Con Law Outline
I. Overview of the Constitution’s Text, Historical Context and Interpretive Methodologies
   A. Interpretation:
      a. **Textualism**: what did the framers intend?
         i. **Strict**: Scalia and Thomas- contractual view
         ii. **Pros**: arguably simpler, less politics, constrains judges
         iii. **Cons**: tough to discern language, ambiguous terms
      b. **Original intent**: looking to Federalist papers, floor disputes of the constitution.
         i. **Same goals as Textualism**.
         ii. **Problems**: framers were not confronted with the exact same situation as now, may not reflect the majority of the framers.
      c. **Structure**: Read the document as a whole. One provision may be general, while another one could relate more specifically. How they mean in relation to each other; could be a source of meaning all on its own. Find the whole: state v federal and 3 branches.
      d. **Political process argument**: seeing system operate and identify its weaknesses. There should be a transparency to govt decision so that voters could see who is enacting law and vote them out. (NY v US- radioactive waste (O’Conner)
      e. **SC precedent argument**- stare decisis
      f. **History- precedent/pattern/practice argument**- 3 Ps. this is the way it has been done. Used for determine intent or for extending provision. Is the conduct an established American tradition.
         i. **Miranda warning**- not in C, but uphold as a custom or practice.
      g. **Fairness/justice**- arguably this should be one of the first things that is discussed as the role of the SC.
      h. **social policy**- burden and benefits to the community.
   B. Review of Text:
      a. Short, Process more than substance, No definitions
      b. **Article I**
         i. Sec 1: vest legislative powers to the Congress
         ii. Article I, Sec 2: House composed of, age, apportionment
         iii. Article I, sec 3: Senate composed of, age, power to try impeachments, extent of judgment.
         iv. Sec. 4: The times and places and manner of holding Elections for Senators and Reps shall be proscribed by the Legislature thereof, but Congress can make or alter regs. Except for Senators.
         v. Sec. 5: House judge of Elections and returns, determine rules and proceedings
         vi. Sec. 6: Compensation for Senate and House.
         vii. Sec 7: All bills for raising revenue originate in House or Senate, pass both house and sign by Pres.
viii. Article 1, Sec 8 enumerates the powers of the Federal Government.
ix. Sec. 9: Limits on power
x. Sec. 10: “interstate compact clause”- no State shall enter into Treaty, alliance or Confederation, no coin money, No state shall without the consent of Congress lay tariffs, except what may absolutely necessary for executing its inspection laws.
c. Article II: Separation of Powers: Executive Power
d. Article III: Judicial Power vested in one SC.
i. Sec 1:
ii. Sec 2: power to extend to all cases in law and Equity “arising under this Constitution, the laws of the US and Treaties made”.
iii. Sec 3: Treason
e. Article IV:
i. Sec 1: Full faith a credit shall be given in each State to the public acts, Records and judicial proceedings of every other State. And the Congress may be general laws prescribe the manner in which such Acts, Records and proceedings shall be proved.
ii. The citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several states.
iii. Sec 3: new states
iv. Sec 4: US to protect states from invasion.
f. Article V: Amendments
g. Article VI: Supremacy clause: The C, laws of Us are the Supreme Law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.
i. Sec.1
ii. Sec2
iii. Sec 3: “oath clause”
h. Article VII: Ratification sufficient to establish.

C. History:
i. Declaration of Independence- 1776
ii. War won –1781
iii. Constitutional Convention- 1787
iv. Ratified –1789
b. Problems with Articles of Confederation:
i. state protectionism- national government weak (states could raise tariffs, Art 4 and Art 6 in C helps this), no branches, unable to raise monies,
ii. extreme populism reward the small guys, lack of protection for property rights for wealthy, printing paper money for poor
iii. uncertainty in the state legislature.
c. Proponents of the need for a new C were the Federalists: Madison
d. Opponents: Anti-Federalists (Jefferson). Objections to new C:
   i. Smaller govt.
   ii. More pure democracy- people vote on all matters
   iii. Agrarian way of thinking
   iv. Debt relief- favor
   v. Revision by generation- it is immoral to lock future generations into the same constitutional framework.

e. Madison’s Federalist papers: 51 and 10
   i. view of human nature: idealistic or cynical? A little bit of both. Needed representation, but needs to checks b/c people will be greedy with the power.
   ii. Talk of controlling the government: enable the government to control the governed, and then oblige it to control itself: checks and balances

II. The Fundamentals of Judicial Review: Supremacy Clause
A. Marbury v Madison: 2/13 Jefferson elected President, 2/27 Federalist Congress passes act creating 42 new federal judgeships, 3/2 Adams nominates 42 new fed judges, including Marbury, 3/3 Senate confirms all 42 nominations, Adams signs commission documents and Sec of state Marshall fails to deliver all of them and Marbury is one of those not delivered; 3/4/1801 New sec of state, Madison, arrives, sees undelivered commissions and fails to deliver. Marbury brings suit in SC.
   f. The authority of the SC to interpret the Constitution and invalidate acts by other branches of the government:
   g. Court delivered by Marshall: A law enacted by the Legislature that is repugnant to the Constitution must be void under judicial review to the SC. Here the Judiciary Act, which said that the Supreme Court had original jurisdiction except as enumerated under Article 3.
   h. Finds that Marshall DOES have a right to his job as justice of the peace. Once signed, sealed and delivered. (the delivery aspect is purely ministerial); there is a legal right at this point.
   i. The Federal Courts DO have the power to order the Executive branch to give it to him if about individual rights.
      i. Individual rights: When the Pres acts where individual rights depend upon the performance of that duty.
      ii. v. national: The subjects are political and the courts do not rule on political questions
   j. Marbury did NOT follow the right procedure by filing this action directly with the Supreme Court. The Supreme Court cannot hear the case under original jurisdiction. There is a procedural flaw.
      i. Congressional statute says that SC can hear this case, but the Constitution says ‘No’ and the Constitution is controlling.
k. The judiciary branch of government should identify and resolve constitutional disputes.
   i. Good argument that each branch should monitor its own: in Congress, let the people decide.
   ii. But note the Supremacy clause, lacks the description of who is responsible for interpreting the Constitution.

l. In general, Marshall enters a warning basically saying that he has a right, but to order mandamus would be to put the C into crisis. Effort to increase power to judiciary to interpret C, and not to Congress.
   i. Because original jurisdiction considered unconstitutional, then SC tightened up SC jurisdiction.

