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CHAPTER 1. INTRODUCTION

The United States Constitution is the supreme law of the United States and it contains the basic principles that govern the nation. The Constitution was implemented in the year 1789. It was written to establish a government in response to England's tyrannical rule over the original American colonies.

The Framers of the Constitution believed that the best way to prevent such tyranny and concentration of power was to break up government into the three separate branches: the legislative branch, the executive branch, and the judicial branch.

A. **Articles of the Constitution**

1. The first 3 Articles establish the 3 branches of the federal government and enumerate their powers.

a. **Article I** — Establishes the *legislative branch*, which serves to make the laws. Under Article 1, the legislative powers are vested in Congress, which consists of the House of Representatives and the Senate.

b. **Article II** — Establishes the *executive branch*, which serves to enforce the laws. Under Article 2, the executive powers are vested in the President.

c. **Article III** — Establishes the *judicial branch*, which serves to interpret and apply the laws. Under Article 3, the judicial powers are vested in the Supreme Court and other inferior courts.

2. The remaining Articles of the Constitution seem to establish a framework for a united nation in which the federal government and the several states share sovereignty, with the Constitution as the supreme law of the land. This system of government is known as **federalism**.

a. **Article IV** — Contains the *Privileges and Immunities Clause*, which guarantees that a citizen of one state shall be entitled to the "privileges and immunities" in every other state.

1) Article 4 also contains the *Full Faith and Credit Clause*, which provides that each state must recognize the laws, records, and judicial proceedings of the other states.

b. **Article V** — Gives Congress the authority to alter the Constitution by making amendments to it.

1) This aspect of the Constitution has allowed it to adapt to changes in time and remain effective for over 200 years. Today, over 25 amendments have been made to the Constitution.

e. **Article VI** — Contains the *Supremacy Clause*, which states that the Constitution, and the Laws of the United States, are the supreme Law of the Land.

d. **Article VII** — Describes the process that the states must take to ratify the constitution.

B. **Amendments of the Constitution**

1. The first 10 amendments (the **Bill of Rights**) were added to the Constitution 2 years after the Constitution was implemented. The Bill of Rights provide protection of some of the most fundamental rights of the individual.

a. **First Amendment** — guarantees freedom of speech, freedom of association, freedom of religion, and freedom of the press.

b. **Second Amendment** — gives people the right to keep and bear arms.

c. **Third Amendment** — prohibits a soldier from being quartered in any house without the consent of the owner.

d. **Fourth Amendment** — protects against unreasonable searches and seizures.

e. **Fifth Amendment** — provides that no person shall be deprived of life, liberty, or property, without due process of law. It also states that private property cannot be taken for public use unless just compensation is provided.

f. **Sixth Amendment** — provides rights for the accused in criminal proceedings, such as the right to a speedy and public trial, the right to confront witnesses, and the right to counsel.

g. **Seventh Amendment** — gives the right to a trial by jury.

h. **Eighth Amendment** — prohibits cruel and unusual punishment.

i. **Ninth Amendment** states that people retain other rights that are not specifically mentioned in the constitution.

j. **Tenth Amendment** — limits the power of the federal government. Specifically, it states that all powers not delegated to the federal government are reserved to the states, or the people.

2. Other important amendments of the Constitution

a. **Eleventh Amendment** — protects the sovereign immunity of the states. Specifically, it prevents federal courts from hearing lawsuits in which a state is being sued by an individual citizen.

b. The **Thirteenth**, **Fourteenth**, and **Fifteenth Amendments** were enacted shortly after the United States civil war, and their primary goal was to attain free and equal treatment for newly freed slaves.

1) **Thirteenth Amendment** — abolishes slavery and involuntary servitude.

2) **Fourteenth Amendment** — prohibits states from abridging the privileges or immunities of US citizens, from depriving any person of life, liberty, or property without due process, and from denying the equal protection of the laws.

3) **Fifteenth Amendment** — bars states from denying voting rights on the basis of race.

► In this constitutional law outline, we will discuss in detail many of the important provisions of the Constitution, and how they have been interpreted over the years. We will examine many Supreme Court cases that have played a crucial role in interpreting the constitution. We will look at the federal judiciary and its power of judicial review. We will discuss the federal legislative power, and its broad reach under the commerce clause. We will discuss federalism, and look at how the constitution allocates power between the federal government and the states. And lastly, we will discuss several important individual rights under the Constitution's due process clause, equal protection clause, and the First Amendment.

CHAPTER 2. FEDERAL JUDICIAL POWER UNDER ARTICLE III

The *federal judicial power* is defined by **Article III** of the Constitution.

A. **Section 1** of Article III states: "the judicial power of the United States is vested in one Supreme Court and other inferior courts that may be established by Congress."

1. The federal court system is comprised of:

(i) Supreme Court,
(ii) District courts, and
(iii) Circuit courts.

*** The district courts are where most federal lawsuits are originally filed. Any district court case that is appealed goes to the circuit courts. And any case appealed from the circuit courts will go to the Supreme Court.

2. The Supreme Court will review a case on appeal when it grants a **writ of certiorari**.

a. When a litigant loses in a federal court of appeals, or in the highest court of a state, they may file a petition for a writ of certiorari — which is a document asking the Supreme Court to review the case.

1) If the court grants certiorari, they will then hear the case.

B. Under Article III of the Constitution, federal courts are only allowed to hear certain types of **cases**.

1. Federal courts have subject matter jurisdiction only over enumerated **cases and controversies** that are explicitly set out in Section 2 of Article III.

a. These Article III cases and controversies will be discussed in detail in the following chapters.

C. Section 2 of Article III also lists the types of cases over which the **Supreme Court** itself has **original jurisdiction** and **appellate jurisdiction**.

1. **Original jurisdiction** — a court can hear a case for the first time.

a. Recall that the federal district courts, where federal lawsuits are initially filed, are the federal courts of original jurisdiction. But under Article III, the Supreme Court also has original jurisdiction over a select few cases.

b. Article III states that the Supreme Court has original jurisdiction over all cases affecting Ambassadors, other public Ministers and Consuls, and cases in which a State is a party

1) Note that although the Constitution gives the Supreme Court original jurisdiction over these types of cases, the Supreme Court has declared that it may exercise discretion over whether to hear original cases.

2) Today, it is extremely rare for the Supreme Court to hear an original case, and will typically only do so for a dispute between 2 or more states.

2. **Appellate Jurisdiction** — a court can review a prior judicial decision from an inferior court.

a. The Supreme Court has appellate jurisdiction over all Article III cases and controversies.

1) However, note that Congress has the power to regulate the Supreme Court's appellate jurisdiction and may place limits on what cases can be appealed to the Supreme Court.

► In this chapter, we discussed the basic principles of the **judicial branch** under **Article III** of the Constitution. We learned that Article III vests the judicial power of the United States in the federal courts, with the Supreme Court as the nation's highest court. We learned that federal courts have the power to hear only certain cases and controversies listed in Article III. And we also discussed the original and appellate jurisdiction of the Supreme Court.

CHAPTER 3. JUDICIAL REVIEW — MARBURY VERSUS MADISON

One of the most important roles of the federal judiciary is to determine whether acts of Congress comply with the constitution. This power is known as **judicial review**. If a federal court declares that a law is in conflict with the constitution, the law will be struck down.

The power of judicial review was not explicitly granted to the federal courts in the Constitution. Instead, it was established by the Supreme Court in the 1803 landmark case *Marbury versus Madison*.

Marbury versus Madison (1803)

Facts — President John Adams appointed William Marbury as Justice of the Peace. To officially accept the position, Marbury needed a commission delivered to him. Commissions are documents that formally appoint an official to a position.

→ Before Marbury's commission was delivered, T. Jefferson became president and ordered the Secretary of State, James Madison, to withhold Marbury's commission.

→ As a result, Marbury petitioned the Supreme Court for a writ of mandamus to force Madison to deliver the commission. A *writ of mandamus* is a court order that commands a lower court or a government official to perform a duty that is required by law. The Supreme Court denied Marbury's petition because Marbury did not have a constitutional right to petition the Supreme Court in the first place.

Issue — At issue in this case was a law called the Judiciary Act of 1789. This Act gave the Supreme Court original jurisdiction over cases regarding writs of mandamus, and therefore, it enabled Marbury to bring his claim directly to the Supreme Court.

→ However, recall that (according to Article III of the Constitution) the Supreme Court has original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, and cases in which a State is a party. Article III does not give the Supreme Court original jurisdiction over cases dealing with writs of mandamus.

Holding — Because part of the Judiciary Act of 1789 extended the Supreme Court's original jurisdiction beyond what was permitted in Article III, it was in conflict with the Constitution; and as a result, it was struck down.

→ In its decision, the Supreme Court relied on the Supremacy Clause in Article VI, which states that the Constitution is the supreme law of the land. Based on this clause, the Court reasoned that any law in conflict with the Constitution must be struck down.

→ The Court went on and held that it is the judiciary (not the legislature) that has the duty to interpret the laws.

→ Therefore, the Courts have the power to determine whether a law is in conflict with the constitution. And if a law is found to conflict with the Constitution, the Court may exercise its power of judicial review and strike down the law.

► In this chapter, we discussed the doctrine of **judicial review**. We learned that judicial review is the power of the federal courts to review federal and state legislation and strike down any laws which are found to conflict with the Constitution.

CHAPTER 4. ARTICLE III CASES AND CONTROVERSIES AND JUSTICIABILITY

Federal courts have jurisdiction only over certain types of cases.

A. Section 2 of Article III explicitly sets out a list of the particular **CASES AND CONTROVERSIES** that federal courts have the power to hear:

(i) Cases that arise under the Constitution and arise under federal law;
(ii) Cases that concern treaties;
(iii) Cases of admiralty and maritime jurisdiction;
(iv) Controversies where the United States is a party;
(v) Controversies where a state is a party; and
(vi) Controversies between citizens of different states.

B. For those cases NOT within federal court jurisdiction, **state courts** provide a forum.

1. State courts have jurisdiction over most other matters that are not listed in Article III (such as contract claims, property claims, and tort claims.)

*** So federal courts are considered courts of *limited jurisdiction*, while state courts are courts of *general jurisdiction*.

C. Just because a case concerns the Constitution or federal law (or any other issue stated in Article III), that does not mean that a federal court will automatically hear the case. Before a federal court will hear an Article III case or controversy, the case or controversy must be **JUSTICIABLE**.

1. **Justiciability** — a case or controversy actually exists and the court has the ability to provide an adequate resolution.

2. Note that when a matter is before a federal court, but there is no case or controversy, the courts cannot render **advisory opinions** regarding the matter.

a. Advisory opinion — a courts' opinion about the legality of a law or certain conduct.

3. In order for a case to be justiciable, 4 factors must be met:

(i) Standing,
(ii) Ripeness,
(iii) Mootness, and
(iv) No political questions.

► In this chapter, we learned that the federal judiciary has **subject matter jurisdiction** only over **Article III cases and controversies**. And before a federal court will rule on any issue, the court must examine the **justiciability** factors to determine whether a case or controversy actually exists and is capable of being decided. In order for an issue to be justiciable, the requirements of standing, ripeness, mootness, and political question must be met.

CHAPTER 5. STANDING

For a federal court to hear a case, the 4 justiciability requirements must be met: the plaintiff must have *standing*, the case must be *ripe*, the case cannot be *moot*, and the case cannot be a *political question*.

A. **Standing**

1. To be heard in federal court, a plaintiff must have standing.

2. **Standing** — the plaintiff has personally been injured or imminently will be injured.

a. The injury must be a *concrete* injury — it cannot be hypothetical.
b. The injury must have been *caused by the defendant*.
c. The injury must be *redressable*, which means that the court can provide a remedy.

*** If the plaintiff cannot prove these 3 elements—known as *injury-in-fact*, *causation*, and *redressability*—the plaintiff does not have standing and the case will not be heard.

B. In order to have standing, the plaintiff must have **personally** suffered an injury.

1. This means that a plaintiff cannot assert claims of others or third parties.

2. However, there are 3 exceptions to this rule:

a. A plaintiff can bring a claim on behalf of a third party when there is a *close relationship* between plaintiff and third party, and the plaintiff will be an *effective advocate* for third party.

Example — When a custodial parent sues on behalf of her child.

b. A plaintiff can bring a claim on behalf of a third party when the *third party is unable to assert their own rights*.

Example — A defendant in a criminal case can raise third-party equal protection claims of jurors who have been excluded by the prosecution because of race or gender.

c. Third party standing will be allowed when an *organization wants to assert the rights of its members*.

1) The only requirements are that a member or members would have standing to sue, the interests are related to the organization's purpose, and neither the claim asserted nor relief requested requires the participation of individual members.

Example — A union may be able to sue on behalf of its members.

C. **Generalized Grievances**

1. In order for a plaintiff to have standing, he CANNOT assert a generalized grievance.

a. This usually means that a plaintiff may not sue as a citizen or as a taxpayer, to force the government to follow the law.

Example — If a citizen does not like a new tax that has been implemented, or does not feel that the government is spending money properly, the citizen cannot seek relief from the courts because that would be a generalized grievance and the plaintiff would not have standing. Because such grievances are widely shared among the public, it is more appropriate to address them through the legislative branches, and not through the courts.

2. Note that there is an **exception** for generalized grievances — which arises when a taxpayer wants to sue the government for spending money in a way that violates the Establishment Clause.

a. The *Establishment Clause* states that Congress cannot make a law that respects an establishment of religion. Therefore, if the government were to give money to a religious school, taxpayers may have standing to sue the government for this generalized grievance because it violates the Establishment Clause.

► In this chapter, we discussed the **standing** requirement of justiciability and learned that for a plaintiff to have standing, there must be an injury-in-fact, causation, and redressability. We also learned that third party standing and general grievances are not allowed, except under certain circumstances.

CHAPTER 6. RIPENESS

For a case to be justiciable, the plaintiff must have *standing*, the case must be *ripe*, the case cannot be *moot*, and the case cannot be a *political question*.

A. **Ripeness** — the issues in the case are mature enough for a court to make a decision.

1. The rationale behind the ripeness doctrine is that a court should not consider and rule on abstract cases, where injuries are too speculative or have not occurred.

B. Ripeness commonly becomes an issue when there is a **challenge to a law or regulation** that has been enacted, but has not yet been enforced.

1. When a party seeks **pre-enforcement review** of a law or regulation, such a claim will NOT be ripe because no injury can occur until the law or regulation is violated and enforced.

a. Once a party has violated a law or regulation and it has been enforced against the party, only then has the party suffered an injury, which makes the case ripe.

2. However, there is an **exception** to this rule:

a. In certain circumstances, a party may seek pre-enforcement review of a law or regulation, but only if the plaintiff can show that *hardship is likely to be suffered* without review, and *the issues are fit for judicial decision*.

Abbott Laboratories versus Gardner (1967)

Facts — The FDA enacted a regulation that required drug companies to include the generic names of prescription drugs in all related printed material, like advertisements.

Issue — Before the regulation could be enforced, the drug companies challenged the regulation. They argued that prosecution for non-compliance with the regulation was likely, that civil and criminal penalties could then be imposed, and that they would suffer reputational damage if they were required to violate the regulation before challenging it in court. The drug companies also argued that the issues were ready to be litigated, as there was nothing to gain by waiting and by violating the regulation.

Holding — In this case, the Supreme Court agreed with the drug companies and found that the drug companies would experience substantial hardship if denied a pre-enforcement challenge to the regulation, and that the issues were fit for judicial resolution. Therefore, pre-enforcement review of the regulation was ripe for review.

► In this chapter, we learned that federal courts have jurisdiction only over lawsuits that are **ripe**, which means that the controversy is mature for adjudication. We also learned that *pre-enforcement review* of a law is generally not ripe, but it will be if the plaintiff can show that hardship is likely without review, and that the issues are fit for judicial decision.

CHAPTER 7. MOOTNESS

For a case to be justiciable, the plaintiff must have *standing*, the case must be *ripe*, the case cannot be *moot*, and the case cannot be a *political question*.

