

Constitutional Law Outline

Relationship of Sovereign States to Federal Government of Limited Power

I. Course Coverage:

- a. Article II. – Judicial Powers
- b. Article VI. - Supremacy Clause
- c. Article I. – Congressional Powers
- d. 9, 10, 11th Amendments – Fed/State Retained Powers
- e. Article IV. - Privileges & Immunities
- f. Article II. – Executive Powers
- g. 5th and 14th Amend – Substantive Due Process

II. Judicial Powers - Article III



a. **Judicial Review**

- i. *Marbury v. Madison*
 1. Chief Justice Marshall outlines court's power of judicial review
 2. Constitution is fundamental & paramount law of nation and a legislative act repugnant to the constitution is void
 3. Writ of mandamus = judicial remedy, a court order to government official or to a lower court to do some act
 4. Context : Jeffersonian Republicans v. Adams Federalists

b. **Authority to Review State Court Judgments**

- i. *Martin v. Hunter's Lessee*
 1. Need harmony between states regarding federal law and constitutionality
 2. State court judges make oath to uphold constitution – supremacy argument again
- ii. *Cohens v. Virginia*
 1. Confirming Martin, SCOTUS can even review criminal cases

c. **Exclusivity in Constitutional Interpretation**

- i. *Cooper v. Aaron* 1958
 1. Re: *Brown v. Board of Education* ruling to desegregate schools – Arkansa gov. deploys state guard to prevent integration of Little Rock schools
 2. Legislature cannot nullify or go around a SCOTUS ruling on constitutionality by making a law that circumvents their decision
 3. Affirm supre
 4. macy in Marbury
 5. “no state legislature or executive or judicial officer can war against the constitution without violating his undertaking to support”
 6. “permanent and indispensable feature of our const” that the federal judiciary is supreme and interprets the law
 7. non-litigants have to obey SCOUT order as well
- ii. *Dickerson v. U.S.*
 1. Any legislation passed in conflict with SCOTUS decision is unconstitutional
 2. Congress tried to pass a federal statute to overturn *Miranda v. Arizna* decision – NOT okay!

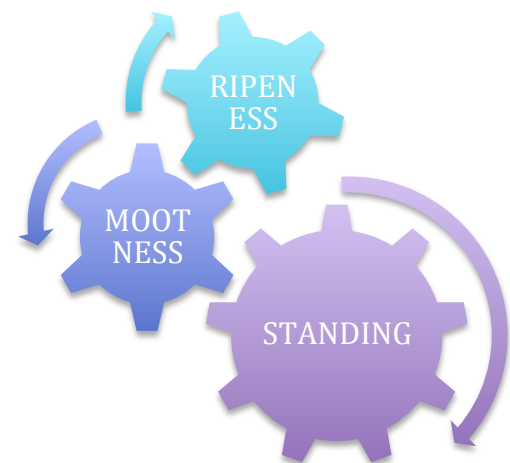
d. Limits on Constitutional Adjudication

i. Political Checks on SCOTUS:

1. **Appointment process:** nomination & confirmation
2. **Impeachment** (occurs in leg. Branch)
3. **Structural changes** (“switch in time”)
 - a. Switch in time saved 9 – FDR wanted to add judges because SCOTUS kept blocking new deal legislation. Threat of change to court made court start to rule in favor of FDR’s policies
4. Congressional changes to appealte jurisdiction (“**court-stripping**” *Ex Parte v. McCardle*)
5. **Constitutional amendment** could overturn a SCOTUS decision

ii. Art. III “Cases or Controversies” Reqs:

1. Is the right *person* litigating?
 - a. **Standing** = legal determination that the party in the case may bring the action
2. Is it the right *time* to litigate?
 - a. **Ripeness** = ready for adjudication, prevents premature adjudication. Dispute is insufficiently developed and is too remote or speculative to warrant court action.
 - b. **Mootness** = can’t be too late for adjudication to make a difference
 - i. Exceptions
 1. capable of repetition but evading review (*Roe v. Wade*)
 2. voluntary cessation of a challenged practice does not deprive the court of its power to determine the legality of the practice.



iii. **Standing:**

1. **INJURY** in fact

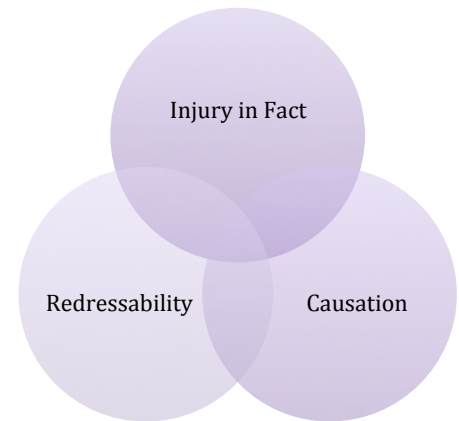
- a. *Clapper v. Amnesty International* (Supp pg 1)
 - i. Threatened injury was not certainly impending
 - ii. Self imposed injury & hypothetical injury
- b. *U.S. v. Windsor*
 - i. There is standing
 - ii. DOMA act, taxes, IRS
 - iii. The govt does have standing because the IRS would have to pay taxes, act required

2. **CAUSATION**, causal connection between injury and legislation

- a. *Lujan v. Defenders of Wildlife*
- b. *Allen v. Wright*
 - i. Tax exceptions, private schools still get money from govt but are segregating
 - ii. Parents didn't have proper standing because causation link
 - iii. Possibly don't use this case cuz fucked up

3. **REDRESSABILITY**. Must be likely that the injury will be redressed by a favorable court decision

- a. Inability to alleviate the injury tantamount to rendering an advisory opinion
- b. *Massachusetts v. Environmental Protection Agency*



iv. **Prudential Standing Requirements**

(Not mandated by const. but considered by the court improve judicial efficiency)

- 1. No assertion of 3rd party rights (jus tetii)
- 2. No adjudication of generalized grievances
 - a. *Hollingsworth v. Perry*
 - i. Prop 8 supporters intervene in the case but don't have standing to hear this case
 - ii. Generalized grievance is not enough
- 3. When standing is authorized by federal statute the plaintiff must be with zone of interest
 - a. **Zone of interest** = within the class of persons/harm contemplated by Congress as a beneficiary of the statute
- 4. No political questions
- 5. No advisory opinions
 - a. Prudential Standing Cases:
 - i. *Craig v. Boren*
 - ii. *Flast v. Cohen*
 - iii. *FEC v. Aikens* – zone of interests
 - iv. *Vermont, qui tam*
 - v. *Raines v. Bird* – no standing
 - vi. *Bond* – can challenge indictment even if no state involved

vii. Laird – ripeness

v. Countermajoritarian Doctrine

1. The idea that SCOTUS should not be able to undo a law enacted by Congress because it was made under the authority of the majority of people who voted those representatives into office

vi. **No Political Questions**

1. Issues committed by the Constitution to another branch of govt; or
2. Inherently incapable of resolution by the judicial process.
3. *Baker v. Carr* (56), an issue is a political question IF:

