

Professor: Tokaji; Book: Eskridge 4th ed.; Grade: "A-"

Note: This is likely my most comprehensive but least condensed outline. In other words, I think that it is my worst outline. Legislation was definitely not my favorite subject. Anyone using this outline should probably approach it with a questioning attitude.

Legislation

Professor Tokaji

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Exam Outline

I. Introduction

A. The Legislative Process

i. How a Bill Becomes Law

- a. **Legislation Introduced** -- Any house member can introduce legislation
- b. **Committee Referral** -- Bills are referred to committees by the speaker of the house or the presiding officer of the senate. Can be referred to more than one committee or have parts split between multiple committees. Failure to act on a bill within appropriate time limits kills the bill
- c. **Committee Action**
 - ◆ Committee has hearings
 - ◆ Bill can be assigned to sub-committee
 - ◆ Mark up sessions revise the bill
 - ◆ Committees write report --> an big part of the legislative history --> most persuasive
 - ◆ Bill goes to the rules committee in the house but not the senate
- d. **Schedule Legislative Consideration**
- e. **Floor Consideration**
- f. **Reconciliation: Conference Committee** -- After the bill has gone through both house and senate there is usually differences. --> both sides must produce the exact same bill.
- g. **Presentment**
 - ◆ President has 10 days to sign or veto -->2/3 (supermajority) vote required to override

B. Case Study: The Civil Rights Act of 1964

i. General

- a. **Strategy Question** -- Why use the legislative process? Why not use the courts like in *Brown*?
 - ◆ Congress was easier to persuade than judges/courts --> Legislators are voted in and are accountable to constituents
 - ◆ Constitution and equal protection clause protect against government discrimination, not private businesses --> thus could be tough to do
- b. **Reforms:**
 - ◆ **Public accommodations**
 - ◆ School segregation
 - ◆ Fair employment
 - ◆ Discrimination by federally funded entities
 - ◆ Bill also included proposal for commission on equal employment opportunity

ii. Passage in the House

a. Judiciary Committee

1. McCormack (D-MA) -- Speaker of the house. Referred the bill to the judiciary committee.
2. Celler (D-NY) -- Chairman of the judiciary committee.
 - ◇ Initially pursued an aggressive approach and almost torpedoed the bill.
 - ◇ Administration and the Republicans agreed to a compromise bill --> approved 20-14.
3. McCulloch (R-OH) -- Ranking republican on the judiciary committee. Supportive of civil rights in general but wanted a weaker bill because he wanted a bill that would pass.

b. Rules Committee

1. Key Event: JFK Assassination -- After JFK was assassinated LBJ make the CRA a big issue. It was to be a part of JFK's legacy.
2. Getting Out of Committee -- Of the three methods for getting out of committee, 2 failed. After Brown (R-OH) agreed to support request for meeting, Chairman Smith (D-VA) agreed to hold hearings. --> rules committee approved resolution governing debate 11-4

c. Floor Debate & Vote

1. Weakening Amendments -- With the help of the department of justice Celler and McCulloch fended off weakening amendments.
2. Sex -- Smith, in a last ditch effort to kill the bill, successfully added "sex" to title VII. This "poison pill" amendment was a failure.
3. Passage -- House voted in favor, 290-130.

iii. Passage in the Senate

- a. **Senate Calendar** -- Majority leader Mansfield (D-MT) avoided the judiciary committee (certain death b/c chaired by Eastland (D-MS)) by moving to have it placed directly on the Senate calendar.
- b. **Role of the Executive (LBJ)** -- LBJ maintained discipline among liberals the best he could by influencing his friends.

- c. **Filibuster** -- Southern democrats filibustered but it was eventually defeated by a vote for cloture. Cloture was accomplished by exchanging votes for weakening amendments.
- d. **Weakening Amendments** -- Senate voted down the major weakening amendments. Those that survived were mostly cosmetic.
- e. **Passage** -- Bill passed, 73-27.

iv. **Bill Becomes Law**

- a. **Conference Committee** -- Usually used to reconcile differences between the bills passed in the house and senate.
 - 1. **Avoiding Conference Committee** -- Conference committee risked killing the bill (committee chaired by Eastland, an enemy of CRA) here so Celler and McCulloch released a joint statement supporting the bill as passed by the Senate.
- b. **Bill Approved** -- House rules committee concurred in Senate amendments. House approved bill 289-126 on 7/2/1964. Signed into law by LBJ that evening.

C. **Case Study: Health Care Reform**

i. **Political Climate**

- US has millions uninsured, and spends more than any other developed nation.
- Health care a pillar of Obama's campaign + Dems control 60 votes in senate
- Big differences in public opinion concerning public option, mandates, and abortion financing
- Three obstacles: 1) bad memories from '93, 2) lots of players, 3) partisan polarization.

ii. **Passage in the House**

- Three committees had jx
- Inter-party conflict btw libs and blue dogs especially over public option
- Anti-abortion Dems presented a barrier too

iii. **Passage in the Senate**

- Two committees had jx
- Negotiations w/ bipartisan gang of 6 failed
- Conflict btw libs, centrist Dems, and independents
- Senate voted for cloture 60-39 to bring bill to floor
- Bill scaled back to get centrist Dems on board
- After several cloture votes, senate voted 60-39 for passage

iv. **Bill Becomes Law**

- Senator Brown (R - MA) elected reducing Dems to just 59 votes in senate (not enough for cloture)
- House approved Senate bill
- House then approved corrections through budget reconciliation bill (controversial approach)
- Senate passed reconciliation bill --> not subject to filibuster (thus no cloture necessary)

v. **Filibuster and Cloture**

- General observation -- The use of filibuster and cloture has increased dramatically in recent years.

vi. **Differences in the Process BTW '64 and Now**

- a. **What's Changed**
 - ◆ Filibuster rules
 - ◆ Special interest groups
 - ◆ More intense partisan division
 - ◆ Who is in the leadership and the parties
- b. **What Hasn't Changed**
 - ◆ Power of committees & their chairs
 - ◆ Division within parties
 - ◆ Majority doesn't necessarily rule, at least in the senate
 - ◆ POTUS's power to shape the agenda (if not process)

D. **Interpreting the CRA of 1964**

📖 **Note:** See PPT slides 26, 49, 50, 51, 52, 56, 57 & 58 for Relevant Title VII provisions!

i. **Key Provisions**

- a. **Prohibition on Employment Discrimination**
 - 1. §703(a) -- Prohibition on employment discrimination by employers
 - 2. §703(b) -- Prohibition on employment discrimination by employment agencies
 - 3. §703(c) -- Prohibition on employment discrimination by labor unions
- b. **Exceptions and Qualifications**
 - 1. §703(e) -- Bona fide occupational qualifications
 - 2. §703(h) -- Seniority, merit and test exceptions
 - 3. §703(j) -- "preferential treatment" not required
- c. **Equal Employment Opportunity Commission**
 - 1. §705 -- establishes EEOC
 - 2. §706 -- administrative procedures and private actions

3. §713 -- EEOC's power to issue regulations

★ ii. Interpretation Checklist

a. Possible Sources of Interpretation

- ◆ Text of the statute
- ◆ Legislature's overarching purpose or intent
- ◆ Other provisions of the statutory scheme
- ◆ Legislative History
 - ◇ Committee Reports
 - ◇ Interpretive Memos
 - ◇ Floor Statements
 - ◇ Presidential Signing Statements
- ◆ Agency Interpretation
- ◆ Precedent/Stare Decisis
- ◆ Background ideological commitments

b. Approaches of Individual Justices

- ◆ Overarching Purpose (Brennan)
- ◆ Specific Intent (Rehnquist)
- ◆ Pragmatism (Blackmun)
- ◆ Text of the Statute (Scalia)

Note: Use this to formulate your exam response when interpreting the CRA. Also incorporate as much as you can from statutory interpretation into the analysis!!

iii. Theories of Racial Inequality

- a. **Atomistic (Rehnquist)** -- Racism as an explicit and conscious belief in racial superiority. The problem is bad apples and the goal is **colorblindness**.
- b. **Systemic (Brennan)** -- Racism as a set of institutional arrangements that perpetuates inequality. The problem is a "poisonous tree" and the solution is **anti-subordination**.

iv. Use of Tests -- *Griggs v. Duke Power*

- a. **Synopsis** -- Four blacks hired after 1955 challenged company which had high school education requirement with certain professionally-developed testing requirements.
- b. **Relevant Law**
 - 1. **§703(a)** -- Unlawful to refuse to hire or discharge any individual or otherwise to **discriminate** against anyone on the basis of race, color, religion, sex, or national origin.
 - i) *Key Issue* -- The meaning of discriminate is ambiguous.
 - 2. **§703(h)** -- Professionally developed tests okay if not designed or intended to discriminate.
- c. **Holding** -- Sees dispute over **intent v. effect**. **Tests with a disparate impact must be justified by business necessity**. Though 703(h) does not explicitly say this, the court still reached this result because the test still had the effect that §703(h) was trying to prohibit.

v. Affirmative Action

- a. **General** -- Employers between a **rock and a hard place** --> there are competing obligations to undo past discrimination while avoiding discrimination against white people.
 - 1. **Three Possible Congressional Intentions:**
 - i) *Require Affirmative Action* -- Clear the legislature didn't intend this
 - ii) *Permit it, but not Require it* -- Justice Blackmun and the *Webber* case take this approach.
 - iii) *Forbid Affirmative Action*
- b. **United Steelworkers of America v. Weber**
 - 1. **Facts** -- USWA and Kaiser Aluminum agree to affirmative action plan --> 50% of training openings go to blacks. **Key provisions** --> §703(a),(d), and (j)
 - 2. **Majority** -- Upholds plan. Congress' primary concern (in title 7) was the plight of blacks. It would be ironic if the law prohibited efforts to abolish traditional patterns of racial segregation and hierarchy.
 - 3. **Concurrence** -- Title 7 creates a tightrope without a net for employers
 - 4. **Dissent** -- Role of the court is to "give effect of to the intent of congress." Relies on plain language and supporters' statements to come to a conclusion on intent.
- c. **Johnson v. Transportation Agency Santa Clara County** -- Reiterates that title 7's objective is to break down racial hierarchy. Does not overrule *Weber*, arguing that congressional inaction signals acquiescence.
 - 1. **Rule** -- Affirmative action is permissible if there is a manifest imbalance and plan doesn't unnecessarily trammel white/male interests.
 - 2. **Dissent (Scalia)** -- Text of T7 prohibits "discrimination" --> meaning race shouldn't be a basis for employment decisions.--> colorblind approach. *Weber* should be overruled.
- d. **Ricci v. DeStefano** -- City threw out results of test for promoting fire fighters, due to a threat of *Griggs* style disparate impact claim. **Relevant statutory provision** --> 703(a)
 - 1. **Majority** -- City's race-based action is impermissible, unless there's a strong basis in evidence that it would be liable. No strong basis in evidence here.
 - 2. **Dissent (Ginsburg)** -- Cites history of exclusion of AA's and Latinos. Tests can only be upheld for business necessity. Here, there was good cause to believe this standard wasn't met.