B. Note cases:
   a. Wooster v GA: Signed a treaty for land and the Indian tribe to the SC. Tribe wins and has the land, but then Pres. Jackson says “you enforce it Marshall”
      i. In Europe, the judicial branch has its own police to enforce.
      ii. US, shows there are some practical limits to judicial power. Everything will not be seamlessly enforced.
   b. Cooper v. Aaron: reject the specific case holding and applies to everyone. Gov of Ark thinks that it does not apply, but the court lets him know otherwise. P.24
   c. Nixon v Watergate: tapes- by turning over tapes he obey Court despite its unpopularity. (Bush v Gore)

D. Judicial Power:
   a. Supreme Court is authoritative voice on C
   b. Is it exclusive interpreter? Not necessarily sometimes Congress
   c. Court can invalidate actions.
   d. Compliance is consensual –no judicial enforcement mechanism.

E. Limits on judicial power: If the Plaintiff does not satisfy any of these then it is OUT!
   a. Who? Ct. Cannot hear it unless the “right” person brings the suit. Party must have Constitutional standing.
      i. Lujan v Defenders of Wildlife: Endangered Species Act and no regulation to Secretary of inferior to consult for environmental concerns not in the US. Plaintiffs complain that they will not be able to visit Egypt at some point and see croc…very attenuated.
      ii. 2 prongs tests: Black Letter Law: Standing Article III
         1. Injury in fact- an invasion of a legally protected interest
            a. (1) physical, 2) economic, or 3) concrete and particularized constitutional right. If it is vague then no injury. But the “in-between”- (jog in forest park and cannot do—regular but astethic use)
            a. actual or imminent, not conjectural or hypothetical; show future harm
b. procedural elements by not following procedure is not enough. Must have injury.

2. Causal Connection between injury and conduct complained of—must be traceable to actual action of Defendant not third party. Use “but-for test.”
   a. *Warth v Seldin*: group sues against zoning regulations we excluded from living in city. No Standing because no causal connectors—there was intervening causal chain.

3. Likely to be redressed by a favorable decision.
   a. will stopping act bring about a favorable decision.
   b. Court, Scalia, says plaintiff not injured and the defense argued that the animal nexus and vocational nexus arguments—ct says these do not work.

4. Prudential Requirements: Cts choosing to impose additional requirements. Optional = not mandated by Constitutional. Constitutional because not forcing them to do it. Will tighten further—
   a. No 3rd party standing n- Congress can modify by enacting a statute or exception i.e. abortion cases brought by Dr’s who asserted economic injuries who assert stronger Constitutional issues that the claims of their patients. Ex. Whistleblower
      i. *Craig v Boren*: Plaintiffs were bartender not 18 year old men.
      ii. Maybe allowed if the injured 3rd party is unlikely to be able to assert his own rights and protect itself in court.
   b. No abstract or vague questions: No generalized grievances are allowed → plaintiff must not be suing solely as a citizen or a taxpayer interested in having the government follow the law → SC has frequently said that these plaintiffs lack standing.
      i. Exception is very narrow- taxpayers have standing if they are challenging government expenditures as violating the establishment clause of the 1st A. But lack standing to challenge fed govt grants of property to religious orgs.
   c. P within “zone of interests” – P within the protected class that the statute protects.
b. Kennedy: If Congress wants to write a statute that deems injury then can have standing. Scalia was sticking to Common Law and we do not necessarily have to do.

c. Standing is a political issue: If it is tight then limits the number of cases, forces the Legislature to deal with issues which are broad. Get people involved with Congress and limits lawsuits with the govt. If loose, too litigious then allowing more plaintiffs to bring.

1. What? Political question doctrine – some things off limits
   i. Baker v Carr: Drawing lines and population shifts into districts which is reviewable
      1. Rule: Equality of population in state districting for congress was constitutional and not political...one vote for one.
      2. Voters claim that the Tennessee general assembly diluted their vote b/c apportioned on pop, but it hadn’t been changed since 1901. Ask for reapportionate.
      3. This is not a political question, rather right to be represented. A political question would be where you draw the lines.
   ii. Powell: Congressmen was scandalous in past and they refuse to seat him. Court said they must seat him as not textually listed things. So this satisfied Prong 1 and doesn’t leave any room for decision.
   iii. Goldwater v Carter: Pres refused to follow treaty and the pres refused to discuss it bc it was a foreign affair: General rule: Court will not intervene in foreign affairs.
      1. Issue: Does the Senate have the “sole power to try” impeachment? Is this constitutional?
      2. P argues that the entire Senate should be able to listen to evidentiary proceedings. Trial with evidence. Read this broadly. Textual reading.
      3. D argues the C does mention limits so why should we impose more.
      4. TWO PRONG TEST: Political Question if:
         a. the concept of a textual demonstrable commitment to coordinate political department is not completely separate from the concept (Baker v. Carr) OR a lack of judicially discoverable and manageable standards for resolving it. (Goldwater v Carter)
      5. Court here decides based on 1) this is textually committed using text, original intent (intent there
because it is there), structure (checks and balances) and the concurring uses history and pattern of practice.

e. **When? Ripeness** (The usually waits until a fed statute or reg violated before is takes the case.- no pre-enforcement issues-must wait until adversely affected) and **mootness** (If events after the filing of the lawsuit end the Plaintiff’s injury, the case shall be dismissed as moot. point not at issue so plaintiffs must present a live controversy OR an ongoing injury while the case in pending.)
   
i. Mootness exceptions: wrongs capable of repetition but evading review- Roe v Wade.
   
ii. Defendant voluntary halts the practice, but is free to resume it at any time, the case will not be dismissed as moot.
   
iii. Class actions where the plaintiff’s claim becomes moot but if one member still has injury, it continues.

f. **Where?** Jurisdiction (fed district and state court)

i. Geography-venue

ii. Hierarchical-court levels- where in system

II. National Powers in the American Federal System


g. **Martin v Hunter’s Lessee:** Judge Story. Martin claim to Fairfax land claim through state treaty. Hunter through inheritance of will. Fairfax, Britain supporters forfeited land to state to Martin from will. Who has the better claim? Does the VA statute operate to take the power from the treaty?
   
i. In state court, found for Hunter and in federal court, found for Martin. Did not deny supremacy. Yes, feds courts could abuse this, but state could too so give to fed.
   
ii. Article 6 –supremacy clause rules, Motives of decision: uniformity of decisions and subjects within the purview of the constitution.
   
iii. Well-pleaded complaint rule: state and fed issues involved if fed issue in complaint then Defendant can put in fed. Court. However, if other fed issue is defense cannot be in federal court. Look to the affirmative case to see where it goes.

b. State issue goes to state SC—does the US SC get to oversee that?

c. Assert authority of fed over State Courts- this is the other side of Marbury coin. Confirms federal over state courts like Marbury power over branches.

h. **Cohens v Virginia:** Cohens charged criminally for selling lottery tickets and Cohen raises fed law as defense. Here, state was party in the case and they argue that grant of original jurisdiction to SC. If the state a party then no jurisdiction since SC only has appellate jurisdiction.
   
i. Did the SC have constitutional authority to review such state judgments?
ii. SC has no right to tell state how to interpret state law.