A. **Mootness** (like ripeness) — determines if an actual case or controversy exists at the right time.

1. A controversy becomes moot when it has been *terminated*.

2. Federal courts do not generally have jurisdiction over a case that is already moot, or an existing case that has become moot.

B. An issue will become **moot** when it has been *resolved* or *invalidated*, and *there is no longer a live controversy between the parties*.

1. For instance, if parties come to a settlement agreement, the case has become moot.

2. Also, if the plaintiff in a case dies, the case will usually become moot.

C. There are 3 **exceptions** to the mootness doctrine. (In each of these situations, federal courts may hear a case that is moot.)

1. A case will not be dismissed as moot when it involves *a wrong that is capable of repetition, but evades review because it lasts only for a short period of time*.

Example — An example of this is a lawsuit by a pregnant plaintiff who is challenging restrictions on abortion so that she may have an abortion. In such a case, by the time the lawsuit comes before a judge, the plaintiff is no longer pregnant and the case is therefore moot. However, since the plaintiff is wronged only for a short period of time, and the wrong is capable of happening again—to the plaintiff, or to other pregnant women—the court will not dismiss such a case as moot.

2. The second exception to the mootness doctrine occurs when the *defendant involved in a lawsuit voluntarily stops committing the illegal act that is the subject of the lawsuit, but could resume the illegal behavior after the case is dismissed*.

Example — An example of this would be a lawsuit against a factory for excessive pollution. If during the lawsuit the factory closes down and stops polluting, the case will not be dismissed as moot, because the defendant could reopen the factory and could open similar factories elsewhere.

3. The last exception to the mootness doctrine concerns *class action lawsuits*.

a. Class action suits, which have multiple members of a class acting as plaintiffs, cannot be dismissed as moot as long as any member has an ongoing injury.

► In this chapter, we discussed the justiciability requirement of **mootness**. Under the mootness doctrine, federal courts do not have jurisdiction over a controversy that has been resolved. However, a case will not be dismissed for being moot in 3 situations: when the issues are capable of repetition but evade review because of their limited time duration, when the defendant voluntarily ceases the activity that gave rise to the lawsuit and is likely to resume the activity, and for class action suits.

CHAPTER 8. POLITICAL QUESTIONS

For a case to be justiciable, the plaintiff must have *standing*, the case must be *ripe*, the case must not be *moot*, and the case cannot be a *political question*.

A. **Political questions** — questions that are best resolved by the political branches of our government and not the judicial branch.

1. Common political questions include challenges to presidential foreign policy, challenges to Congress' impeachment process, and challenges to partisan gerrymandering.

B. The *redistricting of legislative districts* is NOT considered a political question.

Baker versus Carr (1962)

→ In this case, the plaintiffs claimed that the current voting districts in Tennessee were unconstitutionally unequal and should be reapportioned based on population figures. While the state of Tennessee argued that legislative districts were purely political questions, the Court disagreed and held that redistricting of legislative districts is a justiciable issue.

► In this chapter, we learned that that federal courts do not have jurisdiction over **political questions** because they concern issues that are the sole responsibility of the legislative or executive branches of the government.

CHAPTER 9. ADVISORY OPINIONS

Because Article III limits the judicial power only to actual cases or controversies, federal courts cannot issue advisory opinions.

A. **Advisory opinion** — an opinion rendered by the court as to the meaning or legality of a law or conduct; and is typically given in response to a request by another branch of the government.

Example — In 1793, while there was hostility mounting between England and France, President George Washington forwarded to the Supreme Court a request which asked the Court for guidance on how to best maintain neutrality in accordance with international law and treaties.

→ The Supreme Court refused to help President Washington, declaring that it has no power to render an advisory opinion because the Constitution authorizes the Supreme Court to interpret the law only when there is a real case or controversy.

B. The prohibition against advisory opinions is based on the constitutional guarantee of **separation of powers**.

1. If federal courts were able to issue advisory opinions to the executive or legislative branches, the judiciary would then be sharing powers and duties with the other branches.

C. Advisory opinions may be sought not only by requests from the government, but also in a **lawsuit**.

1. For instance, if a party to a lawsuit seeks advice from federal court as to a hypothetical question, there is no standing because there is no valid injury for a hypothetical question; therefore, any ruling by the court would be an impermissible advisory opinion.

2. Also, if a lawsuit is not **redressable** (meaning that any ruling by the court would have no effect on the parties), then the parties do not have standing because the lawsuit is not redressable; therefore, any decision by the court would be an impermissible advisory opinion.

► In this chapter, we discussed **advisory opinions**. We learned that federal courts cannot render advisory opinions when a justiciable Article III case or controversy does not exist.

CHAPTER 10. SUPREME COURT REVIEW OF STATE COURT JUDGMENTS

A. Recall that the Supreme Court can grant certiorari to hear a case from federal appeals courts, as well as from the highest state courts. Since federal courts can hear only justiciable Article III cases and controversies, a *state court appeal* MUST be **justiciable** in order to be heard by the Supreme Court.

1. This means that the state case must not only concern the Constitution or federal law, but there must be standing, and in particular, there must be redressability.

2. A state court judgment will not be redressable by the Supreme Court when it rests on **independent and adequate state law grounds**.

B. Any state or federal court decision must be based on some law — either state law or federal law, or both. While it is typical for federal courts to apply federal law, and state courts to apply state law; it is common for federal courts to apply state law, and state courts to apply federal law.

1. If a *state court decision is based solely on **state law***, the Supreme Court CANNOT review the case because there is no federal law involved, and therefore no Article III case or controversy exists.

2. On the other hand, if a *state court decision is based solely on **federal law***, then the Supreme Court MAY hear the case because it concerns federal law.

3. However, if a *state court judgment is based on BOTH **state and federal law***, the Supreme Court may review the case, but ONLY if the case does not rest on **independent and adequate state law** grounds.

C. When a state court judgment rests on **independent and adequate state law grounds**, this means that no matter how the Supreme Court were to resolve the federal issues in the case, the state law grounds would still apply to support the judgment, and the result of the case would remain unchanged.

Example — Jimmy is beaten by a police officer in the state of Florida. Jimmy sues the officer in Florida State court. Jimmy cites Florida tort law on assault and battery AND the federal civil rights act in his cause of action.

→ The Florida Supreme Court finds in Jimmy's favor and awards him $100,000 in damages. In its decision, the court states that the Florida tort law and the federal civil rights act each independently require the outcome. Afterwards, the police officer appeals the case to the United States Supreme Court.

→ In this situation, the Court will not hear the case because it rests on independent and adequate state law grounds. If the Supreme Court were to reverse the Florida court's ruling in regards to the federal civil rights act, that would not change the result in the case because the Florida state battery ground is independent of the federal law and would still apply to support the judgment.

► In this chapter, we learned that the Supreme Court cannot review a state court judgment when it rests on independent and adequate state law grounds.

CHAPTER 11. SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

A. **Sovereign immunity** — a judicial doctrine that prevents a government from being sued.

B. In the United States, the federal government, as well as the state governments, retain some form of **sovereignty** — meaning that they cannot be sued in certain circumstances. There are differences in the application of federal sovereign immunity as opposed to state sovereign immunity.

1. **Federal sovereign immunity**

a. The federal government has sovereign immunity and it may not be sued unless it has waived its immunity or consented to being sued.

b. Note that the federal government has waived its sovereign immunity with respect to certain lawsuits.

1) For instance, under the Tucker act, the federal government may be sued based on certain contract claims.

2) Under the Federal Tort Claims Act, the federal government may be sued when a federal employee commits a tortious act.

2. **State sovereign immunity**

a. In a *state's own jurisdiction*, the state government has sovereign immunity and may not be sued unless immunity has been waived or the State has consented to being sued.

1) Although laws vary among jurisdictions, most of the States accept liability for torts committed by government employees.

b. States also have sovereign immunity in *federal courts*, pursuant to the Eleventh Amendment.

1) So not only is the federal judiciary limited to hearing only Article III cases or controversies, the Eleventh Amendment further limits the jurisdiction of federal courts.

C. The **Eleventh Amendment** reads: "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

1. In simpler terms, a state cannot be sued in federal court. However, there are some exceptions:

a. A state *may be sued by the **federal government*** in federal court.

b. A state *may be sued by **another state*** in federal court.

c. If a state has ***waived*** sovereign immunity, or has expressly ***consented*** to being sued, the state may be sued in federal court.

d. A state may be sued in federal court if the lawsuit is based on a federal law that has been passed pursuant to the ***Fourteenth Amendment***.

1) Section 5 of the Fourteenth Amendment gives Congress the power to prevent a state from depriving a person of due process and equal protection of the laws. Congress has used this power to apply modern Civil Rights laws as well as patent and trademark laws to state governments.

e. A state may be sued in *bankruptcy* proceedings in federal bankruptcy courts.

2. *** Note that the Eleventh Amendment does not apply to **cities** and **municipalities**; therefore, they lack sovereign immunity and in general may be sued in federal court.

► In this chapter, we discussed the principle of **sovereign immunity** and the Eleventh Amendment's grant of immunity to states in federal court.

CHAPTER 12. FEDERAL LEGISLATIVE POWER UNDER ARTICLE I

A. The federal legislative power is defined by **Article I** of the Constitution.

1. **Section 1** of Article I states that the legislative powers are vested in Congress, which consists of the Senate and the House of Representatives.

2. **Sections 2 through 7** explain many features of the legislative branch — including how the Senate and House are to be structured, the process for electing members of Congress, and the process for passing bills into law.

3. The most essential section of Article I, for our purposes, is **Section 8**.

a. This section provides a list of many of the powers granted to Congress. Some of the more important enumerated powers of congress in Section 8 include:

(i) The power to tax and spend for the general welfare of the United States;
(ii) To regulate commerce with foreign nations and among the states;
(iii) To borrow money;
(iv) To coin money;
(v) To establish inferior federal courts;
(vi) To establish an Army and a Navy;
(vii) To declare war;
(viii) To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers.

*** The most significant clauses that come from Section 8 of Article I are the *General Welfare Clause*, the *Necessary and Proper Clause*, and the *Commerce Clause*.

B. **GENERAL WELFARE CLAUSE**

1. The General Welfare Clause states that Congress has the power to lay and collect taxes and to provide for the common defense and general welfare of the United States.

2. The general welfare clause only authorizes Congress to **tax and spend** for the general welfare — it does NOT give Congress the power to **pass laws** for the general welfare.

3. Congress may, however, use its *spending power* to encourage states to comply with Congress' wishes and pass laws that provide for the general welfare of their citizens.

a. In other words, Congress can require that states meet reasonable criteria before qualifying for federal funds.

Example — Although Congress has no constitutional authority to pass legislation that concerns motor vehicle traffic within each state, Congress can persuade states to pass certain legislation by establishing *grants* that provide federal funding to states that do so.

→ So if Congress wants states to set a certain maximum speed limit on highways, Congress could establish a federal highway fund grant that would only be disbursed to states that have set such speed limits. This condition on states' receipt of federal highway funds is an example of a valid exercise of Congress' power under the General Welfare Clause.

► In this chapter, we discussed Article I of the Constitution, and we looked at several of the legislative powers it grants to Congress. We also discussed the **General Welfare Clause**, which gives Congress the power to tax and spend for the general welfare of the citizens of the nation. Although Congress cannot pass laws for the general welfare, Congress can attach strings on grants given to states in order to encourage states to comply with Congress' wishes.

CHAPTER 13. THE NECESSARY AND PROPER CLAUSE

A. The **Necessary and Proper Clause** in Article I, Section 8, of the Constitution reads: "Congress has the power to make all Laws which shall be necessary and proper for carrying out the enumerated Powers and all other Powers vested by the Constitution."

1. The Necessary and Proper Clause *expands* congressional authority because it gives Congress powers that were not explicitly stated in the Constitution.

2. In interpreting the Necessary and Proper Clause, the Supreme Court has held that not every power meant to be granted to Congress could have been specified in the Constitution. Therefore, Congress must have some implied powers based on the enumerated powers in the constitution; and it is the Necessary and Proper Clause which grants such implied powers to congress.

B. The first Supreme Court case to apply the Necessary and Proper Clause was the landmark case from 1819, *McCulloch versus Maryland*.

McCulloch versus Maryland (1819)

Facts — Congress passed an act that permitted the federal government to create a bank. The federal bank opened branches in several states. After a branch opened in Baltimore, Maryland, the state of Maryland imposed a tax on the bank. James McCulloch, who was a cashier at the federal Bank in Baltimore, refused to pay the Maryland tax, and the case went to court.

Holding — In this case, the Supreme Court found that, although the constitution does not explicitly grant Congress the power to create a bank, Congress may do so through the Necessary and Proper Clause.

→ Since the creation of a federal bank is a reasonable means for congress to carry out several of its enumerated powers (like the power to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies), the court found that Congress has the constitutional authority to create a federal bank.

→ In addition, note that the Supreme Court also found that the Maryland tax on the federal bank was unconstitutional. This part of the Court's decision rested on the Supremacy Clause in Article VI of the Constitution, which states that the Constitution and federal laws are the supreme law of the land.

→ Since the formation of the federal bank was found to be a valid exercise of congressional power by way of the Necessary and Proper Clause, the state of Maryland could not tax, nor in any way impede the operations of the federal bank; therefore, the Maryland tax was found to be unconstitutional and struck down.

► In this chapter, we discussed the **Necessary and Proper Clause**. In addition to the enumerated powers which are spelled out in the Constitution, the necessary and proper clause grants to Congress implied power to use any reasonable means in order to carry out the enumerated powers.

Other than the express and implied powers granted to the federal government, all other powers are granted to the states—pursuant to the Tenth amendment—which we will discuss in the next chapter.

CHAPTER 14. THE TENTH AMENDMENT

The United States Constitution establishes a system of dual sovereignty that allocates power between the federal government and the states. This type of system in which the power to govern is shared between national and state governments is known as **federalism**.

A. Although the Constitution does not explicitly define or explain federalism, it mentions several rights and responsibilities of state governments *in relation to* the federal government and vice versa:

1. As we have discussed, the **federal government** has certain *enumerated powers* which are spelled out in Article I. In addition, Congress has *implied powers* to pass any laws that are necessary and proper for the execution of its enumerated powers.

2. At the same time, **states** retain some form of sovereignty, and they have certain powers that are free from federal government interference.

3. In order to define the balance of power between the federal government and the states, the Tenth Amendment limits the powers of the federal government only to those granted by the Constitution.

B. The **Tenth Amendment** reads: "the powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people."

1. In simpler terms, the Tenth Amendment limits Congress to passing laws in only those areas that are stated in the Constitution.

a. For instance, nowhere in the Constitution is Congress given the authority to *regulate local matters that concern the health and safety of citizens*. Therefore, pursuant to the Tenth Amendment, such authority is reserved to the states. The power of states to regulate the health and safety of its citizens is known as the **police power**.

C. **Police power** is used by each state as the basis for enacting a variety of substantive laws in many areas.

1. Under this power, states may regulate roads and motor vehicles, zoning and land use, gambling, crime, licensing of professionals, liquor, and education.

2. Note that it is common for state legislatures to delegate much of their police power to counties, cities, and towns within the state.

D. Under the Tenth Amendment, Congress may NOT compel states to pass certain laws or regulations, but Congress CAN use its spending power (under the General Welfare Clause) to **induce** state governments to pass certain types of laws.

1. For instance, Congress may establish a federal highway fund that will only be disbursed to states that have set a certain speed limits on their highways.

► In this chapter, we discussed the **Tenth Amendment**, which limits the power of the federal government to act only when there is express or implied constitutional authority. All other powers are reserved to the states, most importantly of which are the police powers.

CHAPTER 15. THE COMMERCE CLAUSE

A. Article I, Section 8 of the Constitution reads: "Congress shall have the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

B. The **Commerce Clause** represents one of Congress's most important sources of legislative power. It vests extremely broad authority in Congress to act in a wide range of matters, even those that do not on their face implicate interstate commerce.

1. For instance, Congress has relied upon the commerce clause to enact legislation on environmental protection, drug labeling, the minimum wage, and civil rights.