II. Representation

A. The Right to Vote

i. Two Important Themes

- a. **Incumbent Entrenchment** -- What role should courts play in checking incumbent entrenchment?
 1. Incumbent legislators have enhanced power (and enhanced interest) in holding political power.
- b. **Ensuring Minority Representation** -- What role should Congress and the courts play in ensuring minority representation?

ii. Key Voting Right Cases

- a. **Gomillion v. Lightfoot (1960)** -- Racial gerrymandering case
- b. **Harper v. Virginia (1966)** -- Poll tax case
- c. **Westberry v. Sanders (1964)** -- One person, one vote---> Congress (<1% difference btw district)
- d. **Reynolds v. Sims (1964)** -- One person, one vote---> State legislatures (<10% difference btw district)

B. Vote Dilution: Malapportionment

i. Reynolds v. Sims (1964)

- No Reapportionment for over 60 years
- 25% of population resides in districts with majority in both houses
- People in the more populated counties have diluted voting strength
- Warren's argument based on **equal protection clause** --> citizens should have an equally effective voice in election of state legislators
- Rule:** Both houses of bicameral **state** legislature must be approximately equal (<10%)

★ ii. Arguments For Judicial Intervention

- a. **Anti-Entrenchment** -- To protect the public from self-interested public officials (**Reynolds**)
- b. **Minority Protection** -- To protect a minority against the tyranny of the majority (**Gomillion, Harper**) ---> The majority doesn't want to loose power

iii. Crawford v. Marion County Elec. Bd.

- a. **Synopsis of Facts** -- Indiana law requires voters to provide government issued ID to have their votes counted. Looks sort of like a poll tax but yet it can be distinguished.
- b. **Important Justices**
 1. Stevens (Lead Opinion)
 - ◇ Unlike poll tax, ID is *relevant* to qualification
 - ◇ State interests in modernization, fraud and confidence
 - ◇ Little evidence of excessive burdens on voters
 2. Scalia (Concurrence) -- ID requirement is non-severe & non-discriminatory. Individual impacts aren't relevant. We should avoid "detailed judicial supervision"
 3. Souter (Dissent) -- Burdens are non-trivial and state hasn't shown that benefits outweigh burdens

iv. The Voting Rights Act (VRA)

a. 3 Key Provisions

1. §2, Practices -- Prohibits practices that deny or abridge the vote on account of race or color. Applies to all jurisdictions (contrast to §5 that only applies to specific ones)
2. §4, Tests -- Suspends literacy tests and other devices in states with low rates of participation
3. §5, Pre-Clearance -- Required covered jurisdictions to "pre-clear" any changes in election procedure with the DOJ or DC federal court
 - i) *Legal Standard: Retrogression* -- Change cant make racial group **worse off** than it was before.

b. VRA Enforcement

1. First Generation (60s and 70s) -- Breaking down barriers
 - i) *Problem: Vote Denial* -- People are impeded from voting or having votes counted (eg: violence, literacy tests, poll taxes, maybe ID requirements?)
2. Second Generation (80s and 90s) -- Increasing minority representation
 - i) *Problem: Vote Dilution* -- Everyone is allowed to vote, but one group's voting strength is weakened (eg: At-large elections, redistricting practices, racial gerrymandering)

C. Racial Gerrymandering

i. Mobile v. Bolden

- a. **Synopsis of Facts** -- Blacks were ~1/3 of city population, but none had ever been elected to city commission do to at-large election scheme

b. Key Points

1. Stewart (Plurality)
 - ◇ Equal protection and 15th amendment are only violated by intentional discrimination
 - ◇ *Reynolds* only establishes a right to a vote "weighted equally" to others
 - ▶ Focused on individual right to vote ---> Mobile court was unwilling to extend this principal to a group
 - ▶ The standard in *Reynolds* was more judicially manageable

2. Stevens (Concurrence) -- Would look to the "objective effects," instead of the intent
3. Marshall (Dissent) -- Proof of disparate impact should suffice for 15th amendment claim
4. Proportional Representation -- All of the justices were opposed to this.
 - i) *Rational* -- This presupposes that all people in a racial group are uniform. It also is inconsistent with the goal of a color blind society.

ii. '82 Amendments to VRA, Legislative Response to *Balden*

- a. **Changes to §2**
 - ◆ Splits §2 into two subsections
 - ◆ Requires a results/effects test ---> The test is no longer intent based (too difficult to prove)
 - ◆ Explicitly says that proportional representation is not required
 - ◆ What is required: Equal participation and equal opportunity to elect representatives of their choice.
- b. **The Problem with §2** -- Its another rock and a hard place scenario: On one hand there cannot be action that has the result/effect of discrimination (vote dilution, vote denial) (seeming to imply proportional representation). On the other hand, proportional representation is explicitly not required. So...
- c. **See PPT Slides (106 to 110) for Specific Changes**
- d. **"Typical Factors" from Senate Report**
 1. The **history** of official voting-related discrimination in the state or political subdivision;
 2. The extent to which voting in the elections of the state or political subdivision is **racially polarized**;
 3. The extent to which the state of political subdivision has used **voting practices or procedures** that tend to enhance the opportunity for discrimination against the minority group...;
 4. The exclusion of members of the minority group from candidate **slating processes**;
 5. The extent to which minority group members bear the effects of **discrimination** in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
 6. The use of **overt or subtle racial appeals** in political campaigns; and
 7. The extent to which members of the minority group have been elected to **public office** in the jx.

iii. The Judicial Response to '82 Amendments: *Thornburgh v. Gingles*

- a. **Having a §2 Claim** -- Three requirements must be established:
 1. Minority group is sufficiently large and **geographically compact**
 2. Minority group is **politically cohesive**
 3. White majority votes as a **bloc** to defeat minority-preferred candidate

Note: The occasional election of a minority candidate does not on its own defeat a §2 claim
- b. **Congressional Guidance** -- Congress provided a list of "typical factors" in the senate report. This gives general guidance to the judiciary but leaves it to them to figure out how to apply it.
- c. **Where do the Three Requirements Come from?** -- Congress was vague, so this is the judiciaries attempt to "walk the line" between **intent** and **proportional representation**.
- d. **Criticism of the *Thornburgh* Test** -- If minority dispersed in community then a §2 claim would be difficult.

iv. Redistricting

- a. **Basics**
 - ◆ Every decade, states must redraw the US house and state legislative districts, in accordance with the US census figures ---> done by state legislature or agency
 - ★◆ Legislators have an incentive to draw district lines to benefit themselves and their party
- b. **The VRA §§ 2 v. 5**
 1. Section 2
 - ◇ Applies to all voting laws and practices old or new
 - ◇ Applies to all jx nation wide
 - ◇ Burden on plaintiffs to obtain relief against violators
 - ◇ Legal standard: **results in** vote denial or vote dilution
 2. Section 5
 - ◇ Applies to **changes** in voting laws or practices
 - ◇ Applies only to **covered** jx
 - ◇ Burden on covered jx to obtain pre-clearance
 - ◇ Legal Standard: **Retrogressive** effect or discriminatory purpose
- c. ***Shaw v. Reno***
 1. Important Facts
 - ◇ North Carolina wanted to redraw its districts. Their plan included only one minority district.
 - ◇ When NC submitted to Department of Justice under §5, their plan was rejected because DOJ wanted to see more minority representation.
 - ▶ NC adds a second minority district in response. Both districts are very strangely drawn.
 - ▶ The NC districts did not have to be so weird. The democrats drawing the districts had two objectives that caused the weirdness: 1) Minority representation (per DOJ) and 2) Incumbent protection

2. Important Points

- ◇ The argument is intentional race discrimination (discriminatory intent violates the equal protection clause -- **Mobile**) against white people.
- ◇ Imports rationale from affirmative action cases to declare a (qualified) right to a "colorblind" electoral process
- ◇ Segregating voters based on race resembles "political apartheid," sends a "pernicious" message, and threatens to "balkanize" voters
- ◇ Fact of racial bloc voting doesn't make segregation of voters "benign" or justify lower level of scrutiny than is applied to other racial classifications.

d. **Cases Following *Shaw v. Reno***

- ★ 1. The "Predominant Factor" Test -- If race was the "**predominant factor**" motivating placement of voters in district, then strict scrutiny must be satisfied. To satisfy strict scrutiny, the plan must be **narrowly tailored** to serve a **compelling interest**.

D. Partisan Gerrymandering

i. Arguments for Judicial Intervention

- a. **Anti-Entrenchment** -- To protect the public from self-interested public officials (**Reynolds**)
- b. **Minority Protection** -- To protect a minority against the tyranny of the majority (**Gomillion, Harper**)

ii. *Davis v. Bandemer*

- a. **Facts** -- Partisan gerrymander alleged.
- b. **Majority** -- Rejects claim. System must be arranged in a manner that will consistently degrade a voter's or a group of voters' influence.
- c. **Other Side** -- State failed to justify discrim. impact by showing a rational basis in neutral criteria.

iii. *Vieth v. Jubelirer*

a. Scalia (Plurality)

- ◆ Notes long history of political gerrymanders and availability of a remedy under art 1 §4
- ◆ No **judicially discoverable and manageable standards**
- ◆ Claim of partisan gerrymander is a nonjusticiable **political question**

b. Dissents

- ◆ Stevens: Would ask whether partisan considerations were a predominate motive
- ◆ Souter: Would apply 5-part test looking for existence of cohesive political groups and deviations from traditional norms.
- ◆ Breyer: Would look at entire plan for unjust use of political factors to entrench a minority power.

iv. *LULAC v. Perry*

- a. **Standard** -- Still no standard with three justices no the fence.

III. Money and Politics

A. **Corruption**

Note: See PPT slides for relevant statute (18 USC 201 -- Slide 154)

i. Theories of Representation

- 1. **Pluralism** -- Legislators as agents of those who elect them
 - i) *Horse Trading* -- Trading support for some legislation for other legislation. Pluralists would be okay with this in most cases.
- 2. **Republicanism** -- Legislators as trustees for the public interest

ii. Bribery

a. **Purposes of Anti-Bribery Statutes**

- ◆ Protect the integrity of the public servant's decision-making process
- ◆ Avoid the appearance of unfairness and abuse of office
- ◆ Assure equal access of all citizens to the services of public servants

b. **Bribery Statute**

- 1. Generally Bribery is -- When a public official 1) obtains **anything of value**, 2) in return for an official act and defendant public official or private person, 3) acted with corrupt intention.
- 2. Federal Bribery Statute -- Limited to **federal** public officials.
 - i) *Corruption* -- Not specifically defined by the statute. A huge amount of case law. Sometimes it can become quite complicated.
 - ii) *Extortion* -- Also can cover extortion ---> often activity can be either extortion or bribery.

c. **Theories in Bribery: Agent v. Trustee**

- 1. Trustee for the Public Good -- May be inclined to criminalize campaign contributions that carry a commitment by the legislator to vote in a specified way on future issues.
- 2. Agent for Popular Desire -- May want to limit bribery prosecutions only to those cases where the representative benefits personally. You might not want to prosecute in those cases where the representative is merely making political tradeoffs resulting in legislation that, on balance serves the interest of her constituents.