PACERS

1. Textually demonstrable, its written in the **Constitution** that someone else has that power;
2. Lack of judicially discoverable and manageable Standard;
3. Impossibility of deciding without initial **Policy** determination;
4. A lack of **Respect** to coordinate branch;
5. Unusual need for **Unquestioning Adherence** to a political decision already made; or
6. Potential **Embarrassment** from multiple branches making announcements on one question



4. Situations in which political questions may arise:
 - a. Foreign relations
 - b. Existence of hostility
 - c. Constitutional amendments
 - d. Guaranty clause

III. Federalism I: Federal Sovereign Power

a. **Values Served by Federalism:**

- i. Autonomy
- ii. Checking concentrated power
- iii. Localism
- iv. Citizen choice
- v. Experimentation
- vi. Political accountability

b. Federalism Doctrines [Separation of Power]:

- i. Vertical separation of power (fed/states)
- ii. Horizontal separation of powers (fed branches= jed/leg/exec)

c. Background:

- i. Each level of government had distinct contributions to make to national welfare
- ii. Framers expected the default norm to be states regulating most aspects of public policy
- iii. Post Civil War there was a rise in national regulatory agencies, new deal, limits state power & shifts to federal power
 - 1. Ex. 14th amendment interpreted as entire Bill of rights applying to the states

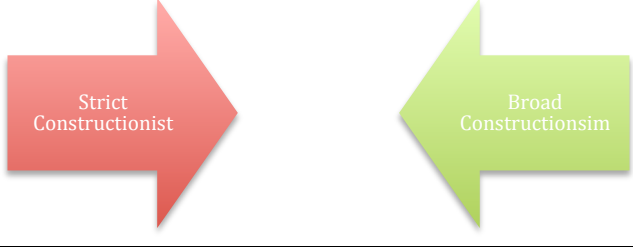
d. Police Power

- i. States have general police power to regulate any health, safety, welfare, moral or aesthetic interest.
- ii. Fed does not – fed must use an enumerated power. (could use tax & spend...)

e. Supremacy Clause – Art. VI, Cl.2

- i. The Constitution, treaties, and laws of the United States are the “supreme law of the land”
- ii. A federal law will supersede any state law in direct conflict
- iii. Congress can PREEMPT any state law in an area in which exercise of federal power is constitutional
 - 1. States may enact similar legislation to a fed one if:
 - a. Congress did not intent to occupy the field completely; and
 - b. State law is not otherwise preempted
 - 2. States can legislate more stringent standards than those mandated by federal law
 - a. If congress created a min standard (health & safety reqs for food/drugs, or roads/highways)

Congress Expressly Excludes States =	Congress Regulates but Does not Exclude States =
Express Preemption	Field preemption OR Conflict Preemption (implied preemption)

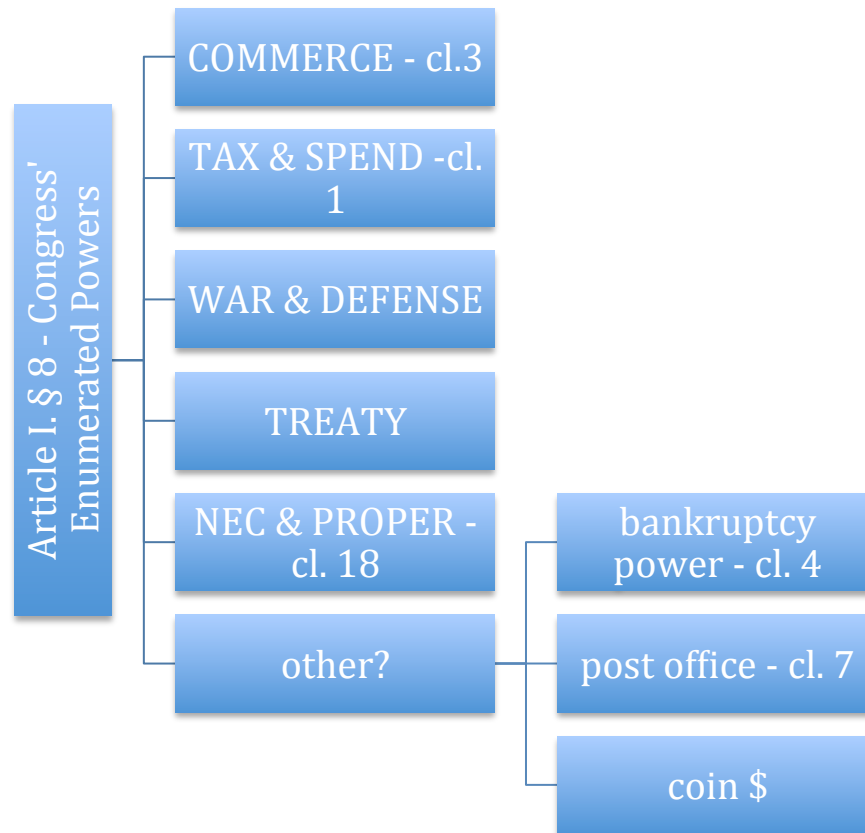
- f. Privileges & Immunities “Comity Clause” – Art. IV § 2 cl. 1
- i. “The Citizens of each state shall be entitled to all Privileges & Immunities of Citizens in the several States” (274)
 1. aka – states can’t discriminate against non-residents
 - ii. Similar to DCC...but NOT the same
 1. No protection for corporations
 2. Congress can’t legislate around P&I
 3. Only FUNDAMENTAL economic or liberty rights
 4. No market participant exception
 - iii. *Supreme Crt NH v. Piper*
 1. Woman lived very close to border but couldn’t be admitted to state bar even though she passed the bar, lived only a few miles from border in that state because bar admission was only for in-state residents
 - iv. *Saenz v. Rose* (see again later in SDP)
 1. Woman challenged CA residency year requirement for receiving welfare benefits, unconstitutional
 - v. *Camden Construction Case*
 - 1.
- g. Guaranty Clause – Art. IV § 4
- i. “The U.S. shall guaranty to every state in this union, a republic form of government”
 1. SCOTUS decided that the legislative branch is supposed to enforce this clause (*Luther v. Bordan*)
- h. Necessary & Proper Clause - Art. I § 8 cl. 18
- i. Congress has power to make all laws necessary and proper for carrying into execution any power granted to any branch of the federal government
 - ii. Interpretations of N&C:
 1. **Strict Constructionist** (Jefferson) v.
 - a. limit the scope of the powers exercised by national government as closely as possible to powers enumerated in the constitution
 2. **Broad Constructionism** (Hamilton)
 - a. expanding powers available to government
 3. **Structuralism** (Madison)
 - a. necessary & proper clause is superfluous, framers intended to restrict the scope of national government implied power to powers incidental to express powers
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The diagram consists of two large, stylized arrows pointing towards each other. The left arrow is red and contains the text 'Strict Constructionist'. The right arrow is green and contains the text 'Broad Constructionism'. Below the arrows is a horizontal line.
- iii. *McCulloch v. Maryland* (75)
 1. Yes Congress has power to charter a national Bank because congress has power to tax and spend, Chief Justice John Marshall

