**American Constitutional Law Briefs**

**1. Marbury v. Madison, (1803); pg. 2, briefed 9/8/95**

2. Facts: Marbury was one of the famous Òmidnight judgesÓ whose commission had been signed by the Secretary of State (Marshall), but had not been delivered before the morning that Jefferson took office.

3. Procedural Posture:  Marbury went directly to the Supreme Court to compel Jefferson's Secretary of State (Madison) to deliver their commissions.

4. Issue: Whether the Supreme Court has the power to review the legislative acts of the Congress to determine their constitutionality.

5. Holding: Yes.

6. Majority Reasoning: Marshall stated that Marbury had a right to his commission once it was signed. Further, Section 13 of the Judiciary Act of 1789 gave the supreme court the right to issue a writ of mandamus against persons holding office. Thus, it would appear that Marbury has a remedy. However, Article III Section 2 of the Constitution states that the supreme court shall have original jurisdiction in cases Òaffecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party,Ó and Òin all other cases,...shall have appellate jurisdiction.Ó Since a writ of mandamus is an original action, Section 13 of the Judiciary Act must be contrary to the constitution, because it allows the Supreme Court to hear cases of original jurisdiction for persons besides ministers, consuls and ambassadors, etc. If the constitution is the supreme will of the people to limit government, then the legislature can not alter it at will. Thus, the legislature can not be allowed to pass laws repugnant to the constitution. Since it is the Supreme Court's role to interpret laws and resolve conflicts between competing laws, and the Constitution is the supreme law of the land, then the Supreme Court has the power to interpret the Constitution and decide if a law passed conflicts with it.

**1. Martin v. Hunter's Lessee, (1816); pg. 29, briefed, 9/8/95**

2. Facts: Fairfax, a British loyalist, owned land in Virginia. A Virginia state law provided for the seizure of Fairfax's lands prior to 1783. Virginia granted the land to Hunter. Martin was the inheritor of the land from Fairfax. Martin claimed that the Peace Treaty of 1783 and the Jay Treaty of 1794 protected the land from seizure.

3. Procedural Posture: The Virginia court, in the original case, found for Hunter The Supreme Court reversed, ordering the Virginia court to enter judgment for Martin under the authority granted by Section 25 of the Judiciary Act which gave the Supreme Court the power to review final decisions of the highest state courts rejecting claims based on federal law. The Virginia state court refused to comply with the order, claiming that Section 25 was unconstitutional, and the Supreme Court had no constitutional right to review the final decisions of the state courts. The case is again being reviewed by the Supreme Court.

4. Issue: Whether Section 25 of the Judiciary Act of 1789 is constitutionally valid, giving the Supreme Court the right to review the final decisions of state courts rejecting claims based on federal law.

5. Holding: Yes.

6. ¸ Argument: Without Supreme Court review of state court decisions, there will be no other mode by which Congress can extend the judicial power of the United States to cases of federal cognizance which arise in the state courts, resulting in non-uniformity of decisions among states.

7. Æ Argument: The constitution does not provide explicitly for Supreme Court review of state court decisions. Since it must have been foreseen by the drafters that conflicts would arise, the omission is evidence that the framers felt that such a powerful tribunal would produce evils greater than those of the occasional collisions which it would be designed to remedy. Thus, once an action is brought in state court, the federal court's sole remedy is to shift it to a lower federal court before it gets to the final court of the state, or simply to advise the high state court that they have improperly interpreted the constitution. The states are dually sovereign with the federal government, and not subject to the laws of Congress which limit their sovereignty.

8. Majority Reasoning: In Article III, the Supreme Court is given the judicial power which Òshall extend to all cases.Ó Thus, it is the nature of the case and not the court of origin that determines whether the Supreme Court has appellate jurisdiction. The Supreme Court appellate power is not limited only to cases that come up through the lower federal courts. Also, the Constitution was designed to operate upon the states themselves, and not just the persons within the states. Thus, the states themselves are not equal sovereigns with the federal government, but rather subject to its law- making capability. Furthermore, even if the state courts do not abuse the power of the constitution, they are likely to rule differently on it from state to state. Thus, the need for uniformity in decisions requires an ultimate single court of last resort which exercises review over all states. Lastly, there is substantial historical evidence that the framers intended Supreme Court review of state court decisions, as well as several previous cases which do so.

**1. Ex Parte McCardle, (1869); pg. 39, briefed 9/8/95**

2. Facts: McCardle was a newspaper publisher in the post-civil war south. He was imprisoned for sedition.

3. Procedural Posture: McCardle brought a habeus corpus act under an Act of Congress of 1867 which authorized the federal courts to grant habeus corpus to anyone restrained Òin violation of the ConstitutionÓ, and gave the Supreme Court appellate jurisdiction over such actions. However, before it was ruled upon on the merits by the Supreme Court, Congress passed another Act, expressly revoking the appellate jurisdiction for these types of actions that it had previously granted in 1867.

4. Issue: Whether Congress can take away the jurisdiction of the Supreme Court as to habeus corpus acts, which jurisdiction was granted in the 1867 Act.

5. Holding: Yes.

6. ¸ Argument: The appellate jurisdiction of the Supreme Court is derived from Article III, Section 2 of the constitution, not from acts of Congress.

7. Majority Reasoning: It is true that the appellate jurisdiction is granted by the constitution, but in the same article, it is made expressly subject to Òsuch exceptions and under such regulations as Congress shall make.Ó Thus, Congress has the power to expand and limit the scope of the appellate jurisdiction of the Supreme Court. Quite simply, Congress was acting clearly within its power in both granting and then repealing the specific jurisdiction to review habeus corpus cases from the Circuit Courts pursuant to the Act of 1867. The Act of 1868 does not affect the appellate jurisdiction with regard to any other cases.

**1. United States v. Klein, (1872); pg. 42, briefed 9/10/95**

2. Facts: Klein was pardoned by the president for aiding in the civil war rebellion. A statute existed that would allow persons who did not aid in the rebellion to recover land seized from them in the Reconstruction. Previous case law had held that a presidential pardon was conclusive proof that a person had not committed the crime.

3. Procedural Posture: A new statute was enacted by Congress while the Klein case was pending appeal, reversing the previous tradition of a pardon being proof of non-participation, and in fact making it conclusive proof of actual participation. In addition, the statute purported to remove federal court jurisdiction for all such claims arising from pardons.

4. Issue: Whether Congress has the constitutional power to enact a statute which limits the jurisdiction of the federal courts, particularly the Supreme Court, when, by limiting said jurisdiction would dictate the outcome of a particular case.

5. Holding: No.

6. ¸ Argument: Congress has the power under Article III to limit the appellate jurisdiction of the federal courts because of the specific language Òwith such exceptions...as the Congress shall make.Ó

7. Æ Argument: Congress does not have the power to dictate the outcome of any particular case because such would be contrary to the separation of powers structure of the Constitution.

8. Majority Reasoning: The statute removing jurisdiction in this instance was unconstitutional because it was only Òa means to an end,Ó to affect the outcome of this particular case. Dismissing the appeal would allow Congress to prescribe the judgments of the Supreme Court directly. The statute prescribed how the court should decide an issue of fact, and it denied effect to a Presidential Pardon, thus violating the separation of powers.

**1. Plaut v. Spendthrift Farm, Inc. (1995); pg. 3 supp., briefed 9/10/95**

2. Facts: A Securities Act violation was committed. After Supreme Court dismissal of the first action for being brought outside of the statute of limitations, Congress passed a new section 27A to the Securities Exchange Act, extending the statute of limitations in these cases, as well as providing for the ÒreinstatementÓ of causes of action that had been dismissed on statute of limitations grounds during the time of pendency of the first action in this case, thus re-opening the case.

3. Procedural Posture: In the first action, the Supreme Court dismissed the case for being brought outside of the statute of limitations (which it has prescribed in the Rules). Congress' enactment of new section 27A reinstated the action.

4. Issue: Whether Congress can reinstate a case that has been previously dismissed on statute of limitations grounds.

5. Holding: No.

6. ¸ Argument: Congress has the power under Article III to modify the appellate jurisdiction of the Supreme Court, which includes statutorily reinstating a class of cases.

7. Æ Argument: Congress' power does not include reinstatement of previously decided cases under new laws.

8. Majority Reasoning: Scalia stated that Article III not only gives the federal judiciary the power to rule on cases, but to decide them, subject only to review by superior courts in the Article III hierarchy. ÒWhen retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than `reverse a determination once made, in a particular case.'Ó Such power is clearly contrary to what the framers contemplated in the separation of powers. It did not matter that the statute was with reference to a general class of cases, and not ostensibly to a particular case, if it gave the Congress the power to reinstate a case, it necessarily interfered with the outcome of a particular case.

**1. Michigan v. Long (1983); pg. 56, briefed 9/10/95**

2. Facts: Long was arrested, and alleged that his search and seizure rights had been violated.

3. Procedural Posture: The Michigan State Supreme Court ruled that the police search did violated the Fourth Amendment and the Michigan Constitution's own search and seizure laws.

4. Issue: Whether the Supreme Court has jurisdiction to review state court judgments which concern federal issues, and which are not clearly based on an adequate and independent state law grounds.

5. Holding: Yes. If the state court decision does not] indicate clearly and expressly by means of a Òplain statementÓ that it is alternatively based on bona fide separate, adequate, and independent grounds the Supreme Court has appellate jurisdiction to review the state court ruling.

6. Majority Reasoning: O'Connor stated that the Court must assume that there are no adequate grounds when it is not clear from the opinion that there were, and the opinion appears to rest primarily on federal law. It was necessary out of respect for the independence of state courts that the presumption of adequate state grounds go against the states so as to promote clarity, thus avoiding excessive remands and advisory opinions. This promotes uniformity in the states interpretation of federal law.

7. Dissent Reasoning: Stevens stated that it would be better to give the presumption for adequate state grounds to the state, because of historical concerns of judicial restraint. The Supreme Court should not be involved unless there is a reason to vindicate the federal rights of a party. A presumption against independent state grounds would have the Court expounding their understanding of Constitutional law to the legal community instead of primarily sitting to resolve disputes.

**1. McCulloch v. Maryland, (1819); pg. 67, briefed 9/10/95**

2. Facts: In 1816, Congress chartered the Second Bank of the United States, which became active in Maryland. In 1818, the Maryland legislature passed an Act to tax any bank not chartered by the Legislature of Maryland, thus taxing the U.S. Bank. The law provided for private remedies against the bank operators, of which, one was McCulloch.

3. Procedural Posture: The trial court entered judgment on the basis of an agreed statement of facts (that the U.S. Bank was not chartered by the Maryland legislature), and the Maryland Court of Appeal affirmed. An appeal was taken by writ of error to the Supreme Court.

4. Issue: 1) Whether Congress has the power to incorporate a bank; and 2) Whether the state of Maryland may, without violating the constitution, tax the U.S. Bank.

5. Holding: 1) Yes. 2) No.

6. ¸ Argument: Although Congress does not have the enumerated power to incorporate a bank, such power is implied by the Ònecessary and properÓ language of Article I Section 8.

7. Æ Argument: Congress not only does not have the enumerated power to incorporate a bank, but furthermore only has the powers that the states, as independent sovereigns, give to it. This is evidenced by the Ònecessary and properÓ language which should be construed to be a limit on Congressional power, implying only strict necessity.

8. Majority Reasoning: Marshall first noted that the Congressional power established by the Constitution originates from the people, not the states. Article II should be read in light of the previous Articles of Confederation, which were unworkable because of their strict limitations on express Congressional power. The Constitution, by nature, must be general in order to adapt to unforeseen circumstances. Thus, there must be some implied powers to allow Congress to exercise the broad range of express powers given as means to ends. The language Ònecessary and properÓ should be construed to mean Òconvenient, or useful, or essentialÓ not as things that are absolutely necessary, otherwise the word ÒproperÓ would be superfluous, and there would be no need to include the word ÒabsolutelyÓ in the enumeration of powers to the states. The Ònecessary and properÓ language is included among the power of Congress, not the limitations, and so should be read as enlarging the scope of Congress' powers. All means which are appropriate and plainly adapted to the exercise of enumerated powers are constitutional, not just those that are strictly necessary. As to whether Maryland could tax the federal bank, the power to tax something is the power to destroy it. Since the states are necessarily inferior to the federal government, the states do not have the power to ÒdestroyÓ (by taxing) the federal government. The people did not design to make their federal government dependent on the states.

**1. Gibbons v. Ogden, (1824); pg. 94, briefed 9/10/95**

2. Facts: Gibbons was a former partner turned competitor of Ogden. Ogden had a monopoly to operate steamboats on the New York Harbor from New York City to New Jersey, and Gibbons was competing with him. Ogdens' monopoly was granted by the New York state legislature. Gibbon's ferries were licensed as Òvessels to be employed in the coasting tradeÓ under a federal law of 1793.

3. Procedural Posture: The trial court granted an injunction against Gibbons to stop operating his ferry. Gibbons brought an appeal to the Supreme Court on the grounds that the statute granting a monopoly to Ogden was unconstitutional as being repugnant to the commerce power granted to Congress.

4. Issue: Whether Congress has the power to regulate the navigation of steamboats on the New York harbor between New York and New Jersey, to the exclusion of the state of New York.

5. Holding: Yes.

6. ¸ Argument: The New York law is unconstitutional because it usurps Congress' power to regulate interstate commerce, which includes navigation.

7. Æ Argument: Congress does not have the power to regulate non-commerce events such as Ònavigation.Ó Also, Congress does not have the power to regulate commerce that occurs internal to a state, only that that occurs between two states.

8. Majority Reasoning: Marshall stated that the common understanding of the word ÒcommerceÓ necessarily included Ònavigation.Ó Thus, Congress has the right to regulate navigation as if it were expressly mentioned in the Constitution. Congress has the power to regulate commerce Òamong the several states.Ó ÒAmongÓ means intermingled with, not just between. Thus, the commerce power extends internal to the states because commerce transactions, which can affect the states generally, can originate and terminate within the state border boundaries. Although it does not extend to transactions which are completely internal to a state, the commerce power would be useless if it could not extend beyond the state boundaries because that is where the transactions occur. Lastly, the commerce power is limited only by the constitution. The Congress has the full and exclusive power to make rules by which interstate commerce is to be governed. This power is centralized in one body, but it can act wherever needed in the states.

**1. United States v. E.C. Knight & Co., (1895); pg. 100, briefed 9/10/95**

2. Facts: Knight acquired the stock of several other sugar manufacturing companies, to control about 98% of the nation's sugar refining capacity.

3. Procedural Posture: The government brought a civil action under the Sherman Act, which provided for penalties for Òrestraint of trade or commerce among the several states,Ó to set aside the acquisition. The lower court dismissed the action, and the government appealed to the Supreme Court.

4. Issue: Whether Congress had the power, under the commerce clause, to regulate the monopolization of the means of manufacturing a good.

5. Holding: No.

6. ¸ Argument: A monopoly of manufacture restrains the free trade or commerce among the states, and thus is contrary to the Sherman Act. Congress has the power to regulate the monopolization of manufacture because it restrains free trade among the states.

7. Æ Argument: A monopolization of manufacture is not possible. Even if it were, such power to control it would necessarily extend to all use of raw materials, and thus is beyond what the Sherman Act contemplates.

8. Majority Reasoning: If monopolization of manufacture could exist, it could only have an indirect effect on interstate commerce. There is a difference between ÒmanufactureÓ and ÒcommerceÓ, namely that commerce succeeds manufacture. Thus, controlling manufacture only indirectly controls commerce. Congress does not have the power to control manufacture because that would be too intrusive a power, necessarily applying to all production of raw materials that could be manufactured into a higher product and then subject to commercial interstate transactions. Allowing the power to be construed this broadly would leave no powers for the states to exercise pursuant to the tenth amendment. All local commerce would then be subject to federal control. Thus, the distinction must be made between activities that have a ÒdirectÓ affect on commerce, which Congress can control, and those which have merely and ÒindirectÓ or incidental affect on commerce, which the states are left to control.

**1. Houston E. & W. Texas Ry. Co. v. United States (The Shreveport Rate Case), (1914); pg. 103, briefed 9/10/95**

2. Facts: The railroad had rail lines both within Texas, and between Texas and Louisiana. As an incentive to promote Texas suppliers to sell to Texas manufacturers, the railroad maintained lower rates for traffic within the state of Texas, while charging disproportionately high rates for traffic to Louisiana.

3. Procedural Posture: The Interstate Commerce Commission (ICC) set rates for the transportation of goods from Texas to Louisiana, and ordered the railroad to end its discriminatory practice of maintaining lower rates for traffic within the state. The railroad challenged that order, appealing to the Supreme Court.

4. Issue: Whether Congress, through the ICC, has the power to set the intra-state railroad cargo rates of a carrier that has both intra-state and inter-state lines, if such intra-state rates represent an unjust discrimination against inter-state commerce.

5. Holding: Yes. ÒWhenever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority.Ó

6. ¸ Argument: Congress has not power to regulate the intra-state rates.

7. Æ Argument: Congress has the power to regulate intra-state rates if they affect interstate commerce.

8. Majority Reasoning: Congressional authority extends to interstate carriers as instruments of interstate commerce. This necessarily includes the right to control all of their operations that have a Òclose and substantialÓ affect on interstate commerce. The fact that the carrier has intra-state business as well does not diminish Congress' power to regulate the interstate portion by preventing injury to it. Otherwise, the commerce power would have no bite among carriers with both lines. Furthermore, Congress had the power to affect the intrastate lines in other areas, such as safety because it also had an interstate commerce component. Thus, Congress has the power to foster and protect interstate commerce, and to take all measures necessary and appropriate to that end, although intrastate transactions may be thereby controlled.

9. Notes: The Òcurrent of commerceÓ notion has also been invoked as a practical consideration to allow Congress to regulate portions of interstate commerce that appear to be solely intrastate. In Stafford v. Wallace, the Supreme Court held that individual purchases by middlemen of meat destined for the cities was a part of the Òcurrent of commerce.Ó The purchase by the middlemen was local to the state that they were in, but they were simply a part of a greater flow of meat from the West to the East. The many transactions, viewed as a whole, represented interstate commerce on a major scale. If the middlemen were unregulated, their actions could become an obstacle to free trade.

**1. Wickard v. Filburn, (1942); pg. 128, briefed 9/10/95**

2. Facts: Filburn was a farmer who grew wheat both for sale and for his own use. Under the Agricultural Adjustment Act of 1938, Filburn was fined for producing too much wheat for his own consumption.

3. Procedural Posture: Filburn sought enjoinder of the fine, and sued the Secretary of Agriculture, Wickard. The lower court granted the injunction on other grounds, and Wickard appealed.

4. Issue: Whether Congress has the power to regulate the production of wheat for consumption by the farmer, apart from the sale of such wheat commercially.

5. Holding: Yes.

6. ¸ Argument: The Congress does not have the power under the commerce clause to regulate the production and consumption of wheat because these activities are local in character and, at most, have an indirect effect on interstate commerce.

7. Æ Argument: The statute does not regulate production or consumption of wheat, but only marketing; and even if it goes beyond marketing, it is Ònecessary and properÓ in this case.

8. Majority Reasoning: The court discarded the Òdirect-indirectÓ approach of Gibbons v. Ogden for a more encompassing approach. Whether an activity had a local is only one of the facts upon which a decision should be based. The test should be based on whether the activity has a Òsubstantial economic effectÓ on interstate commerce. The consumption of homegrown wheat causes extreme volatility in the national market because it is so variable. Although the effect of one farmer may trivial, he is part of a nationwide market, where the overall effect is not trivial. Since this activity has a substantial economic effect on the interstate wheat market, Congress has the power to regulate it.

**1. United States v. Darby, (1941); pg. 131, briefed 9/10/95**

2. Facts: Darby was a Georgia lumber manufacturer who hired labor at less than the minimum wage prescribed in the Fair Labor Standards Act of 1938. He was indicted on violating this Act, which sought to regulate the hours and wages of employees by prohibiting the sale of the product in interstate commerce.

3. Procedural Posture: Darby challenged the indictment, and the lower District Court quashed it, holding that it was unconstitutional because it sought to regulate ÒlocalÓ manufacturing activities.

4. Issue: Whether Congress has the power to prohibit shipments of product that are manufactured by employees who are paid less than a prescribed minimum wage and required to work more than a prescribed maximum number of hours.

5. Holding: Yes.

6. ¸ Argument: The Congress only has the power to regulate prohibit the shipment of products which are ÒbadÓ in themselves, such as toxic or stolen articles. This prohibition is motivated by the regulation of local wages, the control of which has been reserved to the states as police power, and so is trampling on the states' rights.

7. Æ Argument: In its power to regulate interstate commerce, Congress has the implied power to exclude from commerce any articles which it perceives to be injurious to the public health and welfare.

8. Majority Reasoning: The fact that the state has not regulated this type of activity does not preclude the federal government from doing so; its powers are not limited by the inaction of the state. The motive and purpose behind a regulation are legislative concerns, and as long as the power is not exercised beyond the contemplation of the constitution, Congress is free to use the commerce power to implement public policy. Hammer v. Dagenhart, which limited Congress' power to regulate only those objects which were themselves harmful, is overruled. The test for whether Congress can regulate an activity under the commerce power is whether the activity has a Òsubstantial effect on the commerce or the exercise of the Congressional power over it.Ó Congress may choose the means necessary to achieve this end, even if it necessarily involves the control of intrastate actions.

**1. Perez v. United States, (1971); pg. 137, briefed 9/13/95**

2. Facts: Perez was a loan shark. He was convicted under Title II of the Consumer Credit Protection Act which was a federal law prohibiting extortionate loan activities. The Act was passed by Congress pursuant to findings that 1) organized crime is interstate in nature, and 2) a substantial part of the income for organized crime is generated by extortionate loan activities, thus, loan sharking is an instrumentality of interstate commerce, even where individual transactions are purely intrastate in nature.

3. Procedural Posture: Perez challenged his conviction on the grounds that the Act was unconstitutional as being an impermissible exercise of the commerce power by Congress.

4. Issue: Whether Title II of the Consumer Credit Protection Act, as construed and applied to Perez, is a permissible exercise by Congress of its powers under the Commerce Clause.

5. Holding: Yes.

6. ¸ Argument: The Act is unconstitutional because it exceeds the limits of the commerce power contemplated by the framers of the Constitution. It infringes on the States' police power of their own intrastate crime activities. Loan sharking is a local activity, not an interstate activity.

7. Æ Argument: Since loan sharking is a substantial revenue generator for organized crime, and organized crime is a nationwide problem that uses interstate commerce as a conduit to conduct illegal transactions, loan sharking affects interstate commerce and is thus able to be regulated by Congress. The States are not able to deal with this problem individually, the federal government needs to provide tools to deal with the problem on a nation-wide level.

8. Majority Reasoning: The majority accepted Congress' findings on the relationship between loan sharking and organized crime, and the effect of organized crime on interstate commerce. They stated that the commerce clause reaches protection of the instrumentalities of interstate commerce, which included the policing of organized crime. Citing to Darby, the court reasoned that it was permissible for Congress to regulate a class of activities without proof that the particular intrastate activity that was thereby controlled had an effect on commerce. It was proper to consider the Òtotal incidenceÓ that the class of activities had on commerce, rather than to try to carve out exceptions for individual occurrences of the activity that were not proven to be directly related to commerce. Even if individual transactions of loan sharking were completely local in nature, as a whole, they comprised a threat to interstate commerce because of their relation to the interstate activities of organized crime.

9. Dissent Reasoning: Conviction for loan sharking under the federal law should require proof that the individual was actually involved in interstate activities. Otherwise, a purely local problem would be regulated by the federal government, contrary to the States' police power. Loan sharking is only a national problem in the sense that all crime is a national problem. There is no distinguishing factor about loan-sharking that lends itself to being a threat to interstate commerce per se.

**1. United States v. Five Gambling Devices, (1953); pg. 140, briefed 9/13/95**

2. Facts: This case involved three companion proceedings arising from a statute that prohibited the shipment of gambling machines in interstate commerce. The statute required the registration and reporting of all gambling machines sold, by all manufacturers and dealers in gambling devices, not just those that had some nexus to interstate commerce.

3. Procedural Posture: The lower courts found the statutory interpretation unconstitutional.

4. Issue: Whether the statute requiring the registration of all gambling devices by all manufacturers and dealers was a permissible exercise of the commerce power when it was interpreted to apply to purely intrastate transactions.

5. Holding: No.

6. ¸ Argument: The statute should be applied according to its literal terms without any showing that any individual activity be shown to have an actual effect on interstate commerce. To have an effective regulation of those gambling machine related activities that do have a relationship to interstate commerce, it is necessary to require reporting of all intrastate transactions.

7. Æ Argument: The statute is unconstitutional because it regulates purely intrastate transactions that can not be shown to have any nexus to interstate commerce.

8. Majority Reasoning: No precedent of the Court has upheld the power of Congress to enact legislation which penalizes failure to report information concerning acts that have not been shown to be related to interstate commerce. Although the Darby ÒbootstrapÓ theory, which allows a class of activities to be regulated even though it is over-inclusive, is applicable under its own facts, the present case is distinguishable on its facts. However, the traditional limitations of the federal system do not go against the lower courts findings. There is no unmistakable intent of Congress to apply the act to the police powers normally reserved for the states.

**1. United States v. Bass, (1971); pg. 142, briefed 9/13/95**

2. Facts: A man was convicted of possession of a firearm in violation of a provision of the Omnibus Crime Control and Safe Streets Act of 1968 which applied to any felon Òwho receives, possesses, or transports in interstate commerce or affecting commerce, any firearm.Ó

3. Procedural Posture: There had been no showing that the defendant's firearms were commerce- related, but the lower court convicted anyway.

4. Issue: Whether the Omnibus Crime Control and Safe Streets Act of 1968 applied to merely the possession or receiving of firearms without a nexus to interstate commerce demonstrated.

5. Holding: No.

6. ¸ Argument: The commerce limitations in the law applied only to ÒtransportsÓ and that possession and receipt were punishable without a showing that there was a nexus with commerce.

7. Æ Argument: The interpretation by the government is unconstitutional because it reaches into purely intrastate activities which have no relations to interstate commerce.

8. Majority Reasoning: Since the statute was criminal in nature, such a broad reading as the government asserted would be too intrusive to the police powers of the states. In the absence of clear direction of Congressional intent to do so, the court would not construe the statute so broadly as to not require a showing of nexus with commerce.