B. Adequate and Independent State Grounds Doctrine:
   a. For the SC to grant cert and issue an opinion when its ruling could have no possible effect on the rights or duties of the parties would amount to an unconstitutional advisory opinion. Court rules only when there are NOT Adequate and Independent state grounds.
   b. What is an adequate state ground?
      a. Procedural- even if it is deemed adequate a litigant may be able to overcome a procedural default by showing cause and prejudice.
         i. the procedure does not deny due process or violate any other constitutional provision
         ii. The procedure advances a legitimate state interest
         iii. The procedure is applied consistently.
   b. Substantive adequate if
      i. It fully supports the result
      ii. Does NOT conflict with the US Constitution, fed statute or fed treaty.
   c. What is an Independent state ground?” An independent state ground of decision is one that is not based on the state court’s understanding of federal law. Any mistake by the state court in its understanding of federal law would undermine both the state and federal grounds for decisions.
   d. Michigan v Long 1983: the SC announced that in the future unless absolutely clear on the face of the state opinion that the decisions rests on an independent ground, the Court will assume that the state and federal grounds are not independent and thereby allowing the SC view of the case.
      a. Makes it easier to SC to review and reverse when a state court tries to give citizens more rights under state law than they would have under federal law.
      b. Michigan v Long rests on the principle that a state court’s interpretation of the federal Constitution must exactly match that of the SC.
      c. States can impose stricter restrictions but cannot enlarge federal constitutional standards. They must give them more rights under state constitution and laws⇒ thereby making it independent!!!
C. Early assertion of Federal Power: McCulloch v Maryland: Marshall wrote maj. “We must never forget that it is a Constitution we are expounding.” This is a more flexible approach.

a. Art 1. defines the authority of Congress and can only act if there is express or implied authority → Art I § 8 “Congress shall have the power to make all the laws which shall be necessary and proper for carrying into execution the foregoing powers.

b. Congress can choose any means not prohibited by the Constitution to carry out its powers. Still good law and hasn’t been reinterpreted since even in the FDR.

c. Must link the means to the end. Jefferson (anti-fed- would say only most direct and simple.) Hamilton- if they comment let them do it—only natural relation to the end.

d. Art I § 10- says “absolutely necessary” used so then necessary in Art I is not as strong- not just one meaning and not absolute necessary otherwise they would have put it in there. This is more flexible.

e. Art II §3-Also “necessary and expediency” president to report on state of the union

f. Arg for: Do not restrict the govt so much that they cannot do what they were set up to do. Bottom p.89

a. Arg for Federalism since Marshall big on federalism: argu that it is the will of the people to ratify the ways and then singed on by state.

b. Pattern of practice arg: We’ve thought about a national bank before and it is not a good idea as we look back to them.

III. The Affirmative Powers of the Federal Government-
A. The Commerce Clause: Art I, §8 “Congress shall have power to regulate commerce…among the several states.” Creating effective regulatory power over interstate commerce was a major motivation for the framing of the Constitution in place of the articles of confederation. There was the poor condition of American commerce and the proliferating trade rivalries among the states. Goal: would afford the means to end hostile state restriction, retaliatory trade regulations and protective tariffs on imports from other states.

a. Beginning in 1937, no law was struck down as exceeding the reach of the commerce power for nearly six decades. But with Lopez and Morrison, there may be a return of the interventionist commerce clause jurisprudence.

THREE PART TEST: Does the good/service

1) travel or cross state line 
2) Instrumentalities
3) affect interstate commerce 

i. Lopez changed to “substantially/directly affecting” IC

a. Gibbons 1824: Marshall NY legislature gave exclusive right to waters. Described commerce as commercial intercourse. Described “among” as
intermingled with, more than one state, external. “the completely internal commerce of a state, then, may be considered as reserved for the state itself.” Ct holds that navigation of steamboat between NY and NJ is commerce, commercial activity.

b. EC Knight 1895: Sugar manufacturer 98% of nations manufacturing. CT holds that this is NOT in commerce, manufacturing is not commerce and production is not commerce. Emphasis on Direct and indirect-manufacture is an indirect effect and commerce must be seen as a direct.

c. Shreveport Rate Case: imposing intrastate rail rates that discriminated against interstate commerce by mucking up the shipping activity. “Instrumentalities of commerce” Ct holds that the fed can regulate what seems local bc it is connected with an instrumentality of interstate commerce. I.e. local wages for airport workers.

i. origins of the “substantial economic effects” approach: “Congress does possess the power to foster and protect interstate commerce and to take all measures necessary or appropriate to that end, although intrastate transactions may thereby be controlled.”

d. Swift case: “Stream of Commerce”- Holmes- goods injected into the stream of commerce are considered commerce.

e. Mann I: Transporting women across state lines to work in prostitution, money changing hands and traveling. Feds have jurisdiction

i. Mann II: Married people committing affairs in other states, money in hotel.

ii. Items across state lines, carjacking,

f. Hammer 1918: shipping items nationwide that were produced in child labor. Held manufacturing was not commerce, but DARBY v US in 1991 reverse to say that Congress does have to power to regulate.

