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# Constitutionalism and judicial review

## Background

1. Functions of constitution
   1. Create national government and separate powers
   2. Divide power between federal and state governments
   3. Protect individual liberties
2. Why a constitution?
   1. Difficult to change and might not reflect the views of that moment’s majority
      1. Prevents tyranny of the majority
      2. Protects the rights of the minority from oppression by social majorities
   2. Attempt by society to limit itself to protect values it most cherishes
   3. Anti-majoritarian document
   4. Has it succeeded in restraining the majority, especially in times of crisis?
3. **Substantive DP analysis and its doctrinal structure**--related to when strict scrutiny applies and how it relates to the interest balancing analysis we talked about in these opinions. I should have been more clear about this in class, so it's largely my fault; but also in part the Court's fault for not being consistent or transparent about this.
   1. So the "official" doctrine, to the extent anyone can figure it out, is that burdens on fundamental rights trigger strict scrutiny (whereas burdens on nonfundamental liberty interests trigger only rationality review, as in Williamson v. Lee Optical and similar cases).
   2. That said, in Lawrence, the Court never says what level of scrutiny its applying, and one could read the opinion as following Romer in rejecting even the legitimacy of the government's moral interest in regulating sodomy on the lower standard of rationality review. But one could also read it as applying heightened scrutiny to the infringement of a fundamental right to something--gay sex, same-sex intimate relationships of which sex is a part, or the like (as with Griswold, the scope of the right is kind of nebulous).
   3. To make matters more confusing, in Lawrence and Roe and other cases the Court analyzes fundamental rights claims by balancing the individual's liberty interest against the government's interest in regulating. This balancing analysis is probably best understood as deriving the existence and scope of a fundamental right (of the sort that will trigger strict scrutiny if burdened). But the Court then seldom goes on to apply strict scrutiny as a separate, second step. Instead, as in Roe, the Court builds the state's compelling interests into the definition of the right. E.g., if the state has a compelling interest in preventing post-viability abortions, then the abortion right simply "ends" at viability. An alternative, and perhaps more doctrinally correct, way of reaching the same result would be to say that a woman has a fundamental right to abortion even post-viability, but government can overcome strict scrutiny by asserting its compelling interest in protecting fetal life post-viability.
   4. The end result is the same under either the one-step or two-step analysis, but the two-step approach more clearly separates the "does a fundamental right exist/does strict scrutiny apply" question from the "does government have a compelling enough interest to meet the strict scrutiny standard" question.
   5. Then there is a third question in some of these cases, which is whether what the government is doing "infringes" the relevant right. This question goes in the middle of the other two: First we ask whether there is a fundamental right of whatever size and shape; then we ask whether the government is infringing it; and finally we ask whether, if yes to the first two questions, government can justify its infringement by offering a compelling interest that meets the standard of strict scrutiny. This middle question is the one gets answered with the "undue burden" standard in Casey and the unconstitutional conditions analysis in the selective funding cases.
4. **Rational basis review**: The idea behind rational basis review is that the judiciary must show deference to the elected representatives of the people. A respect for the democratic process requires that the Courts uphold legislation if there are rational facts and reasons that could support Congressional judgment, even if the Justices would come to different conclusions.

## Marbury

1. *Marbury v. Madison*
   1. **Background**:
      1. Federalists (Marshall): strong national government
      2. Republicans (Madison): strong states’ rights
      3. Outgoing federalists packed the courts to attempt to shield them from Republican influence
   2. **Parties:** Madison, incoming President Jefferson's Secretary of state, and Marbury, appointed judge under outgoing John Adams
   3. **Material Facts:** Marbury wanted his commission as justice of the peace delivered, which had been issued under Adams but held up under Jefferson.
   4. **Question Presented:** Does Marbury have a right to this commission? If so, do the laws of the country afford him a remedy? If so, is mandamus issuing from this court?
   5. **Holding:** Law cannot override the constitution.
      1. Yes, right under act of congress from 1801. To withhold commission is violative of a vested legal right.
      2. Having legal title to the office, he has a right to the commission, the refusal to deliver is a violation for which the laws of this country afford him a remedy.
      3. § 13 of the Judiciary Act of 1789, giving the Court authority to issue writs of mandamus to an officer, was contrary to Article II Section 2 of the Constitution as an act of original jurisdiction, and therefore void.
         1. Issuing mandamus orders is type of original jurisdiction
         2. Statute conflicts by granting court power to hear type of original jurisdiction case that congress doesn't authorize them to hear
         3. Deliberately ignores the part of Article 3 that says SCOTUS will have jurisdiction that Congress gives it (with such exceptions as the Congress shall make--Congress could transfer from appellate to original)
   6. **Rationale:** Constitution: SCOTUS has original jurisdiction in cases affecting public ministers, constitution for the government of courts. Marshall used this case as a vehicle to expand the power of the court.
   7. **Legacy:** establishes the power of judicial review (the power of the courts to hold legislation unconstitutional)
2. Power of judicial review
   1. No justification in Article III
   2. Marshall uses other sections of the constitution to give strength to the idea of judicial review
      1. Oath requirement: judges take oath to uphold Constitution
      2. Supremacy clause: if there were a dispute about the constitution, judges would have to resolve it anyways
      3. Arising under: granting jurisdiction would be meaningless it SCOTUS couldn’t rule on the constitutionality of laws
   3. No point in having a constitution if there is no court to enforce it
   4. Why judiciary as enforcer?
      1. Whatever makes people comply with what judges say as law will make them pay attention to what judges say about the Constitution
      2. Can’t be the legislature—they enact the laws, and someone has to check them
      3. Can’t be the executive—they can make executive orders, and someone has to check them
      4. Court not politically accountable
         1. Immune to the political pressures influencing the president and legislature
         2. Give the power to the branch who can do the least harm if they abuse it: Courts have limited powers
3. Limits to judicial review
   1. Marshall anticipated judicial review would be limited to cases concerning the judiciary
      1. Denial of jury rights
      2. SCOTUS jurisdiction
      3. Only exercised in cases of clear constitutional violation

## Justifying Judicial Review

1. How politics control the SCOTUS
   1. Amendments
   2. Power to appoint justices
   3. Impeachment
   4. Life tenure
2. Constitutionalism problems
   1. Counter-majoritarian problem: if a present majority of Americans want to do something, and their elected representatives want to, why should nine unelected judges be able to?
      1. Traditional answer: people have a right to established principles conducive to their own happiness (federalist Papers)
      2. The principles themselves are fundamental and permanent and have been decided in advance
      3. The People who wrote and ratified the Constitution have the highest power
      4. The People > today’s people
   2. Why should a set of rules from 220 years ago be binding on present-day Americans?
   3. Reading the text in the abstract is not enough
      1. Have to take our history and system of government to understand the constitution
   4. Once you start abstracting a little (from print media to TV broadcasts)hard to know where to stop
3. **Living Constitution**: the Constitution has a dynamic meaning or that it has the properties of a human in the sense that it changes. The idea is associated with views that contemporaneous society should be taken into account when interpreting key constitutional phrases.
4. Originalism
   1. Strict originalism: Read the constitution with the intent the framers had when they wrote it
      1. Criticism: would make the Constitution irrelevant to the modern world and an impediment to accomplishing anything
   2. Scalia: if we don’t stick to what the founders intended, we are perverting the Constitution
   3. Criticism:
      1. If used their intent, racism and sexism okay
      2. They did not think the Bill of Rights should be applicable to the states.
      3. Impossible to uncover original understandings
      4. Would the founders want the same things in today’s society that they wanted 250 years ago?
   4. Moderate originalism
      1. Blank check for judges to do what they want
      2. Mainstream approach: use moderate originalism (core values and principles), then translate into the modern world and its circumstances
      3. Example: what did they mean by cruel and unusual? Death penalty common, as was killing people at the time of the founders
5. Moderate originalism: follow the principles the founders wanted to establish
6. Moral reading: read the constitution how your morals tell you to
   1. Treat all citizens as having equal moral status
   2. Take concepts from the Constitution and fill in our own values
   3. Or, take concepts and fill in values using the values of the founders
7. Dworkin
   1. Read what the framers said as principles
   2. Move the interpretation from the People to the court
   3. Judges should take abstract moral principles and build their own moral and political philosophies around those principles to strike down acts they don’t approve of
   4. Criticism: courts are making the substantive value and political judgments and not really channeling the will of the people
8. The People v. the people
   1. The People were of high quality
   2. Temporary actions may not even be supported by a present majority
   3. Concern with long-term public interest
   4. Constitutional politics may be overcome by ordinary politics; want to avoid
9. *Ex Parte McCardle*
   1. **Parties:** McCardle, article publisher.
   2. **Material Facts:** The military supervised Miss. during reconstruction, McCardle spoke out against it and was imprisoned for libel, challenged on habeas corpus.
   3. **Procedural History:** Lost in trial court, appealed, and then Congress repealed the portion of the habeas corpus act he was invoking.
   4. **Question Presented:** Is there jurisdiction after the act was repealed?
   5. **Holding:** Dismissed for lack of jurisdiction
   6. **Rationale*:***Congress created the appellate jurisdiction of the SCOTUS, and as such, can repeal it; court is bound to that.

## Constitutional Interpretation: McCulloch and Heller

1. Issues with Constitutional interpretation
   1. Creators didn’t think of everything—just an outline
   2. Open-ended phrases that the court needs to decide the meaning of
   3. What justifications are there for permitting the government to interfere with a fundamental right or to discriminate?
2. We enhance our autonomy in the long run by limiting our choices in the short run
   1. Example: If we can predict in the heat of the moment we'll be more likely to crack down on civil liberties, know we'll be better off in advance forbidding it, in the long run we'll be glad we didn't do those things
   2. Two decision-making context: calm versus spur of the moment
      1. More information at the latter time, but possibly less objective
3. Constitution as precommitment: what if judges substitute their own values for commitments the People made?
   1. Why should decisions made in 1791 trump those made in 2001?
   2. But maybe the median vote should not be the person setting national policy
   3. Congress and the President do not necessarily do what the President wants
4. How the court is moderated
   1. Senate confirmation
   2. Switching of President’s party over time🡪mix of parties represented
      1. May lead to a better representation of the majority than any one president
      2. May be fairly close to the center of American politics
   3. Ongoing control through elected representatives
      1. Amendments can overrule SCOTUS decision
      2. Statutes can clarify Congressional intent
   4. Other tools
      1. Budget of court
      2. Size of court
      3. Establishment of lower courts
      4. Impeachment power
      5. Ignore them!
   5. Congress has not really used these tools
5. Dworkin: challenging the majoritarian premise
   1. Majoritarian does not equate to democratic
      1. If majorities tyrannizing minorities, not democracy
   2. Democracy includes:
      1. Quality of democratic deliberation
      2. High quality process
   3. SCOTUS is anti-majoritarian but pro-democratic:
      1. Few, well-educated justices
      2. Private deliberation
      3. Shielded from political pressures
   4. Issues with democracy
      1. Procedural: majority vote? What if majority votes for a dictatorship?
      2. Substantive: democratic values
   5. Dworkin: pick substance over procedure
      1. Criticism: The more you prioritize the substantive values over the procedural values, the less you are talking about voting, and the more you are just saying some decisions are substantively bad
6. Living Constitution
   1. Views Constitution less as precise instructions and more as a general outline of how we should behave
7. *McCullough v Maryland*
   1. **Parties:** Bank of Maryland v Bank of the US.
   2. **Material Facts:** State of Maryland brought action against McCulloch, cashier of Bank of the United States, alleging he failed to pay state tax levied against the bank.
   3. **Question Presented:** Does Congress have the power to incorporate a bank? Does the State of Maryland have the power to tax that branch?
      1. Article I, Section 8: Congress shall have the power to make all laws necessary and proper to enforce the other laws
      2. Congress can't pass a law and justify it under its necessary and proper power; has to be attached to one of its enumerated powers
      3. Question here: how broadly to define the word necessary in this clause:
         1. Jefferson: necessary means necessary, indispensible; if this was the ONLY way
         2. Hamilton: something more like useful, convenient
   4. **Arguments**
      1. Textualist argument over the 10th amendment, and how to understand necessary and proper clause
         1. How to interpret word necessary: necessary and proper is less restrictive than necessary, because it doesn't say absolutely necessary
      2. Comparing the word to another usage of the word in another part of the constitution
         1. Intra-textualism
         2. Slightly more controversial
      3. States maintain every right not expressly delegated to the US
      4. Should lead us to understanding that Congress should be able to do some things impliedly delegated, since "expressly" was removed
   5. **Holding:** The law imposing a tax on the Bank of the United States was unconstitutional and void because the states had no power to burden the operations of the constitutional laws enacted by Congress.
   6. **Rationale:** Historical practice gives Congress authority to create bank (there was a first bank of the US). The system can exercise only the powers granted to it. Constitution gives government the right to lay/collect taxes, commerce, etc; even though no express right to make a bank, gov't must have means to execute the other powers. Invokes necessary and proper clause:
      1. Placed among powers of Congress, not limitations
      2. Enlarge, not diminish, powers of the government
      3. If the states could tax one instrument of the federal government, they could tax all instruments, prostrating it at the foot of the states. Would be acting upon citizens of other states who created the fed gov't, over whom they have no power.
      4. Once Marshall decides Congress can establish bank, he decides that MD can't tax it
         1. Reasoning: the power to tax is the power to destroy; the power to destroy negates the power to create, and since we just decided Congress has the power to create, therefore power to destroy inconsistent with power to create and must be struck down as unconstitutional
         2. But then Marshall says a state tax on the land the bank is sitting on is OK
         3. OK because applied equally to residents; if it would destroy bank, would destroy residences
         4. Has the political check of the voters within the state
         5. Idea is taxation without representation: we generally believe that most people will be protected against government abuses by democracy; ppl who make political decisions held accountable
         6. Worry when people disadvantaged by political decisions made by bodies in which they are not represented
   7. **History** of the bank controversy
      1. One of many debates over the scope of Congressional power, national government v. state gov't
      2. Federalists wanted national bank: so congress could borrow money, help congress collect taxes, help structure economy, regulate commerce
      3. Jeffersonians: weak nat'l government and strong states
   8. **Legacy:**
      1. Makes basic point about how the structure of federalism works
      2. Good vehicle for identifying the different debates over what the constitution means
      3. Illustration of the way debate happens outside the court over constitutional interpretation
      4. Why can't Congress just do it, if elected representatives think it is a good idea?
         1. Congress can only do what the constitution empowers it to do
         2. Art I, Section I endows Congress with powers herein granted
         3. Powers in Section 8: tax, nat'l defense, borrow, regulate interstate and foreign commerce, currency, post offices and roads, copyrights and patents
   9. McCulloch rule still holds: states aren't allowed to tax federal entities
      1. Not even property taxes, unless Congress okays it
      2. States can tax income of fed employees
      3. Simple idea of no taxation without representation
      4. Courts have to step in to protect political groups not adequately protected
      5. This mitigates concerns; makes democratic process work better or more fairly
   10. Still plenty of debate over what structural elements we should attach to
8. Test for federalism versus state power:
   1. States: one step process: does this state law violate some right?
   2. Is it preempted by a federal law?
      1. State laws have to give way if contradict federal law
      2. If congress has enacted a law using its powers, and it overlaps, it overrides the state law
9. How this relates to healthcare:
   1. The fact that everyone has to have insurance or pay fine is being challenged as not a form of regulating commerce, instead forcing people to engage in commerce
   2. Marshall would be all for healthcare
      1. Adopts federalist interpretation, broad interpretation of congressional power under Article I
      2. Requires only that federal laws only have a reasonable or useful relationship to some enumerated power
      3. Anything could be construed as connected in some way to a power the government has
10. Marshall's approach to Constitutional interpretation
    1. Constitutional law and interpretation limited to certain types of arguments and considerations
       1. Other types not permitted (political arguments versus legal/constitutional arguments)
       2. Only the latter is acceptable
       3. Deciding which is which can be difficult
11. Constitutional interpretation
    1. Dworkin: The more we worry that courts aren't allowed to do what they are doing, the more we see justices clinging to modes of constitutional interpretation tying decisions to the voice of the People to alleviate concerns they are using their own morals
    2. There are many cases where judges do not care what the answer is
       1. In those cases the judges take the sources as they understand them, work with them, and reach an outcome they didn't necessarily predict
    3. Original understanding/originalism
       1. Judges deciding constitutional norms should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution
       2. Hardest constitutionalists say this should govern, and it ends here
       3. Disagreement over what this means
       4. Right exists in the Constitution only if it is expressly stated in the text or was clearly intended by its framers
       5. If Constitution silent, for the legislature to decide
       6. Strict: court must follow the literal text and specific intent of the framers
       7. Moderate: concerned with the founders’ general purpose
       8. Original meaning (Scalia): look to historical practices and understandings of the time
       9. Arguments for:
          1. Nature of interpreting a document requires that meaning be limited to its text and framer’s intentions
          2. Desirable to constrain the power of unelected judges in a democratic society (counter-majoritarian difficulty)
    4. Non-originalism: courts should go beyond the set of references in the Constitution and enforce norms that cannot be discovered within the four corners of the document
       1. Constitution’s meaning can evolve through interpretation
       2. Arguments for:
          1. Desirable to have the Constitution evolve by interpretation to meet needs of changing society (amendments cumbersome)
          2. There is no one framers’ intent that can be used to resolve questions
    5. Precedent: the next move (sometimes the first move)
       1. Has the court heard a case interpreting this part of the Constitution before?
       2. At the time Marshall is writing, not much precedent to draw on
       3. Would have to look at interpretations in other branches (Congress, presidency)
       4. Opinion starts in McCulloch by emphasizing this precedent
       5. Been resolved twice in Banks' favor in Congress
       6. Why a good idea to follow precedent? Why do we have stare decisis?
          1. Lowers decision costs: if another court decided it, it is easy to decide
          2. Creates consistency and stability in the law
          3. Lets people order their lives
          4. Tradeoff between good law and stability
          5. Having a constitution settles a lot of things: maybe not the best way, but better settled in some way than none at all
          6. Why Scalia says he's an originalist but not a nut: doesn't want to unsettle the whole administrative and regulatory state; could make an argument to pull out rug, but might be too destructive to society to be worth it
          7. If the constitution is interpreted in the wrong way, hard to correct short of judicial interpretation
       7. Argument against: maybe stare decisis should be weaker in courts, because courts are the ones best able to correct their interpretations
          1. Following precedent does nothing to make judicial review look better; just substituting interpretations of previous judges; less democratically appealing
          2. More likely to reflect majoritarian views
    6. Traditions
       1. Even if they are wrong, because they have been in place for several generations, it has now become constitutional
       2. Like adverse possession of the constitution
       3. Judges should be limited to recognizing rights with a sea of approval, thought tolerable or protected
    7. Structural arguments
       1. Attribute to design of government certain goals; interpret constitution as a blueprint to achieve those goals
    8. Prudential
       1. Irrespective of text, founders, etc.
       2. Controversial
       3. Drops pretense of channeling the voice of the people
       4. Usually judges and justice do not say this, but they may mean it
       5. It is a CONSTITUTION we are expounding (in contrast to a statutory code)
       6. Marshall is arguing that a constitution by its behavior invites or demands a different approach than an ordinary statute would
       7. Has to endure for a longer period of time; drafters won't be able to anticipate all the ways it will apply
       8. Important we have leeway to fill in constitution with principles that make sense for us now in light of other needs and values
       9. Constitution has to be **living** in a way that statutes don't
       10. Marshall's argument: moral reading is what a constitution does or requires
       11. Have to interpret constitution in light of what a constitution is and does
12. *District of Columbia v. Heller*
    1. **Question Presented:** Does a DC ban on handguns in the home violate the 2nd Amendment?
    2. Right of the people = individual rights, not the rights of a group
       1. Uses text of constitution, dictionaries and history
       2. In discussion of whether to give this right to freed blacks after the Civil War
    3. **Dissent**: Second Amendment applies to militia service
       1. Declaration of Rights of Pennsylvania and Vermont reserving right to own guns expands the amendment's militia purpose
       2. Law abiding citizens v. felons: 1st amendment doesn't distinguish
    4. **Breyer**: handguns cause lots of deaths, accidental, murders, etc in DC
       1. When Framers made the law, urban dwellers were not the people they had in mind: frontier dwellers facing Indians, Etc.
       2. They probably weren't considering handguns, either
    5. Case about the 2nd amendment: court determines amendment gives individual right to bear arms
       1. DC handgun law unconstitutional
       2. Second amendment used to be treated as constitutional anachronism
       3. Didn't want the national government to interfere with state-run militias
       4. Respect the right of the people, taken collectively, to have militias to the common defense
    6. Debate over constitutional interpretation
       1. Turn to original understanding when we don't understand it
       2. Much of the opinion is taken up over going back and forth over the precise original understanding, emphasizing aspects
       3. Argue over what the People means
          1. Dissent: collective right, bunch of people acting together (ie state militia)
          2. Scalia: points to other places, like 4th amendment, that give rights to the People, search and seizure fully assertable by individuals
       4. What does militia mean?
          1. Militia also could mean to oppose a tyrannical government
       5. Keep and bear arms
          1. Bear arms = fighting in war context, not hunting
          2. Even if bear meant that, keep didn't
       6. What does arms mean?
          1. Scalia: specific originalists would mean the type of arms understood to be arms back then, muskets, not handguns
          2. Says this is ridiculous
          3. Need to raise the level of generality at least a little
       7. No side really has an advantage over the other side
       8. Most tied to need for citizens to arm selves against state tyranny; but also good for other purposes like self defense
       9. How to protect against this
          1. Arming as individuals
          2. Organizing into well-regulated militias
          3. Important check on distrusted national government
          4. If army in head of government, won't national government then repress citizenry?
          5. Federalists: need big army to be a power in the world; citizen armies, although won revolution, suck at fighting
          6. They won out: George Washington urged that the constitution create a professionalized standing army
          7. When state militias called into service, president can take control of them; better these militias be used domestically on us soil
             1. Repress insurrections on US soil and invasions on US soil
             2. US army foreign, overseas, where can't repress
       10. State-appointed officers might resist orders from national head on citizens
       11. If militia powerful enough, would side with ordinary citizens, not tyrannical president
    7. So what does this mean?
       1. Second amendment fit into constitutional structure on how to organize out military capacity
       2. Check against professionalized national army
       3. Now majority and dissent disagree over what to infer from this
          1. Dissent: formal structure of militias
          2. Majority: broader idea that we need an armed citizenry, whether formally organized or not; requires that all individuals are allowed to bear arms to maintain citizen threat
          3. Real divide in the case is over how that understanding should be carried into the modern world
       4. If the only reason why people cared about guns at founding was to hunt or defend against criminals, there would be no second amendment
    8. How do we apply that to Heller?
       1. If founders were alive today, they would say forget it: no longer serves the purpose it was meant to
       2. Possess weapons in isolation of the purpose
       3. Believe there would be state militias to defend themselves against national army
       4. Either of those things that founding generation understood and pull them into the present, but can't take both: can't recreate the world they had
    9. So what do we do?
       1. As much as original understanding is offered as a way of creating agreement and limiting flexibility of judges, may be as much disagreement of what to infer about historical understanding
       2. Which parts do we want to treat as fixed and which do we want to take as flexible
       3. Scalia: individuals with guns; dissent: militias
       4. Which part do we take? Which part are we supposed to take and leave behind?
       5. No formula to decide, and no agreement
       6. Could take view that purpose of 2nd amendment not anachronistic in the modern world: citizens with guns can serve as a meaningful check
    10. Heller striking for emphasis on original understanding
    11. There is other stuff in opinion
        1. Before Heller, court had never held that 2nd amendment allowed individuals the right to have guns
        2. Leading case was Miller: statute banning possession of sawed-off shotgun; Fed court held it violated second amendment; SCOTUS unanimously reversed
           1. 2nd amendment's obvious purpose to assure continuation and render possible the militia
           2. Sawed-off shotguns not part of military equipment for the militias
        3. Precedent can be extended or extinguished
        4. Then, history and tradition surrounding second amendment after the founding
           1. Not clear there was ever a single consensus view on 2nd amendment
           2. Gun control laws have been enacted since civil war with very few challenges or doubts
           3. No theory, no agreement on when a constitutional right can adversely be assessed by tradition
           4. Sometimes decide by weight of historical precedent that we aren't going to take rights seriously
    12. First half of breyer's dissent: why a legislature could find that these laws are good policy
        1. Surveys the evidence on gun control laws, accidents, and deaths
        2. Not arguing that constitutionality should depend on policy judgment (would be illegitimate)
        3. No one thinks judges should be empowered to play that role
        4. Even if 2nd amendment protects right to have guns, not absolute, and can be outweighed by government interest in saving lives
        5. If benefits to public outweigh the burden on the right of individuals to keep guns, assuming that right exists, we should allow the government to regulate
           1. Should defer to legislature, they know empirical stuff and can make the best decisions
    13. Scalia: none of this should matter
        1. If second amendment protects individual's right
        2. Doesn't matter if it could be proven this would lead to more injuries, more death, more crime, etc.
        3. Second amendment should be understood to mean something else
    14. Implications
        1. Does 2nd amendment apply outside of DC and Congress?
           1. It only really applies to federal government?
           2. No, SCOTUS struck down Chicago's comparable handgun ban on that interpretation
        2. What kinds of gun control laws would be deemed consistent with Scalia's interpretation
           1. Majority makes it clear lots of regs would be fine
           2. Felons, mentally ill, in schools, gov't buildings, how or to whom they are sold
           3. Heavy artillery and assault rifles
        3. Not clear how majority goes about deciding what scope should be
           1. How can we predict what will be permitted, and what not
           2. No good answer
           3. The ones Scalia said were okay have been upheld
    15. May turn out after Heller that the 2nd amendment is symbolic
        1. Two laws that are seen as extreme get struck down
    16. A note on how constitutional change comes about
        1. Until a decade ago, second amendment had same status as third amendment
        2. 1991: Warren Berger asked on national TV about the meaning of the second amendment: one of the greatest pieces of fraud on the American people by special interests groups
        3. Him and Bork: 2nd amendment obviously doesn't give individuals a right to bear arms
        4. What changed? Effective social and political campaign on behalf of NRA that convinced public they have the right to bear arms
        5. Secular trend: NRA more successful convincing Americans gun are an important part of American society
        6. By the time the DC Circuit decided Heller, large majority of Americans believed it protected individual right
        7. Often interpret the constitution the way majorities want it to mean: median voter at the national level

