I. The Federal Judicial Power
a. Restrictions on Federal Judicial Power
   i. Article III defines scope of federal court authority
   ii. Congress limits jurisdiction
b. Authority for Judicial Review—Marbury v. Madison
   i. 1801 Circuit Judge Act reduced number of justices, eliminated need to ride circuit, added 16 new judgeships for circuit courts....was repealed in 1802
   ii. 1801 Organic Act authorized president to appoint 42 justices of the peace
   iii. Ct. held that although the Judiciary act of 1789 authorized jurisdiction, this provision was unconstitutional because congress cannot allow original jurisdiction beyond that enumerated in the Constitution.
   iv. Three Questions:
      1. Does Marbury have a right to the commission? Yes.
      2. Do the laws afford a remedy? Yes
      3. Can the Supreme Ct. issue this remedy? Is mandamus an appropriate remedy?
         a. Court had the authority to issue mandamus.
         b. Under judiciary act the court had jurisdiction
         c. Judiciary Act was unconstitutional
   v. Why can the Ct. declare federal laws unconstitutional?
      1. Constitution imposes limits on govt powers so you need the ct. to enforce them—but other countries have constitutions and don't have this power
      2. inherent to the judicial role to decide constitutionality—but could interpret w/out this power
      3. authority to decide cases arising under the constitution implies judicial review—but could just apply statutes to decide cases and evaluate the constitutionality of state enactments
      4. Judges take an oath to protect the constitution—but so do other officials
      5. Constitution is supreme—but that doesn't necessarily give the court judicial review
   vi. Ct. didn't hold another federal statute unconstitutional until 1857 Dred Scott case
c. Authority for Judicial Review of State and Local Actions
   i. Martin v. Hunter's Lessee
      1. VA court said federal courts couldn't impose judicial review on state court decisions
      2. Story argues that this power was implied because the congress wasn't required to make other federal courts, so if the Supreme Court couldn't review state courts, then what would they do other than decide the few cases over which they have original jurisdiction?
      3. Supreme ct review is necessary to protect against state prejudices
      4. Necessary to insure uniform interpretation of federal law.
   ii. Cooper v. Aaron—Supreme Court can also review state laws and the action of state officials. (desegregation in Arkansas)
d. Prohibition Against Advisory Opinions
   i. Reasons for prohibition
      1. Separation of powers is maintained by keeping courts out of the legislative process
      2. conservation of judicial resources
      3. ensure that cases will be presented as specific disputes
   ii. Criteria to avoid being an advisory opinion
      1. There must be an actual dispute between litigants
      2. There must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect.
   iii. Are Declaratory Judgments Impermissible Advisory Opinions?
      1. No, so long as justicability requirements are met.
e. The Political Question Doctrine
   i. Certain allegations of unconstitutional government conduct should not be ruled on by the federal courts even though all of the jurisdictional and other justicability requirements are met. The court has said that constitutional interpretation in these areas should be left to the politically accountable branches of government.
   ii. First mentioned in Marbury—was quite narrow then and only included areas where the president was exercising discretion.
   iii. Baker v. Carr Criteria
      1. textually demonstrable commitment of the issue to a coordinate political department, or
      2. lack of judicially discoverable and manageable standards for resolving it, or
      3. Prudential Concerns
         a. the impossibility of deciding w/out an initial policy determination , or
         b. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, or
         c. and unusual need for unquestioning adherence to a political decision already made, or
         d. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
iv. The court has considered the political question doctrine in the following areas: republican form of government clause and the electoral process, foreign affairs, Constitutional amendments, instances where the federal court cannot shape effective equitable relief, and the impeachment process.

v. Should there be a Political Question Doctrine?

1. Justifications
   a. Accords the federal judiciary the power to avoid controversial constitutional questions and limits the court's role in a democratic society
   b. Allocates decisions to the branches of government that have superior expertise in particular areas
   c. The federal courts' self-interest disqualifies them from ruling on certain matters (i.e. Constitutional amendments)
   d. Separation of powers

2. Criticisms
   a. Judicial role is to enforce the constitution so they shouldn't leave questions to other branches
   b. Legitimacy isn't that fragile and is actually quite robust
   c. It confuses deference with abdication
   d. Blatant violations of the constitution should not be tolerated

vi. The “Republican Form of Government” Clause and Judicial Review of the Electoral Process--

1. Luther v. Borden
   a. Rhode Island wound up with two governments because of their new constitution. The first government passed a law prohibiting the new constitution from going into effect.
   b. Court plead political question doctrine, saying that it was up to Congress.
   c. Ct. also claimed that if they declared the law unconstitutional then the old government's actions would be invalidated and there would be chaos.
   d. This case has been followed consistently

2. Reapportionment
   a. Colegrove v. Green—challenge to the congressional districting in IL—PQD
   b. South v. Peters—same result
   c. Baker v. Carr—
      i. Deemed justiciable claims that malapportionment violates the Equal Protection clause. But they didn't overrule Luther v. Borden
      ii. Where “the Guaranty Clause is not a repository of judicially manageable standards...judicial standards under the Equal Protection Clause are well developed and familiar.”

3. Gerrymandering—Davis v. Bandemer—such claims are ok under the PQD because of standards for racial gerrymandering claims

4. Review of Political Parties
   a. The court will prevent discrimination by political parties
   b. O'Brien v. Brown—won't mess with whether delegates have a right to be seated at the convention—better to actually have the parties themselves address the problem at the convention.
   c. Cousins v. Wigoda—a state court should not interfere with the selection of delegates to a national political convention

vii. Foreign Policy

1. Commercial Trust Co. v. Miller—the determination of when war begins or ends is left to the political branches of government.
2. Recognition of foreign governments is a political question
3. Terlinden v. Ames—Political question whether a treaty survives when a country becomes a part of another country.
4. Goldwater v. Carter—Challenge to Carter's rescission of the treaty with Taiwan was a political question—no standards in the constitution to address this question
5. Challenges to a president's use of the war powers is a political question.
6. Should foreign policy be a political question?
   a. In many cases you don't need experts
   b. The PQD renders provisions in the constitution regarding foreign policy essentially meaningless

viii. Congressional Self-Governance

1. The court has held that congressional judgments pertaining to its internal governance should not be reviewed by the federal court
2. Powell v. McCormack—House refused to seat Adam Clayton Powell. Court held that the House only had the right to determine whether he met the qualifications in the constitution.
3. United States v. Munoz-Flores—Court refused to apply the PQD to bar a challenge to a federal assessment as violating the origination clause of the constitution.

ix. Process of Ratification of Amendments

1. Hollingsworth v. VA—president may not veto amendments passed by congress
2. Leser v. Garnett—state's certification that it had ratified an amendment was sufficient to allow it to be counted
3. Coleman v. Miller—congress has the sole and complete control over the amending process, subject to no judicial review—whether the time limit had expired
4. Idaho v. Freeman—ID wanted to rescind ratification of the ERA—no political question—ruled that the time extension was unconstitutional

x. Excessive Interference w/coordinate branches of Government
1. *Gilligan v. Morgan*—PQD for lawsuit claiming that the government was negligent in failing to adequately train the Ohio National Guard
2. This is criticized because it is no more intrusive than is judicial review of school board or prison actions. Also the use of the PQD was unnecessary—the courts always have the power to deny equitable relief when supervision and enforcement of the equitable decree would be too difficult.

xi. **Impeachment and Removal from Office**
   1. *Nixon v. United States*—federal judge was impeached. Court called a PQD question because Article I section 3 demonstrates a textual commitment of impeachment to the Senate. Also said that judicial review of impeachment would be inconsistent with the framers' views of impeachment in checks and balances.
   2. *Nixon* doesn't block all impeachment questions and a concurrence recognizes that sometimes judicial review might be necessary.

f. **Congressional Control of Federal Court Jurisdiction**
   i. Court-stripping authority is based on Article III “Exceptions” clause
   ii. Opponents argue that such measures infringe on constitutional rights and allow Congress to disregard federal law and the constitution.
   iii. Congress has never given full Article III jurisdiction to the lower federal courts. This is ok b/c congress has the authority to create such courts.
   iv. Problem arises when court stripping would mean the unavailability of any court, state or federal, to hear a case.
   v. Courts have right to determine constitutionality of court-stripping provisions under *Marbury* b/c they can't apply unconstitutional law to decide a case.
   vi. Supporters of court stripping argue that its a check on judicial power
   vii. Some argue that “exceptions” should apply to “fact” and that the framers were really concerned about courts not giving the proper deference to trial findings of fact.