2. Maryland could not tax the national bank – Supremacy clause argument
- iv.
- v. ***United States v. Comstock*** (99) – (memorization device: “if you get a **Rat** or **Mouse** stuck under your car, it is necessary & proper to call **AAA**”)
1. Did the necessary & proper clause give authority to congress to commit sex offenders under Adam Walsh Child Protection Act? Yes...
 - a. Federal commitment and prisons are regulated by federal government
 2. Broad scope given to Congress under Necessary & Proper
 - a. N&P clause grants congress broad authority to enact federal legislation that is “convenient, or useful” or “conducive” to Congress’ beneficial exercise of a constitutionally enumerated power
 3. 5 considerations is beyond scope of nec & prop:
 - a. does the statute constitute a means that is **Rationally Related** to the implementation of a constitutionally enumerated power?
 - b. **Modest addition** to existing law
 - c. **Reasonably Adapted** to congress’ power to act
 - d. Statue **properly Accounts for states** interests
 - e. Link between the statues & the enumerate Art. I power are **not too Attenuated**
- vi. ***NFIB v. Sebelius*** (101)
1. Government relied on commerce power + nec & prop clause, not allowed
 2. Chief justice Roberts rejected govt arg, stressed that federal action must be necessary and proper, Obamacare was NOT proper use of nec & prop

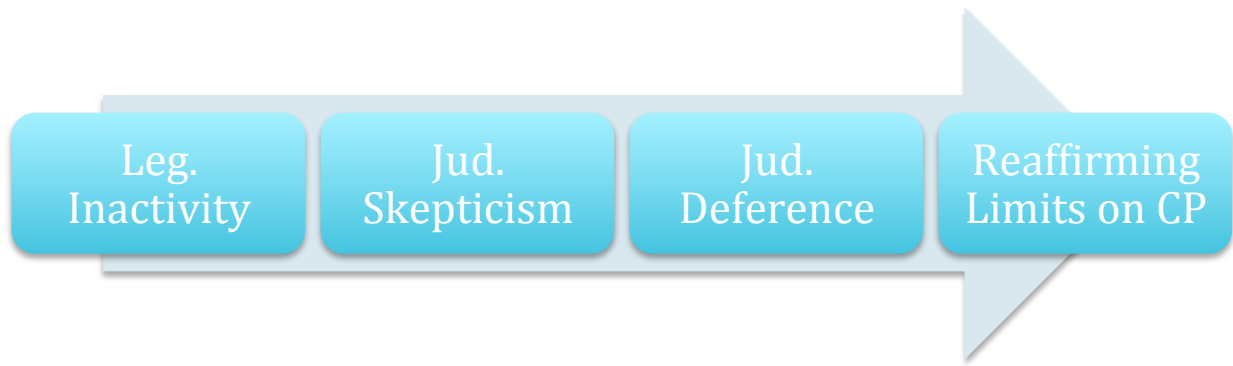
IV. Congress' Legislative Powers – Article I §8

- a. Check on the validity of federal legislation:
 - i. What **enumerated power**?
 - ii. Federalism Limits: **10th and 11th Amendments**



b. Commerce Power (Art. I §8 cl. 3)

- i. Congress has the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”
- ii. 4 eras of SCOTUS Commerce Analysis:
 1. 1800 – 1890: Legislative Inactivity
 2. 1887-1937: Judicial Skepticism
 - a. Industrial Revolution, Laissez faire trumps
 3. 1937 – 1995: Judicial Deference
 - a. whatever go for it congress, New Deal
 4. 1995 – Present: Reaffirming Limits on Commerce Power



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- iii. Under C.P. Congress can regulate:
 - 1. Channels;
 - a. Highways, waterways, air traffic
 - 2. Instrumentality; &
 - a. Cars, trucks, ships, planes
 - 3. Activities that substantial effect interstate commerce
 - a. Regulating activity is “economic” in nature; and
 - i. “Quintessentially Economic”:
 - 1. Produced
 - 2. Distributed
 - 3. Consumed
 - b. Regulated activity has an aggregate effect on interstate commerce (*Wickard*)
- iv. Modern Commerce Power Test:
 - 1. An underlying economic activity that substantially affects interstate commerce.
 - a. Jurisdictional elements (nexus)
 - b. Congressional findings
- v. Old Timey Cases:
 - 1. ***Gibbons v. Ogden*** (110) = navigation is a channel of interstate commerce, anything that passes between 2 states
 - 2. *Shreveport Rate Case* (113) = crt sustained Congress’ authority to regulate intrastate rail rates that discriminated against interstate railroad traffic
 - 3. *NLRB v. Jones & Laughlin Steel Corp.* (125) = court starts to change its approach to commerce clause after the New Deal , allows the federal government to regulate hours & wages
 - 4. *US v. Darby* (127) = lumber manufacturer, fair labor standards act of 1938 to regulate the hours and wages of employees in local manufacturing activities
 - 5. ***Wickard v. Filburn*** (130)
 - a. Broadest interpretation of the commerce clause
 - b. wheat case farmer who grew wheat for himself, Court said that he did effect interstate commerce in the aggregate
 - c. Congress can regulate purely intrastate activity that is not itself “commercial” in that it is not produced for sale, if it concludes that

failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity

d. Aggregate effect

vi. Civil Rights Cases:

1. ***Heart of Atlanta Motel v. U.S.*** (133)
 - a. Hotels are an instrumentalities of interstate commerce
2. ***Katsenbach v. McClung (Ollie's BBQ)***
 - a. So much of the meat was from out of state

vii. Contemporary Cases:

1. ***Perez v. U.S.*** (135)
 - a. C.P. valid use to prohibit "loan sharking" because those transactions are a major source of revenue for organized crime and organized crime had an adverse effect on interstate commerce
2. ***U.S. v. Lopez*** (136) = must be economic activity involved that substantially affects interstate commerce
 - a. Gun Free School Zones Act of 1990
 - b. Structuralist argument
 - c. Rational basis test...
3. ***U.S. v. Morrison*** (144)
 - a. Violence Against Women Act of 1994
 - b. Inappropriate use of commerce power
 - c. Jurisdictional nexus = congress puts language in the state to explicitly say that it is under the commerce power
 - d. Congressional findings, but that is not enough
 - e. Police power reserved for the states
4. ***Gonzales v. Raich*** (149)
 - a. Pot growing, okay to regulate a illegal market
 - b. Used arguments in *Wickard v. Filburn* to say that people
 - i. Dissent = states are laboratories, courts definition of economic activity threatens to sweep all productive human activity into federal regulatory reach
 - c. Extended the economic-noneconomic distinction emphasized in *Morrison*, allowed fed govt to aggregate the effects of home grown marijuana at home for personal consumption in noneconomic
5. ***NFIB v. Sebelious*** (157)
 - a. individual mandate does not regulate existing commerce activity
 - b. failure to act is not an economic activity
 - c. "the commerce clause is not a general license to regulate an individual from cradle to grave"

c. Taxing & Spending Power - Art. I § 8 cl. 1

i. Taxing & Spending Power

1. Congress has the "power to **lay & collect taxes**, duties, imposts & excises to **pay** the debts **and provide** for the common defense and general welfare."