- d. **Case: *People ex rel. Dickinson v. Van De Carr*** -- An example of the republican idea of value.
1. Synopsis of Facts -- Alderman of NYC charged w/ bribery. Commissioner of street cleaning wrote him to say if he would give him more money for projects, the case of Covino would be reconsidered. Alderman wrote back and said if he would reinstate Covino, he would vote and otherwise help to obtain the needed money for the projects.
 2. Result -- Since the benefit defendant was to receive was the reinstatement of Covino, this would be embraced within the meaning of the statute, since it would constitute a bribe.
 3. Rational -- It is demoralizing to public service and against the spirit of the statute for a legislator or other public official to bargain to sell his vote or official action for a political or other favor or reward as it is for money.

iii. Extortion

- a. **Definition** -- Common law: a public official's use of official position to **extract** money or other benefits from private persons.
- b. **Hobbs Act (See p 310 for Full Text), Summary**
 - ◆ Can apply to **either** state or federal officials
 - ◆ Extortion means the obtaining of **property** (note more limited than bribery statute) from another with his consent, induced by the wrongful use of actual or threatened force, violence, or fear, or under the **color of official right**.
 - ◆ Might apply to official misconduct at either the federal or state level
 - ◆ Needs to be an explicit exchange of money for an official act

iv. Conflicts of Interest

- a. **General** -- Both state and federal legislatures have enacted statutes to get at problems of conflicts of interest, or any financial incentive the legislator might have that would **affect her deliberation**.
- b. **Responses to Loopholes**
 - ◆ Full disclosure of financial interests
 - ◆ Adoption of **prophylactic rules** (**rules that go beyond quid pro quo**) to prevent even potential for certain types of financial incentives to slant public deliberation
- c. **Rules Governing Congress**
 1. Gifts are Severely Limited -- Anything of value from those whose interests may be substantially affected by members' official duties. eg., toothpick rule
 2. Outside Earned Income is Limited
 3. Post-Employment Lobbying is Restricted -- Generally, completely prohibited for a period of years (1yr for house, 2yrs for senate) and then access to certain facilities is curtailed thereafter. Restrict the **revolving door** that could distort the interests of sitting legislators.
 4. Prohibition of Activity Inconsistent with Representational Duties
 5. Honoraria Banned -- Can't give speeches or write for money.
- d. **Case: *US v. National Treasury Employees Union***
 1. Facts -- A bunch of low level federal employees got in trouble for doing things like giving speeches on the Quaker religion, lecturing on black history, or writing articles on dance contests. They claimed that this violated their first amendment rights.
 2. Majority -- Law unconstitutional as applied to lower-level federal employees. Since the employees had so little influence on the political process, the court concluded that first amendment rights trumped the need to prevent corruption.
 3. O'Connor (Concur') -- Thought that a nexus (btw employees work and her speech, article or appearance) was required for both a series of speeches and single appearances.

v. Blagojevich Materials

- a. **Summary** -- Blago tried to sell the Illinois senate seat to the highest bidder.

B. Campaign Finance

i. General

- a. **Two General Philosophies**
 1. Pluralist Thinkers -- Might object to regulation because 1) counterproductive to public involvement and 2) inconsistent with the constitution (eg., free speech).
 2. Republican Thinkers -- Consider the political advantages of wealth in an unregulated political system to be corrupting as bribery. They consider unregulated campaign contributions to be inconsistent with the principle of equality.
- b. **Means of Regulation**
 - ★ 1. Expenditure Limits -- Restrict the amount an individual or group may spend in support of or opposition to a candidate. Most stringent form of regulation and thus subject to the highest level of scrutiny (**narrowly tailored to serve a compelling state interest -- Buckley**). After **Citizens United** it is difficult to imagine any expenditure limit that would survive constitutional scrutiny.

- ★ 2. Contribution Limits -- Restrict the amount that may be given to a candidate. Contribution limits may be upheld if **closely drawn** to an **important** government interest (Intermediate Scrutiny -- **Shrink Mo**).
 - ◇ The standard is less because the restriction on speech is less severe.
 - ◇ Risk of corruption (quid pro quo) is also greater so there is an enhanced countervailing interest.
- 3. Public Financing -- gives public money to qualifying candidates.
- 4. Disclosure -- requires campaigns, parties, and other groups to track and report contributions/expenditures. The Court is more favorable to these forms of regulation.
- c. **Contribution v. Expenditure**
 - a) Contribution -- Giving to candidates, who **use** money for their campaigns.
 - b) Expenditure -- Spending money **directly** for or against candidates. Less concern for corruption or the appearance of corruption.
- d. **Purposes of Campaign Finance Regulation (Benefits)**
 - ★ ◆ Tokaji -- Strongest rationale for campaign finance reform is to prevent incumbent entrenchment.
 - ★ ◆ Equality interest ---> those with more money will have a greater influence on the output of legislation. Two pronged problem
 - ◇ Disproportionate influence on who gets into office
 - ◇ Disproportionate influence on the policies adopted by the legislature
 - ★ ◆ Reduce corruption and the appearance thereof
 - ◆ More robust exchange of views
 - ◆ Campaigns will be characterized more by issue discussion
 - ◆ Legislators might make better choices if money is taken out of the equation.
 - ◆ Economic power equates with political power because rich people will be able to demand more quid pro quos
- e. **Arguments Against Campaign Finance Regulation (Costs)**
 - ★ ◆ Speech: Campaign finance regulation infringes upon liberty (constitutional argument)
 - ◆ Reduces competitiveness
 - ◇ if the limits are too low entrenchment is facilitated
 - ◇ Places burden on outsiders (eg., 3rd party candidates)
 - ◆ Fundraising time concerns
 - ◇ This could cut either way
 - ▶ On one hand if you can get money from everyone it might be easier to get fully financed
 - ▶ On the other, something like public funding could put less priority on having to raise funds
 - ◇ full time fundraisers, part time legislators
 - ◆ Forces campaign speech underground -- Money is like water, it will always find an outlet (eg., people are always going to find loopholes)
- f. **Why Should there be Judicial Intervention** -- We have a two party system and each party is inclined to enhance their power. So the idea is that they are going to rig the game. This is an anti-entrenchment rationale.
- g. **Political Theories of Campaign Finance**
 - 1. Quid Pro Quo Corruption -- System dominated by large contributions from wealthy individuals and interest groups clearly seeking influence, access, and favorable legislation appears to be corrupt to ordinary voters. Empirical studies, however, suggest that money seldom buys votes or particular outcomes.
 - 2. Increasing Voter Competence -- Political system is corrupt if it systematically undermines voters' abilities to vote competently.
 - 3. Protecting Legislator Time -- Any system that requires legislators to spend much of their time raising money is a corrupt one
 - 4. Electoral Competitiveness -- Fair and vigorous competition among candidates and parties is critical for the legitimacy of elections and of the government those elections produce.

ii. The Buckley Framework

- a. **Buckley v. Valeo** -- 1) Strikes down fed **expenditure limits** on liberty grounds, 2) upholds federal **contribution limits**.
 - 1. Facts -- The constitutionality of the Federal Election Campaign Act (FECA) was challenged under 1st amendment speech clause by Senator Buckley of NY.
 - 2. Fundamental Rational -- The policy of curbing corruption and the appearance thereof can be sufficient to overcome the 1st a. right of free speech in the right circumstances.
 - ★ i) Important Quote -- "The concept that the government may restrict the speech of some to enhance the voice of others is wholly foreign to the 1st amendment."
 - Note**: This quote eliminates the equality argument from the *Buckley* framework

3. Holding
 - i) *Standard Applied* -- Strict scrutiny
 - ii) *Upheld*
 - ▶ \$1k Contribution Limits
 - The need to prevent corruption and the appearance thereof trumped 1st amendment concern (opportunity for *quid pro quo* needed to be reduced)
 - ▶ Reporting and Disclosure Requirements
 - Deter corruption and appearance thereof
 - People can see where candidate money came from
 - Recordkeeping helps detect violations
 - iii) *Struck Down*
 - ▶ Expenditure Limits
 - Greater imposition on free speech
 - indirect link btw \$ and candidate = less risk of *quid pro quo*
 - Reducing qty of issues discussed, depth of exploration, audience reached, etc...
 4. Why Distinguish btw Contribution and Expenditure -- The limit on expenditures is a more direct/profound restraint on the speech of those people whose views are restricted. The risk of corruption (quid pro quo) is also greater with contributions.
 5. Problem Created by Buckley -- No standard to evaluate contributions v. expenditures
 - b. **Corps: *Austin v. Michigan Chamber of Commerce*** -- Upholds state ban on corporate contributions and expenditures on **equality** grounds. Expenditure component overruled after *Citizens United*.
 1. Facts -- MI statute banned **corporations** from making contributions of expenditures in state races.
 2. Holding -- The regulation was upheld. Regulation survived strict scrutiny (law narrowly tailored to serve a compelling interest). Policy: limiting the **distorting effect of wealth**
 3. Observations -- Equality value may support campaign finance reform ---> The rationale in *Buckley* appeared to eliminate equality as a rationale
 4. Important Quote -- "Michigan's regulation aims at the corrosive and distorting effects of immense aggregation of wealth that are accumulated with help of corporate forum"
 - c. **Post Buckley Issues**
 1. Soft Money -- Soft money is money left unregulated by the FECA. It is money spent to benefit the candidate. There was an explosion of soft money because limits on contributions but not expenditures leads to dramatic increases in expenditures.
 2. Issue Ads -- Unregulated (before BCRA) ads that don't use "magic words" like "vote for X"
 3. Role of Courts -- The court becomes the primary regulator of the field because *Buckley* left it unclear what the precise distinction was between contributions and expenditures.
 4. Campaigning -- Campaigning --> more interest-group centered, more PAC centered, more party centered, than candidate centered because now only spend so much directly on the candidate.
 - d. ***Nixon v. Shrink Mo*** -- Upheld state contribution limits as "**closely drawn**" to important interests.
- iii. **The Bipartisan Campaign Reform Act (BCRA) AKA McCain/Feingold (2002)**
- a. **BCRA Key Provisions**
 1. Soft Money (§323)
 - i) *National Party Committees* -- The national committees of political parties can neither receive nor spend soft money.
 - ii) *PACs* -- Prohibits leadership PACs and other federal candidate-controlled PACs from raising or spending soft money.
 - iii) *State and Local Party Committees* -- Can use soft money to fund generic voter registration and get-out-the-vote drives that relate to federal election. The use of the soft money, however, is subject to a limit of no more than \$10k per source.
 - iv) *Candidates* -- Candidates are banned from soliciting soft money.
 2. Hard Money
 - i) *Corps and Unions* -- Corps and Unions have to create a PAC (vs. giving directly).
 - ii) *Individual Contributions* -- Individual contributions to candidates and national parties are indexed to inflation (eg., aggregate limits 25k to 37.5k).
 3. Issue Ads / Electioneering Communications (§201)
 - i) *Elements*
 - ▶ Ads that refer to a **clearly identified candidate**
 - ▶ Run within 30 days of a **primary** or 60 days of a **general** election
 - ▶ **Targeted** in congressional district or state where election will be held
 - ii) *Restrictions*
 - ▶ Only **hard money** may be spent on these
 - ▶ Corps and unions cannot fund **directly**
 - ▶ 24hr disclosure for over 10k threshold

