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I. INTRODUCTION

- Modalities of Constitutional Interpretation
 - Doctrinal
 - Brennan Dissent in *Marsh v. Chambers* (follow precedent of *Lemon*)
 - At some time there is no doctrine, so this cannot exist on its own. i.e. the issue of infinite regress.
 - How do you correct for error?
 - Vested rights and reliance
 - Historical (intentionalist):
 - Burger majority in *Marsh v. Chambers* (look at behavior of Congress at the time).
 - No actual consent to being bound by history? (*but see* Plato's Apology, implied consent through non-exit)
 - Subjectivity of historical analysis.
 - Ethical
 - Brennan Dissent in *Marsh v. Chambers* (how to achieve the underlying principles of the Establishment Clause—governmental neutrality, we are a different polity than we were at the founding, so we would interpret the principles differently today)
 - Problem: counter-majoritarian difficulty
 - Textual
 - Structural
 - Prudential
- Constitutional Themes

II. JUDICIAL REVIEW

- Judicial review is an important element in checks and balances—note context of post-revolutionary fear of concentrated power, and post-election of 1800 efforts to entrench the federalists.
- *Marbury v. Madison*, 1819
 - How CJ Marshall could have avoided reaching the constitutional question:
 - 1. Recusal
 - 2. Deemed delivery of commissions necessary for vesting of appointment
 - 3. Political Question doctrine (institutional competence, textual commitment, comity)
 - 4. Statutory interpretation. Even assuming Art. III §2 prohibits original jurisdiction over writs, Marshall have found the judiciary act to be consistent with that interpretation. Writ of mandamus does not need to be read as a separate basis of jurisdiction; it is part of appellate jurisdiction.
 - 5. Constitutional interpretation. Even assuming that the interpretation of the Judiciary Act is correct, Marshall could have found that it did not conflict with the constitution: there is an Exceptions clause – Congress can make changes. After Marshall's

interpretation, the exceptions clause allows only contraction but not expansion of Supreme Court jurisdiction; theoretically, Congress could strip all of the Supreme Court's appellate jurisdiction.

- Marshall's opinion establishes the power of the court.
- Marshall's Justifications for Judicial Review:
 - Constitutional supremacy
 - Constitution as extraordinary law (intent)
 - Supremacy clause (text) – Could be read to require statutes to have procedural not substantive consonance with the Constitution.
 - Writtenness: Intention to bind
 - Court as arbiter of the constitution
 - Institutional competence
 - Judicial oath of office (counter: so do many other government officials)
 - Judicial competence as expressed through specific constitutional delegation in certain instances. i.e. treaties. (counter argument: *expresio unius*)
- Normative Rationales and Challenges to the Power Judicial Review
 - The Countermajoritarian difficulty (see Bickel)
 - Concern about the unelected minority with veto power
 - But the constitution is rife with countermajoritarian structures
 - And see Barry Friedman: courts are not countermajoritarian and the political process is not majoritarian. Courts are political and the legislature is representative. See also public choice theory!
 - Preserving values by protecting long-term interests:
 - Possibility of relative judicial competence to assess values – life tenure!, but maybe judges are out of touch)
 - Tying ourselves to the mast
 - Preserving democratic values – check against legislative entrenchment and the possible tyranny of the majority
 - John Hart Ely's processual theory: competence of court to police laws that are results of process failures. E.g. entrenchment.
 - Check against tyranny → Federalist 51 and the need for separation of powers and checks and balances.
 - Essential to uniformity (see *Martin v. Hunter's Lessee*, holding that SCOTUS's power over states is essential to protect against state jealousies/interests) → goes to court's power over state legislatures
 - Stability and notice – constitution requires a single arbiter
 - We are generally less concerned about SCOTUS trumping state legislatures than about SCOTUS trumping Congress.
 - *Cohens v. Virginia*, holding that court must be able to hear questions about anything on which legislatures can make laws or

relating to the constitution → pointing to independence of federal judiciary.

- Limits on judicial power
 - Jurisdiction stripping -- stems from *Marbury*
 - Story: federal question jurisdiction is mandatory, but diversity jurisdiction is discretionary. Constitution uses “shall” with regard to jurisdiction over federal law in the constitution.
 - Henry Hart: Congress could not take SCOTUS’s core functions.
 - Justiciability
 - Standing
 - Constitutional “cases and controversies” Prongs: injury, causation, Redressability, *Lujan v. Defenders of Wildlife* → can’t assert the grievances of others
 - Prudential requirements: generalized grievances (exception: taxpayers have standing to sue under establishment clause when government is using taxpayer money to establish religion), zone of interest
 - Political Question Doctrine (*Baker v. Carr*)
 - Constitutional commitment to another branch
 - E.g. impeachment, *See Walter Nixon Case*
 - Lack of judicially discoverable standards
 - Institutional competence → *Coleman v. Miller*: court determined it had no basis to determine in Art. V set an expiration date for constitutional amendments proposed to be ratified.
 - Impossibility of deciding without policy determinations
 - Comity: Impossibility of deciding without impeding separation of powers
 - Need for adherence to a decision already made
 - Potential of embarrassment from multifarious pronouncements.
 - Mootness: exception matters evading review but capable of repetition (e.g. abortion)
 - Ripeness
 - Certiorari Practice

III. FEDERALISM

Themes/Issues

- Federalism = constitutional structure through which two sovereigns occupy the same space
- Values of federalism
 - Efficiency: different issues may be better dealt at different levels depending on their scope. i.e. deal with schools locally but climate change federally. The federal government is more efficient at solving coordination and collective action problems. Note the race to the bottom issue.

- Individual choice: Tiebout (exit) + McConnell (voice – local majorities control so people are more likely to be happy) But this assumes mobility and assumes away public choice.
- Experimentation: the laboratories of democracy theory
- Citizen participation: citizens are more instrumental at the local level → but this is about localism not federalism
- Prevention of tyranny: separation of powers in many directions: “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time it will be controlled by itself.” Fed. 51

Originalist Vision

- Limited federal government with enumerated powers → check on Congressional power to trump state legislation, which it can do via the Supremacy Clause.
 - Enumerated powers, Art. I, § 8: and others
 - 1 Tax
 - 2 Borrow Money
 - 3 Regulate Commerce
 - 4 Naturalization
 - 5 Coin Money
 - 6 Punish counterfeiting
 - 7 Establish post offices/ roads
 - 8 Patent rights
 - 9 Create lower courts
 - 10 Punish offenses on the high seas
 - 11 Declare war
 - 12 Raise and support an army
 - 13 Raise and support a navy
 - 14 Regulate army and navy
 - 15 Call forth militia
 - 16 Regulate militias
 - 17 Power over district of Columbia
 - 18 Power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers
 - Denied Powers, Art I, § 9
- State sovereignty lies in area outside enumerated powers.
 - Allowed: all other powers (as guaranteed by the tenth amendment)
 - Denied: Art. I § 10

Vertical Federalism: Relationship b/w Congress and the states

“Necessary and Proper” McCulloch v. Maryland, 1819

- Question 1: Does Congress have power to establish the bank?
- Text:
 - Necessary and proper is means to enumerated ends

- Read expansively so as not to be surplusage—obvious that a power carries with it all means absolutely necessary to accomplish the power or it would be no power at all, so the clause necessarily has more meaning.
 - Necessary = convenient → intratextualist argument (use of “absolutely necessary” in Art. I § 10)
 - Phrase is a grant of power (look at placement in the Constitution)
 - Counterargument is that necessary means essential, and the bank power is not enumerated.
 - History: bank existed and was voted on by the framers, even if not in capacity as framers.
 - Doctrine: practice as precedent
 - Prudential: Need for bank demonstrated by experience with War of 1812
 - Structural: Federal government is limited but has a long leash to meet its ends
 - Ethos: Sovereignty resides in the people, who have delegated power to state and feds. This is a constitution meant for the ages—must be open to ethical interpretation.
- Question 2: May MD tax the national bank?
 - Taxation is a concurrent power.
 - But there is an implied prohibition here because power to tax is power to destroy and the federal government has the power to create and preserve its institutions. Supremacy Clause. **Structural argument.**
 - In addition, the bank is suffering from taxation without representation. Taxation cannot extend beyond sovereignty.

