**Outline**

**I. Supreme Court Powers**

1. **Power of Judicial Review**: federal courts are charged with saying what the constitution means – power of courts to declare acts of government or government actors unconstitutional, invalid according to how courts interpret the constitution
   1. Power comes from the text of the constitution (Article III), history surrounding adoption of text, structure of constitution, purposes and policies of provisions, judicial precedent
   2. Article 3 of constitution identifies the kinds of cases the Supreme Court can hear as part of its original or trial jurisdiction
   3. ***Marbury v. Madison***: established courts power of judicial review
      1. Facts: Marbury (P) was an intended recipient of an appointment as justice of the peace granted at the very end of Pres. Adams term. Marbury applied directly to SCOTUS for a writ of mandamus to compel Madison (Jefferson’s Secretary of State), to deliver the commissions under Judiciary Act of 1789, Madison/Jefferson refused, Marbury said Act gave SCOTUS OJ over case
         1. Judiciary Act of 1789 granted the Supreme Court original jurisdiction to issue writs of mandamus “…to any courts appointed, or persons holding office, under the authority of the United States.”
      2. Holding: SCOTUS said no jurisdiction under Act 🡪 Article III did not permit original jurisdiction over this case
      3. Article III §2 states SCOTUS has original jurisdiction in cases involving AMC and where state is named party, appellate review is granted in other cases, and “under such regulations that congress shall make” – Exceptions Clause
      4. Marshall narrowly interprets EC stating Congress cannot freely alter categories, therefore §13 is unconstitutional, Congress cannot expand scope of SCOTUS OJ
      5. *Judicial Review of Executive Conduct Test*
         1. In declaring Madison’s refusal to issue assignment unconstitutional, holding established SCOTUS power to review cases when president does not have exclusive discretion
      6. Marshall’s defense of Judicial review: prevents E & L from exercising unlimited power, Article III, §2 gives SC power to hear cases under constitutional law
      7. Fundamental Propositions:
         1. Only the constitution is fundamental law, superior to and prevails over ordinary legislation and governmental acts
         2. It is up to the courts to say what the law is and what the constitution requires, prevents E & L branches from exercising unlimited power
   4. ***Ex Parte McCardle***
2. Facts: newspaper writer brings habeas corpus proceeding to SCOTUS, Congress passes act repealing SCOTUS appellate power under Act of 1867
3. Holding: court lacks jurisdiction in cases where Congress exercises its power of exception
4. Principle: Congress may not interfere with the fundamental role of the Supreme Court to decide constitutional questions such that it would take away the special function of the Supreme Court of the US
5. **Authority to Review State Court Judgments**
6. ***Martin v. Hunter Lessee***
   * 1. Facts: VA refuses to obey Supreme Court’s mandate that VA could not seize land based on federal treaty
     2. Issue: Does constitution authorize federal courts to act directly upon state court rulings or are state courts the final judges?
     3. Holding: Judicial powers, as enumerated by the constitution, extend to cases arising under the constitution and the laws and treaties of the U.S. SCOTUS does not have OJ, so that case must be reviewed under their appellate power
     4. SCOTUS is last resort to 1) avoid state prejudices, interests…to the regular administration of justice 2) ensure a uniformity of decisions
     5. *Supreme Court’s judicial review authority over state court judgments* 
        1. Strong textual argument that Supreme Court has review authority over state court cases in matters of federal law (Article III gives SCOTUS authority to hear all cases arising under the constitution)
        2. Judiciary Act of 1789- provided for SCOTUS review of state court judgments involving federal law
        3. Policy – want uniformity of federal law
     6. Takeaways:
        1. Supreme court can reconcile/examine whether federal statutes conform to the constitution
        2. Supreme Court can reconcile/examine whether state interpretation of federal law are correct or not
7. ***Cohens v. VA***
   * 1. Facts: Cohen brother convicted in VA for selling DC lotto tickets in violation of VA law
     2. Holding: The court adopts the "Expansive View," stating that the court has appellate jurisdiction over anything arising under the Constitution regardless of who the parties are
     3. Principle: Federal judges are insulated from majoritarian pressures while state judges are generally elected for fixed terms, making them vulnerable to majoritarian pressures
8. **Authority to Decide Constitutionality of State Court Judgments**
9. Principle: when deciding if a statute can alter judicial interpretation, look to see if there is a constitutionally protected right, if within the constitution Congress must initiate amendment process
10. Limited reading of Marbury v. Madison suggests judicial review is a byproduct of a court’s duty to decide cases within its jurisdiction, broad reading is that courts are exclusively competent to consider constitutionality
11. ***Cooper v. Aaron*** *(J. Frankfurter)*
12. Facts: AK governor and state legislature displeased with SCOTUS decision in Brown v. Board of Ed, tries to postpone integration of schools, AK not a party in that case, SCOTUS says they wont hear it again, same argument as first case
13. Issue: Are governor and legislature bound by the holding in Brown?
14. Holding: Article IV §2 makes constitution “Supreme law of the land” therefore states are bound by SCOTUS interpretation of the constitution
15. ***Dickerson v. United States*** – can statute overrule a constitutional interpretation?
16. Holding in Miranda v Arizona: (Rehnquist) – Congress may modify or set aside judicially created rules of evidence not within the constitution but cannot legislatively supersede decisions interpreting and applying the constitution
17. **Constitutional Limits on Adjudication – Cases and Controversy and Standing**
18. **“Case or Controversy” Requirement**
19. Article III §2 cl. 1 – judicial power shall extend to a list of enumerated “cases and controversies”
20. Cases and controversies defined as concrete and real fight between adverse parties. Requires mootness, ripeness, and cannot involve a nonjusticiable political question (one that is left to the unreviewable discretion of another branch)
21. **Doctrine of Standing**: whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues
22. General rules: Does P have sufficient take or interest? Must show 3 things:
23. Injury in fact: must have suffered direct and personal harm, distinct and palpable, can’t be harm to someone else or harm in general (can be intangible such as vote dilution or loss of opportunity) (*Lujan)*
24. Proof of Causation: places burden on P to show that harm is “fairly traceable” to the government (*Allen)*
25. Redressability: courts order must be able to resolve the problem (*Massachusetts)*
26. ***Lujan v. Defenders of Wildlife***(Scalia)
27. Facts: challenge rule promulgated by Secretary of Interior interpreting ESA to actions applicable only in US
28. Holding: more than a cognizable interest is required, C or C requires that party seeking review must himself be among injured, P in this case had vague intention to visit place where the animal may no longer be existent, not enough
29. ***Massachusetts v. Environmental Protection Agency*** (Stevens)
30. Facts: group of states allege EPA has abdicated its responsibility under Clean Air Act to regulate emissions of four greenhouse gases
31. Holding: MA case has standing, not justiciable with political question, advisory opinion, or mootness
32. Statutory right as injury in fact – see below
33. Statutory/citizen suits require “zone of interest” – people that Congress intended to protect in enacting statute, example of bank having to give receipts to everyone – still must satisfy injury in fact
34. Principle: when congress has provided a procedural right to protect a concrete interest (right to challenge agency), the litigant can assert the right without redressability as long as there is some injury
35. ***Allen v. Wright***
36. Facts: claim by parents of black children attending public schools asserting that IRS had failed to fulfill its obligation to deny tax-exempt status to private schools who racially discriminated
37. Holding: lacks standing for lack of causation, speculative that schools and parents would have done something different even if the IRS had taxed every private school as it should have
38. ***Clapper v Amnesty International***
    * 1. Challenge to the FISA Amendments Act of 2008 which empowers the Foreign Intelligence Surveillance Court to authorize surveillance without showing probably cause. Government only required to demonstrate the surveillance targeted persons “reasonably believed to be outside the US” and seeks “foreign intelligence information”
      2. Facts: Plaintiffs alleged that they sustained greater inconvenience and higher costs because of the need to conduct secure communications with parties overseas whom the U.S. government had probably targeted for surveillance
      3. Holding: claims were based too much on speculation and on a predicted chain of events that might never occur, so they could not satisfy the constitutional requirement for being allowed to sue
      4. "Respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending,"
39. ***Federal Election Commission v. Akin***
    * 1. Holding: 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
40. ***Hollingsworth v. Perry***
41. CA Supreme Court held that limiting marriage to only same sex couples violated equal protection clause of CA constitution, court found Prop 8 was unconstitutional under federal constitution
42. Petitioners/official proponents of initiative chose to appeal – injury to them is ideological
43. Holding: official sponsors of a ballot initiative measure did not have Article III standing to appeal an adverse federal court ruling when the state refused to do so
44. ***United States v. Windsor***
    * 1. SCOTUS held that restricting US federal interpretation of “marriage” and “spouse” to apply only to heterosexual unions by DOMA is unconstitutional under the Due Process Clause of 5th amendment
      2. AG stays out of case, BLAG (Bipartisan Legal Advisory Group) defends DOMA – don’t want contrived cases where both parties basically agree so court never hears opposition
      3. Technically government has “imminent harm” because they will have to pay money in refund to Windsor and other future benefits 🡪 this was enough to create standing
45. ***Warth v. Seldin***
    * 1. Facts: Plaintiffs claimed that a local zoning ordinance excluded persons of low and moderate income from living in a certain community. Defendants responded by claiming that Plaintiffs lacked standing to bring suit.
      2. Holding: A plaintiff must generally allege a specific “case or controversy” between herself and the defendant in order to have standing.
46. **Prudential Standing** – three major prudential (judicially-created) standing principles, Congress can override zone of interest (purely prudential) via statute:
47. **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
48. Exception where third party has interchangeable economic interest with the third party
    * + 1. ***Craig v Boren***– seller of beer permitted to challenge sex discrimination for age to buy alcohol based on economic interest
        2. ***Griswold v. Conn:*** Dr can be part of suit because of substantial nexus
49. Exception for overbreadth – person unprotected by particular law sues to challenge oversweeping of law into rights of others
50. **Generalized grievances**: plaintiff cannot sue if the injury is widely shared in an undifferentiated way with many people, reasoning that these grievances are more appropriately addressed in representative branches
51. **Zone of Interest test**s:
52. Zone of injury – injury is the kind of injury that Congress expected might be addressed under the statute
53. Zone of interests – party is within the zone of interest protected by the statute or constitutional provision
    * + - 1. Bennett v. Spear - law restricted use of reservoir water in order to preserve species of fish, ranchers claimed their restricted use of the water was causing them injury, court said they had standing, statute used broad language stating anyone could sue

**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
2. **Mootness** – case has to be alive at all stages of litigation, not merely at the time the complaint is filed
3. Exceptions: capable of repetition yet evading review (Roe v. Wade) – such a short duration that full judicial consideration is not likely
4. Consequences: significant aspect of controversy has dissipated because of change in law or fact but remains a residual aspect which judicial remedy may provide relief
5. Voluntary cessation: no reasonable expectation that party will return to old ways
6. **Ripeness** – P must allege actual harm or immediate threat of harm, prevents premature adjudication, dispute is undeveloped and too remote or speculative to warrant judicial action, contingent on future consequences
7. Three factors:
8. Probability that predicated harm will take place
9. Hardship of parties if immediate review is denied
10. Fitness of record for resolving legal issues presented
11. **Taxpayer Standing**
    * 1. ***Flast v. Cohen***:
         1. Facts: Congress had funded, under Titles I and II of the Elementary and Secondary Education Act of 1965 (the Act), writing, arithmetic, and other subjects in religious schools. Claim that these expenditures violated the Establishment and Free Exercise clauses of the First Amendment of the Constitution
         2. Holding: Taxpayer standing is appropriate when the plaintiff challenges an enactment under the taxing and spending clause of the Constitution and the enactment exceeds specific constitutional limitations on taxing and spending.
         3. Very narrow holding, generalized grievance doctrine, suit has to be against or law enforced by Congress under spending power, involve real money, injury was lack of support of a religion
      2. ***Arizona Christian School Tuition Org v. Winn***
         1. Facts: AZ taxpayers challenged constitutionality of AZ tuition tax credit alleging violation of Establishment Clause of 1st amendment
         2. Issue: did Ps lack standing because they cannot allege that AZ tuition tax credit involves appropriation or expenditure of state funds?
         3. Holding: Court rejected general proposition that an individual who has paid taxes has a continuing legally cognizable interest in ensuring those funds are not used by the gov’t in a way that violates the constitution
      3. ***Valley Forge Christian College v. AUSC***
         1. Facts: respondents AUSC brought suit as taxpayers alleging Dept of Health Education and Welfare grant of US property to a religious college violated the establishment and free exercise clause of 1st amendment
         2. Holding: Taxpayer standing is appropriate when the P challenges an enactment under the taxing and spending clause and the enactment exceeds specific constitutional limitations on taxing and spending
12. **Political Questions:**
13. Principle that some matters are 1) unreviewable discretion of political branches; 2) some otherwise legal questions should be left to other branches of government
14. ***Baker v Carr***(Brennan)
15. Facts: Tenn. Voters claimed violation of equal right protection because the appropriation of representatives had not been changed
16. How do you determine if it is a political question?
17. Does the issue implicate separation of powers? Important threshold question
18. Does the constitution commit the resolution of the issue to either the President or Congress?
    * 1. 6 Factors for political question determination
19. Textually demonstrable constitutional commitment of the issue to a coordinate political dept
20. Lack of judicially discoverable and management standards for resolving it
21. Impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion
22. Impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government
23. Unusual need for unquestioning adherence to political decision already made
24. Potential of embarrassment from multifarious pronouncements by various dept on one question
25. ***Luther v. Borden***: Guaranty Clause (republican form of government) is not a repository of judicial standard for court to identify unlawful government
26. When laws relate to state’s constitutional laws, federal courts has to follow state court decisions unless they are unconstitutional
27. Article IV §II gives Congress authority to deal w domestic issues
28. Distinguishing legal from political questions:
29. ***Powell v. McCormack***(congressional qualifications) – issue justiciable because article I only committed decision of three qualifications to house, Powell’s assertion was based on finding of wrongful diversion of funds
30. ***Goldwater v. Carter*:** 
    1. Facts: President Carter terminated a treaty with Taiwan without Congressional approval
    2. Holding: whether or not a president can terminate a treaty closely involves his foreign relations authority and is therefore not reviewable by the supreme court 🡪 political question, not justiciable
31. ***Nixon v. United States***(impeachment proceedings)
32. Facts: Nixon claimed Senate impeachment hearings against him were unconstitutional because the entire Senate did not try him, instead appointed a committee to make initial findings
33. Holding: nonjusticiable case, political question, textually sole authority of Senate
34. Prudential – lack of finality of difficulty of fashioning relief

**II. Federal Legislative Power**

1. Evaluating constitutionality of an act of Congress:
   1. Does Congress have the authority under the constitution to legislate?
   2. Does the law violate another constitutional provision or doctrine? (ie. separation of powers, individual liberties)
2. Evaluating constitutionality of state law:
   1. Does it violate the constitution?
3. Article I §8 grants two important powers to Congress
   1. Power to levy taxes
   2. Power to regulate interstate and foreign commerce
4. **Necessary and Proper Clause (**Article 1, §8, cl. 18**)**: “Congress shall have powers to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution”
   1. Federal law or regulatory scheme which tries to be added to another law and question whether piece of law is constitutional, cant clearly figure out which enumerated power that portion of the law falls under 🡪 very broad, must ALWAYS be in conjunction with another power, cannot stand by itself (Comstock – 5 factors)
   2. Necessary: reasonably calculated, what enumerated power is linked to
   3. Proper: does it eceed the authority or trample on the states too much? 🡪 comandeering
   4. Limitation: 10th amendment: powers not delegated to the US by constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people
5. ***McCulloch v. Maryland***(Marshall) – dramatic expansion of Congressional authority
   1. Facts: controversy over Maryland’s right to tax the Bank of the United States
   2. Issue 1: Does Congress have power to incorporate a bank?
      1. Sovereignty issue: national government is not subordinate to the states
      2. Enumerated powers: government can only exercise enumerated powers, but are supreme in the sphere of action, establishment of bank is not enumerated but implied
         1. Constitution is a mere outline: proof limitations in Article I §9, everything else is permitted “we must never forget it is a constitution we are expounding”
         2. Power to incorporate bank is incidental to express power of regulating commerce
      3. Necessary and Proper Clause:
         1. Think of necessary as *convenient, useful, or essential* to an end
         2. Textual- compared with Article I §10 “absolutely necessary”
         3. Implied intent – must be adaptable, flexible standard
      4. Holding: Congress should have discretion in choosing means to exercise its vested powers. Contrast in limitations of powers and expansion
   3. Issue 2: is it constitutional for Maryland to tax the bank?
      1. Constitution and its 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 with power to create and preserve
         3. Where contradiction exists, supreme power perseveres
      2. State has power to destroy bank with power to tax, states power to tax is subordinate to the Constitution
      3. Holding: Law passed by Maryland is unconstitutional and void, should not impede or control operations of congressional law
   4. 1st issue supported by NP clause, 2nd is structural inference from the constitution without any textual support
   5. McCullochs two holdings:
      1. Broad view of Congress’s implied powers inferred by the broad and general nature of document
      2. Structural argument on why Maryland lacked power to tax national bank
6. Background and Notes:
   1. Jefferson (strict reading) v. Hamilton any means necessary that is constitutionally permissible to achieve the ends, consider if the proposed measure abridges any pre-existing right of the people or state. Hamilton: what is deemed necessary in one persons view is different than another’s
7. ***U.S. v. Comstock*** *­*– reaffirms McCulloch, focuses on meaning of N&P clause
   1. Facts: Adam Walsh Child Protection Act authorized courts to order indefinite confinement of individuals in the custody of the federal bureau of prisons who are deemed to be “sexually dangerous”
   2. Issue: if AWCP Act violates the N&P clause
   3. Holding: N&P clause is broad in scope, Congress may enact laws that are “convenient, useful, or conducive” to the enumerated power’s “beneficial exercise”
   4. Court looked to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power, look to whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power
   5. Focuses on meaning of necessary and proper clause and strongly reaffirms the approach in McCulloch
   6. Has to be scheme that everyone knows is constitutional and you add a small part that is necessary to achieve point of legal scheme, even though specific clause was not identified
8. ***U.S. Term Limits, Inc. v. Thorton***(Stevens majority)
   1. Facts: Arkansas has amendment that prohibits an eligible candidate from appearing on general election ballot if he has served 3 times as House of Rep or twice in Senate
   2. Issue: Can state alter or add to the qualifications?
   3. Holding: The Tenth Amendment of the United States Constitution (Constitution) does not reserve rights for the States that were not within the original powers of the States.
   4. Principle: Interpretation of 10th amendment – state retains all of their original powers except for those the constitution exclusively delegates to the US. States cannot exercise any powers which the Congress does not delegate to them – see McCulloch has no original right to tax
   5. Reasoning
      1. Powell v McCormack 🡪 Congress may not alter or add to the qualifications in the constitution
      2. 10th amendment: Powers not delegated to US, or prohibited by it to the states, are reserved to the states respectively, or to the people
      3. Power to add qualifications is not in the original powers of the states, 10th amendment only acts to reserve original state powers
   6. Thomas, Scalia, O’Conner dissent: Constitution is silent on states’ rights to add qualifications, and where it is silent there is no ban to the state
      1. Federal powers are limited and enumerated, state can exercise any power not withheld
      2. 10th amendment – where constitution is silent, fed government lacks power and states enjoy it
      3. 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
9. ***United States v. Kebodeaux***
   1. Facts: Convicted sex offender after being released from prison didn’t change his address within 3 days as required by SORNA
   2. Issue: Does Congress have authority to enact this statute?
   3. Holding: the N&P clause grants Congress the power to enact SORNA and apply it in this case, despite the fact that Kebodeaux was convicted and served his time prior to SORNA’s enactment, it is within Congress’s power to modify federal requirements related to crime and punishment

**III. Commerce Power and Federal Basis**

**How to approach Commerce questions:**

* Which is closest analogous case and does it apply?
* Motivation behind regulation doesn’t matter (lottery case, Darby)
* 3 types of cases
  + Cases that regulate channels of commerce (Gibbons), regulate interstate highways, ect. Congress has been doing this regularly without issue
  + Instrumentalities of persons/things in interstate commerce (lottery case, Darby, NLRB) – Congress can regulate stuff being shipped through interstate commerce such as goods made w child labor, interacts with N&P clause to regulate interstate commerce – usually Congress can do this
  + Activities with a *substantial* relation to Commerce (Wickard, loan shark case)
    - First must prove that in the *aggregate* the activity substantially effects interstate commerce (Lopez – when you aggregate, you cant build inference on inference to get there, must be more direct; Morrison, Gonzalez)

