3. Unlike Lopez (handgun/school-zone), this case is supported by numerous Congressional findings.
       4. Court rejects causal chain of effects argument (deterrence of traveling, medical, productivity) as being overly broad. Suppression of crime has always been the prime object of the States’ police power
       5. Aggregate test argument has no limits and presents an opportunity for Congress to intervene in any matter e.g. marriages, etc…
    5. Thomas concurring
       1. Substantial effects test inconsistent
    6. Dissenting Souter, Stevens, Ginsburg, Breyer
       1. Business of courts is to review congress rationality. Here amount of data assembled. 4 yrs of hearings, testimony from physicians, law professors
       2. Economics/Noneconomic distinction is difficult to apply. Complex rules unlikely to protect areas of state regulation from fed intervention. Congress should control state/federal balance.
          1. Wickard aggregate test was more stable
          2. Would the case be related to economics if it involved a mugger?
          3. Congress can easily redraft statute to relate to economics because every activity now involves commerce.
       3. All but one state supported the statute. Furthermore, there is an implicit agreement to the statute in the state’s silence in dealing w/ gender-based violence in state courts. “It is not the least irony of these cases that the States will be forced to enjoy the new federalism”
    7. Limits of Lopez and Morrison:
       1. Do the cases represent a resurgence of federalism or are the practical effects limited? See Congress’ revision of the handgun statute in Lopez by including a jurisdictional nexus.
       2. Aggregation principle set forward in Wickard is limited to economic/commercial cases after Morrison
20. Gonzales v. Raich (Stevens majority)—aggregate test revived
    1. Facts: Application of federal laws to state authorized use of home grown marijuana for medicinal purposes in CA.
       1. State Act: Prop 215 (Compassionate Use Act) exempts from criminal prosecution physicians, patients, caregivers who grow marijuana for medicinal purposes w/ doctor recommendation
       2. Federal Act (Controlled Substance Act) prevents obtaining cannabis for medicinal purposes
    2. Issue: Is Congressional authority exceeded w/ CSA’s intrastate prohibition of the manufacture and possession of marijuana for medicinal purposes?
    3. Holding: CSA is constitutional use of commerce clause
    4. Wickard est. Congress can regulate intrastate, non-commercial goods if failure to regulate the activity would undercut the regulation of intrastate activity of the commodity
       1. Marijuana like wheat is a fungible good
    5. As in Wickard, Congress has a rational basis for believing home-consumed marijuana outside federal regulations will affect national market conditions (undercut interstate activity)
    6. Facts applied
       1. Difficult to distinguish home grown (local) and other marijuana
       2. 215 leaves a gaping hole in CSA
    7. Distinction w/ Lopez and Morrison
       1. Respondents ask to excise individual applications of a valid statutory scheme. In contrast, Lopez and Morrison, the whole provision fell outside of the statutory scheme
          1. CSA was a lengthy statute creating comprehensive framework for regulation, production and distribution of substances (quintessentially economic activity)
    8. Scalia concurring
       1. Power to regulate activities that are not a part of interstate commerce does not come from the commerce clause alone. Power comes from NP clause as well. Where it is necessary to regulate interstate activity, Congress may regulate intrastate activities that do not “substantially affect” interstate commerce. Non-economic regulation may even be valid.
       2. Lopez and Morrison are purely local cases
    9. O’Connor, Rehnquist, Thomas dissenting
       1. One of federalisms virtue is that it promotes state experimentation.
       2. Four requirements under Lopez:
          1. Substantial effect on economic activity
          2. No jurisdictional nexus (jurisdictional requirement est. statute’s connection to interstate commerce)
          3. No legislative finds
          4. Firearm and economic effects connection is too attenuated
       3. No evidence that homegrown marijuana has a sizeable impact on national market or threatens CSA enforcement. At issue is a small amount of marijuana, unlike the excess of wheat in Wickard
       4. Incentivizes Congress to pass all-encompassing statutes
       5. Marijuana is a noncommercial endeavor, regardless of potential effects. It was never in the stream of commerce, nor were the supplies for growing it
    10. Thomas Dissent: may be necessary, but not proper
21. Commerce Clause after Raich
    1. Economic/noneconomic distinction in Morrison extended. In this case, marijuana regulation was considered generally (production, distribution, consumption) and, therefore, fell into the economic category even though at the specific level (medicinal marijuana) is non-economic. Broader statutory scheme considered.
    2. General v. Specific congressional scheme: Could court regulate handguns in Lopez if it was a part of a broader gun control law?
    3. Does the dissent suggest congressional commerce power should be interpreted more restrictively in areas where states are considering policy experiments? Federalism may hold new appeal for advocates of progressive causes
22. External Limits on the Commerce Power: Federalism and the 10th and 11th amendment
    1. 10th amendment—Powers not delegated to the US by constitution, or prohibited…
    2. 11th—Judicial power of the US shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the US by citizens of another state, or by citizens or subjects of any foreign state
23. Commandeering
    1. Congress may not be able to commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program or conscript state agencies into national bureaucratic army
    2. New York v. United States (O’Connor)(92)—
       1. Facts: Waste Policy Act of 1985 required states to promote disposal of waste generated w/in borders and provided 3 incentives
          1. Monetary—allowing states w/ disposal sites to imposes a surcharge
          2. Access—incentives allowing states to increase cost or deny access to their disposal sites against non-complying states
          3. Take Title—sanction provides that if a state fails to provide disposal sites by a particular date, they must take title to waste and become liable for all damages suffered by waste generator.
       2. NY and two counties seek a declaratory judgment, claiming act represents an overreach of Congress’ power and violates 10th
       3. Holding: 1st two provisions are constitutional, but take title is not. Constitution does not confer upon Congress ability to compel states to act (commandeering)
       4. Federalism Q viewed in to two ways: Is the Act a power delegated to Congress in Article I? Is 10th violated?
          1. 10th is a tautology confirming that the power of the Federal Gov is subject to limits that may, in a given instance, reserve power to the states.
       5. Congress may not commandeer the legislative process of states by directly compelling them to enact or enforce a regulatory program
       6. Congress can use other means to directly govern the people.
          1. Spending power—attach conditions as basis for receipt of federal funds
          2. Pre-emption—Where Congress has ability to regulate, they can regulate activity according to fed standards or pre-empt fed law
       7. State retains ultimate decision of compliance, and remains responsive and accountable to people
       8. Facts Applied
          1. If the people of NY decide that disposal of waste is not w/in best interest, they can elect officials accordingly. Supremacy Clause can be used for pre-emption, but such a mandate will be open and increase accountability
          2. Take title provision crosses line
             1. Two choices—take title and accept damages or regulate according to federal standards—provide no choice and is coercive. Same as directing state to regulate.
             2. Transferring waste to state is no different than a congressionally compelled state subsidy
             3. Provision of liabilities would be the same as directing the states to assume liabilities of residents
       9. Even if NY benefitted from agreement, State sovereignty must be protected for the people
       10. Dissent: White, Blackmun, Stevens
           1. Act represents a bargain among states w/ Congress acting as a referee
       11. Stevens concurring/dissenting
           1. No lim in constitution for commandeering. Gov regulates many state functions (railroads, etc…)
       12. Notes:
           1. Different approaches can be used
              1. Spending Power—Congress may condition the payment of relevant federal funds on a state’s agreement to take title to waste
              2. Commerce Power—Congress may impose a federal tax on interstate commerce or pass federal legislation regulating private producers to limit their production if there is a shortage of disposal sites
              3. Conditional preemption—Threat to pass federal leg under commerce clause unless states choose to regulate according to federal standards
    3. Commandeering state executive branch
       1. Printz v. US (Scalia)
          1. Issue: Does anti-commandeering extend to federal laws directed at state or local executive officers?
          2. Facts: Brady Handgun Violence Prevention Act requires state and local officers to conduct background checks on prospective buyers. Petitioners object to being pressed into federal service.
          3. Holding: 5-4 vote, holding that the law is invalid
          4. Fed papers rest on assumption that states would consent to allowing their officers to assist the Fed gov (tax collection)
          5. Fed powers would be augmented considerably if they had officers of each state at their disposal. Enforcement and making laws distinction does not hold water
          6. Distinct from Testa v. Katt where the court held states had to apply federal law under the Supremacy clause. In Printz, states have to administer federal law
          7. Accountability issues—Congress can take credit for solving problems w/out asking constituents to pay
          8. Steven’s dissent—support in fed papers (assumption that state agents would act as collectors) prevents overbearing presence of national collectors
             1. Perversely incentivizes aggrandizement of fed gov power by encouraging the enlargement of fed bureaucracy
          9. Souter dissent—heavy reliance on Fed 27
          10. Breyer—constitution silent on principle forbidding assignment of federal duty
              1. Distinction b/w laws regulating states and laws requiring states to regulate citizens
              2. Foreign federal systems such as Germany, France have states administer federal laws
       2. States as objectives of federal regulation vs. states as regulators
          1. NY and Printz reject Congress’s authority to dictate, through federal prescription, how states regulate their citizens but neither decision addressed the authority to regulate the states’ own conduct under general laws that also regulate similar conduct of private actors.
          2. **Reno v. Condon**—The Driver's Privacy Protection Act of 1994 (DPPA), regulates the disclosure of personal information contained in records of state motor vehicle departments. The DPPA establishes a regulatory scheme that restricts the State's ability to disclose a driver's personal information without the driver's consent. South Carolina law conflicts with the DPPA's provisions.
          3. Holding: Rehnquist: 1) the DPPA was an acceptable exercise of Congress' powers under the Commerce Clause, because drivers' information was an "article of interstate commerce" within the terms of the Act, and 2) the DPPA did not "commandeer" state authority in the manner which the statutes involved in *New York v. United States* and *Printz v. United States* did.
          4. DPPA similar to statute at issue in *South Carolina v. Baker* which prohibited States from issuing unregistered bonds:
             1. Like the statute in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.
          5. Finally, Rehnquist addressed South Carolina's argument that Congress could only regulate the individual states by means of laws of "general applicability" (laws that apply to individuals and states), rather than directly targeting state governments for regulation. Instead of determining whether such "general applicability" is indeed a Constitutional requirement, Rehnquist merely pointed out that the DPPA was "generally applicable", because in addition to regulating the actions of state governments, it also regulated private persons who resold or redistributed drivers' information.
24. Other National Powers: Taxing, Spending, War Treaties, and Foreign Affairs
    1. Taxing Power: Article I § 8 cl. 1 Grants Congress Power to lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common defense and general welfare of the US.
    2. Issue: To what extent has Congress used taxing powers to regulate local issues?
       1. Child Labor Tax Case (Bailey v. Drexel Furniture)(Taft)(1922)
          1. Contrast w/ Hammer v. Dagenhart
          2. Facts: Child Labor Tax Law imposes an excise tax of 10 percent on the net profits of a company who employed children. The law defined child labor as “under the age of sixteen in any mine or quarry, and under the age of fourteen in any mill, cannery, workshop, factory, or manufacturing establishment.”
             1. Definition also included the use of children between the ages of fourteen and sixteen who worked more than eight hours a day or more than six days a week, or who worked between the hours of 7:00 p.m. and 6:00 a.m.” Drexel was a furniture manufacturing company in North Carolina.
          3. Issue: Does the tax regulate incidentally or is there regulation via the tax as a penalty.
             1. Infringement on state powers as enumerated under the Con and 10th?
          4. Holding: Invalid exercise of taxing power: To grant this tax would be to permit Congress to regulate via the magical word “tax”—tax intended to destroy subject and breaks down all constitutional limits
          5. Out of respect for Congressional power to tax, there is a presumption of validity, but there comes a time when a tax is a penalty (pretext)
          6. Difference b/w tax and penalty. Tax imposed to collect revenue w/ incidental property of discouraging an act by making it onerous (incidental)
          7. Veazi v. Kenno—inc taxes on circulatory notes for persons and state from one to 10. Distinguished b/c act was NP to impose an enumerated power (provide currency), no elaborate specifications indicating a purpose to regulate matters. Only objection was steep inc. in price.
          8. McCray v. US—tax on oleomargarine. Congress may select subject for taxation, and other motive did not invalidate law
          9. US v. Doremus—Narcotic Drug Act imposes a special tax on manufacture, importation and sale or gift of opium or coca leaves. Reasonable relation b/w provision for subjecting sale and distribution of drugs to taxing.
          10. Notes: Could the distinction b/w the Drug case and Bailey furniture be the amount of tax excised ($1 a yr compared to 10% of net income)?
       2. US v. Constantine
          1. Facts: P convicted of doing business as a retail dealer of malt liquor contrary to AL law, without paying the 1k tax imposed by Congress
          2. Holding: Punitive contrast and constitutionally invalid
          3. Contrast w/ Sozinksy v. US--$200 fee annually on dealer of firearms—tax is productive revenue (not fair to speculate on the motives)
       3. US v. Kahinger (1953)
          1. Facts: Taxation imposed on gambling and requirement that persons engaged in the business register w/ Collector of Internal Revenue
          2. Holding: Valid exercise of power b/c revenue is being collected (greater than the valid narcotics and firearm acts) and cannot be made invalid b/c of ht incidental consequence of deterring behavior.
          3. Opinion ignores the fact that legislative history suggested a congressional motive
       4. Commerce v. Taxing Power
          1. Darby (overruling Hammer) relied on Veazie and McCray
          2. Are Courts more willing to defer to Congress in Commerce cases? Is it because the statutory scheme is clearer in regards to taxation purposes? What about US v. Morrison and Lopez?
    3. Spending Power
       1. United States v. Butler
       2. Facts: Agricultural Adjustment Act of 1933—tax imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their area and crops. The intent of the act was to increase the prices of certain farm products by decreasing the quantities produced.
       3. Holding: The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.
       4. Two interpretations of the Taxing/Spending Clause
          1. Madison view: National gov power to tax is spend is limited to the enumerated powers of § 8
          2. Hamilton—Power to tax subject only to a general welfare requirement.
          3. Court advocates Hamilton view
       5. Issue: What is the scope of the phrase “general welfare” of the US? Must consider the principle of separate but equal.
       6. Regulation is not voluntary—noncompliance is economically ruinous to the farmer. “Coercion by economic pressure”
       7. Even if the plan was voluntary, it is unconstitutional b/c Congress has no independent power to regulate agriculture. It cannot indirectly compel compliance via tax or spending
       8. Difference b/w a statute stating the conditions upon which moneys will be expended and one effective only upon assumption of a contractual obligation to submit to a regulation that would otherwise be unconstitutional
       9. Stone dissent
          1. Economic coercion is lost not gain. Act is a valid exercise of power.
          2. Constitution states public funds shall be spend for a defined purpose, “the promotion of general welfare”. Without an objective, gov spending would be unconstitutional
          3. Power to spend is inseparable from power of persuasion.
          4. Holding leads to absurd results: gov may give money w/out demanding something in return.

* 1. Spending Power After the New Deal (Post-Butler)
     1. Steward Machine Co. v. Davis (1937)(5-4 decision)(Cordozo)
     2. Facts: The unemployment compensation provisions of the Social Security Act of 1935 establish a tax imposed on employers. If, however, a state has established an approved unemployment compensation plan, the taxpayer is allowed to credit up to 90% of the federal tax paid to the state unemployment fund. In effect, the Act established a taxing structure designed to induce states to adopt consistent laws for funding and payment of unemployment compensation.
     3. Issue: Whether the tax coerced the states and whether the tax was within the powers of Congress?
     4. Holding: No coercion. Tax is a way in which all public agencies work toward a public goal. Ends state paralysis
     5. Intervention is needed to place states on equal footing and to safeguard treasury.
     6. Difference in coercion and motivation, AL is not placed in duress by enacting the law. Act is constitutional if taxing is related to the national interest.
     7. Distinguished from Butler
        1. Proceeds not earmarked for special group
        2. Unemployment compensation law which is a condition of the credit has been approved by states
        3. State may repeal, terminate credit, or place itself where it was before the credit
        4. Relief is not a means to an unlawful end.
     8. Notes: Helvering v. Davis: The line must be drawn b/w general and local welfare, but the discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power
  2. South Dakota v. Dole (Rehnquist)—Court’s current opinion on federalism based limitation on conditional spending power
     1. Facts: National law conditioning highway funds to states on state’s agreement to raise drinking age. National min age drinking act of 1984 directed 5% withholding of federal funds to any state permitting persons less than 21 to purchase OH.
     2. Issue: Even though congress cannot regulate drinking directly b/c of 21st amendment, is it constitutional for them to indirectly regulate drinking?
     3. Limitations on Spending Power
        1. Exercise of spending power must be in pursuit of “general welfare”. Deference toward Congress’s judgment
        2. If Fed places condition on funds, it must do so unambiguously, enabling state to exercise their choice while aware of the consequences
        3. Illegitimate if unrelated to federal interest in particular national projects or programs
        4. See if other constitutional provisions may provide independent bans.
     4. Reasoning
        1. Condition is directly related to a main purpose—safe interstate travel
        2. Non-uniform drinking laws create an incentive to drink and drive as young people drive to border towns
        3. Independent constitutional ban—21st amendment prohibits direct but not indirect intervention
     5. Coercion Question: Steward machine: Congress might be so coercive as to pass the point at which pressure turns into compulsion. In this case, states will only lose a small amount of federal funds.
     6. O’Connor Dissent
        1. Relationship b/w goal (interstate travel) and condition is attenuated.
           1. If Congress’s wishes to make the highways safer, the law is both over and under inclusive. Stops teens from drinking even if they don’t drive. Over inclusive because it doesn’t address other drinkers.
        2. Difference b/w grant and condition—condition is a stipulation of how money should be spent. Anything else is a regulation and only valid if it falls w/in the enumerated powers. (Butler argument)
        3. Butler holding is only wrong in its restrictive view of Congress’ regulatory power in agriculture.
     7. Notes
        1. Whenever there is an issue on spending power, look to relatedness—majority takes a broad view of relatedness.
        2. Factor 4: Look for any violations of DP, Equal protection, etc…
        3. Spending Power and Federalism
           1. B/c Rehnquist Court has not narrowed spending clause, Congress is incentivized to run around commerce restraints e.g. dispersal of fed funds for state w/ regulation criminalizing possession of gun in a school zone
        4. Spending Power and Aggrandizement of State powers: Because Dole’s interpretation of spending power is generous; it enhances Congress’ authority to drive states toward a single, nationwide policy. Congress then responds to the preference of majority states, while ignoring minority ones.
        5. If spending power is restricted so that Congress can only regulate states if direct regulation is allowed, then Lopez would be an impermissible regulation. But the presumption is rebuttable if Congress can show that it is reimbursing states for costs incurred in carrying out a valid federal program.
  3. War and Treaty Powers and Implied Powers Over Foreign Affairs
     1. Woods v. Cloyd M Miller (Douglas)(1948)
        1. Facts: Title II of Housing and Rent Act is contested as an invalid ex of Congressional Power in light of Presidential Proclamation ending war.
        2. Holding: B/c the war has ceased, does not mean war power has ended if there is still war related issues
        3. Standard: Rational relationship
        4. War power includes power to “remedy the evils which have arisen from the its rise and progress” and continues for the duration of that emergency.
        5. Here there is a deficit in housing demobilization of vets and a reduction in residential construction
        6. Case is an ex of NP clause
        7. Jackson Concurring—Particular statue is valid, but ex of war power would not valid where war power is used to affect liberties of people that indirectly affect and do not relate to management of war.
           1. Does not believe war power can be prolonged as long as the effects
           2. War power is the most dangerous power to free government b/c it is usually invoked in haste and excitement and at a time when patriotic fervor makes moderation unpopular.
     2. Missouri v. Holland (Holmes)(1920)
        1. Facts: MO attempts to prevent a game warden from enforcing the Migratory Bird Treaty Act on ground that the statute interferes w/ rights reserved to the states under the 10th.
           1. Treaty b/w US and Britain, prohibiting the killing, capturing or selling of migratory birds except as permitted by regulations compatible with those terms
        2. Holding: Reliance on 10th is in vain, statute and treaty are upheld
        3. A treaty is, as expressed in Article II § 2 and Article IV are made under the authority of the United States and are the supreme law of the land. If a treaty is valid, there is no dispute about the statute under Article I § 8.
        4. Actors of Congress are the supreme law only if they are made in pursuance of the constitution, while treaties are supreme when made under the authority of US (does not have to be w/in the constitutional powers)
        5. Treaty, followed by an act, can deal with matters of sharp exigency for national well being. Constitution is limited and cannot predict all exigencies.
        6. Treaty does not contravene any prohibitory words in the Constitution and is not forbidden by the 10th b/c subject matter is only transitorily w/in the state
     3. War and Treaty and Federalism
        1. Supremacy of treaties over state law: A valid treaty overrides a state law on matters otherwise w/in state control
        2. Treaty and Congress’s other powers: Holmes assumes Congress could regulate under treaty powers even on subjects beyond its otherwise enumerated powers.
           1. If Article I is insufficient to regulate a local matter, can the gov make a treaty with a foreign nation? Are there any limits?
           2. Growing fear that treaty power could override constitutional limits following Missouri.
        3. Reid v. Covert (1957)(Black)
           1. Facts: Involved congressional power under Art. I § 9 to provide for military jurisdiction over civilian dependents of American servicemen overseas derived from a treaty.
           2. Holding: Act is invalid—no agreement with a foreign nation can confer power on the Congress or any other branch, free of constitutional restraints
           3. MO v. Holland ruling is not contrary, since the treaty did not violate any specific provision of the Constitution and 10th is not an barrier w/ valid treatises
           4. Case helped allay fears that treaty powers would expand federal power
        4. Argument that the power to make treaties does not extend to the implementation of treaties, which still must be constitutionally permitted. As a general rule, leg power can only be expanded via an amendment.
        5. Treaty Power and Federalism: Like taxing and spending, treaty is not subjected to federalism based restrictions that Rehnquist court applied to commerce power. Can treaty be another means of expanding national power?
        6. National power as a restraint on state authority in foreign affairs
           1. Zschering v. Miller—Court barred application of a state alien inheritance law because it intruded on the field of foreign affairs which the Constitution entrusts to the President and Congress.

1. Federal Limits on State Regulation of Interstate Commerce
2. Dormant Commerce Clause—Rational Basis Standard
   1. Article I § 8 cl. 3—Court has construed commerce clause both as a grant of power to the national gov and as a limitation of power to the states
   2. Where Congress has exercised its affirmative power under the clause by enacting fed legislation, any confliction law will be struck down under the Supremacy and preemption principles
   3. Negative/Dormant Clause—Even when Congress has not legislated, state laws that burden or discriminate against interstate commerce will be invalidated
   4. Justices who do not believe in Dormant Commerce Clause—Scalia, Thomas
   5. Modern test
      1. Three types of state laws that run afoul of the dormant Commerce Clause
         1. Laws whose purpose is to regulate interstate commerce/control out-of-state transactions
         2. Laws that discriminate against interstate commerce
         3. Laws that are non-discriminatory but burden interstate commerce
   6. Five inquiries
      1. Is the law rationally related to a legit state purpose?
      2. Does the law have the practical effect of regulating out-of-state transactions?
      3. If the law discriminates against interstate or foreign commerce, does it represent the least discriminatory means for the state to achieve the purpose?
      4. Are the burdens the law places on interstate or foreign commerce clearly excessive in relation to the benefits?
      5. Does the law rep the least burdensome means for the state to achieve its goal?
   7. Rational Relationship to Legit State Purpose
      1. Legit Purpose
         1. Enough that the purpose is one the legislature might have been pursuing. Extreme judicial deference means it is rare that a law challenged under the dormant commerce clause is overturned b/c of legit purpose
         2. Two purposes that the court has consistently held to be non-legit
            1. State may not enact law for the purpose of regulating interstate/foreign commerce

Bradley v. Public Utilities Commission—state can limit number of common carriers at certain routes for public safety reasons, but not b/c they believe there is enough commerce occurring

* + - * 1. Economic Protectionism—state may not enact a law to shield local interests

Policy is avoidance of Balkanization

Ex. Case: South-Central Timber Develop, Invc. V. Wunnicke—Alaska statute required timber taken from state lands to be processed in Alaska before being shipped out of state. Admitted purpose was to shield AL infant timber processing industry.

Cannot be used as an intermediate goal toward attaining a legit end either e.g. Bradley v. Public Utilities Comm’n—Legit goal was to assure a dependable supply of local milk during shortage. Means was by pricing milk to make it impossible for out-of-state suppliers to compete.

* + - * 1. Remember to look at purpose, not effect. Not all laws that halt the flow of interstate commerce are protectionist

Maine v. Taylor—Main bans importation of live baitfish for environmental reasons. But even if a court stops short of finding protectionism, the measure is subject to strict scrutiny and the least discriminatory means must have been used

* + 1. Rational Relationship
       1. If the state law has a legit purpose, courts are extremely deferential in finding rational relationship and law will not be defeated even if measure does not further or even defeats the alleged goal
       2. Evidence of protectionism may cause court to use rational basis test
  1. Extraterritorial Regulatory Effects
     1. Unconstitutional per se: State law is invalid if it regulates commerce that occurs wholly outside state’s borders
     2. Regulatory effect—law must prohibit or mandate certain out-of-state behavior such that a failure to comply will result in the imposition of legal sanctions. Regulatory effect must be proven and not speculative.
     3. For a state law to be invalid, two requirements must be met
        1. Must have the effect of controlling certain behavior through legal sanctions rather than influencing behavior for economic reasons
        2. Impact of law must fall on a transaction that occurs wholly outside the state
     4. Brown-Forman Distiller Corp—NY statute required distillers to affirm that the prices charged in NY were the lowest. Once prices were posted, distillers were barred from reducing NY price or out-of-state prices
  2. Discrimination Against Interstate Commerce
     1. State laws that are rationally related to a legit purpose may still be invalidated if it involves discrimination and is not the least discriminatory way
     2. Not invalid per se but rigorous scrutiny applied. Least-discriminatory means test is useful for getting rid of protectionism in cases where there is doubt about the state’s true purpose
     3. Facial discrimination—When deciding on these cases, take other statutes into account (see if the state imposes severe restrictions on its citizens as well as out-of-state ones)
     4. Facially neutral, but with discriminatory effects—law must treat similarly situated in-state and out-of state members (competitors in same market) of industry the same. Cannot be a disproportionate burden.
  3. Balancing Burdens and Benefits
     1. Legit/rational law may still be invalidated if burdens outweighs benefits
     2. Bibb v. Navajo Freight Lines—statute requiring special contour mud flaps on trucks excessively burdened interstate commerce w/out sufficient benefit
     3. Court, esp. Scalia, appears unwilling to use balancing test
  4. Least Burdensome Alternative
     1. If it passes legit purpose/discriminatory/balance test it can still be unconstitutional if it is not the least burdensome alternative
     2. Kassel v. Consolidated Frightways Corp—court stated struck down law requiring trucks to be no longer than 55 ft because studies showed that commonly used 65 ft trucks were as safe
     3. Difference b/w least burdensome/discriminatory. To be least discriminatory, a state can either reduce the burden on interstate commerce or inc. it on intrastate. A less discriminatory alternative may not be least burdensome

1. Exceptions
   1. State Regulation of Alcohol—
      1. State laws dealing w/ alcohol are potentially immune under dormant commerce clause b/c of 21st Amendment. 21st repealed prohibition and provided that state would govern transportation and use of liquors
         1. Recent yrs Court has rejected the contention in *Granholm v. Heald*. State must still prohibit use, sale, and distribution in evenhanded way, lim by nondiscrimination principle in Commerce Clause
      2. State laws affecting commerce with other nations are subject to more searching scrutiny than ones that only affect interstate commerce. Crucial Federal gov speaks with one voice.
   2. If state is shown to violate one of 5 requirements, state may be excused if it can show:
      1. Congressional Approval—Under dormant commerce clause, judicial role is holding the fort for Congress to protect certain aspects of interstate and foreign commerce from state encroachment until Congress deals with the matter. But Congress is able to restore states’ ability to regulate
         1. Congressional authorization must be CLEAR and UNAMBIGUOUS
      2. Market Participant
         1. If a state enters marketplace as a participant, its actions are treated like those of a private party.
            1. Principle—state should be able to operate freely in market, and actions are constrained by market forces
         2. Applies when state is a buyer or seller of goods, but state cannot, by statute, regulation or K, attempt to exercise control over actions of private parties beyond the market in which it is participating.
            1. Court has tended to narrowly define market and, in most cases where states have sought to impose restrictions on their trading partners, Court has found downstream restrictions to involve regulation of a different market

Look to see if obligations b/w initial two parties has been completed

South-Central Timber Development v. Wunnicke—Alaska loses market participant status when it sought to make those buying timber in AL process it in the state

* + - 1. State Subsidies—states may be able to claim market participant when it buys or sells goods and services
         1. Look at the source of the subsidy. If the subsidy is funded from general tax revenues, then there is probably no dormant clause issue. But if it is a special tax paid by both local and out-of-state business, and the revenue is then returned to local interests, the tax rebate discriminates against interstate commerce
      2. Tax Credits will never be eligible for exemption. For tax credit, state is acting in a sovereign capacity and not as a market participant.
  1. State taxes and Dormant Commerce Clause
     1. Complete Auto Transit v. Brady set out a four part test:
        1. Applies to an activity that lacks a substantial nexus to taxing state
        2. Not fairly apportioned
        3. Discriminates against interstate or foreign commerce
        4. Not fairly related to services provided by the state
     2. Substantial nexus similar to the minimum contacts test in International Shoe. For example, requirement is satisfied if the subject of a sales tax is the purchase of goods in the taxing state
     3. Fairly apportioned—Eliminates risk that a co. will be subject to “multiple taxation”. If a company’s activities in a state can be taxed in another state, the state should fairly apportion the tax in accordance to the company’s activity in that state
     4. Cannot be discriminatory, and if it is, has to be the least discriminatory method possible.
        1. Facially neutral tax may be discriminatory if, when considered in the light of similar taxes imposed by other states, its effect is to burden those engaged in interstate or foreign commerce more heavily than it burdens similarly situated interests.
           1. Internal consistency test: What would happen if all States did the same?
        2. Discriminatory tax will be upheld if it is compensatory. E.g. State imposes a sales tax on goods bought in the state. To eliminate the incentive for residents to purchase out of state goods, state charges compensatory use tax on privilege of using goods in the state that were purchased elsewhere.
        3. Three part test.
           1. State must ID intrastate tax for which the discriminatory tax is designed to compensate, and must show that the purpose is one that justifies placing a burden on commerce (Tax used to compensate for the state’s sales tax
           2. Tax must be roughly approximate but in no event exceed the amount of tax on intrastate commerce
           3. Events of interstate and intrastate taxes are imposed must be sub equivalent so that one tax can be deemed to be a proxy for the other
     5. Fairly related to state services—means that the tax must be reasonably related to the extent of services provided
  2. Taxation of foreign commerce is held under a higher standard. Court considers enhanced risk for multiple taxation and possible need for federal uniformity.