Commerce Clause

- Balance of power between federal and state governments. Art. I, § 8, Cl. 3.
- W/ *McCulloch*: **ARC ONE: The Rise of Congressional Power: 1819-1937:**
 - What is commerce?
 - *Gibbons v. Ogden*, 1824, holding that NY Statute granting exclusive license to Ogden is preempted by the federal legislation, under which Gibbons had acquired a license to engage in coasting trade and fishing.
 - **“Commerce” includes navigation** (based on popular usage)
 - Federal power to regulate commerce extends up to but stops short of regulating commerce that is entirely internal to a state.
 - Clear argument that Congress has plenary power over interstate commerce and that states may only regulate to the extent that regulations are within the police power, but, despite urging from Johnson’s concurrence, case is actually decided on preemption grounds.
 - Commerce v. manufacture, mining, agriculture (antecedent to commerce): this is no longer good law.

- *Hammer v. Dagenhart* (Child Labor Case), 1918, overturning a law that put 30-day stop interstate commerce in goods produced with use of child labor.
 - Here the evil the law is directed at occurs separate and prior to interstate commerce.
 - **Manufacture/Commerce** distinction.
 - Justice Day spells out the child labor prisoner's dilemma. → non-regulation zone.
 - *Carter v. Carter Coal*, 1934, striking down the bituminous coal Conservation Act (price and production fixing) as in excess of commerce power.
 - Anything related to railroads is within the definition.
- What are boundaries of Congressional power to regulate commerce?
 - Police Power:
 - State: *Willson v. Black-Bird Creek Marsh Co.*, 1829, holding that DE authorized dam on navigable waters was permissible because its purpose was to protect health not to regulate commerce.
 - Congressional: *Champion v. Ames* (Lottery), 1903, holding that Congress could outlaw sending lottery tickets through mail or transporting them across state lines:
 - **Power to regulate includes the power to prohibit.**
 - Regulation power is plenary.
 - Congress can regulate flow of goods that are injurious. Lottery is immoral and most states ban it anyway.
 - Distinguish insurance contract in *Paul v. Virginia*, which had value only in state. A specious distinction?
 - Stream of commerce v. intrastate (wholly contained or already come to a rest (e.g. *Schechter Poultry*))
 - Direct effects v. indirect effects
- **ARC TWO: The Heyday of Congressional Power: 1937 – 1995**
 - Following court packing scheme, the court began to uphold new deal legislation (both congressional, under the commerce clause, and state, see substantive due process section below). Hughes and Roberts, the moderate, begin consistently siding with the left.
 - Commerce Clause principles in this era:
 - Deference to Congress on purpose → purpose irrelevant.
 - Congress should be able to regulate where states are incompetent to do so (note the prisoners' dilemma problem).
 - Rejection of the earlier tests.
 - Establishing Plenary Power
 - *NLRB v. Jones & Laughlin Steel*, 1937, upholding a law that prohibited employers from engaging in unfair labor practices effecting commerce.

- New Test: If it is essential to preventing commerce from being burdened then it is within Congress's power. Tracks on to the direct/indirect test in a sort of proximate cause way. Unionizing has a direct effects.
- Scope of business is still relevant. (*see also* NLRB v. Friedman-Harry Marks upholding application of law to a company that purchased materials from other states and sold finished goods to other states).
- *United States v. Carolene Products*, 1938, finding that "Congress is free to exclude from interstate commerce articles whose use in the states may reasonably be conceived to be injurious to public health, morals, and welfare." Note parallel to *Champion v. Ames*.
- *United States v. Darby*, 1941, upholding the Fair Labor Standards Act, which prescribed minimum wage and maximum hours, preventing unfair practices that would hinder interstate commerce.
 - Explicitly overruling *Hammer* on the ground that the court should not inquire into the purpose/motive of the legislative so long as commerce is regulated.
 - Overruling reflects change in court personnel.
 - Justifies overruling based on changed doctrine.
 - Rejecting process/product test.
 - Upholding act, even though it would extend to manufacture of some goods that would not cross state lines on ground that the unfair practices hinder interstate commerce more generally and it would be impossible to enforce the act solely with regard to production of products sold across state lines.
- *Wickard v. Filburn*, 1942, upholding conviction of farmer who grew wheat in excess of consumption cap despite fact that wheat was for personal consumption on the ground that personal consumption implicated demand and thus impacted interstate commerce. Look at the activity in the aggregate.
- Commerce Power v. Reconstruction Power: Reaffirming the Irrelevance of Motive
 - Civil Rights Act could not be passed under the Reconstruction Power (Section 5 of the 14th amendment, *see Civil Rights Cases*), so, in 1964, it was passed under the Commerce Power
 - The norm-enunciative issue: Does use of commerce clause undercut the legitimacy of the statute's moral purpose?
 - Marshall thought that it would be safer under the commerce clause rather than under some race-related constitutional power.
 - Note that post-Lopez these cases would be unlikely to survive but that it is unlikely to be overturned now.

- *Heart of Atlanta Motel v. United States*, upholding the CRA noting effect of motels on interstate commerce and travel and noting that concurrent moral purpose of the act does not invalidate it.
 - *Katzenbach v. McClung*, 1964, upholding the CRA as applied to a restaurant on the basis that restaurant, near a highway, impacts demand b/c barring customers means fewer clientele.
- **ARC THREE: The Devolution of Congressional Power to the States (The Rehnquist Revolution: 1995 – Present)**
 - *United States v. Lopez*, 1995, overturning the Gun-Free School Zones Act
 - Rehnquist: Congress can regulate three broad areas:
 - 1) Channels of interstate commerce, OR
 - 2) Instrumentalities of interstate commerce or persons/things in interstate commerce, OR
 - 3) Activities with a substantial effect on interstate commerce (by a preponderance of the following factors)
 - a) **Activity is economic in nature**: Carrying a gun is purely criminal and possession ≠ economic. In contrast to *Wickard*, where activity was economic in nature. This factor distinguishes such non-economic behavior as crime, families, and education.
 - Note Stevens’ dissent that possession is commercial in nature (he thinks this is a category 2 rather than a category 3 case)
 - Souter expresses concern that the commercial/non-commercial distinction is untenable.
 - B) Does the act contain a **jurisdictional element** to ensure case-by-case inquiry to see if gun traveled in interstate commerce?
 - C) Did Congress make **findings of interstate commerce activity**?
 - These are neither sufficient nor necessary, merely helpful.
 - Souter expresses concern about lack of deference here.
 - D) Is there a sufficiently close link b/w activity and interstate commerce?
 - Link cannot be too attenuated.
 - Raises slippery slope concern about Breyer’s dissent.
 - O’Connor/Kennedy: Concerned about stare decisis BUT agree with outcome because federalism, enhancement of democracy, prevention of majority tyranny.
 - Thomas (concurrence) Narrows definition of commerce based on intratextualism and use of “commerce” in the Ports Clause.

