Constitutional Law Linzer, Fall 2010

Table of Contents

Judicial Review 2

Federalism 5

Legislative / Congressional Power 8

Separation of Powers 28

Limits on the Judicial Power 40

Protecting Fundamental Rights – EP & DP 49

Due Process 49

Equal Protection and Fundamental Interests 60

Affirmative Action 77

First Amendment 79

# Judicial Review

1. Bases for Judicial Review
	1. Judicial review effectively nullifies statutes adopted by a legislature if they are unconstitutional
	2. Counter-majoritarian dilemma: why should the Cts intervene if a majority of people want a particular thing?
2. *Marbury v. Madison* (1803) (CJ Marshall): established judicial review
	1. Facts: “The Midnight Judges” - Marbury was a Federalist judge nominated to be justice of the peace by John Adams at the very end of his term. The Senate had approved the nomination, secretary of state Marshall had stamped and given to his brother to deliver. Brother never delivered some of them. The next day, Jefferson takes over. Jefferson and secretary of state Madison) refused to deliver the commission to Marbury and several other Federalist judges in the same boat. Marbury sues Madison directly in the Supreme Court for a writ of mandamus ordering Madison to deliver his commission. Former SoS Marshall had been appointed to Chief Justice of the SC.
	2. At this time, the SC is relatively unimportant. Marshall and Jefferson/Madison are enemies.
	3. Marshall said Marbury was entitled to his commission, but bringing suit in the SC was not a constitutionally authorized way of obtaining it
		1. Marshall could have said up front they had no jurisdiction, and stopped there, but he didn’t
		2. He could have said you can’t order a writ against an official, but he didn’t.
	4. Has Congress vested the SC with original (instead of appellate) jurisdiction in mandamus cases?
		1. Issuing a writ of mandamus would be an act of original jurisdiction
		2. Congress, via §13 of the Judiciary Act said the SC has original jurisdiction to issue a writ of mandamus (per Marshall)
		3. Article III §2 cl. 2 of the Constitution says the SC has original jurisdiction in all cases affecting ambassadors, and other public officials, and those in which the state shall be a party. In all other cases, the SC has appellate jurisdiction, and only this appellate jurisdiction can be modified by Congress
			1. This could be read as the “starting point” for the SCs powers, but additional powers are allowed. So the Judiciary Act added to the SCs original jurisdiction. That would make the two consistent.
			2. Marshall read Article III as being the “end point” for the SCs powers, that anything not enumerate was appellate jurisdiction
		4. Thus, §13 of the Judiciary Act gives the SC original jurisdiction where it should have appellate jurisdiction, so it is unconstitutional.
		5. Thus, SC lacks jurisdiction
		6. Our reading of §13 seems to suggest that the SC only has appellate jurisdiction to issue a writ of mandamus
	5. “The judicial power of the US is extended to all cases arising under the Const.”
		1. Where in the Const. did Marshall find this authority for the Courts?
		2. Pre-Marbury, most exercises of judicial review were on state laws. Marshall didn’t really address why the courts had the power to review federal laws
		3. Either way, this is seen as establishing the court’s power of judicial review
	6. “It is emphatically the province and duty of the judicial department to say what the law is”
	7. Also insisted that everyone was bound by the rules set forth in statutes and the Const.
		1. A public official is subject to the courts when performing a non-discretionary act. Ct will not interfere with discretionary duties.
		2. Separation of powers doctrine prohibits the legislature from interfering with the Ct’s final judgments
	8. WRIT OF MANDAMUS: “we order”, requires someone to do something
3. Post-*Marbury*
	1. After *Marbury*, judicial review remained rare. Next major exercise of judicial review was the 1850’s case *Dred Scott*
4. **Theories of Judicial Review**
	1. Original Meaning: what was the original intent of the Framers?
		1. ORIGINAL UNDERSTANDING: understanding of the Const. that would have been shared by those who ratified what the Framers drafted
		2. ORIGINAL MEANING: what meaning did the Const. language have for “We the People” – the public, as well as the ratifiers and the Framers
		3. How do we figure out what they meant? Consider
			1. Text of the Const: most relevant evidence, but not always available
				1. Clause-Bound Textualism: plain meaning, what a reasonable person in the Framer’s era would have understood (*Marbury v. Madison*)

Conventions: inclusion of one thing implies exclusion of all others, items in a series are presumed to be of the same kind, rule against surplusage (don’t interpret one part to render another part of the sentence unnecessary)

* + - * 1. Holistic Interpretation: read the provision in light of the whole document

Why is there a 15th amendment if there is an equal protection clause? At that time, civil rights were separate from political rights.

* + - * 1. Structuralism: read the text in light of overall const. principles, consider how a particular construction fits with the principles instinct in the Const.
			1. Context within which that text was drafted: debates, public reports, ratifying materials, imaginative reconstruction (how would the Framers have answered the question if it had been posed to them?)
			2. Original goals and norms of the people
			3. Argument: if you aren’t bound by original meaning, what is the alternative?
		1. Problems
			1. Dead-hand of the past: Const. was ratified by a tiny majority of the population a very long time ago
			2. Indeterminacy problem: can we really know what the original meaning was, is there really even only one meaning
			3. Cognitive dissonance problem: for charged issues, can anyone remain genuinely objective
			4. Rigid - society changes and we have to deal with that.
	1. Legal Process: SC must consider its institutional advantages and limitations when exercising its power of judicial review
		1. Views the rule of law from an institutionalist and procedural perspective
		2. Representation-Reinforcement Theory: the legislature is made up of elected people. If the public as a whole doesn’t like the laws, they will elect new people to change them. The court should only step in when the system malfunctions, that is when a “discrete and insular minority” exists who cannot get people elected to protect themselves.
	2. Popular Constitutionalism: Const. must be read dynamically and should incorporate new norms
		1. Anti-Subordination understanding: central goal was to overturn laws and practices that unfairly subordinated social groups
		2. Affirmative, not just negative, state responsibilities: Const. is filled with admonitions that demand affirmative assistance and not just noninterference from gov’t
		3. Rejection of dichotomies b/w liberty and equality, public and private:
	3. Constitutional Moments: political crisis, followed by an intense period of high-politics debate, followed by a popular electoral ratification of a new order governance
1. *United States v. Carolene Products* (1938): federal statute prohibited interstate shipment of filled-milk, Ct upheld the statute
	1. Famous Footnote 4 suggested a new set of roles for the SC
		1. Begins by saying that statutes have a presumption of constitutionality, burden on other party to prove unconstitutional (at least as to commercial products) ¶ 1
		2. If you don’t like what was done, don’t challenge the constitutionality. Organize and get the law repealed. ¶ 2
		3. But if the laws prevent you from organizing and getting it repealed, the majoritarian process has been undermined and the Cts need to fix it. Higher scrutiny might be used for cases that infringe on certain rights: the 1st ten amendments, restrictions on the political process, and restrictions aimed at “discrete and insular minorities”. ¶ 3
		4. Take home: Cts interfere when the regular political process is broken

# Federalism

1. Overview
	1. The Supremacy Clause states that the Constitution, federal law, and federal treaties are supreme and trump all state power…
	2. But, the 10th Amendment limits the federal government only to the powers delegated to it by the constitution. All other powers are left to the states.
		1. 10th Amendment / supremacy clause. National gov’t limited to the powers delegated to it, but within that realm it is supreme.
		2. Do not allow states to take actions that might touch upon foreign relations
		3. Valid act of Congress supersedes any state or local action that actually conflicts with the federal rule, or interferes with achievement of a federal objective, or when the state law is preempted
	3. Paradox: Const. doesn’t say “we the states”, it says “we the people”. But then the focus is on Federal rights versus State rights. Aren’t they both the people?
	4. Writ of Certiorari (Discretionary) – SC has complete discretion to hear cases that come to it by writ. A case will be heard if 4 justices agree to hear it. Cases come from
		1. Highest state courts where (1) the constitutionality of a federal statute, federal treaty, or state statute is called into question, or (2) a state statute allegedly violates federal law
		2. Federal courts of appeals
	5. Appeal (Mandatory) – SC must hear those cases that come to it by appeal, meaning decisions made by 2-judge federal district court panels that grant or deny injunctive relief
	6. Goals of federalism
		1. Protecting liberty: States can protect citizens against abuses in other states. States against Federal, Federal against repressive states
		2. Republicanism: participation is easier at the local level
		3. Efficiency and Diversity: people can move to localities that have policies in line with their preferences
	7. Original intent
		1. Federal can better respond to foreign entities. Tax, diplomacy, armies.
		2. Commercial responses to foreign nations. Unify commerce internally.
		3. Federal can respond to disputes between States. Can override disharmonious statutes between States.
		4. Congress shall “legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.
2. *McCulloch v. Maryland* (1819) (MARSHALL): Maryland tried to tax the US Bank. Q1 is whether Congress had the power to incorporate a bank - YES
	1. Marshall began by looking to the Congressional debates. Argues Congress had the power b/c they have always had the power, and we start by doing what we have always done. Argues a position of inertia.  **(original intent)**
		1. “It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the **great principles of liberty are not concerned**.” He points out that this is a federal-state issue, not an issue around liberties.
	2. Maryland argued that the states ratified the Const., thus the states gave the Federal gov’t power. Marshall says no, it was “we the people.” System is based on the notion that the people are sovereign. The people were acting through the states when they ratified it (a little slight of hand here).
		1. “The gov’t proceeds directly from the people. The govt’ of the Union then, is emphatically, and truly, a gov’t of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”
	3. 10th Amendment supremacy
		1. “…that the gov’t of the Union, though limited in its powers, is supreme within its sphere of action.”
		2. Simultaneously justifies his position with the text (elsewhere in the Const. it uses the words expressly, no words that exclude implied powers) and on the structure of the gov’t (the federal gov’t has to be supreme when acting under it’s limited power)
	4. Yes, power to incorporate a bank. **(textual arguments)**
		1. Not expressly given, but suggests the missing term “expressly” was not done by accident.
		2. Discuss the Articles and said they failed b/c they only had express powers
		3. Constitution would be enormous (“partake of the prolixity of a legal code”) if we tried to include everything
		4. A Const. should be an outline
		5. Const. used broad terms to give power, and very narrow terms to limit the power
			1. “In considering this question, then, we must never forget, that it is a *constitution* we are expounding.”
		6. Talks about the other powers the Fed gov’t does have regarding money, and argues that you can’t do these things unless you have some power to execute it (analogizes to the postal system)
			1. “…that a gov’t, entrusted with such ample powers…must also be entrusted with ample means for their execution”
		7. Conclusion: It doesn’t make sense for the Framers to give power X but no means to accomplish that power. We must have an implied power to carry things out (this is a structural argument)
	5. Necessary and Proper clause was reinforcement
		1. Maryland argued necessary meant necessary, not just convenient
		2. Marshall points out areas of the Const. that said absolutely necessary, and noted that they left out the term absolutely here
			1. Framers indicate the document “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs”
			2. “If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate…if that instrument be not a splendid bauble.”
	6. Throughout Con Law, people on two different sides quote this opinion
		1. “Let the end be legitimate, let it be within the scope of the const., and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the const., are constitutional.” Gives Congress the power.
		2. “Should Congress, in the execution of its powers, adopt measures which are prohibited by the const., or should Congress, under the pretext of executing its powers, pass laws…But where the law is not prohibited, and is really calculated to effect any of the objection entrusted to the gov’t, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to treat on legislative ground.” Says defer to the legislature.
	7. Question 2: Can Maryland tax the bank?
		1. **Representation-Reinforcement:** A state cannot tax the bank b/c it would be taxing the people of the other states and they are not under MD’s control. But the government can do this (or choose not to do things) b/c it represents everyone.
		2. Generally, States cannot tax federal institutions. But the federal gov’t can tax state institutions (if done uniformly)
		3. “The power to tax is the power to destroy.”
3. Additional Cases
	1. *US Term Limits, Inc. v. Thornton* (1995): state imposed term limits, SC ruled the limits unconstitutional

# Legislative / Congressional Power

1. **Commerce Power**
	1. Article I, §8, cl. 3: empowers Congress to regulate commerce with foreign nations and among the several states
		1. Includes basically all activity affecting two or more states
		2. Includes transportation or traffic, whether or not a commercial activity is involved. Any transmission (electricity, TV) counts.
		3. Can regulate any activity, local or interstate, that in itself or in combination with other activities has a substantial economic effect upon interstate commerce
		4. Recent limits: to be within Congress’ power, federal law must either regulate channels of interstate commerce, OR regulate the instrumentalities, OR regulate activities having a substantial effect
		5. Intrastate can be regulated if it is economic or commercial and ct can conceive of a rational basis on which Congress could conclude that the activity in aggregate substantially affects interstate commerce; but if noncommercial and noneconomic then it cannot be regulated unless Congress can factually show a substantial economic effect on interstate commerce
	2. 1800’s: commerce means buying, selling, and transporting goods, services, and people
	3. *Gibbons v. Ogden* (1824) (MARSHALL): ferry boats case
		1. Does commerce extend to navigation? Yes, clearly.
		2. Opinion suggests that an activity not falling within a commonly accepted notion of commerce would not be within Congress’ power
		3. Congress’ power extends only to transactions that operate across state lines
	4. *United States v. E.C. Knight* (1895) (FULLER) (later overturned): sugar monopoly
		1. Manufacturing is not commerce. No direct relation to interstate commerce.
		2. HARLAN dissent: monopoly had a direct rather than incidental effect on interstate commerce
	5. *Champion v. Ames* (1903) (HARLAN): prohibited carrying lottery tickets across state lines
		1. Outlawed carrying lottery tickets across state lines
			1. Argued morality, plus
			2. Argued federalism supported the statute, because states could not reach the interstate market
		2. FULLER dissent: this is going too far, now everything that involves transportation will be commerce
	6. *Swift & Co. v. United States* (1905) (HOLMES): upheld injunction against price-fixing by meat packers
		1. Regulation upheld b/c it was in a “stream of commerce”. A mere “throat” in the stream does not cut off regulatory power.
		2. Later upheld by Taft in *Stafford v. Wallace*, when they upheld regulation of animal stockyards
	7. *The Shreveport Rate Case* (1914) (HUGHES): cheaper RR rate for goods sent intrastate versus interstate
		1. “Close and substantial relation”
		2. Jurisdiction over interstate plus intrastate b/c interstate commerce affected intrastate commerce
		3. Goes back to *Gibbons* and the distinction between interstate and intrastate
		4. RRs are the epitome of transportation, and commerce includes transportation
	8. *Hammer v. Dagenhart (Child Labor Case)* (1918) (DAY): regulation that prohibited goods from being shipped interstate if they were made by children under certain conditions
		1. In the previous cases, some states already had laws banning the prohibited thing. Here, no states had laws against children working these hours.
		2. Act is, in a “two-fold” sense, repugnant to the Const.
			1. Transcends authority delegated to Congress
			2. Exerts power in a purely local matter
		3. Problem with each state regulating itself? Race to the bottom. Business will just go somewhere else where they aren’t regulated.
		4. HOLMES dissent (4 total dissenters): relied on lottery case, still transportation (even if you can read more into it) so no right to interfere. This is used later to justify *US v. Darby*
	9. Late 1920s, agriculture was in a terrible state of depression. Then the Great Depression hit. Roosevelt comes into power and begins passing all kinds of regulation to fix the nation. Things went ok at first, but then in 1935, things headed south. Court struck down the Railroad Retirement Act on similar principles as the Child Labor Case.
	10. *Schechter Poultry v. United States (sick chickens)* (1935) (HUGHES): NIRA set up industry-wide associations that would then set up the rules for each industry. Rules would have the force of law, and were things like wages, hours, etc.
		1. Congress has broad discretion to delegate its legislative power to executive officers and/or administrative agencies
			1. Cannot delegate if power is uniquely confined to Congress (power to declare war)
			2. Delegation must have intelligible standards for delegate to follow
			3. Legislature may delegate authority to enact regs, violation of which are crimes, but prosecution for such violations must be left to the executive and judicial branches
		2. Wholesale butcher who bought and sold almost exclusively within the state. Not the best case to challenge the Commerce power
		3. Said stream of commerce has ceased. Regulating the butcher would be regulation of purely local matters.
		4. Said you can consider extraordinary conditions when looking at regulation but you cannot expand the power of the gov’t (i.e. in a crisis we give the gov’t the benefit of the doubt, but not a blank check)
			1. Hughes had also decided the mortgage moratorium cases
		5. Attempts to draw a distinction between direct and indirect effects. Not the world’s best definition.
		6. Terrible blow to the Commerce power
		7. CARDOZO concurs: one of the most pro-new dealers agrees this is beyond Congress’ power. “Activities local in their immediacy do not become interstate and national b/c of distant repercussions”
	11. *Carter v. Carter Coal* (1936) (SUTHERLAND): Bituminous Coal Conservation Act of 1935 attempted to give power to the coal miners and levied taxes
		1. Does mining sound like commerce? No, it sure sounds like production. The gov’t argued that when the mines shut down, the rest of the world grinds to a halt and thus it certainly affects commerce.
		2. Court ruled it was production, not commerce
		3. **Formalist** view: if 1 man mining 1 ton of coal doesn’t affect interstate commerce, then 1 million men mining 1 million tons of coal also doesn’t affect interstate commerce. Direct means proximate, just because a lot of people are affected doesn’t make something direct.
		4. HUGHES concurs separately. Agrees that the labor provisions were unconstitutional, but suggests that the price control matters would be fine. However, they were lumped together in the majority opinion.
		5. CARDOZO concurs and dissents. Says price control matters were fine. While mining may not be commerce, its relationship to commerce may make regulation necessary. Viewed it as an interstate transaction. Cites himself in *Schechter*. Reiterates what Hughes said regarding the mortgage moratoriums – in a crisis, we give Congress some wiggle room.
	12. Roosevelt proposes his court-packing scheme. “Switch in time that saved nine” – Roberts switched to uphold a minimum wage statute. Scheme killed. Roosevelt gets nothing, but the Court has shifted to vote in his favor.
	13. *NLRB v. Jones & Laughlin Steel* (1937) (HUGHES): steel company is highly integrated across the US (mines, barges, RRs, factories, etc). NLRB applied labor-management provisions.
		1. Factually a much better case than Schechter
		2. Hughes avoided the stream of commerce theory (*Swift*) but upheld the directly affecting commerce theory (*Shreveport*). Individually some were not commerce, but taken as a whole the activities of the steel company were part of the stream of commerce.
		3. Hughes doesn’t focus on the production/commerce distinction, he upholds it b/c the activities have a direct effect on commerce
		4. **CRITICAL CASE**:
			1. We have reached the people in the steel mill, not just the goods that are moving.
			2. This is a constitutional moment, a moment that changes everything.
			3. Critically important politically and colossally changed constitutional law
			4. Everything is covered now
		5. McREYNOLDS dissent: indirect effect. He and his dissenting colleagues then left the court before the next major commerce case.
	14. *United States v. Darby* (1941) (STONE): Fair Labor Standards Act regulated hours, wages, other conditions of employment. Darby manufactured lumber in Georgia and shipped to other states.
		1. Q1: does Congress have power to prohibit interstate shipment of lumber made in violation of the act? YES
			1. Manufacture is not commerce, but shipment undoubtedly is
			2. Motive and purpose behind such regulation is for legislative judgment only
		2. Q2: does Congress have power to prohibit employment of men in the production of goods when that production violates the act?
			1. Overrules *Hammer (Child Labor Case)*. Suggests that *Hammer* was incorrectly decided and there are plenty of cases to support overruling it. Said they were just following the *Lottery Ticket* case
			2. Distinguishes *Carter* out of existence
			3. Extended Commerce power b/c he was “producing for interstate commerce”
			4. Commerce clause extends to those activities intrastate which so affect interstate commerce; substantial effect
			5. Best way to prevent interstate commerce of something? Prevent it from being produced in the first place. OK b/c it helps Congress regulate. Bootstrap.
			6. Double bootstrap: Commerce clause covers products even if you had never intended to ship them interstate anyway. Congress can reach products that wouldn’t ever have been commerce.
		3. *Darby* has just eliminated degree
		4. What happened? Totally different court.
		5. *Schechter* and *Carter* rejected the notion of federal power. *Jones & Laughlin* applied Commerce clause. *Darby* has just expanded Congress’ reach to cover almost everything.
		6. Calls the 10th Amendment a “truism”
	15. *Wickard v. Filburn* (1942) (JACKSON, unanimous court): farmer Filburn grew extra wheat for his own use
		1. Agriculture was in really bad shape at this time. Focus was on stabilizing prices.
		2. Growing his own wheat meant he didn’t have to buy any, plus he could store it up and then flood the market once prices had risen
		3. Jackson argues that one man might be trivial, but many men certainly are not (complete opposite of Sutherland)
	16. **SKIP NOTE**: FEF 1121-48 deals with when Congress can delegate its legislative powers, the legislative veto, and the line item veto. As you remember, **Schechter Poultry** (The Sick Chicken Case) had struck down the delegation to industry groups of rule-making power under the National Industrial Recovery Act (Cardozo concurrence: “delegation running riot”). Even before the Revolution of 1937 the Court less problem with foreign affairs, upholding a criminal conviction of a corporation for violating an embargo based on powers that Congress delegated to the President, involving shipment of arms to South America. After 1937 the Court gradually seemed to abandon the non-delegation doctrine in domestic affairs as well. Recent attempts to revive it have been rejected by the Court, once in an opinion by Justice Scalia, though the Court has said in dictum that there must be meaningful standards and that it presumes that Congress is not going overboard in its delegations. It did strike down two Attorneys General who tried to prevent Oregon from allowing assisted suicide, finding that the AG lacked expertise in controlled substances.
	17. **Commerce power for non-commercial matters**
	18. *Heart of Atlanta v. US* (1964) (CLARK): Civil Rights Act prohibited discrimination in business establishments
		1. Commerce Clause applied b/c discrimination in hotels substantially affected interstate commerce (if they can’t say somewhere, won’t travel, won’t spend money interstate, etc) (common carriers)
		2. Completely avoided the obvious argument under the 14th Amendment b/c of the Civil Rights Cases
		3. Completely avoided any morality arguments
		4. Makes this into an economic argument. So far we have not made a non-economic argument for the Commerce Clause
	19. *Katzenbach v. McClung* (1964) (CLARK): selling food is interstate commerce
	20. Between the 1940s and 1990s, Congress essentially had a blank check with the commerce clause.
		1. 10th amendment was a truism (*Darby*), dual federalism idea underlying *E.C. Knight* has been abandoned, and formal distinctions as to subject matter marginalized (*Heart of Atlanta*)
		2. Congress can regulate anything once it actually enters commerce, under the outlaws-of-commerce theory (Lottery Case), and even beforehand under the stream-of-commerce theory (*Swift*)
		3. Congress can regulate intrastate activities by showing a substantial effect on interstate commerce (*Darby*), and to show such effect Congress can aggregate lots of little transactions (*Wickard*) and even search through trash cans and food bins (*McClung*)
	21. *US v. Lopez* (1995) (REHNQUIST): pg 860, 12th grade student arrested for carrying a concealed gun to school
		1. Rehnquist identifies 3 categories of activity that Congress may regulate via commerce clause
			1. Channels of interstate commerce
			2. Instrumentalities of interstate commerce, or persons or things in interstate commerce
			3. Activities having a substantial relations to interstate commerce
		2. Upheld *Wickard* and then said this case had nothing to do with commerce or any sort of economic enterprise
		3. Gov’t argued crime decreases travel and poor education decreases productive citizenry, clearly economic issues
		4. Rehnquist said to listen to the Gov’t would be to give Congress unlimited power
		5. KENNEDY AND O’CONNOR concur: stare decisis, cannot revert to the 18th century
		6. Various dissents: precedent, the commerce clause has been well defined for 50 years
		7. Linzer thinks the case was correctly decided to keep Congress from going too far. He would not go so far as to say that it must be commercial to be under the commerce clause
2. Nationalist Limitations Upon State Regulatory Authority – **Dormant Commerce Clause**
	1. Constitutional Principles, Policies, and History
		1. 3 policy concerns with state rulemaking embodied in the Constitution
			1. Uniformity policy: certain policies need to be uniform throughout the country
			2. Free trade policy: seeks to integrate the states into one national marketplace
			3. Policy to avoid prisoners’ dilemmas: fear that one state would discriminate, causing the other states to retaliate
		2. Constitutional text puts limits on the states
			1. Prohibits states from enacting certain types of legislation (treaties, coining money, war, etc)
			2. Waivable prohibitions on state action, meaning states may act only if authorized by Congress
			3. Forecloses state action where it clashes with national regulation
				1. Supremacy clause
				2. Federal preemption of state law if state law is