2. Modern judicial trend is to uphold any tax as valid if it is in fact a revenue-raising measure

ii. Taxing Power as a Regulatory Device

1. Child Labor Case

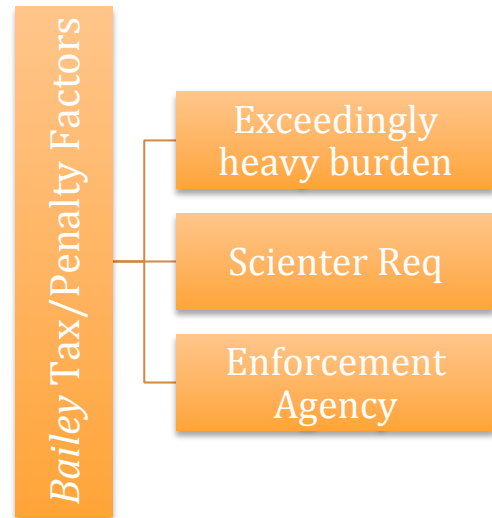
(*Bailey v. Drexel*)

- a. **Tax v. Penalty**

Factors:

- i. **Exceedingly heavy burden**
- ii. **Scienter requirement**
(intent of wrongdoing, look to legislative intent)

- iii. **Enforcement agency** (payments made to enforcement agency)



2. *US. Kahriger* (191)

- a. Unless there are any penalties extraneous to any tax need, court are without authority to limit exercise of taxing power
- b. The tax amount needs to be negligible AND the tax needs to discourage or deter an acidity to blur the line

3. *NFIB v. Sebelius* (193)

- a. even though congress called it a "penalty" it is a TAX and that is okay because it passes the 3 part Bailey test
- b. IRS is the one that implements

4. *McCray v. U.S.*

- a. Upheld a discriminatory tax on colored oleomargarine even though Congress did not have the power to regulate its production directly

iii. Spending Power as Regulatory Device

1. Congress can use S.P. to require states to comply with specified conditions in order to qualify for federal funds

2. *U.S. v. Butler* (197)

- a. Attempt to limit cotton production, Agriculture Adjustment of 1933 – sought to stabilize prices by curtailing ag production
- b. Govt gives \$ to farmers who don't grow cotton
- c. Act held as unconstitutional because it is attempting to regulate and control argr production which is an area reserved for state power
- d. Butler Court went with a Hamiltonian reading of article 1 spending clause

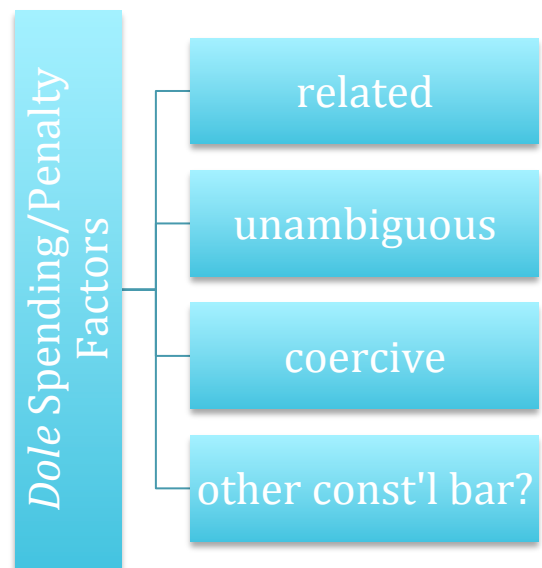
3. *Charles C. Steward Machine Co. v. Davis*

- a. Payroll tax on employers

- b. Motive or temptations is NOT coercions
 - c. Purpose of the act is to safeguard the treasury
4. *Helvering v. Davis* (202)
- a. “the discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power”
 - b. incredibly deferential, the difference between local and general welfare is up to Congress, court can only overtrun if the choice is “clearly wrong” and displa of arbitrary power
5. *South Dakota v. Dole* (204)
- a. SD had a lower drinking age, Congress wouldn’t give tax money of fed highways to states that did not have the fed drinking age, promote safe roads

b. **Dole Factors:**

- i. Is the condition **related** to the expenditure?
- ii. Is the condition expressed in an **unambiguous** manner?
- iii. Is the financial inducement so great as to be **coercive** or compulsory?
- iv. Are **other constitutional concerns** raised?



6. *NFIB v. Sebelius* (209)
- a. This is too much, goes too far – taking all of Medicaid funding
 - b. Gun to the head standard (216):
 - i. Conditions do not limit how states used funds
 - ii. Fed threat at issue was the removal of an independent pre-existing grant, rather than future denial of potential funding
 - iii. The threatened removal was a large amount of funding
 - iv. The change in Medicaid program was a change in kind rather than a degree
 - v. The states were purportedly unable to predict the new conditions upon initially receiving the funds

V. War & Treaty Power – Art. 1 §8

- a. War/Defense Power:
 - i. “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”
 - 1. declare war;
 - 2. raise & support armies;
 - 3. provide & maintain a navy; &
 - 4. organize, arm, discipline & call forth a militia
- b. ***Woods v. Cloyd W. Miller Co.*** (399)
 - i. War power extends beyond war – setting rent control is constitutional
 - ii. Very broad authority to initiate whatever measures Congress deems necessary to provide for the national defense, in peacetime as well as wartime
- c. ***Missouri v. Holland*** (401)
 - i. Migratory Bird Treaty Act
 - 1. Example of self executing treaty because it took effect without necessity of any further action by Congress beyond consent or ratification
 - 2. Treaties are declared to be so when made under the authority of the US
- d. ***Downes v. Bidwell*** (405)
 - i. Puerto Rico fruit case
 - ii. Natural v. artificial rights
 - iii. **Government is not bound by every provision of the constitution when it operates outside the US**

VI. Federalism II: 10th Amend & State Sovereignty Limits on Fed

- a. **10th Amendment**
 - i. **The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”**
- b. *Coyle v. Oklahoma*
 - i. Congress doesn’t have power to tell state where its capital should be
- c. *U.S. v. California*
 - i. “The sovereign power of the states is necessarily diminished to the extent of the grants of power to federal government in the Constitution.”
- d. *National League of Cities v. Usery* (166)
 - i. Federal government wanted to apply min wage law to state employees
 - ii. Crt accepted argument that there are some specific state activity that are integral to its operation is outside the reach of the federal government
- e. *Garcia v. San Antonio Metro Transit* (167)
 - i. Concurrence in National of Cities ins now the majority in Garcia
 - ii. Reject test a rule of state immunity from fed regulation that turns on a judicial appraisal of whether a particular government function is “integral” or “traditional”
- f. ***New York v. United States*** (170)
 - i. Low Level Radioactive Waste Policy required states to provide disposal of waste with 3 “incentive”