- Breyer (dissent) points to cumulative effects test from *Wickard* and defers to Congress pointing to long term economic impacts of guns in schools.
- *United States v. Morrison*, 2000, striking down the Violence Against Women Act on the grounds that the regulated activity is non-economic and the link to commerce is highly attenuated. Applying 3(a) and (d) of the *Lopez* test. There were also no findings and no jurisdictional element; these might have saved VAWA.
- *Raich v. Gonzalez*, upholding federal criminalization of medical marijuana even where it is grown and used locally. Upholding controlled substances act.
 - Followed *Wickard* (fungible commodities). *Lopez* (3)(a).
 - Noted risk of overlap with recreational market. See *Lopez* 3(d).
 - Note: This case, emphasizing the market for marijuana, negates the jurisdictional element – it is not relevant that this specific marijuana did not travel in interstate commerce.
 - Note about supremacy clause: state cannot create an exception to federal law.

The Spending Clause

- Spending power is inferred from the Art. I § 8 Cl. 1, the taxing power, which allows for taxing to “provide for the general welfare.”
- Original conception was the spending could be done only to implement enumerated powers.
- *South Dakota v. Dole*, 1987, upholding a statute requiring the states to keep the drinking age at 21 in order to get federal highway funds. Affirming the test from *US v. Butler*.
 - 1. General Welfare Requirement (O’Connor, in dissent, points to a means end problem → raising drinking age won’t fix drunk driving problem broadly)
 - 2. Explicit Conditioning (rational: this keeps lines of accountability pure → protects state lawmakers from blame!)
 - 3. Nexus with other federal interests in particular national power/program (safe travel)
 - To prevent trammeling on state police powers.
 - 4. Adherence to other constitutional limits
 - Here maj. Found no concern with impinging on individual constitutional rights
 - Dissent (Breyer) expressed conflict with the 21st amendment which gives the states power to regulate alcohol.

Horizontal Federalism: Relationship Among the States

Dormant Commerce Clause

- Text Origin: A negative inference drawn from the Commerce clause. In contrast to war power, international treaty power, which are exclusively federal, and taxation which is concurrent, Constitution is silent as to states’ commerce powers (*See Gibbons v. Ogden*).
- Doctrinal origins:

- *Gibbons* concurrence: Johnson writes separately to argue that states cannot regulate interest commerce.
- *Willson v. Black-Bird Creek Marsh*, upholding DE action because, despite impact on interstate commerce, purpose is health and safety regulation. Outcome might have been different had it been a more significant waterway.
- Rule: “The court has inferred that absent congressional action, states have a ‘residuum of power’ to regulate local affairs, even if their actions affect interstate commerce, provided that their regulation does not impermissibly ‘trespass on national interests.’”
- Justification: Prudential need to protect against parochial, protectionist, mutually inconsistent state legislation.
 - State borders should not inhibit flow of goods.
 - Promote national unity.
 - Protect against interstate externalities.
- Test: State interests v. national interests
 - Does the state regulation impinge on activity covered by federal legislation?
 - Yes → Preemption Analysis (see *Gibbons v. Ogden*)
 - No → DCC Analysis
 - Does State regulation discriminate on its face against interstate commerce?
 - Yes → Invalid, unless
 - Survives Strict scrutiny (no reasonable alternative exists and furthers important non-economic state interest – *Maine v. Taylor*). E.g. *City of Philadelphia v. New Jersey*, invalidating an NJ law barring importation of solid waste
 - Meets Market participant exception (state as purchaser, seller, subsidizer) See *Hughes v. Alexandria*
 - No → Does the state regulation burden interstate commerce?
 - Yes → Pike Balancing Test (The regulation is invalid unless the legitimate state’s interest in regulation outweighs the burden on interstate commerce)
 - If the regulation regulates evenhandedly with only incidental effects. Or
 - Whether statute serves a legitimate local purpose. Or
 - Whether alternative means could promote the local purpose equally well.
 - No → regulation is valid
- Post-judicial congressional action: Congress can ban what court allows or allow what court has banned.

Privileges and Immunities Clause

- Art. IV, §1, Cl. 2: “Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”
- Test:

- 1) Is regulated activity a Privileges and Immunities? See *Corfield v. Coryell*, 1823
 - Travel/ Pass through
 - Reside to do business or for other purposes
 - Do business whether for agriculture, trade, or other
 - Doesn't extend to recreational purposes, *compare Toomer v. Witsell* (overturning rule that out of stater had to pay higher commercial shrimping fee) *with MT Fish & Game* case (upholding law that out of stater had to pay more for elk-hunting license).
 - Hold, take, dispose of property either real or personal
- 2) Does regulation of the activity discriminate against out of stater?
 - This functions as an equality principle not a fundamental rights principle.
 - Plaintiff must be an out of stater.
- 3) If so, is legislation tailored to a substantial state interest?
- Differences from dormant commerce clause:
 - Aliens and corporations cannot sue (they are persons but not citizens).
 - No market participant exception.

Full Faith and Credit Clause

- Art. IV, § 1, cl.1: “Full faith and credit to the public acts, records, and judicial proceedings of every other state.”
 - Basis for interstate preclusion doctrine
 - General rule of marriage: if it is valid in place of celebration it must be given credit.

IV. SEPARATION OF POWERS

Themes/Issues

- Montesquieu, *The Spirit of the Laws*, observing that there are three institutions with institutional competence → a principle of separation of powers.
- Madison, *Federalist 51*, observing that these three institutions interact → a principle of checks and balances. Let ambition counteract ambition.
- Legislature:

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| <ul style="list-style-type: none"> Checks on executive: <ul style="list-style-type: none"> ▪ Override veto ▪ Declare war ▪ Block appointments ▪ Block treaties ▪ Impeach ▪ Try impeachment | <ul style="list-style-type: none"> Checks on judiciary <ul style="list-style-type: none"> ▪ Block appointments ▪ Initiate constitutional amendments ▪ Create/abolish inferior courts ▪ Alter jurisdiction ▪ Impeach ▪ Try impeachments |
|--|--|
- Judiciary

| | |
|--|---|
| <ul style="list-style-type: none"> Checks on legislature <ul style="list-style-type: none"> ▪ Judicial review | <ul style="list-style-type: none"> Checks on executive <ul style="list-style-type: none"> ▪ Judicial review ▪ Chief justice presides over senate for impeachment hearings |
|--|---|

- Executive
 - On legislature
 - Veto Art. I. §7 Cl. 2
 - Commander-in-chief
 - VP is pres. Of senate
 - Pres. Can force adjournment when houses cannot agree

On judiciary

- Nominate judges. Art. II §2 cl.2
- Pardon *federal* offenses (excluding impeachment). Art. II §2 Cls.1

