**CONSTITUTIONAL LAW OUTLINE (Updated 4/30/2009)**

* **3 Main Categories of Cases**
	+ **Separation of Powers – Relationship between Branches of Fed. Govt.**
	+ **Federalism – Relationship between Fed. Govt. and State Govt.**
		- **Basic Issue: Does the Fed. Govt. have the right to do it?**
			* **1. Can any govt do it?**
			* **2. Can the Fed. Govt. do it?**
	+ **Rights Model – Relationship between Govt. and 1 or >1 Individuals**
		- **Basic Issue: Do I have a right to be free from what the govt is trying to impose on me?**
			* **1. Is there a right?**
			* **2. Does the government have the power to act?**
* **SEPARATION OF POWERS**
	+ **Constitution allocates power horizontally, among the 3 branches of government. See Articles I, II and III.**
	+ **EXECUTIVE BRANCH POWERS**
		- **SEE ARTICLE II of CONSTITUTION** – Executive powers include:
			* Commander in Chief of the Army and Navy of the United States and the Militia of the several states;
			* To grant reprieves and pardons for offenses against the United States;
			* With the advice and consent of the Senate, to make Treaties,
				+ Note: may get around “advice and consent of Senate” requirement by making unilateral executive agreements rather than treaties (ok via US v. Belmont)
			* To appoint Ambassadors, public Ministers and Consuls, Judges, and all other PRINCIPAL Officers of the United States, with the advice and consent of the Senate;
				+ Note: Constitution is silent on ability to remove most appointees, but he CANNOT REMOVE federal judges.
			* “shall take Care that the laws be faithfully executed”
		- **The President’s power must stem from either an Act of Congress (to execute an enacted law) or from the Constitution itself. The President’s power in the Constitution to see that laws are faithfully executed refutes the idea that he is to be a lawmaker – his power is limited to recommending laws he thinks wise and vetoing laws he thinks bad – HE HAS NO GENERAL POWER TO ENACT LEGISLATION.** (“The Steel Seizure Case” – Youngstown Sheet & Tube Co. v. Sawyers)
			* Idea of 3 spheres (from the Youngstown Concurrence by Jackson)
				+ Presidential action pursuant to Congressional authority – President’s authority includes all he possesses in his own right plus all that Congress can delegate.
				+ Presidential action in the context of Congressional silence (“zone of twilight”) – President can rely only on his own independent authority.
				+ Presidential action that is incompatible with the express or implied will of Congress – President can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter.
		- **Executive Discretion in Times of War**
			* **Congress is given power to declare war (Art. 1, Sect. 8), and to raise and support armies and navies (Art. 1, Sect. 8), BUT, the President is given the authority to act as Commander in Chief of the armed forces (Art. 11, Sect. 2)**
			* **Issue: Does the Government have to behave within the same constitutional boundaries during periods of crisis as periods of calm?**
				+ **What does the text say? Constitution includes ONLY a few specific and limited references to emergency circumstances:**

States can’t engage in warlike activities without Consent of Congress unless “actually invaded, or such imminent danger as will not admit of delay…”

3rd Amendment expressly limits executive discretion to take private property, even in wartime.

5th Amendment requirement of a grand jury indictment is relaxed for martial law.

* + - * + **Two basic views:**

**The Constitution is continuous, invariant in its basic premises, even in times of war or crises. (Ex Parte Milligan, Steel Seizure Case) OR**

**All constitutional bets should be off, and the executive must have the latitude to assume greater unilateral discretion. (NOT THE LAW IN THE US)**

Possible intermediate position – “The laws will not be silent in time of war, but they will speak with a somewhat different voice.” (Rehnquist)

* + - * **Executive Detention and Trial of “Enemy Combatants”**
				+ **Art. 1, Sect. 9 – provides that “the privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion of the public Safety may require it.”**

**Note: Art. 1 🡪 Suspension requires legislative approval**

* + - * + **After 9/11**

AMUF – Gave the President the authority to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on Sept. 11…”

**When the writ has NOT BEEN SUSPENDED, due process demands that A CITIZEN held in the US as an enemy combatant be given a MEANINGFUL OPPORTUNITY to contest the factual basis for that decision BEFORE A NEUTRAL DECISIONMAKER.** The government may BALANCE THE PRIVATE INTEREST that will be affected against the GOVERNMENT’S ASSERTED INTEREST and burdens the Government would face in providing greater process – the circumstances may demand that aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. **(Hamdi v. Rumsfeld)**

* + **CONGRESSIONAL ACTION**
		- **Congressional Violation of Separation of Powers**
			* **Delegation to Agencies**
				+ **Congress can either:**

**Be very specific and limiting in the delegation of power to agencies, so that the agency’s rule-making power will in turn be limited, OR**

**Be very broad in delegations that in effect require agencies to make specific sub-rules… so arguably the agencies are legislating.**

* + - * + **So long as Congress “lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform”, they can delegate to other bodies. (Touby v. US)**
			* **Delegation to other Branches**
				+ **If the act is an exercise of legislative power (in character and effect), it must be done by Congress, through the bicameralism and presentment requirements of Art. 1. Efficiency, convenience or usefulness cannot alter this Constitutional requirement – can only be changed by Constitutional Amendment. (INS v. Chadha)**
				+ **The Constitution gives one “single, finely wrought and exhaustively considered procedure” for the enactment of legislation (bicameralism and presentment requirements) – constitutional silent on other methods means this is the ONLY method. An act of Congress cannot change this – an Amendment must. (Clinton v. New York)**
			* **Control over Executive Officers**
				+ **President appoints superior officers with the advice and consent of the Senate (Art. 2, Sect. 2), but Congress can appoint lower officers.**
				+ **The Appointments Clause is silent as to removal of executive officers from office – only explicit reference is in the impeachment provisions (impeachment by House, conviction by Senate; allowed for treason, bribery and other high crimes).**
				+ The impeachment process is the only way to for removal of officers charged with the execution of the laws Congress enacts – Congress cannot reserve power of removal for itself beyond the impeachment provisions. (Bowsher v. Synar) – STANDARD CHANGED **🡪 There are not rigid categories of officials who may or may not be removed without the full impeachment process, but to ensure Congress does not interfere with the President’s exercise of executive power, a BALANCING TEST should be used – real issue is whether removal restrictions are of such a nature THAT THEY IMPEDE THE PRESIDENT’S ABILITY TO PERFORM HIS CONSTITUTIONAL DUTY. (Morrison v. Olson)**
		- **Judicial Review of Congressional Action – Military Affairs**
			* **“… Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.” (Rostker v. Goldberg)**
* **SCOPE AND AUTHORITY OF THE SUPREME COURT**
	+ **Judicial Review (Marbury v. Madison** (by Marshall) – first justification**)**
		- **JUDICIAL REVIEW = THE POWER OF THE COURT TO INVALIDATE LAWS AS UNCONSTITUTIONAL.**
		- **Power of Judicial Review is taken from Art. 3, Sect. 2 (“The judicial power shall extend to all cases…”) and Art. 6 (Supremacy Clause – “This Constitution shall be the Supreme Law of the Land…) – is implied, not express.**
		- Two classes of executive acts not subject to judicial review: where the act is of a political nature (at the discretion of the official).
		- **2 Questions brought by Marbury (see below):**
			* **Is the Constitution the Supreme Law of the land?**
			* **Are the courts the ultimate or exclusive interpreters of the Constitution, or do other branches share that authority?**
			* Basic reasoning of Marbury:
				+ The Constitution binds all parts of the federal government (“is paramount”);
				+ The Constitution is enforceable by the Court in actions before it; and
				+ That the Judiciary is charged with interpreting the Constitution in a unique manner such that its rulings are binding on all other depts. of the Govt.
		- **Two interpretations of Marbury:**
			* **Incidental byproduct of ordinary judicial function in deciding lawsuits – look to governing law, consider Constitution as a source of law and in give priority to the Constitution in conflicting cases.** (Narrow Reading)
				+ Strict constructionist would take more narrow reading – belief that the Court should stick to structure, text and history of the Constitution.
			* **The Court is the central guardian of constitutional principles –** **Court is given the power to police other branches.** (Broader Reading)
				+ **“It is the duty of the judicial department to say what the law is.” – this is where the power of judicial review comes from in Marbury.**
				+ Activist would take more broad reading – idea that the Court should consider their own or current societal norms. Legislature is given deference.
		- **The Supreme Court will generally use a statutory analysis first before asking a constitutional question.**
		- **Did the Framers intend to grant the Court the Power of Judicial Review?**
			* **Yes – Federalist Papers – “The interpretation of the laws is the proper and peculiar province of the Courts.”**
			* **No – judicial review is not explicitly stated in the Constitution, and if they intended it, then they would have included it**
		- **Everything in the Constitution has meaning – no surphesage-** “It cannot be presumed that any clause in the Constitution is intended to be without effect.”
		- Congress/Executive passes law/ order 🡪 Judicial Review 🡪 Constitutional Amendments
			* Act of Congress (not Amendment) cannot overrule Supreme Court holding (Dickerson v. US)
		- **Cooper v. Aaron**
			* **Rulings of the Supreme Court are the Supreme Law of the Land, attaching to the Constitution in the area interpreted.**
			* Possible Interpretations of Cooper:
				+ Restatement of Marbury OR Substantial expansion of the authority asserted in Marbury (see above);
				+ Broad v. Narrow Holdings:

Narrow – Brown v. Board applies to all states

Broad – When the Supreme Court speaks, their holdings become part of the Constitution.

Is the broad view holding or dicta? Arguably holding – without it, suit would have been brought in each state or as class action for Brown to apply to each state.