- ii. Upheld the monetary and access incentives, rules the third take title” sanction as unconstitutional
- iii. RULE = **commandeering** = when federal government requires states to LEGISLATE

g. ***Printz v. U.S.* (175)**

- i. Brady Handgun Violence Prevention Act held unconstitutional because it commandeered state & local law enforcement officers for performance of various acts required by the federal legalization
- ii. Unconstitutional to make states do background checks
 - 1. Making the states into puppets of the fed govt not okay
 - a. Reducing them to puppets of a ventriloquist Congress

h. ***Reno v. Condon* (178)**

- i. DMVs were selling info
 - 1. Distinction between laws regulating the states v. laws requiring the states to regulate their own citizens
 - 2. Distinguished from *Printz* because it was held that the owners of the database were responsible for protections, could be state could be anyone

i. **State Sovereign Immunity & 11th Amendment**

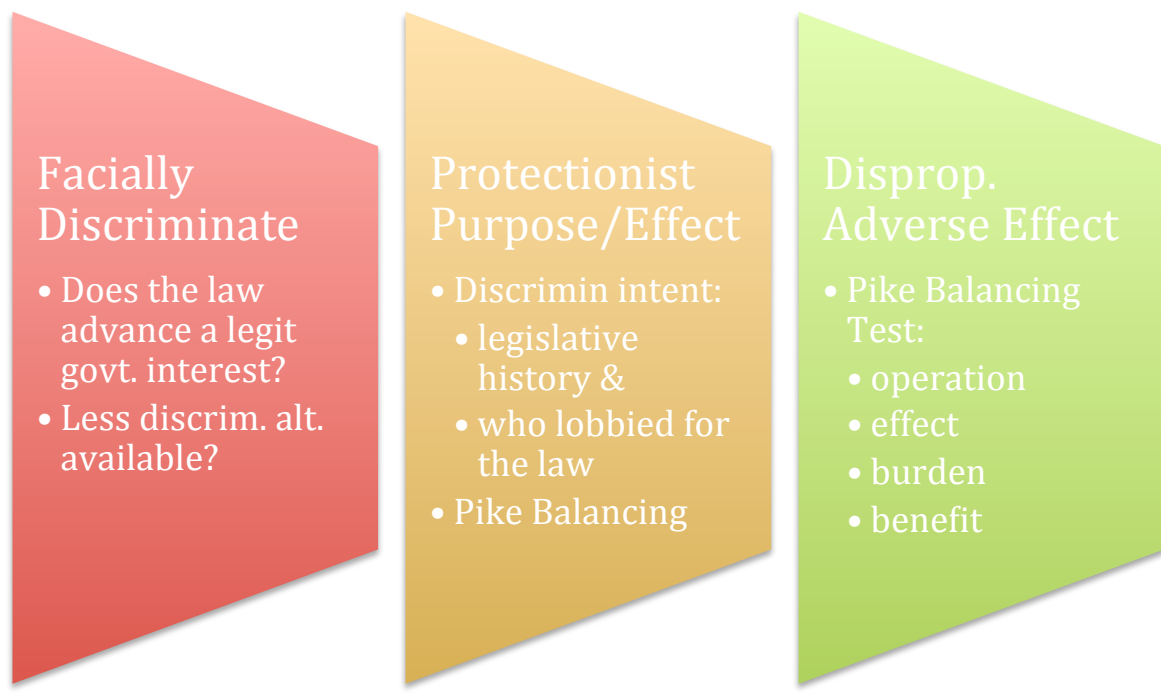
- i. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”
- ii. **Sovereign immunity** = can’t bring the king to court
 - 1. Essentially, you can’t sue a state
- iii. Basic 11th Amendment
 - 1. A citizen of a state cannot sue another state in federal court
 - a. A Texan can’t sue California
- iv. Expanded 11th Amend
 - 1. *Hans v. Louisiana*
 - a. The Californians cannot sue the state of CA in federal court
 - 2. *Alden v. Maine*
 - a. The Californians cannot sue state of CA on federal grounds in **state court**
 - 3. *Seminole Tribe of Florida v. Florida*
 - a. Congress cannot (generally) legislate around sovereign immunity, but in some rare instances they can get states to waive sov. Imm. With spending with strings attached
- v. **How to Bypass Sovereign Immunity:**
 - 1. State consents
 - 2. Suits against state officials for INJUNCTION only
 - 3. Cities are counties are not states, so they are not protected by sovereign immunity

VII. Federal Limits on Regulation of Commerce by States

a. Dormant Commerce "Clause"

- i. Dark side of the force, not a real clause, rather a doctrine established by the negative implications of the Commerce Clause (Art. 1 §8 Cl 3)
- ii. Congress is silent: no action, express or implied to make federal policy on a given subject matter
- iii. Constitution was framed under political philosophy that the several states are a union and need to "sink or swim" together

b. Modern Categories of DCC Challenge:



i. **Facially Discriminate**

1. FD laws are presumptively invalid UNLESS:

- a. They advance a legitimate local interest, AND
- b. there was no non-discriminatory alternative means to advance that interest

ii. **Impermissibly protectionist purpose or effect**

iii. **Disproportionate adverse effect**

iv. **Facially Discriminatory Cases:**

1. *Gibbons v. Ogden*

- a. Laid out the ground work for DCC, but upheld on other grounds

- i. Congress had legislated local waterways as area for states to legislate

2. *Wilson v. Black Bird Creek Marsh Co.* (226)
 - a. DE law allowed building of a damn, federal boat burst through, upheld state law. Building a dam is a valid function of the state
 3. *Cooley v. Board of Wardens*
 - a. Establishes DCC
 - b. Local law upheld for local carries to bring pilots on to ships and bring in harbor
 - c. Local v. national distinction (not used anymore)
 4. Railway cases:
 - a. *Southern Railway Co. v. King* (231)
 - i. GA safety law to blow your horn as going through town
 - b. *Seaboard Airline Railway v. Blackwell*
 - i. Had to stop 124 times in 123 mile trip
 5. *Philadelphia v. New Jersey* (233)
 - a. NJ prohibited out of state waste dumping, facially discriminatory because no out of state
 - b. Philadelphia won the NJ law was held to be invalid
 6. *Granholm v. Heald* (237)
 - a. Ice grape wine
 - b. Law invalid via DCC challenge the state law imposed regulatory burden on out of state wineries to sell wine
 7. *Maine v. Taylor* (238)
 - a. Successful quarantine exception
 - i. Keep different stuff out
 - b. Upheld law to ban Out of state bait fish because we didn't know what could happen to the environment
 - c. No alternative means
 8. *Chemical Waste Management v. Hunt*
 - a. Similar to Philadelphia, imposed fee on out of state hazardous waste
 9. *Oregon Waste Systems v. Dept. of Environmental Quality* (238)
 - a. Facially discriminatory taxes
 - b. Differential surcharge (tax) was facially discriminatory
 10. *West Lynn Creamery v. Healy* (239)
 - a. Facially discriminatory subsidies
 - b. State may not benefit in state economic interest by burdening out of state actors
 - c. Crt said it was a tax to make out of state milk more expensive and to try to make in state producers more competitive
 11. **Taxes**
 - a. *Complete Auto Transit v. Brady* (293)
 - i. Interstate commerce is NOT immune from state taxes IF: **connected, apportioned, no discrimination, and fairly related.**
 1. There is a substantial connection between the out of state biz & the taxing state;
 2. The tax is fairly apportioned;
 3. The tax does not discriminate against interstate commerce?
 4. The tax is fairly related to services provided by the taxing state
 - ii. Tax was upheld
- v. **Not Subject to DCC IF:**