- b. **Concern Raised by BCRA** -- Soft money will flow to outside groups
 - ◆ Bill eliminates soft money, but increases hard money limits to parties
 - ◆ Federal candidates are barred from soliciting non-federal money not only for parties but also for outside groups
 - ◆ National parties which have contributed significant amount of money in the past will not be in a position to do that in the absence of soft money
- c. **McCormell v. FEC** -- Upholds federal limits on soft money and issue ads
 1. Competing Values -- Liberty versus Anti-corruption
 - i) Equality -- Equality is a value still in the background but effectively cant be argued since it was taken off the table in *Buckley*
 2. Supreme Court Holding
 - ◇ Virtually all of BCRA upheld
 - ▶ Upheld soft money limits
 - Corruption and appearance of corruption rationale (**expansive** view v. narrow view in *Buckley*)
 - Special access rational (candidates were giving big donors special access ---> quid pro quo concern)
 - Courts standard: Strict scrutiny ---> "Closely drawn to sufficient interest"
 - Restriction on PACs increases dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors
 - ▶ Upheld definition/regulation **issue ads** --> raises none of the vagueness issues as the "magic words" approach in *Buckley*
 - Definition of electioneering communications as broadcast ads identifying candidate within 30/60 days of election
 - Regulates by:
 - ◆ disclosure requirements for those who spend >10k per year on electioneering
 - ◆ Prohibition on direct corporate and union disbursements (reversed in *Citizens United*). Can still do it through PAC's that draw funds from sources other than company treasuries
 - The interest (rationale) ---> risk of circumventing contribution limits, reducing the **distorting** effect of money (a pseudo equality argument)
 - ▶ Upheld disclosure requests because they do not **prevent** anyone from speaking
 - ◇ Limits on party spending held **unconstitutional** during the post nomination, pre-election period.
 - ▶ Parties have constitutional right to make independent expenditures.
 - ◇ Hard money ---> non-justiciable issue (plaintiff lacked standing)
- d. **Randall v. Sorrell** -- Strikes down state expenditure and contribution limits, citing anti-competitive impact.
 1. Vermont Act 64: Key Provisions
 - i) Expenditure Limits
 - ▶ \$300k for Gubernatorial
 - ▶ \$2k to 4k for state legislators
 - ▶ Incumbents limited to 85-90%
 - ii) Contribution Limits
 - ▶ \$400 for Gubernatorial candidates
 - ▶ \$200-\$300 for state legislators
 - ▶ Political parties subjected to the same limits
 2. Key Opinions
 - i) Breyer (Plurality)
 - ▶ Upholds *Buckley*
 - ▶ Struck down expenditure limits
 - ▶ Invalidates contribution limits under *Shrink*, not closely drawn
 - Impedes challengers from running effective campaigns (more competitive and thus require more money)
 - ★ – Incumbent entrenchment
 - ii) Thomas and Scalia (concur' in judgment) -- *Buckley* isn't protective enough of speech associated with contributions
- e. **FEC v. Wisconsin Right to Life, Inc.** -- Strikes Down application of BCRA to issue ads unless "no reasonable interpretation" other than an appeal to vote a certain way. <-- **This case is almost completely superfluous in light of Citizens United**

1. Facts -- Wisconsin right to life was a nonprofit advocacy group running ads urging voters to contact their senators and urge them to avoid filibusters of judicial nominees. The group wanted to run their ads during the 2004 general election but the BCRA prohibited it. WRTL argued that their ads were issue ads and that they didn't advocate a particular candidate. The FEC argued that the ads were "sham issue ads" still having the goal of altering the election.
2. Result -- The court carved out an exception to the *McConnell* ruling where unless an ad could not reasonably be interpreted as anything other than an ad urging the support or defeat of a candidate, it was eligible for an "as applied" exception to the BCRA limits on issue ads.
- f. **Davis (2008)** -- Struck down BCRA's "millionaire's amendment" which raised contribution limits for those facing wealthy, self-funded candidates...Indicates **increased skepticism of campaign finance by the supreme court** ---> new justices and O'Connor's exit

★ g. **Values in Campaign Finance Debate** -- Note: Weave values into exam argument

1. Buckley
 - i) *Pro* --Anti-corruption ---> We don't want legislators to be bought
 - ii) *Con* -- Liberty ----> To reduce corruption here inevitably results in some infringement upon 1st amendment rights.
2. Equality
 - i) *Buckley* -- The court in *Buckley* appeared to reject this rationale
 - ii) *Austin* -- The *Austin* court accepted a limited version of this rationale
3. Competition -- In *Randall* the court used the rationale of competition.

iv. **Citizens United v. FEC** 📖 Note: See PPT slide 182 for relevant statute (2 USC 441b)

- a. **Summary** -- Challenges application of BCRA's "electioneering communication" provision to video-on-demand. Struck down BCRA's prohibition on **corporate expenditures** for electioneering, overruling *Austin* and part of *McConnell*.
- b. **Holding**
 1. Independent Expenditures by Corporations
 - i) *Austin Overruled* -- The court struck down §441b's ban on **corporate** independent expenditures.
 - ii) *McConnell Overruled in Part* -- The court struck down the BCRA's extension of §441b's restrictions on independent corporate expenditures.
 - iii) *Rationale* -- The "government may not suppress political speech on the basis of the speaker's **corporate identity**. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." <--- limits on speech could drive ideas from the marketplace.
 2. As Applied Challenge -- The Court held that the case could not be resolved on an as applied basis without chilling political speech.
 3. Facial Challenge to §441b -- Strict scrutiny applied: The government required to demonstrate that the statute was **narrowly tailored to a compelling interest**.
 - i) *Compelling Interest* -- The *Citizens United* Court reasoned that "differential treatment of media corporations and other corporations cannot be squared with the First Amendment and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' free speech." *Austin*, it found, interferes with the "open marketplace" of ideas protected by the First Amendment. As a result of this reasoning, the Court was not persuaded by the government's arguments on (1) anticorruption and (2) shareholder protection.
 4. Anticorruption -- The Court addressed the government's anticorruption argument and ruled that independent expenditures "do not give rise to corruption or the appearance of corruption."
 - i) *Rationale* -- Influence over and access to elected officials does not mean that those officials are corrupt and the appearance of influence or access "will not cause the electorate to lose faith in our democracy."
 5. Shareholder Protection -- Finally, the Court rejected the government's argument that shareholders should be protected from being compelled to fund corporate speech.
 - i) *Rationale* -- Under a shareholder protection interest, if shareholders of a media corporation disagreed with its political views, the government would have the authority to restrict the media corporation's political speech.
 6. Disclaimer and Disclosure Requirements -- The Court ruled that BCRA's disclaimer and disclosure requirements are constitutional as applied to both *Hillary* and advertisements for it. Citing *Buckley* and *McConnell*, the Court found that disclaimers and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities or prevent anyone from speaking.

v. State Reforms & Public Financing

- a. **The Basic Model** -- Creates a floor rather than a ceiling. Provides public money to candidates who agree not to accept private money or to abide by expenditure limits (sometimes both).
- b. **States Adopting** -- Some states do it differently than others...
 1. Maine -- Candidates qualify by raising seed money from small contributors
 2. Massachusetts -- Passes "Clean Elections Law" ---> legislature failed to fund it, so it died.
 3. Arizona -- Passed the "Clean Elections Law" that took effect in 2002.
 4. Presidential Elections -- There is also a public financing system at the national level but it is only for presidential campaigns. Amount provided is so small the scheme is not viable.
- c. **Arizona Citizens Clean Elections Act**
 1. General Scheme -- Candidates that want public financing qualify by raising a certain number of small (\$5) campaign contributions. Once they qualify they get initial grants from the state.
 2. Problem: what if the initial grant is not enough (eg., their opponent gets a huge donation from Mr. Big Bucks)
 - i) *Solution*: Arizona will match the privately funded candidates contributions that are over a certain amount.
 3. Constitutional Problems
 - i) *Appropriate Level of Scrutiny* -- Arguments can be made -- see **McComish**
 - ii) *Infringement Upon Free Speech* -- The law will have a **chilling** effect on speech because people might be unwilling to spend money on their candidate if they know that their contributions will be matched by public funds to the opposition.
- d. **McComish v. Bennett**
 1. Background -- Arizona created a clean voting act where candidates that participated in the program could be eligible to receive state funds matching the amount of private funds of their competitor. To be eligible participating candidates needed to raise a certain number of \$5 donations.
 2. Issue -- Whether the First Amendment prohibits a state from giving additional money to a candidate who accepts state funding for her campaign whenever: (a) an independent group spends more than a certain amount campaigning against the candidate; or (b) the candidate's opponent refuses public funding and spends more than a certain amount on the campaign.
 3. Constitutional Argument -- Discourages/Chills speech by and in support of nonparticipating candidates.
 - i) *Level of Scrutiny* -- The cert petition argues for strict scrutiny (empirical argument, could also argue incumbent entrenchment) but a good argument can probably be made for intermediate scrutiny or even rational basis (a combination of weak empirical evidence and increases speech by giving a voice to other views argument).
 4. State Interests in Supporting the Law
 - ◇ Anti-corruption or the appearance thereof
 - ▶ This is the biggest one because it is the only one that the current supreme court appears to support (see **Davis**)
 - ◇ Equality Argument
 - ▶ Risky making this argument directly because **Citizens United** and **Davis** appear to take this argument off the table. Though could couch it in terms of corruption/appearance of corruption.

C. Lobbying

i. General

- a. **General Points**
 - ◆ The flipside of our corruption discussion (vs. campaign finance)
 - ◆ The process through which individuals attempt to translate access to influence
 - ◆ Lobbying is protected by the 1st A. like with campaign finance we have competing values:
 - ◇ Corruption or the appearance thereof (Washing is for sale to the highest bidder).
 - ◇ Interest of having a voice in Washington.
- b. **Constitutional Basis for Lobbying (1st Amendment)**
 1. Speech Clause -- Recognizes the general precept that speech, especially about political matters, presumptively cannot be limited by the government.
 2. Petition Clause -- Recognizes the general precept that legislative representatives in a democracy should be open to the viewpoints of their constituents, and the latter in turn should be encouraged to present their proposals and ideas to their representatives.

★ c. Types of Lobbying

1. Direct Lobbying
 - i) *Direct Presentation of Views* -- Through testimony at legislative hearings, calling up legislators or writing them directly.
 - ii) *Member-to-Member* -- Uses an insider ally to influence legislators. Often the most effective form of lobbying.
 - iii) *Social Lobbying* -- Laying the groundwork for future access to influence policy.
2. Indirect Lobbying
 - i) *Outside Forces* -- Stirring up forces outside of the beltway to get the attention of the people inside the beltway.
 - ii) *Grassroots Efforts* -- Grassroots efforts are at least as prevalent as direct lobbying. A big reason for this is the increased regulation in both the area of lobbying and in the area of corruption. Grassroots lobbying also tends to work well.
 - iii) "*Netroots*"/*Astroturf*
 - (a) *Netroots* -- Online support for various issues (eg., present day issue 5 protests)
 - (b) *Astroturf* -- These are basically fake grassroots efforts.

ii. Federal Lobbying Rules

a. Federal Regulation of Lobbying Act of 1946

1. §305 Statements of Accounts Filed -- Quarterly statements (filed with the Clerk of House) for those who received contributions or made expenditures for the purpose of influencing legislation
- ★ 2. §307 Persons to Whom Applicable -- Definition of person bound by registration and disclosure requirements
 - i) §307 Issues
 - ▶ Covers people who collect money for the purpose of advancing or defeating legislation. <---sort of ambiguous and open to interpretation
 - ▶ Direct or indirect influence < -- could include grassroots efforts but the supreme court doesn't interpret this way.
3. §308 Registration of Lobbyists -- Quarterly registration requirements for those engaged in lobbying for pay.

★ b. *US v. Harris* **🔴 Note:** See PPT slide 204, 207 & 209 for relevant statute (Lobbying Act, §§307, 305)

1. Facts -- Guys (directors of national farm committee) were having parties and basically trying to influence legislation and they failed to report their activities. Later they were prosecuted under the FRLA.
2. Issue -- Is §307 of FRLA give a person of ordinary intelligence notice of what has been forbidden?
3. Majority
 - i) *Narrowly Construed* -- The court narrowly construed the statute to avoid constitutional issues. A line was drawn between direct communication and other forms of influence.
 - ii) *New Standard Articulated* -- The court created a new standard and in doing so basically rewrote the statute.
 - (a) Person solicited, collected, or received contributions
 - (b) Main purpose of contribution was to influence passage/defeat of legislation
 - (c) Most importantly: Intended method was "direct communication with member of congress." <--- difficult to see this requirement in the language of the statute because it says "directly or indirectly".
4. Pros and Cons of Judicial Re-Writing
 - i) *Pros*
 - ▶ Re-written > stuck down entirely (at least from CR or pluralist view)
 - ▶ The burden of building inertia in congress ---> re-writing helps them out
 - ii) *Cons*
 - ▶ The law as written is unconstitutional --> not right to change it under the guise of interpretation
 - ▶ As written it infringes on way too much (eg., could potentially be illegal to write to congress).
 - ▶ Strike and let congress fix, maybe they meant for it to be unconstitutional.
5. Defects in FLRA of 1946
 - i) *Loopholes* -- Way too many, effectively a dead letter by 1979
 - ii) *Vagueness* -- The reporting requirements were vague to an extent that they led to incomplete information.
 - iii) *Not Applicable to Executive* -- The statute only applied to the legislative branch.
 - iv) *Only Criminal Sanctions* -- No civil sanctions...kind of reduces the utility.
 - v) *Staff* -- Didn't apply to contacts with staff members

c. **Lobbying Disclosure Act of 1995 (as Amended in 2007)**

1. General Observations

- i) *Breadth* -- The new legislation is both broader and narrower.
 - ▶ Broader --
 - Includes Executive officials.
 - Not just limited to members but also their staff
 - ▶ Narrower -- More specific threshold
- ii) *Many Issues Resolved* -- Alleviates first amendment concerns. Adopting a civil enforcement approach is helpful. The new law still leaves other gaps, however.