9. Notes: In Scarborough v. United States, the government came prepared to show that the firearm in question had once moved in interstate commerce, but did not provide a strong link that the person convicted was involved in any way in interstate commerce or got the firearms after his felony conviction. Nevertheless, the Supreme Court found that the showing was Òsufficient to satisfy the statutorily required nexus between the possession of the firearms by a convicted felon and commerce.Ó

**1. Heart of Atlanta Motel v. United States, (1964); pg. 151, briefed 9/17/95**

2. Facts: The hotel had 216 rooms and was located within ready access to two interstate highways. It advertised in national media, and was a center for conventions of out of state guests. The hotel refused to rent rooms to African Americans.

3. Procedural Posture: The hotel brought a declaratory judgment action attacking the constitutionality of Title II of the Civil Rights Act of 1964, which prohibited discrimination on the basis of race in places of Òpublic accommodation,Ó and which grounded its authority primarily in the commerce power. The District Court upheld the Act, and the Hotel appealed.

4. Issue: Whether application of Title II of the Civil Rights Act of 1964 to a motel which serves interstate customers is within the constitutional power of Congress under the Commerce Clause.

5. Holding: Yes. ÒThe determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is `commerce which concerns more States than one' and has a real and substantial relation to the national interest.Ó

6. ¸ Argument: Congress did not have the power to legislate against moral wrongs under the guise of the Commerce Power. Even if they did, the operation of a motel is purely local in character, and thus does not affect interstate commerce.

7. Æ Argument: Discrimination by hotels has a significant effect on interstate commerce by deterring African Americans to travel.

8. Majority Reasoning: There is ample evidence in the Congressional record that discrimination by places of public accommodation impair African-Americans' ability to travel, thus affecting interstate commerce. Thus, the Act passed the test of Òcommerce which concerns more States than one,Ó and discrimination had a substantial relation to the national interest. The court then listed several examples of factual scenarios where the Congress had legitimately exercised the commerce power to police activities which were both immoral and had an adverse affect on interstate commerce. ÒThat Congress was legislating against moral wrongs...rendered its enactments no less valid.Ó Furthermore, Òif it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.Ó Thus, the commerce power encompasses the regulation of local activities that have an affect on interstate commerce.

**1. Katzenbach v. McClung, (1964); pg. 153, briefed 9/17/95**

2. Facts: Ollie's BBQ was a family-owned restaurant in Birmingham that seated 220 customers and was located on a state highway near an interstate highway. The restaurant received about $70,000 of food, mostly meat, in interstate commerce annually. However, it refused to serve African Americans inside its dining facility. They could only order take-out.

3. Procedural Posture: The restaurant brought this action [a sister action to Heart of Atlanta] to challenge the constitutionality of Title II of the Civil Rights Act as it related to restaurants. The District Court found that the Act provided no basis for relating the operations of a local restaurant to interstate commerce, and thus issued an injunction restraining the Act from being enforced against the restaurant, concluding that it would lose substantial business.

4. Issue: Whether such part of Title II of the Civil Rights Act that prohibits discrimination on the basis of race in restaurants which serve interstate travelers or which serve food a substantial portion of which has moved in interstate commerce is constitutional.

5. Holding: Yes.

6. ¸ Argument: There is no basis for believing that racial discrimination in local restaurants has any affect on interstate commerce. Congress has merely created a conclusive presumption that it does, without making formal findings in the record that support such an assertion. The government should be required to show the connection to interstate commerce on a case-by-case basis. The volume of food served at Ollie's BBQ prohibits such a finding.

7. Æ Argument: Racial discrimination in restaurants has an affect on interstate commerce because it deters African Americans from traveling, thus reducing business overall.

8. Majority Reasoning: Although there were no formal findings made by Congress, the testimony contained ample evidence to support a finding that racial discrimination in restaurants had an adverse affect on interstate commerce. For instance, by deterring travel by African Americans, the whole business climate suffers for lack of customers. Also, discrimination puts an artificial restriction on the free flow of goods. The wide unrest over the discrimination has a depressant effect on local businesses making new investment and expansion unfavorable in such a depressed business climate. Following Wickard, local activities can be said to have a substantial effect on interstate commerce when viewed in Òaggregation.Ó Racial discrimination is not merely a local problem. As an ÒaggregationÓ it is a nationwide problem. Thus, it exercises a substantial economic effect on interstate commerce. The lack of formal findings to that effect were not fatal to the Act because there existed enough evidence to conclude that Congress had a rational basis for Òfinding a chosen regulatory scheme necessary to the protection of commerce.Ó The Court needed to do no further examination to second-guess Congress' judgment in the light of such evidence.

9. Concurrence Reasoning: Douglas was reluctant to base his opinion entirely on the Commerce Clause because he felt that the human rights issue at stake was more consequential than the commerce clause could justify. Thus, he would also support the reasoning under the equal protection clause of the fourteenth amendment because it seemed a much more appropriate grounds for anti- discrimination protection.

10. Notes: Five years later in Daniel v. Paul, Justice Black was the sole dissenter against application of Title II of the Civil Rights Act to the Lake Nixon Club in Arkansas. The club had a snack bar that refused to serve African Americans, and a substantial portion of the food served at the snack bar had traveled in interstate commerce. However, Black felt that the Act would be justifiable if based on the Fourteenth Amendment, but he did not feel that there was an adequate relationship between this snack bar and interstate commerce. He was afraid that this finding would stretch the commerce power to regulate any Òremote country place of recreation in every nook and cranny of every precinct and countyÓ everywhere.

**1. Garcia v. San Antonio Metro. Transit Auth., (1985); pg. 160, briefed 9/17/95**

2. Facts: Garcia was a bus driver who worked overtime hours. Under the FLSA, the Æ, SAMTA, was required to pay a certain wage and comply with certain overtime standards. However, four months after the Supreme Court's ruling in National League of Cities, that the FLSA did not apply to state government agencies Òin areas of traditional government functions,Ó SAMTA notified its employees that the decision relieved it of its overtime obligations under the FLSA because a municipal public mass-transit system was traditionally a local government function, and therefore immune from FLSA.

3. Procedural Posture: Garcia sued for his overtime pay under the FLSA. The District Court found that a municipal operation of a mass transit system was a traditional government function, and thus under National League of Cities, is exempt from the FLSA wage and overtime obligations.

4. Issue: Whether Congress has the power, under the Commerce Clause, to regulate activities and functions that are ÒtraditionallyÓ an ÒintegralÓ part of state government operations.

5. Holding: Yes. The fundamental limitation that the constitutional scheme imposes on Congress' power under the commerce clause to protect Òstates as statesÓ from intrusion by federal regulation is a procedural one to be found in the political process - states' and citizens' participation in federal governmental action.

6. Majority Reasoning: The test of National League of Cities [also the third prong of the test in Hodel], that Congress may not interfere with ÒtraditionalÓ state government functions, is unworkable. There is no meaningful way to determine what is a ÒtraditionalÓ or ÒintegralÓ part of a state government's function, and what is not. Such an approach has led to artificial results since its enactment. History is not a viable grounds for a determination because this prevents meaningful change when necessary, as well as being fairly arbitrary. Furthermore, it requires the unelected judiciary to review legislative decisions based on which policies it likes and dislikes. [This argument goes contrary to Marbury.] If Congress has a particular power, it does not matter whether it interferes with the laws of the states. To find limits on the commerce power, the constitution itself must be examined. Since there are no express limits, the constitution suggests that the structure of the federal government itself is the process by which it is regulated; i.e. by state representatives to the federal government. The states' interests are best protected by their own representation in the federal government. Since the FLSA is a lesser burden on the states than many other Acts, it is evidence of the political pressures on the federal government to protect states' rights. Thus, National League of Cities is overruled.

7. Dissent Reasoning: [Powell] reasoned that the majority rendered the 10th amendment [reservation of power to the states] meaningless. The Òbalancing testÓ of National League of Cities was best designed to protect the states while allowing the Congress proper power. The majority also failed to explain how the states' role in the electoral process protects them in their capacity as states themselves. The fact that Congress does not generally exceed its constitutional limits to reach state activities does not make judicial review any less necessary on those occasions that it does. The States' rights are a matter of congressional law, not legislative grace. Congress has passed increasingly more legislation of this type, while at the same time losing ground with its local constituents. This poses a danger for future stability of the federal government because it undermines the constitutional balance of power between the federal government and the states. Furthermore, it is clerks and aids who normally draft legislation, not the Senators themselves. Thus, the drafters are even one more step removed from the constituents who best know how to govern their local agencies. Since the FLSA is so economically intrusive, it clearly violates the ÒbalanceÓ established by National League of Cities.

8. Dissent Reasoning: [O'Connor] felt that the majority had backed down from the fight for states' rights just when the states needed help from the Supreme Court. There is now a risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers relied. Such a fear is not unwarranted given the amount of similar legislative activity in the last 30 years. The proper test should be weighing the states' rights as a Òrelevant considerationÓ in determining the constitutionality of uses of the commerce power.

**1. United States v. Lopez, (1995); pg. 9 Supp., briefed 9/17/95**

2. Facts: Lopez was a high school senior in San Antonio who was caught with a .38 caliber handgun and five bullets on school grounds.

3. Procedural Posture: Lopez was charged with violation of ¤ 922(q) of the Gun-Free School Zones Act of 1990, which made it a federal offense Òfor any individual knowingly to possess a firearm at a...school zone.Ó The District Court convicted him on a bench trial and sentenced him to six months' imprisonment. The Court of Appeal for the 5th district reversed the conviction on the grounds that the law was unconstitutional as being beyond the power of Congress to legislate control over local public schools, and the Supreme Court granted cert.

4. Issue: Whether ¤ 922(q) of the Gun-Free School Zones Act is unconstitutional as being beyond the power of Congress to legislate control over local public schools.

5. Holding: Yes.

6. ¸ Argument: ¤ 922(q) is valid because possession of a firearm in a school zone Òsubstantially affectsÓ [see Shreveport] interstate commerce because it results in violent crime which affects the economy in two ways: first, it results in increased costs to the taxpayers, second, it deters people from traveling to areas that are perceived to be unsafe. Also, the presence of guns in school is a substantial threat to the learning environment, which results in a less educated population, and therefore a less productive economy.

7. Æ Argument: The Gun-Free School Zones Act is unconstitutional as being beyond the power of Congress to legislate control over local public schools.

8. Majority Reasoning: ¤ 922(q) is a criminal statute that has no observable relationship to ÒcommerceÓ or any sort of economic enterprise, regardless of how broadly those terms are defined. Deterring the presence of guns on school grounds is not part of a larger regulatory scheme to control commerce that would otherwise be undermined if not viewed in the Òaggregate.Ó Furthermore, it contains no test by which the firearm in question could be rationally linked to interstate commerce. Although the lack of formal Congressional findings to this extent are not fatal, their absence fails to save the statute from the otherwise plain observation that it is not commerce-related. To accept the government's position that it guns at schools do have a substantial effect on commerce because they adversely affect the economy would be to give virtually unlimited power to Congress to regulate any activity that has a social cost. Additionally, such a position would allow Congress to provide federally mandated school curriculums, and regulate each and every aspect of local schools. This is too broad a reading of the commerce power.

9. Concurrence Reasoning: [Kennedy, O'Connor] Such a broad reading of the commerce power would violate the theory of federalism in which the states perform their role as laboratories for the experimentation with various means of local regulation.

10. Concurrence Reasoning: [Thomas] In future cases, the Court should take the opportunity to fashion jurisprudence that more accurately reflects the intent of the Framers with respect to the commerce power. The Òsubstantial effectÓ test is far too broad in light of the historical evidence of the Framers' intent.

11. Dissent Reasoning: [Souter] The Court was wrong to second-guess the rational basis for Congress' enactment of this Act based on the commerce clause. As a matter of judicial restraint, the Court should defer judgment to the legislature when it appears that there is a rational basis for the Act.

12. Dissent Reasoning: [Breyer] The economic reality is that the quality of education has a Òsubstantial effectÓ on interstate commerce because it affects the individual citizen's ability to compete in the global marketplace.

**1. Gregory v. Ashcroft, (1991); pg. 40 Supp., briefed 9/17/95**

2. Facts: Missouri has a state constitutional provision that provides for the mandatory requirement of judges when they reach age 70. The Age Discrimination in Employment Act prohibits an employer from discharging an individual over the age of 40 for reasons of age. However, the Act expressly excludes from the definition of ÒemployeeÓ any Òperson elected to public officeÓ or any Òappointee on the policymaking level.Ó Judges in Missouri are first appointed by the Governor and then re- elected.

3. Procedural Posture: Unknown.

4. Issue: Whether the Age Discrimination in Employment Act may be applied to the mandatory retirement of Missouri judges.

5. Holding: No.

6. ¸ Argument: Missouri argued that the judges fell into the exception of the Act as being either elected or policymaking persons, and therefore exempt.

7. Majority Reasoning: Because of the delicate balance of federal vs. state power, and especially in light of the serious intrusion it would be into state power if the federal government were able to regulate the ages of their public officials, O'Connor held that Congress would be taken to have encroached on state power in this context only if there was a Òplain statementÓ to that effect. This was necessary to preserve the Framer's Òdual sovereigntyÓ notion of the power of the states being commensurate with the power of the federal government. Especially since the Court, in Garcia, had left protection of states' rights primarily to the political process of elections, we must be absolutely certain that Congress intended such an exercise so that the Commerce Power is kept in check. Since the ADEA's exclusion of most public officials is ambiguous, the Court would not interpret Congressional intent as being plain enough to effect such a broad exercise of power.

8. Concurrence Reasoning: The majority's Òplain statementÓ rule is ÒunwiseÓ, ÒinfeasibleÓ, and Òunnecessary to the proper resolution of this case.Ó It deviates from the standard set forth in Garcia, and there is no reason to think that the rationale of Garcia would be inapplicable here. However, there is no reason to consider this question, because as a matter of simple statutory construction, Missouri judges are exempted as ÒelectedÓ or ÒpolicymakingÓ officials.

**1. New York v. United States, (1992); pg. 43 Supp., briefed 9/24/95**

2. Facts: In 1985, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985, which was intended to solve a national problem of the disposal of low-level radioactive waste by providing a procedure for states to either group together into regional compacts, each dumping their waste into a single site in one of the compact states, or find their own waste disposal area. The Act had three provisions: 1) monetary incentives which allowed site states to charge increasingly higher surcharges to non-pact states for disposal of their waste, part of which surcharges would be refunded to the states by the Secretary of Energy if they complied with a timeline for finding their own disposal sites, 2) access incentives which allowed site states to deny access to non-pact states after a few years, and 3) a Òtake-titleÓ provision which required the delinquent states to take possession and title of the radioactive waste and assume liability for it if they remained delinquent to the end. New York decided to dispose of its own waste, and did not join a regional pact. However, the state had problems locating the site within its borders because the local citizens did not want it.

3. Procedural Posture: The state of New York brought this action to seek a declaratory judgment that the Act was inconsistent with the Tenth Amendment and the Guarantee Clause of Article IV.

4. Issue: Whether Congress may direct or otherwise compel a State to regulate a particular private field in a particular way.

5. Holding: No.

6. ¸ Argument: The 10th amendment forbids Congress from directly regulating the states to compel them to carry out federal regulation in this private field. Although they unquestionably have the power under the Commerce Clause to regulate the generators of the waste, they do not have the power to compel the states to directly regulate the waste generators in a particular manner. The Act Òcommandeers the legislative processes of the states.Ó Furthermore, the second part of the act which provides for monetary incentives is beyond Congress' spending power. Lastly, the Act violates the Guarantee Clause because it attempts to undermine the states' own republican form of government.

7. Æ Argument: The Constitution's prohibition of convressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission. Also, the Constitution does, in some circumstances, permit federal directives to state governments. Lastly, the Constitution envisions a role for Congress as an arbiter of state disputes.

8. Majority Reasoning: The Tenth Amendment is a truism that simply directs the court to examine what are the internal limitations to the powers granted to Congress in Article I. So the court must examine the Commerce Power, the Spending Power, and the Supremacy Clause. The basic premise is that under Hodel, Congress may not simply ÒcommandeerÓ the state governmental processes. Nothing in the Constitution implies that Congress has the ability to require states to govern by federal coercion. This premise is supported by looking at the Framer's intent when they chose the structure that the Congress would exercise its power directly over individuals rather than over states as intermediaries. Although Congress can motivate or encourage states to regulate in a certain way by making federal assistance conditional or by giving them the choice between doing it themselves or having the federal government do it for them by preemption, it can not directly compel. This enables state governments to be directly responsive and accountable to the local electorate. Where the federal government compels regulation, the state officials take the brunt, while the federal officials remain insulated, thus reducing accountability in the political process. Construing the Act in a light most favorable to the United States, the Òtake titleÓ provision is still clearly beyond Congress' power because Congress neither has the power to force states to take title to the waste (thereby subsidizing the generators) nor does it have the power to compel regulation. That there is a very strong federal interest in controlling waste does not allow Congress to go beyond the Constitution. Even if New York state itself agreed to the bargain, the state is powerless to waive the Constitutional limits on Congressional power because the Constitution is for the protection of individuals. The other parts of the Act are Constitutional because neither monetary incentives nor access denials can reasonably be said to deny a State a republican form of government.

9. Concurrence/Dissent Reasoning: [White] reasoned that the majority had taken the Act out of its historical context and its contractual setting. The states, including New York, got together to reach their own agreement on how the radioactive waste crisis should be handled. They did not seek federal pre-emption, but rather federal sanction of their pact under Article I, Section 10 which states that Òno state shall, without the consent of Congress,...enter into any agreement or Compact with another State.Ó Thus New York should be estopped from asserting the unconstitutionality of a bargain that it had derived substantial benefit from.

**1. Bailey v. Drexel Furniture, (1922\_; pg. 177, briefed 9/24/95**

2. Facts: After the Court held that regulation of child labor was unconstitutional if its basis was the Commerce Power (Hammer v. Dagenhart), Congress passed the Child Labor Tax Law of 1919 which imposed a federal excise tax of 10% of the annual net profits of any employer who exceeded the age or working hours limitations provided. It was almost identical to the Act declared unconstitutional in Hammer, but it rested on the taxing power instead.

3. Procedural Posture: Drexel brought this action for refund in the District Court after paying $6,000 under the tax, and won. The IRS appealed.

4. Issue: Whether Congress may impose a tax on industries as a means of regulating child labor, under the pretext of the taxing power.

5. Holding: No.

6. ¸ Argument: The Act is a regulation of the employment of child labor internal to the states, which is an exclusively state function under the 10th amendment.

7. Æ Argument: The Act is a mere excise tax levied by the Congress under its broad power of taxation under the Constitution. The court has already gone so far un upholding taxing statutes that it is bound by precedent to uphold this one as well.

8. Majority Reasoning: The Act, on its face, appears to be a penalty enacted under the pretext of a tax. It provides a heavy burden for departure from a detailed and specific course of conduct. It is imposed without regard to the severity or proportion of the violation of the child labor provisions. It also requires a mens rea in that the violator knowingly depart from the standards. Thus, it clearly looks like a penalty.  To allow it merely because it has the magic word ÒtaxÓ would be to break down all constitutional limitations on Congress' power to interfere with state activities, because then any subject of federal concern could be regulated by the taxing power. Even though some taxes have an incidental penalty-like action, this one is primarily a penalty. This case is the same as Hammer. Also, the previous authority relied upon by the government is distinguishable because it involved taxes that were not enacted under a pretext.

**1. United States v. Kahriger, (1953); pg. 181, briefed 9/24/95**

2. Facts: The Revenue Act of 1951 contained a 10% occupational tax on persons engaged in the business of accepting wagers (professional interstate gamblers). It also required these persons to keep a list of the names, and addresses of all employees for public inspection at any time by any state county or municipal agency. In the discussions in the Congressional record, there was evidence that one of the primary purposes was to tax these professional gamblers out of existence.

3. Procedural Posture: The lower court found this provision beyond the taxing power of the Congress.

4. Issue: Whether Congress has the power, under the taxing power, to enact a tax on a particular profession if the tax also has a regulatory effect which appears to infringe on the states' police power under the 10th amendment.

5. Holding: Yes.

6. ¸ Argument: The legislative history indicating a congressional motive to suppress wagering indicates that this is a tax passed under a pretext of revenue generation and thus is not a proper exercise of the taxing power. The sole purpose of the law is to penalize gamblers. The revenue generation pretext is evidenced by the small amount of revenue actually generated. Furthermore, a the law requires the gamblers to record and present upon demand the names and addresses of their employees, which is clearly an attempt to regulate this occupation.

7. Majority Reasoning: A federal excise tax is not invalid merely because it discourages or deters the activities taxed. Nor is it invalid because the revenue generated is negligible. If a tax produces revenue, and unless there are penalty provisions extraneous to any tax need, the courts are without authority to limit the exercise of the taxing power. This tax is not a penalty, therefore it is valid. The registration requirement simply aids in the collection of the tax.

**1. United States v. Butler, (1936); pg. 186, briefed, 9/24/95**

2. Facts: Butler was a processor of cotton. In 1933, the Congress passed the Agricultural Adjustment Act as one of the New Deal measures intended to raise agricultural prices by limiting farm production. In return for limiting their production, the government would give the farmers a subsidy that was raised by taxing the processing stage of the agriculture.

3. Procedural Posture: Butler attacked the tax on the grounds that it was an integral part of an unconstitutional program to control agricultural production.

4. Issue: Whether the Act was a valid exercise of the power to spend for the general welfare.

5. Holding: No.

6. Æ Argument: Congress has the right to tax and spend to Òprovide for the general welfare.Ó This phrase should be liberally construed to cover anything conducive to the national welfare. The decision as to what is conducive to the national welfare is the function of Congress alone, unreviewable by the courts, and this Act was for the Ògeneral welfare.Ó Furthermore, it is not coercive, because it provides for voluntary compliance through payment of benefits.

7. Majority Reasoning: Looking to the framer's intent, the Court accepted Hamilton's view that Congress has a substantive power to tax and to spend, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. However, the Court did not reach the determination of whether the Act was for the general welfare, because it invades the rights reserved to the states. The attempt by congress to regulate the production of agriculture is unconstitutional, thus any laws passed as a means to this unconstitutional end are enacted under a pretext. The taxing power can not be used to interfere with the states' rights, so the spending power should not either. The Act is coercive, because it does not provide the farmers with a practical choice, since their non- compliance would result in their financial ruin. Furthermore, the power of Congress to contract with individuals is limited by whether its federal power reaches the subject matter of the contract. In this case, the federal power does not reach so far.

8. Dissent: The court should only be concerned with the power to enact statutes, not their wisdom. The court here may be overstepping its bounds by trying to pass judgment on the policy of the law, not its consitutionality. The coercion argument is unconvincing because Congress must be able to have the power to condition funding on proper use of the funding, otherwise, its broad powers would be defeated.

**1. Steward Machine Co. v. Davis, (1937); pg. 192, briefed 9/24/95**

2. Facts: Title IX of the Social Security Act imposed a payroll tax on employers, but granted a credit of up to 90% of the tax for contributions to a state unemployment fund if such fund was certified by the federal government as meeting the requirements of the Act. One of the provisions of the Act required the states to immediately pay over the funds to the federal government who would hold them in trust.

3. Procedural Posture: Steward sought a refund of the taxes they had paid under this Act.

4. Issue: Whether Congress has the power to encourage the states to accept federally approved unemployment programs by providing tax credits to employers in that state if the programs are adopted.

5. Holding: yes.

6. ¸ Argument: The aim of the law is to conscript the state legilatures by the use of economic pressure. Thus, it is unconstitutional as infringing upon the soveriegnty of the states.

7. Æ Argument: The statute was designed to enable the states to cooperate with the federal government in the solving of a national problem. It does not coerce state governments because it is optional.

8. Majority Reasoning: Cardozo explained that the unemployment problem was nationwide and was not relieved by the action (or inaction) of the states. Thus, the action of the federal government was clearly for the general welfare. Congress was capable of determining what was in the best interest of the national welfare in this case. There was not coercion, but merely motivation or temptation. To argue that coercion was the same as economic motivation would be to Òplunge the law into endless diffifultiesÓ because the distinction between what was coercion and what was not would be impossible. Congress has the power to tax and to condition the tax on the compliance of the states, as long as the subject matter of the tax is related to the scope of national policy and power. The Child Labor Law case is distinguishable because in that case, the pretext was clearly visible. In this case, the tax credit would be lawful on its own. It is not crippled by the fact that it is tied to conditional performance by the states.

**1. Woods v. Miller Co., (1948); pg. 302, briefed 10/1/95**

2. Facts: The Housing and Rent Act of 1947 was passed under the authority of the war power to regulate the rents of houses in post-WWII America. As the soldiers came back from the war, they were met with a housing shortage due to the reduction in residential construction. The reduction was caused by allocation of building materials to military projects.

3. Procedural Posture: The District Court held that the authority of Congress to regulate rents by virtue of the war power ended with the President's New-Year's Eve 1946 proclamation of peace. Also, Congress did not state that they were acting under the war power when they passed the Housing and Rent Act. The government appealed directly to the Supreme Court.

4. Issue: Whether the Housing and Rent Act is a constitutional exercise of the war power by Congress.

5. Holding: Yes.

6. Majority Reasoning: [Douglas] Citing to both Hamilton and Ruppert, the court stated that the war power includes the power Òto remedy the evils which have arisen from its rise and progressÓ and continues for the duration of that emergency. It does not end with the cessation of hostilities. The Presidential proclamation recognized that the state of war still existed, and the war effort was what contributed most heavily to the present housing shortage. Thus, Congress had the power, even after the cessation of hostilities, to regulate a shortage of housing caused primarily by the war. The necessary and proper clause requires that the war power be held over to treat the effects of war. Although this holding, read broadly, would authorize the war power to used during peace to regulate long-term effects of war and swallow up the Ninth and Tenth amendments, we must assume that Congress will act responsibly and take into account its constitutional limits when exercising the war power.

7. Concurrence Reasoning: [Jackson] felt that the result in this case was clear, but was worried about the potential abuse of the war power because it tended to bexercised during periods of hasty patriotism. The war power cannot last as long as the effects and consequences of war because many are permanent.

**1. Missouri v. Holland, (1920); pg. 204, briefed 10/1/95**

2. Facts: There were migratory birds in the northern United States that transited between the U.S. and Canada. These birds had a beneficial effect on the ecosystem by controlling the insect population, as well as being a food supply. However, the birds were being over-hunted. The U.S. and Great Britain entered into a treaty to protect the birds by delineating hunting seasons. Pursuant to the treaty, the Migratory Bird Treaty Act of 1918 was passed by Congress to give effect to the U.S. side of the treaty.