1. Article I §8 grants Congress power to “regulate commerce with foreign nations, among the several states and with the Indian tribes”
2. ***Gibbons v. Ogden*** (Marshall) – Supremacy clause and defined “commerce”
   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. Does not stop at external boundary line, may be introduced into the interior
   4. Completely internal commerce of state should be left to governance of state
   5. Commerce power is power to regulate, power has no boundaries except the restrictions of the constitution, restrictions are wisdom and discretion of Congress
3. **Judicial Limits on the Commerce Power**
   1. Cases between 1887 and 1937 greatly restricted Congress’s use of Commerce Clause
   2. Interstate Commerce Act and Sherman Anti-Trust Act (1890) led to challenges on judicial limitations on congressional authority over commerce
      1. ***United States v. EC Knight***- Sugar Trust Case
         1. Holding: Sherman anti-trust act could not be used to stop a monopoly in the sugar refining industry because the constitution did not allow Congress to regulate manufacturing
         2. Exercise of commerce is secondary/incidental
      2. Policy: if national government is allowed to regulate all transactions involving trade, there would be little room for state regulation
   3. Substantial Economic Test: emphasizes the practical physical or economic effects of the regulated intrastate activities on interstate commerce, must be a direct effect
   4. ***Houston v Shreveport Railroad*:** 
      1. Facts: court sustained congressional authority to regulate intrastate rail rates that discriminated against interstate railroad traffic. Railroads rates within TX lower than rates between TX and LA
      2. Issue: Unjust discrimination in favor of traffic w/in TX.
         1. Holding: When interstate commerce is *enmeshed* and economically tied with intrastate commerce, Congress has the power to foster and protect interstate commerce through all measures necessary
         2. Railroads are instruments of interstate commerce
   5. ***Schechter Poultry Corp v. US***
      1. Facts: Under the National Industrial Recovery Act Congress imposed “codes of unfair competition” which resulted in convictions for violating wage, hour, and trade practice provisions of federal statute,
      2. Issue: Did Congress, in authorizing the “codes of unfair competition” establish standards of legal obligation, thereby performing its essential legislative function?
      3. Holding: No, was not a sufficiently “direct” relationship to interstate commerce
      4. Hughes rejects both stream of commerce (interstate transaction ends when chicken reaches slaughter house) and subst. economics test. Also federal motive to remedy declining wages and falling prices is an insufficient reason.
      5. 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
   6. ***Carter v. Carter Coal***— court emphasized narrow definition of commerce to protect the states
      1. Facts: challenge of the constitutionality of Bituminous Coal Conservation Act of 1935 which sought to stabilize coal industry and promote interstate commerce, called for collective bargaining, minimum and maximum price controls and unfair trade practice provisions
      2. Holding: Act was unconstitutional, exceeded the scope of Congress’s power and usurped states’ prerogatives (direct v. indirect), act sought to control certain activities that are not “commerce” and effect intrastate commerce to a large degree
   7. Stream of Commerce Test: local activities can be regulated because they are an integral part of commerce or “in” commerce
      1. ***Swift & Co. v. United States*** (Holmes)
         1. Facts: major dealers of meat were colluding in order to control prices, and pressured railroads into charger them lower rates, US government attacked it as unlawful economic monopoly
         2. Holding: Congressional power under the Commerce Clause justified regulations of the meat trust because of the effect of the trust on commerce among states was not “accidental, secondary, remote or merely probable” but rather a *direct* attempt to monopolize commerce.
         3. 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.
   8. **National police regulation** – even if activity was commerce and was among the states, Congress still could not regulate if it was intruding into the zone of activities reserved to the states
      1. Article 1 §8: “Congress shall have 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 United States”
      2. ***Champion v. Ames*** (Lottery case)
         1. Facts: appellant is express carrier challenging constitutionality of act of Congress which prohibits carriage of lottery tickets across state lines
         2. Holding: Congress has ability to regulate transport of interstate commerce when such regulation does not affect the internal affairs of the states
      3. ***Hammer v. Dagenhart*** (Child Labor Case)
         1. Facts: Congressional law barred transportation in interstate commerce of goods produced in factories using child labor
         2. Act is unconstitutional – in previous cases power over interstate commerce was used to prevent commerce from distributing evil, here the goods had already been produced and the goods being shipped are harmless, state should enact regulations
         3. Holding: Regulation of production was left to the states and therefore a federal law that prohibited shipment in interstate commerce of goods made by child labor was unconstitutional even though it was limited to interstate commerce, because it violated 10th amendment
      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
4. Commerce Power and the 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
5. Commerce After the New Deal – Key Decisions Changing the Commerce Clause Doctrine – broadening the scope
   1. Courts stances towards commerce power changed in 1937
   2. ***NLRB v. Jones & Laughlin Steel***(Hughes) – broadened Congress power
      1. Facts: constitutional challenge to the NLRB act which created right of employees to bargain collectively, prohibited unfair labor practices and established NLRB to enforce the law, law contained detailed findings on the relationship between labor activity and commerce
      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. Court granted congress broad power: “power to regulate commerce is the power to enact ‘all appropriate legislation for its protection and advancement to adopt measures to promote its growth and insure its safety, to foster, protect, control, and restrain”
   3. ***United States v. Darby***(Stone) – overturned Dagenhart
      1. Facts: Darby was charged with violating the Fair Labor Standards Act (the Act) which prohibited shipment in interstate commerce of goods made by employees who were paid less than minimum wage
      2. Court departed from all acts of pre-1937 commerce clause doctrines
      3. Issue: Do the wages and hours of local employees have such a substantial impact on interstate commerce as to allow Congress to constitutionally regulate them?
      4. Holding: If the regulated intrastate activity has a substantial effect on interstate commerce, Congress may regulate the activity regardless of Congress’s motive.
      5. Holdings:
         1. Congress may control production by regulating shipments in interstate commerce
         2. “Plenary power” conferred on Congress by the Commerce Clause
         3. Motive of regulation are matters for legislative judgment, Court said a law is constitutional so long as it is *within the scope* of Congress’s power’ tenth amendment would not be used by the judiciary as a basis for invalidating federal laws
   4. ***Wickard v. Filburn***(Jackson) – case demonstrates outer limits of “substantially affecting commerce”
      1. Facts: Filburn sues Wickard to prevent enforcement of penalty imposed on him for exceeding quota of wheat for his farm, was only going to be used for personal use, claims Market Agricultural Adjustment Act exceeds commerce power
      2. 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 direct or indirect
      3. *Aggregation test*: appellee’s own contribution may seem trivial but his contribution taken with others similarly situated, is not trivial
   5. **Test for Commerce Clause *after* 1937**: Congress could exercise control over all phases of business, a federal law would be upheld so long as it was within the scope of Congress’s power, and the commerce clause was interpreted so broadly that seemingly any law would meet this requirement
      1. Congress could regulate any activity if there was *a substantial effect* on interstate commerce
6. **Regulatory Laws**: Court’s broad definition of the commerce clause power facilitated this expansion, court held that Congress can set the terms for items shipped in interstate commerce and can regulate purely intrastate activities, including all aspects of business, if there is a rationale basis for believing there is an interstate effect
7. **Civil Rights Act 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. United States***:
      1. Facts: Atlanta wanted to uphold its practice of refusing rooms to AA
      2. Court upheld law under the Commerce Clause, discrimination in hotels impedes travel
      3. Holding: Congress may regulate the ability of commercial institutions to deny service on the basis of race under its power to regulate interstate commerce.
      4. Determinative test: whether the activity sought to be regulated is commerce which concerns more states than one and has real and substantial relation to the national interest
   3. ***Katzenback v. McClung***:
      1. court upheld application of the act to a small business, Ollie’s BBQ
      2. Emphasized interstate connections of the restaurant, direct evidence of interstate economic effect not necessary
      3. Holding: Congress has the ability to require desegregation of restaurants under the Commerce Clause.
8. **Criminal Laws:** 
   1. ***Perez v. US*** 🡪 outer limits of commerce clause for crime
      1. Facts: Loan shark case, Perez lent money to butcher and threatened violence when debt went unpaid, challenged constitutionality of Consumer Credit Protection Act which prohibited loan sharking
      2. Issue: Is Congress’s enactment of CCPA valid use of Commerce Clause power?
      3. Holding: yes, loan shark money funds a national, interstate system of organized crime, Congress had a rational basis to believe that the conduct they were seeking to prohibit had an effect on interstate commerce.
9. Revival of Internal Limitations on Commerce Power – Rehnquist
   1. For 60 years prior to Lopez, court *did not hold a single congressional act as violating the commerce clause* – substantial effects test
   2. ***US v. Lopez*** (Rehnquist)
      1. Gun Free Zone Act of 1990- unlawful for an individual to possess firearm in school zone, Perez carried loaded handgun into hs and was arrested and charged with firearm possession
      2. Holding: The power of Congress to regulate activities extends only to those activities that substantially affect interstate commerce. The Act neither regulates commercial activity, nor contains a requirement that the possession be connected in any way to interstate commerce.
      3. Rehnquist: majority: wasn’t really a commerce act, it was a criminal statute, three categories of activities that Congress may regulate under its commerce power
         1. **Use of channels of interstate commerce**
         2. **Regulate and protect instrumentalities of interstate commerce** even if threat comes from intrastate activities 🡪 Shreveport (includes people or things that travel or operate in the channels of interstate commerce) – instrumentalities: things or buildings that operate in and promote the flow of people and goods through the channels of interstate commerce
         3. **Intrastate has “substantial effect” on interstate commerce**
            1. Congress may rely on aggregate interstate commerce only if the regulated activity is either an economic enterprise or essential to the regulation of a larger economic activity
            2. Can use only if the regulated activity is either commercial or essential to the regulation of a larger economic activity
      4. Court says “if you can regulate this and use aggregation and economic effect, then everything has an economic effect and Congress can regulate anything, that can’t be right..” Therefore strike down GFSZA 🡪 congress finally went too far
10. Commerce Clause after Lopez:
    1. ***United States v. Morrison***: declared unconstitutional the civil damages provision of the Violence against Women Act which created a federal cause of action for victims of gender motivated violence
       1. Looked to Lopez for proper framework – activity must be some sort of economic question, court rejects causal chain of effects argument as being overly broad
    2. ***Gonzalez v. Raich***: Stevens – aggregate test revised
       1. Facts: application of federal laws to state authorized use of home grown marijuana for medicinal purposes in CA
          1. State Act: Prop 215 exempts from criminal prosecution physicians, patients, caregivers who grow marijuana for medicinal purposes w doctor recommendation
          2. Federal Act (Controlled Substance Act) prevents obtaining marijuana for medicinal purposes
       2. Holding: CSA is constitutional use of commerce clause, 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
       3. As in Wickard, Congress has a rational basis for believing home-consumed marijuana outside federal regulations will affect national market conditions (undercut interstate activity)
11. 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
12. ***NFIB v. Sebelius*** *­–* Commerce clause does not support the individual mandate – see tax and spending section
    1. Issues:
       1. Whether, Congressional law requiring all citizens to obtain health insurance or pay a penalty is justified under the commerce clause
    2. Holding:
       1. The Act is not justified under the commerce clause.  The court has never permitted congress to use its power to regulate interstate commerce so as to mandate the purchase of a particular product.  He noted that in order for congress to “regulate” interstate commerce, there must be something to regulate.  The Act creates commerce, essentially, by regulating inactivity into activity; it summons or creates commerce.

**IV. Commandeering State Executive Branch – 10th Amendment as External Constraint on Federal Commerce Power**

1. **10th Amendment: federalism**
   1. ***National League of Cities v. Usery*** 
      1. National League of Cities (Appellants), brought suit challenging the constitutionality of the 1974 amendments to the Fair Labor Standards Act (the Act), specifically the requirement that state governments pay their employees the new minimum wage and overtime.
      2. Holding: The Tenth Amendment of the United States Constitution (Constitution) acts to preserve the States’ sovereign authority and limit the Congress’ power to compel State actions. Congress could not impose minimum wage requirements on states
      3. Determined whether certain state employers represented “traditional” state functions not bound by FLSA or non-traditional functions operating outside of state’s sovereign authority
   2. ***Garcia v San Antonio Metropolitan Transit Authority***– overturned Usery
      1. Facts: Garcia brought suit against SA Metro saying its function was a non-traditional function and was therefore bound by FLSA
      2. Holding: division between Congressional regulatory power under the commerce clause and state sovereignty is defined by political action, not judicial review
      3. **Congress may regulate state employees under general statutes that cover both private and public employees**
      4. Court finds that determination of traditional/non-traditional state functions is wrong standard and overturns National League of Cities
      5. The Supreme Court removes the standard by overturning National League of Cities and leaving any decisions regarding Congressional control of state actions to the political process.
   3. ***Coyle v. Oklahoma***
      1. Holding: Supreme Court held that preventing the state of Oklahoma the right to locate its own seat of government deprived it of powers which all other states of the Union enjoyed, and thus violated the traditional constitutional principle that all new states be admitted "on an equal footing with the original states"
2. Court has developed several external restraints on commerce power as rooted in two textual sources
   1. 10th amendment: powers not delegated to the US by the constitution, nor prohibited by it to the States are reserved to the states respectively, or to the people”
   2. 11th amendment: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (enacted to overrule Chisholm v Georgia)
3. **Commandeering**
   1. ***New York v. United States***
      1. Facts: A federal statute required states to either provide for radioactive waste disposal or take title to waste made within the state’s borders. New York claims the statute is an impermissible violation of state sovereignty.
      2. Holding: 10th Amendment is violated when Congress directs states to regulate in a particular field and in a particular way. The Constitution does not authorize Congress to commandeer the state legislative process by compelling states to enact and enforce a federal regulatory program.
      3. The take title provision is Congressional coercion.
   2. ***Printz v. US***(Scalia)
      1. 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.
      2. Issue: Does anti-commandeering extend to federal laws directed at state or local executive officers?
      3. Holding: The federal government may not compel the states to enact or administer a federal regulatory program.
      4. Constitution established a system of dual sovereignty, in which states and federal government exercise concurrent authority. If the federal government were able to impress the states into service, its power would be enhanced greatly.
      5. States cannot be forced to absorb the financial burden of implementation of federal government regulations. Nor can states be put in a position to be blamed for the failure of federal regulations.
   3. ***Reno v. Condon***
      1. Facts: Challenge to constitutionality of DPPA which established penalties for disclosure or resale of personal information contained in state motor vehicle records
      2. Holding: The Tenth Amendment does not prevent the Federal Government from regulating the States as individual entities if it does not ask the States to enforce a federal program.
      3. **Congress may neither commandeer state legislatures into making law, nor commandeer state executive or law enforcement officials into enforcing or implementing federal law**
      4. **Federal law commandeers only if it directs either the state or other state officials to exercise their sovereignty power over private actors**
      5. DPPA only restricts state government action, it cannot be said to commandeer state government in violation of the Tenth Amendment.
   4. ***South Carolina v. Baker***
      1. Issue: Did the TEFRA violate the Tenth Amendment and intergovernmental tax immunity?
      2. Holding: The Act is nondiscriminatory because the regulations are imposed on the federal government as well as the state governments.
      3. Owners of state bonds have no constitutional authority to exempt taxes on the earned income.
4. States as objectives of federal regulations 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 addresses the authority to regulate states’ own conduct under general laws
5. **11th Amendment – sovereign immunity**
   1. Prohibits suits in federal courts against state governments in law, equity, or admiralty, by a state’s own citizens, by citizens of another state, or foreign citizens; also bars suit against state governments in state court without states consent
   2. Very few exceptions (ex parte young – you can sue state officials related to unconstitutional law)
   3. ***Hans v. Louisiana***:
      1. Facts: P was a citizen of Louisiana and owned bonds issued by the state, was concerned that recent change to state constitution would render bonds invalid, filed suit asserting the state was impairing obligations of a contract
      2. Holding: The amendment prohibits a citizen of a U.S. state to sue their own state in federal court. Forbidden by Article I, §10
   4. ***Seminole Tribe of Florida v FL*** – reaffirmed *Hans*
      1. Facts: Petitioners brought suit under the Indian Gaming Regulatory Act, which authorizes suits against state governments to enforce good faith negotiations with tribes attempting to allow gambling on reservations.
      2. Congress made clear in the Indian Gaming Regulatory Act that it intended to abrogate States’ sovereign immunity. However, it lacks the ability to do so under its Article I powers.
      3. Section 5 of the Fourteenth Amendment is the only authority Congress has to authorize a private suit against a state.
      4. Holding: The Indian Commerce Clause does not allow Congress to abrogate state sovereign immunity. Indian tribes cannot sue state governments in federal court without their consent
   5. ***Ex Parte Young***
      1. Facts: Minnesota passed law limiting what railroads could charge in state and established penalties for violators, shareholders of Railway company filed suit
      2. Holding: Plaintiffs can sue in federal court against officials acting on behalf of states of the union despite the State’s sovereign immunity, when the State acted unconstitutionally (can only seek injunctive relief)
   6. ***Fitzpatrick v. Bitzer***
      1. Facts: In 1972, Congress amended Title VII of the Civil Rights Act of 1964, authorizing private suits for monetary damages. In doing so, Congress cited its authority under Section: 5 of the Fourteenth Amendment
      2. Holding: Congress may authorize private suits against states under Section: 5 of the Fourteenth Amendment that are impermissible in other contexts.
      3. § 5 of the 14th Amendment allows Congress to exercise authority that infringes on areas otherwise relegated to other entities under the Constitution. Because of the Section: 5 grant of this authority, the Supreme Court allows Congress to abrogate sovereign immunity
6. Extending State Sovereign Immunity from federal to state courts:
   1. ***Alden v. Maine:***
      1. Facts: suit filed in Maine state court by state probation officers seeking damages for state’s failure to pay overtime compensation required by Fair Labor Standards Act
      2. Holding: state sovereign immunity prevents a non-consenting state from being sued in state court for violations of federal law
      3. Congress cannot abrogate the States’ sovereign immunity in federal court otherwise the National government would wield greater power in state courts than its own judicial instrumentalities
7. Extending State Sovereign Immunity from federal to state courts:
   1. Rule: Congress lacked power to abrogate state sovereign immunity insofar as antidiscrimination laws were enacted under the commerce power
   2. ***Kimel v. Florida Board of Regents:*** court held the states immune from suits under the Age Discrimination in Employment Act of 1967
   3. ***Board of Trustees of Univ. Alabama v. Garrett:*** court held the states immune from suits under the Americans with disabilities act
8. Extending State Immunity to Federal Agency Proceedings
   1. “Dual sovereignty is a defining feature of our Nation’s constitutional blueprint. States, upon ratification of the constitution, did not consent to become mere appendages of federal government”
   2. ***Federal Maritime Commission v. S. Carolina Ports Authority***
      1. Facts: case involved a cruise ship company’s admin complaint against SC port authority alleging the state authority violated the federal shipping act by disallowing berths in the state’s ports for gambling vessels
      2. Court extended reach of state sovereign immunity from judicial proceedings to adjudications within federal administrative agencies
      3. Holding: state sovereign immunity bars the Federal Maritime Commission from adjudicating a private party’s complaint against a non-consenting state, states cannot be named as defendants in federal administrative agency proceedings
9. State Sovereign Immunity and Article I Bankruptcy Power
   1. ***Central Virginia Community College v. Katz***:
      1. Holding: Bankruptcy Clause of constitution abrogates state sovereign immunity, court used Article I power to authorize individuals to sue states
         1. “Congress shall have the power to establish uniform laws on the subject of bankruptcies throughout the United States”