B. No more limits on the Commerce Clause:

a. US v Darby 1941: Darby a GA lumber manufacturer challenges an indictment charging him with violated the Fair Labor Standards act of 1938. Court ruled that the production of goods for interstate commerce is so related to the commerce that it is to be within the reach of Congress’ power.

b. Wickard v Filburn: “Affecting commerce” rationale: demonstrating outer limits ➔ Filburn a dairy farmer in Ohio sued the Secretary of Agriculture to enjoin enforcement of a marketing penalty imposed for exceeding a market quota for wheat that had be established for his farm. He said this was beyond the commerce power. Court held that it was not: The act extends Federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.

iii. Court says mechanical application of the legal formulas no longer feasible. Even if the appellee’s activity be local and though it may NOT be regarded as commerce it may still be,
whatever its nature, be reached by Congress if it exerts a 
substantial economic effect on interstate commerce and this is 
irrespective of whether the effect is “direct” or “Indirect.”

ii. Court says individual effect small, but the aggregate effect is 
   enough to say it is commerce.

c. Maryland v Wirtz 1968: The court has said only that where a general 
   regulatory statute bears a substantial relation to commerce, the de minimus 
   character of individual instances arising under that statute is of no 
   consequence.

d. Hodel: “When Congress has determined by statute that an acitivity 
   affects interstate commerce, the courts need inquire only whether the 
   finding is rational.”

e. Heart of Atlanta Motel 1964: P. 146 Hotel wanted to continue its 
   practice of refusing to rent rooms to African Americas. Court said: 
   Disruptive force of discrimination of commerce can led the fed to regulate 
   the local incidents thereof, including local activities in both states of origin 
   and destination, which might have an substantial and harmful effect upon 
   commerce
   Katzenbach: BBQ for 220 people about 11 blocks from interstate which 
   allowed white to eat in and black service to take-out. 46% of meat 
   purchased out-of state. The dimunitive spending of negros in restarants 
   stems from the refusal to derve them and their loss as customers has a 
   cloase connection to inerstate commerce. “Absence of direct evidence is 
   NOT a crucial matter” Discourages travel, etc.

3. New limits on the Commerce Power since 1995:
   a. US v Lopez: Rehnquist- Lopez was a 12th grade student who was 
      arrested for possessing a concealed handgun and bullets at his San 
      Antonio High School. The Gun Free School Zones Act of 1990 basing its 
      authority on the commerce power, made it a federal offense for an 
      individual to knowingly possess a firearm in a school zone. Lopez was 
      convicted, but COA says this is beyond the reach of commerce power.
      
      iv. Fails 1) of test: is not a regulation relating to the channels of 
          interstate commerce, 2) fails commerce since it is criminal no 
          matter how broadly you try to define it. Therefor, not 
          substantially affects.

      v. Govt argues that violent crime spreads its cost through the 
         whole population through insurance. They also argue that 
         violent crime reduce the willingness of people to travel to 
         certain areas of the country and may handicap the education 
         process which could result in less productive citizenry.

      vi. Court says this is wrong: if allow, the congress could regulate 
          all possible crime regulated activities, all activity leading to 
          prosuctive citizenery (family law)…in fact they would be 
          hardpressed to find any activity that Congress could NOT 
          regulate.
vii. Concurrence: Ken- Federalism argument that says that the fed balance wins here.

viii. Concurrence: Thomas- The commerce clause boundaries cannot be defined as being “commensurate with our national needs.”

ix. Dissent: Breyer- Substantial is narrower that it used to be. Problems: 1) runs counter to the SC precedent, 2) did not focus on affect rather commercial v noncommercial, 3) threatened settled area.

x. Analysis: Couldn’t the federal government

xi. Can’t we encourage enforcement by other means by the use of incentives without infringing on state sovereignty.

b. United States v Morrison (2000): P claimed she was raped by 2 football players and she filed a complaint under the university disciplinary system, but one man not punished and the other one’s punishment suspended. Ahe sued under the Violence Against Women Act. May Congress regulate gender-motivated violence under the Commerce Clause?

i. Rehnquist: Test:

1. Does the statute regulate some sort of economic activity? → here it did not.

2. Does the statute contain a jurisdictional element establishing a federal cause of action is in pursance of Congress Commerce power? No and Congress elected to apply over purely intrastate matter.

3. Whether the statute contains formal findings of fact regarding the activity and places substantial burdens on interstate commerce? Here, they found that gender-motivated violence affect inter-state by deterring travel, employment and business, diminishing national productivity, by increasing medical costs and by decreasing the supply of and demand for interstate products. BUT THESE ARE TOO ATTENUATED and could apply to any violent crime.

NOTE**: This case decided only 5-4 and Souter warns in his dissent that Congress should be deciding and not the Courts. Courts conclude only if Congress had a rational basis. The Majority failed to use the substantially affects test and seems to be categorically rejecting come exclusions from the commerce clause. Race wins out, but women do not—are the courts saying that there is not a strong of a need for strong federal legislation on this issue?

C. The Taxing Power: Art. I §8 gives Congress the “power to lay and collect taxes, Duties, Imposts and Excises to pay the Debts and provide for the common defense and general welfare of the United States.” To what extent can Congress tax as a means of national regulation or arguably local affairs?

1) Usually when the commerce power seems unusable.

a. Child Labor Tax Case- Bailey v Drexel Furniture 1922: After the SC held that the regulation of child labor through commerce clause was unconstitutional, Congress enacted a child labor tax. Every employer of child labor was required to pay an excise tax of 10% of annual ne
profits. After paying 6,000 Drexel brought refund suit in DC claiming that the tax is a regulation of the employment of child labor in the states, and exclusively state function under C and within states power of 10th A. SC held that Tax was not valid.

i. **RULE:** The presence of extensive penalizing features of tax indicates the primary purpose is to regulate and may render tax statute invalid.

ii. This tax provides a heavy penalty for divergence from a detailed specific course of conduct. The tax punished for knowingly departs from the conduct→this is associated with penalties not taxing! Employer factory subject to inspection by dept of labor as well as tax. “To give such magic to the word “tax” would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States”

iii. A tax that has the primary purpose of generating revenue but has an incidental deterrent effect is ok → can have a secondary regulatory motive but cannot go too far or it becomes a penalty.

D. The Spending Power: Most important of all Art I §8 powers on its impact on the functioning of the federal system. Litigation is rare for restrictive doctrines regarding standing to sue have traditionally barred taxpayer challenges to federal spending programs.

a. South Dakota v Dole: (1987) Congress enacted a statute directing the Secretary of Transportation to withhold 5% of federal highway funds otherwise allocated to a state if the permitted or possession of any alcoholic beverage by a person less than 21 years old. South Dakota which had a drinking age of 19 sought a declaratory judgement that the statute violated the Constitutional limits on the Spending Power and also violated the 21st Amendment.

i. **Rule:** Congress may use the spending power to indirectly achieve regulatory goals that it could not achieve directly. Apply 4 limitations:

   1. The exercise of must be in pursuit of the “general welfare”
   2. When Congress desires to condition the receipt of federal funds, it must do so unambiguously enabling states to excise their choice knowingly, cognizant of the consequences.
   3. The grants may be illegitimate if related to the “federal interest in particular national projects or programs.”
   4. Cannot conflict with another Constitutional right.

   a. Here, SD argued that this was against 21 A which says no congressional dictation on drinking ages, but court says the GOVT CAN DO THIS INDIRECTLY!
ii. There are circumstances where financial pressure turns into compulsion, but the Court gives no guidance as to what these are.

iii. Apply on individual basis each time.