Presidential Powers in Wartime

- Meta questions:
 - What can the executive do?
 - As someone subjected to executive action, what is your recourse?
- Sources of unenumerated powers:
 - “The executive power shall be vested in a President” (contrast to Art. I which vests in Congress “all legislative powers herein granted.”)
 - Note desire of Cheney and others to use this as a basis for imperial presidency → but, short of Nixonian crisis, this is a oneway ratchet.
- *Youngstown Sheet & Tube Co. v. Sawyer*, 1952, overturning seizure of steel mill after break down of talks with the NLRB.
 - Black overturns action on the ground that there was no Constitutional grant of power to take the action. No congressional authorization + no enumerated power = no right to act.
 - Frankfurter (conurrence): Legislation on point denying power to seize. But allows possibility that longstanding practice could create constitutionality.
 - Jackson (conurrence): Presidential power is defined with regard to Congressional enactments:
 - Explicit Authority → widest presumption of constitutionality
 - Congressional Silence → independent powers are nebulous and circumstantial
 - Congressional prohibition → heightened scrutiny of presidential action
 - Wider indulgence in sphere of war: “I should indulge in widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.”
 - Dissent: Vinson thinks this is a category two case rather than a category three case (silence with regard to seizure), but considers it to be category one in a broader sense that a network of laws that president must faithfully execute requires this action, which is essential to effective participation in the Korean war.
- *Korematsu v. United States*, 1944, upholding internment of Japanese Americans on basis of wartime necessity. Specifically conviction of a Jap Am for failure to leave home in contravention of wartime order.
 - Justice Black announces strict scrutiny standard, because law is facially discriminatory against a racial minority, but finds that court should defer to military determination that Japanese people are a threat to national security and internment is the most effective way to deal with that threat.
 - Justice Frankfurter concurs to note that the validity of the action may be judged solely in the context of war.
 - Dissenters:
 - Roberts: Convicted of crimes with out any evidence. Tailoring problem.

- Murphy: no evidence, cannot determine general disloyalty on basis of race.
- Jackson, guilt is personal not inheritable. Should accord deference to the military, but should constitutionalize this determination because of concern about impact of the holding. Perhaps court shouldn't have granted cert.
- War powers as a political question?
 - Textual commitment to Congress and executive.

Military Trials: Habeas Corpus

- Suspension Clause:
 - “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.”
 - Art. I, § 9 (limiting Cong. Power) → suspension is a congressional power, so when Lincoln suspended writ in 1862, there were questions of this constitutionality.
- Distinguishing courts:

| Ordinary Court | Military Tribunals (Courts-Martial) | Military Commissions |
|---|---|---|
| Trial by jury | Trial by military judge (no autonomy) | Military lawyers presiding |
| Right to speedy/public trial | Non-public | More permissible evidence rules: hearsay and coerced statements allowed |
| Confront witnesses, subpoena defense witnesses | No compulsory process for defense witnesses | |
| Reasonable doubt std | No burden on prosecution to carry proof | |
| Procedural protections before death penalty – including unanimity | Originally unanimity not requires | |
| Indictment by grand jury | No indictment by grand jury | |

- *Ex Parte Milligan*, 1866, holding that a military tribunal was inappropriate where activities and arrest were outside the theater of war.
 - Status: Citizenship rights: Davis (maj.) emphasized theater of war and question of individual right to trial by jury except where the courts are closed.
 - Cong. Authorization: Chase (conc.) focused on lack of Congressional authorization for this type of military tribunal (which, still, would only be appropriate in theater of war, including where threat of invasion).
- *Ex Parte Quirin*, 1942, upholding use of military tribunal for US citizen acting as a spy for an enemy army. If you are an unlawful enemy combatant, the military can, with Congressional authorization, try and punish you; citizenship is irrelevant.

- Stone (Maj.) established Cong. Authorization through the Articles of War and noted that those Articles distinguished between POWs (lawful combatants) and unlawful enemy combatants.
 - Haupt fell in latter category because he had buried his uniform (didn't identify himself as an enemy soldier).
 - Status: Citizenship irrelevant for unlawful enemy combatants → essential that there was no challenge as to his status.
- Distinguish from Milligan → Milligan was a civilian. Distinction is not based on citizenship.
- 1) Enemy Combatants can be detained during war in Afghanistan, but they have right to challenge classification as enemy combatants, and a military tribunal can provide sufficient due process. To receive this protection, you must either be a citizen or under control of United States (which includes Gtmo). Following Hamdi & Rasul, DoD creates CSRTs → separating status question from merits question.
 - *Hamdi v. Rumsfeld*, 2004, finding that citizens held as enemy combatants must be able to challenge determination of status.
 - O'Connor (maj.):
 - Cong. Authorization: from the AUMF, which allows whatever force necessary to subdue al Qaeda.
 - The Non-Detention Act doesn't apply because it allows detention "pursuant to an act of Congress," and the AUMF is such an act. Note that Souter disagrees on this point, finding that the AUMF does not provide the clear authorization that the NDA requires (putting case in *Youngstown* category 3).
 - Note possibility of indefinite detention for length of hostilities, but O'Connor doesn't reach the question.
 - Required Procedures:
 - Absent suspension habeas remains available.
 - Court refuses to defer to gov't on this question of fact and applies the *Matthews* test → balancing risk of private harm with risk of public harm.
 - Requires:
 - Notice of basis for classification (see evidence against you)
 - Opportunity to rebut facts before neutral decisionmaker
 - Slightly relaxed rules of evidence
 - Burden-shifting on proof of innocence
 - Can be in military court
 - Citizenship: In Dissent, Scalia and Stevens argue that as a citizen, on US soil, he must be tried in Art. III court. O'Connor relies on Quirin, citizenship is irrelevant in these circumstances.
 - Institutional competence: Thomas argues for upholding the opinion below on basis that court has no competence to intervene. Note

- the Madison nightmare here → military creating rules for, executing rules for, and trying cases under rules.
- *Rasul v. Bush*, 2004, establishing statutory habeas rights for detainees at GTMO, finding that GTMO is technically outside US sovereign territory but is under its sole control.
 - To file for habeas you must either be citizen or within the jurisdiction of the court (in territory under US control).
 - Court distinguishes *Johnson v. Eisentrager* (1950), which held that there was neither constitutional nor statutory habeas for unlawful combatants captured, held, and tried in China.
 - 2) Congress passes the Detainee Treatment Act, sponsored by John McCain. Act protects all prisoners from inhumane treatment, but it strips habeas appellate review from SCOTUS, conferring it on DC Circ. *See* Marbury for Congress's authority to strip SCOTUS's appellate jurisdiction.
 - 3) In *Hamdan v. Rumsfeld*, 2006, court rejects US motion to dismiss cert finding that DTA cannot apply to pending cases (court resolves this as a matter of statutory interpretation without taking on the Marbury rule).
 - Jurisdiction Question: The stripping provision is not explicitly retroactive; whereas the granting provisions are → *Ashlander* cannon, avoid constitutional question when matter can be settled with statutory interpretation.) → SCOTUS can hear the case. Note that in dissent, Scalia disagreed with the results of Stevens' interpretation.
 - CSRT, a military commission, created by executive. Is it lawful?
 - Cong. Authorization: Art. 21 of the UCMJ provides authorization for military tribunals, but not military commissions. Rather the UCMJ, AUMF, DTA acknowledge but do not authorize military commissions.
 - UCMJ requires consistency w/ laws of war & uniformity in so far as practicable with courts-martial.
 - Laws of War: Common Article 3 requires judgments to be made with protections deemed "indispensable to civilized people."
 - Stevens finds that DTA violates UCMJ and through UCMJ, the Geneva Convention → no Cong. Authorization (putting case into *Youngstown* category 3) → no executive power to act in this way. Note that in dissent, Thomas puts case into category 1.
 - In concurrence Breyer notes that because this is *Youngstown* Category 3, Cong. Could correct the constitutional problem by providing authorization.
 - Dissent thinks this is a category 1 case based on statutory interpretation.
 - 4) Military Tribunals Act: Congress responds to Hamdan by attempting to provide the requisite Congressional authorization for CSRTs. The act unequivocally moves executive detention scheme into *Youngstown* category 1, and it explicitly extends this to all pending cases.