Contrary to provisions of a federal statute

Inconsistent w/federal policy

In an area wholly occupied by federal law

* + 1. DORMANT COMMERCE CLAUSE: state attempts to exclude interstate commerce in the absence of federal legislation, Congress hasn’t made active use of its power. Idea that the Commerce Clause power inherently means states cannot pass legislation that improperly burdens or discriminates against interstate commerce
		2. Possibilities for Fed/State regulation for interstate commerce
			1. Mutually exclusive regulation: whatever Congress can regulate at interstate under CC is closed to states, whatever states can regulate as local is closed to Congress
				1. Logically creates a dormant CC
			2. Concurrent regulation: jurisdiction overlaps, but states regulation cannot violate other constitutional prohibitions or interfere with federal regulation
			3. Authorized concurrent regulation: states can regulate interstate commerce in the absence of congressional negation and of any interference with the negative goals of the CC
		3. *Gibbons v. Ogden* (1824) (MARSHALL): same case as before, ferryboats
			1. States and Fed Gov’t can both tax w/o getting in each others way, but when a State regulates commerce, it is doing the very thing which Congress is authorized to do
			2. Grant of the federal coasting license preempts any state regulation
			3. In dicta, Marshall indicates that states are completely barred from regulating commerce b/w states on notion that congress has that power. Indicates he might agree with Theory 1.
		4. *Willson v. Black Bird Creek Marsh Co.* (1829) (MARSHALL): put up dam to drain wetlands, but creek was navigable, dam blocked waterway, state said draining wetlands was improving health of local citizens
			1. SC upheld state law and allowed dam b/c it was a ‘local health measure’. Main motive was not to burden interstate commerce, but to improve public welfare
			2. States could pursue other legitimate regulatory goals even if that regulation impinged to some extend on interstate commerce
			3. Left open the possibility that the federal commerce power was exclusive and, thus, state could not regulate interstate commerce
		5. *Cooley v. Board of Wardens of the Port of Philadelphia* (1851) (CURTIS): regulation of pilots of ships. PA put tax on ships if they didn’t use pilots (specialized navigator) entering and leaving port of PA
			1. SC seemed to adopt Theory 3 – authorized concurrent regulation
			2. SC upheld state law b/c matter was intrinsically ‘local’ in nature and not an area needing national uniformity. Confined holding to navigation, but gave both state and fed gov’t power
			3. *Cooley* reading permits state regulation of local matters, not national matters. Nothing says congress couldn’t have moved in and changed this. Not a dual federalism / mutually exclusive argument, a concurrent jurisdiction argument.
		6. *Leisy v. Hardin* (1890): SC invalidated state seizure of the interstate shipment of beer kegs on the grounds that Congress’ power to regulate interstate commerce is plenary and exclusive
		7. So, Congress passes a statute that authorizes the states to regulate interstate-shipped liquor once it arrives within the state
		8. *In re Rahrer* (1891): SC upholds Congress’ statute
			1. \*\*\*By 20th century, became accepted that Congress could **authorize** state regulation of interstate commerce
	1. Why do we justify a dormant commerce power?
		1. We can leave the states alone knowing that Congress can move in if it wants to (but Congress is very busy so we need the SC to enforce the dormant commerce power)
		2. Jackson said Framers created a free trade market where you can’t put up barriers to other states. Basic notion is that states should not be allowed to discriminate against other states, especially when it benefits themselves
		3. Rent-seeking (representation-reinforcement): role of SC is to correct for serious defects in the political process, state laws may be too protective of insider interests at the expense of outsiders
	2. Modern Dormant Commerce Clause Doctrine
		1. Overt state discrimination against interstate commerce is presumptively invalid, can be sustained only to meet an important [non-economic] state interest [and there are no reasonable alternatives available]
			1. Discriminatory and protectionist measures are almost per se unconstitutional
			2. Subject to strict scrutiny
			3. Discrimination against outside competition
				1. *Baldwin v. GAF Seelig* (1935): SC invalidated a NY law that barred importation of out-of-state milk that did not adhere to local price minima, said it was a ‘barrier’ to commerce
				2. *Dean Milk Co. v. City of Madison* (1951): SC invalidated city ordinances making it unlawful to sell milk not pasteurized within 5 miles of city…SC admitted the legitimacy of the state regulation but struck it down b/c the practical effect was to exclude milk produced out of state. Cannot regulate in this way if alternatives are available.
			4. Discrimination hoarding local resources or opportunities
				1. *Pennsylvania v. West Virginia* (1923): SC invalidated statute requiring in-state pipeline co’s to meet domestic needs before exporting gas
			5. Discrimination preventing outside burdens from flowing in-state
				1. *City of Philadelphia v. New Jersey* (1978) (STEWART): NJ law prohibited importation of solid or liquid waste

SC struck down the prohibition on the dormant CC grounds, said prohibition was protectionist

Issue was that NJ only regulated external waste, but did not do anything about internal waste. Argument advanced was that this was a public health matter, but later admitted the health issue was once waste was there (hence no difference if it came from in state or out of state)

Rehnquist, Burger dissent: health issue

* + - * 1. *C&A Carbone, Inc. v. Town of Clarkstown* (1994) (KENNEDY): ordinance required waste to be funneled through a privately owned waste treatment plant, even though it was sometimes cheaper to send it out of state. SC struck down measure as protectionist.
				2. *United Haulers Ass’n, Inc. v. Oneida-Herkimer WMA* (2007) (ROBERTS): ordinance required waste to be funneled through facilities owned by state-created public benefit corporation

SC upholds the ordinance. Said burden on commerce does not outweigh the benefits conferred on citizens. If anything, the burden was on the locals, b/c they partially paid for facility

SC makes a big deal out of private ownership in *Carbone* versus the gov’t ownership here

Dicta seems to dredge back up the idea of deciding what to regulate based on whether it is local or not. Interesting outcome – results oriented?

Alito, Stevens, Kennedy dissent: should have the same outcome as *Carbone*

* + 1. State policies burdening commerce will be invalidated if the burden is excessive compared to legitimate local benefits
			1. *South Carolina State Highway Dep’t v. Barnwell Bros.* (1938) (STONE): SC upheld a regulation forbidding trucks whose width exceeded 90” and weight exceeded 20K lbs on state roads b/c the state regulation was at least fairly debatable. OK b/c local matter and regulation applied to any truck, where originating in-state or out-of-state
				1. A year later, Justice Stone writes *Carolene* FN 4, that if you don’t like it, vote it out
			2. *Southern Pacific Co. v. Arizona* (1945) (STONE): SC strikes down state statute forbidding long RR cars. Stone justifies his differing opinions by saying that RRs are a national matter but highways are more local
			3. *Pike v. Bruce Church, Inc.* (1970): cantaloupe cases where they must be boxed in state
				1. If regulation is protectionist, basically dead. Almost per se unconstitutional.
				2. If not, SC does a cost-benefit analysis (issue here is that corps usually have more money than state to litigate)
		2. Rules do not apply when state acts as market participant
			1. MARKET PARTICIPANT EXCEPTION: if the state goes into business it can favor itself over others
				1. One argument is that this involves state spending, and spending discriminations are less likely to trigger retaliation than taxing
			2. *West Lynn Creamer, Inc. v. Healy* (1994) (STEVENS): tax on all wholesale milk transactions, but use the tax money to fund cash payments to state’s struggling dairy farmers. SC invalidated tax saying it was protectionist. Yes, both in and out-of-staters are paying, but the in-staters basically get their money back
	1. Alternative Limitations on States
		1. *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (1997) (STEVENS): Maine provided a general exemption from real estate taxes for charitable institutions incorporated in the state, Camps Newfound was not a Maine company
			1. Ct held that:
				1. Camps service was clearly in commerce and triggered Dormant Commerce Clause
				2. Jurisprudence is fully applicable to not-for-profit as well as profitmaking enterprises
				3. Statute’s facial discrimination against interstate commerce brought it within the rule.
			2. Essentially Ct viewed it as protectionist and said it discriminated on its face against interstate commerce
			3. SCALIA, REHNQUIST, THOMAS, GINSBURG dissent argued state ought to be able to encourage charitable uses of state land
		2. Import-Export Clause – see *17:26, the next section*
			1. As with the dormant commerce clause, Congress can authorize the discrimination otherwise prohibited
			2. THOMAS’ *Camps* dissent said Import-Export clause could include trade between the states
	2. Summary: Commerce power is given to Congress. If Congress is silent, the states can act. Congress can then allow, or not allow, the state to do that thing. If Congress doesn’t say anything, then the SC acts as Congress’ agent and decides what Congress might have done.
1. Beyond the Commerce and Civil Rights Enforcement Power: Taxing and Spending
	1. Taxing and Spending power found in Article I, §8, cl. 1
		1. Congress has the power to lay and collect taxes, imposts, and excises, but they must be uniform.
		2. Neither Congress nor the state can tax exports to foreign countries
		3. Taxes are generally valid. A tax measure will be upheld if it bears some reasonable relationship to revenue production or if Congress has the power to regulate the taxed activity
		4. Congress may spend to provide for the common defense and general welfare. Spending may be for any public purpose. Note that Congress can use its spending power to ‘regulate’ areas, like requiring entities that accept gov’t money to act in a certain manner
	2. *US v. Butler* (1936): Agricultural Adjustment Act, farmers were indirectly taxed to pay for subsidies to reduce their production
		1. SC invalidated the AAA
		2. Ct held that taxing and spending power was an independent enumerated power, limited only by the requirement that the tax and expenditure be ‘in the general welfare’. Rejected the idea that the taxing and spending powers could only be invoked in support of other enumerated powers of Congress.
	3. On it’s face, the taxing and spending power appear unlimited. Why? Idea of Framers was that it can be unlimited b/c the people naturally hate it and will control it by voting people out who they don’t like. Restrictions should be in the ballot box, not in the Court
	4. *Steward Machine Co. v. Davis* (1937) (CARDOZO): provisions encouraged the states to adopt federal unemployment compensation standards
		1. SC said there is a difference between coercion and inducement
	5. *South Dakota v. Dole* (1987) (REHNQUIST): Congress enacted law which withheld 5% of federal highway funds unless state raised drinking age from 18 to 21
		1. Limitations on the Spending Power
			1. In pursuit of the general welfare (Ct should defer substantially to the judgment of Congress)
			2. Unambiguous
			3. Related to the federal interest in particular national projects or programs
			4. Other constitutional provisions may provide an independent bar to the conditional grant of federal funds. [Tax and Spend] power may not be used to induce states to engage in activities that would themselves be unconstitutional
		2. Mild encouragement, not coercion
		3. Note on *Rumsfeld v. Forum for Academic & Institutional Rights* (2006): Solomon Amendment said if any part of a university denied military recruiters access, entire institution would lose federal funds. ABA (?) suggested schools deny military access b/c they refused to hire gays. SC upheld the Solomon Amendment.
	6. Import-Export Clause: Article I, §10, cl. 2
		1. Discriminatory state taxation can be invalidated only if the challenger can show that
			1. It is an impost or a duty
				1. Impost – tax levied on goods at time of importation
				2. Duty – included imposts, and was still a tax on particular goods or written instruments
				3. Excluded direct taxes, such as taxes on real property
			2. On imports or exports, and
			3. Not absolutely necessary or executing its inspection laws
2. Takings Clause (pg 497-513)
	1. Requires gov’t to pay when it takes property for a public purpose (rationally related to a conceivable public purpose)
	2. If valid exercise of the police power, not a taking
	3. Recent cases suggest that the Court may be backing away from finding takings in environmental areas
	4. **SKIP NOTE:** (Theoretically, it can’t take for a private purpose, but Kelo v. City of New London allowed the condemnation of people’s homes so that the City could give the land to private developers whose improvements were thought to provide jobs and an increase in the tax base. Kelo has been very unpopular.) Public purposes have been found to include the preservation of historic sites (including the waiting room at Grand Central Station), and the elimination of ownership of almost all of Honolulu by a few families. If the state acts out of its police powers it may force a person to bear a cost without a taking being found (and thus, without getting reimbursed for his loss). Obvious examples include destroying property to create fire breaks, and Texas’s open beach laws. The courts’ decision whether a governmental act is an uncompensated police action or a compensated taking is critical to environmental and other laws that requires a property owner to lose his property or to lose some amount of control over it. The Court has gone both ways, finding requirements of bicycle paths and beach access to be takings, but upholding a moratorium on building near Lake Tahoe while a planning commission considered ways to preserve the clarity of the water from algae. Recent cases suggest that the Court may be backing away from finding takings in these environmental areas.
3. Civil Rights
	1. *Civil Rights Cases* (1883) (BRADLEY): pg 876
		1. SC struck down the CRA of 1875
		2. Ct held that 14th Amendment does not apply to private action. If the state is not discriminating, or helping you discriminate, then the 14th isn’t applicable
		3. Congress went beyond it’s §5 power when it tried to legislate something not within §1
		4. SC has never officially overruled this case
		5. SC rejects the 13th Amendment argument, saying that refusing to accommodate someone does not impose a badge of slavery or servitude, and to hold so would be running the slavery argument into the ground
		6. HARLAN dissent:
			1. Argued discrimination is a badge of slavery (13th applies)
			2. Argued that business and hotels are licensed by the state. Thus, it is related to a state action (14th applies)
	2. *Jones v. Alfred H. Mayer Co.* (1968) (STEWART): pg 883, RE developer refused to sell home to black couple
		1. 42 U.S.C. § 1982 prohibited discrimination related to real and personal property. Prohibited both public and private discrimination.
		2. SC accepts 13th Amendment argument, “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery”
		3. Doesn’t overrule but does reject the Civil Rights Cases
4. Free Exercise Clause
	1. Sunday “blue laws”
		1. Law required businesses to be closed on either Saturday or Sunday.
		2. Argument against them was that it established religion. When they made it to the SC, WARREN argued that they may have started as religious law but today they were merely part of the police power and it was good for public health to have a wind-down day anyway
		3. Never truly struck down, but they were eventually phased out by the legislative process
		4. One of the cases challenged these laws under the Free Exercise Clause. SC said if you choose to make sacrifices b/c of your religion, the Court doesn’t have to make these sacrifices any easier on you
	2. *Department of HR v. Smith* (1990): pg 900, 2 drug counselors fired b/c they used peyote. Both were members of Native American church, who used peyote as a sacrament. Argued law prevented them from carrying out their religion.
		1. SC denied them unemployment b/c the law against peyote use was a law of general applicability
		2. Problem? Certain areas in Arkansas are dry. Suppose there is a Roman Catholic church located in a dry county. Boss fires EE b/c he drank wine as part of Catholic mass. Is there any doubt the SC would not uphold this?
			1. Linzer argues 3 differences: peyote, native Americans, not a mainstream church (even though SC would never admit this)
		3. People are mad and RFRA (Religious Freedom Restoration Act) of 1993 is passed
		4. *Sherbert* balancing test: prohibition substantially burdened a religious practice? If so, was it justified by a compelling gov’t interest?
	3. *City of Boerne v. Flores* (1997) (KENNEDY): pg 901, catholic church wanted to expand but it violated historic preservation ordinance
		1. SC strikes down RFRA
			1. Beyond 14th Amendment §5 powers. This was a separation of powers issue. SC said Congress wasn’t trying to remedy something, they were really trying to overrule *Smith* and determine what constitutes a violation of the 14th amendment (which is the SCs power)
				1. So why wasn’t the VRA an attempt to overrule the SC?

VRA eliminated an established problem. It was a remedial measure. Not changing the law, changing the remedy.