viii. *Ex parte McCordale*
   1. Under 1789 judiciary act courts could hear habeas petitions only from those who were in federal custody. The act of 1867 supplemented but did not replace the 1789 act.
   2. Court held it could not hear the case under the 1867 act because Congress passed a law repealing the portion of the act that would allow them to do so.
   3. Opponents of stripping cite this as precedent.
   4. Opponents say that this case is distinguishable—The court still could have heard the case under the 1789 Act, so there was still a way for them to hear the case. The court even points this out.

ix. *Ex parte Yerger*
   1. Held that it had authority to review habeas corpus decisions of lower federal courts under the act of 1789.
   2. This means that congress can only strip jurisdiction where there are two ways of getting jurisdiction and they get rid of one. So *McCordale* is not precedent for proposals of stripping all routes to jurisdiction.

x. *Felker v. Turpin*—stands for the proposition that nay continuing basis for review, no matter how unlikely, is sufficient to make a restriction on jurisdiction constitutional.

xi. *United States v. Klein*
   1. Court held that a presidential pardon fulfilled the statutory requirement of demonstrating that an individual was not a supporter of the rebellion. Congress adopted a statute saying a pardon was inadmissible as evidence in a claim for return of seized property. This was a redefinition of the pardon power of the president.
   2. Court held that the statute was unconstitutional because Congress cannot direct results in particular cases.
   3. Opponents of stripping say this means that the court can't strip to dictate substantive outcomes. Supporters counter that it only means that Congress can't strip if doing so would violate other constitutional provisions.

xii. *Plaut v. Spendthrift Farm, Inc.*—statute was unconstitutional because it overturned a Supreme Court decision and gave relief to a party that the Court had said was entitled to none.

xiii. **Policy Arguments and Responses**
   1. Supporters say stripping acts as a check on the judiciary. Opponents say this is a mis-definition of democracy and is inconsistent with the Constitution. The correct definition of democracy includes substantive values in the constitution.
   2. Stripping does not overrule prior decisions. It freezes existing law. However, stripping might invite state legislatures and even courts to disregard federal law. This is repugnant, because the constitution's purpose is to protect minorities and individual rights.
   3. Critics say that Congress can't strip to violate other constitutional provisions. That would undermine the court's essential function. For example, the supremacy clause and the power to check the Congress that is established in *Marbury*.
   4. Opponents say that stripping can't violate specific constitutional rights. But there is nothing in the constitution that requires the availability of the Supreme Court to review particular types of claims.
   5. Congressional stripping that resulted in state courts disregarding Supreme Court precedent would not be upheld. Supremacy Clause Rocks!

**Sovereign Immunity as a Limit on the Federal Judicial Power**

i. Based on interpretation of the 11th Amendment which prohibits suits in federal courts against state governments by a states own citizens, citizens of another state, or citizens of foreign countries. It bars suits against state governments w/out their consent.

ii. *Alden v. Maine*—its not from the 11th amendment, its from the structure of the original constitution itself.

iii. The court has allowed suits against state officers, permitted states to waive their immunity, and sanctioned suits pursuant to statutes adopted under the 14th amendment.
iv. Chisholm v. Georgia
   1. Judiciary Act of 1789 gave the court original jurisdiction in cases between states and citizens of another state or citizens of foreign states. This case involved an attempt by a SC citizen to recover money owed him by the state of Georgia.
   2. Supreme court held that Article III allowed suits against a state by citizens of another state. The eleventh amendment was approved by the congress less than three weeks later, and ratified by the states within a year.

v. Theories on the 11th amendment
   1. Conservatives see it as a restriction on SMJ that bars all suits against state governments.
   2. Liberals only see it as an SMJ restriction on cases being brought against states based solely on 1332 jurisdiction.

vi. Hans v. LA—it would be anomalous to allow a state to be sued by its own citizens
vii. Seminole Tribe of Florida v. FL—reaffirmed Hans and declared that the decision is based in common law and the fundamental jurisprudence of all civilized nations.

viii. Suits allowed:
   1. federal court suits by the US government against a state
   2. suits against a state by another state
   3. Only applies in federal court. Does not prevent the supreme court from hearing claims against the state as part of its appellate jurisdiction.
   4. Does not bar suits against municipalities or political subdivisions of a state.

ix. For state boards, corporations, and other entities where the law is uncertain the courts look to several factors.
   Affirmative answers mean the entity is protected, negative answers mean its not:
   1. Will a judgment against the entity be satisfied with funds from the state treasury?
   2. Does the state government exert significant control over the entity's decisions and actions?
   3. Does the state executive branch or legislature appoint the entity's policymakers?
   4. Does the state law characterize the entity as a state agency rather than a subdivision?

x. Circumventing 11th Amendment by Suing State Officers
   1. Osborn v. Bank of the United States--11th amendment only precludes suits against a state when the state is actually named as a D.
   2. Ex parte Young--11th Amendment does not preclude suits against state officers for injunctive relief, even when the remedy will enjoin the implementation of an official state policy.
   3. Problems with allowing Ps to circumvent the 11th Amendment by suing state officers
      a. If officers are stripped of the state's authority then is there state action for purposes of the 14th amendment? 14th Amendment only applies to state action.
      b. Second problem concerns injunctive relief that has the effect of awarding money damages against the state treasury.

xi. Waiver
   1. If a state waives its immunity and consents to suit in federal court, the 11th Amendment does not bar the action. This seems inconsistent with seeing the 11th Amendment on SMJ.
   2. Constructive waivers are disfavored and will rarely be found by the court.

II. The Federal Legislative Power
a. McCulloch v. Maryland and the Scope of Congressional Powers
   i. Issue was whether the State of MD could collect a tax from the Bank of the United States.
   ii. Does Congress have the authority to create the Bank of the United States?
      1. Historical practice established the power of congress to establish the bank.
      2. States don't retain ultimate sovereignty because they ratified the constitution. The PEOPLE ratified the constitution, and thus they are sovereign, not the states.
      3. “In considering this question [whether there are implied powers], then, we must never forget that it is a constitution we are expounding.” Congress may choose any means, not prohibited by the constitution, to carry out its lawful authority. Constitution is different from a statute and therefore it should be interpreted differently.
      4. Necessary and proper clause means that congress may choose any means, not prohibited by the constitution, to carry out its express authority. “Necessary” means useful or desirable. Also, its in Article I Sec 8, which expands Congress's powers, and not in Section 9, which limits them. Its terms purport to enlarge, not to diminish the powers vested in the government. This doesn't mean congress can do things forbidden by the constitution or that it can use pretexts.
   iii. Is the state tax on the bank constitutional?
      1. The power to tax is the power to destroy. Allowing the state to tax the bank would allow them to tax the bank out of existence.
      2. Also, taxing the bank of the US would be taxing those in other states.

b. The Commerce Power—Article 1 Sec 8
   i. Gibbons v. Ogden
      1. Commerce is traffic, but it is also all commercial intercourse between nations, and parts of nations, in all its branches, and is regulated be prescribing rules for carrying on that intercourse. It includes all phases of business.
      2. “Among” means Congress can regulate intrastate commerce if it has an impact on interstate activities. This requires line-drawing and a case-by-case inquiry as to whether a particular activity has interstate effects.
      3. This power is complete by itself and may be exercised to its utmost extent. Congress has complete authority to regulate all commerce among the states. This power is not limited by state sovereignty.
ii. The Commerce Clause Before 1887

1. Paul v. Virginia--VA statute discriminated against insurance companies incorporated in other states. Formalistic: giving definitions to the operative concepts, rather than looking to the exigencies that gave rise to the litigation in the first place. Court rejected the challenge concluding that “issuing a policy of insurance is not a transaction of commerce,” so the commerce clause does not reach it.

2. The Daniel Ball—The court accorded Congress broad authority to license ships, even those operating entirely intrastate, so long as the boats were carrying goods from another state or that would ultimately go to another state. Unsafe ships in intrastate commerce could affect and harm ships in interstate commerce.

3. United States v. Dewitt—federal law outlawed the sale of naphtha and other illuminating oils that could ignite at less than 110 degrees. The Court held that this law was a police regulation that was under the purview of the states.

4. The Trademark Cases—Court invalidated federal law that established a federal system for registering trademarks because it applied to wholly intrastate businesses.

iii. Commerce Clause--1887-1937

1. Dual Federalism—fed and state governments are separate sovereigns that each have separate zones of authority, and the courts have to protect the states' zones.