**V. National Taxing and Spending Powers**

1. Article 1 §8: “Congress shall have 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 U.S.”
2. Issue: to what extent has Congress used taxing powers to regulate local issues?
3. **Taxing**
   1. ***Child Labor Tax Case (Bailey v Drexel Furniture)***
      1. Facts: Child Labor Tax Law imposes an excise tax of 10 percent on the net profits of a company who employed children, Dexel was a furniture manufacturing company in NC 🡪 effort to regulate child labor through commerce power
      2. Issue: does the tax regulate incidentally or is there regulation via the tax as a penalty?
      3. Holding: Congress cannot use their power to tax in order to regulate.
      4. Reasoning: Invalid exercise of taxing power. To grant this would be to permit Congress to regulate via the “tax” – tax actually intended to destroy subject and breaks down constitutional limits
      5. Tax v. Penalty: tax imposed to collect revenue with incidental property of discouraging an act by making it onerous (incidental)
      6. Although taxes can have a “incidental” regulatory effect, a tax is unconstitutional when *“in the extension of the penalizing features of the tax, it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment”*
      7. **Drexel factors**: tax unconstitutional if it imposes an exceedingly heavy burden; scienter/ill will requirement; tax enforced by department of labor, an agency in charge of punishing for violations of labor law
   2. ***U.S. v Kahiger***
      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 the incidental consequence of deterring behavior.
      3. Federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed nor is the tax invalid because the revenue is negligible
4. Restrictions on taxation:
   1. Direct tax without apportionment – real estate tax
   2. Racially discriminatory tax
   3. Taxes on alcohol -21st amendment
   4. ***NFIB v. Sebelius***
      1. Individual mandate cannot be upheld under the commerce clause but it can be upheld as within Congress’ enumerated power to lay and collect taxes
      2. Holding: Chief J. Roberts: the tax isn’t a heavy burden, scienter requirement (no ill will), exaction is only on violators, if a penalty, it wasn’t meant to punish
      3. Look at **Drexel factors**: if tax imposes an exceedingly heavy burden (no in this case); scienter/ill will requirement (no in this case); tax enforced by department of labor, an agency in charge of punishing for violations of labor law (no in this case, IRS was collecting tax)
5. **Spending**
   1. ***United States v. Butler***
      1. Facts: dispute over Agricultural Adjustment Act which authorized the setting of limits on the production of certain crops and the imposition of taxes on crops produced in excess of these limits.
      2. Holding: Act was unconstitutional on grounds that it violated 10th amendment by regulating production; invaded rights reserved to the states
      3. Tax was levied to discourage production of crops beyond the limits set by the Act, this is beyond the powers delegated to the Federal Government, regulation of agriculture is delegated to the state (absent a nexus with interstate commerce)
      4. Rule: Congress may tax and apportion for the general welfare, but Congress may not use taxation as a means to exercise powers retained by the States.
      5. Consider what the scope of “general welfare” is
      6. Took Hamilton’s position on taxing power, “Congress could tax and spend for any purpose that is believed served the general welfare, so long as Congress did not violate another constitutional provision”
6. ***Steward Machine Co v. Davis*** 
   1. Facts: The federal unemployment system provided a scheme whereby employers paid a tax to the federal government, but they could deduct the same tax if they made a contribution to a state employment fund.
   2. Holding: The tax system at issue is merely designed to assist the federal and state agencies to work together. Neither the States nor the citizens are injured. The system does not require the States to surrender powers essential to their quasi-sovereign status.  
      It is necessary to distinguish between coercion and temptation. Every tax is to some degree coercive. Every rebate from taxes conditioned upon conduct is to some extent a temptation. In the instant case, the tax system did not reach coercion.
   3. Rule: For a tax and credit scheme to be unconstitutional as against the Fifth Amendment or of principles of federalism, there must be a showing that the tax and credit used together are coercive and/or that they impair the autonomy of the States
7. ***South Dakota v. Dole***
   1. Facts: problem with underage drinking causing highway collisions and deaths, Congress cant make states change drinking age because of 21st amendment, Congress tries to tell states if they don’t change drinking age they will cut off their federal highway funding by 5%
   2. Holding: this was ok because it enhances the “general welfare”, government gave clear notice that states were aware of so it was not coercive, condition has to be related to the spending, in this case it was close enough
   3. **4 part test for taxation power:**
      1. Congress has a purpose to serve the general welfare
      2. Clear statement of purpose funding condition
      3. Condition must be reasonably related to purpose for which funds were appropriated
      4. Other constitutional provisions provide an independent bar to the conditional grant of federal funds
8. ***NFIB v. Sebelius***– Medicaid issue
   1. Court ruled ACA finally went too far when it came to Medicaid expenses
   2. Act tried to say that the state had to expand Medicaid and if it doesn’t then they will cut off every dollar towards Medicaid that the federal government would provide them towards the program 🡪 “gun to the head”, no state could refuse that, much too coercive, Medicaid is the largest item in the federal funding/state budget
   3. 5% of federal highway funding v. 100% of Medicaid, need to find a middle ground
9. Notes:
   1. Is conditional spending *coercive?* Balance Dole v. Sebelius (only data points)
   2. Whenever there is an issue on spending power, look to relatedness – majority takes broad view of this
   3. Factor 4 of Drexel test: look for any violations of DP, equal protection, ect
   4. Spending power and federalism
      1. Congress is incentivized to run around commerce restraints

**VI. Interstates Privileges and Immunities Clause Article IV §2: \*\***If P&I issue, almost always also a DCC issue\*\*

1. “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, states cannot give favorable treatment to in state or local residents (general rule, some exceptions)
3. There is a mutually reinforcing relationship between the P&I clause and the commerce clause
4. Dormant v. P&I Article IV §2
   1. For P&I to apply, must be a “fundamental right” (ie. employment/travel)
   2. Corporations enjoy no protection under PI
   3. Congress may authorize, through exercise of commerce power, state practices that would otherwise be impermissible under the dormant commerce clause.
   4. P&I *cannot* be waived
   5. DCC extends to all commercial activities, not just fundamental rights
5. **Dormant Commerce Clause – does the state law discriminate between in-state and out of state commerce?**
   1. Intended to prevent state laws that interfere with interstate commerce
   2. Limitations can be express or implied
   3. Constitution grants Congress the owner to regulate interstate commerce, Congressional silence is not necessarily Congressional approval
   4. Courts have recognized legitimacy of certain state actions taken pursuant to a state’s police power to protect its citizens and its environment
   5. ***Cooley v. Board of Wardens****:*
      1. Involved PA law that required all ships enter or leaving port of PA to use a local pilot or pay a fine
      2. Whether a state law violates the dormant commerce clause depends on the nature of the activity being regulated
      3. Exclusive/concurrent
         1. Exclusive zone: Congress possess exclusive power to regulate
         2. Concurrent zone: states possess a concurrent power to regulate and may do so as long as the federal commerce power remains dormant
      4. Direct/indirect burden – eventually abandoned this test
   6. Current test: 3 types of state laws that potentially run afoul of the dormant commerce clause
      1. Laws whose purpose is to regulate interstate commerce
      2. Laws that discriminate against interstate commerce
      3. Laws that do not discriminate against interstate commerce but burden interstate commerce
   7. 5 inquiries to test whether a state law violates principles of DCC
      1. **Is the law rationally related to a legitimate state purpose**
         1. **Healthy, safety, and morals and welfare of public**
      2. **Does the law have 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 its purpose?**
      4. **Are the burdens the law places on interstate or foreign commerce clearly excessive in relation to the benefits which the law affords the state?**
      5. **Does the law represent the least burdensome means for the state to achieve its goal?**
   8. **Economic protectionism**: Commerce clause bars a state from seeking to benefit its people by shielding them from the economic consequences of free trade among the states, laws will be deemed economic protectionist if it was enacted because of the fact that it will shield locals from the effects of out-of-state competition
      1. Ex. Banning importation of baitfish from other states for environmental reasons – therefore it was ok
      2. ***Maine v. Taylor*** (baitfish)
         1. Facts: Challenge to a law in Maine, enacted to protect the State’s fisheries from parasites and non-native species, prohibited the importation of live baitfish
         2. Holding: State may regulate matters of legitimate public concern even though interstate commerce may be effected. Where a law is discriminatory on its face, the state must show that the law both serves a legitimate local purpose and that the purpose cannot be achieve by available nondiscriminatory means
      3. ***Baldwin*** (Milk case):
         1. Facts: The State of New York passed the Milk Control Act. This law states that milk can not be sold to a New York farmer at a higher price than is sold to Vermont farmers
         2. Holding: While states are allowed to legislate under its police power for the health safety and welfare of its citizens, this court will not permit states to carve an exception that allows them to discriminate against other states. The police power can not be used to squash competition.
   9. **Extraterritorial regulatory effects**: when a law prohibits or mandates certain out-of-state behavior such that failure to comply will result in the imposition of legal sanctions, requirements that make state law invalid as a forbidden extraterritorial regulation
      1. ***Brown-Forman Distiller Corp v. NY State Liquor Authority***
         1. State law must have effect of prohibiting, mandating, or controlling certain behavior, through threat of legal sanctions rather then influence
         2. Legal impact of the law must fall on a transaction that occurs wholly outside the state, as opposed to a transaction that is party related to the state
   10. **State Regulation of Transportation**: states generally regulate transportation in interstate commerce in furtherance of public safety, court has focused on rational relationship between state objective and regulation
       1. Applies balancing test 🡪 weight the burden of regulation on interstate commerce and the putative state benefit, Court usually shows deference to legislative findings
   11. **Discrimination and Protectionism**: generally a state may not enact laws which on their face or by effect discriminate against interstate commerce, ie. provide an economic advantage to intrastate commerce while burdening interstate commerce
       1. State laws enacted pursuant to a state’s police powers that impose equal burdens on interstate and intrastate commerce are usually upheld as nondiscriminatory, court will not allow a state to isolate itself economically from commercial interplay among states
   12. **Incoming Commerce**:
       1. Protection of economy: state may not bar importation of certain goods into its borders in order to protect its in-state industries from out-of-state competition, protectionist regulations are per se invalid
       2. Health, safety, and environmental regulations: if the state is pursuing legitimate aims to protect the health and safety of its citizens and its environment, court will generally *balance the putative benefits to the state against the burdens to interstate commerce and determine if state aims could be achieved through less burdensome means*
   13. **Outgoing Commerce**: Protection of Natural Resources
       1. State regulation that restricts use of its natural resources to its residents or that bars their movement in interstate commerce warrants strict review by courts
       2. Court usually upholds such discriminatory regulations only if a compelling state interest exists and less discriminatory measure is unavailable
   14. **Market Participant and Commerce Clause Restrictions**
       1. A state may contract on any terms it wishes when participating within a market, even if it discriminates against out of state residents without violating DCC
       2. When a state acts as a market participant and not as a regulator, dormant Commerce Clause analysis is usually not applied
       3. State, as a market participant may discriminate against interstate commerce in favor of its residents, however a state as a market participant in one market may not exert its influence to affect the operation of another market in which it is not a participant
       4. Privileges and Immunities Clause (Art. IV §2, cl. 1) 🡪 a state acting as a market participant which discriminates against out of state individuals or corporations might be vulnerable to a challenge based on this clause even though the state’s action does not violate the dormant commerce clause
       5. ***South Central Timber v. Wunnicke*** – exception to market participant
          1. Court declared unconstitutional an Alaska law that required purchasers of state-owned timber have the timber processed in Alaska before shipping it out of state
          2. Holding: state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny
          3. Court defines “market” narrowly to keep doctrine from swallowing up the rule that states may not impose substantial burdens on interstate commerce
   15. ***Complete Auto Transit v. Brady***
       1. Facts: The Mississippi State Tax Commission levied a tax upon Complete Auto "for the privilege of engaging or continuing in business or doing business"in the state of Mississippi. The Court refers to the tax as a "sales tax”; however, it was a "transaction privilege" or gross receipts tax based on Complete Auto's gross receipts.
       2. **Holding: Tax was constitutional, established four prong test for constitutionality of tax under Commerce Clause:**
          1. Substantial nexus: connection between state and potential taxpayer clear enough to impose tax
          2. Nondiscrimination: interstate and intrastate taxes should not favor one over the other
          3. Fair apportionment: taxation of only the apportionment activity that transpires within the taxing jurisdiction
          4. Fair relationship to services provided by the state: company enjoys services such as police protection while in state
   16. ***Bradley v. Public Utilities Commission***
   17. ***Bibb v. Navajo Freight Lines***
   18. ***Kassel v. Consolidated Freightways Corp***
6. **Privileges & Immunities Clause**
   1. Analysis:
      1. Is there discrimination against out of state residents?
      2. Does law at issue *burden constitutionally protected privileges and immunities*
      3. Is there a “tiering of rights”? With some receiving more protection than others
      4. “Fundamental is seen narrowly, what constitutes fundamental?
   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. Court declared unconstitutional a city’s ordinance that required that 40% of the employees on city-funded construction projects be residents of city
      3. Found that law violated P&I clause and that market participant exception does not exist under P&I
      4. **Holding:** The Privileges and Immunities Clause prevents states (and cities in this case) from discriminating against non-residents if **two elements are met**. First, the discrimination burdens a “fundamental” privilege. Here the fundamental privilege was employment. Second, there is no “substantial reason” for the discriminating treatment.
   3. *Primary purpose of P&I clause is to ensure a citizen of state A enjoys the same privileges as a citizen of State B*
7. **Application of P&I in discrimination of out-of-state residents requires 2 step inquiry**
   1. Does the ordinance burden a P&I protected by the clause? Applies only with respect to distinctions that prohibit formation, purpose, development of a single union
   2. Are out of state resident’s interest of private employment fundamental to the promotion of interstate harmony?
      1. P&I works to ensure interstate harmony, it is discrimination against out-of-state residents on matters of fundamental concern which triggers P&I, not regulation affecting commerce
   3. Is there a substantial reason for discrimination? And does the discrimination bear a close relationship to the reasons
      1. Every inquiry must be conducted with due regard for principle that the states should have substantial leeway in analyzing local evils and prescribing cures
8. Scope and Limits of Interstate P&I
   1. Camden recognizes private employment as fundamental privilege but does not address public employment
   2. ***Supreme Court of NH v. Piper***
      1. Facts: state rule limited bar admission to in-state residents
      2. Issue: does state-licensed employment count as a privilege?
      3. Holding: law violated P&I clause, state-license involves a privilege because 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
         1. Reason: nonresident members are less likely to become familiar with local laws and do pro bono work
9. Justifying deferential treatment
   1. P&I test requires intermediate rather than strict scrutiny (substantial reason)
   2. Dormant clause requires compelling interest
10. **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 (preempt)
    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. **Federal Law Preempts State Law when:**
       1. **Federal law expressly preempts state law**
       2. **State law conflicts with the terms or purpose of federal law**
       3. **Federal law so completely occupies a field of regulation that it leaves no room for state regulation**
    5. ***Crosby v. National Trade Council***
       1. Facts: Constitutional challenge to Massachusetts Burma Law which prohibited MA governmental agencies from buying goods and services from companies conducting business w Burma
       2. Holding: Congress’ passage of a federal law imposing mandatory and conditional sanctions on Burma preempted the Massachusetts law, since Massachusetts’s more stringent and inflexible provisions presented an obstacle to the accomplishment of Congress’s full objectives under the federal act.
    6. ***Prudential Insurance v. Benjamin***
       1. Facts: NJ insurance company objected to the continued collection of a long-standing 3% tax on premiums received from all business done in South Carolina, no similar tax was required of South Carolina corporations
       2. McCarran Act: in response to state’s discrimination on insurance, Congress enacted this act which limited applicability of antitrust laws to the insurance business and sought to assure continued state authority over insurance
       3. Holding: Court assumed that the tax was “discriminatory” and invalid under the commerce clause, but the Court held that the McCarran Act validated the tax.

**VII. Pre-Emption** – Congress may preempt state power to regulate in 4 ways

1. Express Preemption: when it’s express, only issue is if whether state statute falls within preempted area
2. Field Preemption: court requires clear showing that Congress meant to occupy a field and displace states from regulating on that matter
   1. Look to purpose of Congress
   2. Evidence of Congress manifest of intent to preempt is:
      1. Scheme of federal regulation is so extensive 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 federal interest is so dominant that federal system can be assumed to preclude enforcement of state laws on the same subject
      3. ***Rice v. Santa Fe Elevator Co*** *–* historic police powers of states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress
   3. Criteria to help find if there is a field preemption
      1. Is it an area where the federal government has traditionally played a role?
      2. Has Congress expressed intent in text of law or legislative history to have fed law be exclusive in that area?
      3. Would allowing state & local regulations in the area risk interfering with comprehensive federal regulatory efforts?

* + 1. Is there an important traditional state/local interest served by law?

1. Conflict Preemption: if federal gov enacts a complete scheme of regulation states cannot conflict or interfere with federal law or enforce additional or auxiliary regulations
   1. Consider if state law “conflicts with, is contrary to, occupies the field, ect” 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. Just because federal and state law is different doesn’t mean there is an impermissible conflict
   3. ***Hines v Davidowitz****:* court barred enforcement of PA Alien Registration Act of 1939 because of the federal Alien Registration Act of 1940
   4. ***Florida Lime & Avocado Growers v Paul***: issue where compliance with both federal and state regulations is a physical impossibility
      1. Court says fed/state are mutually exclusive if federal law is viewed as setting exclusive standard but not if it just sets a minimum
      2. In this case fed is just a minimum, states have traditionally reg marketing of food products
      3. Holding: When a state and federal law exist with different standards, as long as they can coexist, the Supreme Court of the United States (Supreme Court) will not decide which one preempts the other one.
   5. ***Wyeth v. Levine***: court upheld against implied conflict preemption challenge a state-law failure-to-warn judgment where an anti-nausea drug bearing a label approved by FDA was administered in a way that caused medical problems
   6. Holding: Congress did not expressly intend for the FDCA to preempt all state common law tort claims, and with respect to prescription drugs, state tort law claims offer an additional important layer of consumer protection which complements, and does not obstruct, FDA regulation.
2. Preemption if state law interferes with Federal Objective
3. ***PG& Elec. Co v. State Energy Resources Conservation & Development Comm’n*** 
   * 1. Facts: CA statute imposed moratorium on issuance of certification of nuclear energy plants until state energy resource conservation fund demonstrated tech or means for disposal of nuclear waste
     2. Issue: is the provision pre-empted by the Atomic Energy Act of 1954?
     3. 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. Holding: State law is preempted if it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. However, the Supreme Court of the United States (Supreme Court) *will not interfere where there is a permissible and good basis for the state law.*
   1. Ultimately doctrines are about allocating government authority between federal and state governments

**VIII. Separation of Powers:** Art I. (Legislative), II. (Executive), III. (Judiciary)

* **For exam: when evaluating the constitutionality of executive action, where does it fit within the 3 categories of J. Jackson?**
  + **Congress authorized action? – Pres. Maximum**
  + **Congress prohibited the action – Pres. Lowest ebb**
  + **“Twilight znoe”: Dames, Moore – is congressional silence tacit approval? Silence can sometimes be acquiescence, try to figure out if it is more like prohibition or approval, silence in the face of repeated action is more like approval**