# Federalism

## Introduction to federalism

1. Division of power between the federal government and the states defined by the 10th amendment and the enumerated powers
2. Democratic decision-making as general rule, and judicial intervention justified only when Constitution can be fairly interpreted as foreclosing the course of action the representative institutions chose
3. Constitution vests sovereignty in the people of the United States, not the state nor federal government
4. Supremacy clause: state and local laws will be preempted if they conflict with federal law
5. Arguments for state government/decentralized decision-making
   1. Smaller units of government are better able to further the interests and general welfare of the people
   2. Decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation
      1. Way of satisfying the greatest number of people at once: If 75% want it here, and 75% don't want it there, if each has a different law 75% of people are happy, but if combined, only 50%; If citizens can move to the place they want, possibility of making 100% of people happy
   3. Allocation of decision making authority to a level of government no larger than necessary will prevent mutually disadvantageous attempts by communities to take advantage of their neighbors
      1. Make majorities at the local level minorities at the national level
   4. Decentralization allows for innovation and competition in government
   5. Decentralization a substitution for minority rights
   6. Different solutions may be better for problems in different places
   7. Reduces threat of exit by voters: competition
   8. Members of congress will respect local gov'ts enough so that they will rarely exercise broad grants of power improvidently (Madison)
   9. Easier for citizens to participate: difficult for any individual citizen to participate in government at the national level (too big and distant)
   10. Scale political decision-making to match the costs suffered to the benefits
6. Arguments for centralized government:
   1. Efficiency: all regions benefit from defense, transportation, education, public health
   2. Just because a majority wants something doesn’t mean they should be able to impose that view on the whole country
   3. Will stop externalities: one jurisdiction imposing costs on others without having to pay for them (seen in McCullough)
   4. Judicial precedent: if all individuals settled outside of court would be no comparable cases for others to use as a guide
   5. Can extend some benefits that have a high fixed cost but low marginal cost, like national defense or mapping the human genome
   6. Better coordination, like national postal system
   7. Avoid transaction costs: avoid railroads and highways that don’t line up at state borders
   8. Protect people stuck in a jurisdiction where the local law doesn’t map to their preferences
   9. States seem like a bad level for purposes of decentralization: too big to capture homogenous communities of interest, and too small to capture regional problems like pollution or transportation
7. Complicated mix of factors influencing local jurisdictions
   1. Competing to create mix of public goods and costs that best serves the people in that jurisdiction: multi-dimensional preferences
   2. Communities like rich people: tend to pay more in taxes than they consume in benefits
   3. Races to the bottom: every jurisdiction will want to attract employers, will bid for lenient environmental standards until all near the bottom
   4. But people who live there who benefits from job opportunities will also suffer from poor environment, so will vote to raise standards
   5. Competition can both improve government performance and cause a race to the bottom
8. Adverse selection problem
   1. Why most major redistributive programs operate at the federal level: harder for rich people to flee that country as it is to flee a state
   2. Rich select themselves out, but we need them to stay
   3. Sick people benefit more form insurance than healthy people do: sick people select in, healthy out, and whole thing unravels, so sick buying insurance and paying maximum premiums
   4. Class actions are like this: if you allow people to opt out, for any given level of recovery, some believe if they litigated individually they would do better, then opt out, and composition of class changes, and quality of claim goes down
9. Problems
   1. Problem exacerbated when public asked to provide local goods: because the benefits of these goods are concentrated where the costs are spread, senators have incentive to pursue these things and externalize costs onto the rest of the country

## History of Commerce and the New Deal switch

1. Ways to examine commerce power
   1. Intent
   2. Congressional power
   3. Formalism (drawing the line between pre- and post-interstate commerce)
   4. Stream of commerce--where does it end?
2. State police powers
   1. States need to be able to inspect gods coming into their boundaries
   2. Regulate public health
   3. Turnpike roads
   4. Ferries
   5. Enumerated in Article I, Section 10: state inspection powers
3. After Civil War and Reconstruction end, economy starting to change in ways that create political and social demand for federal economic regulation
   1. National regulations make sense to combat externalities states imposing on each other
   2. Interstate commerce act of 1887: regulating railroads and Sherman Antitrust Act restricting anti-competitive monopolies
      1. Unified national railroad network: economies of scale
      2. Antitrust: costs of monopoly borne by consumers, if in one state but exported out of state, no incentive to break up but hurts people
4. Difficult to draw a line once you have an economy in which activities create ripple effects that reverberate across the entire economy
5. Alternatives to restricting Congress’s power
   1. Allow Congress to regulate everything
      1. Pro: easy administrability
      2. Con: neglecting balance Constitution sets up
   2. Draw lines that may be arbitrary but limit Congress’s power
      1. Draw lines between what is a regulation and what isn’t
   3. Take functional ideas of federalism and use those to draw distinctions
      1. Apply Article I, Section 8’s architecture of powers to the modern world
      2. Criticism: looks too much like making policy?
6. In New Deal Period, court starts by drawing lines
   1. Roosevelt and Congress of Democrats, as well as state governments, okay with wide reach of federal government
   2. Court finds most of New Deal unconstitutional
7. *Houston, East & West Texas Railway v. United States* (1914)
   1. **Facts:** A complaint was filed against the railroads, alleging that the railroads were discriminating against interstate commerce by charging higher rates for interstate travel than for intrastate travel. The commission ordered the railroads to cease the discriminatory practice, and the commerce court upheld the commission's order.
   2. **Holding:** the court upheld the commerce court's order, rejecting the railroads' claims that because they engaged in intrastate as well as interstate commerce, congress lacked the power to regulate its rates. The court further held that congress had delegated the commission to act on its behalf in ensuring that the railroads' rate did not discriminate against interstate commerce. The court also rejected the railroads' claims that because their rate practices were caused by conditions wholly beyond their control, congress lacked the authority to regulate the practices.
8. *United States v. E.C. Knight, Co.*
   1. **Background:** Pretty much all industries are being taken over during the Great Depression. Congress passes the Sugar Act, which busts up monopolies even if within one state. Plaintiffs, the United States and others, filed a bill charging that defendants, four sugar refinery companies, had violated the provisions of 26 Stat. 209 (1890), which protected trade and commerce against unlawful restraints and monopolies. The bill charged that contracts under which purchases of stock were made constituted combinations in restraint of trade. The bill sought cancellation of the agreements under which the stock was transferred and redelivery of stock.
   2. **Holding:** Beyond Congressional power if the monopoly stays within one state; activity ITSELF must be part of interstate commerce. The court affirmed finding there was nothing which indicated any intention by defendants to put a restraint upon trade or commerce.
   3. **Rationale**: Unrealistic to expect states to be able to control, as manufacturing in ONE state; commerce occurs after it is manufactured, Congress doesn't have the power to regulate manufacturing or production, only commerce. The fact that commerce was indirectly affected was not enough to entitle plaintiffs to the bill. The act only authorized the courts to restrain violations in respect to contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.
9. *Stafford v. Wallace*
   1. **Background:** Congress passed an act aimed at anti-competitive activity of meatpackers. bAppellant stockyards brought an action against appellees, Secretary of Agriculture and United States District Attorney, seeking to enjoin enforcement of the Packers and Stockyards Act of 1921.
   2. **Argument**: Appellants argued that the transactions regulated took place in a single state and were not within the power of congress to regulate.
   3. **Holding**: The stockyards were, but a throat through which the current of livestock flowed and that the transactions that occurred therein were only incident to this current from one state to another. The only question was whether the business done in the stockyards between the receipt of the livestock in the yards and the shipment of them therefrom was a part of interstate commerce, so as to bring it within the power of national regulation. Constitutional.
   4. **Rationale**: Bidding at the stockyard happens within uninterrupted flow of commerce. Livestock gets back on train to East with big consumer markets; within uninterrupted stream. A railroad is THE defining feature of the current of commerce. As long as Congress regulating only on the tracks, looks like uninterrupted stream of commerce. The act attempted to regulate the business of the packers done in interstate commerce and forbid them to engage in unfair, discriminatory, or deceptive practices or to do any of a number of acts to control prices or establish a monopoly in the business.
   5. **Criticism**: Effect is exactly the same as in *Knight*; raises the price and creates social deadweight loss
10. *Coronado Coal Co. v. United Mine Workers* (1925)
    1. **Facts:** The coal company employed union mine workers to operate its mine. The manager of the mine notified the president of the district union that he intended to run the mine on a non-union basis. The local union members organized a public protest and assaulted the coal company's guards. The coal company resumed mining under the protection of United States deputy marshals. When the coal was about to be shipped, a large force of local and district miners and their sympathizers, armed with rifles and other guns furnished and paid for by the district union, attacked the coal company's non-union employees and destroyed the property and equipment of four of the coal company's mines with dynamite and the torches.
    2. **Holding**: Although a corporation was responsible for the wrongs committed by its agents in the course of its business, it did not appear that the district union was doing the work of the international union in attacking the mines. Regulation at site of activity is usually unconstitutional, but here, because of direct effect on interstate commerce, regulation is permitted. Fine to apply the Sherman Act to bust a strike against mine workers: restraining a trade through their strike (not just monopolistic behavior)
    3. **Rationale:** When regulating before current begins, usually not permissible, but will be permissible in cases where the activity being regulated has a DIRECT effect on interstate commerce, but not where it has an indirect effect. There was substantial evidence to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states in violation of the Anti-Trust Act.
11. *Champion v. Ames*
    1. **Background:** Congress targeted a statute at shipment of goods across state lines: lottery tickets!
    2. **Holding**: If regulating because of morality, Congress regulating pretextually, and should strike down for that reason
12. *Hammer v. Dagenhart*
    1. **Background:** Challenging constitutionality of Child Labor Act, which prohibited interstate commerce of goods produced by children under age 14
    2. **Holding:** Transcends the authority delegated to Congress over Commerce and exerts a power over a purely local matter to which the federal authority does not extend.
    3. **Rationale:** Commerce is clearly a pretext here, and Congress can’t use their commerce power to achieve an alternative purpose (prevention of child labor)
    4. **Dissent**: if power within those granted to Congress, its indirect effects are not enough to hold it void. In the Oleo margarine case, the Court held as long the form of the statute is right, it is fine; here they say it isn’t—what is the line?
    5. Court striking down lots of other state regulations of the economy on grounds they violated Constitutional right to economic freedom/freedom of contract
13. Court on regulating monopolies
    1. Besides Knight, upheld Sherman against other monopolies (Standard Oil)
    2. Depended if US gov't could prove if monopoly had DIRECT effect on interstate commerce
14. *A.L.A. Schechter Poultry Corp. v. United States*
    1. **Background:** The National Industrial Recovery Act (NIRA) authorized the President to work with trade organizations to promulgate codes of fair competition, which ended up stymieing competition to stabilize production through wage regulations, etc. By keeping prices high, workers get paid more, and increases buying power.
    2. **Facts:** Schechter Poultry was convicted of violating terms of the NIRA (refusing to buy diseased chickens)
    3. **Holding:** SCOTUS strikes down NIRA
    4. **Rationale:** this is an end point, the stream of commerce has ended, and Congress cannot regulate it. In order to regulate outside of commerce, the thing it is regulating needs to have direct effects on the stream of commerce. This activity has only indirect effects and is beyond the reach of Congress.
    5. **Test:** Is Congress regulating something in the current of commerce?
       1. **If yes:** allowed
       2. **If no:** if directly in stream, allowed; if indirect, unconstitutional
       3. Unclear what direct versus indirect means (big effects versus small ones?)
    6. **Legacy:** Constitutional law should not change for what is going on in the country and the court will stand in the way of federal government to take over the national economic system if necessary.
15. In Roosevelt’s next term, resistance to the New Deal collapses, and upholds statute
16. *Carter v. Carter Coal Co*. (1936)
    1. Carter Coal stands for threat by the court to stand in the way of the federal government to take over national economic system
    2. **Facts:** Shareholders brought their actions to enjoin enforcement of the Bituminous Coal Conservation Act of 1935. Respondents, coal mining companies, their directors, and the Commissioner of Internal Revenue of the United States, all claimed that the statute was a constitutional regulation under the Commerce Clause of the U.S. Constitution.
    3. **Holding:** Coal mining was not part of commerce in a constitutional sense. Mining was a local industry, and that the result that Congress undertook to achieve was beyond the power of Congress because it could not be realized by any exercise of specific power granted by the Constitution. The Court found that the primary contemplation of the Act was stabilization of the mining industry through the regulation of labor and prices. The Court held that the regulation of labor on a local level was beyond the purview of the Commerce Clause.
17. *NLRB v. Jones & Laughlin Steel Corp.* (1937)
    1. SCOTUS bowed to political pressure
    2. **Facts**: The National Labor Relations Board challenged the lower court's denial of its petition to enforce an order requiring respondent employer, which was engaged in the manufacture of iron and steel, to cease and desist from unfair labor practices, to offer reinstatement to 10 employees at one of its plants who were discharged for union activity, to make good their losses in pay, and to post notices.
    3. **Holding**: The National Labor Relations Act was a proper exercise of Congress' power to regulate interstate commerce, that employees had a right to self-organization, and that discrimination and coercion to prevent exercise of this right was a proper subject for condemnation by legislative authority. The court further ruled that the Act applied to respondent's employees who were engaged exclusively in production because intrastate activities that were closely connected to interstate commerce were subject to regulation by Congress. The court also ruled that the Act did not violate the Fifth Amendment or the Seventh Amendment.