3. Procedural Posture: The state of Missouri brought this action to prevent an U.S. game warden from enforcing the Act on the grounds that it violated the 10th amendment, arguing that Congress did not have to power to pass the Act without the treaty, and thus should not be able to pass the Act under the treaty because if the Act, standing alone, is in violation of the 10th amendment, then the treaty is as well.

4. Issue: Whether Congress may properly pass an Act that regulates hunting seasons for migratory birds if that Act regulates in traditionally state-controlled areas.

5. Holding: Yes.

6. Majority Reasoning: Article II, ¤ 2 expressly delegates the power of Congress to make treaties. Furthermore, Article IV declares that treaties made under the authority of the United States are the Òsupreme law of the land.Ó If the treaty is valid, then it is clearly a necessary and proper action to carry out the treaty-making power in this case. The treaty-making power derives from the authority of the United States, as an ÒorganismÓ itself.  It does not matter that Congress might not have the power to pass the Act not in pursuance of a treaty, because Congress does have the power to make treaties, and the Act is a necessary and proper means to give effect to the treaty. Since the birds are important, and they transit back and forth between the countries, the United States has the power to make a treaty concerning their protection and the treaty is valid. Since the treaty is valid, the Act is valid as being necessary and proper to give effect to a valid treaty.

7. Notes: In the 1950's fear that any Constitutional limitation on Congress' power could be overriden by the broad effect given by Holmes to the treaty power in Holland led to a proposed constitutional amendment called the ÒBricker AmendmentÓ which stated that ÒA provision of a treaty which conflicts with this Constitution shall not be of any force or effect,Ó and ÒA treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.Ó However, in Reid v. Covert, these fears were put to rest by Justice Black when he stated that no agreement can Òconfer power on the Congress...which is free from the restraints of the Constitution.Ó and that Holland should be read as standing for the proposition that the 10th amendment is no barrier to the United States' power to make treaties because the states had delegated their rights as to treaties to the federal government. Although there is no explicit power in the Constitution for the Congress, independent of the treaty power, to pass laws concerning foreign affairs, it is generally regarded as implied by the fact that the United States' power to interact with other countries must lay in some body, and it rests most appropriately in Congress who has the power to make all other federal laws.

**1. Gibbons v. Ogden, Part II (1824); pg. 214, briefed 10/1/95**

2. Facts: See above Part I.

3. Procedural Posture: See above Part I.

4. Issue: Whether a state has the right to pass laws which affect interstate commerce concurrently with that of Congress.

5. Holding: No.

6. ¸ Argument: The states may severally exercise the same power to regulate commerce within their respective jurisdictions as Congress has with regard to interstate commerce. The states possessed this right before the Constitution, and so it is reserved to them under the 10th amendment to the extent that Congress has not acted on it.

7. Æ Argument: The full power to regulate interstate commerce rests with Congress. Thus, there is no residual power left to the states because the grant of the whole power is inconsistent with the existence of a residual power. The words Òto regulateÓ require the grant of the full power.

8. Majority Reasoning: Marshall reasoned that a Congressional power could, in some cases, be concurrently exercised by the states. For example, the power to tax was shared by both Congress and the states. However, the power to regulate interstate commerce could not be shared because it is by its very nature, unsharable. The states still have the power to pass ÒpoliceÓ laws, such as inspection and quarantine laws and the like which act upon a good in preparation for interstate shipment, but this is quite different from having the power to pass laws which actually regulate interstate commerce. Although the devices by which the power is exercised may appear to be the same between Congress and the states, that does not mean that the power is the same. Even if a state law encroaches upon a commerce area that the Congress has left untouched, the action necessarily interferes with Congress' commerce power if it regulates interstate commerce. Thus, it is immaterial whether the state law was passed for local ÒpoliceÓ purposes if it conflicts with Congress' ability to exercise the commerce power. The law here is then unconstitutional under the Supremacy Clause.

**1. Wilson v. Black Bird Creek Marsh Co., (1829); pg. 216, briefed 10/1/95**

2. Facts: The Æ company was authorized by Delaware law to put a dam across Black Bird creek, which was a navigable waterway flowing into the Delaware river. ¹ crashed through the dam, and was successfully sued by the Æ company for damages.

3. Procedural Posture: Wilson brought this action to invalidate the Delaware law as being in conflict with Congress' power under the commerce clause to regulate interstate commerce, which was conducted on the Creek.

4. Issue: Whether the Delaware law authorizing the Æ to dam up the navigable waterway was constitutional.

5. Holding: Yes.

6. Majority Reasoning: Marshall reasoned that the power to increase the value of the surrounding property, as well as the health of the inhabitants was well within the power of the states as long as it did not conflict with the powers of the federal government. But since Congress had passed no acts over this creek, the repugnancy of the Delaware law must be measured wholly according to its repugnancy to the dormant commerce power. In this case, the Delaware law can not be considered as repugnant to the dormant commerce power.

**1. Cooley v. Board of Wardens of The Port of Philadelphia, (1851); pg. 219, briefed 10/1/95.**

2. Facts: A Pennsylvania law of 1803 required ships entering or leaving Philadelphia harbor to hire a local pilot. For failure to comply, Cooley was fined. The proceeds from the fines went to a fund used to support retired pilots and their dependents. Also, a 1789 congressional statute stated that all previous piloting laws were expressly adopted, and the states had the right to enact further similar laws until Congress saw fit to enact laws in this area.

3. Procedural Posture: Cooley sued for the penalty, claiming that the law was unconsitutional as being in conflict with the dormant Commerce power.

4. Issue: Whether the law was unconsitutional as being in conflict with the dormant Commerce power.

5. Holding: No.

6. Majority Reasoning: The regulation of pilots is regulation of navigation, and thus regulation of commerce. The 1789 Act, although it expressly adopts existing piloting laws, can not grant any more power to the states than does the constitution. Thus, if the commerce power is exclusive in this area, the Act is inoperative and the local law is unconstitutional. However, since the field of commerce is so diverse, it requires laws of varying scope. Some facets of interstate commerce require uniform national laws by their very nature. Others require purely local legislation to meet diverse needs. Those that require uniform national laws must be said to be exclusively regulated by Congress, thus barring any state action in that area even when the commerce power is dormant. However, in this case, there is a manifested intent of congress to leave this area of commerce to local regulation. Thus, this is an example where the commerce power can coexist between the state and federal government if the federal government has not actuall passed a law in that area. The determinative factor of whether a state law is repugnant to the constitution in the face of the dormant commerce power is the ÒsubjectÓ of the regulation, not the ÒpurposeÓ behind it.

**1. South Carolina State Hwy. Dept. v. Barnwell Bros., (1938); pg. 226, briefed 10/1/95**

2. Facts: A 1933 South Carolina law prohibited trucks that were more than 90 inches wide or had a gross weight of over 20,000 pounds from travelling on South Carolina highways. About 85% to 90% of the nations trucks exceeded these limits. The law was passed to preserve the highways from damage.

3. Procedural Posture: The trial court found that substantial burdens were put on interstate commerce by this law, and that it was an unreasonable means of protecting the highways because it was tied to gross weight instead of axle weight.

4. Issue: Whether the South Carolina law is unconstitutional as an impermissible conflict with the dormant commerce power.

5. Holding: No.

6. Majority Reasoning: There are matters of local state concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which, because of their local character and diversity, may not be fully dealt with by congress. A state has an adequate local interest in preserving its highways. Thus, it can pass local laws to regulate the size of shipping on those highways. The fact that this necessarily affects interstate commerce is immaterial because, so long as the law does not discriminate, which this one does not, the power is reserved to the states to regulate. It is not the judicial function to determine whether the standard is the best approach or not, but only to determine whether it is without a rational basis.

**1. Southern Pacific Co. v. Arizona, (1945); pg. 228, briefed 10/1/95**

2. Facts: The Arizona Train Limit Law of 1912 prohibited operating  railroad trains of more than a prescribed length. Reducing the length of the trains was said to increase safety because of less Òslack actionÓ which caused trains to behave uncontrollably. However, the length limit required the train operators to run about 30% more trains, and cost Southern Pacific about a million dollars/year in extra costs. About 95% of all rail traffic in Arizona was interstate, and so it affected train operations from Texas to California.

3. Procedural Posture: In 1940, Arizona sued Sourthern Pacific for the statutory penalties for violating the law. The trial court found the law to be an unconstitutional burden on interstate commerce, and further found that it was not justified by local safety concerns because the increase in safety by reducing the slack action was offset by the decrease in safety of more trains. The state supreme court reversed, concluding that a state police law, based on safety, could not be overturned even though it had a substantial effect on interstate commerce.

4. Issue: Whether the total effect of the state law as a safety measure in reducing accidents is too small to outweigh the national interest in keeping interstate commerce free of burdens where a uniform national regulation is needed.

5. Holding: Yes.

6. Majority Reasoning: The general rule is that the states do not have the authority to substantially impede the free flow of commerce where the need for national uniformity in laws demand that the regulation be done at the national level. However, this case lies between the two extremes of clearly needing national regulation, and clearly needing a local police measure. Thus, it calls for a balancing of the state and federal interests. The findings show that the increase in safety is small if at all. Also, if the length of trains is to be regulated, it must be done uniformly for efficiency. Since the Arizona Law is a substantial burden on commerce where a need for uniformity exists, and does not have an adequate police justification, it is unconstitutional.

7. Dissent Reasoning: [Black] thought that the balancing test was best left to the legislature and not the judiciary. [Douglas] felt that the state legislation was adequately tied to safety and thus entitled to a presumption of validity.

**1. Dean Milk Co. v. Madison, (1951); pg. 247, briefed 10/1/95**

2. Fact: Madison, Wis., has a local ordinance which prohibits the sale within Madison of any milk which has not been pastuerized within a 5 mile radius of the city of Madison. The three pastuerizing plants within that radius are subject to rigourous local safety laws. Dean Milk operates out of Chicago, and its facility meets Federal safety standards.

3. Procedural Posture: Dean Milk brought this action to strike down the Madison law after it was denied a license to sell milk there. The state court rejected the commerce clause attack.

4. Issue: Whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them.

5. Holding: No.

6. ¸ Argument: The regulation of milk in this manner is a substantial burden upon interstate commerce because it plainly discriminates against interstate commerce.

7. Æ Argument: The ordinance is valid because it is a good-faith attempt to police health of the milk supply. It is valid regardless of its affect on interstate commerce, because the states have the power to enact local police laws that are not in conflict with existing federal legislation.

8. Majority Reasoning: The statute clearly is a barrier to interstate commerce. It has a discriminatory effect, even if it is not purposefully discriminatory. If it were held valid simply because it were related to health, then the Commerce Clause would be powerless because a state could enact a burdensome and protective law on the pretext of health. Since there are alternative methods for assuring the same degree of health protection, the local law's interest in health does not outweigh the national interests in non-discriminatory interstate commerce practices. It would be just as effective for the local ordinance to require higher standards without requiring local processing. A model federal provision existed that would adequately safeguard the public health.

**1. CTS Corp. v. Dynamics Corp. of Am., (1987); pg. 272, briefed 10/1/95**

2. Facts: Indiana passed a corporate takeover law which stated that should any party acquire a controlling interest in the number of shares he held, he could only acquire voting rights on those shares to the extent approved by a majority vote of the prior disinterested stockholders.

3. Procedural Posture: The lower court held that the law was unconsitutional as being a hindrance to tender offers, and thus an interstate commerce burden.

4. Issue: Whether the Indiana law is unconstitutional as being in conflict with the dormant Commerce Clause.

5. Holding: No.

6. Æ Argument: Tender offers should generally be favored because they represent a shifting of property rights to their highest value use. Also, the state of Indiana has no interest in protecting non- resident shareholders.

7. Majority Reasoning: A state has the fundamental right ot pass laws concerning the regulation of corporations it establishes. They are only unconsitutional if they discriminate against interstate commerce. Since this law has the same effect on interstate commerce as well as intrastate commerce, meaning that all shareholders and tender offers are treated the same regardless of locality, then it does not discriminate. The state regulation of corporations necessarily has some effect on interstate commerce, since the shares are traded internationally. However, there is stability in knowing that the corporation is subject to one set of regulations - that of its home state.

8. Concurrence Reasoning: [Scalia] stated that there was no consitutional basis for any balancing test when determining whether a local interest outweighs a federal interest. Whether the burden on commerce imposed by a statute is excessive in relation to its benefit is a question for the legislature, not the judiciary.

**1. United Building & Constr. Trades v. Camden, (1984); pg. 282, briefed 10/8/95**

2. Facts: The city of Camden N.J. passed a municipal ordinance requiring that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents.

3. Procedural Posture: ¹ challenged the constitutionality of that ordinance under the Privileges and Immunities clause. The state supreme court of New Jersey rejected the attack on the grounds that the ordinance discriminates on the basis of municipal residency and not state residency, and thus declined to broaden the interpretation of the privileges and immunities clause beyond the literal language in the constitution.

4. Issue: Whether the Camden ordinance is constitutional under the privileges and immunities clause.

5. Holding: No.

6. Æ Argument: The clause does not apply to a municipal ordinance. By its own language, it applies only to state laws which discriminate based on state residency.  This ordinance discriminates equally against state residents and non-state residents as long as they are non-Camden residents. Even if it does apply to municipal ordinances, in this case the law is necessary to counteract grave social and economic ills, of which the out-of-city employees are a primary cause. Because they Òlive off ofÓ Camden without residing in Camden, these out-of-city employees promote Òmiddle-class flightÓ from Camden, resulting in a depleted tax base.

7. Majority Reasoning: First, the privileges and immunities clause does apply to strictly municipal ordinances because what would be unconstitutional if done by the state can be no more readily accomplished by the city acting under the authority of the state. Also, a person who lives out of state will be just as discriminated against regardless of whether the ordinance also discriminates against other state residents. The out-of-state resident has no chance to remedy the law by participating in the local political process. Determination of validity must therefore proceed under the two-step process. First, whether the ordinance burdens a ÒfundamentalÓ privilege or immunity protected by the clause, and second, whether there is a good balancing reason for allowing it anyway. Although a Commerce Clause analysis can distinguish between cities acting as regulators (conflict with the dormant Commerce Clause) and cities acting as participants (no conflict), the privileges and immunities clause imposes a direct restraint on the local legislature without regard to whether they are acting as a participant. Clearly, the opportunity to seek employment with private employers, whether or not they work Òfor the cityÓ, is a fundamental right protected by the clause. As to whether the law is nontheless justified, it can only discriminate against out-of-city residents who are shown to Òconstitute a peculiar source of the evil at which the statute is aimed.Ó Here, there are no findings as to whether the out-of-city residents are an ÒevilÓ with regard to Camden's law, thus the case must be remanded for trial and specific findings to that extent.

8. Dissent Reasoning: The privileges and immunities clause has long been interpreted as applying only to state laws that discriminate against out-of-state residents. The majority cites no historical basis for broadening its scope.  Furthermore, the out-of-state resident's interests are adequately protected by the voters who are not residents of Camden, but still residents of New Jersey.

9. Notes: In Supreme Ct. of New Hampshire v. Piper (1985), the court struck down a state law prohibiting non-state residents from being admitted to the state bar under the privileges and immunities clause. The court found that Piper's claim involved a ÒprivilegeÓ because the practice of law is Òimportant to the national economy.Ó The court also found that there was no substantial justification for the difference in treatment between state residents and others. In Edwards v. California (1941); the court struck down the anti-Okie law which forbade bringing indigent persons into the state. The majority opinion relied entirely on the commerce clause, but a concurrence by Douglas stated that the privileges and immunities clause was a better rationale because the right of mobility of persons is more fundamental than that of products.

**1. Pacific Gas & Elec. Co. v. State Energy Comm'n., (1983); gp. 292, briefed 10/8/95**

2. Facts: A California law imposed a moratorium on the certification of nuclear energy plants until a state agency found that there existed a demonstrated means for disposal of high-level radioactive waste generated by the nuclear power plants. There was evidence in the State legislative record that the law was passed for economical reasons, such as regulating the price of electricity, because an increase in the number of nuclear power plants without an increase in radioactive disposal capacity could result in the shutdown of existing plants and the subsequent instability of electricity prices.

3. Procedural Posture: P.G.&E. brought an action for declaratory judgment against the law, claiming that it was preemted by the federal Atomic Energy Act of 1954. The District Court granted relief, the Court of Appeal reversed, and P.G.&E. appealed to the Supreme Court.

4. Issue: Whether the California statutory moratorium on the certification of nuclear power plants is preemted by the Atomic Energy Act of 1954.

5. Holding: No.

6. ¸ Argument: 1. The state law is preempted because it regulates construction of nuclear plants based on safety reasons. Since the AEA's primary function is exclusive federal safety regulation, there is no room here for the state to regulate. 2. The statute conflicts with actual decisions made by Congress and the NRC. 3. The statute frustrates the AEA's goal of the development of nuclear technology.

7. Æ Argument: Although safety regulation of nuclear plants is forbidden, a state may completely prohibit new construction until its safety concerns are satisfied by the federal government.

8. Majority Reasoning: Historically, the federal government has taken efforts to ensure that nuclear power is developed and operated safely, while leaving police regulations of the economics of electricity generated by nuclear energy to the states themselves. This is evidenced by the AEA's own language when it states that nothing in it is to be construed as affecting the authority of any local government to regulate the Ògeneration, sale or transmission of electric power produced through the use of nuclear facilities.Ó Thus, the federal government has explicitly left this power to the states; it is not impliedly preempted by the mere existence of the AEA. However, the federal goverment, by the AEA, has exclusively retained the right to regulate nuclear safety, and so the state has no power to regulate in that specific area. Since there is legislative history evidence that the law was passed as primarily an economic, and not a safety matter, the court accepted California's representation that they were not attempting to regulate safety. Even though the Congress and the NRC have recently passed legislation that it is safe and permissible to continue to certify new power plants, the state is in no way compelled to do so. Thus, compliance with both the federal and state statutes are possible here, and so the statute is not expressly preempted. Lastly, the even though the AEA's purpose was to promote the safe development and use of nuclear energy, that was not to be accomplished at all costs. So the statute is not impliedly preempted as being an obstruction of a Congressional purpose.

9. Notes: In Rice v. Santa Fe Elevator Corp., (1947), Justice Douglas stated that the test in whether a local law was preempted was the intent of Congress. In areas that were traditionally state-regulated, any action by Congress was presumed not to preempt unless it was the Òclear and manifest purpose of Congress.Ó There were three ways to divine this purpose: 1. If the federal scheme of regulation was so pervasive as to infer that Congress left no room for state regulation, 2. Where the federal interest is so dominant that it outweighs the state interests,  and 3. The state law produces a result inconsistent with the federal objective. Note the similarity between this analysis of preemption by actual legislation, and the Cooley ÒbalancingÓ analysis with regard to the dormant commerce clause. In Campbell v. Hussey (1961), Justice Douglas' plurality opinion struck down a local Georgia statute requiring that tobacco that was grown (locally) according to federal regulations be marked with a white tag (tobacco grown out-of-state in Carolina was to be marked with a blue tag). He rejected the argument that the Georgia statute was constitutional because it merely ÒsupplementedÓ the federal regulations. In this case the question of preemption did not need actual conflict between the federal and state law, because one could draw an inference from the structure of the federal regulation scheme that there was no room for state augmentation. [See point 1 in Rice, above.] Compare this result with the commerce clause rejection under the rationale of local discrimination in the Washington Apple case. However, in Florida Lime & Avocado Growers, Inc. v. Paul, the court distinguished Campbell by stating that there was neither an actual nor presumed conflict based on the federal regulatory design.

**1. Barron v. Mayor & City Council of Baltimore, (1833); pg. 397, briefed 10/22/95**

2. Facts: Barron was a wharf owner. The city of Baltimore, in an effort to construct some streets, diverted part of the flow of some streams feeding the Baltimore harbor. This caused sandbars to form around Barron's wharf, making it too shallow for most ships to do business there.

3. Procedural Posture: Barron sued the city for taking his property Òfor public use, without just compensationÓ under the 5th Amendment. The trial court awarded him damages, but the court of appeals reversed.

4. Issue: Whether the guarantee in the 5th Amendment that private property shall not be taken Òfor public use, without just compensationÓ is applicable to state governments as well as the federal government.

5. Holding: No.

6. Majority Reasoning: Marshall felt the answer was easy. The historical context of the framing of the constitution implied that the general guarantees in the Bill of Rights only applied to the federal government and not state governments. The purpose of the constitution was to ordain and establish a federal government, not state governments. Thus, any limitations on that power should be construed as applying to the federal government, since states have their own constitutions. The structure of the constitution shows that there was a plain line drawn between the powers and limitations of the federal and state governments, and so if the framers meant for these limitations to apply to states, they could have made such intent clear. The bill of rights itself was a guarantee against the encroachment of federal government. That is where the fear resided. There was no need for security against local governments, and so none was asked for.

**1. Slaughter-House Cases, (1873); pg. 400, briefed 10/22/95**

2. Facts: A Louisiana law of 1869 created a state corporation for the slaughtering of livestock. The corporation was given exclusive power to slaughter livestock, and all other private slaughterhouses were required to close. Independent butchers could use the corporations facilities for a charge, but could not conduct independent operations.

3. Procedural Posture: The butchers not included in the monopoly claimed that the law deprived them of their right to Òexercise their tradeÓ and challenged it under the 13th and 14th amendments. The highest state court sustained the law.

4. Issue: Whether the 13th and 14th amendments guarantee federal protection of individual rights of all citizens of the United States against discrimination by their own state governments.

5. Holding: No.

6. Majority Reasoning: The states have the proper police power to limit slaughter house operations for the health and safety of their residents. The meaning of the 13th and 14th amendments must be derived from the historical context of the problems they were designed to remedy, namely African slavery. The Congress, after the end of the Civil War, sought to strenghten the freedom of the former slaves by passing these amendments. The word ÒservitudesÓ in the 13th amendment refers to Òpersonal servitudesÓ not property rights, because of the qualifying word Òinvoluntary.Ó The purpose of the 13th amendment was thus to etch freedom for slaves into the constitution so that it later would not be questioned or avoided. The 14th amendment was a further step needed to protect former slaves from the Òblack codes.Ó The 15th amendment must be grouped in with the 13th and 14th, and it was specifically for black suffrage. These three amendments were ratified to counteract the specific evils of discrimination against former slaves. They did not create any further guarantees of privileges that did not already exist. Specifically, they only were meant to guarantee federal privileges, not state priviliges, whatever they may be. The Òpriviliges and immunitiesÓ clause did not create additional rights, it merely required states to apply its laws equally to non-state residents as well as state residents.

7. Dissent Reasoning: [Field] stated that the privileges and immunities referred to in the 14th amendment included the right to pursue lawful employment. The clause in article 4, section 2 did for the protection of citizens of one state against discrimination by another state, what the 14th amendment does for the protection of every citizen against discrimination by his own state against him. [Bradley] felt that since the language of the 14th amendment was general in nature, and did not claim to protect only blacks, that it was meant to secure fundamental rights of any citizen against discrimination by his state.

**1. Palko v. Connecticut, (1937); pg. 414, briefed 10/22/95**

2. Facts: Palko was convicted of second-degree murder. The state of Connecticut appealed his conviction, seeking a higher degree conviction. This was made possible by the state's local statute that allowed the state to appeal criminal convictions, as well as the defendant. The second-degree murder conviction was set aside, and he was retried and convicted of first degree murder.

3. Procedural Posture: Palko brought an action to declare the procedural statute unconstitutional as a violation of his 5th amendment guarantee against double jeopardy.

4. Issue: Whether the action of the state in this case amounted to double jeopardy prohibited by the 5th amendment.

5. Holding: No.

6. ¸ Argument: The retrial violated the 5th amendment, and whatever is forbidded by the 5th amendment is also forbidden by the 14th. Moreover, whatever would have been forbidden to the federal government in the bill of rights is now forbidden to the states by operation of the 14th amendment.

7. Majority Reasoning: There is no such general rule that the 14th amendment incorporates the bill of rights and applies all of its provisions to the states. Certain rights, such as that of a grand jury indictment and trial by jury are important, but have not been applied to the states through the 14th amendment because they are not Òfundamental.Ó The rights that are absorbed by the 14th amendment are those which are indespensible to freedom and liberty, such as freedom of thought and speech. In this particular case, the particular procedure used by the state was not so harsh as to prevent the fair administration of criminal justice. The state has a right to prosecute a case against a criminal until it ends in a decision that is free from substantial legal error.

**1. Adamson v. California, (1947); Pg. 415, briefed 10/22/95**

2. Facts: Adamson was convicted of murder. During the trial, the state had commented to the jury on his failure to take the stand.

3. Procedural Posture: Adamson claimed that the conviction violated the 14th amendment because the state's comment amounted to a violation of the 5th amendment's self-incrimination privilege in a federal proceeding.

4. Issue: Whether a state's comment at a state criminal trial on the failure of a defendant to take the stand at trial is a violation of the defendant's 5th amendment privilege against self-incrimination.

5. Holding: No.

6. ¸ Argument: The 14th amendment incorporates the 5th amendment's privilege against self- incrimination and applies it to the states in the same way that the 5th amendment applies directly to the federal government.

7. Majority Reasoning: Although the 14th amendment's due process clause guarantees a right to a Òfair trialÓ in a state criminal trial, there is no ground under Palko to make the self-incrimination privilege one of the ÒfundamentalÓ rights that is incorporated in the 14th amendment and applied to the states.

8. Dissent Reasoning: [Black] felt that the full incorporation of the bill of rights into the 14th amendment was the Òoriginal purposeÓ of the 14th amendment and the intent of the amendment's framers. The history demonstrates that both those in favor of and against the amendment thought that it was powerful to forbid the states from depriving a citizen of the protections afforded by the bill of rights. The process of Twining to expand or contract the applicability of the bill of rights through the 14th amendment as needed by Ònatural lawÓ was more power than the court was granted by the constitution. Also, the Òselective applicationÓ process of Palko was inconsistent with the historical purpose.

9. Concurrence Reasoning: [Frankfurter] argued that the 14th amendment's due process clause has Òindependent potencyÓ apart from the bill of rights. It does not represent shorthand for the first 8 amendments. However, in determining which clauses in the first eight amendments are incorporated and which are not, the judicial interpretation of which are ÒfundamentalÓ is too subjective. The relevant question is whether the ciminal proceedings deprived the accused of the due process of law.