- 5) In *Boumediene*, the court then finds that the MTA is acts as a suspension of habeas corpus, but that suspension can only be done explicitly and according to constitutional procedures (thus requires showing of time of rebellion or invasion). Issue is constitutional habeas.
 - As in *Rasul*, aliens have habeas rights when under US control, includes Gtmo.
 - Kennedy explains that the constitution cannot be turned on and off at will because that would “permit a striking anomaly in our tripartite system of government, lending to a regime in which Cong. And the Pres., not this Court, say ‘what the law is.’”
 - Current Test: For availability of writ and extent of process required.
 - Citizenship and status (civilian, lawful combatant, unlawful combatant) of detainee and the adequacy of the process of status determination.
 - Nature of sites of apprehension and then detention: need either sovereignty or control for one.
 - Practicable obstacles inherent in resolving prisoners’ entitlement to the writ.
 - Dissent expresses concern about bait and switch, because Cong. Passed MTA in part in response to invitation in *Hamdan*. Scalia.
 - Dissent is also concerned about lack of clarity of what is required. Roberts.
 - Congress could respond by suspending writ, but no rebellion or invasion.
- 6) Obama EOs
 - Close Gtmo w/in one year.
 - Ban Torture
 - Task force for systemic review of detention policies and procedures and review of all individual cases.

V. INDIVIDUAL RIGHTS VIS-À-VIS GOVERNMENT

Reconstruction Amendments

Thirteenth Amendment

- §1: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof a party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.”
 - *Slaughterhouse Cases*, rejecting claim that monopoly rule violated 13th amendment because constraint on trade was not a badge or incidence of slavery.
- §2: “Congress shall have the power to enforce this article by appropriate legislation.”
 - Congress can pass laws abolishing the “badges and incidents” of slavery – judicially created broad language that is then construed narrowly.
 - *Civil Rights Cases*, finding that exclusion from accommodation was not a badge of slavery.

- On the other hand, laws protecting property holding, contracts, and crim pro rights are within the ambit.
- “It is referred to for the purpose of showing that at the time Congress did not assume, under the authority given by the 13th amendment, to adjust what may be called social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment of deprivation of which constitutes the essential distinction between freedom and slavery.”
- Harlan, in dissent, argues that discrimination is a badge and incidence of slavery.

- *Jones v. Alfred Mayer Co.*, broadly interpreting §2.

Fourteenth Amendment

- §1, cl. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside.
 - Clause 1 overrules *Dred Scott v. Sanford* (holding that slave was citizen of state in which he was born but not of US) → note that when citizenship is expanded notion of privileges and immunities of citizens is contracted.
 - Note Akhil Amar argues that equal protection claims could be housed in this clause, which has no state action doctrine and simply establishes that there is no second-class citizenship. HE argues this in connection to a critique of the outcome of *US v. Morrison*.
- Cl. 2: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;
 -
- Cl. 3: Nor shall any state deprive any person of life, liberty, or property, without due process of law;
- Cl. 4: Or deny to any person within its jurisdiction the equal protection of the laws.”
 - *Strauder v. West Virginia*, 1880, overturning a law that excluded blacks from jury panels. Criminal Def. has right to trial by jury of peers (creates standing to sue on jury exclusion rule). Note that no right to actually have blacks on jury – they just can’t be categorically excluded. An example of general constitutional law.
 - 14th amendment is meant to secure civil rights, which the white race enjoys.
 - The function of the law was brand blacks and perpetuate racial prejudice.
 - Inferiority of blacks is a function of history not capacity → to assure that the holding wouldn’t apply to women.
 - Anti-subordination and anti-classification run parallel here (in contrast to affirmative action context).
 - Dissent (Field to *Ex Parte Young*) argued that equal protection doesn’t demand jury service and that whites would give fair trial to blacks. Jury participation is political not civil right.

- *The Slaughterhouse Cases*, 1873, upholding a monopoly granted to the slaughterhouse in Louisiana.
 - Privileges OR immunities clause:
 - does not incorporate the Bill of Rights,
 - guarantees only access to seaports, access to courts and seats of government, protection over liberty and property on the high seas, citizenship in any state.
 - Excludes right to pursue a calling and other broad rights articulated in *Corfield* (although, of course, today P & I really is just an interstate equality rule).
 - Due Process: No deprivation of property has occurred and finding no substantive content to the Due Process clause.
 - Equal Protection: Meant only to protect freed slaves.
 - Dissent (Field) argues that P or I means you can't privilege one citizen over another → can sue home states for deprivations just as under Art. IV you can sue other states for deprivations. 14 Amend. Guarantees the "fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States."
 - Dissent (Bradley) argues for full incorporation and notes that mischief addressed by 14th amendment is broader than slavery.
- General Notes:
 - What is race?
 - Neil Gotunda's Categories:
 - Status Race: As marker of social status
 - White supremacy
 - Japanese better than Chinese
 - *See Plessy*.
 - Formal Race: Bloodlines/Skin color → principle of colorblindness (melting pot): **anti-classification**
 - *Plessy*,
 - Historical Race: Difference created by contingent historical practice (slavery, hutus/tutsis). → principle of remediation: **anti-subordination**
 - *Bakke, Fullilove, Wygant, Adarand, Seattle*
 - Culture Race: Race as "culture, community, and consciousness." → principle of pluralism or "diversity"
 - *Bakke, Metro B., Grutter, Gratz, Seattle Sch.*
 - In the Courts:
 - *Ozawa v. US* (1935) holding that whiteness is a matter of Caucasian origin not of actual skin color.
 - *US v. Thind*, rejecting naturalization petition of South Asian man who shows that South Asians are Caucasian and holding that race is actually a matter of public knowledge.