C. The Supreme Court's interpretation of the Commerce Clause is complex and has evolved over time, and continues to evolve. Based on the interpretation of the word "commerce" and the phrase "among the several states", the Supreme Court has held that Congress has the power to regulate 3 categories of commercial activity:

1. The **channels** of interstate commerce.

a. Places where commerce occurs — roads, rivers, airways, as well as the internet.

2. The **instrumentalities** of interstate commerce.

a. Congress may regulate the instrumentalities of interstate commerce and persons or things in interstate commerce.

b. This category includes anything that is used to carry out commerce or that moves in interstate commerce — vehicles, boats, airplanes, machines, as well as people.

3. **Any activity that has a substantial effect** on interstate commerce.

a. Congress may regulate any activity that has a substantial effect on interstate commerce. This means that Congress can regulate any activity—even a local activity—as long as it substantially effects interstate commerce.

D. In order to understand the full extent of Congress' commerce power and the types of activities that Congress may regulate under the Commerce Clause, we will look at the Supreme Court's Commerce Clause jurisprudence over time, which is generally divided into 3 different phases:

1. *From the earliest days of the nation to the 1930s*, around the time of the Great Depression, the Supreme Court generally moved toward a more expansive interpretation of the Commerce Clause, recognizing the important role of the federal government in a developing nation of several states.

2. After the Great Depression, then president Franklin D. Roosevelt implemented a series of domestic programs (known as the *New Deal*) which were aimed to restore the economy and to provide relief to the poor and unemployed.

a. Although the Supreme Court initially struck down New Deal legislation (since the legislation sought to expand the power of the federal government), the New Deal marked a turn in Commerce Clause jurisprudence. From 1937 to 1995, the Supreme Court developed an extremely expansive view of the Commerce Clause. And during this period, no federal laws enacted under the Commerce Clause were struck down.

3. The year *1995* marked another turn in commerce clause jurisprudence. In this year, for the first time in nearly 60 years, the Supreme Court, led by Chief Justice Rehnquist, struck down a federal law under the Commerce Clause. The Rehnquist court was concerned with the federal government's encroachment on the police powers of the states, and cited the tenth amendment to limit the reach of the commerce power.

► In this chapter, we discussed the **Commerce Clause**, which gives congress the power to regulate commerce among the states. We learned that Congress has the power to regulate three broad categories of activity: the channels of interstate commerce, the instrumentalities of interstate commerce, and any activity that substantially affects interstate commerce.

CHAPTER 16. COMMERCE CLAUSE JURISPRUDENCE — THE EARLY YEARS

Gibbons versus Ogden (1824)

Facts — Gibbons and Ogden were competitors both operating steamboats which ran from New York to New Jersey. Pursuant to a New York state law, Ogden was granted a monopoly that gave him the exclusive right to operate steamboats on waters within the state's jurisdiction. Gibbons, who did business under a federal coastal license, challenged the New York State monopoly license.

Holding — The Supreme Court found that the New York State law was unconstitutional and it was struck down.

→ This case is important because the Court found that the Commerce Clause gave Congress the exclusive power over interstate commerce. Therefore, the states cannot pass legislation that would normally fall within the scope of the states' police powers if such legislation is inconsistent with federal law enacted under the commerce power. So even though New York's law was only to be enforced within the state, the Supreme Court held that *Congress may regulate any local activity as long as the activity has some commercial connection with another state*.

Houston East & West Texas Railway Company versus US (Shreveport Rate Case) (1914)

Facts — Texas railway companies charged higher rates on freight travelling between Shreveport, Louisiana and Texas than on freight travelling solely within Texas. As a result, the federal government established maximum rates and ordered the Texas railroads to fix their rates accordingly, including rates for railway travel within the state of Texas. The railroad companies sued.

Holding — The Supreme Court found that the railroads' in-state rates were subject to federal regulation. Since the price discrimination adversely affected interstate commerce, it was immaterial that the discrimination came from an activity that took place solely within the state. Therefore, the Court held that *when an in-state activity has a substantial effect on interstate commerce, Congress may regulate the activity pursuant to the Commerce Clause*.

► In this chapter, we discussed the early Supreme Court cases that interpreted the Commerce Clause.

CHAPTER 17. COMMERCE CLAUSE JURISPRUDENCE — THE NEW DEAL

With the advent of the New Deal in the 1930s, the powers of the federal government expanded into new areas that had not been considered commerce. Naturally, the Supreme Court initially struck down certain New Deal legislation.

Schechter Poultry Corporation versus United States (1935)

→ The Supreme Court invalidated federal legislation that established labor conditions and regulated the sale of unhealthy chickens as applied to a poultry seller who bought and sold chicken only within the state of New York.

Carter versus Carter Coal Company (1936)

→ The Court invalidated a New Deal program that attempted to regulate the wage and hour practices of coal companies on the ground that such practices were "local" and had only an "indirect" effect on interstate commerce.

However, by 1937, the Supreme Court reversed course and began to allow for greater government regulation under the Commerce Clause.

National Labor Relations Board versus Jones & Laughlin Steel Company (NLRB) (1937)

Facts — Congress had enacted the National Labor Relations Act of 1935, which gave workers the right to organize unions. After Jones & Laughlin Steel Company fired workers for joining a union, the National Labor Relations Board charged the Company with discriminating against union employees. In response, the steel company argued that the Act was unconstitutional because it regulated labor relations between employees and management and not interstate commerce.

Holding — The Supreme Court held that the Act was a valid exercise of Congress' Commerce power.

→ In its decision, the Court emphasized that, under the Commerce Clause, *Congress may regulate interstate commerce as well as any activity that substantially affects commerce, whether directly or indirectly*.

→ And since labor relations, particularly labor disputes, are likely to burden the flow of interstate commerce, Congress may regulate such activity.

United States versus Darby (1941)

→ In this case, the Court used the *substantial effects test* to uphold Congress' Fair Labor Standards Act, which set a national minimum wage and set maximum hours for employees across the nation.

After *NLRB* and *Darby*, the Supreme Court had established that the Commerce Clause grants Congress the power to regulate any activity, including a local activity, if it is shown to substantially affect interstate commerce. This interpretation of the commerce clause went to perhaps its most extreme limits in the 1942 case *Wickard versus Filburn*.

Wickard versus Filburn (1942)

Facts — Congress had passed the Agricultural Adjustment Act, which was enacted to stabilize the price of crops on the national market. The Act established limits on the amount of wheat that farmers could produce based on the acreage of their farm.

→ Filburn was an Ohio farmer who harvested more wheat than permitted under the Act. He produced 239 bushels in excess of his quota, which was for his own personal use. Regardless, Filburn was ordered to pay a fine, which he refused to pay, and the case went to the Supreme Court.

Holding — In upholding the Act, the Court found that Congress had the power to regulate the production of wheat for personal use under the Commerce Clause.

→ The court held that *even if an activity, in itself, does not have a substantial effect on interstate commerce, Congress may still regulate the activity if the activity, when viewed in the aggregate, could have a substantial effect on interstate commerce*.

→ In other words, even though one farmer could not produce enough excess wheat to impact the national wheat market, the aggregate or combined effect of thousands of farmers producing wheat for personal use could have a substantial effect on the price of wheat. Therefore, Congress could regulate the production of wheat for personal use under the Commerce Clause.

Note that important provisions of the **Civil Rights Act of 1964**—which aimed to prevent businesses from discriminating against customers based on race—were passed based on the Commerce Clause.

The Supreme Court issued several opinions which supported this use of the Commerce power, the most notable of which came from the case ***Heart of Atlanta Motel versus United States*** (1964), where the Court held that Congress may prohibit racial discrimination in hotel lodging under the Commerce Clause.

► In this chapter, we discussed the Supreme Court's expansive interpretation of the Commerce Clause following the New Deal legislation of the 1930s. We learned that during this time period, the Supreme Court developed the aggregation test, also known as the cumulative effects test, which allows Congress to regulate any activity if the activity, when viewed in the aggregate, could have a substantial effect on interstate commerce.

CHAPTER 18. COMMERCE CLAUSE JURISPRUDENCE — REHNQUIST COURT TO PRESENT

In 1995, for the first time in nearly 60 years, the Supreme Court, led by chief justice Rehnquist, invalidated a federal law on the ground that it was outside the scope of the commerce power. The Rehnquist Court established a new phase of commerce clause jurisprudence that restored limits to Congress's reach pursuant to the Commerce Clause.

Rehnquist, who was considered to be a conservative, favored a conception of federalism that emphasized the Tenth Amendment's reservation of powers to the states. The Rehnquist Court wanted to ensure that there was no encroachment by the federal government on the state's police powers.

The 1995 landmark case that marked the Rehnquist Court's new phase of commerce clause jurisprudence was *United States versus Lopez*.

United States versus Lopez (1995)

> *Facts* — At issue was a provision of the Gun-Free School Zone Act, which made it a federal crime to possess a gun in school zones. Alfonso Lopez, who was a 12th grade student, had brought a loaded handgun to school and was charged under the Act.
>
> *Holding* — The Supreme Court found the provision of the Act to be unconstitutional because it exceeded the power of Congress under the Commerce Clause.
>
> > → The Court held that the possession of guns in school zones is not an *economic activity* that could have a substantial effect on interstate commerce. The Court reasoned that because the carrying of guns is not a commercial activity and does not substantially affect interstate commerce, Congress may not regulate such activity under the Commerce Clause.

A few years after Lopez, the Supreme Court again invalidated an act of congress as being outside the scope of the commerce clause, in the case *United States versus Morrison*.

United States versus Morrison (2000)

> *Facts* — At issue was the Violence Against Women Act, which allowed victims of gender-motivated violence to bring federal civil suits for damages. A student brought a lawsuit under this act against her former university alleging that she was raped by two university football players.
>
> *Holding* — The Supreme Court dismissed the students' claims after it found that the Act was unconstitutional, as it was outside of the scope of Congress' commerce power.
>
> > → In its reasoning, the Court emphasized that the activity being regulated—violence against women—was a *non-economic activity*, and furthermore, one that is traditionally regulated by states. Since the Federal Act therefore did not regulate an *economic* activity that substantially affected interstate commerce, Congress did not have power to regulate the activity under the commerce clause.

National Federation of Independent Business versus Sebelius (2012)

Facts — At issue in this case was the Affordable Care Act of 2010. The Court held that the individual mandate provision of the Act—which required all persons to buy health insurance or pay a penalty—was outside of Congress's power under the Commerce Clause.

Holding — The Court found that the Commerce Clause does not give Congress the power to regulate *inactivity* — which in this case was the decision of an individual to not buy health insurance.

*** Note that the mandate under the Affordable Care Act survived as a valid exercise of Congress's taxing power.

► In this chapter, we finished our discussion of commerce clause jurisprudence. We learned that according to the Supreme Court, the basic present day rule of law that derives from the commerce clause is this: Congress has the power to regulate any activity that is economic in nature, even a local activity, if the activity has a substantial effect on interstate commerce, or if the activity, when viewed in the aggregate, could have a substantial effect on interstate commerce.

CHAPTER 19. FEDERAL EXECUTIVE POWER UNDER ARTICLE II

The **federal executive power** is defined by Article II of the Constitution. Section 1 of Article II states that the executive power is vested in the President of the United States.

A. **Article II** grants several executive powers to the President. The most important include:

(i) The power as Commander in Chief of the Army and Navy,
(ii) The power to grant Pardons,
(iii) The power to make Treaties,
(iv) The power to appoint Ambassadors, other public Ministers and Consuls, and judges of the Supreme Court,
(v) The power to take care that laws are executed and observed.

B. When the president **appoints** ambassadors, federal judges, and cabinet members, the appointments are *subject to Senate approval*.

1. Note also that the president generally has the power to remove any executive branch officer.

C. Note that executive officers, including the president, may also be removed from office by Congress through **impeachment**.

1. Once the House of Representatives has a majority vote to impeach, a trial is held in the Senate; and if 2/3 of the Senate vote to convict, the officer will be removed from office.

D. The President has the power to **pardon** anyone accused of or convicted of federal crimes. However, the president cannot pardon someone for violation of a state law or for violation of a civil offense.

E. The President has the power to **veto** any Act of Congress.

1. However, when the president vetoes an Act, the Act may still be passed into law by a 2/3 majority vote of each house of Congress.

F. **Foreign policy**

1. Article II grants the President broad discretion over foreign policy. The 2 most important means of establishing foreign policy are by treaties and executive agreements:

a. **Treaties** — agreements between the United States and a foreign country that are negotiated by the president and become effective when ratified by a 2/3rds vote of the senate.

b. **Executive agreements** — agreements between the United States and a foreign country that become effective when signed by the president and the head of a foreign country. Unlike treaties, executive agreements do not require senate approval.

2. Note there is a *crucial difference between a treaty and an executive agreement* — as each operates differently with respect to state and federal laws and the Constitution.

a. Since a **treaty** is constitutionally authorized and is approved by the Senate, a treaty will trump any existing federal law that is in conflict with the treaty.

1) However, if a federal law is passed AFTER a treaty has already been formed, then the new law will trump the treaty.

a) In other words, *if a treaty and a federal statute are in conflict, the more recent one will control*.

b. If an **executive agreement** ever conflicts with federal law, the federal law will always control.

3. Note that treaties and executive agreements will always trump any conflicting **state laws**. And note also that treaties and executive agreements may never conflict with the **Constitution**.

► In this chapter, we discussed the executive power of the federal government as granted in Article II of the Constitution.

CHAPTER 20. FEDERALISM — THE SUPREMACY CLAUSE AND PREEMPTION

The United States Constitution divides sovereignty between the federal government and the state governments. This type of system is known as **federalism**.

As we have discussed, the **federal government** has certain *express powers* which are spelled out in the Constitution. In addition, Congress has *implied powers* to pass any laws that are necessary and proper for the execution of its express powers.

All other powers, pursuant to the Tenth Amendment, are reserved to the **states** or the people.

A. At the same time, however, state power is *limited* by the Constitution in several ways:

(i) By the Supremacy Clause,
(ii) By the dormant Commerce Clause,
(iii) By the Privileges and Immunities Clause, and
(iv) By the Full Faith and Credit Clause.

B. **Supremacy Clause**

1. The **Supremacy Clause** (within in Article VI of the Constitution) states that the Constitution and the laws of the United States shall be the *supreme law of the land*.

a. Any valid federal law will trump (or ***preempt***) a conflicting state law.

Example — Recall the case *Gibbons v. Ogden*, where the state of New York granted a monopoly to a steamboat operator.

→ Because the New York state law conflicted with a federal licensing law for the operation of steamboats, the federal law preempted the state law pursuant to the supremacy clause, and the state law was struck down.

2. **Preemption** can be either express or implied:

a. **Express preemption** is where Congress expressly states that it intends for federal legislation to preempt competing state laws. Congress can do this by stating that its power is exclusive.

b. **Preemption may be implied** when Congress has been silent on such issues.

a. *Conflict preemption* —when a state law directly conflicts with a federal law, or frustrates the purposes or objectives of a federal law.

b. *Field preemption* — when Congress has occupied a particular field and there is no room in that field for states to regulate.

Example — State laws regarding foreign affairs, like immigration, will usually be preempted because the federal government has clearly occupied this field.

► In this chapter, we discussed the **Supremacy Clause** and the related doctrine of **preemption**. We learned that under the Supremacy Clause, any state law that conflicts with a federal law will be preempted.

CHAPTER 21. THE DORMANT COMMERCE CLAUSE

The **dormant Commerce Clause** (also the negative implications of the Commerce Clause) is not an express clause in the Constitution, but rather a legal doctrine that has been inferred from the Commerce Clause.

The Supreme Court has interpreted the Commerce Clause not just to be a *positive grant of power to Congress*, but also to be a *limitation on the power of states to regulate interstate commerce*.

A. Under the **dormant Commerce Clause**, state regulations that affect interstate commerce must satisfy a 3-part test in order to be upheld:

(i) The state regulation must pursue a *legitimate state objective*,
(ii) It must be *rationally related* to the legitimate state objective, and
(iii) The *burden* imposed on interstate commerce *must be outweighed by the state's interests*

B. Typically, a state regulation is **rationally related to a legitimate state objective** when it serves to protect the health, safety, and welfare of its citizens.