5-year life cycle

* + - * 1. Note the *Cooper v. Aaron* mentality that the Judiciary gets to interpret laws, not Congress
			1. No indication the states had done anything to prevent religious exercise
		1. “Any suggestion that Congress has a substantive, non-remedial power under the 14th Amendment is not supported by our case law”
		2. Case suggests there must be a discriminatory intent, not just an effect, before the law can be overthrown.
		3. Counter-majoritarian dilemma. The people really did want it.
		4. Bottom line? States passed their own laws to deal with the issue.
	1. Whole Bill of Rights doesn’t apply to states, only the ‘core’ ones do through the due process clause of the 14th amendment. However, most of them (not the 7th) have been considered ‘core’ and do apply to the states.
	2. *US v. Morrison* (2000) (REHNQUIST): pg 925, Violence Against Women Act
		1. SC rules VAW unconstitutional
		2. Commerce Clause
			1. SC said effect on commerce was too remote. Not economic activity. “Reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”
			2. Relied on *Lopez* but may have restricted Congress’ power even more. Keeps referring to economic and non-economic activity
			3. Note, Gov’t gave substantial evidence that showed its effect on commerce
		3. 14th Amendment
			1. It would be hard to prove there were actions by the state that treated her unfairly (how do you show that they didn’t investigate her case as well as they could have)
			2. Dismissed this argument b/c there was no state action
			3. Note, you can get at private parties if they have a connection to the state
			4. Linzer thinks this argument was stronger than the commerce argument, and the SC was just results oriented
		4. Dissent argued this was clearly commerce (distinguished from *Lopez* b/c gov’t had 4 years worth of evidence to show effect on commerce)
1. **Sovereign Immunity**
	1. 11th Amendment: US cannot be sued in federal courts w/o its consent. States cannot be sued in federal court by someone of another state or country w/o their consent. A similar immunity generally protects states from lawsuits in their own courts unless they have consented.
		1. 11th prohibits a federal court from hearing a claim for damages against a state gov’t, although not against state officers, unless
			1. State has consented
			2. Plaintiff is the US or another state
			3. Congress has clearly granted federal courts the authority to hear a specific type of damage action under the 14th amendment
	2. Congress cannot interfere with the states.
	3. *Chisholm v. Georgia* (1793): pg 912, SC took original jurisdiction in a lawsuit against the state of Georgia by a South Carolina creditor seeking payment for goods purchased by Georgia during the Revolution
		1. SC held they had the power under Article III to embrace cases where the State is a defendant and where it is a plaintiff
		2. Created a major sensation
		3. 11th amendment passed in 1798, which says judicial power of the US shall not extend to suits against a state by citizens of another state, or citizens of a foreign state
			1. Note: 11th amendment does not apply to anything below state level, like municipality
	4. *Hans v. Louisiana* (1890): SC gave 11th amendment a decidedly nonliteral interpretation by holding that it forbids suit against a state also by the state’s own citizens. States generally have sovereign immunity when sued in federal court.
	5. What is Barred?
		1. Actions against state governments for damages
		2. Actions against state governments for injunctive or declaratory relief where the state is named as a party
		3. Actions against state gov’t officers where the effect of the suit is that retroactive damages will be paid from the state treasury or where the action is the functional equivalent of a quiet title action that would divest the state of ownership of land
		4. Actions against state gov’t officers for violating state law
	6. Exceptions to the 11th Amendment
		1. *Ex parte Young* (1908): person sued attorney general, alleging that state statute was unconstitutional.
			1. Suit may proceed against a state officer in her official capacity implementing an unconstitutional state statute, on the grounds that the state is not really the defendant. Only works for injunctive relief, but not for money damages.
			2. SC essentially says that you aren’t a state official when you are acting unconstitutional, but you are still burdened with the obligations of the state. Weird.
		2. State may waive immunity and allow itself to be sued, although for the waiver to be effective it must clearly specify the state’s intention to allow suits against it
		3. US may sue a state in federal court notwithstanding the 11th amendment
		4. Local governments, cities, counties are not protected
		5. Certain actions against state officers
			1. Injunctions
			2. Violations of federal law where the money damages would be payable by the official himself, acting as an individual
			3. Violations where remedy would be that the state has to pay monetary damages in the future
	7. *Fitzpatrick v. Bitzer* (1976): SC held that §5 of the 14th amendment authorizes Congress to abrogate state immunity under the 11th amendment (i.e. civil rights issues can be brought against the state)
		1. Court has required a crystal-clear statement of abrogation on the face of a statute before it will find that Congres has exercised its *Bitzer* authority
	8. *Seminole Tribe of Florida v. Florida* (1996) (REHNQUIST): provision of Indian Gaming Regulatory Act allowed Indian tribes to sue states in federal court to enforce the statutory duty to create gaming enclaves
		1. SC invalidated the provision.
		2. Overruled *Pennsylvania v. Union Gas Co.*, which said Congress can abrogate state immunity under Article I commerce power
		3. Congress cannot abrogate states 11th amendment immunity under Article I, b/c the 11th amendment came after Article I. Note – the commerce power is in Article I. Congress can abrogate states 11th amendment immunity under §5 of the 14th amendment b/c the 14th came after the 11th
			1. Thus, civil rights acts are protected and you can sue the state, but other things may not be
		4. Stevens, Souter, Ginsburg, Breyer dissent: against the plain language of the 11th amendment
	9. *Alden v. Mainer* (1999) (KENNEDY): state probation officers sued state in state court to enforce the overtime-pay requirements of the FLSA
		1. Couldn’t sue in federal court b/c of the 11th amendment immunity
		2. Sue in state court. State tries to argue state immunity, but FLSA was a federal law so the supremacy clause applies
		3. SC held that although the 11th amendment was not technically applicable (b/c suit was in state court), principle underlying *Hans* and *Seminole Tribe* barred the state lawsuit anyway
		4. Stevens, Souter, Ginsburg, Breyer dissent: no basis for holding this way
	10. *Federal Maritime Comm’n v. South Carolina State Ports Auth* (2002): protected states against being hailed before federal agencies performing adjudicative functions
	11. Time out. What happened to dual sovereignty?
		1. Problem? Can’t just overrule what has happened since 1937. We are stuck with it.
		2. Linzer thinks that the Ct is more searching when a federal law infringes on an area where the state has traditionally had control. Need a stronger justification, higher standard of scrutiny to bring that area under the federal sphere
		3. Might be what they were saying in *Lopez* – degree of connection matters, especially when things are near commerce but not in commerce
	12. *Central Virginia Community College v. Katz* (2006) (STEVENS): held that Congress can create a uniform, integrated national bankruptcy system to replace inconsistent state approaches (even though this is under Article I)
	13. Recall, even if something is clearly under the commerce power, the commerce power is in Article I. Article I cannot abrogate state immunity under the 11th amendment. Need to look for something else, like the 14th amendment.
2. 14th Amendment Authority to Abrogate 11th Amendment State Immunity
	1. Congress can remove the states’ 11th amendment immunity under its power to prevent discrimination under the 14th amendment
	2. *Kimel v. Florida Board of Regents* (2000) (O’CONNOR): Age Discrimination in Employment Act
		1. SC held that Congress could not make the ADEA apply to state employers under the 14th amendment
		2. To enact the ADEA, rational basis review. No evidence to support even rational basis review, so Congress could not force ADEA on the states
	3. *Board of Trustees v. Garrett* (2001) (REHNQUIST): Americans with Disabilities Act
		1. Disability and age discrimination draw only rational-basis review under the Equal Protection Clause
		2. Congress attempted to show lots of evidence of the discrimination, but SC said it generally dealt with the private sector
		3. *Garrett* seems to suggest that Congress needs a wealth of evidence showing discrimination before they can act
		4. Held Congress had exceeded its §5 power when forbidding states from engaging in employment discrimination against the disabled via the ADA. Congress’ legislation failed to pass the rational basis review.
	4. *Nevada Dept of HR v. Hibbs* (2003) (REHNQUIST): Family and Medical Leave Act
		1. Gender discrimination has an intermediate scrutiny standard of review
		2. FMLA upheld against the 11th amendment. Ct said it was “congruent and proportional to the targeted violation”
		3. Persistence of such unconstitutional discrimination justifies Congress’ passage of §5 legislation
	5. *Tennessee v. Lane* (2004) (STEVENS): Title II of ADA, two physically handicapped persons were denied access to state courts b/c they were in wheelchairs and could not physically get in the building
		1. Records of state constitutional violations was stronger than in *Hibbs*
		2. When something interferes with fundamental rights (*Carolene* footnote 4) we get the notion of strict scrutiny. Access to the courtroom is a fundamental right.
		3. ‘Congruent and proportional’ response, Title II’s remedy is a ‘reasonable accommodation’
3. Intergovernmental Immunities and Congressional Power
	1. Summary
		1. 10th Amendment / supremacy clause. National gov’t limited to the powers delegated to it, but within that realm it is supreme.
			1. No 10th amendment bar on a regulation or tax that applies to state or local govts when applied to both the public and private sector
			2. 10th amendment does limit Congress’ power to regulate the states alone by requiring the states to act in a particular way
			3. Do not allow states to take actions that might touch upon foreign relations
			4. Valid act of Congress supersedes any state or local action that actually conflicts with the federal rule, or interferes with achievement of a federal objective, or when the state law is preempted
		2. Congress may use its power under the 14th/15th to restrict state activities that it determines violate the civil liberties of persons within the state
		3. Congress may regulate by imposing conditions on the grant of money to state or local govts
		4. In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court has in some cases stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of its State.
	2. State Immunity from Direct National Regulation
		1. *National League of Cities v. Usery* (1976) (REHNQUIST) (later overturned by *Garcia v. SAMTA*): FLSA amended to include certain state EEs under minimum wage and other guarantees
			1. National League said it interferes with state sovereignty
			2. Regulation clearly was within the Commerce power
			3. SC struck down FLSA as amended (Blackmun provides the swing vote). Said FLSA directly displaced the states’ freedom in areas of traditional gov’tl functions
			4. Note, notion of dual sovereignty finally rises from the ashes
		2. *Hodel v. Virginia Surface Mining & Reclamation Ass’n* (1981): upheld a regulation b/c it applied to strip miners, not to the states. To be unconstitutional under *National League*, a statute must meet all of the following:
			1. Showing that the challenged statute regulates the states as states (states qua states – regulation of states in their role as states)
			2. Federal regulation must address matters that are indisputably attributes of state sovereignty
			3. Must be apparent that the state’s compliance would directly impair their ability to structure integral operations in areas of traditional gov’t functions
		3. *United Transportation Union v. Long Island RR* (1982) (unanimous): whether federal labor relations rules could be applied to state owned RRs
			1. SC upheld it and said that RRs are normally private, so not a traditional state function
			2. In fact, there are very FEW private RRs still left in America at this time
		4. *Garcia v. SAMTA* (1985) (BLACKMUN): whether San Antonio Metropolitan Transit Authority was subject to the minimum-wage and overtime requirements of the FLSA
			1. SC said SAMTA was subject to FLSA b/c it was not a matter of state sovereignty
			2. Blackmun rejected the *Hodel* notion of evaluating things as traditional or non-traditional (times change)
			3. Also rejected a government/proprietary distinction
			4. Says judiciary can’t decide what the state can and cannot do. States and citizens decide how to run things. Makes an argument that sounds like he is vying for states rights, but then he says we should just let Congress do its thing and get out of it. Sounds like he sold the SC out…
				1. But he is just saying stay out of federal power things and focus on individual rights – *Carolene* footnote 4 – individual rights more important than business
			5. Rehnquist went nuts in the dissent
			6. *Garcia* is still the law
		5. *South Carolina v. Baker* (1988) (BRENNAN): Congress removed the federal income tax exemption for interest on state and local bonds unless issued in registered form, effectively eliminating bearer bonds
			1. Why can the federal gov’t tax the state if the state can’t tax the federal gov’t? States are represented in Congress
			2. If federal gov’t got rid of the exemption, the state was going to have to pay higher interest rates to keep rich people investing into municipal bonds, and this would effectively bankrupt the states. Indirect effect.
			3. SC upheld Congress. Overruled *Pollock*, which said state bonds were immune from national taxation
		6. Seems like any attempt to resurrect dual sovereignty has failed
	3. State Immunity from National Commandeering
		1. *FERC v. Mississippi* (1982): SC upheld federal law requiring state utility commissions to hold fact-finding hearings and carry out certain national energy policy tasks
			1. O’Connor dissents and said this was commandeering
		2. *New York v. US* (1992) (O’CONNOR): low level nuclear waste. States entered a compact (treaty with eachother, ok if you have Congress’ approval) to deal with it. NY never signed a deal with anyone. Compact had several milestones:
			1. Sited states could charge gradually increasing fees: OK under commerce power
			2. Sited states could reject external waste: OK under commerce power
			3. Take title provision where State takes title to the waste from the producer: Not OK
				1. Congress has crossed the line distinguishing encouragement from coercion
				2. Commandeering the state government
				3. Why is this a problem? Has to do with accountability. Congress didn’t pass a law that said the states have to create sites, they could have but didn’t. Instead Congress wants the states to do their dirty work. Congress can either pre-empt the states or leave it to the states, but some intermediate option does not exist
				4. Inconsistent with the federal structure
		3. *Printz v. US* (1997) (SCALIA): gun control, sheriff had to do background checks and deliver reports. SC said it was commandeering the sheriff.
		4. *Reno v. Condon* (2000) (REHNQUIST): Driver’s Privacy Protection Act prevented state from selling personal information unless the driver consented
			1. SC upheld DPPA, said it was within the commerce power
			2. In short, this is different b/c the DPPA didn’t ask them to DO anything. It merely said you CANT do something.
			3. What about states qua states? Earlier Rehnquist had said the law should be acting on individuals, here it is clearly acting on the states.
		5. *Jinks v. Richland County* (2003) (SCALIA): supplemental jurisdiction, tolling of state statute of limitations while claim is pending in federal court
			1. SC upheld the tolling of the state SOL while federal claim is being considered
			2. Really, this is the only way you can make supplemental jurisdiction work
		6. Neo-federalism seems quite real, but attempts to cripple Congress are not quite what people feared. Recent cases have not had a tremendous impact.

# Separation of Powers

1. Historical Overview
	1. Legislative – Article I
		1. Framers probably considered Congress the most important
		2. §1: all powers “herein granted”
			1. Indicates the Framer’s view that there are other law making powers held by Congress
		3. §8: lists the powers specifically granted to Congress
			1. Cl. 11: power to declare war
			2. Cl. 18: necessary and proper clause. Power can reach the gov’t and any officer or department thereof (some limits on the President). Congress has the power to make all laws necessary and proper for carrying into execution any power granted to any branch of the federal gov’t. Note, N&P clause is not itself a basis of power, it merely gives Congress power to execute specifically granted powers
	2. Executive – Article II
		1. Early Presidential veto power was seen as reserved for use for unconstitutional things only
		2. Grants the President “the executive power” – no herein granted language
		3. §2: Commander in Chief powers
			1. Cl. 2: power to make Treaties
		4. §3: Bound to faithfully execute the laws
			1. Bound by international law (i.e. UN resolutions)
			2. Being bound enhances Presidential power to execute. President’s don’t mind b/c then they can blame the duty for executing a law
		5. Note, President ratifies treaties. The senate debates and recommends, but the President does not have to listed to the Senate.
	3. Judicial – Article III
		1. §2: We are bound by the laws of the US, as well as by treaties
	4. Article VI
		1. Cl. 2: Supremacy Clause. All treaties are the supreme law of the land
	5. Agreements
		1. CONGRESSIONAL EXECUTIVE AGREEMENTS: only 51% of the House and the Senate have to approve the agreement
		2. SOLE EXECUTIVE AGREEMENTS: created by the President alone. Can have direct effect of law.
	6. Separation of Powers versus Checks and Balances
		1. SEPARATION OF POWERS: notion that the three branches shall be separate from one another and shall concentrate on their respective functions
		2. CHECKS AND BALANCES: notion that each of the three branches shall have some influence on how the other two branches perform their specialized roles
		3. Madison suggested that optimal protection lay in separation of powers combined w/checks and balances
	7. Efficacy versus Tyranny
		1. Separation of rulemaking from rule-executing and rule-adjudicating protects citizens
	8. Political versus Judicial Enforcement of Separation of Power: deeply devided
	9. Formalist versus Functionalist Reasoning
		1. FORMALIST: SC strictly enforces the lines apparently drawn in Const. If a practice violates the Constitution’s allocation, Ct strikes it down. Problem – not always clear what boundaries and rules are embodied in the Const.
		2. FUNCTIONALIST: sacrifice or soften some of the lines to permit ‘necessary’ gov’t action. Notion of ‘you got to do what you got to do’. Subserves the ultimate goal of the Constitution, the general welfare.
			1. In this view, power usually ends up with the President. Historically we have lots of early examples of this (LA purchase, emancipation proclamation)
2. **EXECUTIVE -** Issues of Executive Aggrandizement (The Imperial Presidency)
	1. The General Post-New Deal Framework
		1. Setting up The Steel Seizure Case
			1. Between WWII and the 1950s, Congress was being isolationist and avoiding interfering with almost everything. Congress is mostly republican. Standard liberal view is that the President should be able to do whatever he wants
			2. 1947 – Taft-Hartley Act: Cut back on union power. If union went on strike in sensitive industry, President could appoint a special board to try and settle the dispute. If the dispute was not resolved, President could get an 80 day injunction to make them work (called the cooling off period)
				1. Truman had vetoed this bill but Congress passed it anyway
			3. 1948 – Selective Service Act: If producer failed to fill an order of good required for defense purposes, President could take immediate possession of producer’s facilities until required goods were produced
			4. Truman sends troops to Korea without asking for permission. Congress okays it. Major increase in demand for steel.
			5. Steel Union wanted a wage increase, which companies wouldn’t give w/o a steel price increase, which Gov’t didn’t want b/c they were worried about inflation in the steel industry
			6. Truman refuses to invoke the Taft-Hartley Act – he had vetoed it before, it would have been embarrassing to use it. Ironically, if he had, it probably would have prevented all of this.
			7. Instead, Truman issues an Executive Order to take possession of the steel industry
			8. Steel industry complies but is unhappy, gets an injunction
			9. SC upholds the injunction and sides with the steel industry
		2. *The Steel Seizure Case* (1952) (BLACK):
			1. President argues that past Presidents have done the same thing
			2. Black
				1. Argues Truman could have tried to use existing statutes, but he didn’t even meet the pre-requisites for those statutes
				2. Formalist approach: Constitution did not give Truman the power to legislate. Legislative powers, via Article I, rest with Congress
				3. Says that debates during Taft-Hartley act indicate Congress’ unwillingness to give President the power to seize an industry
			3. Frankfurter concurs
				1. Constrained functionalist approach: past actions are important, yes, b/c the way we have acted in the past gives us some idea of what we think is constitutional behavior. The text of the Constitution is not black and white, we must take into account the ‘gloss which life has written upon them’ (sounds like Marshall in *McCulloch*)
				2. At the same time, just b/c people have done things before doesn’t make them right. Rejects Truman’s historical arguments.
				3. Idea is not that violating the Constitution long enough makes it constitutional, but looking at what people have done in the past gives some evidence that how they have acted may be constitutional
			4. Jackson concurs
				1. Jackson opinion is commonly referenced and perhaps more important than Black’s majority opinion. Jackson’s opinion has prevailed, but it doesn’t always answer all the questions. Can be hard to know if Congress did or didn’t approve of something.
				2. Jackson sets out three classification (admittedly a bit over-simplified)

CATEGORY 1: Presidential powers + Delegation by Congress: when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. A seizure executed by the President pursuant to an act of Congress would be supported by the strongest of presumptions

CATEGORY 2: Presidential powers + Silent Congress: when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers

CATEGORY 3: President + Action against Congress: when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. This would be ok only if the President has powers solely in his control, something that Congress has no control over, which is pretty rare

* + - * 1. Said this was group 3. Cited Taft-Hartley history to say Congress had implicitly rejected the notion of Presidential seizure
				2. Solicitor General argued three clauses in the Executive Article. Jackson said these only work for necessary actions / emergency powers, and if we start calling things emergencies then we tend to start getting more and more ‘emergencies’
			1. Vinson, Reed, Minton dissent: cite historical precedent. Constitutional adverse possession.
	1. Impeachment – Article II, §4
		1. President can be impeached for treason, bribery, or other high crimes or misdemeanors
		2. High treason means “of state”
		3. Question is what does this entail? Typically things that are seen as political, meaning they injure society itself, like betrayal of public trust
		4. Should impeachment be reviewable by the Courts?
			1. Clearly, yes for procedural matters
			2. But for why the person was impeaches, basic argument is that the Ct should stay out of the political issues
		5. Majority vote in the House to invoke charges, 2/3 vote in Senate to convict
	2. Executive Privileges and Immunities
		1. *US v. Nixon (The Tapes Case)* (1974) (BURGER): Nixon refused to produce tapes from secret meetings, tried to quash the subpoena to produce on grounds of executive privilege
			1. SC denied the motion and required production of the tapes
			2. Neither the doctrine of separation of powers, not the need for confidentiality of high-level communications, w/o more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process
			3. Communications are presumptively privileged, but this privilege must be considered in light of a historic commitment to the rule of law
			4. Balancing act: When the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice
			5. President is a person, yes, but not a regular person. Linzer thinks it comes down to what works.
		2. Executive branch has developed a common law of privilege
			1. State secrets involving foreign and military affairs
			2. Law enforcement investigations
			3. Confidential information that reveals the executive’s deliberative process
		3. *Nixon v. Administrator of General Services* (1977) (BRENNAN): Act directed executive official to take the tapes, screen them, and make required material available. SC rejected Presidential challenge on executive privilege.
			1. Invoked flexible approach of Tapes Case. Seizure of info would affect things but would not be unduly disruptive.
			2. Limited intrusion into executive confidentiality was justified by the public interest in restoring public confidence
			3. Dissent was that it was a serious intrusion into President’s assurance of freely flowing information
		4. *Nixon v. Fitzgerald* (1982) (POWELL): SC applied Tapes Case balancing approach to hold Nixon immune from civil damages lawsuit. Powell interpreted Article II to give President important discretionary decisionmaking authority that protected him from being second guessed in lawsuits. Claim immunity.
			1. Because civil lawsuits could 'distract the President from his public duties' the Court found the individual interest in remedy insufficient to justify a civil lawsuit against the President for acts within his official responsibilities. This is CLAIM IMMUNITY.
		5. *Clinton v. Jones* (1997) (STEVENS): SC rejected claim that a President could invoke *Fitzgerald* immunity to claims that arose before the President took office. Doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office. Temporal immunity.
			1. This is a denial of TEMPORARY TEMPORAL IMMUNITY.
	3. **Foreign Relations and War**
		1. Article I, §8: Congress has power to declare war, raise and support armies, provide and maintain navy, etc.
		2. JOINT RESOLUTION: does not go to President to be signed
		3. CONCURRENT RESOLUTION: same as a bill, can be vetoed
		4. *US v. Curtiss-Wright Export Corp.* (1936) (SUTHERLAND): Congress had, by joint resolution, authorized President to place an embargo on arms sales, President acted against Curtiss-Wright for selling guns
			1. Note, this is 1 year after Schechter Poulty, where Cardozo complained about ‘delegation running riot’
			2. SC upheld the President’s actions
			3. Sutherland
				1. Congress is allowed to delegate power to the President
				2. Presidential powers are inherent and plenary
				3. Jackson Category 1. Sutherland went far beyond Jackson’s language and basically said the President can do an awful lot
				4. Case often cited for supporting the executive power: speak, listen, negotiate, just don’t make laws
		5. *US v. Belmont* (1937) (SUTHERLAND): Litvinov Agreement, assigned to the US Russian claims against Americans who held funds of Russian Co’s seized after the Russian Revolution
			1. FDR had negotiated the agreement with Russia
			2. Jackson category 2. President relied on his own, independent powers.
			3. SC upheld and applied the agreement
			4. Like treaties, executive agreements trump state law – supremacy clause
		6. *Dames & Moore v. Regan* (1981) (REHNQUIST): Iranian students seized American hostages, President blocked removal of all Iranian property and assets in US. After discussion, issues series of Executive Orders resolving the matter, but never submitted the agreement to Senate for ratification as a treaty.
			1. SC upheld under Jackson category 1. IEEPA had given President power to regulate foreign-owned property.
			2. President’s unilateral executive agreement overrode a federal jurisdictional statute
		7. War Powers Resolution
			1. Serious debate about whether or not the War Powers Resolution is constitutional. It was passed over a Presidential veto. Most president’s don’t like it but deal with it anyway.
			2. Early on, people thought all powers to deal with war were vested in Congress
			3. §1541(c): Limitation on CiC power
				1. CiC powers exercised only pursuant to