* + - **Current Debate over Power of Judicial Review:**
			* **Power of judicial review is established – the question is how expansive this power is (broad v. narrow), and whether Marbury was really a legitimate grasp of power (“where did the power come from – was it just an assertion?”)**
			* Judicial Review and Democracy – Is judicial review undemocratic?
				+ Yes, if you say that judges are not elected and have life tenure, so there is no real legitimacy in their authority or “check” on them.
				+ No, if you say that they are indirectly chosen by the people (elected official appoints them).
		- **WHY DO WE NEED JUDICIAL REVIEW?**
			* **In Rights Model Cases**
				+ **Because Rule by the Majority is only part of the “foundation” – its important that we still look at individual rights and liberties**
			* **In Separation of Powers Cases**
				+ **Judicial Review is a part of the Checks/Balances Process – Judicial Review attempts to prevent one branch from seizing the powers of another**
			* **In Federalism Cases**
				+ **Congress is made up of elected representatives of the States, so without Judicial Review, you’d have states deciding if the Fed. Govt. can interfere with states**
				+ **Lack of Political Accountability – may be difficult for citizens to know which member of Congress to hold responsible when Congress acts, so they can’t necessarily show true dissatisfaction by voting (O’Connor in NY v US)**
	+ **Judicial Review of State Court Judgments (main case - Martin v. Hunter’s Lessee)**
		- **Supreme Court has the jurisdiction and authority to review all state acts under the Constitution, laws and treaties of the United States.** (Section 25, Judiciary Act of 1789)
		- **It is the case, not the Court, that gives jurisdiction. (Art. 3 Sect. 2 – “shall extend to all cases”)**
		- **Judicial power of review extends to all cases arising under the constitution or law of the United States, whoever may be the parties.** (Cohens v. Virginia)
		- Justifications (Martin)
			* Purpose of Supreme Court = federal supremacy + uniformity
			* Art. 3, Sect. 2 + Art. 6 – text/implied;
			* Court had done this in previous cases without making explicit statement;
			* Compromise at Constitutional Convention – that federal questions can come up in both state and federal court – so SC must be able to rule on state court rulings to ensure uniformity.
		- Effect: impacts state’s rights and complexity of relationship between federal/ state Courts
		- Martin today:
			* Supreme Court is more likely to give deference to state courts
			* When state courts are reviewing the constitutionality of federal laws, the court must enforce laws over inconsistent state acts. If the state courts refuse to follow US Supreme Court rulings, the Supreme Court can reverse.
			* Federal Constitution can be said to establish minimum guarantees of rights – a state granting additional liberties does not violate its provisions.
	+ Political Restraints on the Supreme Court:
		- Types:
			* Judicial selection (nomination and confirmation process by Senate);
			* Impeachment (Court members “hold offices during good behavior” and Art. 2 Sect. 4 allows for impeachment (officer of the US);
			* Court packing (Congress sets size and budget);
			* Court stripping (Congress may make “exceptions” to Court’s appellate jurisdiction);
				+ Note: Congress may limit appellate jurisdiction, but cannot take it away completely without a constitutional amendment. (Ex Parte McCardle)
			* Constitutional Amendment (permitted by Art. 5; binds Court) OR Congress may pass law that “chips away” at a Supreme Court ruling; and
			* Private citizens may still bring suits challenging Supreme Court rulings.
		- Boundary between legitimate disagreement and improper defiance?
			* Boundary comes from whether the legislative/executive actions are within their separate spheres (exclusive power in Constitution). If the action is within a separate sphere, Marbury says that there can be legitimate disagreement with the Supreme Court. If not in a “sphere”, and statute/order goes directly against Supreme Court holding, then it is improper defiance.
* **FEDERALISM - SCOPE OF FEDERAL POWERS (MCCULLOCH V. MARYLAND)**
	+ McCulloch v. Maryland
		- Central Issue: Could the State of Maryland collect a tax from the Bank of the United States?
		- Court used McCulloch to narrowly limit the authority of state governments to impede the federal government.
		- Four Arguments by Court:
			* Historical experience (first bank) justifies constitutionality of practice (second bank).
			* Defeats “compact federalism” argument (that states retain sovereignty b/c they ratified the Constitution). People are sovereign, not states.
			* Scope of Congressional authority – VERY EXPANSIVE/ BROAD VIEW
			* Meaning of Necessary & Proper Clause – “any means calculated to produce the end”
	+ Necessary & Proper Clause
		- **Art. I, Sect. 8 – Necessary and Proper Clause – gave Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”**
		- **NOTE: NECESSARY & PROPER CLAUSE MUST WORK IN CONJUNCTION WITH ANOTHER FEDERAL POWER.**
		- **“The government has a right to do an act, and has imposed on it the duty of performing that act must be allowed to select the means.” (McCulloch v. Maryland)**
		- **Means/Ends Test 🡪 NECESSARY = ANY MEANS CALCULATED TO PRODUCE THE END (McCulloch v. Maryland)**
			* **Test: “Let the end be LEGITIMATE, let it be WITHIN THE SCOPE, and all means which are APPROPRIATE, which are PLAINLY ADAPTED to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution.” (McCulloch v. Maryland) 🡪 Generally understood as by any means not prohibited by the Constitution.**
			* **Question is how broad power under the Necessary & Proper Clause is.**
		- Examples of use of Necessary & Proper Clause:
			* Creating a national bank falls within the Necessary & Proper Clause. The Constitution gives the power to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct war and to raise and support armies. The right to create a national bank logically follows. (McCulloch v. Maryland)
	+ 10th Amendment
		- **To assuage fears of unlimited power under the Necessary and Proper Clause, 10th Amendment was added – “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”.**
	+ What boundaries did the Constitution establish between the respective powers of the national government and the states?
		- Articles 1 and 3 enumerate the affirmative powers of the federal government.
			* Necessary & Proper Clause is listed among the powers of Congress, not among limitation of powers, so it was arguably meant to enlarge, not limit powers of government.
		- Article 10 expressly bars States from a short list of forbidden acts that might interfere with the national interest, including entering into treaties, coining money, granting titles of nobility, and requires congressional consent before states may impose customs duties, enter interstate compacts, or engage in war.
		- **“The states have no power, by taxation or otherwise, to impede on or in any way control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government” – such actions will be void under the Supremacy Clause. (McCulloch v. Maryland)**
		- Opposing structural “default rules” for states and national power:
			* States have no reserved powers over the composition or operation of the federal government because power may not be reserved over what does not exist – WHEN CONSTITUTION IS SILENT, FEDERAL GOVERNMENT HAS POWER TO ACT.
				+ Example: The power to add qualifications for a person running for Congress are not within the original powers of the States, and therefore not reserved to the States by the 10th Amendment (electing representatives was a “new right”. (US Term Limits, Inc. v. Thornton)
			* OR States have all the powers, including powers with respect to activities of the federal government, except those the Constitution withholds from them.
		- How broadly you read McCulloch – whether it means that federal power will always usurp state power, regardless of what powers the states have traditionally had – determines how far the Necessary & Proper Clause stretches (i.e. can the fed govt. regulate guns in schools?)
	+ Principle of Popular Sovereignty
		- Was it the peoples of the individual states that ratified the Constitution? Or the collection of states? Do people have power, or states?
		- **The Constitution was submitted to the people, and the fact that individual citizens assembled within their states was inconsequential – the measures the people adopted did not become the measures of the states themselves. (McCulloch v. Maryland)**
* **COMMERCE CLAUSE**
	+ **US Constitution, Art. 1, Sect. 8, cl. 3 – grants Congress the power “To Regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes.”**
	+ Three main issues under the Commerce Clause:
		- What is commerce?
			* Commerce = intercourse/exchange (Gibbons v. Ogden)
		- What does “among the several states” mean?
			* Among = intermingled with (Gibbons v. Ogden)
		- Does the 10th Amendment limit Congress/relationship with Commerce Clause?
			* Current – 10th Amendment can limit use of Commerce Clause (US v. Lopez)
	+ Basic Timeline:
		- Constitutional Convention – Commerce Clause was intended as a response to lack of trading between states – to promote the national market.
		- Early 20th century – Court frequently struck down national regulatory laws as exceeding the proper scope of the commerce power.
		- Beginning in 1937 – Court began to show great deference to congressional action under the commerce clause
		- 1995 Lopez decision – marked a partial return to judicial intervention to prevent the commerce clause from becoming an unlimited national police power.
	+ Pre-New Deal
		- **COMMERCE = INTERCOURSE, AMONG = INTERMINGLED WITH (Gibbons v. Ogden)**
			* **Among ≠ commerce that is completely internal or does not affect other states**
				+ Note: Very expansive view of power under the Commerce Clause.
		- **3 Principal Approaches to the Commerce Clause:**
			* **Direct/Indirect Test – Activity must have a direct effect on interstate commerce for Congress to regulate under the Commerce Clause –** it is not enough that the good is manufactured for export for another state**. Manner in which activity occurs, not extent matters. (US v. E.C. Knight Co.)**
			* **Substantial Economic Effects Test – Whenever intrastate and interstate activities are closely tied together so that one impacts the other, then Congress can regulate – “practical impacts” – “CLOSE and SUBSTANTIAL relation to interstate commerce such that it is NECESSARY to regulate”. (Houston E. & W. T. Ry. Co. v. US)**
			* **Stream of Commerce Test – Some local activities can be regulated by Congress because they could be viewed as themselves “in” commerce or as an integral part of the “current of commerce” – “local connection”. (Swift v. Tyson)**
		- Commerce Clause used as “National Police Regulation”
			* Congress used the commerce power increasingly in the late 19th century to deal with not only economic problems, but morality problems.
			* “Cases where good itself is dangerous”
				+ Champion v. Ames (“the lottery case”) – lottery tickets were subjects of traffic 🡪 subjects of commerce 🡪 within regulatory power of Congress
				+ Hipolite Egg Co. v. US (“bad eggs”) – power to seize goods is within Congress’s power to bar goods from interstate commerce
				+ **“Congress may adopt not only means necessary but convenient to its exercise and the means may have the quality of police regulations.” (Hoke v. US)**
			* “Cases where good itself is NOT dangerous”
				+ Power to regulate not necessarily = power to prohibit. When goods themselves are harmless, the commerce clause does not allow the federal government to prohibit the goods from interstate commerce. (Hammer v. Dagenhart) – LATER OVERRULED
			* **Congress can exclude from shipment or travel in the channels of interstate commerce any goods, persons or activities found by Congress to be harmful to the public health, safety, welfare or morals. Motive is irrelevant.**
	+ Post New Deal (after Court packing plan)
		- **If the activities have a SUBSTANTIAL RELATION to interstate commerce that their control is ESSENTIAL to protect that commerce from burdens/obstructions, Congress may exercise that control. (NLRB v. Jones & Laughlin Steel Corp.)**
		- **The power to regulate commerce extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. (US v. Darby)**
		- **The power of Congress over interstate commerce extends to activities INTRASTATE which have a SUBSTANTIAL AFFECT on the commerce of the country. Congress may choose the MEANS RATIONALLY ADAPTED to the attainment of the PERMITTED END, even if they involve control of intrastate activities. Affect, not source of burden matters. (US v. Darby)**
			* **MEANS/ENDS TEST** (McCulloch link)
				+ **Means = Regulations (How does Congress get to the end?)**
				+ **Ends = Interstate Commerce (Constitutional Power)**