1. Recall that these type of objectives are within states' *police power*.

2. However, if such a public health measure *discriminates against* or *unduly burdens* interstate commerce, that will NOT be legitimate and the measure will almost always be struck down under the dormant Commerce Clause.

3. When a state enacts a regulation that promotes the economic or health interests of its own but *discriminates* against out-of-staters, this will NOT be a legitimate state objective. These types of measures are known as **state protectionism**.

a. The most common examples of **protectionism** occur when a state prevents out-of-state goods from entering the state, or prevents in-state goods from leaving the state.

C. In addition to being rationally related to a legitimate state objective, a state regulation must not **excessively burden interstate commerce**.

1. This means that even if a state regulation does not discriminate against out-of-staters, it still may violate the dormant Commerce Clause if it excessively burdens interstate commerce compared to any local benefits.

a. When balancing burdens and benefits, courts must examine whether there are less restrictive means available to the state. If the state can accomplish its objective in a manner less burdensome to interstate commerce, then it probably will have to do so.

Example — In the 1976 Supreme Court case, ***Philadelphia versus New Jersey***, the Court struck down a New Jersey law that prohibited the importation of garbage into the state.

→ Even though the New Jersey law was rationally related to legitimate state health and environmental objectives, the law discriminated against garbage (which is an article of commerce) that came from outside the state, for protectionist reasons. In addition, the court found there were reasonable, nondiscriminatory alternatives available to New Jersey.

→ Therefore, the law violated the dormant Commerce Clause and was struck down.

D. In rare situations, **a state law that discriminates against out-of-state commerce** MAY be upheld.

> *Example* — In the case ***Maine versus Taylor*** (1986), there was a challenge to a Maine statute that banned live bait fish from being imported into the state. The law was passed because Maine wanted to prevent new parasites and non-native fish species from disrupting the state's ecosystems.
>
> → Even though the law was discriminatory, the Supreme Court upheld the law because it found there were no non-discriminatory alternatives that adequately served Maine's interest in protecting its ecosystems.

E. In our discussion on the dormant Commerce Clause, we have learned that states may not restrict out-of-state businesses from doing business within the state. In addition, states also MAY NOT ***pressure out-of-state businesses to perform certain operations within the state*** — as such regulations would burden interstate commerce.

> *Example* — In the Supreme Court case, ***Pike versus Bruce Church*** (1970), the Court struck down an Arizona law that required all cantaloupes grown in Arizona to be packed in Arizona. The plaintiff was an Arizona grower of high quality cantaloupes, who transported them to California facilities to be packed.
>
> → The Court found that the Arizona law unduly burdened interstate commerce, and it was struck down in violation of the dormant Commerce Clause.

F. Under the dormant Commerce Clause, in addition to state laws and regulations, **state taxation** also MAY NOT discriminate against or unduly burden interstate commerce.

> 1. Therefore, states cannot tax out-of-state businesses while giving tax breaks to in-state businesses.
>
> 2. Also, states cannot tax businesses that use out-of-state components more heavily than businesses that use locally made components.
>
> 3. In order for state taxes to be *valid* under the dormant Commerce Clause, the taxed activities must have a *substantial nexus* with the state, and the taxes must be *fairly apportioned*.

G. Note that the dormant Commerce Clause prevents not only a *state* from discriminating against out-of-staters, but also a **city** or **municipality** from discriminating against any of those who do not reside in the city or municipality.

► In this chapter, we discussed the **dormant Commerce Clause**, which prohibits states from discriminating against or unduly burdening interstate commerce. However, there are several exceptions to the dormant Commerce Clause, which we will discuss in the next chapter.

CHAPTER 22. THE MARKET PARTICIPANT EXCEPTION

The dormant Commerce Clause restricts states from passing laws that discriminate against or burden interstate commerce. However, there are several exceptions to the dormant Commerce Clause:

A. **Consent**

1. Since Congress has the power to regulate interstate commerce, Congress may **Consent** to a state law that discriminates against or burdens interstate commerce.

a. If congress consents to such a state law, the law will be valid under the Constitution.

B. The **market participant exception**

1. Under the market participant exception, a state may favor local interests over out-of-state interests as long as the state is acting as a market participant.

2. This means that if a state or local government *owns or operates a business*, the business may prefer in-state buyers or sellers over out-of-state ones—and that will not violate the dormant Commerce Clause.

Example — When a state is engaging in the buying or selling of goods, it may choose to buy from local companies at a higher price than it would pay to out-of-state companies, or sell to local companies at a lower price than it would otherwise.

Example — The market participant exception permits state-operated universities to charge less tuition to in-state residents, while at the same time charge higher tuition for out-of-state residents.

Example — States may also provide welfare for their own citizens, while excluding out-of-state citizens from the same welfare benefits.

Reeves versus Stake (1980)

→ At issue was South Dakota's preference for selling cement from its state-owned Cement plant to South Dakota customers.

→ In this case, since South Dakota was acting as a market participant rather than as a regulator of commerce, the Court upheld the state's preference for in-state customers.

South-Central Timber Development versus Wunnicke (1984)

→ In this case, there was a challenge to an Alaska law that required purchasers of state-owned timber to process some of the timber in the state of Alaska.

→ The court found that since Alaska was attempting to control commerce relating to its timber, after it had already sold the timber, the state was acting as a regulator, not as a mere market participant. Therefore, the law was struck down as a violation of the dormant commerce clause.

► In this chapter, we discussed exceptions to the dormant Commerce Clause. We learned that a state may pass laws that discriminate against out-of-staters when congress **consents** to such regulations, or when the state is acting as a **market participant**.

CHAPTER 23. THE PRIVILEGES AND IMMUNITIES CLAUSE

A. **Article IV** of the constitution reads "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

1. The purpose of the Privileges and Immunities Clause was to facilitate the unification of the independent states into one nation, so that citizens traveling throughout the country would receive the same treatment as citizens of the states through which they traveled.

B. Under the **Privileges and Immunities Clause**, the general rule is: no State may discriminate against out-of-state citizens with respect to rights that are fundamental to national unity, unless there is substantial justification.

1. The Privileges and Immunities Clause protects only **out-of-state individual citizens** from discrimination.

a. This means that corporations and aliens are not protected by the Privileges and Immunities Clause.

1) Note that if corporations or aliens are being discriminated against, they may invoke the dormant Commerce Clause, as well as the Equal Protection Clause, which we will discuss later in this outline.

2. Under the Privileges and Immunities Clause, not only are the states restricted from discriminating against out-of-state citizens, but also **cities and municipalities** are restricted from discriminating against citizens who are not residents of the city or municipality.

3. The Privileges and Immunities Clause only applies to rights that are **fundamental to national unity**.

a. Such rights are based on civil liberties and commercial interests — for instance, the right to travel freely within a state, the right to earn a living within a state, the right to acquire and own property within a state, and the right to reside within any state.

1) Therefore, under the Privileges and Immunities Clause of Article IV, states are restricted from discriminating against out-of-state citizens with respect to these rights.

b. Note that noncommercial rights (like recreational interests) are not protected.

Supreme Court of New Hampshire versus Piper (1985)

→ At issue was a New Hampshire law that prevented out-of-state residents from being admitted to the state bar.

→ The Supreme Court found that the state's attempt to restrict employment opportunities to out-of-state residents violated the Privileges and Immunities Clause and struck down the law.

Hicklin versus Orbeck (1978)

→ At issue was an Alaska statute that required Alaska residents to be preferred over nonresidents for all jobs on an Alaska oil pipeline.

→ The Supreme Court held that since access to employment is a right fundamental to national unity, the statute impaired the out-of-state citizen's rights under the Privileges and Immunities Clause, and the statute was struck down.

Toomer versus Witsell (1948)

→ At issue was a state law that charged nonresident fisherman significantly more than residents for a shrimp boat license.

The Supreme Court invalidated the law because it interfered with a nonresident's right to earn a living in a State other than his own.

Baldwin versus Montana Fish & Game Commission (1978)

→ The Supreme Court upheld a state licensing system that required nonresidents to pay a substantially higher fee than residents, in order to obtain an elk hunting permit.

→ The Court distinguished this case from commercial fishing license cases, because elk hunting is "recreational," rather than a commercial activity.

C. Note that in addition to the Privileges AND Immunities Clause of Article IV, there is also a similarly worded Privileges OR Immunities Clause in the **Fourteenth Amendment**.

1. Article IV Privileges and Immunities Clause — restricts states from denying certain rights that are *fundamental to national unity* — like the right to travel within each state.

2. Fourteenth Amendment Privileges or Immunities Clause — prevents states from denying certain rights that have to do with *national citizenship* — like the right to travel (within the United States) between states.

3. Regardless, note that today, both Privileges and Immunities Clauses in the Constitution are not commonly invoked, since the Equal Protection Clause, which we will discuss later in the outline, provides similar but broader protections.

► In this chapter, we discussed the **Privileges and Immunities Clause** of Article IV. We learned that the Privileges and Immunities Clause restricts states from discriminating against citizens of other states in regards to certain fundamental rights.

CHAPTER 24. CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS — STATE ACTION

For the remainder of this outline, we will be discussing the individual rights and liberties that are guaranteed by the Constitution. The most common of these rights, and those we will discuss in detail, include due process of law and equal protection of the law, and the First Amendment freedoms of expression and religion.

Before we do, however, note that there are limits as to when the Constitution applies in this context.

A. **The State Action Requirement**

1. The general rule is that the Constitution protects individual rights only when there has been government action.

2. There will be **state action** for every law, rule, and action made by the federal, or any state or local government.

a. This can include actions of government officials, public agencies, cities, public schools, and police.

3. However, there will be NO state action when a private party acts; and therefore, private conduct need not comply with the constitution.

a. Private parties include individual citizens as well as corporations.

Example — The Due Process Clause limits public schools when they discipline students, but does not apply to private schools.

Example — Under equal protection of the law, a state may not pass a law that discriminates based on race; but a private club, even one that has a liquor license from a state, can discriminate based on race.

B. **Exceptions** to the state action requirement

1. Under these exceptions, conduct of private parties WILL be treated as state action; and therefore, must comply with the Constitution.

2. Private conduct will be treated as state action in 2 general circumstances:

a. **Public functions doctrine** — if a *private party is performing a task that is traditionally and exclusively the function of the government*, this will usually be considered state action and the private party must comply with the Constitution.

1) Common examples of public functions include the operation of a company town, the electoral process, the operation of a park, and the operation of a prison.

2) By contrast, note that utility companies, shopping centers, health insurance companies, and nursing homes are generally NOT considered public functions because they are not "traditionally" operated by the government.

b. **State involvement doctrine** — if *government is so closely involved in the activities of a private party*, then the private party's conduct may constitute state action.

1) There are several different ways government and private parties can be so closely involved that the private conduct becomes state action:

a) If the government in any way **authorizes or encourages a private party's actions**, that will generally constitute state action.

(i) However, note that providing a *license* to a private party, merely *supplying money* to a private party, or merely *acquiescing* to a private party's actions — all generally will not be enough involvement by the government for there to be state action.

b) Any actions by the **judiciary** constitute state action.

(i) Courts cannot enforce unconstitutional contracts (like racially restrictive covenants)

(ii) Courts cannot allow litigants to use peremptory challenges to exclude jurors on racial or gender grounds.

c) If there is a **mutually beneficial relationship** between the government and a private party, the activities of the private party can be treated as state action.

(i) However, the relationship must be sufficiently close to where it can be found to be *symbiotic*.

Example — A city agency owns and runs a parking garage complex, and gives a 20-year lease to a privately-operated restaurant that refuses to serve African Americans.

→ In this case, because there is such a close involvement between the restaurant and the government, there is state action, and any individuals who are refused service based on their race can bring an equal protection claim.

Example — Let's instead assume that the city rents the parking garage to a different person or group every weekend, and charges the same rate to everyone.

→ If the city rents the parking garage one weekend to an organization that racially discriminates, the city's involvement would be so limited and independent of the discrimination that no state action will be found.

C. Note that **Congress has the power**, in limited circumstances, **to pass laws that apply constitutional norms to private conduct**.

1. Specifically, under the *Thirteenth Amendment* (which prohibits slavery and involuntary servitude), Congress can prevent private discrimination on the grounds that it is a badge or incident of slavery.

a. For instance, Congress can prohibit private citizens from racially discriminating when they sell their own houses.

2. Also, Congress can apply constitutional norms to private conduct pursuant to the Commerce Clause, as it did when it passed the Civil Rights Act of 1964.

► In this chapter, we began our discussion on the constitution's protections of individual rights. We learned that nearly all of the individual rights guaranteed by the Constitution protect only against *government action*. They do not protect an individual against acts by private parties.

Under the **state action requirement**, private conduct need not comply with the constitution unless the private party is performing a public function, or unless there is sufficiently close involvement between the government and the private party.

Once the state action requirement has been established, courts can then consider whether there has been an unconstitutional deprivation of an individual right. When addressing such issues, courts generally will use one of three standards of judicial review in their analysis, which we will discuss in the next chapter.

CHAPTER 25. LEVELS OF SCRUTINY

As we discuss the individual rights and liberties guaranteed by the Constitution, we must be aware of the different levels of scrutiny (standards of judicial review) that are used by courts when faced with such issues.

When there is a constitutional challenge to a law or other act of government, particularly in due process or equal protection claims, courts will apply one of three levels of judicial scrutiny:

A. **STRICT SCRUTINY**

1. The highest level of review applied by courts.

2. Under strict scrutiny, a law will be struck down unless it is necessary to achieve a compelling government purpose.

a. The government has the burden of proof.

3. In other words, in order for a law to survive strict scrutiny, the government interest must be *compelling*. And the law itself must be *necessary* in order to achieve the objective.

a. This means that if there are any less restrictive means of achieving the goal, the law will be struck down.

4. The strict scrutiny level of review is an extremely tough burden for the government to meet, and as such, most laws will be struck down when they are strictly scrutinized.

5. Strict scrutiny is applied for several types of cases:

a. When the government ***infringes upon a fundamental right***, and

b. When the government ***discriminates based on race*** *or* ***national origin***.

B. **INTERMEDIATE SCRUTINY**

1. The middle level of judicial review.

2. Under intermediate scrutiny, a law will be struck down unless it is substantially related to an important government purpose.

a. The government has the burden of proof.

3. Intermediate scrutiny is primarily used for ***equal protection claims when the government discriminates based on gender or based on illegitimacy***.

C. **RATIONAL BASIS REVIEW**

1. The lowest level of judicial scrutiny.

2. Under rational basis review, a law will be upheld as long as it is rationally related to a legitimate government purpose.

a. Under this test, it is the challenger, not the government, who has the burden of proof.

3. The rational basis test is very easy to satisfy — nearly every challenged law subject to rational basis review will be upheld.

4. The rational basis test applies to ***laws that burden non-fundamental or economic rights***, and also applies when the ***government discriminates against non-suspect classes***.

► In this chapter, we discussed the 3 levels of scrutiny used by courts addressing individual rights and liberties under the constitution.

(i) Under the highest level of review, **strict scrutiny**, a law will be struck down unless it is necessary to achieve a compelling government purpose.

(ii) Under **intermediate scrutiny**, a law will be stuck down unless it is substantially related to an important government purpose.

(iii) And under the minimal level of review, **rational basis review**, a law will be upheld as long as it is rationally related to a legitimate government purpose.

CHAPTER 26. DUE PROCESS OF LAW

Due process essentially means that government must operate within the law and provide fair procedures before depriving individuals of their basic constitutional rights to life, liberty, and property.

A. The Constitution guarantees due process of law in 2 different places:

1. The **Fourteenth Amendment** reads "no state shall deprive any person of life, liberty, or property, without due process of law."

a. The Fourteenth Amendment applies ONLY to *state and local governments*.

2. The **Fifth Amendment** reads "no person shall be deprived of life, liberty, or property without due process of law."

a. The Fifth Amendment applies ONLY to the *federal government*.

3. *** Although both due process clauses have been interpreted the same way, there is one thing to keep in mind.

a. Because the Fourteenth Amendment binds the states, while the Fifth Amendment binds the federal government, lawsuits that claim a *state* has violated due process must invoke the *Fourteenth Amendment*, and claims that the *federal government* has violated due process must invoke the *Fifth Amendment*.