1. **Executive Assertions of Power:**
2. ***Youngstown v. Sawyer***(Steel Seizure Case) – leading case addressing scope of presidential power
   1. Facts: faced with an imminent steel strike during Korean war, President ordered gov seizure of steel companies to prevent strike
   2. Court held act unconstitutional 🡪 President didn’t have constitutional statutory authority to seize
   3. Holding: President as leader of executive is bound to enforce laws within limits expressly granted to him by Constitution, he cannot usurp lawmaking powers of Congress by an assertion of an unspecified aggregation of his specified powers
   4. Jackson concurrence lays out 3 categories of presidential power:
      1. President is at maximum when he acts pursuant to express/implied authorization of Congress (denies existence of any real inherent presidential power)
         1. Acts in this category are presumptively valid
      2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone in which he and Congress may have concurrent authority. Test depends on the imperatives of events
      3. When the President takes measures incompatible with the expressed or implied will of Congress, the authority of the President is at its lowest.
         1. Presidential action will only be allowed if Congress is acting unconstitutionally
         2. Acts are subject to closest scrutiny here (J. Jackson- SS case falls in this category)
         3. “Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure”
   5. J. Douglas approach – interstitial executive power, president can act without express statutory authority as long as he is not usurping powers of another branch of government
   6. Presidents act falls into 3rd category because congressional silence is tantamount to a refusal to grant the President power to seize
   7. President is commander in chief of Army and Navy but not country
3. **Express/Impled Authorization from Congress**
4. ***Dames and Moore v. Regan***
   1. Facts: 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 agreement to settle all claims bw two countries in arbitration
   2. Holding: President does not have plenary power to settle claims against foreign gov through executive 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
5. **Executive discretion in times of war or terrorism**
   1. President, Congress and War Powers
      1. Article 1 §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. War Powers Act Resolution of 1973 came about 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 with Congress before introducing US into hostilities and should submit report within 48 hours to Speaker
6. Emergency Constitutionalism
   1. Constitution contains 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 Grant 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
   3. Executive Detention and Trial of “Enemy Combatants”
   4. ***Ex parte Merryman*** *­*– Pres. Lincoln doesn’t have authority to suspend writ of HC on his own
   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. Holding: 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. Lawful v. Unlawful combatants:
      1. Lawful: subject to capture and detention, you can detain “spies” during the war so they don’t go back and fight again
      2. Unlawful: subject to capture and detention but also subject to trial and punishment by military tribunals for acts which render their belligerency unlawful
   7. ***Ex Parte Quirin*** – court upheld use of military tribunals
      1. Facts: 8 Nazi saboteurs are tried in military tribunals and denied habeas corpus
      2. Holding: 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
      3. Congress has provided that military tribunals shall have jurisdiction in appropriate cases – court makes distinction between treatment of unlawful combatants and lawful combatants
      4. Detention and trial of foreign espionage & sabotage agents w/in the US during wartime by a military commission is constitutional here.
      5. Ct says law of war draws distinction b/w armed forces & peaceful populations of belligerent nations & also b/w lawful & unlawful combatants
      6. Lawful combatants are subject to capture & detention; Unlawful are subject to that and trial & punishment by military tribunals; 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.
   8. Non-Detention Act of 1948: no citizen shall be imprisoned or otherwise detained by the US except pursuant to Act of Congress, need a federal crime defined before you start detaining people
   9. Geneva Convention of 1949: after WW2, tries to further draw distinction between lawful and unlawful combatants, lists acts that are prohibited, carrying out of sentences and executions without previous judgments pronounced by regularly constituted court
7. Executive Detention and Trial of Enemy Combatants after 9/11
   1. Congress passes AUMF – joint resolution for authorization of military force, grants authority to use all “necessary and appropriate force” against those whom he determined planned, authorized, committed, or aided” the 9/11 attacks
   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*** - federal habeas corpus statute granted federal courts jurisdiction to hear claims of non-citizen detainees held at Guantánamo.
      1. Stevens/Kennedy - Treat Guantanamo as US bc we hold it with such control
      2. Holding: those being detained in Guantanamo Bay have right to have habeas corpus petition reviewed in federal court, Guantanamo is functionally under control of US
      3. Habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory in which US exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty’
   4. ***Hamdi v Rumsfeld –*** (1)AUMF was sufficient congressional authority to meet requirements of NDA and permit detaining American citizen apprehended in foreign country as enemy combatant; (2) Hamdi must be accorded due process
      1. Facts: Hamdi is a US citizen apprehended in Afghanistan after training w al Qaeda, brought to US and held as enemy combatant without being charged with any real crime, wants civilian court to try him not a military tribunal, disputes his enemy combatant “status”
      2. Issue #1: Does the federal government have the authority to hold an American citizen apprehended in a foreign country as an enemy combatant? Issue #2: what process must be accorded to him?
      3. Holding: An American citizen apprehended in a foreign country and held as an enemy combatant must be accorded due process and meaningful opportunity to contest the factual basis for classification/detention before a neutral decision maker
         1. Non-Detention Act (NDA) states no citizen shall be imprisoned or otherwise detained by US except pursuant to an act of congress
         2. Authorization for Use of Military Force (AUMF) grants executive the authority to detain citizens who qualify as enemy combatants 🡪 this was sufficient congressional authorization to meet the NDA and permit detaining American citizen apprehended in foreign country as an enemy combatant
         3. Due process is required and the procedures required are to be determined by applying **3-part test in Matthews v. Eldridge**
         4. At the very least, Hamdi was entitled to notice of charges, right to respond, and right to be represented by attorney
      4. Detention of individuals who fought against the US as part of Taliban is “necessary and appropriate”
      5. Detainee treatment act allowed the creation of Combat Status Review Tribunal to make classifications
      6. Indefinite detention is not authorized, detention can only last during the duration of the conflict
      7. Even in cases where detention is authorized, writ of habeas corpus remains unless there is a suspension or enemy combatant status is undisputed
      8. Case requires balancing of
         1. Respect for separation of powers and the fundamental importance for the nation to protect itself in wartime
         2. Critical and deep-seated individual constitutional interests at stake
   5. ***Matthews v. Eldridge*:**
      * 1. **Importance of interest to the individual**
        2. **Ability of additional procedures to reduce risk of erroneous deprivation**
        3. **Government’s interests**
           1. During times of war, it is most important to preserve commitment at home to principles for which we fight abroad
      1. *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
   6. ***Padilla v. Rumsfeld***
      1. Facts: Padilla, an American citizen apprehended at Chicago O’Hare for planning to detonate a bomb, was never indicted or tried for crime but was held as enemy combatant
      2. Was being held in South Carolina, filed HC petition in NY, court said no jurisdiction, needed to file petition where is being detained
      3. \*Subsequently ruled that government had to either criminally charge Padilla or release him
   7. ***Hamdan v. Rumsfeld –*** military tribunals were not authorized by act of Congress and they violated the Uniform Code of Military Justice and Geneva Conventions
      1. Facts: Osama’s driver captured and brought to Guantanamo, claims he isn’t being charged with a real crime and claims:
         1. UCMJ requires military commissions to be similar or identical to real courts but military tribunal doesn’t allow him to be present
         2. Geneva convention requires a “regularly constituted” court, military tribunal has different procedural rules regarding testimony, evidence, presence of defendant therefore it violated GC
      2. Holding: Prisoners of war may not be tried in military commissions that do not afford the rights prescribed in the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions
      3. Detainee Treatment Act (DTA) provided that federal courts could not hear writs of HC by “enemy combatants” 🡪 court ruled this does not apply retroactively to those held prior to its enactment
      4. Majority opinion:
         1. President’s unilateral military tribunal procedure is unauthorized by statute and contrary to international law
         2. President may constitutionally convene military commissions under certain circumstances, nothing in AUMF or DTA expands President’s authority to convene these commissions, AUMF only authorizes president to 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. Part of temporary military government 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

Hamden is charged w conspiracy which it not violation of 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
        3. Trial by commission raises separation of power issues because a single branch is charged with defining and prosecuting without independent review
        4. Under Jackson’s framework in *Youngstown* this falls under category 3 (President’s lowest ebb)
      1. *Congress responded to Hamden with Military Commission Act of 2006:* 
         1. Defines unlawful combatant as a person engaged in hostilities against the US, include 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 provided by DTA, no court shall have J for any other action against US or its agents relating to detention, treatment, ect
  1. ***Boumediene v. Bush*** – procedures laid out in MCA are not adequate substitutes for HC, MCA operates as unconstitutional suspension of HC
     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. Holding: constitutionally guaranteed right of habeas corpus review applies to persons held in Guantanamo and to persons designated as enemy combatants on that territory. If Congress intends to suspend the right, the Court said that an adequate substitute must offer the prisoner a meaningful opportunity to demonstrate he is held pursuant to an erroneous application or interpretation of relevant law
     4. Cannot deny habeas corpus to noncitizens held as enemy combatants
     5. About non-citizen aliens detained in Guantanamo, court holds they have habeas corpus privileges, get into question of whether the MCA process is an adequate substitute, says Congress does not have plenary authority to suspend HC whenever it feels like it, court can second guess their decision
     6. 3 factors relevant in determining reach of SCOTUS
        1. Citizenship and status of 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
     7. MCA is an unconstitutional suspension of the writ bc DTA is not an adequate and effective substitute for habeas corpus

**IX. Congressional Violations of Separation of Powers**

1. **Attempts to Restrain and Enable the Executive**
   1. Non-delegation rule: Congress is forbidden to delegate legislative power
      1. Exception: Congress has traditionally delegated very broadly and in effect have required agencies to legislate by specific subrules, court will permit as long as Congress provides *intelligible principle* to which person authorized to act is directed to conform
   2. ***INS v Chadha***(Burger formalism)
      1. Facts: Chadha got suspension of deportation, Congress looked at it and said they didn’t know why it got suspended and deported him, Chadha said legislative veto was unconstitutional (Chadha wins)
      2. Issue is constitutionality of federal statute authorizing a 1 house veto of Attorney General’s decision to suspend deportation
      3. Court took rigid/textual perspective that for Congress to act in this way would mean that the constitution is too flexible, it has procedures on how things are supposed to work
      4. Holding: Where the House takes actions that have the purpose and effect of altering legal rights, duties, or relations of persons outside of the legislative branch, bicameralism and presentment are required.
      5. Rule- because veto is exercise of legislative power & is thus subject to bicameralism & presentment requirements of constitution, 1 house veto is unconstitutional
         1. Presentment Clause (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
      6. Court calls the veto “essentially legislative in purpose and effect” under the enumerated power of establishing uniform rules of Naturalization, which make it subject to bicameralism and presentment requirement
      7. 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
      8. Importance of this decision: to avoid enlarging exec power, Congress must draft delegations more restrictively
   3. ***Myers v. United States***
      1. Facts: Appointee to the postmaster of the first class in Oregon was forced to resign.
      2. Issue: Whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.
      3. Holding: Tenure of Office Act of 1867, “in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.”
   4. ***Humphrey’s Executor v. US***:
      1. Facts: President FDR wanted to dismiss a member of the Federal Trade Commission – a “quasi-legislative” agency for lack of political support (FDR). FTC employment Act specifically stated that the President could not fire a member for any reason other than “inefficiency, neglect of duty, or malfeasance in office.”  The court found the dismissal was for none other reason that political differences.
      2. Issue: Whether the President’s power to remove employees within the executive branch is absolute, such that he can remove employees within quasi-executive agencies.
      3. Holding: Quasi-agencies exist precisely to maintain either an a-political or politically balanced delivery of services. Therefore, the President cannot fire employees within these agencies without due cause described in the Act.
   5. ***Clinton v. NY*** (Stevens): challenging constitutionality of Line Item Veto Act (Art I, Sec 7).
      1. Line-item allows president to strike certain spending provisions of congressionally enacted bills without vetoing entire bill
      2. Facts: Clinton strikes NY from receiving Medicaid fund for national bill
      3. Issue: does the line item veto act’s cancellation procedures violate the presentment clause of the constitution?
      4. Rule: cancellation provisions authorized by line item veto are unconstitutional
      5. Holding:  If there is a new procedure in which the President will play a different role in determining the final text of what may “become a law,” such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution
      6. There is no provision in the constitution that authorizes the president to enact, to amend, or to repeal statutes
      7. SCOTUS notes the key differences between the Veto Act and standard constitutional procedures – constitutional return takes place before bill becomes law, statutory cancellation occurs after bill becomes law, constitutional return is of entire bill, statutory cancellation is of part of bill, silence on this important issue is equal to express prohibition
   6. 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 depts
   7. ***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 joint resolution of Congress
      2. Holding: assignment of executive powers to an agent of legislative branch violates separation of powers, Congress does not have active role in supervision of officers charged with execution of law
      3. Congress can remove comptroller for “inefficiency, neglect or duty, or malfeasance”
      4. As *Chadha* makes clear, once Congress enacts legislation, its participation ends, it places execution in hands of officer who is subject to Congressional removal
   8. ***Morrison v. Olson***:
      1. Facts: The Ethics in Government Act (the Act) allows for the appointment of an “Independent Counsel” by a special court, upon the recommendation of the Attorney General to investigate and if necessary, prosecute government officials for certain violations of federal criminal laws.
      2. Holding: Permissible under the appointments clause; There’s no separation of powers problem with regard to the Act because the statute (1) appropriately puts the removal power in the hands of the Executive Branch: an independent counsel may only be removed by the Attorney General for good cause and (2) does not impermissibly interfere with the functions of the Executive Branch.
   9. ***Buckley v. Valeo***
      1. Federal law empowered speaker of the house of representatives and president pro tempore of Senate to appoint 4 of 6 members of the FTC
      2. With respect to 4 of the 6 voting members, neither the president, head of any department, or judiciary had voice in their selection
      3. Issue: Were the powers of the Act vesting in the Commission the primary responsibility for conducting civil litigation in the courts constitutional?
      4. Holding: The provisions of the Act which vested in the Commission primary responsibilities for conducting civil litigation in the courts of United States for vindicating public rights violated Article II, Section:2, cl. 2, of the Constitution; Congress cannot delegate power to itself
      5. Rule: Article II, Section 2, cl. 2 of the Constitution Appointment clause provides that only the president or executive can appoint such officials
2. **Congressional War and Treaty Powers, and the Implied Power over Foreign Affairs**
   1. Supremacy of treaties over state law: a valid treaty overrides a state law on matters otherwise w/in state control
   2. Treaties cannot violate the constitution (Reid), can violate 10th amendment (Missouri)
   3. Treaty and Congress’s other powers: Holmes assumes Congress could regulate under treaty powers even on subjects beyond its otherwise enumerated powers
   4. ***Woods v. Cloyd Miller***
      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. Just because war has ceased, doesn’t mean war power has ended if there aren’t still war related issues, standard: rational relationship
      3. Standard: rational relationship
      4. Holding: War power includes power to “remedy the evils which have arisen from the rise and progress” and continues for duration of that emergency, here there is a deficit in housing demobilization of vets and reduction in residential construction
      5. Example of Necessary and Proper clause
      6. Jackson concurrence: does not believe war power can be prolonged as long as the effects, want to limit ruling
   5. ***Missouri v Holland***
      1. Facts: MO attempts to prevent game warden from enforcing Migratory Bird Treaty Act on ground that statute interferes w/ rights reserved to the states under the 10th amendment
         1. Treaty between US and Britain, prohibited killing, capturing, or selling of migratory birds except as permitted by regulations compatible with those terms
      2. Reliance on 10th amendment is in vain, statute and treaty upheld
      3. Holding: A treaty, 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 treaty is valid- there is no dispute about the statute under Article I §8
      4. Article 6: constitution, and laws of the US which shall be made pursuant of all treaties made under US
      5. Treaty does not contravene any prohibitory words in the Constitution and is not forbidden by 10th because subject matter is only transitorily within the state
   6. ***Reid v Covert***
      1. Facts: The case involved Mrs. Covert, who had been convicted by a military tribunal of murdering her husband. Executive agreement was in effect between US and UK which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in UK American servicemen or their dependents.
      2. Case dealt with congressional power under Art. I §8 to provide for military jurisdiction over civilian dependents of American servicemen overseas
      3. Holding:  No agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution.
      4. The Court's core holding of the case is that U.S. Citizen civilians abroad have the right to 5th and 6th amend. constitutional protections.
      5. Distinguishes Missouri case- treaty in that case was not in conflict with a specific provision of the constitution
   7. ***Downes v Bidwell:*** 
      1. Facts: challenge to US law which enacted a duty on imports from the territory of Puerto Rico on ground it violated Art 1 §8
      2. Holding: government was not always bound by every provision of the constitution when it operated outside of the US, language indicates ‘throughout the United States or among the several states’ 🡪 Puerto Rico duty was therefore constitutionally permissible
3. Executive Privileges, Immunities and Congress’s Power of Impeachment
   1. Art. I, §6, cl. 1 specifies no privileges or immunities for President, however, there has become an implied executive privilege and immunities from structure of Constitution and analogies to common law
   2. ***United States v. Nixon***
      1. Facts: special prosecutor in Watergate scandal subpoenaed tape recordings of Pres. Nixon discussing scandal, president claimed executive privilege as basis for refusing to produce tapes
      2. Issue: is President’s Art. II constitutional privilege absolute?
      3. Holding: although a President deserves great deference regarding his Article II constitutional privilege, that privilege is not absolute and must be balanced against other constitutional interest
   3. ***Nixon v. Fitzgerald***:
      1. Facts: cost management expert for Air-Force was fired after he testified to Congress about cost overruns in certain military projects, claimed Nixon fired him for this
      2. Holding: President of the US is shielded by absolute immunity from civil damages for acts done in his official capacity as President
   4. ***Clinton v. Jones***
      1. Facts: The Respondent filed a complaint containing four counts against the President alleging unwanted sexual advances towards her when he was the Governor of Arkansas
      2. Issue: Whether the President can be involved in a lawsuit during his presidency for actions that occurred before the tenure of his presidency and that were not related to official duties of the presidency?
      3. Holding: The Constitution does not automatically grant the President of the United States immunity from civil lawsuits based upon his private conduct unrelated to his official duties as President.
4. **Executive Removal Power**
   1. **General rule**: President has the power to remove executive officials, but Congress may limit the removal power if it is an office where independence from the president would be desirable, Congress cannot completely prohibit removal or give removal power to itself
      1. Is office one in which independence from the president is desirable? (Humphreys v Morrison)
      2. Are Congress’s limits on removal constitutional?
   2. ***Myers v. US***–
      1. Facts: firing of postmaster of Portland in violation of federal law that provided that postmasters could be removed during their four-year terms only “with advice and consent of Senate”
      2. Holding: Power to remove is an incident of the power to appoint
      3. President should select those who were to act for him under his direction in the execution of laws
   3. *Weiner v*. *US –* presidents removal of member of commission with “intrinsic judicial character” function is illegal
   4. ***Morrison v*. *Olsen***
      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 removal of purely executive officer is not constitutional
      3. Standard is whether the removal restriction is of such a nature that would impede the president from performing his constitutional duty
      4. If considering removal of power, ask 2 questions
         1. Is the office one in which independence from president is desirable?
         2. Are Congress’ limits on removal const? Congress can limit removal to “good cause”
   5. See also
      1. ***Humphrey’s Executor***

**X. Bill of Rights and Post-Civil War Amendments “Fundamental” rights and “Incorporation” dispute**

1. Bill of rights (1st 10 amendments) was meant only as restriction on federal powers, and 10th expressly reserves powers not delegated to the US in the states
2. Reconstruction amendments added restrains upon the states, but did not specify that all of the provisions of the bill of rights applied
   1. 14th amendment due process clause was later read to make applicable to criminal proceedings almost all of B of R restrictions, later extended to other provisions, including takings, freedom of speech, right to free exercise of religion
3. ***Barron v. Mayor and City Council of Baltimore*** – bill of rights applies only to fed govt
   1. Baron sues BA claiming city ruined his wharf when construction work diverted the flow of streams and deposited large masses of sand and earth, said it violated takings clause of 5th amendment
   2. Issue: whether provisions in the bill of rights apply to the states?
   3. Holding: No, Article 1 §9 and §10 provide exclusive list of restrictions on state governments, this was not one of them, Bill of rights applies only to the federal govt
   4. Constitution was established for national and not state governments
   5. Amendments restrain only the power of the federal government and are not applicable to the states
   6. Amendment contained no expression indicating intent to apply to the states where there is a conflict between state and federal constitution, court has no jurisdiction
4. ***Dred Scott v Sanford***
   1. Dred Scott was slave in Missouri, Missouri compromise allowed it to remain a slave state, Scott traveled with his master to Illinois which was a free territory therefore Scott believes he should be free, sues in federal court under diversity of citizenship jurisdiction
   2. Court must decide whether there is jurisdiction, is Scott a “citizen” of a state under the Constitution
   3. Holding: slaves are not citizens under the constitution
   4. Taney decision (2 parts)
      1. Decitizenizes all African detainees (should have dismissed without prejudice at this point)
      2. Says Congress had no authority to prohibit slavery or free people who had traversed territories
   5. Enact 13th amendment: abolish slavery and involuntary servitude
      1. §2: Congress has power to enforce article by appropriate legislation, regulates private action, individual arrangements
   6. Civil Rights Act 1866: all persons within jurisdiction of U.S. shall have same right in every state…which whites are subject to
   7. 14th amendment due process clause – states cannot abridge your rights as a citizen of the United States

**XII. Privileges and Immunities Incorporation – 14th amendment**

1. Post Civil War Amendments
   1. ***Slaughter-House Cases***: Court chooses narrow reading of 14th amendment – P&I was not meant to protect individuals from state govt actions
      1. Challenge by would be competitors to state conferred monopoly. Louisiana law of 1865 chartered Slaughter House Co and granted it exclusive right to maintain slaughterhouses in area. All competing facilities required to close. Butchers claimed law deprived them of right to trade in violation of 14th amendment
      2. Holding: SCOTUS upholds the law, says 14th amendment speaks of P&I of citizens of the US, rather than the states – P&I is an anti-discrimination provision, states cannot discriminate against natural human citizens of another state in favor of natural human citizens of its own state (without good reason)
      3. National and state citizenships are not the same – do not afford the same rights, language: “no state shall make or enforce any laws that abridge the privileges and immunities of the citizens of the US”
      4. Article IV §2 gives states duty of establishing and securing fundamental rights but does not create or control these rights, sole purpose is to ensure citizens of other states enjoy P&I as those in state
      5. Under J. Miller – US citizens under P&I clause are entitled to: free access to seaports, bid on govt contracts, travel to DC, that’s it
      6. 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
   2. ***Edwards v. California:*** 
      1. Facts: court invalidated a law making it a misdemeanor to bring into California “any indigent person who is not a resident of the state, knowing him to be an indigent person”
      2. Holding: Commerce Clause forbids a state to exclude indigents, CA’s interest in the health of its citizens and sufficiency of welfare funds do not justify the burden on interstate commerce
   3. ***Crandall v. Nevada***
      1. Holding: court invalidated a tax on passengers leaving the state via common carriers and emphasized the citizen’s basic “right to come to the seat of the national government” – fundamental right to travel between states
   4. ***Saenz v. Roe*** (court breathes new life into the P&I clause)
      1. Facts: CA enacted a statute limiting the amount of welfare benefits available to newly arrived residents, limit applies to people who have resided in CA for less than 12 months
      2. Holding: Court invalidates CA statute under P&I and holds Fed statute does not save it
         1. 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
      3. Traveling is a right within the constitution, right to travel allows a citizen of one state to enter another and be treated as a welcomed visitor
      4. Article IV §2: for travelers who elect to become permanent residents, there is right to be treated like other members of the state
      5. Fiscal savings is not a legitimate justification where there are less discriminatory means
   5. ***Shapiro v. Thompson***:
      1. Facts: welfare applicants denied assistance because they resided in DC for less than one year prior to filing application for assistance
      2. Holding: Denying welfare assistance to needy families who do not meet a residency requirement, but would otherwise qualify is unconstitutional unless the denial is supported by a compelling interest.
      3. Requirement violated right to travel and due process clause of 5th amendment by denying public assistance to poor people
2. **Incorporation of the Bill of Rights through the Due Process Clause**
   1. ***Palko v. Connecticut***: “Selective”/flexibile incorporation: D argues that he cannot be convicted twice because it was a violation of 5th as incorporated into 14th DP clause, whatever was forbidden by national gov was forbidden by state
      1. 14th only absorbs rights that are essential for liberty and justice
   2. Issue: Does the entire Fifth Amendment double jeopardy prohibition apply to the states through the Fourteenth Amendment?
   3. Holding: The double jeopardy prohibition provision included in the Fifth Amendment is not applied to the states through the Fourteenth Amendment.
   4. ***Duncan v. LA***
      1. Issue: whether sixth amendment right to jury trial is applied to states by the 14th amendment
      2. Holding: Yes- jury trial in criminal cases is “fundamental to the American scheme of justice”
      3. Thought process: The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by 14th amend: whether a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,’ whether it ‘basic in our system of jurisprudence,’ and whether it is ‘a fundamental right, essential to a fair trail.
3. **Right to Keep and Bear Arms and “Incorporation”**
   1. ***US v. Cruikshank***:
      1. Court vacated convictions of members of a white mob for dispossessing African-Americans of their guns
      2. Holding: the second amendment only applies as against the federal court
   2. ***US v Miller***
      1. Facts: Challenge constitutionality of National Firearms Act as violation of second amendment, required certain types of firearms to be registered and to pay a tax
      2. Holding: Court found section of National Firearms Act unconstitutional for violating 2nd amend. People have right to bear arms for personal safety
   3. ***DC v Heller***
      1. Holding: The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.
   4. ***McDonald v. City of Chicago***
      1. Holding: right of an individual to “keep and bear arms” protected by the Second amendment is incorporated by the due process clause of the 14th amendment and applies to the states