As long as the end is affecting interstate commerce, then do the means even matter? (note: Darby seems to suggest it doesn’t)

* + - * If the goods are to stay entirely in the state and there is no direct effect on interstate commerce, then the Court arguably cannot regulate under the commerce clause. (Schecter Poultry Corp. v. US)
			* **“SUBSTANTIAL” is a limitation, but remember, individual affects can be aggregated**
		- **The Court does not consider the impact of a single person’s activities on interstate commerce, but considers the AGGREGATE AFFECT of all individual activities on commerce. (Wickard v. Filburn)**
			* Note: Wickard is said to represent the outer limits of the “substantially affecting commerce” rationale by the Court.
		- 2 Holdings of Darby:
			* Anything with end of prohibiting goods is ok under the commerce clause;
			* “Direct affect” on commerce test.
			* *Why did the court bother to use the direct affect test if the holding could stand on the means/ends test?*
				+ The first is really a direct affect test – where Congress prohibits the shipment of goods, it is directly affecting commerce. Some cases after Darby apply the first (“Congress prohibiting”), but still go through deep analysis, implying it cannot be taken as a superficial standard.
		- Commerce Power and Civil Rights
			* Court found that discriminative actions by individual places of accommodation could give Congress a rational basis for laws prohibiting discriminative acts based on their relationship with interstate commerce (discouraging travel, less goods sold, etc.) (Heart of Atlanta Motel v. United States; Katzenbach v. McClung)
			* Civil Rights cases arguably belong under 14th Amendment Equal Protection, but remember, 14th Amendment speaks to “State” providing equal protection, not directly private entities. As a result, Court has tried to stretch Commerce Clause.
		- Commerce Power and Regulation of Crimes
			* “Extortionate credit transactions”, and other such crimes, though individually purely interstate, may in the judgment of Congress affect interstate commerce – using aggregation/substantial affects test. (Perez v. United States)
				+ Narrow v. Broad Holding – “extortionate credit transactions” can be regulated v. all crimes occurring in multiple states can be regulated
			* Note conflict with 10th Amendment and areas traditionally left to states – 10th Amendment/ Art. 1, Sect. 8 Conflict.
	+ **1995 Shift Beginning with United States v. Lopez**
		- **Courts attempts to “go back” to “original” reading of Commerce Clause in Gibbons – economic/commercial v. area traditionally regulated by states**
		- **3 broad categories of activity that Congress may regulate under its commerce power:**
			* **Congress may regulate the USE OF THE CHANNELS OF INTERSTATE COMMERCE.**
				+ i.e. roads, waterways, airways, transmission facilities, etc.
			* **Congress can regulate and protect the INSTRUMENTALITIES OF INTERSTATE COMMERCE, even though the threat may come only from intrastate activities.**
				+ i.e. people, machines, etc.
			* **Congress may regulate those activities having a SUBSTANTIAL RELATION to interstate commerce in the AGGREGATE. (TEST IS “SUBSTANTIALLY AFFECTS”)**
		- **Specific to 3rd Category:**
			* **“Rational Relationship Test” - Shifts to “Can the COURT rationally find that it substantially affects interstate commerce?” instead of “Could CONGRESS have rationally found…”**
			* **Congress is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, but findings if made, may be helpful.**
			* **Balance of federalism concerns/police power v. Commerce clause –**
				+ **FOUR FACTORS to consider:**

**ECONOMIC V. NON-ECONOMIC**

**CONGRESSIONAL FINDINGS** – persuasive, not binding

**JURISDICTIONAL ELEMENT - i**dea that something has to “move” interstate for it to be regulated under the commerce clause (which Court later said was not necessary)

**TRADITIONAL AREA OF STATE AUTONOMY**

* + - * + **Court said regulation of guns in school zones is “too far” or a civil remedy for the victims of gender-motivated violence. (US v. Morrison), but regulation of marijuana production/distribution is not. (Gonzales v. Raich). DIFFERENCE IS QUESTIONABLE, PUT PERHAPS IN ECONOMIC v. NON-ECONOMIC ISSUE IN REGULATION.**

Issues raised: How far can the Commerce Clause now stretch? Is the Court choosing which “evils” to regulate at the cost of federalism?

* + - * + Why might fed government try to regulate crime (traditionally state)?

Use federal procedure/sentencing guidelines/etc, create consistency across the country, fed govt is displeased with how states are handling the issue, etc.

* + - Note: No previous cases are overruled by Lopez
	+ Note – Tie with Necessary & Proper Clause – could be used to expand fed govt power under Commerce Clause (concurrence in Gonzales v. Riach)
	+ **Limitations on the Commerce Power**
		- **Rationality Standard – “Could the Court have rationally concluded…”**
		- **Exercise of congressional authority otherwise permissible under the Commerce Clause might be invalid because it runs up against federalism based immunity (“COMMANDEERING”)**
			* **NOTE: JUST BECAUSE SOMETHING IS OK UNDER THE COMMERCE CLAUSE, DOESN’T MEAN IT IS OKAY UNDER THE 10TH AMENDMENT.** Two views:
				+ 10th Amendment is not a separate constraint on Congress, but just a reminder that fed govt can only regulate under authority of the Constitution.
				+ 10th Amendment protects state sovereignty and a federal law can be found unconstitutional just under it.
			* **10th Amendment, US Constitution – “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.”**
				+ Old Test (National League of Cities v. Usury)

Whether the federal government can regulate is based upon whether the state government function impacted is “integral” or “traditional” to the state – if it is, the federal government cannot regulate. “Traditional” state activities would include fire prevention, police protection, sanitation, public health, parks, recreation, etc.

* + - * + **New Test**

**Rejects “integral/traditional” test –** States’ sovereign interests are better protected by the political process than judicial oversight. Any restraint on the exercise of Commerce Clause powers should be based on failings in the political process. (Garcia v. San Antonio Metro Transit Authority)

**“COMMANDEERING” IS NOT A MATTER OF DEGREE** – either regulates only state (not allowed), or does not (is allowed). (Printz v. United States)

**2 Part Test:**

**Is the law GENERALLY APPLICABLE (to state and private entities)? 🡪 then probably okay (Garcia)**

**COMMANDEERING is not allowed (10th Amendment/ federalism) (Printz)**

**When the regulation falls SOLELY ON THE STATE - NOT ALLOWED.**

“The federal government cannot issue directives requiring the States to address particular problems, nor command the States’ officers, to administer or enforce a federal regulatory program.” (Garcia v. San Antonio Metro Transit Authority; Printz v. United States) – “CANNOT COMMANDEER”

**When the regulation falls on the state and on private parties:**

**“… but so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution… does not forbid it merely because it also falls on a State.” (New York v. United States) – CAN REGULATE STATE AND PRIVATE TOGETHER**

**When the state is NOT DIRECTLY REGULATED, BUT IS GIVEN INCENTIVES to follow the federal directive - OK:**

Spending Power – Congress may condition the payment of relevant federal funds on a state’s agreement to proposed regulations.

Conditional Preemption – Congress may threaten the above tactic unless states choose to regulate to federal standards.