4. Regardless, for every due process claim, there must be **state action**, which we discussed earlier.

a. The due process clauses protect only against action by government; they do not protect an individual from due process violations by private parties.

B. Note that one of the major functions of the Fourteenth Amendment's Due Process Clause is to **make the Bill of Rights applicable to the states**.

1. The Bill of Rights applies only to the federal government. However, the Due Process Clause incorporates nearly all of the protections within the Bill of Rights so that they apply to the States as well.

a. For instance, the First Amendment restricts only Congress from abridging the freedom of speech. But through its incorporation into the Fourteenth Amendment Due Process Clause, state and local governments are also restricted from abridging the freedom of speech.

2. *** Note that because there are several guarantees within the Bill of Rights that have not been applied to the states, the Supreme Court is said to have *selectively incorporated* the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

C. The constitutional guarantee of **due process** of law has been divided into 2 categories:

1. **Procedural due process** — refers to the procedures that the government must follow before it deprives a person of life, liberty, or property.

a. Such procedures include the right to adequate notice of a lawsuit, the right to a hearing, and the right to an attorney.

2. **Substantive due process** — restricts the government from regulating certain individual rights.

a. For instance, the right to contract and the right to practice a profession, to the right to marry, the right to procreate, and the right to purchase and use contraceptives.

3. *** So while *procedural due process* requires the government to follow fair procedures when carrying out the laws, *substantive due process* limits the actual subject matter or content of the laws.

► In this chapter, we discussed the **Due Process Clauses** of the Fourteenth Amendment and the Fifth Amendment. We learned that due process guarantees that no individual shall be deprived of life, liberty or property, without due process of law. We learned that the Due Process Clause of the Fourteenth Amendment selectively incorporates most of the protections within the bill of rights and applies them to the states. We also learned that due process guarantees procedural due process, which limits the manner in which laws are applied and enforced; and substantive due process, which limits the subject matter and content of laws.

CHAPTER 27. PROCEDURAL DUE PROCESS

Procedural due process guarantees that the government must follow fair procedures before depriving an individual of life, liberty or property. Such procedures help ensure that the laws are applied evenhandedly, so that individuals are not subjected to any arbitrary exercise of government power.

Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.

A. Before a court can determine what procedures are required in a given case, it must first be established that there has been a deprivation or a threatened deprivation of a person's **life, liberty or property**.

1. A deprivation of **life** occurs when government puts a person to death. Therefore, the death penalty requires procedural due process.

2. A deprivation of **liberty** occurs when government deprives a person of some particular right or freedom provided by the Constitution or a statute.

a. For instance, liberty interests may be violated by physical confinement, probation and parole, as well as restrictions on certain rights like the right to practice a profession and the right to raise one's family.

b. The important individual liberties will be discussed in the following chapters on substantive due process.

3. A deprivation of **property** occurs when a person has an entitlement and that entitlement is not fulfilled.

a. Aside from property interests in personal and real property, individuals also have property interests in entitlements that stem from contracts.

1) For instance, if a public school and a teacher enter into a contract, procedural due process requirements must be met in order for the school to terminate the teacher before the end of the contract term.

B. In order to hold the government liable for violating procedural due process, there must be **intentional** or at least **reckless action on behalf of the government**.

1. This means that mere negligence by the government will be insufficient to impose liability.

2. Furthermore, in *emergency situations*, the government will not be liable under due process unless the government's conduct can be said to shock the conscience.

3. There is also no violation of procedural due process when the government *fails to protect individuals from privately inflicted harms*, except when the government has created the danger in the first place, or the individual is in the government's custody.

C. Once there has been a deprivation or a threatened deprivation of life, liberty or property, the next step of the procedural due process analysis is to determine **what procedures are required**.

1. In general, the more important the individual right, the more process that must be afforded by the government.

a. For instance, no one can be deprived of their life without a criminal trial and a hearing on aggravating factors. However, suspension of a driver's license may occur without much process.

2. The Supreme Court, in the case ***Matthews versus Eldridge*** (1976), has developed a 3-part balancing test to determine what procedures are required for a particular case:

a. Courts will look at the **importance of the interest to the individual**.

1) As just stated, the more important the interest is to the individual, the more procedural protections will be required.

b. Courts will consider the **effectiveness** of the procedures used.

1) If it is found that additional procedures are likely to lead to better and more accurate findings of fact and reduce erroneous deprivations, then more procedural protections will be required.

c. Courts will look at the **interests of the government or the burdens on the government**.

1) Under this last part of the test, the focus is on efficiency and saving money.

Example — Billy, a student at a public high school, gets caught in a fist fight with a fellow student. As a result, the Principal immediately suspends Billy. Billy brings a due process claim against the school arguing that he should have been given notice and an opportunity to be heard.

→ Under the 1st part of the balancing test, the nature of Billy's interest, which is the right to an education, is an important interest. Under the 2nd part, giving notice and an opportunity to explain is likely to lead to additional facts not already known. And under the 3rd part, the burden to require the school to give notice and a hearing is minimal. Therefore, the balancing would most likely be in favor of Billy.

3. *** Note that **other procedural protection** (besides notice and hearing) may be required for certain types of deprivations.

a. For instance, due process may require the *right to counsel*, the *right to an impartial tribunal*, and the *right to confront and cross-examine witnesses*.

► In this chapter, we discussed the constitutional guarantee of **procedural due process**, which requires state and federal governments to provide certain procedures—usually some form of notice and a hearing—before depriving a person of life, liberty, or property. We learned that once a deprivation has occurred, a 3-part balancing test is generally applied to determine what procedures are required.

CHAPTER 28. SUBSTANTIVE DUE PROCESS AND NON-FUNDAMENTAL RIGHTS

The substantive part of the Due Process Clause derives mainly from the interpretation of the term "liberty." As such, substantive due process limits the power of the government to regulate certain individual liberty interests.

A. It is important to note that these liberty interests can be split into 2 categories:

1. **Fundamental rights**

a. Fundamental rights include rights that are related to an individual's privacy and personal autonomy, like the right to make decisions about personal matters.

2. **Non-fundamental rights**

a. Non- fundamental rights are generally economic rights.

1) For instance, the right to contract and the right to practice a profession.

B. When a law (or any state action) impairs a **non-fundamental right**, courts will apply a minimal level of review using the *rational basis test***.**

1. Under the **rational basis test**, a law will be upheld as long as it is rationally related to any legitimate government purpose.

a. Under the easy to satisfy rational basis test, nearly every economic regulation will be upheld under a due process challenge.

C. When a state acts pursuant to its *police power* (passes a law to protect the health, safety, or welfare of its citizens), this will always be considered a **legitimate state objective**.

1. Therefore, in addition to **economic regulations**, most **social welfare regulations** will also be upheld under the rational basis test.

Example — A state passes a law giving it the power to set rates for life insurance. An insurance company claims that the law interferes with its substantive due process right to charge customers what they want.

→ In this case, the court would hold that the statute does not violate the insurer's due process rights, because it is rationally related to the legitimate state objective of making insurance affordable to everyone.

Example — A state passes a law that requires all motorcycle passengers to wear helmets. A motorcyclist attacks the statute on the ground that it violates his substantive due process liberty interest in riding without a helmet.

→ In this case, since the statute was enacted for a legitimate state purpose, to reduce serious head injuries, the statute will be upheld.

Williamson versus Lee Optical (1955)

Facts — At issue was an Oklahoma law that prohibited opticians from fitting or duplicating lenses for eyeglasses. The effect of the law was that it required people who broke their glasses to go through the whole process of getting an eye exam and obtain a prescription before they could get replacement glasses. They could not just go to a business that made and sold glasses to get replacements. The Lee Optical Company challenged the law, arguing that it violated their Due Process rights.

Holding — In this case, since the Oklahoma law was an economic regulation, the Supreme Court applied the rational basis test and upheld the law. The court found that the law had a legitimate purpose in providing for the public welfare by encouraging more frequent eye examinations. And even though the law may have been "needless" and "wasteful," it did not violate any due process rights because it was rationally related to a legitimate state objective.

► In this chapter, we began discussing **substantive due process**. We learned that substantive due process claims that involve non-fundamental rights are subject to rational basis review. And therefore, nearly all economic and social welfare regulations will be upheld.

CHAPTER 29. THE TAKINGS CLAUSE

In addition to the constitutional guarantee of due process, the Takings Clause of the Fifth Amendment also protects economic rights, particularly property interests.

A. The **Takings Clause** of the Fifth Amendment states that "private property shall not be taken for public use without just compensation."

1. In other words, the government may take a person's property only if it does so for a **public use** and if it **pays just compensation**.

a. The power of the government to take private property and convert it into public use is often referred to as eminent domain.

2. Note that the Takings Clause of the Fifth Amendment *applies to the federal government*, and also applies to *state and local governments* by its incorporation into the Fourteenth Amendment.

3. Note also that private property under the Takings Clause most commonly refers to land, but it also includes all other forms of property, like personal property, fixtures, and stocks.

B. **Elements** of the Takings Clause that must be present in order for the government to exercise its power of eminent domain:

1. There must be a **TAKING**

a. There are several governmental actions that constitute a taking:

1) The most apparent occurs when the government **physically seizes property**.

a). For instance, converting private land into a highway or a park.

2) In addition, any **substantial physical invasion** of property may be considered a taking.

a) For instance, requiring that digital cable be laid across private property is a taking, and aircraft flights over private property that significantly interfere with the property owner's use may amount to a taking.

3) Aside from possessory acts, **government regulations** may also be considered a taking.

a) The general rule is that a governmental regulation is a taking if it leaves *no economically beneficial use* of the property. However, if a regulation merely *decreases* the economic value of property, it will not be considered a taking under the Fifth Amendment.

Example — In the case ***Lucas v. South Carolina Coastal Council*** (1992), a zoning law prohibited the plaintiff from building any permanent habitable structure on lots that he had recently purchased.

→ The Supreme Court found that the regulation amounted to a taking because it denied the owner of all economically viable use of his property.

Example — In the case ***Penn Central versus City of New York*** (1978), a landmark preservation law prevented the owner of grand central station from constructing a multi-story office building above it.

→ In this case, the Supreme Court held that the regulation was not a taking because it merely decreased the value of the property.

b) *** Note that if a regulation is *temporary*, it will probably not amount to a taking.

(i) For instance, if a state wants to prohibit the development of private land for three years so that the state can conduct an environmental study, the Supreme Court has held that such a temporary regulation does not constitute a taking.

2. Must be for **PUBLIC USE**

a. The government can take private property only if it is for public use.

b. Courts have interpreted the public use requirement very broadly.

1) Public use does not mean that the government must actually allow the public to use the property — all that is necessary is that the purpose behind the taking is in some conceivable way public in nature.

2) Note also that the government does not have to become the owner of the property for it to be a public use, the government may transfer the property to private parties.

c. While the common examples of public uses include roads, parks, public schools, hospitals, and railroads, courts have found that alleviating unemployment, stimulating the local economy and even preserving scenery also can be considered public uses.

Example — In the case ***Hawaii Housing Authority versus Midkiff*** (1984), there was a challenge to Hawaii legislation that took land from private landowners and redistributed the land to many in the population. The state discovered that half of the land in Hawaii was owned by only 72 private landowners, and it passed this law to remedy the land oligarchy structure.

→ In this case, the Supreme Court upheld the law and found that reducing the concentration of ownership in land was a legitimate public use.

Example — In the case ***Kelo versus the City of New London*** (2005), a city in Connecticut transferred private property to private developers for the purpose of building hotels, restaurants and office buildings.

→ In this case, the Supreme Court permitted the city to do so, holding that economic development and job creation are legitimate public uses.

3. **JUST COMPENSATION MUST BE PAID**

a. The general rule is that just compensation means that the government must pay **fair market value** for the property that was taken.

b. Note that if a taking is not an actual taking of land, but instead a *substantial physical invasion* (like the constant nuisance of airplanes flying overhead), then just compensation will be measured by the decrease in the fair market value.

► In this chapter, we discussed the **Taking Clause** in the Fifth Amendment of the Constitution. Under the Takings Clause, federal or state governments may take private property if it is for public use and if just compensation is paid.

CHAPTER 30. THE CONTRACTS CLAUSE

In addition to the constitutional guarantee of due process, the Contracts Clause in Article I, Section 10 of the Constitution also protects certain economic rights.

A. The **Contracts Clause**: "no state shall pass any law impairing the obligations of contracts."

1. The contracts clause essentially prevent retroactive state legislation that alters or modifies any substantive contractual rights.

2. Note that the Contracts Clause *applies only to state and local governments, not to the federal government*.

a. Therefore, the federal government may pass laws that impair contract obligations—as long as they do not violate due process.

3. *** Note that the Contracts Clause *restricts the government from regulating only contracts that have already been formed, not future contracts*.

a. This means that states cannot interfere with an existing contract, but they can set requirements for future contracts that have yet to be made.

B. The Contracts Clause limits state regulation of any and **all types** of existing contracts:

1. **Private contracts** — contracts between private parties.

a. States may interfere with existing private contracts if 3 elements are met:

1) The State *regulation must not substantially impair a contractual relationship*,

a) *Example* — the lowering the interest rates on existing loan agreements or home mortgages.

2) There must be a *significant and legitimate purpose* behind the regulation, and

3) The law must be *reasonable* and appropriate for its intended purpose.

*** Note that this 3-part test is similar to the rational basis test; therefore, most state regulations that rewrite private contracts will be upheld as long as they do not substantially impair contractual relationships.

2. **Public contracts** — the government is a party.

a. In contrast to private contracts, when a state modifies a public contract (and in doing so modifies its own contractual obligations), the judicial review will be more stringent.

1) In general, any state attempt to regulate a public contract will be struck down unless it meets a higher level of scrutiny.

C. **Exceptions** to the Contracts Clause:

1. Pursuant to their **police power**, states can interfere with contracts in *the interest of safety, health, morals and the general welfare*.

a. For instance, states may terminate contracts that cause pollution or contracts that fix prices.

2. States may alter contractual obligations when an **emergency**, like an economic crisis, warrants state action.

Example — In the case ***Home Building and Loan Association versus Blaisdell*** (1934), the supreme court allowed the state of Minnesota to temporarily restrict mortgage foreclosures, in order to combat deflation during the great depression.

► In this chapter, we discussed the **Contracts Clause** of the Constitution, which limits the ability of states to impair existing contractual obligations.

CHAPTER 31. SUBSTANTIVE DUE PROCESS AND FUNDAMENTAL RIGHTS

Substantive due process limits the power of the government to regulate certain individual liberty interests. And the liberty interests can be split into 2 categories: fundamental rights, and non-fundamental rights.

A. **Non-fundamental rights** — generally those that are economic in nature. Any law that impairs a non-fundamental right will be subject to rational basis review.

B. **Fundamental rights** — extremely important personal liberties that are related to an individual's privacy and personal autonomy.

1. The fundamental rights protected under substantive due process are often referred to as **privacy rights**.

a. Although the Constitution does not expressly mention a right to privacy, the various guarantees within the Bill of Rights establish certain privacy rights.

1) For instance, the First Amendment's freedom of religion protects the privacy of beliefs; the Third Amendment's prohibition on soldiers in homes protects privacy of the home; and the Fourth Amendment's restriction on unreasonable searches and seizures protects the privacy of the person and his possessions.

2) In addition, the Ninth Amendment states that there are other rights retained by the people besides those that are contained in the constitution.

b. Collectively, the guarantees within the Bill of Rights create a "*penumbra*" or *"zone" of privacy*.

1) This general right of privacy includes a broad range of unenumerated rights that have become part of the "liberty" protected under due process.

a) Such privacy rights have come to encompass an individual's right to make decisions about personal matters, like marriage, child-bearing, and child-rearing.

2. In addition to the privacy rights, **other rights** may be found to be fundamental for purposes of substantive due process.

a. For instance, many of the guarantees within the Bill of rights are fundamental rights, like the First Amendment's *freedom of speech* and *freedom of religion*. In addition, the *right to vote* and the *right to travel* are also considered fundamental rights.