2. Important Sections

- i) *Section 2* -- Finds existing law ineffective to unclear language and weak enforcement
- ii) *Section 3* -- Defines lobbying activities, lobbying contacts (and exceptions), lobbyist
- iii) *Section 4* -- Lobbyist (or employer) must register, if lobbying income > \$2500 or expenses > \$10k (indexed for inflation)/qtr
- iv) *Section 5* -- Quarterly reporting requirements, estimates > \$5k rounded to nearest \$10k, electronic filing required
- v) *Sections 6 & 7* -- Enforcement, civil fines, criminal penalties

3. Important Provisions

- ◇ Semi-annual reporting requirements
- ◇ Communication must only relate to legislation (not intended to influence it)
- ◇ Defines lobbying activities, lobbying contacts, lobbyist

★ 4. Key Definitions

- i) *Lobbying Activities* -- lobbying contacts and **efforts in support of such contacts**, including preparation and planning activities, research and other background work that is intended, at the time performed, for use in contacts, and coordination w/ the lobbying activities of others.
 - (a) Bottom line -- Lobbying contacts and activities in support of such contacts.
- ii) *Lobbying Contacts* -- any **oral or written communication** (including an electronic communication) to a covered **executive branch** official **OR** a covered **legislative branch** official (**includes staff**) that is made on behalf of a **client** with regard to:
 - ▶ Federal legislation
 - ▶ Federal rules & Regulations
 - ▶ Administration or execution of programs
 - ▶ Nomination or confirmation (e.g., federal judges)
- iii) *Lobbyist* -- Any individual who is:
 - ▶ **employed or retained** by a client for
 - ▶ financial or other **compensation** for
 - ▶ services that include more than one **lobbying contact**,
 - ▶ **[Exception]** other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.

5. Critical Exceptions to Lobbying Contact

- ◇ Ministerial or de minimis activities (e.g., request for a meeting)
- ◇ Information disclosed under other laws or part of public record
- ◇ Contacts required by law or court order (e.g., a subpoena)
- ◇ Hardship cases (e.g., whistleblowers, churches)

★ 6. Key §3 Concepts -- **Useful for getting through hypotheticals**

- i) *Lobbying Contacts* -- Communications with covered executive or legislative officials
- ii) *Lobbying Activities* -- Contacts and efforts in support of contacts
- iii) *Lobbyist* --
 - ▶ Engaged for compensation,
 - ▶ >1 lobbying contact,
 - ▶ threshold: 20% in 3 mos
 - Percent of time is based on the time working for a particular client
- iv) *Client* -- Employs or retains someone to conduct lobbying activities
- v) *Employee* -- Officer, employee, partner, director or proprietor, but not independent contractor.
- vi) *Covered Officials* -- Executive and legislative branch officials, including congressional staff

★ 7. Steps of the Analysis:

- i) **Who is a lobbyist?**
 - (a) **Dependent on lobbying contacts and activities.**
- ii) **Who is a client?**
- iii) **Who is an employee?**

8. Remaining Gaps
 - ◇ Doesn't cover grassroots lobbying
 - ◇ Increments of \$20k limits precision
 - ◇ No disclosure under \$10k
 - ◇ Reports don't include much detail about the actual contacts
 - ◇ No reporting of "strategic counseling" fees (eg., advice to clients about how congress will act).

iii. Modern Problems

a. Obama Reforms

- ◆ Ethics pledge prohibiting appointees from participating in matters on which they lobbied in prior two years (but waivers have been granted)
- ◆ Limits on lobbying for stimulus funds
- ◆ Prohibition on registered lobbyists.....

b. Ohio Lobbying Requirements

- ◆ Basically mirrors federal lobbying statutes
- ◆ Major difference: prohibits certain people from lobbying (e.g., revolving door statutes)

c. *Brinkman v. Budish*

1. Facts -- COAST, an advocacy group for less government, sued JLEC a government organization responsible for enforcing a State of Ohio lobbying rule (revolving door statute). COAST alleged that the statute violated their first amendment rights both facially and as applied.
2. Standard Applied -- Strict Scrutiny: "When a State places a severe or significant burden on a core political right the provision must be **narrowly tailored** and advance a **compelling** state interest."
3. State Interests Alleged -- 1) Prevent corruption and the appearance thereof 2) preventing unequal access
4. Result -- The revolving door statute was found to be unconstitutional. Preventing corruption is a compelling interest but preventing unequal access isn't (**Citizens United**). But still the law wasn't sufficiently narrowly tailored enough to the anti-corruption interest.
5. Rationale -- The government did not prove an adequate state interest to justify their restriction on **uncompensated** lobbying efforts. The statute was both overbroad (no personal involvement required, applied to uncompensated lobbyists) and under-broad (didn't deal with situations involving gifts).

IV. Making Laws

A. Due Process of Lawmaking

i. General

- a. **Major Tension** -- To what extent should courts be involved in ensuring due process of the legislative process.
- b. **Linde (Grandfather of this Garbage) View** -- The legislative process should be designed to produce rational lawmaking: Lawmakers would be obliged to inform themselves in some fashion about the existing conditions on which the proposed law would operate and the likelihood that proposal would in fact further the intended purpose.

NOTE: A statutory interpretation problem will likely be **embedded** in another problem (e.g., affirmative action, disparate impact). When you get something like this try to pack in as many major statutory interpretation points as possible!!

ii. Structural Due Process

a. Constitutional Requirements for the Procedures Followed in Lawmaking

1. Bicameralism -- Comes from art. I, §7 of the constitution (presentment too). Bills must be approved in the same form by both chambers.
2. Presentment -- Bill must be signed by the president/governor
3. Origination -- Bills raising revenue (tax) must originate in the House. --> closer to people
- b. **Enrolled Bill Rule** -- An "Enrolled Bill" is the final text of the bill or resolution as approved by both the Senate and House, as it is sent to the President in the case of a bill. Under the rule, once a bill moves through the Congress and is signed into law, the courts assume that all rules of procedure in the enactment process were properly followed.
 1. Marshall Field & Co. -- An entire section was allegedly missing from an enrolled bill. The Judiciary refused to get involved. Courts should not interfere with the will of the people expressed through the legislature to invalidate enacted legislation.
 2. United States v. Munoz-Flores -- Challenged revenue bill on the ground that it was a revenue measure that had not originated in the House, contrary to the Origination clause.
 - i) *Majority* -- The statute did not violate the Constitution. House can always protect its own prerogatives by not passing one of these bills.
 - ii) *Concurrence* -- Improperly originated bills become law as long as they follow bicameralism and presentment, and Court should not look past the enrolled bill for more information (e.g., bill had an "H" which was good enough evidence that it originated in the House).

- c. **Institutional Competence of the Decisionmaker** -- Form of judicial review that the court might take with regards to legislative due process. Court more likely to engage in this form of review compared to the enrolled bill rule but is still **rare** compared to other forms of judicial review.
1. Hampton v. Mow Sun Wong
 - i) *Facts* -- Resident alien denied civil service job b/c Civil Service Commission (CSC) barred non-citizens. Rule justified on foreign policy grounds --> gave president a bargaining chip, no other countries let aliens take civil service jobs, and state security grounds b/c some jobs were sensitive. Alien alleged denial of Due Process.
 - ii) *Majority* -- Court avoided constitutional issue and looked at **institutional competency** instead. CSC could only have such a rule if it related to its own needs such as promoting efficiency within civil service. Otherwise the rule had to be made by the **legislature or executive** b/c they had the **competence** (e.g., CSC didn't have sufficient competence) to decide issues of foreign policy and state security.
 - iii) *Takeaway* -- Certain important decisions affecting substantive rights must be made by the entities that have the **capacity to deliberate** on the issue and be held democratically responsible.
 - iv) *Aftermath* -- President Ford ordered the ban, Congress never modified and supreme court didn't grant cert.
- d. **Congruence and Proportionality** -- Court will review the congruence and proportionality of laws enacted under the **14th a.**(§5).
1. *Congruent and proportional*: congress doesn't have the power to create new rights. It must create laws under §5 that are **congruent and proportional** to actual rights recognized by the supreme court. (See the **Boerne** line of cases)
- e. **The Competency of Political Actors** -- Are political actors competent to judge the constitutionality of legislation?
1. **Yes** -- The conscientious legislator can and should make an independent judgment on the constitutionality of proposed legislation.
 2. **No** -- Congress isn't **designed** to make hard constitutional judgments, but rather to pass them off to the courts
 3. Example: Defense of Marriage Act --Section 3 was designed to prevent the federal government from recognizing same sex marriage. Signed into law in 1996 by slick Wille. This year BO directed the attorney general not to defend §3 because BO believes it is unconstitutional.
 - i) IS BO within his power as the president in not enforcing a law it sees as unconstitutional? This question is somewhat open.
- f. **State Constitutions**
1. Procedural Requirements --Often include more for enactment of laws.
 2. Role of Enrolled Bill Rule -- Enrolled bill rule often severely restricts judicial review of legislative procedural errors. Courts conclusively presume that a bill was validly enacted according to prescribed procedures and refuse to entertain contrary evidence. Some states have an extrinsic evidence rule.
 - i) *Exception: Journals of Legislative Proceedings* -- Courts may make exceptions for the journals of legislative proceedings that legislatures are required to keep.
 - (a) Pure Journal Entry Rule -- Conclusive presumption that the enrolled bill is valid only if it is in accordance with procedures recorded in the journal and Constitution.
 - (b) Affirmative Contradiction Rule -- Determination that the enrolled bill is valid unless the journal affirmatively show a statement that there has not been compliance with constitutional requirements.
- g. **The Relationship Between Legislator and the Constitution**
1. Obligation of Constitutional Legislation -- Legislators are obligated to determine the constitutionality of proposed legislation.
 - i) *Rationale*:
 - ▶ Some provisions of the Constitution are addressed to legislators.
 - ▶ Many framers expressed the belief that the Congress should assess the constitutionality of pending legislation.
 - ▶ Oath of office giving support to the Constitution is required by Constitution.
 - ▶ Courts often presume that laws are constitutional because they assume the legislators care about this sort of thing.
 2. Obligation to Consider Supreme Court Holdings -- Legislators should consider themselves bound by the supreme courts substantive constitutional holdings.

iii. Legislative Drafting

- a. **Question** -- Can courts induce better legislative drafting?
 1. Yes -- Scalia: We have an obligation to conduct our exegesis in a fashion which fosters that democratic process
 2. No -- Research: Congressional staffers don't really pay much attention to how courts interpret statutes.
- b. **General Approach to Drafting a Statute** -- A three step linear process:
 1. Determine what the Proposed Legislation is Designed to do
 2. Determine the Structure
 3. Draft the Bill -- Must be no more complicated than necessary