2. Commerce was defined as one state of business, distinct from manufacturing, mining, or production.
   a. United States v. E.C. Knight—Court held that the Sherman Act could not be used to stop a sugar monopoly because the Constitution does not allow Congress to regulate manufacturing. The monopoly was in production, not in commerce.
   b. Carter v. Carter Coal—mining isn't commerce

3. “Among the States” requires that there be a direct effect on interstate commerce
   a. Shreveport Rate Cases—Court upheld Interstate Commerce Commission’s ability to set intrastate railroad rates because of their direct impact on interstate commerce.
   b. A.L.A. Schecter Poultry Corp. v. United States—“sick chickens case” Court said the Live Poultry Code was unconstitutional because there was not a sufficiently “direct” relationship to interstate commerce. Although almost all of the NY chickens were shipped from other states, the law concerned the operation of businesses IN NY. “Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power.”
   c. Stream of Commerce Cases
      i. Swift & Co. v. US—upheld application of Sherman Act to an agreement among meat dealers to price fix. The stockyard was intrastate, but the court said it was only a temporary stop for the cattle and it was in a “current of commerce among the states.”
      ii. Stafford v. Wallace—Court upheld act that authorized the Sec. Of Commerce to regulate rates and prescribe standards for the operation of stockyards because they are in the stream of commerce.
      iii. Railroad Retirement Board v. Alton RR Co.-- said act that provided a pension system for railroad workers was unconstitutional. BUT railroads were part of the stream of commerce! Court distinguished this from other cases that concerned the safety or efficiency of railroads because the law was only to help the “social welfare of the worker, and therefore was remote form any regulation of commerce.”

4. Even if an activity was commerce among the states, Congress could still not regulate if it was intruding into the zone of activities reserved to the states.
   a. 10th Amendment reserved control of activities like mining, manufacturing, and production to the states.
   b. The Child Labor Case (Hammer v. Dagenhart)--
      i. Federal law prohibited the interstate shipment of goods produced by children under age 14 or children age 14-16 who worked more than 8 hours per day or 6 days a week.
      ii. Court held in unconstitutional because it regulated production.
      iii. States have exclusive control over the police power over local trade and manufacturing. The court expressly rejected the argument that the legislation was necessary to prevent unfair competition.
      iv. Court claimed if they allowed the regulation that “all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.”
   c. Contrast Child Labor Case to The Lottery Case (Champion v. Ames).
      i. Court upheld federal law prohibiting the interstate shipment of lottery tickets.
      ii. Both cases the fed prohibited the shipment of specific goods.
      iii. In this case the court made it clear that the power to regulate interstate commerce include the ability to prohibit items from being in interstate commerce.
      iv. The court rejected arguments based on the 10th amendment and based in the idea that congress might abuse the power and destroy state rights.
      v. This shows that the court would allow the fed to regulate morals, but not to create economic regulations.

iv. Commerce Clause from 1937 to 1995

1. In 1937 Roberts changed his position and was the fifth to uphold two laws of the type that had previously been invalidated—a state minimum wage law for women and a federal law regulating labor relations. He was “the switch in time that saved nine.”
   a. Steel business was a part of the stream of commerce and labor relations within it had a direct effect on commerce.
   b. Court directly stated that the fact that the employees were engaged in production was not determinative.
   c. Court held that the power to regulate commerce is the power to enact “all appropriate legislation” for its “protection and advancement”

3. *United States v. Darby*
   a. Challenge to Fair Labor Standards Act that prohibited the interstate shipment of goods made by employees who were paid less than minimum wage.
   b. Court upheld the act saying that the shipment of manufactured goods is interstate commerce, so Congress may prohibit the shipment of manufactured goods as a regulation of commerce.
   c. Court expressly overruled *Hammer v. Dagenhart* and rejected the view that the 10th Amendment limits Congress's powers. They call the 10th Amendment a truism—a law is constitutional so long as it is in congress's power.

4. *Wickard v. Filburn*
   a. Sec. Of Ag. Set a quota for wheat production and each farmer was given an allotment. Filburn grew wheat for home consumption and to feed his livestock. He grew more than his allotment of wheat and was fined.
   b. Court called the distinction between direct and indirect effects bullshit.
   c. The court upheld the application of the law because the cumulative effect of home grown wheat on the market is dramatic.

5. Test for the Commerce Clause after 1937
   a. Congress could regulate any activity if there was a substantial effect on interstate commerce. The requirement was only that the activity, looked at cumulatively across the country, have a substantial effect.
   b. Sometimes the court even deleted the word substantial.
   c. In *Hodel v. Indiana* the court said that they could only invalidate a law under the Commerce Clause if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

6. Regulatory Laws
   a. Congress can regulate purely intrastate activities if there is a rational basis for believing that there is an interstate effect.
   b. Congress can regulate intrastate activities if necessary to protect is regulation of interstate activities.

7. Civil Rights Laws.
   a. *Heart of Atlanta Motel Inc. v. United States*
      i. Court upheld Title II of the Civil Rights Act which prohibited discrimination by places of public accommodation.
      ii. The only questions are
         1. Whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and
         2. if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.
      iii. It didn't matter that the motive was moral.
      iv. It also didn't matter that the motel was of a “local character”
   b. *Katzenbach v. McClung*—the law also applies to a small local BBQ because discrimination by restaurants cumulatively had an effect on interstate commerce.

8. Criminal Laws.--*Perez v. United States*
   a. Act prohibited loan sharking. D had been convicted under the law, but argued that it shouldn't apply to him because there was no proof he was involved in organized crime and he had worked solely within NY state.
   b. Court concluded that it was rational for Congress to believe that even intrastate loan sharking activities had a sufficient effect on interstate commerce.
   c. After this decision, congress used this authority to enact the RICO statute.

9. Between 1936 and 1995 the court did not find a single federal law unconstitutional under the commerce clause.
   v. 1995-Today: *United States v. Lopez* and Beyond
   1. *United State v. Lopez*
      a. Court declared unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to carry a gun within 1000 feet of a school.
      b. The court held (5-4) that the relationship to interstate commerce was too tangential and uncertain to uphold the law.
      c. Three Types of Activities Congress can Regulate
         i. The use of the channels of interstate commerce (like Heart of Atlanta Motel)
         ii. Congress may legislate to regulate and protect the instrumentalities of interstate commerce (like rail roads)
iii. Those activities having a substantial relation to interstate commerce. The effect must be substantial.

d. Dissent criticized majority for judicial activism and ignoring almost 60 years of precedent to invalidate an important federal statute.

2. United States v. Morrison
   a. Court declared unconstitutional the civil damages provision of the violence against women act, which created a federal cause of action for victims of gender motivated violence.
   b. This goes even further than Lopez by holding that congress cannot regulate a noneconomic activity by finding that, looked at cumulatively, it has a substantial effect on interstate commerce.
   c. Just because congress may conclude that a particular activity substantially affects interstate commerce does not make it so.
   d. Thomas' concurring opinion wants to do away with the substantial effects test and move backwards a century or two.
   e. Dissent stressed the need for judicial deference to congressional fact finding.

3. In United State v. Jones and Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers, the court interpreted federal laws narrowly to avoid “constitutional doubts” that would be raised by broader interpretation. This was to avoid commerce clause questions. In Solid Waste the court held that the presence of migratory birds is not sufficient to bring intrastate waters within the scope of the Water Pollution Control Act.