## Commerce and enforcement powers

1. *Wickard v. Filburn*
   1. **Issue:** Does the Agricultural Adjustment Act exceed Congress's powers by regulating not commerce but wheat intended solely for consumption on an individual farm?
   2. **Holding:** Because the consumption of what exerts a substantial effect on interstate ecommerce Congress can regulate it.
   3. **Rationale:** Even if that wheat is never marketed, it supplies the demand of the man who grows it, which would otherwise be reflected in the market. The key point is the ACTUAL effects in interstate commerce.
   4. **Test:** is the activity that Congress wants to regulate one that exerts substantial effects on interstate commerce?
      1. Here, can aggregate all small farmers who might do this to make the answer yes
2. *United States v. Darby*
   1. **Issue**: Is the Fair Labor Standards Act (FLSA), which regulates interstate shipment of goods produced by employees who don’t meet minimum and maximum hour requirements, constitutional?
   2. **Holding**: the shipment of manufactured gods interstate qualifies as interstate commerce (overruling Hammer v. Dagenhart) and therefore the law is constitutional
   3. **Breadth of holding**: Also fine to just regulate wages and hours directly: if Congress can regulate things around the wages and hours, you can just regulate the wages and hours
3. Ways Congress can regulate:
   1. Regulate something connected to something it wants to regulate (Darby)
   2. Regulate something that isn't itself interstate as necessary and proper to doing it in the first way
   3. Can regulate something that no one claims is interstate (Wickard)
   4. Can regulate criminal activity that has a substantial effect on interstate commerce or if a federal crime has a jurisdictional hook
4. *Heart of Atlanta Motel v. United States*
   1. **Holding:** hotels and motels affect interstate commerce under Title II of the Civil Rights Act
   2. **Rationale:** discrimination by hotels causes qualitative and quantitative effects on interstate travel by persons of color
5. *Katzenbach v. McClung*
   1. **Facts**: a family-run restaurant in Birmingham, where it was unclear if anyone from out of state had ever eaten there, did not feel that the Equal Protection Act should apply to it.
   2. **Holding:** Restaurants affect interstate commerce under Title II of the Civil Rights Act
   3. **Rationale:** Discrimination by restaurants causes qualitative and quantitative effects on interstate travel by persons of color—restricts travel
      1. Same aggregation used in Wickard: the more reluctant blacks are to travel, the greater the aggregate effects on interstate commerce
      2. Argument from Darby: restaurant serves food that has traveled interstate, so Congress can regulate it
6. *United States v Lopez*
   1. **Facts:** Criminal cases that Lopez violated the Gun-Free School Zones Act of 1990
   2. **Holding:** The Act neither regulates a commercial activity nor contains a requirement that possession be connected to interstate commerce, and as such, exceeds the authority of Congress under the Commerce Clause
   3. **Test:** does the regulated activity substantially affect interstate commerce?
      1. Government: having a gun in a school zone may result in violent crime which may affect the functioning of the national economy through the costs it imposes and reduced willingness of individuals to travel
   4. **Rationale**: The Act regulates a non-commercial, non-economic activity; cannot use Wickard aggregation to try to get there.
   5. **Rehnquist’s framework**: If the activity Congress is targeting is intrastate, is that activity economic or noneconomic, commercial or noncommercial?
   6. **O’Connor and Kennedy**: need to be careful about Congressional regulation in areas traditionally left to the states
   7. **Dissent**: Gun violence = no schools = no education = economy collapses
7. *United States v. Morrison*
   1. **Holding**: the civil portion of the Violence Against Women Act is unconstitutional, as it does not affect interstate commerce, and is outside the scope of Congressional powers
   2. **Rationale**: need limits on Congressional power. Until you can show us another framework that actually prevents Congress from doing something, ours is better than nothing.
8. *Gonzales v. Raich*
   1. **Issue:** Can Congress regulate the growing of marijuana at home for medical purposes?
   2. **Holding:** Yes. Congress can regulate purely intrastate activity that is not itself commercial in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.
   3. **Rationale:** hard to justify! “Rational basis” for concluding that high demand in the interstate market would draw the medical marijuana into that market.
   4. **Dissent:** there is simply no evidence that homegrowers constitute a strong enough power, even in the aggregate a sizable enough class to have a discernable impact on the interstate drug market to threaten the regulatory regime
9. *United States v. Comstock*
   1. **Holding:** Federal law allowing the government to hold convicted sex offenders after their sentence is up if they have a mental illness that might lead them to commit further crimes is upheld
   2. **Rationale:** Court stretches the necessary and proper clause to encompass this as a similar power to building federal prisons or hiring guards.
10. *Future healthcare challenge?*
    1. **Issue:** Can the individual healthcare mandate by upheld as necessary and proper to regulate the interstate healthcare market?
    2. **Rationale for:** Whole regime will be unworkable unless young and healthy can be forced in, else you will get people self-selecting out
    3. **Rationale against:** Congress has the power to regulate an activity, but does it have the power to regulate inactivity?
11. Congress’s enforcement power under the Reconstruction Amendments
    1. Give Congress the power to enforce their substantive provisions through appropriate legislation
    2. Example: Equal Protection right, which prohibits government from discriminating against certain groups of people
    3. *Heart of Atlanta* under this power: Court could have justified decision under 14th amendment: trying to protect against race discrimination; however, amendment only prohibits discrimination on behalf of government, not private entities
12. *Katzenbach v. Morgan*
    1. High water mark of enforcement power
    2. **Facts:** Appellee registered voters challenged the constitutionality of § 4(e) of the Voting Rights Act of 1965, which provided that no person who met specified educational requirements could be denied the right to vote due to inability to speak or write English, insofar as the Act prohibited enforcement of N.Y. Const. art. II, § 1 and N.Y. Elec. Law § 150, which provided that no person could become entitled to vote unless such person was also able, except for physical disability, to read and write English.
    3. **District Court:** The district court granted declaratory and injunctive relief to appellees, holding that in enacting § 4(e) Congress exceeded the powers granted to it by the Constitution and usurped powers reserved to the states by U.S. Const. amend. X.
    4. **SCOTUS:** Under the McCulloch v. Maryland standard, § 4 of the Act was "plainly adapted" to furthering the Equal Protection Clause and that its remedies constituted means consistent with the letter and spirit of the constitution. Therefore, the state English literacy requirement could not be enforced to the extent that it was inconsistent with § 4(e) of the Act.
13. *City of Boerne v. Flores*
    1. **Facts:** Petitioners challenged the judgment in favor of respondents that upheld the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA), under an action challenging respondents' church building permit denial.
    2. **Holding:** Court finds the Religious Freedom Restoration Act unconstitutional because it allowed considerable Congressional intrusion into the states' general authority to regulate for the health and welfare of their citizens.
    3. **Rationale:** The court determined that the RFRA appeared to be an attempt to invoke substantive change in constitutional protections. Congress was afforded broad powers under the Enforcement Clause of the Fourteenth Amendment. However, in most cases, the state laws to which RFRA applied were not ones motivated by religious bigotry and, thus, the RFRA was not considered remedial or preventative legislation.
       1. (From Employment Division v. Smith) as long as a law is religion-neutral, it doesn’t matter if that law has a disparate impact on some groups’ free exercise of religion.
       2. **Example:** Oregon permitted to apply drug laws to prohibit Native Americans from using peyote in religious exercise because the law was not targeted specifically at them
    4. **Legacy:** Before *Boerne*, Congress treated the court’s definition of free exercise of religion as flexible: even if we accept the SCOTUS understanding of free exercise, we can go farther using enforcement power to make sure states don't sneakily discriminate under religion-neutral laws
       1. In *Boerne*, SCOTUS rejects this view: judicial supremacy governs, and SCOTUS’s understanding of the rule governs (*Marbury*).
       2. Curtails Congress’s enforcement power: defines the difference between enforcement and re-writing a definition.
14. What turns on if Congress defines a statute based on Commerce power v. Section 5 enforcement power?
    1. Doesn’t matter; Congress can pick either to justify
15. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), held that the Family and Medical Leave Act of 1993 was "narrowly targeted" at "sex-based overgeneralization" and was thus a "valid exercise of its power under Section 5 of the Fourteenth Amendment.”

## State sovereignty and horizontal federalism

1. *Seminole Tribe of Florida v. Florida*
   1. **Facts:** Indian tribe filed suit against Florida to compel negotiations under the Indian Gaming Regulatory Act (IGRA). The 11th amendment Forbids suits against states by citizens of different states in federal court. Court developed that into a rule that forbids suits by private parties against state governments asking for government damages against the state because the state has violated a federal statute—plaintiffs can always get injunctions, but can't collect damages for past violations, and that grew to forbid suits by citizens of the same state for suing a state government.
   2. **Holding:** overruled Union Gas Co. and held that: (1) Congress lacked authority under the Indian commerce clause to abrogate the states' Eleventh Amendment immunity, and (2) doctrine of Ex parte Young did not apply in light of intricate remedial provisions of IGRA. So states could refuse the suit.
2. *National League of Cities v. Usery*
   1. **Holding:** the Commerce Clause does not empower Congress to enforce the minimum wage and overtime provisions of the FLSA against the states in areas of traditional governmental functions
3. *Garcia v. San Antonio Metropolitan Transit Authority*
   1. **Holding:** Overruled *National League of Cities*; holding the traditional governmental functions test as unworkable. States retain sovereign authority to the extent the Constitution has not divested them of their original powers and transferred them to the federal government.
4. *New York v. United States*
   1. **Facts:** Testing the validity of a statute that:
      1. Creates incentives for states to accept waste from others
      2. Take title; states without waste sites will have been deemed to have taken title to all waste produced in the state
   2. **Holding:** The third part of the statute is unconstitutional and impinges on state sovereignty.
   3. **Rationale:** The statute directly compels the states to enact and enforce a federal regulatory operation.
5. *Printz v. United States*
   1. **Issue:** does anti-commandeering apply not just to state legislatures, but state officials?
   2. **Holding:** Yes. The court struck down part of Brady Act that makes state officers conduct background checks as part of a federal regulatory regime.
6. Federal government commandeering state resources to serve national ends
   1. Pros:
      1. Waste of resources for federal government to create parallel federal offices in states
   2. Cons:
      1. Might be a way for federal officials to take credit for doing something good while passing on the costs to states (raise taxes to pay for program)
      2. Or if good, vote for the state officers, not giving Congress credit
      3. Keeping clear lines of who is accountable for what
   3. Coercing states through conditional spending is allowed (drinking age and highway funds; on-campus recruiting and DADT)
7. Dormant Commerce Clause: states versus each other/horizontal federalism
   1. The grant of power to Congress to regulate commerce among the states limited the ability of states to regulate or tax commerce in a manner that places an undue burden on state commerce
   2. In some cases, this clause, which looks like all it does is grant Congress power, prohibits states from regulating commerce in certain ways, irrespective if Congress has acted on the power to regulate the same
   3. Examples of cases:
      1. Economic protectionism in one state hurting another
      2. Tariffs on goods form out of state
      3. Embargoes on out of state goods
   4. Until Congress says something, it is preempting, and if it wants the opposite result, it can just pass something
   5. Example: *McCullough*
      1. MD has incentive to impose tax to transfer wealth out of state in state, winning political play in state bounds
      2. Might not be good if other states impose retaliatory tax
   6. Doctrine doesn't prohibit state regulations that impose negative externalities on other states; it only prohibits a subset of those--economic protectionism
      1. Example of states imposing acceptable externality: NJ makes it desirable for factories to locate on downwind border to blow pollution into other states; the people who suffer the costs aren't represented, but benefits captured in state
   7. *City of Philadelphia v. New Jersey*
      1. Courts struck down law prohibiting importation of out-of-state waste
      2. Created doctrine: Only laws the court will strike down are those laws that the objective purpose is to transfer wealth from out-of-staters to in-staters
   8. *Hunt v. Washington State Apple Advertising Commission*
      1. On its face: nothing to do with protectionism: want consumers to know which apples are good and bad
      2. But the other side argues that the law just forces apples grown under more stringent inspection regime is now forbidden from use in NC; have to re-grade all apples with less informative system that makes it impossible to distinguish the superior apples
      3. **Holding:** State’s regulation requiring changing apple grading system is unconstitutional.
      4. **Rationale:** practical effect of statute is to both burden out of state apple producers and discriminate against them.
   9. Contrast with *Maine v. Taylor*
      1. **Holding:** Court upholds the statute prohibiting the importation of live baitfish.
      2. **Rationale:** Avoid having in-state fish killed off by parasites-statute really about protecting fish and food supply
   10. How to decide these cases?
       1. Is the state regulating interstate commerce?
       2. Does the activity regulate evenhandedly with only “incidental” effects on interstate commerce, or does it discriminate against interstate commerce?
   11. Complications in deciding these cases
       1. Does the statute have a protectionist purpose?
          1. Exception to dormant commerce clause when state government not acting as sovereign regulator, but as market participant
             1. Example: state regulating which food it buys to serve in public school cafeterias
       2. Subsidies
          1. Using state tax dollars to subsidize an in-state industry is sometimes okay
       3. Trucking
          1. ???
   12. *Kassel v. Consolidated Freightways Co.*
       1. **Issue:** Does an Iowa statute that prohibits the use of certain large trucks within the state unconstitutionally burden interstate commerce?
       2. **Holding:** yes, it unconstitutionally burdens interstate commerce.
       3. **Rationale:** A state cannot constitutionally regulate its own parochial interests by requiring safe vehicles to detour around it.

# Separation of powers

## Madisonian theory and the *Youngstown* framework

1. Separation of powers
   1. First part: diving powers amongst the branches of government
   2. Second part: Non-delegation doctrine: one branch of government can’t delegate its powers to another branch
      1. Use the “intelligible principle” test to determine what can be delegated
   3. Mixed government supposed to create social cohesion so no branch gets the upper hand
   4. Differences between legislative and executive powers
      1. Congress
         1. Senate has power to advise presidential appointments, treaties: hand in executive power
         2. Congress has power to declare war and raise army, but president commander in chief of armed forces
         3. Power to impeach president
      2. President
         1. Veto power: give president role in legislating
   5. Efficient or inefficient?
      1. Efficient form of government-like an assembly line
      2. Inefficient form of government-in order to pass a law, need three branches on board: makes it hard to pass laws
         1. But this will protect us from government passing tyrannical laws!
   6. How could tyranny result?
      1. Representatives ignore what constituents want
      2. Or, opposite problem: representatives will be too responsive to what constituents want and a unified majority will capture a branch of government and start redistributing wealth
      3. Solution: divide power and pit branches of government against each other: pit ambition against ambition
      4. Same argument as the constitutional safeguards of federalism: states and federal government balancing and checking each other
   7. Madison on the judiciary’s role
      1. Don't need judicial review of separation of powers controversy because they will work it out amongst themselves, and between each other
      2. Like in federalism, court tinkers at margins and turns blind eye to important changes
         1. Example: massive growth of federalism from New Deal up to the present
   8. Levinson and Pildes: branches are not as ambitious as Madison expected
      1. President held responsible for all problems in the world
      2. Members of Congress can be quite successful by just keeping heads down and voting the same way time after time
   9. Public-spirited version of separation of powers:
      1. Congress hands over power to the executive when they are in a better purpose to accomplish the policy goals
      2. President can act consistently, concisely, and secretly--win a war that way; Congress can't do these things well
   10. Competition and rivalry is not between branches as Madison expected, but between parties
   11. When there is a policy disagreement between the President and Congress, then Madisonian dynamics kick in:
       1. Checks and balances
       2. Oversight
       3. Hearings
       4. Investigations
       5. Less agency delegation
       6. More vetoes
       7. Presidential impeachment
   12. Executive far more powerful than the framers could have imagined
       1. Based on being a single individual who can act quickly and consistently, in contrast to a multi-member body
       2. Doing well in conflicts requires features executive has and others don't:
          1. Consistency (credibility)
          2. Need quick decisions, as opposed to waiting Congress debate before action
          3. Decisions in secret, confidences
          4. Easier to keep secrets among small decision-making group
       3. Agencies administering the laws that Congress passes
   13. Where is the limit of the executive’s Power?
       1. Madison: only the enumerated powers in Article II (limited)
       2. Alternative view: might be the case that the president has some implied powers above and beyond those enumerated, in contrast to Congress, who is limited
       3. Congress usually happy to let president do what he wants during times of crisis, but ongoing back and forth over history, usually at level of politics, but both sides have teams of lawyers
   14. Court usually doesn’t get in the middle, except for the following cases
2. *Youngstown Sheet and Tube Co. v. Sawyer*
   1. **Material Facts:** In 1951, a dispute arose between mill operators and the union member workers in terms to be included in new collective bargaining agreements. The union announced a strike, but President Truman was worried about the effects of a stoppage of steel on the Korean War and that he had to step in to avert a catastrophe. He issued an executive order directing Sec Comm to take possession of mills and keep them running. Sent a message to Congress, and then a second twelve days later, and Congress took no action.
   2. **Procedural History:** Companies obeyed order, but brought suit in District Court, who issued temporary restraining order against this. Same day, District Court's order stayed by Court of Appeals. SCOTUS granted cert and was hearing the case within a month of the initial seizure; decided two weeks later.
   3. **Issue:** Was President Truman acting within his Constitutional power when he ordered the Secretary of Commerce to take possession of and operate most of the steel mills in the US?
   4. **Holding:** Affirmed lower judgment: President did not have authority to do this. The President works for Congress in enforcing statutes; he cannot create legislation.
   5. **Rationale:** President's power to act must stem from either Congress or Constitution, and no statute authorizes this action, or authorizes this implied power. In fact, Congress had refused to authorize this type of action earlier.
      1. This is also not found in the CIC authority or powers that grant executive authority to the President.
      2. The battlefield over which President has CIC powers does not include the home front.
      3. If the president can't claim to be implementing a statute, he can't do anything unless he can justify it according to one of the Article II enumerated powers
   6. **Concurrence (Frankfurter)**: Past action by presidents that has gone forward without complaint may also be evidence of what he can do now, not just the Constitution. If Congress has watched the President do certain things and has not objected, it is reasonable to assume it is an inherent executive power.
   7. **Concurrence (Jackson)**: There are three categories:
      1. Where the president is acting pursuant to an express or implied authorization of Congress - broadest powers, limited only by the Constitution (all that he possesses in his own right plus all that Congress can delegate).
      2. Where the president is acting in the face of Congressional grant or denial of authority, he has to rely on his independent powers, but there is a zone of twilight where they have concurrent authority, or in which the distribution of power is uncertain.
      3. Where the president is acting in opposition to Congress - most narrow powers, supported only by his expressly granted constitutional powers, and then still limited by any overlap Congress may have [Congress’ will is dominant in case of overlap].
         1. This order falls into the third category, and since there is no express authority, it must fall, even when it may be otherwise justified by “emergency.”
         2. Doesn’t resolve what the president can actually do if a case falls in this category.
   8. **Concurrence (Douglas**): the branch that would pay compensation for a seizure is the only one that can do it; therefore, the president cannot.
   9. **Dissent:** Although the president does not usually have this power, because this arises in an emergency, this case is different and this is why we have an executive—to take quick action in cases like this.
   10. **How to analyze a case under Youngstown:**
       1. Figure out what category president's actions go in
          1. Do that by figuring out what Congress has said about what he is doing