1. A substantial nexus between out of state biz and out of state;
2. The tax is fairly apportioned;
3. Tax does not discriminate against interstate commerce; AND
 - i. And tax is fairly related to services provided

vi. **Home Processing Requirements**

1. *Dean Milk Co v. Madison* (242)
 - a. Emphasis on reasonable nondiscriminatory alternatives
 - b. Model Milk Ordinance was example of a less restrictive alternative, the city could achieve its legislative purpose another way
 - c. Invalidated Madison Wisconsin law that discriminated against instate and out of state
2. **Balancing Analysis**
 - a. Regulations not essential for protection of health interests, place a discriminatory burden on interstate commerce
3. *C&A Carbone, Inc v. Clarkstown* (244)
 - a. Ordinance has interstate economic effects
 - b. Landfill and waste transfer station regulation will have out of state effects, state law overturned
4. *United Hauler Association v. Oneida-Herkimer* (246)
 - a. Public utility distinction, sovereignty issues when state operates the biz
 - b. State law was upheld

vii. **Market Participant Exception**

1. “the market participation doctrine permits a state to influence a “discrete, identifiable class of economic activity in which [it] is a major participant.”
2. When a state/city acts as a market participant and not as a regulator, it may discriminate in favor its own residents
 - a. Buyer or seller of goods & services, OR
 - b. Subsidiary program
3. ***South-Central Timber Development v. Wunnickie*** (250)
 - a. 2 different markets at play: selling v. processing
 - b. AL was only in one of the markets, so when they acted in the other market they were being regulators
 - i. *Hughes v. Alexandria Scrap*

viii. **Facially NEUTRAL, DISCRIMINATORY INTENT**

1. *Baldwin v. GAR Seeling, Inc.*
 - a. Invalidated Milk Control Act set min milk prices in NY
 - b. Took away Ohio’s economic advantage
2. *HP Hood & Sons v. DUMond*
 - a. Boston milk distributor wants to build a 4th receiving depot in NY, curtails volume of interstate commerce
3. *Hunt v. WA State*
 - a. WA labels not accepted in NC, NC wanted to use the federal (lower) standard label
 - b. State was trying to take away WA’s competitive advantage in the apple market, but left NC unaffected

- c. Non discriminatory alternatives were available (i.e. use both stickers)
 - d. Burden = raised cost of doing biz in WA
 - 4. ***Bacchus Imports v. Dias***
 - a. Hawaii, removed liquor tax on Hawaiian liquors
 - i. **How to find discriminatory intent:**
 1. **Legislative history**
 2. **Who lobbied for the law**
 - 5. ***Exon v. Gov't of MD***
 - a. MD prohibited refiners & producers of gasoline from operating in MD
 - b. Anyone with a refinery couldn't have a gas station, but there were no in state refiners so it was okay
 - 6. ***Minnestoa v. Cloverleaf***
 - a. Couldn't sell milk products in plastic, had to be pulpwood container
 - b. Burden on out of state interest in minimal
 - c. Used "Pike"-like factors
- ix. **Facially NEUTRAL but with DISPROPORTIONATE ADVERSE EFFECT**
1. ***Pike v. Church***
 - a. AZ grown cantaloupes, compliance with state law was very costly for out of state producers
 - b. If law does NOT facially discriminate or discriminate in effect and law has "other credible objectives" apply Pike balancing test
 - c. **Pike Balancing Test: PIKE**
 - i. **OPERATION:** does the law regulate **evenhandedly?** (aka is law facially discrim?)
 - ii. **EFFECT:** are the interstate commerce effects **incidental?**
 - iii. **BURDENS:** Are burdens imposed excessive with relation to local benefits of the law?
 - iv. **BENEFIT:** If the law creates substantial benefits determine if the benefits are available with less discriminatory impact?
 2. ***Kassel v. Consolidated Freight (265)***
 - a. Not facially discrim, burdens interstate comm
 - b. Crt applies balancing test
 - c. Prohibited certain long trucks, law tried to limit length of trucks
 - d. Didn't actually prevent accidents in the state, burden out weighed the benefit

VIII. Executive Branch & Separation of Powers

- a. **Executive Powers** – Art. II § 1
 - i. "The Executive Power shall be vested in a President of the United States,"
 1. broad authority in Prez to **execute** laws
 - ii. ***Youngstown Sheet & Tube Co. v. Sawyer*** – Presidential power must issue from Constitution or act of Congress
 1. **Pursuant to Congressional Authority** - Article II + Congressionally delegated power (Valid)
 2. **Congressional Silence: Twilight Zone** – rely on independent powers

- a. Upheld as long as act does not take over powers of another branch or prevent another branch from carrying out task
- 3. To Act contrary to Congressional Direction – his powers minus congress’ powers

iii. Appointment Power – Art. II § 2

- 1. Prez nominates & appoints cabinet members, ambassadors, SCOTUS judges, and all other officers of US with “advice and consent” of Senate
- 2. Congress can delegate its approval power for “inferior” officers with Prez or heads of departments
 - a. *Buckley v. Valeo* (383) - Federal Election Campaign Act, Congress appoints FEC members not okay – its executive in nature
 - i. Ask what is the charge of the Administrative Body?
 - 1. **Enforcement power,**
 - 2. Rulemaking,
 - 3. Adjudication

iv. Removal Power

- 1. Constitution is silent, but **general rule is that Prez may remove any executive appointee without cause**
- 2. Congress has no power to summarily remove an executive officer
 - a. *Bowsher v. Synar*
- 3. *Humphrey’s Executor v. United States*
 - a. “quasi-legislative” or “quasi-judicial” positions are different and that Congress may limit the removal of these individuals

v. Veto Power

- 1. Federal Law Making Process (Art I §7)