c. The Taxing and Spending Power
   i. The Scope of the Taxing and Spending Power
      1. United States v. Butler—Congress has the broad authority to tax and spend for the general welfare so long as it doesn't violate other constitutional provisions
      2. Steward Machine Co. v. Davis—upheld the unemployment compensation system
      4. Helton v. United States—Court held that a federal tax on carriages was indirect and therefore did not need to be apportioned among the states
      5. Pollock v. Farmer's Loan & Trust Co.—Federal income tax is unconstitutional because it was a direct tax and needed to be apportioned among the states. 16th Amendment was ratified to overturn this.
      6. Flint v. Stone Tracy Co.—Court abandoned direct/indirect distinction, and now unless Congress were to create a federal property tax all other taxes will be upheld even without apportionment among the states
      7. Bailey v. Drexel Furniture Co (Child Labor Tax Case)—Court declared unconstitutional a federal tax on companies that shipped in interstate commerce goods made by child labor. The court based its decision on a true tax and a penalty for a violation of a commercial regulation. Although taxes could have incidental regulatory effects, a tax was unconstitutional when it become a mere penalty with the characteristics of regulation and punishment.
      8. United States v. Constantine—tax on liquor dealers who had violated state liquor laws was unconstitutional.
      9. Distinction between regulatory and revenue raising taxes disappeared after 1937 when the court upheld a tax on firearm dealers.
   ii. The Spending Power
      1. United States v. Butler—congress not limited to spending only to achieve specific powers granted in Article I.
      2. Congress may place conditions on grants to state and local governments so long as the conditions are expressly stated and have some relationship to the purpose of the spending program.
         a. Oklahoma v. Civil Service Commission—upheld grant of federal funds on the condition that the states adopt civil service systems and limit the political activities of many categories of government workers. Congress can have such conditions even if they touch areas congress would normally not be able to regulate.
         b. South Dakota v. Dole—approved 21 year old drinking age condition on federal highway funds, because it was directly related to one of the main purposes behind federal highway money—creating safe interstate travel.
         c. Pennhurst State School and Hospital v. Halderman—Congress may place strings on grants so long as the conditions are expressly stated.
   d. Foreign Policy
      i. Treaties
         1. Reid v. Covert—Court reversed conviction of military dependent who was convicted in Great Britain without a jury trial pursuant to a treaty because no agreement with another nation can confer power on the Congress or other branch which is free from the restraints of the constitution.
         2. Missouri v. Holland—State Sovereignty and the 10th Amendment don't limit the treaty power.
         3. Congressional approval is not required for executive agreements.
         4. Goldwater v. Carter—because of P quadrant court didn't rule on whether the senate must approve the recision of a treaty. In practical terms this means that the president doesn't need the Senate's authority to do so.
      ii. Citizenship
         1. Rogers v. Bellei—upheld federal law that accorded citizenship to people born in foreign countries if the person has met certain residence requirements and at least one parent is a US citizen.
         2. Schneider v. Rusk—law that withdrew citizenship from naturalized citizens who maintained residence in their old countries for 3 years was found unconstitutional
      iii. War!
1. **Brig Amy Warwick**—President has the power to impose a blockade on souther states without a congressional declaration of war.

2. **War Powers Resolution**—
   a. President can introduce Armed Forces into hostilities or situations where they appear imminent only pursuant to:
      i. declaration of war
      ii. specific statutory authorization, or
      iii. a national emergency created by attack upon the US, its territories or possessions, or its Armed Forces.
   b. Requires that President consult with congress first where possible and that he report to Congress within 48 hours after introducing troops.
   c. President shall withdraw troops after 60 days if Congress hasn't declared war or authorized a 60 day extension, unless Congress can't meet b/c of an attack on the US. The president can extend for 30 days if he tells congress in writing that he has to keep troops on the ground to ensure their safe and prompt return.
   d. Presidents call the resolution unconstitutional and don't comply with it.

3. **Woods v. Cloyd W. Miller Co.**—Housing and rent Act case. Congress set federal rent controls because boys coming home and decreased production of homes during war. The war powers can be applied to the effects of the war, even if the fighting has technically stopped. Jackson says in concurrence that this goes too far because some effects of war last forever, and the war powers can be very dangerous (like the forced camps for Japanese Americans)

**e. Congressional Power Under the Reconstruction Era Amendments**
   i. **The Civil Rights Cases**
      1. Court held the Civil Rights Act of 1875 unconstitutional and adopted a restrictive view as to the power of congress to use the amendments to regulate private behavior.
      2. Thirteenth Amendment applies to private conduct, but it was only to end slavery. Court said Congress couldn't use it to eliminate discrimination because doing so would run the slavery argument into the ground.
      3. 14th Amendment was said to only apply to government action and thus couldn't be used to regulate private behavior. The court upheld this in *United States v. Morrison*.
   ii. **Jones v. Alfred Mayer Co.**—the court has held that the 13th Amendment can be used to prohibit private racial discrimination. This case dealt with a real estate developer who refused to sell to African Americans.
   iii. **Noorwood v. Harrison**—Mississippi program to give free textbooks to private schools case. Court said that some private discrimination is subject to special remedial legislation in certain circumstances.

**f. 10th Amendment**
   i. In the 19th Century the court viewed the 10th amendment as a reminder that congress must have authority to legislate—*Gibbons v. Ogden*
   ii. From the late 19th Century to 1937 the court held that the 10th Amendment reserved a zone of activities to the states for their exclusive control—*Hammer v. Dagenhart; Bailey v. Drexel Furniture Co.*
   iii. From 1937 to the 1990s there was only one case that declared a law unconstitutional using the 10th amendment, and it was overturned. *Darby* called the amendment a truism. *National League of Cities v. Usery* was that one case. It held that congress violates the 10th amendment when it interferes with traditional state and local government functions. It dealt with the FLSA which required the payment of a minimum wage to state and local employees.
   iv. **Hodel v. VA Surface Mining and Reclamation Assoc.**—court made it clear that *Usery* only applied when Congress was regulating state governments, and not when they were regulating private conduct.
   v. **United Transportation Union v. Long Island R.R.**—no violation of 10th amendment because there was no evidence that application of the federal law would hamper the state's ability to fulfill its role in the union or endanger its separate and independent existence.
   vi. **EEOC v. WY**—considered whether forcing states to comply with the ADEA violated the 10th Amendment. The court said no, b/c the act did not directly impair the state's ability to structure integral operations in areas of traditional government functions.
   vii. **Garcia v. San Antonio Metropolitan Transit Authority**—expressly overturned *National League* for two reasons
      1. The *Usage* approach was unworkable.
      2. The protection of state prerogatives should be through the political process, and not through the judiciary.
   viii. **Gregory v. Ashcroft**—a federal law will only be applied to important government activities if there is a clear statement from Congress that the law was meant to apply.
   ix. **New York v. United States**—The “take title” provision of the law was unconstitutional b/c it gave state governments the choice between accepting ownership of waste or regulating according to the instructions of Congress. This would either impermissibly commandeering state governments or impermissibly impose on states a requirement to implement federal legislation. This is the first time since 1937 other than National League that a federal statute has been overturned on 10th Amendment grounds.
   x. **Printz v. United States**—Congress impermissible commandeering state executive officials to enforce the brady bill. This violates the 10th Amendment and the separation of powers. The dissent disagreed with the *New York v. US* standard and pointed out how important the Brady Bill is.
   xi. **Reno v. Condon**—rejected 10th amendment challenge to the Driver's Privacy Protection Act because it was covered by the Commerce clause and it was a prohibition of conduct, not an affirmative mandate as in the three previous cases.

**g. Delegation of Legislative Power and the Problems of the Administrative State**
   i. **The Nondelegation Doctrine**
      1. Principle that congress may not delegate its legislative power to administrative agencies
III. The Federal Executive Power

a. Express and Inherent Presidential Powers

i. Youngstown Sheet & Tube Co. v. Sawyer

1. Steelworkers were going to strike. Truman issued an executive order telling the Secretary of Commerce to take possession of the mills and keep them running b/c steel was necessary for the Korean War. Sawyer did as he was told. Truman told congress, and they did nothing. He told them again and they did nothing again.
2. Court held the seizure unconstitutional. The justices took four different approaches in reaching this conclusion
   a. There is no inherent presidential power and the president may only act if there is express constitutional or statutory authority. (majority opinion)
   b. The president has inherent authority unless the president interferes with the functioning of another branch of government or usurps the powers of another branch.
   c. The president may exercise powers not mentioned in the Constitution so long as the president does not violate a statute or the Constitution. (dissent agreed with Jackson's view of this approach, but they disagreed as to whether Congress had acted)
   d. The president has inherent powers that may not be restricted by Congress and may act unless the Constitution is violated.

ii. The Legislative Veto—INS v. Chadha

1. Court held legislative veto to be unconstitutional using the following syllogism:
   a. Congress may legislate only if there is bicameralism and presentment.
   b. The legislative veto was legislation without bicameralism or presentment. (it was essentially legislative because it altered the legal rights, duties, and relations of persons).
   c. THUS: The legislative veto is unconstitutional.
2. Dissent pointed out that the legislative veto is a vital check on broad delegations of legislative power.
3. Congress is faced with a Hobson's Choice—either refrain from delegating the necessary authority, or abdicate its lawmaking function to the Executive Branch.
4. Majority was formalistic, dissent was functional.