## The emergency constitution

1. What is the extent of the President’s emergency powers under the Constitution? Defining questions:
   1. What extent can the president act without congressional power because of an inherent authority in times of war or crisis? Is his power expanded in these times?
   2. What extent should the constitution be partially suspended during war or other emergencies--with respect to power and rights
   3. What role should the courts play in this?
2. During times of war and emergency in Constitutional democracies, the rights of the people shrink and executive power expands
3. Powers the president should have:
   1. Defend the country against a surprise attack
   2. Constitutionally granted power v. realistic power limits
   3. Paper powers: explicit presidential powers in emergencies
   4. Congressional powers
      1. Power to suspend habeas corpus
      2. Power to call up a militia
   5. Way to deal with emergency: separate the institution that declares the emergency from the one that exercises the emergency powers
   6. Court’s view: Most guidance we have is the courts have said in dicta that president would be justified in using emergency powers to repel surprise attack
4. Lincoln during the civil war
   1. Splits the difference between cosntitutionalizing emergency powers and keeping them illegal and expect president to violate them in real emergencies (Jackson position)
   2. Congress approves Lincoln’s actions after he takes them
   3. Worry: In Latin America, presidents declare decades-long states of emergencies, cutting out legislature, rule by decree
   4. Jackson's position: might be less dangerous to add flexibility than to invite presidents to step outside the law, where all bets might be off
      1. The law will stop mattering if they are expected to step outside of it
5. *Korematsu v. United States*
   1. **Facts**: Japanese and Chinese on W coast discriminated against after Pearl Harbor, FDR allows exclusion zones to be set up on the west coast, with a curfew for citizens and non-citizens on the basis on Japanese ancestry. Korematsu has a white girlfriend, is 23, has plastic surgery to try to get out of this. He challenged the assumptions underlying the order and claimed that when the exclusion order was enacted, all danger of Japanese invasion of the exclusion area had disappeared.
   2. **Holding**: The exclusion order under which petitioner was convicted was valid and, thus, upheld the conviction. The exclusion order was justified by the exigencies of war and the threat to national security.
   3. **Rationale**: Because the order curtailed the rights of a group based on national origin, the order was inherently suspect and *rigid scrutiny* was applied. The Court found that the exclusion order, like a previously upheld curfew order, was intended to prevent espionage and sabotage in threatened areas during war. The exclusion from such an area was closely related to the intent of the order. Moreover, the Court could not reject the judgment of the military and Congress that there were disloyal members of the population who constituted a menace to the national defense and safety. Compulsory exclusion of groups of citizens from their homes, except under circumstances of direst emergency and peril, was inconsistent with the basic governmental institutions.
   4. **Dissent**: SCOTUS shouldn’t pretend to conduct judicial review of constitutional rights during wartime if the court is not willing to uphold the constitution. This creates dangerous precedent: it is better to exercise actions extra-constitutionally than to exercise them and use the constitution to justify them during non-emergency times
      1. There is a risk that if the court decides rights one way during wartime, that constrained version could be pulled over into peacetime, though that isn't the type of rights we want in peacetime (this hasn’t happened)
6. Why do rights shrink during wartime?
   1. Court reluctant to enforce rights it knows the president won't pay attention to: if this happens in war, and spills over into peace, court might never be able to stand up to the president--more likely president will take them seriously if they stick to enforcing rights the president will listen to
   2. Judges don't feel that they have the expertise to judge a military decision (Posner)--tradeoff between security and rights, and in order to balance, need to know more about security than they do
7. People’s view changes depending on if pre-crisis, during crisis, and post-crisis
8. Security paradox:
   1. Post 9/11, no terrorist attack on US after Bush
   2. Civil Libertarians: All a mistake, outrageous measures interfering with rights, and he didn't need to, because no more attacks
   3. Executive Branch: if we hadn't done these things, there would have been a ton of more attacks
9. Posner: executive unilateralist
   1. Balance costs and benefits of certain actions, and then decide where to go from there
   2. In contract to originalism or textualism
   3. Places some limitations on what courts do; see judges as doing exactly what legislators do: policy analysis, not taking the values of the framers, but forward-looking decision-making
   4. Posner in the same camp as Dworkin: judges have no choice but to make forward-looking decisions
      1. Conservative with Dworkin on a living Constitution
10. Civil libertarians: regardless of what terrible things happen, we need to adhere to the time-honored principles the founders decided for us
11. Cole: constitutional theory of precommitment
12. Issacharof and Pildes: courts should be following Youngstown
    1. Don’t enforce rights against the President, just require that whatever the President does has to be authorized by Congress; if it hasn’t, don’t let the President do it!
13. Ex Parte Kieran
    1. **Facts:** Group of Nazi saboteurs that are not US citizens (save one) found in Ohio
    2. Court finds a statute that contemplates using military commissions during wartime, and thus approves this

## War and executive power post-9/11

1. Constitution and courts never left it up to Congress and the President to fight over war-making power when Constitutionally delegated powers conflict
2. What kind of Congressional permission, if any, does the President need to engage forces in combat?
   1. On side of congressional power: president needs formal declaration of war to engage in military hostilities
   2. On side of presidential power: declaring war might be distinguished from making war
3. Three interpretations
   1. Necessity of formal declarations of war collapsed under weight of history
      1. Congress has only done this five times: WWI, WWII, Mex-American, Spanish-American
      2. Scope of executive powers determined by historical practice: if long unbroken string, enough to change what the constitutional norm actually is
      3. Modern interpretation: president needs authorization to use military force just doesn’t need magic words like military force
   2. Presidents don't need any congressional authorization before they fight wars
      1. Congress can cut funding if it chooses
      2. Bush administration: President can do things in peacetime that he would do in war, including interrogation, surveillance, regulate speech. All these powers inherent in president's article II executive power or commander in chief authority
   3. Middle ground: Congress gets to decide what wars will be fought and scopes; president can make tactical moves within the bounds congress has set
      1. Congress can't tell president which place he can invade, but can say which places it is OK to fight a war
      2. Agreeing or not agreeing to fund additional troops
      3. Pass a statute: Congress can say we must invade here/must not invade here
      4. Or, can use funding power to influence how President fights the war
   4. In this age with a massive standing military with an enormous budget, the President can easily start a war without Congressional appropriations
      1. Furthermore, Congress has never denied a request to fund operations already under way
4. War Powers Resolution
   1. 1973, response to Vietnam War, over Nixon's veto
   2. Says president may send military in hostilities only pursuant to congressional authorization except very specific emergencies
   3. But presidents have repeatedly taken the stance this is an attempt to limit the president's powers, and ignored it
5. Post-9/11 and the War on Terror
   1. War on terror not a traditional war
      1. Bush admin did everything it could to convince the country this war on terror as practical a war as WWII
      2. Other say things like terrorism is a tactic, not an enemy
   2. Is it enough to increase executive power, Congress rolling over and playing dead, Courts declining to take sides
   3. What is the right legal framework to deal with this problem?
      1. War framework
         1. Not like this:
            1. Not clear who the enemy is
            2. If we lose, they aren't going to take over our country
            3. Scope of battlefield is everywhere
      2. Crime framework
         1. I.e., war on drugs
         2. Treaties with other countries
         3. Standard criminal justice constitutional regime
         4. Not like this:
            1. Not supported formally by governments of countries, like drug cartels
            2. National security requires more ex ante protection than dealing with drug dealers
            3. Dealing with people willing to die for their cause, no threat of ex post deterrence
6. Guantanamo
   1. President wants the power to grab anyone in the world he has reason to want to hold, and to interrogate them and not have to convict them of anything
   2. Entire point of Gitmo enterprise: no access to US courts because not on US soil
   3. *Johnson v. Eisentrader*: denied right to file habeas petitions to German soldiers captured and convicted in China
      1. Tried to get in US court on habeas pleas
      2. US courts said ridiculous: enemy soldiers captured on non-US soil not in US court's jurisdiction
   4. Gitmo seems different
      1. Post-9/11 war on terror not the same kind of war; detainees not in same situation
      2. Or is it different?
7. *Rasul v. Bush*
   1. **Issue:** Does US have sovereignty over Gitmo?
      1. US has perpetual lease on territory from Cuba
   2. **Holding:** Gitmo in jurisdiction and control of US federal courts. Furthermore, federal courts can maintain habeas petitions, (but they don’t know what to do with those petitions)
   3. **Legacy:** what if same people were held in Afghanistan? Fall under Rasul or Eisentrader?
8. Congress’s view:
   1. Detainee treatment act of 2005
      1. Stripped federal courts of habeas jurisdiction, denying access to US courts for any alien held in Gitmo or anywhere else in the world
      2. In place of habeas, permit Gitmo detainees to appeal to the DC circuit their detentions and convictions by military commissions if they are ever tried
      3. Limit:
         1. Review detention procedures
         2. But not the evidence if there enough evidence to keep them held
   2. Military Commissions act of 2006
9. *Hamdi v. Rumsfeld*
   1. **Facts**: Hamdi captured while fighting in Afghanistan, held in military brig in S.C. as an enemy combatant
   2. **Holding**: Court applies Youngstown framework: category 1
      1. provides that Hamdi be allowed to challenge this status in a hearing before a neutral decisionmaker
      2. Not sufficient for the government to simply present "some evidence"
   3. **Concurrence**: Category 3, Congress has forbidden detentions like this (Non-Detention Act), and President has no power under Article II to detain citizens
   4. **Dissent**: The government has two choices to deal with American citizens, trying them as criminals in federal court or holding them indefinitely until they are put back where they came from
   5. **Only thing agreed upon**: Not Youngstown category 2
   6. **Scope**: Congress has authorized the detention of combatants captured during the war in Afghanistan, can hold them during the span of the war in Afghanistan; can’t hold them forever
   7. **Take**-**away**: aliens in the US have some rights, but not as many as US citizens
10. *United States v. Padilla*
    1. **Facts**: Padilla, an American citizen is arrested by FBI in 2002 in O'Hare as returning from Pakistan trip. Designated enemy combatant: closely associated with Al Qaeda, prepping to participate in terrorist attack against the US. Held in brig for 1.5 years in SC. No contact allowed with lawyer, interrogated, tortured.
    2. Habeas filed on behalf of him
    3. **District court**: Just need some evidence that he is an enemy combatant to continue holding him
    4. **Second Circuit reversed**
       1. Youngstown category 3 case
       2. Gov't can release him or charge him in criminal court
    5. **SCOTU**S: Vacates 2nd circuit on technicality related to jurisdiction; should have filed petition in SC
    6. **District Court:** Re-file in SC, rules in his favor
    7. **Appeals Court:** 4th circuit overturns
    8. **Executive steps in:** Bush releases him to avoid a SCOTUS decision
    9. **Finally**: Tried in court under civilian rules; convicted, 17 year sentence in federal prison
11. Bush: executive order allowing military tribunals to try aliens suspected of being al Qaeda members
    1. Authorized to use death penalty
    2. Procedures
       1. Less protection of Ds and less proof than civilian trials
       2. But standard features of wars
    3. Category 1: congress has allowed military trials
       1. Same statute used to convict Nazi saboteurs re-enacted
12. *Hamdan v. Rumsfeld*
    1. **Facts**: Former driver for bin Laden captured in Afghanistan and charged with conspiracy to commit war crimes.
    2. **Holding**: Youngstown category 3; the statute Congress has passed forbids the President from doing this
    3. **Rationale:** Because are statutes on the books that contemplate this, including AUMF, and uniform code of military justice, authorizes the use of military tribunals?
       1. BUT only authorize the use of certain KINDS of military tribunals, and the way Bush has set up his versions goes beyond the versions approved by congress
       2. Conspiracy is not the kind of offense traditionally tried by military commissions
       3. It's problematic in the Bush version the accused would be excluded from the trial and not allowed to show evidence that could let him off
    4. **Dissent:** This is Youngstown Category 1
       1. This has been authorized by Congress, so of course president can do it
       2. No one says he could go forward with them even if Congress had expressly prohibited them (Y3)--no CoC authority that would allow prez to use them
       3. The relevant statutes authorize this
13. After Hamdan decided, Congress passes Military Commission Act of 2006, giving prez more power than ever
    1. Congress gives him clear authorization to conduct military trials
    2. A little bit more procedural protection for defendants
       1. Greater access to evidence against them
       2. Nothing like a civil trial
    3. Broadens definition of unlawful enemy combatants
       1. Anyone who has engaged in or supported hostilities, including US citizens
    4. Congress bans habeas petitions by aliens
       1. Although overruled by court later in *Boumediene*
14. *Boumediene v. Bush*
    1. **Holding:** The Detainee Treatment Act unconstitutionally restricts the writ of habeas corpus and the limited review in the US Court of Appeals provided for in the Act not an adequate substitute.
    2. Court invalidated executive action backed by congressional legislation (Youngstown category 1)
    3. Despite the agreement, court willing to step in and strike down on rights grounds
15. Going forward
    1. So far, Obama administration has embraced the view that the US is in state of war with al Qaeda and its affiliates
16. Cole: At best, Congress has played a secondary role to the President in times of war and crisis
    1. What is the value of the Youngstown framework taking this into consideration?
    2. Incentives to push back against prez greater when one or both chambers controlled by opposite political party
       1. May make the difference
17. When wars and crises happen, courts, congress, and the country fall in line behind president
    1. Only when sense of emergency disappears, is when turn back into normal peacetime Constitution
    2. Cole: neither the court nor congress has done enough to challenge executive power
    3. Executive unilateralists: court and congress have bogged president down too much
    4. All of these opinions reflect deeper disagreement over how constitutions should work during times of war and crisis
       1. Constitution should change: living constitution
       2. Constitution should stay the same: precommitment argument

# Equal protection

## Slavery to Reconstruction; incorporation

1. Who governs: state level majorities or a national majority?
2. Equal Protection Clause
   1. No state shall deny to the people within its jurisdiction a certain set of things based on superficial characteristics
   2. Guarantees equal treatment by the government
   3. Enacted to protect the newly freed slaves in the South against various forms of discrimination
   4. When enacted, specifically aimed at race (not gender, sexual orientation, etc.)
3. Slavery and the Constitution
   1. Shift after Civil War to enforcing individual rights against states, not just against the national government
   2. Rights protect individuals against minorities and/or majorities
   3. Constitution was a bargain over slavery when enacted:
      1. Congress has power to suppress insurrections or domestic violence (thinking of slave revolts)
      2. Bans Congressional export taxes: Southerners worried about taxes on items grown by save labor
   4. *Prigg v. Pennsylvania* declared unconstitutional all fugitive slave laws enacted by the states on the ground that the federal law provided the exclusive remedy for the return of runaway slaves
      1. Refuse to provide assistance to slave catchers
   5. Series of compromises (Missouri compromise, etc.) to keep the balance of slave and free states leading up to the Civil War
4. *Dred Scott v. Sanford*
   1. **Holdings:** The court held that:
      1. Blacks, whether freed or slaves, cannot be U.S. or state citizens, and as such cannot have standing to sue in federal court (no diversity of citizenship).
      2. Congress had no authority to prohibit slavery in federal territories.
   2. **Rationale:** Court seems to understand that if there is a governing federal law, once he goes into a free territory he is free, but instead, court holds federal law is unconstitutional
   3. **Dicta**: The Missouri compromise is unconstitutional, and Congress cannot ban slavery from territories.
      1. Constitutional basis: property rights of slaveholders under the 5th amendment Due Process clause, and territories clause of constitution, prevent the court from infringing on those rights by forbidding slavery
      2. And the territories themselves cannot ban slavery
   4. **Legacy:** If the case had gone the other way, the South would have immediately seceded; court sees itself as averting a major political crisis.
5. Government divided into three parties:
   1. Northern Whigs: Congress constitutionally required to ban slavery
      1. Collapses after Dred Scott opinion; so they reject this opinion and accuse justices of being part of slaveholder conspiracy
   2. Northern Democrats (moderates): Congress constitutionally required to leave issue up to territories to decide for themselves
   3. Southern Democrats: neither Congress or territorial governments can ban slavery
6. Congress ignores *Dred Scott* decision and bans slavery in the territories
   1. Followed by Lincoln issuing the Emancipation Proclamation under his Commander in Chief Powers
   2. Thirteenth Amendment makes the Emancipation Proclamation permanent
      1. Original interpretation by the court is simply the banning of slavery
   3. Followed by the Fourteenth and Fifteenth amendments, together change how rights are understood
7. Rights
   1. Original understanding rights in Constitution directed against federal government as limitations on power; state governments not seen as a threat
   2. Civil war changed this understanding: states (i.e., Southern states) are the primary threat to individual rights and liberties of Southern slaves and union loyalists
      1. The national government is the best hope to protect them
8. Fourteenth Amendment
   1. Creates incentives for southern states to enfranchise black voters
   2. Section 1: Designed to protect the individual rights of southern blacks, from being effectively re-enslaved by whites
      1. Civil rights: property, contract, access to courts
      2. Social rights: right to education, access to public accommodations, rights to marriage
      3. Political rights: right to vote, serve on juries
      4. Social rights distinct from the civil rights being protected
9. Congress followed this by passing legislation to protect freed slaves
   1. Criminalize violence against blacks
   2. Statutes to rebut black codes provision by provision
   3. 1867 reconstruction act: appointed military governors to oversee southern states
      1. Disenfranchised whites who fought for confederacy
10. SCOTUS decides Congress doesn't have the power to protect blacks against *private* discrimination
    1. Harris (1882)
    2. Cruikshank
    3. Court just isn't ready to think of Constitutional Rights as protection against state government
11. *Slaughterhouse cases*
    1. **Facts**: A Louisiana statute grants a monopoly to a particular slaughterhouse (Crescent City).
    2. **Charge**: equal protection violation—this law submits all livestock owners to involuntary servitude by forcing them to bring their livestock to this particular slaughterhouse
    3. **Holding**: The Equal Protection clause applies only to race discrimination, not economic discrimination
       1. Furthermore, the equal protection clause protects national citizenship, not state citizenship
    4. *Saenz v. Roe*
       1. **Holding:** Court upholds right of plaintiffs to travel; and it is an equal protection violation to give different rights to new citizens than to already established citizens.
       2. **Rationale:** No rights, other than those created by reconstruction amendments, apply to state governments
          1. Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the Slaughter-House Cases (1873), it has always been common ground that this Clause protects the third component of the right to travel.
    5. After the Slaughter-house cases, the court reads the Due Process Clause as effectively incorporating a number of important rights to apply against state gov'ts
       1. No state shall deprive anyone without life, liberty, or property, without due process of law
    6. Tests to use:
       1. Does the Right count as a fundamental principle of liberty? (Twining)
       2. Would the right be included as the essence of a scheme of ordered liberty? (Palco)
       3. Is the right really important and fundamental?
    7. Different views by justices of what is incorporated:
       1. Black: All of the Bill of Rights, but only the Bill of Rights
       2. Frankfurter: only some of the Bill, but some not in there
          1. Right to abortion, physician-assisted suicide, etc.
       3. Warren Court
          1. Incorporates most criminal procedure rights
          2. Religion clauses of first amendment
       4. Only rights that haven't been incorporated are:
          1. 2nd amendment right to bear arms (now incorporated)
          2. 3rd amendment: quartering soldiers
          3. 5th grand jury
          4. 7th grand jury in civil cases
12. Complications with incorporation
    1. Some of the rights in the first 8 amendments were designed not to apply to state government, and instead designed to protect states from national government
       1. Example: establishment clause
          1. Designed to prevent federal government from establishing national church, and from displacing any church established by a state
    2. At founding, Bill supposed to protect states and individuals
13. Second Amendment right to bear arms
    1. *Presser v. Illinois:* held explicitly that the Second amendment not incorporated against the states
    2. *Heller*: original and historical interpretation of 2nd amendment was the right of states to organize militias
       1. Made no sense to incorporate against state governments; was right possessed against state governments
    3. Debate between Scalia (history) and Stevens (we should decide rights based on moral principles like autonomy, dignity, equality)