1. Federal Limits on State regulation of Interstate commerce
   1. Dept of Revenue of KY v. Davis—upholds KY exempted interest on its public bonds from state income taxes but imposed taxes on bonds from other states. Legit state purpose, bonds have venerable history of paying for public projects
2. Interstate Privileges and Immunities Clause of Article IV § 2
   * 1. “The citizens of each state shall be entitled to all privileges and Immunities of Citizens of the several states”
     2. Purpose: Restraint on state efforts to bar outsiders from access to local resources
   1. Dormant v. Article IV § 2 (privileges)
      1. Corporations enjoy no protection under PI
      2. Congress may authorize, through affirmative exercise of its commerce powers, state practices that would otherwise be impermissible under dormant commerce clause. P&I cannot be waived
      3. P&I extends to exercise of “fundamental rights” and not to all commercial activity
      4. No market participant exception under P&I
   2. United Building & Construction v. Mayor and Council of Camden (market participant case)(Rehnquist)(1984)
      1. Facts: Camden ordinance requiring that min 40% of employees of contractors and subs working on city construction must be Camden residents
      2. Does PI apply only to laws passed by states?
         1. Unconstitutional if passed by a state or a city that derives authority from state
      3. Does PI apply only to laws that discriminate on the basis of state citizenship?
      4. Holding: Terms citizen and resident are interchangeable: municipal ordinances must comport w/ the Constitution
      5. Primary purpose of clause is to ensure citizen of state A enjoys same privileges as citizen of State B
      6. Similarly disadvantaged argument rejected—in state residences have power to vote while out of state ones do not
      7. Application of the clause in discrimination of out-of-state-residences requires a two-step inquiry
         1. Does the ordinance burden a PI protected by the clause? Applies only w/ respect to distinctions that prohibit the formation, purpose, development of a single union
         2. Issue: Are out of state resident’s interest of private employment fundamental to the promotion of interstate harmony?
            1. Market Participant theory: In White, court found that for the purposes of the commerce clause, everyone employed on a city public works project is “working for the city”. But market participant theory does not apply to PI.
            2. Commerce and PI

When state acts as a participant, no conflict b/w state regulation and fed applies. Commerce restraint upon state regulatory powers. Gives authority to Congress to regulate or leave unregulated

PI works to ensure interstate harmony. It is discrimination against out-of-state residents on matters of fundamental concern which triggers PI, not regulation affecting interstate commerce. Camden is not violating dormant commerce clause, but PI is violated.

* + - 1. Is there a substantial reason for discrimination? And does the discrimination bear a close relationship to the reasons.
         1. Every inquiry must be conducted w/ due regard for principle that the states should have substantial leeway in analyzing local evils and prescribing cures.
         2. Camden argument—discrimination counteracts grave economic and social ills, prevents the middle class flight. Non residents are the source of evil “live off w/out living in”. States should have leeway in decision
         3. Holding: Case remanded to lower court for further investigation
      2. Dissent (Blackmun)—No evidence that PI extends to municipalities. For over a century, it has been settled that state cannot discriminate citizens of other states on the basis of state citizenship. New ruling extends the scope of the clause.
         1. Those who are discriminated against in NJ represent out of state residents. Prevents those who are disadvantaged from being disenfranchised.
  1. Scope and Limits of Interstate PI
     1. Camden recognizes private employment as a fundamental privilege, but does not address public employment.
        1. Supreme Court of NH v. Piper
           1. Facts: State rule limited bar admission to in-state residents. Challenge brought by a woman who lived in Vermont who took the bar and passed, but was denied admission.
           2. Issue: Does state-licensed employment count as a privilege?
           3. Holding: State-license involves a privilege b/c practice of law is important to national economy
           4. No substantial reason for discrimination and discrimination does not bear a substantial relationship to state objective (are there less restrictive means)?

Reason: nonresident members are less likely to become familiar with local laws and do pro bono work for state.

* + - * 1. Rehnquist Dissent: less discriminatory test is unmanageable. Court will be able to strike down any statute on grounds that there is a less restrictive means.
    1. Justifying deferential treatment—
       1. PI test requires intermediate rather than strict scrutiny (substantial reason)
       2. Dormant Clause requires a compelling interest
  1. Congressional Ordering of Federal-State Relationships by Preemption and Consent
     1. Under Supremacy Clause of Art. VI. When congress exercises a granted power, the federal law may supersede a contrary state law.
     2. Issue occurs when federal gov does not clearly disclose its intended impact on state law
     3. Court’s preemption rule often turns on congressional intent on the setting of the text, history and purposes of federal legislation involved
     4. **Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm’n (White)(1983)**
        1. Facts: CA statute 25224.2 imposed moratorium on issuance of certification of nuclear energy plants until state energy resource conservation fund demonstrated tech or means for disposal of high-nuclear waste.
        2. Case involved storage pools for nuclear waste. Because the waste was not reprocessed, there was insufficient room to store spent fuel, and no space to hold entire fuel core when emergencies or inspections required unloading of reactor. Insufficient storage space can lead to shutdowns, rendering nuclear energy unprofitable.
        3. Issue: Is the provision pre-empted by Atomic Energy Act of 1954
        4. Two methods of pre-emption
           1. Expressly stated
           2. Scheme of federal regulation is so pervasive as to make it a reasonable inference that Congress left no room for supplementation (Federal interest is dominant—same objectives and obligations).
           3. Even in the absence of entire displacement, conflict in compliance of state and fed law will lead to pre-emption
           4. Law stands as an obstacle to accomplishment and execution of full purposes and objectives of Congress
        5. Issue One: Regulation of nuclear facilities and safety concerns is occupied by the federal gov. Fed gov sole authority on nuclear regulation.
           1. AEA gives federal gov complete control of the safety and nuclear aspects of energy regulation
           2. State is able to regulate in areas of economics (how a plant is run, need for additional generating capacity, etc..)
        6. Holding: Gov completely occupies safety field, and state cannot prohibit the construction of a plant based on safety concerns
        7. Issue Two: Test becomes is the matter in which the state asserts the right prohibited by the gov? Necessary to determine if there is a non-safety rational.
           1. Economic reason: CA Committee reported build-up leads to high cost of maintenance, shutdowns.
           2. Great deference should be given to CA’s motives and CA has been allowed to retain authority. Statute is outside the occupied field, and it is up to Congress to determine if state has misused authority via another statute, revised statute, etc…
        8. 2nd Argument: Staute conflicts w/ federal regulation aimed at the nuclear waste disposal problem. NRC has promulgated extensive and detailed regulations on handling of nuc materials, but legislation concerns safety and not economic reasons. No attempt to enter safety field. NRC thought they had economical say, but Supreme CT says no.
        9. 3rd: Statute frustrates AEA purpose of developing commercial plants. Well est. that a law is pre-empted when it stands as an obstacle to Congressional objective
           1. Promotion is not to be accomplished at all costs
        10. Final holding: Congress has left sufficient power up to the states to develop or slow nuclear power for economic reasons. Up to Congress to rethink division of regulatory authority
        11. Concurring: Stevens, Blackmun: Could state prohibit based on safety concerns?

1. **Preemption** – Congress may preempt state pwr to regulate in 4 ways [p.234]
   1. Express Preemption – When it’s express, only issue is if whether state statute falls w/in preempted area.
   2. Field Preemption – Court requires clear showing that Congress meant to occupy a field & displace states from reg on that matter
      1. Question in each case is the purpose of Congress
      2. Evidence of Congress manifest intent to preempt is (*Rice v. Santa Fe Elevator Corp*.):
         1. Scheme of fed reg is so pervasive as to make it a reasonable inference that Congress left no room for state to supplement it
         2. Act of Congress may touch a field in which fed interest is so dominant that fed system can be assumed to preclude enforcement of state laws on the same subject
      3. Criteria to help find if there is field preemption
         1. Is it an area where the fed govt has traditionally played a role?
         2. Has Congress expressed intent in text of law or in legislative history to have fed law be exclusive in that area?
         3. Would allowing state & local regulations in the area risk interfering with comprehensive fed regulatory efforts?
         4. Is there an important traditional state/local interest served by law?
   3. Conflict Preemption – If fed govt enacts a complete scheme of regulation states cannot conflict or interfere with fed law or enforce add’l or auxiliary regulations
      1. Considerations are if state law “conflicts with, is contrary to, occupies the field, repugnance, difference, irreconcilability, inconsistency, violation, curtailment, interference” but no clear distinct formula
      2. Under each case consider if state law stands as an obstacle to the accomplishment and execution of the full purpose/objective of Congress
         1. But just b/c fed/state law are different doesn’t mean there’s an impermissible conflict
      3. *Hines v. Davidowitz*
      4. *Fl. Lime & Avocado Growers v. Paul* – CP is when “compliance with both state & fed reg is physical impossibility”
         1. Facts: Dept of Agriculture has reg for measuring maturity of avocados & Calif. adopted a stricter rule
         2. Ct says fed/state are mutually exclusive if fed law is viewed as setting exclusive std but not if it is just sets a minimum
         3. In this case fed is just a minimum, states have traditionally reg marketing of food products
   4. Preemption if State Law Interferes with Federal Objective
      1. *PG&E v. State Energy Resources Conservation & Development* [p.230]
         1. Facts: Calif. law imposes moratorium on the construction of nuclear plants; utility argues that this interferes with fed objective of encouraging nuclear pwr
         2. *C*t upholds state law b/c Congress’ goal is to ensure safety while states goal was economic
         3. Intent of govt in passing Atomic Energy Act of 1954 was to give the fed govt exclusive reg pwr over the radiological safety aspects of construction & operation of nuclear plant
      2. Congress must determine (1) characterization of fed objective or (2) characterizing the state law & its purpose
   5. Policy: Ultimately these doctrines are about allocating govt authority b/w federal & state govts
   6. \*\*Biggest issue in determining preemption is determining congressional intent (this is difficult b/c intent is not always clear)
2. **Separation of Powers** – Art. I (Legislative), II (Executive), III (Judiciary)
   1. *Youngstown v. Sawyer* [p.245] – leading case addressing scope of presidential power
      1. Facts: Faced w/ an imminent steel strike during Korean War, President ordered gov seizure of steel companies to prevent strike.
      2. Held: act is unconstitutional
         1. Pres didn’t have constitutional or statutory authority to seize
      3. Rule = President as leader of executive is bound to enforce laws w/in limits expressly granted to him by Constitution. He cannot usurp lawmaking powers of Congress by an assertion of an unspecified aggregation of his specified powrs
      4. Jackson concurrence lays out 3 categories of prez power
         1. President power is at a maximum when he acts pursuant to the express/implied authorization of Congress
            1. Acts in this category are presumptively valid
         2. In absence of Congressional grant of power, Prez can act solely on the basis of the powers specified to him in C. Test of power depends on imperatives of events.
         3. If he acts against will of Congress, he can only do so where it can be shown Cong has exceeded its const. power and the prez is acting in his own sphere of authority
            1. Acts are subject to closest scrutiny in this category
         4. “Ours is a govt of laws, not of men & we submit to rulers only under rules”
         5. President’s act falls into third category b/c congressional silence is tantamount to a refusal to grant the President the power to seize
      5. Black majority says Prez is commander in chief of Army & navy but not of country
      6. Frankfurter concurrence = executive pwr in C is vague, so look to history to see what past prez have done to determine pwrs
         1. Here there’s no longstanding pwr of prez seizures
   2. Formalism v. Functionalism
      * 1. Black opinion took a formalistic approach tending to categorize and rigidly separate legislative, exec and judicial functions
        2. Frankfurter and Jackson take more flexible, functional approaches
   3. Executive Authority of Foreign/Military Affair: Exec branch has frequently resorted to unilateral exec agreements in foreign relations rather than using treaties
   4. Dames & Moore v. Regan
      1. President Carter, acting pursuant to International Emergency Economic Powers Act (IEEPA) froze Iranian assets in the US after Americans were taken hostage in Tehran. Hostages released pursuant to an agreement to settle all claims b/w two countries in arbitration. D&M, holders of an attachment against Iran file suit.
      2. Holding: President does not have plenary power to settle claims against foreign gov through Exec agreement, but can do so if Congress acquiesces to the actions. Congress gave implicit approval w/ IEEPA which gave him substantial power to seize and handle foreign assets.
      3. Rehnquist cites Jackson’s tripartite analysis and finds that this case fits in category one.
3. Executive Discretion in Times of War or Terrorism
   1. President, Congress and War Powers
      1. Article I § 8 confers upon Congress power to declare war. Article II § 2 gives him authority to act as Commander in Chief
      2. Does President have authority to defend nation against sudden attacks?
   2. Congress passed War Powers Resolution of 1973 in response to Vietnam War. Provides that President may introduce troops into hostilities pursuant to:
      1. Declaration of War
      2. Specific statutory authorization OR
      3. National emergency created by attack upon the US, its territories, or armed forces
         1. President should consult w/ Congress before introducing US into hostilities, and when troops are being introduced, President should submit a report w/in 48 hrs to Speaker specifying conditions of war.
         2. Congress can w/in 60 days 1) declare war 2) extend 60 day period 3) unable to meet extend period by 30 days 4) forces shall be removed if Congress directs
   3. Emergency Constitutionalism
      1. Constitution contains no general state emergency. Only a few provisions relating to war:
         1. Writ of Habeas Corpus🡪 privilege should not be suspended unless in cases of rebellion
         2. 3rd amendment, no quartering of soldiers and in times of emergencies, no Grand Jury needed for indictment of crime.
      2. Two views of emergency constitutionalism
         1. Strict reading, even during times of emergency
         2. All constitutional bets are off and executive must have latitude to assume greater unilateral discretion
   4. Executive Detention and Trial of “Enemy Combatants”
   5. Ex Parte Milligan—example of a strict reading of emergency constitutionalism
      1. Facts: Civilian detained b/c of suspected conspiracy in Indiana to stage a rebellion against union forces. Milligan was detained by military tribunal and convicted and sentenced by a commission.
      2. Court ruled that military tribunals could not try civilians in areas where civil courts were open, even during times of war. Martial rule can exist only if courts are closed, in cases of foreign invasion
      3. During the suspension of the writ of habeas corpus, citizens may be only *held* without charges, not *tried*, and not executed by military tribunals.
      4. Constitution is a law for rulers and people, equally in war and in piece, offers protection under all circumstances. No doctrine involves more pernicious consequences than the suspension of any provision during an exigency. Such a doctrine leads to anarchy or despotism.
   6. *Ex Parte Quirin*
      1. Facts: 8 Nazi saboteurs are tried in military tribunals and denied habeas corpus
      2. Constitutional safeguards for protection of all who are charged w/ offenses are not to be disregarded to inflict injury, but orders of President during times of war are not to be set aside w/out a clear conviction that they are in conflict w/ the Constitution or laws of Congress constitutionally enacted
         1. Constitution gives power to wage war which Congress has declared
         2. Congress has provided that military tribunals shall have jurisdiction in appropriate cases
         3. Detention and trial of foreign espionage & sabotage agents w/in the US during wartime by a military commission is constitutional here.
         4. Ct says law of war draws distinction b/w armed forces & peaceful populations of belligerent nations & also b/w lawful & unlawful combatant*s*
            1. Lawful combatants are subject to capture & detention
            2. Unlawful are subject to that and trial & punishment by military tribunals
      3. Spies who seek to wage war through destruction of life or property are offenders against law of war, even if one is a citizen of the US.
4. Executive Detention and Trial of “Enemy Combatants after 9/11”
   1. Congress passes AUMF—Joint Resolution for the Authorization of Military Force. AUMF grants authority to use all "necessary and appropriate force" against those whom he determined "planned, authorized, committed or aided" the September 11th attacks, or who harbored said persons or groups
   2. Johnson v. Eisentrager (1950)—enemy alien German citizens were tried and convicted at a German military tribunal.
      1. Holding: Privilege of litigation does not extend to aliens in military custody who have no presence in “any territory over which US is sovereign”. At no time, neither during the crime, capture or trial, were Germans in US jurisdiction
   3. Rasul v. Bush (6-3 majority ruling)
      1. Habeas statute confers a right to judicial review of the legality of Exec detention of aliens in a territory in which US exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty”
      2. Stevens—US exercises complete jurisdiction and control over Guantanamo. Kennedy says Guan is like a US territory.
   4. *Hamdi v. Rumsfeld* – (O’Connor plurality)
      1. Facts: Hamadi is US citizen apprehended in Afghanistan, brought to US & held as enemy combatant w/o being charged
      2. Rule = Due Process requires a citizen held in US as enemy combatant be given a meaningful opportunity to contest the factual basis for detention before a neutral decision maker
      3. AUMF grants executive the authority to detain citizens who qualify as enemy combatants. Detention of individuals who fought against the US as part of the Taliban is “necessary and appropriate”
      4. But indefinite detention is not authorized. Detention can only during the duration of the conflict
      5. Even in cases where detention is legally authorized, writ of habeas corpus remains available unless there is a suspension or enemy combatant status is undisputed
      6. Mathews v. Eldridge balancing test used.
         1. Important right at stake
         2. Suspension of writ can lead to substantial error
         3. Need for judicial efficiency
            1. During times of war, it is most important to preserve commitment at home to principles for which we fight abroad
      7. Youngstown—State of war is not a blank check for President to dictate rights of citizens. Unless Congress acts to suspend writ, writ allows judicial branch to check the power of the exec branch
      8. Scalia Dissent—Hamdi is entitled to writ unless Congress has ex. the suspension clause or criminal proceedings have been brought. AUMF does not act as a Suspension Clause and no criminal proceedings have been brought. Either try him or release him.
      9. Thomas Dissent—Court should defer to prez decision that H is enemy combatant*.* Court doesn’t have expertise or capacity to second guess.
      10. Case requires balancing of:
          1. Respect for sep of pwrs and the fundamental imp for the nation to protect itself in wartime
          2. Critical and deep-seated individual constitutional interests at stake
   5. *Hamdan v. Rumsfeld*
      1. Majority opinion reached in Part V
         1. President’s unilateral military tribunal procedure is unauthorized by statute and contrary to international law
         2. President may constitutionally convene military commissions under special circumstances, nothing in AUMF or the DTA expands President’s authority to convene these commissions. AUMF only authorizes president convene the commission in appropriate circumstances
         3. Commissions have historically been used in 3 situations:
            1. When martial law is declared (emergency situations where civilian law is not functional)
            2. As part of a temporary military gov over occupied enemy territory
            3. Incident to the conduct of war when there is a need to seize and subject to disciplinary measures those enemies who have violated the law of war

Hamdan is charged w/ conspiracy which is not a violation of the law of war

* + - 1. Under international law, D should be allowed to be present for his trial and must be privy to evidence against him
      2. Military commission must have same procedures as court martial unless uniformity is impracticable. Nothing indicates that uniformity is impracticable here.
    1. Kennedy, Souter, Ginsburg and Breyer concurrence in part—If Congress wants to expand President’s power to hold military commissions it may do so
       1. Trial by commission raises separation of powers concerns b/c a single branch (executive) is charged with defining and prosecuting w/out independent review.
       2. Under Jackson’s triparte framework in Youngstown, this case falls in category 3 b/c Congress has set forth principles of a military court in UCMJ. President has exceeded those limits.
       3. In light of the UCMJ conclusion, there is no need to address the Geneva convention violation or conspiracy charge.
    2. Thomas/Scalia dissent—AUMF authorizes President to hold a military commission
       1. Hamdan has violated the law of war by joining terroristic organization like al Queda
  1. Congress responded to Hamdan with Military Commission Act of 2006
     1. Defines an unlawful combatant as a person engaged in hostilities against the US…including a person who is part of the Taliban
     2. Gives President authority to try alien combatants by military commissions for any offense made punishable by law of war
     3. Removes habeas jurisdiction to all overseas enemy combatant detainees, regardless of where they are held.
     4. Except as provide by DTA, no court shall have J for any other action against US or its agents relating to detention, treatment, etc.
  2. Boumediene v. Bush (Kennedy majority opinion)
     1. Petitioners are aliens designated as enemy combatants and retained at US Naval Station in Guantanamo
     2. **Article I §9 cl. 2** provides Privilege of Writ shall not be suspended, unless in Cases of Rebellion or Invasion of public safety
     3. Writ insures delicate balance of separation of powers. S of P doctrine must also inform reach and purpose of Suspension Clause. Three factors relevant in determining reach of SC:
        1. Citizenship and status of the detainee and adequacy of the process through which that status determination was made
        2. Nature of the sites where apprehension and detention took place
        3. Practical obstacles inherent in resolving prisoner’s entitlement to writ
     4. US has defacto jurisdiction over Guantanamo and in most respects it is like a US territory
     5. MCA is an unconstitutional suspension of the writ b/c DTA is not an adequate and effective substitute for habeas corpus