iii. Other Checks on Administrative Powers

1. Congress can overturn agency decisions so long as there is bicameralism and presentment.
2. Congress controls the purse strings.
3. Agency appointments are often subject to Senate approval.

iv. Delegation of Executive Power to Congress and its Officials

1. Buckley v. Valeo—Provision that allowed the Speaker and the President Protempor to appoint members of the Federal Election Commission was held unconstitutional as an impermissible delegation of appointment power to congress.
2. Bowsher v. Synar—declared unconstitutional a provision that allowed the comptroller general (a legislative official) to impose across the board spending cuts if spending exceeded the deficit ceiling, because it is impermissible for Congress to delegate the executive power to itself or its officers.
3. Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise—federal law that gave authority to review decisions of an airport authority to a Board of Review made up of congressmen unconstitutional b/c congress was delegating executive power to itself and Chadha requirements weren't met if the board's role was legislative.

b. Appointment and Removal Power

i. Appointment

1. Ex parte Siebold—Congress can authorize the federal circuit courts to appoint election supervisors
2. United States v. Eaton—upheld Department of State regs that allowed executive officials to appoint vice consul during the temporary leave of the consul.
3. Rice v. Ames—held that Congress could have federal court judges appoint extradition commissioners
4. Morrison v. Olson—upheld having federal judges appoint independent counsel because it is an inferior officer position. First, he or she can be removed by the attorney general for sufficient cause. Second, she possesses inferior power compared to the attorney general, third she has limited tenure and jurisdiction, and fourth there is no incongruity in having judges appoint the independent counsel. It only makes sense since
she is investigating the executive branch. Scalia's dissent said that the power to prosecute is a quintessentially executive activity. He's being a formalist, while the majority is being functionalist.

5. Under Article II, congress can vest the appointment power for inferior officers in the president, the heads of departments, or the lower federal courts.

ii. Removal
1. Myers v. United States—involved the firing of the postmaster of Portland in violation of a federal law that required consent of the Senate. The court held that the power to remove is an incident of the power to appoint. The president has the exclusive power of removing executive officers of the US whom he has appointed by and with the advice and consent of the Senate.
2. Humphrey's Executor v. United States—upheld the ability of Congress to limit the removal of a commissioner of the federal trade commission. The authority of Congress in creating quasi-legislative or quasi-judicial agencies cannot be doubted and that authority includes power to fix their term of office and forbid their removal except for cause in the meantime. The court said Myers only applies to purely executive officers. The practical effect is to draw a line between cabinet officials and those who are in independent regulatory agencies. Functionally this makes sense, but not from a formalistic standpoint.
3. Weinstock v. United States—court held that even without a statutory limit on removal, the president could not remove executive officials where independence from the president is desirable. The functional need for independence of the War Claims Commission limited the president's removal power.
4. Bowsher v. Synar—Congress cannot give itself the power to remove executive official except through impeachment.
5. Morrison v. Olson—distinguished Bowsher and upheld the constitutionality limits on the president's ability to remove the independent counsel. It is distinguishable because Congress has no role in removing the independent counsel. The real question is whether the removal restrictions are of such a nature that they impede the president's ability to perform his constitutional duty.
6. Now in general the president has the power to remove executive officials, but Congress may limit the removal power if it is an office where independence from the president would be desirable. Congress cannot completely prohibit all removal, and it cannot give the removal power to itself.

c. Foreign Policy
i. United States v. Curtiss-Wright Corp.
1. Congress empowered the president to issue a proclamation banning further sales of arms to warring nations. The court upheld the delegation and spoke generally of a fundamental difference between domestic and foreign policy.
2. Domestic power was possessed by the states before ratification of the constitution, while foreign power was always under the control of the federal government.
3. Plus, realistically the president needs more power for foreign than he does for domestic.
ii. Executive agreements
1. They can be used for anything a treaty can be used for, and the Court has never held one unconstitutional.
2. United States v. Pink and United States v. Belmont—court upheld an executive agreement whereby the US recognized the USSR in exchange for the USSR assigning to the USA its interests in a Russian insurance company in NY. The court also held that states must comply with executive agreements.
3. Dames & Moore v. Regan—Carter froze Iran's US assets. An executive agreement lifted this freeze and also provided for an end to all suits pending against Iran in US courts. Court held that so long as the president is not violating another constitutional provision or a federal statute, there seems little basis for challenging the constitutionality of an executive agreement.

iii. Treaties
1. Reid v. Covert & Missouri v. Holland—see above
2. If there is a conflict between a treaty and a federal statute, the one adopted last in time controls.
3. Goldwater v. Carter—see above

iv. War Powers
1. The Prize Cases—held that the president had the power to impose a blockade on souther states w/out a congressional declaration of war.
2. Challenges to the president's use of troops in a foreign country are likely to be dismissed on PQD grounds.
3. It is unresolved as to what constitutes a declaration of war sufficient to fulfill the requirements of Article I.
4. It is unclear whether and how congress can put other limits on the presidents' use of troops in foreign countries. See War Powers Resolution Above.

IV. Limits on State Regulatory and Taxing Power
a. Preemption of State and Local Laws
i. Two major situations where preemption occurs
1. where a federal law expressly preempts state or local law
2. where preemption is implied by a clear congressional intent to preempt state or local law
ii. Gade v. National Solid Waste Management Association Test: Absent explicit preemptive language there are two types of preemption
1. field preemption—where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, and
2. conflict preemption, where compliance with both fed and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the congress.
iii. Preemption might also be found because states generally cannot tax or regulate federal government activities.
iv. Field Preemption
1. *Hines v. Davidowitz*—PA alien registration law case. It was preempted because alien registration affects international relations, the one aspect of our government that has always belonged to the federal government. The court found preemption even in the absence of express preemptive language in the federal statute.
2. *Penn. v. Nelson*—court found that a PA sedition statute was preempted by the Smith Act
3. *Uphaus v. Wyman*—Congress had not preempted all state sedition laws.
4. *Rice v. Santa Fe Elevator Corporation*—state regulation of federally licensed grain elevators is preempted.
5. *City of Burbank v. Lockhead Air Terminal*—pervasive nature of the scheme of federal regulation of aircraft noise that leads court to conclude there is preemption.
6. *Hillsborough County, FL v. Automated Medical Labs, Inc.*—Court concluded that federal regs governing the collection of blood plasma from paid donors did not preempt local ordinances.
7. Criteria for Field Preemption
   a. Is it an area where the federal government traditionally has played a unique role?
   b. Has congress expressed an intent in the text of the law or in the legislative history to have federal law be exclusive?
   c. Would allowing state and local regulations in the area risk interfering with comprehensive federal regulatory efforts?
   d. Is there an important traditional state or local interest served by the law?

v. Conflict Preemption
1. *Gade v. NSWMA*—OSH preempts safety regulation by the state
2. *Pacific Gas & Electric*—Court accepted that the state had two reasons for stopping the construction of nuclear plants—safety and economics. Although safety regulation would not be allowed, the economic motivation was enough to save the law.
3. If the court wants to avoid preemption, it can narrowly construe the federal objective and interpret the state goal as different from or consistent with the federal purpose. But if they want to find preemption, it can broadly view the federal purpose and preempt a vast array of state laws as it did in *Gade*.

b. The Dormant Commerce Clause
i. The dormant commerce clause is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce.
ii. Justifications for the DCC
   1. There is a historical argument—the framers intended to prevent state laws that interfered with interstate commerce
   2. The economy is better if state and local laws impeding interstate commerce are invalidated.
   3. States and their citizens should not be harmed by laws in other states where they lack political representation
      *(McCulloch v. Maryland)*

iii. Arguments Against the DCC
1. Is not in the text
2. Congress can invalidate state laws that unduly burden interstate commerce—defenders counter this by saying that expecting congress to review all state and local laws is unrealistic.

iv. DCC before 1938
1. *Gibbons v. Ogden*—when a state regulates commerce with foreign nations or among the several states its doing Congress's job. There's a distinction between the police power of the state and exercising power over federal commerce. Problem is that these two aren't all that separate in the real world.
2. *Cooley v. Board of Wardens*—Court drew a distinction between subject matter that is national and that which is local. The court upheld a law that required all ships entering or leaving the port of Philadelphia to use a local pilot or pay a fine then went to support retired pilots. The court upheld the law because the subject matter did not require uniform national regulation, it required diverse local regulation.
3. Problems with Cooley Test
   a. It allows state regulations, no matter how protectionist or how much they interfere with interstate commerce so long as the subject matter is local
   b. there is not a clear distinction between what's national and what's local
4. *Welton v. MO*—court used Cooley approach to invalidate a law that required peddlers of out-of-state merchandise to pay a tax and obtain a license while in-state merchants had no such requirements.
5. *DiSanto v. Penn.*—court drew a distinction between laws that directly interfered with interstate commerce and those that only had an indirect effect and thus were permissible. Problem with this was the difference between the two categories isn't clear.