3. When the government interferes with a fundamental right, that may trigger a due process challenge based on the deprivation of liberty. However, at the same time, other provisions in the Constitution may be violated as well, in particular, the **Equal Protection Clause**. We will discuss the Equal Protection Clause later in this outline

4. When a law, or any state action, *interferes with a fundamental right*, courts will apply the highest standard of review, **strict scrutiny**.

a. Under strict scrutiny, a law will be struck down unless the government can show that the law is necessary to further a compelling government interest.

b. Strict scrutiny is an extremely tough burden for the government to meet; and therefore, nearly every law that regulates a fundamental right will be struck down.

► In this chapter, we discussed **substantive due process protection of fundamental rights**. We learned that the fundamental rights include the privacy rights, but other rights are also fundamental, like the right to vote and the right to travel. We also learned that when a law burdens a fundamental right, the law will usually be struck down unless it passes the very demanding strict scrutiny standard.

CHAPTER 32. FUNDAMENTAL PRIVACY RIGHTS

A. Privacy rights that are fundamental liberty interests under the Due Process Clause:

1. **The right to marry**

a. The right to marry is a fundamental right; therefore, any law that interferes with an individual's right to marry must pass strict scrutiny.

Example — In the Supreme Court case, ***Zablocki versus Redhail*** (1978), there was a challenge to a state law that prevented people who owed child support from getting married. The court struck down the law because it restricted an individual's fundamental right to marry.

2. **The right to procreate**

a. The second fundamental privacy right is the right to procreate; therefore, any law that interferes with procreation will be subject to strict scrutiny.

Example — In the Supreme Court case, ***Skinner versus Oklahoma*** (1942), there was a challenge to a state law that allowed the state to sterilize a person who had been convicted three or more times of serious felony crimes. This law was struck down because it interfered with the right to procreate.

3. **The right to keep the family together**

a. The third fundamental privacy right is the right to keep the family together; therefore, any law that interferes with the sanctity of the family will be subject to strict scrutiny.

Example — In the Supreme Court case, ***Moore versus City of East Cleveland*** (1977), there was a challenge to a law that limited occupancy of a dwelling to members of a single family. This meant that extended family, like grandparents and cousins, could not live in a house together. This law was struck down because it interfered with the sanctity of the family.

*** Note, however, that in another case, the Court held that states may limit the number of unrelated individuals who may inhabit a dwelling because unrelated people have no fundamental right to live together.

4. **The right to custody of one's own children**

a. The fourth fundamental privacy right is the right to custody of one's children; therefore, any law that interferes with a parent's custody of a child will be subject to strict scrutiny.

1) For instance, states can't take away a child from a parent just because it thinks a foster home would be better for the child. However, if there is child abuse or neglect, the state's interest in protecting the child would be compelling, and custody rights may be terminated.

b. In rare cases, a parent's right to custody of their child may be considered to be non-fundamental when there is no relationship between the parent and the child.

1) For instance, the Supreme Court has held that states may deny a parent the right to block an adoption of their child, when the parent has not had custody of the child, has not married the other parent, and has not participated in the child's upbringing.

5. **The right of parents to raise their children**

a. The fifth fundamental privacy right is the right of parents to control the upbringing and education of their children; therefore, strict scrutiny is applied to laws that burden parental decisions about how to raise their children.

Example — In the Supreme Court case, ***Pierce versus Society of Sisters*** (1925), the Court held that states may not require parents to send their children to public schools because Parents have a fundamental right to determine how their children will be educated.

Example — In another Supreme Court case, ***Troxel versus Granville*** (2000), the Court held that states may not award visitation rights to grandparents over the objection of fit custodial parents, because parents have a fundamental interest in deciding who will spend time with their children.

6. **The right to contraceptives**.

a. The sixth fundamental privacy right is the right to purchase and use contraceptives or birth control. Therefore, any law that restrict access to contraceptives must meet strict scrutiny.

Example — In the landmark Supreme Court case, ***Griswold versus Connecticut*** (1965), there was a challenge to a law that restricted married persons from access to contraceptives. The Court struck down the law, and held that states may not restrict access to contraceptives because it violates the right to privacy.

► In this chapter, we discussed the **fundamental privacy rights** that are protected by the due process clause. We learned that the due process rights of privacy include the right to marry, the right to procreate, the right to keep family together, the right to custody of one's own children, the right of parents to raise their children, and the right to purchase and use birth control. Therefore, any law that interferes with any of these rights will be struck down unless it meets strict scrutiny.

CHAPTER 33. OTHER PRIVACY RIGHTS

In the previous chapter, we discussed several privacy rights that are protected as fundamental liberty interests under the due process clause.

In addition to these rights, there are other rights that are included in the general right to privacy; however, it is not clear whether some of these rights are fundamental, and which level of scrutiny is applied for each right. In this chapter, we will look at 3 specific privacy interests:

A. **The right to engage in adult private consensual sexual activity**

1. The right to privacy protects an individual to engage in adult private consensual sexual activity; however, this right has not been deemed to be fundamental.

Example — In the Supreme Court case, ***Lawrence versus Texas*** (2003), the state of Texas had passed a law outlawing two persons of the same sex to engage in certain intimate sexual conduct.

→ The Supreme Court found that the Texas law violated the Due Process Clause, holding that the right to liberty under due process gives two persons of the same sex the full right to engage in intimate sexual conduct without intervention by the government.

→ So while the Court prohibited states from denying individuals the right to engaging in private consensual same-sex activity, there is no set level of scrutiny for such right.

B. **The right to refuse medical treatment**

1. The right to privacy also protects an individual's right to refuse medical treatment. This may be referred to as the right to die. It is not clear whether this is a fundamental interest.

Example — In the Supreme Court case, ***Cruzan versus Director, Missouri Department of Health*** (1990), a woman was involved in an automobile accident which left her in a persistent vegetative state, and she was put on life support. After several weeks, the woman's parents attempted to terminate the life-support system, but the State refused to do so without clear and convincing evidence that the woman would have wanted the treatment to end.

→ In this case, the Supreme Court sided with the State. Although individuals enjoy the right to refuse medical treatment under the Due Process Clause, at the same time, states have an important interest in preserving life. Therefore, states may require clear and convincing evidence that a person wants medical treatment to be terminated before it is ended.

C. **The right to physician assisted suicide**

1. There is no fundamental right to commit suicide, or to assisted suicide. Therefore, laws that infringe upon this right will only be subject to rational basis review.

Example — In the Supreme Court case, ***Washington versus Glucksberg*** (1997), the Court upheld a Washington state law which criminalized physician assisted suicides.

→ The Court held that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause. Therefore, since states have a legitimate interest in preserving human life, the law met rational basis review, and it did not violate due process.

► In this chapter, we discussed the due process liberty interests concerning the right to engage in private consensual same sex activity and the right to refuse medical treatment. We also learned that there is no due process right to physician assisted suicide.

CHAPTER 34. ABORTION UNDER THE DUE PROCESS CLAUSE

Substantive due process has been expanded to grant the right to an abortion; however, with certain limitations. Today, abortion is not a fundamental right, but it is afforded more significant protection than are non-fundamental rights.

A. Under the Due Process Clause, any state regulation of abortion will be subject to the **undue burden test**.

1. This basically means that state laws cannot unduly burden a women's right to an abortion.

2. The undue burden test was adopted by the Supreme Court in the second of two controversial decisions that dealt with a woman's right to an abortion. Those cases are *Roe versus Wade* and *Planned Parenthood versus Casey*.

B. ***Roe versus Wade*** (1973)

1. In *Roe*, the Supreme Court established abortion as a fundamental right, and held that that women have a right to choose to have an abortion during the first two trimesters of a pregnancy.

2. The Court based its decision on the constitutional right to privacy under the Due Process Clause, which the court found is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

C. ***Planned Parenthood versus Casey*** (1992)

1. In *Casey*, the court held that the right to an abortion is not a fundamental right. As such, the court adopted the **undue burden test** for state regulation of abortions.

2. Under the **undue burden test**, states may regulate abortions prior to viability, so long as they do not place an undue burden on the woman.

a. And once the fetus is **viable** — meaning that it has a realistic chance of surviving outside of the womb — states may then prohibit abortions, except when necessary to protect the woman's life or her health.

D. **Examples** of state regulations on abortion that have passed and failed the undue burden test:

1. State regulations that require a *24 hour waiting period* for an abortion do not place an undue burden on women.

2. States may require that abortions be performed by *licensed physicians*.

3. States may prohibit *partial birth abortions*.

4. States may require *minors must notify or get consent* from a parent before an abortion.

a. However, note that if a state requires *parental* consent, it must give the minor an opportunity to go before a judge and get approval from the judge to get an abortion.

b. Note that state regulations that require a woman to notify or get consent from her *spouse* before getting an abortion have been struck down because this places an undue burden on the woman.

► In this chapter, we discussed the **right to abortion**. We learned that any state law that interferes with a woman's right to abortion will be subject to the **undue burden test**. Under this test, states may restrict the availability of abortions prior to viability, so long as they do not place an undue burden on the woman's right to choose.

CHAPTER 35. EQUAL PROTECTION OF THE LAW

The Equal Protection Clause of the Fourteenth Amendment reads "no state shall deny to any person within its jurisdiction the equal protection of the laws."

A. By its terms, the Equal Protection Clause **applies only to the states**.

1. However, through the *Due Process Clause of the Fifth Amendment,* the Equal Protection Clause ALSO applies to the federal government.

2. Therefore, equal protection analysis for a claim against the federal government is the same as that for a claim against a state.

B. For every equal protection claim, there must be **state action**.

1. Therefore, the equal protection clause applies only to laws or other government action; it does not protect against action by private parties.

C. Equal protection of the law guarantees that all people who are similarly situated must be treated similarly by the government. In other words, **the government may not unreasonably discriminate against classes of people**.

1. Courts will find that the government has made a **classification** in 2 circumstances:

1. When the classification is clearly written on the face of a law or regulation. This is known as **facial discrimination**, and will always implicate the Equal Protection Clause.

2. A classification will also be found for a law that is **neutral on its face**, but the law as applied has both a **discriminatory intent** and a **discriminatory impact**.

Example — In the Supreme Court case, ***Batson versus Kentucky*** (1986), the Court held that a prosecutor's use of *peremptory challenges* in a criminal case—the dismissal of jurors without reason—may not be used to exclude jurors based solely on their race.

→ So although state laws that grant peremptory challenges do not create classifications on their face, when they are applied for discriminatory reasons (based on race, or gender) there is a discriminatory intent and impact, and most likely an equal protection violation.

D. Once it has been found that the government has made a classification, the next step in an equal protection analysis it to determine which **type of classification** has been made. There are 3 different categories of classifications:

1. **Suspect classification**

a. Classifications can be made of suspect classes. There are only 3 suspect classes generally recognized by the Supreme Court:

1) They are **race**, **national origin**, and, in some cases, **alienage**.

a) *** Note that these classes are suspect because they have historically been discriminated against and they possess certain immutable characteristics that are seldom connected to the merits of the individual.

b. When a law discriminates against a suspect classification, the law will be subject to the **strict scrutiny** standard of review and will usually be struck down.

2. **Quasi-suspect classification**

a. There are 2 main types of quasi suspect classes:

1) They are based on **gender** and **illegitimate born children**

b. Laws which discriminate based on such quasi suspect classifications will be subject to **intermediate scrutiny**.

1) Usually a quasi-suspect classification will fail this mid-level review.

3. **Non-suspect classification**

a. Any classifications other than those under suspect and quasi suspect classes fall into this category.

1) They include classifications based on **age**, **disability**, and **poverty**.

b. Laws that discriminate based on non-suspect classifications will be subject to the mere **rational basis** standard of review (they will generally be upheld).

E. We have learned that the equal protection clause applies when the government makes a classification and discriminates against the class. But the Equal Protection Clause will ALSO apply in one more situation. That is when the government makes a classification and **burdens a fundamental right** of the people in the class.

1. When the government burdens a **fundamental right** of people in a certain class, **strict scrutiny** will apply, just as it applies to laws that discriminate against suspect classes.

a. Recall that strict scrutiny also applies under the Due Process Clause, when the government interferes with a fundamental right.

2. Note that, while the fundamental rights protected under the Equal Protection Clause are similar to those that are protected under the Due Process Clause, there is one important **difference** between the applications of each clause:

a. If a law denies a fundamental right to a *particular group*, equal protection applies.

b. But if a law denies a right *to everyone*, and there is no classification, then due process will apply.

c. *** Note also that certain rights are particular to equal protection and usually decided under equal protection grounds — like the right to vote and the right to travel.

► In this chapter, we discussed the **Equal Protection Clause** of the Fourteenth Amendment. We learned that for equal protection to apply, the government must *intentionally* make a classification.

(i) When the govt classifies based on a suspect classification (like race or national origin), or when the govt burdens a fundamental right of any class of people, *strict scrutiny* is applied.

(ii) For quasi suspect classifications (gender and illegitimacy), *intermediate scrutiny* applies.

(iii) And for all other classifications, *rational basis* is applied.

CHAPTER 36. SUSPECT CLASSIFICATIONS

A. The Supreme Court recognizes **race** and **national origin** as suspect classes; and in most cases, **alienage** is a suspect class as well.

1. Under equal protection, any intentional government action that discriminates against a suspect class will be subject to **strict scrutiny**.

2. Note that **national origin discrimination** is discrimination against people who are citizens of the United States, but who originally came from another country or whose ancestors came from another country.

a. This is distinguishable from **alienage discrimination**, which is discrimination against people who are not United States citizens. Since alienage is a unique category under equal protection, we will discuss alienage in the next chapter.

B. Once the Court decides that a suspect classification is involved, and that strict scrutiny applies, the government's classification scheme will *almost always* violate the Equal Protection Clause.

1. Let's look at some cases where a suspect class has been intentionally discriminated against in violation of equal protection:

a. The clearest example of a classification involving a suspect class is *segregation*.

Example — In the landmark case ***Brown versus Board of Education*** (1954), the Supreme Court declared that states cannot establish "separate but equal" schools for black and white students. The Court held that intentional government segregation based on race is a violation of the Equal Protection Clause.

b. The Fourteenth Amendment Equal Protection Clause has also been applied in other contexts (like *custody*).

Example — In the Supreme Court case, ***Palmore versus Sidoti*** (1984), Anthony and Linda Sidoti, both Caucasians, got divorced and Linda was awarded custody of their daughter. Afterwards, Linda began cohabiting with an African American man. In response, Anthony sought custody, and the court transferred custody to him, on the grounds that the child will be socially stigmatized if she grows up in a racially mixed household.

→ In this case, the custody decision did not survive strict scrutiny under the equal protection clause. The Court held that state officials may not differentiate based on race in child custody and adoption proceedings.

C. **Affirmative Action**

1. Since strict scrutiny review is so hard to overcome, any suspect classification scheme by the government will almost always violate the Equal Protection Clause. However, in a few types of cases, the Supreme Court has found that the government MAY discriminate against a suspect class. This has occurred mainly in cases that challenge race conscious affirmative action plans.

2. **Affirmative action** is essentially government action that attempts to help racial or ethnic minorities by giving them some sort of preference.

a. According to the Supreme Court, any laws that impose affirmative action are still subject to the same strict scrutiny standard as laws that *disadvantage* minority groups.

b. However, the court has found that *diversity in a university's student body qualifies as a compelling governmental interest*.

1) So as long as an affirmative action plan is found to be necessary to help achieve a diverse student body, the plan will be upheld under strict scrutiny.

Example — If a public university evaluates each applicant's entire file, and weighs many variables (including the applicant's race), this form of affirmative action has been found to be constitutional. The interest in a diverse student body is a compelling governmental objective, and an approach that relies on individualized evaluation of each applicant is narrowly tailored to achieve that objective. (*see Grutter v. Bollinger* (2003))

Example — However, if a public university implements an affirmative action plan where they award certain points to applicants for various attributes, including race—and the result is that virtually every minimally-qualified black or Hispanic applicant is admitted, whereas many well-qualified non-minority applicants are rejected—then this form of affirmative action violates equal protection because such a mechanical scheme that does not evaluate applicants individually is not narrowly tailored to the achievement of the compelling interest in student-body diversity. (*see Gratz v. Bollinger* (2003))

D. Lastly in this chapter, let's discuss one more Supreme Court decision that allowed the government to discriminate against a suspect class based on **national origin**.