A declaration of war

Specific statutory authorization

National emergency created by attack upon the US (can respond in self-defense w/o congressional authority via UN article 51)

* + - 1. §1543: Reporting requirements
			2. §1544(c): Forces must be removed is Congress directs by concurrent resolution
				1. “Short Wars”: §1544(b) – President has 60 days to withdraw troops. Argument is that this gives the President too much power.
				2. Point of debate is recognition that you cannot run a war by committee (hence we need a CiC), but that war affects everyone (so Congress should be involved)
			3. §1547(a): No implied will of Congress, (d): WPR not intended to displace other treaties
			4. This is a struggle b/c the nature of war has changed. We no longer have definitive “wars” that need Congressional declaration. Original constitution was written based on the british system of a strong navy but a little army (Article 1, §8, Cl. 12-13). The idea of a standing army was beyond the Framers, and there were no concerns that the President could just act – he didn’t have an army to do anything with.
		1. **Treaties**
			1. SELF-EXECUTING: binding law
			2. NON SELF-EXECUTING: not binding law unless implemented through congressional legislation
			3. Can President terminate self-executing treaties on his own authority? SC has never resolved this issue but the consensus seems to be yes.
				1. Executive agreements usually trump state law
			4. Can President implement non self-executing treaties as binding law on his own authority?
				1. *Medellin v. Texas* (2008) (ROBERTS): No. President has no authority to convert a non self-executing treaty into a self-executing one
				2. Dissent said the underlying treaty was a self-executing one
			5. Treaties will be considered self-executing law of the land only if there is clear evidence that the President and Congress expected them to be
			6. If a treaty is not self-executing, state law inconsistent with the treaty commitments is not pre-empted
			7. *Medellin* may contribute to the end of treaties as a significant means by which the US enters into international commitments
	1. **Immunities**
		1. Only Constitutional given immunity is that given to Members of Congress in the Speech or Debate Clause, Article I, §6
		2. All other immunities are essentially common law created by SC
			1. Absolute immunity from private damage actions to federal judges
			2. Damages actions against state officials for violating federal constitutional and statutory rights (42 U.S.C. §1983)
				1. Absolute: state legislators, state judges, some state prosecutor functions
				2. Qualified: state executive officials, some state prosecutor functions
1. Issues of Legislative Overreaching
	1. **Congressional and Presidential Power to Control Executive Officials**
		1. Appointments Clause: Article II, §2, Cl. 2: president empowered, with the advice and consent of the Senate, to appoint all ambassadors, other public ministers, and counsuls, judges of the SC, and all other officers of the US…but Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, or in the courts of law or heads of departments
		2. *Myers v. US* (1926) (TAFT): SC invalidated a statute preventing the President from discharging postmasters w/o the consent of the Senate. President has full removal power of executive department officers, Congress has none.
		3. *Humphrey’s Executor v. US* (1935) (SUTHERLAND): SC upheld a provision in the FTC act that limited removal powers of President to “inefficiency, neglect of duty, or malfeasance in office”. Officer occupied no place in the executive department. It was a Congressional creation, so Congress could limit the terms of their removal.
		4. *Buckley v. Valeo* (1976): Federal Election Commission was 8 members, 2 appointed by President, 2 by Speaker of House, and 2 by President of Senate. SC said this structure violated the appointments clause. FEC were officers of the US and had to be appointed per the appointments clause (thus, 2 appointed by President were fine, the 4 appointed by Congress had no support). SC added that if the FEC were a part of Congress, the appointments clause would not apply.
		5. *Bowsher v. Synar* (1986) (BURGER): Gramm-Rudman-Hollings act sought to eliminate federal budged deficit. Directors would estimate the required budget cuts, report to Comptroller General, who reported to President. President was required to act per the Comptroller General’s instructions.
			1. SC invalidated the act on separation of powers grounds. SC said Congress cannot exercise executive powers.
			2. Formalist approach
			3. Comptroller General is an officer of Congress. Solicitor General is an officer in the executive branch.
			4. Problem? Congress was admitting that they couldn’t control themselves, that they would overspend if given the chance. Put the CG in charge to keep them on track since he was basically neutral.
			5. Because Congress has retained removal authority over the CG, he may not be entrusted with executive powers. President had to follow CG, so in effect Congress was executing their own laws.
			6. Some of the arguments for the dormant commerce clause were to ensure accountability. If you try an accountability argument here, you can probably come up with an argument that goes both ways.
			7. White dissent: saw no intrusion into the requirements of bicameralism, more functionalist approach
			8. SELF AGGRANDIZEMENT: the act of making oneself more powerful
		6. *Clinton v. New York*: line item veto gave President power to sign a bill but cross out what he didn’t like. SC struck down on separation of powers, seemed to stick to the formalist approach.
		7. *Morrison v*. *Olson* (1988) (REHNQUIST): after Watergate, Congress adopted act. Act created office of “independent counsel” to investigate and/or prosecute high-ranking gov’t officials. Attorney General would decide if reasonable grounds to investigate, if so Court appoints a special prosecutor. Independent counsel continues until special prosecutor reports job is complete or special division finds her job complete or Attorney General removes her for ‘good cause’ only.
			1. Background: Attorney General appoints Archibald Cox. Cox wants the Nixon tapes. Nixon tries to order him to stop asking for them, tries to make a deal, Cox says no. Nixon threatens to fire him, Cox said he didn’t have the authority. 2 resignations later, the 3rd in line Attorney General finally fires Cox. Country went crazy and said the President was interfering. Appointed a new special prosecutor (Jaworski)
			2. Attorney General is a member of the executive branch
			3. Article II, §2, Cl. 2 gives Congress the power to provide for interbranch appointments of “inferior” officers. Question was whether Morrison was an inferior officer or not.
				1. Upheld Article II, §2, Cl. 2
				2. Question regarding special division’s power to terminate the office of independent counsel (special division was part of the judiciary). Did not find the power to terminate a significant judicial encroachment upon executive power.

Said the power they have was no where near removal power, all they could do was call the job finished

* + - 1. Separation of Powers
				1. Q1: whether the “good cause” restriction was interfering with Presidential power
				2. Q2: whether act violated separation of powers by reducing President’s ability to control the prosecutorial powers wielded by the independent counsel
				3. Said unlike *Bowsher* and *Myers*, case did not involve attempt by Congress to gain removal powers
				4. Said it was fine b/c it did not impermissibly burden the President’s power to control or supervise the independent counsel
				5. Functionalist approach
			2. Scalia dissent: interfering with executive power, rejects the idea of a balancing test, formalist
		1. *Weiss v. US* (1994) (REHNQUIST): military judges selected by judge advocate general. SC said the officers met requirements of Appointments Clause b/c, as commissioned officers of the armed forces, all were already appointed by the President
	1. Congressional Structuring of Adjudication
		1. The limits the Court has developed to restrain its own potentially self-aggrandizing exercise of power, or the limits Article III places on Congress
		2. Assigning Article III Judges Nonjudicial Duties
			1. *Misretta v. US* (1989) (BLACKMUN): Congress created a federal sentencing guidelines commission. Members of commission appointed by President and confirmed by Senate. Commission passed sentencing guidelines.
				1. SC said it was fine, no violation of separation of powers (judges creating law?)
				2. “Twilight Area” in which the activities of the separate branches might properly overlap. No one ever said the three branches had to be completely, airtight separate.
				3. Idea of judges doing other things goes back to the 18th century
				4. Scalia dissent, took a formalist approach
				5. Linzer: Ct seems to say a little mixing is ok, just don’t do it too much
	2. Assigning Adjudicative Tasks to Non-Article III Judges
		1. *Ex Parte Quirin* (1942) (STONE): defendants, one American citizen and several aliens, convicted by Article II military tribunals of violating the law of war. Defendants brought a writ of habeas corpus
			1. HABEAS CORPUS: petition for review to determine if prisoner is being properly detained
			2. TREASON: defined in Article III, §3 (only term defined in the Constitution)
			3. Stone ruled convictions validly obtained
				1. Said writ was properly before the SC
				2. Subject to review, said military commission decisions may be set aside when they are clearly unconstitutional
			4. Ct distinguished ‘lawful combatants’ from ‘unlawful combatants’
				1. LAWFUL COMBATANTS: those captured in the uniform of another nation in combat, were to be treated as prisoners of war
				2. UNLAWFUL COMBATANTS: a spy working for the enemy who without uniform attempts to pass information to the enemy, or one who without uniform secretly sneaks through the lines to commit sabotage are not entitled to POW status. It does not matter whether the person is a citizen or not. Unlawful combatants can be tried by military tribunal if authorized by Congress.
			5. Distinguished *Ex parte Milligan* as a case where the defendant had no association with the armed forces of a belligerent
			6. Military tribunals are held to be sufficient DP b/c decisions can be reviewed and set aside by courts
	3. Congressional Attempts to Alter Federal Judicial Jurisdiction and Authority
		1. Article III, §1, 1st sentence (Vesting Clause) gives Congress the power to establish the inferior courts
		2. *Plaut v. Spendthrift Farm, Inc.* (1996) (SCALIA): DC dismissed suit based on SC decision setting a SoL that suit did not meet, after judgment Congress passed law that tried to reinstate certain lawsuits that were dismissed, DC refused to re-open case
			1. Issue is that Congress would be dictating what suits the DC heard
			2. SC ruled statute unconstitutional b/c it was overriding the court’s jurisdiction (separation of powers)
			3. Dissent argued Congress had the authority to override a SC decision interpreting a federal statute and to make it apply retroactively, essentially Congress was saying that the SC had interpreted it incorrectly
			4. Notion of the limitation of Congress to determine a court’s jurisdiction. It is the Cts job to say what the law is and Congress cannot get involved
		3. 3 ways Congress can respond to a SC interpretation
			1. Constitutional amendment: only done 4 times, requires 2/3 vote
			2. Legislation to curtail constitutional decisions: normal legislation, problem is that the Ct can later narrowly construe or invalidate it
			3. Limitations on jurisdiction: Congress does have some authority to regulate federal jurisdiction under Article III §1
				1. Restrict or eliminate SC’s appellate jurisdiction
				2. Restrict or eliminate the jurisdiction of lower federal courts
				3. Restrict or eliminate the jurisdiction of any federal court
		4. *Ex parte McCardle* (1869) (CHASE): civilian being held for trial by military commission for allegedly publishing libelous articles, February statute gave SC appellate jurisdiction in habeas corpus cases, March statute repealed the February statute
			1. SC held they had no jurisdiction and dismissed the case
			2. Constitution guarantees SC certain jurisdiction, rest is conferred by Congress (Article III §2, the Exceptions Clause). *McCardle* has been read as giving Congress full power to regulate and limit the SC’s appellate jurisdiction, but possible limitations that have been suggested are
				1. Congress may eliminate certain avenues for SC review as long as it does not eliminate all avenues
				2. Congress may eliminate SC review of some cases, but it must permit jurisdiction to remain in some lower federal court
				3. Denial of all SC review for violation of constitutional rights would violate DP
			3. Exact powers are debatable b/c the Constitution is not clear
		5. *Felker v. Turpin* (1996) (UNANIMOUS): Antiterrorism and Effective Death Penalty Act of 1996 placed new limitations on petitions for habeas
			1. Q was whether Congress had unconstitutionally eliminated SCs jurisdiction
			2. Ct held it still had the power to hear cases on an original writ of habeas, this just limited appellate writs
			3. Statute did not suspend the writ of habeas corpus. Habeas corpus can only be suspended under Article I §9 cl. 2.
		6. What are the core SC roles?
			1. To provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state or federal courts, and
			2. To provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority
			3. If Congress allows SC to take jurisdiction over a class of cases to ensure uniformity, it cannot tell them how to decide the cases.
		7. *McCardle* can be read broadly. What other limitations are there on Congress?
			1. Congress can not pass so many exceptions so as to destroy the essential role of the SC
			2. Bitter with the sweet: Congress has an interest in allowing the SC to decide things to ensure uniformity
		8. Congress’ power to restrict inferior federal courts
			1. *Martin v. Hunter’s Lessee* (1816) (WHEAT): SC argues that Congress is bound to create some inferior courts. However, this is in dictum and has been controversial. Framers’ debates indicate they contemplated no inferior courts at all

# Limits on the Judicial Power

1. Overview
	1. No authority to adjudicate lawsuits raising “political questions”
	2. Limited jurisdiction to “cases” or “controversies”
	3. Remedial power may be limited to those kinds of relief that parties have traditionally received in the US system
	4. Congress has constrained jurisdiction
2. Political Question Doctrine
	1. Some constitutional issues are not justiciable, b/c
		1. The issue is committed to the other political branches of the gov’t (Congress and President)
		2. Issue is inherently incapable of resolution and enforcement by the judicial process
		3. Alt, a political question exists if there is a need to (1) provide finality to an action of the political departments; (2) lacks satisfactory criteria for a judicial determination
		4. Examples: foreign relations, when hostilities have stopped, procedures used by senate to try impeachments, what constitutes a republican form of gov’t, requirements to sit for Congress
	2. Article IV, §4: Guarantee Clause. SC has consistently held that cases alleging a violation of this clause are nonjusticiable political questions.
	3. Ct’s definition of political questions in *Marbury* was quite narrow.
		1. Included only matters where president has unlimited discretion
		2. Questions involving individual rights could never be political questions
	4. Today this is not true. Political Question Doctrine now includes instances where individual rights are infringed.
	5. Doctrine is an amalgam of several different concerns about the judicial power
		1. Constitutional – Constitutions allocation of authority to the other branches
		2. Pragmatic – competence of judiciary to develop and apply rules and principles of law to the matter
		3. Administrability – incapacity to administer a remedy
	6. *Luther v. Borden* (1849): RI was basically in civil war. Citizens went into rebellion, gov’t organized under colonial charter imposed martial law and gave soldiers various police powers.
		1. Q was whether soldiers had committed trespass while breaking into private home
		2. Ct held that a federal court could not determine which of two competing state govt’s was authorized
		3. Guarantee clause of Article IV confirms that Congress has the authority to decide this question
		4. Further, a political q b/c if the state gov’t was declared unconstitutional, all its actions would be invalidated, creating chaos
		5. Followed consistently
	7. *Giles v. Harris* (1903) (HOLMES): claim that Alabama county unlawfully refused to register more than 5,000 qualified African-American voters
		1. SC ruled lower court properly declined to issue an injunction to remedy the wrongs
		2. Suggested lower court had essentially no practical power to deal with the people
		3. Relief must be given by the legislative and political departments
	8. *Colegrove v. Green* (1946) (FRANKFURTER): Illinois had not redrawn congressional districts for 40 years despite major population shifts, voters brough suit alleging dilution of their vote
		1. Ct declared it nonjusticiable. “Cts ought not to enter this political thicket”
		2. Greater institutional competence of the political branches
		3. Only in racial discrimination cases (*Brown* et al) did the Ct intervene to redraw districts
			1. *Gomillion v. Lightfoot* (1960) (FRANKFURTER): Alabama statute altered city limits of Tuskegee so that virtually all black voters were outside the new limits, Ct struck it down
	9. *Baker v. Carr* (1962) (BRENNAN): Tennessee legislature had not been reapportioned since 1901, demographics had changed dramatically, urban voters claimed votes were diluted sought injunction and reapportionment
		1. SC deemed justiciable claims that malapportionment violates the equal protection clause
			1. Overruled *Colgrove*
			2. Political process was not likely to correct the Constitutional violation, and judicial review provided democratic rule
		2. Ct distinguished cases brought under the equal protection clause from those pursued under the republican form of gov’t clause
			1. Distinguished *Luther*. Guaranty Clause is not a repository of judicially manageable standards which a Ct could utilize to identify a state’s lawful gov’t
			2. But apparently judicial standards under the Equal Protection Clause are well-developed and familiar
		3. **6 BAKER FACTORS:** emphasize pragmatic (2-6) over constitutional (1)
			1. Prominent on the surface of any case held to involve a PQ is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
			2. A lack of judicially discoverable and manageable standards for resolving it; or
			3. The impossibility of deciding w/o an initial policy determination of a kind clearly for nonjudicial discretion; or
			4. The impossibility of a ct’s undertaking independent resolution w/o expressing lack of the respect due coordinate branches of govt; or
			5. An unusual need for unquestioning adherence to a political decision already made; or
			6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question
		4. If one of the 6 factors is applicable, it is a nonjusticiable PQ
		5. Note, these are completely useless. Need to look at the Ct’s history in an area to determine whether that area is a PQ or not.
		6. CLARK gives a good concurrence: courts must intervene if the legislature has broken the process to the extent that people could not repair it by voting
		7. FRANKFURTER, HARLAN dissent: said present case contains all the elements that made the Guarantee Clause non-justiciable, and this is a Guarantee Clause claim masquerading under a different label
	10. Exclusion of Members of Congress
		1. *Powell v. McCormack* (1969) (WARREN): House refused to seat Representative Powell based on a resolution asserting he had wrongfully diverted House funds, Powell argued he met the formal requirements of Article I, §2, cl. 2 and had been elected, sued to be seated.
			1. SC held controversy justiciable
			2. Said it required an interpretation of the Constitution, something for which there were judicially manageable standards
			3. House is the sole judge of the qualifications of its members. If you satisfy those qualifications then you cannot be excluded. By excluding Powell, they violated in the Constitution b/c it was denying his constituents their vote. They should have seated him and then expelled him.
			4. SC has said it will stay out of impeachments but will not give Congress a blank check
	11. Adjudicating Expropriations by Foreign Countries
		1. *Banco Nacional de Cuba v. Sabbatino* (1964): SC held that foreign expropriations (deprivations) of the property of US citizens are non-justiciable acts of state
			1. No accepted standard in international law for determining when just compensation is due
			2. Usual remedy is for executive branch to espouse its nationals’ claims through diplomacy
		2. Congress enacted the *Sabbatino* amendment, which directed courts to adjudicate claims that foreign state expropriations violate international law, unless the President specifically forbids it
	12. Gerrymandering
		1. *Vieth v. Jubelirer* (2004): SC said suits are inherently non-justiciable political questions b/c there are no judicially discoverable or manageable standards
			1. SCALIA wrote majority opinion, joined by Rehnquist, O’Connor, and Thomas
			2. Kennedy concurs but says you could probably develop standards
			3. Stevens, Souter, Breyer, Ginsburg dissent saying there are standards to implement
	13. Review of Political Parties
		1. SC repeatedly has held that federal judiciary will prevent racial discrimination by political parties
		2. Other challenges to political parties, especially suits concerning the seating of delegates at national conventions, have been dismissed
	14. Challenges to the President’s use of the war powers typically a PQ
	15. Foreign Relations: error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Application of PQ doctrine very controversial.
		1. Ct has upheld the constitutionality of the president’s use of executive agreements instead of treaties to implement major foreign policy agreements
		2. Dates of Duration of Hostilities: Ct’s refusal to review the political department’s determination of when or whether a war has ended. However, there may be cases where this is not so.
		3. Recognition of foreign govt’s is a PQ, as are related questions concerning disputes about the diplomatic status of individuals claiming immunity
		4. Validity of Enactments: Ct generally stays out of this arena, ratification and interpretation of treaties typically a PQ
	16. SC has frequently reaffirmed that challenges to election districts are justiciable (*US Department of Commerce v. Montana*)
	17. Impeachment and Removal from Office
		1. *Nixon v. US* (1993) (REHNQUIST): House impeached Walter Nixon (federal district judge) for making false statements to grand jury, Senate delegated its role to a committee, committee prepared and presented reports to Senate, Senate convicted and he was removed. Nixon argued impeachment was unconstitutional b/c full Senate did not take part
			1. Article I, §3, cl. 6 – gives the Senate the sole power to impeach.
			2. SC said that the above section meant the Senate alone has authority to impeach. There is nothing that prohibits a committee from giving a recommendation. Textual commitment argument.
			3. Judicial review would violate separation of powers / checks and balances
			4. Lack of finality and difficulty of fashioning relief counsel against justiciability
			5. Held that judiciary will not review Senate’s use of committee b/c this is a political question
			6. Leaves open whether all challenges to impeachment are PQs
			7. Souter concurs that this was a PQ, but opinions that if the Senate were to act unfairly (coin-toss) then judicial review may be appropriate
	18. Proposal and Ratification
		1. SC precedent suggests that proposal and ratification is one process and must be accomplished more or less contemporaneously, to ensure that the same societal consensus exists for both proposal and ratification
		2. However, *Coleman v. Miller* suggest the issue may be a PQ
3. **Cases or Controversies**
	1. Article III, §2 power extends to cases or controversies
		1. SC review is discretionary
			1. Cts have refused to issue advisory opinions
			2. Hear cases of national importance
		2. Judges are trained to handle live controversies but have no special expertise in handling abstract policy questions
		3. Adversarial dispute ensures Cts have a full basis for making a decision
		4. Reasons for having the standing/ripeness/mootness requirements
			1. Makes for more reliable adjudicative decisions and stronger clashes
				1. Law develops incrementally, w/o sweeping pronouncements that might go too far
			2. Requirements reflect Cts understanding of its role within the Constitution’s scheme of separation of powers
				1. Judicial power is not a roving authority to do good and make law
			3. Requirements allow Ct to avoid confronting issues it is not ready to decide
		5. *Marbury* requires the Cts to decide constitutional issues. *Marbury* also indicates the only reason we have judicial review is to decide the case before the court (hence, we need standing)
	2. **SKIP NOTE**: I skipped cases on standing of legislators who voted against a bill because they thought it was unconstitutional and taxpayers who argue that a tax exemption for others is improper or that a spending bill violates some limitation on Congress’s spending powers. For the most part, the Court has found no standing, though in some instances, it appears that the Court may be peeking at the end result in either finding or refusing to find standing (sometimes called the “grant” or “denial” of standing, though I don’t think its within the courts’ powers to grant or deny jurisdiction, as opposed to finding it).
	3. **Standing**: a personal stake in the outcome
		1. Justification
			1. Prevents Ct from being a platonic guardian, from turning into a roving commission
			2. Forces SC to decide what their view of the US is
		2. Requires
			1. An injury in fact, an actual injury to her interests. 3 inquiries:
				1. Whether plaintiff has suffered an actual injury