**1. Duncan v. Louisiana, (1968); pg. 421, briefed 11/2/95**

2. Facts: Duncan was convicted of simple battery, which in Louisiana was a misdemeanor punishable by 2 years imprisonment and a $300 fine.

3. Procedural Posture: Duncan sought trial by jury, but the Louisiana constitution grants jury trials only in capital punishment or hard labor cases, so the trial judge denied the request.

4. Issue: Whether the federal constitution guarantees the right to a trial by jury under the 6th amendment, through the 14th amendment in a state criminal trial where a sentence as long as 2 years may be imposed.

5. Holding: Yes. The 14th amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the 6th amendment's guarantee.

6. ¸ Argument: The 14th amendment makes the jury trial guarantee of the 6th amendment applicable to the states in cases where a sentence as long as 2 years may be imposed.

7. Æ Argument: The constitution imposes no duty on a state to guarantee a trial by jury in a state criminal trial, regardless of the severity of the punishment available. If the trial by jury is guaranteed in state criminal cases, it will cast doubt on the integrity of every trial conducted without a jury. Also, if due process is deemed to include trial by jury, then all past interpretations of the 6th amendment in the federal courts (such as a 12-man jury) would then become applicable to states, infringing on their ability to experiment.

8. Majority Reasoning: The test for whether a bill of rights right is incorporated to the states by the 14th amendment is whether that right is a ÒfundamentalÓ right. Although there were prior cases stating in dicta that a right to a trial by jury was not fundamental to a fair trial, those cases are rejected as being wrong. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Although there are other countries that have fair criminal justice systems, but use no juries, ours is not one of them. The supporting framework of our criminal justice system relies upon juries for fairness. It is true that there are some criminal cases that may be tried without a jury, however, this is not one of them.

9. Concurrence Reasoning: [Black] expressed that he is glad that selective incorporation has worked since Adamson to incorporate most of the Bill of Rights guarantees. He goes on to restate his arguments in support of total incorporation. Namely that the Òprivileges and immunitiesÓ clause of the 14th amendment serves to totally incorporate the Bill of Rights because Òwhat more precious privilege can there be that the privilege to claim the protections of our great Bill of Rights.Ó He criticizes Harlan's dissent as being too subjective a definition of due process.

10. Dissent Reasoning: [Harlan] stated that the due process clause of the 14th amendment requires that state procedures be Òfundamentally fairÓ in all respects, but it does not require jury trials in criminal cases. The historical evidence demonstrates that the framers of the 14th amendment did not think that they were ÒincorporatingÓ the bill of rights. The proper analysis should be a Ògradual process of judicial inclusion and exclusionÓ to ascertain those Òimmutable principles of free government.Ó It is improper for the majority to simply incorporate the jury trial clause Òjot-for-jotÓ with all of its associated baggage of federal judicial interpretation. Each case must be analyzed to see whether it was a fair one.

11. Notes: In Benton v. Maryland, the court held that the Òdouble jeopardyÓ clause was a ÒfundamentalÓ ideal and is applicable to the states. Since then, as a result of selective incorporation, almost all criminal process guarantees are applicable to the states. In Wolf v. Colorado the court incorporated only the ÒcoreÓ of the 4th amendment, but not the case law interpreting it in federal courts. However, later in Mapp v. Ohio, the court changed its mind, and incorporation thereafter meant not only incorporating the ÒcoreÓ of the bill of rights guarantee, but applying every detail of the contours of the guarantee as delineated in judicial interpretations (the baggage). In Williams v. Florida, the court held that a 12 man jury was not necessary, because the function of the jury was fairness, and less than 12 men could still be fair. In Apodaca v. Oregon, the court stated that the verdict did not have to be unanimous, for the same reasons. Lastly, in Burch v. Louisiana, the court stated that a 6 man non-unanimous jury was unconsitutional, thus putting a limit on the relaxations of Williams and Apodaca.

**1. Calder v. Bull, (1798); pg. 434, briefed 11/2/95**

2. Facts: There was a dispute over a will. A probate court decree had refused to approve a will. The persons who were the beneficiaries of that will had the judgment set aside and a new hearing was granted, at which the will was approved. There was a Connecticut law that allowed the probate court to be set aside.

3. Procedural Posture: The persons who would have inherited the property if the will was void brought an action to declare the law setting aside their initial favorable judgment as violating the ex-post facto clause.

4. Issue: Whether the Connecticut law was valid.

5. Holding: Yes.

6. Reasoning: [Chase] reasoned that there were fundamental liberty reasons why the law was sound. The purposes for which the constitution was written was to give effect to a Òsocial compactÓ wherein the government was established to protect the natural and preexisting rights of the citizens. The nature of these rights determines the limits of the legislative power to infrnge on these rights. The government can not have the power to enact leglislation that violates the natural laws of civilized society that it was established to protect, even if such natural right is not explicitly mentioned in the constitution. An example is this case, the government can not violate the right of an antecedent lawful private contract or the right of private property.

7. Dissent Reasoning: [Iredell] stated that the citizens had framed their constitution to define the precise boundaries of the leglislative power. Thus, if the legislature violates this power, its act is certainly void. However, if the legislature passes a law within its consitutional boundaries, the judiciary does not have the power to use subjective determinations of what is Òcontrary to natural lawÓ to strike it down.

**1. Lochner v. New York, (1905); pg. 439, briefed 11/2/95**

2. Facts: Lochner was convicted under a New York law prohibiting bakery employees from working more than 10 hours per day or 20 hours per week.

3. Procedural Posture: Lochner borught this action to attack the New York bakery labor law.

4. Issue: Whether the New York law was a constitutional regulation of health and safety of a workplace under state police power.

5. Holding: No.

6. Æ Arguments: The state has an interest in the health and safety of both the bakery workers as well as the quality of the bread that they make. Thus, these laws were passed under a valid exercise of the state's police power.

7. Majority Reasoning: The statute necessarily employs with the right of contract between the employer and employee. Thus, the power of the state to police the ÒlibertyÓ of the individual to contract, which is protected by the 14th amendment (See Allgeyer), must be balanced against the state's interest. There is a limit on the police power of the states. Thus, the question is whether this law is a reasonable exercise of the police power or an arbitrary interference with the right of personal liberty to contract as he sees fit. There is no reasonable right to interfere with the liberty to contract by determining the hours of a baker. This law does not involve safety of the baker, who in contrast to a miner is as a class intelligent, is not threatened by his power to negotiate hours of employment. The state's justification for this law under health and safety is a pretext because the public interest is not sufficiently affected by this act. There is no demonstrable causal link between labor hours of a baker and the quality of his product or his own health.

8. Dissent Reasoning: [Harlan] felt that the people of New York had decided that the health of an average man is endangered if he works more than 60 hours per week. Whether or not this is wise is not a question for the court to inquire. The only question for the court is whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health of bakers. Common experience tells us that there is a logical relationship. There is abundant evidence that the workplace of a baker is hazardous to his health. Clearly, this is not a plain invasion of rights secured by Òfundamental law.Ó

9. Notes: Lochner is criticized as being an overly broad interpreteation of the word ÒlibertyÓ in the 14th amendment. At common law, liberty meant freedom from physical restraint, and it did not include Òfreedom of contractÓ as held in Lochner. Also, Lochner seemed to read the terms ÒpropertyÓ and Òdue processÓ very broadly to cover contractual rights.

1. Pennsylvania Coal Co. v. Mahon, (1922); pg. 466, briefed 11/5/95

2. Facts: The coal company deeded the surface land above a mine to Mahon's predecessors in title. The deed expressly reserves the right to remove all of the coal udner the land, and puts the risk of loss of the surface property on the grantee. However, a local statute forbids the mining of coal in such a way as to harm a structure used as a dwelling.

3. Procedural Posture: Mahon brings an action in equity to enjoin the coal company from mining under his house in such a way as to weaken its support.

4. Issue: Whether the local statute is a valid exercise of the state's police power, or is an unconstitutional taking under the 5th amendment as incorporated through the 14th amendment and applied to the states.

5. Holding: Unconstitutional taking.

6. Majority Reasoning: The question of whether a regulation is a valid exercise of the police power or an unconstitutional taking depends on the particular facts. The property being protected here is private property belonging to a single citizen, in which there is no public nuisance if it is destroyed. The law is not justified as a protection of personal safety. The contract itself provided notice of the risks, and the grantee still contracted. Since coal rights are worthless if the coal can not be mined, preventing their mining is a taking because it is tantamount to destroying it. If the police power of the states is allowed to abridge the contract rights of parties, it will continue until private property disappears completely. In general, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. The loss should not fall on the coal company who provided for this very risk contractually. If the state wants more protection for its citizens, it can pay for it.

7. Dissent Reasoning: A restriction imposed to protect the public health, safety or morals from danger is not a taking. The restriction here is merely the prohibition of a noxious use. Just because a few private citizens are enriched does not make the law non-public. If the mining were to set free noxious gas, there would be no question that the state could prohibit it for the safety of the citizens, without paying the miner.

1. Lucas v. South Carolina Coastal Council, (1992); pg. 118, briefed 11/5/95

2. Facts: Lucas bought some beachfront property in 1986 for $975,000, intending to build single-family residences on it. At the time he bought is, a coastal zone management statute was in effect which regulated the use of certain Òcritical areasÓ in the beachfront areas, but Lucas' property was not a Òcritical area.Ó However, in 1988, the state passed another beachfront management act which completely forbade construction seaward of a ÒbaselineÓ marked by the highest points of erosion in the last 40 years. Unfortunately, Lucas property was seaward of the baseline, and so he could not build his residential houses on it.

3. Procedural Posture: Lucas brought an action for compensation, claiming that regardless of whether the legislature had acted legitimately in furtherance of some police power objective, he was entitled to compensation. The trial court agreed, finding that the statute deprived Lucas of Òany reasonable economic use of the lots...rendering them valueless.Ó The Supreme Court of Carolina reversed, finding that when a regulation respecting the use of property is designed Òto prevent serious public harmÓ, no compensation is owing regardless of the regulations effect on the property's value.

4. Issue: Whether the 1988 beachfront management statute was a taking under the 5th amendment, thereby entitling Lucas to compensation.

5. Holding: Yes.

6. Majority Reasoning: [Scalia] first rejected the contention that since the state had amended the statute to provide for special permits, that Lucas was still able to apply for this permit, thus making the action Òun-ripe.Ó Even if he won a special permit, there is still a ÒtemporaryÓ taking until he does. There are two discrete categories of regulatory action that are compensable without looking at the particular facts - 1) physical ÒinvasionÓ of property, and 2) denying all economically beneficial or productive use of land. Regulations that leave the owner of land without economically beneficial or productive options for its use carry with the the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. However, Òharm preventingÓ and Òbenefit conferringÓ definitions can be made as support of either side of the controversy. It is not critical that the legislature have found the regulation to be Òharm-preventing.Ó The appropriate inquiry is whether the regulation deprives the owner of the land of rights that were part of his legal title; i.e. that were not a nuisance or proscribed under normally property law. All total regulatory takings of land must be compensated unless the use would be a common-law nuisance anyway. Here, the land use was lawful, and it can not be said that there was some Òimplied limitationÓ on Lucas' use of the land for residential houses.

7. Concurrence Reasoning: [Kennedy] reasoned that land is bought and sold all the time with knowledge that it is subject to the state's power to regulate. Where there is a taking alleged from regulations which deprive property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

8. Dissent Reasoning: [Blackmun] reasoned that there was no significant taking here, and certainly not a total deprivation of economic value. The court has unwisely gone against the precedent that the state has the power to prevent any use of its property that it finds harmful, and that the state statute is entitled to a presumption of constitutionality. The state made findings tjat this was to prevent harm, and the court can not simply disregard them. Also, the new rule that the court fashions - Òdeprivation of all econaomically feasible useÓ itself cannot be determined objectively. Finally, the court's exception for nuisance is confusing.

9. Dissent Reasoning: [Stevens] The court has unwisely departed from the precedent of Mahon which required a look at the individual facts in each case. The question of a taking is one of degree, and so requiring the dimunition in value of the land to be total is too rigid and too narrow. The generation of a general proposition that Òtotal regulatory takings must be compensatedÓ as a categorical rule is an unwise approach to takings cases.

1. Dolan v. City of Tigard, (1994); pg. 133, briefed 11/5/95

2. Facts: Dolan owned a hardware store set on an upaved lot downtown in the City of Tigard. Adjacent to her property was a stream which flooded often, causing damage to the downtown area. Dolan wished to get a permit to enlarge her store and pave the lot for parking. A city planning commission had developed regulations for managing the heavy traffic and flooding in the downtown area by requiring local business owners to donate a portion of their land adjacent to the stream as an unimproved greenbelt and a paved section along their land as a bicycle/pedestrian route if they wished to get improvement permits. The local legislature had justified the regulations based on findings that more paving would cause more run-off (thus requiring the greenbelt), and more development would cause more traffic (thus requiring the bicycle/pedestrian path).

3. Procedural Posture: Dolan brought an action against the city claiming that the conditional grant of a portion of her land in return for approval of her building permit was an unconstitutional taking. The lower courts found that the city's dedication requirements were Òreasonably relatedÓ to the public interest in water and traffic management, and so the cost should be borne by Dolan for the management of the increased water flow and traffic that her development would bring.

4. Issue: Whether the local dedication requirement is sufficiently connected to the purpose for the taking, i.e. water and traffic managment.

5. Holding: No.

6. Majority Reasoning: One of the principle purposes of the takings clause is to bar the government from forcing individuals to bear public burdens which, in all fairness, should be borne by the public as a whole. Thus, under the doctrine of Òunconstitutional conditionsÓ the city may not require an individual to give up her 5th amendment right of just compensation in exchange for a government granted benefit where the property sought has little or no relationship to the benefit. Although there is a nexus between preventing flooding and limiting development along the sides of the creek, it is not a sufficiently close nexus to justify an uncompensated taking. There must be a Òreasonable relationshipÓ or a Òrough proportionalityÓ between the flooding and the city's taking of the land. The required dedication must be related both in nature and extent to the impact of the proposed development. Although there is a need to have an adjacent greenway, it is not necessary that the city own the property itself. Also, the bicycle/pedestrian walkway is not sufficiently justified by statistics shown by the city, who has the burden of proof here.

7. Dissent Reasoning: [Stevens] The burden of proof should not lie with the city. A statute should be given the presumption of constitutionality, putting the burden on the challenger to show that it is not constitutional. Furthermore, the taking must be viewed from the entirety of the value of the property. A commercial developer views these exactions as a business regulation, and a cost of doing business. They should not be invalidated unless they are sufficient to deter the owner from proceeding with his planned development.

1. Griswold v. Connecticut, (1965); pg. 493, briefed 11/15/95

2. Facts: Griswold was the executive director of planned parenthood. He was convicted under a Connecticut statute that made it a crime to assist our counsel someone for the purpose of preventing conception.

3. Procedural Posture: The state appellate courts affirmed.

4. Issue: Whether the Connecticut law is a constitutional exercise of the state's police power in view of the substantive due process of the 14th amendment.

5. Holding: No.

6. Majority Reasoning: The court distanced itself from Lochner, stating that they do not sit as a Òsuper-legislatureÓ to determine the wisdom and need of laws that touch economic or social conditions. However, this law operates directly on the intimate relationship between husband and wife. Although there are rights that are not specifically mentioned in the Bill of Rights, the court has held that they nevertheless are constitutionally protected. For instance the right to choice in education (Pierce v. Society of Sisters, Meyer v. Nebraska). These rights were derived from the 1st amendment right of free speech, which was held to include the freedom of thought and to teach. Without those peripheral rights, the express rights would be less secure. Thus, the 1st amendment has a ÒpenumbraÓ (shadow) where Òprivacy is protected from governmental intrusion.Ó Likewise, the 3rd amendment prohibition against quartering of soldiers, and the 4th amendment prohibition of search and seizure, and the 5th amendment self-incrimination clause, all have a penumbra of privacy. The 9th amendment guarantees that the bill of rights is not to be construed as exclusive of other rights retained byt he people. This present case lies within the zone of privacy created by these guarantees.

7. Concurrence Reasoning: [Goldberg] The due process clause of the 14th amendment does not incorporate all of the Bill of Rights, but it does protect Òliberty,Ó which is those personal rights which are fundamental, such as marital privacy. The 9th amendment itself, although it is not an independent source of rights incorporated by the 14th amendment, lends strong support. The entire fabric of the Constitution and the traditions it represents demonstrate that the marital right of privacy is of the same fundamental importance as the rights specifically enumerated. Where there is such a fundamental right being infringed, the state must show a ÒcompellingÓ interest, not merely Òrational relation.Ó The law here is an extremely bad means-ends fit because the state interest in preventing extra-marital relationships is not furthered by criminalizing contraception. [Harlan] felt that the proper analysis was whether this statute infringed on the due process clause of the 14th amendment because it violated basic values Òimplicit in the concept of ordered libertyÓ like Palko. The liberty here is so fundamental that it must be subjected to Òstrict scrutiny.Ó

8. Dissent Reasoning: [Black] felt that the word ÒprivacyÓ was being substituted for ÒlibertyÓ, thus he was afraid that the specific guarantees of the bill of rights were being too broadened. The government has a right to invade privacy unless prohibited by some constitutional provision. Broadening these guarantees has the danger of diluting them because the concept of ÒprivacyÓ can be easily narrowed or broadened according to judicial subjectiveness. The court's analysis here is too much like Lochner in its attempt to find a Ònatural lawÓ basis for constitutional protections not found in the bill of rights.

9. Notes: 1. Although Justice Douglas disavows Lochner as a guide and instead relies on ÒpenumbrasÓ of the enumerated constitutional rights, Lochner's Òliberty of contractÓ could possible also be found in a ÒpenumbraÓ of the contracts clause, thus there is not a significant distinction. 2. It is also unclear as to what the scope of the Griswold right of privacy is. It is probably narrower than a private ÒautonomyÓ of choice. In Eisenstadt v. Baird, the court took a further step in overturning a statute that prohibited the distribution of contraceptives (not just the ÒuseÓ, as was the case in Griswold), even by unmarried couples (not just ÒmarriedÓ couples as was the case in Griswold), thus broadening the scope of the right of privacy to include the right of an individual to be free from governmental regulation of birth choices. 3. Griswold does not reveal at what point a liberty becomes so fundamental as to deserve Òstrict scrutinyÓ rather than just Òrational relation.Ó

1. Roe v. Wade, (1973); pg. 506, briefed 11/15/95

2. Facts: Roe was a single pregant woman representing a class action suit against a Texas abortion law that made it a crime to Òprocure an abortionÓ except Òby medical advice for the purpose of saving the life of the mother.Ó

3. Procedural Posture: The district court held the law unconstitutional under the 9th amendment.

4. Issue: Whether the Texas anti-abortion law is constitutional.

5. Holding: No.

6. ¸ Argument: The woman's right to end her pregnancy is absolute based on the considerable pyschological, physical and economic impact that it has on her to bear an unwanted child. This absolute right bars any state imposition of criminal penalties for that choice.

7. Æ Argument: The state's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest which overrides any right of privacy of the mother. The fetus is a ÒpersonÓ within the meaning of the 14th amendment, and is thereby protected directly by the constitution.

8. Majority Reasoning: Although the constitution does not explicitly mention the right of privacy, the court has held that it exists. (Griswold, Meyer). This right is limited to personal rights that are Òfundamental.Ó The right of privacy is broad enough to cover a woman's decision to terminate her pregnancy. This right is fundamental but this right is not absolute. Although the fetus is not a ÒpersonÓ under the 14th amendment, a state has an interest in safeguarding health of the mother and in the protection of Òpotential life.Ó Where there is an attempted regulation of a fundamental right, the state interest must be Òcompelling.Ó With respect to the interest in the health of the mother, the state's interest becomes ÒcompellingÓ at the end of the first trimester because it becomes significantly more unsafe to perform an abortion after the first trimester. With respect to the interest in the potential life, the ÒcompellingÓ point is at the viability of the fetus; when it becomes capable of meaningful life outside the mother's womb - about 7 months. Measured against these standards, the Texas law sweeps too broadly into areas that it does not yet have a ÒcompellingÓ interest, thus it is an unconstitutional invasion of privacy. Thus, the abortion is left to the woman's discretion during the first trimester, it may be regulated in ways that are reasonably related to maternal health after the first trimester and before viability, and may be prohibited after viability.

9. Concurrence Reasoning: [Stewart] The ÒlibertyÓ protected by the due process clause of the 14th amendment covers more than just the freedoms named in the bill of rights. It is a source of protection of ÒfundamentalÓ substantive rights that can only be infringed upon by a state law that passes the Òstrict scrutinyÓ test. The state interests in this case are not compelling enough to support the broad anti-abortion law. [Douglas] gave three meanings of the word ÒlibertyÓ as used in the 14th amendment. 1) Òautonomous control over the development and expression of one's intellect, interests, tastes, and personality (absolute rights protected by the 1st amendment); 2) Òfreedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children (ÒfundamentalÓ rights subject to some control by the state), and 3) Òfreedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf.Ó (ÒfundamentalÓ, but subject to regulation on a showing of a Òcompelling state interestÓ).

10. Dissent Reasoning: [White] The constitution does not guarantee that the mother's right to abortion is absolute before viability. The constitution does not balance the ÒwhimÓ of the mother who does not have a compelling reason for abortion, over the life of the fetus. The majority's opinion announces this new constitutional right too broadly, removing the state's legislature's power to weigh the impacts of abortion on both sides. [Rehnquist] There is not a right of ÒprivacyÓ involved in this case. The right of abortion is not Òso rooted in the traditions and conscious of our people as to be ranked fundamental.ÓThere is only ÒlibertyÓ guaranteed by the 14th amendment, which is subject to infringment with due process. The standard should be basic Òrational relation.Ó Again, the court goes too far in judging the wisdom of the statute as was the case in Lochner. Breaking the term up into stages and outlining possible regulations that the state may impose on each is usurping the legislative role, not interpreting the 14th amendment.

11. Notes: 2. Blackmun states that he need not resolve when life begins, yet he still draws a line for when the potentiality of human life is Òcompelling.Ó The existence of the disagreement as to when life begins does not support the Court drawing an arbitrary line, in fact it substitutes the arbitrary line of the court for the arbitrary line of the state legislature. 3. Roe is perhaps more subjective than Lochner. In Lochner, the invalidations rested either on an illegitimate purpose, or a bad means-ends fit. In contrast, Roe simply states that the state interest is not important (ÒcompellingÓ) enough. 8. Justice O'Connor's dissent in Akron advocated a substantial change in the Court's approach to abortion cases. She felt that the ÒstagesÓ of pregnancy were too arbitrary and subject to differing interpretation based on the differing medical technology available at the time. Rather than the strict scrutiny/trimester approach of Roe, she advocated that an abortion regulation Òis not unconsitutional unless it unduly burdens the right to seek an abortion.Ó If the law is Òunduly brudensomeÓ then it should be subjected to strict scrutiny, but not before. In Thornburgh, the same Òundue burdenÓ theme was raised by the O'Connor. Also, Justice White felt that the Roe decision and its progeny went too far by legislating requirements that were not fairly read into the Consitution, usurping the power of the people from overruling through corrective legislation. In Akron II, the court struck down a statute requiring the provision of information to the aborting mother, such as alternatives available and the probable date of viability of the fetus, as being a significant obstacle to the woman's ability to get an abortion, and not related to the state's interest in protecting the health of the mother and potential life of the baby.

1. Planned Parenthood of S.W. Penn. v. Casey, (1992); pg. 167 Supp., briefed 11/18/95

2. Facts: A Penn. statute had five questioned requirements regarding an abortion: 1) informed consent of the woman, 2) 24 hour waiting period after receiving information, 3) informed consent of one parent for minors, 4) notification of the husband, and 5) reporting requirements for abortion facilities.

3. Procedural Posture: An action for declaratory and injunctive relief prior to the statute taking effect. The District Court held all provisions as unconstitutional on their face, and entered a permanent injunction. The Court of Appeals affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement.

4. Issue: What is the appropriate standard to use in determining whether a statute regulating abortion is unconstitutional.

5. Holding: ÒUnduly burdensome.Ó ÒAn undue burden exists, and therefore a provision of the law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.Ó

6. Majority Reasoning: [O'Connor] First, the essential holding in Roe is reaffirmed. The essential holding is 1) a woman has a constitutional right to choose to have an abortion before viability without undue interference from the state, 2) the state has a power to restrict abortions after viability, and 3) the state has legitimate interests in both the health of the mother and the life of the fetus from conception. The constitutional protection comes from the ÒlibertyÓ of the due process clause of the 14th amendment, which is a source of substantive rights beyond the Bill of Rights. It is not time to overrule Roe. Stare Decisis requires reaffirmation. Roe is not ÒunworkableÓ, society relies on it, it is not outdated, it is not entirely based on improper factual assumptions, and to overrule it would undermine the principled legitimacy of the Court in the eyes of the people. However, the trimester framework adopted by Roe is rejected as being unnecessary to adequately protect the woman's right to choose. It misconceives the nature of the woman's interest, and it undervalues the State's interest in potential life. Only where state regulation imposes an Òundue burdenÓ on a woman's ability to choose before viability is the statute unconsitutional. The informed consent requirement is constitutional (partially overruling Akron I, and Thornburgh), because it furthers the states legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating consequences, that her decision was not fully informed. The doctor should be required to provide information as in other medical procedures. The 24 hour waiting period, although burdensome, is not an undue burden. Informed consent of minor's parents is not an undue burden because the minors will benefit from the consultation with their parents. However, the spousal notification is an undue burden because a significant number of women will be deterred from abortion for fear of their safety as surely as if the state had prohibited it altogether. The reporting requirement, although not related to the state's interest in informed consent, does relate to health and is a vital element of medical research and health regulation.

7. Concurrence/Dissent Reasoning: [Stevens] felt that serious question arose with respect to the state's attempt to pursuade the woman to choose childbirth over abortion. The provision of pro-life information at the critical point of decision is an unconsitutional invasion of the woman's right to choose. Also, the 24 hour waiting period, in practice, serves to wear down a woman's ability to get an abortion, without a showing that it is necessary or helpful. The waiting period appears to rest on the assumption that a woman is incapable of making a rational decision in less than 24 hours.