B. Direct Democracy

i. General Overview

- a. **Methods**
 1. Initiative -- Alternative, citizen propelled lawmaking. People vote directly on a proposed statutory or constitutional amendment.
 2. Referendum -- People vote to approve or disapprove a law already proposed or enacted by the legislature (people get to stop a proposed law that was started in the legislature).
 3. Recall -- People petition to have continued service of elected officials put to a vote.
- b. **Advantages of Direct Democracy**
 - ◆ Returns power to the people
 - ◆ Highlights issues that won't get on legislative agenda
 - ◆ May make legislators more accountable and responsive to voters (hybrid democracy)
 - ◆ Can increase voter turnout
- c. **Problems with Direct Democracy**
 1. Drafters have no Control -- No deliberation and compromise process like there is with legislation (eg no due process in lawmaking). No informed & inflective decision making. Interest groups like this.
 2. The Expense of Direct Democracy -- Direct democracy is expensive (btw \$1-\$4 a signature). This leads to problems related to equality, corruption, and everything else associate with rich people being able to influence legislation.
 - i) Special Interests -- Special interests who do not have public good in mind and are merely making an end run around the legislature.
 3. Voter Confusion -- Ordinary citizens don't have the time or capacity to evaluate a number of complex ballot measures.
 4. Proposals Severed from Funding Issues -- Legislature often gets stuck funding programs that result from initiatives. Initiative supporters often don't consider funding issues.
 5. Tyranny of the Majority -- Direct democracy does not protect minorities. The procedural rules like veto, filibuster, etc, that make it difficult to pass legislation are not present (e.g., there are no safeguards in direct democracy).
 6. Distortion of the Legislative Agenda -- AKA Ballot box budgeting. Voters don't consider all of the budgeting priorities that exist. They don't have to weigh the true pluses and minuses of the laws that they are trying to pass (e.g., California and laws like their three strikes law).
- d. **Possible Checks on Direct Democracy**
 - ◆ Make it more difficult to get issues onto the ballot
 - ◆ Impose **supermajority** requirement for passage, especially of state constitutional amendments
 - ◆ Require **legislative review** with a "cooling off" period ---> provides at least some deliberation
 - ★◆ Judicial review ----> our focus
 - ◇ State law restraints -- Single-subject, Initiative v. referendum
 - ◇ Federal law -- Equal protection/Due process

ii. State Law Restraints

- a. **Kinds of Restraints**
 1. Single Subject -- A referendum/initiative must involve only one question to avoid voter confusion. Some courts are more strict with this rule than the court in the **St. Paul** case.
 2. Initiative v. Referendum -- Distinguishing between initiatives and referendums by providing different methods for using each process. The line btw initiative and referendum is not always clear.
- b. **St. Paul Citizens for Human Rights v. City Council of the City of St. Paul**
 - a) Facts: Initiative passed to repeal existing ordinance giving gays certain protections and influencing how religious schools admit students. Plaintiff argues that the referendum process should have been used to repeal the existing ordinance. Referendums take away, initiatives add. The practical result of P's argument is that there are different timing requirements for initiatives/referendums.
 - i) Secondary Issue (Single-Subject Rule)--- sexual orientation and religious discrimination parts are two discrete issues. Court dismisses this argument straight away. But the policy driving this argument is voter confusion.

- b) Result: Initiative upheld
- c) Rationale -- The power to give includes the power to take away. Note: no limiting principle
- c. **California Prop. 8**
 - a) Subsequent Challenge 1 -- Basic argument (similar to **St. Paul**): prop. 8 was not an amendment but was a revision that is subject to different requirements.
 - b) Subsequent Challenge 2 -- Violates US Constitution: Still pending...

iii. Federal Constitutional Restraints

a. Equal Protection

1. Arthur v. City of Toledo

- i) Facts -- A city ordinance supplying utilities to a public housing development outside the inner city was rejected by direct democracy.
- ii) Issue -- To establish a race based classification the challenger must establish both racially discriminatory impact and purpose. The problem is that it is very difficult to establish purpose with direct democracy because there is a secret ballot and the sheer number of people voting for the law.
- iii) Holding -- Absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a court cannot inquire into the electorate's motivations in an equal protection context.
- iv) Rationale -- The policy of the secret ballot

2. Romer v. Evans

- i) Facts -- Popular referendum amends the state constitution which provides no state or local branch of government can enact any law protecting homosexuals.
- ii) Issue -- The dispute here is really over whether gays are a class that need protection from the government or not. Kennedy says yes, Scalia says no.
- iii) Holding -- The amendment was struck down b/c not rationally related to a legit state interest.
- iv) Rationale -- Protection offered by antidiscrimination laws is not a "special right" because they protect fundamental rights already enjoyed by other citizens. Though antidiscrimination laws "enumerate" certain groups that they protect, this merely serves to put others on notice. Amendment 2 prevents gays from using the typical political process to gain protection from the government. The law is too broad.
 - (a) Infers animus
 - (b) Dislikes that amendment cuts off gays access to the political process --> The context of **cutting off access to the political process** causes the court to be more searching.

b. Due Process -- Limitations don't exist for the most part.

1. City of Eastlake v. Forest City Enterprises, Inc.

- i) Facts -- Popular referendum made a law that required changes in zoning to be approved by a 55% majority of the city's residents. Plaintiff sued after his zoning application was denied, contending that it was a violation of due process because the decision was one that shouldn't be made by the electorate (there is no standard or deliberation). Argued the scheme was a delegation of legislative power (requires standards to guide discretion).
- ii) Holding -- The requirement did not violate due process.
- iii) Rationale -- The referendum is a power reserved by the people in the Ohio State Constitution (not a delegation of legislative power), and as such is only required to be within the scope of the legislative power to be valid ----> The people are sovereign.

2. Philly's v. Byrne

- i) Facts -- Voters banned the sale of liquor in the plaintiffs precinct by referendum. Plaintiff (bar owners) sued under due process. The question is whether this is legislation or adjudication.
- ii) Holding -- No violation of due process. The local-option referendum procedure was a constitutionally permissible method of regulating the local sale of liquor, assuming it was conducted fairly and honestly because it was **legislative** rather than **adjudicative**. ----> didn't decide whether the bar could sell liquor but whether the whole precinct would adopt the policy of no liquor sales.

c. Challenging the Procedure: Free Speech

a) Doe v. Reed

- i) Facts -- Washington Public Records Act (PRA) requires disclosure of all public records, including referendum petitions. An anti-gay group had petition to overturn some gay law. Then some gays tried to get the petitions to post the names and addresses of the anti-gays on the web. Anti-gays claimed the disclosure violated the constitution by chilling political speech.
- ii) Holding -- Disclosure of the identity of persons who sign petitions for ballot referenda does not normally violate 1st A. Court leaves open, however, the question whether 1st A. might prohibit disclosure if it can be shown that disclosure could expose signers to serious harm.

V. Statutory Interpretation

A. General

i. Three Approaches to Statutory Interpretation

- a. **Intentionalism** -- Interpreter identifies and follows the original intent of the statute's drafters. American courts in the 18th century generally proclaimed their fidelity to legislative intent, but would consider as evidence as such intent the statute's text, canons of construction, common law, circumstances of enactment, principles of equity...etc.
- b. **Purposivism** -- Interpreter chooses the interpretation that best carries out the statute's purpose. This looks for intent at a higher level of generality.
- c. **Textualism** -- Interpreter follows the plain meaning of the statute's text.

B. Statutory Text and Legislative Intent

i. General Theoretical Approaches

- a. **The Mischief Rule** -- Four things must be discerned to interpret statutes:
 - ◆ Common law before the statute
 - ◆ Mischief and defect for which the common law did not provide
 - ◆ Remedy suggested to cure the mischief
 - ◆ True reason of the remedy, then make construction to suppress the mischief and advance the remedy
- b. **The Golden Rule** -- Judges are not supposed to legislate, but are supposed to declare the expressed intention of the legislators. Must do three things:
 - ◆ Take the whole statute together
 - ◆ Give words their ordinary meaning
 - ◆ If the ordinary meaning leads to an absurd, inconsistent, or inconvenient interpretation, the court is justified in giving them another meaning.
- c. **The Literal Rule** -- If the statutory language is plain, legislature must be taken to have meant and intended what is plainly expressed. Where there are clear terms, they must be enforced even if it leads to absurd or mischievous results.

ii. Recognizing Legislative Intent

a. *Holy Trinity Church v. US*

1. **Facts** -- Pastor was foreign, church was contracted to bring him to a church in New York. A statute on the books made it unlawful for any person, company, partnership, or corporation to prepay the transportation of any alien into the US under contract, made before the importation, to perform labor or service.
2. **Issue** -- the churches act appears to be unlawful under the statute but it seems absurd to conclude that congress would have denounced this type of transaction.
3. **Holding** -- The Churches conduct must not have been within the statute because congress could not have possibly intended that result.
4. **Rationale** -- The court used several interpretive techniques for reaching its conclusion:
 - ◇ Statute must have meant only manual laborers
 - ◇ Evil which was intended to be remedied was the influx of cheap unskilled labor (Mischief rule)
 - ▶ Looked to the legislative history to come up with this rationale
 - ◇ The US is a Christian nation and does not want to bar priests from coming in (golden rule).
5. **Importance** -- The first case where the Court rewrote the statute based on evidence from the legislative record. **In a sense elevating intent over the actual text of the statute.** The court however missed the fact that no amendment was ever proposed to limit the statute to manual laborers.

iii. Plain Meaning Rule

- a. **General Rule** -- If the statutory text has a plain meaning then that is the end of the interpretive enterprise. Do not need to go on to consult legis history, statutory purpose, or other potential sources of meaning.

iv. Pond's Spurious Interpretation

a. Three Purposes of Genuine Interpretation

- ◆ Discover the rule which the lawmaker intended to establish
- ◆ Discover the intention which the lawmaker made the rule
- ◆ Enable others to derive from the language used the same idea which the author intended to convey

b. Two Ways to Interpret Statutes

1. **Genuine Interpretation** -- Try to find out directly what the lawmaker meant.
 - ◇ Assume position of the lawmaker in the surroundings in which he acted
 - ◇ Endeavor to gather from the mischief he had to meet and the remedy by which he sought to meet it, his intention with respect to the particular point
 - ◇ If interpreter has clear evidence of intent, should follow it
 - ◇ If no clear evidence of intent is available the interpreter must engage in imaginative reconstruction

2. Spurious Interpretation -- Meet the intent of the lawmaker directly and assume that he thought as we do on general questions of morals and policy and fair dealing.
 - ◇ The interpretation which most appeals to our current sense of right and justice is the one most likely to give meaning of the lawmaker
 - ◇ Cases must be decided for the long run
- c. **Disadvantages of Spurious Interpretation**
 - ◆ Tends to bring the law into dispute
 - ◆ Subjects the courts to political pressure
 - ◆ Reintroduces the personal element into judicial administration --> judges injecting their personal views into the law.

v. Imaginative Reconstruction

- a. ***Fishgold v. Sullivan Drydock and Repair Corp.***
 1. Facts -- Plaintiff returned from army service and was laid off from his job within a year. A statute provided that any person who is restored to a position in accordance with the provisions of the above shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority and shall not be discharged from such position without cause within one year after such restoration.
 2. Holding -- The layoff was legal under the statute.
 3. Rationale -- Court looked to the dictionary definition of "discharge" and found that it meant permanent termination, not temporary termination denoted by a layoff.