Concrete and particularized, actual or imminent and not conjectural or hypothetical

Economic, aesthetic, environmental, emotional injuries, all recognized by Ct

Injury to rights recognized at common law – property, K, tort – are sufficient

* + - * 1. Causation - Whether plaintiff’s injury is the result of defendant’s conduct

Must be ‘fairly traceable’ to a specific gov’t action

* + - * 1. Whether plaintiff’s injury can be redressed by judicial relief

Must demonstrate a ‘substantial likelihood’ that plaintiff will benefit from requested relief

* + - 1. Within the zone of interests meant to be protected by constitutional or statutory provisions
		1. *Jus tertii*: third party standing, asserting standing on the basis of another party’s legal injury
			1. General rule – no one has right to press another’s claim
			2. Exceptions
				1. Difficult for rightful plaintiff to assert her legal right, another plaintiff w/standing to sue in his own right may also press her claim

*Craig v. Boren*, pg 1289: statute forbad sale of 3.2% beer to males under 21 but allowed it to females 18 and over. Ct allowed beer seller to challenge law b/c she had her own standing (economic injury from lost sales), seller ideally situated to press rights of men

*Bush v. Gore*, pg 1289: presidential candidate allowed to litigate equal protection rights of voters w/spoiled ballots, Cts never mentioned standing

Certain organizations may press claims of their members (NAACP)

* + - * 1. Parents, legal guardians, etc.
				2. Congress may pass legislation which creates standing
		1. *Sierra Club v. Morton* (1972), pg 1294: Disney wanted to put ski resort on mountain, Sierra Club sued on the basis that they were a private club designed to protect the environment
			1. SC dismissed for lack of standing b/c they did not allege that any of it’s members had ever been on the mountain (hence no injury)
			2. Douglass dissented, arguing that the trees have standing
			3. Sierra Club re-filed and said they did have some hikers who went through there regularly, SC accorded standing. Must show particularized injury.
		2. *US v. SCRAP* (1973), pg 1294: RR tariff was changed that made transportation of non-throwaway cans expensive, SCRAP challenged propriety of the tariff and argued that this would lead to pollution and aesthetic issues.
			1. SC said they had standing
			2. Ct seems to be wavering a bit. Unclear.
		3. *Lujan v. Defenders of Wildlife* (1992) (SCALIA), pg 1290: Endangered Species Act of 1973 provided that each federal agency must ensure any action taken by that agency would not jeopardize an endangered species, Secretary of the Interior said it applied only to US and high seas, sued to apply it extraterritorially
			1. SC holds no standing b/c no injury.
				1. Plaintiff argued injury was that they had visited once, and if they went back they might not see animals
				2. Scalia has a field day b/c this is too easy. Intent [to return] is not enough.
				3. If Defenders of Wildlife had regular tours, that would be stronger than the 2 women who had visited once before
			2. SC rejects ‘ecosystem nexus’ theory that any person who uses any part of a contiguous ecosystem has standing. Seems dangerous (if you harm enough people you escape liability? But what is the other option?)
			3. Obvious problem is lack of way to redress situation. Even if SC held in favor of plaintiffs, no effective way to fix the problem
			4. Separation of powers – believed it would impose on the Executive’s power under Article II §3, the take Care clause
			5. SC holds that the plaintiffs were asserting a generalized grievance and Congress by statute cannot authorize standing in such an instance (plaintiff must demonstrate individual injury)
			6. KENNEDY concurrence becomes more influential
				1. Ct must be sensitive to the articulation of new rights of action that do not have clear analogs in the CL tradition
				2. Congress has the power to define injuries, but it must identify the injury and relate the injury to the class of persons entitled to bring suit
		4. *Federal Election Commission v. Akins* (1998) (BREYER), pg 1296: plaintiffs challenged Commissions determination that the AIPAC was not a political committee and thus not covered by disclosure requirements
			1. SC held plaintiffs had standing, injury was inability to obtain information
			2. SC said it was irrelevant that the injury was shared generally
			3. Overrules *Lujan*? Indicates Congress can grant generalized standing.
			4. Scalia, O’Connor, Thomas dissent on *Lujan* grounds
		5. *Massachusetts v. EPA* (2007) (STEVENS), pg 1298: EPA denied petition for rulemaking to regulate GHG emissions from motor vehicles under Clean Air Act
			1. SC accepts global warming and held plaintiffs had standing. Said just b/c climate changes are widely shared does not mean that no one has standing. The loss of land, an economic loss, was an injury.
			2. Causation – EPA refusal to regulate emissions contributes to injuries
			3. Remedy – just because this won’t cure it doesn’t mean we shouldn’t take steps to help it along
			4. Note, SC went the other way in *Lujan*. Fuzzy issue.
			5. Current court is stacked against people bringing environmental suits, even if you make it past the standing issue
			6. A litigant to whom Congress has accorded a procedural right to protect his interests can assert that right w/o meeting the normal standards for redressability and immediacy
			7. Roberts, Scalia, Thomas, Alito dissent saying non-justiciable, failure to demonstrate injury in fact, causation, and redressability, said they were merely asserting general complaints, and we can’t do a darn thing about the loss of land
		6. Standing of Organizations
			1. Org has standing to challenge gov’t action that causes injury to the org itself
			2. Org has standing if injury to the members of the org IF
				1. Injury in fact to the members of the org that would give individual members a right to sue on their own behalf
				2. Injury to members related to the org’s purpose
				3. Neither the nature of the claim nor the relief requested requires participation of the individual members in the lawsuit
		7. No Generic Standing
			1. No standing just b/c you are a citizen (*Lujan*)
			2. No standing just b/c you are a taxpayer (of course, you do have standing regarding your own tax bill)
			3. Legislators may have standing if they have a sufficient personal stake in the dispute and suffer a concrete injury
			4. Assignee of a legal claim has standing
	1. **Ripeness**: complaint cannot come too early, seeks to avoid premature adjudication b/c it involves too remote and too abstract an inquiry for the proper exercise of the judicial function
		1. Sometimes an impending crisis causes ripeness (*Lankford*, pg 1274)
		2. *United Public Workers v. Mitchell* (1947): gov’t workers brought suit challenging provisions of the Hatch Act that prohibited their participation in political campaigns. Ct found the one EE who had violated the act had a ripe claim, but those who just wanted to partake but had no done so were barred b/c of ripeness. “A hypothetical threat is not enough.” Douglas dissented b/c it was unfair to require EE to risk punishment just to challenge statute.
		3. *Adler v. Board of Education* (1952): SC goes the other way. SC upheld NY law excluding ‘subversive persons’ from employment in the public school system w/o demanding that any of the plaintiff’s had been prosecuted for violating the statute. Frankfurther dissented on ripeness grounds and cited *Mitchell*.
		4. In other cases, SC has considered ‘hardship to the parties’ and ‘fitness of the issues’ to adjudicate where they could dismiss on ripeness grounds
		5. Like mootness, plaintiffs alleging ongoing patterns of constitutional violation have sometimes been able to sue w/o proving the particular plaintiffs were harmed
		6. *Boumediene v. Bush* (2008) (KENNEDY), pg 1309: Guantanamo detainees seeking habeas relief
			1. SC said it had been so many years since the detainees were first detained that they were not going to make them exhaust all other options before filing habeas
	2. **Mootness**: complaint cannot come too late, federal courts are w/o power to decide questions that cannot affect the rights of litigants in the case before them
		1. *DeFunis v. Odegaard* (1974): Ct found plaintiff’s claim that he had been unconstitutionally denied admission to University of Washington Law School moot b/c the school later admitted plaintiff
		2. *DeFunis* standards often do not apply in the context of public law litigation, such as the desegregation cases. Parties usually litigate as class actions, b/c then there is always someone with a live claim
		3. Problem is that sometimes litigation takes longer than the action complained of (i.e. it will always become moot). Ct may hear case if issue is ‘capable of repetition yet evading review’ b/c the lawsuit’s duration systematically tends to moot individual grievances
			1. *Roe v. Wade*: takes longer than 9 months to get to the SC
			2. Other exception is voluntary cessation, class actions
		4. May be moot b/c of statutory change, compliance with a court order
		5. *FEC v. Akins* (1998) (BREYER): pg 1296, AIPAC required to disclose?
			1. Majority said plaintiffs have standing b/c inability to obtain information counts as an injury
			2. SCALIA dissent argues separation of powers
		6. Generally there is no standing for past harms

# Protecting Fundamental Rights – EP & DP

1. Overview
	1. Not enumerated in the Constitution. Notion of unwritten rights.
	2. Declaration of Independence embodies notion of natural-rights
	3. 9th Amendment: included to ensure that people didn’t think the Constitution was exhaustive, that other rights continue to exist
	4. It was originally thought that when cases came from the state courts on federal Constitution grounds, the SC viewed its role as interpreting the Constitution. Pre-Erie, when cases came from the federal courts, the federal courts thought they could decide the common law as well as anyone else, so the SC was essentially making law.
	5. Due Process Clause: Ct has viewed DP clause as embodying those rights fundamental to citizens in a free country

# Due Process

1. **Procedural Due Process, and the War on Terror**
	1. *Hamdi v. Rumsfeld* (2004) (O’CONNOR, badly divided): after 9/11, Congress passed Authorization for Use of Military Force (AUMF) authorizing President to use necessary and appropriate force against people who helped in the attacks. Hamdi, American citizen, captured in Afghanistan and brought to US. Mobbs filed declaration saying he was connected to Taliban, but declaration based on hearsay. Hamdi filed habeas corpus.
		1. Ct split
			1. 4 justices rules he was entitled to some form of due process hearing
			2. 4 justices would have ruled his detention unlawful
			3. One believed he was justifiably detained
		2. Majority believed Congress authorized detention of combatants, but due process demanded he be given a hearing
			1. Q whether the executive has authority to detain citizens considered ‘enemy combatants’
			2. Congress authorized Hamdi’s detention through AUMF. Note, War Powers Resolution specifically says ‘no implied authorization.’ Here, Ct says his detention was implied by Congress’ passing of AUMF.
			3. Said no bar to the Nation’s holding one of its own citizens as an enemy combatant (cited *Quirin*)
			4. Detention prevents combatant’s returning to war, hence Congress authorized detention when they authorized use of “necessary and appropriate force”
			5. Acknowledges detention may be indefinite, and says Congress didn’t authorize indefinite detention, but seems to brush it off and say as long as hostilities are going on they can detain him. Problem is that in today’s world they never cease.
			6. Ct says they do have power to review the Govt’s determination of Hamdi as an enemy combatant
				1. Invokes *Mathews* balancing test (*Mathews v. Eldridge*), process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Govt’s asserted interest

Criticism – if due process is a right, why do we have a balancing test

Mathews was a civil case, not a criminal case. Another criticism is not of the balancing test, but that it was incorrectly applied in this situation

* + - 1. Ct holds that a citizen-detainee seeking to challenge his status as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Govt’s factual assertions. (Majority then sets up some interesting ‘rules’ that would probably satisfy due process within the military tribunal, probably b/c they had to do something but had nothing to work with):
				1. Proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict
				2. Hearsay may need to be accepted
				3. Presumption in favor of the Govt’s evidence, so long as the presumption remained rebuttable. I.e. burden of proof on detainee.
			2. Said this does not interfere with separation of powers b/c President does not have a blank check, cites system of checks and balances
			3. SOUTER, GINSBURG concur b/c they knew they had to do something. If there wasn’t some sort of a ruling, the Executive was going to think they could do whatever they want. Bad as this is, at least it is something.
			4. SCALIA, STEVENS dissent argues the AUMF did not say you could detain American citizens, thus he cannot be detained. Said in *Quirin* it was uncontested that the petitioners were members of enemy forces. Critizes the rules that the majority set up b/c they have no basis (the plurality seems to view it as its mission to Make Everything Come Out Right…)
			5. THOMAS dissent says Jackson Category 1, he can clearly be detained
		1. Notes on *Hamdi*. 3 issues for Ct to resolve.
			1. Does Federal Govt have authority to detain American citizens indefinitely w/o a criminal charge or suspension of habeas corpus? Only dissent said no.
			2. Does President have authority to detain American citizens? Ct, 5-4, said yes via AUMF. This would make it a Jackson Category 1.
			3. What process is owed to citizens who are detained but dispute their status? 6-3 said some form of hearing
		2. Should Ct be reluctant to second-guess the President?
			1. *Steel Seizure* argument: Ct should require President to follow the processes established by Congress
			2. Bending the rules in emergencies leads to more emergencies
		3. We see Congress giving a little bit of power and then taking it back.
	1. War on Terror
		1. Bybee letter: Attorney General should represent the views of the President, but he should still remain true to the Constitution. Memo was later withdrawn b/c it was an embarrassment.
		2. After 9/11, President authorized National Security Agency (NSA) to intercept communications in and out of US related to terrorism. Ct has never ruled on 4th Amendment validity of surveillance.
		3. Foreign Intelligence Surveillance Act (FISA): comprehensively regulates electronic surveillance within the US, authorized electronic surveillance only upon certain showing and only if approved by a Ct. Allows for warrantless wartime domestic surveillance but only for 15 days.
			1. Department of Justice argued that surveillance is already authorized by AUMF as necessary and appropriate and a fundamental incident of war
			2. Scholars argued this, saying that FISA provided more specific guidance on what the generic AUMF authorized. Distinguished *Hamdi* b/c it was on foreign soil, said it was entirely different to allow domestic spying
			3. Debate over inherent authority. Scholars argue President has inherent authority until Congress puts a statute into effect.
			4. DoJ argued there is a need for prompt decisionmaking that can only be done by the President
			5. If we want to reign in the Executive power, Congress can pass legislation. It would then be subject to judicial review. For example, if President signs a treaty, Congress can pass a law saying that you must follow the treaty
			6. AUMF is more of a blank check
			7. Alone, FISA did not allow the gov’t to do what it wanted to do
		4. *Johnson v. Eisentrager* (1950): SC ruled that prisoners detained by Americans in post-WWII occupied Germany were beyond the habeas jurisdiction of the federal judiciary
			1. Prisoners at no relevant time were within any territory over which the US is sovereign, at all times beyond jurisdiction of US courts
			2. Factors Ct found relevant (restated in *Boumediene*, pg 1232). Each petitioner:
				1. Was an enemy alien
				2. Has never been or resided in the US
				3. Was captured outside of our territory and there held in military custody as a POW
				4. Was tried and convicted by a Military Commission sitting outside the US
				5. For offenses against laws of war committed outside the US
				6. And is at all times imprisoned outside the US
		5. *Rasul v. Bush* (2004) (STEVENS): non-citizen detainees of Guantanamo brought habeas corpus petition seeking release
			1. SC ruled that habeas jurisdiction extends to territories where US holds plenary and exclusive territorial jurisdiction, even if not ultimate sovereignty
				1. Linzer said this seems like an easy case b/c it is Guantanamo, which is basically an American lease
			2. Distinguished *Eisentrager* on 3 grounds
				1. *Eisentrager* complainants had been adjudicated enemy combatants, whereas Rasul insisted they were not
				2. *Eisentrager* prison was far away, highly inconvenient to bring them to the US for a habeas proceeding
				3. Guantanamo is a territory over which US has exclusive and plenary control
			3. Opinion suggests the holding is not limited to Guantanamo
			4. KENNEDY said *Eisentrager* had not been overruled, that it stands for the correct proposition that there is a realm of political authority over military affairs where the judiciary may not enter. Concluded that these detentions fell outside the *Eisentrager* realm
			5. SCALIA said *Eisentrager* could not be distinguished, and the Constitution does not apply extraterritorially
		6. After *Hamdi*, Congress set up Combat Status Review Tribunals (CSRTs)
			1. Provides detainees with notice of the unclassified basis for being considered an enemy combatant (never get the classified info)
			2. Detainees have opportunity to present evidence
			3. Given a personal representative (not an advocate or a lawyer)
			4. Mandatory review is by the same people who lead the CSRT
			5. Habeas review can only go to the District of Columbia circuit
			6. Process by which detained persons can challenge their continued detention and seek release
		7. Military Commissions to try accused enemy combatants
			1. In *Hamdan*, SC ruled the military commissions were unlawful b/c the procedures were legally insufficient b/c they were contrary to congressional enactments, primarily the Uniform Code of Military Justice
			2. Said Jackson Category 3
			3. Process by which the gov’t can seek penalties against detained persons for violating the law of war
		8. Military Commissions Act (MCA) of 2006: Congress responded by setting forth detailed procedural rules for the commissions
			1. §7 tried to cut off detainees from filing for habeas corpus and other lawsuits. Habeas corpus can only be suspended under Article I §9 cl. 2.
			2. In *US v. Klein*, Congress passed a law that said if you received a pardon, it automatically proved you were disloyal. SC ruled it unconstitutional b/c it would prescribe the rule of decision of the courts (disloyal) and violation of separation of powers (also said it infringed on Executive power by limiting effect of a Presidential pardon)
			3. Under *McCardle*, the SC had power to hear habeas corpus cases. This would take away that power.
		9. *Boumediene v. Bush* (2008) (KENNEDY): accused terrorists detained at Guantanamo argued federal courts could hear their habeas petitions b/c §7 of MCA was unconstitutional
			1. Q: Whether the suspension clause guarantees a habeas forum to noncitizens
			2. Framers deemed the writ to be an essential mechanism in the separation of powers scheme
				1. Found HC vital b/c if you are being held prison some place, there must be a court somewhere that can review your case and decide if you are being rightly held
				2. In British law, HC was the ultimate protection against tyranny. The executive could not indefinitely detain you.
			3. Historical review found no indication that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant
			4. Rejected *Eisentrager* and it’s formalistic, sovereignty-based test on several grounds
				1. Other reasoning in *Eisentrager*, which emphasized practical concerns
				2. In *Eisentrager*, unlike this case, US lacked both de jure sovereignty (legal right to exclusive power) and de facto authority (in practice, may not be given by law but how things really work)
				3. Respect for the holding of the Insular Cases and their functional approach
			5. Focused on separation of powers. “When a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing”
			6. Concluded 3 factors relevant in determining reach of Suspension Clause
				1. Citizenship and status of detainee and adequacy of process through which that status was determined

Here, had not been afforded trial-type process of military commission

Detainees were being held by executive order

CSRT protections are far more limited and fall short of the procedures that would eliminate the need for habeas corpus review

* + - * 1. Nature of sites where apprehension and detention took place

Guantanamo is essential a US territory

* + - * 1. Practical obstacles inherent in resolving prisoner’s entitlement to writ
			1. SCALIA’s dissent maintained *Eisentrager* had settled the issue
			2. Unclear whether the SC is guaranteeing habeas corpus actions to non-citizens
1. **Substantive Due Process**
	1. 14th Amendment (1868)
		1. PRIVILEGES OR IMMUNITIES (P&I CLAUSE): “no state shall abridge the privileges or immunities of citizens of the US”, prohibits states from denying their citizens the P&Is of national citizenship
		2. SUBSTANTIVE DUE PROCESS: liberty-based due process challenges which seek certain outcomes instead of merely contesting procedures and their effects
		3. Framework: is the government’s classification justified by a sufficient purpose?
			1. Is there a protected liberty?
				1. Is it a fundamental right?