8. Concurrence/Dissent Reasoning: [Blackmun] still fully supported all of the implications of Roe. He was concerned that there was only 1 vote necessary to overrule Roe, and that he wsa getting old and stepping down soon. The Roe framework is more administrable and far less manipulable thatn the Òundue burdenÓ standard. The strictest of scrutiny should be applied to this case, and under that view, each of the provisions should be struck down. Also, the fundamental rights protected by Roe are too precious to be left to an election.

9. Concurrence/Dissent Reasoning: [Rehnquist] believed that Roe was incorrectly decided, and should be overruled. Overruling Roe would be entirely consistent with stare decisis because it misinterpreted the cases it purported to be based on. The majority's arguments on stare decisis are conculsory and unconvincing. The majority's new Òundue burdenÓ standard is a new standard which represents an unjustified compromise. The correct standard here should be whether the statute rationally furthers any legitimate state interest. In each provision, it does and so should be entirely upheld.

10. Concurrence/Dissent Reasoning: [Scalia] felt that the right of a woman to choose an abortion finds no protection by the constitution. The matter is one for the people and the legislature to decide. The proper issue is not whether the power of a woman to abort her unborn child is a ÒlibertyÓ in the absolute sense, it is whether it is a liberty protected by the constitution. It is not. The constitution says absolutely nothing about it and the longstanding traditions of American society have permitted it to be legally proscribed. Roe was Òplainly wrong.Ó The courts should Òget out of this area, where we have no right to be.Ó

1. Zablocki v. Redhail, (1978); pg. 557, briefed 11/18/95

2. Facts: A Wisconsin law required that a person who had a child who he was required to pay child support on must gain the permission of the court before remarrying. Redhail, a deadbeat dad with an illegitimate daughter, applied for a marriage license but was denied because he did not ask the court for permission.

3. Procedural Posture: Redhail brought a class action suit to invalidate the statute.

4. Issue: Whether the Wisconsin law is consitutional.

5. Holding: No.

6. Majority Reasoning: [Marshall] stated that the right to marry is of fundamental importance and since the statute significantly interferes with that right, Òcritical examinationÓ of the state interests is required. Reasonable regulations that do not significantly interfere with decisions to marry may be legitimately imposed, however, this law did Òdirectly and substantiallyÓ interfere. A Òcritical examinationÓ means that the law Òcannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.Ó Although the interests were legitimate, there was a bad means-ends fit. The statute did not provide for counseling (as was one of the asserted interests). Also, there were less intrusive means for Òexacting compliance with support obligations,Ó such as civil and criminal penalties. The net result of preventing marriage is more illegitimate children.

7. Concurrence Reasoning: [Powell] felt that the majority opinion was too broad because it required too strict of scrutiny in an area that was traditionally subject to state regulation. Particularly, that a sphere of privacy exists between married couples does not require that the same level of scrutiny be applied to regulations of entry into marriage. [Stevens] found that the constitution allowed Òdirect and substantialÓ regulation of marriage, but rested his concurrence on equal protection grounds - this statute discriminated against the poor. [Stewart] rested his concurrence entirely on substantive due process grounds, feeling that the equal protection standards proposed by other opinions were Òno more than due process by another name.Ó

1. Bowers v. Hardwick, (1986); pg. 565, briefed 11/18/95

2. Facts: Respondent was charged with violating a Georgia sodomy law by having homsexual relations with another adult man in his own bedroom.

3. Procedural Posture: Respondent seeks to challenge the constitutionality of the sodomy statute. The Court of Appeals held that the law violated the mans fundamental rights because his homosexuality is a private and intimate association that is beyond the reach of state regulation.

4. Issue: Whether the statute is consitutional under the due process clause of the 14th amendment.

5. Holding: Yes.

6. Majority Reasoning: There is no constitutional right to protection from state proscription of all private sexual conduct between consenting adults. According to the Palko standard, in order for a non- Bill of Rights individual right to be constitionally protected, it must be one that is Òimplicit in the concept of ordered liberty,Ó such that Òneither liberty nor justice would exist if they were sacrificed.Ó A similar standard is those that are Òdeeply rooted in this Nation's history and tradition.Ó Sodomy meets neither of these standards. The court refuses to expand substantive due process in this area, and defers to the states.

7. Dissent Reasoning: This is not a case about a fundamental right to sodomy. It is a case about the right to be left alone. The right of an individual to conduct intimate relationships in the intimacy of his or her own home is at the heart of the Constitution's protection of privacy.

1. Kelley v. Johnson, (1976); pg. 571, briefed 11/25/95

2. Facts: Kelley was a police officer who wanted to wear his hair in a length and style contrary to local police standards.

3. Procedural Posture: Kelley brought an action to invalidate the local regulation. The lower courts sustained the attack, requiring the police department to establish a Ògenuine public needÓ for the regulation.

4. Issue: Whether a regulation of police officer's personal appearance is constitutional.

5. Holding: Yes.

6. Majority Reasoning: Rehnquist applied a much more deferential standard of review ot the regulation - Òrationality.Ó The liberty interest of personal appearance is distinguishable from that involved in Roe. Even if ther 14th amendment protected a liberty interest in personal appearance, it is outweighed under the rationality standard by the public interest in maintaining police officers readily recognizable to the public by providing uniform standards of appearance. Although a like regulation of the general public might be too intrusive, Kelley was not a Òmember of the citizenry at large.Ó

7. Dissent Reasoning: The dissent reasoned that the regulation did not pass even the rational relation standard because an individual's personal appearance is central to personal autonomy and integrity.

1. Cruzan v. Director, MO. Dept. of Health, (1990); pg. 575, briefed 11/25/95

2. Facts: Cruzan was rendered a vegetable by a car accident in 1983. She was kept alive by life support equipment that gave her nourishment through a tube. Her parents sought to have her removed from the life support equipment. A Missouri statute allowed a responsible party to pull the plug only if there was Òclear and convincing evidenceÓ of the patient's intent. The only evidence of Cruzan's intent was statements to former roomates that she would not want to live if she were a Òvegetable.Ó

3. Procedural Posture: The trial court found that Cruzan's intent was Òclear and convincingÓ and ordered the hospital to remove the life support equipment. The state supreme court reversed.

4. Issue: Whether the state statute requiring the high evidentiary standard of Òclear and convincing evidenceÓ in a right to die case is constitutional under the 14th amendment substantive due process ÒlibertyÓ interest.

5. Holding: Yes.

6. Majority Resaoning: There exists a right to refuse medical treatment under the liberty interest. This right does extend to an incompetent person who is in a vegetative state. However, the person's constitutional rights must be determined by balancing his liberty interest against the relevant state interests. The state has a strong and unqualified interest in the preservation of human life. The evidentiary standard of Òclear and convincing evidenceÓ is not unconstitutional because it puts the burden of error on those who seek termination of life. If the state is wrong, then the person continues to live, awaiting changes in the law or in medical science which may change the error. If the party is wrong, the error can not be corrected. This statute is similar to the standard required for regular wills.

7. Concurrence Reasoning: [O'Connor] reasoned that the court only decided whether the standard of Òclear and convincingÓ evidence was constitutional under these facts. The court has not yet made the more challenging decision of crafting appropriate procedures for determining when the surrogate should be allowed to make decisions for the incompetent. That question will be left for now to the ÒlaboratoryÓ of the states. [Scalia] felt that the court had no business in this field at all. There was no constitutional basis for the right to die, and the court was no better able to determine the correct balance of state and individual interests than was the state citizenry. The safeguard against violation of individual constitutional rights is the Equal Protection Clause which requires that the same laws apply to the democratic majority as are applied to any individual.

8. Dissent Reasoning: [Brennan] felt that the evidentiary burden of Òclear and convincingÓ evidence was an impermissible burden on the individual's right to refuse medical treatment. Since a fundamental right was at issue, the proper standard should have been a form of strict scrutiny. The state statute could only be upheld if it is closely tailored to effectuate only those interests which are legitimate. Here, the state interest could not outweigh that of the individual. [Stevens} felt likewise that the state interest could never outweigh that of the individual.

1. Goldberg v. Kelly, (1970); pg. 584, briefed 1/14/96

2. Facts: A welfare recipient's benefits were terminated without an evidentiary hearing.

3. Issue: Whether 14th amendment procedural due process required that a welfare recipient be afforded Òan evidentiary hearing before the termination of benefits.Ó

4. Holding: Yes.

5. Majority Reasoning: [Brennan] Welfare benefits are a matter of statutory entitlement. They are not mere charity but a means to promote the general welfare. Thus, termination of benefits without a hearing may deprive an eligible recipient of his ÒlibertyÓ and ÒpropertyÓ.

6. Notes: In Bell v. Burson, a driver's license was held to be an entitlement under state law, and so a state could not suspend a driver's license without a hearing to determine fault in an accident.

1. Board of Regents v. Roth, (1972); pg. 585, briefed 1/14/96

2. Facts: Roth was a non-tenured college professor hired to teach for one year at a state university. During that year he made comments against the university officials. He was not rehired for the next year, and no reason was given. State law provided that no reason need be given. Most teachers would be rehired.

3. Procedural Posture: Roth brought an action for violation of his first amendment rights (being fired for making criticisms) and for a violation of his 14th amendment procedural due process guarantee (for being fired from a position of status without a hearing or a reason). The District Court granted summary judgment for Roth on the procedural due process claim, and the court of appeals affirmed.

4. Issue: Whether Roth had a constitutional right to a statement of reasons and a hearing.

5. Holding: No.

6. Majority Reasoning: The 14th amendment protections apply only to ÒlibertyÓ and Òproperty.Ó Although Roth's employment was important, it does not fall under the nature of ÒlibertyÓ or Òproperty.Ó The failure to rehire Roth was only one employment prospect for one year, and it did not damage his reputation (or it may have been found to be protected ÒlibertyÓ under Wisconsin v. Constantineau). He was still free to seek other work. Roth has not shown that his failure to be rehired was based on his critcisms. It is also not a property interest because Roth, by his employment contract, does not have any legitimate entitlement to the employment.

7. Dissent Reasoning: [Marshall] There are cases holding that the state governments are restrained by the constitution from acting arbitrarily with respect to government employment. Every citizen who applies for a government job is entitled to it unless the government can establish a reason for denying the employment. Otherwise, the people's faith in the government is undermined by apparently arbitrary decisions.

8. Notes: Contrast Perry v. Sindermann, in which the court held that the plaintiff was entitled to a full trial court hearing on the first amendment issue (government can not deny rehire for criticism). Also, even if the teacher did not have formal tenure, if there was an unwritten practice among the administration to rehire, there still could be a deprivation of property. In Paul v. Davis, the court [Rehnquist] held that mere defamation is not a violation of ÒlibertyÓ (reputation is not a liberty interest per se), unless it is accompanied by some more tangible interest such as employment. Thus, a person labeled a ÒshoplifterÓ by local police did not have any constitutional protection from the defamation, only a remedy in tort law. However, in Vitek v. Jones, a state prisoner was found to have a liberty interest in not being involuntarily transferred to a mental institution if his condition could be adequately treated in the prison. An Òobjective expectationÓ based on the state law and normal official practice was created, and it could not be violated without a hearing. The liberty interest can arise not only from the 14th amendment due process clause, but also from state law itself. In determining what sort of a hearing is required to satisfy due process, the court [Powell] held in Mathews v. Eldridge, that Òdue process is flexible and calls for such procedural protections as the particular situation demands.Ó The balancing approach was taken which considered 1) the private interest that will be affected by the official action, 2) the risk of an erroneous deprivation of such interest throught the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and 3) the government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

1. Railway Express Agency v. New York, (1949); pg. 612, briefed 1/23/96

2. Facts: Railway operates a fleet of trucks, on which it sells advertising. The city of New York has an ordinance that forbids the sale of advertisements on the side of trucks. The city's justification for the ordinance was that advertisement on the street is a public safety and traffic hazard.

3. Procedural Posture: Railway was convicted and appealed on equal protection grounds.

4. Issue: Whether the banning of advertisements on the sides of trucks for hire, while allowing advertisements related to the owner of the truck's own business, violates the equal protection clause of the 14th amendment.

5. Holding: No.

6. ¸ Argument: The advertisements on the sides of hired truck are no more dangerous than those on the sides of a non-hired truck.  Thus, it provides unequal protection because the classification does not bear a rational relationship to the purpose of the law.

7. Æ Argument: Even though it does not eliminate vehicular advertising, it does eliminate advertising for hire, and to that extent cuts down on the hazard sought to be controlled.

8. Majority Reasoning: The local authorities have their own reasons for drawing the classification as they do. If they feel that the advertising for hire presents a greater hazard than those who advertise their own business, then the court can not second guess the wisdom of their judgment. The classification has a relation to the purpose of safety, and does not result in the kind of discrimination from which the equal protection clause affords protection [doesn't apply to economic protection]. It is not a requirement that all evils of the same genus be eradicated or none at all.

9. Concurrence Reasoning: [Jackson] was concerned that when government chooses to eliminate only part of a problem, there is a greater danger that they are acting arbitrarily. Banning advertising altogether would bring more close scrutiny than only banning ads for hire, thus it is more likely that there is some arbitrariness in the classification.  The court has often announced that the classification must have an appropriate relation to the purpose. Here, the classification can only be viewed as relating to the purpose if one assumes that tolerating advertising for hire is undesirable since advertising is a danger. Still, it is not the court's job to second guess the legislature for this type of economic regulation.

1. Massachusetts Bd. of Retirement v. Murgia, (1976); pg. 623, briefed 1/23/96

2. Facts: Mass. had a law that provided for mandatory retirement of police officers upon reaching age 50. The stated purpose was the protection of the public by assuring that police officers are physically fit.

3. Procedural Posture: Unknown.

4. Issue: Whether classification of police officers by age is a violation of the equal protection clause.

5. Holding: No.

6. Majority Reasoning: Age is not a suspect classification for police officers, and so strict scrutiny is not triggered. Thus, the more relaxed rational basis test will be applied. Classification by age is not perfect in deciding who is physically fit to be a police officer, but perfection is not required. Age bears a rational relationship to fitness, and so the law is valid. The fact that the state does not use individual testing instead of an across-the-board mandatory retirement does not make the law irrational, only imperfect.

7. Dissent Reasoning: [Marshall] felt that the two-tier approach was too rigid because it forced the court to choose rational relationship test too often when the cases did not arise to the level of strict scrutiny. A sliding scale approach would be better, which focuses on the relative interests of the persons being discriminated against, and the legislature's purpose.

8. Notes: In Vance v. Bradley, the court was deferential to the legislature in upholding mandatory retirement of Foreign Service personnel at age 60. Even though the classification was both under- inclusive and over-inclusive, the court stated that the burden was on the challenger to show that the legislative facts on which the classification is based could not reasonably be believed to be true by the legislature.

1. Strauder v. West Virginai, (1880); pg. 637, briefed 1/23/96

2. Facts: A black defendant was tried by a jury of all white males. A State law provided that only white males could sit on a jury.

3. Procedural Posture: The defendant tried unsuccessfully to remove to federal court, and was convicted.

4. Issue: Whether the state law prohibiting non-white males from sitting on a jury was a violation of equal protection.

5. Holding: Yes.

6. Majority Reasoning: The purpose of the equal protection clause was to provide protection for the civil rights of blacks. This law clearly discriminates against blacks. Furthermore, any classification of jurors by race would be unconsitutional, whether it be nationality based or otherwise. That is not to say that the state may not prescribe qualification for its jurors, it just may not do so with respect to race. [But age, sex, and education was okay. This is the first exercise of racial protection under the equal protection clause.]

1. Korematsu v. United States, (1944); pg. 638, briefed 1/23/96

2. Facts: Shortly after the bombing of Pearl Harbor, the president issued an order allowing the military commanders to exclude persons of Japanese ancestry from areas identified as military areas.

3. Procedural Posture: Korematsu was convicted of violating the exclusionary laws.

4. Issue: Whether classification and exclusion based on Japanese ancestry during the WWII was a violation of equal protection.

5. Holding: No.

6. Majority Reasoning: All legal restrictions that curtail the civil rights of a single racial group are immediately suspect, triggering the Òmost rigid scrutiny.Ó  There must be a Òpressing public necessityÓ for the classification. Here, it was impossible to segregate out the loyal from the disloyal persons, so exclusion of the whole class was justified due to the public dangers involved. The Congress has given the power to the military to make these military based decisions. They are not based on racism.

7. Dissent Reasoning: [Murphy] Contended the the racial classification was not even rationally related to the end of protecting from invasion because it was over inclusive. It is an unreasonable assumption that all persons of Japanese ancestry have the capacity to engage in espionage. The Army had the more effective alternative, which would accord with due process, to hold individual loyalty hearings to determine who was a risk. [Jackson] felt that the decision was even more onerous. A military commander may breach the constitution temporarily every now and then, but for the Supreme Court to rationalize it is to make racism part of the Constitutional doctrine, ready to be used in the future by anyone who can show military expediency.

1. Loving v. Virginia, (1967); pg. 641, briefed 1/23/96

2. Facts: A Virgina statute prohibits interracial marriages between whites and blacks. The appellants are an interracial couple who went to D.C. to get married and then returned to Virginia.

3. Procedural Posture: Appellants were convicted, but the trial judge suspended their sentence for 25 years on the condition that they leave Virginia and not return together for 25 years.

4. Issue: Whether forbidding interracial marriages is a violation of the equal protection clause.

5. Holding: Yes.

6. Æ Argument: The meaning of equal protection is that state penal laws must apply equally to whites as well as blacks in the sense that each member is punished equally. The intent of the framers of the 14th amendment does not show that they intended to make miscegenation laws unconstitutional.

7. Majority Reasoning: This law is based on the promotion of white supremacy, and the purity of the white race. There is no support in the historical context for the proposition that equal protection meant only that penal laws must apply equally to both races. The racial classification here triggers the Òmost rigid scrutinyÓ, meaning that they must be shown to be necessary to the accomplishment of some permissible state objective. There is no legitimate purpose here. Restricting the freedom to marry based on racial classifications violates the central meaning of equal protection.

8 Concurrence Reasoning: [Stewart] Ò it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.Ó

1. Palmore v. Sidoti, (1984); pg. 643, briefed 1/23/96

2. Facts: A divorced white woman was awarded custody of her child until she remarried a black man.

3. Procedural Posture: The trial court awarded custody to the father based on the idea that it was in the best interest of the child to protect the child from the discrimination and prejudice that would accompany her remaining with her mother in an interracial family.

4. Issue: Whether racial classifications are a constitutional justification for the removal of an infant child from her mother.

5. Holding: No.

6. Majority Reasoning: Racial classifications trigger strict scrutiny. The classification must be justified by a compelling governmental interest and must be necessary to accomplish a legitimate purpose. Here, the state interest in protecting a child is substantial. It is true that racial discrimination does exist. However, the existence of private prejudices can not be tolerated by the Constitution, and so are never a justification for racial classifications.

1. Brown v. Board of Education (Brown I), (1954); pg. 649, briefed 1/23/96

2. Facts: Brown was a black child who was denied admission to public schools in her community because of her race. She was not denied access to schools for blacks set up under the Òseparate but equalÓ doctrine of Plessey.

3. Procedural Posture: Class action brought on the behalf of all black students in the U.S..

4. Issue: Whether the racial classifications in public school admissions are a violation of equal protection, notwithstanding the Òseparate but equalÓ doctrine of Plessey.

5. Holding: Yes.

6. Reasoning: There is no conclusive evidence that the framers of the 14th amendment had any idea, or desire, one way or the other to prevent blacks from attending public schools alongside whites. Regardless of whether two separate schools may be called ÒequalÓ with respect to the ÒtangibleÓ factors of buildings, curricula, qualifications of teachers, etc, by definition they can not be equal with respect to the intangible factors of the ability to take advantage of the environment of the school. In practice, separation of the races promotes the idea of inferiority of the minority race. It generates a feeling of inferiority among the minority race which affects their motivation and eagerness to learn. In public education, separate but equal has no place, and is a denial of equal protection.

7. Notes: On the same day that Brown was decided under the 14th amendment, Bolling v. Sharpe was decided under the 5th amendment with respect to the District of Columbia (federal schools). Although there is no Òequal protectionÓ clause in the 5th amendment, the due process clause of the 5th amendment affords similar protection with regard to classifications based on race. ÒSegregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on [Black] children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of due process.Ó

1. Goesaert v. Cleary, (1948); pg. 658, briefed 1/28/96

2. Facts: A Michigan state law provided that no women could obtain a bartender's license unless she was the wife or daughter of the male owner.

3. Procedural Posture: Challenged under equal protection.

4. Issue: Whether the law violates equal protection; i.e. whether women have a constitutionally protected right to choose to bea bartender.

5. Holding: No.

6. Reasoning: [Frankfurter] Michigan could ban all women from being bartenders if it wished. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards. Since there may be a reasonable and valid desire in the legislature to protect female bartenders, the court can not second- guess the legislature and decide that the real purpose here was for male bartenders to monopolize the industry.

1. Reed v. Reed, (1971); pg. 658, briefed 1/28/96

2. Facts: Idaho had a law designating men to be the administrators of estates, and not women. The state's reasoning was that it prevented a burden on the probate courts of having to decide each case based on a hearing on the merits of whether the petitioning woman or petitioning man was better suited to be the administrator.

3. Procedural Posture: The state courts had sustained the law as a legitimate means of reducing the burden on the courts.

4. Issue: Whether the law is in violation of equal protection.

5. Holding: Yes.

6. Reasoning: [Burger] applied a mere rational basis standard to strike down the law. He refused to find that sex was suspect classification. Although the reduction of the burden on the probate courts was a legitimate end, the classification was a completely arbitrary method of acheiving that end. The equal protection clause was meant to prevent exactly this kind of a arbirary means-ends relationship.

1. Frontiero v. Richardson, (1973); pg. 659, briefed 1/28/96

2. Facts: The military had a practice of automatically allowing a dependence for wives, but females had to show that their husband was actually a dependent before getting dependent benefits. The government rationale was that since most women's husbands are not dependent, but most men's wives were, it was administratively convenient to put the burden on the wife of showing dependence.

3. Procedural Posture: Unknown.

4. Issue: Whether the practice violates the equal protection clause.

5. Holding: Yes.

6. Majority Reasoning: Sex is a suspect class. The nation has a long history of using the physical differences of the sexes, and the traditional dominance of men in society, to discriminate against women arbitrarily. Even people of different races were given more equality than women, and race has been made a suspect class. Since the sex characteristic frequently bears no relationship to the ability to perform or contribute, it deserves strict scrutiny. No law which has its basis in administrative convenience can withstand strict scrutiny.

7. Concurrence Reasoning: [Powell] stated that it was unnecessary in this case to characterize sex as a suspect classification because it could be easily decided on the authority of Reed. Also, the equal rights amendment was still pending, and this would represent a judicial pre-emption of the legislative function.

1. Craig v. Boren, (1976); pg. 661, briefed 1/28/96

2. Facts: A Oklahoma statute provides for a minimum age to purchase 3.5% beer differently for males than for females. For females, the age is 18, but for males, the age is 21. The state has statistics that, if valid, tend to show that more males in the 18-20 range than females in the 18-20 range are arrested for drunk driving. Thus, their rationale for the rule is that it is a necessary protection of public safety.

3. Procedural Posture: Unknown.

4. Issue: Whether the law violates the equal protection clause, i.e. whether the difference between males and females with respect to the purchase of 3.2% beer does not justify the differential treatment by the Oklahoma statute.

5. Holding: Yes.

6. Majority Reasoning: Reed and Fornteiro stand for the proposition that classification by gender must serve Òimportant governmental objectivesÓ and must be Òsubstantially relatedÓ to the achievement of those objectives. The purpose of increasing traffic safety is certainly ÒimportantÓ and valid. However, there relationship between the classification and the objective is not sufficiently Òsubstantial.Ó The statistical evidence presented is statistically invalid because it rests on too many assumptions which have not been proven. Also, even given their correctness, they do not justify differential treatment because of their close results. There is an inherent difficulty (i.e. too many uncontrollable variables) in using statistical evidence to make broad social classifications.

7. Concurrence Reasoning: [Powell] felt that the announcement of the new intermediate standard was not necessary because the case was easily decidable on the Òfair and substantialÓ relation standard of Reed. [Stevens] objected to the classification because it was based on an Òaccident of birth,Ó and because it is easily circumvented (i.e. the female can buy the alcohol). It also punishes the 100% of the male population between 18-20 when the statistics only show that 2% need punishment.

8. Dissent Reasoning: [Rehnquist] felt that the new standard was without authority, and also that the previous cases were not on point because they involved women seeking relief (as the discriminated party), rather than men. The justification for Reed was that women were a discrete and insular class. Men have no such problem. Thus, this should only be given the Òrational basisÓ test. The legislature has not been irrational or arbitrary in their actions because they were acting on the best statistical information they had.

1. Mississippi Univ. for Women v. Hogan, (1982); pg. 671, briefed 2/6/96

2. Facts: A state-sponsored Mississippi college was all female, and had an all female nursing school. Hogan was a man who lived in the college community, was a registered nurse, and desired to attend the school to pursue a degree. The school denied his request, and permitted him only to attend the classes on an audit basis. The state's justification was that the school compensated for discrimination against women, and was Òeducational affirmative action.Ó

3. Procedural Posture: Unknown.

4. Issue: Whether the college's policy of excluding males is a violation of equal protection.

5. Holding: Yes.

6. Majority Reasoning: [O'Connor] stated that the heightened level of scrutiny applied in Craig was applicable here. The fact that it discriminated against males and not females did not matter. The standard was that Òimportant governmental objectivesÓ must be legitimate, and the classification must be Òsubstantially related to the acheivement of those objectives.Ó If the state objectives are based on sexual stereotypes, they are illegitimate. Here, there was no sexual discrimination to protect against, because the nursing profession was 90%+ women. Also, the classification was not substantially related to the purpose, because the presence of male students on an auditing basis, whether they got credit or not, changed the ÒenvironmentÓ of the school, so it was not necessary to withhold credit for males in order to accomplish the school's educational goals.

7. Dissent Reasoning: [Powell] The rational basis test should have been applied here because there was no sex discrimination. It is only an additional choice for women, not a denial of choice for men. There are distinct advantages to segregation of sexes in higher education, and this simply represents the consensual choice of the participants.