1. Congressional Violation of Separation of Powers
   1. Congressional Control Over the Actions of the Executive Branch
      1. The breadth of legislative decisions means Congress has to delegate powers. Tension results b/c Congress does not want to relinquish too much power. Can retain control over exec by being very specific and limiting delegation
      2. Non-delegation rule:Congress is forbidden to delegate legislative power
         1. Rule has little bite: Congress has traditionally delegated very broadly and in effect have required agencies to legislative by making specific subrules. Court will permit it as long as Congress provides an intelligible principle to which the person authorized to act is directed to conform, but is
   2. *INS v. Chadha* (Burger formalism)
      1. Issue is constitutionality of fed statute authorizing a 1 house veto of Attorney General’s decision to suspend deportation
      2. Rule = b/c veto is exercise of legislative power & is thus subject to bicameralism & presentment requirements of Constitution, 1 house veto is unconstitutional
         1. Presentment Cl. (Art 1 Sec 7) says both houses have to present laws they are going to pass to president
         2. Bicameralism – president can veto & congress can override veto with 2/3 vote in both houses
      3. Court calls the veto “essentially legislative in purpose & effect” under the enumerated power of establishing uniform Rule of Naturalization, which makes it subject to bicam & presentment requirement
      4. Congress made a deliberate choice to delegate powers to the AG to suspend deportation in certain circumstances, and cannot overturn a decision without going through the proper channels.
      5. Four cases where Congress can act alone
         1. House initiates impeachment
         2. Senate has power to conduct trial
         3. Senate’s power over Presidential appointments
         4. Senate power to ratify treaties
      6. Powell concurrence on judgment—case should have been decided on narrower ground that Congress assumes a judicial function in violation of the principle of sep of powers when in finds that a person does not meet the statutory criteria for permanent residency
      7. White dissent (functionalism)—Death knell for nearly two hundred statutory provisions where Congress has reserved a legislative veto.
         1. Without the vet, Congress faces a Hobson choice: either refrain from delegating authority or leaving itself with a hopeless task of writing laws with requisite specificity to cover endless special circumstances
         2. Veto not subject to bicameralism or presentment. Only bills are.
      8. Importance of this decision: To avoid enlarging Exec power, Congress must draft delegations more restrictively
         1. Breyer suggested a strategy of conditioning legal effect of exercise of delegated authority on a confirmatory statute. The statute would then fast tracked through the bill process.
   3. *Clinton v. NY* (Stevens majority) – challenging const. of Line Item Veto Act (Art I, Sec 7). Line-item allows president to strike particular parts of a bill w/out vetoing entire bill.
      1. Facts: Clinton strikes NY from receiving Medicaid fund for natl bill
      2. Rule = the cancellation provisions authorized by line item veto act are unconst.
      3. Ct says although the Constitution authorizes the President to veto a bill, it is silent on the subject of unilateral action that repeals/amends parts of a duly enacted statute
      4. Constitutional silence should be interpreted as express prohibition
      5. Important difference b/w return of bill and veto. In returning, President acts before the bill becomes a law, in vetoing he acts after the bill is the law
      6. President cannot have unilateral power to delegate authority, Congress must provide some principle to guide his discretionary power.
         1. Procedures for enacting & vetoing laws in C must be strictly adhered to
      7. Scalia concurrence/dissent—if the line item veto authorized the president to “decline to spend” any item of spending rather than “canceling” it would have been constitutional. Given that there is only a tech difference b/w the two acions, the Line Item veto does not offend the constitution
      8. Congress has consented to this procedure. Precedence Tariff Act. Executive has power to spend and expand, then why not reduce? What is the difference.
         1. “Principled delegation”—Tariff etc (for the greater good), while line-item is purely discretionary
         2. Ex of delegation w/out any principle or instruction on application
   4. Congressional Control Over Executive Officers
      1. Appointments Clause provides President shall nominate by and w/ the advice and consent of the senate A, Judges, and other officers…but Congress may vest the appointment of inferior offices to the president alone, in the courts of law, or heads of deps
   5. *Bowsher v. Synar*
      1. Facts: Comptroller General reviews necessary budget reductions, and submits his report to the President who must implement the conclusions in the report. CT nominated by the President by persons recommended by officers of House and Senate, and is removable only by impeachment or by a joint resolution of Congress
      2. Holding: Assignment of executive powers to an agent of legislative branch (comptroller) violates the doctrine of separation of powers. Congress does not have an active role in the supervision of officers charged w/ the execution of law.
      3. Comptroller is subject to the removal of Congress, and these removal powers dictate that he is subservient to congressional control (makes him an agent of the legislative branch)
      4. Comp is performing executor duties b/c the president, by law, is forced to implement the reductions in his report. Separation of powers is violated.
      5. Terms of his removal are very broad (inefficiency, neglect) and effectively allows Congress to remove at will.
      6. As Chanda makes clear, once Congress makes a choice of enacting legislation, its participation ends. By placing execution in the hands of an officer subject to Congressional removal, Congress has retained control over the execution of the Act.
   6. **Executive Removal Power**
   7. *Myers v. US* – Pres should select those [purely executive officers] who were to act for him under his direction in the execution of the laws
   8. *Humphreys Executor v*. US – Congress constitutionally limited Pres’ power to remove member of quasi-legislative/quasi-judicial indep. agency to removal for cause.
   9. *Weiner v*. US – pres’ removal of member of commission w/ “intrinsic judicial character” function is illegal
   10. *Morrison v. Olsen* (Rehnquist Majority)
       1. Facts: Independent counsel created to investigate criminal wrongdoing of high-ranking executive officials. Congress makes executive’s removal of the IC to “good cause”
       2. Good cause restriction on the removal of a purely executive officer is not constitutional
       3. New interpretation of Humphrey’s executor and Wiener. Rigid classification of “purely executive and quasi-judicial/legislative” is no longer used. Standard now is whether the removal restriction is of such a nature that would impede the president from performing his constitutional duty.
       4. Good cause standard does not impermissibly burden President’s power to control or supervise the IC as an executive officer. Under good cause, president retains ample authority.
       5. Act is not a violation of separation of powers b/c the act does not represent an attempt by Congress to increase its power or pose a usurpation of Exec branch functions.
       6. If considering the removal power, ask 2 questions
          1. Is the office one in which independence from pres is desirable?
          2. Are Congress’ limits on removal const? Cong can limit removal to “good cause”
       7. Scalia dissent: Restriction violates separation of powers. President’s power to remove a purely executive officer should not have any restrictions.
   11. Aftermath of Morrison
   12. *Mistretta v. US* (Blackmun) – Ct rejects sep of power attacks on judicial commission created to set guidelines for federal sentences
       1. Commission is set up as “independent commission in judicial branch,” 7 members, at least 3 of which were to be fed judges
       2. Court rejects anti-delegation attack. Congress has given an intelligible principle to guide the agency
       3. Separation of powers issue is judged under Jackson’s functional tripartite analysis.
          1. Framers rejected the notion that the branches must be entirely distinct. A degree of comingling is acceptable as long as power does not accrete to a single branch.
       4. In the case of the judicial branch S of P is violated if
          1. Tasks are assigned that are more appropriate for other branches
          2. No provision of law impermissibly threatens the institutional integrity of the judicial branch
       5. JB is not engaging in an act better delegated to another branch. Under the Jackson guide, this falls into the twilight area where judicial and legislation can exercise power. Substantive judgment of sentencing has been appropriate for the judicial branch.
       6. Judicial participation in commission does not undermine judicial impartiality. Judges can wear two hats as long as one role does not have a significant effect on the operation of the judicial branch.
2. Bill of Rights and the Post-Civil War Amendments “Fundamental” Rights and “Incorporation” Dispute
   1. Bill of Rights (1st 10 amend) was meant only as a restriction on federal powers, and 10th expressly reserves powers not delegated to the US in the states
   2. Reconstruction Amendments added restraints upon the states, but did not specify that all of the provisions of the B of R applied.
      1. 14th’s DP clause was later read to make applicable to state criminal proceedings almost all of B of R restrictions. 14th later extended to other provisions, including takings, freedom of speech, and right to free exercise of religion
      2. Debate on whether states should be constrained by the same restrictions as the fed gov.
   3. **Barron v. Mayor and City Council of Baltimore (Marshall)**
      1. Baron sues BA claiming that the city ruined his wharf when construction work diverted the flow of streams and deposited large masses of sand and earth. Sate action violated Takings Clause.
      2. Constitution was est. for the national and not for state governments.
      3. Amendments restrain only the power of the fed gov and are not applicable to state.
      4. Article I § 10 lists the restrictions upon state governments (see K clause)
      5. Amend contain no expression indicating intent to apply to the states and where there is a conflict b/w state and federal constitution, court has no jurisdiction
   4. Post-Civil War Amendments
   5. 13th ends slavery but black rights cont. to be severely limited by black codes. 14th and 15th did not explicitly speak on racial discrimination
3. **Privileges and Immunities Incorporation**
   1. **Slaughter-House Cases (Miller)**—Court choices a narrow reading of 14th
      1. Challenge by would be competitors to state conferred monopoly. LA law of 1865 chartered Slaughter House Co and granted it a 25 yr right to maintain slaughterhouses in areas including NO. All competing facilities were required to close. Butchers claimed law deprived them of right to trade in violation of the 14th.
      2. Holding: SC sustains the law.
      3. 14th speaks of privileges and immunities of citizens of the US rather than the states.
      4. Citizenship (state/national) is not the same, specific language—“no state shall make or enforce any laws that abridge the privileges and immunities of the citizens of the US”
      5. Art IV § 2 (citizens of each State, shall be entitled to P&I of citizens of several states) gives States the duty of establishing and securing fundamental rights.
         1. Art. IV does not create or control theses rights; sole purpose is to ensure citizens of other states enjoy the same P&I as those in state.
      6. 14th did not transfer the security and protection of all civil rights to the federal gov. Such a reading would violate federalism.
      7. The specific right, opening butcher shops, is not a fundamental right, but Miller leaves the door open to define other national citizen rights.
      8. Field dissent: 14th is a protection for all citizens of fundamental rights. Among such a right is equal opportunity for employment.
      9. Bradley dissent: law is in violation of the DP clause
      10. Analysis: Rendered 14th P&I clause ineffectual in protecting individual rights from states. Ruled out possibility that B of R could be enforced upon the states as a P&I of national citizenship.
          1. Possible misreading of the holding? Nothing in Miller’s opinion precludes incorporation of B of R freedoms against the state.
   2. **Saenz v. Roe** (Court breathes new life into the P&I)(Stevens majority)
      1. Facts: CA enacted a statute limiting the amount of welfare benefits available to newly arrived residents. Lim applies to people who have resided in CA for less than 12 mths. 1996 Congress enacted Personal Responsibility and Work Opportunity Act of 1996, authorizing states receiving fed benefits to apply other states welfare programs to families who had resided there for less than 12 mths.
      2. Holding: Court invalidates CA statute under P&I and holds Fed statute does not save it.
      3. Durational residency requirements violate fundamental right to travel by denying a newly arrived citizen the same P&I enjoyed by other citizens and is subject to strict liability
      4. Traveling is a right w/in the constitution. Right to travel allows a citizen of one state to enter another and be treated like a welcomed visitor. Article IV § 2: For travelers who elect to become permanent residents, there is a right to be treated like other citizens of the state.
         1. Slaughterhouse also covers right to travel
      5. Citizen who chooses to become a permanent resident enjoys the same rights as other citizens. Need is unrelated to length of stay.
         1. Distinction in tuition and divorce requirements b/c those are portable benefits
      6. Fiscal savings is not a legit justification when there are less discriminatory means
      7. Dissent—Rehnquist and Thomas
         1. Right to travel and right to become a citizen is distinct.
         2. Court has consistently sanctioned durational requirements
         3. Welfare is portable
         4. CA should have authority and flexibility
      8. Thomas—P&I apply to fundamental rights rather than every public benefit. Welfare benefits is not a fundamental right. Suggests an analysis of the slaughterhouse holding is needed.
   3. Shapiro v. Thomas (1969)
      1. Court finds right to travel under 14th EP clause to strike down a number of durational requirements. Shapiro invalidated a law that denied welfare benefits altogether to new state residents in the 1st yr of residency.
      2. Welfare benefits are essential to survival, a basic necessity
   4. Shapiro v. Saenz—both invalidate welfare durational requirements
      1. Distinction: Shapiro states traveling is a fundamental right. Saenz finds right to travel under P&I.
      2. Saenz rests on the structure of the federal union. State is not required to share its treasury w/ nation at large, but cannot determine membership into community. Does Saenz repudiate the slaughter house cases by recognizing P&I does protect individual liberties against states? Or does it vindicate a right Miller alludes to?
4. “Incorporation” of the Bill of Rights through Due Process
   1. **Palko v. Connecticut** (Cardozo): “Selective”/Flexible Incorporation: D argues that he cannot be convicted twice b/c it was a violation of the 5th as incorporated into the 14th DP Clause. Whatever was forbidden by the national gov, was forbidden by the state. Cardozo disagreed, not essential to liberty. 14th only absorbs rights that are essential for liberty and justice.
   2. Adamson v. CA—5 to 4 majority adheres to Cardozo’s approach. Another 5th claim, this time against self-incrimination. **Black** dissent contains most famous exposition on view that DP requires total incorporation of Bill of Rights: Natural law theory (court expands standard of fundamental liberty and justice at a particular time) degrade constitutional safeguards. Total incorporation would curb excessive judicial discretion on concepts of fundamental freedom.
   3. **Duncan v. LA (White majority)**
      1. Importance: Court shifts from looking at facts of case to determine “fundamental fairness” to ascertaining whether relevant provision represented “fundamental fairness”
      2. Holding: 14th guarantees right of jury trial in criminal cases (incorporation of 6th)
   4. Incorporation Since Duncan
      1. All of the criminal process guarantees of the Bill of Rights guarantees apply to states, except for the 5th GJ indictment and 8th “excessive bail”. Outside of the criminal area, Court has applied against states all protections except 2d and 3d amendments or 7th right to jury trial for civil suits at common law for more than $20.
   5. **District of Columbia v. Heller (Scalia majority)(2008)**
      1. Court enforced the 2nd as a matter of individual right, unconnected w/ service in militia, to carry arms. DC law banning possession of handguns invalidated
      2. Scalia looks to the words of the 2d (right of people), phrase “to keep and bear arms” (refers specifically to weapons not designed for military use, and historical context to find that the right to bear arms is not exclusively connected w/ militia.
      3. Provided a caution that the right only applied to handguns, and dangerous and unusual weapons would still be prohibited
      4. Dissent: No indication that 2nd was intended to enshrine the right of self-defense
5. **Substantive Due Process and Economic Liberties**
   1. SDP—a way for the court to reign in state power through the constitution.
   2. **Allgeyer v. LA—**1st time court invalidates a state law on substantive DP grounds. Involved a LA law that prohibited obtaining insurance on LA property from any marine insurance co. which has not complied in all respects w/ LA law. Statute violated 14th liberty w/out due process of law. Peckham articulates the idea of liberty of K.
   3. **Lochner v.** NY—(Peckham)
      1. Facts: Challenge to NY labor law that prohibited the employment of bakery employees for more than 10 hrs a day or 60 hrs a week. Lochner was convicted and fined for letting an employee work beyond the permitted hrs.
      2. Holding: Statute interferes with the right of K, a liberty of the individual that is protected under the 14th
      3. 14th would have no meaning if there was not a limit to the valid exercise of state police power
      4. Rational Relationship: Is this a fair, reasonable and appropriate exercise of the police power or is it an unreasonable, arbitrary interference /w the right of the individual to his personal liberty or to enter into those K which are necessary to support himself and his family? (traces of McCulloch)
      5. Law in question involves neither safety, morals nor welfare of public.
      6. Purpose of a statute must be determined from natural and legal effect and not any proclaimed purpose.
      7. Harlan dissent: Whether the statute is wise legislation is not for the court to decide. Courts are not concerned w/ wisdom or policy legislation. The court may only inquire whether the means devised by the state are germane to an end which may be lawfully accomplished. Also uses rational relationship test, but bases finding on empirical data
      8. Importance: Following Lochner, Court invalidated a considerable number of laws on substantive due process grounds, mainly those involving regulation of business activities. Modern court claims to have rejected Lochner in economic areas, but has maintained and increased intervention w/ non-economic liberties. Lochner formed the basis for absorbing rights such as the 1st into the 14th concept of liberty.
   4. **Nebbia v. NY** 
      1. NY Legislature est. a Milk Control board w/ power to fix minimum and max retail prices to be charged by stores to consumers. Purpose: Failure of producers to receive reasonable return threatens a relaxation of vigilance against contamination. Issue is whether Constitution prohibits a state from fixing the selling price of milk?
      2. General rule is property and K rights are private and should be free of gov interference, but neither right is absolute. Equal w/ private right is the public right to regulate in the common interest
      3. DP only demands that the law is not unreasonable, arbitrary or capricious, and means selected have real and substantial relation to object to be attained.
      4. State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to the purpose
      5. Nebbia represents modern position of the Court: Presumed propriety of legislation. Judicial deference to means-ends relationship.
      6. **Post Nebbia legislation:**
         1. **West Coast Hotel v. Parrish**: Court majority upholds a state min wage law for women. Liberty under the Constitution is necessarily subject to the restraints of due process and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is DP. Purpose—protection of women who have inherently weak bargaining power—redistribution of power b/w employer (switch in time to save the nine?)
         2. **US v. Carolene Products:** 
            1. **Standard:** Minimum “rational basis ”introduced in due process review of economic legislation
            2. Stone—Carolene Products Footnote 4—distinguishes cases warranting deference to cases in which greater judicial scrutiny is appropriate. Particular religions or racial minorities (discrete and insular) groups need special protection and are subjects of more searching judicial inquiry.
   5. **Williamson v. Lee Optical Co.**
      * 1. **Facts:** NY leg makes it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses except upon written authority from licensed optometrist or ophthalmologist
        2. Enough that there is an evil at hand for correction and a particular legislative measure was a rationale way to correct it
        3. Conceivable rational relationship: Court guesses at legislative intent
        4. Day is gone when DP can be sued to strike down state laws, regulatory business and industrial conditions, because they may be unwise, improvident or out of harmony w/ thought.
      1. No socioeconomic law has been invalidated on substantive DP grounds since 1937.
   6. **Exception**: One economic area where court has revived heighted DP review is punitive damage awards in civil cases.
      * 1. **BMW of North America v. Gore**: $2 million punitive awarded for concealed paint touch-up of a new car. Court found award grossly excessive in violation of procedural DP requirement of fair notice to the D of potential legal liability. In concurrence, Breyer also suggests this is a matter of substantive DP. Basic unfairness of depriving citizens of life, liberty of property through arbitrary coercion. Uniform general treatment of similarly situated people.
        2. **Statefarm Mutual Auto v. Campbell:** Gore opinion sets forth “guideposts” to determine what an unreasonable amount of damages is:
           1. **Degree of reprehensibility**: Cannot punish a party to deter conduct that bears no relation to the P. P must have been specifically injured.
           2. **Disparity b/w harm or potential harm suffered and punitive damages**: Award must be proportionate. No single bright-line ratio, however, few awards exceeding single digit ratio b/w punitive and compensatory damages, to a significant degree, satisfy DP.
           3. **Difference b/w this remedy and the civil penalties authorized in comparable cases.**
        3. **Philip Morris USA v. Williams (Robert’s Court** latest case)—Court relies on procedural DP w/out reaching substantive. Court vacates an award to the estate of a deceased smoker of $821 K in compensatory damages and $79.5 million in punitive damages.
        4. **Breyer** forces on trial court’s failure to instruct the jury to not punish PM for possible harms to people other than the P. Constitution’s DP Clause forbids a state to use punitive damages award to punish D for injury that it inflicts on nonparties of the litigation. D has no opportunity to defend against charge of others.
        5. **Exxon Shipping Co. v. Baker:** Court imposes a limit on punitive damages as a matter of federal common law (maritime law) rather than substantive DP
           1. **Facts:** $2.5 billion jury verdict against Exxon for catastrophic oil spill.
           2. Court caps punitive damages in the case to the equivalent of 507.5 million compensatory damages
           3. Common sense of justice bars penalties that reasonable people think excessive for the harm caused in the circumstances. 1:1 ratio established
6. **The Takings Clause**
7. Fed gov and states have power of eminent domain
   1. Eminent Domain—authority to take private property when necessary for gov activities
   2. Limitation: 5th—“nor shall private property be taken for public use w/out just compensation” (first provision applied to the states)
8. Four issues:
   1. Taking?
      1. Possessory—gov confiscates or physically occupies property
      2. Regulatory—gov regulation leaves no reasonable economically viable use of property
   2. Property?
   3. Public Use?—If the prop is not for public use, the gov must give the property back.
      1. Standard: deferential “rationally related to a conceivable purpose”
   4. Just Compensation?
      1. Measured by loss to owner rather than gain to taker
9. Purpose
   1. Calder v. Bull—taking violates natural law upon which C was founded. Cannot confiscate property to give to others.
   2. Loss spreading—If society benefits from confiscated property, society should pay. Prevents the gov from forcing some people alone to bear public burdens
   3. Cautionary—makes the government think about its regulations
   4. Protects the sense of security in a property owner
10. Taking
    * 1. Possessory—gov confiscates or physically occupies property
      2. Regulatory—gov regulation leaves no reasonable economically viable use of property or leaves no reasonable economically viable use of property
11. Possessory
    1. Confiscation—Webb Fabulous Pharmacies, Inc. v. Beckwith—FL statute provided the gov could take the interest on interpleader account (sum of money deposit to the court to which there are competing claims)
    2. Physical Occupation: Pumpelly v. Green Bay Co –Gov construction of a dam permanently flooded a person’s property
       1. United States v. Causby—Regular use of airspace for military flights destroyed use of land as a chicken farm. Court finds harm is a direct invasion of farmer’s domain
    3. Confiscation or Physical Occuation is a taking no matter how small the amount of property—**Loretto v. Teleprompter Manhattan CATV Corp.**—taking in a city ordinance requiring apt building owners to make space for a one cubic foot cable wire. **Permanent physical occupation is a taking regardless of amount.**
    4. **Government required access to property:** Distinction b/w possessory and regulatory is unclear
       1. Kaiser Aetna v. United States—Taking where owners of a pond spent a substantial amount of money to dig a channel connecting it to the Pacific Ocean. US Corp declared the channel “navigable water’ and opened it to the US and general public. Holding: Turning private prop into public and allowing public to occupy it.
       2. PruneYard Shopping Center v. Robbins—No taking where CA constitution required shopping centers to be open to speech activities. Rehnquist holding: Unlike Kaiser, there was not a substantial interference with “reasonable investment backed expectations”. Excluding speakers was not “essential to the use or economic value of property”.
          1. Possessory or regulatory case? Is it a taking because the land is being physically occupied or should it be considered under the looser regulatory of decrease in value in property?
    5. **Emergency Exception—Cases are inconsistent**
       1. United States v. Caltex—No taking where gov destroys a co’s oil facilities in Philippines to prevent Japanese occupation
          1. Under 5th no obligation to restore goods ravaged from war
          2. Case-by-case analysis, no rigid rules laid down
       2. United States v. Pewee Coal—Gov seizure of a coal mine during labor strike is a taking under possession and control
       3. **Lucas v. SC Coastal** (Scalia) **recent case** rejecting any exception. In general, no matter how minute the intrusion or weighty the public purpose, there is a required compensation
    6. **Regulatory Takings**
       1. **PA Coal v. Mahon**—PA statute prohibiting the mining of coal in any manner that would cause the subsidence of property. Effect of the law was prevent co from exercising certain mining rights
          1. Holmes: When regulation reaches a certain magnitude, there is an ex of eminent domain. Taking b/c it was commercially impracticable to mine certain coal
       2. **Kaiser** test: General criteria to determine if a regulation is a taking (extremely discretionary leading to inconsistent results)
          1. Economic impact on claimant
          2. Extent regulation has interfered w/ investment-backed expectation
          3. Character of governmental action
       3. **Must leave no reasonable economic viable use of property, not simply a decrease in the value of prop.**
          1. PA Central Transport v. City of NY—Gov designates a building as a historical landmark, and prevents owner from constructing an expansion on top.
             1. Holding: No taking, action did not deny owners of profitable use and had not precluded air rights above building
          2. Lucas v. SC Coastal Council
             1. Person purchases beachfront for $1 million, state prevents construction of any permanent habitable structure on property. Court finds a taking on the Lucas property unless there had been a similar restriction on development when he had acquired the land
       4. **Relationship b/w gov’s action to property owner’s expectations** 
          1. Distinction b/w common law rules and other regulations
          2. Person who purchases a property knowing of a common law legal regulation (nuisance) cannot claim a taking after
             1. Hadachek v. Sebastian—nuisance case where brickyard was ordered to cease operations, without just compensation b/c of nuisance
             2. Miller v. Schoene—VA orders destruction of large number of ornamental red cedar trees to prevent the spread of cedar rust for the protection of apple orchards. Holding: No compensation. When gov is forced to make a choice between two classes of property, it does not exceed its power by ordering the destruction of one to save the other.
          3. With regulations, property owner can bring a takings claim as to regulations and laws that were in place when property was acquired
             1. Palazzolo v. RI—P forms a co to purchase and develop coastal property on RI. After several proposals of development were rejected, co. dissolved. P files a taking claim b/c gov is preventing all use of his property.

Holding: Taking, state cannot place an expiration date on the Takings Clause

* + 1. Zoning—limits the way in which a person may use his property, therefore diminishing economic value
       1. Generally court has refused to find a taking since all economic value is not eliminated
       2. Euclid v. Amber Realty Co—Tract of vacant land zoned for industrial use had a market value of 10K per acre. Rezoned for residential purposes, value reduced to $2,500
          1. Court rejects DP challenge and emphasized gov’s strong police purpose in zoning ordinance (safety, security, etc…)
       3. Keystone Bituminous Coal v. DeBenedictis—PA law preventing mining that could cause subsidence of buildings, and PA agency required that 50% of coal would be kept underneath structures. Effect: Coal Co prevented from some mining b/c there was still economically viable use
       4. Palazzolo v. RI—no taking when environmental protection laws prevented development so long as economically viable use remained.
       5. Very difficult to persuade the Supreme Court that zoning is a taking only all economically viable use of the land is prevented
    2. Government Conditions on Development
       1. In two recent cases, SC has found a taking where condition imposes a burden that is not roughly proportionate to gov’s justification for regulating. Standard of review: **Rationally related**.
          1. Nollan v. CA Coastal Commission—Gov conditioned permit for development of beachfront property on the owner allowing public an easement to access beach. Taking found b/c of insufficient reasons (psychological barrier and increased need for public access)

Scalia finds permanent occupation has occurred where individuals may continuously traverse land. Not rationally related

* + - * 1. Dolan v. City of Tigard—store owner receives a permit to expand on building conditioned on setting aside land for public greenway to minimize flooding and bicycle path. SC applies a two-part test:

Rational nexus b/w state interest and permit condition **(relationship b/w conditions and goals in regulation)**—Requirement met in Dolan

Rough proportionality standard: Exactations on development are roughly proportionate to gov’s justifications for regulating. No precise mathematical calculation, instead determination of nature and extent of development

* + 1. Temporarily Denying an Owner Development of Property
       1. Rational standard
       2. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency—
          1. Facts: Was a 32 mth moratorium on building a taking?
          2. Court held that temporarily denying an owner the ability to develop property is not a taking so long as the gov’s action is reasonable. Moratorium reasonable in light of strong gov interest in preserving beauty of Tahoe.
    2. Limits on Conveyance of Property
       1. Cases are inconsistent
       2. Andrus v. Allard—Eagle Protection Act prohibits the sale of bald or golden eagle parts, including those obtained before statute adoption
          1. Not a taking b/c all use of property is not eliminated—possession and transportation still allowed. Act does not require surrendering of artifacts, just eliminates one means of disposing
       3. Hodel v. Irving—Federal law divided Sioux property into individual allotments, 2nd regulation allows inheritance and over time property is divided into smaller parts. Congress passes a law preventing inheritance of parcels less than 2% of total land and that had earned less than $100 in prior year. Land would revert back to tribe.
          1. Holding—Taking. Abrogation of rights to pass on property to heirs.
       4. Difference in holding due to the court’s unarticulated perception that greater weight should be given to preserving endangered species than reuniting small parcels of land? Government interest?
    3. Rent and Rate Controls
       1. Virtually all cases have rejected objections and found there is not a taking b/c the controls leave economically viable use of property
       2. Pennell v. City of San Jose—court upholds rent control ordinance that allows landlords to raise rent up to 8% and provide DP for tenants who object to higher raise
          1. Holding—not a taking. Rational attempt to accommodate tenants and landlords. Statute required hearings to determine if raise was reasonable
       3. Federal Communication Commission v. FL Power Co—not a taking when gov set rates for cable co. using utility poles. Again gov emphasizes that no land is confiscated or use of land denied. Rates only a taking if they are unreasonable or confiscatory.
    4. Imposition of Gov Liability
       1. **Eastern Industries v. Apfel**—Coal Act made coal companies responsible for paying the medical benefits of former coal miners
          1. Imposition of retroactive civil liability is a taking (plurality).
          2. Kaiser test used—economic impact of regulation, interference w/ reasonable backed expectations, character of gov action
  1. Conclusion on Regulatory takings—see if there is a rationale basis and if any viable economic use remains