Marriage, marital zone of privacy (*Griswold*), use of contraceptives (*Carey*), abortion (*Roe*),

* + - * 1. Has this right been impinged or unduly burdened? If so, this is subject to strict scrutiny.
			1. OR - What is the classification? How is the gov’t drawing a distinction among people?
			2. What is the appropriate level of scrutiny?
				1. Strict: race, national origin, aliens (generally), fundamental right

Necessary to achieve a compelling gov’t purpose?

Least burdensome? No less discriminatory alternative?

* + - * 1. Intermediate: gender

Substantially related to an important gov’t purpose?

* + - * 1. Rational basis: default

Rationally related to a legitimate gov’t purpose?

* + - 1. Did the gov’t action meet the level of scrutiny?
		1. Proving discriminatory classification
			1. Discriminatory effect does not automatically trigger heightened scrutiny. Must be intent to discriminate, as shown by (1) facial discrimination, (2) discriminatory application, or (3) discriminatory motive (may be shown by evidence of disproportionate impact)
	1. *Barron v. Baltimore* (1833): MARSHALL said the Bill of Rights applies only to the federal government. Dredging by the city made his wharf worthless, but SC said it was not a taking under the 5th amendment b/c it was the state who did something
		1. SC later said takings clause did apply through the 14th amendment
	2. *The Slaughter House Cases* (1873) (MILLER): pg 471, LA law granted a private company a 25-year monopoly in the slaughterhouse business, law required them to let others use the slaughterhouse but they could charge a fee
		1. SC upheld the law, 5-4.
			1. Majority may have indicated that the Bill of Rights was included in the 14th amendment
			2. Rips apart the 14th amendment P&A. Leaves equal protection (EP) and due process (DP) alone
		2. Flatly rejected argument that the P&I clause or DP clause protected their fundamental right to work at their trade. SC held that P&I clause protected only a limited set of national privileges, such as right to use navigable waterways.
			1. Significant b/c anyone born in the US is a citizen, even if their parents are not
			2. Congress can pass laws to protect its citizens. This was essentially zoning.
			3. Ct was afraid of transferring too much power to the federal government. 14th protects citizens of the US. If this protected citizens from state laws, this would be a big transfer of power.
			4. Initial rejection of economic substantive due process. Majority said DP provides only procedural protections.
		3. FIELD, Chase, Swayne, and Bradley dissent: argued individual rights, and that this law was discriminatory towards all the other butchers in LA. Interpreted ‘liberty’ and ‘property’ in the DP clause as protecting a right to practice a trade or profession and believed that arbitrary interference with these rights violated the 14th
			1. Later became the majority view
	3. *Mugler v. Kansas* (1887): pg 472, SC upheld a state law that prohibited the sale of alcoholic beverages, but indicated state laws would be invalidated as against DP if they had no reasonable relationship to the police power. Ct begins to conclude that DP protects more than just procedures, and begins to limit the govt’s regulatory power
	4. *Allgeyer v. Louisiana* (1897): SC found that a law interfered with freedom of contract and had thus violated the DP clause of the 14th. Allowed economic substantive due process.
	5. *Lochner v. New York* (1905) (PECKHAM): pg 489, NY statute prohibited bakers from working over 60 hours/week, argued the statute interfered with right of contract protected by the 14th amendment, rags to riches was a popular motif at the time
		1. SC applied substantive due process notion that had been rejected in the *Slaughter House* cases. Held:
			1. Freedom of contract is a basic right protected (*Allgeyer*)
			2. Gov’t can interfere only to serve a valid police purpose
			3. Judicial role to carefully scrutinize legislation interfering with freedom of contract
		2. Real question is whether the state can intervene to ‘level the playing field’
		3. Peckham asks whether this is a reasonable exercise of the police power (health, safety, welfare) or not. Held: no impact on HSW, strikes down the law.
		4. “There is no reasonable ground for interfering with the liberty of person or the right of free contract”. Said not within the police power b/c it is a labor law, pure and simple
		5. Ends analysis. Regulation of labor, or of the contract b/w man and man, is an impermissible end
			1. Different from other cases b/c it is one man versus one man, not involving the thousands who work in the factory
		6. Note, this case is related to two private parties, it has nothing to do with the state
		7. HOLMES dissent focuses on precedent, “the 14th amendment does not enact Mr. Herbert Spencer’s Social Statics”
			1. Argues that the Ct should not interfere with majority rule. If the people want to have a system other than laissez-faire they can.
			2. Later cases show that he moves away from this position
		8. HARLAN dissent says it is clearly HSW. Attaches a book of diseases that bakers might suffer. Brandeis brief method.
			1. BRANDEIS BRIEF METHOD: focus on facts, a brief where you put less emphasis on law and more on facts
	6. Over the next 30 years, the SC strikes down some 200 statutes on substantive DP claims. But difficult to reconcile some of the decisions from this era.
		1. *Muller v. Oregon* (1908): SC upheld a maximum hours law for women
		2. *Bunting v. Oregon* (1917): SC upheld a maximum hours law for manufacturing jobs
		3. *Adkins v. Children’s Hospital* (1923): SC struck down a state minimum wage law for women. Ct said minimum wage law was different b/c it interfered with freedom of contract and had no valid police purpose
	7. *Powell v. Alabama* (1932): 2 black boys prosecuted for rape of white woman, evidence clearly showed no case. SC recognized DP right to counsel in capital cases.
	8. Early cases also found that the 1st amendment applies to the states through the DP clause of the 14th amendment
	9. Problem? 1933-1934 the Court was supporting the emergency measures and the New Deal. 1935-1936 Court started striking things down.
		1. *Nebbia v. New York* (1934): SC upheld a NY law that set prices for milk. Ct appears to question *Lochner* premises that gov’t could only regulate to achieve a police purpose
		2. *Home Building v. Blaisdell* (1934): SC upheld Minnesota mortgage moratorium, indicates Ct’s willingness to defer to gov’t economic regulations
	10. In 1937, SC signaled the end of the laissez-faire jurisprudence and the *Lochner* era
	11. *West Coast Hotel v. Parrish* (1937) (HUGHES): pg 495
		1. SC upheld state law establishing a minimum wage for women, overruling *Adkins* and abandoning the principles of *Lochner*
			1. No such thing as the freedom of contract
			2. Said gov’t can regulate with more than just the police power. Gov’t could regulate to equalize bargaining power (further, any legitimate purpose)
			3. Judiciary would defer to the legislature’s choices if they were reasonable
		2. “The switch in time that saved 9” – Roberts switched sides and cast the 5th vote to uphold the laws
		3. Abandoned the substantive due process principles of *Lochner*
	12. *Palko v. Connecticut* (1937) (CARDOZO) (later overturned): pg 473, man receives life sentence for murder, state appeals b/c wrong instruction given, new trial ordered and sentenced to death. Objected that this was double jeopardy and violated the 14th amendment.
		1. In these an other situations immunities that are valid as against the federal gov’t by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the 14th, become valid as against the states
		2. If the 14th has absorbed them…it is b/c…neither liberty nor justice would exist if they were sacrificed
		3. Held: allowing state to appeal, when defendant had been acquitted due to legal error, did not violate any fundamental principle of justice
		4. Overturned by *Griffin v. California*
	13. *US v. Carolene Products* (1938): SC upholds filled milk statute, said economic regulations should be upheld so long as they are supported by a conceivable rational basis
		1. FN4: generally, the Ct will defer to the gov’t and uphold laws so long as they were reasonable. But this deference would not extend to laws interfering with fundamental rights or discriminating against discrete and insular minorities.
		2. Ordinary transaction involves a presumption of validity
		3. Burden is on the opposing party to show the law in question is constitutional
	14. Roosevelt makes 8 appointments to the Court. Solid majority committed to repudiating *Lochner* and to deferring to gov’t economic regulations
	15. Since 1937, not one state or federal economic regulation has been found unconstitutional as infringing liberty of contract as protected by the DP clause of the 5th and 14th. Ct has made it clear that economic regulations will be upheld so long as they are rationally related to serve a legitimate gov’t purpose
	16. *Adamson v. California* (1947) (REED) (later overruled): pg 475, challenged constitutionality of a state provision that allowed prosecutor to point out to jury that he did not testify
		1. REED held that provision did not violate the ‘concept of ordered liberty’
		2. Historical: FRANKFURTER concurs and makes the historic argument. This is tough b/c people are on both sides of the argument.
		3. Federalism: concerns that applying the BoR to the states imposes a substantial set of restrictions on state and local governments
		4. Appropriate judicial role: BLACK dissents and argues that selective incorporation gives judges too much discretion in deciding what rights are fundamental. Black argues for total incorporation of the BoR. Black had also dissented in *Lochner*.
		5. MURPHY, RUTLEDGE dissent. Says BoR should be incorporated, plus there may be additional fundamental rights too
		6. Later overruled by *Malloy v. Hogan*
	17. *Skinner v. Oklahoma* (1942) (DOUGLAS): pg 481, Oklahoma statute required forced sterilization to habitual criminals
		1. SC does not argue a right against being sterilized, but rather the unequal/arbitrary punishment
		2. Used strict scrutiny b/c what was involved was not racial discrimination (normal grounds) but b/c this was a fundamental rights
		3. Argues that procreation is a fundamental right and a basic liberty
		4. In 1927, HOLMES upheld a Virginia statute for forced sterilization, *Buck v. Bell*, and made some strange comments that “3 generations of imbeciles is enough”, and that EP is the last right. Viewed as Holmes at his most arrogant
	18. *Williamson v. Lee Optical* (1955) (DOUGLAS): pg 496, state statute prohibited opticians from duplicating or replacing lenses w/o a written prescription
		1. SC upheld law b/c rational, legitimate purpose. Seems rational, but works through a litany of possible arguments to justify its legitimacy
	19. Throughout 50’s and 60’s, Warren Court began finding things to be essential, but the Ct has never overruled *Palko*.
	20. *Ferguson v. Skrupa* (1963) (BLACK): some states had completely outlawed debt adjusters. Black opinion said it is up to the legislators, not the courts, to decide the wisdom of legislation.
		1. Substantive due process is absolutely dead
		2. Clear deference to legislative choices
	21. Current Law
		1. Technically selective incorporation, but realistically almost total incorporation
		2. Everything but: 2nd – right to bear arms, 3rd – right to not have soldiers quartered in a person’s home, 5th – right to a grand jury indictment in criminal cases, 7th – right to a jury trial in civil cases, 8th – prohibition of excessive fines
1. Contracts Clause
	1. “No state shall pass any law impairing the obligation of contracts”
	2. Essentially never used. SC has gotten to these issues by recognizing a liberty of contract right in the DP clause (*In re Jacobs*, 1885)
	3. State cannot pass any law that retroactively impairs contract rights

# Equal Protection and Fundamental Interests

1. Generally
	1. Heightened scrutiny under the EP clause is warranted only if the gov’t action overtly classifies people on the basis of sensitive criterion, or if, although facially neutral, is rooted in intentional discrimination against such a group
	2. Egalitarian: focusing on extent of overinclusion and underinclusion
	3. Libertarian: rights oriented
	4. Conventional approach: ask whether the statute flunks the scrutiny test
2. *Perry v. Schwarzenegger* (2010): CA SC struck down Proposition 8, a ban on gay marriage. Ct rules that sexual orientation could be a suspect class, but then said Proposition 8 failed to meet even the rational basis test
	1. *Strauss v. Horton* (2009, CA SC): discussed the difference between a revision to the state Const. and an amendment to the state Const. Said Proposition 8 met the requirements for a valid amendment.
	2. *Loving v. Virginia* (1967): Ct struck down VA’s miscegenation statutes
		1. FACIAL CLASSIFICATIONS: statutes which one their face classify on the basis of race or national origin (it shall be unlawful for any person of Japanese ancestry to…)
		2. Ct struck down the equal application theory, that a statute is fine if it punishes members of each race equally.
	3. STRICT SCRUTINY: stringent standard, applies when a fundamental constitutional right is infringed (including those protected by the due process clause of 14th amendment), or when gov’t action involves the use of “suspect classification” that may render it void under the equal protection clause. Usually an EP standard and not a DP standard.
		1. Necessary to achieve a compelling government interest
		2. To pass strict scrutiny, law or policy must
			1. Be justified by compelling governmental interest
			2. Narrowly tailored
			3. Least restrictive means
		3. Gov’t usually loses
		4. Race based classification are subject to strict scrutiny
		5. Gov’t has the burden of proving that the law is necessary.
	4. INTERMEDIATE SCRUTINY: intermediate standard, law or policy being challenged furthers an important government interest in a way that is substantially related to that interest
		1. Used for gender-based, legitimacy classifications
		2. Unclear, but burden of proof appears to be the gov’t. Must have an exceedingly persuasive justification.
		3. AA benefitting women generally upheld, intentional discrimination against men generally invalid
	5. RATIONAL BASIS: low standard of review, gov’t action must be rationally related to a legitimate gov’t interest, action is a reasonable means to an end that may be pursued by a gov’t, default standard
		1. Gov’t usually wins unless arbitrary or irrational
		2. Used in due process or equal protection claims
		3. Any conceivable purpose will do
		4. Used for economic or social legislation
		5. Laws are presumed valid, so challenger has burden of proof
	6. SUSPECT CLASSIFICATION: any classification of groups that suggests they are likely the subject of discrimination
		1. “discrete and insular minority”
		2. Usually race, national origin, and per *Perry* perhaps sexual orientation
		3. NOT suspect: age, wealth
	7. EQUAL PROTECTION: we can classify, but we cannot discriminate
		1. Can we create a classification and then deny that class some privilege? Sure, we don’t let blind people drive. But it cannot interfere with a fundamental right.
		2. EP guarantees that similarly situated persons will be treated alike
		3. Where a law treats a person or class of persons differently from others
	8. SUBSTANTIVE DUE PROCESS: guarantees that laws will be reasonable and not arbitrary. Generally where a law limits the liberty of all persons to engage in some activity, it is a DP question
	9. CONGRUENCE: thing regulated has to be close to the power asserted
	10. PROPORTIONALITY: remedy must be proportional to the harm
3. Historical Overview
	1. Pre-Civil War
		1. Before Missouri, roughly equal number of slave and non-slave states
		2. Missouri tipped the scale in favor of the slave states.
		3. Missouri Compromise, later ruled unconstitutional, was a major cause of the Civil War
		4. Began with *Marbury v. Madison*. The Marshall Ct really introduced judicial review
	2. Reconstruction Era
		1. Federal troops withdrew from the South, leaving blacks to fend for themselves
		2. Birth of Jim Crow laws
	3. 13th Amendment: abolished slavery and involuntary servitude
		1. Only section that directly addresses the public, applicable to state and private action
		2. Must have something based on RACE + intrusion of a FUNDAMENTAL RIGHT
		3. SC will uphold legislation proscribing almost any private racially discriminatory act that can be characterized as a ‘badge or incident of slavery’
	4. 14th Amendment:
		1. Slaughter House cases
		2. Narrowly interpreted to apply **only** to state action (state or local gov’t, gov’t officer), not private action
			1. State action can also mean actions of private individuals who perform exclusive public functions or have significant state involvement in their activities
			2. State action also exists whenever a state affirmatively facilitates, encourages, or authorizes acts of discrimination by its citizens. Note there must be some sort of affirmative act, it is not enough that the state permits the conduct to occur. State must be significantly involved in a private entity – merely granting a license or providing essential services is insufficient. States are not required to outlaw discrimination, they just can’t authorize or encourage it
				1. Private colleges can force students to attend church, but the state cannot
		3. Historians generally argue the amendment assured civil rights, not social or political
	5. NAACP: 1909. Kicked off a more organized response by the blacks.
	6. To have an equal protection concern you need to have a discriminated class. If there is no discriminated class you are not taking away a fundamental right and thus there is no equal protection issue
	7. *Plessy v. Ferguson* (1896): pg 68, Plessy refused to leave the RR car reserved for whites
		1. Brown: majority argued statute involved social, not political, rights
			1. Holding: “Separate but equal”
			2. Stamp of inferiority was self-imposed. Mere separation does not make one race inferior.
			3. Distinguished between laws interfering with equality versus social laws
		2. Harlan: dissent argued statute involved civil, not social, rights
			1. Said fundamental objection was that the law interfered with personal freedom
			2. Saw the law for what it really was – not an attempt to keep each race from the other, but an attempt to keep the blacks from the whites
			3. “There is no caste here” (after rambling about how whites just really are superior).
				1. Anti-Subordination Principle: seems to suggest that race cannot be used to subordinate a particular class of people.
			4. “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”
				1. Rationality Principle: suggests that race is no longer a proper classification upon which to base public policy
		3. Separate but Equal was the mantra for a long time. Ct figured that it would be too expensive for schools to meet the “separate but equal” requirement and that they would eventually go bankrupt trying to do so, making de-segregation the only choice. But this was a slow process.
		4. What was really the issue? Did the state deny EP to blacks by requiring them to attend separate schools – i.e. the State was mandating separation by race.
4. Education?
	* Federal versus State, then education is a state issue. State versus Private, education is not inherently a state function and the private sector may not be subject to the 14th. If a state has completely outsourced its education, then the private sector would be subject to the 14th b/c it is essentially a state function achieved by delegation of authority.
	1. Cases Leading up to *Brown*
		1. *Missouri ex rel. Gaines v. Canada* (1938): pg 75, black man wanted to attend law school, Missouri said no but offered to pay for him to go to school in another state
			1. Holding: Ct rules that going to school elsewhere was not “equal” to going to school in Missouri
			2. Watershed. For the first time, the SC really comes down on the black’s side
		2. *Sipuel v. Board of Regents* (1948): no black law school in Oklahoma. Oklahoma started one over the weekend by roping off an area in the Capitol building
			1. Ct upheld it, but dissent was that the law school was not equal
		3. *Sweatt v. Painter* (1950): black denied admission to UT law, Tx created a one-person school for him. Argued that it was unequal because of the intangible benefits of interacting with other students.
			1. Ct ruled for plaintiff. First, Ct listed all of the physical things that the new school didn’t have. This would be enough to show it was not equal. But,
			2. Ct said it isn’t just the bricks and mortar, it is also that he wouldn’t be dealing with the 85% of the population that is white – he doesn’t have the same interaction with others. These are the “intangible differences”
			3. Holding: “Cannot conclude that the education offered petitioner is substantially equal to that which he would receive at UT…”
			4. Ct refused to overrule Plessy
		4. *McLaurin v. Oklahoma State Regents* (1950): pg 78, allowed black man into University of Oklahoma but then made him sit by himself
			1. Holding: Ct said this was not equal. Interaction with students is relevant to equality. Students may choose not to talk to him, but the State cannot force it to be that way.
			2. With college and grad school, the NAACP turned its attention to the elementary schools. 5 cases came at once.
		5. *Brown 1: Brown v. Board of Education* (1954, BRANDEIS): desegregation of elementary schools
			1. Historical Context
				1. *Plessy’s* “separate but equal”
				2. Several cases that challenged what equality means
				3. 17 states have segregated schools and are opposed to desegregation
			2. Warren’s Opinion
				1. Takes as a given that the school are “equal” physically
				2. “Separate educational facilities are inherently unequal”. Focused on the intangibles of *Sweatt*
				3. “Education is perhaps the most important function”
				4. Separate facilities based on race “may affect their hearts and minds”
				5. Never expressly stated that they overruled *Plessy*. “Any language in *Plessy* contrary to this finding is rejected”
				6. Avoided a moral argument, cited the ridiculous doll test and a Swedish sociologist in a careful attempt to diffuse the situation. This failed miserably and there was massive opposition to *Brown*