## The Civil Rights Casesand the “state action” problem

1. SCOTUS begins dismantling the civil rights agenda and struggling with the problem of state action: how to constitutional rights apply to private conduct?
   1. State action doctrine: Constitution only restricts government, not private conduct
2. *Civil Rights Cases* (1883)
   1. **Issue**: can Congress go farther than substantive provisions required to enforce 14th amendment? Accepting that EP isn’t violated by private discrimination, can Congress still prohibit it as prophylactic measure to stem government discrimination?
   2. **Background:** Five civil rights cases were consolidated before the court in order to decide if the Civil Rights Act of 1875 was constitutional. The court held that these sections were unconstitutional as they sought to proscribe individual action, which was the purview of state rather than federal law pursuant to the U.S. Const. amend. X. The court held that U.S. Const. amend. XIII prohibited the badges and incidents of slavery, and individual discrimination against African Americans did not rise to the level of slavery. The court further held that U.S. Const. amend XIV did not provide authority to enact these sections of the Civil Rights Act, as it was aimed at the state legislatures rather than the individual person. As such, the court held the sections unconstitutional in respect to the five cases brought before it.
   3. **Holding**: No. Congress is not permitted to interpret the 14th amendment to mean something broader than prohibiting private discrimination directly
      1. This was before the court was comfortable using Congress’s commerce power to justify prohibiting race discrimination at this point it had to directly relate the 13th and 14th amendments
      2. Court finds that constitutional rights are not supposed to apply against private actors, only against governments
   4. **Rationale:** 13th amendment does prohibit private discrimination and allows Congress to enforce it
      1. Prohibits slavery, which was done not just under state law but by private actors – direct ban on private actors doing the thing called “slavery”
      2. 13th is only rights provision of constitution that does NOT have state action requirement
      3. Civil Rights cases: race discrimination is part of practice of slavery, so perhaps continued discrimination is a continuation of slavery? This would allow Congress to ban all private discrimination.
         1. Court rejects this argument, 13th amendment power = eliminate slavery in the narrowest sense
   5. **Dissent** (Harlan): should apply to private discrimination
   6. **Legacy:** makes the 13th amendment dead, in the same way the Slaughterhouse cases made Privileges and Immunities clause dead. Constitutional Rights and the 14th Amendment only apply to state action.
3. But argument in CR cases isn’t that private discrimination *itself* violates EP, instead makes argument that STATE has violated it by *failing to prevent* such discrimination
   1. Directed at state governments that allow discrimination to continue unregulated
   2. Court’s response: one of problems with 1875 Act = applies equally to cases arising in states w/ Justice laws (where they ARE enforcing anti-discrimination laws) and the states where private discrimination does occur
      1. So state inaction may indeed be constitutionally problematic
   3. In order for a statute to stand, Congress has to show that states have in fact failed in their duty to protect against private discrimination
      1. Congress can’t just assume that every state has/will fail (which is what they’ve done by applying the law to ALL states regardless of the situation)
      2. Court doesn’t want to jump to conclusion that individuals CANT rely on state governments to protect against injustice, immediately rely on federal government to protect those rights
         1. If you show us Southern States are behaving badly and not protecting rights, THEN we’ll allow you to bring in Congress as the protector of individual rights
         2. But first need evidence of this injustice
4. Modern doctrine for private discrimination
   1. Most states protect against various forms of discrimination (race, gender, religion, disability, sexual orientation)
      1. Varies from federal to state, and state to state
   2. Private action is formally not subject to any constitutional restraint, with exception of slavery in the 13th amendment
   3. When will the federal government step in? If state passes statute/executive action excluding black people from doing X, this is a constitutional violation
   4. Reason for the state action line: If decide to marry a person based on race/gender/religion, you’re discriminating, but this is NOT violation of constitution, even though if government made decisions on these criteria it *would* be a violation
      1. People should be free in some private decision making to engage in these discriminatory choices, even though governments can’t
5. Continuum
   1. Private (on one end): protected
      1. Private action (who to marry) – constitutional protected choice
      2. Constitutional rights apply to protect discriminatory choices from gov’t regulation (often 1st amendment issues)
      3. Who to marry, socialize with, have sex with, etc (in families/homes/intimate relationships)
      4. Limits: no right to same-sex marriage or polygamy
      5. Protection provided by:
         1. Due Process rights to privacy
         2. 1st amendment rights
   2. Choices not so private that constitutionally protected, but not so public that constitutionally regulated
      1. Public accommodations
      2. Employment decisions/hiring, housing
      3. Protection provided by Free Exercise clause of 1st amendment allowing religious orgs to discriminate in certain ways
         1. Can’t open restaurant and ban women, or not hire female women, but Catholics don’t have to hire Jewish/Female priests
   3. State action (state statutes like Jim Crow)
      1. Clearly constitutional rights
   4. Public (on other end)
   5. That middle category, rule re: what is discrimination is determined entirely by statute
      1. Either allowed, or forbidden by statute
6. 1st amendment right re: freedom of association cases
   1. Groups of people who gather to share/express common viewpoint, not necessarily religious
   2. *Hurley:* Irish St. Patty’s day parade has right to exclude gay/lesbian Irish marchers, despite MA attempt to apply anti-discrimination law to the organizers
   3. *Boy Scouts of America v. Dale*: ok for boy scouts to kick out gay scoutmaster. NJ tries to apply public accommodations law, but SCOTUS rejects.
   4. *Moose Lodge*: court allows to discriminate against blacks because private organization, even though they rely on the state regulating liquor licensing (see below)
   5. *Christian Legal Society v. Martinez* (2010)
      1. **Facts:** Hastings law school, public law school. Policy that every student org has to accept all comes, can’t exclude. Christian student org wanted to limit membership to people willing to reject unrepentant homosexuality. Hastings said no, no longer official student org, can’t use law school space and get funding.
      2. **Holding:** Hastings CAN do that without violating organization’s first amendment rights
      3. Hard to see why this is any different from Boy Scouts, same basic legal argument (5-4 decision w/ Kennedy flipping)
   6. *Roberts v. JayCees*
      1. **Holding:** State anti-discrimination laws can apply to sex discrimination by JCs (Chamber of Commerce)
   7. *Rumsfeld v. Fair*
      1. **Facts:** Law schools argue coerced presence of military recruiters interferes with expressive association rights, distorts non-discrimination message
      2. **Holding:** Court unanimously rejects challenge by law schools re: access to military recruiters.
      3. **Rationale:** Court says not close, different from Hurley because hosting interviews isn’t expressive, doesn’t get in way of communicating a message
         1. Distinguishes from Boy Scouts, law schools not being forced to allow them into community, visitors for limited time/purpose (not full-fledged members)
   8. **Takeaway:** set of constitutional doctrines that draw a line between constitutionally protected and only statutorily covered
      1. Doctrines use First Amendment, Due Process, and privacy protections
7. Line between state actions (constitutional actions applied directly to the states) and lack of state action to prevent discrimination within its borders
   1. ALWAYS a sense in which state has acted that is causally connected to the bad thing being complained of
   2. When state chooses not to pass a statute prohibiting discrimination, is it choosing to permit it?
      1. State always has power to prevent individual from engaging in discrimination
      2. Why isn’t government allowing discrimination just as culpable as discriminating itself?
   3. *Miller v. Schoene*, 1928
      1. **Facts:** Acting under the Cedar Rust Act of Virginia, defendant state entomologist ordered plaintiff tree owners to cut down a large number of ornamental red cedar trees growing on their property as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. Plaintiffs challenged the constitutionality of the statute under the due process clause of U.S. Const. amend. XIV.
      2. **Holding**: When forced to make the choice, the state did not exceed its constitutional powers by deciding upon the destruction of the cedar trees in order to save the apple orchards, which in the judgment of the legislature was of greater value to the public.
         1. State had to choose between one class and another
         2. If they had done nothing, would’ve killed apple trees, and state would’ve taken apple trees
         3. So court sees no distinction between act/omission
         4. Had to make a choice, either cedar or apple trees
      3. Schoene logic goes with Civil Rights Cases – omissions v. affirmative discrimination
         1. In either case can avoid it if it wants to, court could make choice to allow discrimination to proceed
   4. *DeShaney v. Winnebago County Department of Social Services*
      1. **Facts**: Parents divorce, father gets custody, abuses son, state aware and intervenes but keep him in the home, father beats him into coma. Son and mother sue County (state) for violating DP rights
      2. **Holding:** County not responsible for boy’s coma.
      3. **Rationale:** If one of COUNTY workers had beat, that would be constitutional violation under Due Process, but not a violation when it’s a private individual and social worker simply failed to prevent father from doing so.
         1. Omissions not culpable re: constitutional law as applies to government
         2. Could’ve been sued by father if State had taken son away too soon!
         3. However, government has no interests of its own, not a person, created by the people us to serve the people, so less of an autonomy argument for omission culpability
   5. Act/Omission distinction highly problematic, unclear why it’s relevant to state responsibility, and unclear how to draw the distinction
      1. Government will generally not be responsible for private harms to protected interests
      2. However, if the government affirmatively acts in a way that causes the harm, they will be held responsible
      3. In order to find constitutional violation, need to find state action as opposed to state omission, and that action has to be unconstitutional
         1. Need to show not only that, but that this was the government’s *intent*
8. *Shelley v. Kraemer*
   1. **Facts**: Neighborhoods were creating racially restrictive housing covenants that state courts were called upon to enforce.
   2. **State’s argument**: the action the state is engaged in is not discriminatory; the state is simply enforcing contracts that come before it without regard to race; race discrimination supplied by private parties writing it into their contracts.
   3. **Holding**: Racially-based restrictive covenants are, on their face, not invalid under the Fourteenth Amendment. Private parties may voluntarily abide by the terms of a restrictive covenant, but they may not seek judicial enforcement of such a covenant, because enforcement by the courts would constitute state action. Since such state action would necessarily be discriminatory, the enforcement of a racially-based restrictive covenant in a state court would violate the Equal Protection Clause of the Fourteenth Amendment.
   4. **Legacy**: What Shelley means is that the court during a certain historical period was quite prone to fudge the state action line to reach private forms of race discrimination BECAUSE congress and executive not doing enough to eliminate this by passing statutes.
9. *Burton v. Wilmington Parking Authority*
   1. Just because a restaurant is privately owned, because it leases space from city (who will rent space to anyone who will pay for it), will be state action (state facilitating private race discrimination)
10. *Moose Lodge*
    1. **Holding:** State grant of liquor license not sufficient to hold state responsible for discrimination the lodge engages in
    2. **Criticism:** Only reason Moose Lodge exists is to serve liquor to members, and only reason can do that is because of state license--Pretty direct relationship
       1. But in this cases and many others, as long as there is no evidence of discrimination, the state has not discriminated
    3. Difference between outcomes in Moose Lodge and Shelley/Burton is really just the historical circumstances and timing
       1. Up until 1964 civil rights act, only way to prevent private race discrimination was to erase the state action line and go after it
11. In later cases, the court creates an inscrutable legal theory in order to avoid losing the state action line but trying to avoid allowing racial discrimination (wants legislature to continue to oppose discrimination)
12. Two ways the court can convert cases into constitutional issues:
    1. One: court can hold responsible for omissions
    2. Two: court can look around harm to state actions that causally contributed to them
    3. The state action doctrine is misleading
       1. There is always state action linked-the question is just is that state action causally linked enough to be the cause?
13. Some cases: court will look at private actor doing a public function, and reclassify them to enforce norms
    1. *Marsh v. Alabama* (1946)
       1. **Facts:** Company town in Mobile Alabama, just like any town run by a normal government, owns all land, leases to workers, all privately owned and operated by company. Jehovah's witness comes to town, distributes lit on town street, arrested by security officers. If this happened in normal town, clear First Amendment violation. But since private town, JW convicted of criminal trespass.
       2. **Holding:** Court says that conviction violates the First Amendment.
       3. **Rationale:** No sense in distinguishing between company as private actor and real government.
          1. Most straightforward way to strike conviction would be Shelley logic: violation when state court imposes penalty for violating trespass laws, but okay for private guard to escort of premises
          2. That is not what the court does: different tact, focusing on behavior in town itself.
       4. **Legacy:** Cases where private parties are performing a public function: a function usually or traditionally performed by government
    2. White primaries in the state of Texas
       1. **Facts:** Democratic only party; with primaries, won't let blacks participate. Since only party, winner of primary by default wins. Dem Part private entity.
       2. **Holding:** Court comes to conclusion: in a one-party state, exercising a public function, essentially running the election for office, can be reclassified as defacto public offer
    3. Public function doctrine threatens to swallow up all state action qualifications
       1. Private schools that restrict speech have been held not to be public actors, even if contract to get kids from public school system with learning disabilities
       2. Charter schools are designated as public
       3. Private prisons also on the public side of the line, if contract with state or federal government
       4. But private security guards are not
    4. If purpose of Con Law to protect individuals, then hard to justify distinguishing harm gov't inflicts versus those private parties inflict

## Plessy and Brown

1. *McCabe*
   1. **Holding:** (1913) equality of segregated facilities required
      1. Can't have sleeping cars only for whites
2. *Cumming v. Richmond Board of Education*
   1. **Background:** The taxpayers filed suit against the board and the tax collector arguing a tax for the support of high schools was illegal and void because it was for the use and benefit of the white population exclusively. The taxpayers also argued that the system denied them the equal protection of the laws guaranteed by the Fourteenth Amendment.
   2. **Lower courts:** The trial court refused to grant an injunction against the tax collector, but entered an order restraining the board from using any funds for the white high school until an equal facility was established for black students. The state supreme court reversed the injunction against the board and dismissed the petition.
   3. **SCOTUS Holding:** On appeal, the court affirmed. The board's decision to give educational facilities to the 300 black children who were not provided for, rather than to maintain a separate school for the 60 children who wished to have a high school education, was in the interest of the greater number of black children. The board's decision to suspend temporarily and for economic reasons the high school for black children was not made to discriminate against the black students because of their race. The taxpayers were not denied equal protection of the laws.
3. *Plessy v. Ferguson*
   1. **Background:** The Fourteenth Amendment established the requirement of equality before the law; states used “separate but equal” facilities to accomplish this.
   2. **Holdings:** The fourteenth amendment cannot regulate activities in the “social” sphere.
      1. Segregation laws are consistent with government neutrality.
      2. For state action, to the extent that government is acting neutrally by equally segregating: mere separation is okay
      3. To the extent that laws are harder on blacks than whites, that is a matter of private interpretation that state or government is not responsible for
      4. The law is powerless to effect private beliefs and preferences about racial difference (this is not true!!! Brown argument?
   3. **Rationale:** Fourteenth Amendment was not enacted to stop distinctions based on color. Constitutional law cannot reach the choices of people operating in the private sphere.
      1. **Problem with this:** State statutes enforcing private decisions of association, are really state validation of decisions made by private actors.
      2. Court says that separation does not mean the colored race is inferior; if they think that, they are choosing to feel inferior. Government imposition of a neutral regime is constitutional.
      3. What equal protection and due process were meant to mean is that whereas court would have struck down hair color law as irrational, race or skin color was a totally different thing because majority believed skin color has everything to do why government might decide to treat people differently
      4. Everyone knows Jim Crow for promotion of public good: segregation in best interest of both blacks and whites.
   4. **Dissent**: The only reason these laws exist is because of the belief that blacks are inferior. A technically correct legal argument by the majority doesn’t change this.
      1. **Vicious cycle**: One reason why whites regard blacks as inferior is that they are taught that by Jim Crow Laws.
      2. Majority: law reflects private understandings and attitudes, but doesn’t shape them.
   5. **Legacy:** Different from Dred Scott: court refusing to intervene to make things better, but not actively trying to make things work.
      1. At the time, however, separate but equal was seen as a relatively enlightened approach to race, better than inequality, and reducing racial friction.
4. So the NAACP begins a campaign to show that separate is not equal, and starts cases against radically unequal facilities
   1. Requires going case by case and showing on the facts that the schools are not equal
   2. Press for integrated schools as only guarantee of equal education
5. *Missouri ex rel Gaines v. Canada*
   1. **Facts:** Student filed suit for the denial of admittance to a law school. Student filed a mandamus action to compel the law school to admit him. The student contended that the discrimination constituted a denial of his constitutional rights. The student insisted that there were special advantages for a person intending to practice law in Missouri to attend the university to which he had applied.
   2. **Holding:** The court determined that the denial of the right for black students to pursue a legal education in Missouri was a denial of a legal right to the enjoyment of a privilege which the State had set up. The court further concluded that the payment of tuition fees in another State did not remove the discrimination. The court determined that the student was entitled to the equal protection of the laws and that the state was bound to furnish it for him within the borders of the state. The court concluded that petitioner was entitled to be admitted to the school of law at the state university in the absence of other and proper provision for his legal training.
6. *Sweatt v. Painter*
   1. **Holding:** Texas's strategy of a quick law school for black students (no faculty, no facilities) is unequal
   2. **Rationale:** The 14th amendment guarantee of equality to material resources and to prestige and absence of opportunity to interact with the majority of people who WILL be lawyers in Texas
      1. Basically, no way to make a separate law school that will be equal
7. *McLaurin v. Oklahoma State Regents*
   1. **Holding:** Can't put black students at different lunch tables/special table in library.
   2. **Rationale:** Impair his ability to study, engage in discussions, and exchange views with other students; learn his profession.
8. *Brown v. Board of Education of Topeka (Brown I)*
   1. **Background**: the decision turned on the votes of three justices who thought that segregation was a moral outrage, but couldn't find legal justification for overturning Plessy; Plessy was rightly decided
      1. When ambiguity, court should defer to democratically elected officials
      2. Warren: fifth vote in favor of Brown, convinces the holdouts it is important court speak with single voice
         1. Long, protracted, difficult struggle involving Congress, President, states, could fail, could succeed, every move important
         2. Wants a unanimous decision to blunt Southern resistance
         3. If could get all justice on board, even if not liked politically, what constitution required
   2. **Holding:** Segregation based solely on race deprives minority children of equal education opportunities. Plessy should be held inapplicable to public education.
   3. **Rationale:** Cannot turn back the clock to when Plessy was written; must consider public education in the light of its full development and its present place in American life throughout the Nation. Racial inequality product of culture and environment, influenced by law and government. Arguments:
      1. **Stigma:** Social stigma is a sufficient type of harm to amount to a violation of equal protection; created by laws state is responsible for
      2. **Educational disadvantage:** segregation has a tendency to retard the educational development of black children.
   4. **Legacy:** the real beginning of the role of the court in equal rights revolution
      1. Court takes on the role of heroic protector of oppressed minorities
      2. Doesn't even pretend this mandates desegregation: original understanding of 14th amend not inconsistent with requiring segregation
      3. Shift in how court decides cases, away from originalism, towards a forward-looking morality or policy based on what the justices think best for the country.
   5. Critics: Court's decision reduced constitution to mere scrap of paper
      1. Need inequality to show an equal protection problem
   6. Klarman’s argument: it was the circumstances in the country that made Brown possible in 1954, when it was not possible in 1896
      1. Legal change is pulled along by social change
9. *Bolling v. Sharp*
   1. Reverse incorporation: any rights applying against the state applied through 5th amendment to the federal government, too.
   2. With a few exceptions, every constitutional right applies to national and state and local governments
10. *Brown v. Board of Education of Topeka (Brown II)*
    1. **Issue:** Does Brown require more than getting rid of segregation laws on the books?
    2. **Holding:** The court held that because of their proximity to local conditions and the possible need for further hearings, the courts that originally heard the cases could best perform judicial appraisal of whether local school authorities' actions constituted good faith implementation of the governing constitutional principles to accomplish admission of students to public schools on a racially nondiscriminatory basis.
    3. **Rationale:** Brown accomplished desegregation, but something more is required to get to integration.
    4. **Legacy:** Brown II left the country to do nothing for ten years, and allowed the south the resist the enterprise of discrimination. SCOTUS stays silent for the next ten years, except for *Cooper*.
11. *Cooper v. Aaron*
    1. **Holding:** The Supreme Court refused to suspend the integration plan of the school board until state laws and efforts to upset and nullify the Court's holding in Brown v. Board of Education (that the Fourteenth Amendment forbids states to use their governmental powers to bar children on racial grounds from attending public schools) had been further challenged and tested in the courts. It was pointed out that the constitutional right not to be discriminated against in schools maintained by or with the aid of a state cannot be nullified openly and directly by state legislators or state executive or judicial officers nor indirectly by them through evasive schemes for segregation whether attempted ingeniously or ingenuously; and that the ruling of the Brown Case was the supreme law of the land and of binding effect on all state legislators and officials.
    2. **Klarman**: The words of SCOTUS were never going to make a difference until national government itself got on board with integrating schools
12. *Green v. County School Board*
    1. **Holding:** The court rejected the validity of freedom of choice plans to choose to attend schools of other races.
    2. **Rationale:** Whites could choose a black school, but they didn’t; if blacks chose white school, fired from jobs, or rejected. Need to do actual integration.
13. *Swann v. Charlotte-Mecklenburg Board of Education*
    1. **Facts:** Because of segregated neighborhoods, after Brown, the state began busing students from one district to another to achieve integration.
    2. **Holding:** this is a legitimate way to attempt relief. However, this stops short at making sure every school’s ratios reflect the ration of the greater population.
14. Types of segregation:
    1. **De jure segregation**: Segregation imposed by law.
    2. **De facto segregation**: segregation by fact or circumstance. Very often this is not a conscious choice. A good example is found in neighborhoods, frequently there is a white neighborhood or a black neighborhood.
    3. *Brown* and equal protection prohibit only de jure segregation. However, court extends it to apply to remedying even de facto segregation, because if it is exists, it is the result of earlier de jure segregation.
15. *Keyes v. School District No. 1 (Denver)*
    1. **Background:** Although the district court found that the school board had engaged in an unconstitutional policy of deliberate racial segregation with respect to schools in the Northeast area of the city, the district court required the parents to make a fresh showing of de jure segregation in each area of the city for which they sought relief, including the core city area. The appellate court upheld this approach.
    2. **SCOTUS:** The Court held that both lower courts erred. The Court held that a finding of intentionally segregative school board actions in a meaningful portion of a school system created a presumption that other segregated schooling within the system was not adventitious. It established a prima facie case of unlawful segregative design on the part of school authorities, and shifted to those authorities the burden of proving that other segregated schools within the system were not also the result of intentionally segregative actions. This was true even if it was determined that different areas of the school district should be viewed independently of each other.
16. *Milliken v. Bradley*
    1. **Holding:** federal courts cannot impose inter-district remedies to segregation (i.e., bussing n kids from the suburbs)
    2. **Legacy:** in districts where it isn’t hard to get outside the city school district, leaves schools irremediably segregated. Gives white families a safe place to flee where their children and wealth are outside the grasp of inner-city school districts.
17. *Missouri v. Jenkins (Jenkins II)*
    1. **Background:** 1995, SCOTUS’s last word on Brown. District judge had order more faculty, money, and creation of magnet schools in inner city schools, with the idea that if city schools get good enough, white kids might come back, and if not, at least improving the education of black students in the city.
    2. **SCOTUS Holding:** Cannot justify increasing funding to bring white back in: that is a way to get around Milliken and can't order funding to remedy lower education achievement unless you can tie it to pass de jure segregation a long time ago, when these kids weren't even in public school system.