* + - * **11th Amendment, US Constitution – “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 states by citizens of another state, or by Citizens or Subjects of any Foreign State.”**
				+ **When acting under the Commerce Clause, the federal government cannot abrogate a state’s sovereign immunity (in court) without the state’s consent. (Seminole Tribe of Florida v. Florida)**
				+ **Exceptions**

**Can seek injunctive relief, just usually not damages**

**Bankruptcy proceedings**

* + - **Political Process -** “Commerce power is limited by the wisdom of congress and the influence which their constituents possess at elections.” (Gibbons v. Ogden)
		- Pro/Cons of Fed Interference with State/Local Govt:
			* Rationale for State/Local Autonomy:
				+ State/local governments can deal with problems that vary by location better;
				+ Citizens can “vote with their feet” on state/local policies – much harder to effectively do the same for national policies.
			* Rationale for Centralized Power:
				+ National regulation can deal with negative externalities that flow across state boundaries (like air pollution).
				+ National govt can provide public goods that state govts may under-produce because state governments are subject to “free-riders”.
* **“RECONSTRUCTION AMENDMENTS” (13TH-15TH)**
	+ **BASIC LINK BETWEEN AMENDMENTS AND CIVIL RIGHTS ACTS**
		- **Constitution – Amendments**
			* **1st – Identify which Amendment the right falls under.**
				+ **Right to not be treated as a slave 🡪 13th Amdmt. 🡪 NO STATE ACTION required**
				+ **Equal Protection/Due Process – 14th Amdmt 🡪 STATE ACTION required**
				+ **Voting 🡪 15th Amdmt. 🡪 STATE ACTION required**
				+ **Right stemming from “Privileges of National Citizenship” 🡪 no amendment, from “structure and relationships found in Constitution”**
		- **Statutory Power – derived from the “Enabling Clauses” of each Amendment**
			* **2nd – Is there a specific relevant statute?**
	+ **13TH-15TH AMENDMENTS:**
		- Purpose for enactment: “the freedom of the slave race, the security and firm establishment of that freedom, and the protection… from the oppressions of those who had formerly exercised unlimited dominion over him”. (Slaughterhouse Cases)
		- **Enabling Clause - All end with “The Congress shall have power to enforce this article by APPROPRIATE LEGISLATION”.**
		- **13th Amendment DOES NOT require STATE ACTION, but has a RACIAL overtone.**
		- **14th and 15th Amendments require STATE ACTION**
			* **Generally, DOES NOT APPLY TO PRIVATE CONDUCT.**
			* Two basic considerations:
				+ Whether the individual is close enough to the state action for their act to be considered a state action? AND
				+ Would application to the private individual’s action violate one of their Constitutional rights?
			* **If it is an act of a government “agent”, acting under color of law, it is state action.** (Ex parte Virginia)
			* **If a private entity engages in POWERS TRADITIONALLY EXCLUSIVELY RESERVED TO THE STATE (“FUNCTIONAL EQUIVALENT”), then it is considered state action. (Marsh v. Alabama; Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.; Evans v. Newton).** Examples:
				+ Yes, State Action = A “company town”; a shopping center; a park
				+ Yes, State Action = “White Primary Cases”

Where the political party is acting as an “agent” of the state. (Noxon v. Herndon)

Where the primary is a “part of the election machinery by law”. (Smith v. Allwright)

Where county election officials were in effect “participants in the discriminatory scheme” and the party was a “decisive power” in the electoral process. (Terry v. Adams)

* + - * + NO STATE ACTION

Supplying of public utilities (Jackson v. Metropolitan Edison Co.)

* + - * **If the actions of STATE COURTS AND JUDICIAL OFFICERS “MAKE AVAILABLE to private individuals the FULL COERCIVE POWER OF GOVERNMENT TO DENY individuals, ON THE BASIS OF RACE OR COLOR, the ENJOYMENT OF RIGHTS”, they will be considered STATE ACTION.** (Shelley v. Kraemer)
				+ Examples:

Where the state is enforcing a private land covenant that prohibits blacks from obtaining land, there is STATE ACTION. (Shelley v. Kraemer)

Note: State Action if two parties are seeking to act in non-discriminatory manner (Shelley), not necessarily where the state facilitates already existing discrimination between parties 🡪 this takes a narrow reading of Shelley

Where the state and a private party jointly participate in the seizure of disputed property, the party is classified as STATE ACTION. (Lugar v. Edmondson Oil Co.)

Note: holding limited to pre-judgment attachment and seizure of property

Where a private litigant in a civil suit challenges to exclude jurors on the basis of race and his challenges are granted, there is STATE ACTION. (Edmondson v. Leesville Concrete Co.)

* + - * + It is no exception that the Judge is acting pursuant to state common law policy. (Shelley v. Kraemer)
				+ There is a difference if the actions of the Court are such that no one can enjoy a “right”, regardless of color. (Evans v. Abney)
			* Where there is SIGNIFICANT STATE INVOLVEMENT and a SYMBIOTIC RELATIONSHIP between the private entity and the State, there is STATE ACTION. (Burton v. Wilmington Parking Authority). 🡪 The SIGNIFICANT STATE INVOLVEMENT must be WITH THE DISCRIMINATION. (Moose Lodge v. Irvis). 🡪 **There must be a SUFFICIENTLY CLOSE NEXUS BETWEEN THE STATE AND THE CHALLENGED ACTION and the STATE MUST COMPEL the challenged action. (Jackson v. Metropolitan Edison Co.)**
				+ Examples of “Significant State Involvement”

Where the city has paid for the land and building and maintains a parking garage in a complex with a private restaurant that is discriminating, there is STATE ACTION. (Burton v. Wilmington)

Where an interscholastic athletics association is comprise of public and private schools, with 84% of members public, there is STATE ACTION. (Brentwood Academy v. Tennessee Secondary School)

* + - * + Examples of NO “Significant State Involvement”

Where a private club is discriminating, and the state has only provided them with a liquor license. (Moose Lodge v. Irvis)

Where the state regulated a nursing home, but independent doctors made decisions based on medical reasons, about which residents to move. (Blum v. Yaretsky)

* + - * **Where the STATE HAS ENCOURAGED PRIVATE DISCRIMINATION, there is STATE ACTION. (Reitman v. Mulkey)**
				+ Examples of “Encouragement”

State repealed fair housing laws after proposition passed. This did not involve a new discriminating law, just the removal of a non-discrimination law. Argument was that the amendment did more than repeal antidiscrimination laws – its purpose was to encourage discrimination, because discriminators were freed from any official censure. (Reitman v. Mulkey)

* + - * + Examples of NO “Encouragement”

Where the only state encouragement is through a uniform law – like the UCC – which itself does not discriminate. (Flagg Bros. v. Brooks)

* + - * + Question is how broad “encouragement” is… if not read in light of other cases, could be very broad.
	+ **13TH AMENDMENT – “Neither slavery nor involuntary servitude… shall exist within the United States…”**
		- **NO STATE ACTION requirement – so it can be applied to public and private entities.**
		- **Court first asks “Is this a badge of servitude?”, if yes 🡪 “Could the Congress have found the regulation rational?”**
		- Private v. Quasi-Private Acts:
			* Private – “Who will I let inside my home?”
			* Quasi-Private – “Who will I let inside my business/establishment?”
	+ **14TH AMENDMENT – “… No STATE shall MAKE OR ENFORCE ANY LAW which shall abridge the privileges or immunities of citizens of the United States; nor shall any STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW, nor DENY ANY PERSON… the EQUAL PROTECTION OF THE LAWS.”**
		- **REQUIRES STATE ACTION (see above for def. state action)**
		- **ONLY INTENDED TO REACH THE DENIAL OF RIGHTS – SHOULD BE REMEDIAL**
		- **Nothing in the 14th Amendment requires the STATE to protect the life, liberty and property of its citizens against invasions by PRIVATE ACTORS.** The 14th Amendment limits a state’s power to act – it isn’t a guarantee of a minimum level of safety or security. (DeShaney v. Winnebago Cty Social Services Dept.). Exception would be where the State has assumed a duty to act, such as where the State has imprisoned someone.
		- **Not limited only to racial discrimination –** has been expanded.
		- **Test for Congressional Action under Enabling Clause**
			* **Test is “Could CONGRESS have found a RATIONAL RELATIONSHIP between the proposed law and the discrimination it sought to address (past or future)?**” (Katzenbach v. Morgan)
				+ Asks “Could CONGRESS have found”, but Court requires that Congress identify the conduct it found to violate the 14th Amendment – must show “pattern of unconstitutional discrimination”. (Nevada Dept of Human Resources v. Hibbs; compare Florida Prepaid Postsecondary Ed Expense Board v. College Savings Bank)
			* **There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.** (City of Boerne v. Flores)
			* Limitations: Congress may not –
				+ Adopt legislation that expands substantive constitutional rights beyond those defined by the Supreme Court (arguable – see voting rights cases);

“enforce” in 14th Amendment = prevent or remedy already recognized violations of rights