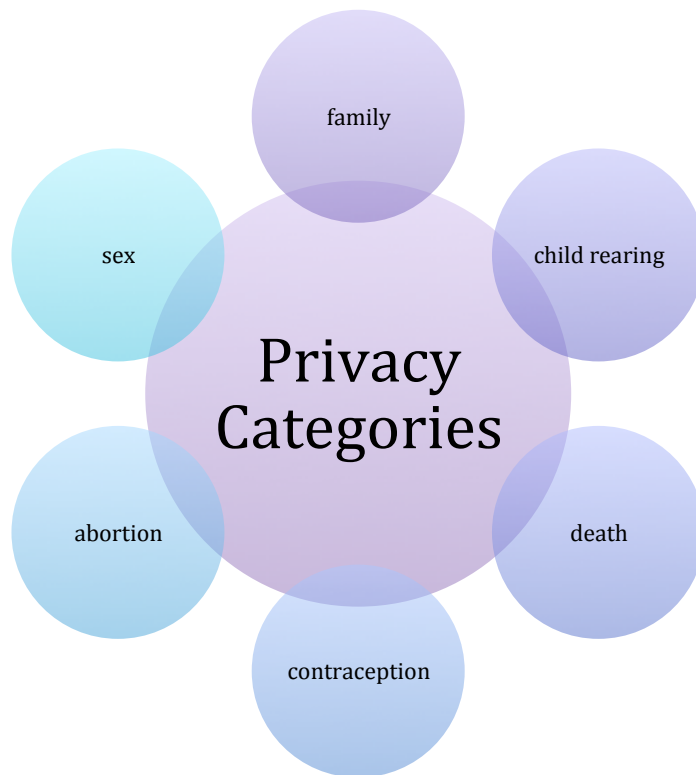
- a. BICAMERALISM +
 - i. Both chambers agree
 - b. PRESENTMENT
 - i. President signs into law
- 2. After congress has passed legislation & presented it to Prez, she has 10 days to act upon it
 - 3. If she does not veto it within the 10 day period – the proposed legislation becomes law
 - 4. *Pocket veto* – a bill passed within 10 days of end of congressional term will not become law if not signed, carries over to next term?
 - 5. *Line Item Veto* is unconstitutional, *Clinton v. City of New York* (377)
 - a. LIV unconstitutional because it would grant Prez power to amend a statute
 - 6. *One House Veto* of an appointee is unconstitutional – *INS v. Chanda* (396)
 - 7. Before it’s a law it’s a bill or joint-resolution
 - 8. *Signing Statement* = I’ll sign, but I fundamentally hate and won’t enforce

- b. **Executive Privileges & Immunities:**
 - i. Prez has an absolute privilege to refuse to disclose info relating to military, diplomatic or sensitive national security secrets
- c. ***United States v. Nixon* (406)**
 - i. Nixon wanted to claim executive privilege to not have to turn over hours of taped conversations as evidence for criminal indictment
 - 1. Confidential communications between Prez and advisors are presumptively privileged, UNLESS they are subpoenaed as evidence in criminal trial
 - ii. Protectable only if:
 - 1. National security interest
 - a. Diplomatic
 - b. Military interests
 - 2. Policy Rationale
 - a. Prez' advisor will be less candid if there is possibility that their communications may be released
- d. **Presidential Liability**
 - i. Sitting & former Presidents are entitled to absolute immunity from damages liability predicated on official acts
 - 1. *Nixon v. Fitzgerald* – air force whistle blower sues Prez
 - ii. 3 possibilities for indictment of a sitting Prez:
 - 1. publicly indict & post pone trial until President's term is over;
 - 2. seal indictment until President leaves office;
 - 3. wait until President's term expires to indict
 - iii. ***Clinton v. Jones* (411)**
 - 1. Is a sitting Prez entitled to an absolute immunity from civil litigation arising out of events which transpired prior to his taking office? NO
 - 2. (in reality) this case led to President Clinton's impeachment because he lied to a grand jury (perjury)
- e. **Congress' Power to Impeach** – Art.I, § 2 Cl. 5
 - i. Prez, V.P. & all civil officers shall be removed from office for impeach & conviction of: treason, bribery or other high crimes and misdemeanors” – Art. II § 4
 - ii. Impeachment Process:
 - 1. House of Reps has sole power of impeachment
 - 2. Senate shall have sole power to try all impeachments
- f. **Random Extra Cases:**
 - i. *Dames & Moore* – Argo, Iran freezing assets case, upheld Prez' use of power here
 - ii. *Humphrey's Executor v. U.S.* – quasi legal or judicial officers can be protected by Congress by requiring for cause for Prez to remove
 - iii. *Touhey v. U.S.* –no facts...just that Congress can ask for help from coordinate branches, just can give away its legislative power
 - iv. *U.S. v. Cartiss Wright* - ammunition sales from Bolivia, Congress can give legislative power
 - v. *U.S v. Belmont* – Prez is the sole organ, can negotiate with USSR

IX. Individual Rights: DUE PROCESS

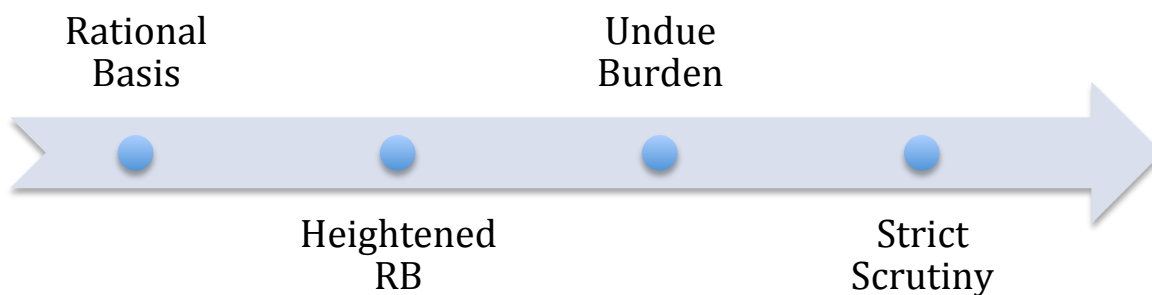
- a. Due Process = legal requirement that the state must respect all legal rights that are owed to a person
- b. Before Civil War
 - i. *Baron v. Mayor & City Council of Baltimore*
 - ii. *Dred Scott v. Sandford*
- c. Post Civil War
 - i. 1865 – 13th Amendment
 - ii. 1868 – 14th Amendment
 - iii. 1870 – 15th Amendment
 1. Slaughter House Cases
 2. *Saenz v. Rose* (440)
 - a. Violates Privileges & Immunities clause – CA provision that welfare recipients had to be in state for 12 months
 3. *Lochner v. NY* (471)
 - a. Baker case
 4. *Nebbia v. NY*
 - a. Rational Basis
 - i. If laws have a reasonable relation to a proper public purpose, and are neither arbitrary nor discriminatory are upheld
 5. ***Carolene Products (Footnote 4)***
 - a. Strict scrutiny for certain types of litigation
 - b. Lays out some groundwork for right of privacy
- d. **Substantive Due Process & Privacy:**