Korematsu versus United States (1944)

Facts — The federal government ordered Japanese Americans into internment camps during World War II regardless of citizenship. Korematsu, an American citizen of Japanese descent, refused to comply, and brought an equal protection challenge.

Holding — The Supreme Court sided with the government, and held that national security is a compelling government interest, and the need to protect against espionage in an emergency situation outweighed Korematsu's rights.

*** Note that this case has essentially been overruled. Today this course of government action would probably not be found to be constitutional under the Equal Protection Clause because it could not survive strict scrutiny. Although national security is a compelling governmental objective, placing individuals in internment camps based on their national origin would not be found to be "necessary", because less discriminatory alternatives—like frequent document inspections and/or loyalty oaths—would be almost as effective.

► In this chapter, we discussed suspect classes under the **Equal Protection Clause**. We learned that if government discriminates against a class based on race or national origin, as well as alienage, that will be a denial of equal protection unless strict scrutiny can be met.

CHAPTER 37. ALIENAGE

Alienage discrimination is discrimination against **aliens** — people who are not US citizens.

Alienage is a unique category under the Equal Protection Clause, because different types of alienage classifications made by the government may be subject to different standards of review.

A. In most cases, *laws that discriminate against aliens* will be subject to **strict scrutiny**, and therefore, will usually be struck down.

Example — States cannot deny welfare benefits to aliens, states cannot prevent resident aliens from practicing law, and cannot prevent them from receiving financial aid.

B. Discrimination against aliens usually triggers strict scrutiny and will be struck down; however, there is 1 important **exception** to this rule:

1. If a state discriminates against aliens, but does so in a way that relates to **self-government and the democratic process**, then **rational basis** review applies and these types of classifications will be upheld.

Example — States may prevent aliens from voting, serving on juries, becoming police officers, public school teachers, and even probation officers.

2. States cannot discriminate against aliens with respect to every type of government job.

a. For most *low-level government jobs* (like clerical work or sanitation), strict scrutiny applies and states cannot prevent resident aliens from access to such jobs.

C. When the **federal government** discriminates against aliens, rather than **state governments**, then only *rational basis* scrutiny will apply.

1. The reason for this distinction is because the United States Congress has the power to regulate *immigration*. Therefore, federal laws that discriminates against non-citizens will usually be upheld.

D. Up to now, we have been discussing the equal protection rules that apply to resident or documented aliens. However, for **undocumented aliens** (who are in the country illegally) the rules are different.

1. Specifically, any government action that discriminates against *undocumented aliens* will be subject only to **rational basis review**.

Example — Under this test, undocumented immigrants may be denied access to most government services, like Medicaid and social security; however, they cannot be denied access to necessary services, like emergency medical care and immunizations.

2. *** Note that a special rule has been established for **children of undocumented aliens**.

a. If a state law discriminates against *undocumented alien children*, then the law will be subject to **intermediate scrutiny**, and will probably be struck down.

Example — In the Supreme Court case, ***Plyler versus Doe*** (1982), there was a challenge to a Texas law that allowed the state to withhold funds from school districts that were educating children of illegal aliens. The Court found that the law violated the EP Clause because it denied free public education to children of illegal aliens.

► In this chapter, we discussed the equal protection rules for discrimination against **aliens**. We learned that, most often, state laws that discriminate against aliens must meet strict scrutiny. However, if an alienage classification is related to self-government and the democratic process, or if Congress is regulating aliens, then rational basis review applies. We also learned that states cannot deny free public education to children of illegal aliens.

CHAPTER 38. QUASI-SUSPECT CLASSIFICATIONS

A. The Supreme Court recognizes **gender** and **illegitimacy** as quasi-suspect classes.

1. Under the Equal Protection Clause, if the government intentionally discriminates against either quasi-suspect class, **intermediate scrutiny** applies.

a. Recall that a law will be struck down under intermediate scrutiny, unless the government can show that it's pursuing an important objective, and that its classification scheme is substantially related to that objective.

B. **Gender Discrimination** — discrimination against either women or men.

Example — In the Supreme Court case, ***Craig versus Boren*** (1976), Oklahoma passed a law that prohibited males under the age of 21 from purchasing low alcohol beer, but allowed women under the age of 21 to purchase the same beer.

→ In this case, the Court found that the law did not pass intermediate scrutiny because there was not a substantial enough relationship between the law and the important objective of maintaining traffic safety. Thus, the law was struck down as a violation of the equal protection clause.

Example — In another Supreme Court case, ***United States versus Virginia*** (1996), the Court struck down a Virginia law policy that admitted only males to its public university, the Virginia Military Institute.

→ The Court found that the state failed to show an "exceedingly persuasive justification" for its gender based discrimination, and held that women may not be deprived of an opportunity that is available only for men.

C. *** Note that although most government discrimination against men or women will be invalid under the Equal Protection Clause, certain laws have been upheld.

Example — *Statutory rape laws* that discriminate against men, as well as *all-male drafts*, have been found to be valid.

D. **Illegitimacy Discrimination** — discrimination against children who are born out of wedlock.

1. Under the equal protection clause, any *classifications that disadvantage children who are born out of wedlock* will be subject to **intermediate scrutiny**, and will usually be struck down.

Example — States cannot pass laws that prevent illegitimate children from inheriting from their fathers' estates or from bringing wrongful death action on behalf of parent.

→ Instead, states must give illegitimate children a reasonable opportunity to obtain a judicial declaration of paternity, and once they obtain such a declaration, they must be treated equivalently to legitimate born children.

► In this chapter, we discussed the equal protection rules for discrimination against the **quasi-suspect** classes of men or women, and illegitimate children. We learned that any laws that discriminate based on gender or illegitimacy will be subject to intermediate scrutiny, and will usually be struck down.

CHAPTER 39. NON-SUSPECT CLASSIFICATIONS

A. Any classifications other than suspect and quasi-suspect classes are considered **non-suspect classifications**.

1. These include classifications based on age, disability, poverty, political affiliation, sexual orientation, and having been convicted of a crime.

2. In addition, most economic and social-welfare legislation that discriminates against a class of people will also fall into this category.

B. Under the Equal Protection Clause, laws that discriminates against non-suspect classifications are subject only to **rational basis review**.

1. Under this test, non-suspect classifications will be upheld as long as they are rationally related to a legitimate governmental purpose.

a. Nearly every law subject to rational basis test will be upheld.

C. *Example* — Assume that a state requires that all police officers must retire by the age of 50, so that the police force stays physically fit. Because age is non-suspect classification, this requirement would pass rational basis review.

D. *Example* — A city wants to crack down on congestions in its streets, and passes a law that bans food vendors from operating carts on city streets. However, the law gives an exemption to anyone who has been operating a food cart for at least 6 years.

→ Because this regulation makes a classification (it discriminates against vendors who have been selling for only 6 years or less, while benefiting longer working vendors) the Equal Protection Clause applies. This economic regulation, however, will be upheld under rational basis review because it pursues a legitimate government objective—it alleviates traffic congestion on city streets—and it is not irrational, since a partial ban would nonetheless improve traffic problems.

E. Note that *sexual orientation* is considered to be a non-suspect class for purposes of equal protection.

1. Therefore, any classifications made by the government that are based on sexual orientation are generally subject to rational basis review. However, note that there seems to be a trend among courts to apply heightened scrutiny to such laws that discriminate against people based on their sexual orientation.

► In this chapter, we discussed **non-suspect classifications** under the Equal Protection Clause. We learned that any law that discriminates against a non-suspect class will be upheld as long as it can meet rational basis review.

CHAPTER 40. FUNDAMENTAL RIGHTS UNDER THE EQUAL PROTECTION CLAUSE

A. Whenever the government makes a classification, and burdens a fundamental right of the people in the class, the classification will violate the Equal Protection Clause unless it meets strict scrutiny.

1. The **fundamental rights** protected under the Equal Protection Clause are similar to those protected under the Due Process Clause.

a. They include the *privacy rights*, the *right to vote*, the *right to interstate travel*, and the *first amendment rights*.

2. Recall that if a fundamental right is denied to everyone, it is a substantive due process problem. But if a fundamental right is denied only to some individuals, it is an equal protection problem. Regardless, the applicable standard of review in either case is **strict scrutiny**.

a. For a law to pass strict scrutiny review, the government must show that the law is necessary to achieve a compelling government purpose. Most laws will be struck down under this high standard of review.

B. Certain fundamental rights are particular to equal protection, like the *right to vote* and the *right to travel*.

1. **The right to vote** is fundamental.

a. Therefore, any classification that burdens the right to vote will be unconstitutional unless strict scrutiny is met.

b. *Examples*

1) States CANNOT require that voters pay *poll taxes*.

2) States CANNOT require that voters own *property* in order to vote.

3) States MAY NOT require that a voter *reside* in the state for an unreasonable time before Election Day to vote.

a) 1-year residency requirements to vote are invalid, but 30-day residency requirements are reasonable.

4) States CAN deny voting rights to convicted felons.

5) States CAN require voters to register party affiliation 30 days before election in order to vote in a primary election.

c. Note that the right to vote protects the *one person, one vote* principle.

1) This means that states cannot dilute votes and therefore, must create election districts that are about equal in population.

2) In addition, when drawing boundaries of voting districts, government cannot manipulate the boundaries so as to favor one party or class. This is known as *gerrymandering*, and it is unconstitutional unless strict scrutiny is met.

2. The **right to interstate travel** is also a fundamental right that is frequently litigated under the Equal Protection Clause.

a. Therefore, any laws that burden travel among states or prevent people from moving into a state will be invalid unless they pass strict scrutiny.

b. Note, however, that there is no fundamental right to **international travel**.

1) So govt limitations on foreign travel need only meet rational basis review.

c. The fundamental right to interstate travel usually becomes an issue when states impose **durational residency requirements**.

1) This occurs when a state requires a person to live in its jurisdiction for a certain amount of time before receiving a certain benefit.

2) Most durational residency requirements will be invalid under strict scrutiny, but some have been found to be constitutional:

a) A state cannot require a person to live in its jurisdiction for 1 year in order to receive welfare benefits or state subsidized medical care, or to vote in the state.

b) However, states may require a 30-day residency to vote in the state. And they may require a 1-year residency requirement to get divorced in the state.

3. **Access to the courts** is usually considered a fundamental right.

a. This usually comes up when a state imposes a fee relating to a criminal case that the rich can pay but the poor cannot.

1) Based on the right to access to courts, for criminal cases, states must provide an indigent with free counsel, and they cannot charge an indigent for his trial transcript.

4. The **right to education** is not generally considered a fundamental right. Therefore, most laws that infringe on this right need only meet rational basis review.

Example — In the Supreme Court case, ***San Antonio School District versus Rodriguez*** (1973), the Court held that states may distribute money to public school districts in a way that treats different districts differently.

→ Specifically, states can distribute money to school districts based on property taxes of the district. Although the effect of such a policy will be that poor school districts will receive less money than wealthier school districts, such a policy does not violate the Equal Protection Clause because the right to an education is not a fundamental right and the policy will pass rational basis review.

► In this chapter, we discussed **fundamental rights under the Equal Protection Clause**. And we learned that whenever a classification burdens a fundamental right—like the right to vote or the right to interstate travel—the classification will be subject to strict scrutiny.

CHAPTER 41. THE FIRST AMENDMENT — FREEDOM OF EXPRESSION

A. The **First Amendment** reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

1. The First Amendment protects several distinct fundamental rights from government interference. The right to freedom of **expression**, of **association**, and of **religion**.

2. The freedoms contained within the First Amendment, by its express terms, apply only to Congress. However, the Supreme Court has interpreted the amendment as applying to the entire **federal government**. Furthermore, the First Amendment applies to the **states** as well through the Due Process Clause of the fourteenth Amendment.

3. Note that the first step in any First Amendment analysis must be to ask whether there has been **state action**.

a. As with the Due Process and Equal Protection Clauses, the First Amendment protects only against government or state action. If a private party interferes with an individual's freedom of speech or religion and there is no state action, First Amendment protections will not apply.

4. In this chapter, we will begin our discussion of the First Amendment with the freedom of expression. Afterwards, we will discuss the freedom of association and freedom of religion.

B. **Freedom of Expression**

1. There are several First Amendment rights which may be grouped under the category of freedom of expression:

a. Freedom of speech, of the press, of assembly, and of petition.

2. The right to freedom of expression allows individuals to express themselves without interference by the government.

a. The concept of **speech** encompasses essentially any form of expression or communication:

1) It includes verbal speech, writing, music, the visual arts, other symbolic conduct, as well as commercial advertisements.

2) *** As we will discuss over the next several chapters, it is important to distinguish between the different types and categories of speech because each is granted different levels of protection under the First Amendment.

C. When the government attempts to regulate any type of speech—regardless of the category of speech involved—there are **2 limitations** which are always imposed:

(i) Laws cannot be vague, and
(ii) Laws cannot be overbroad.

*** If a government regulation on speech is either vague or overbroad, the law will be invalidated.

1. A regulation on speech is unconstitutionally **vague** if a reasonable person cannot tell what speech or conduct is prohibited and what is allowed.

Example — A statute is passed that makes it illegal for a person to stand on the sidewalk and be annoying to people passing by.

→ Because the wording of this statute would leave a reasonable person unsure about what conduct is prohibited, it would be struck down under the First Amendment for being unconstitutionally vague.

2. A regulation on speech is unconstitutionally **overbroad** when it regulates substantially more speech than the Constitution allows.

Example — The statute from our previous example (that made it illegal to be annoying) could be invalidated because it is overbroad, as well as for being vague.

→ The statute is unconstitutionally overbroad because it forbids a substantial amount of speech that—while it may be considered to be annoying—is nonetheless protected speech.

D. Once it has been determined that a law regulating expression is neither unconstitutionally vague nor overbroad, the next step in a First Amendment analysis is to determine whether the law is **content based** or whether it is **content neutral**.

*** This distinction is important because different standards of review are used for regulations within each category.

1. **Content-based regulations** forbid communication of a *specific idea* or *message*.

a. Any government regulation that is content-based will generally be subject to strict scrutiny, and will be struck down.

2. **Content-neutral regulations** on speech merely limit *conduct* that is associated with speech — such as the time of the speech, the sound level, and the place.

a. Content-neutral regulations on speech (which are commonly called *time, place and manner restrictions*) must pass only intermediate scrutiny, and therefore are more likely to be upheld than content-based restrictions.

► In this chapter, we discussed the First Amendment and its right to **freedom of expression**. We learned that government regulations of expression are unconstitutional if they are *vague* or *overbroad*. We also learned that regulations on expression will either be *content based*, which are generally subject to strict scrutiny, or *content neutral*, which are generally subject to intermediate scrutiny.

CHAPTER 42. CONTENT-BASED RESTRICTIONS AND UNPROTECTED SPEECH

A content-based restriction forbids communication of a specific idea, and such a regulation will be subject to strict scrutiny under the First Amendment.

A. There are 2 ways to find that a law is **content based**:

1. If it forbids discussion of a particular *subject matter* or *topic*.

Example — A law that prohibits displaying any signs near an abortion clinic—whether they are for or against abortion—limits the freedom of expression on the topic of abortion, and will be subject to strict scrutiny.

2. It forbids the expression of a particular *viewpoint*.

Example — A law that prohibits only antiwar protesting limits the expression of a particular viewpoint—that being opposition to the war. This is a content-based restriction based on one's viewpoint, and it will be struck down.

B. For any content-based restriction on speech to be upheld, it must meet **strict scrutiny**.

1. This means that the law must be necessary, or narrowly tailored, to achieve a compelling government interest.

a. Most government speech regulations that are content based are presumed to be unconstitutional under this test.

b. However, there are certain categories of speech that the government has a *compelling* interest in regulating. Therefore, speech in these categories are less protected or completely unprotected by the First Amendment:

C. The unprotected or less protected categories of speech include:

(i) Incitement of illegal activity,
(ii) Fighting words,
(iii) Obscenity,
(iv) Defamation, and
(v) Commercial speech.