* + - * + Adopt legislation that conflicts with other Constitutional provisions OR
				+ Restrict, abrogate or dilute 14th Amendment rights.
	+ **15TH AMENDMENT – “The RIGHT… TO VOTE SHALL NOT BE DENIED OR ABRIDGED BY THE UNITED STATES OR BY ANY STATE on account of RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE.”**
		- **REQUIRES STATE ACTION (see above for def. of state action)**
		- **Timeline:**
			* **Prior to Voting Rights Act of 1965 – Congressional legislation was purely remedial. It was left to the Court to delineate, case by case, the content of the rights.**
				+ Court uses RATIONAL RELATIONSHIP TEST.
				+ **Literacy tests are not per se unconstitutional on their face, BUT, they may be used to perpetuate discrimination. Absent evidence of ACTUAL discrimination in the use, a literacy test is NOT a violation of the 15th Amendment.** (Lassiter v. Northampton County Election Board)
			* Voting Rights Act of 1965
				+ In covered areas (with <50% voter turnout and use of literacy tests), Act suspended literacy tests for five years from the last occurrence of substantial voting discrimination.
				+ After five years, the Fed Govt would look at the state and their actions and approve any new suggested practices by declaratory judgment.
			* **After the Voting Rights Act of 1965 – Congress begins to legislate proactively**
				+ Court begins to use “Fundamental Rights” test
				+ **Literacy tests may be used to discriminate – congressional findings are basis for review of discrimination. Congress may use ANY RATIONAL MEANS (THINK MCCULLOCH NECESSARY & PROPER CLAUSE TEST) to effectuate the constitutional prohibition of racial discrimination in voting – litigation is no longer necessary.** (South Carolina v. Katzenbach)
			* Voting Rights act of 1970 – Suspended the use of literacy tests nationwide.
			* **After the Voting Rights Act of 1970**
				+ **The nationwide literacy tests suspension was within the remedial power of Congress under the 15th Amendment because (a) racial prejudice is pervasive and (b) the suspension would remedy past discrimination in education (which causes minorities to be disproportionately affected by literacy tests.** (Oregon v. Mitchell)
				+ **Test is “Could CONGRESS have found a RATIONAL RELATIONSHIP between the proposed law and the discrimination it sought to address?**” (Katzenbach v. Morgan)
	+ **CIVIL RIGHTS ACTS**
		- **18 USC 241 (CRIMINAL; CONSPIRACY AGAINST RIGHTS)**
			* **Text – “If two or more persons CONSPIRE TO INJURE, OPPRESS, THREATEN OR INTIMIDATE… [anyone] in the free exercise or enjoyment of ANY RIGHT OR PRIVILEGE secured to him by the Constitution or laws of the United States…”**
			* **“Wilfully” = Scienter Requirement -** **the actor must have a SPECIFIC INTENT TO DEPRIVE a person of a federal right. (**Screws v. United States)
			* 2 types of conspiracies covered:
				+ Private individuals acting against public/state officials to keep them from carrying out 14th amendment duties (if Guest = substantive allowed) OR
				+ Public officials against private individuals to deprive them of their 14th amendment rights.
			* **Remedial v.** **Substantive**
				+ **Remedial = there must be a violation of a constitutional amendment FIRST before there is a remedy.**
				+ **Substantive = an affirmative granting of rights, not in reaction to a constitutional amendment violation, expanding the existing constitutional rights.**
				+ **Sect. 241 is remedial and state action is required.** (US v. Guest).

6 justices said Sect. 241 is substantive in Guest – dictum or holding?

* + - **18 USC 242 (CRIMINAL; DEPRIVATION UNDER COLOR OF LAW)**
			* **Text – “Whoever, UNDER COLOR OF LAW… WILFULLY SUBJECTS any [person] to the DEPRIVATION OF ANY RIGHTS… secured or protected by the [Constitution or laws]…”**
			* **This can cover PRIVATE PERSON acting jointly with state officials, or STATE OFFICIALS, if the accused is a WILFUL participant in the deprivation of rights.** (United States v. Price)
				+ Note: even if the public official is acting contrary to law, his action is still “under color of law”
			* **“Wilfully” = Scienter Requirement -** **the actor must have a SPECIFIC INTENT TO DEPRIVE a person of a federal right. (**Screws v. United States)
		- **42 USC 1981 (EQUAL RIGHTS UNDER THE LAW)**
			* **Text – “All persons within the jurisdiction of the United States shall have the same right in every State to… MAKE AND ENFORCE CONTRACTS, TO SUE, TO BE PARTIES, TO GIVE EVIDENCE, AND TO THE FULL AND EQUAL BENEFIT OF ALL LAWS AND PROCEEDINGS for the SECURITY OF PERSONS AND PROPERTY…”**
			* **This included the right to attend private schools – schools cannot deny admission to students because of race. (Runyon v. McCrary)**
				+ Remember, this prohibits EXCLUSIVE DISCRIMINATORY actions, not inclusive actions (i.e. only Black students can attend X school, not everyone BUT Black students can attend) – there is a difference in saying “everyone but X race is invited” 🡪 often evidentiary matter
		- **42 USC 1982 (PROPERTY RIGHTS)**
			* **Text – “All citizens of the United States shall have the SAME RIGHT… as is enjoyed by white citizens thereof to INHERIT, PURCHASE, LEASE, SELL, HOLD AND CONVEY REAL AND PERSONAL PROPERTY…”**
			* **This is a valid exercise by Congress under the 13th Amendment because the inability to own land was a “badge” of slavery – at the time of drafting, Congress knew STATES AND PRIVATE PARTIES kept blacks from owning homes.** (Jones v. Alfred Mayer Co.)
		- **42 USC 1983 (CIVIL; DEPRIVATION UNDER COLOR OF LAW)**
			* **Text – “EVERY PERSON who… CAUSES TO BE SUBJECTED [any person] the DEPRIVATION OF ANY RIGHTS… under COLOR OF LAW… secured by the Constitution and laws, shall be LIABLE TO THE PARTY INJURED…”**
				+ Note: “color of law” also includes custom/usage with state involvement (Adickes v. SH Kress)
			* **INTENT is required, but not scienter requirement like with the criminal statute.**
			* **BUT, common law immunities are incorporated** (i.e. judge/district attorney has complete immunity in their official actions)
		- **42 USC 1985(3) (CONSPIRACY TO INTERFERE WITH RIGHTS)**
			* **Text – “If TWO OR MORE PERSONS… CONSPIRE or go in disguise… for the PURPOSE OF DEPRIVING… any PERSON OR CLASS OF PERSONS of the equal protection of the laws…”**
			* **There must be some racial or otherwise CLASS BASED INVIDIOUSLY DISCRIMINATORY ANIMUS behind the conspirator’s action.** (Griffin v. Breckenridge). **The discrimination must be AGAINST THE GROUP SPECIFICALLY… it is not enough that there is some relationship.** (Griffin v. Breckenridge; Bray v. Alex. Women’s Health Clinic)
		- **Title VI of the Civil Rights Act of 1964**
			* **“No person in the US shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”**
	+ Issues/Concerns:
		- Federalism – Is this encroaching on the state’s right to define what conduct is criminal?
			* Think Necessary & Proper Clause and Commerce Clause (McCulloch v. Maryland; Marbury v. Madison) – Issue is: How far can Congress go? Can they act only remedially, or substantively?
				+ **Note: After Katzenbach v. Morgan, Court could not get a majority to revoke substantive power of Congress – Morgan could have been read to say that Congress has some substantive powers.**
		- Individual Liberty – Can the Fed Govt tell the individual not to discriminate?
			* Can Congress legislate private individuals? Possible “right to privacy” concerns?
* **BILL OF RIGHTS**
	+ **Bill of Rights originally only guaranteed individual liberties against the federal government.**
	+ **Reconstruction Amendments were the first express restraints on the states against infringing individual rights.**
	+ **14th Amendment Due Process Clause – used to incorporate Bill of Rights guarantees into the 14th Amendment to make them applicable to states.**
		- **Narrow reading of incorporation – Slaughterhouse Cases – Purpose of 14th Amendment is to incorporate those rights that are fundamental rights of national citizenship – protection by the government, right to acquire and possess property, to pursue and obtain happiness, right to travel.**
			* Right to travel:
				+ Is a FUNDAMENTAL RIGHT 🡪 strict scrutiny applied
				+ 3 components (Saenz v. Roe) – FROM PRIVILEGES AND IMMUNITIES CLAUSE:

Right of a citizen to enter and to leave another state;

Right to be treated as a welcome visitor instead of an unfriendly alien when temporarily residing in the state; and

For those travelers that elect to become permanent residents to be treated like other citizens of that State.

\*\*this means that a State cannot statutorily discriminate between residents and previous non-residents in most cases – “presumptively unconstitutional” (Shapiro v. Thompson), but state may make “bona fide state residency” requirements to determine the person’s real residency intentions.

* + - * + This right is what US v. Guest is based on.
		- **Increasing Incorporation**
			* **“IS THE PROVISION ESSENTIAL TO FUNDMENTAL FAIRNESS, SUCH THAT IT SHOULD BE MADE APPLICABLE TO THE STATES?”**
			* **Due Process is now also understood to include:**
				+ **Fair trial (Adamson v. California)**
				+ **Right to compensation for property taken by the state; rights of free speech, press and religion covered by the 1st Amendment, the 4th Amendment rights to be free from unreasonable searches and seizures; 5th amendment right to be free of compelled self-incrimination; 6th amendment rights to counsel, speedy and public trial, to confrontation of opposing witnesses. (Duncan v. Louisiana)**
				+ **NOT – grand jury indictment provision of 5th amendment, right to jury trial of 7th amendment**
	+ **Due Process**
		- **Consider two things:**
			* **The actual text of the constitution – Is the process being used in direct conflict with the actual verbage?**
			* **Settled usages of proceeding – What does history tell us due process is?**
* **SUBSTANTIVE DUE PROCESS**
	+ **General – TWO DIFFERENT APPROACHES**
		- **Narrow Positivist Approach** (like majority opinion under Rehnquist in Glucksberg)
			* **Emphasizes the need to ground any fundamental liberty interest or right in narrowly defined tradition 🡪 if it hasn’t been a historical interest/right, it is not fundamental.**
		- **Broader Approach** (like concurrence by Souter in Glucksberg)
			* **Tradition guides our view of fundamental liberty interest, but the interest is broader than that – it also includes a broader freedom from arbitrary restraint, which may change with time.**
	+ **Early Substantive Due Process Cases**
		- **Liberty of Contract = part of substantive due process rights. (Allgeyer v. Louisiana)**
			* **BALANCING TEST should be employed when liberty of the individual to contract is interfered with – right of the individual or police power concerns of the state. (Lochner v. New York)**
		- 1905 to mid 1930s – Court continued to invalidate regulations on substantive due process grounds – usually prices, wages and hours regulations.
		- **Guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected have a real and substantial relation to the object sought to be attained – due process rights are not absolute. (Nebbia v. New York) 🡪 Court begins to defer to congressional judgment**
	+ **Shift to “Minimum Rationality Review”**
		- **Post Nebbia, it became difficult for the “rational basis” of economic legislation to be struck down. Court increasingly deferred to congressional judgment.**
		- **Idea that “it is for the legislature, not the courts, to balance the advantages and disadvantages of [regulations]” (Williamson v. Lee Optical Co.)**
		- **Court distinguishes between two types of cases and level of judicial review** (US v. Carolene Products – Footnote 4)**:**
			* **Where political processes ensure that Laws = Wants of Public, Court should defer more to Congress.**
			* **Where political processes can’t be trusted to even out winners and losers over time, Judicial Review more important 🡪 helps to reinforce democracy by preventing entrenched advantage/disadvantage in the political process.**
		- **TEST = CONCIEVABLE RATIONAL RELATIONSHIP TO A LEGITIMATE END?**
		- **No socioeconomic law has been invalidated on substantive due process grounds since 1937 – too much deference?**
			* Exception – Punitive Damages
				+ Court has set guideposts for how much is too much for punitive damages (BMW of North America v. Gore):

Degree of reprehensibility;

Disparity between harm/potential harm suffered and damages awarded;

Difference between remedy and those imposed in comparable cases.