## Levels of scrutiny and *Carolene Products* theory

1. Two tiered structure of equal protection
   1. Specially protected groups
   2. Everybody else
2. What does equal protection mean?
   1. Doesn't mean government can treat people unequally in terms of passing laws or enacting policies
   2. Every law or policy advantages some people relative to others
   3. Every law discriminates or classifies on some basis
   4. Advantageous to be on one side of the distinction; disadvantageous to be on the other side
   5. Whatever equal protection means, can't mean law can't exist
3. *New York City Transit Authority v. Beazer*
   1. **Facts:** NYC Transit refused to hire methadone users because they might be unsafe.
   2. **Issue:** Are methadone users a specially protected group?
   3. **Complaint:** The employer's blanket exclusion of all former heroin addicts receiving methadone treatment was illegal under Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Protection Clause of the Fourteenth Amendment.
   4. **Holding:** As the rule was not motivated by racial animus, there was no rebuttal claim that it was merely a pretext for intentional discrimination, and the findings did not support the conclusion that the regulation prohibiting the use of narcotics violated Title VII.
   5. **Rationale:** While it may have been unwise for the employer to rely on a general rule instead of individualized consideration of every job applicant, it concerned matters of personnel policy that did not violate equal protection principles, and the Constitution did not authorize a federal court to interfere in such policy decisions.
   6. **Dissent:** Turns out methadone users are disproportionally minorities. Reason transit authority decide to exclude methadone users and not alcoholics is likely because they were insensitive to exclusion of racial minorities, while sensitive to other groups
      1. **Majority**: Not enough to show an equal protection violation to show that it happened; have to show gov't INTENDED law had racially disparate effect
   7. **Takeaways:**
      1. What equal protection is really about is the relationship between a classification and the purpose that government classification is trying to serve
      2. Rationale basis: Special classification "serves general directives of safety and efficiency" by excluding narcotics users
      3. Court is not going to force a tight fit between means and ends.
      4. All laws and policies are over and/or under-inclusive: forced to take the form of rules, not standards, which are over and under-inclusive relatives to the purposes they are supposed to serve.
4. How to tell if a law will pass muster:
   1. Look at Constitution
   2. Exclusionary line challenged by Beazer not directed to an individual or category of persons, but rather, represents a legitimate policy choice
   3. We could distinguish legitimate gov't policy decisions from constitutionally dubious ones that reflect prejudice
   4. Purposes that are off-limits:
      1. Disadvantaging a group because of race, ethnicity, or gender unconstitutional under equal protection
         1. Maybe sexual orientation
         2. Maybe a couple of minor categories
   5. The law or policy must be rationally related to a legitimate state purpose, where rationality describes the fit, over- or under-inclusive, and legitimate describes the purpose itself
5. *Railway Express Agency v. New York*
   1. **Facts:** NY prohibits advertising vehicles, but permits advertisements on delivery vehicles
   2. **Holding:** This doesn’t violate equal protection.
   3. **Rationale:** The law has a legitimate rational purpose in promoting traffic safety by avoiding distractions. There is a real difference between doing something for hire and for self-interest, so it is different to tolerate something for those who act on their own and for those who do it for a price.
6. *Minnesota v. Clover Leaf Creamery*
   1. **Facts:** Minnesota law bans the sale of milk in plastic containers but not paper under the auspice that it is more environmentally friendly (it isn’t), but really to promote the Minnesota paper industry.
   2. **Holding:** Upholds the law
   3. **Rationale:** The court will defer to the state’s purported purpose and not try to figure out their actual purpose; it is not the court’s job to question legislative fact-finding. As long as there is a theoretical connection, that is enough.
7. *Williamson v. Lee Optical*
   1. **Facts:** Law forbids opticians from fitting lenses into frames; only optometrists and ophthalmologists, with the purported purpose of protecting public health and safety to avoid improper fittings.
   2. **Holding:** Upholds the law and does not find an equal protection violation.
   3. **Rationale:** Equal protection goes no further than protecting against invidious discrimination.
8. *City of Cleburne v. Cleburne Living Center, Inc.*
   1. **Facts:** State enacts law excluding building a group home for mentally retarded and recovering drug users, but allowed to build a group nursing home, etc.
   2. **Holding:** Court finds that law violates equal protection.
   3. **Rationale:** The fit between means and ends is not good enough. The state cites the reason for denying the permit as it is a flood plain, but then why is a nursing home allowed there? However, court does not use ordinary rationality review, because then as in Beazer, this would pass muster.
      1. Court has made judgment that mentally retarded going to get constitutional protection against being disadvantaged in a way that opticians are not
      2. Court below said quasi-suspect class, so quasi-heightened review
      3. But not a complete suspect class protected from all discrimination: don’t have to require public universities to admit the mentally retarded.
      4. Classification in Cleburne reflects irrational prejudice that Beazer, etc., do not
   4. **Concurrence**: Fears or prejudices of neighborhood residents not enough: private prejudice or irrational fear is what distinguishes this case from Beazer
9. Cases where the court seems to apply real rationality review fall into two groups:
   1. Testing out a group for suspect classhood:
      1. Romer: testing for gays/lesbians
      2. Cleburne: testing for mentally retarded
      3. Once you put in heightened scrutiny for a group, hard to take it back
   2. Justices see a law that they think is stupid or evil and have to strike it down
   3. In most cases, can argue the law either way
10. Doctrinal framework for equal protection
    1. Statutes that classify on the basis of race or ethnicity are subject to strict scrutiny and will almost always get struck down
       1. Require weighty purpose and very tight fit
       2. The classification must be necessary or narrowly tailored to achieving a compelling government interest
       3. Strict scrutiny is an absolute ban on racial classifications with one big exception: this only applies to racial classifications designed to HARM racial minorities, not those that are designed to HELP, i.e., affirmative action
11. *Johnson v. California*
    1. **Facts:** California enacted a statute authorizing racial segregation of prisoners for up to the first 60 days of incarceration in order to prevent race-based violence.
    2. **Holding:** Classifications based on race violate equal protection, and as such, the law is unconstitutional.
    3. **Rationale:** The court must always apply strict scrutiny to race classifications, and is very unlikely they will allow anyone to discriminate on the basis of race.
12. *Carolene Products FN 4*
    1. Court reconceiving its role in politics: judicial review that no longer second guesses, but puts courts in the service of democratic decision-making by instructing judges only to strike down laws that make political process less democratic
    2. Court starts with a presumption of constitutionality, then they examine the law with regard to three circumstances:
       1. First: legislation that appears on its face to be a specific prohibition on something
          1. If specific and clear enough to be enforced using nothing but mechanical interpretation, no problem
          2. Example: President has to be 35
          3. No democratic problem when court enforces a provision like this because one can at least make the case, made by Marshall in Marbury, that court is doing nothing more than channeling the voice of the People
       2. Second: laws that restrict processes that might bring about the repeal of undesirable legislation
          1. Here, idea is that restrictions on voting or political speech/participation create imperfections in political process making it less legitimate
          2. If court steps in, court playing democracy enhancing role
          3. Procedural versus substantive democracy:
             1. Substantive: anti-democratic to disenfranchise otherwise qualified voters
          4. Court can at least negate the charge of being anti-democratic by saying striking them down will improve the functioning of the democratic process
          5. Corollary to paragraph 2: the court, if it can't for whatever reason remove the blockage, may be justified in striking down laws that harm those groups that have been excluded or blocked from participation
             1. Substituting ideas of actual democratic decision making process for the actual results of a democratic decision-making process
          6. Paragraph two might also be interpreted to allow courts to step in and block a law passed by an anti-democratic legislature
       3. Paragraph 3: political processes can be distorted or contaminated, also by prejudice against discrete and insular minorities, preventing them from getting their fair share out of political process
          1. Those characteristics will prevent them from fully participating in the same sort of way that an outright ban would
          2. Some groups are for all practical purposes disenfranchised, even if they can vote
13. Ackerman: Why does disadvantaging some groups reflect prejudice, while disadvantaging others is just a matter of policy?
    1. What is it about discreteness and insularity that prevents these groups from getting less than their fair share out of politics?
       1. Discreteness: group easily identifiable
          1. Race--skin color easily observable
          2. Sexual orientation or religious orientation, often invisible
       2. Insularity: group is internally cohesive; members interact, and separated out from society at large
          1. Native Americans on reservations
          2. Women at large
    2. All else equal, a group that is the same in number as other groups, that is insular or discrete, will do worse in politics than a comparable group
    3. Insular groups have several advantages:
       1. Better at overcoming free rider problems--collective identity and motivate each other to pursue goods for the group
       2. Better to organize a group that interacts with itself already
    4. Discreteness may help politically:
       1. Discreteness may encourage political voice, effort, or fighting back
       2. Removes possibility of responding another way to politics (exit)
       3. Exit option not easily available, hard to hide membership
    5. Immutability should count AGAINT special protection: advantage
       1. Stigmatized heroin users should change; blacks have no option but to fight back

## The Discriminatory Purpose Requirement

1. *Washington v. Davis*
   1. **Facts:** The trial court denied the police recruits' motion for summary judgment because the qualifying test was directly related to the requirements of the police training program, and a positive relationship between the test and training course performance was sufficient to validate the former. The appellate court reversed that ruling because the disproportionate impact resulting from the fact that a greater proportion of blacks failed the test than whites established a constitutional violation.
   2. **SCOTUS Holding:** The appellate court erroneously applied legal standards applicable to Title VII cases. A statute, which was otherwise neutral on its face had to be applied so as to invidiously discriminate on the basis of race.
   3. **Rationale:** The police department's efforts to recruit black officers, the changing racial composition of the recruit classes, and the relationship of the test to the training program negated any inference that the police department discriminated on the basis of race or that a police officer qualified on the color of his skin rather than ability.
      1. The fact that test disproportionately disadvantages blacks not enough to trigger strict scrutiny.
         1. As long as gov't doesn't take race into account when passing laws, not accountable for its effects
      2. Applying rational basis review, the court will look for disparate impact but probably uphold the statute.
   4. How to argue the other side?
      1. Holding government responsible for omissions:
         1. DC could either solve the problem by getting at the root cause, or could accommodate or not exacerbate the problem, by lowering cutoff score for black applicants, etc.
      2. Alternatively, focus on the actions taken by DC that contributed to the harm that is being suffered by African Americans applying to be police officers
         1. DC had de jure segregated schools until 1954, for example
         2. If the reason why racially neutral laws are having a disparate impact is because blacks are worse off as a baseline matter, why should the gov't be allowed to take this baseline for granted rather than accept responsibility?
2. What counts as race discrimination in the first place?
   1. Laws that discriminate on the basis of race
   2. Laws that don't say anything about race, but are motivated by race discriminatory purpose
   3. Laws that are generally racially neutral, but the laws have a racially disparate impact
3. Three approaches to remedying inequality:
   1. Effects test
   2. Could force gov't to get rid of inequality
   3. Do nothing
4. Discriminatory purpose: what the law actually accomplishes
   1. Not looking into the minds of the legislators who passed the law
   2. Could the law have been enacted in the same form if race were not a consideration in the political process at all?
   3. Applied:
      1. In *Washington v. Davis*: would they have been using this test if white applicants just as likely to flunk as black? If not, then race is a but-for cause, and racially discriminatory purpose established.
      2. In Beazer: what if most methadone users were white? Would NYCT still have an exclusion rule? Probably yes.
5. *Personnel Administrator of Massachusetts v. Feeney*
   1. **Facts:** Appellee was a female civil service worker who had lost several positions to male veterans despite her high test scores. She filed a claim against appellant, the State of Massachusetts, and twice argued successfully before the district court that the veterans' hiring preference statute violated the Equal Protection Clause of U.S. Const. amend. XIV by discriminating on the basis of sex.
   2. **SCOTUS Holding:** After a close examination of the statute, the Court found that although the result of the statute had a disproportionate impact on women, it had not been enacted in order to discriminate against women. The statute contained gender neutral language. Because the statute was gender-neutral on its face, the Court considered first whether the statutory classification was neutral and then whether the adverse effect reflected invidious gender-based discrimination. The statutory classification was neutral because it was intended to discriminate against non-veterans, not against women. Female veterans were entitled to its benefits. Moreover, the legislative purpose had not been to invidiously discriminate against women.
6. *Gomillion v. Lightfoot*
   1. **Facts:** City of Tuskegee changed town’s shape from square to irregular 28-sided figure.
   2. **Holding:** an electoral district created to disenfranchise blacks violated the Fifteenth Amendment.
   3. **Rationale:** Court says unconstitutional, discriminatory purpose, need no other evidence besides racial effects: no other story that you could draw the line this way!
7. *Arlington Heights v. Metropolitan Housing Development*
   1. **Facts:** Town denies rezoning for group homes: claims because trying to exclude predominately black low-income housing units
   2. **Holding:** Court accepts town's race-neutral purpose of preserving single family homes
      1. Just as likely to exclude other types of group homes
      2. Powell: other evidence plaintiffs might point to to show discriminatory purpose
         1. Departments from procedural or substantive norms
         2. Historical background of the case
         3. Beyond that, tough
8. *Hernandez v. New York*
   1. **Facts:** Defendant alleged that prosecution struck jurors on the basis of their race
   2. **Holding:** The court affirmed the rejection of petitioner's claim that the prosecution exercised peremptory challenges based upon ethnicity. In applying the three-step process for evaluating claims of this nature, a defendant had to make a prima facie showing that the prosecutor used his peremptory challenges on the basis of race; if the requisite showing was made, the burden shifted to the prosecutor to articulate a race-neutral explanation for striking the jurors in question; and then the trial court would determine whether the defendant carried his burden of proving purposeful discrimination. Prior to petitioner making a prima facie showing of discriminatory strikes, the prosecution offered its reasons for excluding the jurors in question. Therefore, the prima facie requirement was waived. The prosecutor explained that because the jurors in question were hesitant to agree that they could rely on the translation of testimony by a court translator, he exercised the peremptory strikes. The court found no error in accepting this reasoning as a race-neutral basis for the exercise, and thus affirmed the rejection of petitioner's claim.
9. *Yick Wo v.Hopkins*
   1. **Facts:** Petitioners, natives of China, operated laundry businesses. They complied with every requirement necessary to protect neighboring property from fire and took precautions against injury to the public health, yet were still found to have violated the city ordinances and were fined. After they were in default, they were imprisoned until the fines could be paid. Petitioners contended the ordinances were void as being in violation of U.S. Const. amend. XIV. Discrimination against Chinese laundry businesses specifically was admitted.
   2. **Holding:** The Court reversed and held that no reason for discrimination existed except hostility to the race and nationality to which petitioners belonged. The discrimination was, therefore, illegal, and the public administration that enforced it was a denial of the equal protection of the laws in violation of U.S. Const. amend. XIV. The discrimination against nationality was in violation of equal protection when petitioners met all other safety requirements to operate their laundry services.
10. Court then tackles “symmetric” race discrimination laws
11. *Loving v Virginia*
    1. **Facts:** VA passes a law that makes it a crime for white to intermarry with colored
    2. **Holding:** Court unanimously strikes down VA's law barring interracial marriages even though it was symmetrical.
    3. **Rationale**: Anti-miscegenation laws are unconstitutional despite the fact that both the white and black party equally punished because everyone knows laws like this were a measure to maintain what supremacy
       1. Social meaning/understanding of interracial marriage not to stop a mongrel race, but recognized that purity of white blood important to protect
12. *Palmore v. Sidoti*
    1. **Facts:** Custody battle between two whites; when white woman remarries a black man, custody transferred to father, judge acts on policy disfavoring giving custody to interracial marriages: disadvantage to children to be reared in multiracial household
    2. **Holding:** The Fourteenth Amendment would not brook such governmentally-imposed discrimination based on race.
    3. **Rationale:** While the Court found that the State of Florida had a substantial governmental interest for purposes of the Equal Protection Clause in protecting the interests of children, such an interest could not support the State's toleration of prejudices based on race. The reality of private biases and the possible injury such biases could inflict on a child were determined by the Court not to be permissible considerations for removal of an infant child from its mother.
13. Evolution of court’s thinking:
    1. Plessy: as long as race-neutral, no problem; any bad effects in private sphere
    2. Brown: bad effects are what you have to show to show equal protection violation
    3. Then to Palmore and Johnson: bad effects beside the point; all that matters is that government took race into account in the first place
    4. Government should be as color-blind as possible.