v. Modern Approach
1. Is based not on rigid categories but on balancing the benefits of the law against the burdens it imposes on interstate commerce.
2. *SC State Highway Dept. v. Barnwell Bros*—ct. Upheld a law which imposed length & width requirements for trucks operating in the state—important interest in highway safety and preserving roadways
3. *Southern Pacific Co. v. AZ*—ct. Struck down a law that limited the length of RR trains operating in the state—burdens on commerce were greater than the safety benefit
4. If the state is discriminating against out of staters then there is a strong presumption against the law and it will be upheld only if it is necessary to achieve an important purpose. If it is nondiscriminatory then it will only be invalidated if it's burdens on commerce outweigh its benefits.

vi. Facially Discriminatory Laws.
1. *Philadelphia v. NJ*—NJ law that kept landfills in the state exclusively for NJ use. This was an impermissible protectionist action.
2. *Hughes v. OK*—OK law that prevented the transport of minnows obtained in OK for sale outside of the state—CT struck this down because it was discriminatory and was not the least discriminatory alternative.
3. *Dean's Milk*—WI milk case—discriminatory against out of staters, not least restrictive means

**vii. Facially Neutral Laws**

2. Discriminatory impact is sufficient for a facially neutral law to be deemed discriminatory
3. Important factors
   a. A law will be discriminatory if its effect is to exclude virtually all out of staters from a particular state market, but not if it only excludes one group of out of staters.
   b. A law is discriminatory if it imposes costs on out of staters that in staters would not have to bear.
   c. It is discriminatory if the court believes it is motivated by a protectionist purpose, helping in staters at the expense of out of staters.

**viii. When not discriminating:** If the court decides a particular law is not discriminatory then a simple balancing test is used: the laws burden on interstate commerce vs. its benefits.

1. *Pike v. Bruce*—included a least restrictive means element. The court invalidated an AZ law that required cantaloupes grown there to be packed in the state rather than in another state. Came up with the following test:
   a. Is the treatment evenhanded?
   b. Is there a legitimate state purpose?
   c. Were the effects on interstate commerce merely incidental?
      i. If you answer all three questions yes, then you defer to the legislature.
      ii. If you answer the third question “no” then you do balancing.
      iii. If you answer the first question “no” (if you say there was discrimination) then you go to the strict scrutiny test developed by Brennan in the *Hughes* case. Ordinarily you will prove this by showing discriminatory effects or point out a bad motive if you can’t find discrimination.

2. Yet a court has never invalidated a nondiscriminatory law on the grounds that it is not the least restrictive means.
3. *Raymond Motor Transp. Inc. v. Rice*—struck down a WI law that generally prevented the operation on state highways of trucks longer than 55 feet and of double trailer trucks on the basis that the burden on commerce massively outweighed the speculative contribution to highway safety.
5. *Bibb v. Navajo Freight Lines, Inc.*—Contour mudguard case—Undue burden on interstate commerce—different states had different laws regarding the type of mud flaps required on trucks—this renders conforming to the law vary difficult….think about trucks full of explosives pulled over in MO using a blowtorch to get the damn things off between IL and AR--IL says their interest is in preventing debris. But these metal contour mud guards accumulate heat, and that can create problems with break linings, and that's even more dangerous.--Safety measures carry a strong presumption of validity. If it were only a matter of cost they would have to sustain the law, but because the measure is so unsafe then they can strike it down.
6. *Healy v. The Beer Institute*—struck down CT law that required beer companies to post their prices each month and to attest that the prices were not higher than their prices in the four state bordering CT. The court held that the commerce clause precludes the applicability of a state statute to commerce that takes place wholly outside the state's borders.

**ix. When the state is discriminating:** There is a strong presumption against discriminatory laws that burden interstate commerce. Such a law will only be upheld if it is necessary to achieve an important government purpose.

1. *Maine v. Taylor*—upheld ME law that prohibiting the importing of live baitfish. The law protected ME’s unique and fragile fisheries from significant threats of parasites that were present in other states but not in ME.
2. Laws that limit access to in-state resources
   a. *Hood & Sons v. DuMond*—struck down NY law that prevented a company from constructing an additional depot for receiving milk. This was to keep more milk for in staters at the expense of those in MA. This was struck down because there wasn’t a permissible nonprotectionist purpose for it.
   b. *Chemical Waste Management v. Hunt*—Court invalidated a law that imposed a fee on out of staters that disposed of hazardous wastes in the state, but collected no such fee from in staters.
   c. *OR Waste Systems v. Dept of Enviro Quality of the State of OR*—declared unconstitutional an OR law that charged a greater fee for disposal of wastes generated out of state than for those generated in the state.
3. Laws that Require the Use of Local Businesses
   a. *WY v. OK*—declared unconstitutional an OK law that required that coal-burning power plants use at least 10% OK coal.
   b. More recent cases have found Cooley-like laws unconstitutional.

**x. Congressional Approval Exception**—the constitution empowers Congress to regulate commerce among the states and that therefore state laws burdening commerce are permissible if they have been approved by congress.

**xi. Market Participant Exception**

1. *Hughes v. Alexandria Scrap*—upheld a MD law designed to rid the state of abandoned automobiles.
2. *Reeves v. Stake*—upheld a cement company owned by SD charging less to in-state purchasers and more to out of state purchasers.
3. *South-Central Timber Development v. Wunnicke*—struck down AK law that required that purchasers of state-owned timber have the timber processed in AK before it is shipped out of state. The limit of the market-participant doctrine must be that it allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.

c. The Privileges and Immunities Clause of Article IV Section 2

i. Differences from Dormant Commerce Clause
1. Can only be sued if there is discrimination against out-of-staters
2. Corporations and aliens can’t sue under privileges and immunities
3. There are two exceptions to the dormant commerce clause that do not apply to the P&I clause—Congressional approval and the market participant exception.

ii. Two Basic Questions
1. Has the state discriminated against out-of-staters with regard to P&I that it accords its own citizens?
2. If there is such discrimination, is there a sufficient justification for the discrimination?

iii. Important Economic Activities
1. *Sup. Ct. of NH v. Piper*—invalidated law that required residence in the state in order to be admitted to the bar.
2. *Toomer v. Witsell*—declared unconstitutional a SC law that required nonresidents to pay a license fee nearly 100x as large as that of residents for each commercial shrimp boat.
3. *Mullaney v. Anderson*—law that required AK residents to pay $5 for a license but nonresidents to pay $50 was unconstitutional.
4. *Hicklin v. Orbeck*—struck down AK law that required that AK residents be given priority in hiring for jobs on oil and gas projects.
5. *United Building & Construction Trades Council of Camden v. Mayor and Council of the City of Camden*—struck down law that required that 40% of people working on city construction projects be residents of the city.
6. *Baldwin v. Fish and Game Commission of MT*—elk hunting isn’t protected because its not economic discrimination or discrimination with regard to constitutional rights.

iv. A state may discriminate against out-of-staters even with regard to constitutional rights or the ability to earn a livelihood, only if there is a “substantial reason” for the difference in treatment compared with in-staters and only if the law is closely related to the justification. The clause does not preclude discrimination against nonresidents where (1) there is a substantial reason for the difference in treatment, and (2) the discrimination against nonresidents bears a substantial relationship to the State's objective. In determining whether the discrimination bears a close or substantial relationship to the State's objective, the court has considered the availability of less restrictive means.

V. The Structure of the Constitution’s Protection of Civil Rights & Civil Liberties

a. The Application of the Bill of Rights to the States

i. Privileges and Immunities Clause of the 14th Amendment

1. *Slaughterhouse Cases*—said the 14th Amendment was only to protect slaves. The privileges and immunities clause was not meant to protect individuals from state government actions and was not meant to be a basis for federal courts to invalidate state laws. It only included the right of the citizen to come to the seat of government, to assert claims against that government, transact business with it, to seek its protections, to share its offices, to engage in administering its functions. He also has the right of free access to its ports, and courts, and to demand the care and protection of the fed when on the high seas or in a foreign country.