* + **Liberty = freedom from bodily restraint + right of the individual to contract + right to engage in an occupation + right to acquire useful knowledge + right to marry + right to establish a home and raise children + right to choose a religion and worship.** (Meyer v. Nebrasksa)
		- **There is no general power of the state to standardize its children by forcing them to accept instruction from only public teachers.** (Pierce v. Society of Sisters)
		- **Marriage and Procreation = Fundamental Rights 🡪 Strict Scrutiny used** (Skinner v. Oklahoma)
	+ **RIGHT TO PRIVACY**
		- **Right to privacy isn’t explicitly listed in the Constitution, but it has been inferred from “various guarantees in the Bill of Rights that create zones of privacy” –** right of association (1st amendment); prohibition of the quartering of soldiers (3rd amendment); right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures (4th amendment); self-incrimination clause (5th amendment); 9th amendment – rights listed in Constitution are not exclusive. (Griswold v. Connecticut).
		- **Right of Privacy in Child-bearing Issues = Fundamental Right 🡪 Strict Scrutiny Review** (Carey v. Population Services, Int’l)
			* **Two relationships have been established to be within “zones of privacy” -** **that between a couple and their doctor and that between man and wife.** (Griswold v. Connecticut)
			* **Right of privacy (in relationship to contraception/child bearing issues) isn’t limited to married couples – it is the right of the individual to be free from “unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child.”** (Eisenstadt v. Baird)
			* Court has held that the state interest in discouraging sexual activity among the young was not sufficiently “significant” to warrant intrusion into privacy. (Carey v. Population Services, Int’l)
			* **ABORTION**
				+ **“Person” in 14th Amendment ≠ Fetus 🡪 so “rights” of fetus not relevant**
				+ **RIGHT TO PRIVACY IN THIS AREA IS NOT ABSOLUTE – SHOULD USE BALANCING TEST – State’s interest in safeguarding health, maintaining medical standards, and protecting potential life v. individual rights of mother**
				+ Under Roe v. Wade – Rights/Powers based on Trimester

Until end of 1st trimester - Abortion decision left to medical judgment of pregnant woman’s attending physician.

Post 1st trimester – State, in promoting its interest in health of mother, may regulate abortion procedure in ways reasonably related to maternal health.

Post Viability of Fetus – State, in promoting its interest in human life, may regulate abortion except where necessary, in appropriate medical judgment, for preservation of the life/ health of the mother.

* + - * + Between Roe and Casey

States enacted restrictions on abortions that increased the difficulty or cost of obtaining an abortion 🡪 Court struck down most of these laws under Roe.

Roe implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by allocation of public funds 🡪 there is a difference between direct state interference with a protected activity and state encouragement of an alternative. (Maher v. Roe)

Right to have an abortion ≠ right to government aid in carrying out the abortion (funding, facilities, etc) (Rust v. Sullivan)

* + - * + **Post-Casey – Current State of the Law**

**Casey upholds the “central holding” of Roe – right to privacy includes women’s right to abortion.**

Abandons trimester framework, but reaffirms…

Post-viability, the State, in promoting its interest in potential human life may, if it chooses, regulate abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life/health of the mother.

**Adopts UNDUE BURDEN STANDARD – State action is okay, as long as it does not place an undue burden on the woman seeking an abortion of a nonviable fetus. (Planned Parenthood v. Casey)**

**Partial Birth Abortions:**

Where substantial medical authority supports that banning a particular abortion procedure (in this case, partial birth) could endanger women’s health, Casey requires the statute to include a health exception when the procedure is necessary for the preservation of life/health of the mother, regardless of the government interests in banning the procedure. (Stenberg v. Carhart) – LATER OVERRULED BY CARHART

**Banning partial birth abortion does not place an undue burden on women seeking an abortion, so a LAW PROHIBITING PARTIAL BIRTH ABORTION, WITH NO MEDICAL EXCEPTION, IS FACIALLY CONSTITUTIONAL. Further challenges may be made on an as-applied basis. (Gonzales v. Carhart)**

* + - * **Marriage**
				+ **Freedom to marry is a fundamental right. (Loving v. Virginia) 🡪 Strict Scrutiny Review used (Zablocki v. Redhail)**

**This includes the freedom to marry or not marry a person of another race. (Loving v. Virginia)**

* + - * **Extended Family Relationships**
				+ **“Parent has fundamental right to make decisions for their children - so long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into this private realm of the family. (Troxel v. Granville)**
				+ “The Constitution prevents States from standardizing its children and adults by forcing all to live in certain narrowly defined family patterns. (Moore v. East Cleveland)
				+ Right to privacy includes right of family to live in its choice of arrangements – like cousins with grandparents, not just nuclear families to live together. (Moore v. East Cleveland). This does not extend to unrelated groups of people. (Belle Terre v. Borraas)
				+ Grandparents do not have a substantive due process rights in relation to their grandchildren over the objections of the child’s parent. (Troxel v. Granville)
			* **Sexuality**
				+ **Liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. (Lawrence v. Texas)**
				+ **As applied to homosexual behavior (Lawrence v. Texas)**

**Choices about sexuality are central to personal dignity and autonomy, and are a substantive due process right. Persons in a homosexual relationship have the same right to seek autonomy as a person involved in a heterosexual relationship.**

**Whether or not the relationship of the individuals is entitled to formal recognition at law, it is within the LIBERTY of the persons to choose without being punished as criminals. 🡪 POSSIBLE LIMITATION ON GAY MARRIAGE**

**Gay Marriage**

**Massachusetts – Prohibitions against same-sex marriage violated the State Constitution – same-sex couples not allowed to marry were deprived “of membership in one of our community’s most rewarding and cherished institutions.” (Goodridge v. Dept. of Public Health)**

**Gay Parenting**

**Lawrence is not extended to a gay person’s right of privacy in an adoption contract, and there may be a rational relationship between the State interest and banning gay couples from adopting. (Lofton v. Sec. of Dept. of Children and Family Services)**

* + - Privacy/Autonomy Claims for Prior Felons
			* A State may require involuntary civil commitment, upon release from prison, of a person who had been convicted of a sexually violent offense – individual’s interest in avoiding restraint may be overridden by State interest in public safety and proof of dangerousness and some other factor, like mental illness, of the individual. (Kansas v. Hendricks)
		- **Substantive Due Process and Rights Over Death**
			* 4 Different Situations in which one might seek to accelerate their death:
				+ Suicide when one is healthy or only terminally ill – NOT ADDRESSED
				+ Withdrawal of life support when one is terminally ill – ADDRESSED IN CRUZCAN
				+ Physician-assisted suicide when one is terminally ill – ADDRESSED IN GLUCKSBERG
				+ Active euthanasia by a physician when one is terminally ill – ADDRESSED IN GLUCKSBERG
			* **A competent person has a constitutionally protected liberty in refusing unwanted medical treatment, but in the case of an incompetent person, the State may put into place procedural requirements to ensure that the incompetent’s wishes are proved by clear and convincing evidence. (Cruzcan v. Director Missouri Dept. of Health)**
			* **The decision to commit suicide with the assistance of another person has historically never enjoyed legal protection 🡪 Right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. (Washington v. Glucksberg)**
			* How can a person that wants to refuse medical treatment (ending their life) be treated differently than someone who seeks assisted suicide (also ending their life) be treated differently?
				+ **Equal protection only requires that similar cases are treated the same way – these are two fundamentally different situations, so the government may treat them differently. (Vacco v. Quill)**
* **EQUAL PROTECTION**
	+ **Constitution, 14th Amendment, Equal Protection Clause – “No state shall… deny to any person within its jurisdiction the equal protection of the laws.”**
	+ **Traditionally, equal protection required only those who are similarly situated to be treated alike 🡪 differences in treatment are justified when they correspond to RELEVANT differences.**
	+ **Tiers of Review:**
		- **Strict Scrutiny (Race, Fundamental Interests 🡪 “inherently suspect”)**
			* **COMPELLING government interest**
			* **MEANS NARROWLY TAILORED to the government objective**
		- **Intermediate Scrutiny (Gender)**
			* **IMPORTANT government interest**
			* **MEANS SUBSTANTIALLY RELATED to the government objective**
		- **Rational Review (Everything else – age, disability, sexual orientation, etc 🡪 NOT “inherently suspect”)**
			* **LEGITIMATE government interest**
			* **MEANS RATIONALLY RELATED to the government objective**
	+ **2 Types of Discrimination** (definitions from Black’s Law Dictionary)**:**
		- **De Jure – “as a matter of law” – existing by right/according to law**
		- **De Facto – actual – existing in fact – having effect even though not formally recognized**
	+ **Court Review Process (example if fundamental right)**
		- **When reviewing the state law – Does it impinge on a fundamental right? (strict scrutiny)**
		- **Then, when reviewing Congressional action to address the state law – Is there a rational relationship between the law and problem it seeks to address? (rational relationship)**
	+ **Race Discrimination**
		- **1ST QUESTION: IS THE LAW FACIALLY NEUTRAL?**
		- **Law can be challenged facially, based on de jure segregation. If facially discriminatory, then strict scrutiny analysis.**
		- **If the law is facially neutral, the Court will ask if there is de facto segregation. If yes, then strict scrutiny analysis. (Yick Wo)**
			* **Court will ask what if there was DISCRIMINATORY INTENT by the actors.**
				+ **Circumstantial evidence of a racially disparate impact may lead to an inference of discriminatory intent. (Gomillion v. Lightfoot; Washington v. Davis).**
				+ **4 Factors to consider to determine whether an unconstitutional discriminatory purpose exists** (Arlington Heights v. Metropolitan Housing):

**Historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;**

**Specific sequence of events leading up to the challenged decision;**

**Departures from the normal procedural sequence;**

**Substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a contrary decision than the one reached.**

* + - * + **It doesn’t matter how many nonracial grounds the State may have for the action - an intent to discriminate being part of the motivation is enough to warrant strict scrutiny. (Griffin v. County School Board of Prince Edward County)** (note: Palmer v. Thompson holds differently – as long as part of the motivation is not founded on discrimination, then strict scrutiny is not needed)
		- **In Public Education:**
			* Originally: separate = equal (Plessy v. Ferguson) 🡪 Court began to look at all factors to determine whether the education opportunities were really equal (facilities, teachers, ability to study and exchange ideas, etc. **🡪 Now: separate ≠ equal (Brown v. Board of Education)**
			* **“In the field of public education, the doctrine of separate but equal has no place.” (Brown v. Board of Education). This applies to both state and federal action. (Bolling v. Sharpe, applying it to fed. govt)**
			* **Remedies to Implement Brown v. Board**
				+ **SCOTUS remanded individual cases back to lower courts in individual states to enter necessary orders and decrees that are NECESSARY AND PROPER TO DE-SEGREGATE SCHOOLS WITH ALL DELIBERATE SPEED and allowing individual courts to determine what amount of time is needed for full compliance with Brown. (Brown v. Board of Education II)**
				+ Remember Cooper v. Aaron – used to apply Brown to all states
				+ **Plaintiffs must show that “school authorities have carried out a systematic program of segregation affecting a substantial proportion of the students, teachers, schools and facilities” before Brown II requires them to take steps to de-segregate schools. (Keyes v. School District) – the NATURE AND SCOPE OF THE REMEDY MUST DIRECTLY ADDRESS AND RELATE TO A CONSTITUTIONAL VIOLATION. (Missouri v. Jenkins)**
				+ **The SCOTUS command to desegregate schools doesn’t mean that every school in a community always has to reflect the racial composition of the school district as a whole; it just means that in districts where there is a history of segregation, there is a presumption against such disproportionate schools. (Swann v. Charlotte-Mecklenburg Board of Education).**
				+ Possible specific remedies (Swann v. Charlotte-Mecklenburg Board of Education):

State Court CAN use gerrymandering of the district to create attendance zones.

State Court CAN employ bus transportation UNLESS the time or distance of travel is so great as to risk either the health of the children on significantly impinge on the educational process.

* + - * + Limitations on Federally-Mandated Remedies

Court CANNOT order a tax increase directly to pay for implementing desegregation. (Missouri v. Jenkins)

Federal plans to de-segregate individual districts are TEMPORARY do not extend beyond the time required to remedy the effects of past intentional discrimination – once the past discrimination has been remedied, federal supervision ends. (Board of Education of Oklahoma City v. Dowell)

* + - **In Other Public Facilities**
			* **Court used Brown to find separate ≠ equal in the context of other public facilities (like buses, drinking fountains, etc).**
			* **Court hasn’t said that ALL types of racial segregation violate the Equal Protection Clause – in some special circumstances (like prisons with gang violence; or during times of war), racial classifications may be justified. Strict Scrutiny is still applied, regardless of the circumstances. (Johnson v. California; Korematsu v. US)**
		- **Interracial Relationships**
			* **Prohibitions on interracial cohabitation, interracial marriage, interracial re-marriage, or custody decisions based on such, are Equal Protection violations… “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of equal protection”. (McLaughlin v. Florida; Loving v. Virginia; Palmore v. Sidoti)**
	+ **Sex Discrimination**
		- Deference to laws maintaining “separate spheres” based on sex:
			* “It cannot be affirmed, as a historical fact, that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.” (Bradwell v. State – law prohibited women from practicing law)
			* Pre-19th Amendment extension of voting rights to women – Court denied that federal privileges and immunities include the right of women to vote – women may be persons under the 14th Amendment, but that didn’t mean they were necessarily entitled to vote. (Minor v. Mapersett)
			* “The fact that women have now achieved the virtues men have long claimed as their prerogatives and now indulge in vices that men have long practiced does not preclude the States from drawing sharp lines between the sexes.” (Goesaert v. Cleary – law prohibited women from working in tavern)
		- Court began applying rational review to laws that discriminated against women. (Reed v. Reed – Court struck down law preferring men to women as administrators of estates)
			* But – In a world where men and women were unequal, wouldn’t it be rational to discriminate against women?
		- Court attempted to begin applying STRICT SCRUTINY in Frontiero v. Richardson, but Justice Brennan only obtained a plurality for this analysis.
			* Reasoning for strict scrutiny in Frontiero – “What differentiates sex from non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”
		- **Court begins to apply INTERMEDIATE SCRUTINY to gender discrimination cases**
			* **IMPORTANT ENDS + SUBSTANTIALLY RELATED MEANS required for the law to not violate equal protection when it classifies based on gender. (Craig v. Boren)**
			* **Defenders of a gender-classifying law must carry the burden of showing an EXCEEDINGLY PERSUASIVE JUSTIFICATION for the classification. (Mississippi University for Women v. Hogan)**
			* **The fact that a law discriminates against males rather than females does not exempt it from scrutiny or reduce the standard of review 🡪 ANY law that classifies based on gender is subject to intermediate scrutiny. (Mississippi University for Women v. Hogan)**
			* **2 Prong Test (Mississippi University for Women v. Hogan):**
				+ **Does the statutory objective itself reflect archaic and stereotypic notions?**

**Yes – then objective itself is unconstitutional, and action violates Equal Protection**

**No – then go to next prong**

* + - * + **Is there a direct and substantial relationship between the means and the objective?**

**Yes – then action DOES NOT violate equal protection**

**No – then action DOES violate equal protection**

* + - * Court has repeatedly recognized that government doesn’t act compatible with the equal protection clause if it “denies to women, simply because they are women, full citizenship – EQUAL OPPORTUNITY TO ASPIRE, ACHIEVE, PARTICIPATE IN AND CONTRIBUTE TO SOCIETY based on their individual talents and capacities”. (US v. Virginia)
			* “Generalizations about “the way women are”, estimates of what is appropriate for most women, no longer justifies denying opportunity to women whose talent and capacity place them outside the average description. (US v. Virginia)
			* Sex Discrimination in Schools:
				+ Separate not necessarily ≠ equal when separation is based on gender 🡪 US v. Virginia leaves open the possibility that the state might run single-sex schools as part of an “even-handed and diverse educational menu”.
			* “Real” Differences – like pregnancy
				+ Court has said that a legislative classification concerning pregnancy is not necessarily a sex-based classification – “normal pregnancy is an objectively identifiable physical condition with unique characteristics”. (Geduldig v. Aiello)
			* Sex Discrimination in Statutory Rape Laws:
				+ Because pregnancy is a “special problem” for women, and the risk of pregnancy itself constitutes a substantial deterrence to young females and no such natural deterrent exists for males, a criminal sanction imposed solely on males serves to equalize the deterrents, and the State is within its constitutional limits. (Michael M. v. Superior Court)
			* Sex Discrimination in the Draft
				+ Because the purpose of the draft is to provide troops for combat and women are statutorily excluded from combat, women and men are not similarly situated for purposes of the draft 🡪 so draft is analyzed under rational review, not intermediate scrutiny 🡪 discrimination okay. (Rostker v. Goldberg)
			* Sex Discrimination and Child Custody
				+ Ok in some cases, not in others – dependent upon govt objective –

Ex. A law granting the mother but not the father of an illegitimate child the right to block the child’s adoption by withholding consent 🡪 Court found this to be just an overbroad generalization, not related to the interest of the State in promoting the adoption of illegitimate children. (Caban v. Mohammad)

Ex. A law treating children born out of wedlock to one citizen parent and one non-citizen parent differently depending on whether it was the mother or father that was the citizen 🡪 govt objective is to ensure child has formed a relationship with the citizen parent and the United States 🡪 there is a close enough relationship between requirement and objective, so law is okay. (Nguyen v. INS)