**XIII. Due Process**

1. **Substantive Due Process and Economic Liberties**
   1. **Applicable Standards:** 
      1. **Fundamental Rights – strict scrutiny**
         1. Where a law limits a fundamental right, strict scrutiny will be applied, and the law will be upheld only if it is necessary to promote a compelling or overriding interest Fundamental rights include
            1. Right to travel
            2. Privacy
            3. Voting
            4. All first amendment rights
      2. **All other cases – Rational basis**
         1. The law will be upheld if it is rationally related to any conceivable legitimate end of government
            1. Business and labor relations
            2. Taxation
            3. Lifestyle
            4. Zoning
            5. Punitive damages

Factors considered: reprehensibility of D conduct

Disparity between actual or potential harm suffered by the P and punitive award

Different between punitive damages award and the criminal or civil penalties authorized for comparable misconduct

Generally: punitive damages should not exceed 10 times the compensatory damages

* 1. SDP: way for the court to reign in state power through the constitution
  2. ***Allgeyer v. Louisiana***
     1. Facts: involved Louisiana law that prohibited obtaining insurance on Louisiana property “from any marine insurance company which has not complied in all respects” with Louisiana law
     2. For the first time, the court invalidated a state law on substantive due process grounds
     3. Holding: A state may not legislate in such a way as to deprive its citizens of liberties guaranteed by the Due Process Clause of the United States Constitution (Constitution).
     4. Reasoning: improper and illegal interference with the conduct of a citizen’s right to contract and carry out the terms of the contract.
  3. Lochner Era Cases: Lochner, Adkins, Adair, Williams
     1. Question whether rights over those specifically mentioned and protected by the constitution – unenumerated rights – are of such magnitude that they are protected because they are encompassed within the constitution’s concepts of liberty and property without being specifically listed in the constitution
  4. ***Lochner v. NY* (1905)**
     1. Facts: The Bakeshop Act was a New York state labor law which prohibited bakery employees from working for more than sixty hours per week or ten hours per day (didn’t want immigrants getting ahead too much)
     2. Issue: What is the test for determining whether legislation which seeks to impose restrictions upon an individual’s general right to make a contract in relation to his business is not invalid under the Due Process Clause of the Fourteenth Amendment?
     3. Holding: Act was an unconstitutional abridgement to the liberty to contract and a violation of due process; court must determine whether the legislation is a *fair, reasonable and appropriate exercise of the police power of the State*, or an unreasonable, unnecessary and arbitrary interference with the right of the individual to enter into a contract related to his business.
     4. “Rational Relationship Requirement” : fair, reasonable, appropriate exercise of police power
     5. Want to protect economic rights, majority in Lochner aligns with dissent in Slaughterhouse
     6. 9th amendment issue- incorporation of the 9th amendment, nothing in constitution about hours and baker restrictions so shouldn’t be protected, is there something beyond the literal language of the constitution
     7. J. Holmes: don’t use constitutional interpretation as a way to incorporate economic theories of the day
  5. ***Calder v. Bull***
     1. Court rejected an attack on a CT legislative act setting aside a probate court decree that refused to approve a will
     2. Issue: Whether a federal court can nullify a state statute for violation of Article 1, Section 10 of the constitution, which prohibits the passage and application of retroactive laws.
     3. Holding: The relevant action is a civil/private right, not a criminal right.  The constitution applies ex post facto restrictions on criminal rights, not civil/private rights.
  6. ***Munn v. Illinois***
     1. Holding: Court rejected an attack on state law regulating rates of grain elevators, court cautioned “in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be asserted judicially”
  7. ***Mugler v. Kansas***
     1. Holding: sustained law prohibiting intoxicating beverages, but court announced it was prepared to examine the substantive reasonableness of state legislation, not every statute enacted by states for promotion of “public morals, public health, or public safety” would be accepted as a legitimate exertion of state police powers
  8. ***Adair v. US***
     1. Facts: A law passed by Congress in 1898 made it illegal for employers to fire employees solely on the basis of their participation in labor unions.
     2. Holding: The right of a person to sell his labor upon such terms as he deems proper is, in essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it
  9. ***Coppage v. Kansas***
     1. Facts: The Petitioner, Coppage (Petitioner), was found guilty of violating the Kansas state law that prohibited employers from asking employees not to join or remain a member of a labor union as a condition of employment.
     2. Holding: States are prohibited from the arbitrary interference with a person’s freedom to contract because of the Due Process Clause of the 14th Amendment of the Constitution
     3. Reasoning: Employment relations are the same as a contractual arrangement. Both contracting parties have the right to terminate the employment ‘at-will’ for any reason. At the onset, the employee has the choice to refuse employment if union membership is more valued than the position offered.
  10. ***New Skate Ice Co v. Liebmann***
      1. Court invalidated an OK law that treated the manufacture of ice like a public utility, requiring a certificate of convenience and necessity as a prerequisite to entry into the business
      2. Holding: due process prevented a state legislature from arbitrarily creating restrictions on new businesses only on the claim that their markets affected a public use.
  11. ***Muller v. Oregon***:
      1. Sustained Oregon law that provided that “no female” shall be employed in any factory or laundry for more than ten hours during any one day
  12. ***Nebbia v NY*:**
      1. NY legislature established Milk Control Board with power to fix minimum and maximum prices of milk – issue whether the constitution prohibits a state from fixing the selling price of milk
      2. A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and enforce that policy by legislation adapted to its purpose.
      3. Rule: Price controls that are arbitrary, discriminatory, or demonstrably irrelevant to the policies of the legislature, are unconstitutional because they are unnecessary and unwarranted interferences with individual liberty – the control of rates in this case was unconstitutional
      4. General rule is property and K rights are private and should be free of government interference, but neither right is absolute.
      5. Represents modern position of the court: presumed propriety of legislation
  13. ***West Coat Hotel Co v Parrish***:
      1. Court upheld a state minimum wage law for women, legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection of women
  14. ***US v Carolene Products:***
      1. Standard: minimum “rational basis” introduced in due process review of economic legislation
         1. Court rejected due process challenge, unless it is totally obvious that law is absurd, courts wont strike it down under due process clause, statutes are presumed constitutional
      2. Court upheld a federal prohibition on the interstate shipment of filled milk, because it is a decision that should be made by Congress, not by courts.
      3. **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 subject of more searching judicial inquiry
         1. Unnecessary to consider whether legislation which restricts those political processes which can ordinary expect to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the 14th amendment
  15. ***Williamson v Lee Optical Co*** *–* ***overrules Lochner***
      1. Court held unconstitutional a law which made is unlawful for anyone not a licensed optometrist to fit lenses for someone
      2. The Oklahoma law may exact a needless, wasteful requirement, but it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.
      3. A state law must be reasonably and rationally related to the health and welfare of the public to fall under a state’s Police Powers. It must also not be an arbitrary or discriminatory law
  16. **Exceptions:** economic area where court has revised heightened DP review is punitive damage awards in civil cases
      1. **BMW of North America v Gore**: $2 million punitive damages award for concealed paint touch up of a new car, court found award grossly excessive and in violation of due process requirement of fair notice to D of potential liability
      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 plaintiff. P must have been specifically injured
         2. **Disparity between harm or potential harm suffered and punitive damages**: award must be proportionate, no bright line rule, however, few awards exceeding single digit ratio between punitive and compensatory damages, to a significant degree, satisfy DP
         3. **Difference between this remedy and civil penalties authorized in comparable cases**
      3. **Exxon Shipping Co v Baker**:
         1. Court imposed a limit on punitive damages as a matter of federal common law rather than substantive due process, but commented on notions of proportionality derived from due process analysis
         2. Law rests on sense of fairness in dealing with one another, penalties should be fairly predictable

1. **Substantive Due Process and Privacy**
   1. **Heightened Judicial Scrutiny**: used in line of cases to protect certain rights of privacy
   2. ***Meyer v Nebraska:*** court read “liberty” broadly to reverse conviction of a teacher for teaching German which violated a state law prohibiting teaching foreign languages to young children
   3. ***Skinner v Oklahoma***: court invalidated law providing for compulsory sterilization after third conviction for felony involving “moral turpitude”, this violated a basic civil right of man
   4. ***Griswold v Connecticut***: contraception case, 5 different opinions
      1. J. Douglas delivered opinion, Goldberg, Warren, Brennan concurs, Harlan concurs. White concurs, Black and Stewart dissent
      2. Facts: CT provision that penalizes contraception use and any person who aids and abets an offender
      3. 1st amendment has a penumbra where privacy is protected from government intrusion, which although not expressly included in the amendment, is necessary to make the guarantees meaningful
      4. the states effort to control marital activities in this case is unnecessarily broad and therefore impinges on protected constitutional freedoms
      5. Law was overly broad and invades areas of protected freedoms
      6. Goldberg concurrence: agrees that certain rights, not enumerated in the B of R are fundamental, finds the right in this case under the 9th amendment, certain rights shall not be construed to deny or disparage others retained by the people
      7. Harlan concurrence: applies the 14th amendment directly, liberty is a rational continuum, which speaks of freedom from all substantial arbitrary impositions and restraints
      8. White concurrence: apply strict scrutiny, right is in 14th amendment
      9. Black dissent: the law is offense but does not violate the 9th or 14th amendments
   5. Scope of Privacy following Griswold
      1. ***Eisenstadt v Baird***: Griswold applies to unmarried couples as well as married couples
      2. ***Carey v Population Services Int’l:*** can’t enforce anti-contraception laws against minors
2. **Substantive Due Process and Abortion**
   1. ***Roe v Wade*** – Blackmun majority
      1. Constitution only applies the word “person” post-natally, court does not need to resolve issue of when life begins
      2. **Trimester Framework**
         1. Morality in abortion is less than morality in normal childbirth – state cannot regulate, abortion decision is left to the woman and her physician
         2. C**ompelling state interest narrowly drawn**. State in promoting the interest in the health of the mother, may choose to regulate abortion in ways that are **reasonably related** to maternal health
         3. Stage subsequent to viability, state in promoting interest in potentiality of human life may, regulate and proscribe abortion **except** where it is necessary for the preservation of the life or health of the mother
      3. Stewart concurrence: liberty protected by DP covers more than those freedoms explicitly named in B of R, individual has right to be free from unwarranted government intrusion into reproductive choices which includes 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, 14th should be confined to procedural deprivation of liberty
   2. ***Belloti v Baird***: plurality opinion
      1. 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 absolutely vote
   3. **Abortion Funding Restrictions**
      1. ***Maher v Roe***: upheld CT regulation granting Medicaid benefits for childbirth but not for medically unnecessary abortions, unequal treatment of abortion and childbirth in the scheme did not interfere with the fundamental right recognized in Roe
      2. ***Harris v McRae***: federal funding limits on medically necessary abortions was constitutional
      3. ***Rust v Sullivan***: The government can selectively fund programs without violating the constitution, if it believes the funded programs encourage certain activities it believes are in the public interest
   4. ***Planned Parenthood v Casey*** – undue burden standard
      1. Importance: court replaces strict scrutiny/trimester framework with undue burden standard
      2. Requiring spousal notification prior to an abortion is unduly burdensome and unconstitutional, requiring parental notification in the case of minors is constitutional so long as there is a medical emergency exception and a judicial bypass procedure
      3. Rule: 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 it is reasonable related to the goal
         1. Rejects trimester framework – state may take measures to make sure a 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. Requirement that physician informs woman of the nature of the procedure and requires 24 hour wait period before performing abortion is not an undue burden
   5. ***Stenberg v. Carhart:*** 
      1. Court strikes down a law prohibiting “partial birth abortions”, specifically D&X extraction without providing exceptions for the mother’s health.
   6. ***Gonzalez v Carhart***
      1. Congress passed act in response to Stenberg that made factual findings that there was a moral, medical, and ethical consensus that partial-birth abortion is never medically necessary and should be prohibited
      2. Court held this was constitutional – emphasized the Casey holding
      3. Court says it does not impose a substantial obstacle – purpose is to preserve the humanity of newborns and other innocent human life
      4. Dual intent exists: physician must intend to deliver the fetus past an anatomical boundary AND must have delivered the fetus with intent to commit the overt act to terminate the fetus
3. Substantive DP and Marriage and Family Relationships
   1. Marriage
      1. ***Loving v VA:*** interracial marriage
         1. State cannot 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***
         1. Court invalidated Wisconsin law that provided any resident having a minor not in his custody and for whom eh is obligated to financially support, could not marry without obtaining court approval showing proof that financial obligations have been met
         2. Holding: strict scrutiny must be used when the state is significantly interfering with the fundamental right of marriage, state could have created a less intrusive means of safeguarding a child’s interest
   2. Extended Families
      1. ***Moore v East Cleveland***: court invalidated zoning ordinance limiting occupancy to single, narrowly defined “family”
4. Substantive Due Process and Sexuality
   1. ***Bowers v Hardwick***
      1. Georgia law made sodomy a felony, punishable by up to 20 years in prison
      2. Court finds there is no fundamental right for homosexuals to engage in sodomy, uses tradition test
   2. ***Lawrence v Texas – overruled Bowers***
      1. TX made homosexual sodomy a criminal offense
      2. The right addressed is not a particular right of homosexuals to engage in sex but the broader right of privacy, it is within the liberty of a person to choose to engage in the act without being punished as criminals
      3. Fundamental right: Casey confirmed that our rights and traditions afford constitutional protections to the “most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy”
      4. Traditional roots: times have changed
      5. *Meaning and implications of Lawrence*
         1. **No standard of scrutiny** is applied in Lawrence, implication of rational basis standard but may be strict if it is a fundamental right
         2. Kennedy and O’Conner explicitly state the decision does not extend to any formal recognition of relationships (ie. marriage)
   3. *Fundamental rights summary*: contraception, abortion, marriage, extended families, freedom of sexuality within the home, maintaining a marital unit, make decisions about child rearing
5. **Procedural Due Process**
   1. Refers to the procedures that the government must follow when it takes away a person’s life, liberty, or property – arises when there is a possible issue about how the law applies to a specific person
   2. Procedural DP must be applied when
      1. There is a deprivation of life, liberty, or property
      2. Potential factual issues exist concerning a particular individual or group
   3. Three step analysis:
      1. Protected interest in life, liberty, and property is threatened by gov’t action
      2. Impairment of protected interest must be sufficient to trigger the application of procedural DP
      3. If constraints on procedural DP apply, timing and nature of required hearing will depend on circumstances of case
      4. *Vacco v. Quill*: court ruled that a New York ban on physician-assisted suicide was constitutional and was a legitimate state interest that was well within the authority of the state to regulate, there was no constitutional guarantee of a “right to die”
   4. What is a liberty and property?
      1. Constitutional liberty interest – right of privacy, ect
      2. Nonconstitutional liberty interest – if gov’t creates a liberty interest and provides they may be impaired only for cause, these interests are entitled to DP protection
      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, some 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
   5. What is 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
   6. Content of notice: what type of hearing or notice is required?
      1. Must be reasonably calculated to apprise interested parties in pendency of action
      2. Must reasonably convey required info
   7. Type of hearing afforded:
      1. Timing and degree of formality concern
      2. “Bitter with the sweet” approach – Arnett v Kennedy – if it is a government-created liberty or property interest is involved, government may decide what if any procedures will accompany the decision affecting the interest
         1. Court majority has consistently rejected this approach and held that timing and nature must conform to constitutional standards rather than state law ones
      3. *Arnett v. Kennedy*: court rejected a nonprobationary federal civil service employee’s claim to a full hearing prior to dismissal, procedures did not provide for adversary hearing, government should be able to define the right with the procedures built in
   8. ***Mathews v Eldridge Test (Balancing weighing 3 factors)***
      1. **Significance of private interest that will be affected by government action**
      2. **Chance of error: fairness and reliability of existing procedures/probably value of any additional safeguards**
      3. **Public interest in resolving matter quickly and efficiently (cost considerations)**
   9. At some point the benefit of 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
   10. 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
   11. 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
   12. 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. Impracticable – courts look at benefits derived/burdens from Mathews test – such as an emergency where swift action is required
   13. 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 because harms from erroneous deprivation is irreparable, prior hearing must give more complete safeguards
   14. ***Goldberg v Kelly***: involving deprivation of government benefits - 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.
       1. **Receiving a government benefit could become a property interest, which required providing due process when the government attempted to alter or deny the continued enjoyment of that property interest**
   15. Possible Post-deprivation remedies where there is no liberty or property interests if there is an unconstitutional condition (e.g. 1st amendment rights)
   16. *Kaley v. US:* to what extent are you entitled to a hearing before the government seizes assets that give you no money to hire legal counsel? Court held, government may seize assets without a hearing, marginal value of having the hearing is minimal, cost to government would be too high and public defender should be good enough
   17. Irrebuttable Presumption Doctrine
       1. Person may seek a hearing not to correct gov’ts version of facts, but to rebut an express or implied presumption contained in the law
          1. Ex: A is fired because of law that states police officers may not exceed 300 lbs (express/implied presumption that those exceeding limit are out-of-shape and not fit to be officers). A can seek a hearing to rebut the presumption that he is not fit to be an officer
          2. *Vlandis v Kline*: prohibits gov’t from using a permanent irrebuttable presumption when the presumption is not universally true in fact and when state has reasonable alternative means of making crucial determination
          3. Doctrine was a way of bypassing EP
       2. Doctrine today:
          1. *Weinberger v Salfi* – court drastically narrows this avenue of attack in a case involving SS act that denied survivors benefits to widows and stepchildren whose relationship had existed for less than 9 months
             1. 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, court permit individual to rebut presumption
6. **The Contracts Clause: Article I § 10**
   1. Prohibits any state from impairing the obligation of contracts: purpose of clause was to restrain state laws from affording debtor relief (ie. postponing debt payments)
   2. Court first interpreted clause in cases rather than private contracts
   3. Constitutional ban on impairment of contractual obligations did not prohibit legislative changes in remedies
   4. Permissible scope of remedial changes depended on their “reasonableness” provided no “substantial right” was impaired
   5. ***Home Building & Loan Ass’n v Blaisdell***
      1. Arose from MN Mortgage Moratorium Law of 1933 enacted during the depression, local courts were allowed to extend relief from mortgage foreclosures and execution sales of real property
      2. Protective Power of 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, floor, or earthquake
      3. Controls must be balances as to not undermine faith in freedom to contract
      4. States possesses authority to safeguard the vital interests of its people
   6. ***US Trust Co v NJ***
      1. Court invalidated state law when it revoked its own obligations, a law impairing its own obligations was subject to greater scrutiny than legislation interfering with private contracts
      2. As with laws impairing the obligations of private contracts, an impairment of state obligations may be constitutional if it is reasonable and necessary to serve an important public purpose
      3. Does the state have alternative methods of achieving their goal?
   7. ***Allied Structural Steel Co v Spannaus***
      1. Court reinvigorated the contracts clause as applied to private contracts, invalidated Minnesota pension reform legislation which increased obligation that plaintiff had to their employees
      2. Holding: **In determining whether contract could be modified, court considered the *severity of the impairment* and the *importance of the public interest* to be serviced**
      3. Court found that MN police power was limited and invalidated the pension reform legislation
   8. ***Energy Reserves Group v Kansas Power and Light***
      1. **An impairment of a contract must be substantial to trigger any further review**
7. **State Action – Congress’s Civil Rights Enforcement Powers**
   1. Constitution applies to government at all levels but general does not apply to private entities or actors
   2. Timeline
      1. 1866 – 13th amendment (ratified in 1865) gave constitutional support to Emancipation Proclamation, section 1 stated all persons born in the US were citizens of the US and had certain rights such as right to contract and own property
      2. 1870 – 15th amendment was ratified, prohibiting denial of the franchise “on account of race, color, or previous condition of servitude” – provided criminal sanctions for private conspiracies to violate federal rights
      3. 1871 and 1875 Acts – amended 1870 act and enacted new law, Civil Rights Act of 1871 established civil and criminal liabilities
   3. In 1879 (not long after ratification of 14th amendment), the Supreme Court declared that “the provisions of the fourteenth amendment…all have reference to state action exclusively and not to any action of private individuals”
   4. ***Civil Rights Cases*** 
      1. Civil Rights Act of 1875 provided that all persons were “entitled to the full and equal enjoyment of accommodations, advantages, facilities, and privileges of inns, public conveyances ect.” - Law strictly prohibited discrimination on the basis of any previous condition of servitude
      2. Prohibited private race discrimination and imposed civil and criminal penalties
      3. Supreme Court declared law unconstitutional, *the 14th amendment applies only to the states, not to private conduct*
      4. Private action is governed by state law and not the constitution – Congress could only legislate against wrongs by state governments (overruled in later cases, now established that Congress can prohibit private racial discrimination)
   5. **“Public Function” as a basis for state action** – there is state action “in the exercise by a private entity of powers traditionally exclusively reserved to the states”
      1. Purpose: government should not be able to avoid the constitution by delegating its tasks to a private actor
      2. ***Marsh v Alabama***: public function test – can a private entity’s performance of traditionally public functions make 14th amendment restrictions applicable?
         1. Holding: a company town may not limit speech through restrictions that would violate the first amendment if imposed by a municipality, a state may not impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the town’s management
         2. No right to first amendment protections if it had been considered private property
      3. ***Evans v Newton***: Court held invalid under the equal protection clause the operation of a park in Georgia for “whites only” pursuant to a trust established in Senator Bacon’s will, court held that services rendered even by a private park of this character is municipal in nature
   6. ***Shelley v Kraemer***
      1. Black family bought a home in neighborhood in which other owners signed a restrictive covenant stating that no home was to be sold to a black family
      2. Court prohibited enforcement of restrictive covenant, held 14th amendment’s guaranteed equal protection applies because Supreme Court of Missouri enforced the agreement which deprived family of their property, this was sufficient state action
      3. However, restrictive covenants, standing alone, could not be regarded as violation of the 14th amendment
   7. ***Evans v Abney***
      1. When general charitable intent of a testator cannot be carried out (park for only whites) the charitable trust will fail and revert to the grantor or his heirs
   8. ***Burton v Wilmington Parking Authority***:
      1. There is significant state involvement to permit an action under the 14th amendment when a state leases public property to a private actor who then discriminates against non-whites
   9. ***Moose Lodge v Irvis***: having a liquor license from the state isn’t enough
   10. ***Jackson v Metropolitan Edison Co***
       1. Plaintiff sought relief against private company regulated by PA Public Utilities Commission for terminating electrical service for alleged nonpayment without notice, hearing, and opportunity to pay amount due
       2. Holding: inquiry is whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself
       3. **Rule: a private company that does not have specific authorization by the state to act, is not acting on behalf of the state**
8. **Equal Protection**
   1. EP clause contained in 14th amendment: “No state shall…deny to any person within its jurisdiction the equal protection of the laws”
   2. **Three Questions Presented**
      1. What is the classification?
         1. Facially discriminatory
         2. Facially neutral but discriminatory impact or effect
            1. Impact is insufficient to prove an impact is insufficient to prove a racial or gender classification
            2. Requires proof that there is a discriminatory purpose behind the law
      2. What is the appropriate level of scrutiny?
         1. Strict – race or national origin (sometimes aliens), burden of proof on government, virtually always fatal to challenged law
            1. Necessary to achieve a compelling government purpose, government needs a truly significant reason
            2. Government must show it cannot achieve its objective through any less discriminatory alternative
         2. Intermediate – gender and nonmarital children, burden of proof on government
            1. Law must be substantially related to an important government purpose (not compelling, but important), means must have a substantial relationship to the end being sought
         3. Rational Basis – everything else, challenger has burden of proof
            1. Must be rationally related to a legitimate government purpose, something that the government may legitimately do
      3. Does the government action meet the level of scrutiny?
         1. Evaluates the laws ends and its means
         2. Focus on degree to which a law is under-inclusive and/or over-inclusive – used by courts in evaluating the fit between the governments ends and its means, strict scrutiny requires the closes fit
   3. **Race Discrimination – ALL racial classifications [imposed by the government] must be analyzed under strict scrutiny**
      1. ***Strauder v West Virginia***
         1. Facts: Black man convicted or murder by jury from which all blacks had been excluded because of state law, court held removal should have been granted and found law unconstitutional
         2. Courts first application of the equal protection rights
         3. The equal protection clause of the 14th amendment was enacted to secure all the civil rights the superior race enjoys, doesn’t extend to categories outside of race
      2. **Schools:**
         1. ***Plessy v Ferguson*** 
            1. Court sustained Louisiana separate but equal accommodations for railroad passengers
            2. 14th amendment is not meant to enforce social and political equality, support in precedential holdings sustaining segregated schools
            3. Rational basis application – police power must only be reasonable, and enacted in good faith rather than for annoyance or oppression of a class – usage, tradition, and preservation of public peace is a reasonable end here
            4. Separate is not a badge of inferiority, if two races are to meet upon terms of social equality it must be voluntary
         2. ***Brown v Board of Education ­– overruled Plessy***
            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 field of public education, “separate but equal” has no place, segregation is the denial of equal protection
            4. *Bolling v Sharpe –* decided same day as Brown, court held racial segregation in DC violated DP clause of the 5th amendment, concept of equal protection and due process are not mutually exclusive, discrimination may be so unjustifiable as to be violative of due process
         3. Implementing Brown v Board of Ed.
            1. ***Brown II*** – Warren requires the local courts to implement good faith compliance with desegregation