IV: External Limits on the Commerce Power: State Autonomy, Federalism and the 10th and 11th Amendments: State activities, even though they otherwise related to commerce, are immune from federal regulation because external limits stemming from structural postulates implicit in the 10th and 11th Amendments.

1.10th Amendment: “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.” Before 1976, state autonomy did not get much receptivity on the court; but in 1976 held that a federal law based on the commerce power infringed on state autonomy in National League. Argument would be framed “the law/reg infringes on an exercise of a public function in its sovereign capacity.” Congress may not exercise power in a fashion that impairs states’ integrity or ability to function effectively in a federal system.” In general, if there is an essential government function then it reserves the rights to the states and the fed cannot touch it. So we must decide what is an essential government function.

a. National League (1976): cannot regulate state salaries; “There is nothing cooperative about a federal program that compels state agencies either to function as bureaucratic puppets of the fed government or to abandon regulation on an entire field traditionally reserved to state authority.”
i. **state function in 3 part test:**
   ii. 1) showing that the challenged statute regulates the “states as states”;
   iii. 2) the federal regulation must address matters that are indisputably attributes of state sovereignty,
   iv. 3) it must be apparent that the State’s compliance with federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions.

***BUT then Garcia v San Antonio (1985) 5-4*** → The case involved the subjection of a municipal transit authority to the minimum-wage and overtime requirements of the Fair Labor Standards Act. **Court rejects the notion of integral or traditional essential functions.** The problem is that no distinction that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. Imposing limits to fed govt power in state functions is not the business of the Court. State sovereignty is protected by the federal system and political process safeguards. “The political process insures that ; laws that unduly burden the States will not be promulgated.”

j. Dissent: Powell-conserv- “The States’ role in out system is a matter of constitutional law, not of legislative grace.” says we may have lost here, but we will become the majority. O’Conner dissent- says weigh state autinomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States.

b. Congress cannot compel state legislative or regulatory activity. **New York v. United States** – Congress said clean up nuclear waste by 1996 and regulations if they couldn’t use their own regulations; got approval from Congress through Art.1, § 10 through interstate compact clause-because the need the blessing of Congress to grant states the power: Sup. Ct. Congress compelling states to adopt regulations. Majority: O’Conner- Forcing state to enact policy would be comendeering legislature; **“cannot make then enact or administer federal programs.”**

i. **Rationale:** The is an example of a political argument-transparency in government so if we do not like something we can hold someone responsible for and effect change in that area (election), but here state politicians do not want to blame and forcing state programs that mandated by government and voters do not who is accountable.

b. **Printz v. United States** – Brady Handgun Act ≠ Constitution because Congress is forcing the states to carry out federal statutes. Cannot comendeer state officials to carry out fed programs.
   i. Majority: Scalia- arg strong structure (see notes)
   ii. Minority: Stevens: arg strong on test, original intent.


   preventing harmful commercial behavior.

   Difference from Printz
This is a prohibitive act, not an affirmative obligation. Drivers license information is in the stream of commerce and therefore can be regulated by the federal government.

2. 11th Amendment: Doctrine of Sovereign Immunity for States- The judicial power of the US shall not extend to any suit commenced against any one of the US by a citizen of another state. With can trim back Congress’ remedial power to sue states: A citizen of any state cannot sue other states. But there are exceptions:-see handout from Ruger.
   a. Chisholm: Before the 11th was passed that allowed SC to sue GA on some bad bonds and their was uproar.
   b. Hans (1890): After 11th Amendment, Extended the text, to say that literally re-wrote the constitution to say a citizen of any state, but does not mean that the US cannot sue the state (see exceptions).
   c. Under the 13, 14, 15 Amendments the SC says that the Congress can waive the Sovereign Immunity for “true” civil rights actions. Statute must spell it out in the law that they are waiving.

Alden v Maine: no power to congress to write fed statute that says citizens can sue in state courts either

VI. Federal Constitutional Limits on State Autonomy to Regulate the National Economy:
   a. Pre-Emption: Article VI contains the Supremacy Clause: “Constitution & laws & treaties made pursuant to it are the supreme law of the land.” Therefore, if there is a conflict between federal law on the one hand and state/local law – state/local law MUST give way. When does the federal law win?
      1. Express Pre-Emption: Congress expressly/specifically pre-empts state/local laws: Federal Law = pre-eminent law in the law. Look at the words of the statute to see what they on state law. E.G., federal meat labeling standards were explicit, so state law loses. PG & E is an example of express.
      2. Implied Pre-Emption: Can be found in:
         d. Conflict preemption: Federal law & state law are mutual exclusive, then state law = pre-empted. Florida lime and Avocado case: Fed law as a floor! If it’s not possible to simultaneous comply with BOTH the federal & state law, then the state law is pre-empted. E.G., maple syrup bottles must be labeled with ingredients = federal. VT law = no ingredients. VT law pre-empted. If the fed regulation provides a floor, then the state can add to this. If it looks like the fed law looks more like a floor and ceiling, exact standard, then it preempts state law. Crosby is an example of federal legislation being a ceiling.
         e. Frustration of Purpose: State or local law impedes the objective of a federal law, then state/local law = pre-empted. E.G. FL law ≠ anyone who files a grievance with NLRB ≠ compensation. Goes directly against NLRB’s purpose. Crosby is example because the fed law imposed sanction but Mass law wanted to impose more sanctions undermines the purpose of the fed law. (most litigated!)
      3. Field Pre-Emption: p.319 Congress evidences a clear intent to occupy a field to pre-empt state/local laws, then the state/local laws are deemed pre-empted.
E.G. Sup. Ct. – Congress expressed clear intent that only the federal government can regulate immigration because it intends to wholly occupy the field. Geier: evinced a clear intent to control the area of providing regulations or standards in public safety; the weight of the evidence to occupy the field.