2. *Saenez v. Roe*—right to travel is fundamental, and part of that is the right of new residents to be treated the same as old residents.

ii. Incorporation

1. First the debate was over history and whether the framers intended for the 14th amendment to apply to the bill of rights
2. Second it was over federalism
3. Third the debate was over the appropriate judicial role.
4. *Duncan v. LA*—The question has been asked whether a right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is basic in our system of jurisprudence, and whether it is a fundamental right essential to a fair trial.

5. *Adamson v. California* --The court says that the 14th Amendment doesn’t carry everything over, and that it does not carry over freedom from self-incrimination.
   a. Considerable latitude was left to the states after the civil war to work out incorporation on their own. Do these reach to and concern the criminal process?
   b. Frankfurter’s criterion: Incorporation is defensible in a criminal proceeding where a defendant is deprived of due process as measured by the canons of decency and justice expressed by English-speaking people.
   c. Dissent: Black was a champion of literal incorporation—the first eight amendments should be carried over—nothing more; nothing less. He trots out “natural law” and talks about it in a negative way. He says it gives justices an opportunity to just follow their whims b/c natural law is so open and ambiguous. So the best way to go about reining them in is literal interpretation. But natural law is the old term for “moral theory on law,” which is where we get the precept of equality and autonomy, which is vital to protecting privacy rights.

6. The 1st, 4th, 5th, 6th, and 8th amendments have all been incorporated in some way.
i. Civil Rights Cases—14th Amendment only applies to state and local government actions, not to private actions.

ii. United States v. Morrison—reaffirmed Civil Rights Cases

iii. When does the Constitution Apply to Private Actions?
1. 13th Amendment applies to private conduct.
2. Public Function exception cases and entanglement exception cases.
3. Federal and State statutes can apply constitutional norms to private conduct.

iv. Why is there a State Action Doctrine?
1. Textual Concerns
2. Historically it was thought that the common law protected individuals from private interference of their rights.
3. It preserves a zone of private autonomy
4. The state action doctrine enhances federalism by preserving a zone of state sovereignty.

v. Public Function Exception
1. Jackson v. Metropolitan Edison Co—held that there is state action in the exercise by a private entity of powers traditionally exclusively reserved to the state
2. Marsh v. Alabama—Jehovah's Witness Company Town case—running a city is a public function, and therefore it must be done in compliance with the Constitution, whether by the government or by a private entity.
3. Evans v. Newton—city can't avoid desegregation of a park by turning it over to a private entity

vi. The Entanglement Exception
1. The Constitution applies if the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.
2. Have arisen in four areas: (1) judicial and law enforcement actions; (2) government licensing and regulation; (3) government subsidies; and (4) voter initiatives permitting discrimination
3. Lugar v. Edmonson Oil Co: Two part test for state action—First the deprivation must be caused by the exercise of some right or privilege created by the state, or a rule of conduct imposed by the state, or by a person for whom the state is responsible...Second, the party charged with the deprivation must be a person who may be fairly said to be a state actor because he is a state official because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

VI. Economic Liberties and Substantive vs. Procedural Due Process

a. Distinction Between Substantive and Procedural Due Process
i. Procedural due process is made up of the procedures that the government must follow before it deprives a person of life, liberty or property. This is what we are talking about if someone wants to have an action declared unconstitutional because of the lack of adequate safeguards, such as notice and a hearing.
ii. Substantive due process asks whether the government has an adequate reason for taking away a persons life, liberty, or property. This is what we are talking about if someone is seeking to have a government action declared unconstitutional as violating a constitutional right.

b. Economic Substantive Due Process
i. Economic Substantive Due Process During the 19th Century
1. Fletcher v. Peck—court relied, in part, on natural law in declaring a state law unconstitutional. It involved a challenge to a GA statute that rescinded an earlier law that granted land to certain individuals.
2. Terrett v. Taylor—VA law that would have taken away title for land from a church was held to be a violation of principles of natural justice.
3. Murray v. Hoboken Land & Improvement Co.--ct. Denied a due process challenge to an attempt by the government to collect delinquent taxes. The court said that due process is met so long as the government's procedures are in accordance with the law.
4. Slaughter-House Cases—court expressly rejected substantive due process claim. The suit involved a challenge to a Louisiana law that granted a private company a 25-year monopoly in the livestock landing and slaughterhouse business. Butchers sued claiming that it denied their right to practice their trade and thus violated the due process clause. In rejecting this argument, the court emphasized that this clause concerned the procedures that the government must follow and thus could not be used to challenge the law for interfering with the right of butchers to practice their trade.

ii. The Lochner Era
1. Lochner v. New York
   a. held unconstitutional a law that set the maximum number of hours bakers could work because it did not serve a valid police purpose and it interfered with the freedom to contract.
   b. Three Principles
      i. First—freedom of contract is a basic right protected as liberty and property rights under the due process clause.
      ii. Second—government can only interfere with freedom of contract only to serve a valid police purpose; that is, to protect the public safety, public health, or public morals.
      iii. Third—it was the judicial role to carefully scrutinize legislation interfering with freedom of contract to make sure that it served a police purpose.
   c. The health of bakers was not a sufficient justification to allow the state to interfere with freedom of contract...it had no relation to public health.
   d. Strong dissents talked about the need for judicial deference to legislative choices and rejected the idea that the judiciary should use the constitution to protect a laissez-fair economy
VII. **Evolution of Modern Substantive Due Process**

**a. Transitional Case: Meyer v. Nebraska**

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The switch in time saved nine.

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West Coast Hotel v. Parrish—Ct upheld a law that required a women's minimum wage and expressly overruled Adkins. Also pointed out that the constitution doesn't speak of a freedom of contract. And it said that the government wasn't limited to health, safety, and morals.

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United States v. Carolene Products Co.—
  a. said that economic regulations should be upheld so long as they are supported by a conceivable rational basis, even if it cannot be proved that it was the legislatures actual intent.
  b. Double standard for review: Generally, the court would defer to the government 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.

**b. New Substantive Due Process**

i. 
**Griswold v. CT**

1. Douglas rejects the CT ordinance on the grounds of penumbral rights.

2. 
NAAACP v. AL—freedom to associate means that membership lists don’t have to be disclosed. The Penumbral right of association in this case got its strength from the core right of assembly in the first amendment. The right to express your opinion is another penumbral right. There are penumbral rights in half of the amendments in the bill of rights.

3. Penumbral right to 3rd amendment is privacy. Immunity from governmental directive to quarter soldiers privacy right.

4. Goldberg’s concurrence is like the Adamson case—standing for literal incorporation +. 9th Amendment—doesn’t set out specific rights.—which is the problem w/using it. He also has a reducteo absurdeum argument. To show: not every constitutional right is expressly stated in the constitution. 1. Assume the opposite. 2. Then (draw from 1) no constitutional protected immunity from state imposed compulsory sterilization. THAT is absurd. 3. Premise 2 states an absurdity, then 4. 1 is false and our original premise is true. Then argue by analogy that premise #1 can’t be used to deny marital privacy. The analogy is difficult, though—forced sterilization is not = to marital privacy.

5. Harlan says that Douglas's approach amounts to a species of literal incorporation. He follows the Palko idea of incorporation.

6. Black says that if natural law is to prevail, then justices must determine constitutionality based on their own appraisal of what the law should be.

7. Stewart is interested in expressly rejecting the idea that there is anything at all to substantive due process in any context. New version is no better than the old version. He will change his mind in Roe.

8. The issue is part and parcel of the privacy field and there is a real effort to advance the argument in doctrinal terms via the penumbral rights doctrine.

ii. **Roe v. Wade**

1. Abortion was not an indictable offense in the older common-law if it was before the quickening (16th or 17th week of pregnancy). If there was an abortion it was homicide. Then in the 18th century it became a misdemeanor to have a post-quickening abortion. By the 1840s only 8 states had abortion laws….the rest were left to common-law. Then almost all the states got them, but in the 25 years before Roe about 1/3 had liberalized their statutes.

2. Blackmun emphasizes the contention that abortion laws were based on legislatures concern over the health and welfare of the pregnant woman. The American Medical Association was arguing that the protection of unborn life was based on a woman’s marital duty to procreate.

3. The 1st, 4th, 5th, 9th, and 14th Amendments come into play here.

4. Precedent includes: *Loving v. VA*—the interracial marriage case; *Skinner v. OK*—overruled statute that required sterilization of felons who had been convicted 3+ times; *Another Case*—can’t prevent single people from getting contraception. Problem the dissent brings up is that none of these cases lend support to the court’s claim that there is a right to privacy evident in the constitution.