Allowed remedies to proceed “with all deliberate speed”

* + - * 1. **Presumption** of unconstitutionality against schools with substantially racial imbalance
        2. ***Green v County School Board*** – court issued a detailed opinion on the question of remedies, good faith “freedom of choice” plans adequately complied with the Brown mandate
        3. ***Keyes v School District*** – set forth criteria that would facilitate a finding of purposeful discrimination, even if the segregation was not state-mandated
        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
    1. Eliminating other forms of segregation
       1. ***McLaughlin v Florida***: court invalidates criminal adultery statute prohibiting cohabitation by interracial unmarried couples due to lack of overriding statutory purpose
          1. Holding: purpose of 14th amendment is to eliminate all official state sources of racial discrimination, racial classifications are subject to most rigid scrutiny and regulations must be shown to be essential to state objective
          2. VA statute rested only on discriminations of race, no legitimate purpose- doesn’t even pass rational basis test
    2. ***Loving v VA***
       1. State of VA enacted laws making it felony for white person to marry black person
       2. Issue: does a statutory scheme adopted by VA to prevent marriages between persons solely on the basis of racial classifications violate the 14th amendment?
       3. Holding: restricting freedom to marry solely on the basis of race violates the central meaning of the equal protection clause
       4. Fact that statute is one of equal application does not mean it is exempt from strict scrutiny review – statutes clearly drawn upon race-based distinctions
    3. ***Palmore v Sidoti***
       1. Facts: court faced the question whether the “best interests of the child” standard could permit custody allocation to prefer a same-race and an interracial marriage by the child’s parents
       2. Court held the 14th Amendment does not permit the consideration of potential effects do to racial prejudice against mixed-race families in child custody determinations.
    4. 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.
          1. 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.
          1. Where there is substantial evidence that the city thought the pool could not be operated safely and economically on an integrated basis, motivation does not impeach purpose
    5. Facial Discrimination and Minorities
       1. ***Korematsu v United States***
          1. Facts: Military commander ordered all persons of Japanese descent (US citizens or not) to leave their homes on West Coast and report to “Assembly Centers”, US Citizen of Japanese dissent was convicted for failing to comply
          2. Holding: while legal restrictions that curtail the civil rights of a single racial group are subject to strict scrutiny, pressing public policy may sometimes justify such restrictions
    6. Facially neutral laws with racially discriminatory effect – does not change strict scrutiny, did not suggest that racially discriminatory purpose cant be found in facially neutral laws
       1. ***Washington v. Davis***
          1. Facts: arose from an equal protection challenge by black applications to the DC PD who were rejected for failing to perform satisfactorily on a written test measuring verbal ability, vocabulary, reading, and comprehension
          2. Law racially neutral and on face but not in impact
          3. **Holding**: **proof of a *disproportionate impact* is not enough to ground a finding that a law amounts to unconstitutional discrimination, basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose**
          4. **Rule**: **a facially neutral law may still classify based on race or ethnicity if the law was *intended* to have a differential effect**
  1. **Gender Discrimination – intermediate scrutiny**
     1. Why is gender subject to intermediate scrutiny?
        1. Historical discrimination, immutable, equal ability
     2. ***Frontiero v Richardson*** (failed to adopt strict scrutiny)
        1. Facts: 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. Holding: standard to be applied is intermediate scrutiny
        3. J. Brennan failed to obtain majority advocating gender as a suspect class
        4. Similar to Carolene products footnote 4: J. Stone suggested there were reasons to apply a more exacting standard of judicial review in other types of cases.
        5. 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
     3. ***Craig v Boren***
        1. Facts: OK statute prohibits sale of non-intoxicating beer to males under the age of 21 and females under the age of 18
        2. Issue: does difference between males and females justify the differential age drawn by OK statute? Is there congruence between gender and gender characterization?
        3. Purpose: regulation of driving while under the influence
        4. Holding: no substantial relationship between law and government interest (rejects statistical analysis)
     4. ***University of Women v Hogan***
        1. Sustained male applicant’s challenge to the State’s policy of excluding men from the Mississippi University for Women, needed to show an exceedingly persuasive justification for the classification
        2. Rule: if statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. If the state’s objective is legitimate and important, we must next determine whether the requisite direct, substantial relationship between objective and means is present
     5. ***United States v. Virginia***
        1. Facts: Virginia Military Institute (VMI) was the only single-sexed school in Virginia. VMI used a highly adversarial method to train (male) leaders of the future. There was no equal educational opportunity to that of VMI in the State for women.
        2. Rule: Gender-based classifications of the government can be defended only by exceedingly persuasive justifications. The State must show that its classification serves important governmental objectives and that the means employed are substantially related to those objectives. The justification must be genuine, not hypothesized. And it must not rely on overbroad generalizations about the differences between males and females
        3. The women’s school (VWIL) did not qualify as equal to VMI, VA remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade
     6. ***Rostker v Goldberg***
        1. Court rejected a claim under EP of 5th amendment DP clause that the military service act was unconstitutional in not requiring males to register but not female
  2. **Sexual Orientation**
     1. ***Rowland v Mad River School District***: only case to argue that sexual orientation should be subject to heightened scrutiny, discrete and insular minority
     2. ***Romer v Evans***: Colorado voters adopted Amendment two to their State Constitution, precluding the government from adopting measures that would protect homosexuals from discrimination- court held Amendment 2 could not even survive minimum rationality review
        1. Rule: A bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.
        2. “If a law neither burdens a fundamental right nor targets a suspect class targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end”
        3. “If the amendment seems inexplicable by anything but animus toward the class that is affects, it lacks a rational relationship to legitimate state interests”
  3. **Other “Suspect” Classes**
     1. **Alienage –** applystrict scrutiny, “discrete, insular minority”
        1. ***Graham v Richardson***: court held that states could not deny welfare benefits to noncitizens
     2. Rational basis review applies to state laws excluding resident aliens from governmental functions; strict scrutiny applies to all other state laws excluding resident aliens
     3. “Public Function” Exception – J. Blackmun dicta in Dougall regarding greater deference to exclusion of non-citizens from “public policy functions that go to the heart of representation government” bore fruit in a series of cases rejecting EP claims by non-citizens
        1. Public Officers: ***Foley v Connelie***: court held NY could bar employment of aliens as state troopers, only needed rational basis
        2. Public school teachers: ***Ambach v Norwick***: applied public function exception to hold that a state may refuse to employ as elementary and secondary school teachers aliens who are eligible for citizenship but who refuse to seek nationalization
        3. Notaries public: ***Bernal v Fainter***: public function could not justify Texas barrier to aliens becoming notaries public
     4. ***Toll v Moreno***
        1. Struck down University of MD policy of granting preferential tuition and fees treatment to students with “in state” status, nonimmigrant aliens were not eligible for such status even if they were domiciled in MD
        2. Court used federalism-related grounds rather than EP
        3. “States decision to deny ‘in-state’ status to them, solely on account of their federal immigration status, amounts to an ancillary burden not contemplated by Congress’ in admitting these aliens to the US
     5. ***Hampton v Mow Sun Wong***
        1. Court invalidated a civil service commission regulation barring resident aliens from employment in federal competitive civil service
     6. ***Cleburne v Cleburne Living Center, Inc***
        1. Facts: Texas city denied special use permit for operation of a group home for mentally retarded
        2. Court held mental retardation as a “quasi-suspect” classification and the ordinance violated EP because it did not substantially further an important governmental purpose
        3. Rule: Legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.
        4. In this case, court found no rational basis for requiring a special permit
  4. **Fundamental Interests Branch of Equal Protection**
     1. **Voting**:
        1. ***Harper v Virginia State Board of Elections***:
           1. Facts: Voters challenged the constitutionality of Virginia’s poll tax. The right to vote was conditioned on the payment of a poll tax.
           2. Rule: Prerequisite payments within the election process are unconstitutional.
           3. Right to vote in state elections is not expressly mentioned in the constitution but once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with EP
        2. ***Kramer v Union Free School District No. 15***
           1. Facts: Court held unconstitutional a NY law that required voters in certain school board elections to either own or lease taxable property within district or have children enrolled in the local schools
           2. Rule: Laws granting the voting franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged law grants the right to vote to some bona fide residents of the requisite age and citizenship and denies the franchise to others, the Court must determine whether the conclusions are necessary to promote a compelling state interest
           3. Classification permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs, and exclude others who have a distinct and direct interest in the school meeting decisions
        3. ***Crawford v Marion County Election Board***
           1. Facts: court rejected challenge to Indiana law requiring citizens voting in person to present photo ID
           2. Sufficient state interests to justify law, issuing of photo ID was free, wanted to avoid voter fraud, there was no substantial burden
     2. **Access to Courts:** 
        1. ***Griffin v Illinois***: court held a state must provide a trial transcript or its equivalent to an indigent criminal defendant appealing a conviction on nonfederal grounds
           1. Courts cannot discriminate on account of poverty
        2. ***Douglas v California***: court extended Griffin by holding that a state must appoint counsel for an indigent defendant for the first appeal from a criminal conviction, but only the first appeal
        3. ***Ross v Moffit***: refused to extend Douglas to require provisions of counsel in discretionary appeals, the guarantee to equal protection does not require absolute equality but assurances that “indigents have an adequate opportunity to present their claims fairly within the adversarial system”
        4. ***Halbert v Michigan***: held unconstitutional Michigan’s practice of denying appointed appellate court counsel to indigents convicted by guilty or nolo contendere pleas
           1. Court revisited the line distinguishing Douglas from Ross, held Douglas provided the controlling instruction, a defendant who pleads guilty or nolo contendere in a Michigan court does not thereby forfeit all opportunity for appellate review
        5. Divorce: ***Boddie v CT***:
           1. Facts: indigent welfare recipients who sought to file divorce actions in the state courts but were unable to pay the required court fees and costs for services of process
           2. Holding: relied on DP, given the basic position of the marriage relationship in society and states monopolization of the means for dissolving the marriage, due process prohibits states from denying access to courts solely because of inability to pay
        6. Welfare and bankruptcy:
           1. ***United States v Kras -*** Facts: indigent challenged $50 filing fee requirement in voluntary bankruptcy proceedings

Holding: bankruptcy is sufficiently distinguishable from divorce, bankruptcy did not rise to the fundamental level of divorce

* + - * 1. ***Ortwein v Schwab*** *–* the interest in welfare payments, like that in a bankruptcy discharge, “has far less constitutional significance” than the interest of Boddie
      1. Paternity: ***Little v Streater*** – court held that DP entitled an indigent defendant in a paternity action to state-subsidized blood grouping tests, unique quality of blood grouping tests as source of exculpatory evidence and states prominent role in litigation
      2. ***M.L.B. v S.L.J.***:
         1. Facts: The Petitioner, M.L.B. (Petitioner), lost custody of her children and cannot afford to appeal the decision. She argues that such a fundamental right requires the State to pay for the costs of her appeal.
         2. Holding: The loss of parental rights is the loss of a fundamental right.
      3. ***Dandridge v. Williams:*** 
         1. Court rejected a challenge to MD’s implementation of the Aid to Families with Dependent Children program, state imposed maximum grant of $250 per month per family regardless of size or need
         2. Holding: state does not violated EP merely because the classifications made by its laws are imperfect, if the classification has some reasonable basis, it does not offend the constitution
    1. ***San Antonio Independent School Dist. v Rodriguez***
       1. Facts: In Texas, public schools were financed primarily through a system whereby property taxes were imposed by local school districts. Because property values were higher in some districts, than in others, substantial disparities across districts in per pupil spending arose. The disparities in spending among public school children triggered a Fourteenth Amendment Equal Protection challenge to the constitutionality of the system.
       2. Holding: A State public school taxing system that results in interdistrict spending disparities among local school districts is consistent with the Fourteenth Amendment Equal Protection Clause as long as the system satisfies the rational basis standard of review and is, thus, rationally related to a legitimate governmental interest.
  1. **Voting Rights: Reapportionment and Gerrymandering –** rational basis standard
     1. Vote dilution: EP requires uniform treatment of persons standing in the same relation, and people of different localities are similarly situated
     2. ***Reynolds v Simms***
        1. Facts: The Plaintiffs alleged that the last apportionment of the Alabama legislature was based on the 1900 federal census and that the population growth in the intervening six decades has now made representation discriminatory against areas with fast-growing populations.
        2. Holding: In most instances, districts should be apportioned to allow each voter to have one, undiluted vote.
        3. If the State gives voters in one part of the State much more weight in the vote of their legislators, the right to vote of voters in underrepresented parts of the State has been diluted.
     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. Equal protection requires states make 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
     5. ***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
        1. Facts: The Pennsylvania General Assembly (D) drew a map delineating the districts for the congressional elections. The map was challenged by Vieth (P) and others in court, on the basis that the creation of the districts was for the improper purpose of obtaining political advantage, or gerrymandering.
        2. Rule: Since the process of creating districts can involve many political considerations none of which are enforceable by the courts under any constitutional provision, gerrymandering cannot be brought into a court of law as a justiciable issue.
  2. Definitions
     1. AI, §2 – “representatives…shall be apportioned among the several States…according to their respective numbers…”
     2. **Gerrymandering**: a form of boundary delimitation (redistricting) in which electoral district or constituency boundaries are deliberately modified for electoral purposes thereby producing a contorted or unusual shape
        1. **Packing**: drawing district boundary lines so that members of the minority are concentrated or packed into as few districts as possible - don’t want a district with 100% democrats or republicans, you don’t need 100%, you are “wasting” them, you only need 51%, ideally 60% to be safe
        2. **Fracturing**: drawing district lines so that the minority population is broken up, members of minority are spread among as many districts as possible, keeping them in a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts
     3. **Reapportionment:** the process of reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established plan or formula
        1. Senate - each state is represented by two seats
        2. House of representatives - seats are apportioned among the states based on relative population of each state in the total population of the union
     4. **Political Subdivisions**: 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
  3. **Voting Rights Act**: voting practices are prohibited which have the intent OR the effect of unduly burdening one racial group more than another
  4. ***Thornburg v Gingles***: test for what undue burden is under VRA, court articulated criteria that must be met in order to establish prima facie case of vote dilution;
     1. minority must be sufficiently large and geographically compact as to be able to compromise a majority of the district;
     2. the minority group must be shown to be politically cohesive;
     3. racially polarized voting must be shown by demonstrating that it is likely that whites would vote as a block to defeat minority candidates
     4. then look to “totality of circumstances”
  5. ***Davis v Vandamer***: Congress uncomfortable with having to prove intent, people have gotten crafty and can make up reasons for districting in certain ways
  6. ***Karcher v Daggett:*** plan may be upheld if you can show a significant deviation from the ideal was necessary to achieve a legitimate state objective
     1. The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions…By necessity, whether deviations are justified requires case-by-case attention to these factors.
  7. **Affirmative Action**
     1. Race is subject to strict scrutiny:
        1. History – EP was intentionally meant to protect blacks
        2. Immutable characteristic – cannot get into 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
     2. ***Regents of Univ of California v Bakke***
        1. Facts: challenge to special admissions program at UC-Davis aimed at increasing minorities – reserved 16 out of 100 places in its entering class for minority groups, alleged violation of EP under 14th amendment
        2. Court held the admissions program unlawful - Although race may be a factor in determining admission to public educational institutions, it may not be a sole determining factor.
        3. Racial and ethnic distinctions are inherently suspect and call for more exacting judicial standard
     3. ***Wygant v Jackson Board of Education***: court held unconstitutional a minority preference in teacher layoffs
        1. Applied strict scrutiny: goal of providing “minority role models” was not compelling enough
     4. ***Fullilove v Klutznick***: court rejected a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of federal funds granted for local public works projects must be used by the state to or local grantee to procure services from businesses controlled by members of specified minority groups
     5. ***Adarand Constructors Inc v Pena – overruled Fullilove***
        1. Facts: Adarand claims federal government practice of giving general contractors financial incentives to hire socially and economically disadvantaged individuals violates the 5th amendment DP component
        2. Rule: Race classification by the federal government is subject to strict scrutiny
        3. Croson case 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 amendment is same as 14th
     6. ***Grutter v Bollinger***
        1. Facts: A white law school applicant challenges a law school’s use of race as a factor in the admissions process.
        2. Rule: schools may consider race as part of the admissions process as long as it is only one factor in an individualized process
        3. Schools have a compelling interest in having diverse student bodies
        4. In this case, the school was conducting sufficiently individualized reviews of each applicant, race was only one of many factors for eligibility
     7. ***Gratz v Bollinger***
        1. Facts: challenge by white student to an admissions policy of University of Michigan, admissions policy was to automatically grant 20 out of 100 points to students of a minority ethnicity
        2. Admissions process was unconstitutional, was not an individual assessment and violated EP clause of 14th amendment, white students deserved strict scrutiny, system was not narrowly tailored
        3. Rule: Admission criteria based on race must be narrowly tailored to achieve a compelling interest. Race may be considered in an individual assessment, but not as a sole or contributing factor for admission.
     8. ***Parents Involved in Community Schools v Seattle School District***
        1. Facts: school district adopted student assignment plans that relied upon race to determine which public schools certain children could attend, classified students as white or non-white
        2. Holding: School plans that use race alone as a qualifying criterion for school assignments is unconstitutional
        3. Court held in order for a state actor to engage in discriminatory actions it must do so in a way that is narrowly tailored to achieve a compelling state interest. The only interests recognized by this court are: 1 to remedy past intentional discrimination; and 2 to achieve exposure to widely diverse people, cultures, ideas and viewpoints