- Formation v. treatment
- What are “Rights”?
 - Civil Rights → hold property, sue, contract, travel
 - Early conception was that the 14th amendment would grant these civil rights only. In *Strauder*, Field argues that jury right is political.
 - Political Rights → vote, hold office
 - Social Rights → associate, marry
- §5: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”
 - Under *Civil Rights Case*, the scope of this power is limited to legislation where there are or might be violations of section 1. “Enforce” is read narrowly. Legislation may precede the violation but “it should be adapted to the mischief and the wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment.”
- State Action Doctrine:
 - *Civil Rights Cases*, 1883, overturning the Civil Rights Act of 1875, which barred discrimination in public accommodations, transport, and amusement, on the ground that it enforce 14 §1 against private parties.
 - The amendment explicitly extends its requirements solely to States.
 - Thus Congress’s legislative power is solely corrective against states.
 - Limiting the §5 power: It is not for Congress to pass state/municipal laws. Congressional laws must be limited to the mischief and wrong the amendment protects against.
 - There is no state action doctrine under the 13th amendment.
 - In dissent, Harlan argues that there is no state action problem here because public amusement is licensed so within concept of state action and public accommodation – public purpose.
 - *Shelley v. Kraemer*, holding that it would be state action for court to enforce a racially discriminatory contract. This is an aberrational case.
 - Charles Black argues that the line between public and private action is extremely murky.
 - Test: IS private actor undertaking traditional and exclusive public function:
 - Company town, *see Marsh*
 - Running an election
 - State inaction ≠ state action, *see Deshaney*.

Fifteenth Amendment

Equal Protection: Government Power to Classify

- Subordination of blacks was a tool for post-war healing of the north and south. C. Vann Woodward.

Separate but Equal

- *Plessy v. Ferguson*, 1896, upholding a railroad segregation law on the grounds that the 14th amendment was not intended to eliminate distinctions among races. Brown's majority.
 - This is a concocted litigation → note mixed message of picking plaintiffs that blend in. Corollary to the paradox of the subaltern.
 - Segregation goes to social rights, which is not demanded by the amendment. Perceptions of inferiority is a gloss that black people put on segregation; not inherent to the institution.
 - Whiteness is a form of property that is protected by the law. The law protects custom and keeps peace. Contrast to *Yick Wo v. Hopkins*, in which ordinance giving licenses to launderers solely on basis of race was arbitrary and unjust.
 - Harlan, in dissent, argues that only purpose is to keep black people out of white cars and that this is an illegitimate purpose that interferes with freedom of association.
 - Slippery slope concern → law should be color-blind. Harlan also uses anti-subordination language → in this context these two concepts track.
 - Note that Harlan also believe in white supremacy, but he doesn't think that equality under the law will threaten that supremacy.
 - This is about the civil right of travel rather than the social right of association.

Decline of Separate but Equal

- The litigation strategy (Marshall): the equalization cases, chip away at separate but equal by demanding equality → if you take sep. but equal seriously it will collapse under its own economic weight.
- 1938: *Missouri ex rel Gaines v. Canada*, holding that sep. but equal was not satisfied by U. of Mo. Law school's claim that af. Ams could attend law school in adjacent state.
- 1950: *Sweatt v. Painter*, holding that separate but equal was not satisfied by hastily constructed law school that mimicked U of T law school → note importance, in education context, of reputation. Points to specific differences of staff, library, offerings.
- 1950: *McLaurin v. OK State Regents*, holding that separate but equal was not satisfied by sep. sections for af. Ams. In classroom, library, and cafeteria, because association with other students was central to the educational experience.
- 1954: *Brown v. Board*, overruling *Plessy* and finding that doctrine of separate but equal was unconstitutional. Short, readable, non-accusatory opinion. Warren.
 - Separate cannot be equal.
 - Court looks at historical evidence of whether 14th amend was intended to abolish segregation, but finds it undeterminative.
 - Pointing to the intangible inequalities that the court had discovered in the earlier cases. Intervening precedent → chipped away so plessy = outlier.
 - Changed context on importance of education.

- Bickel argues that while intent for short-term effect clearly opposed killing segregation, intent as to long-term effect was less clear, and more likely that the broadly worded amendment was meant to allow for change over time.
- McConnell argues that there is little pre-ratification evidence for desegregation but there is substantial post-ratification evidence for it. He focuses more on Cong. than states which play essential role in ratification. Also looking after is cheap talk.
- The parties' arguments:

| | Marshall & Robinson | Davis |
|--------------------------|--|--|
| 1. Framers Direct Intent | Fears of integration expressed in floor debate, but not quashed. | Same 39 th Congress that proposed 14 th amend. Voted out funds to black schools. |
| 2. Springing Intent | 14 th amendment framed in broad terms. Cite Strauder, note nascence of public educ. In 1860s. | As courts have repeatedly demonstrated the framer's intent has not been interpreted to permit desegregation. |
| 3. Independent Power | Judiciary has already required de facto desegregation. | Argument for repose. |

- Contemporary sociological evidence (the Doll studies) clearly demonstrates the damage done to children by segregation: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."
- Ordered reargument for question of appropriate remedy (court wanted South to sit with idea for a while before mandating any change – also reflected compromise necessary to get unanimous decision). Ultimate formulation is desegregation with "all deliberate speed." Note trade off between force and fancy → need to have places in the law that are devoid of force in order to allow them to become aspirational.
- Bell says if separate but equal had been allowed to collapse under its own weight, we would have achieved full equality earlier. Because we would have borne the costs of inequality longer and more fully.
- Note the problem of forcing discrimination sub rosa → discrimination doesn't go away, but it becomes harder to see.
- Hollow hope critique → Brown accomplished nothing. Nothing changed until 64.
- *Bolling v. Sharpe*, 1954, holding that the 14th amendment applied to the federal government via the fifth amendment and thus overturning segregation laws in DC.
 - **Reverse Incorporation.**
 - "It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."
 - Note the intent problem – no way to find that there was intent to use fifth amendment in this way.

Levels of Scrutiny and Classifications

- Expansion of Brown
 - *Naim v. Naim* – first opportunity to hear anti-miscegenation case and court denied cert. Marriage is a social right; this is the last area into which the court extends equal protection.
 - *McLaughlin v. Florida* (1964) invalidating statute that punished interracial cohabitation more severely than it punished cohabitation by people of same race.
- Strict Scrutiny:
 - *Loving v. Virginia* (1967) holding anti-miscegenation laws to be unconstitutional both on EPC grounds and on SDP grounds.
 - Equal application was irrelevant because the purpose of the law was to protect the purity of the white race. Note importance of how you define act: “marrying a white person.” Statute says white person can engage in act, but black person can’t. v. “interracial marriage” court invalidates bans on both.
 - Strict Scrutiny – “At the very least the EPC demands that racial classifications, especially suspect in criminal statutes, be subject to the most rigid scrutiny, and, if they are ever to be upheld they must be shown to be necessary to the accomplishment of some permissible state objective.”
 - End was racial purity
 - Statute not tailored to achieve that end → only protects white purity, which is an impermissible end.
- Modern formulation of the strict scrutiny test: Whether law is narrowly tailored to achieve a compelling governmental interest. Is SS fatal in fact?
 - Racial Segregation in Prison:
 - *Lee v. Washington* (1968) ordering the integration of Alabama prisons with the caveat that prison guards can do what is necessary to maintain order and discipline.
 - *Johnson v. California* (2005) finding that CDC practice of rooming people by race in intake facility was subject to strict scrutiny.
- Court won’t apply strict scrutiny for self-identified race: informational classification
 - Facial discrimination and the Census:
 - *Anderson v. Martin* (1964) barring practice of listing candidates by race.
 - *Tancil v. Wools* (1964) validating practice of requiring divorce decrees to list race.
 - *Morales v. Daley* (SD Tex. 2000) validating census requirement of listing race and relation of household members on basis that data is used for anti-subordination purposes. Private party is providing the informational purposes. Hypothetical misuse of data is insufficient reason to invalidate. Normally court would find classification and say that strict scrutiny applies, but here the court looks first to the way race is being used, finds it legitimate, and

therefore SS shouldn't be apply. Court is trying to avoid SS which was fatal in fact in order to protect a legit policy.