Brandeis Brief: Evidence of expert testimony and objective

* + - * 1. Holding: Ct rejects separate but equal in public education. After Brown, everything was desegregated and people referenced Brown anyway.
		1. *Bolling v. Sharpe* (1954): Holding: Ct said due process includes an equal protection clause. It would be “unthinkable” to say the States can’t do it but the Feds can.
		2. *Brown 2: Brown v. Board of Education* – decree for relief
			1. Schools were directed to proceed “with all deliberate speed”
	1. The Authoritativeness of Supreme Court Decisions
		1. It was never really denied that ultimate authority lay in the Constitution.
			1. Article VI cl. 2 – The Constitution is “the supreme law of the land.”
		2. As judicial review came to be more and more respected and recognized, the power of the Court grew.
		3. *Brown*, and subsequent cases, are great examples of the SCs power of judicial review
		4. *Cooper v. Aaron* (1958)
			1. Facts: Arkansas Governor Faubus refused to comply with the integration order of Brown. Cts ordered him to comply. After unsuccessful attempts to integrate, Faubus requested a stay of the judicial order requiring integration.
			2. Only time in history that all 9 SC justices signed an opinion
			3. Opinion restated *Marbury* as holding that the federal judiciary is supreme in the exposition of the law (but Marshall didn’t really put this in his opinion. Instead it reflected what we had come to believe). When all 9 justices signed it, this became the official way forward.
			4. “No state legislator or executive or judicial officer can war against the Const. w/o violating his undertaking to support it”
		5. Ct became frustrated with local foot-dragging after *Brown 2*
			1. Civil Rights Act of 1964 cut off funding to segregated schools
			2. Ct interpreted *Brown 2* to require actual integration, not just desegregation
	2. Post-*Brown* Attempts to Integrate
		1. New issue is how you integrate residential housing patterns
			1. DE JURE: government says you do it, actionable
			2. DE FACTO: it just happens to work out that way, not actionable
		2. Substantial discretion to fashion a remedy to comply with *Brown 2*
		3. *Green v. New Ken County School Board* (1968): plan allowed pupils to choose which school they would enter
		4. *Swann v. Charlotte Mecklenburg BoE* (1971): big school system, many schools were 99-100% black b/c of local housing patterns. Plan required rezoning and crazy busing of students to integrate. Ct affirmed the plan on the grounds that it was undoing de jure segregation. High point of integration, district court has substantial discretion to fashion a remedy
			1. *Marbury*: litigation by individuals to uphold their individual rights, court involvement ends with decision/injunction, court is the umpire
			2. *Swann*: litigation arises out of violation of group rights, injunction has effects on non-parties, court retains jurisdiction after decision/injunction, court is manager
		5. *Milliken v. Bradley* (1974) (Burger): Detroit BoE had perpetuated a system of racially segregated schools (if one burned down, bused blacks long way to another black school instead of to closer white school). Plan tried to integrate *multiple* school systems.
			1. SC overruled plan and said that busing b/w separate school districts is only justified when acts of the state have been a “substantial cause of interdistrict segregation.”
			2. Essentially the SC ok’d private action – “white flight”
			3. Ct required a nexus b/w the violation and the remedy. No reason to create a super-district and re-do all the zoning if the govt wasn’t to blame.
		6. *Freeman v. Pitts* (1992): “where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts…”
		7. Local control of school districts is sacrosanct.
			1. Unless you can show that the govt had some deliberate role in making the suburbs “white,” you cannot rearrange the whole district to put black kids in predominately white schools
			2. Effect is that unless you can show de jure segregation, everything is fine
			3. “White flight” could lead to resegregation, but it is ok b/c it is simply the market operating
		8. The main question to be asked is whether we act to remedy deliberate actions by the state (to fix segregation) or whether we take deliberate acts to integrate (cause integration)
1. Travel
	1. STEWART: right so basic that the Framers didn’t bother to put it in the Constitution
	2. SC has consistently struck down statutes that seem to be an attempt to keep poor people out
	3. *Saenz v. Roe*: Stevens caused a stir by citing the P&I clause of the 14th, suggesting to some that there might be some interest in revisiting the *Slaughter House* cases. He actually cited it to say that federal P&I would include the right to go to the seat of government
	4. Fundamental right to travel from state to state, which encompasses the right:
		1. To leave and enter another state, and
		2. Right to be treated equally if they become permanent residents of that state
	5. SC has not yet declared that the right to international travel is fundamental, but right appears to be protected from arbitrary federal interference by the DP clause
	6. **SKIP NOTE:** I skipped the right to travel, a very basic notion of what it means to be an American. We have never required a passport or visa to travel within the United States, but it is very hard for the Court to explain why. Justice Stewart said that the right was so basic that the Framers didn’t bother putting it in the Constitution, a rather unsatisfactory answer. Other reasoning has involved the Commerce and Equal Protection Clauses. In modern times it has come up when states or localities try to keep poor people out, either directly (as was tried in California in the forties against the Oakies – if you don’t know what Oakies are, read The Grapes of Wrath), and in more recent times by trying to put a waiting period or a cap on the welfare rights of people from other states. The Court has pretty consistently struck these laws down, and in Saenz v. Roe, Justice Stevens caused a stir among constitutional scholars by citing the Privileges and Immunities Clause of the Fourteenth Amendment, suggesting to some that there might be some interest in revisiting The Slaughter-House Cases. But actually, he cited the example given there that federal P&I would include the right to go to the seat of government, and there hasn’t been any sign of further life being breathed into privileges and immunities.
2. Voting Rights
	1. 15th Amendment: prohibits both state and federal govt from denying any citizen the right to vote on account of race or color
	2. Districts
		1. Congressional elections require almost exact mathematical equality b/w congressional districts (*US Dept of Commerce v. Montana*, pg 1258)
		2. State and local elections, variance must not be unjustifiably large
		3. Scope: applies to almost every election where a person is being elected to perform normal gov’t functions. Exceptions
			1. Appointed officials and officials elected at large
			2. Special purpose gov’t units – i.e. water storage units
	3. *Lassiter*, 1959: literacy tests and related devices are not themselves contrary to the 15th Amendment
	4. Voting Rights Act of 1965: pg 887
		1. Case-by-case litigation had failed to enforce compliance with the 15th Amendment b/c it was too slow, too expensive, and too cumbersome
		2. VRA had two strategies
			1. Remove barriers to registering and voting
				1. Outlawed tests and devices that were prerequisites to voting
			2. No change in voting procedures without prior approval of Attorney General or US District Ct for the District of Columbia
		3. Question – can the VRA outlaw discriminatory effects when discriminatory intent is not present?
		4. Coverage formula appeared neutral but targeted at Deep South
		5. 5-year life span
	5. Not enough to determine discriminatory impact, must also be contaminated with discriminatory intent (*Washington v. Davis*)
	6. *South Carolina v. Katzenbach* (1966) (WARREN): pg 888, challenged VRA
		1. SC upheld the VRA. Literacy test may be fair on its face (*Lassiter*) but employed to perpetuate the discrimination prohibited by the 15th
		2. SC said we could do this case-by-case, but it takes too long and costs too much. This gave Congress the power to have a broad brush stroke. Implement a broad remedy to speed things up.
	7. *Katzenbach v. Morgan* (1966) (BRENNAN): pg 889, NY denied right to vote to people who had completed 6th grade in any language other than English.
		1. SC upholds the VRA under the 14th Amendment
			1. Congress can act under §5 to ensure a minority is given equal political opportunities
			2. Brennan suggests that the literacy requirement was really a cover for trying to discriminate. Congress saw this and prevented that opportunity.
		2. Note, at this time there is a distinction between civil and political rights. That is why there is both a 14th and a 15th amendment
		3. HARLAN dissent: argued you need to have a violation of the 14th amendment before you can enact legislation to cure that violation
		4. REMEDIAL THEORY: Congress may provide remedies only for violations of §1 as it is judicially understood
			1. Broad brush
			2. Where there’s smoke, there’s fire
			3. If there are discriminatory effects we should worry there is discriminatory intent.
		5. SUBSTANTIVE THEORY: Congress and the SC share interpretive power over the substantive meaning of §1 so that Congress may enact legislation under §5 providing remedies even if the Ct would not read the Equal Protection Clause that way
	8. Nixon takes over, SC shifts from liberal to middle of the road
	9. *Oregon v. Mitchell* (1970) (?): pg 893, lowered minimum voting age from 21 to 18 (note, Vietnam War)
		1. Question – Is the act constitutional, b/c the Const. gave states the right to decide voting requirements?
		2. Ct split down the middle. BLACK’s vote decides it, said it was constitutional for federal elections but not for state elections.
		3. Insane outcome. States would have to have 2 ballots for every election if it involved both federal and state matters.
			1. States passed their own laws to reduce voting age to 18
			2. Court starts to fragment
	10. **Equal Protection**
		1. Right to vote is a fundamental right
			1. Extends to all national and state gov’t elections
			2. Restrictions on voting, other than on basis of age, residency, or citizenship, subject to strict scrutiny
				1. Residency: short residency requirements usually ok, long usually not ok; can prohibit non-residents from voting if rational basis
				2. Right to vote conditioned on property ownership usually invalid
				3. Poll taxes prohibited
		2. *Reynolds v. Sims* (1964) (WARREN): pg 517, Alabama had not reapportioned since 1900, residents of large county argued dilution of their vote
			1. Right to vote essence of a democratic society
			2. SC said dilution of vote is unconstitutional
			3. EP prohibits state dilution of the right to vote, and Article I has been interpreted to place the same type of restriction on the federal gov’t
		3. *Harper v. Virginia* (1966): poll taxes are unconstitutional
		4. Mixed record dealing with right to vote tied to property ownership. *Kramer v. Union Free School District* said state may not limit right to vote to those who own property.
		5. *Lassiter* (see above): literacy tests are permissible, although they have been outlawed by federal statutes, said ability to read and write relevant to the ability to exercise the [voting] franchise intelligently. Congress initially limited literacy tests (Oregon v. Mitchell) and then the VRA completely prohibited them
		6. *Karcher v. Daggett* (1983): SC struck down gerrymandering as dilution of voting rights
		7. *Bush v. Gore* (2000) (PER CURIAM): pg 523, Fla. SC ordered a statewide manual recount to determine the winner
			1. SC ruled that counting the ballots w/o standards violated EP. Arbitrary and disparate treatment
			2. Yes, Fla. can decide how they will cast their electoral votes. Issue is that there must be a uniform, non-arbitrary rule to implement whatever they have decided.
			3. Recount process inconsistent with minimum procedures necessary to protect fundamental right of each voter
			4. STEVENS, GINSBURG, BREYER dissent. Precedent, never before cared how a state determines if a vote has been legally cast
		8. Racial discrimination in voting receives strict scrutiny under the EP clause
3. Wealth
	1. *San Antonio ISD v. Rodriguez* (1973) (POWELL): poor school district filed suit against Texas b/c they had far less money for education than the rich school
		1. Poor had the highest tax rates, but b/c the land wasn’t worth much there was no money for the school
		2. 5-4, SC held that disparities in school funding to not violate equal protection. Poverty is not a suspect classification, thus rational basis review is sufficient.
		3. Rejected wealth-discrimination argument. At least where wealth is involved, EP does not require absolute equality or precisely equal advantages
		4. Despite *Brown*, education may be fundamental, but the right is just to education. Not to the best education that you can have. This is contentious – Linzer says they never really come out and say that education is fundamental.
		5. Basically the end of the ‘fundamental rights’ arguments
		6. MARSHALL dissent complains that the SC has used a sliding scale to decide if things violate EP
	2. Note, *Eaglewood ISD v. Kirby*, a Texas SC case from 1989. By the end of the 1980s, lawyers started looking at the State’s Bill of Rights and bringing cases in the state courts b/c decision regarding the State BoR are not reviewable by the SC. States cannot give less protection than the federal government, but they can give more. Tx Constitution does impose a duty on the legislature to establish efficient public schools, and in this case held that the resulting disparity between schools was unconstitutional.
	3. *Plyler v. Doe* (1982) (BRENNAN): “illegal alien” is not a suspect class, but the children of illegal aliens do deserve equal protection
4. Privacy
	1. *Meyer v. Nebraska* (1923) (McREYNOLDS, the worst of the four old men): pg 549, Nebraska law prohibited teaching children in any public or private school in any language other than English
		1. Defined liberty as freedom from bodily restraint, right to contract, engage in common occupations of life, acquire useful knowledge, and enjoy those privileges long recognized at CL as essential to the orderly pursuit of happiness
		2. SC struck down the statute b/c it was arbitrary and w/o any reasonable relation to any end within the competency of the state (b/c it actually allowed some languages be taught, just not others)
		3. Used substantive DP to find that statute violated the right of parents to make decision for their children
	2. *Pierce v. Society of Sisters* (1925): DP clause barred the state from using compulsory education laws to suppress private, especially religious, schools
	3. Court has also recognized that the right to make parenting decisions is not absolute and can be interfered with by the state if necessary to protect a child
	4. **Contraception, Marriage, and Family**
		1. Summary
			1. Pre-viability: no undue burdens
				1. Informed consent ok
				2. Waiting period ok
				3. Parental consent if judicial bypass ok
				4. Spousal consent not ok
				5. Physician performed procedure only ok
				6. Partial-birth abortion ban generally ok
			2. Post-viability: may prohibit unless woman’s health is threatened
			3. Gov’t not required to grant medical benefit payments for abortions to indigent women, may prohibit the public funding of abortions
		2. *Poe v. Ullman* (1961): pg 552, statute forbid the use of contraceptives, married women had a medical need for, but could not receive, birth control advice
			1. 5-4, SC concluded suit was not ripe b/c only one prosecution for violation of the statute had ever been brought and threw out the case
			2. \*HARLAN dissent, believed strongly in individual rights
				1. Said Constitution is a broad guarantee of rights, not just those specifically enumerated
				2. Emphasizes ‘fundamental rights’ and the due process approach
				3. Said the idea of throwing out a suit just b/c the law has not been enforced is bogus
				4. Rules on the merits and says the intimacy of husband and wife is an essential feature of marriage and should be protected
				5. Based on the tradition of preserving individual privacy. See this same notion in the dissents of Scalia
		3. *Griswold v. Connecticut* (1965) (DOUGLAS): pg 556, doctors were charged as accessories to the offense of the crime of using birth control
			1. On its face, statute does not violate any part of the Constitution
			2. SC struck down the statute
				1. Right to privacy is a fundamental right
				2. Rejected the argument that this right was protected under the liberty of the DP clause (*Lochner*). Found that privacy was implicit in many provisions of the BoR.
				3. Guarantees of the BoR have **penumbras** (secondary shadow), zones of privacy (attempted to avoid substantive DP, since he had lived through the *Lochner* era). Provisions of the BoR throw off other rights.
				4. Douglas focused on the need to protect the privacy of the bedroom and the ability to control information about contraceptive use, not the right to make reproductive choices
			3. GOLDBERG concurs, said the 9th amendment clearly indicates there are additional fundamental rights that are protected from gov’t infringement
				1. Also indicates that right to privacy in the marital relation is fundamental and basic
				2. Rejects *expressio unius est exlusio alterius*, the expression of certain things implies the exclusion of all other things
			4. HARLAN concurs, follows *Poe* dissent and argues that right to privacy should be protected by the DP clause
			5. WHITE concurs, argues that the law fails even a rational basis test b/c it was overbroad and did not achieve its purported purpose
			6. BLACK dissents, said no right to privacy and this is just *Lochner* again, Ct is putting itself over the legislature
		4. *Eisenstadt v. Baird* (1972): pg 563, SC struck down a law prohibiting the sale of contraceptives to unmarried individuals. Denied EP b/c it discriminated against non-married individuals. Failed rational basis test b/c no legitimate gov’t purpose.
			1. Right to control reproduction is a fundamental right
		5. *Carey v. Population Services* (1977) (BRENNAN): pg 563, SC held that restrictions on sales of contraceptives to minors infringed minors’ right to privacy
			1. Strict scrutiny required for the gov’t to justify a law restricting access to contraceptives
	5. **Abortion**
		1. *Roe v. Wade* (1973) (BLACKMUN): pg 570, class action challenged constitutionality of Texas criminal abortion laws
			1. 7-2, SC struck down the law and held that the Constitution protects a right for a woman to terminate pregnancy based on trimester
				1. First trimester: gov’t could not prohibit abortions and could regulate only as it regulated other medical procedures
				2. Second trimester: gov’t could not outlaw abortions, could regulate in ways that are reasonably related to maternal health
				3. Third trimester (viability): may prohibit except if medically necessary
			2. Said right to privacy is broad enough to encompass a woman’s decision to terminate a pregnancy, but that this privacy right is not absolute
			3. It is reasonable and appropriate for a State to decide that at some point the interest of the potential human life outweighs that of the mother
				1. Intentionally focuses on the medical standpoint and avoids the issues of the right to control your body, fetal rights, etc.
				2. Protected the Doctor’s right, not the women’s, since the doctor has a right to consult with their patient
				3. Applied strict scrutiny b/c right to privacy was a fundamental right
			4. Blackmun talks DP, which gets Stewart’s vote
			5. REHNQUIST dissent says it is difficult to conclude that a right to privacy is involved
			6. Other dissenters argued this is a federalism issues, one that the states should decide
		2. After *Roe*, the Court struck down almost any statute the was restrictive as an **undue burden** on the woman’s right to choose
			1. Seems to indicate that people thought of *Roe* as a fundamental right. Hence, they required strict scrutiny. If it was not fundamental, rational basis would apply and many of the things below seem to be rational
			2. Invalidates requirements of parental consent for minors (later Ct upheld law requiring minor to obtain parental consent or judicial approval of her choice to abort b/c of the special situation of minors), spousal consent for wives, requirement that dilatation and evacuation abortions be performed in hospitals, blanket rule that minors under 15 are too young to make an abortion decision, informed consent laws
			3. Poor women were not well protected. Ct held that the gov’t has no affirmative obligation to pay for abortions, even if it does pay for childbirth (*Maher v. Roe*, pg 580)
				1. Substantive due process

Don’t have a right to an abortion, have a right not to be prevented from having one.

Ct said it was not restricting right to terminate the pregnancy

* + - * 1. Equal protection: rational basis test b/c wealth is not a suspect class

State has a rational purpose in deciding what welfare will and will not cover

SC refuses to get into arguments that involve a market economy

* + - * 1. Ct was upholding some cases where poor were being denied rights because of incidental costs, like man was unable to appeal b/c he couldn’t pay to get a transcript of the case
		1. Reagan Administration and the Court changes, moving towards a more conservative viewpoint. 7-2 *Roe* majority begins to evaporate
			1. Ct beings upholding the laws previously invalidated
			2. *Webster v. Reproductive Health Services* (1989) (REHNQUIST): pg 580, law required doctors to determine viability before performing abortion after the 20th week of pregnancy
				1. SC upheld law. Declined to revisit *Roe’s* holding, but rejected the trimester system in favor of viability

Rehnquist made unmistakable implication that *Roe* should be overruled

* + - * 1. Kennedy and O’Connor concur
				2. Scalia berated majority for refusing to overrule *Roe*
				3. Blackmun, Brennan, Marshall, Stevens dissent b/c holding inconsistent with *Roe*
			1. *Hodgson v. Minnesota* (1990) (KENNEDY): pg 581, law required minor to obtain parental consent, allowed for judicial bypass
				1. Upheld law, probably b/c of judicial bypass provision
			2. Cases start shifting towards a more pro-life position
		1. Court also begins shifting notion that poverty should be viewed as a suspect class. Ct pretty much rejected cases arguing the state should pay for people’s own needs
			1. *San Antonio ISD* – rejected notion that disparate wealth violated a right to education
			2. Rationale is usually that suspect classification is reserved for those things that you cannot change – immutable characteristics
		2. *Planned Parenthood v. Casey* (1992) (O’CONNOR, KENNEDY, SOUTER): pg 582, PA law required woman to wait 24 hours before having abortion, law required physician to provide her with certain information, required minors to obtain consent of parent or judicial bypass option, married women required to notify spouses
			1. No majority opinion. Strange opinion with various concurrences and dissents.
			2. SC upholds *Roe*
				1. Kennedy and O’Connor were fairly anti-*Roe*, but upheld it b/c of precedent (admitted that if they were on the court when *Roe* had been decided they would have voted against it)
				2. Said basic holding of *Roe* was decision to terminate pregnancy, but reject the trimester system as arbitrary. Decided that viability was the intended line.
				3. Upholds informed consent, 24 hour waiting period, and parental consent
				4. Strikes down spousal notification
			3. Three parts of Roe affirmed:
				1. Recognition of the right to choose abortion before viability AND without undue interference from the State.
				2. Confirms State's power to restrict abortions after viability IF there are exceptions for woman's life or health.
				3. State has legitimate interests in protecting health of woman and life of fetus that may become a child.
			4. Very clear that we are now discussing (assuming) the woman’s right
			5. Liberal concurrence happy to uphold *Roe*, but would prefer to strike down the other restrictions
			6. SCALIA dissent is that it is insane to argue precedent and says it is clear that the right to an abortion is not in the constitution
			7. FACTORS IN OVERTURNING DECISIONS (*stare decisis*):
				1. HIGHEST SCRUTINY BASIS OF REVIEW
				2. Is the holding unworkable?
				3. Can the ruling be overturned without serious inequity to those who relied upon it or significant damage to the stability of society?
				4. Is the holding a doctrinal anachronism?
				5. Have the facts underlying the decision changed to irrelevance?
		3. *Stenberg v. Carhart* (2000) (BREYER): pg 597, ban on partial birth abortion – prohibited an abortion procedure (D&X, extract fetus intact), not abortion per se, banned it both pre- and post-viability
			1. SC struck down the statute
				1. Could not be constitutionally applied, even post-viability, b/c it contained no exception for medically necessary partial birth abortions
				2. Imposed undue burden on ability to choose b/c wording of ban reached beyond the intended D&X procedure to the D&E procedure (extract fetus while in womb)
			2. Dissents tended to be emotionally / morally grounded
			3. 1st time the SC clearly said that the undue burden test is to be used in evaluating laws regulating abortion. No clear standard for this test, but seems to say that undue burden exists only if there is a showing that the regulation will keep someone from getting an abortion
			4. Clear that states may not prohibit abortions prior to viability, and may prohibit after viability except where medically necessary
		4. *Gonzales v. Carhart* (2007) (KENNEDY): pg 598, after *Stenberg*, Congress passed a national Partial-Birth Abortion Ban Act of 2003, which prohibits knowingly performing a partial-birth abortion that is not necessary to save the life of a mother. No exclusion for mother’s health. Law challenged.
			1. SC upheld the act
				1. Said it was not vague
				2. Does not impose an undue burden b/c D&E procedure was still allowed, other alternatives still available
			2. Seems like more of a moral argument than a factual / legal one. Bottom line is that the State cannot go out of its way to make things hard, but it can make things just a little bit harder
			3. Thomas, Scalia concur
			4. Ginsburg, Stevens, Souter, Breyer dissent on grounds that it ignores precedent and upholds a prohibition w/o an exception for the mother’s health