PROVISION	CONST'L LANG	ATTENUATED RIGHT TO GET TO PRIVACY
1 st Amend	Right of assembly	Right of association
3 rd Amend	No quarter of soldiers	Right to be free of government intrusion
4 th Amend	Free from search or seizure	Privacy to person/property
5 th Amend	Self incrimination	Privacy to “go through your stuff”
9 th Amend	Even if a right is not express, individuals have it	



e. **MODERN SUBSTANTIVE DUE PROCESS**

- I. Constitution Protects Individual Rights via:
 - a. 5th Amendment – (fed)
 - b. 14th Amend – (states)
- II. Sources of Authority for “Right to Privacy”:
 - a. Grounded in penumbras of rights in First 10 Amendments (*Griswold*); or
 - b. Implicit in the idea of “Ordered liberty” (Justice Frankfurter in *Adamson v. California*)
- III. Types of Due Process:
 - a. Procedural Due Process
 - b. Economic Substantive Due Process (*Lochner* era)
 - c. **Modern Substantive Due Process**
- IV. Standards of Review:



a. **Rational Basis**

- i. Apply RB if no “fundamental right”
- ii. Most deferential to state, requires a conceivably rational relationship with a genuine public end/purpose

b. Strict Scrutiny

- i. Apply SS if “fundamental right”
- ii. Least deferential to state, need a compelling state interest
 1. ***Carolene Products* footnote 4**
 - a. Basis for Modern Strict Scrutiny
 - b. Apply when the legislation:
 - i. targets a specific prohibition of the constitution, such as the bill of rights
 - ii. restricts political processes that could repeal undesired legislation
 - iii. is directed at racial, religious and “discrete and insular” minorities

V. Modern SDP Cases (Privacy)

a. FAMILY COMPOSITION

- i. MARRIAGE = fundamental right, **strict scrutiny**
 1. ***Loving v. Virginia*** (529)
 - a. Struck down VA ban on interracial marriage
 - i. Freedom to marry long recognized as essential to orderly pursuit of happiness
 - ii. Equal protection & d.p. rationales
 2. ***Zablocki v. Redhail*** (529)
 - a. Invalidated WI law requiring man with child support obligations to obtain a court order before marrying
 - b. Crt applied ‘critical examination’ test
 - i. There were less intrusive means to compel child support (i.e. wage garnishment)
 3. ***Turner v. Safely*** (530)
 - a. Invalidated prison regulation restricting prison inmates’ right to marry conditioning it only for compelling reasons like pregnancy or birth of child
 - b. Marriage is expression of emotional support and public commitment with spiritual significance
 - i. Most inmate marriages formed with expectation that they will be consummated
 - ii. Marriage is often pre-condition to receive government benefits
 - iii. Reasonable relation standard
- ii. HOUSEHOLD COMPOSITION & EXTENDED FAMILY RELATIONSHIPS – **rational basis**
 1. ***Moore v. East Cleveland*** (531) – **rational basis invalids the law**
 - a. Invalidated zoning ordinance limiting occupancy to single nuclear family
 - b. The ordinance only marginally served legit gov’t interests of overcrowding and traffic congestion
 2. ***Belle Terre v. Boraas*** (532) – **rational basis**
 - a. Upheld family oriented zoning restriction preventing unrelated groups from village
 - b. Majority upheld law as “economic and social legislation”

3. ***Troxel v. Granville*** (533)
 - a. Invalidated state court order granting grandparent's visiting rights to their grandkids over objection of sole fit mother
 - b. 14th amend DP protects fundamental right of parents to make decisions regarding the care, custody & control of their kids
4. ***Michael H. v. Gerald D.*** (534)
 - a. Upheld CA law that presumed a child born to a wife is a legitimate child of the marriage
 - b. Scalia view: must be a fundamental & historical/traditionally recognized right

b. CHILD REARING – heightened scrutiny

- i. Parents able to control the education of their children
 1. ***Meyer v. Nebraska*** (492)
 - a. not ok to ban teaching foreign languages to young children
 2. ***Pierce v. Society Sisters*** (492)
 - a. not ok to require kids to attend public schools
 3. ***Skinner*** (493) – prisoners who committed moral turpitude were being sterilized, procreation is so inherent to right of man you can't take that away-strict scrutiny

c. ADVANCE DECISION TO REFUSE TREATMENT – rational basis standard

- i. ***Cruzan v. Director Missouri Dept. Health*** (550)
 1. Upheld MI law requiring “clear and convincing evidence” to discontinue life support for a person left in vegetative state
 2. Interest of other family members does not trump the states interest to protect life
 3. the Constitution does not require that family members be allowed to make these decisions for their incapacitated relatives
- ii. ***Washington v. Glucksberg*** (553)
 1. Upheld WA law banning physician assisted suicide
 - a. You can refuse treatment, you can't do an affirmative act to kill yourself

d. SEXUAL CONDUCT – need legitimate state interest to justify the intrusion

- i. ***Bowers v. Hardwick*** (536)
 1. Court upholds GA state law ban on sodomy, no gender distinction so no equal protection argument
 - a. Crt limited scope of right and determined not to be fundamental via previously recognized rights, historical proscription, uniform state approach, fails traditional SDP analysis
- ii. ***Lawrence v. Texas*** (538)
 1. Invalidates TX law criminalizing same sex sexual conduct
 - a. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression & certain **intimate control**
 - b. No rational relation to a legitimate government interest, in effect used strict scrutiny
 2. Need to have a legitimate state interest that justifies the intrusion

e. CONTRACEPTION – strict scrutiny

- i. ***Griswold v. CT*** (493)
 - 1. fundamental right to marital privacy, can't ban use of contraceptives for married couples b/c fundamental right in penumbras of 1st, 3rd, 4th, 5th, and 9th Amendments
- ii. ***Carey v. Population Services, Int'l*** (501)
 - 1. Can't ban sale of contraceptive to minors
 - 2. Strict scrutiny
- iii. ***Eisenstadt v. Baird*** (501)
 - 1. Contraceptive liberty expands to unmarried people, under equal protection, rational basis with a bite

f. ABORTION – undue burden standard

- i. ***Roe v. Wade*** (503)
 - 1. Challenge to a TX state abortion law that prohibited abortions except to save a woman's life
 - 2. Standing – capable of repetition yet evading review
 - 3. Personal rights are “fundamental”
 - 4. State DOES have a compelling interest: protecting health of pregnant woman v. protecting potential human life
 - 5. Developed trimester framework (no longer applicable)
- ii. ***Planned Parenthood v. Casey*** (515)
 - 1. Challenge to PA law imposed 24 hr waiting period & spousal notification requirements
 - 2. **Undue burden standard** = law is unconstitutional if the purpose or effect is to place a substantial obstacle in the path of a women seeking an abortion before the fetus attains viability
 - a. Spousal notification was an “undue burden” because it would prevent women in relationships with history of domestic violence from seeking an abortion – an insular minority is effected
 - b. 24 hr waiting period was not a substantial obstacle
 - c. parental notifications are okay as long as judicial bypass
- iii. ***Ayotte v. Planned Parenthood*** (525)
 - 1. State abortion law unconstitutional because it lacked an exception for the health of the mother
 - 2. parental notification statute
- iv. ***Stenberg v. Carhart*** (525)
 - 1. Application of Casey, unconstitutional late term D&E abortion ban that did not include exception for health of mother
- v. ***Gonzales v. Carhart*** (526)
 - 1. Challenge to late term abortion dilation & evacuation (D&E) ban
 - 2. Law was upheld because Congress enacted law to draw a bright line between an abortion & infanticide
 - 3. Only a method of abortion is banned, that's okay
 - 4. Regulations that subject women to significant health risks (Challenges) must establish that the law would be unconstitutional in a large fraction of relevant cases
 - 5. “as applied challenge” – a particular application of a statute is unconstitutional