1. Property
   1. US v. GM—Property as used in the takings clause refers to the entire “group of rights inhering in the citizen’s ownership”. Not limited to physical possession, also encompasses right to dispose
   2. Positivist approach—court looks to the state law defining the property interest
   3. Interest is property w/in the takings clause (but court has been inconsistent)
      1. Phillips v. WA Legal Foundations—IOLA (Interest on Lawyers Accounts)—lawyers are required to keep client funds in trust accounts, but sometimes the amount is too small and needs to be pooled. Interest in pooled money is used for legal services. Interest is property. (Webb Fab Pharmacy—interest follows the principle). But no takings b/c owners do no lose anything of value from IOLA operation.
      2. Dames & Moore v. Regan--Attachments are not property b/c president has unlimited power to revoke
      3. Ruckelshaus v. Monsanto—trade secrets are property—characteristics of traditional property. Assignable, etc…
   4. Bowen v. Gilliard—support payments for child is not a property interest because government is not obligated to provide those benefits
      1. Holding is questioned in many respects
         1. **Welfare under Goldberg v. Kelly is considered property under DP of 5th, but not under 5th takings clause**
         2. Positivist law not used—state said that the benefit was child’s property and then took the benefit
2. Taking for Public Use
   1. Very broad definition used: Taking is for public use if rationale basis is met
   2. Berman v. Parker—legislature not the judiciary is the main guardian of public needs
3. Just Compensation
   1. Just compensation is measured in terms of loss to the owner, the gain to the taker is irrelevant.
   2. Loss measured in terms of the market value to the owner at the time of the taking and gov does not need to pay for any increases in the market value resulting solely from the planned taking
      1. Brown v. Legal Foundation of WA—(5-4) although interest in IOLTA program is property, there is no impermissible taking b/c IOLTA programs apply to accounts that would not otherwise generate interest
   3. Inverse Condemnation Suit—even if gov seeks regulation in response to an inverse condemnation suit, they must nevertheless pay damages for the time it had the property
      1. Gov must pay even if there is a temporary taking, but note that temporarily denying property is not a taking so long as it is reasonable.
4. **II. The K Clause—Article I § 10**
   1. **Prohibits any state law impairing the obligation of Ks**. Major purpose of the clause was originally to restrain state laws from affording debtor relief e.g. laws postponing debt payments,
   2. Cour**t f**irst interpreted clause in cases of grants rather than private K.
      1. **Dartmouth College v. Woodward:** Court finds no reason to limit the K clause to private K.
   3. **Shift to private K Cases**
   4. **Sturges v. NY--** Court held unconstitutional a NY insolvency law discharging debtors upon surrender of their property
   5. **Ogden v. Saunders**: K clause does not prohibit all state insolvency laws. K clause is not an inflexible barrier to public regulation. Insolvency laws could apply to K made after the law is enacted**.**
      1. Court draws two distinctions w/ Sturges. Sturges holds that 1) insolvency laws cannot be applied retroactively to K already formed 2) constitutional ban on impairment of K “obligations” did not prohibit legislative changes in “remedies”
      2. **Bronson v. Kinzie—**remedial charges must be reasonable and “no substantial right” can be impaired.
   6. **Charles River Bridge v. Warren Bridge**
      1. Co’s charter to operate a toll bridge did not prevent the state from authorizing the construction of a competing toll bridge. “Any ambiguity in terms of the K must operate against the adventurers and in favor of the public”. Second, certain state powers are inalienable e.g. state could grant of a charter to operate a lottery, but were not prevented from later prohibiting lotteries.
   7. **Home Building & Loan Ass’n v. Blaisdell**
      1. **Facts:** Arose from the MN Mortgage Moratorium Law of 1933 enacted during the depression, authorizing relief from mortgage foreclosures and execution sales of real property. Local courts were allowed to extend period of redemption from foreclosure sales. No deficiency judgment could be obtained during the time either.
      2. Protective power of the State may be exercised to
         1. Control remedial processes
         2. Directly prevent immediate and literal enforcement of K obligations by temporary restraint where public interests would otherwise suffer…presence of disasters such as fire, flood, or earthquake
      3. Controls must be balanced as to not undermine faith in freedom of K.
      4. Great clauses of the constitution must be confined to interpretation which the framers, with the conditions and outlook of the time, would have placed upon them (can re-interpret if current conditions are different)
      5. Conditions of the K restriction are reasonable and do not impair the integrity of the K.
   8. **Scope and Limits of the K Clause**
      1. Most cases post-Blaisdell rejected K Clause attacks on state laws
      2. **Impairment of public K**: Court applies K Clause w/ greater scrutiny in cases where the state is a party to a K.
         1. **United States Trust Co. v. NJ (states attempt to revoke its own K obligations):** Complete deference in applying the standard of reasonable and necessary is not appropriate where state’s self-interest is at stake.
      3. **K clause and private obligations**
         1. **Allied Structural Steel Co. v Spannaus**—Court reinvigorates K clause applied in private K. Law imposed a completely unexpected new obligation. Did not affect a temporary alteration of a K relationship, but worked to severely, permanently and immediately change a relationship—irrevocably and retroactively. New obligation is potentially disabling.
5. **Substantive DP and Rights Over Death; Procedural DP and the Right of a Hearing**
   1. **Right to Medical Care—**Government generally has no duty to provide medical care except when the person is incarcerated or institutionalized by the government
   2. **Right to Refuse Treatment**
      1. Generally there is a constitutional right for a person to refuse treatment, but it is not absolute and can be regulated by the state. (WA v. Harper prisoners have a right to avoid administration of anti-psychotic drugs)
         1. Gov’s compelling interest—**Jacobson v. MA**—Court upholds a law that requires vaccinations
         2. **Cruzan v. Director, MS Dept of Health**
            1. Competent adults have a right to refuse medical care (right to refuse hydration and nutrition)
            2. State requires clear and convincing evidence that a person wanted treatment terminated before it is cut off
            3. State may prevent family members from terminating treatment for another
            4. Q unresolved: No articulation of a level of scrutiny to be used in evaluating gov regulation of personal decisions concerning refusal of medical treatment**.** Did not resolve what is sufficient to create clear and convincing evidence. Doesn’t address guardians/power of attorney situations.
   3. **Physician Asst Suicide**
      1. **WA v. Glucksberg**—physician assisted suicide is not a fundamental right. To hold it as such would contravene history.
      2. **Vacco v. Quill—**Laws prohibiting PA suicide are not an EP violation. Does not involve discrimination against a suspect class.
         1. Cases leave the door open for states to allow PA suicide and hints that laws prohibiting the administration of pain killers (even in lethal doses) to alleviate severe pain would be unconstitutional.
   4. **Procedural DP and the Right to a Hearing**
      1. **Defining property and liberty**
         1. Property—court has often deferred to state law in delineating constitutionally protected prop rights.
         2. Goldberg v. Kelly (seminal case involving the deprivation of gov benefits)
            1. Held that DP requires a welfare recipient be afforded “an evidentiary hearing before the termination of benefits”. Injury caused by mistaken cutoff would lead to irreparable harm.
         3. Court later cuts back on extension of DP hearing to all manner of gov entitlements
            1. Board of Regents v. Roth—Teacher hired for a yr had no constitutional right to a statement of reasons and hearing before being denied rehire. 14th protects security of interest that a person has already acquired in specific benefits
            2. Perry v. Sindermann—nontenured college teacher won a procedural DP right to hearing on the sufficiency of retention. School had a de-facto tenure program and he had tenure under that program. Person’s interest is a property interest if there are such rules or mutually explicit understandings that support his claim for entitlement.
            3. Bishop v. Wood—State law is the primary focus in determining if a state interest exists, but state procedures contained in the law creating that property right are not the source of constitutionally required procedures upon termination.
            4. Roth line of cases est. that DP does not protect against deprivation of all gov benefits, only of “entitlements” created.
            5. Town of Castle Rock v. Gonzo—Benefit is not a gov entitlement if gov may deny or grant it at their discretion
         4. Liberty rights is also narrowly defined (Paul v. Davis—reputation is not a liberty\_
6. **Substantive Due Process and “Privacy”**
   1. **Heightened Judicial Scrutiny** used in a line of cases to protect certain rights of privacy
   2. **Meyer v. Nebraska:** Court reads “liberty” broadly to include acquisition of useful knowledge, marry, est. a home and bring up children. Nebraska law prohibiting the teaching of German interfered with the acquisition of knowledge.
   3. **Pierce v. Society of Sisters** strikes down an OR law requiring children to attend public schools as interfering with the liberty of parents to direct the upbringing of their children.
   4. **Skinner v. OK**—Court invalidates OK Habitual Criminal Sterilization Act. Heightened scrutiny applied in favor of a fundamental liberty not tied to a specific constitutional guarantee. But court avoids the substantive DP question by relying on EP. Court is interfering w/ a basic civil right of a man—marriage and procreation.
   5. **Griswold v. CT (Douglas majority)**
      1. Facts: CT provision that penalizes contraception use and any person who aids and abets an offender.
      2. Specific right (right to engage in consensual sex by married people) is not guaranteed in the Constitution, but Court declines to implicate 14th of DP. Instead finds the right in penumbras. Specific guarantees in the B of R have penumbras, formed by emanations from the guarantees. Various guarantees create zone of privacy e.g. 3rd in its prohibition against quartering soldiers is a facet of privacy. Also look at the 3th, 5th, 9th for right of privacy.
      3. Law is overly broad and thereby invades areas of protected freedoms.
      4. **Goldberg concurring**: Agrees that certain rights, not enumerated in the B of R, are fundamental. Finds right in 9th: Enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.
      5. **Harlan concurring: Direct application of the 14th.**
         1. Liberty is not a series of isolated points but a rational continuum, which speaks of freedom from all substantial, arbitrary impositions and restrains
         2. Privacy of home receives constitutional protection from two places 3rd and 4th**.** Right to contraception by married couple is implicitly a right of privacy in homes.
         3. Right of privacy is not absolute (homosexual sex). Difference w/ homosexuality—historical, statutory prohibition, marriage on the other hand is acknowledged and the state cannot impart criminal law into the details of intimacy
      6. **White Concurring**
         1. Strict scrutiny should be applied, finds right in the 14th. Statute is overly broad.
      7. **Black Dissent**
         1. The law is offensive but neither the 9th or DP invalidates it. Both lead to the court imposing notions as to what is wise or unwise. What constitutes as a “fundamental” value is incapable of judicial determination. Use the amendment process. Relying on DP is too imprecise and lends itself to subjective interpretation.
      8. **Stewart**: DP is not the guide b/c there is no claim that the statute is unconstitutionally vague or that D was denied procedural DP. 9th simply restricts federal gov to a gov of express and limited powers.
      9. **Notes:** Is this an ex of Carolene footnotes—protection of women, esp. poor. Prohibition on contraception was not enforced in practice against doctors for the middle and upper class, but only for the birth control clinics used by indigent women.
   6. **Scope of Privacy Post Griswold**
      1. **Eisenstadt v. Baird**—Court overturns a conviction under a law banning the distribution of contraceptives to unmarried couples. Court avoids the married/unmarried distinction. Decided the case under EP, using minimum rationality standard. Brennan opinion lays the footing for right of individual privacy.
      2. **Carey v. Population Services, International—**post Roe case, divided court strikes down a NY prohibition on the sale of contraceptives to minors. Plurality opinion states that strict scrutiny applies to all restrictions on access to contraceptives.
      3. Do these lines of cases recognize a right of privacy for sexual reproduction? If so, can the government restrict asexual reproduction such as cloning? Ground the argument in history, nature, precedence.
7. **Right To Reproduction When Another “Life” is Involved**
   1. **Roe v. Wade—(Blackmun majority)**
      1. Constitution only applies the word “person” postnatally. The court does not need to resolve the issue of when life begins
      2. **Trimester Framework**
         1. First: Mortality in abortion is less than mortality in normal childbirth—State cannot regulate. Abortion decision is left to the woman and her physician
         2. Second (first compelling pt): **Compelling state interest, narrowly drawn.** State in promoting the interest in the health of the mother, may choose to regulate the abortion in ways that are **reasonably related** to maternal health
         3. Third (second compelling pt): Stage subsequent to viability, State in promoting interest in potentiality of human life may, regulate and even proscribe abortion **except** where it is necessary for the preservation of the life or health of the mother.
      3. **Stewart Concurring:** Liberty protected by DP covers more than those freedoms explicitly named in B of R. Eisenstadt recognized the right of the individual, married or single, to be free from unwarranted governmental intrusion into reproductive choices. That right nec includes the right to terminate pregnancy.
      4. **White and Rehnquist dissent:** No language or history of the constitution supports Court’s judgment. Improvident and extravagant exercise of power.
      5. **Rehnquist** 14th should be confined to procedural deprivation of liberty
      6. **Notes:** Does Roe represent an even greater ex. of judicial intervention than Lochner? In Lochner, court decides that the means are not related to the end. In Roe, court decides the end is not legitimate.
   2. **State Regulation of abortion from Roe to Casey**
      1. **Bellotti v. Baird—**plurality opinion—state could involve a parent in a minor’s abortion decision, but an alternate judicial bypass procedure is required so that parental involvement is not an “absolute and possibly arbitrary vote.
      2. **Abortion funding restrictions**
         1. **Maher v. Roe—**upholds a CT regulation granting Medicaid benefits for childbirth but not for medically unnecessary abortions. Strict scrutiny is not warranted b/c scheme did not interfere w/ fundamental right in Roe. Law reviewed under deferential “rationality” review. Gov has wide latitude in choosing among competing demands for limited public funds. Difference b/w state interference and state encouragement.
         2. **Harris v. McRae**—federal funding limits on medically necessary abortions constitutional. Indigent pregnant woman is still given some range of choice in deciding to obtain a medically necessary abortion. Dissent: Discriminatory distribution of funds can deter exercise of fundamental liberty as much as an outright sanction.
         3. **Rust v. Sullivan—**Reasoning extended to a restriction on abortion counseling by any projecting receiving federal funding. DP confers no affirmative right to governmental aid.
   3. **Planned Parenthood v. Casey (majority in I, II, III V-A, V-C, and VI)**
      1. **Importance:** Court replaces strict scrutiny/trimester framework w/ an undue burden standard.
      2. **Stare Decisis (I-III)**
         1. Still a workable formulae
         2. Has induced reliance
         3. No evolution of legal principle or factual principle has undermined Roe e.g. Lochner or Plessy. Advances in viability only go to the trimester scheme, and do not weaken the central holding that viability marks the earliest point at which State’s interest in fetal life can justify a ban on non-therapeutic abortions
         4. To overrule w/out a compelling reason would subvert the Court’s power
      3. **Undue Burden Standard** appropriate. State regulation cannot place a substantial obstacle in the path of a woman seeking an abortion of a **nonviable** fetus. Unless it has the effect of limiting the right of choice, a state measure designed to persuade will be upheld if reasonably related to the goal.
         1. Trimester framework rejected. State may take measures to ensure woman’s choice is informed
         2. State may impose regulations to further the health or safety of a mother as long as they are not a substantial burden.
      4. **Subsequent to viability**, the state in promoting its interest in potentiality of human life, may regulate or even proscribe an abortion except where it is necessary for the life and preservation of a mother
      5. **Permitted**: Requirement that physician informs a woman of the nature of the procedure 24 hrs before performing an abortion is not an undue burden even if it is a greater burden on certain classes of women (indigent)
      6. **Substantial Burden: Note court’s heavy reliance on statistics.** Except in medical emergencies, no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse (woman has option of providing an alt signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy was due to sexual assault which she reported; or the woman believes notifying her husband will cause him or someone else to inflict bodily harm). **Will prove a substantial burden for the small percentage of cases where women are in abusive relationships. Notice allows husband to wield an effective veto over the decision.**
      7. **Permitted:** State requirement that a minor seeking an abortion obtains parental consent as long as a judicial bypass is in place
      8. **Permitted:** Filing procedure that does not identify the woman’s name. Collection of info is a vital element of medical research.
      9. **Stevens** Concurrence and Dissent: A burden is **undue** if it is too severe or lacks legitimate justification. All of the regulations are invalid. Societal consequence of overruling Roe would be too great. Takes O’Connor’s view further and questions constitutionality of persuasion.
      10. **Blackmun** wants to maintain the trimester framework and strict scrutiny. Under strict scrutiny all of these regulations would be struck down.
      11. **Rehnquist dissent:**  Roe wrongly decided, could and should be overruled. Decision to abort involves the destruction of a fetus. Historical traditions do not support the view that the right to abort is fundamental.
      12. **Scalia:** Decision is driven by personal predilection as much as reasoning. Roe did not resolve but further divided.
      13. **Notes**: First instance the court downgrades a fundamental right to a protected liberty and removes the usual strict scrutiny standard of review.
   4. **Stenberg v. Carhart:** Court strikes down a law prohibiting “partial birth abortions”, specifically D&X extraction without providing exceptions for the mother’s health.
      1. **Court** relies on DC’s finding that D&X significantly obviates health risks in certain number of cases. When **substantial** medical authority suggests that banning a procedure could endanger women’s health, Casey requires that the statute contain a health exception. Statute also violates Casey b/c it can be read to exclude D&E procedures, a method commonly used during 2nd trimester pre-viability abortions. Undue burden.
      2. **Dissent:** Procedure is not necessary. Women can choose another method.
   5. **Gonzales v. Carhart (Kennedy Majority):**
      1. **Facts:** In the 3rd trimester, the usual surgical procedure performed is D&E (dilation and excavation). In response to Stenberg, Congress passes an act that 1) moral, medical, and ethical consensus exists that the practice of partial-birth abortion should be prohibited b/c it is inhuman and never medically necessary. 2) Act punishes knowingly performing a “partial-birth” abortion. Unlike the Stenberg statute, Congress is detailed in banning only D&X.
      2. **Previability—**From Casey, when a procedure does not impose a substantial burden, it is considered a persuasive measure. Persuasive measures only require a **rational** basis to act, and the state may use its regulatory power to bar certain procedures, in furtherance of its legitimate interests in regulating the medical profession to promote respect for life.
         1. Not an undue burden b/c D&E is still permitted
         2. Court uses speculative conclusions about increased rate of depression and loss of self esteem following abortion (legitimate purpose).
      3. **Post viability—**Act would be unconstitutional if it subjected women to substantial health risks. There is evidence that D&E procedures are the safest method of abortion. Medical uncertainty on whether prohibition creates a substantial risk means a facial attack that the Act imposes an undue burden cannot survive. No exception needed.
         1. Proper means of considering exceptions is by as-applied challenge. Act is open to as-applied challenge in discrete, well-defined cases, but a facial attack cannot survive.
      4. **Ginsburg, Stevens, Souter, Breyer Dissent**
         1. Court has consistently required that laws regulating abortion, at any stage of pregnancy, safeguard a woman’s health. State must avoid a regulation that forces women to resort to less safe methods of abortion. Also, an EP concern—most women seeking late term abortions are minors, poor people with financial constraints, and women who discover fetal abnormalities
         2. Makes no sense to conclude that a facial challenge fails because a majority of women’s health would not be endangered. The very purpose of an exception is to protect women in exceptional cases.
         3. Court refers to Congressional findings to overrule stare decisis. Chipping away at a fundamental right.
8. Substantive DP and Marriage and Family Relationships (Other recognized fundamental rights)
   1. **Marriage**
      1. Loving v. VA (interracial marriage)—State may not define eligibility requirements to exclude men/women from marrying. Marriage is a basic civil right and fundamental to our existence and survival.
      2. Zablocki v. Redhail—Court vindicates marriage via an equal protection route. WI provides an resident having a minor not in his custody, and for whom he is obligated to financially support, could not marry without obtaining court approval showing proof that financial obligations have been met, and children are not likely to become public charges.
         1. Right to marry is of fundamental importance and strict scrutiny must be used when the state is significantly interfering w/ this right. State can create a less intrusive means of safeguarding a child’s interests. **Powell concurrence**: Compelling test would cast doubt on a network of restrictions such as bigamy, homosexuality.
      3. Turner v. Safley—Restriction cannot be placed on a prisoner’s right to marry. Marital status is often a pre-condition to the receipt of governmental benefits, property rights, and other, less tangible benefits.
   2. **Extended Families**
      1. **Moore v. East Cleveland—**Court invalidates a zoning ordinance limiting occupancy to single, narrowly defined “family”. Under definition extended families were not “family”.
         1. **Powell’s plurality opinion** uses SDP/heightened scrutiny to find a right for extended family members to co-habitat. SDP is a treacherous field, but limits can be drawn through looking at history and the basic values that underlie our society. There is a strong tradition of sharing households w/ extended families.
      2. **Belle Terre v. Boraas—**Douglas majority finds no privacy rights involved in a family oriented zoning restriction excluding unrelated groups from a village. Line drawn w/ unrelated groups.
      3. **Troxel v. Granville—**Court finds mother has substantive due process right to make decisions concerning the care, custody and control of their children. State cannot interfere w/ a parent’s right to make childrearing choices. Dissent: What about the interest of the child? Liberty interest is not a rigid constitutional shield.
   3. Tradition as a Guid**e**
      1. **Michael H. Gerald**—CA law that presumes a child born to the wife is legitimately a child of marriage. Gerald, claiming to be the biological father, seeks visitation rights with respect to child (skanky wife had an affair). Court upholds CA test in **Scalia opinion**. SDP requires that an interest not only be fundamental, but also traditionally protected in society. Adulterous natural father’s right to visit his child is not traditional. But historic respect has been given to the development of a unitary, marital family.
         1. Tradition requires an emphasis on the “most specific” level of generality at which history and tradition could be perceived. Under this approach, the historical tradition specifically related to adulterous natural fathers, not parents more generally. If there is not societal tradition either way, move to the next level—right of father’s in general.
         2. O’Connor agrees w/ the opinion except for the footnote. The historical mode of analysis would be inconsistent w/ Griswold, Eisenstadt. Court has characterized relevant traditions protecting asserted rights at levels of generality.
         3. Brennan dissent: Traditional mode of analysis undermines Eisenstadt, Griswold, and ignores the society in which the constitution exists. This is not an assimilative, homogenous society. We must be willing to abide to someone unfamiliar practice because the same tolerant impulse protects our own idiosyncrasies.
9. **Substantive DP and Sexuality**
   1. **Bowers v. Hardwick--**GA law makes act of sodomy a felony, punishable to 20 yr imprisonment. Court finds there is no fundamental right for homosexuals to engage in sodomy. Uses tradition test: proscription against sodomy has ancient roots, so a claim that such conduct is deeply rooted in the Nation’s history is facetious.
   2. **Lawrence v.** **TX**
      1. **Facts:** TX statute makes homosexual sodomy a criminal offense.
      2. **Overrules Bowers:** The right addressed is not simply the particular right of homosexuals to engage in sex, but the broader right to engage in sex within the privacy of one’s own home. It is w/in the liberty of a person to choose to engage in the act without being punished as criminals.
      3. **Definition of Fundamental right:** Casey confirmed that our laws and traditions afford constitutional protection to “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy”
      4. Traditional roots: Early sodomy laws were designed to prohibit non-procreative sexual activity in general and not just sodomy. Laws prohibiting sodomy were not enforced against consenting adults acting in private. Moreover, times have changed since those laws. Court references European law.
      5. **Romer v. Evans** cited**—**Court strikes down class-based legislation directed at homosexuals as a violation of the EP clause. EP should not be applied in this case because it would invite legislation that banned sodomy in general.
      6. **Stare Decisis** does not save **Bowers.** See stare decisis analysis in Casey.
      7. Reference to MO v. Holland. Those who drew the constitution were blind to certain truths apparent to later generations. Constitution must be a flexible framework to endure.
      8. **O’Connor concurring:** Would rather rely on EP Clause. Long recognized that bare desire to harm a particular group is not a legitimate interest. TX statute makes sodomy b/w homosexuals a crime, but not b/w heterosexual couples. Case raises a different issue than Bowers.
      9. **Scalia—**relies on historical analysis. Homosexuality is not a right deeply rooted in our Nation’s history. Rational basis—TX has a legitimate interest in decrying some acts as immoral and unacceptable. Today’s opinion is another way of propagating the “homosexual agenda”.
   3. **Meaning and Implications of Lawrence**
      1. **No standard of scrutiny** is applied in Lawrence in the Kennedy majority opinion. Implication is that it is a rational basis standard. But may be strict if it is a fundamental right. Important in the analysis of homosexual adoption/marriage.
      2. **Use of comparative law**
         1. **Atkins v. VA**—case reviewing the 9th implications of executing retarded criminals, Court cites amicus brief by the EU, stating that w/in the world, imposition of death penalty for crimes committed by the mentally retarded is overwhelming disapproved”
         2. **O’Connor** has been quoted as saying overtime court will increasingly rely on international and foreign courts to examine domestic issues.
      3. **Gay marriage:** Both Kennedy and O’Connor explicitly state the decision does not extend to any formal recognition of relationships b/w homosexuals. O’Connor states that promoting the institution of marriage is a legitimate state interest.
   4. Fundamental rights summary: Contraceptives, abortion, marriage, extended families, freedom of sexuality w/in the privacy of one’s home, maintaining a unitary/marital unit, make decisions about rearing child.
10. **Substantive Due Process and Rights over Death; Procedural Due; Process and the Right to a Hearing**
    1. **Procedural Due Process**
    2. Three step analysis
       1. Protected interest in life, liberty and property is threatened by gov action
       2. Impairment of protected interest must be sufficient to trigger the application of procedural DP
       3. If constraints of procedural DP apply, timing and nature of required hearing will depend on circumstances of case
    3. What is a liberty and property?
       1. Constitutional lib interest—Right of privacy, liberty of interests, etc…
       2. Nonconstitutional lib interest—If gov creates a liberty interest and provides that they may be impaired only for cause, these interests are entitled to full DP protection
          1. Special cases—prisoners, court will permit violation of DP claims in cases of early parole, but are less hospitable to complaints regarding changes in circumstances or degree of their confinement
             1. Will only receive protection in cases of atypical and significant hardship
       3. Property—DP embraces both real and personal property and public benefits and statutory entitlements.
          1. Benefit qualifies for Procedural DP if it can be denied or withdrawn only for cause. Same as liberty test: has state agreed that it will not deny or impair the interest except under certain conditions?
             1. Look to see how much discretion the government has in denying the right.
             2. Distinguish b/w a claim to property interests (gov cannot deny the application of someone who meets the eligibility criteria), but person does not a property interest in the benefits until they have been found eligible
       4. Relevance of Custom and Practice
          1. Unwritten Common law (custom and practice)—Used to prove existence of a protected liberty or interest even without an express statute, regulation or K provision stating that the interest will not be terminated or denied except for cause
    4. What is a deprivation?
       1. Not implicated simply by negligent act.
       2. Even an intentional act that deprives a liberty or property interest will trigger protections of DP only if impairment exceeds a certain threshold. Cannot be de minimis or insubstantial (e.g. reputation claim)
    5. Content of Notice: What type of hearing or notice is needed?
       1. Must be reasonably calculated to apprise interested parties in pendency of action
       2. Must reasonably convey required info.
    6. Type of Hearing afforded?
       1. Timing and Degree of formality concern
       2. “Bitter with the Sweet” Approach—Arnett v. Kennedy—If it is a gov-created liberty or property interest is involved, gov may decide what if any procedures will accompany decision affecting the interest
          1. Court majority has consistently rejected this approach and held that, regardless of type of liberty or property interest involved, once procedural due process protection is triggered, timing and nature must conform to constitutional standards rather than state law ones
    7. Mathews v. Eldridge Test (Balancing test weighing 3 factors)
       1. Significance of private interest that will be affected by gov action
       2. Chance of error: Fairness and reliability of existing procedures/Probable value of any additional safeguards
       3. Public interest in resolving matter quickly and efficiently (cost considerations)
    8. At some pt the benefit of an additional safeguard to the individual affected by the admin action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.
       1. Even if not all of the Mathews factors apply, Court may still conclude that it appears beyond a reasonable doubt that use of correct procedure would have made a difference
    9. Timing—Court has held that root requirement is that an individual be given an opportunity for a hearing before he is deprived of any significant liberty/property interest
       1. Relevancy principle—Must show that some substantive rule of law is defecting (conflicts w/ a provision of the constitution) e.g. convicted sex offender contests his inclusion in a sex offender registry b/c he claims he is no longer dangerous. Registry not based on current behavior, but used to stigmatize him as sex offender
    10. Exception to prior hearing requirement occurs when it is impossible or impracticable to conduct one or where the court believes that any risk of an error or serious deprivation is low.
        1. Impossible ex: Prison guards destroy person’s property during a search. Since search was random and unauthorized, the state could not have conducted a hearing before the destruction.
        2. Impracticable—Court looks at benefits derived/burdens from Mathews test
           1. Classic case is in an emergency where swift action is required
        3. Interesting variation: Lujan v. G & G Sprinklers—State withheld payment to private company based on the allegation that the co. failed to comply with wage requirements. Court held that co. was not entitled to benefit b/c it had not met its K obligation. Lujan may be limited to cases where claimed deprivation stems from K w/ gov.
    11. Formality of Prior hearing
        1. Relatively informal prior hearings and an opportunity to write/respond in person will suffice if there are elaborate post-deprivation remedies. Notice/Opportunity to be heard.
        2. If post-deprivation remedy is available or if there is little utility in them b/c harm from erroneous deprivation is irreparable, prior hearing must give more complete safeguards.
           1. Goldberg v. Kelly (seminal case involving the deprivation of gov benefits)
              1. Held that DP requires a welfare recipient be afforded “an evidentiary hearing before the termination of benefits”. Injury caused by mistaken cutoff would lead to irreparable harm.
              2. The interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.
    12. Possible Post-deprivation remedies where there is no liberty or property interests if there is an unconstitutional condition (e.g. 1st Amendment rights)
    13. Irrebuttable Presumption Doctrine
        1. Person may seek a hearing not to correct gov’s version of facts, but to rebut an expressed or implied presumption contained in law
           1. Example: A fired because of law that states police officer may not exceed 300lbs (expressed/implied presumption that those exceeding lb limit are out-of-shape). A can seek a hearing to rebut the presumption that he is too heavy to be an officer.
           2. Vlandis v. Kline prohibits gov from using a permanent Irrebuttable presumption when the presumption is not university true in fact and when state has reasonable alt means of making crucial determination
           3. Doctrine was a way of bypassing EP
        2. Doctrine today