- Note importance of categorization: how does census shape racial categories and identity?
- Suspect descriptions (this is a disparate impact case):
 - *Brown v. Oneonta* (2d. Cir. 1999) validating practice of looking for crime suspect based on race description given by the victim on basis that this was a legitimate purpose. Following *Morales*, no SS b/c private person provides race, and was used for a legitimate purpose.
- After *Grutter*, SS is no longer necessarily fatal in fact:
 - What we gain is that we can really evaluate the government interest and honestly evaluate the tailoring.
 - What we lose is that we open the door for the next *Korematsu*.
- Classifications:

| | |
|---|--|
| Strict: “ narrowly tailored to a compelling governmental interest” | Race: <i>Korematsu</i> National Origin: <i>Oyama v. CA</i> (1948) Alienage: <i>Graham v. Richardson</i> (1971), with pol. function exception. |
| Intermediate: “ substantially related to an important governmental interest.” | Sex: <i>Craig v. Boren</i> (1976) Non-Marital Parentage: <i>Tremble v. Gordon</i> (1977) |
| Rational basis with bite: Rationally related to a legitimate gov't interest | Disability: <i>Cleburne v. Cleburne</i> (1985) Sexual Orientation: <i>Romer v. Evans</i> (1996) |
| Rational Basis | Everything else (although w/ bite list is not exhaustive) Age: <i>Mass. Board of Retirement v. Evans</i> (1996) Opticians: <i>Williamson v. Lee Optical</i> (1955) |

Disparate Impact

- Disparate impact claims can rise as either facial or as-applied challenges.
- Question is what is a race-dependent decision?
 - Motivated by animus v. foresaw disparate impact
- 1. The As-Applied Challenge: Discriminatory Administration of Neutral Statutes:
 - *Yick Wo v. Hopkins*, 1886, holding that the application of laundry licensing scheme reflected a clear intent to discriminate.
- 2. The Facial Challenge: Adoption of neutral law for race-dependent reasons
 - *Ho Ah Kow v. Nunan* 1879, striking down a regulation that required prisoners to cut their hair upon conviction because it was clearly aimed at Chinese prisoners and was clearly not a health measure because it didn't include those awaiting trial or women.
 - *Gomillion v. Lightfoot* 1960, holding that a decision to redraw city lines in such a way that excluded most blacks was tantamount to segregation.
 - *Griffin v. Prince Edward County school Board* 1964 holding that decision to close public school to sidestep integration decree was invalid.

- *Palmer v. Thompson*, validating decision to close municipal pool rather than integrate on basis that the court will not be able to ascertain whether bad motives of supporters were cause of passage. Importantly, this case is different because there is no disparate impact.
- *Hunter v. Underwood*, 1985, striking down law that disenfranchised for certain crimes finding that fact that it discriminated against poor whites as well “would not render nugatory the purpose to discriminate against all blacks.”
- 3. Facially neutral law passed for neutral reasons but maintained invidious purposes. *See Rogers v. Lodge*.
 - *Rogers v. Lodge*, invalidating law that was established for neutral purposes but maintained for invidious purposes.
- 4. Facially neutral statute with disparate impact.
 - **Intent is required:** *Washington v. Davis*, 1976, declining to adopt Title VII std into const. jurisprudence.
 - Disparate impact alone is not unconstitutional.
 - Find intent → look to classification → look to type of scrutiny. Upholds written test for civil service because it tests skill that is essential to the jobs.
 - **Intent = purpose:** *Personnel Administrator of Mass. V. Feeney*, 1979, upholding a law that gave civil service preference to vets despite disadvantage to women. WHITE.
 - Intent = purpose as opposed to knowledge, recklessness, or negligence.
 - Must be because of rather than in spite of disparate impact.
 - Concern about slippery slope of government always embroiled in constant litigation over purposes of actions.
 - Brennan, in dissent, called this the “too much justice argument.” If abolition of racism is at the bottom of the slope what is the danger of sliding there.
 - **How do you show intent?** *Arlington Heights v. Metro. Housing Dev. Corp.* 1977 rejecting challenge to denial of rezoning request.
 - Impact of official action, including existence of clear pattern, unexplainable on grounds other than race.
 - Historical background.
 - Specific sequence of events.
 - Departures from procedural norms.
 - Departures from substantive norms.
 - Legislative or administrative history.
 - If intent is demonstrated → burden shifts to defendant to disprove intent.
 - *United States v. Clary*, 1994, 8th Cir., validating fed. law that imposed 100:1 punishment on crack relative to cocaine.
 - Rational basis for distinction b/w the two drugs.

- No clear evidence of discriminatory purpose (discounting newspaper articles in legislative record, and hasty 50-fold increase of punishment, relied on by district court).
 - This case shows that *Arlington Heights* is a bad test because it doesn't get at how discrimination actually works today. For general criticisms of these tests see Linda Hamilton Krieger and Charles Lawrence.
 - Title VII and Disparate Impact Claims:
 - Forbids discrimination for employers of 15 or more people on basis of race, national origin, color, religion, or sex.
 - Employer can defend charge based on bona fide occupational qualification (although none exist for race).
 - Can defend against disparate impact only on basis of business necessity.
 - *Griggs v. Duke Power* 1971 holding that general intelligence test violated Title VII because it disadvantaged black applicants and froze status quo. Employer failed to show business necessity.
 - Analysis:
 - 1. Is employer policy racially discriminatory on its face?
 - Yes → invalid unless BFOQ (except for race)
 - 2. Is policy facially neutral but has discriminatory intent?
 - Yes → invalid
 - 3. Does employer policy have a disparate impact?
 - Yes → can employer produce a business justification?
 - No → invalid
 - Yes → valid
 - No → valid
 - EPC and Disparate Impact:
 - Analysis:
 - 1. Is state action facially discriminatory?
 - Yes → strict scrutiny
 - 2. Is state action neutral on its face but a pretext (discriminatory intent, because of)?
 - Yes → strict scrutiny
 - 3. Does state action have disparate impact?
 - Yes → valid unless impact is probative of intent
 - No → valid
 - A note on intent: Racially motivated statutes can be intended to malign subordinate groups or to help subordinate groups.