Get Congress purpose: 1) the federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the state to supplement. 2) Or the Act may touch a field in which the federal interest is do dominant that the deferral system will be assumed to preclude enforcement of state laws on the same subject

b. The Dormant Commerce Clause: Congress is silent: it has taken no action, express or implied, indicating its own policy on a given subject matter. In that situation, the objection to state authority rest entirely on the negative implications of the commerce clause. The Court invalidates some “protectionist” state legislation.

i. Nowhere expressly limits state power to regulate interstate commerce, nor impose any explicit barrier to state protectionism or discrimination. The Court has drawn on the negative implications of the grant of power to Congress to regulate interstate commerce mostly relying on history and inferences from federal structure, and national free market economy.

ii. If there is a different rule for in-state and out-of-state then it looks suspicious…Discrimination against out-of-state commerce: 3 part test

1) is the law discriminatory on its face? (tax one and not the other)
   (1) if yes, then there is an extraordinary strong presumption of invalidity. This is so even where there may be valid health, safety or environmental reasons (Phil v NJ → the state legislative purpose would not be relevant to resolve the case given the over discrimination against out of state trash.

2) If not facially discriminate, is it discriminatory in purpose or effect?
   (2) if so, then likely to be struck down. Discrimination need not be by direct ban or tax, but can be by other regulations. (NC apple regulation prohibiting advertisement of Washington state grade)

3) Law may not be discriminatory but would cause undue burden (e.g. Iowa truck law that couldn’t have 2 long trucks on highways was deemed too burdensome on trade even though a valid safety standard.) They apply a balancing approach set forth in Pike v Bruce Church 1970 (p. 245)

   a. when there is an even-handed, neutral statute to effectuate a legitimate local interest and its effects on intersate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to local benefits. The question is one of degree,

NOTE ***May be upheld if the state purpose is legitimate and there is absolutely no other way to achieve the purpose (e.g. quarantine law).

A few cases suggest that the Court is more forgiving of state protectionsit legislation where only an insignificant portion of the economy is involved.
(Clover leaf case with pulpwood cartons and Maine v Taylor involving the ban of out-of-state baitfish)

1) Laws that facially discriminate: Philadelphis v New Jersey 1978- A NJ statute prohibited the importation of most solid or liquid waste which originated or was collected outside the territorial limits of this state. Landfill operators and various cities in other states having contracts with the operators changed the law. A NJ trial judge found the statute unconstitutional because it impeded interstate commerce. The state SC reverse holding the law pertained to state health and environmental issues and had little eco impact on the state.
   a. A state law prohibiting the importation of solid waste on health and environmental grounds can be held to violate the commerce clause.
   b. May not discriminate against articles of commerce coming from out of state unless there is some reason APART FROM THEIR ORIGIN to treat them differently.

2) Discriminatory in effect: Baldwin v Seeling 1935- state effort to stabilize milk prices. Seeling bought milk in VT at prices lower than the NY min and the law prohibited NY sales of out-of-dtate milk if the milk had been purchased below the price for NY. NY refused to license unless conform. SC found law unconstitutional-
   a. Cardozo: said if we allow this then state rivalries will occur. Great quotes “sink or swim together” in the book-p.265.

3) Kassel 1981 p.287: Iowa prohibits use of 65-foot doubles within its borders; most are restricted to 55. Held to unconstitutionally burden interstate commerce. State’s safety interest has been found illusory and its regulations impair significantly the fed interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause,
   b. “Market Participant” Exception to the Dormant Commerce Clause- The Court’s concern about detecting parochialism was found inappropriate when the state function not as a regulator of the market, but rather as a market participant.
      i. Especially where the state itself produced goods for commerce or where it engaged in a program of subsidies or other economic incentives to aid in-state business.
      ii. South-Central Timber Development v Wunnicke (1984): Alaska proposed to sell large amount of timber owned by the state. In all Alaska timber sales contracts require a special provision was included which required that the purchases partially process the timber in Alaska before shipping it out of the state. The requirment was designed to protect Alaska timber processors, develop new industries and derive revenue from timber resources. P, an Alaska Corp that purchases and ships timber out of state for
processing claimed that Alaska’s in-state processing requirement violates the commerce clause. Alaska responded that the requirement was exempt due to “market participation.”

(A) RULE: A State may not impose “downstream” conditions while acting as a market participant.

(B) IF acting as market participant then no limitations due to commerce clause. But here more than a pure seller, since it attempts to affect the obligations of the purchaser after the completion of the sale. A state may not impose conditions whether by statute or reg or contract that have a substantial regulatory effect outside of that particular market. **A state MAY prefer its own residents in the initial disposition of goods when it is a market participant, it may not “attach restrictions on dispositions subsequent to the goods coming to rest in private hands.”**

VII. Federal Executive Power = Authority of President

A. Article II defines the power of the President & executive branch.

Youngstown: Powers of President from the negative view:

i. Jackson concur:

   (C) 1) When the president acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. For it includes all the he possesses in his own right plus all that Congress can delegate.

   (D) 2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his idenpendent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution in uncertain.

   ii. Dames and Moore v Regan: Application of Jackson’s concurrence and falls under the second prong and because it is a foreign policy issue they will defer to the president so that we preserve a united front on freezing assets for hostages.

   * another example here is the 9/11 aftermath policies would fall under prong 2.

   (E) 3) When the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. (Youngstown fell into this category and Truman could not force people to work, labor issue, to nationalize steel issue.)
B. Foreign Policy
   1. Treaties – agreement between US & a foreign country that is negotiated by the President & effective when ratified by the Senate.
      a. State laws that conflict with treaties are invalid. \(\rightarrow\) Crosby: Massachusetts case against Burma???
      b. Conflict between a treaty & a federal statute – the one adopted last in time controls.
      c. Treaties = invalid if violate the Constitution because Constitution = Supreme Law of the Land.
   2. Executive Agreements
      a. Definition: An agreement between the US & a foreign country that is effective when signed by the President & the foreign country. NO Congressional approval needed. \textbf{NOTE:} If document entitled treaty = then Senate approval is required.
      b. Executive agreements may be used for any purpose. Anything that can be done by a treaty can be done by an executive agreement. Never has an executive agreement been invalidated for violating the Congressional treaty approval.
      c. Executive Agreements prevail over conflicting state laws BUT NEVER over the Constitution and federal statutes.
   3. President has broad powers as Commander in Chief to use American troops in foreign countries. NEVER has the President’s use of American troops in foreign countries been declared unconstitutional.