1. **Congress’ Civil Rights** 
   1. **Background History**
      1. After civil war 3 amendments were passed
         1. **13th amendment** – prohibits slavery and involuntary servitude, except as punishment for a crime
            1. “Congress shall have the power to enforce this article by appropriate legislation” 🡪 can be used to regulate private activity
         2. **14th amendment** – provides that all persons born or naturalized in the US are citizens and no state can abridge the P&I of such citizens nor deprive them of life, liberty or property without due process of law or deny equal protection of the law
            1. §5: “the Congress shall have power to enforce, by appropriate legislation, the provisions of this article” 🡪 CANNOT be used to regulate private activity
         3. **15th amendment** – “right of citizens of the US to vote shall not be denied or abridged by the US or any state on account of race, color, or previous condition of servitude”
            1. §2: congress has power to enforce by appropriate legislation
   2. ***Jones v Alfred H Mayer Co***:
      1. Congress could prohibit private discrimination in selling and leasing property
      2. Facts: Jones attempted to buy a home in St. Louis, Missouri and respondent refused to sell to him on the basis of Jones being black
      3. Issue: whether Congress has the power under the Constitution to do what §1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property
      4. Rule: §1982, which prohibits racial discrimination in all sale and rental or property, is a constitutional exercise of Congressional power in regulating private and public sales of property as a result of the enabling clause of the 13th amendment
      5. Enabling clause of the 13th amendment: gave Congress power to pass “all laws necessary and property for abolishing all badges and incidents of slavery in the United States”
         1. Badges and burdens include restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens”
   3. ***Sullivan v Little Hunting Park, Inc***: court expanded the broad interpretation of 1866 Civil Rights Act, found that plaintiffs could sue under §1982 for damages and injunctive relief for refusing to allow lease to black man
   4. ***Runyon v McCrary***: **13th amendment can be used to regulate private conduct**
      1. §1981 applies to prohibit discrimination in private contracting and is within the scope of Congress’s power under §2 of thirteenth amendment
      2. §1981 “prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are negros” was constitutional, enabled direct suits against private all-white academies trying to get around Brown v Board of Ed case for public schools
   5. 15th amendment was ratified in 1870, then enforcement act of 1870 made it a crime for public officers and private persons to obstruct exercise of the right to vote
   6. Civil Rights Act of 1957: authorized Attorney General to Seek injunctions against public and private interferences with the right to vote on racial grounds
   7. Voting Rights Act of 1965: intended to rid the country of racial discrimination in voting
   8. ***Lassister v Northampton County Election Bd****:* rejected a black citizens’ attack on NC literacy test, provision stated “every person presenting himself for registration shall be able to read and write any section of the NC constitution in the English language”
      1. Court held states have long been held to have broad powers to determine the conditions under which the right to suffrage may be exercised, literacy and illiteracy are neutral on race, creed, color, and sex
   9. ***South Carolina v Katzenbach***: court sustained §5 of the VRA of 1965, largely directed at racial discrimination in the south as proper exercise of congressional power under §2 of the 15th amendment
      1. \*\*McCulloch application 🡪 Holding: Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting, basic test to be applied (under §2) is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the state
      2. Act suspended literacy tests and other devices for five years from the last occurrence of any substantial voting discrimination
      3. §5 also barred any new “standard, practice, or procedure with respect to voting”
   10. ***Katzenbach v Morgan*** – indicated Congress, under §5 of the 14th amendment may independently interpret the Constitution and even overturn the Supreme Court
       1. Facts: A law that ensured Puerto Ricans the right to vote upon successful completion of the sixth grade was upheld as a valid exercise of the powers of the United States Congress by means of Section:5 of the Fourteenth Amendment of the United States Constitution (Constitution).
          1. §4(e) of the VRA of 1965 ensures the right to vote to all Puerto Ricans who successfully complete the 6th grade, suit was brought challenging constitutionality of §4(e) because it prohibited the enforcement of the election laws of NY which required ability to read and write English
       2. Court held §4(e) was a proper exercise of the powers granted to Congress under §5 of the 14th amendment
       3. Holding: A federal law ensuring the right to vote upon successful completion of the sixth grade, despite a conflicting state law’s voting qualifications, is a valid exercise of the powers of the United States Congress by means of Section: 5 of the Fourteenth Amendment of the Constitution because Section: 5 is a positive grant of power.
       4. It was well within the congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement - previous and fundamental right
       5. Two Reasoning’s:
          1. Law was constitutional because it was a remedy for discrimination
          2. Denied equal protection
   11. ***Rome v United States*** 🡪 court suggested that Congress has the authority under §2 to interpret the meaning of the 15th amendment – Congress can “prohibit changes that have a discriminatory impact” (decided before Boerne)
       1. Court considered constitutionality of §5 of the VRA of 1965 as applied to changes in election procedures in Rome, GA, city made a number of annexations to its territories
       2. Rule: Congress has the authority to regulate state and local voting through the provisions of the Voting Rights Act, as the Fifteenth Amendment supersedes contrary exertions of state power, and this act is an appropriate means for carrying out Congress’ constitutional responsibilities under the Fifteenth Amendment. Congress also has the power to regulate practices that it sees are discriminatory, even if no evidence of past discrimination is in the present record
       3. Holding: The Act’s ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if Section: 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of the Court foreclose any argument that Congress may not, pursuant to Section: 2, outlaw voting practices that are discriminatory in effect.
   12. ***City of Boerne v Flores*** – §5 of 14th amendment empowers congress to enact legislation that both remedies and prevents violations of the 14th amendment – such legislation must enforce the Sup. Cts prevailing interpretation of the 14th amendment
       1. expressly rejects view in Katzenbach and shifted to federalist perspective that Congress may not use its §5 powers to expand the scope of rights or create new rights
       2. Fact: church in Texas was prevented from constructing a new facility because its building was classified as a historic landmark, church sued under RFRA and city challenged the constitutionality 🡪 held by SCOTUS to be an excessive use of power under Section 5 of the Fourteenth Amendment of the constitution
       3. RFRA prohibited the govt from substantially burden the exercise of religion even if it results from a rule of general applicability unless the government can demonstrate the burden is (1) in furtherance of a compelling governmental interest and (2) the least restrictive means of furthering that interest (strict scrutiny)
       4. Rule: While preventive rules are sometimes appropriate remedial measures, there must be congruence between the means used and the ends sought to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.
       5. **Holding:** Congress is limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court, there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end
       6. “sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description regardless of subject matter” 🡪 prohibits much which does not violate the constitution
       7. Legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations
   13. AFTER BOERNE: Supreme Court reaffirms that Congress under §5 cannot expand the scope of rights and that any federal law must be a “proportionate” and “congruent” measure to prevent and remedy constitutional violations – Congress may be sued for their unconstitutional acts and thus may be sued under Title II of the ADA for conduct that violates the constitution
   14. Basic Principal: Congress can authorize suits against states for unconstitutional actions and also has much broader authority to legislate if it is a type of discrimination or a right that receives heightened scrutiny. But if it is a type of discrimination or claim that receives only rational basis review, Congress’s ability to legislate under §5 is very narrow
   15. ***Shelby County v Holder***
       1. Facts: §5 of Civil Rights Act of 1965 prohibits eligible districts from enacting changes to their election laws and procedures without official authorization. Section 4(b) defines the eligible districts as ones that had a voting test in place as of November 1, 1964 and less than 50% turnout for the 1964 presidential election. Such districts must prove to the Attorney General or a three-judge panel of a Washington, D.C. district court that the change “neither has the purpose nor will have the effect” of negatively impacting any individual’s right to vote based on race or minority status. Section 5 was originally enacted for five years, but has been continually renewed since that time. Shelby county challenged the constitutionality of §5 and §4(b)
       2. Issue: Does the renewal of § 5 of the Voter Rights Act under the constraints of Section 4(b) exceed Congress’ authority under the Fourteenth and Fifteenth Amendments, and therefore violate the Tenth Amendment and Article Four of the Constitution?
       3. Holding: The Court held that Section 4 of the Voting Rights Act imposes current burdens that are no longer responsive to the current conditions in the voting districts in question. The Court also held that the formula for determining whether changes to a state’s voting procedure should be federally reviewed is now outdated and does not reflect the changes that have occurred in the last 50 years in narrowing the voting turnout gap in the states in question.
   16. ***United States v Morrison – reaffirmed Civil Rights Cases*** (Congress could not regulate private conduct)
       1. Facts: Morrison was sued under part of the Violence Against Women Act of 1994 (Act), which penalized crimes of violence motivated by gender
       2. §13981: provides a federal civil remedy for the victims of gender-motivated violence – law declares “all persons within the US shall have the right to be free from crimes of violence motivated by gender…shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages…”
       3. Language and purpose of 14th amendment place certain limitations on the manner in which Congress may attack discriminatory conduct
       4. Holding: Congress’s power under §5 does not extend to the enactment of §13981
       5. VAWA exceeds scope of Congress’s §5 powers because “it is not aimed at proscribing discrimination by officials which the 14th amendment might not itself proscribe”
   17. ***Tennessee v Lane***
       1. Facts: Challenge by paraplegics who were unable to enter several courthouses because of non-availability of wheelchair entrances. Sued TN on the ground of Title II of the Americans with Disabilities Act of 1990 (ADA). TN argued that the law was unconstitutional
       2. Rule: Title II of the ADA which prohibits discrimination against disabled persons by public entities is constitutional.
       3. Title II, like Title I seeks to enforce this prohibition on irrational disability discrimination,
       4. Title II was enacted because of a systematic and widespread system of discrimination against disabled persons in state services and programs, whether public education, the penal system or the voting system. This discrimination amounted in many cases to depriving disabled persons of their fundamental rights
2. **First Amendment**
   1. **Free Speech – Hate Speech/Incitement to Violence**
      1. ***Brandenburg v Ohio***:
         1. Facts: An Ohio law prohibited the teaching or advocacy of the doctrines of criminal syndicalism. The Defendant, Brandenburg, a leader in the Ku Klux Klan, made a speech promoting the taking of vengeful actions against government and was therefore convicted under the Ohio Law.
         2. “Clear and present danger test”
         3. Holding: the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action – statute impermissibly intrudes on 1st and 14th amendment
         4. Rule: Speech can only be prohibited if it is “directed at inciting or producing imminent lawless action” and it is likely to incite or produce such action
      2. ***Hess v Indiana***
         1. Facts: protestors said “we’ll take the fucking street later”
         2. Holding: this speech was nothing more than advocacy of illegal action at some indefinite future time – no evidence that words would produce imminent disorder and could not be punished by the State on the ground that they had a tendency to lead to violence
      3. ***NAACP v Claiborne Hardware***
         1. Facts: Beginning in 1966, under the direction of the Petitioner, the Mississippi NAACP, black citizens began to boycott the businesses of several white merchants, on the basis of racial injustice. Claiborne Hardware Co. and other merchants brought suit asking for damages, alleging that their businesses had suffered due to the boycott.
         2. Rule: The freedom to associate includes the freedom to demonstration, provided that a demonstration does not lead to violence.
      4. ***Miller v California***
         1. Material is obscene and unprotected when a jury can answer yes to the following 3 questions – basically sexual materials only
            1. Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest
            2. Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law
            3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value
   2. **Free Speech – Fighting Words**
      1. ***Chaplinksy v New Hampshire***
         1. Facts: Chaplinsky was convicted under a State statute for calling a City Marshal a “God damned racketeer” and a “damned fascist” in a public place.
         2. Rule: “Fighting words” are not entitled to protection under the First Amendment of the United States Constitution (Constitution)
         3. Reasoning: Right to free speech is not absolute under all circumstances**. “Fighting words” are not protected under first amendment - words that inflict injury or tend to excite an immediate breach of the peace. Such words are of such little expositional or social value that any benefit they might produce is far outweighed by their costs on social interests in order and morality.**
         4. The statute at issue is narrowly drawn to define and punish specific conduct lying within the domain of government power.
         5. Test is what men of common intelligence would understand would be
      2. Justice Murphy balancing: attached a low value to the speech claiming protection measured against that weak variety of speech against the competing state interests
      3. ***Gooding v Wilson***
         1. Facts: antiwar picketers at army building refused a police request to stop blocking access to inductees, said to officers “If you ever put your hands on me again I’ll fucking kill you”
         2. Holding: court reversed a conviction under a Georgia statute providing that any person “who shall, without provocation, use to or of another, opprobrious words or abusive language, tending to cause any breach of peace” was guilty of misdemeanor
         3. Overly broad statute - Court found statute void on its face because it swept in protected speech ranging beyond the “fighting words” punishable under Chaplinksy
      4. ***Texas v Johnson***
         1. Facts: Court invalidated on free speech grounds the conviction of a political protestor who burned an American flag
         2. Statute prohibited desecration of a flag in a manner the defendant “knows will seriously offend one or more persons likely to observe or discover such action”
         3. Holding: invalidated statute – “no reasonable onlooker would have regarding the generalized expression of dissatisfaction with the policies of the federal government as a direct personal insult or an invitation to exchange fisticuffs”
         4. Reasoning: **The state’s restriction on Defendant’s expression is content-based. Therefore, the state’s asserted interest in preserving the special symbolic character of the flag must be subjected to the “most exacting scrutiny.”**
      5. ***R.A.V. v City of St. Paul***
         1. Facts: R.A.V. and several friends made a cross and burned it inside the fenced yard of a black family. The city of St. Paul charged Petitioner under the Ordinance which forbids harmful conduct on the basis of race. RAV claimed the Ordinance was substantially overbroad and impermissibly content-based.
         2. Rule: **Content-based restrictions, as well as point-of-view restrictions, are presumably invalid.**
         3. The ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses, **content-based regulations are presumptively invalid**
         4. Government cannot regulate based on hostility toward the underlying message expressed
         5. Must determine if content discrimination is reasonably necessary to achieve St. Paul’s compelling interests – not in this case
      6. ***Wisconsin v Mitchell:*** distinguishes RAV
         1. Holding: If you have law that punishes crime but enhances sentence if you can find the person selected their victim on the basis of race, is this a form of discrimination against people for their racial views
         2. Whereas the ordinance struck down in R.A.V. was explicitly directed at expression, the statute in this case is aimed at conduct unprotected by the first amendment
      7. ***Virginia v Black***
         1. Facts: Black was convicted under Virginia’s cross-burning statute. He argued that it was an unconstitutional law because under it any cross-burning was treated as prima facie evidence of the intention to create fear in another.
         2. Rule: If a state’s cross-burning statute treats any such incident as being on the face of it an intention to intimidate another, it violates the constitution.
         3. The provision as interpreted would create an “unacceptable risk of the suppression of ideas”
         4. Prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate – first amendment does not permit such a shortcut
   3. **Free Speech – Money**
      1. **Motifs of Campaign Finance Reform Cases**
         1. **Government has legitimate interest in preventing quid pro quo corruption (here is $x, I want to make sure that zoning variance of my neighbor gets denied)**
         2. **Government has legitimate interest in preventing appearance of quid pro quo corruption (idea is that we want to prohibit things that suspicious minds might think would lead the politician to engage in favoritism)**
         3. **Third party messaging frequently does not help the candidates and thus does not generate as much of a threat of quid pro quo corruption (running ad campaigns for someone as a third party can be distracting from the message the candidate actually wants to send)**
         4. **Forming a PAC is burdensome (groups of ppl, corporations can form – nobody is in them against their will, people know what they are getting into when they join a PAC v. if you buy a share of exxon stock, you probably aren’t doing it for political reasons)**
         5. **Entities such as corporations and unions can oppress their members by spending money on political views**
         6. **It distorts the market to let control of money dictate the power and amount of speech in which one can engaged; government thus has a legitimate interest in limiting the amount of speech in which one can engage (if some ppl have lots of money to make themselves heard, where others do not, the truth doesn’t necessarily emerge – money is speech so why would truth emerge under those circumstances)**
         7. **Government should not be permitted to help others engage in speech where, in doing so, they explicitly discourage others from speaking**
         8. **Since speech can not be engaged in without money, regulation of campaign or issue spending is essentially the same as regulation of speech (is there a meaningful distinction between saying something and paying somebody with a political voice – it takes money to speak in any effective way so the regulation of money used in speech is the same thing really as regulating speech)**
         9. **States should be able to limit the purposes of corporations that they limit to be formed (although its maybe a formality, you are not permitted to go off and form your own corporation, you need to file documents and get approval – if corporation commits a tort or breach, the shareholders are insulated from personal liability, states are according a privilege of assuming the corporate form so they should be able to limit the purposes for which they are formed)**
         10. **It would be illegitimate to draw a distinction between media corporations and general purpose corporations (should this matter? Some justices don’t think it is legitimate to treat these any differently, if you say the first amendment doesn’t protect citizens united then you next have to say it doesn’t protect Comcast or fox news or anybody else in a corporate form)**
         11. **It would be illegitimate to draw a distinction between nonprofit corporations and organized at least in substantial part for ideological purposes and for-profit corporations**
         12. **The potential for corruption caused by independent expenditures is different than the potential corruption caused by contributions (giving money directly to a candidate v. spending money on behalf of a candidate without coordination of the candidate)**
         13. **Issue discussions different from campaign expenditures**
      2. Definitions
         1. Contribution limits – restrictions on the amount that a person gives to a candidate or a committee – are generally constitutional.
         2. Expenditure limits – restrictions on what a person spends overall – are unconstitutional
         3. Soft money – (no limits on soft money) money that goes to "party building activities," such as "get-out-the-vote" efforts and generic advertising, such as "issue" ads.
         4. Hard money - firm limits on contributions, is highly regulated
      3. ***Buckley v Valeo***: **1, 2, 3, 8, NOT 6** constitutional challenges to the key provisions of the Federal Election campaign act of 1971 (FECA) and related provisions as amended in 1974
         1. Rule: The government may not restrict expenditures in political campaigns because such expenditures are forms of political expression protected by the First Amendment to the United States Constitution. However, the government may impose restrictions on the amount of a person’s contributions to political campaigns.
         2. Campaign contributions warrant less judicial scrutiny because such contributions are less communicative than other political speech and individuals may still take direct actions to support their preferred candidate
         3. Campaign finance regulations must not violate basic principles of political freedom and free speech recognized and protected by the first amendment
         4. Limitations to free speech are subject to strict judicial scrutiny
         5. Reasoning:
            1. Contribution limits entail “only a marginal restriction on the contributor’s ability to engage in free communication” because “the transformation of contributions into political debate involves speech by someone other than the contributor.”
            2. Expenditure limits, by contrast, “represent substantial rather than merely theoretical restraints on the quality and diversity of political speech.”
      4. ***Nixon v Shrink Missouri Government PAC – reaffirmed Buckley***
         1. Court reiterated that contribution limits are subject to greater deference than expenditure limits
         2. **Contribution limits need not satisfy strict scrutiny but will survive if “closely drawn” to a “sufficiently important interest” such as prevention of corruption and appearance of corruption**
         3. **Whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless**
      5. ***Randall v Sorrell***
         1. Court reiterated the contribution/expenditure distinction but for the first time found a contribution limit so low it could not satisfy Buckley’s avoidance of corruption rationale
      6. ***Colorado Republican Federal Campaign Committee v FEC***
         1. **3, 8**