## Affirmative action

1. Affirmative action programs fly in the face of government color-blindness
   1. Affirmative action programs are race-conscious programs that seek to allocate benefits to racial minority groups
2. Problems with affirmative action:
   1. Some might suspect that at least certain types of programs presented as for the benefit of minorities are another way of harming them--either in immediate way or long-run way
      1. Thomas's concurrence in *Adderand*: true that remedial preferences desire to foster equality; but paternalism can be poisonous-because of chronic handicaps minorities cannot compete with them without indulgence, provoke resentment
      2. Even in the short term, it is hard to tell whether supposedly benign race-based preference comes as benefit to recipient group
      3. Perpetuates stereotypes
3. *Reagents of the University of California v. Bakke*
   1. **Facts:** Plaintiffs challenged a program designed to increase minority enrollment at the medical school.
   2. **Holding:** The University’s program of reserving a specific number of seats is unconstitutional. Affirmative action programs can be constitutional if done in the right way:
      1. Step 1: All racial classifications subject to strict scrutiny
      2. Step 2: two compelling gov't interests that can allow a program to survive strict scrutiny
         1. Remedying the effects of past discrimination
            1. Okay to do this to make up for previous discrimination that racial minorities have suffered, but only acceptable as narrowly tailored remedy based on specific findings
            2. Only can remedy discrimination that it itself engaged in in the past
         2. Promoting diversity
            1. Attainment of a diverse student body
   3. **Rationale:**
      1. The program violated title VI of Civil Rights Act, which prohibits racial discrimination in programs receiving federal funding.
      2. Powell: all racial classifications suspect and should be subject to strict scrutiny
         1. Wanted flexible program: race a plus but not reserved seats
         2. Can try to achieve a racially diverse class, but in the least racially divisive or stigmatizing way possible.
         3. Okay to take race into account, so long as it isn't done with quotas--needs to be done in holistic way
   4. **Dissent:** Would have upheld the program after using an intermediate level of scrutiny somewhere the between rational basis test and the strict scrutiny test for race-specific statutes that disadvantage minorities.
      1. Purpose of remedying prior effects of discrimination was enough
4. *Fullilove v. Klutznick*
   1. **Holding:** Program upheld, but no majority opinion
   2. **Rationale:** Rejected claim that Congress must act in a wholly color-blind fashion, but a program that employs racial criteria calls for close examination
      1. Minority firms hampered by past effects of discrimination, so if useful for eradicating, okay
5. *City of Richmond v. JA Croson*
   1. **Facts:** Richmond had created a program allocating a certain number of government contracts to minority-owned businesses. The purpose of the plan was to promote wider participation by minority business enterprises in the construction of public projects.
   2. **Holding:** State and local affirmative action programs should be subject to strict scrutiny.
   3. **Rationale:** Applying the two prongs of the strict scrutiny standard, the Court found that the evidence did not point to any identified discrimination in the construction industry. Appellant had failed to demonstrate a compelling governmental interest in apportioning public contracting opportunities on the basis of race or that its remedy had been narrowly tailored to the achievement of that interest. The Court found the ordinance to be unconstitutional.
      1. Fit is SO bad to calibrate remedies for past harms, that flushes out purpose of program, not as remedial, but racial balancing for diversity (allocations for Eskimos with no evidence they ever lived there).
      2. There is a danger that that classifications based on race carry danger of stigmatic harm unless strictly reserved for remedial settings
      3. Scalia and Thomas: Recipient of benefit is not the same person harmed! Idea you can make up because they share a race is the offensive premise.
         1. Harm and benefit have to be netted out at individual level, not groups
      4. Affirmative Action should only be used when race-neutral ways won't work
         1. For example, financial grants to small firms allocated on race neutral basis, but designed with intent of money going to minority owned firms
6. *Adarand Constructors, Inc. v. Pena*
   1. Petitioner, low bidder on a federal contract, was denied the contract because a presumptive preference was given to minority business entities; petitioner sued, claiming violation of its U.S. Const. amend. V equal protection rights. Lower federal courts rejected claim, relying upon precedent which subjected U.S. Const. amend. V equal protection claims to intermediate scrutiny. The Supreme Court reversed and remanded, holding that (a) petitioner could claim injury owing to a discriminatory classification which prevented it from competing on an equal footing (petitioner need not allege that it would have obtained a benefit but for the discriminatory classification); (b) U.S. Const. amends. V and XIV equal protection claims are analyzed precisely the same way - applying strict scrutiny analysis (that is, government racial classifications must serve a compelling governmental interest and be narrowly tailored to further that interest); and (c) since lower courts applied intermediate scrutiny, remand for strict scrutiny analysis was required.
7. Post-Croson and Adarand, affirmative action in admissions still okay: *Grutter v. Bollinger*
   1. **Facts:** Michigan Law has thoughtful program that is supposed to do everything. Admits primarily based on grades and LSATs, but also soft variables, recommendations, work experience, accomplishments, essay. Also takes account of race and ethnicity: one of ten soft variables. Keeps eye on number of minorities admitted, aiming for critical mass-13-20% of class. If race not taken into account, minority attendance would drop.
   2. **Holding:** Affirms Powell's Bakke opinion, diversity counts as compelling interest, survives strict scrutiny. Need to do it in individualistic-holistic style.
   3. **Rationale:** The Equal Protection Clause did not prohibit this narrowly tailored use of race in admissions decisions to further the school's compelling interest in obtaining the educational benefits that flow from diversity. The goal of attaining a "critical mass" of underrepresented minority students did not transform the program into a quota. Because the law school engaged in a highly individualized, holistic review of each applicant, giving serious consideration to all the ways the applicant might contribute to a diverse educational environment, it ensured that all factors that could contribute to diversity were meaningfully considered alongside race.
8. *Gratz v. Bollinger*
   1. **Facts:** The university’s undergraduate admissions policy was based on a point system that automatically granted 20 points to applicants from underrepresented minority groups.
   2. **Holding:** The school’s policy made race the decisive factor for virtually every minimally qualified underrepresented minority applicant. As the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity, it violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964.
   3. **O’Connor’s concurrence:** Crucially important to bring different viewpoints and perspectives to a class, but race doesn't correlate to different viewpoints
9. Thomas: Affirmative action isn't even geared toward helping racial minorities and is condescending, misguided paternalism.
   1. Really just providing benefits for white students: diversity to enrich experience of white students
   2. Diversity to legitimate the institution, as if it were equally open to all
   3. Goes on to say maybe a public law school like Michigan shouldn't be allowed to have it both ways
   4. Elite institutions are more accessible to white privileged people than less privileged
   5. If really a mission of public university, serving population of state, then just choose to be diverse, not elite, and serve entire population, i.e. scrap the LSAT
10. *Parents Involved v. Seattle School Dist. 1*
    1. **Facts:** Both school districts adopted plans whereby, after place of residence and availability of space were considered, school assignments were made on the basis of race to ensure that schools were racially balanced
    2. **Holding**: The districts, which did not operate legally segregated schools, denied students equal protection by classifying students by race and relying upon the classification in school assignments. The districts failed to establish a compelling interest in racial diversity since their plans relied on racial classification in a non-individualized, mechanical way as a decisive factor, and racial imbalance in the schools was not unconstitutional by itself. Further, the minimal effect the classifications actually had on assignments indicated that other means would be effective to achieve the districts' goals and that the use of racial classifications was unnecessary.
    3. **Rationale**: Two compelling interests that might be used to support bussing programs:
       1. Remedial
          1. Rejected, Seattle had never been litigated as having instituted de jure segregation
          2. Louisville had been adjudged to have engaged in de jure segregation in the past, operating under court degree, but had been released, declared unitary-->legal implication that remedied de jure segregation problem
       2. Diversity
          1. Rejected, strongly suggests that a compelling interest in diversity limited to higher education, can't be used in lower to justify race-conscious student assignment plans

## Gender discrimination

1. Next suspect class: gender (follows race)
   1. Everyone understands that 14th amendment was about race
   2. No one thought it was about gender, discrimination, gender equality or inequality
2. History
   1. Court followed the line of logic that gender is relatively similar to race when it came to discrimination
      1. Political and economic subordination
   2. Political consensus: ideal with respect to race and society is one in which no one thinks or cares about race anymore, at level of gov't policy-making; this is not true with regards to gender. There are some real differences between men and women that policymakers must take account of:
      1. Laws touching on pregnancy
      2. Segregated bathrooms ok by gender, not race
   3. Court didn't invalidate a single law on sex discrimination grounds until Reed v. Reed in 1971
   4. Gender Equal Protection Amendment passed in 1960s: Only thing it prohibits is intentional governmental use of gender in allocating future burdens irrespective of baseline equality between men and women that exists in society
      1. Same doctrinal structure of state action--limited to things that governments do, not things private actors do
   5. Court started with presumptive color-blindness such that any intentional use of gender to be treated as suspect
   6. Biggest difference: in gender equal protection, court will allow some gender protections that reflect "real or natural gender differences"
   7. Began applying heightened scrutiny in 1971
   8. At first, court pretended it was doing rationality review
   9. In 1976, court came clean that it was doing this
3. Understanding how the court allows the government to classify on the basis of gender:
   1. Affirmative action
      1. The right kind might pass intermediate scrutiny
      2. Narrowly tailored
   2. Natural or real differences
      1. Combat duty in military
      2. Pregnancy (Michael M. case)
   3. If classification not one of these two things: based on archaic and over-broad generalizations, or reflects illegitimate stereotypes and strike it down
4. *Bradwell v. Illinois*: court refused to license a woman to practice law—not protected by the 14th amendment
   1. Natural timidity of women makes them unfit to do certain things
5. *Reed v. Reed*
   1. **Facts:** When a minor died intestate, appellant mother and appellee father, who had separated before the child's death, each filed a petition with the probate court seeking appointment as administrator of the deceased minor's estate. The probate court appointed appellee father as administrator of the estate, relying on a statute that gave preference within a designated class of persons to males over females.
   2. **Holding:** The statute violated the equal protection clause, U.S. Const. amend. XIV. The state interest in reducing one level of contests in the probate courts had some legitimacy, but that a statute could not give mandatory preference to members of one sex over the other merely to eliminate the need for hearings on the merits. The court held this was the type of arbitrary legislative choice forbidden by the equal protection clause, U.S. Const. amend. XIV.
6. *Frontiero v. Richardson*
   1. **Facts:** Appellants, female military personnel, filed an action contending that the statutory difference in treatment of male and female military personnel for purposes of determining "dependent" benefits violated the Due Process Clause of the Fifth Amendment. Appellants asserted that the discriminatory impact of the statutes was twofold: first, as a procedural matter, a female member was required to demonstrate her spouse's dependency, while no such burden was imposed upon male members; and, second, as a substantive matter, a male member who did not provide more than one-half of his wife's support received benefits, while a similarly situated female member was denied such benefits.
   2. **Holding:** The statutory scheme involved the very kind of arbitrary legislative choice forbidden by the United States Constitution because it drew a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commanding dissimilar treatment for men and women who were similarly situated.
   3. **Rationale:**
      1. Gender classifications inherently suspect and need close scrutiny
      2. Administrative convenience not a justification
      3. Taking gender into account equally problematic irrespective of which gender is benefitted
7. *Orr v. Orr* (1979)
   1. Court strikes down Alabama's alimony law--under that law divorced husbands have to pay alimony, but wives don't
   2. Based on illegitimate stereotype that women are not wage-earners
   3. What matters to the court is that laws like this advantage male breadwinner, female dependant, and makes it worse for women in marriages
8. *Mississippi University for Women v. Hogan*
   1. **Facts:** Plaintiff challenged that only women were allowed to apply to the nursing school.
   2. **Holding:** Struck down: enforces stereotype of women as nurses, lower wages for nurses, material advantage to women in short run
9. *Craig v. Boren*
   1. **Facts:** Plaintiffs challenged a law that prohibits the sale of low-alcohol beer to men, but not women.
   2. **Argument:** State tries to justify pointing to male drunk driving states, risk of drinking and driving in that age cohort higher amongst men than women
      1. Court says irrelevant
   3. **Holding:** Classifications by gender must serve important government objective and be related to the achievement of those objectives in order to stand. The court will use intermediate scrutiny in evaluating gender classifications.
10. *JEB v. Alabama*
    1. **Holding:** Court strikes down gender-based preemptory juror strikes
    2. **Rationale:** To say that gender makes no differences as a matter of law is not to say gender makes a difference as a matter of fact
       1. Acknowledge proof that female jurors vote differently than male jurors in criminal rape cases, but classification still unconstitutional
11. *Weinberger v. Weisenfeld*
12. *Califano v. Webster*
    1. The statutory scheme embodied in the former version of § 415 resulted in a higher "average monthly wage" and a correspondingly higher level of monthly old-age benefits for the retired female worker. Section 415 was amended to equalize the treatment of men and women but was not given retroactive application.
    2. **Holding:** Old-age benefit payments were not constitutionally immunized against alterations of the kind at issue in the case and Congress was authorized to replace one constitutional computation formula with another and to make the new formula prospective only. The former version of the challenged statute operated directly to compensate women for past economic discrimination and was deliberately enacted to compensate women for the particular economic disabilities they suffered. The subsequent amendment of § 415 was not a Congressional admission that its previous policy was invidiously discriminatory. The retired male worker's Fifth Amendment rights were not violated by the prospective application of § 415, as the Constitution did not forbid statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.
    3. Aspect of social security benefit program: higher benefits for retired female wage earners than for male
       1. Allows females to exclude more low-earning years in calculating benefits
       2. Affirmative action designed to benefit women, not reflect gender stereotypes
    4. Differing treatment not accidental byproduct, but made up to make up for differential treatment of women in the past--remedying prior wage discrimination against women
       1. Some of the reason they were earning less money--being unfairly paid less
       2. Doesn't require the narrow tailoring that O'Connor needed to pass scrutiny in the race context
    5. Less convincing: artifact of lower standard of review
       1. Difference between intermediate and strict scrutiny is that court will uphold more gender classifications
    6. More slippage between the benefits provided and past discrimination compensated for
13. *Geduldig v. Aiello*
    1. **Facts:** Appellee citizens, who were subject to a mandatory employment tax to fund the disability program, had argued that the program violated the Fourteenth Amendment because it precluded the payment of benefits for any disability resulting from pregnancy.
    2. **Holding**: the exclusion of benefits due to disability from pregnancy did not result in invidious discrimination under the Equal Protection Clause. The court found that the program did not discriminate with respect to the persons or groups that were eligible for disability insurance protection under the program. The court held that the challenged classification related to the asserted under-inclusiveness of the set of risks that the state had selected to insure. Although the state had created a program to insure most risks of employment disability, it was not required to insure all such risks based upon the minimal amount collected from each participating citizen.
    3. **Rationale**: Merely discriminates against pregnant persons regardless of their gender
    4. **Legacy**: Quickly overruled by congress: pregnancy discrimination act, amendment to Title VII, includes pregnancy is sex discrimination
14. *Nguyen v. INS*
    1. **Holding:** Contains proof, but upholds standard
    2. **Rationale:**
       1. Mothers are present at birth because of natural necessity, where fathers are not
       2. DNA testing makes it difficult for gov't to justify higher standard for proving paternity
       3. Guaranteeing the opportunity for parent and child to develop lasting relationship
       4. Father doesn't necessarily have that opportunity
       5. Stereotype: mothers seem more likely than fathers to play major role in rearing children, fathers more likely to disappear
    3. **Dissent**: that crosses the line into stereotype where father can demonstrate he had actual knowledge of birth, hard to see how this is different
       1. Risks sliding over that mothers have long term relationships
15. *Miller v. Albright* (1998)
    1. Child born overseas, if father citizen, need proof of paternity before age 18 of fatherhood
    2. Majority: court upholds rule, based on about proving a blood relationship to US citizen, mother there at birth, no further proof necessary
    3. Dissent: this is about stereotype that mothers care for children, fathers disappear
    4. No political inflection, just disagreement
16. *US v. Virginia*
    1. Facts: Virginia funds all-male college VMI
    2. **Holding:** Virginia can't reserve to men the educational opportunities of VMI. The violation doesn't go away when VA sets up all female college (VA women's leadership institute)
    3. **Rationale**: Maybe a bit higher than intermediate scrutiny, but not clear what difference this is supposed to make
       1. Some natural differences will be recognized as important, draws distinction to race, where inherent differences are not recognized
       2. Whatever remains of natural differences justification, there is no natural difference in this case that can justify all-male status of VMI
    4. What is the natural difference that makes this a hard case?
       1. Obviously can't have all-female nursing school on grounds that nursing is a women's profession
       2. On theory that military is a male profession
       3. District court: gender-based developmental differences between men and women that make the adversative method distinctly valuable for men
       4. Men and women learn differently, and there are some men, but no women, who will benefit from this method of instruction
       5. Requires all-male environment
       6. Benefits for men would disappear if women were introduced into that environment
       7. None of these is enough
    5. Rehnquist: if VA had created a really truly equal college, would have been okay
       1. Separate but truly equal okay in gender where it isn't in race
    6. Two major problems that lead to decision going this way:
       1. This stereotype exists, and is especially egregious-men are warriors and disciplined soldiers
       2. Men get prestigious institution, and women get nothing
    7. **Legacy:** VMI will have to make changes to accommodate women (separate bunks, privacy)
       1. Can’t ignore gender altogether
    8. **Dissent:** Scalia
       1. Justices want to do away with traditional roles that Scalia celebrates
       2. Idea of the gentlemen is the problem

# Fundamental rights

## Rise and demise of *Lochner*

1. History of court’s doctrine in fundamental rights jurisprudence
   1. Important: philosophical distinction between liberty and equality rights
   2. First, used due process to create economic liberty rights
      1. No longer exists (repudiated in the 1930s)
   3. Newer category of rights: privacy rights
      1. Sex, marriage, death--domestic, not market sphere rights
   4. Express/enumerated rights v. implied, unwritten constitutional rights
   5. Should court be free to make up rights beyond those expressly stated in the constitution, like right to choice to get an abortion?
      1. In contrast to freedom of speech, in text of constitution
      2. Interpreting abstract clauses like free speech requires just as much additional content as finding constitutional right to privacy or abortion
2. *Calder v. Bull*
   1. A probate court decreed a will invalid in favor of plaintiffs in error, who stood to obtain property through inheritance. However, the state legislature passed a law enabling defendants in error to obtain a new hearing on the probate court's decree, which resulted in the will being validated in favor of defendants in error, who stood to take under the will. The Court rejected the contention made by plaintiffs in error that the law authorizing the rehearing was an unconstitutional ex post facto law because there was previously no right to a rehearing. The Court defined the ex post facto laws prohibited by the U.S. Constitution to include only those related to crimes, which (1) made an innocent action done before the passing of the law, criminal; (2) aggravated a crime or made it greater than it was when committed; (3) inflicted a greater punishment than the law annexed to the crime when committed; (4) altered the legal rules of evidence, and received less, or different, testimony than the law required at the time of the commission of the offence to convict the offender. Thus, the Court held that the state law at issue did not fall within the constitutional prohibition.
   2. **Issue:** Should courts be able to strike down statutes based on natural law?
   3. **Justice Chase**: Cannot uphold laws that take from A to give to B
      1. Unwritten Constitution just as enforceable against the states as anything found in the written constitution
      2. Wealth distribution on par with punishing innocent
   4. **Justice Iredell:** Because there is a written constitution, that is it, and that means courts can't call upon principles of natural justice
      1. Ideas of natural justice regulated by no fixed standard
      2. Legislature possessed of equal right inconsistent with abstract principles of justice
3. *Munn v. Illinois*
   1. **Holding:** Illinois statute fixing max charges for grain storage did not violate due process
   2. Test: is the private property affected with a public interest?
4. *Slaughterhouse* Cases
   1. Who knows what the privileges and immunities of natural citizenship might be?
   2. Free pursuit of livelihood as butcher, not spelled out in constitution, but government interfering with it
   3. Privileges and immunities clause open-ended interpretation to enforce rights that belong to citizens of all free governments
   4. But every law inhibits people's freedom to pursue happiness
5. *Railroad Commission Cases*: court sustained state regulation of railroad rates, emphasizing limit of judicial deference
6. *Santa Clara County*: corporations = person within 14th amendment due process
7. *Minnesota rate case*: invalidated statute setting unreviewable railroad rates
8. *Allegeyer v. Louisiana*: invalidated statute that prohibited any person from issuing insurance on property in the state with companies that had not been admitted for do business in the state
9. *Lochner v. New York*
   1. **Facts**: statute made it illegal for a baker to work more than 60 hours a week
   2. **Holding**: the due process clauses of the fifth and fourteenth amendments protect liberty of contract and private property against unwarranted government interference
   3. **Rationale**: statute interferes with the right of contract between the employer and employees
      1. General right to make a contract in business protected by 14th amendment
      2. Police powers that relate to the safety, health, morals, and general welfare of the public are those which may impose on property and liberty of citizens
      3. Question to ask: is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?
      4. In this case, the law has nothing to do with public welfare/safety
      5. Not all economic regulation is unconstitutional: regulations that have a direct relation to general welfare of public, exercise of police powers, safety are permissible.
   4. **Holmes's dissent**:
      1. Majority has the right to embody their opinions in law without interference from the court
      2. Court's shouldn't be imposing their own views
      3. Laissez-faire should be applied by court to the legislative process
      4. Liberty of politics takes priority over liberty of economics
      5. View that ultimately prevails in rationality review--successful groups entitled to keep fruits of political victories
   5. **Legacy**
      1. If court thought a statute simply there to readjust the market in favor of one party, more likely to hold regulation invalid
   6. Contrast:
      1. *Holder v. Hardy*, where the court upholds a maximum hours law for miners: designed to protect workers in a very dangerous setting from getting hurt.
      2. *Muller v. Oregon*: court upholds max hour law for women working in industrial labor
10. Court later renounces the Lochner view
    1. After the New Deal, the court gives into the change in law: not just to unlimited federal power under commerce clause, but to virtually unlimited power of government in general, including state and local governments to regulate the economy with respect to economic liberty rights
    2. What caused the New Deal change?
       1. Economic, political, social factors outside of court
          1. Roosevelt's popular mandate
          2. Threats to pack court
          3. Great depression undermined faith in free market economy
          4. Need for gov't intervention in econ; when need became great, court couldn't stand in way
       2. Internal reasons distinctive to Lochner
          1. Idea that there is such a thing as a free market is a crazy idea
          2. The law is the thing that allows you to have property
          3. Gov't always involved in markets
       3. Pre-New Deal, gov't took a laissez-faire view towards economy
          1. All of a sudden, FDR, massive attempt at regulation, changing distribution of entitlements, market power, wealth
          2. Before gov't pervasively involved in the economy, in New Deal, some measure of common law regulation replaced by statutes and admin regulation, but not more gov't, just changed form of gov't
       4. Realist view challenges the idea of Lochner court that there is something suspicious about taking from A and giving to B
          1. Once you get the idea that gov't played an important role in giving thing to A in first place, fact that giving to be no less problematic than gov't letting A have it
    3. Court has not struck down a law under economic liberty since the New Deal
    4. *Nebbia v. New York*
       1. Court sustains price controls for milk prices
       2. Private rights must yield to public need sometimes
       3. So far as due process is concerned, can adopt anything to promote public welfare
    5. *West Coast Hotel v. Parrish*
       1. Upholds law
    6. Link to Carolene Products:
       1. Substantive due process
          1. Rationality review for most types of economic and social legislation
          2. Heightened scrutiny for statues that infringe on a limited, fundamental set of rights
       2. Low-level rationality form of due process scrutiny
          1. Same test as in equal protection
          2. Challenged laws, so long as no fundamental right involved, must only be rationally related to a legitimate state interest, court happy to make up public-regarding purpose, or conceivable set of facts to fit classification or the law
    7. What was so wrong with it?
       1. Courts making up value judgments and using them to second guess what legislatures were deciding
       2. In the wake of Lochner, the court really should bring back some component of what it was doing there, naked preferences for some interest groups, without any public-regarding justification or public interested reason behind him
       3. Lesson that the court took form Lochner= Holmes lesson; courts' value judgments ungrounded in the constitution should be trumped by democratic value judgments
       4. Used to think majorities would extract wealth from the wealthy, but that hasn't happened
       5. We live in majoritarian system, would think the minority with disproportionate wealth would be who went wrong, but why don't majorities redistribute?
       6. But courts don't order the redistribution of wealth: no constitutionally grounded power to do that