1. Geduldig v. Aiello, (1974); pg. 675, briefed 2/6/96

2. Facts: California had a disability insurance plan that did not cover pregnancy.

3. Procedural Posture: Unknown.

4. Issue: Whether failing to provide disability insurance for pregnancy is a violation of equal protection.

5. Holding: No.

6. Majority Reasoning: The classification was not based on gender, as such. Thus, the rational basis standard is applicable. Although California has chosen to provide disability insurance, it has not chosen to pass on the expense of pregnancy to the whole state of employees. Under equal protection, the state can choose to do things one at a time. The state has a legitimate interest in keeping the cost of insurance down. There is no invidious discrimination here because the lawmakers have divided the state into two classifications, pregnant females, and non-pregnant persons. As such, both males and females are benefitted.

7. Dissent Reasoning: Dissimilar treatment of men and women based on physical characteristics tied to one sex is sex discrimination. Thus, the standard should have been the strict scrutiny of Frontiero. The state's interest in preserving the fiscal integrity of the insurance program can nt render the states' use of a suspect classification constitutional.

8. Notes: In Caban v. Mohammed, the court invalidated a New York law granting the mother but not the father of an illegitimate child the right to block the child's adoption by withholding consent, by using the ÒintermediateÓ sex discrimination standard. The classifications were overbroad generalizations based on stereotypes of unwed mothers being closer to children than their fathers, and did not further the state's interest in promoting adoption. However, the dissent [Stewart] stated that men and women were not similarly situated here, and so there was no equal protection violation. Also, in Parham v. Hughes, Stewart made the same analysis (in the majority this time) to reject a sex discrimination suit on a Georgia law that did not allow an illegitimate father the bring a wrongful death action for the death of his illegitimate child, reasoning that mothers and fathers of illegitimate children are not similarly situated.

1. Graham v. Richardson, (1971); pg. 681, briefed 2/7/96

2. Facts: A state law prohibited aliens from receiving welfare. The state justfication was their interest in preserving the minimal welfare resources for their own citizens.

3. Procedural Posture: Unknown.

4. Issue: Whether denial of welfare benefits to aliens is a violation of equal protection.

5. Holding: Yes.

6. Majority Reasoning: Classifications based on alienage are inherently suspect. Aliens are a prime example of a Òdiscrete and insularÓ class. [But see Rehnquist's dissent stating that alienage is not an immutable characteristic]. Also, the federal government has the supreme power to regulate the conduct of aliens - i.e. immigration, naturalization, and conduct before naturalization. Thus, there is an overriding federal interest in preempting this field.

7. Notes: In In Re Griffiths, the court struck down a Conn. law providing that only U.S. citizens could practice law there; and in Sugarman v. Dougall, struck down a New York law providing that only citizens could hold permanent civil service positions. However, Justice Blackmun added that the state does have some power, in an appropriate situation, to require citizenship as a prerequisite for office.

1. Foley v. Connelie, (1978); pg. 682, briefed 2/7/96

2. Facts: New York had a law barring aliens from becoming state troopers.

3. Issue: Whether the law barring aliens from becoming state troopers was a violation of equal protection.

4. Holding: No.

5. Reasoning: Dougall carved out an exception to the strict scrutiny for alienage-based state classifications - i.e., where the power the state is exercising is clearly within its Ògovernmental functionÓ or Òpolitical function.Ó Otherwise, there would be no benefit to citizenship. Thus, in these cases, rational relationship is the appropriate standard. Since police officers exercise a very broad discretion in enforcement of laws, it would be as anomolous to say that a citizen could be exposed to the broad discretion of a non-citzen police officer as it would be to say that judges and juries can be made up of aliens. Thus, citizenship bears a rational relationship to law enforcement.

6. Notes: In Amach v. Norwick, the court applied the Dougall exception and Foley to hold that a state may refuse to employ teachers who are eligible for naturalization, but refuse it, stating that less demanding scrutiny is required where aliens are excluded from Òstate functionsÓ that were part of the state's Ògovernmental function.Ó

1. Bernal v. Fainter, (1984); pg. 683, briefed 2/7/96

2. Facts: Texas had a state law barring aliens from becoming notaries public.

3. Issue: Whether the bar was a violation of equal protection.

4. Holding: Yes.

5. Reasoning: Generally, alienage is a suspect classification, which can only pass strict scrutiny if there are compelling state interests and the classification is the least restrictive means available. The only narrow exception was the Dougall case, where the exclusion is from the state's Ògovernmental functionÓ or Òpolitical function.Ó To determine this exception, a two-part test is used. First, the classification must not be too under- or over-inclusive. Second, the exclusion must only apply to Òpersons holding state elective or important nonelective executive, legislative and judicial positions,Ó i.e. those that Òparticipate directly in the formulation, execution, or review of broad public policy.Ó This is a very narrow exception. Notaries public do not fall within the Òpolitical functionÓ exception, because their duties are Òclerical and ministerialÓ rather than the exercise of broad discretion or policy.

6. Notes: Federal restrictions on aliens were addressed in Hampton v. Mow Sun Wong (invalidating a federal bar on aliens holding competitive civil service positions), and Mathews v. Diaz, (upholding a restriction on alien eligibility for federal Medicare conditioned on (a) admission for permanent residence, and (b) continuous residence in the U.S. for five years.)

1. Levy v. Louisiana, (1968); pg. 688, briefed 2/7/96

2. Facts: A state law prohibited unacknowleged illegitimate children the right to recover for the wrongful death of their mother. The state justification was administrative simplification of proceedings by relying on Òformal papers.Ó

3. Issue: Whether the law violated equal protection.

4. Holding: Yes.

5. Majority Reasoning: [Douglas] The test is rational basis, but the court has been extremely sensitive when it comes to basic civil rights. There is no reason that the tortfeasor should go unpunished just because the mother had illegitimate children rather than legitimate ones. It is invidious to discriminate against the illegitimate child when his characteristics have no relation whatsoever to the nature of the harm inflicted on the mother.

6. Dissent Reasoning: [Harlan] The interest that one person has in another's life is inherently intractable. Thus, the state may justifiably and rationally define eligible wrongful death plaintiffs in terms of their legal, rather than biological relation to the deceased.

7. Notes: Three years later in Labine v. Vincent, the court distinguished Levy, and upheld a law, under the rational basis test, that subordinated the intestate succession rights of an acknowleged illegitimate child to those of other relatives of the parent. However, the court followed Levy in Weber where the death benefits from a workmen's compensation law could not be subordinated to the claims of legitimate children. In Matthew v. Lucas the court upheld a social security benefits law which made benefits harder to get for surviving illegitimate children, distinguishing all prior illegitimacy cases, and stating that illegitimacy was not Òan obvious badgeÓ like race or sex.

1. Mills v. Habluetzel, (1982); pg. 691, briefed 2/7/96

2. Facts: A Texas law required that a paternity suit to identify the natural father of an illegitimate child for the purpose of obtaining child support must be brought before the child was one year old. The nominal state purpose was to prevent fraudulent claims later in life by the children.

3. Issue: Whether the law violated equal protection.

4. Holding: Yes.

5. Majority Reasoning: [Rehnquist]The support opportunity provided by the state [i.e. benefits depend on a paternity hearing] must be more than illusory. The law must bear a Òsubstantial relationship to a legitimate state interest.Ó The period for ascertaining the fatherhood of the child must be sufficiently long to permit those who have an interest in the child to bring an action on their behalf despite the personal difficulties that may surround the birth of a child outside of wedlock. Also, the time limit set does not have a rational relationship to the state purpose of preventing fraudulent claims.

6. Concurrence Reasoning: [O'Connor] feared that the majority opinion might be read as approving an arbitrarily longer time limit (such as four years). Thus, she stated that the practical considerations that existed within the first year, which served to make the one year statute of limitations invalid, may also exist for longer periods, which would make them also invalid.

7. Notes: The court struck down a two-year limit on paternity suits in Clark v. Jeter. Finally, in Clark v. Jeter, Justice O'Connor stated that the ÒintermediateÓ level of scrutiny is applicable to illegitimacy [Òsubstantially related to an important governmental objectiveÓ], and struck down a 6-year limit on bringing paternity actions because it was not Òsubstantially relatedÓ to the state interest in avoiding the litigation of stale or fraudulent claims.

1. Cleburne v. Cleburne Living Center, Inc., (1985); pg. 694, briefed 2/11/96

2. Facts: A texas city denied a special use permit to a person who intended to build a 200-person home for the mentally retarded. A city ordinance gave the city the power to require a special use permit for homes for mentally retarded persons, but not for other classifications, such as boarding houses, sanitariums, nursing homes, etc. The city's rationale was that the neighboring property owners did not want it, a junior high school was across the street, it was located on a 500 year flood plain, and there would be a lot of people living there.

3. Procedural Posture: The lower court struck it down under the ÒintermediateÓ level of review, stating that it did not ÒsubstantiallyÓ furhter an Òimportant governmental interest.Ó

4. Issue: Whether the ordinance requiring a special use permit hearing for establishment of mentally retarded care homes violates equal protection, and under what standard.

5. Holding: Yes. Rational basis.

6. Majority Reasoning: [White] The general rule for equal protection is rational basis. The mentally retarded are not a class that require heightened scrutiny because they are 1. not a homogenous group, 2. they are specially protected in many ways by the legislature, and 3. most laws concerning the mentally retarded are likely to be beneficial and not based on prejudice. However, here the law appears to be motivated only by prejudice. The negative attitudes of the surrounding property owners are not a valid basis for discrimination. Also, there are no other distinguishing characteristics that are inherent to the retarded people that would require that they be treated differently with regard to the location of the home, or its size. Clearly, if other homes, such as those for the insane, or convalescent, are allowed in the same area, the law is not even rationally related to the city's objectives because it is substantially underinclusive.

7. Concurrence Reasoning: [Stevens] felt that putting a name on the standard of review to be used was inappropriate because there is just a single continuum of standards. In some cases, certain characteristics are relevant, and in others, they are not. The court merely needs to ask what the purpose of the law is, and what the characteristics of the group are that justify the disparate treatment. [Marshall] felt that the standard should have been a heightened level of review, because of the tradition of discrimination, and the characteristic of mental retardation is often used as a proxy for reduced capacity. The majority should have admitted that it was using heightened scrutiny because this law would probably pass the extremely deferential rational basis standard of Lee Optical (i.e. Òreform may take one step at a timeÓ allows the city to require the special use permits for mentally retarded persons but not for other similar classes).

8. Notes: In James v. Valtierra, Justice Black's majority opinion rejected an equal protection challenge to a California constitutional requirement that Òno low rent housing project shall hereafter be developed by any state public bodyÓ without prior approval in local referendum. Even though the law had the practical effect of disadvantaging low-income persons, the law passed the rational basis standard. Marshall vigorously dissented stating that the law was on its face invidious discrimination against the poor, as suspect class which demanded exacting scrutiny.

1. Yick Wo v. Hopkins, (1886); pg. 704, briefed 2/11/96

2. Facts: A San Franscisco law required that laundries could not be operated in other than brick or stone buildings without approval by the city. All but one of 88 non-chinese applicants were granted approval to operate in a non-stone building. However, not a single one of 200 chinese applicants had been granted approval.

3. Procedural Posture: Unknown

4. Issue: Whether the statistically unequal administration of a facially neutral law is violation of equal protection when it operates to discriminate in practice against a racial minority.

5. Holding: Yes.

6. Reasoning: Statistics show that the application of this law was clearly discriminatory against chinese launderers. Even if the law is neutral on its face, it is a violation of equal protection to enforce it in an invidiously discriminatory manner.

7. Notes: In Swain v. Alabama, the court held that a prosecutor may use peremptory challenges to strike all black jurors from a jury, without violating equal protection unless a showing could be made that it was systematic discrimination. However, in Batson v. Kentucky, the court overruled Swain to hold that it was a violation of equal protection if it was based on the justification that blacks, as a class, would be unable to impartially consider the State's case against a black defendant. Also, in Snowden v. Hughes, the court stated that Òunequal applicationÓ of statutes fair on their face is not a violation of unequal protection Òunless there is a showing of intentional or purposeful discrimination.Ó

1. Palmer v. Thompson, (1971); pg. 706, briefed 2/11/96

2. Facts: The city of Jackson, Mississippi, closed all of its public swimming pools after they had been ordered desegregated. The city's purpose was that desegregation of the pools could not be done economically or efficiently.

3. Issue: Whether the closing of the pools was a violation of equal protection.

4. Holding: No.

5. Majority Reasoning: [Black] stated that there was no affirmative duty to operate swimming pools. The motivation of the persons who passed the law is difficult for the court to determine, and does not render the closing unconstitutional solely because it appears to be racially motivated. If this were the only reason, then the city could re-pass the law with a different purpose, which would then make it constitutional.

6. Dissent Reasoning: [White] felt that the closing of the pools was an official public policy statement by the city that blacks are unfit to associate with whites in public pools. Racial animus was the only motivation for this law, and it thus violated equal protection because it did not have the same affect on whites as it did on blacks.

7. Notes: In Griffin v. County School Board of Prince Edward County, the court struck down the school board's attempt to shut down the public schools and support private schools only to avoid desegregation, holding that the motive was unconstitutional. Also, in Gomillion v. Lightfoot, the court struck down a redrawing of the city's borders which had the effect of eliminating most black voters, an no white voters, holding that the motive, as well as the effect, was unconstitutional.

1. Griggs v. Duke Power Co., (1971); pg. 708, briefed 2/11/96

2. Facts: A company had an employment screening procedure that required the applicants to take a general intelligence test and have a high school diploma. The practical effect was that fewer blacks were being hired, and the standards were not shown to have a predictive affect on job performance.

3. Issue: Whether, in a Title VII case, the giving of general intelligence tests and requiring a high school diploma for employment are violations of equal protection if the practical result is to statistically exclude more blacks than whites, and the tests do not have a demonstrated predictive affect on job performance.

4. Holding: Yes.

5. Reasoning: Artificial and unnecessary barriers to employment operate invidiously to discriminate against blacks. The motive of good or bad intent does not change the fact that the practical affect of the employment standards was discrimination against blacks. Congress intended to prevent the consequences of racially biased employment screens, not just the motivation behind them.

6. Notes: In Wards Cove Packing Co. v. Atonio, the court held that mere statistical data alone was not enough to show discriminatory effect of policies. The burden was on the plaintiff to show that qualified individuals were being discriminated against, and that the source of the unequal representation of races in the work force was due to the particular policy in issue, and not to other causes that are beyond the control of the employer. However, the dissent stated that the majority position would make it too difficult for legitimate claims to overcome the burden of proof. However, in Jefferson v. Hackney, the court rejected a de-facto challenge to a state welfare benefit calculation law (granting less ÒneedÓ to AFDC recipients), stating that just because there were Ònaked statisticsÓ showing more minorities in AFDC rather than other welfare programs, did not mean that the law violated the 14th amendment.

1. Washington v. Davis, (1976); pg. 710, briefed 2/11/96

2. Facts: The D.C. police department administers an entrance examination which tests reading and writing communication skills. The test was developed by the U.S. Civil Service Commission, and is the same test used generally throughout the civil service. Statistically, more blacks than whites failed the test.

3. Procedural Posture: The district court found that the test was not discriminatory merely because of the effect. However, the court of appeals applied Griggs (which was applicable to Title VII cases), to invalidate it solely on its disparate statistical effect.

4. Issue: Whether the D.C. police department employment exam is a violation of equal protection due to its de facto effect of more blacks failing than whites.

5. Holding: No.

6. Majority Reasoning: A facially neutral statute or policy can still be discriminatory in effect. The invidious discriminatory purpose behind it may be inferred from the totality of the relevant facts, including the statistical evidence that it bears more heavily on one race rather than another. Nevertheless, a law does not violate equal protection simply because it may affect a greater proportion of one race than another. The D.C. police department has the legitimate interest of setting minimum standards for its police officers. That blacks did not score as well as whites does not demonstrate racial discrimination. Also, there is also evidence that the police department actively and aggressively recruits black officers, so there is no inference of racially discriminative motive. The more rigorous standard of Griggs (requiring the defendant to ÒvalidateÓ the requirements) is only applicable to Title VII cases, not 14th or 5th amendment equal protection.

7. Concurrence Reasoning: [Stevens] felt that bare statistics may be probative enough in some situations to demonstrate racial discrimination (such as in Yick Wo) without more. But here, the statistics were not probative enough because the D.C. police only represented a small sample of those taking the test.

8. Notes: In Arlington Heights v. Metropolitan Housing Corp., the court reaffirmed Davis, holding that although the Òultimate effectÓ of a law may be racially discriminatory, it will not violate equal protection absent Òproof of racially discriminatory intent or purpose.Ó ÒSubjects of proper inquiryÓ to determine intent would be the history leading up to the enactment of the law, whether the statistical effect was grossly lopsided (as in Yick Wo), and departures from normal procedural sequence. Even if an improper motivation can be shown, the city could still provide evidence that the law would be sustainable on otherwise valid grounds.

1. Personnel Administrator of Mass. v. Feeney, (1979); pg. 716, briefed 2/11/96

2. Facts: Mass. had a state law which gave an Òabsolute lifetimeÓ preference to veterans over non- veterans for civil service positions. The veterans in Mass. were 98% male and 2% female. In effect, the law gave statistically significant preferences to males.

3. Issue: Whether the law, which is facially neutral, is nevertheless a violation of equal protection given its disparate impact on men vs. women.

4. Holding: No.

5. Majority Reasoning: Davis stands for the principle that the 14th amendment Òguarantees equal laws, not equal results.Ó Clearly, this law is facially neutral. Although it has a disparate affect on women, that is the result of the traditional military roles of men and women, which is not on trial here. Also, many men are disadvantaged by this law as well. It is not a pretext for discrimination against women, but rather against non-veterans, a significant portion of whom are men.

6. Concurrence Reasoning: [Stevens] stated that the statistics show clearly that there are about 2 million men disadvantaged by this preference, and only about 3 million women. When taken in combination with other evidence, this difference does not support a finding that the law was intended to benefit males as a class.

7. Dissent Reasoning: [Marshall] felt that the law was purposeful discrimination because the legislators were presumed to have intended the natural and probable consequences of the law - discrimination against women. There is clear evidence from the legislative history that the legislature understood the impact against women, and took steps to make sure that women could still qualify for the lower-paying jobs.

1. Green v. County School Board, (1968); pg. 729, briefed 2/11/96

2. Facts: A small school district had a racially desegregated population, but the Òfreedom of choiceÓ rule had done very little to promote desegregation of the schools. No whites had gone to the predominantly black school, and few blacks were attending the white school.

3. Issue: Whether the freedom of choice plan was an adequate compliance with the desegregation mandates of Brown II.

4. Holding: No.

5. Reasoning: The racial identification of the schools between white and black had remained completely intact. The goal of Brown was to transition to a single, non-racial school system. Clearly, the school board here has not acheived that goal. There has been too much delay in the implementation of Brown II remedies, and it is up to the school board to take more aggressive action.  Freedom of choice is unacceptable because its practical effect is to maintain the status quo.

1. Swann v. Charlotte-Mecklenburg Board of Education, (1971); pg. 731, briefed 2/11/96

2. Facts: In Charlotte, N.C., the school in a metorpolitan area was not becoming racially desegregated, and so the lower court instituted a busing plan, and a grouping plan to affirmatively integrate the schools to represent the underlying racial representation in the population.

3. Issue: Whether the district court had the constitutional authority to force integration in the schools.

4. Holding: Yes.

5. Reasoning: The court may excercise broad equitable remedial powers when there is a constitutional violation, as there was here. The mathematical ratio proposed by the lower court of 71% to 29% is not a rigid requirement, but it is a starting point and well within the courts power to use mathematical ratios to ensure desegregation in practice. The transfer arrangement is also valid, given that the students are provided free transportation and that room is made for them at the target school. Even though this will be inconvenient and appear bizzare, it is necessary in the short term to overcome years of building infrastructure designed to support segregation. Thus, pairing and grouping is valid. Lastly, the use of school buses is widely practiced and may be employed as a means of forcing integration.

1. Milliken v. Bradley, (1974); pg. 746, briefed 2/18/96

2. Facts: A particular urban school district in Detroit was found to have de jure segregation. There were other school districts in the suburban areas.

3. Procedural Posture: The lower court found that the appropriate remedy would be interdistrict in nature, including busing of suburban outlying school districts. They based this holding on the notion that school district lines were a matter of political convenience, and may not be used by the state to deny constitutional rights.

4. Issue: Whether the remedy for unconstitutional de jure segregation found in a particular public school district may include busing the suburban school districts also.

5. Holding: No.

6. Majority Reasoning: The scope of the lower court's remedy exceeded the scope of the constitutional violation. The remedy must not be interdistrict if the violation was not interdistrict. Since only one particular school district was found to have de jure segregation, it was the only district to which remedies were appropriate. There was no finding that the other school districts contributed to the segregation.

7. Dissent Reasoning: [Marshall] The decision of the majority emasculates the equal protection. Where de jure segregation is found, it is the duty of the court to eliminate it Òroot and branchÓ which requires the greatest degree of actual desegregation. There is no reason why the drawing of the school district lines should sheild the state. [White] stated that the result is that the state can sheild itself from constitutional attack by vesting more power in its individual school districts. The majority's plan will result in even more white flight.

8. Notes: However, in Hills v. Gautreaux, in deciding that the court could validly take remedial measures against HUD beyond the city boundaries, the court stated that nothing in Miliken suggests a per se rule that federal courts lack the power to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occured. In Missouri v. Jenkins, the court held that the remedy of directly imposing taxes on a school district's resident in order to finance the desgregation was beyond the limit of their power unless no other alternative existed. However, the court could allow the school district to impose its own taxes, and enjoin any state laws that would prohibit such a levy. In Spallone v. United States, the court held that personal contempt orders against city council members for refusing to implement a desegregation plan could not be upheld, although contempt orders against the city itself were permissible.

1. Board of Education of Oklahoma City Public Schools v. Dowell, (1991); pg. 226 Supp., briefed 2/18/96

2. Facts: Oklahoma City had been ordered to desegregate its schools, and in 1972, the court ordered mandatory busing to integrate the schools. The busing plan was successful in integrating the schools, and so in 1977, the court entered an order terminating its jurisdiction to enforce remedies. In 1984, the school board voted to institute a neighborhood (non-bussed) school system for K-4 students.

3. Procedural Posture: A motion was made to Òre-openÓ the case, and the district court denied it. The court of appeals reversed, and the Supreme Court reversed the court of appeals.

4. Issue: Whether a federal court has the power to terminate its jurisdiction over enforcing remedies after a reasonable time has passed in which the school district has complied with the remedies.

5. Holding: Yes.

6. Majority Reasoning: The federal court must give way to the concern for the autonomy of the local control of the school board after the remedy has been given effect. This does not mean that the court must take for face value that the board promises not to return to segregative practices. However, the court must recognize that the composition and motives of the school board change over time, and must determine whether there will be a good faith effort to continue the desegregation in the future, unsupervised. Even if the court is wrong, the equal protection clause still exists, and a new action may be brought if the school board violates it.

7. Dissent Reasoning: [Marshall] felt that 13 years of compliance after 65 years of forced segregation was not enough. The remedy should be in effect until the effects of the prior segregation are fully eliminated.

1. Freeman v. Pitts, (1992); pg. 228, briefed 2/18/96

2. Facts: The school board in DeKalb, Ga., had been forcibly integrated from 1969 to 1986. However, instead of becoming more racially integrated, the school district became less racially integrated, due to the demographic change in the area (more blacks) rather than any intentional resistance to desegregation.

3. Procedural Posture: The school board moved to have the remedial order dismissed, and the district court found that it had been complied with in part, but that many areas needed continued supervision. Thus, the district court withdrew from supervision of the areas that it deemed appropriate. The school board still sought total dismissal, and the court of appeals upheld the district court's holding that some remedial measures were still needed, except that it reversed with respect to the holding that the court could partially dismiss.

4. Issue: Whether the district court has the power to withdraw from supervision of certain facets of a desegregation plan if there are other facets that still require supervision in order to accomplish a ÒunitaryÓ school system.

5. Holding: Yes.

6. Majority Reasoning: The court may change its remedies to fit the violations. Due to the strong interest a local school district has in self-determination, the court exceeds its remedial powers when it continues supervision of programs that no longer alleviate the initial constitutional violation. This withdrawal may proceed in incremental stages, especially where it is found that the contributing factor to the re-segregation is a change in demographics which is beyond the control of the school board.

7. Concurrence Reasoning: [Scalia] proposed that the time had come to resolve what the court was going to do about terminating the temporary remedial measures, and reinstating the traditional principles of law which require proof of intent and causation. [Souter] indicated that it was possible that the school system's policies contributed to the change in demographics, in which case, the remedial measures should remain in place. [Blackmun] agreed with Souter and was in favor of remanding the case for the school district to try to prove that the racially identifiable schools are in no way the result of past segregation.

8. Notes: In United States v. Fordice, the court held that the state had an affirmative obligation to dismantle the dual-standard university system as well as the elementary and secondary schools. Regardless of whether an independent and legitimate purpose now existed for the policies that were intentionally discriminatory in the past, they must be dismantled. Note that Justice Thomas felt that there may be a Òsound educational justificationÓ for preserving the predominantly black colleges that had done so much for blacks during the years of segregation. In Missouri v. Jenkins (1995), the court again stated that the lower court had exceeded its judicial power, this time in attempting to make one of the local schools spend a considerable amount of money to make it a Òmagnet schoolÓ in order to counteract the effects of white flight. Notably, Justice Thomas again stated that separate education by choice for blacks was not by definition inferior. The equal protection clause only protects from intentional discrimination by the state, not from imagined inferiorities of black educational establishments assumed by social science data studies.

1. Kahn v. Shevin, (1974); pg. 752, briefed 2/18/96

2. Facts: A state property tax exemption existed for widows, but not for widowers.

3. Procedural Posture: Unknown.

4. Issue: Whether the ÒbenignÓ gender classification in favor of women promoted by the state statute is a violation of equal protection, and under what standard should the court scrutinize it.

5. Holding: No. Rational basis.

6. Reasoning: The law was easily sustainable because it rested upon some ground of difference having a Òfair and substantial relationÓ to the subject of the legislation. Laws designed to rectify the effects of past discrimination against women are justifiable.

7. Dissent Reasoning: [Brennan] urged Òclose judicial scrutinyÓ of even benign gender classifications. Although the law served a Òcompelling governmental interest,Ó the classification was not narrow enough to effect that interest alone. Less drastic means were available to remedy the history of discrimination, i.e. the state could have limited the exemption to only those widows who needed it.