C. New Textualism

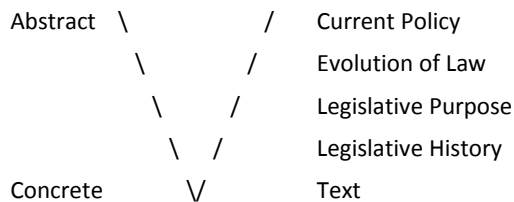
- i. **Definition** -- A style of Textualism developed as a more constrained version of the plain meaning rule.
 - a. General Principles
 - ◆ Courts have no authority to even apply a statute to a problem unless the language clearly targets that problem
 - ◆ Courts interpreting statutes have no business figuring out legislative intent
 - ◆ Should eliminate the use of legislative history altogether
 - ◆ A textualist should rewrite the statute in a way that does least violence to the text
 - ★◆ In the case of ambiguity: Text should be construed reasonably
 - ◇ Reasonable: what a statute fairly means
 - ◆ What an ordinary speaker of the English language would draw from the statutory text is the alpha and omega of statutory interpretation.
- ii. **Justifications of New Textualism**
 - a. Consistency with Facts -- The legislative process is chaotic and undependable so it is almost impossible to figure out what congress intended. All we know for sure is what the legislature created.
 1. *Counter* -- We can figure out some intent. In the process of legislating legislators come to a functionalist agreement about what the law is that should be passed.
 - b. Democratic Legitimacy -- Congress has the responsibility of crafting statutes. Those laws then need to be followed to the T. Only those products are the end result of bicameralism and presentment are worthy of democratic respect. Moreover, legislators have (under the belief that judges would use legislative history) started to put stuff in the legislative history for the purpose of influencing judges. The result of this is the creation of legislation without bicameralism or presentment.
 - c. Rule of Law -- Stability and predictability. We think it's good when people know what the law is, when it is certain, etc... There are also notice and due process concerns when judges go making laws through imaginative interpretation.
- iii. ***Green v. Block Laundry***
 - a. Facts -- Plaintiff, Green, sued after being injured in a laundry accident. Block used Greens prior convictions to impeach his credibility. The statue (federal rules of evidence) seemed to only limit the rule for **defendant**. This result was clearly absurd (and even unconstitutional) if strictly applied. Thus, the court had to decide if "defendant" had some other meaning.
 - b. Majority -- The statute could not possibly mean what it said. The majority went on to discuss the legislative history upon which it concluded that "defendant" means criminal defendant only.
 - c. Scalia (Concur') -- Scalia also rewrote the statute. He disregarded the plain meaning because the statute contained an unintended absurdity that justified a departure from plain meaning. The majority's interpretation does the least violence to the text. Scalia disfavored the reliance on legislative history but **acquiesced** that legislative history could be used in a **very narrow way** -- to verify that the legislature did not intend the absurd result.
 - d. Dissent -- Should interpret the rule to protect any party. Majority's interpretation was not consistent with the logic of congress as revealed by the conference committee report.
 - e. Criticism -- This opinion suggests that there are elements of textualism that are just as arbitrary as other kinds of interpretation.

iv. **Chisom v. Roemer**

- a. Facts -- A vote dilution issue like in *Mobile v. Bolden*. Orleans parish (with lots of black people) had two seats while other parishes had one. Plaintiff was trying to get the statute in Bolden to apply here (a judicial election).
- b. Issue -- Does the vote dilution test in section 2(b) of the VRA apply to judicial elections?
- c. Dissent (Scalia) -- Suggests that using the term "representative" to apply to judges simply because some of them are elected is a bad way to go about it because judges are ordinarily not meant to serve in that capacity.

D. Static and Dynamic Interpretation

- i. **Static v. Dynamic Interpretation** -- The basic question between the two is whether a judge must interpret in a way consistent with history or with the way the law is modernly.
 - a. Realist View -- Judges should not be particularly constrained by past rulings but should instead interpret in a way consistent with modern law.
 - b. Formalist View (Brandeis) -- The past **statutory** decisions of a court are entitled to extra deference because congress and not the court is more institutionally competent to change statutory meaning.
- ii. **Flood v. Kuhn** -- An extreme example of static interpretation.
 - a. Facts -- At issue was baseballs exemption to anti-trust statutes with regards to reserve clauses (a clause that limited free agency of players) in players contracts.
 - b. Majority -- Taking a formalistic approach, the court refused to overturn precedent because of changed conditions. All of the justices agreed that a change was appropriate but the majority insisted that that change was best left to the legislature.
 - c. Dissents -- Exemption is a derelict in the stream of the law that we, its creator, should remove. The Majority may have read too much into congressional inaction. The court should admit error and correct it, given the substantial federal rights at stake.
- iii. **Eskridge on Dynamic Statutory Interpretation**
 - a. Role of Judges -- Judges are **agents** of the legislature applying the principals directive to unforeseen circumstances. Therefore, judges should not read statutes mechanically, but with an eye towards achieving underlying purpose.
- iv. **In the Matter of Jacob** -- An extreme example of dynamic interpretation.
 - a. Facts -- Unmarried cohabitating couple wants to adopt a child. The female partner is the child's mother. There is also a lesbian couple in the same situation.
 - b. Relevant Law -- §110 says that a boyfriend and girlfriend or gay couple cant adopt because neither one is a **two parent married family** or **one parent alone**. §117 says that an adoption **extinguishes parental rights** of the natural parents because they want to protect adopted children against biological parents changing their minds.
 - c. Majority -- The court allowed the adoption. Policy: The statute is designed for the benefit of the child. The statute is old. Society has changed. The court should change the statute so that it is consistent with changing social conditions.
 - d. Problem -- The majority isn't exactly consistent with the legislative purpose in New York. It looks a lot like judicial policy making.
 - e. Importance -- this represents dynamic interpretation because the court departs from the plain meaning in order to have the law reflect changed circumstances (e.g., more people in co-habituating unmarried relationships).
- v. **Li v. Yellow Cab of California** -- The California court is dealing with an old statute. Because it is so old the court asks if the statute means something different now than when it was written.
 - a. Issue -- Should the California Supreme Court invalidate contributory negligence and replace it with comparative negligence? The problem is that contributory negligence is actually a part of the California statutes. Does the legislature have to be the one to abolish contributory negligence?
 - b. Majority -- Takes a dynamic interpretation approach and relied on "emerging concepts" in tort law from other jurisdictions. They conclude that the legislature in the past didn't want to keep the judicial system from evolving.
- vi. **Pragmatic Theories of Interpretation**
- vii. **Funnel of Abstraction** -- An attempt to describe what most judges actually do **in practice**.



Note: Use this on every statutory interpretation problem to try and reconcile each interpretive approach!!!!

E. Textual Canons

- i. **Definition** -- Textual canons set forth inferences that are usually drawn from the drafter's choice of words, grammatical placement in sentences, and their relationship with other parts of the whole statute.
- ii. **Maxim of Word Meaning**
 - a. **Ordinary Meaning** -- Judges may consult dictionaries and will often rely on their own linguistic experience or intuition to decide the most **reasonable** meaning.
 1. **Prototypical Meaning** -- Some judges will look to what core idea is associated with a word or phrase (e.g., Brennan in affirmative action case saw discrimination as requiring invidious intent).
 2. **Technical or Specialized Meaning** -- When the statute deals with a technical or specialized subject the courts adopt the specialized meaning of the words unless it leads to an absurd result.
 3. **Settled Meaning Under Equity or Common Law** -- Where Congress uses terms that have an accumulated meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.
- iii. **Maxims of Word Association and Classification**
 - a. ***noscitur a sociis*** -- Light may be shed on the meaning of an ambiguous word by reference to words associated with it (e.g., statute uses the terms exploration and prospecting to describe discover --> meant only the discovery of mineral resources).
 - b. ***Ejusdem generis*** -- Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. This canon can also work in reverse.
 - ★ c. ***Expressio unius*** -- Words omitted may be just as significant as words set forth. Inclusion of one thing indicates exclusion of another. When this canon leads to an improper result, courts may ignore this. In deciding whether to employ this canon it is helpful to consider context (e.g., statute covering "any horse, mule, cattle, hog, sheep, or goat" did not cover turkeys).
- iv. **Grammar Canons** -- The legislature is presumed to know and follow basic conventions of grammar and syntax.
 - a. **Punctuation Rule** -- (Majority) Looking on punctuation as a less-than-desirable, last ditch alternative.
Note: The punctuation canon has not played a major role in the jurisprudence of the supreme court. Though, modern courts use this canon more than traditional courts.
 - b. **Referential and Qualifying Words** -- Referential and qualifying words or phrases refer only to the **last antecedent** (previous or preexisting), unless contrary to the apparent legislative intent derived from the sense of the entire enactment. Can be trumped by the punctuation rule.
 - c. **Conjunctive versus Disjunctive Connectors** -- Words connected by the disjunctive "or" are often read to have separate meanings and significance. Though in ordinary usage, people often use the two conjunctions (and/or) interchangeably.
 - d. **Mandatory versus Discretionary Language** -- When a statute uses mandatory language (e.g., shall), courts often interpret the statute to exclude discretion to take account of equitable or policy factors. Though ordinary use sometimes uses the words may and shall interchangeably.
 - e. **Singular/Plural Numbers and Male or Female Pronouns** -- Generally all of these words are not given much weight. This is largely a result of the historical use of the male pronoun only.
 - f. **Golden Rule** -- Interpreters should adhere to the ordinary meaning of the words used, and to the grammatical construction unless that leads to any **manifest absurdity** or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience.
 - g. **Nietzsche Rule** -- Be humble rather than hyper-technical, and show some common sense.
- v. **Whole Act Rule** -- The legislature passes judgment on the act as an entity, not giving any one portion greater authority than another. Thus, any attempt to segregate any portion or exclude another is almost certain to distort the legislative intent.
 - a. **Presumption of Coherence** -- This canon presumes that the legislature drafted the statute as a document that is internally consistent in its use of language and the way the provisions work together. This presumption doesn't necessarily reflect the reality of the legislative process.
 - b. **Titles** -- The title cannot control the plain words of the statute. In case of ambiguity the court may consider the title to resolve uncertainty.
 - c. **Preambles and Purpose Clauses** -- may be used to interpret only where there are ambiguous terms (e.g., to determine the legislative purpose).
 - d. **Provisos** -- Restrict the effect of statutory provisions or create exceptions to general rules. In the case of ambiguity a proviso is **strictly** construed.
 - e. **Rule to Avoid Redundancy** -- Every word is presumed to add something to the statutory language. ---> a presumption against redundant language.
 - f. **Presumption of Consistent Usage** -- Identical words used in different parts of the same act are intended to have the same meaning.
 - g. **Rule Against Interpreting a Provision in Derogation of Other Provisions** -- One provision of a statute should not be interpreted in such a way as to create conflict or tension from other provisions of the statute.

vi. **Criticisms of Canons**

- a. Karl Llewellyn -- Argued that every canon had a counter-canon that would lead to the opposite interpretation of the statute. Therefore, they don't really restrain judges at all.
- b. Legislative Process -- The canons do not reflect the way that statutes are actually drafted. They do not force legislators to draft with care. And they do not address the fact that ambiguities often exist because legislators failed to reach a consensus.