## Privacy: contraception and abortion

1. Precursors
   1. *Meier v. Nebraska* (1923): due process right that isn't economic, right to teach kids foreign languages in private schools
      1. Liberty of contract equated to liberty right to establish home
   2. *Pierce*: right to send kids to private school
      1. Liberty of parents to send kids to private school
   3. *Skinner v Oklahoma*
      1. Court strikes down law providing for mandatory sterilization for certain categories of habitual criminals
      2. Right to procreate
      3. Constitutionally protected liberty under due process clause might have some relationship to family
2. *Griswold v Connecticut*
   1. **Holding**: state cannot criminalize use of contraceptives by married couples
   2. **Rationale**: scope of right to privacy defined by penumbras formed by emanations of guarantees
      1. Light shines from first amendment, creating shadows and areas partially in shadow
      2. If First Amendment shining light, what is making the shadow?
      3. First, Third, Fourth amendments are evidentiary of a broader overarching constitutional protection of privacy we can extend to laws that forbid the use of contraceptives
      4. 9th amendment: enumeration of certain rights shouldn't be taken to disparage others
         1. Fact that we are listing rights in BoR doesn't mean Congress can do anything but violate the first 8 amendments
         2. SCOTUS has never relied on the 9th amendment to strike down a law, perhaps because it might be seen as to large an expansion of judicial power
      5. Privacy right tied to marital relationship; not about freedom of sexual liberty, but marriage--coming together
   3. Debate between Goldberg and Black between Constitutional law and morality
      1. Goldberg: not in constitution, worry that justices make up rights, but surely you wouldn’t vote for law mandating sterilization after 2 kids; some laws so outrageous we have to strike them down
      2. Black: Hypotheticals teach us nothing; whichever institution has the last word will have capacity to do crazy things
3. *Eisenstadt v. Baird*
   1. **Holding:** Invalidated Mass. Law forbidding distribution of drugs to unmarried persons designed to prevent conception--violated equal protection; disparate treatment for unmarried v. married
   2. **Rationale:** If right to privacy means anything, right of any individual to be free from gov’t intrusion in bearing or begetting a child.
      1. Deterrence of premarital sex not reasonably regarded as law's purpose: not for prohibiting spread of disease, just contraception
      2. Not designed to serve the health needs of the community in regulating distribution of harmful articles--not all are dangerous, and why married v. unmarried?
      3. Rejected that statute could be sustained on moral grounds as prohibition on contraception: rights to access contraception must be same for married and unmarried, and as right to privacy under Griswold found right to individual to make decision without unwarranted gov't intrusion, can't forbid
   3. **Legacy:** Leaves Griswold protecting an individual's decision not to reproduce
      1. Right to reproductive autonomy/liberty
      2. Has nothing to do with typical understanding of privacy (protecting personal space or keeping information secret)
      3. Soon becomes clear that Griswold about freedom to engage in activity that shouldn't be subject to gov't control
4. *Roe v. Wade*
   1. **Holding:** Abortion was within the scope of the personal liberty guaranteed by the Due Process Clause. This right was not absolute, but could be regulated by narrowly drawn legislation aimed at vindicating legitimate, compelling state interests in the mother’s health and safety and the potentiality of human life. The former became compelling, and was thus grounds for regulation after the first trimester of pregnancy, beyond which the state could regulate abortion to preserve and protect maternal health. The latter became compelling at viability, upon which a state could proscribe abortion except to preserve the mother’s life or health. The Texas statutes made no distinction between abortions performed early in pregnancy and those performed later, and it limited the legal justification for the procedure to a single reason --saving the mother's life -- so it could not survive the constitutional attack.
   2. **Rationale:** In the due process clause, but maybe 9th amendment
      1. Strict scrutiny applies: laws that interfere with right to terminate pregnancy unconstitutional unless tailored to particular gov't interest
      2. Two potential state interests
         1. Protecting health of mother
         2. Protecting potential life of fetus
      3. Each interest starts at moment of conception as an interests and grows
         1. First trimester: state can't regulate at all
         2. Second trimester: state interest in protecting health of mother compelling; states can regulate as long as reasonably relates to protection of maternal health
            1. Can't ban outright
            2. Interest in life of fetus still not compelling
         3. Third trimester/viability: can live outside womb
            1. Then, state interest in protecting fetus becomes compelling
      4. Because "person" in constitution used to describe qualifications to be elected, must refer to only post-natal
   3. **Legacy**: many proponents have found Roe's justification unsatisfying
      1. Leading justification: justify abortion rights on equal protection grounds; abortion restrictions unequally discriminate against women
      2. State restrictions compel women to continue pregnancies they might otherwise terminate
      3. Single out women for a special burden or disadvantage by compelling them to carry to term children they don't want
         1. Not enough to make equal protection violation: pregnancy natural difference
      4. Not allowing abortions versus forcing organ donations of mothers to children: Act, not an omission: affirmative killing of fetus versus passive letting die in not donating
5. Two ways of framing constitutional arguments about abortion
   1. Substantive due process way: when does a fetus become a human being?
      1. If fetus is human, hard to think anything for woman outweighing that
   2. Constitutional due process
      1. To what extent does prohibiting abortion put a duty not on men?
      2. Is this a distinctive natural difference created by pregnancy or based on stereotypes from expectations about women that we as a society put on them?
6. *Planned Parenthood of SE PA v. Casey*
   1. The Court applied the doctrine of stare decisis and reaffirmed the essential holdings in Roe v. Wade because that decision was still workable and its factual underpinnings had not changed. In a joint opinion, three Justices rejected Roe's trimester framework and adopted an undue burden test for determining whether State regulations had the purpose or effect of placing substantial obstacles in the path of a woman seeking an abortion before viability. The Court agreed that § 3209 imposed a substantial obstacle in a large fraction of cases and was invalid. The Court also affirmed the holding the court of appeals that 18 Pa. Cons. Stat. § 3202, the medical emergency provision, did not impose an undue burden on a woman's abortion right. A plurality of the Court determined that 18 Pa. Cons. Stat. § 3214(a)(12) was also invalid because it required a married woman to provide a reason for her failure to provide notice to her husband.
   2. **Rationale**: States' interest in protecting health of mother and fetal life allow restrictions in various times of pregnancy as long as no undue burden on right to choose abortion
   3. **Legacy**
      1. More about court placing the history of the court above their own personal or political values; the force of binding precedent and stare decisis. When CAN the court change its mind?
         1. Workability: unworkable to limit commerce because couldn't find non-arbitrary line
         2. Evolution of law: if precedent in tension with other areas, interest in court in creating coherent body to make it consistent with other lines of precedent enough (but doesn't apply here--not in tension)
         3. Reliance: people structure their behavior according to past decisions, court needs to take into account social costs of changing those decisions
      2. Simplifies the trimester framework in Roe: woman’s right to terminate at any point prior to viability

## Abortion funding, restrictions, and unconst. Conditions

1. Funding cases: to what extent does the government need to fund abortions women wouldn’t otherwise have?
   1. Suppose gov't does fund any medical care for poor people, and argue that refusing to pay for abortion violates right to choose to abort
      1. LOSER: state action requirement, which means gov't can't do affirmative things to hurt you, but not obligated to do anything to help you
      2. Surefire losing argument that gov't should be responsible for paying
   2. First amendment right to free speech, but that doesn't mean gov't has to pay for you to advertise in television
   3. When gov't funds alternatives for a constitutionally allowed choice, argument can be made: gov't coercing women not to exercise their constitutionally allowed right, or penalizing them for exercising it
2. *Maher v. Roe*
   1. **Facts**: State Medicare program pays for childbirth for poor women but not abortion
   2. **Holding:** Medicaid payments for childbirth but not for non-medically necessary abortions constitutional
   3. **Rationale**: State has right to make value judgment favoring childbirth over abortion and can allocate public funds accordingly
      1. Difference between state interference with a protected activity and state encouragement of an alternative activity
      2. Roe doesn't place limitation on state to make a value judgment; Roe merely prohibits criminalizing abortion
      3. State allowed to offer incentives to women who choose that path
   4. **Dissent**: unduly burdened fundamental right of pregnant women to choose
3. *Harris v. McRae*
   1. **Holding:** Prohibits the use of federal funds for abortions except if life of mother in danger or rape or incest
   2. **Rationale:** While gov't may not place obstacles, need not remove obstacles that were not a government's own creation
4. *NEA v. Finley*
   1. Congress orders NEA only to fund art that is not indecent
   2. **Holding:** Upholds statute on limited set of assumptions: statute vague suggestion, not mandatory rule
5. So why are conditional offers in Maher and Harris okay, but others are unconstitutional conditions on the exercise of constitutionally protected rights?
   1. Some constitutional rights require gov't to treat groups equally
   2. Never arise with respect to equality rights, only fundamental individual rights
   3. In speech contexts, gov't has to treat different viewpoints equally
      1. Relevant baseline is how gov't is treating the opposing viewpoint
      2. Equality rights don't depend on whether gov't is harming or helping you; they only depend on how you are being treated compared to some reference group
6. *AAA v. Society of Sisters*
   1. States do not have to treat private and public schools equally
   2. Tax everyone, then provide those funds for public schools and allow everyone to go, bias towards public education
   3. This is where unconstitutional conditions doctrine come in: some limits on what gov't can to do favor one
   4. Okay for disparate funding
   5. But not okay for state to not allow private school buses to use highways
7. *Webster v. Reproductive Health Services*
   1. **Holding:** Court upholds ban on state doctors performing abortions and state hospitals performing abortions
   2. **Rationale:** But would be unconstitutional to stop water and sewage services from places that do provide abortions
      1. Water and sewage expected, baseline
      2. But hospitals added benefits so refusal to subsidize okay
   3. **Legacy:** Roe almost overruled, but not quite, invites future test cases
8. How does court determine line should be drawn there?
   1. Not based on what is constitutionally required of gov't, because nothing is constitutionally required of gov't
   2. No one, least of all SCOTUS, has come up with explanation for how we should distinguish what is a penalty and is unconstitutional, and what is merely a refusal to subsidize and is fine
   3. Related conditional benefits more likely to succeed
   4. Impossible to create doctrine so long as gov't has discretion on how to distribute benefits
9. *Rust v. Sullivan*
   1. Federal funds for family services can't be used where abortion is a method of family planning
   2. Gov't can selectively fund clinics that encourage childbirth but not those that encourage abortion
10. Abortion restrictions
    1. What can states do in the area of actively discouraging abortions?
       1. Propaganda must be read before can get one
       2. Waiting period
11. *South Dakota v. Dole*
    1. Upheld federal statute directing secretary of Transportation to withhold a portion of federal highway funds from states that do not prohibit alcohol purchases to those under 21
    2. National concern
12. Nollan v. California Coastal Commission
    1. Attempt to make couple agree to easement in order to rebuild house was unconstitutional
    2. Extortion
13. *Stenberg. v. Carhart*
    1. **Facts**: Nebraska law criminalized partial-birth abortion
       1. No precise definition of what partial birth abortion is, but aimed at relatively rare second trimester abortion procedure
       2. Only 10% of abortions occur in second trimester
       3. Only small subset performed using this procedure
    2. **Holding:** Standard procedure, dilation and evacuation (D&E) must remain legal
       1. Standard, so long as constitutional right, need procedure available
       2. Nebraska's ban unconstitutional:
          1. Doesn't include exception on ban on partial birth to protect life of mother
             1. So long as health reason for mother to choose it, state has to allow her to do that
             2. Only if no health with that state can choose for her
          2. Not clear enough in distinguishing D&E from D&X abortion
             1. Need some form of second trimester abortion
          3. If want to ban, need to do the right way:
             1. Waiver for women's health
             2. Distinguish procedures
14. Gonzales v. Carhart
    1. In 2003: Congress passes ban on partial birth abortions
       1. Does neither of the two things court required in Stenberg
    2. Court upholds statute
    3. Court in Gonzales recognizes several new legitimate interests gov't can invoke
       1. Not safeguarding health of women, or protecting life of fetus
       2. State interest in promoting respect for life--power of that procedure to devalue human life
       3. State can also have a legitimate interest in preventing abortions women might later regret
15. Practice exam question: analyze whether this is Constitutional as an exercise of Congress's commerce power
    1. Law v. politics
    2. Raitch (marijuana case)

## Sexual orientation

1. *Bowers v. Hardwick*
   1. **Facts**: cop serving warrant, cop walks in on him engaging in sodomy with another man, adult male charged of sodomy under GA statute forbidding contact between genitals of one and mouth or anus of another, prosecutor drops case, but brings civil suit.
   2. **Hardwick’s argument**: Shouldn't stop consenting adults to engage in whatever sort of sexual relations they want in their own bedroom. Small step from procreation to sexual autonomy, given that individuals have always had the freedom to reproduce or not.
   3. Doesn't distinguish other types of sexual conduct between people in privacy that state finds okay to criminalize:
      1. Incest
      2. Polygamy
      3. Pornography
   4. **Holding**: state has right to regulate homosexual conduct as it wants, not protected by due process or rights in Roe et al.
   5. **Rationale:** Due process and privacy rights only protect activity related to family, marriage, and procreation, as opposed to sex. By definition, not procreative; non-marital by law.
   6. **Legacy:** Even if no substantive due process right to engage in gay sex, Bowers raises issue if state even has a legitimate interest in criminalizing private gay sex between adults.
      1. **Majority:** state does have interest in enforcing majority sentiments about the morality of sexuality
      2. **Dissent:** state has no legitimate interest if conduct has no tangible third party harms stemming from it
      3. Court in Bowers does not reach the issue of whether GA can enforce sodomy law against only homosexuals and not heterosexuals
2. *Romer v. Evans*
   1. **Holding:** Colorado amendment making sexual orientation not a protected class unconstitutional
   2. **Rationale:** Bare desire to harm a politically unpopular group cannot constitute a legitimate government interest under equal protection.
      1. Apply rationality review (in Cleburne/Moreno way): only explanation for a law like this is animus towards a class, and that cannot count as a legitimate purpose
   3. **Legacy:** First time court has intervened to provide any constitutional protection for gays and lesbians
   4. **Dissent:** Amendment II merely prohibits preferential treatment of gays and lesbians
      1. Taking away discrimination laws simply returns them to a baseline
      2. Scalia sees all of this as example of gays capturing the political process and getting special benefits
3. *Lawrence v. Texas*
   1. **Facts:** Texas repeals general sodomy law, re-enact sodomy law explicitly limited to same sex sodomy, makes it a misdemeanor to engage in deviate sexual intercourse, includes oral and anal
   2. **Issue**: validity of Texas statute criminalizing homosexual contact; does the 14th amendment protect this liberty?
   3. Court could have chosen wither equal protection or due process violation route
   4. **Holding**: As a matter of due process, moral disapproval of sexuality not a permissible basis for discrimination, overrules Bowers
   5. **Rationale:** Liberty protected by the Constitution allows homosexuals to decide to express themselves sexually
      1. Bowers not correct when decided, and not today
      2. In its analysis of tradition it is wrong: homosexuality has not traditionally be subject to moral condemnation (half-heartedly); laws specifically targeting same-sex sodomy relatively recent, laws in past targeted all sodomy
      3. Casey confirms that laws protect personal decisions regarding family relationships/procreation
      4. Romer strikes down legislation directed at homosexuals as equal protection violation
      5. O'Connor: moral disapproval of homosexuals does not survive rational basis review under the Equal Protection Clause
   6. **Dissent:** everything Kennedy says of true to overrule Bowers true of Roe, but results different
      1. What happened to crucial distinction between changes of facts and changes of principles for when decisions could be overruled?
      2. The court is instead guessing direction world headed and gets in front; court vanguard of social change
4. Country moving in terms of many variables towards gay marriage: does this mean SCOTUS will author an opinion to go with the trend?

## Death

1. Another frontier of substantive due process fundamental rights: People who want to end their lives; for medical reasons no longer worth living
2. *Cruzan v. Director, Missouri Dept. of Health*
   1. **Facts**: Cruzan was in a persistent vegetative coma since 1983, parents petition to let her die, Missouri refuses to make that order absent clear and convincing evidence she would not want to be kept alive in these circumstances.
   2. **Issue**: Is Missouri allowed to use clear and convincing evidence standard (higher than 50-50 preponderance of the evidence) for proof of patient’s desire to die?
   3. **SCOTUS**: That standard is constitutional.
   4. all justices seem prepared to entertain the existence of the right of a competent person to refuse life-sustaining hydration and nutrition
   5. **Rationale:** state will respect right of competent patient to refuse treatment. Interests state may balance in keeping her alive:
      1. Interest in making sure the patient has decided that she doesn’t want to be kept alive
         1. Role in protecting against coercion (third parties with other interests that may push patients toward ending their lives)
         2. Interest in making sure patient's decision well-reasoned and stable, not in temporary depression, pain, etc.
         3. Important to protect the vulnerable from being pressured to end life when might not choose to do so
      2. State interest not just protecting patient's autonomy to decide, but preserving life in general
         1. Even when what death is what patient wants
         2. Like in abortion case decisions
         3. But no state interest an outweigh the liberty interest a person has in having their life support terminated if they want it to be
3. *Washington v. Glucksburg*
   1. **Issue**: can terminally ill patients enlist the affirmative assistance of doctors to end their life sooner?
   2. **Holding**: No (but with the possibility of yes left open)
   3. **Rationale**:
   4. Not deciding if mentally cognizant person suffering has right to control circumstances of their death
      1. State laws at issue would allow palliative care
      2. As long as purpose of drugs to relieve pain, palliative care
      3. State laws would not make it a crime for docs to proscribe palliative care
4. *Gonzales v. Oregon*
   1. **Facts**: Oregon enacts Death with Dignity Act soon thereafter, followed by Washington. Laws allow patients diagnosed with terminally ill with six months or less of life expectancy to get prescriptions for drugs they can use to end lives. Diagnosis of incurable illness must be confirmed by second doctor, verify patient's psychological health, two requests at least 15 days apart. Federal government challenges this Act by saying that the federal controlled substances act should pre-empt it.
   2. **Holding:** Impermissible to use preemption here.
   3. **Rationale:** Statutory interpretation.
5. How to create a law that passes muster?
   1. Limit to people in severe pain
   2. Limit to people close to death
   3. Or both
   4. May be other ways: received diagnoses of certain severe diseases
   5. Boils down to recognizing moral purpose between acts and omissions
   6. Removing life support is letting die; physician suicide actively killing
   7. Philosopher's brief: There is no rational difference and no moral distinction
   8. Easy to cabin Cruzan right, because only allows people on life support
6. Idea that there can be no substantive due process right unless grounded in traditional values seems to be forgotten