8. Notes: In Orr v. Orr, by applying intermediate scrutiny, the court struck down laws which authorized the Alabama courts to impose alimony obligations on husbands but not wives. Since alimony hearings were already being conducted, they could also be used to determine the wife's obligations, if any. The law was based on prohibited stereotypes. However, in Califano v. Webster, also under intermediate scrutiny, the court upheld a benign gender classification that allowed women to discard three more of the lower-paying employment years than men when determining social security benefits, as a legitimate way of redressing the past effects of discrimination against women in their wages. However, in Schlesinger v. Ballard, the court upheld a difference in promotional standards between male and female Naval Officers, stating that the male and femal officers were not similarly situated. In Weinberger v. Wiesenfeld, the court invalidated a social security provision that paid death benefits to the widow and children in case of the father's death, but only to the children in case of the mother's death, finding that it actually discriminated against women by providing them less post-death benefits than a similarly situated male. Similarly, in Califano v. Goldfarb, the court struck down a similar statute that required the widower to show that he got at least half of his support from his deceased wife in order to obtain her death benefits.

1. Wengler v. Druggists Mutual Ins. Co., (1980); pg. 755, briefed 2/18/96

2. Facts: Wengler's wife died in a job related accident. He sought to collect worker's compensation for her death. However, a state law required that the widower not be able to collect for worker's compensation for his wife's death unless he could show that he was physically disabled or dependent on his wife's salary. Wengler did not fit either of these qualifications.

3. Procedural Posture: Wengler brought an action challenging the state law on equal protection grounds. The state court rejected the challenge, holding that the substantive difference in the economic standing of working men and women justifies the advantage that the law gives to the widow.

4. Issue: Whether the law is a violation of equal protection, even though it presumably gives widows a benefit.

5. Holding: Yes.

6. Reasoning: The law here is a discrimination against both living women, and surviving men. In both cases, it deprives the parties of the benefits they would get as (or from) a similarly situated male. Thus, under intermediate scrutiny, although having enough resources to provide for needy spouses is an important governmental objective, the classification used is not substantially related to the accomplishment of this objective. The state could either pay benefits to both spouses without a showing, or require a showing from both spouses. However, the difference in treatment here appears to be solely based on the stereotypical assumption that the widower will not need the assistance in most cases. As such, it appears to be only for administrative convenience. Although administrative convenience may properly withstand heightened scrutiny in some contexts, it does not in this case.

1. Regents of Univ. of Cal. v. Bakke, (1978); pg. 760, briefed 2/22/96

2. Facts: Bakke was an applicant to the U.C. Davis Medical School, which had two separate admissions programs - one for whites, and one for minorities. They had a 16% minorities quota system. Bakke was not admitted, but minorities with significantly lower qualifications were admitted.

3. Procedural Posture: Bakke filed suit in the lower court under Title VI of the civil rights act and equal protection. The trial court held that the university could not take race into account, but refused to order Bakke's admission claiming that he had failed his burden of proof that he would have been admitted but for the existence of special admissions. The Cal. Supreme Court applied strict scrutiny to strike it down, holding that there were less intrusive means of furthering the important state interest in having minority physicians, and ordered Bakke admitted.

4. Issue: Whether the U.C. Davis admissions program is a violation of equal protection because it discriminates intentionally against whites.

5. Holding: Yes.

6. Majority Reasoning: The fact that this is discrimination against whites (and thus benign against minorities) does not change the court's obligation to use strict scrutiny, because this is still a racial classification. Any classification based upon race must be necessary to accomplish a substantial state interest. A classification which intentionally disadvantages one race in order to grant other races an advantage is unconstitutional in the absence of specific findings of a constitutional violation [de jure]. The constitution forbids discrimination for its own sake. The state has a legitimate interest in eliminating and correcting for discrimination. However, there has been no finding of any constitutional violation which would give rise to a requirement for a remedy. The state's interest in promoting diversity in education is also legitimate. However, race may only be one factor in the determination of diversity among otherwise qualified applicants. There are other characteristics besides race that promote diversity. Since the white students may only compete for certain seats, and the minorities are free to compete for every seat, solely because of race, this practice violates the equal protection clause because there are less burdensome alternatives available, such as aggressive recruiting.

7. Concurrence Reasoning: [Brennan] The majority is correct in stating that race may be considered in admissions. Strict scrutiny is applicable here, but this admissions process passes it. Sometimes the white majority is required to bear the burden of societal discrimination in the remedying of past discrimination. To hold that there must be finding of actual constitutional violations as a prerequisite to race-conscious remedial actions would discourage voluntary compliance. The purpose of the University's policy is to overcome the effects of prior segregation. It compensates applicants who would have been more admittable but for the existence of societal discrimination. Once admitted, they are judged by the same standards as the other students. [Marshall] It is unnecessary in the 20th century for individual blacks to demonstrate that they were discriminated against, given the long history of state-sponsored, legal discrimination. [Stevens] The issue of whether race could ever be used as a factor in the determination of admissions was not before this court. This was not a class action, but an individual action. The only admissions policy before the court was that of U.C. Davis.

1. Richmond v. J.A. Coroson Co., (1989); pg. 791, briefed 2/22/96

2. Facts: Richmond instituted a 30% minority set-aside program for all city construction projects. A particular contractor was the lowest bidder for a city project, but he had not complied with the set- aside provision, and so his bid was refused.

3. Procedural Posture: The District Court found that the set-aside program was a legitimate remedy for past discrimination. The court of appeals applied strict scrutiny and reversed, and the Supreme Court affirmed.

4. Issue: Whether the Richmond set-aside program is a violation of equal protection.

5. Holding: Yes.

6. Majority Reasoning: The city of Richmond does not have the power to institute a ÒbenignÓ or compensatory program that discriminates against whites beyond the limits of the 14th amendment. This is overt racial discrimination, and must be subjected to strict scrutiny.  Here, the city has only provided general assertions that there has been discrimination against minorities in contracting, or that such discrimination has been a cause of their under-representation. The absence of minorities firms may be attributable to many other reasons, and it is speculation to assume that it was the product of intentional discrimination. If the city desires to use suspect classifications, it can not merely rest upon generalizations, because racial classifications are generally harmful to both sides. Past societal discrimination is not sufficient to justify racial quotas, and thus there is not a compelling state interest in providing a quota. Also, the racial classification of minorities is over-inclusive because it includes Eskimos and Aleuts. It cuts against the city's declared remedial purpose that these groups are included given that there is certainly no evidence of any discrimination against them.

7. Dissent Reasoning:  [Marshall] The city should be able to have the power to correct for past wrongs without having to shoulder the enormous administrative burden of proving that there was past discrimination that led to the effects.

1. Adarand Constructors, Inc. v. Pe–a, (1995); pg. 235, briefed 2/25/96

2. Facts: Adarand is a highway construction firm that submitted the lowest bid on a subcontract. A minority-owned construction firm also bid, and won the contract because the general contractor was given bonus money under federal statutes for awarding the subcontract to a firm controlled by Òeconomically ans socially disadvantagedÓ persons.

3. Procedural Posture: Adarand lost by summary judgment in both the District Court and the Court of Appeals. Both courts felt that the recent Supreme Court rulings in Fullilove and Metro Broadacasting, which applied a level of Òintermediate scrutinyÓ to federal affirmative action (benign racial classifications), were controlling.

4. Issue: What is the proper standard of review for federal racial classifications.

5. Holding: Strict scrutiny. There are three general propositions with respect to governmental racial classifications, 1) skepticism (racial classifications are inherently suspect, invoking strict scrutiny), 2) consistency (the standard of review does not depend on which race is benefitted and which is discriminated against), and 3) congruence (equal protection under the 5th amendment is the same as that under the 14th amendment).

6. Majority Reasoning: The history of equal protection jurisprudence must be traced to determine the proper course. In Bolling v. Sharpe, the court stated that the phrase: Òall legal restrictions which curtail the civil rights of a single racial group are immediately suspectÓ carries no less force in the federal context. Secondly, in Croson, the court announced that the strict scrutiny standard applied to any racial classification under the 14th amendment. Although some other cases have been more split (i.e. Bakke, and Wygant), the same themes are echoed there. Metro Broadcasting, which used intermediate scrutiny for the federal government, was a departure from stare decisis, and is therefore overruled to the extent that it is inconsistent with this opinion. All racial classifications require strict scrutiny in order to determine whether the supposedly ÒbenignÓ purpose is valid, otherwise we risk making the same mistake as in Korematsu.

7. Concurrence Reasoning: [Scalia] felt that a racial classification could never serve a Òcompelling interestÓ [and thus never pass strict scrutiny] because that only fosters racial hatred, even when done for the most beneficial reasons. The Constitution protects individuals, not groups, and there are no debtor and creditor races. [Thomas] wrote separately to disagree with the dissent's premise that there is Òa racial paternalism exception to the principle of equal protection.Ó

8. Dissent Reasoning: [Stevens] Remedial-based race classifications are distinguishable from race discrimination and should be afforded a more intermediate standard of review consistent with Fullilove and Metro Broadcasting. It is wrong to have ÒconsistencyÓ between the standard of review for discriminatory and benign racial classifications because the first is a ÒNo TrespassingÓ sign, where the second is a welcome mat. Furthermore, there is solid justification for treating the 5th and 14th amendments as affording different levels of protection, namely that Congressional deliberations about a matter should be accorded far greater deference than those of a State or municipality. Lastly, the stigma of affirmative action is surely less than that of discrimination.

1. San Antonio School Dist. v. Rodriguez, (1973); pg. 820, briefed 2/25/96

2. Facts: Texas had a system of financing public education by allowing the local school boards the power to levy higher property taxes in their districts to pay for school upgrades. However, the state had a minimum educational standard level which applied to all schools. In urban San Antonio, there were disparities between the qualities of the school districts because the affluent children attended better school (paid for through local taxes) than the hispanic children, because the hispanic neighborhoods could not pay higher property taxes.

3. Procedural Posture: The District Court, exercising strict scrutiny, held that the Texas schme violated equal protection.

4. Issue: Whether the Texas system impinges on any fundamental right (i.e. is quality public education a fundamental right), thereby requiring strict scrutiny.

5. Holding: No.

6. Majority Reasoning: There is no reason to give quality of education the level of fundamental right for equal protection purposes. First, not all poor people live in the poorest school districts, and do not have the traditional indicia of suspectness (i.e. ÒimmutableÓ characteristics - poor people can improve their financial situation). Second, the students have not been denied all public education, they is just not as much money being spent on them (and there has been no correlation shown between money and quality of education, or that the minimum standard of the state funding guarantee is insufficient to provide meaningful education). Equal protection does not require precisely equal advantages. Although education is important because it leads to informed voters and effective free speech, it is not explicitly or implicitly constitutionally protected. Lastly, the appropriate standard here is rational basis, and the Texas scheme passes.

7. Dissent Reasoning: [Marshall] Even if education is not a ÒfundamentalÓ right, the court should apply higher level scrutiny than Òrational basis.Ó Many fundamental rights are simply closely enough tied to explicitly protected rights that they must be protected to give the explicit rights any meaning. The local school district wealth bears no relation to the Texas state interest in providing educational opportunity to the students by vesting power in the local school districts to tax. Since the amount of revenue depends largely on the physical amount of property located within the district, a factor over which voters have no control, the means is not related to the ends.

1. Plyler v. Doe, (1982); pg. 831, briefed 2/25/96

2. Facts: Texas had a law denying benefits to schools to teach undocumented illegal school age children, and allowing these schools to deny admission to those students as well.

3. Procedural Posture:  The lower courts held that the exclusion of the children from free public education violated equal protection.

4. Issue: Whether the exclusion of the non-documented illegal immigrant children from free public education violates equal protection.

5. Holding: Yes.

6. Majority Reasoning: Illegal immigrant children are entitled to 14th amendment protection. Although the right to free public education is not fundamental, and illegal aliens are not a suspect class, the children are not able to control their status, and should not be held accountable for the actions of their parents. By depriving the children of the education, the law forecloses any means by which that child may elevate himself into a functioning member of society. As such, the law must further some substantial goal of the State [intermediate level of review]. There appear to be no federal level objectives in denying these children education. The state's justification of preserving scarce resources for legitimate citizens is not rationally served because employment, not education, is the dominant reason for illegal immigration. The state's justification that undocumented children are unlikely to remain in the U.S. and become citizens is not supported by any proof.

7. Dissent Reasoning: The court is overstepping its bounds in finding a non-fundamental right, and a non-suspect class, to require special judicial scrutiny. Their reasoning is wholly result-oriented, and against precedent. The proper measure of review is rational basis. It is not irrational for a state to exclude illegitimate children from school in order to save costs. However, this is a choice for the legislature.

1. Shapiro v. Thompson, (1969); pg. 861, briefed 3/3/96

2. Facts: The District of Columbia had a federal statute, [and Penn. and Conn. both had state statutes] which required that an indigent family be present in the state for at least one year before being eligible for welfare benefits.

3. Procedural Posture: The lower courts invalidated the statutes on violation of equal protection grounds.

4. Issue: Whether the statutes violate equal protection.

5. Holding: Yes.

6. Majority Reasoning: The statute divides the indigent population into two similar classes, residents > 1 yr. and residents < 1yr. The first class is granted and the second denied welfare benefits based on this arbitrary distinction, even though these are the very means that the families subsist for their food, shelter and other necessities of life. The state makes several justifications that are constitutionally impermissible objectives: 1. deterring people from entering the state is an unconstitutional burden on the fundamental right to travel, even if it is only to deter them from obtaining larger benefits, and 2. distinguishing between whether the person has made significant past contributions to the community is impermissible because it would theoretically preclude any state protection. Also, the permissible objectives forwarded are not sufficiently ÒcompellingÓ to justify the burden on the fundamental right to travel: 1. there is no evidence that the waiting period promotes budget predictibility, 2. that it is administratively efficient will not withstand scrutiny, 3. there are less drastic means available to guard against fraud, and 4. it does not promote employment because that logic would require that those over one-year residents also have a waiting period.

7. Dissent Reasoning: [Harlan] Apparently the majority has expanded the list of ÒsuspectÓ classifications unwisely. If the right to travel is fundamental [which it is] then it does not require special constitutional protection under equal protection, and should be treated under the 14th amendment's due process clause. Thus, the proper question should be whether the governmental interests served by the residence requirements outweigh the burden imposed by the right to travel. Here, they do. The court should not sit as a Òsuper legislatureÓ to second guess the priorities of the state governments.

8. Notes: In Memorial Hospital v. Maricopa County, (1974), the court reexamined and relied on Shapiro in invalidating an Ariz. requirement of a year's residence in a county as a condition to an indigent's receiving free non-emergency hospitalization or medical care. The court stated that the essential holding in Shapiro was that strict scrutiny was required when the residency requirements were ÒpenaltiesÓ on the right to travel, and that depended in turn on whether the subject of the statute was Òa basic necessity of life.Ó Since medical care is clearly a basic necessity, and the residency requirement is a penalty on that, the statute is unconstitutional because it does not support a ÒcompellingÓ state interest. However, in Sosna v. Iowa, (1975), the court upheld a state statute requiring one-year residency before bringing a divorce action against a non-resident. The majority distinguished Maricopa County on the basis that the law only postponed the plaintiff's right [to court access], in contrast to the Maricopa statute which irretrievably foreclosed the indigent's rights. In Zobel v. Williams, (1982), the court struck down (under equal protection) an Alaska law distributing the income from its natural resources to adult citizens in varying amounts depending on the length of residence. Justice O'Connor's concurrence based the result on the privileges and immunities clause [because she felt that there was nothing invidious or irrational about rewarding longevity].

1. The Steel Seizure Case (Youngstown Sheet & Tube Co. v. Sawyer), (1952); pg. 313, briefed 3/ 3/96

2. Facts: In the latter part of the Korean war, labor disputes led to a threatened strike by the steel workers. President Truman issued an executive order directing the Secretary of Commerce to seize the steel mills and keep them running. The Secretary issued orders to the presidents of the steel companies, directing them to keep the mills open. The next morning, the President sent a message to Congress reporting his action and promising to abide by their decision either way. Congress took no action. However, there was evidence that Congress disapproved of allowing the President to exercise such power because a few years prior, they removed a clause from the Taft-Hartley act that would have given the President power to seize an industry in case of national emergency.

3. Procedural Posture: The trial court issued a preliminary injunction restraining the Secretary from continuing possession. The court of appeals stayed the injunction. The Supreme Court accepted the case promptly due to the importance of the subject matter.

4. Issue: Whether the president had the power under these circumstances to seize the steel mills of the country.

5. Holding: No.

6. Majority Reasoning: There is no express power in the Constitution supporting the president's actions. The government claims that the power should be implied from the aggregate of the presidential powers under the Constitution. However, the order can not be sustained under the power of the Commander in Chief of the armed forces because that power is reserved for military commanders in the theater of war and is not broad enough to cover the situation here. This is a job for the nation's lawmakers, not the military authorities. Also, the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. Congress has the exclusive constitutional power to make laws necessary and proper to carry out the powers vested by the constitution in any officer thereof. Thus, this order is unconstitutional.

7. Concurrence Reasoning: [Frankfurter] felt that the situation was more complicated and flexible. However, in view of the Taft-Hartley act, congress has expressed its will to withhold this power from the president in cases like this. In effect, the Congress has said, Òask for seizure power from us if you feel it is needed in a specific situation.Ó [Jackson] felt that the presidential powers were not fixed, but rather fluctuate, depending on their congruence with Congress. There are three categories: 1. where the president is acting pursuant to an express or implied authorization of Congress - broadest powers, limited only by the Constitution, 2. where the president is acting in the face of Congressional silence - more narrow powers limited by the Òzone of twilightÓ where there may be overlap with congressional powers, and 3. where the president is acting in opposition to Congress - most narrow powers, supported only by his expressly granted constitutional powers, and then still limited by any overlap Congress may have [Congress' will is dominant in case of overlap]. This order falls into the third category, and since there is no express authority, it must fall, even when it may be otherwise justified by Òemergency.Ó

8. Dissent Reasoning: The president has some power under the constitution to meet a critical situation in the absence of express statutory authorization. Looking at history (particularly WWII), there were several instances when the president made similar orders. The fact that Congress and the courts have consistently recognized and given their support to such executive action indicates that such a power of seizure has been accepted throughout our history.

1. INS v. Chadha, (1983); pg. 322, briefed 3/3/96

2. Facts: A section of the Immigration and Nationality Act provides that the Attoryney General could suspend the deportation of a deportable alien if the alien met specified conditions and would suffer Òextreme hardshipÓ if deported. However, the act also had a provision which provided for legislative veto by one house if the Congress disagreed with the Attorney general's decisions as to any particular alien. Chadha was an Indian whose education was not yet complete, but whose Visa had run out.

3. Procedural Posture: The Court of Appeals found that the provision was unconstitutional as a violation of separation of powers.

4. Issue: Whether the one house legislative veto provision in the act was unconstitutional as a violation of separation of powers since it did not provide for bicameral support or presentation to the President.

5. Holding: Yes.

6. Majority Reasoning: [Burger] The fact that a given law is efficient will not save it if it is contrary to the constitution. The constitution is very explicit about its grant of powers among the executive and legislative branches. The framers were very clear that it was paramount that the legislative power require bicameral support and presentation to the President (except for some minor exceptions not relevant here). The act is primarily legislative in nature. Although it delegates some broad legislative authority to the executive branch, it is no less legislative. As such, it requires bicameral support and presentment.

7. Concurrence Reasoning: [Powell] felt that Congress was acting in a judicial role in providing for judicial-type review of the actions of the executive branch.

8. Dissent Reasoning: [White] felt the majority opinion was too broad because it read on all legislative vetoes, which weren't implicated by the present fact situation. The power to exercise legislative veto is not the power to write new law without bicameral support or presidential consideration. The veto must be authorized by statute and may only negative what an Executive deparment agency has proposed.

1. Bowsher v. Synar, (1986); pg. 333, briefed 3/17/96

2. Facts: The Gramm-Rudman-Hollings Act established maximum annual permissible deficits designed to reduce the federal deficit to zero by 1991. If needed to keep the deficit within the maximum, the Act required the OMB and the CBO to make recommendations to the Comptroller General as to the budget reductions necessary in each program. The Comptroller General office was created by the budget and accounting office, in an act that required nomination by the President, but removal [for cause] by a Congressional resolution, subject to presidential veto.

3. Procedural Posture: The act establishing the Comptroller General office was challenged as being a violation of the separation of powers because it gave Congress the power to remove an official having executive powers.

4. Issue: Whether the act establishin the Comptroller General's office is unconstitutional as a violation of separation of powers.

5. Holding: Yes.

6. Majority Reasoning: Congress cannot reserve for itself the power of removal of an officer charged with the execution of laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. To permit an officer controlled by congress to execute the laws would be, in essence, to permit a congressional veto of the kind struck down in Chadha. The Comptroller is an executive officer because of his duties. The scope of the reasons allowable for his removal are broader than that allowed for impeachment, which is only for Òtreason, bribery, or other high crimes and misdemeanors.Ó Even though it may be a small chance of removal in practice, the Comptroller is not sufficiently free from congressional influence. Thus, the fallback provisions of the Act, wherein Congress itself makes the ultimate budget decisions by joint resolution, must be activated.

7. Dissent Reasoning: [White] The removal by Congress of the Comptroller is of such minimal practical significance that it presents no threat to the scheme of separation of powers. It requires 2/3 approval by both houses to override a presidential veto of the Comptroller's removal.

1. Morrison v. Olson, (1988); pg. 342, briefed 3/17/96

2. Facts: The Ethics in Government Act of 1978 provided that The Attorney General may ask for the appointment of a special counsel by a Special division of three Circuit Judges in order to investigate and prosecute high-ranking government officials for violations of federal crimes. Once appointed, the Special counsel can only be removed by the Attorney General personally (not the president) and only for Ògood causeÓ (not at will).

3. Procedural Posture: A group of persons moved to quash subpoenas issued by the Special counsel, claiming that the Act was unconsitutional as a violation of separation of powers.

4. Issue: Whether the Act is was unconsitutional as a violation of separation of powers because it limits the President's authority to remove an executive officer.

5. Holding: No.

6. Majority Reasoning: The special counsel, due to the limited tenure, duration, and duties of her office, is an Òinferior officerÓ for Appointment clause purposes. As such, her appointment may be vested by congress in the courts. The court has never held that the Constitution prevents Congress from imposing limitations on the President's power to remove al executive officials simply because they wield ÒexecutiveÓ power. The power to vest appointment in other departments implies the power to limit and regulate removal. The imposition of a Ògood causeÓ standard is not unduly limiting. The president's need to control the Special Counsel is not so central to the functioning of the executive branch as to require as a matter of constitutional law that the special counsel be terminable at will by the President. This case does not involve a usurpation of executive power by Congress. The attorney general still has the power to refuse to ask for appointment of a special counsel.

7. Dissent Reasoning: [Scalia] The framers of the constitution intentionally vested all of the executive power in the president. As such, any person executing purely executive power must be under the exclusive control of the President, and thus terminable at will. A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. The majority has replaced a constitutional requirement with an unprincipled Òbalancing testÓ having no guidance.

1. United States v. Curtiss-Wright Export Corp., (1936); pg. 352, briefed 3/25/96

2. Facts: Congress passed a joint resolution authorizing the President to embargo Bolivia and Paraguay who were fighting in Chaco. Curtiss-Wright was indicted for conspiracy to violate the embargo.

3. Procedural Posture: Curtiss-Wright challenged the resolution as being an unconstitutional delegation of legislative power to the President. The lower court sustained the challenge.

4. Issue: Whether the resolution is unconstitutional as a delegation of legislative power to the President.

5. Holding: No.

6. Reasoning: The resolution may have been unconstitutional if it related solely to internal domestic powers, where the President's power is more constitutionally limited. However, the origin and nature of the President's domestic and foreign powers is very different. The President's foreign power is not dependent solely upon the affirmative grants of the constitution. The President has the power to negotiate treaties, and is the representative of the U.S. in international relations. He is in a better position than Congress to handle foreign affairs because he is privy to classified information. Thus, it is unwise to narrowly limit the President's foreign power.

7. Notes: The War Powers resolution of 1973 now provides that Congress shall be consulted beforehand Òin every possible instanceÓ when the President is introducing troops into situations where hostilities are imminent. Afterwards, he must report within 48 hours the reasons and constitutional or statutory basis for his action, and any other information that Congress may request. Also, he must continue to consult with the Congress on a periodic basis. Then, if Congress does not declare war, or otherwise granted statutory power, the President must remove the troops within 60 days, or immediately if directed by Congress.

1. The Prize Cases, (1863); pg. 365, briefed 3/25/96

2. Facts: The civil war had not yet been declared a war, but Congress had passed several resolutions giving the President some limited powers to take action against the seceding states. The President instituted a naval blockade and seized several ships.

3. Procedural Posture: The seizures were challenged as unconstitutional.

4. Issue: Whether the President had the authority, given the circumstances, to initiate a naval blockade in the absence of an express declaration of war by the Congress.

5. Holding: Yes.

6. Reasoning: Congress does not have the power to declare war against a domestic state. However, the President, as the chief executive, has the statutory power to supress insurrection, and to see that the laws are carried out. In fact, he has the obligation to protect the union. It is the President's decision whether force is necessary when it is authorized. In any event, the Congress subsequently passed laws retroactively granting the power, without admitting that it did not exist.

7. Dissent Reasoning: The Congress alone has the power to declare war, and the naval blockade was war-like force. There is no difference between a civil war or a public war. Also, the subsequent grant by Congress was an ex post facto law.

8. Notes: Before the Iraq war, President Bush sent massive amounts of U.S. troops to Saudi Arabia, relying on his constitutional powers as Commander in Chief, and denied the efficacy of the War Powers resolution. Debate ensued as to whether the President had the power to take action towards starting a war without Congressional declaration of war or statutory grant of power. In Dullum v. Bush, 54 members of Congress sued to prevent the President from initiating an offensive attack without first seeking the approval of the Congress, claiming that it was a justiciable, and not merely a political question. However, as the Jan 15th deadline approached, Congress voted to authorize Presidential use of force and the issue became moot. In 1967, the Fulbright committee issued a report recounting the expanding assertion of power of the Presidency, and recommending that Congress reassert its constitutional authority over the use of the armed forces by using joint resolutions that specifically grant definite and limited power rather than merely express approval for indefinite actions to be taken by the President. After that, Congress also used its purse string powers to cut off funding for american armed forces involvement in Cambodia.