           1. Weinberger v. Salfi—Supreme Court drastically narrows this avenue of attack in a case involving Social Security Act that denied survivors benefits to widows and stepchildren whose relationship had existed for less than 9 mths.
              1. Supreme court narrowed use of presumption to only cases where heightened scrutiny would be called for under EP Clause
              2. Still of value in situations of intermediate and strict scrutiny, but rather than invalidating the law entirely, court permits individual to rebut presumption
11. **Equal Protection**
    1. 14th Amendment—no State shall “deny to any person within its jurisdiction the equal protection of the laws”.
    2. 5th—applies to federal government
    3. Three tiers of standards:
       1. Strict scrutiny—Racial discrimination and analogues
          1. Regulations serve **compelling** governmental interests and are **essential (eg least restrictive) means**
       2. Intermediate scrutiny—Gender discrimination
          1. **Important gov. objectives** and must be **substantially** related to objectives
       3. Rationality review—Other classifications (including all socioeconomic laws and laws classifying along lines like age, disability and sexually orientation)
          1. **Rational relationship to legitimate ends**
12. **Equal Protection: Race Discrimination**
    1. Strauder v. West Virginia
       1. Courts first application of ERP against racial discrimination
       2. Facts: Black man convicted of murder by jury. State law provided only white male citizens can serve on the jury.
       3. Holding: Law is unconstitutional. ERP enacted to secure all the civil rights the superior race enjoys. Court refrains from extending ERP to other categories outside of race.
13. Schools:
    1. Plessy v. Ferguson (Brown)
       1. Is LA law requiring “equal but separate accommodations” for “white” and colored” railroad passengers a violation of the 14th?
       2. 14th is not meant to enforce social as well as political equality. Support in precedential holdings sustaining segregated schools.
       3. Rational basis—police power must only be reasonable, and enacted in good faith rather than for annoyance or oppression of a class. In this case, the usage, tradition, and preservation of public peace is a reasonable end
       4. Separate is not a badge of inferiority, if two races are to meet upon terms of social equality, it must be voluntary. Constitution cannot place them on the same plane.
       5. Dissent: Harlan—fundamental objective of statute is to interfere with personal freedom of citizens. Present decision will encourage state enactments that defeat the beneficent purposes of 14th.
       6. Erosion of holding:
          1. Initial challenges focus on material inequity of facilities
          2. Gaines v. Canada—University of Missouri Law School refuses admission based on race. Holding: State obligated to furnish, within boundaries, a substantially equal facility. Barring this, admission required in existing school.
          3. Sweatt v. Painter—Holding: Separate school is unequal in educational opportunities and intangible qualities
    2. Brown v. Board of Education (Warren)
       1. Issue: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of minority group of equal educational opportunities?
       2. Holding: Yes, segregation of educational facilities engenders feelings of inferiority in colored children, and the sanction of the law increases the impact.
       3. In the field of public education, the doctrine of “separate but equal” has no place. Segregation is the denial of equal protection.
       4. Notes
          1. Bolling v. Sharpe—Desegregation extended to fed government, but holding based on violation of 5th and not EP. EP clause is more explicit safeguard of unfairness than DP, but both concepts stem from ideal of fairness. Segregation in schools is not reasonably related to any governmental objective and constitutes an arbitrary deprivation of their liberty to pursue an education.
          2. Theories of Brown: Scope of ruling
             1. Color-blindness—Race is never a permissible basis on which to distribute public benefits
             2. Caste—only prohibits if there is a racial hierarchy or caste (more narrow). Cannot subordinate a group.
             3. White Supremacy—under this theory, all black school permitted if they are created by black political bodies
          3. Historical note—was the 14th originally supposed to apply to segregation?
          4. Brown is a violation of EP b/c it affected blacks and whites equally?
14. **Implementing Brown v. Board**
    1. **Brown II**—Warren requires the local courts to implement good faith compliance with desegregation.
    2. **Presumption** of unconstitutionality against schools with substantially racial imbalance. Neither school authorities or DC are constitutionally required to make yr-by-yr adjustments once desegregation has been accomplished
    3. **Keyes v. School District (Brennan)** sets forth a criteria that would facilitate a finding of purposeful discrimination, even if the segregation was not state-mandated
       1. P proves that authorities have carried out a systematic program of segregation that affects a large number of students and teachers
       2. Showing of intentional segregation in one area is probative as intentional segregation in other areas.
    4. **Milliken v. Bradley**—District boundaries cannot be changed unless there is a showing that one district’s discriminatory acts caused racial segregation in another district or where district lines have been drawn on the basis of race.
15. Eliminating other forms of segregation
    1. McLaughlin v. Florida
       1. Court invalidates a criminal adultery statute prohibiting cohabitation by interracial unmarried couples due to a lack of overriding statutory purpose. Holding: 14th central purpose was the elimination of racial discrimination emanating from official sources in the States. Racial classifications are “constitutionally suspect” and subject to “most rigid scrutiny”
    2. Loving v. Virginia (Warren) Miscegenation
       1. Issue: does a statutory scheme adopted by VA to prevent marriages b/w persons solely on the basis of racial classifications violate the 14th.
       2. VA argues 14th only requires equal application of a statute containing racial classifications
       3. Clear purpose of 14th is to eliminate all official state sources of racial discrimination. Racial classifications subjected to “most rigid scrutiny” and regulations must be shown to be essential to state objective. VA statute rests solely on distinctions of race. No legitimate purpose—doesn’t even pass Rational Basis test.
    3. **Palmore v. Sidoti—**Court finds that best interest of a child justification in interracial custody cases does not pass strict scrutiny. Private biases may be outside the reach of the law, but the law cannot give them effect.
    4. **Permissible Use of Racial Criteria**
       1. **Johnson v. CA (2005)—**Court strikes down a state policy of segregating prisoners by race to prevent gang violence under strict scrutiny. Not narrowly tailored, even if it is a compelling interest.
16. Facial Discrimination and Minorities
    1. **Korematsu v. United States**—Strict Scrutiny is first announced as applied to racially discriminatory laws
       1. **Rare case where classification passed strict scrutiny**
       2. Sustained a challenge against the 5th a conviction for violating a military order during WWII excluding all persons of Japanese ancestry from West Coast areas
       3. West Coast program included curfews, detention in relocation centers, and exclusion from the West Coast area
       4. Pressing public necessity is found, court seems to defer to the military b/c it was a military concern. Look at urgency of the situation.
       5. Dissent: Murphy—compelling interest, but it is not **reasonably related** to the removal of the dangers. For there to be a relation, there must be a presumption that all persons of Japanese ancestry have a dangerous tendency to commit sabotage and espionage. Forced exclusion is an erroneous assumption of racial guilt. Exclusion rested on an accumulation of misinformation, half-truths, and insinuations.
17. Racially Discriminatory Purpose and Effect
    1. Racially discriminatory application of facially neutral laws
       1. Yick Wo v. Hopkins-
       2. Facts: San Francisco ordinance prohibited operating a laundry without consent of Supervisors. Board granted to permit to all but one non-Chinese applicant, while denying all but one Chinese applicant. Chinese applicant refused permit, imprisoned for illegally operating laundry
       3. Holding: though the law is on face impartial, if it is applied with an unequal hand, so as to be discriminatory, the denial of equal justice is w/in prohibition of Constitution
    2. Racially discriminatory purpose underlying facially neutral laws (contradictory rulings)
       1. GoMillion v. Lightfoot (Frankfurter)—AL law redefining city boundaries in a 28 side figure resulted in removal from city all but 400 negro voters, without removing a single white one.
          1. Legislation is solely concerned w/ segregating white and colored voters
       2. Griffin v. County School Board of Prince Edward—closing of public schools and giving of grants to white children to attend private schools. Black holding—purpose was racial discrimination and is not constitutional
       3. Palmer v. Thompson—closing of public swimming pools is constitutional. Black majority opinion states motivations of men are hard to gauge. Where there is also substantial evidence that the city thought the pool could not be operated safely and economically on an integrated basis, motivation does not impeach purpose. Case is contrary to Griffin b/c Court refuses to look at motive.
          1. Dicta? When motivation is considered, the predominant focus is still effect. Here, state action effects both blacks and whites
          2. Dissent—Blacks and whites not treated alike. Desegregation alone was the purpose. Effect was only assessed after improper motivation was shown.
    3. Facially neutral laws w/ racially discriminatory effect
       1. Washington v. Davis
          1. Racially neutral on face and application but not impact
          2. Important case: factors resulting in a racial gradient are numerous. To what extent do policies have to account for these factors?
          3. DC conditions becoming a policeman on receiving a score on a “validated” test. Blacks score worse on average.
          4. Test must test skills that are germane to the occupation
          5. Holding: DC can use this test.
          6. Basic EP principle that invidious quality of a law claimed to be racially discriminatory must be traced to a racially discriminatory purpose or intent to segregate
          7. In the absence of a particular race, a prima facie case for discrimination is established, and the burden shifts to the State to rebut the presumption
          8. **Arlington Heights exception—**Discriminatory purpose can be found if 1) Historical discrimination 2) Specific sequence of events leading up to the challenged decision e.g. departure from normal procedures 3) Proof that the decision was motivated by racially discriminatory purpose shifts the burden 4) Starkly disparate effects
18. **Affirmative Action and Race Preferences**
    1. **Race is subject to strict scrutiny**
       1. History—EP was intentionally meant to protect blacks
       2. Immutable characteristic—cannot get into the favored category if you wanted to
       3. Race has no bearing on a person’s ability
       4. Carolene products footnote—insular, discrete minority. Cannot obtain a majority. Politically powerless
19. **Education**:
    1. **Regents of Uni. Of CA v. Bakke (Powell)**
       1. Facts: Challenge to special admissions program at UC-Davis Medical School aimed at increasing minorities to:
          1. Reducing historic deficit of traditionally disfavored race
          2. Counter the effects of societal discrimination
          3. Increase the number of physicians who will practice in communities currently underserved
          4. Obtaining the educational benefits that flow from an ethnically diverse student body
       2. Holding:
          1. Court affirms CA SC decision that UC-Davis admissions is unconstitutional
          2. Reverses enjoinment of the program in ever considering race of applicant
       3. Racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial standard
       4. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake and is constitutionally forbidden
       5. Societal Discrimination argument rejected: Court has never approved of a classification that aids a perceived victimized group over another
       6. **Fourth goal is the only acceptable one: Academic freedom, though not a specifically enumerated right, is viewed as a special concern under the 1st.** Robust exchange of ideas is a liberty guaranteed under freedom of speech
       7. Program focused solely (fixed no. of slots) on ethnic diversity hinders genuine diversity
       8. Harvard method advocated: admissions office looks at the body of a candidate, and race is a factor that may be a tipping point, just as economic, etc…Plus factor.
       9. Blackmun—with time, hope that affirmative action programs are no longer necessary
20. **Racial Preferences in Employment and Contracting**
21. Public Employment
    1. **Wygant v. Jackson Board of Education**
       1. Court holds minority preference in teacher lay-offs is unconstitutional
       2. Facts: When layoffs are required, teachers with seniority are given preference, except that in no time will the % of minority layoffs be greater that the % of minorities in the district
       3. Holding: 5-4 vote, Powell **plurality** holding that strict scrutiny must be applied, and the goal of providing “minority role models” to overcome societal discrimination is not compelling
       4. Societal discrimination is insufficient, and there is not an adequate limit on the role model theory**. Must have a showing of a prior discrimination by the governmental unit involved**
       5. Requirement of narrowness: Even if there is a compelling interest in remedying prior employment discrimination, layoff provision is not sufficiently narrow b/c layoff goal imposes entire burden of achieving racial equality on one individual
       6. O’Connor—rejects requirement of past discrimination as it would undermine public employers’ incentive to meet voluntarily their civil rights obligations
       7. Marshall, Blackmun, Brennan dissent: Public employer, with consent of employees, should be permitted to retain affirmative-action hiring plan
       8. Stevens: instead of relying on remedial actions, focuses on public interest of providing educators as role models
22. **Public Contracting**
    1. **Fullilove v. Klutznick (Congressional power)**
       1. Facts: Congressional spending program requirement that 10% of federal funds granted for local public works projects must be used by state or local officials to procure the services of minorities, absent a waiver
       2. Burger plurality opinion upholding program’s constitutionality. **Deference to Congressional opinion that traditional hiring acts could perpetuate the effects of prior discrimination**
       3. Marshall concurrence: Upholds Bakke standard that racial classifications employed are substantially related to achievement of important and congressionally articulated goal
       4. Steward dissent w/ Rehnquist: EP prevents invidious discrimination, even if injured person is not a minority
    2. **Richmond v. J.A. Croson Co. (state power)**
       1. Facts: Program requires prime contractors on city project to subcontract 30% of the dollar amount to Minority Business Enterprises. Case brought by contractor whose low bid was not accepted because of failure to comply with the Plan’s requirement.
       2. Principle: Court holds that 14th requires strict scrutiny of all race-based actions by state and local gov
       3. O’Connor Holding
          1. Fullilove is not dispositive: Distinction b/w 14th, which stemmed from distrust of state leg enactment based on race and § 5, a positive grant of legislative power to Congress
          2. Strict scrutiny required, opinion joined only by Rehnquist, White and Kennedy
          3. No evidence of statutory violation by anyone in Richmond construction industry, but even in the face of evidence, the program not narrowly tailored enough, and there is no consideration of race-neutral programs of city financing for small firms
          4. Stevens’ concurrence: disagrees on premise that gov decision on racial classification is not permissible except as a remedy, but agrees that the program is not narrow: Richmond has engaged in the stereotypical analysis that is a hallmark of violations of EP.
          5. Scalia concurs only in judgment: Agrees that strict scrutiny should apply to all governmental classifications by race, but does not believe that actions can be taken to ameliorate past discrimination. Specific person must be identified.
          6. Marshall dissent, joined by Brennan and Blackmun:
             1. Profound difference separates gov actions that are themselves racist and remedial measures
    3. **Adarand Constructions, Inc. v. Pena (O’Connor)**
       1. Facts: Adarand claims Federal Gov practice e of giving general contractors on gov projects financial incentives to hire socially and economically disadvantaged individuals violates the 5th DP component. Case remanded for further consideration.
       2. **Croson** has developed three principles:
          1. Skepticism: any preference based on racial or ethnic criteria must receive a searching examination
          2. Consistency: Standard of review under EP is not dependent on the race burdened
          3. **Congruence: Equal protection analysis under 5th must be the same as the 14th**
       3. Therefore, federal racial classifications, like those of the state, must be a narrowly tailored measure that furthers compelling governmental interests.
       4. **Fullilove** overturned—racial classification at a federal level is subject to as rigorous a standard as discrimination on a state level.
       5. Strict scrutiny is strict in theory, but not fatal in fact: when race-based action is necessary to further a compelling interest, such an action will not be unconstitutional b/c of a race-based preference
       6. Scalia concurring in part and concurring in judgment: Government can never have a compelling interest in remedying past wrongs. Under the constitution there is no such thing as a creditor/debtor race
       7. Thomas concurring in part and concurring in judgment: Gov may not make distinctions based on race even under good intentions. Paternalism at the heart of the program is at war with the principle of inherent equality.
          1. Programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or adopt an attitude of entitlement
       8. Stevens and Ginsburg dissent:
          1. No equivalence b/w a policy designed to perpetuate a caste system and one that seeks to eradicate racial subordination
          2. Congruence: Significant difference b/w a decision by Congress to adopt an affirmative action plan, and a decision by a state b/c federal programs represent the will of our entire Nation’s elected reps, whereas state program may impact a nonresident who has no vote
       9. Ginsburg and Breyer dissent:
          1. There is still a persistence of racial inequality.
          2. Bias both conscious and unconscious keep up barriers preventing racial equality. Congress can help realize 14th promise of equal protection of law with an affirmative plan.
          3. Strict scrutiny may not be fatal in fact, but the standard announced in the case is fatal for classifications burdening groups that have suffered discrimination
    4. **AA after Croson and Adarand**
       1. Only remedial justifications sufficient in contracting cases? Remedial justifications may be narrow, e.g. Scalia would confine permissible racial remedies to identified victims of specific past acts of discrimination. Cronson and Adarand settle on a middle point: remedies for identified past discrimination, but not limited to particular victims
       2. Strict in theory but not fatal in fact: New standard of review, strict scrutiny minus?
    5. **Grutter v. Bollinger (O’Connor majority opinion)(2003)**
       1. Facts: University of MI law school has a policy that uses race as a factor in their admissions program. Grutter, white Michigan resident seeks admission, and claims the policy is in violation of the 14th.
       2. Holding: Policy constitutional, reaffirms Powell’s view in Bakke that student body diversity is a compelling state interest that can justify the use of race in university admissions.
       3. Strict scrutiny, with narrowly tailored to further compelling government interest still applies.
       4. Facts applied: Given the important purpose of the university, and expansive freedoms of speech and thought associated w/ a university, a degree of deference is given to university academic decisions
          1. Targeting a specific % of a specific group would be unconstitutional
          2. Admission policy promotes livelier discussions, prepares students for an increasingly diverse workforce and society, and better prepares them for the professional world.
          3. Reliance on amicus briefs from high ranking retired officers and civilians
       5. Specifically and narrowly framed requirement:
          1. University’s cannot est. quotas, no separate admissions tracks, cannot insulate applicants from competition
          2. Must remain flexible, and individualized
          3. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative
          4. Must not unduly burden individuals who are not of the favored racial or ethnic group
       6. B/c 14th purpose is to do away w/ any race classification, race-conscious admissions programs must be limited in time (25 yrs)
    6. Ginsburg and Breyer concurrence:
       1. Conscious and unconscious racial bias remains. Minorities encounter markedly inadequate and unequal educational opportunities
    7. Scalia and Thomas concurring in part and dissenting in part
       1. Application of strict scrutiny standard in education is difficult. Constitution proscribes gov discrimination on the basis of race, and state-provided education is no exception
       2. Constitution abhors classifications based on race.
       3. No pressing need to maintain a public law school and no need to maintain an elite status. MI has made no attempt to implement any racial neutral alternatives
       4. Black students may not be prepared for the high standards of a MI legal education (ironic in light of his spiel on feelings of inferiority)
    8. Rehnquist, Scalia, Kennedy, Thomas—Consistency of the admissions number stronger suggest that there is a quota.
23. **Gratz v. Bollinger (Rehnquist 5-4 majority opinion)**
    1. **Facts:** Challenge by a white student to U of MI undergraduate admissions policy of automatically assigning 20 pts to an ethnic minority group—namely AA, Hispanics, and NA.
    2. Holding: University policy is not sufficiently narrowly tailored
    3. The volume of applications does not excuse the requirement of an individualized assessment of a candidate’s merits
    4. Side note: Diversity as a basis for employing racial preferences is too open-ended and ill-defined.
    5. O’Connor concurring: 20 pt given to race is higher than point assessed to other soft variables such as an extraordinary accomplishment
    6. Thomas: Racial discrimination is categorically prohibited by EP
    7. Souter dissent: Procedure closer to the permitted policy in Grutter rather than Bakke’s prohibition of racial quota.
       1. Unfair to penalize MI for being upfront about their racial diversity policy
24. **Implications:**
    1. Bakke vs. Grutter and Gratz—Does Grutter have further reaching implications than Bakke? O’Connor champions diversity in the classroom and beyond by linking higher education to leadership.
    2. Race Neutral alternatives—UT’s 10% rule—is that more narrowly tailored?
    3. Why is the diversity in education reason compelling but not compelling enough to be mandatory
    4. Look up two pile system (Austin)
25. **Racial Diversity in K-12 Public Education**
    1. **Parents Involved in Community Schools v. Seattle School District (Roberts plurality)**
       1. Facts: School districts adopt student assignment plans that depend on race. School district relies on race in assigning a student to a particular school, so that racial balance falls w/in a predetermined range based on racial composition of the school district as a whole. Parents bring suit under violation of 14th EP
       2. Seattle ISD—operates 10 public high schools. Ninth graders rank preference of the school, if too many students list the same preference, the district employs tiebreakers. 1st siblings 2nd racial composition of school and individual. If a district is not w/in 10% points of district’s racial composition, district is integration positive.
          1. District has never legally separated schools for different races
       3. Jefferson County—KY. In the past district was found to operate a segregated system, but the decree is dissolved in 2000 upon finding of unitary status.
          1. Post-segregation district adopts a plan requiring non-magnet schools to maintain 15-50% black enrollment
    2. Standard of review: Strict Scrutiny—plan is narrowly tailored to achieve a compelling gov interest
       1. Compelling reasons include remedial measures and in higher education diversity
    3. Grutter distinguished: Race is not considered as part of a broader effort to achieve exposure to wide diversity of ideas, and race is not one factor weighed w/ others
    4. Purpose: State does not want to prevent black students from access to most desirable schools because of racially concentrated housing patterns. Broader social benefits from a racially integrated learning environment.
    5. Holding: Unconstitutional ex of racial preference. Policy is not narrowly tailored to the goal of achieving educational and social benefits
       1. No evidence that the level of racial diversity nec to achieve educational benefits coincides with racial demographics of school districts
       2. Racial balance is not achieved for its own sake
       3. Plan has minimal effects
    6. Narrow tailoring requires “Serious, good faith consideration of workable race-neutral alternatives”
    7. Narrow holding—applies only to the facts of this case
    8. 14th prevents differential treatment to American children on the basis of race. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.
    9. Thomas concurring—Racial imbalance is not segregation. De jure/de facto distinction. View of the constitution is Harlan’s one color-blind one endorsed in Plessy
    10. Kennedy concurring—Disagrees to the extent that the plurality suggests the constitution mandates school authorities to accept the status quo of racial isolation. Agrees the means the districts used were ineffective
        1. Should employ race-conscious measures that do not rely on individual classifications.
        2. School boards may pursue the goal of racial balancing, but through different means such as recruiting teachers, tracking enrollments, etc…other plus factors such as special talents should be considered
    11. Stevens dissenting—Roberts view is not in touch with reality
    12. Breyer, Stevens, Souter, Ginsburg dissent—
        1. Plurality ignores precedential cases and undermines Brown’s promise of integrated education
        2. EP forbids practices that lead to racial exclusion
        3. No test has held that strict scrutiny means all racial classifications must be treated the same. Strict scrutiny is fatal in fact only to classifications that harmfully exclude
        4. No exclusion or unfair burdens. Three interests:
           1. Historical and remedial
           2. Educational—interest in overcoming adverse education effects of segregated schools
           3. Democratic interest in producing environment that reflects pluralistic society
        5. Here race conscious criteria sets out outer bounds of broad ranges—one part of plans. Voluntary school choice plans are more narrowly tailored than the Grutter test. Race is only a factor in a fraction of student’s no-merit based assignments. School board judgment should receive deference
26. **Equal Protection: Other Suspect Categories**
27. US Constitution is the only major written constitution w/ a B of R that does not have a provision explicitly declaring the equality of sexes. Never a reference to a woman, only 19th refers to an ER to vote.
28. Why is gender subject to intermediate scrutiny?
    1. Historical discrimination
    2. Immutable
    3. In most areas, equal ability
29. Reed v. Reed—first case to est. heightened scrutiny
30. **Frontiero v. Richardson** (failure to adopt strict scrutiny)
    1. Unconstitutional gender classification: overbroad, outdated misconception concerning the financial position of servicewomen. Federal law gives men automatic dependency allowance for wives, but requires that women prove their husbands are dependent
    2. **Brennan fails to obtain a majority in his opinion advocating gender as a suspect classification**
       1. Similar to Carolene Product’s footnote: Justice Stone suggested there were reasons to apply a more exacting standard of judicial review in other types of cases. Legislation aimed at *discrete and insular minorities*, who lack the normal protections of the political process, should be an exception to the presumption of constitutionality, and a heightened standard of judicial review should be applied
       2. **Basic concept of our system that legal burdens should bear some relationship to individual responsibility**
       3. Women have historically been regulated to 2nd class citizenship, gender is an immutable quality, and bears no relationship to the actual abilities of its individual members
       4. Like Reed, rejects administrative ease and convenience as sufficiently important objectives to justify gender-based classifications
31. Standard of review:
    1. Intermediate test—Important justification and substantially related means. The characterization cannot be based on archaic notions of gender differences
32. **Craig v. Boren (Brennen)**
    1. OK statute prohibits the sale of non-intoxicating beer to makes under the age of 21 and to females under the age of 18.
    2. Issue: Does the difference b/w males and females with respect to the purchase of 3.2% beer justify the differential age drawn by OK statute? Is there congruence between gender and the gender characterization?
    3. Purpose: Regulation of driving while under the influence
    4. Holding: No substantial relationship (rejects statistical analysis showing a greater number of males arrested for DUI) and there is no study that measures the danger of 3.2% beer specifically.
    5. Rehnquist dissent: Finds holding objectionable on two grounds:
       1. Application of strict scrutiny in a case where men challenge a gender-based statute
       2. There is no citation to any source that gender classifications should not be reviewed on a rational basis.
33. **MS University for Women v. Hogan (O’Connor)**
    1. Facts: Challenge to an all female nursing school policy to exclude men from admissions. MSU is the oldest state-supported all female university in the nation. Male applicant is able to audit courses
    2. Holding: State’s justification and reason for meeting the objective are not constitutional under ERP.
    3. Standard of review: **Exceedingly persuasive justification**: Important governmental objective and the discriminatory means are substantially related to those objectives
    4. Important objective: In reviewing important governmental objective, must consider if the objective rests on archaic, stereotypical notions about proper roles of gender
       1. In limited circumstances a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that are disproportionately burdened (e.g. face discrimination in the field).
       2. **A state may est. a compensatory justification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.**
    5. Substantially and directly related to goal b/c the policy allowed for men to audit in the classroom
    6. Powell dissent: Classification provides an additional choice for women and there are other alternatives for males.
34. **Gender based peremptory strikes**
    1. JEB v. Alabama—state’s gender based peremptory challenges are unconstitutional in a case where the state used most of its peremptory strikes to remove males
35. **United States v. VA**
    1. Facts: VMI is the sole single-sex public institution in VA and has a mission to produce male “citizen-soldiers” through a “adversative method”. Complaint is filed by a female applicant. Court of appeals gives. VA three options: 1) form an equivalent school 2) cease its existence as a public institution 3) admit women. VMI chooses to form an equivalent school.
    2. Issues: Does VMI’s exclusion of women violate equal protection laws? If there is a violation, what is the remedial requirement?
    3. Standard: Exceedingly persuasive justification (burden rests solely on the state). Justification must **be genuine not hypothesized** or invented post hoc in response to litigation and must not rely on **overbroad generalizations** about differences in the genders.
    4. First Issue Holding:
       1. VMI’s stated reason of educational benefits of diversity of education approaches is an ad hoc response to litigation
       2. The schools adversative method rationale (1. Absence of privacy, physical training and adversative approach) is based on generalizations about all women. Some women may prefer the adversative approach and are capable of the physical standards.
          1. While conceding that there may be genuine physical differences between genders, the court holds VMI cannot constitutionally deny women who have the will and capacity. Doing so continues a self-fulfilling process similar to procedures that would deny women higher educational chances.
       3. Second Issue:
          1. VWIL program does not offer an equivalent school in terms of teaching methods, funding, or networking
       4. Rehnquist concurrence: Diversity of education purpose benefitted only one sex. (Distinction w/ MS University there were other schools that admitted male nursing students). Not the exclusion of women that is unconstitutional, but the failure to provide a comparable institution for women (overall quality and caliber).
       5. Scalia: Court’s interpretation of Hogan’s exceedingly persuasive justification is wrong. Intermediate scrutiny has never required a least restrictive means analysis but only a substantial relation. No support in case law requiring that the characterizations are true in every instance (does not matter if some women can meet the exacting standards)
          1. Carolene products footnote does not apply to women who are not a discrete and insular minority
          2. Implication that private schools will be deemed unconstitutional in the future. Gov. provides charitable status under tax law and it is not beyond today’s holding that a donation to a single sex college could be deemed contrary to public policy.
    5. **Sex equality and Sex Differences—traditional EP require only those who are similarly situated be treated alike.** Where there is a real difference, segregation of sexes permitted.
       1. **Real differences**—laws that discriminate with respect to sex-related characteristics such as pregnancy
    6. **Pregnancy**
       1. **Geduldig v. Aiello**—Exclusion of pregnancy related disabilities from CA’s disability insurance system did not constitute invidious discrimination under EP Clause.
          1. Holding (Stewart majority): Case does not present a gender-based classification and rational basis standard is used. Insurance does not exclude all women, only pregnant women. Exclusion of a specific medical condition.
          2. Brennan dissent—men receive full compensation for all disabilities suffered, including those peculiar to their sex. Therefore, there is a dissimilar treatment of sexes as pregnancy is inextricable limited to women.
       2. Statutory rape laws:
          1. **Michael M. v Superior Court**—court upholds CA’s statutory rape law, which punishes males but not females under 18 who engage in sex.
             1. Rehnquist plurality—Court has consistently upheld statutes where the gender classification is not invidious, but realistically reflects the fact that the sexes are not similarly situated in certain circumstances
             2. State has a strong interest in preventing illegitimate pregnancies. Males who impregnate girls need state-enacted deterrence because they do not have to fear a pregnancy.
             3. Statute does not have to be drawn precisely as long as it is w/in the constitutional limits e.g. substantially related.
             4. Not a case of admin convenience or one where males are in need of special solicitude from the court because of past discrimination
             5. Females are also less likely to report violations of the statute if she is subject to criminal persecution (dissent points out that this reinforces generalizations and calls to mind paternalistic desire to protect a women’s chastity)