C. Domestic Affairs in the White House
   1. Appointment & Removal Power
      a. Who may possess the appointment power?
         i. President appoints: ambassadors, federal judges, and officers of the United States. Senate has to approve the appointments, but the appointment power = solely in the President.
         ii. Congress may vest the appointment of inferior officers in the President, the heads of departments, or the lower federal courts.
            \textbf{(A) Morrison v. Olsen:} After Watergate. Atty. General = recommend Special Prosecutor/Independent Counsel. Congress may vest the appointment of the independent counsel in the lower federal courts. Congress cannot give the appointment power to itself OR to its officers. \(\rightarrow\) 1974 Federal Election Commission. Unconstitutional
b. Removal Power: Unless removal is limited by federal statute, the President can fire ANY executive branch official. Most famous use: October 1973 – Nixon ordered firing of Special Prosecutor Archibald Cox.
   i. Congress may limit removal if two (2) requirements are met:
      (A) Must be an office where independence in the President is desirable.
      (B) Statute must not prohibit all removal BUT it can limit removal to “good cause.”

2. Impeachment and Removal from Office: President, VP, Federal Judges, all officers of the United States can be “impeached & removed from office for treason, high crimes, and misdemeanors.” NO LEGAL Definition of “high crimes & misdemeanors.”- crimes against the state, not personal behavior.
   a. Impeachment does NOT remove a person from office. The Constitution says the House has the sole power to impeach by majority. If the House impeaches, then there is a trial in the Senate; sole power to try with 2/3 vote. Only if the Senate convicts is the officer removed from office. Andrew Johnson & Bill Clinton were impeached by the House, but neither were convicted by the Senate.
   b. Majority Vote = Impeachment in House & 2/3 Vote = Conviction in Senate.

3. President has absolute immunity to civil suits for money damages for anything done in carrying out the duties of the Presidency.
   a. Nixon v. Fitzgerald: Sup. Ct. 5-4 – President has absolute immunity for civil suits from any acts done while carrying out the official acts of the President. “the sphere must be related closely to immunity justifying purposes”
      i. Avoid rendering Pres “unduly cautious” in the discharge of his duties. Instrumentalities – confidence
      ii. Take time away from pres, heavy burden 1) confined and 2) depositions
   b. Clinton v. Jones – 9-0 -President does NOT have immunity from civil suits arising from acts by the President that occurred before he took office. No reason to believe that a civil suit against the President would take much of his time or distract him.

4. Executive Privilege to Protect Presidential papers & conversations BUT privilege must yield to overriding need for information. US v Nixon: Invoked executive privilege. Sup. Ct. = executive privilege does exist but it must yield when there is an overriding need for the information in criminal prosecution. Executive v. Judicial- do not deny anything from us….we are the brethren Maybe this would different if it was Exec v Congress? Maybe. It most cases when this is invoked it loses.

Note: Privilege is designed to foster substantive relationship-“protective function privilege” for Secret Service in personal detail- not testimony; Hilary C thought that she has a certain amount privilige; none but there are spousal privileges, but it is not one.
i. “privileges are in derogation of the search for truth”

ii. Black letter law- typology
   (A) Does a privilege exist at all? In this case, yes.
   (B) Is it absolute or qualified? Qualified, balance between dignity of office v. necessity of information.
      (1) This is a criminal case so the need for truth is high
      (2) It is not national security so pres interests are low.
   (C) Who can invoke it?
   (D) What are the limits or conditions?

5. Pardon Power: Unreviewable and only for federal offenses.
   a. 80-90% pardon after they serve sentence to erase felony record
   b. commutation- cutting the sentence or reducing
   c. pardon someone who has been indicted but they fled- he was a fugitive
      i. ie. Problem with Marc Rich, but there is no way to get at him.

Policy: error correction, reformed man theory, healing and closing the nation, mercy

VIII. Separation of Powers
2 questions we MUST ask?
   1) Where does the power come from?
      a. Congress: Art1, 8, 14th, Congress has ability to grant more power to other branches.
      b. President: Art II, express and inherent- Congress
      c. Judiciary: Art III, common law- Marbury
   2) How is the power exercised?
      a. Congress: statute (bicameral present), by overriding P veto or give power away
      b. President: lots of discretion, agencies (must act as designed to act)
      c. Judiciary: Case and controversy, adequate and independent state grounds, standing, ripeness and mootness.

6. Limit exists on Congress ability to delegate legislative powers to executive agencies or even to the judiciary. ➔ Prior to 1937, Sup. Ct. applied the “Non-Delegation Doctrine” = rule that Congress could not delegate. Since 1937, NO LAW HAS BEEN STRUCK DOWN on Congressional delegation of power. Sup. Ct.: Congress must include “intelligible criteria” to guide the excise of discretion when it delegates legislative powers.
   b. INS v. Chadha: Student visa ran out and INS says you can stay but under congressional legislative veto provision in statute that gave power to INS can look to case and they decided to deport. The act was no legislative and there was no check to the act. Here fail under the FIRST question.
      i. 2 part test:
         (A) Was the act/position legislative or not? If yes, move to 2. If no, then unconstitutional.
If legislative, did Congress do it right? did they do this H + S +P? If no, then it is not constitutional.

ii. There are only 4 provisions where the House may act alone without the unreviewable force of law:
   (A) House to impeach
   (B) Senate power to conduct trials on impeachments
   (C) Senate’s power over Presidential appointment
   (D) Senate’s power to ratify treatises

c. Bowsher v Synar: Balanced Budget Reform Act. Comptroller would submit to President and the President would have to put into effect. President picked from Congress’ list of 3 people. Congress retaining the power to remove him from office. Therefore the Court says that the Comptroller was given executive power and this violated the separation of power. Comptroller is officer of Legislative branch and congress cannot delegate executive authority to someone in their branch but if the duties to do are executive, then the pres must have the ability to remove him.

d. Morrison v Olson: Example of sunset provision- law/act in effect until proscribed date with expiration→tentative legislation→as a way to skirt legislative veto issue that Chadha outlawed. More flexible approach to Bowsher.