* + - **Compensating for Past Discrimination:**
			* **“A state may establish a compensatory justification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.” (Mississippi University for Women v. Hogan)**
			* **“A remedial decree must closely fit the constitutional violation – should be shaped to put the persons “in the position they would have occupied in the absence of discrimination.” (US v. Virginia)**
		- **19th Amendment – “The right of citizens in the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.”**
		- **Affirmative Action (Gender Based)**
			* **If the preference for females in the government action REINFORCES TRADITIONAL ARCHAIC OR OVERBROAD STEREOTYPES of fragility or financial dependence on men, the Court will usually NOT uphold it.**
				+ Examples:

Authorizing alimony obligations on husbands, but not wives. (Orr v. Orr)

Social Security provision applicable when a covered wage earner died – in the case of a deceased husband, benefits were automatically payable to the widow and the couple’s minor children, but in the case of a deceased wife, benefits were payable only to minor children and not to the widower. (Weinberger v. Wiesenfeld)

* + - * **If the preference COMPENSATES WOMEN FOR PAST DISADVANTAGE, including societal differences such as pay, then the Court will usually UPHOLD it.**
				+ Examples:

Difference in property tax exemptions for widows than widowers. (Kahn v. Shevin)

Gender preference in the Social Security Act’s formula for computing old age benefits that favored female wage earners. (Califano v. Webster)

Different standard in the Navy’s promotion system that allowed women to stay in the navy longer without promotion before mandatory discharge than men. (Schlesinger v. Ballard)

* + **AFFIRMATIVE ACTION AND RACE**
		- **“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”** (Parents Involved in Community Schools v. Seattle School District)
		- **“The State has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”** (Regents of Univ. of California v. Bakke)
		- **Any classification based on race warrants strict scrutiny:**
			* **“Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” (Regents of Univ. of California v. Bakke; strict scrutiny adopted in Richmond v JA Croson Co). This applies to racial classifications imposed by whatever federal, state or local government actor. (Adarand Constructors, Inc. v. Pena)**
			* **In the context of racial classifications made to remedy past discrimination, strict scrutiny is not “strict in theory, but fatal in fact” 🡪 there is a possibility that the race-based classification will satisfy strict scrutiny.** (Adarand Constructors, Inc. v. Pena) 🡪 WAS THE COURT CREATING A LESSER TEST FOR AFFIRMATIVE ACTION STYLE LAWS THAT CLASSIFY BY RACE?
			* **“Context matters when reviewing race-based governmental action under the Equal Protection Clause.” (Grutter v. Bollinger)**
			* **Carolene Products, Footnote 4 – Application (Regents of Univ. of California v. Bakke):**
				+ **Whether the plaintiff is a “discrete and insular minority” requiring extraordinary protection from the majoritarian political process may be relevant in deciding whether or not to add new types of classifications to the list of “suspect” categories or whether a particular classification survives close examination. BUT, RACIAL AND ETHNIC CLASSIFICATIONS OF ANY SORT ARE INHERENTLY SUSPECT and thus call for the most exacting judicial examination.**
		- **Race-conscious programs must be limited in time – should be a remedy against past discrimination, and last only as long as necessary.** (Grutter v. Bollinger)
		- **In the context of higher education:**
			* **Deference to Universities – “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the University environment, universities occupy a special niche in our constitutional tradition.** (Grutter v. Bollinger)
				+ Another example of deference:

Board of Regents of the University of Wisconsin System v. Southworth – Court upheld the constitutionality of a mandatory “activities fee” charged to the students by the University to promote extracurricular activities 🡪 Court said “The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall.”

* + - * **Student body diversity is a compelling state interest that can justify the use of race in university admissions.** (Grutter v. Bollinger)
			* **There is a difference between an admissions program focused SOLELY on diversity and one where race or ethnic background is deemed a “PLUS” but does not insulate the individual from comparison with other candidates, treating each candidate as an individual. The first (solely focused on diversity) is facially unconstitutional, the second (plus factor) is not.** (Regents of Univ. of California v. Bakke). **Even if race/ethnicity is a plus factor, each applicant must be viewed as an individual.** **Universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.** (Grutter v. Bollinger)
				+ An admissions system that assigns a substantial amount of points to an applicant based on race/ethnicity, weighing more heavily than other qualities, has the same result as a program that focuses solely on diversity – it is not narrowly tailored to address compelling government interest of diversity in education. (Gratz v. Bollinger)
			* **“To be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups’.”** (Grutter v. Bollinger)
		- **In the context of K-12 public education:**
			* **Racial balance is not a compelling government interest of its own sake – the interest must be something deeper and more linked to a legitimate interest.** (Parents Involved in Community Schools v. Seattle School District)
		- **In the context of employment and contracting:**
			* **In public employment:**
				+ **The goal of providing “minority role models” in order to overcome societal discrimination is not a compelling government interest by itself 🡪 there must be a showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy discrimination.** (Wygant v. Jackson Board of Education)
			* **In public contracting:**
				+ **Upon substantial Congressional findings that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination, a congressional requirement that 10% of federal funds be used to procure services from businesses controlled by minorities.** (Fullilove v. Klutz-Nick)
				+ **Findings of particular and specific past discrimination are crucial –** **general discriminatory practices are not enough 🡪race conscious relief MUST BE REMEDIAL and NARROLWLY TAILORED TO REMEDY THAT PAST DISCRIMINATION.** (Richmond v. JA Croson Co.)

Why is remedial so important?

If there is not a showing of specific past discrimination, this would open up the door to competing relief for every “disadvantaged group” – “The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” (Richmond case)

* **RELIGION CLAUSES**
	+ **1st AMENDMENT – Prohibits Congress from making a law respecting an ESTABLISHMENT of religion or PROHIBITING THE FREE EXERCISE of religion. Applied to the States through the 14th AMENDMENT.**
	+ **ESTABLISHMENT CLAUSE**
		- **Government must be NEUTRAL in religious matters.**
		- OLD - 3 pronged LEMON test – to be valid, the action must:
			* Have a secular purpose;
			* Have a principal/primary effect that neither advances nor inhibits religion and
			* Not foster EXCESSIVE GOVERNMENT ENTANGLEMENT.
		- **NEW – 2 prong LYNCH test**
			* **Is the law NEUTRAL?**
				+ **To answer this, Can the government act be perceived as an ENDORSEMENT of religion/a particular religion by a REASONABLE PERSON?**
				+ Special Issues:

Neutral = neutral among competing religious claims AND neutral between religion and non-religion

Endorsement = in the eye of the justice(s) viewing it – opinions show it is VERY SUBJECTIVE

Reasonable Observer – Is there a problem if the person judging reasonable observer is from the religion being benefited by the government “support” of religion.

* + - **STANDING in Establishment Clause Cases – The plaintiff only has to allege that they are DIRECTLY AFFECTED by the action in order to have standing.**
	+ **FREE EXERCISE CLAUSE**
		- **DEALS WITH INDIVIDUAL’S RIGHT TO PRACTICE THEIR RELIGION.**
		- Old Test (Sherbert) – STRICT SCRUTINY REQUIRED - If the PURPOSE of the government action is to TREAT RELIGION ADVERSELY or DISCRIMINATE against (a) religion, it IS UNCONSTITUTIONAL UNLESS IT IS NARROWLY TAILORED TO ADVANCE A COMPELLING INTEREST.
		- **NEW TEST (Smith) – Court rejects strict scrutiny test and uses “rational relationship” test for government action.**
		- City of Boerne (p. 1288) – Congress had passed law requiring strict scrutiny analysis in free exercise clause 🡪 SCOTUS says that law is unconstitutional because Congress was re-writing the free-exercise clause, not using their “enforcement” powers under the 14th Amendment. 🡪 POST-BOERNE – states enacted their own “free exercise” provisions, usually stricter/requiring greater scrutiny than the fed. Free Exercise Clause
		- **Beliefs v. Action/Conduct**
			* **RIGHT TO HAVE A RELIGIOUS BELIEF IS ABSOLUTE.**
			* **CONDUCT IS NOT ABSOLUTELY PROTECTED.**
				+ Old Test:

Balanced the severity of the burden against the important of the state interest in regulation and

Considered the availability of alternative means to achieve the state interest.

* + - * + **New Test:**

**There is NO RIGHT to religious exemption from a NEUTRAL law that happens to impose a substantial burden on religious practice.**

* + - Relationship with Establishment Clause – Exemptions for religion from laws do not violate the Establishment Clause 🡪 “accommodating” is NOT government sponsorship of religion, neither does it result in excessive government involvement with religion.
		- **Standing – A person claiming a Free Exercise Clause violation must show DIRECT PERSONAL INJURY and INTERFERENCE with her own religious beliefs.**
* **MISCELLANEOUS**
	+ **Standing = Asks “Who is the appropriate party to bring an action?”**
		- **“Non-justiciable controversies” – small class of cases where NO ONE can sue**
	+ **“Counter-majoritarian Difficulty” – when the majority speaks (through Congressional legislation), and the Judiciary overturns, and is arguably going against the will of the people**
		- 2 solutions given:
			* Explanations of why and when judges should interfere with the will of the majority
			* There is a problem with the premise of the statement – Do the executive and legislative branches really represent the majority? If not, then is the “foundation of democracy” a “big lie”?
	+ **Why do we need Courts?**
		- **To decide facts 🡪 decide what principles apply 🡪 apply principle to facts**
	+ **What is judicial activism?**
		- **Usually used to mean that the judiciary is acting against the will of the majority**
	+ **Stare Decisis**
		- **When the Court re-examines a prior holding, it asks…**
			* **Whether the rule has proven to be intolerable and defies practical workability;**
			* **Whether the rule is subject to a kind of reliance that would lend to a special hardship to the consequence of overruling;**
			* **Whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or**
			* **Whether facts have so changed as to rob the old rule of significant application.**