    7. Exclusion of women from the military draft
       1. **Rostker v. Golberg**—6-3 vote court rejects a claim under EP of the 5th DP that the Military Selective Service was unconstitutional in authorizing the President to require males to register and not females.
          1. Rehnquist majority—Statute passes intermediate scrutiny test (important governmental interest):
             1. Case arises in the context of Congressional authority over national and military affairs and should be accorded the greatest deference.
             2. Congress considered two schemes, and decided to register only males because **females are statutorily excluded from combat**. Men and women are not similarly situated.
          2. Dissent: No basis for concluding that excluding women is substantially related to the gov interest. Additional costs and admin burdens is not an acceptable justification
          3. Note: Should a disability that results from a legal construct be given the same weight as a natural one such as pregnancy?
    8. Discrimination against fathers of nonmarital children
       1. Standard—intermediate scrutiny
       2. **Caban v. Mohammed**—Powell’s majority opinion invalidates a law granting the mother but not the father of an illegitimate child the right to block the child’s adoption by withholding consent.
          1. Law is another example of an overbroad generalization in gender based classifications. No showing of a relationship b/w the state’s interest in promoting the adoption of illegitimate children and classification. No fundamental difference in paternal and maternal relationships (both mother and father could have custody).
          2. **Nguyen v. INS**—court upholds a law that treats children born out of wedlock to one citizen parent differently than one born to a non-citizen parent. Children born to citizen mothers are automatically considered citizens but those with citizen fathers have additional requirements.
             1. Kennedy holding based on the difference b/w a mother and father’s relationship to citizen at time of birth. Substantially related to two important governmental objectives that a biological parent-child relationship exists and the child and citizen parent have an opportunity to develop the connection.
             2. Mother knows the child is hers. It is not certain that a father will know that a child was conceived, nor is it clear the mother knows the father’s identity.
             3. O’Connor dissent—DNA testing, sex-neutral alternatives. INS has no greater chance of verifying biological connection b/w mother and child than father/child
36. **Other Classifications Arguably Warranting Heightened Scrutiny**
37. **Alienage**—EP holds “no person shall be deprived of the equal protection of the law” and is not conditioned on citizenship. Note that only legal aliens are protected
    1. Standard: Heightened scrutiny, substantial interest—Carolene products discrete, insular group. Chandler states that even though strict scrutiny is the standard, there are a lot of exceptions and the same outcome would have occurred under rational basis.
    2. Strict Scrutiny of state alienage classifications
       1. Welfare benefits**—Graham v. Richardson**— State cannot deny aliens welfare benefits. Power of state to apply laws exclusively to aliens is confined to narrow limits. Also, state action infringes on federal power.
       2. Bar admissions—**In re Griffiths**—state cannot exclude aliens from law practice
       3. Civil Service Jobs—**Sugarman v. Dougall**—Court invalidates state law that holds only citizens may hold permanent positions in competitive classified civil service. Law covers menial positions were there is no relationship to state interest of employing citizens of undivided loyalty.
    3. **Public function exception**—Blackmun: State may, in appropriately defined class of positions, require citizenship as qualification to job. Ex—officers who participate directly in the heart of a representative government. **Deferential (rationale) review**, but actions are not wholly immune from scrutiny.
       1. Police officers—Foley v. Connelie—NY can bar aliens. To require every exclusion of aliens to pass strict scrutiny would depreciate the value of citizenship. Scrutiny is not demanding when matter is w/in State’s constitutional pejorative. Police authority requires a high degree of judgment and discretion, citizenship requirement has rational relationship
       2. Public School teachers—Ambach v. Norwick—rationale review used, exclusion permissible because public schools play an important role in preparing individuals to participate as citizens of society
       3. Notaries public—Bernal v. Fainter—Court limits public function exception. Strict scrutiny b/c notaries duties are clerical and ministerial
    4. Federal Preemption and alienage restrictions—Does strict scrutiny reflect theory of preemption where state is implicitly barred from altering fed est. immigration scheme?
       1. **Toll v. Moreno**—Rare decision where court strikes down a state alienage restriction on federalism rather than EP grounds. Court strikes down University of ML policy of granting preferential tuition and fees to students with in-state status. “Nonimmigrant aliens” were not eligible even if they were domiciled in Maryland. Congress made an explicit decision not to bar aliens from acquiring domicile, and State’s decision to deny in-state status is a pre-emption.
    5. Federal restrictions on aliens: Congress’ Immigration and naturalization powers are considered plenary. Constitutional limits on federal gov’s power to discriminate.
       1. Public Employment—**Hampton v. Mow Sun Wong**—Court recognizes an overriding national interest may provide a justification for a citizenship requirement even if an identical requirement cannot be enforced by a state. When the state asserts an overriding national interest, DP requires that there is a legit basis for presuming that the fed rule was actually intended to serve the interest.
       2. Medical Benefits—**Matthews v. Diaz—**Court held congress may condition an alien’s eligibility for participation in a federal Medicare program on 1) admission for permanent residence 2) continuous residence in the US for 5 yrs. **Deferential standard of review** applied.
38. Disability, Age, Poverty—deferential rationality review—rationally related to legitimate state interest
    1. **Cleburn v. Cleburn Living Center Inc. (White majority)**
       1. Facts: TX denies special use permit for operation of a group home for the mentally retarded, acting pursuant to municipal zoning ordinance. Special use permit in the R-3 zone is not required for other multiple dwellings
       2. Holding—Rational Basis standard is appropriate, but ordinance still fails under rational basis review.
       3. Mentally retarded are immutably different. Retarded person’s status does relate to his ability to contribute to society and there is ample evidence lawmakers have responded to retarded people’s plights. Finally if such a large group is given special DP rights, hard to see where DP would stop.
       4. Ordinance not rationally related:
          1. Fears for elderly and negative attitude of majority of owners (unsubstantiated fear not a good enough justification),
          2. 30 yrds from middle school might lead to harassment (school has retarded students),
          3. Located next to a flood plain (concern for flood does not explain need for distinction)
       5. Marshall Concurrence and Dissent: Ordinance would no doubt survive the Court’s classic “rational basis test” Court has fashioned a heighted level of scrutiny w/out stating. In light of the lengthy and grotesque history of segregation and discrimination, a greater than rational basis should be applied.
       6. Chandler agrees w/ Marshall and Brennan Blackmun to an extent that rational basis is mucked up
39. Age classifications
    1. **MA Board of Retirement v. Murgia**—rationality standards used to sustain a mandatory retirement law for uniform police officers at 50. Real difference, group has not experienced a history of unequal treatment, or have been subjected to unique disabilities on the basis of stereotyped characteristics. Also, not discrete or insular.
40. Poverty and Wealth Classifications—strict scrutiny does not apply unless coupled with a fundamental interest (e.g. equal protection)
41. Sexual orientation
    1. Rowland v. Mad River School District—Brennan dissent calls for heightened scrutiny: Homosexuals constitute a significant and insular minority in country’s population similar to blacks. Court has yet to adopt heightened scrutiny in discrimination against GLBT.
    2. **Romer v. Evans (Kennedy)(1996)**
       1. Facts: CO Amendment 2 repeals and rescinds ordinances affording homosexual protection from discrimination. Prohibits all leg, executive or judicial action at any level of state or local gov designed to protect homosexuals for present and future purposes
       2. Violation b/c amendment withdraws from homosexuals, but no others, specific legal protection from injuries resulting from discrimination. Imposition of a special disability on homosexuals who can only change the law by amending the constitution.
       3. Protections in amendment are not special, but are fundamental protections.
       4. EP must co-exist with the fact that most legislation classifications disadvantage a group. Rational relation to a legitimate end standard used: If law does not burden a fundamental right or target a specific class, it is upheld
          1. Even using deferential standard, there must be a relation b/w classification and object. Must be a legitimate interest and rationally narrow. Animus towards group is not a legit justification.
       5. Facts applied: Amendment 2 is both too narrow in broad. Narrow in denying only one class, too broad in the breadth of protection denied. Breadth is too far removed from justification.
       6. Scalia and Rehnquist dissent: Purpose of preserving sexual mores is a legitimate justification. Congressionally and judicially approved in Bowers v. Hardwick
       7. Chandler would deny cert and wait and see what sort of discrimination might occur. Not ripe—standing issues
    3. Meaning and Implications of Romer
       1. Bare desire to harm a politically unpopular group cannot be a legitimate governmental interest. Will not pass muster even under rational basis test.
       2. Should homosexuality be protected under DP or EP clause? Is Lawrence constrained to SDP b/c EP implicates equal right to marry? EP and SDP are intertwined. Lawrence can be interpreted as stating there is a fundamental liberty to be treated equally?
42. **Minimum Rationality Review in Economic Protection**
43. **Two test for Economic EP cases**
    * 1. Classification must be reasonable, not arbitrary, and must rest on a difference that has a fair and substantial relation to the legislative purpose
      2. Any state of facts that can be reasonably conceived to sustain it
44. **Railway Express Agency v. New York (Douglas)**
    1. Facts: NY Statute provides no person shall operate any vehicle containing an advertisement. Exception—business notice on business delivery vehicles that are not mainly used for advertisement
    2. Standard: Deferential/Rationality under EP (min rationality)
    3. Issue: Violation of EP because trucks carrying advertisement of a general house is no more distracting than if the commercial house carried the same advertisement on its truck?
    4. Holding: Classification has relation to legislative purpose, and it is no requirement that equal protection eradicate all evils or none at all. Local authorities may well have concluded that those who advertise their own products on trucks do not present the same traffic problem.
    5. Jackson concurring
       1. Distinguishes between DP and EP. Court frequently uses DP, but rarely EP. The burden should rest heavier on those who would use SDP to strike down substantive law because a greater scope of conduct is unregulated and non-regulation. DP does not disable the gov, rather it means regulation must have broader, equitable impact
       2. Holding should be affirmed b/c there is a real difference b/w those who advertise out of self-interest and those who are hired
45. **Extreme Judicial Deference to Economic Regulation**
    1. Williamson v. Lee Optical revisited: Court rejects an EP claim as well as substantive. EP protects against invidious discrimination. Under inclusive classifications are valid if they remedy a problem one step at a time.
46. Departure from extreme Deference: Classifications based on “animus”
    1. In animus cases, where there is a bare congressional desire to harm a politically unpopular group, deferential standard is heightened. There must be a legitimate gov interest.
       1. **US Dept of Agriculture v. Moreno—**Court strikes down provision limiting food stamp assistance to households defined as a group of related persons. Bare congressional desire to harm hippies, with no relation to the stated purpose of raising levels of nutrition among lower income families.
       2. **NYC Transit Authority v. Beazer**—Example of where animus toward methadone users is upheld. Court allows exclusion of all meth users from any Transit Authority employment. Lower court states exclusion is overly broad b/c it reaches meth users in treatment programs. SC holding: When drug users are in a treatment program, a degree of uncertainty persists.
47. **Rational Review with a Bite**
    1. **Village of Willowbrook v. Olech (ex. of irrational and arbitrary discrimination)**
       1. Facts: Olech, homeowner, sues Village of Willowbrook alleging a violation of EP because the village demanded a 33 ft easement as a condition of connecting her house to the municipal water supply, while requiring only a 15 ft easement for other similarly situated property owners.
       2. Holding: Violation of EP b/c there is no rational basis for difference. The purpose of EP w/in state’s jurisdiction is to secure a person against **arbitrary** and intentional discrimination whether occasioned by express terms or application
       3. Breyer concurrence—Zoning differences will usually be given deference b/c they almost always treat one land owner differently. **Olech case presents a plus factor—illegitimate animus or ill will.**
48. Should EP review of economic legislation be stricter? Special interest group concern, less powerful minorities should be protected.
    1. **U.S. Railroad Retirement Bd. V. Fritz (Rehnquist)**
       1. Facts: In 1974, Congress restructures railroad retirement system to eliminate dual benefit system, but includes a grandfather provision to preserve the windfall for special classes of employees. Fritz contends distinctions used to determine eligibility for both sets of benefits violates EP.
          1. Three classifications
             1. Those who had already been retired and received dual benefits would continue to receive them
             2. Workers who had not retired, but were retired (worked for 10 yrs) could receive them if (1) they had performed some railroad work in 1974 (2) current connection w/ railroad industry in 74 (3) had completed 25 yrs of railroad work
       2. Issue: Were the classifications arbitrary or irrational? Stated purpose: classification protects equity of employees and provides benefits to career railroad employees
       3. Holding: Act upheld because there were plausible reasons for Congress’ action, judicial inquiry ends.
       4. Classification is not unconstitutional merely because inequality results (see one step at a time argument from Williamson)
       5. Constitutionally irrelevant whether reasoning actually underlay legislative decision
       6. Stevens concurring
          1. EP requires more than a conceivable or plausible explanation, but the objective does not have to be the actual purpose (actual purpose unknown, requiring actual purpose would lead to inconsistent validation of the same statute in one state but not another)
          2. Must be a correlation b/w classification and actual/reasonably presumed objective
       7. Brennan/Marshall dissent
          1. Must ask purpose for classification and rational relationship
          2. Deference is only properly applied where Congress has articulated a legitimate gov objective (actual legitimate gov purpose)
             1. Strong implication that legislation is the result of public interest groups who misled Congress. Classification was, therefore, not related to an actual gov purpose
    2. **Should Rationality Review be Stricter (Rationality w/ a bite)? Three theories advocating stricter scrutiny**
       1. Judicial concern for minorities who have an inadequate say in a governmental process
          1. Deference to classifications perpetuate the hierarchy b/w small, insular groups and majority ones
          2. Should the same concerns extend to large, but unorganized and diffused groups?
       2. Constitutional roots in civic republicanism—Gov action must advance public values rather than respond to naked preferences.
          1. Williams—upheld statute not b/c EP tolerates wealth distribution to one group, but because deferential treatment was a means of protecting consumers
          2. Posner argues that most public policies are an expression of narrow interest private groups rather than a desire to advance a public goal.
       3. Discipline legislatures to assure that means promote articulated purposes
49. **Fundamental Interest Branch of Equal Protection**
    1. **Fundamental Interest in Voting—**Constitution leaves it up to the state to determine qualifications of voters for national and state elections (limitations 14, 19, 24, 26)
    2. **Harper v. VA State Board of Elections** (Douglas)(Case est. voting in state elections is fundamental for EP even in the absence of a textual right).
       1. Fact: VA makes payment of poll taxes precondition for voting
       2. Holding: Violation of EP whenever State makes affluence of voter or payment of a fee an electoral standard. Voter qualification has no relation to payment of tax
       3. State power in voting limited to fixing qualifications—wealth is a capricious and irrelevant factor and has no bearing on ability to participate intelligently
       4. **Where fundamental rights and liberties are asserted under EP, classifications must be closely scrutinized and carefully confined**
       5. Black dissent—Statute should be upheld as long as it is not irrational. Rational basis here—state desires to collect revenue
       6. Harlan and Stewart—EP does not impose an ideology of unrestrained equalitarianism
    3. **Kramer v. Union Free School District No. 15 (Warren)**
       1. Facts: NY Law provides in certain school districts residents may vote in school district election only if they or spouse own or lease taxable real property w/in district or are parents or have custody of children enrolled in a local public school. Kramer is an unmarried man who met neither requirement.
       2. Standard: Higher strict scrutiny—close and exacting examination. Must be a compelling state interest.
       3. Statutes distributing voting rights are the foundation of a rep society and any unjustified discrimination undermines democracy
       4. There is an assumption that statutes are structured to fairly represent all people, but assumption no longer holds when statute challenges this basic assumption
       5. Purpose: Limiting franchise to those who are primarily interested or affected
       6. Means is too inclusive (inclusion of those with a remote and indirect interest) and exclusive (excludes those w/ an interest)
       7. Note: State is not willing to sustain interest voting tests, but will upheld requirements such as age and sanity
50. Strict Scrutiny of Vote Denials
    1. Standard strict scrutiny is applied for elections. Laws that do survive strict scrutiny:
    2. Limited Purpose elections and special purpose governmental units
       1. **Salyer Land Co. v. Tulare Lake Basin Water Storage Dist—**election scheme for water storage district under which only landowners were permitted to vote and votes were proportioned to the valuation of their land. Main purpose was to assure water for farming and project costs were assessed upon land in proportion to benefits received.
          1. Voting classification permitted based on special limited purpose of statute and the **disproportionate effect** of its activities on landowners. Interest must be sufficiently substantial to justify exclusion
       2. Felons are disenfranchised
          1. Richardson v. Ramirez—Court holds 14th § 2 expressly denies franchise for those involved in rebellion or other crime.
       3. Voter ID Requirements
          1. **Crawford v. Marion County Election Board**
             1. Supreme Court declines to apply strict scrutiny and upholds an IN law that requires residents to present government issued photo identification before voting. Important interest in preventing voter fraud. Law is not a case of discrimination and is not a great burden b/c most voters have a valid driver’s license or acceptable form of ID.
             2. Under Harper the law would be invalid if the state would require the person to pay a tax or fee to obtain the ID, but the BMV provides a free ID.
             3. **Souter dissent:** Discriminatory against elderly and poor who cannot afford the trip. Obtaining an ID also requires a showing of a birth certificate or certificate of naturalization…forms a voter has to pay to obtain. Compare with the **Harper** poll tax of $1.50. Voting is an important right, and there has been only one showing of voter fraud (standing issue?).
51. Vote Dilution: Reapportionment and Gerrymandering
    1. Court first abandons position that apportionment is a political issue in Baker v. Carr.
    2. **Reynolds v. Sims (Warren)**
       1. Facts: Federal district court for the Middle District of AL held that the existing and two legislatively proposed plans for the apportionment of seats in the two Houses of the AL legislature violated the EP clause. Court orders into effect a temporary reapportionment plan
       2. Holding: Supreme Court affirms
       3. EP requires uniform treatment of persons standing in the same relation, and people of different localities are similarly situated
    3. Why the issue is justiciable?
       1. Purpose of apportionment is fair and effective representation of all people, EP Clause guarantees the opportunity for equal participation by all voters in election and state legislatures.
       2. Overweighing vote of a person living in one area dilute those living in another area. (People living in different locations are still similarly situated)
       3. Dilution of vote based on locale has the same invidious effects as discrimination based upon race. Wight of a citizen’s vote cannot depend on where he lives
       4. Denial of constitutional right demands judicial protection
    4. EP requires that a state makes a good faith effort to construct districts as nearly of equal population as possible.
       1. Mathematical exactness not constitutionally required so long as the divergences are based on legitimate consideration incident to the effectuation of a rational state policy
          1. Inadequate consideration includes, history alone, area, desire to ensure effective representation of sparsely settled areas, attempt to balance rural and urban power, or economic interests
          2. An adequate consideration is the desire to give voice to a political subdivision to prevent gerrymandering (b/c most state legislation involves enactment of local concerns), but this consideration still cannot be at the expense of the overall population
52. **Definitions**
    1. **Gerrymandering** is a form of boundary delimitation (redistricting) in which [electoral district](http://en.wikipedia.org/wiki/Electoral_district) or [constituency](http://en.wikipedia.org/wiki/Constituency) boundaries are deliberately modified for electoral purposes, thereby producing a contorted or unusual shape
    2. **Apportionment** –Is the process of allocating political power among a set of principles (or defined constituencies). The US apportions [political power](http://en.wikipedia.org/wiki/Political_power) differently between its [upper house](http://en.wikipedia.org/wiki/Upper_house), the [Senate](http://en.wikipedia.org/wiki/United_States_Senate), and its [lower house](http://en.wikipedia.org/wiki/Lower_house), the [House of Representatives](http://en.wikipedia.org/wiki/United_States_House_of_Representatives). Within the Senate, each state is represented by two seats, the result of compromise when the constitution was written. Seats in the US House of Representatives (the House) are apportioned among the states based on the relative population of each state in the total population of the union. The states then create districts from which representatives will be elected to serve in the US House of Representatives. The ideal is that each district would have an equal amount of population. States can lose or gain seats at each decennial census. Districts must be redrawn within each state after each census to reflect population changes.
    3. **"Political subdivision"** means any county, municipality, county school district, independent school district, judicial circuit, militia district, or any other geographical area of the state which does not include the entire area of the state
53. **Post Reynolds**
    1. **Lucas v. Forty-Fourth**—court holds that even if the majority of a state’s (CO) electorate votes to approve of an apportionment, the scheme is still invalid if it fails to measure up to the requirements of EP.
    2. **Harlan** dissents in all cases invalidating a state’s apportionment. Dilution and equal are two different concepts. 14th was never meant to limit the power of states to apportion their legislatures.
54. **Judicial Scrutiny of Political Gerrymanders**
    1. **Gaffney v. Cummings**—judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance w/ their voting strength as long as the method is w/in reasonable population limits.
    2. **Davis v**. **Bandemer (1986) (White plurality)**
       1. Facts: Challenged apportionment plan, adopted by R controlled IN legislature, provided for state and senate seats in substantially equal populations. D claim that the plan substantially undermined D voting strength through a mix of single and multi-member districts and gerrymandering district lines. In election, D wins 50% of the house and senate votes, but only receive 43/100 house seats.
       2. Holding: Political gerrymandering cases are properly justiciable under the EP clause. A threshold showing of discriminatory vote dilution is required for a prima facie case of an EP violation. In this case, the findings made by the DC of adverse effects on D do not surmount the threshold requirement.
       3. To succeed on an EP claim for gerrymandering, there has to be a showing of both intentional discrimination against an identifiable group and an actual discriminatory effect.
       4. Whenever a legislature draws districting lines, it is likely that the political composition of the new districts will be known. As long as redistricting is done by a legislature, it would not be difficult to prove that that the likely political consequences of reapportionment were intended.
       5. Constitution does not require proportional rep or that legislatures, in reapportioning, must draw district lines to come as near as possible to allocating seats to the contending party in proportion to their statewide vote.
       6. Mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect a rep does not render the scheme unconstitutional.
          1. Winner takes all plan can mean a 50/50 vote leads to one party receiving an overwhelming number of seats
          2. A candidate not affiliated with a voter’s political group can still serve his interest
       7. Unconstitutional discrimination only occurs when the electoral system is arranged in manner that will consistently degrade a voter’s or group of voter’s influence
       8. Finding must be supported by evidence of **continued frustration of the will of a majority of the voters or the effective denial of a chance for minority voters to influence the political process.** Without such evidence, deference is given to legislature since apportionment is a legislative task.
       9. Facts applied: DC only relied on a single election, IN is a swing state, D in the next few elections can secure control of the assembly
       10. **Concurrence O’Connor:** Political gerrymandering is a nonjusticiable political question. Qualifications the court has enumerated will not endure—grave risk that court will eventually require proportionality, where any deviations are suspect.
       11. **Dissent**: Justiciable question, analysis should be used that focuses on whether voting districts have been deliberately distorted or are arbitrary. Look at the shapes. Other considerations are legislative goals and procedures, evidence concerning population disparities, and statistics showing voter dilution.
       12. Note: Has the court opened up a can of worms by agreeing that there was a justiciable issue that political parties deserve protection from discriminatory reapportionment? Traditionally, focus was on protecting racial minorities. Case adds another factor in the reapportionment picture.
    3. **Vieth v. Jubelirer**—Court comes close to ruling (overruling Davis v. Bandemer) that all political gerrymandering cases are nonjusticiable, but Kennedy, while providing the 5th vote to reject the challenge, refuses to foreclose the possibility of judicial relief if some limited or precise rational were found.
55. **Fundamental Right to Access Courts**
    1. Court has been divided on whether to invalidate economic barriers impeding access to criminal or civil procedures under procedural DP or the fundamental branch of EP. B/c wealth is not a suspect classification, something more than an economic barrier must be involved to explain judicial intervention.
    2. **Economic Barriers and Criminal Process**
       1. **Transcripts on Appeal**
          1. **Griffin v. IL (Black plurality)**—case launches access to courts strand of EP. Court holds state must provide a trial transcript or its equivalent to an indigent criminal defendant appealing a conviction. Ability to pay has not rational relationship to a D’s guilt or innocence. No meaningful distinction b/w a rule that would deny the poor the right to defend themselves in a trial court and one which denies the poor an adequate appellate review. State cannot rob a man of life, liberty or property because he has no money.
             1. **Harlan dissent:** EP only requires that the state treat similarly situated people the same. State does not have an affirmative duty to lift handicaps. Requirement to pay for transcripts applies to everyone. Court is using a fundamental fairness analysis that is better constrained in procedural DP. Under procedural DP, state’s rule is not unreasonable or arbitrary.
       2. **Counsel on appeal**
          1. **Douglas v. CA**—Court uses EP to hold that a state must appoint counsel for an indigent D for the “first appeal” of a criminal conviction. Rejects CA’s system of appointing counsel only after an independent investigation.
       3. **Discretionary appeals**
          1. **Ross v. Moffit—**Court refuses to extend Douglas to require provision of counsel in discretionary appeals. EP does not require absolute equality, but merely assurance that indigents have an adequate opportunity to present their claims fairly w/in the adversarial system. “Meaningful access” to the highest court is required.
          2. **Halbert v. MI—DP** requires appointment of counsel for D seeking first tier review.
    3. **Economic Barriers and Civil Litigation**
       1. **Divorce**
          1. **Boddie v. CT (Harlan majority)—Strict scrutiny applied. I**ndigent welfare recipients seek to file divorce actions in state courts but are unable to pay the $60 required court fees and costs for service of process. Harlan sustains claim relying on DP. DP requires that absent a state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Right to be heard is confined to cases involving fundamental rights such as marriage.
       2. **Welfare and Bankruptcy**
          1. **United States v. Kras**—Court refuses to extend Boddie to an indigent’s challenge of a $50 filing fee requirement in voluntary bankruptcy proceedings. Boddie involved a “**fundamental”** marital relationship and emphasized **utter** **exclusiveness** of a court remedy.
          2. **Ortwein v. Schwab—**Court relies on Kras to reject an attack by indigents on OR $25 filing fee perquisite to judicial review of administrative denials of welfare benefits. Claim fails under EP b/c wealth is not a suspect category. Fails under PDP b/c welfare benefits is not a constitutional “fundamental” right.
       3. **Paternity**
          1. **Little v. Streater (unanimous majority)—**DP entitled an indigent defendant in a paternity action to state-subsidized blood grouping tests. Court distinguishes case b/c test are a unique quality source of **exculpatory evidence, paternity proceedings in CT had quasi-criminal overtones, and the state had a prominent role in litigation**. Also, **D has no choice of an alternative forum** and the parent-child relationship is of constitutional significance.
          2. Look for: No choice in alternative forum, quasi or criminal overtones, any family connects, strength of exculpatory evidence.
    4. **MLB v. SLJ (Ginsburg majority)**
       1. Facts: MLB’s parental rights from her two minor children were terminated. MLB seeks to appeal the termination but cannot afford the fees of $2,352.
       2. Holding: Inconsistent with DP and EP for the state to terminate parental rights based on an inability to pay.
       3. EP concern relates to the legitimacy of fencing out would-be appellant based solely on an inability to pay core costs. DP is about essential fairness of state-ordered proceedings anterior to the adverse state action. Most decisions in the area rest on EP prong b/c DP does not require a State to provide a right of appeal.
       4. Court must evaluate the stakes of the defendant against the interest in payment. (**Mayer v. Chicago**—court holds State must pay for poor medical student’s transcript in a misdemeanor case. Potential consequences on D’s professional prospects far exceed state’s interest in payment).
       5. Other factors are: risk of error, countervailing government interest, imposition of an undue burden on the state.
       6. Termination of parental rights is irretrievably destructive of the most fundamental family relationship. State has a legitimate interest of offsetting court costs, but parental status cases are rare and will not impose an undue burden on the state.
       7. State’s need for revenue usually passes the rational justification requirement, with a few exceptions: right to participate in the political process, access to judicial processes in cases criminal or “quasi criminal in nature” and decrees forever terminating parental rights. **State may not bolt the door to equal justice.**
    5. **Notes:** Is the family right fundamental because the child’s interests are also affected?
    6. **Dissent Thomas:** EP is not a panacea for all disparate treatment see. Davis v. WA. The law is facially no different than in cases where state-funded abortion, education and employment are denied.
56. Other areas of fundamental rights:
    1. **Welfare Benefits**
       1. **Dandridge v. Williams—**Court uses rational basis to uphold a welfare regulation: 14th gives fed courts no power to impose upon States their view of what constitutes as wise economic/social policy.
    2. **Housing**
       1. **Lindsay v. Normet**—deferential review used; no fundamental interest in decent shelter.
    3. **Education**
       1. **SA Independent School District (1973)**
          1. Holding: Court used rational relationship test to hold that there was no fundamental right to equality in public-school education. Absolute equality in education was not guaranteed by the Constitution. Implied that wealth is not a suspect class, therefore, the property tax scheme is left to rationality review. Nexus to free speech argument fails. Case clearly indicates that the current court will not extend the fundamental right and suspect classification analysis beyond traditional, well-est. categories.
       2. **Pyler v. Doe (1982)**
          1. **Facts:** TX school requires undocumented children to pay full tuition for public education
          2. Court applied heightened scrutiny to hold that the exclusion of undocumented children altogether from TX schools violated equal protection.
          3. Combination argument—undocumented aliens are not a protected class, public education is not a fundamental right (Rodriguez), but both factors combined require a substantial state interest. Children are discrete, innocent (status is not their fault) group, education is important to attaining other fundamental rights.
          4. Implications—Can the state pass laws barring access for children of undocumented immigrants to public hospitals or other state-financed medical services?