*** If speech falls into one of these pre-defined unprotected categories, then the government can basically ban that expression completely (based on its content) without any interference at all from the First Amendment.

1. **Incitement of illegal activity**

a. This basically means that the government may ban speech that advocates crime or the use of force. (For instance, the government may outlaw speech that is intended to incite a riot.)

b. In order for the government to regulate speech that incites illegal activity, 2 requirements must be met:

1. It must be shown that *imminent illegal conduct is likely*, and
2. It must be shown that the speaker *intended* to cause the illegal activity.

2. **Fighting words**

a. Fighting words are words which are likely to make the person to whom they are addressed commit an act of violence, and probably against the speaker.

b. The fighting words doctrine is very limited; and as a practical matter, most fighting words laws will be invalid for being overly broad and unconstitutionally vague.

3. **Obscenity**

a. In the Supreme Court case, ***Miller versus California*** (1973), the Court laid out a 3-part test to determine whether material is considered **obscene**:

1) The material must appeal to the *prurient interest*,
2) It must be *patently offensive*, and
3) It must *lack any serious literary, artistic, political or scientific value*.

b. The body of law surrounding obscenity is complex:

1) States MAY prohibit the sale and distribution of obscene materials. However, states CANNOT criminalize the private possession of obscene material in one's own home.

2) States MAY use zoning ordinances to regulate the number or location of adult bookstores and movie theaters.

3) In regards to child pornography, this material may be completely banned, even if it's not obscene.

a) Therefore, while states cannot prohibit private possession of obscene material, they may outlaw private possession of child pornography.

b) Note that to be child pornography, actual children must be used in the production of the material.

4. **Defamation**

a. Defamation is any false statement, whether written or oral, that injures one's reputation.

b. The First Amendment applies to defamatory speech in that it limits the extent to which a plaintiff may recover tort damages for defamation.

c. Although we will not discuss defamation in detail, note the general rule, which is as follows:

A public figure cannot recover for defamation unless it is shown that the statement made was *false*, and the defendant acted with *actual malice* (which means that the defendant knew the statement was false or acted with a reckless disregard of whether the statement was true or false).

5. **Commercial Speech**

a. Commercial speech — speech that advertises a product or proposes a commercial transaction.

b. As a general rule, commercial speech is protected if it is *truthful*.

1) Basically any regulation that restricts truthful commercial speech will be subject to intermediate review.

a) As a result, the Court has struck down state attempts to regulate the advertising of abortion, contraceptives, and drugs and alcohol.

b) However, certain restrictions on truthful commercial speech may be upheld, especially when there is a risk of deception.

(i) For instance, states may prohibit attorneys from in-person solicitation of clients for profit.

c. On the other hand, commercial speech that is *false* or *misleading*, or proposes *illegal activity*, is not protected by the First Amendment and may be banned by the government.

► In this chapter, we discussed **content-based restrictions** on speech under the First Amendment. We learned that any attempt by government to restrict speech because of the content of the message will be strictly scrutinized and almost certainly struck down. We also learned about the categories of speech that are unprotected or less protected under the First Amendment.

CHAPTER 43. CONTENT-NEUTRAL TIME PLACE AND MANNER RESTRICTIONS ON SPEECH

Unlike content-based restrictions on speech (which prohibit speech of a certain topic), content-neutral restrictions limit the **conduct** that is associated with speech — like the time that speech can occur, the places that it can occur, and the manner in which it may occur.

A. In general, content-neutral time place and manner restrictions on speech will be upheld as long as they pass **intermediate scrutiny**.

1. However, this test will vary, and different levels of review are applied to such restrictions depending on the *place* or *forum* in which they apply.

B. There are 3 different **forums**:

(i) Public forum,
(ii) Limited public forum, and
(iii) Nonpublic forum.

1. **Public forum**

a. Public properties that have historically been open to speech related activities.

1) Parks and most sidewalks and streets are common examples of public forums.

b. In a public forum, a time, place and manner restriction of speech has to pass a 3-part test that is similar to middle level review:

1) It must be *content-neutral*,
2) It must be *narrowly tailored* to serve a *significant governmental interest*, and
3) It must leave open *alternative channels of communication*.

c. Under this test, Courts have held that the government CAN:

1) Limit the use of sound amplification devices (like loudspeakers on trucks).

2) Prohibit making disturbing noises near schools.

3) Create buffer zones around abortion clinics.

d. However, the government CANNOT prohibit the distribution of leaflets, literature, or handbills on the streets.

1) Even if the government is concerned about littering (which is an important government objective), banning the distribution of leaflets is not narrowly tailored because the government can enact a direct ban on littering.

e. In addition, note that *permit fee requirements*—like for parades or demonstrations—will be unconstitutional when city officials have the discretion in setting the amount of the fee.

2. **Limited public forum** (also known as a designated public forum)

a. Public property that has not traditionally open to speech, but which the government has voluntarily opened up to speech

1) Public school rooms, auditoriums, or other facilities that the government opens up for after school use by groups are common limited public forums.

b. The same rules apply to government restrictions on speech in limited public forums as for public forums.

Example — If the government opens up a public school for use by groups, it could not exclude religious groups from using the school.

3. **Nonpublic forum**

a. Nonpublic forums are public properties that have been closed off to speech by the government.

b. The government can regulate speech related activities in a nonpublic forum as long as 2 elements are met:

1) The regulation must be *rationally related* to some legitimate government objective, and
2) It must be *viewpoint neutral*.

c. Examples of nonpublic forums include governmental office buildings, military bases, jails, the insides of courthouses, certain sidewalks like those outside post offices, and airport terminals.

Example — The government may ban face-to-face solicitation in an airport terminal, because such a ban is rationally related to the legitimate governmental objective of reducing congestion and preventing fraud.

C. Note that there is no First Amendment right of access to **private property** for speech purposes.

1. Therefore, in *shopping centers* and *malls*, a person does not have a first amendment right to speak.

► In this chapter, we discussed **content-neutral regulations** of speech that restrict the time, place, and manner in which speech can occur. We learned that, in general, any restriction on the time, place or manner of speech will have to be narrowly tailored to a significant governmental objective and will have to leave open alternative channels. We also learned that the govt's power to regulate conduct associated with speech depends on whether the forum is a public forum, a limited public forum, or a nonpublic forum.

CHAPTER 44. SYMBOLIC SPEECH

Under the First Amendment, speech includes all types of expression that communicate an idea or message, even if words aren't used. Expression that is non-verbal is known as **symbolic speech**.

Examples of symbolic speech include wearing a black armband to protest the war, nudity, and burning a flag.

Symbolic speech may be protected but it is generally subject to a lesser degree of scrutiny than is protected speech.

A. In general, the **test for symbolic speech** is this:

1. The government can regulate symbolic speech if:

(i) It has an *important interest unrelated to suppression of the message*, and
(ii) If the *impact on communication is no greater than necessary*.

B. **Flag desecration**

1. In general, flag desecration is constitutionally protected speech.

a. Therefore, individuals have a first amendment right to burn the flag, sew it on clothes, and put a peace sign on it.

b. Since the purpose of most flag burning statutes is to keep the flag from being used to communicate protest, the government interest IS related to suppression of the message; and therefore such statutes will be struck down.

2. *** However, the **burning of draft cards** is not protected speech.

a. In this situation, the government has an independent and important reason for banning the burning of draft cards—to facilitate the smooth operation of the draft and national safety.

C. **Nude dancing**

1. Nude dancing is not considered protected speech; and therefore, the government may completely ban nude dancing.

2. Note that bans on nude dancing are constitutional because the government's interest is unrelated to the suppression of the erotic message. Instead, the government is motivated by a desire to protect societal order and morality, and to prevent the *negative secondary effects* of nude dancing (like crime).

3. **Cross burning**

1. The Supreme Court has held that burning a cross is protected speech. But if the cross-burning is done with the intent to threaten or intimidate, then there is no First Amendment protection and states may ban such conduct.

Example — In ***Virginia versus Black*** (2003), the court upheld the punishment of the defendant who burned a cross on the lawn of the home of an African American because it found that defendant did so with the intent to threaten those in the home.

► In this chapter, we discussed **symbolic speech** under the First Amendment. And we learned that, under certain circumstances, the government can limit certain types of symbolic speech.

CHAPTER 45. FREEDOM OF ASSOCIATION

A. The **freedom of association** is not specifically mentioned in the First Amendment, but it is a fundamental right that is *implied* from the rights within the First Amendment.

1. Since an individual has a First Amendment right to engage in a particular expressive activity, then a group has a "freedom of association" right to engage in that same activity as a group.

Example — Groups have the right to get together and conduct peaceful protests, economic boycotts, and bring lawsuits.

B. The freedom of association as a fundamental right serves to *limit the government from burdening a person's right to belong to a group*.

1. In general, laws that prohibit or punish group membership will be struck down unless **strict scrutiny** is met.

2. So in most cases, individuals cannot be punished because of their association in a group.

Example — the government may not deny government benefits on the basis of an individual's current or past membership in a particular group.

C. Also, the right to association *prohibits the government from requiring a group to register or disclose its members*.

D. In certain situations, the **government MAY prohibit people from associating**.

1. In order to do so, the government must prove 3 elements:

(i) The group engages in or promotes *illegal activities*,
(ii) The individual *knows* of the group's illegal activity, and
(iii) The individual specifically *intends to further the group's illegal objectives*.

Example — Congress cannot make it a crime simply to be a member of the American Communist Party.

→ However, Congress can make it a crime to be a member of a group that advocates the violent overthrow of the government, if the member knows of the group's illegal activities and the member intends to further those objectives.

E. In addition to the right to association, individuals and groups also have a **right not to associate**.

1. This means that the government cannot force an individual to give financial support to a group, unless strict scrutiny is met.

2. Also, the government cannot make a group take members if they would interfere with the group's expressive activities.

Example — The Supreme Court has held that states may not force the Boy Scouts to hire a homosexual to serve as a troop leader because this would violate the Boy Scouts' First Amendment right of expressive association. (*see Boy Scouts of America v. Dale* (2000))

Example — In another case, the Court found that Rotary Clubs, which bring together business and professional leaders in order to provide humanitarian services, may not discriminate against women because female members would not prevent the club from carrying out its expressive activities. (*see Rotary Int. v.. Rotary Club* (1987))

→ Unlike the Boy Scouts, the relationship among the Rotary club members was not of the intimate or private variety which warrants First Amendment protection.

► In this chapter, we discussed the fundamental right to **freedom of association** under the First Amendment, which prohibits the government from burdening a person's right to belong to a group.

CHAPTER 46. FREEDOM OF RELIGION — THE FREE EXERCISE CLAUSE

A. There are 2 clauses in the First Amendment that guarantee freedom of religion:

1. **The Establishment Clause** — prevents the government from endorsing or supporting religion.

2. **The Free Exercise Clause** — prohibits the government from interfering with a person's practice of their religion.

B. **FREE EXERCISE CLAUSE**

1. The **Free Exercise Clause** prevents the government from getting in the way of a person's ability to practice his religion.

a. In other words, the government cannot punish someone on the basis of their religious beliefs.

Example — A state cannot require officer holders or employees to take a religious oath.

Example — A state may not forbid members of the clergy from holding elective state office.

2. However, the government CAN pass **neutral laws that regulate general conduct** — even if the laws happen to interfere with an individual's practice of his religion.

Example — The State of Oregon bans the use of the drug peyote, however, the drug is used by Indian tribes as a central part of their religious rituals. (*see Department of Human Resources of Oregon v. Smith* (1990))

→ In this case, since the ban is generally applicable and the state is not motivated by a desire to interfere with religion, the law will be upheld.

a. Note that courts have found 2 exceptions that apply to neutral laws of general conduct in relation to the Free Exercise Clause.

1) If an individual quits his job for religious reasons, the government cannot deny unemployment benefits to that person, because this would interfere with the individual's free exercise of his religion. (*see Sherbert v. Verner* (1963))

2) Amish children have been granted an exemption from laws that require compulsory school attendance for all children. (*see Wisconsin v. Yoder* (1972))

C. **Conflict** between Free Exercise Clause and Establishment Clause

1. In certain cases the Free Exercise Clause will conflict with the Establishment Clause. When these 2 clauses seem to conflict, the *Free Exercise Clause will dominate*.

Example — A public school makes meeting rooms available to all sorts of groups. If the school allows religious groups to use rooms, there might be an Establishment Clause problem. But if it doesn't allow religious groups to use the rooms, while allowing other groups to do so, there might be a Free Exercise Clause problem.

→ Since the Free Exercise Clause requires the government to permit religious groups to use the rooms, then by doing so, the Establishment Clause will not be violated.

► In this chapter, we discussed the freedom of religion under the First Amendment, which includes the Free Exercise Clause and the Establishment Clause. We learned that the **Free Exercise Clause** prevents the government from burdening a person's pursuit of religion or from punishing people on the basis of their beliefs.

CHAPTER 47. THE ESTABLISHMENT CLAUSE

The **Establishment Clause** prevents the government from endorsing or supporting religion. The purpose of the Clause is to enforce the separation of church and state.

The Establishment Clause prevents the government from actively participating in religious affairs, from intentionally preferring one religion over another, and from encouraging people to worship or attend church.

In the Supreme Court case ***Lemon versus Kurtzman*** (1971), the Court provided a 3-part test (the *Lemon* test) that is used to assess whether a law violates the Establishment Clause.

A. Under the ***Lemon* test**, a law will be valid only if the following 3 elements are met:

1. There must be a *secular* (or nonreligious) *purpose* for the law,

2. The *primary effect* must be neither to advance nor inhibit religion, and

3. There must not be *excessive government entanglement* with religion.

*** If any of these elements are violated, government action will be deemed unconstitutional under the Establishment Clause.

B. Any **government programs that provide aid to religious affiliated institutions** (like schools and hospitals) are subject to the *Lemon* test.

1. In general, government programs *must benefit students across the board*—at public schools, private nonreligious schools, as well as private religious schools—in order to be valid under the *Lemon* test.

a. Therefore, the government can provide textbooks, bus rides, computers, standardized tests, and school lunches to students at religious schools, as long as the aid ALSO goes to students at nonreligious schools.

1) Such government programs are valid under the Establishment Clause because they have a secular primary purpose, they do not advance nor inhibit religion, and they have an extremely low risk of government entanglement.

2. However, if a government program results in *financial aid that goes overwhelmingly to religious school students*, then it will most likely be struck down under the *Lemon* test

a. Such a program would be found to excessively entangle the government in religious affairs.

2. The **government may directly give assistance or grants** to any colleges and hospitals (even religious ones) as long as the government requires that the aid is not used for religious purposes.

3. In addition, the government may pass broad *tax laws* that give **exemptions** to charities or non-profits, even if they exempt certain religious organizations.

a. However, tax exemptions that single out religious organizations have the purpose and effect of advancing religion and will violate the Establishment Clause.

2. Note that if the government tries to **introduce religion into public schools**, it is most likely violating the Establishment Clause.

a. Public schools cannot set aside time to have a school *prayer*.

b. They cannot set aside time for a *moment of silence*.

c. Public schools cannot *display the 10 commandments*.

d. Also, states may not prohibit the teaching of evolution.

1) And even if evolution is taught at a public school, the school may not mandate that creationism be taught alongside it.

3. When the government puts up **holiday displays**, this will not violate the Establishment Clause unless a reasonable person would conclude that the display is an endorsement of religion.

a. When the government puts up religious displays, the **context** is very important.

Example — If a nativity scene is surrounded by a Christmas tree, a menorah, and other seasonal symbols, then the display, as a whole, will be found to be primarily secular, and the nativity scene itself won't be a violation of the Establishment Clause.

Example — However, if a religious symbol stands by itself, then courts will find that the display has a primary religious effect, and the display will violate the Establishment Clause.

► In this chapter, we discussed the **Establishment Clause** under the First Amendment, which guarantees that the government will not make any law that respects an establishment of religion. We learned that, under the *Lemon* test, a law will be upheld if it has a secular purpose, if the primary effect does not advance religion, and if there is no excessive entanglement.