5. The right to an abortion is not absolute. The state has an interest in maintaining health and medical standards and protecting potential life.
a. Interest in protecting potential life becomes compelling at the point of viability.

b. Question of Personhood: TX claims that the fetus is a “person” in the meaning of the 14th Amendment. There is NO support for this in the case law.

c. The other compelling interest is the health of the mother. This interest becomes most compelling at the end of the first trimester because in the first trimester the abortion fatality rate is lower than in ordinary child birth.

d. During the second trimester the state can regulate in ways reasonably related to maternal health.

6. Stewart’s concurrence recognizes substantive due process with an eye to privacy.

7. Douglas’s concurrence appeals to the “blessings of liberty” clause of the preamble of the constitution, and says this is carried over to the states via 14th amendment. He references a woman’s “autonomous control” over her life. The interest in autonomy is promising way to protect right to privacy.

8. Rehnquist’s dissent places weight on what the framers/reconstruction congressmen did not intend. But damn it, the same is true of Brown v. Board of Education. Why should the framers’ intentions matter today? Should the first generation’s society be thrust upon the second generation?

9. Modern case in terms of the issue, doctrinally a mixed bed. The strict scrutiny test is here, and that counts as an advance. There is no real improvement, however, in doctrinal terms regarding the source of the right to privacy.

10. If there is a right at issue here, then of course the court must hear it. If on the other hand you are an opponent of Roe you are insisting, of course, that these issues are to be left to the people via the legislature.

iii. Casey v. Planned Parenthood

1. Webster case made it seem like Roe was in trouble. The statute in that case forbade the use of government funds and the statute was upheld.

2. Kennedy joined Souter and O’Conner in the 3-judge plurality, and the other two good guys concurred. Bush I administration had urged the court to overturn Roe w/ Casey

3. This statute required a 24 hour waiting period and a spousal notification requirement for abortions. The court upheld the 24 hour waiting period and as per Danforth case, found the spousal notification requirement unconstitutional.

4. The plurality decision allowed some elements of Roe like the trimester distinction and the use of a strict scrutiny standard for passing on abortion statutes. This is a huge problem. Constitutional rights generally have a strict scrutiny standard. If O’Conner abandons the strict scrutiny standard then some of the support for the right that was recognized in Roe has been left behind. She creates an undue burden paradigm. State regulations can stand unless they constitute an undue burden on the right to an abortion. An undue burden is one that prevents women from getting abortions via a substantial obstacle.

5. No general criterion is presented in O’Conner’s talk about the undue burden test. O’Connor speaks of interests. The nature of the pregnant woman’s interest versus the state’s interest. Wherever you have a prima facie case we ARE NOT TALKING ABOUT INTERESTS. This is a step backwards because O’Connor abandon’s the strict scrutiny test.

iv. Bowers v. Hardwick

1. Does the equal protection clause play a role in this decision? Nope. The court frames the issue in terms of whether the constitution confers a fundamental right to gay sodomy. If the issue is being framed in due process terms it should have been framed in general terms regarding a right to privacy or autonomy, not something as specific as gay sex.

2. Might equal protection have played a role in Hardwick’s lawyer’s brief? Sure it did. He wanted to bring a due process claim so he would have wanted to claim he didn’t enjoy equal protection under the law b/c the law is only enforced against homosexuals. In a test case the heterosexual couple’s action was dismissed for lack of standing.

3. Court draws from Palko and Moore that liberty and justice characterize those liberties that are “deeply rooted in this Nation’s history and tradition.

4. Blackmun’s dissent includes categories of privacy—(1) a privacy interest with reference to certain decisions that are properly for the individual to make (like decisions to have or not have kids) and (2) a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged (like your own home).

5. Stevens talks about the equal protection issue in his dissent.

v. Lawrence v. Texas

1. The courts still stick to the rational relation test.

2. Liberty in the 14th amendment is too broad to use to defend the privacy right. Its better to talk about autonomy. Autonomy presupposes privacy. Autonomy = dignity.

3. Autonomy—see Kant (Groundwork of the Metaphysics of Morals)—Under autonomy, human beings are ends in themselves, and not the means to some ends. Suppose then that the state legislature introduces its purpose for proscribing abortions is procreation. Then child bearing women become a means there to. But that won’t work if women are properly regarded as ends in themselves, and not the means to some other end. What about in the context of sexual behavior? Gays are ends in themselves. Suppose then we have a sodomy statute and the end in question in the statute is to preserve a certain community standard respecting sexual conduct that precludes “unnatural sex.” Well, then the gays are a means where behavior on their part is proscribed. They are being used as a means to an end, but that can’t be the case if they are ends in and of themselves.

VIII. Slavery Stuff that Doesn’t Fit Anywhere

a. Interstate Commerce and Slaves—Groves v. Slaughter
i. Argued that provision of Mississippi Constitution which forbade importing slaves into the state from other states was a violation of the commerce clause. Court side-steps the issue by saying that implementing legislation is required to give the constitutional provision effect and without that legislation the constitutional provision is irrelevant because it has no force and acts like a dead letter.

ii. Doctrine of exclusivity: If there had been a federal statute governing congress vis a vis slaves then we have the congressional exercise of commerce power and then the states could not act. The Congressional power is exclusive. But the dilemma goes further. Suppose Congress has not acted, but Congress MIGHT have, then states still shouldn’t have any power.

   1. This doctrine did not in the end prevail. The Cooley case dismisses it once and for all. If it had stuck around, there would be no dormant commerce clause material to cover. Get around this by saying that slaves are a state matter and not a commercial matter.

   2. Exclusivity in the defense area is not the same as exclusivity in the commerce area

b. Prigg v. Pennsylvania

i. 1793 Fugitive Slave Act—Authorizes owner or agent to seize fugitive slaves who are then to be certified by a judge as fugitive and then the owner gets a certificate of removal. Amounts to a vigilante’s license to enforce his rights himself with a minimum formality. Sets aside the regular legal process and denies the alleged fugitive the opportunity to testify on his own behalf. Nothing in the act to discourage the pursuer from taking the captive home with him without obtaining the certificate of removal, which is what we have in Prigg. Fugitive Slave Provision continues to function as self-executing along side the 1793 law, meaning the pursuer can go after the slave privately so long as no disturbance of the peace is noticed. This is Congressional endorsement of kidnapping.

ii. Prigg seizes Margaret Morgan, who was either a runaway slave or the daughter of a slave, with her daughters. Prigg applies for a certificate of removal. PA law is supposed to prohibit self-help in the return of fugitive slaves. He doesn’t get the certificate. But he takes Maggie and her kids back. MD extradites him and he’s convicted. The Sup Ct holds the state law unconstitutional.

iii. If the constitutional Fugitive Slave Act is self-executing, then what’s the point of the 1793 Act? Isn’t one.

iv. The 1793 Act is an option for Prigg, not a mandatory provision. The self-help option is still available under the constitution. The state of PA is trying to assure that self-help won’t happen, but the PA law is unconstitutional because of the exclusivity doctrine.

v. The 1793 purports to confer power on the states! But story says the states doing anything like PA is still unconstitutional.

vi. Took the northern states out of the business in assisting in the return of fugitive slaves, but it carries forward the involvement of the federal government in the protection of slavery

c. Dred Scott v. Sanford

i. What is the legal status of a slave who enters a non-slave-holding state or territory? If that individual should later return to a slaveholding state, what effect does his stay outside of the slave states have once he’s back inside the slave state? There were three possible answers:

   1. Permanent Slave Status—law of slavery continues to attach to the slave who has entered a free state

   2. Once Free, Always Free—the slave taken by his master into a free state becomes a free man/woman and he/she remains so, even if he/she goes back to a slave state

   3. Reversion—the slave who is taken into a free state becomes free there in the sense that his master loses the power to control him there, but if he returns to a slave state than he reverts back to his slave status. A beating in the slave state would be perfectly fine punishment, but a beating in the free state would be an assault.

ii. The US Sup Ct ruled against Dred Scott because

   1. “Blacks are not citizens of the US because they cannot be, so they can’t sue in federal court.”

   2. MO decision still stands so he’s still a slave.

   3. Also, Congress has no power to limit slavery in the territories.

   4. The Property Interest in slaves is protected under commerce clause.