**I. State Action Doctrine—Private action does not have to comply w/ the 14th**

1. Determines when ostensibly private conduct will be subject to constitutional restraint (i.e. when it private act is deemed a state function)
2. There is generally a constitutional distinction between government and private actions
   1. 14th limits power of state to transgress on substantive and procedural rights, but does not impose restrictions on purely private activities
   2. 13th Exception—slavery abolished from both private and public spheres
3. Historical explanation—common law protects individuals from private interference of rights
4. Policy Justifications—preserves
5. Recent trend: Court has been reluctant to find state action.
6. Government/State action is satisfied when the state or any of its subdivisions, such as agency or city or county, directly or through an officer, is the perpetrator of the challenged activity
7. Underlying question in state action case: Is the state sufficiently implicated in the challenged activity to warrant 14th
8. Threshold Question: Is it the Government?
   1. **San Francisco Arts v. US Olympic Committee**—Does USCO violate 14th by preventing a group from calling its activities the Gay Olympics? Holding: No, not a gov group even though it was chartered and funded w/ gov money.
   2. **Lebron v. National Railroad Passenger Co**—Amtrak is found to be a gov body b/c it was created by federal law, board is appointed by president, substantial fed funding, owned all of its stock. Distinguish from USOC b/c of continued presence.

II. Categorical Approach (Four contexts in which state action is found) (Is this person a state actor?)

1. **Private Performance of a Public Function**
   1. State permits a private party to exercise a power traditionally and exclusively reserved to the states (e.g. eminent domain)
   2. **Management of Private Property**
      1. **Marsh v. AL**—Jehovah witness claims a violation of 1st and 14th right to distribute literature on the streets and side of a town that was completely owned and governed by a private company
         1. Holding—despite private ownership, 1st and 14th applicable b/c owner of the company town was performing the full spectrum of municipal duties
         2. Language is extremely broad: Determination of state action is a balancing test b/w nature of constitutional right and property rights.
            1. “More owner, to his advantage, opens up his property for public use, more rights become circumscribed by con and statute rights”
         3. Later limited by Jackson—traditionally, exclusive requirement
      2. Evans v. Newton—Running of park deemed a public function, even though it was managed by a private company
   3. **Election Cases**
      1. **Smith v. Allwright**—Court applies public function doctrine in a case where AA voters challenged their exclusion from participation in primary election conducted by Democratic Party. Reasoning: Election conducted under state statutory authority, and primary was an integral part of general election machinery. Election is a government function.
   4. **Running and Regulating Schools**
      1. Government funding of a private operation for public purposes is not sufficient to est. public function doctrine
         1. Rendell-Baker v. Kohn—private school for maladjusted high school students receiving 90 percent of its operating budget from a state is not performing a public function. Private education is not traditional, exclusive state function.
   5. Public Function doctrine restrained
      1. **Lloyd Corp v. Tanner**— Court holds privately owned shopping center could exclude anti-Vietnam War protestors from distributing literature on premise. Distinguishes Marsh as an ex of where the private party’s actions had a pervasive scope.
         1. Court reconciles Lloyd w/ Logan Valley (case involving labor protest) b/c labor protest was related to the functioning of store. Meaningless distinction? 1st is still violated. Logan Valley later overruled.
      2. **Jackson v. Met Edison**—private owned utility company is not performing a public function b/c providing utilities is not a power traditionally and exclusively reserved tot the state
   6. Summary: Authority of private party must be extensive e.g. Marsh or the power must be one that is traditionally and exclusively a state one. Also, cases where private party enters into a K where state delegates governmental authority.
2. **Judicial Enforcement of Private Agreements (Entanglement Exception)**
   1. Limited doctrine
   2. **Shelley v. Kraemer**—14th challenge to the judicial enforcement of a covenant that restricted the sale of real property to white people.
   3. Facts: In 1945, a black family by the name of Shelley purchased a house in St. Louis, Missouri. At the time of purchase, they were unaware that a restrictive covenant had been in place on the property since 1911.
   4. Holding: While private agreement to discriminate did not violate the 14th, the enforcement of it by a judicial officer made it a state action
      1. Shelley limited to circumstances where a 14th right (race, gender) is violated. Court cannot require a party to discriminate in a manner that would violate the 14th
      2. Court may enforce neutral principles that are motivated by discriminatory purposes as long as the court itself does not discriminate or require discrimination (Will ex: State cannot enjoin states from violating an all-male admissions requirement but can order that the estate is returned to the heirs)
      3. First Amendment—Shelley judicial enforcement concept is also applied to violations of first amendment.
   5. Slippery Slope argument: Shelley holding could mean that all private discrimination actions involving state officials e.g. police, courts, will become state actions.
      1. Bell v. Maryland—trespass case involving 9 AA students participating in a sit-in at a segregated restaurant.
      2. Douglas relies on Shelley b/c the Maryland policy was enforced by police, courts
      3. Black distinguishes Shelley b/c private action prevented an exchange that both parties (property buyer/seller) wanted while Bell was a case where seller did not want the transaction
3. **Joint Activity Between a State and Private Party**
   1. State and private party engage in a joint activity that results in the deprivation of another’s constitutional rights.
   2. **Two patterns:**
   3. **Concerted and conspiratorial activity b/w a state and private actor directed toward depriving an individual of his constitutional rights**
      1. Look for nature and scope of the relationship.
         1. Is it a state action (does it involve a state actor)?
         2. Is the activity a joint partnership b/w state and private party?
      2. Cases
         1. **Adickes v. Kress**—court holds Kress employees and policy officers efforts to deprive a school teacher of her rights were sufficient to assert a 14th violation against the private party
         2. Facts: Plaintiff (a teacher) entered a Miss restaurant with six of her African American students. The restaurant refused to serve her and she was arrested by the police. The sued the restaurant under federal law, alleging that there was a conspiracy between the defendant (restaurant owner) and the police to arrest her because of her company.
   4. **Mutually beneficial relationship where private actor takes action that would violate the 14th if undertaken by state**
      1. **Burton v. Wilmington Parking Authority—**Court finds a symbiotic relationship b/w city that owned and operated parking structure and lessee, a restaurant located w/in parking structure that discriminated on the basis of race.
         1. Restaurant was a physically and financially integral part of the state’s plan to operate its project as a self sustaining unit
         2. Mutually beneficial: guest of restaurant afforded convenient place to park, and convenience for diners provides additional demand for state parking facilities
      2. **Moose Lodge v. Irvis**—Pargues private club’s state issued liquor license created a sufficient relationship b/w state and private club to make club activities a state action.
         1. Holding—no symbiotic relationship. State and club both derive a mutual benefit, but that alone does not est. interdependence. Must be indispensible part of state’s plan. The lodge is a private club in a privately owned building on private land.
         2. Mere presence of state regulation scheme is not sufficient, only if state regulation mandates the specific activity being challenged (e.g. if state required club to adhere to bylaws that were racially discriminatory). The State regulation of private clubs by the Liquor Control Board does not foster or encourage racial discrimination.
      3. **Rendell-Baker v. Kohn**—Mere government funding is not enough. (see public function argument earlier) court rejects symbiotic relationship argument as well. No showing that state derived any benefit from discriminatory practice
         1. Strains Burton holding b/c there is no showing that the state benefited from restaurant’s discriminatory practice, but the reinterpretation is consistent with modern Court view
4. **State endorsement of Private Conduct**
   1. State authorization or encouragement of private conduct that violates 14th
   2. **Reitman v. Mulkey**—Challenge to a CA constitution provision legalizes private acts of discrimination in sale or rental of house. Repeals existing laws and immunizes racial discrimination in future state gov actions.
      1. Holding—provision authorizes and encourages racial discrimination. Had the state only repealed existing civil liberties, the action would still be neutral, but immunity for future actions endorses discrimination.
   3. Another ex: Statute that requires private cable tv operates to ban indecent programs is a state action b/c the state affirmatively commands a violation of the 1st amendment.
   4. Shelley v. Kraemer and Burton are also ex of a potential state endorsement

III. Two Part Approach (**Lugar v. Edmonson**—use of courts for prejudgment attachment)

1. Deprivation must be caused by some right or privilege created by the state or by a rule of conduct imposed by the State or a State official. Does the state give another body the privilege to act in a certain way?
2. Person charged w/ deprivation must be a state actor
3. In Lugar—state law provided for prejudgment attachment and sheriff carried out attachment
4. **Shelley v. Kramer** using two part test:
   1. 1st—deprivation involved a right created by state law (right to restrict covenants)
   2. Party is a state actor b/c he obtains assistance from a state official (judge)
5. Look for policy arguments: By allowing an action does it promote the perception that the state is prohibiting discrimination?
6. **NCAA v. Tarkanian** (strict holding)—NCAA conducted an investigation of the men’s tennis program at Casino University and after finding coach violated numerous recruiting rules issued sanctions. Coach files suit, claiming hearing procedures violated 14th DP.
   1. First analysis: Yes. NCAA privilege to conduct investigations granted by University even if the procedures were created by the NCAA. State had delegated investigation duties to NCAA.
   2. 2nd prong—Joint action. NCAA acted in concert with state. NCAA held investigation and imposed sanctions and state was contractually obligated to adhere to findings. Also, regulating and fostering collegiate athletics is not a traditional, exclusive state function
   3. Real Holding: Five person majority holds there were no privileges since the university was free to withdraw from the NCAA at any time. 2nd—no joint activity b/c the state took the final action and NCAA preliminary acts are not construed as a state action.
   4. Thin argument veils real policy concern. Opening a wide range of NCAA activities to judicial scrutiny
7. **Brentwood Academy v. TN Secondary School**—Do actions of TSSAA, group charged with overseeing interscholastic competition among public and private schools, qualify as a state action?
   1. Holding: Yes, it is a state action
   2. Distinct: TSSAA operated w/in a single state, making the relationship b/w the org and state more defined than that of NCAA (national body) and state. State employers ran the organization and provided funding. Taken together, entwinement supports conclusion that the private organization has public character. Note there is no requirement of conspiracy or mutually beneficial relationship b/w TSSAA and state. Only entwinement.
8. Peremptory Challenges
   1. **Batson v. Kentucky**—equal protection prohibits prosecutors from using peremptory challenges in discriminatory manner
   2. **Edmonson v. Leesville** Concrete extends Batson to civil cases using Lugar two-part test. First prong—state federal laws authorized peremptory. 2nd prong—involves judicial supervision and
9. State anomaly, very limited: Polk County v. Dodson—public defender is not considered a state actor b/c she was an adversary of the state in representing the client
10. Just b/c you can’t find a federal constitutional right, doesn’t mean there isn’t a state right
11. CH 288-310 Reading
    1. Congress powers under the Reconstruction Era Amendments
       1. 13th prohibits slavery and involuntary servitude except as punishment for a crime. Also provides Congress shall have power to enforce article through appropriate legislation.
       2. 14th provides all person born or naturalized in the US has privileges and immunities….cannot be deprived of life liberty and due process. § 5 give Congress power to enforce.
       3. 15th—Rights of citizens to vote shall not be abridged on account of race…
          1. All three provisions give Congress power of enforcement.
    2. May Congress Regulate Private Conduct?
       1. Civil Rights cases est. that the provisions of the §1 of the 14th apply only to government and not private action. However, Congress can prohibit some private behavior through the 13th.
       2. 13th permits Congress to prohibit some private action
          1. **Jones v. Alfred H. Mayer**—Congress has authority under the 14th to determine what are badges and incidents of slavery and the authority to translate that determination into effective legislation.
12. **Congressional Power to Enforce Civil Rights/Amendment 14 § 5—Congress shall have the power with appropriate legislation to enforce the provisions of this article**
    1. § 5 is a power that applies directly against the state “nor shall any state deny a person life, liberty and property”. If Congress is using its power properly it can tell States what to do, and allows Congress to bring states to courts.
       1. Current law: Statute must be w/in 14th power. Congress can give remedies, but the §5 is not the power to interpret the law. Court interprets and Congress writes legislation.
    2. Prior to Voting rights of 1965, Congressional acts under the 14th were remedial. Court interpreted substantive right and congress provided enforcement. Shift occurred when Congress grew frustrated with case by case approach
    3. Alternative views on scope of Congress’s powers under the reconstruct amendments. Nationalist perspective e.g. Katzenbach v. Morgan and federalist perspective in Boerne. Court has adopted and reaffirmed nationalist perspective through the yrs.
    4. **Lassiter v. Northampton County Election BD—**Douglas in a unanimous decision rejected challenge on NC literacy test, finding that state has broad power to determine conditions of voting, absent the type of discrimination forbidden by the 15th. Literacy tests are neural on race and state may conclude that literacy is important characteristic of an informed voter.
    5. **Katzenbach v. Morgan (Brennen)**
       1. Facts: Voting Rights of 1965 §4(e) provides that no person who has successfully completed sixth grade primary school in Puerto Rico in which the language was not English shall be denied the right to vote b/c of inability to write and read in English. NY brings suit b/c it pro tanto prohibits enforcement of NY law requiring an ability to read and write
          1. NY argues that § 5 of 14th congressional act prohibiting state law is only allowed if judicial branch determines 14th is violated
       2. Issue: Does a federal statute enacted pursuant to the **Enabling Clause** of the 14th supersede state law by reason of the Supremacy Clause of the US Constitution?
       3. Holding: Provision is within Congress Power under §5 of 14th.
       4. § 5 is like the Necessary and Proper Clause—Congress is allowed to exercise its discretion w/in the bounds of the constitution. Test is whether provision is appropriate legislation under McCulloch standard
          1. Legitimate end—Literacy test does not violate the constitution but can lead to a constitutional violation. Literacy test may be a ploy to ex. discrimination.
       5. Congress has broad power under the §5 to abrogate state powers, and should not be confined to what the judicial branch has deemed unconstitutional.
       6. Notes: **Oregon v. Mitchell**—involved challenge by several states to several provisions of VR Amendments of 1970, including §302 which prohibits any age restrictions if citizen is 18 or older
          1. 5-4 vote upheld provision as constitutional for federal elections; 5-4 unconstitutional in state elections. Power to determine voting qualifications is essential to separation of powers. Congress is allowed to prohibit state qualifications if there is a violation of 13, 14, or 15th, but in this case Congress made no finding that age requirements disenfranchised voters on the account of race
    6. **City of Boerne v. Flores (congress may not expand or contract a constitutional right)**
       1. Facts: Decision by local zoning authorities to deny a church a building permit is challenged under the Religious Restoration Act of 1993.
       2. Congress first enacted the RFRA after Employment in response to **Div. Dept of Human Resources of Ore. v. Smith—**Court considers Free Exercise Clause claim of members of a Native American Church who were denied unemployment benefits when they lost their job due to ingestion of peyote. Religious practice was to ingest peyote for sacramental purposes. Court declines to apply balancing test of **Sherbert**, which requires a **compelling gov interest if prohibition substantially burdens** religious practice. Court holds that if a law does not violate religious freedom if it is of general applicability.
          1. Congress passes RFRA to restore **Sherbert’s** strict scrutiny test, requiring a compelling gov interest, and the least restrictive means.
       3. Issue: Does Congress exceed its power under the § of 14 with the RFRA?
       4. Congress has to power to enforce the Free Exercise Clause through remedial measures but does not have the power to determine what constitutes as a constitutional violation.
       5. Line must be drawn between measures that remedy or prevent unconstitutional actions and measures that make substantive change in governing law.
          1. There must be a **congruence and proportionality** between the injury Congress wants to prevent and behavior that is prohibited under the 14th. Remedy must relate to something the court has found unconstitutional (must be a sufficient connection). And must be proof of a constitutional violation.
          2. Katzenbach is congruent because there were studies and evidence of voter discrimination. Proportionate b/c the proscription was narrow—literacy tests.
       6. Separation of Powers: If Congress could define its own powers by altering 14th then Constitution would no longer be superior law of the land (Marbury)
       7. Court alone determines the meaning of substantive constitutional provisions. Congress may enact laws the according to the court’s constitutional interpretation.
       8. **Factors to consider when determining if legislation is remedial**
          1. Evidence in the record showing pervasive discrimination (see City of Rome, Katzenbach, Oregon v. Mitchell)
          2. Effectiveness of existing laws—does it counteract a specific law?
          3. Cost of case-by-case method
          4. Scope of the remedial measure (in SC v. Katzenbach challenged provisions were confined to regions where voter discrimination was the most flagrant; OR attacked a particular kind of voting restriction).
    7. **US v. Morrison**
       1. Voluminous Congressional record shows that there is a pervasive bias in various state justice systems against victims of gender motivated violence. Bias denies victims EP of the laws and Congress acted appropriately in enacting a private civil action to remedy State’s bias and deter future instances of discrimination in the state courts.
       2. The court had held that the 14th only prohibits state action. This act is prohibiting private action and is, therefore, unconstitutional.
          1. **United States** v. **Harris** the court held that law directed against the action of private persons, without reference to the state or admin bodies was beyond the scope of Congress.
       3. Even if it is targeting state officials, the law lacks congruence and proportionality (applies uniformly throughout the states without specifically targeting the “bias” States)
    8. Elaboration of §5 powers in cases involving the abrogation of State Sovereignty (11th)
       1. Seminole Tribe v. FL—Congress can only authorize suits against state governments and override the 11th when it acts pursuant to the §5 of 14. A yr after the Seminole decision the court narrowed Congress power under the §5 in Boerne. In deciding whether a state can be sued under a fed statute, the court must decide whether the law is a valid ex of Congress’s §5 powers.
       2. Florida Prepaid Postsecondary Expense Education Board v. College Savings Bank—Congress amended patent laws to authorize suits against state gov for patent infringement. Court holds the law is not a valid ex of state’s powers. Though Congress can protect property under the 14th, the law is not proportionate and congruent. No pattern of pattern of patent infringement by states, let alone a pattern of patent infringement.
          1. Significance: Fed has exclusive jurisdiction over patent law. Barring patent infringement suits against state gov in federal court means that a state gov can infringe patents without ever facing a lawsuit.
       3. Age Discrimination
          1. Kimel v. Board of Regents—Court rules Congress had exceeded its 14th remedial authority in allowing state employees to sue the states for violations of Age Discrimination Act. AEDA is not a valid exercise of Congress’s power under the §5. Law fails the congruence and proportionality test. AEDA has elevated the standard for analyzing age discrimination to heightened scrutiny without ever identifying pattern of age discrimination in the states. Regulation is an abrogation of the state’s immunity.
       4. Disability
          1. Board of Trustees of the University of AL v. Garrett—Court invalidates Title I, in which Congress provides damages remedy against state employers for discrimination based on non-suspect classification. Title I requires employers to make reasonable accommodations to the physical and mental limitations of qualified workers. Because application of ADA abrogated State immunity, provision could be sustained only if it was w/in Congress’ 14th powers. Court’s prior decisions only required a rational relationship b/w classifications based on disability. Congress failed to identify a history of States engaging in irrational discrimination. The classifications are rational.
             1. **Steps the court takes:** 1) Does the provision abrogate State power? 2) Is it within Congress’ powers 3) What has the court held in the past? 4) If the provision is contrary to a court’s holding, is the measure congruent and proportional? Extensive records are not enough and will be looked at with great scrutiny, especially in non-suspect categories.
          2. Tennessee v. Lane—Court holds Title II of the ADA, which permits suits against states for monetary damages if a person with a disability is excluded from participation or denied the benefits of services, programs or activities of the public entity. Majority holds that the act extends beyond equal protection and protects against deprivation of fundamental rights. There is a history of pervasive voting discrimination against the disabled by the States. Many individuals were also being excluded from courthouses. Because it is a valid exercise of power, court does not consider if the measure is congruent or proportional.
       5. Family Leave and Gender Discrimination
          1. Nevada Dept of Human Resources v. Hibbs—Court rejects claim of state sovereign immunity to suit. Case involves FMLA (Family Medical Leave Act). Majority reasons FMLA is appropriately tailored to prevent work place discrimination. Congress may enact prophylactic measures that proscribe facially constitutional conduct to deter unconstitutional conduct.
             1. Court has in the past sanctioned state laws that discriminate against gender, but there is strong evidence of continuous state prohibited gender discrimination.
             2. Unlike the disability cases, States classifications have to pass more than the rational basis test. In those cases, to impinge on State power, Congress had to identify on a widespread pattern of irrational behavior. Gender classification is subject to heightened scrutiny and it is easier for Congress to show a pattern of state constitutional violations. Evidence can show generalized patterns of discrimination rather than specific ones.
             3. Congruence and proportionality test—because discrimination against women is subtle and hard to determine on a case-by-case basis, the prohibitions can be broader in scope. Congress is not confined to the enactment of legislation that merely parrots the 14th, but may prohibit a broader swath of conduct, including that which is not prohibited by the 14th.
          2. Implications of Kimel, Garrett, Hibbs and Lane---do the cases suggest Congress is virtually powerless against states that discriminate against less suspect groups? Have to find a broad pattern of irrational behavior.
          3. After Hibbs will the court uphold Congressional laws abrogating state power if the law deals with a suspect or quasi-suspect power?
          4. Hibbs reinforces Courts stance that laws passed under the §5 are only valid if remedial in nature. This suggests Congress power under the §5 will decrease through time as constitutional evils decline.
    9. 15th amendment
       1. **South Carolina v. Katzenbach**—Warren (1966)
          1. Facts: Challenge to § 5 of Voting Rights Act of 1965 as a proper exercise of Congress power under §2 of 15th. Act suspended literacy tests and other devices for 5 yrs after date of last discrimination. Covered areas where voter turnout was less than 50%
          2. Apply McCulloch test— legitimate ends that are not banned by the Constitution may be pursued through all appropriate means.
          3. Holding: Prescribing remedies w/out prior adjudication is a legitimate response to prevent voter discrimination.
          4. Rational basis test—Long history of voter discrimination using tests and devices. Remedy is confined to small area of states w/ history of voter discrimination
          5. Notes: Voting Rights amended in 1975 to include a permanent ban on literacy tests
       2. **Rome v. United States—**Court suggests that Congress has authority under §2 of the 15 to interpret the meaning of the 15th. Rome involved challenge to the city’s plan to adopt a new at large voting system after altering the area’s racial composition through annexation. Fed court finds no evidence that the changes were motivated by discriminatory purpose.
          1. Court rules that Congress could prohibit rules that have a discriminatory impact even if they were facially neutral
          2. Two readings—narrow one that sees the holding as approving a remedy for violations of the voting act. A broad one that sees it as an authorization to Congress to independently interpret the meaning of the 15th and adopt a view contrary to the Supreme Court.
          3. Thus far, the court has chosen the nationalist prospective in interpreting the § 2 of the 15, but Boerne could change that.
13. **Free Speech and Hate Speech**
    1. Imminent Danger
    2. Bradenburg v. OH –
       1. Significance: Est. imminence of danger as a requirement
       2. Facts: OH Criminal Syndicalism Statute prohibits advocating the duty, necessity, or propriety of crime, violence as a means of accomplishing industrial reform.
       3. Holding: Statute is an unconstitutional restriction on 1st
       4. Denis—State is not allowed to proscribe advocacy of use of force except where such advocacy produces imminent lawless action and is likely to incite or produce such action.
       5. Mere teaching is not enough. Statute must draw a distinction or it is overly broad
       6. Dissent: Black and Douglas do not believe clear and present danger test should be used. Apart from rare exceptions, speech should be immune to prosecution.
       7. Hess v. Indiana—
          1. Ant-war demonstrator Hess states “We’ll take the fucking street later” after group is moved to the curb. Court again requires evidence of imminent disorder to prohibit speech
       8. NAACP v. Claiborne Hardware
          1. Facts: Economic boycott by blacks against white merchants in MS. Liability imposed on a NAACP leader who states boycott violators would be disciplined—break their necks. State argues his speech incited lawless action
          2. Court holds speech is mere advocacy of the use of force. Suggestion that the holding would have been different if violence resulted from speech, but there is no such finding
       9. Planned Parenthood v. American Coalition of Life Activists contrast (court of appeals decision)
          1. Sharply divided court of appeals upholds FACE statute which prohibited any threat of force against a person providing reproductive health services
          2. Reasoning: Unlike Claiborne, specific individuals were threatened (wanted posters identifying doctors) and the comments were not hyperbolic vernacular
       10. Notes:
           1. What is the scope of Brandenburg? Should informational communication be included?
           2. Stanford Law Review article suggests speech should be protected unless
              1. Said to a small people who will likely use it for criminal purposes
              2. w/in few classes of speech that has no noncriminal value
              3. can cause extraordinary harm—nuclear attack
           3. In terrorism age, should Bardenburg be relaxed to include speech proliferating terrorism or circulated info on terrorism methods
14. Fighting Words
    1. Involves violence directed against the speaker. Speaker’s provocative message illicit a response. Tension b/w free speech and state’s desire for peace
    2. Cantwell v. CT
       1. Facts: Jehovah’s Witness arrested for proselytizing. Plays a record attacking organized crime as an instrument of Satan. Charged w/ common law offense of breaching the peace
       2. Holding—No showing that his conduct was noisy, truculent or overbearing
       3. One may be guilty of breaching peace if the statement would likely provoke violence, but in almost all cases language is profane, indecent or abusive
       4. D’s act embodied a general attack on organized religion and did not target a single person. D left after he was threatened w/ violence. No threat of bodily harm or truculent behavior
    3. Chaplinsky v. NH (Murphy)
       1. Facts—Jehovah’s witness is distributing literature in Rochester. Disturbance breaks out, police escorts D away. Argument ensues where D calls marshal a damned racketeer and fascist. Law states no person shall “address any offensive or annoying word to any person who is lawfully in street or other public place, nor call him by any offensive or derisive name.”
       2. Murphy finds epithets are likely to illicit a person to retaliate and cause breach of peace
       3. Free speech is not an abs right at all times. Certain well-defined, narrow class of speech, the prevention of which is not unconstitutional. Generally, lewd, profane fighting words have little social value when balanced against state’s need to keep peace.
       4. Fighting words categorized as a class of speech wholly outside the 1st. No case-by-case analysis
          1. Defined as words which by their utterance inflict **injury or incite immediate breach of peace**. **Unambiguous invitation to a brawl.**
       5. Court has not sustained a conviction on the basis of fighting words alone
       6. Suggestion that Chaplinsky is based upon a moralistic aberration that infects the whole fighting words thesis and deserves to be extirpated like a weed
       7. Ongoing justification for state punishment involving provocation by minorities of officers
    4. Limitations of Fighting words doctrine
       1. Gooding v. Wilson—
          1. Facts: Court reverses a conviction under GA statute that provides any person who uses opprobrious words, tending to cause breach of peace, is guilty of a misdemeanor. Appellee, anti-war picketer, charged after calling an officer a white son-of-a-bitch. Threatens to choke and cut officer.
          2. Court holds GA appellate decisions have applied the statute in an overly broad manner to include more than fighting words
       2. Fighting words narrowed to face-to-face confrontations and bar room brawls—does this offer too little protection to women and sects advocating non-violence (see Scalia’s Quaker concern)
       3. Cohen v. CA
          1. Facts: D wears a jacket w/ the words “Fuck the draft” into a courthouse corridor. No evidence that anyone seeing jacket was violently aroused. Convicted under the statute of maliciously disturbing the peace by offensive conduct.
          2. Holding: State cannot constitutionally prevent use of certain words on the ground that they are offensive
          3. Statute is not specific enough—if the purpose is to maintain the decorous atmosphere of the court, statute should state so
          4. Not enough that the speech is an obscenity, should be provocative enough to be “erotic”
          5. Was not directed at any particularly person
          6. Those offended had the option of turning away. To move in society is to be bombarded w/ cacophony and people must accept that fact.
          7. State cannot act as guardian of morality and cannot erect laws around the proclivities of extra sensitive people
          8. In a diverse society , freedom of speech is important for an informed polity. Words also have a dual function of expression and emotive expression
          9. Blackmun dissent—Immature conduct has little value
15. Hate Speech—subset of fighting words that includes speech harmful and offensive to religious and racial minorities
    1. R.A.V. v. City of St. Paul (Scalia)
       1. Facts: D charged with burning a cross outside the fenced yard of a black family. MN chooses to punish the act under Bias-Motivated Crime Ordinance which punishes hate crimes: Whoever places in public a swastika or cross, and knows it will arouse anger on the basis of race, color or gender, commits crime of disorderly conduct and is charged w/ misdemeanor
       2. History: MN Supreme Court finds ordinance constitutional b/c 1st does not protect “fighting words”—arouses anger, etc…
       3. Holding: Content discrimination of ordinance does not survive 1st amendment scrutiny. Where content discrimination in an ordinance is not reasonably necessary to achieve a city’s compelling interests, the ordinance will not survive 1st scrutiny.
       4. Court has traditionally used categorical approach where certain classes of speech prohibited b/c of their content e.g. defamation. Cannot use these categories as vehicles to proscribe content unrelated to the distinctly proscribed content.
          1. Can prohibit libel, but not further make it content discrimination to proscribe libel of the gov
          2. Burning the flag can be punishable as burning outdoors but not punishable for dishonoring the flag
       5. Fighting words are not protected b/c of a non-speech element—analogous to a noisy truck. No value? Gov may not regulate use based on hostility or favoritism
       6. Special prohibitions on speakers who express views on a disfavored topic are impermissible
       7. Note: Are attacks on religion, sex, etc…ex of hitting below the belt, and should, therefore, be proscribed b/c they are more likely to illicit a “brawl”?
    2. Concurring in Judgment—White, Blackmun, O’Connor, Stevens
       1. All of the limited prohibited categories of speech are proscribed b/c of their content. 1st does not apply b/c expression is worthless in society. Nonsensical that gov can prohibit an entire category b/c of content but not a subset
       2. Ordinance survives under strict scrutiny of 1st
       3. Ordinance is unconstitutional not b/c it is under inclusive but because it is overly broad in proscribing expression that arouses anger, alarm or resentment but not “fighting words”
    3. Distinguishing regulation of hate speech and hate crime
       1. WI v. Mitchell (MS Masala case) Nothing in R.A.V. prohibits the punishment/inc punishment of racially motivated crimes. R.A.V. prohibits words, not conduct.
    4. VA v. Black
       1. Facts: d was prosecuted and convicted by jury under VA cross burning statute, which bans cross burning w/ an intent to intimidate a person or group of persons. Statute contains a provision that any burning of a cross constitutes prima facie evidence of intent to intimidate.
       2. Holding: Provision treating any burning of a cross as prima facie evidence of intent to discriminate is unconstitutional. Statute is unconstitutionally overbroad to the prima facie provision. Provision permits every jury to convict in every cross burning case and creates an unacceptable risk of the suppression of ideas.
16. Pornography
    1. Miller v. CA (standard)
       1. Whether the average person, applying contemporary community standards would find that the work, taken as a whole appeals to prurient interest
       2. Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by applicable state law
       3. Whether the work, taken as a while, lacks serious artistic, literary, political, scientific value Ashcroft—prohibition on child pornography is mainly a protection for the abuse that children suffer during the making of the pornography
    2. American Booksellers Ass’n v. Hudnut
       1. Facts: Indy enacts ordinance defining pornography as act that discriminates against women.
       2. Holding: State may not ordain preferred viewpoints. Ordinance that discriminate on the basis of the content of speech are an unconstitutional violation of 1st.
       3. Ordinance proscribes a whole class of sexual content (those which depict women as submissive, degraded) with regards to literary artistic value and shows reference for a certain use of sexual images
       4. 1st means gov has no power to restrict expression b/c of its message or its ideas, no matter how insidious or influential
       5. Constitution does not make the dominance of truth a necessary condition of freedom of speech
    3. **Buckley v. Veleo**
       1. Facts 1) individual contributions—1K per candidate, 25K per aggregate 2) independent expenditures 3) candidate personal wealth 4) public disclosure 5) public funding voluntary
       2. Holdings 4) and 5) acceptable.
       3. (1) Individual contributions can be limited b/c there is a substantial interest in curtailing corruption. How society sees corruption—appearance of corruption. Quid pro Quo. Realistically it is hard to speak w/out money. Restriction on speech.
       4. No bar on independent expenditures—Court does not permit equalization in any sense in order to permit small voices to be heard.
    4. Citizens United v. Federal Election Committee
       1. Facts: Nonprofit co brings action against FEC for declaratory and injunctive relief to release a Hilary film. FEC prohibits release of electioneering communications 30 days of primary election/60 from general election. Bipartisan Campaign Reform Act prohibits corporations a unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate
       2. Background: MA states that the statute is unconstitutional but makes an exception, if the co. is only formed for the purposes of political advocacy and received funds from non-profit.
       3. Citizens united does not fit into this exception b/c they took some money from a profit org.
       4. First court holds that 441b covers Hilary and refuses to carve out an exception for nonprofits funded overwhelmingly by individuals.
       5. Court states they cannot resolve case on narrower grounds to resolve case, and find an new issue on whether 441b, a ban on corporate expenditures, is facially unconstitutional
       6. Disclosure requirements still present
       7. Four routes court could have gone:
          1. Statute is facially unconstitutional
          2. Unconstitutional as applied to Citizen’s United
          3. Statute should be interpreted to protect “Hillary” viewings
          4. Constitutional figure out another way to distribute Hillary
17. **Religion: Free Exercise**
18. Beliefs absolute prohibition.
19. Conduct. Targeting of specific religion exercise—compelling/limited
20. Cannot target religion generally
    1. 1st—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
    2. Everson v. Board of Education
       1. Voluntarism—advancement of a church would come only from the voluntary support of its followers and not political support of state
       2. Separatism—both religion and gov function best if each remains independent of the other
    3. Minority View: Nonpreferentialism—theory that the 1st was intended merely to prevent the est. of a national church or religion or the giving of an religious sect or denomination a preferred status rather than prohibiting any state/religious tie
    4. Incorporation of religion—State beginning w/ Everson has assumed that the Est. Clause was incorporated into the 14th and applicable to states
    5. Sherbert v. Verner (Harlan)
       1. Facts: Court holds free exercise compels grant of benefits to a person who loses her job b/c she observed Saturday as her Sabbath
       2. Reconciling the religion clauses: Free exercise compels some accommodation of religion, est. forbids other accommodation of religion, and between lies a broad zone where religious accommodation by the gov is neither forbidden or required
       3. Not all religious accommodations are forbidden
21. What is Religion?
    1. United States v. Seeger—Court interprets statutory term religion broadly. “The test is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that by the orthodox belief in God”
    2. Welsh v. United States—Court finds a religious exemption where objection is based on political, sociological or philosophical views. Exemption granted as long as objection is not based on pragmatic, expediency concerns and beliefs that are not deeply held
    3. Gillette v. United States—Court holds that Congress could constitutionally refuse to exempt those who did not object to all wars but only particular conflicts. Congress had a neutral and secular reason to justify the policy.
    4. United States v. Ballard—Douglas majority opinion states 1st does not allow the questioning of the truth or verity of religious beliefs or doctrines, but can question the sincerity of the beliefs.
22. Free Exercise of Religion
    1. Torcaso v. Watkins—Neither the State nor Fed Gov can constitutionally force a person to profess a belief or disbelief in any religion
    2. McDaniel v. Paty—Court invalidates provision disqualifying clergy from being legislature under the Free Exercise Clause. Strict scrutiny applied to find that state’s rational was inadequate to support the ban.
    3. Church of Lukumi Babalu Aye v. City of Hialeah
       1. Facts: Case involves the Santeria religion. One of the principle forms of devotion is sacrificing of animals. City Council adopts a ordinance prohibiting the slaughtering of animals for rituals
       2. Holding: Ordinance violates free exercise clause
       3. FE Clause prohibits discrimination against some or all religious beliefs and regulations proscribing conduct that is undertaken for religious reasons.
       4. If law restricts practices b/c of religious motivation, it is not neutral and invalid unless there is a compelling interest, and it is narrowly tailored to that interest
       5. Legit gov interest in protecting public health and preventing cruelty to animals could be addressed by restrictions stopping short of prohibiting all Santeria sacrificial practice
    4. Larson v. Valente:
       1. Facts: Court strikes down MN law imposing registration and reporting requirements for charitable solicitations and excepting some, but not all religious orgs from the law. Requirement applied only to religious orgs that solicit more than 50% from nonmembers.
       2. Holding: Violation of Est. Clause. One religion cannot be officially preferred over another.
       3. Strict scrutiny applied, narrowly tailored interest. Evidence that provision was drafted w/ explicit intention of including and excluding specific denominations.
       4. Both Larson and Lukumi looked behind the facial neutrality of the law to discern a religious discriminatory purpose.
    5. Locke v. Davey (Rehnquist)
       1. WA est. the Promise Scholarship to assist gifted students with their postsecondary education expenses, but excluded students who were pursuing a degree in devotional theology
       2. Exclusion does not violate the Free Ex Clause
       3. Strict standard—narrowly tailored to achieve a compelling state interest
       4. Court states Lukumi does not require a presumption of unconstitutionality b/c a program is not facially neutral w/ respect to religion.
       5. State has not imposed any criminal sanctions, but only has chosen not to fund a distinct category of instruction
       6. Training someone to lead a congregation is a religious endeavor. Therefore, anti-establishment concerns come into play. Traces back to using tax funds to support the ministry.
       7. Scholarship does not suggest animus towards religion, still allows students to attend pervasively religious schools and take theology courses
       8. States interest (anti-est. concerns) is substantial and the burden on Promise Scholars is minor.
       9. Scalia dissent—State violates FE Clause when it withholds funds solely on the basis of religion. Promise Scholarship is a public fund available to all and has carved out an impermissible exception. Majority’s freedom of conscience argument has no limits.
    6. Neutral Laws Adversely affecting religion
       1. Reynolds v. United States—upheld application of a federal law making bigamy a crime in the territories to a Mormon claiming polygamy was a religious duty. Congress free to reach actions in violation of social duties or subversive to good order.
          1. Studies cited showing polygamy leads to patriarchal principle, stationary despotism when applied to large communities
          2. **Main principle: Laws cannot interfere w/ religious belief and opinions but may with practices**
       2. Cantwell v. CT—modified Reynolds belief/practice distinction.
          1. First encompasses two concepts—freedom to believe and freedom to act. Freedom to believe is absolute, but freedom to act is not.
       3. Braunfield v. Brown—Challengers Orthodox Jews whose religion required closing of their store on Sundays. Alleged Sunday closing laws would put them at an economic disadvantage.
          1. Court rejects FE challenge—law does not prohibit anyone to practice their religion, simply makes practice more expensive and is an indirect burden
          2. State has valid secular goal of eliminating the atmosphere of noise and activity on one day
          3. Brennan dissent argues that law violates Clause b/c it makes an individual choose b/w his business and religion. States interest is convenience.
       4. Sherbert v. Verner—est. compelling interest standard
          1. Sherbert discharged from her employment b/c she refuses to work on Sat, her religion’s Sabbath. Employment Security Commission finds she is ineligible for benefits b/c of her refusal to work was failure, without good cause, to accept work. Law also provides no employee required to work on Sunday.
          2. Holding—unconstitutional burden on worker’s free ex of religion for a state to apply eligibility requirements for unemployment benefits so as to force a worker to abandon her religious principles. P
          3. P is forced to choose b/w religion and benefits and such a choice unnecessarily burdens her
          4. Sunday provision saves some worshippers from making a choice
          5. Passes strict scrutiny b/c state can pt to no compelling interest. Fraudulent claim concern insufficient.
          6. Concurrence—Believes case is similar to Braunfied and Braunfield should be overruled b/c the burden placed on the P was more ponderous
          7. Harlan and White dissent—Courts holding requires State to carve out an exception and provide benefits for religion
             1. Overrules Braunfeld?
       5. Free exercise exceptions
          1. Unemployment compensation cases post Sherbert
             1. Most have followed Sherbert exception holding ex. Thomas v. Review Board—Court strikes down IN denial of unemployment commendation to Jehovah’s witness who quit his job in munitions factory b/c of his religious protest to war
          2. Compulsory education laws
             1. WI v. Yoder—Amish member convicted for refusing to send his daughter to school after she completed 8th grade
             2. State’s interest in universal education must be strictly scrutinized.
             3. First Q—is claim rooted in religious belief? Yes, Amish have a deep religious conviction
             4. State interest of educating the populace so that they can participate in the political system is substantial but not adversely affected by granting an exception to the Amish. An education through the 8th grade sufficiently serves those purposes and the Amish can leave their community.
          3. Denials of FE claims
             1. United States v. Lee—Court denies exception to Amish who refuses to pay SS tax for employees. Burger found that the mandatory participation of citizens was indispensable to the fiscal vitality of the system
             2. Bob Jones University v. United States—Court refuses to provide tax exempt status to two educational institutions that practiced racial discrimination. Governmental interest in eradicating racism in education was compelling
             3. Goldman v. Winberger—Court abandons reliance on heightened scrutiny and adopts openly deferential approach.