# Affirmative Action

1. Gov’t action that favors racial or ethnic minorities is subject to strict scrutiny, just like regulation that discriminates
	1. May remedy past discrimination
	2. May promote AA if narrowly tailored to a compelling interest
2. Higher Education
	1. *Bakke* (1978): pg 253, CA med school was a new school with no history of discrimination. Took 16/100 slots and reserved them for minority group members. Ct fragments 4-4-1 and strikes it down
		1. 4 justices (Burger, Stewart, Rehnquist, Stevens) said program violated Title VI of the Civil Rights Act of 1964 b/c it was racial discrimination by a recipient of federal financial assistance. Avoided constitutional issue.
		2. 4 justices (Brennan, White, Marshall, Blackmun) considered meaning of EP, argue that the standard is not strict scrutiny but rather intermediate scrutiny b/c the policy favors the minority
		3. 1 (Powell) said race can be a factor if you are trying for diversity, but it is a strict scrutiny standard and the program violated EP
		4. Powell’s lone opinion basically becomes the law
	2. *Grutter v. Bollinger* (2003) (O’CONNOR): pg 285, U of M’s Law School required admissions officials to look at several soft variables to improve diversity of incoming class, including race. Policy challenged when white student who was denied admission. Ct upholds policy.
		1. Majority decided this was not a quota and upheld it, minority said it was a quota and would have struck it down
			1. Majority says use of race may be unfortunate but we cannot deny its relevance. Majority seems to think the use of race is temporary.
		2. Ct clearly says that race can be considered, student body diversity is a compelling state interest that can justify the use of race in university admissions
			1. U of M argued critical mass, and that diversity was important for education. Argument is that everybody benefits from diversity.
			2. Pure racial balancing is patently unconstitutional
			3. To be narrowly tailored, a race-conscious admissions program cannot use a quota system. Race as a plus factor is ok. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.
	3. *Gratz v. Bollinger* (2003): companion case, undergrad program awarded automatic points to racial minorities, Ct struck down the program b/c it did not provide the individual review of *Grutter*, these were just gimmes
	4. Cts struck down a lot of statutes where the gov’t tried to make people hire minority businesses (like when they said the road construction companies had to take X% of the money they were granted by the gov’t and hire minority owned businesses). Many areas, outside of education, have struck down the use of race b/c it fails strict scrutiny.
	5. Note, early gender cases used rational basis, now we have the intermediate standard. So it is easier to uphold an affirmative action program that favors women instead of blacks.
3. K-12 Public Education
	1. *Parents v. Seattle School District* (2007) (ROBERTS): pg 301, school districts voluntarily adopted student assignment plans that relied on race to determine what public schools students could attend, tried to make each school reflect the racial composition of the school district as a whole. Ct struck down the plans as violating the 14th amendment guarantee of EP.
		1. Issue was not the school district failing to act, but the way they acted. Ct usually avoids forcing a district to act b/c the argument is that a market economy drives things and we don’t always need to fight it
		2. Race can be considered (for diversity), but pure racial balancing is illegitimate.
		3. *Swann* was de jure segregated and the school was trying to fix it. Here, there was no segregation, the school district was just being extra affirmative.
		4. Majority cited *Brown* and argued that you were undermining *Brown* by not allowing the school districts to integrate schools that are now largely white. But *Brown* said you can’t use race to keep students out (which is kind of what they were doing)
		5. KENNEDY called out school district for using only two categories – white and non-white – to describe the students
		6. BREYER dissent.
			1. Argues that educational policies are within the school board’s discretion, and it shouldn’t matter if the school was de jure segregated or not
			2. Said racial integration of the public school system is going backwards, so schools should be free to combat it
			3. Questions the de jure / de facto terms
			4. Complexity of reducing racial isolation, and local opinions, should give school district power
			5. Nature of the compelling gov’t interest
			6. Question of narrow tailoring

# First Amendment

1. Overview
	1. Key aspects
		1. Dissident political groups can attack the gov’t, as long as the communication does not pose an imminent risk of violence or constitute a true threat
		2. Media and other groups can criticize public officials without restraint, as long as they do not make knowingly false statements
		3. Sets rules governing regulation of inter-group relations: limits ability of gov’t to smooth group relations by regulating speech that offends members of particular groups
		4. Rule against ‘content regulation’ (harmful messages) is the centerpiece of current doctrine. Ct extremely suspicious. More forgiving of ‘conduct regulation’, or laws which ignore content completely and regulate time, place, or manner of speech
			1. Content-based restrictions must meet strict scrutiny
			2. Content-neutral restrictions need only meet intermediate scrutiny
		5. There are settings where the gov’t has a legitimate interest in controlling the content of speech (public EEs, students, broadcasters, etc). Ct has developed special doctrines to deal with these.
		6. Ct requires unusual degree of precision in laws regulating speech
			1. A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate DP whether or not speech is regulated.
			2. A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows
		7. Prior restraints are the most serious and least tolerable infringement on 1st amendment rights. Sanctions after the fact are preferred.
		8. Rationales for free speech
			1. Marketplace of ideas: bad ideas should fight it out and lose to better ideas
			2. Informed citizenry: free flow if information facilities voting and gov’t
			3. Individualism and autonomy: speech is sued to define oneself
			4. Avoiding censorship: once censorship starts, it becomes entrenched
	2. **Free Speech and Competing Values**
		1. First Amendment Values
			1. Marketplace of ideas and the search for truth – contribute to free and open debate
			2. Systemic political values – unimpaired channels of communication, consider tolerance as a norm that might be fruitful elsewhere
			3. Individualism and autonomy values
		2. *Texas v. Johnson* (1989) (BRENNAN): pg 657, Texas man publicly burned American flag as political protest
			1. SC held that action was protected under 1st Amendment. Flag was just a symbol.
			2. Principal function of free speech is to invite dispute
			3. Gov’t may not prohibit the expression of an idea simply b/c society finds the idea itself offensive or disagreeable
			4. Rehnquist, White, O’Connor dissent that American flag is not just another symbol
		3. *RAV v. City of St. Paul* (1992) (SCALIA): pg 658, burned cross inside fenced yard of black family, local ordinance prohibited placing symbols on public or private property that one knows or should know arouses anger…on the basis of race, creed, color, religion, or gender
			1. SC strikes down the ordinance b/c it put special prohibitions only on certain areas
			2. Society does permit restrictions upon the content of speech in a few limited areas that are of such slight social value
			3. **Fighting words**: personal insults that are likely to cause retaliation, 1st Amendment does not protect
			4. A state can prohibit what is ‘the most patently offensive’ but not obscenity which includes offensive political messages
			5. Ct indicated that generally content-based distinctions within categories of unprotected speech (fighting words) must meet strict scrutiny
		4. Both of the above are forms of content regulation, hence the State’s restrictions were not allowed
		5. *US v. O’Brien* (1968) (WARREN): pg 663, draft card burning
			1. Major issue is extent to which the Constitution protects ‘symbolic speech’
			2. SC upheld conviction for burning draft card on the ground that gov’t had valid reasons for protecting draft cards that had nothing to do with his message
			3. 4-part test for when speech and non-speech elements are combined. Gov’t regulation sufficiently justified if:
				1. Within the constitutional power of the Gov’t
				2. Furthers an important or substantial gov’t interest
				3. Gov’t interest is unrelated to the suppression of free expression
				4. Incidental restriction on 1st amendment freedoms is no greater than is essential to the furtherance of that interest
	3. Regulation of **Political Expression**
		1. Illegal Advocacy
			1. Historically, most stringent controls on speech are imposed during periods of national emergency
				1. *Masses Publishing Co. v. Patten* (1917) (LEARNED HAND): pg 665, post office refused to mail a magazine on grounds that its contents would hamper war effort, supported by Espionage Act of 1917. SC construed statute narrowly to criminalize only speech or writings that on their face constituted a direct incitement to violent resistance to the law
				2. *Schenck v. US* (1919) (HOLMES): pg 665, mailed leaflet to draft-age men arguing that draft violated 13th Amendment, SC announced the ‘clear and present danger test’ and found it satisfied, said leaflet was not protected

Original Clear and Present Danger Test: character of every act depends upon the circumstances in which it is done. Q is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Requires a particularized showing of an immediate threat of serious harm

* + - * 1. Turning point was the next case. Holmes’ dissent announced a bold new perspective, Brandeis concurs.
				2. *Abrams v. US* (1919) (CLARKE): pg 666, charged with violating Espionage Act after distributing leaflets. SC upholds charge. HOLMES’ dissent said a silly leaflet is not an immediate danger, and we cannot just prohibit things that we don’t like
				3. *Gitlow v. New York* (1925): pg 669, Ct upholds conviction of Gitlow for violating a law prohibiting criminal anarchy when he helped publish a pamphlet.

1st opinion where Ct held/assumed that 1st is applicable to states via the 14th

Applied clear and present danger test to find a clear and present danger b/c his ideas might incite a governmental overthrow

Holmes, Brandeis dissent that every idea is an incitement

* + - * 1. *Whitney v. California* (1927): pg 669, Ct upheld conviction for criminal syndicalism of a member of Communist Labor Party for attending meetings. Brandeis’ opinion was technically a concurrence but rejects the majority reasoning, his language gives weight to the freedom of speech means free to dissent and argue unpopular things. Watch as this becomes discredited.
				2. During post-war Red Scare, Ct upholds state repression. But by the 1930s, Ct becomes libertarian and takes up Holmes/Brandeis’ views. Ct adopts ‘clear and present danger’ test.
				3. *Dennis v. US* (1951) (VINSON): pg 671, variety of actions taken to suppress Communist influences, SC backed these efforts, Vinson watered down clear and present danger test to say that since an eventual Communist revolution would be a disaster, not much was required in the way of present risk to justify suppression of the party. Harm may be balanced against risk.
				4. *Yates v. US* (1957) (HARLAN): pg 671, those to whom the advocacy is addressed must be urged to *do* something, rather than merely to *believe* in something
				5. *Brandenburg v. Ohio* (1969) (PER CURIAM): pg 672, leader of KKK prosecuted for burning large cross, newsmen filmed it, other than burning and vague comments there were no non-KKK members present and nothing specifically actionable

**CURRENT CLEAR AND PRESENT DANGER TEST** - “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”

Imminent harm

Likelihood of producing illegal action

Intent to cause imminent illegality

SC struck down the act under which the KKK member was prosecuted

Does *Bradenburg* mean the clear and present danger test allows radical political expression to be suppressed as soon as it shows signs of becoming effective?

* + - * 1. *Virginia v. Black* (2003) (O’CONNOR): pg 674, KKK members convicted of violating Virginia’s cross-burning statute at a KKK rally

**FIGHTING WORDS / TRUE THREATS**: statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals

These tend to be hard to uphold, b/c the statute is often overbroad or vague

SC upholds. Unlike *RAV*, VA statute does not single out areas where you can or can’t burn the cross, it just doesn’t allow it b/c it is a particularly virulent form of intimidation

Thomas dissents b/c this isn’t a 1st amendment case – statute prohibits conduct, not expression

Different from *Brandenburg* b/c there it was an incitement (audience includes only potential participants), whereas here it was a threat (audience for a threat includes victims)?

* 1. **Campaign Expenditures**
		1. *Buckley v. Valeo* (1976): pg 685-ish, Ct struck down a lot of restrictions on money for political campaigns, holding that the 1st amendment does not allow us to level the playing field
		2. *McConnell v. FEC* (2003) (STEVENS, O’CONNOR): pg 688, gov’t ban on national parties’ involvement with soft money to prevent corruption of federal candidates and officeholders
			1. Concern that contributions have a corrupting influence
			2. Congress’ legitimate interest is curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence’
			3. Ability to form and administer separate segregated funds (PACs) gives corporations and unions sufficient opportunity to express advocacy. Statute is regulation, not a complete ban
			4. KENNEDY concurs/dissents, said this is directed towards corps and unions and thus is not neutral
			5. Fracture lines: status of speech by corps and unions, definition of corruption
		3. Future cases have been less receptive to campaign finance regulation
			1. Ct struck down 1997 Vermont law that imposed especially stringent limits on contributions and campaign expenditures (*Randall v. Sorrell*, pg 693)
			2. Closely divided Ct sharply contradicted the prohibition on union and corp advertising during the blackout period before elections (*FEC v. Wisconsin Right to Life*, pg 693)
			3. Ct struck down the ‘Millionaire’s Amendment’, said illegitimate any gov’t interest in providing a level playing field between wealthy and less wealthy candidates (*Davis v. FEC*, pg 694)
		4. *Citizens United v. FEC* (2010) (KENNEDY): supplement pg 51, §441b made it a felony for all corps to expressly advocate the election or defeat of candidates or to broadcast electioneering communications during the blackout period
			1. Ct struck it down as censorship, said PACs are insufficient b/c it is a separate association from the corp
			2. Dissent said that the difference between corporate and human speaker is huge and important
	2. **Fighting Words and Hate Speech**
		1. *Cohen v. California* (1971) (HARLAN): pg 702, Cohen convicted of disturbing the peace b/c he work a jacket with the words ‘Fuck the Draft’
			1. Harlan, the great conservative, wrote the opinion and began with a discussion of what this case was not about. Things which are outside the 1st amendment
				1. Statute was applicable throughout the state, not just in the courthouse, so presumably Cohen had sufficient notice of the statute
				2. Widely accepted that time, place, people, and manner restrictions can be regulated

Prison authorities, military personnel, high schools

* + - * 1. Obscenity cases. Could regulate obscenity if you could show a social purpose. This was not obscenity b/c at the time, obscenity required some sort of eroticism
				2. Fighting words (*Chaplinsky*). States can ban use, without having to show more, of fighting words, those personally abusive epithets that would provoke a violent reaction, must be clearly directed towards one person in particular (face-to-face), violent reaction can be physical or emotional

Ct has never overturned *Chaplinsky*, but also never enforced. Ct usually finds that they were too vague or overbroad, or has found that laws prohibiting some words – like prohibition based on race or gender – are impermissible as content-based restrictions

* + - * 1. Loud noises.
				2. At this point, the opinion allows expansive speech.
				3. Other exceptions: speech would create a clear and present danger of imminent lawless action, speech constitutes defamation, false or deceptive advertising
			1. Question is whether the state can legislate civility: whether CA can exercise, as ‘offensive conduct’, one particular scurrilous epithet from the public discourse
			2. Constitutional right of free expression is powerful medicine, fundamental societal value, ‘surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us…often true that one man’s vulgarity is another’s lyric’
				1. Cites to *Whitney v. California*, Brandeis’ opinion: It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. (Brandeis dissent in *Whitney*) … That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.
			3. We leave it to the individual to say what words mean. State cannot decide matters of taste and connotation
			4. Blackmun, Burger, White, Black dissent, choosing to avoid the 1st amendment issues by claiming that it was conduct and not speech
		1. Why regulate hate speech?
			1. Hate speech does little to promote First Amendment values
			2. More speech is rarely a reasonable solution
			3. Not always true that in an “unregulated marketplace of ideas” the best ones will rise to the top and gain acceptance; experience tells quite the opposite.
			4. When we allow hateful speech, the burden falls most heavily on the burdened class
				1. HOWEVER: often, race related statutes are used against the protected class
	1. Procedural Aspects
		1. Even if a speech restriction would otherwise be permissible, may be struck down b/c it takes the form of a prior restraint or b/c it is badly drafted
		2. **Prior Restraints**
			1. Administrative system or a judicial order that prevents speech from occurring
				1. Usually things that require a license or permit before one may engage in expression
				2. Injunctions stopping speech
			2. Idea is to prevent previous restraints on publication, not subsequent punishment
			3. Heavy presumption against its constitutional validity
				1. Ask whether there is some special societal harm that justifies the restraint: national security, preserving fair trial, contractual agreements , military, obscenityy
			4. Prior restraint worse than subsequent punishment
				1. Can’t even get your idea into the public debate
				2. *Near v. Minnesota* (1931) (HUGHES): pg 735, newspaper had charged that certain officials had been protecting local gangsters and called for a special grand jury, gov’t obtained an injunction forbidding the publication. Ct struck down injunction and said subsequent punishment would take care of the issue, said injunctions should be allowed only in exceptional cases
				3. *Shuttlesworth v. City of Birmingham* (1969) (STEWART): pg 736, civil rights marchers convicted under ordinance that gave complete discretion to city officials over parade permits, marched w/o a permit. Ct reversed conviction b/c without narrow, objective, and definite standards to guide the licensing authority, it is unconstitutional

Licensing schemes must be related to an important gov’t interest, contain procedural safeguards, and not grant officials unbridled discretion

* + - * 1. *NY Times v. US* (1971) (PER CURIAM): pg 736, NY times wanted to publish facts from Pentagon papers, gov’t sought an injunction. Ct clearly says this is a prior restraint and cannot be allowed, denies injunction. Didn’t matter that the info was classified and stolen, the point is that you cannot restrain it

4 of the judges (Black, Douglas, Brennan, Marshall) would have reversed on the spot as violation of the 1st amendment

2 (Stewart, White) more cautious

3 dissent (Burger, Harlan, Blackmun) that Ct decided case too quickly, feared release of papers would have serious repercussions

* + - 1. Injunction should be scrutinized somewhere between strict scrutiny and content neutrality (*Madsen v. Women’s Health Center*, pg 738)
		1. Vagueness and Overbreadth
			1. Void-for-vagueness: must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute, unduly vague laws violate DP
				1. Really a DP issue – can’t adjust your conduct b/c you don’t know what to adjust it to
				2. When freedom of speech is involved, this is doubly a problem. Violates DP and chills your speech, effectively enjoining you without actually being enjoined
				3. Fairness – unjust to punish without providing clear notice what behavior was prohibited
				4. Give enforcement authorities too much discretion (*Papachristou*, pg 739 – made it a crime to be a vagabond, habitual loafers, etc)
				5. Powerful tool b/c greater precision is required when laws regulate speech, allows facial challenges to laws even by those whose speech otherwise would be unprotected
			2. Overbreadth: broader than needed, statute might be precise but it is too broad
				1. Ct upheld state law restricting political activities by public EEs, White’s opinion said that overbreadth must be real and substantial (*Broadrick v. Oklahoma*, pg 740)
				2. *Board of Airport Commn’rs v. Jews for Jesus* (1987) (O’CONNOR): LAX banned all 1st amendment activities within the airport, Ct bans for violating 1st amendment

Vague, but not that vague. Just crazy overbroad.

Sweeping bad would be extremely chilling and give too much arbitrary discretion

* + - * 1. Look for things where the law would prohibit constitutionally protected speech
				2. Person challenging has the burden of proof
			1. Standing rules are different. Ct has developed a rule that you don’t have to be the person prosecuted to bring suit. Allows someone already in court to bring suit because they are already there.
1. Freedom of Association
	1. Not absolute. Infringement may be justified by compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive

Full Faith and Credit Clause has three requirements:

* Court that rendered the judgment must have had personal and subject matter jurisdiction
* Judgment must have been on the merits
* Judgment must be final

|  |
| --- |
| Sources of Congressional Power |
| Gov’t Action | Source of Power |
| Congress enacts divorce laws for the Dist. of Columbia | General federal police power for DC (as well as military bases and federal lands) |
| Congress pays for highways | Spending power and commerce clause |
| Federal income tax | Taxing power |
| Congress conditions aid to states for medical programs on state funding of AIDS research | Spending power |
| Congress adopts a tax to regulate banknotes rather than to raise revenue | Power to coin money |
| Congress bars racial discrimination at place of public accommodation | Commerce clause |
| Congress requires all employers, including state gov’ts, to comply with federal minimum wage and overtime provisions | Commerce clause |
| Note: Amendments to the Constitution may also be a source of power |

|  |
| --- |
| State Action vs. No State Action |
| State Action | No State Action |
| Public Function |
| Running a town | Running a shopping mall (does not have all attributes of a town) |
| Conducting an election | Holding a warehouseman’s lien sale |
|  |
| Significant State Involvement |
| Enforcing restrictive covenants prohibiting sale or lease of property through use of state courts | Granting a license and providing essential services to a private club |
| Leasing premises to a discriminatory lessee where state derives extra benefit from the discrimination | Granting a monopoly to a utility |
| Allowing state official to act in a discriminatory manner under color of state law | Heavily regulating an industry |
| Administering a private discriminatory trust by public officials | Granting a corporation its charter and exclusive name |

Other ‘great’ justices: Brennan, Douglas, Harlan (both), Holmes, Cardozo, Brandeis

|  |
| --- |
| Current SC Justices |
| CJ Roberts (replaced Rehnquist)  | ConservativePragmatistStrong federalist society tilt |
| Scalia | Conservative |
| Alito | Conservative (texan) |
| Thomas | Conservative |
|  |  |
| Kagan (F) (replaced Stevens) | Liberal |
| Ginsburg (F) | Liberal |
| Breyer | Liberal |
| Sotomayor (F) | Liberal |
|  |  |
| Kennedy | Swing vote |