         2. Issue: can a political party expend funds freely in support of or opposition to candidates so long as they do so independently of a candidate’s own campaign?
         3. Court invalidated a provision of FECA imposing dollar limits upon campaign party expenditures in connection with the general election campaign of a congressional candidate
         4. Court rejected the governments view that party expenditures on behalf of a candidate’s election should be conclusively presumed to be coordinated with the candidate’s campaign and thus treated as contributions
      7. ***FEC v Colorado Republican Federal Campaign Committee***
         1. **1, 6, 12, NOT 8**
         2. Court held that limits on a party’s coordinated expenditures are facially constitutional
         3. A party is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid
         4. Found limits justified “on the theory that unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contributional limits
      8. ***Citizens Against Rent Control v Berkeley***
         1. **13**
         2. Court invalidated a city ordinance imposing a $250 limit on personal contributions to committees formed to support or oppose ballot measures, finding it an unconstitutional interference with “rights of association” and “individual and collective rights of expression”
      9. ***Austin v Michigan City of Commerce***
         1. **5, 6\*, 9**
         2. Court upheld a Michigan restriction that barred corporations from making independent expenditures from general treasury funds on behalf of candidates in political campaigns
         3. “Unique legal and economic characteristics of corporations” that enable them “to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace”
         4. Held that state had articulated a sufficiently compelling rationale for its restrictions on spending since the law was designed to deal with the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the publics support for the corporations political ideas
      10. ***McConnell v Federal Election Commission***
          1. Facts: Congress enacted the Bipartisan Campaign Reform Act (BCRA) to cover the loopholes left in the first statute, The Federal Election Campaign Act (FECA) that sought to control federal election campaign contributions.
          2. Under the BCRA federal candidates and national party committees may not use soft-money funding for federal election campaigns – BRCA only had marginal impact
          3. The prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits
          4. Partially overturned in FEC v Wisconsin Right to Life – see below
          5. Makes it a federal crime to speak/donate to about a political candidate
          6. Issue advocacy distinctions
             1. Express advocacy – “Don’t vote for Hilary”
             2. Functional equivalent – “Women can’t be trusted as leaders”
             3. Issue advocacy – “Abortion is murder”
          7. Roberts says no overbreadth concern in the sense it was express campaign speech which can’t be regulated
          8. The interest of preventing corruption and its appearance is a sufficient interest – this interest allows gov’t “sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process”
          9. **Rule:** the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or plausibility of the justification raised”
      11. ***Davis v Federal Election Comm’n***
          1. Court invalidated §319(a) of the BCRA “Millionaire’s Amendment” which provided that when a candidate’s expenditure of personal funds exceeded $350,000, he would remain subject to normal contribution limits but his opponent would be permitted to receive individual contributions at treble the normal limit and unlimited coordinated party expenditures
      12. ***Federal Election Commission v Wisconsin Right to Life – Prelude to Citizens United*** 
          1. Facts: §203 of BCRA makes it federal crime for any corporation to broadcast, shortly before an election, any communication that names a federal candidate for elected office and is targeted to the electorate – regulated “issue ads” – typically discussed a candidate name with regard to a particular issue but did not expressly advocate the election or defeat of a candidate
          2. Wisconsin Right to Life Inc, a nonprofit advocacy group, sought to run ads asking voters to contact their Senators and urge them to oppose filibusters of judicial nominees, wanted to run its ads within the 30 and 60 day blackout provisions of BCRA. However, because WRTL was itself incorporated and also because it accepted corporate contributions, it was prohibited from doing so.
          3. Holding: Court ruled that unless an ad expressly urges support or defeat of a candidate it was eligible for an "as applied" exception to the McCain-Feingold limits on issue ads close to an election.
          4. Overturned part of McConnell – ruled that organizations engaged in genuine discussion of issues were entitled to broad “as applied” exemption from the electioneering communications provision of BRCA – cannot ban issue ads
      13. ***Citizens United v Federal Election Commission – overrules Austin and partially overrules McConnell***
          1. **1, 2, 4, 10, 11, NOT 6**
          2. Facts: Citizens United (a non-profit organization) created a negative documentary aimed at Senator Clinton during the 2008 race, and ran ads to urge others to order it on-demand to watch.
          3. Issue: Whether section 441b of the Bipartisan Campaign Reform Act BCRA which criminalizes ads produced by corporations that expressly advocate for or against a candidate within 30 days of the primary elections and within 60 days of the general election is constitutional.
          4. Holding: Congress may not ban political speech based on a speaker’s corporate identity.
          5. Banning all corporations from political speech is too broad and the constitution will not allow it
          6. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations
   4. **Religion**
      1. First amendment provides that “Congress shall make no law respecting an establishment of religion (Establishment Clause), or prohibiting the free exercise thereof (Free Exercise Clause).”
         1. Establishment Clause Claims: three kinds, claims that government impermissibly provided aid to religion, claims that the government has impermissibly allowed religion to intrude into public schools, claims that government has impermissibly sponsored religious doctrines or symbols
            1. Lemon Test: statute must have secular legislative purpose, its principle or primary effect must be one that neither advances nor inhibits religion, statute must not foster an excessive government entanglement with religion
      2. Religious Freedom Restoration Act (RFRA): held unconstitutional in Boerne as applied to state efforts to limit religion, but ok as to Federal efforts
      3. For claims that a state has infringed religious exercise by a law of general application 🡪 use Smith test
      4. For claims that federal government has infringed religious exercise by law of general application 🡪 use RFRA test (compelling interest, Sherbert/Yoder test)
      5. Views:
         1. Voluntarism: the advancement of a church would come only from voluntary support of its followers and not from the political support of the state
         2. Separatism: both religion and the government function best if each remains independent of the other
      6. ***United States v Seeger***: Court interpreted the statutory term “religion” broadly
      7. ***Gillette v United States***: held that Congress could constitutionally refuse to exempt those who did not oppose all wars but only particular conflicts
      8. **Free Exercise of Religion – look at question whether government may deliberately disadvantage religion or a particular religion, and second at whether religious practitioners are entitled to exemptions from generally applicable laws that conflict with dictates of their faith**
      9. ***McDaniel v Paty***: court invalidated, under the Free Exercise Clause, a TN provision disqualifying clergy from being legislators or constitutional convention delegates
      10. ***Church of Lukumi Bablu Aye v City of Hialeah***
          1. Santaria religion, practice of sacrificing animals but not eating the animal as part of religious service, city passed ordinance restricting sacrificing animals (not for the purpose of consumption) within city limits – does with the specific intention to keep Santaria church out of city
          2. Holding: Ordinance violated Free Exercise Clause. A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. Where the government restricts only conduct protected by the 1st Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.
          3. Strict Scrutiny - If the object of the law is to restrict or infringe upon practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.
          4. When gov’t conduct selectively burdens religiously-motivated conduct, the next question is whether the gov’t purpose was to disapprove of a particular religion or religion in general – if so, apply strict scrutiny
      11. ***Reynolds v US***
          1. Court upheld application of a federal law making bigamy a crime in the territories to a Mormon claiming that polygamy was his religious duty
          2. “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices – plural marriages should not be allowed”
      12. ***Minersville School District v Gobitis***
          1. Court refused to grant free exercise exemption to Jehovah’s witnesses who refused to salute the flag
          2. “Foundation of a free society is the binding tie of cohesive sentiment”
      13. ***West Virginia State Bd of Education v Barnette – overturned Gobitis***
          1. Invalidated school’s pledge requirement relied on free speech grounds
          2. State was employing flag as symbol of adherence to government as presently organized
      14. ***Braunfeld v Brown***
          1. Court rejected free exercise challenge to a PA Sunday closing law; challengers were orthodox jews whose religion required they close their stores on Saturday, claimed the law requiring them to be closed on Sunday placed them at a severe disadvantage
          2. Court rejected free exercise challenge- it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions
      15. ***Sherbert v Verner***
          1. Facts: Sherbert, a Seventh-Day Adventist was denied unemployment benefits by South Carolina because she refused to work on Saturdays. State compensation law barred benefits to workers who failed, without good cause, to accept “suitable work when offered.” She refused to take a job that required her to work Saturdays.
          2. Rule: A state may not constitutionally apply the eligibility provisions of its unemployment compensation scheme so as to constrain a worker to abandon her religious convictions respecting the day of rest.
          3. State law imposed an undue burden on Sherbert’s free exercise of religion
          4. State justification was not sufficient (possibility of filing of fraudulent claims)
          5. State may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest
      16. ***Wisconsin v Yoder***
          1. Yoder, an Amish man, was convicted and fined for refusing to send his daughter to school – Amish object to high school education because of religious beliefs
          2. Court overturned conviction because it violated Free Exercise Clause
          3. Rule: A states interest in universal education must be strictly scrutinized when is imposes on fundamental rights and interests such as right of free exercise
          4. Reasoning: The State’s power is subject to a balancing test when it impinges on fundamental rights such as those protected by the Free Exercise Clause and the traditional interest of parents with respect to the religious upbringing of their children.
          5. In order for Wisconsin to compel such attendance, it must follow that either the State does not deny the free exercise of religious belief by its requirement or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. This Court determines that the Amish objection to the attendance is rooted in religious beliefs that directly conflict with the compulsory school attendance law. Amish community has been a highly successful social unit within our society, producing productive and law-abiding citizens.
      17. ***United States v Lee***
          1. Amish man objected to paying SS tax for his employees arguing that Amish believe it is sinful not to provide for their own elderly
          2. Court upheld application of the tax – “state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest” – here, mandatory participation in the SS system was indispensable to the fiscal vitality of the system
      18. ***Bob Jones University v United States***
          1. Court rejected free exercise challenge to IRS denials of tax exemption status to two educational institutions that practiced racial discrimination in accordance with the religious beliefs on which they were founded
          2. State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest
      19. ***Goldman v Weinberger***
          1. In rejected a free exercise challenge involving military service, court abandoned heightened scrutiny and adopted openly deferential approach
          2. Orthodox jew was disciplined in the military for wearing yarmulke
          3. Review of military regulations challenged on first amendment grounds is far more deferential than constitutional review of similar regulations designed for civilian society
          4. Court gives great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest
      20. ***Bowen v Roy***
          1. Court rejected a free exercise challenge to a requirement in the federal AFDC and food stamp programs that applicants for welfare benefits be identified by SS numbers
      21. ***Employment Division, Dept of Human Resources v Smith***
          1. Facts: Smith sought unemployment compensation benefits after he was fired from his job for using peyote in a religious ceremony. The Oregon Supreme Court ruled that the Respondent should be awarded unemployment compensation as his right to free exercise of religion was violated.
          2. Rule: The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law makes criminal conduct that his religion proscribes.
          3. A generally applicable law does not violate the free exercise clause – does not selectively burden only those whose conduct is religiously motivated
          4. There was no contention that OR drug law represented an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of ones children in those beliefs
          5. Applies Sherbert test 🡪 government actions that substantially burden a religious must be justified by a compelling interest (this case is distinct from the issue in Sherbert)
      22. ***City of Boerne v Flores***
          1. Held Congress lacked authority under civil rights enforcement act clauses to enact a statute applying the Sherbert rather than Smith standard to claims of religious exemption from generally applicable state laws
      23. ***Zelman v Simmons-Harris***
          1. Facts: Cleveland public schools were performing badly, and in an effort to resolve this issue, the state of Ohio put into effect a school voucher plan under which parents could opt to enroll their children in private schools taking part in the program. Since a great majority of the private schools were affiliated to one or other religious group, Ohio taxpayers filed an action against the program pleading violation of the Establishment Clause.
          2. Rule: A school voucher program which allows parents to send their children to a private school is not in violation of the Establishment Clause, where the vast majority of participating private schools are affiliated to religious groups.
          3. “Establishment clause prevents a state from enacting laws that have the purpose or effect of advancing or inhibiting religion”
          4. Does not violate establishment clause when a neutral government program provides aid directly to a broad class of individuals who, in turn, direct the aid to religious schools or institutions of their own choosing
      24. ***Locke v Davey***
          1. Court upheld the state of Washington’s refusal to allow student recipients of its Promise Scholarship Program to “use the scholarship at an institution where they are pursuing a career in devotional theology”
          2. State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on promise scholars
      25. ***Everson v Board of Education***
          1. Facts: government said they would provide free transportation to kids going to NJ public schools – what if kid wants to go to parochial school
          2. Court ruled this was ok – even though taxpayer money is being used to advance religion, it is neutral, doesn’t prefer one school over another, government isn’t paying school directly
      26. ***Larkin v Grendel’s Den***
          1. Court struck down MA law that gave churches and schools the power to veto the issuance of liquor licenses to restaurants within 500 feet of the church or school buildings
          2. Cant turn governmental functions such as zoning to a church
      27. ***Estate of Thorton v Caldor, Inc***
          1. Court stuck down CT law providing “no person who states that a particular day of the week is observed as his Sabbath may be required to work on such day. An employee’s refusal to work on his Sabbath shall not constitute grounds for his dismissal”
      28. ***Cutter v Wilkinson***
          1. Court rejected an Establishment Clause defense raised by prison officials against prisoners’ attempts to enforce section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) – “no government shall substantially burden the religious exercise of an institutionalized prisoner unless they have a compelling interest of doing so and least restrictive means”
          2. Boerne: found RFRA to be unconstitutional as applied to states, this statute sounds a lot like RFRA
      29. ***Board of Education of Kiryas Joel v Grumet***
          1. Orthodox jewish town, all children attended religious schools with the exception of schoolchildren with special needs, who were sent to public schools
          2. State legislature passed law designating Kiryas Joel as its own school district so special needs students would have their own school
          3. Court found the NY law violated the Esablishment Clause – the only reason that state enacted the law was to reinforce the parents religious inculpation of their kids, intent is inappropriate, fails first part of lemon test
3. **Indians**
   1. ***Cherokee Nations v Georgia***
      1. Martin v Hunter’s Lessee – about power of Sup. Ct and judiciary to review state court judgments, particularly those that interpret the constitution
      2. Issue: is Cherokee nation a foreign nation within meaning of judiciary act?
      3. They are a domestic, dependent nation – means that constitution doesn’t give jurisdiction to the Sup Court to resolve this case
   2. ***Worcester v Georgia***
      1. Facts: Worcester was indicted for “residing within the limits of the Cherokee nation without a license" and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." GA act entitled "an act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians." Worcester argued that the state could not maintain the prosecution because the statute violated the Constitution, treaties between the United States and the Cherokee nation, and an act of Congress entitled "an act to regulate trade and intercourse with the Indian tribes." Worcester was convicted and sentenced to "hard labour in the penitentiary for four years."
      2. States can’t exercise regulatory authority over Indian nations
      3. Holding: Court held that the Georgia act, under which Worcester was prosecuted, violated the Constitution, treaties, and laws of the United States.
      4. There is a relationship between the federal government and the Indian tribes and the state doesn’t have the right or power to regulate that
      5. Noting that the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union,"
      6. "The Cherokee nation, then, is a distinct community occupying its own territory in which the laws of Georgia can have no force. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." The Georgia act thus interfered with the federal government's authority and was unconstitutional. Justice Henry Baldwin dissented for procedural reasons and on the merits.
   3. ***United States v Lara***
      1. To what extent can Indians subject members of their own tribe to discipline/act as their own government?
         1. Rule: tribes are permitted to regulate life at least on reservation lands up to a point but they are permitted to send them for a year to prison with some monetary penalty – limited ability to execute
         2. That authority only extends to trying Indians at least of some sort it has not until recently been permitted to extend to non-Indians who commit wrongdoing while on Indian land – couldn’t subject non-Indians to that when they really haven’t consented
         3. Indian tribes do not have jurisdiction to try and punish Indians who aren’t members of the tribe
         4. Tribes lobby to undue Duro – to say the tribes should have the same authority to regulate non-tribal Indians who misbehave on their land the same as their own tribal members
         5. Inherent authority theory – tribes have inherent authority by virtue of being nations to deal with things that happened on their land, why not say Indians have the inherent power to prosecute almost anything that happens on their land but US can take that away from them by virtue of their superiority
         6. Delegated power theory
         7. Double jeopardy exception – separate sovereign rule
4. **Immigration and Territories**
   1. ***Arizona v United States***
      1. Facts: United States Supreme Court case involving Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act, At issue is whether the law usurps the federal government's authority to regulate immigration laws and enforcement
      2. Court ruled sections 3, 5(c), and 6 were preempted by federal law, but left other parts intact, including provision that allowed law enforcement to investigate a person’s immigration status
      3. Provisions at issue:
         1. Section 3 of S.B. 1070, which made it a state crime to be unlawfully present in the United States and failing to register with the federal government – STRUCK DOWN
         2. Section 5, which made it a misdemeanor state crime to seek work or to work without authorization to do so – STRUCK DOWN
         3. Section 2, which in some circumstances required Arizona state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained; and
         4. Section 6, which authorized warrantless arrests of aliens believed to be removable from the United States based on probable cause –STRUCK DOWN
      4. 3 Provisions struck down: required legal immigrants to carry registration documents at all times; allowed state police to arrest any individual for suspicion of being an illegal immigrant; and made it a crime for an illegal immigrant to search for a job (or hold one) in the state
      5. All justices agreed to uphold provision of the law allowing AZ state police to investigate the immigration status of an individual stopped, detained or arrested if there is reasonable suspicion the person if there illegally
      6. Opinion embraced expansive view of the US Gov’ts authority to regulate immigration and aliens, describing it as “broad” and “undoubted”
   2. ***Chan Chae Ping v US***
      1. Facts: Appellant challenged an order from the Circuit Court of the United States for the Northern District of California, which held that appellant was not entitled to enter the United States and that appellant was not restrained of his liberty. The United States denied entry under an act that was a supplement to an act titled "an act to execute certain treaty stipulations relating to Chinese"
      2. Holding: The Court affirmed the refusal of the United States to grant appellant entry into the United States because the legislature had the authority under the sovereign powers delegated by the Constitution to exclude foreigners. The treaties with China did not strip the legislation of the power to exclude Chinese laborers
      3. Reaffirmed congressional discretion to abrogate or modify treaties
   3. ***Wong Wing***
      1. Facts: Chinese Exclusion Act imposed imprisonment at hard labor and deportation to Chinese persons convicted of unlawful entry to or presence in the United States. A commissioner of the Circuit Court (who was not a judge) found that Wong Wing was an unlawful alien and sentenced him to 60 days at hard labor followed by deportation to China. Wong Wing sought a writ of habeas corpus, but it was denied
      2. Issue: Does penalty of imprisonment at hard labor and deportation without a jury trial constitute a violation of the Fifth and Sixth Amendments?
      3. Holding: Yes – the imprisonment provisions of the act are void, Congress may deport without a jury trial, but imprisonment at hard labor is an infamous offense calling for judicial trial to establish guilt of the accused
   4. ***Consejo de Salud Playa de Ponce v Rullan***
      1. Medicaid in Puerto Rico case