F. Substantive Canons

i. **Introduction**

- a. **Definition(Substantive Canons)** -- Presumptions about statutory meaning based on substantive principles or policies drawn from the common law, other statutes, or the Constitution.

ii. **The Rule of Lenity**

- a. **Definition (Rule of Lenity)** -- Laws whose purpose is to punish must be construed strictly.
- b. **Justifications for Lenity**
 1. Fair Notice -- One justification for the rule of lenity is fair notice. The state may not impose penalties upon people without clearly warning them about unlawful conduct and its consequences. Under this rationale lenity is most appropriately applied to offenses that are **malum prohibitum**.
 2. Mens Rea -- Another justification is the requirement of mens reas in the criminal law.
 3. Separation of Powers -- Congress cannot delegate to judges and prosecutors power to make common law crimes, because the moral condemnation inherent in crimes ought only to be delivered by the popularly elected legislature. (Tokaji not big on this argument)
- c. **Modern Rule of Lenity** -- As of 2006 28 states have abolished or reversed the rule of lenity.
- d. **Muscarello v. US**
 1. Issue -- Law says that if you use or carry a firearm while committing certain crimes, you get an extra 5 years. Muscarello carries a gun in his truck. Is this carrying within the meaning of the statute?
 2. Majority -- Used lots of evidence (e.g., legislative history & such) besides the rule of lenity. Existence of some ambiguity is not enough to trigger rule of lenity. Must have **grievous ambiguity**.
 3. Dissent -- Looks to the common meaning of "carries a firearm." Puts more emphasis on applying the rule of lenity. Used lenity as more of a presumption than a tie breaker. Main reason for rule of lenity is separation of powers: Legislatures, not courts should define criminal activity.
- e. **McNally v. US**
 1. Issue -- There was some sort of government insurance corruption scheme. The people involved were indicted under mail fraud. At issue is the meaning of "money and other things of value"
 2. Majority -- Applied rule of lenity to require "tangible loss" to public. Doesn't include kickback scheme, unless the state lost money.
 3. Dissent -- Wants to take a more expansive view.
- f. **Skilling v. US** -- Example of a case where the court was more sympathetic to the rule of lenity
 1. Facts -- we have a fraud statute that is very vague. Particularly: "intangible right to honest services."
 2. Majority -- No violation. Relying (in part) on the rule of lenity. The court limited "intangible right to honest services" to bribes and kickbacks. --> would still apply statute in the future
 - i) Note -- There is some constitutional avoidance here too.
 3. Scalia -- Would have held statute unconstitutionally vague, accuses majority of substituting "invention" for interpretation. --> throws out right entirely

iii. **Constitutional Avoidance**

a. **US v. Witkovich**

1. Facts -- Illegal immigrant was arrested under a statute that appeared in its text to give the attorney general the authority to arrest illegal immigrants who refused to testify about themselves and their associates. The immigrant was arrested for refusing to testify.
2. Issue -- Is the statute unconstitutional?
3. Majority -- Interpreted around the plain text of the statute in order to avoid constitutional doubts. To interpret the majority used legislative history, the statutory scheme, and the clause immediately following the clause in question.

b. **NLRB v. Catholic Bishop of Chicago**

1. Issue -- Does NLRB's jurisdiction extend to religious schools?
2. Majority -- No. First evaluated if there were any first amendment concerns. Found that there could be so the court interpreted the statute to see if there was any way to avoid the constitutional concerns. There was no **clear expression** of congress' **intent** to exercise jurisdiction (over religious schools) when the exercise raises constitutional questions. Therefore, the court found no jurisdiction. --> this is a "**clear statement rule**"
3. Dissent -- A clear expression should not be required whenever there is a constitutional question. Moreover, the statute has 8 exceptions --> if congress wanted to exclude they could have added. --> dissent argues that silence doesn't necessarily mean a clear statement is lacking (the 8 exceptions is an exhaustive list).

- c. **Methods of Applying Constitutional Avoidance**
 - ◆ When one interpretation would be unconstitutional, choose another one that would pass constitutional muster.
 - ◆ When one interpretation would raise serious constitutional problems, choose the one that would not (**Modern Approach**).
 - ◆ When one interpretation presents constitutional difficulties, do not impose it unless there has been an affirmative indication from Congress that it is required. This is the more aggressive approach.
- d. **Values Underlying Constitutional Avoidance**
 - ◆ Avoidance interpreters assume that the legislature would not have wanted to press constitutional limits.
 - ◆ Protecting basic constitutional values or norms that are under-enforced. Unwilling to close off congressional options through constitutional review, judges will give effect to due process and free speech norms through narrowing constructions.
 - ◆ Judicial restraint. Conservation of institutional capital by constitutional avoidance.
- e. **Criticisms of Avoidance**
 1. Judge Friendly -- The avoidance canon may be an occasion for stealth judicial activism, which is both anti-democratic and unhealthy for the judiciary. This may also lead to unpredictable application.

iv. New Federalism

- a. **Definition** -- The creation or clarification of clear statements of rules that reflect constitutional norms of federalism.
- b. **Gregory v. Ashcroft** -- The most dramatic example of the Court protecting state sovereignty through the use of canons.
 1. Facts -- Missouri constitution provided for a mandatory retirement age of 70 for judges. This was a violation of the ADEA. An **employer** cannot specify a mandatory age requirement for **employees** over 40.
 2. Issues
 - ◇ Congressional interference with this decision would upset the constitutional balance of federal and state powers, whereas application of the plain statement rule would avoid a potential constitutional problem.
 - ◇ Cannot conclude that the act clearly covers appointed (ADEA doesn't apply to elected officials) state judges, so it is at least ambiguous whether Congress intended for appointed judges to be included ---> "appointees on the policymaking level" are excluded from the ADEA
 3. Majority (Tokaji is not into this) -- Will not attribute to Congress an intent to intrude on state governmental functions (**clear statement rule**). The majority interpreted in a way to avoid interference with state power.
 - ◇ Judges aren't explicitly included (*expresio unio*), but could qualify as appointees on the policymaking level (plain language).
 - ◇ Clear Statement Rule: A conservative judge's tiebreaker canon (like how a liberal judge would use legislative history). This trumps what is suggested by the ordinary meaning.
 - Note** -- Clear statement rule not really necessary...there is an ambiguous statute here. Could have just relied on the text.
 - ◇ Rejects application of *noscitur a sociis* (word known by its associates) canon as limiting exception to those working with elected officials.
 4. Criticism of Majority -- The rationale for federalism is that decentralized government protects the rights of the people. ADEA seems to protect the rights of the people.
 - i) *Counter* -- People have the right to competent judges.
 5. Justifications for Clear Statement Rule
 - ◇ Adequately detects congressional preferences, settled expectations and public values
 - ◇ Countervailing Justification -- Could be viewed as judicial activism.
- c. **Gregory and Chisom (Above) Compared**
 - ◆ Both cases seem to have federalism issues but the court doesn't use federalism in *Chisom*
 - ◇ The cases were also decided by the same court, on the same day.
 - ◆ How can these cases be reconciled?
 - ◇ ADEA is justified by commerce clause, VRA justified under 14th amendment
 - ◇ Maybe as a practical matter the court achieves the same result in both cases so it didn't need federalism.

G. Legislative History

i. Introduction

a. **Leo Sheep. Co. v. US**

1. **Facts** -- This is a property case. People were having difficulty accessing a reservoir because the surrounding land was privately held. The land originally became private during the construction of the transcontinental railroad. The government granted land to the railroad using a checkerboard scheme where every other parcel was given to the railroad while the rest remained public. Because of this the government claimed it had an implied easement by necessity.
2. **Majority** -- Focused on congressional intent. Statute (Union Pacific Act of 1862) did not mention easements but other reservations were made. Rejected a canon of resolving doubts involving land in favor of the government. Court concluded that since the Congress intended organic development through the purchase of land, there was no implied easement.
 - i) **Key Point** -- Congress was trying to encourage development ---> they didn't want to encumber the land more than was necessary. Therefore the government is not justified in asserting an easement. This is why the history matters.
 - ii) **A Different Kind of History** -- This legislative history is more like finding the actual context of the law. Its not as dubious as looking for some tiny piece of information buried in a committee report.

ii. Committee Reports

- a. **Generally** -- Most judges agree that committee reports should be considered as authoritative legislative history and should be given great weight.
- b. **Limitations** -- There are limitations of the usefulness of committee reports in giving meaning to ambiguous statutes.
 - ◆ Sometimes there is no committee report for a particular bill or important provision.
 - ◆ Committee report is often as ambiguous as the statute. It could even be misleading by leaving out important qualifications.
 - ◆ Traditionally committee reports didn't include mark-up sessions, where critical compromises were made.
 - ◆ Under some circumstances statements may be suspicious because there could be other reasons for the statements being in the report (e.g., political maneuvering).
- c. **State Legislatures** -- State courts often use committee reports and similar documents to interpret ambiguous statutes. They can take a few forms:
 - ◆ Regular reports (akin to congressional committee reports)
 - ◆ Staff analysis of a bill
 - ◆ Reports of special committees created to investigate and resolve important problems
- d. **Blanchard v. Bergeron**
 1. **Facts** -- A civil rights case. The statute provides that plaintiff may recover "reasonable" attorneys fees. The court had to figure out what was reasonable.
 2. **Majority** -- Looked to the legislative history which referenced three cases that correctly applied the reasonableness standard. The court then looked at each case and tried to apply it to the facts here.
 3. **Concurrence (Scalia)** -- Scalia objected to the courts analysis because the cases that the legislature looked to were from lower courts. This role reversal was not proper. Moreover, it is not the role of the legislature to point to cases. They are to enact statutes. Finally, most members of congress probably didn't even read the committee reports and therefore did not vote to enact them.
- e. **In re Sinclair**
- f. **Carr v. US** -- The use of legislative history is something that the Supreme Court is okay with using (except Scalia).
 1. **Facts** -- Sex offender registration and notification act (SORNA) was enacted while Carr was traveling interstate.
 2. **Issue** -- SORNA makes it a crime when a person travels interstate and knowingly fails to register (if the person is required to register). Carr argues that the statute cannot be applied to him because the travel must have taken place after the statutes effective date.
 3. **Majority** -- Makes a textual argument (use of present tense) because a person who travels must register under SORNA. There is no way for a person who travels to register under a non-existent statute.
 - i) **Dictionary Act** --
 4. **Dissent** -- Relies on legislative history. Relies on a drafting manual, which says present tense should generally be used.
 - i) **Counter Argument** -- drafting manual is not a statute like the dictionary act is.

H. Agency Interpretation

i. The Basic Framework

- a. **Skidmore** -- An agency administrator's practices and recommendation to the court is not binding but is entitled to **respect** because it constitutes a **body of experience** and **informed judgment**. The weight of such a judgment will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
- b. **Chevron** -- Established a two-step test for deciding when a court should defer to an agency's construction:
 1. Congress Has Spoken -- If congress has spoken directly to the issue, the court gives no deference.
 2. Congress Has Not Spoken -- If congress has not spoken directly and the statute is silent or ambiguous with respect to the particular issue, then the court must ask whether the agency's answer is based on a permissible construction of the statute.
 - i) *Overriding the Construction* -- If the construction is arbitrary, capricious, or manifestly contrary to the statute, then the court can override the construction.
 - ii) *Reasons for Ambiguity* -- The court recognizes three reasons why a statute might be ambiguous: 1) congress may intend to have the agency strike the balance; 2) Congress may have ignored the issue entirely; 3) Congress may have failed to strike a balance and thus agreed to leave it blank.

I. Signing Statements

i. Use of Signing Statements

- Presidents have used to:
 - ◆ Say how they interpret and will apply law
 - ◆ Raise constitutional objections
- Bush 43 (W) challenged or sought to alter >800 provisions --> the use of signing statements has increased
- Obama Memo
 - ◆ Signing statements will issue "only when it is appropriate to do so as a means of discharging my constitutional responsibilities" and
 - ◆ Executive branch is directed to seek AG's advice before relying on prior signing statements to disregard or refuse to comply w/ statutes.