1. Nixon v. Fitzgerald, (1982); pg. 376, briefed 4/2/96

2. Facts: Fitzgerald lost his management position with the Department of the Air Force after Òblowing the whistleÓ on significant budgetary overruns on the building of a military transport plane.

3. Procedural Posture: Fitzgerald sued the President and several of his officials for damages, alleging violation of his First Amendment and other statutory rights due to his firing.

4. Issue: Whether the President is entitled to absolute immunity from damages liability predicated on his official acts.

5. Holding: Yes.

6. Majority Reasoning: [Powell] The absolute [rather than qualified] immunity is required due to the unique position of the Presidency. The President must not be diverted from a proper exercise of discretion for fear of being subject to a lawsuit for private damages. The President is required to make decisions every day that would Òarouse the most intense feelings,Ó and so must enjoy absolute immunity for his official acts. There may be cases where the Congress could take some affirmative action to subject the President to personal jurisdiction, but the court would have to weigh the constitutional weight of the interests to be served with the danger of intrusion on the authority and function of the Executive Branch. There are other ways to keep the President from abusing power, namely the press, impeachment, re-election, and personal reputation.

7. Dissent Reasoning: [White] Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform places the President above the law. The scope of immunity should be determined by the function, not the office, and the dismissal of employees does not fall under a constitutionally assigned executive function which would be substantially impaired by the possibility of a private action for damages.

8. Notes: In Harlow v. Fitzgerald, the court refused to extend blanket immunity to the top Nixon aids involved in the same conspiracy as charged in the above case. Qualified immunity was the proper standard, unless perhaps the aid was entrusted with Òdiscretionary authority in such sensitive areas as national security or foriegn policy.Ó However, the court refused to give the Attorney General absolute immunity even while engaged in actions related to national security in Mitchell v. Forsyth.

1. Nixon v. United States, (1993); pg. 73, briefed 4/2/96

2. Facts: Nixon was a Federal Circuit Court judge who was accused of taking gifts from a prominent local businessman in return for asking a local DA to halt the prosecution of the businessman's son.

3. Procedural Posture: The House adopted three articles of impeachment, and then the Senate, subsequent to its own impeachment rules, appointed a subcommittee to hear the evidence. The subcommittee then summarized the facts and findings for the entire Senate, and open arguments were held on the floor, which culminated in the required 2/3 vote to convict. Nixon appeals on the grounds that the power to ÒtryÓ impeachments in the Constitution requires a full judicial proceeding where the entire Senate hears all of the evidence.

4. Issue: Whether the Senate procedural rule allowing for a subcommittee to hear and summarize the evidence violates the Impeachment clause which provides that the ÒSenate shall have the sole Power to try all Impeachments.Ó

5. Holding: No. This is not a justiciable question, it is a political question.

6. Majority Reasoning: [Rehnquist] A controversy is non-justiciable, i.e. it involves a political question, where there is Òa textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standars for resolving it.Ó Here, the power to ÒtryÓ an impeachment is a broad power that precludes any manageable standards. Also, since the Senate has the ÒsoleÓ power to try impeachments, it must be able to function without interference in these proceedings. Judicial review of the Senate's trial would introduce risks of violation of checks and balances, because it would make the Judicial Branch the final reviewing authority of the Òimportant constitutional checkÓ placed on them by the Framers.

7. Concurrence Reasoning: [White] This is a justiciable question, and may be judicially managed fairly.

1. United States v. Nixon (The Nixon Tapes Case), (1974); pg. 378, briefed 4/2/96

2. Facts: Several of Nixon's top aids were indicted in a criminal conspiracy proceeding in relation to the Watergate burglary.

3. Procedural Posture: The District Court, acting on motion of the special prosecutor, ordered that the President produce taped conversations with the aids in order to determine who was involved to what extent. The President refused to comply with the subpoena duces tecum, invoking executive privilege. The District Court rejected his privilege, and the President appealed. While the case was before the Court of Appeals, the Supreme Court granted cert. before judgment.

4. Issue: Whether an assertion of Presidential privilege as to subpoenaed materials for use in a criminal trial is valid when it is based solely on the general interest in confidentiality of Presidential communications.

5. Holding: No.

6. Reasoning: The President does not have the power to determine the scope of his own privilege. Thus, this is a jusiticialbe question. It is the function of the court to say what the law is, and thus separation of powers [Marbury] supports judicial review of executive privilege. Although the executive privilege is broad in scope, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The interests of the Presidential privilege must be weighed against the interests of criminal justice. Since, the Presidential interest is low in this case [because these are not national security related matters], and the interests of the criminal justice system are high, the executive privilege must yield to the need for evidence in the pending criminal trial.

1. U.S. Term Limits, Inc. v. Thornton, (1995); pg. 83, briefed 4/2/96

2. Facts: Arkansas, by popular vote, adopted a State constitutional amendment that prohibited the eligibility of candidates for placing their name on the ballot for re-election if they have already served 2 terms (in the U.S. Senate) or 3 terms (in the U.S. House).

3. Procedural Posture: The lower courts found that the amendment violated the federal constitution.

4. Issue: Whether the states may prescribe additional qualifications for candidates who are otherwise eligible under the federal constitution to have their name placed on the congressional ballot.

5. Holding: No.

6. Majority Reasoning: [Stevens] There is overwhelming historical evidence that it was the intent of the Framers that the qualifications set forth in the Constitution for membership in the House and Senate be the exclusive requirements. It is fundamental that the people be able to choose who is to represent them, not the states. In Powell, the court held that the House of Representatives has no authority to exclude any person, duly elected by his constituents, who meets all of the requirements for membership expressly prescribed in the Constitution. This reasoning applies to the power of States to prescribe additional qualifications as well. The power to add additional qualifications is not within the original powers of the states, and thus not preserved by the 10th amendment. Also, even if it were and original power, it has been divested by the constitution. Only an amendment to the federal constitution can change the framework of the election process so drastically.

7. Dissent Reasoning: [Thomas] Nothing in the Constitution deprives the people of each state to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The states do enjoy reserved powers over the selection of their congressional representatives.

1. Marsh v. Alabama, (1946); pg. 891, briefed 4/6/96

2. Facts: Marsh, a jehovah's witness, was convicted of trespassing when she passed out religious fliers in the company-owned town of Chicksaw against the corporate owner's permission.

3. Procedural Posture: Marsh challenged the conviction under the 1st amendment right to free speech, and the corporation defended on the ground that the owner of private property has a privacy interest in excluding persons and behavior that he does not desire.

4. Issue: Whether the conviction violates the 1st amendment, even though the town is privately owned.

5. Holding: Yes.

6. Reasoning: The company town was only different from other towns in that the title was privately owned. The owner, for his own advantage, had opened up his property for use by the public in general, and thus his rights are limited by the constitutional rights of those who use the property. Since these facilities are built and operated primarily to benefit the public, and since their operation is Òessentially a public function,Ó it is subject to state regulation. Here the activity was sufficiently state-like to balance the interests of the owner against the constitutional rights of the user.

7. Notes: Marsh was eventually limited to its facts because of the difficulty in maintaining the argument that a private property owner was serving a sufficiently public function. However, it served as an alternate grounds for the decision in Evans v. Newton, in which a privately owned park was forbidden to exercise racial discrimination since the Òservice rendered by a private park of this character is municipal in nature.Ó In Jackson v. Metro Edison, the Court refused to extend the public function doctrine to the actions of a privately owned utility licensed and regulated by a state public utilities commission. Rehnquist noted that there was no state action present, even though the utility was state regulated, because utility provision was not a function traditionally exclusively reserved to the state. Also, the Court rejected a state action attack in Flagg Bros., Inc. v. Brooks, holding that a warehouseman's proposed sale of goods entrusted to him for storage to satisfy a warehouseman's lien under the UCC did not constitute state action.

1. Shelley v. Kraemer, (1948); pg. 899, briefed 4/6/96

2. Facts: A 1911 covenant signed by the private property owners in a residential neighborhood to exclude blacks and asians for 50 years. Petitioners are blacks who purchased houses from white owners despite the racial covenant.

3. Procedural Posture: The respondents brought a successful state action to enforce the covenant.

4. Issue: Whether private property covenants that would violate the 14th amendment if enacted as law are nevertheless void under the 14th amendment if enacted by private persons and enforced by the state.

5. Holding: Yes.

6. Reasoning: Although the covenants would not be violative of equal protection if they were solely private in nature, here there is more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. State action refers to all exertions of state power.

7. Notes: In Barrows v. Jackson, the Court used Shelley to block enforcement of a restrictive racial covenant by instituting a suit for damages [rather than absolute exclusion as was the case in Shelley]. However, in Evans v. Abney, the Court refused to extend Shelley to cover the case where a park had been willed in trust to the city for operation as Òwhites only.Ó The court rested its decision on the fact that the trust was void for inability to give effect to the donor's intent, and thus the property reverted to the donor's heirs. However, in Pennsylvania v. Board of Trusts, the Court held that a board of trustees made up of government officials could not constitutionally exclude blacks from a college that was donated in trust under the condition that it be white only, and that substituting private trustees for the government officials was no more constitutional. In Bell v. Maryland, the court split 3-3 on whether Shelley should apply to prevent enforcement of trespassing laws to prosecute black sit-in protestors when the private owner of the restaurant personally discriminated against black patrons.

1. Burton v. Wilmington Parking Authority, (1961); pg. 906, briefed 4/6/96

2. Facts: A state-operated parking building had a restaurant facility which it leased to a privately- owned business. The restaurant had a policy of discriminating against blacks, and refused to serve Burton solely because he was black.

3. Procedural Posture: Burton brought an action against the owner of the restaurant and the state for violation of equal protection. The state supreme court held that the restaurant was acting in a purely private capacity under the lease, and that its action was not that of the lessor, and therefore not state action.

4. Issue: Whether a private restaurant that is leased as a part of a state-owned public facility may discriminate on the basis of race if there is a sufficient conncetion or nexus between the tenant restaurant and the state owned public facility.

5. Holding: No.

6. Reasoning: The restaurant and the parking garage are inseparably interdependent. The restaurant relies on the presence of parking for its customers, and the parking garage relies on the rent from the restaurant for operating costs. Thus, the state has made itself a party to the discrimination by failing to exercise its power to stop it by writing such terms into the lease. The nexus here is so close that the discrimination can not be considered to be purely private in nature, but rather the state is involved Òto some significant extentÓ with the discrimination.

7. Notes: In Moose Lodge v. Irvis, the Court refused to extend Burton to the case of state licensing, rejecting a state action challenge to a private club's discrimination, solely on the ground that the private club held a state liquor license. Also, in CBS v. Democratic National Comm., the Court refused to find that refusal of editorial advertisments was state action, solely on the ground that CBS was granted a broadcast license.

1. Edmonson v. Leesville Concrete Co., (1991); pg. 272 Supp., briefed 4/6/96

2. Facts: Race-based peremptory challenge of a civil juror.

3. Procedural Posture: Alleged violation of 14th amendment.

4. Issue: Whether race based peremptory challenges by a private citizen in a civil case violate the 14th amendment equal protection under the state action doctrine.

5. Holding: Yes.

6. Majority Reasoning: [Kennedy] The claimed constitutional deprivation here results from the exercise of a right having its source in state authority. There are several guidelines illustrated by the previous cases, 1. the extent to which an actor relies on governmental assistance and benefits [Burton], 2. whether the actor is performing a traditional governmental function [Marsh], and 3. whether the injury caused is aggravated in a unique way by the incidents of governmental authority [Shelley]. This case meets all three of the guidelines because the discrimination is occuring in a judicial proceeding, during the selection of a jury, which is a unique governmental entity bound by race neutrality.

7. Dissent Reasoning: [O'Connor] It is necessary after Jackson v. Metro Edison, for a showing that the government was involved in the specific decision challenged. Here all of the government action is preliminary to the use of a peremptory challenge, it does not constitute participation in the challenge itself. Trials are adversarial proceedings in which attorneys act on behalf of private clients, not the government. [Scalia] felt that there was no consitutional basis for the holding and it was just evidence of the majority's hostility to race-based judgments.

8. Notes: In Lebron v. National Railroad Passenger Corp., (1995), the Court [Scalia] held that Amtrak was an Òagency or instrumentality of the United StatesÓ [since the U.S. had created the corporation and reserved the power to appoint members of its board] and therefore was bound by the first amendment to prohibit content-based restrictions on the leasing of billboards for political purposes.

1. Frothingham v. Mellon, (1923); pg. 1600, briefed 4/11/96

2. Facts: A federal taxpayer disagreed with the Treasury expenditures in a Congressional Act. She felt that it exceeded the general power of the Congress and thereby invade the province of the states under the 10th amendment.

3. Procedural Posture: The taxpayer filed suit challenging the act under the theory that as a taxpayer, she would have property taken without due process, because the expenditure would result in an increase, generally, in her taxes.

4. Issue: Whether a single federal taxpayer has standing to sue the federal government to prevent expenditures if her only injury is an anticipated increase in taxes.

5. Holding: No.

6. Reasoning: The taxpayer's interest in the treasury money is shared with millions of others and is too small to determine. There are too many uncertain and fluctuating factors to determine the effect this act might have on one person's taxes. Furthermore, to decide this case, where there is no controversy, would be to assume a position of review of the governmental acts of another co-equal department, an authority which the court does not possess.

1. Flast v. Cohen, (1968); pg. 1601, briefed 4/11/96

2. Facts: Taxpayers disagreed with the congressional spending in subsidizing religious private schools, claiming that it violated the establishment clause.

3. Procedural Posture: The taxpayers brought an action challenging the spending act as unconsitutional under the establishment clause, and the lower court dismissed under Fronthingham.

4. Issue: Whether a taxpayer has standing when he alleges that the congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.

5. Holding: Yes.

6. Majority Reasoning: The standard is lower when a taxpayer attacks a federal statute on the grounds that it violates the establishment and free exercise clauses of the first amdendment. Frothingham does not serve as an absolute bar to actions by taxpayers, only as authority for exercise of discretion and self-restraint. The court is not a forum for a taxpayer to air generalized grievances about the conduct of government. If the taxpayer has a personal stake in the outcome of the controversy, and the parties have adverse legal interests, then there is standing if the taxpayer can show nexus between the status asserted and the claim sought to be adjudicated. That nexus exists where there is a specific constitutional limitation imposed on the taxing and spending power of the Congress.

7. Dissent Reasoning: [Harlan] The court should not grant access to taxpayers on its own in the absence of permission by Congress. ÒPublic actionsÓ should only be brought under the authority of Congressional statute.

8. Notes: In U.S. v. Richardson, the court held that a taxpayer did not have standing to challenge the non-publication of CIA expenditures, on the ground that there was no allegation that the funds were being spent in violation of a specific constitutional limitation on Congress' spending power. Also, in Schlesinger v. Reservists to Stop the War, the court refused to recognize standing of the challengers because their injury was not ÒconcreteÓ enough.

1. Warth v. Seldin, (1975); pg. 4/11/96

2. Facts: ¹s are minority citizens and associations of Rochester, NY. Æs are members of the zoning commission of Penfield, a city adjacent to Rochester that has allegedly discriminatory zoning laws, preventing the building of low and moderate income housing.

3. Procedural Posture: The lower courts dismissed the case for lack of standing.

4. Issue: Whether the ¹s had standing.

5. Holding: No.

6. Majority Reasoning: The ¹s must show that they have suffered some concrete injury or threatened injury from allegedly illegal action to satisfy the consitutional requirements of cases and controversies of Art. III. Also, the ¹s must show that their grievance is not just a generalized one of a large class, and that they are not bringing an action on behalf of a third party. The ¹s must also show that a favorable ruling would provide actual relief, not just speculative relief. Here, none of the minority citizens has alleged facts that show an actual injury, they are merely representatives of a larger class. None of them has ever lived, or alleged that they would live in Penfield were the zoning laws different. Also, they have not show that a favorable ruling would allow them to get the housing they need. The various organizations fail standing for the same reasons.

7. Dissent Reasoning: [Brennan] The court views each separate ¹ as if it were bringing a separate lawsuit, rather than seeing that their allegations are intertwined to be sufficient to overcome a motion to dismiss for lack of standing. One can not expect the ¹s to have enough knowlege, prior to discovery, to allege specific enough facts that the majority requires.

8. Notes: In Northeastern Florida Chapeter General Contractors of America v. City of Jacksonville (1993), the court distinguished Warth and made it clear that the ÒconcretenessÓ of the ¹s planned conduct was an important factor in the determination of standing. Here, the contractors actually did bid on the contracts awarded to the minorities, and could allege facts showing that they would have received the contracts if not for the set-aside clause.

1. Employment Div. Ore. Dept. of Human Res. v. Smith, (1990); pg. 1573, briefed 4/22/96

2. Facts: Oregon law prohibits the knowing use of the drug peyote. Members of the Native American Church use the drug in ritual ceremonies for religious purposes. When religious members were fired from their jobs for using peyote, the unemployment division refused to pay them unemployment benefits because they had been fired for work related misconduct.

3. Procedural Posture: Oregon Supreme court held that the law as applied here was an unconstitutional infringment on free exercise, reasoning that the state interest in preserving the unemployment fund was outweighed by the burden on free exercise. The Supreme Court granted cert.

4. Issue: Whether a state may pass a general and neutral ban on all of the use of a particular drug, even though the general ban may burden the exercise of a particular religion.

5. Holding: Yes.

6. Majority Reasoning: The proper standard for a neutral and generally applicable law is not strict scrutiny, or any type of balancing. The government's ability to enforce generally applicable prohibitions can not depend on measuring the effects on a particular religion. To make an individual's obligation to obey such a lw contingent upon whether the state's interest is ÒcompellingÓ is to allow the individual to become a law unto himself. Use of strict scrutiny in this context will dilute it for other contexts.

7. Concurrence Reasoning: [O'Connor] Strict scrutiny is the proper test.

1. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, (1993); pg. 425 Supp., briefed 4/22/ 96

2. Facts: Members of the church practice the Santeria religion which practices animal sacrifices for various occasions. Sometimes the animal is then eaten, sometimes it is not. Outrage in the community over the animal sacrifices led the city council to ban all animal sacrifices which were not for the purpose of food.

3. Procedural Posture: The district court found for the city, and the court of appeals affirmed.

4. Issue: Whether a city may enact laws specifically prohibiting the practice of certain religious rituals when such laws are directed against a particular religion.

5. Holding: No.

6. Reasoning:  A law which is specifically directed at regulating the practice of a specific religion will be subjected to Òthe most rigorous of scrutiny,Ó unless it is both neutral and generally applicable (Smith). The law here is very underinclusive, because the city's stated purpose of promoting public health would be better served if they also regulated disposal of animals killed by hunters, as well as disposal of restaurant food, and the killing of pests. Since the city failed to enact such other laws, its purpose could not be compelling.

1. Schenck v. United States, (1919); pg. 1010, briefed 4/22/96

2. Facts: Æs had written and sent anti-draft propoganda to men who had been drafted.

3. Procedural Posture: Æ's were charged with conspiracy to violate the Espionage Act, which made it a crime to willfully obstruct the recruiting or enlistment of servicemen.

4. Issue: Whether the government may criminalize speech that poses a Òclear and present dangerÓ to the U.S. government.

5. Holding: Yes.

6. Reasoning: The character of every act depends on the circumstances which surround it. When a nation is at war, many things that are said may be dangerous to the country, that would not otherwise be dangerous in peacetime. Thus, the first amendment protection of speech is not so broad as to cover all speech. A person who cries ÒfireÓ in a crowded theater would not be protected by the first amendment.

1. Abrams v. United States, (1919); pg. 1014, briefed 4/22/96

2. Facts: Æ's produced and distributed leaflets that were pro-revolution in Russia, and urged the U.S. factory workers to strike, so that arms and munitions being produced for WWII would not be used against the revolutionaries in Russia.

3. Procedural Posture: The Æs were charged with violation of a section of the Espionage Act which prohibited advocating the Òcurtailment of production of ordnance and ammunition, necessary to the production of the war.Ó

4. Issue: Whether the government may criminalize the speech presented here.

5. Holding: Yes.

6. Majority Reasoning: Based on Schenk, this speech is clearly prohibitable. Even though their primary purpose was pro-Russian, it had an anti-American effect by urging strikes.

7. Dissent Reasoning: [Holmes] The Æs did not intend to interfere with the war against Germany. There was not clear and present danger present because the leaflet was silly and posed no immediate danger to the U.S. government. Free speech is necessary because it is the Òmarketplace of ideasÓ that generates what the truth really is. The suppression of free speech should only be permitted when necessary to immediately save the country.

1. Dennis v. United States, (1951); pg. 1042, briefed 4/22/96

2. Facts: Æs were members of the Communist Party, and generated pro-revolution materials in violation of the Smith Act. The communist party was believed to pose a significant danger because it advocated violent overthrow o the government.

3. Procedural Posture: Æ's were convicted of conspiring to advocate the overthrow of the government based on their writings.

4. Issue: Whether the government may criminalize speech which poses a clear and present danger to the government.

5. Holding: Yes.

6. Majority Reasoning: The Òclear and present dangerÓ test does not require that the government wait until overthrow is imminent. It only need determine that there are persons advocating the overthrow of the government by force and violence. It does not matter that the government not actually be in any danger of overthrow due to its size and strength, the gov't still has a substantial interest in putting down dangerous threats. Judge Learned Hand's test is proper: Òwhether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.Ó Also, it is not a question of fact for the jury, the existence of sufficient danger is a question of law for the judge.

7. Concurrence Reasoning: [Frankfurter] The clear and present danger test is vague dogma. A better approach is to balance the interests of the government against the interests of free speech and the individual. It is not for the courts to determine the proper balance, Congress has already done so by passing the act.

1. Brandenburg v. Ohio, (1969); pg. 1061, briefed 4/30/96

2. Facts: Brandenburg was the leader of a KKK group. He  organized a KKK rally and made public speeches advocating violent resistance to government.

3. Procedural Posture: Brandenburg was convicted for violating the Ohio criminal syndicalism act which prohibits ÒadvocatingÓ violence for political reform, as well as ÒassemblingÓ with groups that advocate violence for political reform.

4. Issue: Whether a law that proscribes advocacy of violence for political reform is constitutional if applied to speech that is not directed toward producing imminent lawlessness and is not likely to produce such action.

5. Holding: No.

6. Reasoning: Although Whitney approved of such laws, it has bee thoroughly discredited by later decisions. The mere abstract teaching of moral propriety or even moral necessity for a resort to force and violence is not the same as preparing the group for violent action, and causing that violence to happen. Here, the statute sweeps too broadly because it covers the case where the violence is not likely.

1. Chaplinski v. New Hampshire, (1942); pg. 1070, briefed 4/30/96

2. Facts: Æ was a jehovah's witness, who upon being escorted away from a public disturbance that he had created, told an officer that he was Òdamned facistÓ and a Òdamned racketeer.Ó

3. Procedural Posture: Æ was convicted under a statute which prohibited speech that were Òlikely to cause an average addressee to fight.Ó

4. Issue: Whether words Òplainly likely to cause a breach of the peace by the addresseeÓ are protected by the First Amendment.

5. Holding: No.

6. Reasoning: The right of free speech is not absolute at all times. These are Òfighting wordsÓ which by their very nature tend to inflict injury or tend to incite an immediate breach of the peace. They are not an essential part of the expositionof ideas that were meant to be protected by the First amendment. Also, lewd, obscene, profane, and libelous words are not protected.

7. Notes: The lewd, obscene, profane, and libelous speech has been protected to some degree since Chaplinski. However, Òfighting wordsÓ survives to a limited extent as an exception to free speech. However, in Gooding v. Wilson, (1972), the court held 4-3 that a statute that was so broadly written that it covered speech Ònot plainly likely to cause a breach of the peace by the addresseeÓ was unconstitutional on its face. Thus, the court is not likely to broaden the scope of the Chaplinski holding.

1. New York Times Co. v. Sullivan, (1964); pg. 1078, briefed 4/30/96

2. Facts: Sullivan is a police commissioner. A group supporting Martin Luther King Jr bought a full- page ad in the New York Times, which implied that Sullivan was behind some oppressive tactics being used against blacks in Alabama, and which contained factual discrepancies.

3. Procedural Posture: Sullivan won general damages under an Alabama statute which made Òlibel per seÓ if the words spoken Òtend to injure a person in his reputation,Ó the only defense being truth.

4. Issue: Whether a statute that allows civil damages for defamation of a public official by statements criticizing his official conduct is constitutional if it does not require that the statements be made with Òactual maliceÓ - that is, with knowlegde that they are false, or with reckless disregard for their truth.

5. Holding: No.

6. Reasoning: The first amendment must protect unintentional false statements against public officials if it is to have the Òbreathing spaceÓ that it needs to operate freely. The fear of libel awards is likely to make a person censor himself, or to make the newspaper refuse to print the statement unless the declarant guarantees that it is free from error. Also, public officials are required to have a thick skin. The Òactual maliceÓ requirement is not met here.

1. Roth v. United States, (1957); pg. 1099, briefed 4/30/96

2. Facts: Two cases involving the mailing and advertising of obscene books. One federal and one state.

3. Procedural Posture: Roth was convicted under federal obscentiy statutes. Alberts was convicted under California statute prohibiting sale and advertising of obscene books.

4. Issue: Whether obscenity is utterance within the area of protected speech and press.

5. Holding: no.

6. Majority Reasoning: [Brennan] Implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance. Since obscenity does not fall under free speech, it is no defense that a particular book would not induce antisocial behaviour, and thus the state would not have a sufficiently strong interest to prohibit it. The definition of obscenity is material which deals with sex in a manner appealing to prurient interests. The test of whether a particular material is obscene is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.

7. Dissent Reasoning: [Douglas] This test makes the legality of a publication depend on the purity of thought which a book or tract instills in the mind of the reader. The people are as capable of rejecting noxious literature as they are of sorting out true from false in theology, economics, politics, or any other field.

8. Notes: In Kingsley Int'l Pictures v. Regents, (1959), the court struck down a new york licensing law which banned ÒimmoralÓ films, holding that ÒimmoralityÓ was not coterminous with Òobscenity.Ó In Stanley v. Georgia, (1969), the court struck down the conviction of a man for the possession of obscene films in his house, stating that Òif the first amendment means anything, it means that the state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.Ó However, in United States v. Reidel, (1971), the court upheld a law prohibiting the mailing of obscene materials, stating that mail distribution poses the danger that obscenity will be sent to children and unwilling adults.