Case involves Orthodox Jew in Air Force, who is disciplined for wearing a yarmulke in violation of uniform dress regulations barring the wearing of headgear indoors. Seeks an exception.

Court holds that military challenged under the 1st is more deferential than similar regulations in civilian society. Military need not encourage debate or tolerate protest to the extent required of a civilian society

Traditional outfitting promotes subordination of individual to group purposes.

Brennan and Marshall dissent reject the claim that group identity would be threatened by wearing a yarmulke. Majority’s slippery slope fear of dreadlocks etc…should be evaluated when those cases come before the court

Blackmun dissent states Airforce has not shown any reason to fear a significant number of enlisted people would requires religious exemptions that could be denied on safety grounds

O’Connor dissent 1) When gov denies free exercise, must show an unusually important interest is at stake (see Sherbert, Yoder, Lee) 2) Gov must show that the means adopted is the least restrictive or essential. These two requirements should apply in the military as well as civilian context

* + - * 1. O’Lone v. Estate of Shabazz—Court again applies deferential standard in prison context to reject Members of Islamic challenge of prison regulations relating to time and place of work which had effect of preventing them from attending a midday service. Rehnquist majority opinion applies reasonable standard.
        2. Bowen v. Roy—Court in an 8 to 1 vote rejects a free exercise challenge to a requirement in AFDC and Food stamp programs that applicants to welfare programs be IDed by their SSN.

Facts: Challengers claim assignment of number for 2 yr old would rob the spirit of the child.

Court distinguishes FE claims with respect to personal conduct from claims with respect to gov conduct. 1st does not require gov to behave in ways to further a person’s spiritual development

5 judges thought an exception should be made for the applicant

Brennan and Marshall dispute the distinction, arguing that a different version of the constitution should not be applied just because the case involves benefits rather than penalties

* + - * 1. Lying v. NW Indian Cemetery Protective Ass’n

O’Connor majority fails to apply strict scrutiny in a case where US Forest Service planned to build a road through forest traditionally used by Indian tribes for religious purposes

Court acknowledges that the action would have severe adverse affects on the practice of religion but draws a distinction b/w actions w/ coercive effects and actions w/ incidental effects.

Gov cannot operate if it has to reconcile various beliefs before acting

Brennan, joined by Marshall and Blacknum objected to majority’s limitation of FE claims.

Coercion test turns on actions that compel affirmative action inconsistent w/ religious beliefs and those that prevent conduct consistent w/ belief. Distinction has no constitutional significance and compelling interest standard should apply.

* 1. Summary
     1. Three techniques used to distinguish Sherbert and Yoder
        1. Overriding government interest in uniformity
        2. Free exercise interests were attenuated and gov interest were paramount in specialized environments such as the military and prison
        3. Applied a narrow definition of what constitutes a burden on religious practice, rejecting free exercise claims seeking to alter “internal” gov operations such as SSN and development of fed property
  2. City of Boerne—
     1. Suppose the fed gov says that in federal prisons, no prisoner can wear a Yamike or other form of head dress. Constitutional. Free ex interests are attenuated by gov interest.
     2. What is the level of scrutiny for benefits applied on Sat?
  3. Sherbert/Smith/Peyote case
     1. RFRA—act attempts to restore strict scrutiny, Smith Rationale basis, City of Boerne—RR, Gonzalez case
     2. States—Smith RB, not required to satisfy SS
     3. Federal—Gonzalez—RFRA is apparently constitutional. Congress can, therefore, grant greater religious leniency as long as they don’t bump into the est. clause.
     4. Cases b/w Sherbert and Smith—Bowen v. Roy
  4. Sherbert is largely confined to its set of facts and new test is rational basis

1. Freedom From Religion Foundation v. Obama
   1. Case concerns statute 42 U.S.C. § 119 which creates National Day of Prayer. P is Freedom from Religion Foundation representing several members.
   2. Issue: Is the statute a violation of the est. clause?
   3. Lemon v. Kurtz est. the test most commonly used by courts when interpreting the est. clause. Under Lemon, gov violates est. clause if:
      1. **Has no secular purpose**
      2. **Primary effect advances or inhibits religion**
         1. In evaluating effect, the test is whether a “reasonable observer” would view the government’s conduct as endorsing religion
      3. **Fosters an excessive entanglement with religion**
   4. First two parts of Lemon test are often described as “endorsement test”.
   5. Acknowledgement test
      1. Court has been most likely to find “acknowledgment” of religion permissible when it is part of a larger secular message see *Lynch* (upholding display of crèche that was part of large holiday display and *Van Orden* (upholding display of 10 Commandments that was part of a larger display of monuments)
      2. *McCreary*—Gov crosses line b/w acknowledgment and endorsement when it
         1. “Manifests the objective of subjecting individual lives to religious influence”,
         2. “Insistently calls for religion action on the part of citizens” **or**
         3. “Expresses a purpose to urge citizens to act in prescribed ways as a personal response to divine authority”
   6. Accommodating Religion
      1. Appropriate when it is necessary to alleviate gov imposed burdens on religion
   7. Potential Limitations on Lemon and Endorsement Test
      1. Marsh v. Chambers
         1. Facts: Court upheld a longstanding practice in Neb legislature to open sessions with a prayer
      2. “**Ceremonial deism**”— O’Connor in *Elk Grove* (case involving pledge of allegiance) suggests that ceremonial deism is appropriately applied where the religious act serves a secular purpose. Pledge of Allegiance instills patriotism, solemnizing public occasions (*Lynch*).
      3. “**History and Ubiquity**”—“standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees”. Test is relevant but not dispositive
2. **Chae Chan Ping v. US (loves testing on Immigration law)**
   1. **Facts**: Ping was born in China, arrives in the US in 1875-US. 1887—China. Between 1848, when gold was discovered in California, and the time of this case, the number of Chinese laborers in the United States greatly increased. During this short time, the Chinese immigrant population grew to become seventeen percent of the California population. This threatened American workers' jobs; in response Congress passed the Chinese Exclusion Act of 1882. The Act permitted the United States to regulate the flow of Chinese immigrants into the United States. Chae Chan Ping, a subject of the Emperor of China and a laborer by trade, lived in San Francisco, California. He left for China in 1875, but was not allowed to return to the United States in 1888 because of the new legislation. Ping contended that the Act violated existing treaties with China and that he should be allowed to re-enter the United States.
   2. **Certificate:** Tagging system like a driver’s license.
   3. Can it be found under the migration cl.? Negative (implicit regulation); General welfare clause (except not a tax); Treaty and MO.
   4. Big issue: Federalism—who is going to control the issue of immigration? If you look at the txt, have to do an exercise in creativity. All that is not reserved for the national gov is given to states (10th). Constitution limits Congress’ plenary powers such as immigration work rules
   5. 1884—Congress passes an act that states b/c the regulations were too hard to enact, Congress would have to make changes. According to 1884, if you get a certificate, then you could come back. Oct 1 act stated that certificate law would be null and void. Ping arrives on Oct 8.
   6. Asks for writ of habeas—argument act should be violated due to treaty b/w US
   7. Treaty states that there would be free immigration b/w the two countries. Field holds that treaty has no greater legal obligation than Congress acts.
   8. **Last in Time Rule:** Last rule has power. House has no power in enacting treaty, but can undue treaties by subsequent legislation.
   9. Field finds power in inherent power—pursuant to sovereignty
   10. Article I §. 8 naturalization—need to control comes in first to determine naturalization
   11. Also DP concerns—went through the regulations.
   12. **Issue(s)**—Whether an act of Congress that excluded Chinese laborers from the United States was a constitutional exercise of congressional power even though the act conflicted with an existing treaty with China.
3. **Holding and Reasoning**

The Supreme Court of the United States ruled that Congress did have the right to deny Chae Chan Ping's re-entry into the United States. Saying that treaties are equivalent to acts of Congress and can be repealed or amended, the Court reasoned that it was permissible to exclude the Chinese because the preservation of independence and the security against foreign aggression are the highest duties of every nation. All other considerations are subordinate. Congress must have the power to do whatever it may deem essential in order to maintain and protect the United States. Such power includes the control over the immigration of aliens and their return to the United States. The Court decided that Congress had the authority to determine whether certain foreigners should be excluded.

1. **Wong Wing v. United States**
   1. Facts: Wong Wing is deported, but before then is sent to prison and hard labor.
   2. Issue: Violation of DP—violation is against all persons. 6th—right to GJ (presentment)
   3. Power of congress to exclude aliens altogether from the US, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.
   4. Holding: When Congress sees fit to further such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to est. the guilt of the accused.
   5. Important b/c if it takes the addition of hard labor, then people can be trapped in prison w/out GJ. Need an addition? Is it imprisonment alone that requires a GJ? Current SC trend is that imprisonment w/out hard labor alone is enough.
   6. Another gov argument: Not w/in the court’s jurisdiction. W/in holding, court says that whenever someone is punished for an infamous crime, it passes out of the sphere of constitutional legislation. Court charged with protecting all people under the 14th, not just citizens
   7. How do you deport people? Consent from country and send them on their way w/ a one-way ticket.
   8. Zadyvdas—no reasonable prospect of successfully deporting a person, you have to let them go. Cannot detain them indefinitely.
2. **Wong Kim Ark**
   1. Holding: 14th amendment: “All person born or naturalized in the US, and subject ot the jurisdiction thereof, are citizens of the United States.
   2. How can you argue that someone born in the US is not a citizen?
      1. 14th only applies to slaves? Refuted by Wong Kim Ark, VMI, Plyer—no compelling state interest to deny admissions. Even illegal children.
      2. Subject to the jurisdiction argument? Germany, Roman Law
3. AZ law—merely being present in the US when you should be deported in not a criminal offense. AZ has converted not criminal offense into state crimes. Profiling.
   1. Requires, in the enforcement of this statute, the final determination of an alien’s immigration status to be determined by:
      1. A law enforcement officer who is authorized to verify or ascertain an alien’s immigration status or
      2. A law enforcement officer or agency communicating with ICE or the U.S. Border Protection.
      3. To what extent can the state regulate when they feel the national gov has left a hole?

**I. Immigration continued…**

* 1. **Fiallo—**Citizen kid (non-citizen dad)/Citizen dad (non-citizen kid)
     1. Certain restrictions that prevent people from gaining citizenship: Numerical limits. Exception created in Immigration and Naturalization Act and Labor certification rule.
     2. Broad class who can bypass these restrictions—parents and children. Family unification act. Once someone has a toe-hold in the US, people w/ very close relations are able to enter.
     3. Parents and Illegitimate children of father’s were not accepted.
     4. Gender/legitimacy classification. Intermediate scrutiny applied (substantial purpose). For legitimacy, also intermediate.
     5. Court does not go into the issue of EP. Congress is given extreme deference in immigration/naturalization, yet Congress has no enumerated power regarding immigration.
     6. Why is congress given such deference? Sovereignty, importance of speaking with one voice.
     7. Why shouldn’t notions of EP apply? Political Question (Marbury): Defining who we are as a people? Process should be left up to electoral body. Tension b/w immense power in Congress to treat people differently (gender).
     8. Law has changed—notions of VMI, don’t want to stereotype people on the basis of gender laws, and science-based reason. But you have to have a prior relationship w/ the child (nice to them)
  2. **Consejo De Salud**
     1. Medicaid—gov gives big pot of money to assist in Medicaid in the form of FMAP. FMAP depends on how affluent the state is. Puerto Rico is given a small amount of FMAP and rules about providing Medicaid change. Congress has changed the rule so that they will have to pay federally funded clinic.
     2. Three clinics sue gov, one of which is for Consejo, for payment**.** Argument against payment--Dole test (circumstance under which Congress can condition money: If Fed places condition on funds, it must do so unambiguously, enabling state to exercise their choice while aware of the consequences
     3. Puerto Rico cannot bring up the spending clause—only US territories and incorporated territories can bring up the spending clause.
     4. Insular case—Puerto Rico is not an incorporated country (Downs/Balzac)
     5. **Downs/Balzac** all arise following the Spanish War, where Spain cedes Cuba, Puerto Rico, Philippines. Issue—taking over territories w/ rules in place, what will the gov do with new territories? What were these people’s rights? Big debate (comparable to abortion) about whether the constitutional rights should apply to the territories.
     6. Own Puerto Rico—country needs revenue—whatever the tariff applies to other countries oranges, we’ll give it to PR for 15%. Uniformity clause. If throughout the US includes Puerto Rico, why do we have a 15% tax on oranges for PR, but not for FL.
     7. Supreme Court makes up the idea of incorporation in **Downs/Balzac. Unincorporated—**pieces of the constitution apply. **Incorporated—**full pieces apply.
     8. Why did the SC create this idea of incorporation? What other debate does this sound like? Reminiscent of Duncan—incorporation should have occurred—**Palko** etc…
        1. Would not want to incorporate all of the constitution b/c of racism (savages). Convenient way of permitting the US to extend its influence (bring into our economic and military spheres) people who don’t deserve full rights.
     9. Judge says that Puerto Rico is incorporated but does not overrule the insular cases. If Constitution can apply to Guantanamo (Boumediene), then it should apply to Puerto Ricans who are US citizens. At odds with Equal Protection. Times have changed. How can Puerto Ricans be citizens, pay taxes, yet cannot be afforded protection of citizens? Not inconsistent w/ insular cases that Puerto Rico is incorporated. Manifesto against shoddy treatment of Puerto Ricans.

**Exams: 40 MC—50%. 2-3 essays 50%. Decide what issues are easy and which are hard. Acknowledge easy issues and resolve them quickly. Review: May 11 9-10:30**

To pass **strict scrutiny**, the law or policy must satisfy three prongs:

First, it must be justified by a **compelling governmental interest**. While the Courts have never brightly defined how to determine if an interest is compelling, the concept generally refers to something necessary or crucial, as opposed to something merely preferred. Examples include national security, preserving the lives of multiple individuals, and not violating explicit constitutional protections.

Second, the law or policy must be **narrowly tailored** to achieve that goal or interest. If the government action encompasses too much (overbroad) or fails to address essential aspects of the compelling interest (under-inclusive), then the rule is not considered narrowly tailored.

Finally, the law or policy must be the **least restrictive means** for achieving that interest. More accurately, there cannot be a less restrictive way to effectively achieve the compelling government interest, but the test will not fail just because there is another method that is equally the least restrictive. Some legal scholars consider this 'least restrictive means' requirement part of being narrowly tailored, though the Court generally evaluates it as a separate prong.

Legal scholars, including judges and professors, often say that strict scrutiny is "strict in theory, fatal in fact," because popular perception is that most laws subject to this standard are struck down. However, an empirical study of strict scrutiny decisions in the federal courts, by Adam Winkler, found that laws survive strict scrutiny over thirty percent of the time. In one area of law, religious liberty, laws survived strict scrutiny review in nearly sixty percent of applications.

**Rational Basis—Legit interest/rationally related**

The rational basis review tests whether a governmental action is a reasonable means to an end that may be legitimately pursued by the government. This test requires that the governmental action be “rationally related” to a “legitimate” government interest. Under this standard of review, the “legitimate interest” does not have to be the government’s actual interest. Rather, if the court can merely hypothesize a “legitimate” interest served by the challenged action, it will withstand the rational basis review.

## History

The rational basis review received its origin from the means-ends test used by the U.S. Supreme Court in *McCulloch v. Maryland*. The actual introduction of the rational basis review came in *United States v. Carolene Products Co.*, where rational basis became separate and distinct from [strict scrutiny](http://en.wikipedia.org/wiki/Strict_scrutiny).

## Rational Basis with Bite

Application of the rational basis test almost always means a ruling favorable to the government, as the Court will normally show deference under the rational basis test. However, in certain cases where a "quasi-suspect" class is involved and the interest involved is also strong, the Supreme Court seems to give the rational basis test more "bite" or "teeth". In [*Cleburne v. Cleburne Living Center*](http://en.wikipedia.org/wiki/City_of_Cleburne_v._Cleburne_Living_Center,_Inc.), [*Plyler v. Doe*](http://en.wikipedia.org/wiki/Plyler_v._Doe), and [*Romer v. Evans*](http://en.wikipedia.org/wiki/Romer_v._Evans), the Court purported to use the rational basis test, and yet it overturned the challenged law in each of these cases. The difference between the "rational basis" test and the "rational basis with bite" test is whether the court tries to come up with its own ideas for legitimate government interests, or whether the court insists that the government have already stated that interest prior to the ruling. Practically, the Court almost never strikes down a law under rational basis review; when it does, the case is often said to have been decided using "rational basis with a bite."

**Intermediate scrutiny**—Important important interest, substantially related

In [U.S. constitutional law](http://en.wikipedia.org/wiki/United_States_constitutional_law), is the middle level of scrutiny applied by courts deciding constitutional issues through [judicial review](http://en.wikipedia.org/wiki/Judicial_review). The other levels are typically referred to as [rational basis review](http://en.wikipedia.org/wiki/Rational_basis_review) (least rigorous) and [strict scrutiny](http://en.wikipedia.org/wiki/Strict_scrutiny) (most rigorous).

In order to overcome the intermediate scrutiny test, it must be shown that the law or policy being challenged furthers an important government interest in a way that is substantially related to that interest.[[1]](http://en.wikipedia.org/wiki/Intermediate_scrutiny#cite_note-0) This should be contrasted with strict scrutiny, the higher standard of review which requires narrowly tailored and least restrictive means to further a compelling governmental interest.

[1 Sex-based classification](http://en.wikipedia.org/wiki/Intermediate_scrutiny#Sex-based_classifications), [2 Illegitimacy](http://en.wikipedia.org/wiki/Intermediate_scrutiny#Illegitimacy), [3 Free Speech](http://en.wikipedia.org/wiki/Intermediate_scrutiny#Free_Speech)