i. Independent Counsel does not violate the Appointments Lause, Art III and Art II. Chief Justice appoints a special court. AG retains removal for good cause only. Does the restrict the AG power to remove the IC to only those instance in which himself he can show good cause taken by itself, impermissibly interferes with the President’s exercise of his constitutionally appointed functions. Issue #2: taken as a whole, the Act violates the separation of powers by reducing the President’s ability to control the prosecutorial powers wielded by the IC?

ii. Court interpreted IC to be an inferior officer.

iii. The ACT was legislative? Yes.

iv. They did it right because the

e. Mistretta v. United States – Sentencing guidelines to be developed. Sentencing commission = located in Judicial branch of government. Can Congress grant power to judges to legislation. 3 branches exec enforce the crime, legislative what are federal crimes, judge whether constitutional or not. Sup. Ct.: that it was permissible delegation of legislative power to judiciary…the delegation of authority to sentencing commission was specific and detailed to meet constitutional requirement. There is precedent here-FRCP and Rules of Evidences.

i. “The constitution, at lease per se matter, does not forbid judges from 2 hats; it merely forbids them from wearing 2 hats at the same time.”

ii. Dissent says: The problem here is that this is case by case test. The slippery slope effect of allowed comingly between branches.

7. Whitman v American Trucking Association: Congress punts and gives EPA the ability to give standard that is requisite to protect public health. What does this
mean? This gives a whole lot of discretion to EPA. Congress can delegate to agency.

a. Is there any delegation of legislative powers? If yes, the unconstitutional.
b. Does the act and give power to executive branch as long as there is an “intelligible principle” that the party is directed to do.

i. The court has not struck down delegable powers on agency decisions since the 30s. Ct the very lenient.

3. Legislative Vetoes & Line Item Vetoes are unconstitutional. **KEY:** For Congress to adopt a law, there **must be** bicameralism (passage by both House & Senate) + presentment (presentation of bill to President). President must then sign or veto the bill in **its entirety.**

c. **Legislative Veto:** Congress attempts to overturn an executive action without bicameralism and/or presentment. Congress tries by action of one house to overturn an executive action. OR Congress tries to overturn by action of both houses without presentment to President an executive action. **ALWAYS UNCONSTITUTIONAL.**

d. **Line Item Veto:** President attempts to veto part of a bill while signing the rest into law. Congress passed authority in mid-1990’s for President to veto part budgetary spending authorities 3 things: 1) any discretionary, 2) any item of new direct spending and 3) any limited tax benefit In Clinton v. City of New York – Sup. Ct. declared **unconstitutional.** Gives the President unilateral power to change the text of a duly enacted statutes.

i. Majority: only chance to legislation is to veto; he cannot take back one item without bicameral and presentment process. This violates legislative process. The constitution is silent on this and he thinks that this is prohibitive!

ii. Dissent: SC got faked out by the name. This is really to just decline to spend. The argument does not offend Art 1, § 7.

iii. NOTE: Senator Bryd tried to bring this suit as it takes away his power as a senator; it was a status based right, not particularized not individual.
FREE SPEECH SECTION

A. First Amendment: “Congress shall make no law…respecting an establishment of religion …or prohibiting the free exercise thereof.” Cases are usually one or the other.
   1. Free exercise clause test:
      a. is the belief sincere?
      b. Is it religious?
      c. Does the state interest outweigh religious belief?
   2. Africa v Commonwealth: P is being transferred to different prison and he wants special diet b/c of religion, MOVE, which says he must eat raw foods. They believe 1) in no levels of the church, 2) everyday is a holiday, 3) God is natural.
      a. DC and COA say that this is not a religion and apply 3 factors to part b) on the 3 part test above: 1) does the religion answer fundamental and ultimate questions, 2) comprehensive in nature, 3) external and presence of certain formal signs.
   3. Brown: Orthodox Jewish store owner brought claim against blue laws c/c his religion I honor is a burden since I lose another day due to Sat. Sabbath. Court says you lose individual interest was less that the strong and unified state interest.
   4. Sherbert: 7th day Adventist refused to work on Saturday and got no benefits from unemployment when her employer fired here. Court says State must show a compelling state interest if we deny exceptions.
   5. Employ Div. v Smith 1990: OR law prohibits the possession of peyote and Smith and other fired from their job with a private employer because they had used peyote as part of a religious ceremony of the Native American Church, of which both are members. When the 2 applied for unemployment they were denied because of their “misconduct.” The OR SC determined that it was indeed illegal but that the ban on sacramental peyote use was invalid under the free exercise clause. SC of US reverses.
      a. RULE: The state may deny benefits to those who need it b/c of a violation of a generally applicable criminal statute for religious purposes.
      b. The law must be generally applicable and religion-neutral laws in order to outweigh the religious interest. The State interest outweighs. But the interest does NOT have to be compelling.
      c. So Govt. passes RFRA-which says that govt. can only burden free exercise if it can show a compelling interest. Effort by Congress to disagree with Smith. SC struck it down on Sep. of powers in City of Boerne v Flores 1997- congress over stepped bounds and infringing on prerogatives of the states.
         i. Congress can hold agencies to higher standard of freedom of religion.
   6. Lueki 1993: The city of Hialeah passed ordinances forbidding the sacrifice of animals in religious ceremonies and the Santeria religion includes animal sacrifice so they challenged the ordinance. Decision 4-2-3- Scalia did not join part II-a as it looked at the subjective motivation of lawmakers.
a. A law which burdens the practice of religion although claiming to be unrelated to religion can be found unconstitutional if the purpose of the law is to restrict practices because they are religiously motivated. TEST
   i. Law is facially neutral?
   ii. Law is discriminatory in effect?
b. There were legitimate ends concerning this but the means of reaching these ends was overbroad and under inclusive— the absence of narrow tailoring is enough to invalidate the law.

2. ESTABLISHMENT CLAUSE- Lemon Test 3 criteria to withstand attack:
   a. Statute has a secular legislative purpose? Pretty easy
   b. Its principal or primary effect must be on that neither advances nor inhibits religion.
   c. the statute must not foster “an excessive government entanglement with religion.”

   a. Lee v Weisman: A public school teacher invited a rabbi to deliver the invocation and benediction at a graduation ceremony. The inclusion of a general; religious content in an official public school function violates the Establishment Clause.
   b. Santa Fe School v. Doe 2000: A public high school voted to see who student speaker would be to deliver a brief invocation and /or message to solemnize the event. Majority struck down saying that it preserve a popular state-sponsored religions practice and coerces those present to participate in an act of religious worship. Dissent says b.c possible to apply nonreligious the policy is ok.