Affirmative Action

- Is state permitted to help minorities under EPC? Note link between context and rationale.
 - Siegal, facial discrimination tends to show up with remedial laws whereas discrimination never shows its face.
 - Remediation: Remedying past discrimination by state actor
 - Correction by state for private discrimination is impermissible → no remediation for discrimination by society

- Requirement that state actor engaging in remediation is the same state actor that engaged in the discrimination.
 - Common example: Government contracting
 - Test:
 - Identify past discrimination with specificity.
 - Show that it has continuing effects into the future.
 - Diversity
 - Education: justified by desire for diversity (and for redemediation)
- Congruency Principle: Who is the promulgating entity?
 - In early litigation courts were more sympathetic to federal AA programs.
 - Today the distinction is erased. *See Adarand*. → both get SS.
- Consistency Principle: prior to *Adarand* it mattered if program benefited racial minorities or whether it was neutral.
- *Bakke*, 1978, invalidating UC plan, which sets aside 16 seats for minority candidates, on the basis that whites cannot compete at all for those spots.
 - Powell (writing for himself)
 - This type of quota tends to lead to per se invalidation.
 - Contrast to a plus system, where whites can compete for every spot.
 - Applying strict scrutiny even though white men are not “discrete and insular” → rejecting two class theory
 - Rationales:
 - Diversity is okay. Talks about something looking like racial balancing.
 - Remediation by this particular actor is okay.
 - Remedying societal harms is not permissible, although, in dissent, Brennan argues that it is.
 - SCOTUS finds that the lower court erred in finding that UC could not consider race at all and overturns injunction that court issued: Powell + four justices deciding on Title VII grounds.
 - Brennan dissents arguing for lower scrutiny → an anti-consistency principle.
- *Fullilove*, 1980, finding that Congress has special prerogative to engage in affirmative action because of section five of the 14th amendment.
 - Upholding a 10% requirement for federal funds for local public works to go to MBEs.
 - Burger (plurality).
 - Unarticulated level of scrutiny.
 - Purpose is remedial.
 - Powell concurrence. Congress has unique competence to make findings of unlawful discrimination.
 - Rehnquists dissents voicing a strong anti-classification principle.
 - Stevens dissents expressing concern about entrenchment of classifications.
- *Wygant*, 1986, court expresses skepticism of a role modeling rationale (there must be someone who looks like me.
 - Applying strict scrutiny

- Overturning school district whites-first firing policy.
- Powell (majority)/O'Connor (concurrency) both attacks means as too intrusive.
- *Crosby*, 1989, invalidating Richmond's Minority Business Utilization plan, which requires that 30% of subcontracts go to minority businesses.
 - Part IIIB : O'Connor for the majority
 - Ordinance declares itself to be remedial, but this is mere recitation. Failed to carry burden of showing past discrimination. Declaring it is so, doesn't make it so.
 - Proponents of measure to testify to past discrimination in construction industry, but there is no hard data.
 - Minority businesses receive .67 percent of contracts but are 50% of the population, but population isn't relevant comparison → look instead at minority business owners. → need to distinguish between general societal discrimination (contributing to few applicants) and specific agency discrimination (contributing to few successful applicants).
 - Very few minorities in state/local contracting associations.
 - Congress made determination in 1977 that the effects of past discrimination had stifled minority participation in construction nationally, but this not relevant. Congress has a 14th amendment prerogative to.
 - Part IV: O'Connor for the majority
 - No consideration of race-neutral alternatives.
 - 30% quota is not narrowly tailored to goal, resting on unrealistic assumption that "minorities will choose a particular trade in lockstep proportion to their representation in the population."
 - Also included minority groups that had never been discriminated against here.
 - Not for the court:
 - O'Connor, for a plurality, also broadly defines what counts as past discrimination by a specific state actor (could include complicity with private discrimination) but still holds a high evidentiary bar for showing that it occurred.
 - She also announces the consistency principle for the plurality.
- *Metro Broadcasting*, 1990, upholding a federal affirmative action program. Court subjects FCC's minority preferences to intermediate scrutiny. Level of scrutiny applied is overruled by *Adarand*.
- *Adarand v. Peña*, 1995, O'Connor, strikes down federal affirmative action plan relying on remedial justification
 - Skepticism → approach to all race-based distinctions.
 - Consistency requirement → between treatment of minorities and whites, overruling *Metro Broadcasting*
 - Stevens objects that it doesn't distinguish between malignant and benign use of race.

- Congruence → no difference between fed and state, overruling *Fullilove* and inconsistent with O'Connor's own position in *Croson*
 - Stevens objects that this ignores the purpose of section 5.
- New rule: if you are a government entity applying race-based program, you are subject to strict scrutiny.
- Repudiated strict in theory is fatal in fact.
- *Grutter v. Bollinger*, 2003, O'Connor makes good on the promise that strict in theory is not fatal in fact. Upholds AA plan which relies on admitting a "critical mass" of minority students.
 - Ends: diversity is a compelling interest, need to expose to difference in order to prepare for the global workplace. Note the 3-M brief.
 - Learn that there is no single minority viewpoint, which is important for white students.
 - Note Thomas's dissent that it perhaps isn't so good for black students.
 - Rehnquist objects that this is remedial rationale because it is only looking at one type of diversity, which O'Connor justifies by unique past of race → back door for remedial rationale.
 - Means:
 - Narrowly tailored because it uses the plus-factor approach and importance of individualized determination for each applicant/each spot
 - And the school considered race-neutral alternatives.
 - Rehnquist dissented, pointing out that diversity means many things besides race; although O'Connor counters this by noting that race is different because of its history. (is this remediation through the back door). Rehnquist also notes that the program functions essentially like a quota program.
 - Thomas dissents, quoting Frederick Douglas expressing concern that someone who would have been at the top of second tier school should be in the middle at a top school → appearance of underperforming, cascade analysis.
 - Race theory:
 - Historical: note sneaking in of remedial rationale.
 - Formal: integrate based on skin color.
 - Cultural: value diversity.
- *Gratz v. Bollinger*, strikes down racial preference plan for undergrads, which assigns 20 points out of possible 150 to certain groups, whereas other personal achievements get only 5 points (need 100 to admit). Dissent notes that this is the same as the Grutter case just substitutes words for numbers. You can use race as long as you don't say how you are doing it or what exactly what you are doing.

Gender Discrimination

- Early litigation: the court viewed state action that discriminated on the basis of sex as rationally reflecting the different social roles of men and women and a dose of healthy paternalism.

- *Bradwell v. Illinois*, holding that preventing women from the bar was fine because women belong in the domestic sphere. Bradley (conurrence)
 - Protection of the purity of women.
 - Divine ordinance of the family.
 - Court relies on fact that women cannot enter into contracts as a basis for saying they cannot be lawyers.
- *Muller v. Oregon*, differentiating women in the *Lochner* era, allowing workplace regulation.
- Impact of the 19th Amendment:
 - *Adkins v. Children's Hospital*, the court retreated from this position and eradicated non-physical differences between men and women.
 - But the courts did not continue on this track and *Goeseart v. Clearly* applied a minimum rationality standard for a law banning women other than wives and daughters of bartenders from being bartenders.
- Women's rights themes:
 - Sex discrimination enforces traditional family roles.
 - Must eradicate traditional family roles → free women from condition in which they bear and raise children in order to allow women to achieve political equality.
 - *MacKinnon v. Ginsburg*:
 - On the one hand, women can't be lawyers until men can be caretakers
 - On the other hand, what has passed for feminist law has achieved for men what little has been gained for women.
- Modern Doctrine: Extending Scrutiny
 - *Reed v. Reed*, 1971, holding that a state law could not preference men over women in picking default person to administer an estate. Applying rational basis with bite.
 - *Frontiero v. Richardson*, 1973, invalidating a statute that allowed a serviceman to claim a wife as dependent but requiring servicewomen to show proof of dependency before claiming husband.
 - Note: not military deference b/c this is about admin efficiency not national security
 - Brennan plurality applies strict scrutiny, finding that sex is a suspect class.
 - Bradwell veneration is discarded as romantic paternalism. Traditional paternalism no longer acceptable. On separate spheres, Brennan notes women "were not on a pedestal but in a cage."
 - Sex is an immutable characteristic. And this characteristic bears no relation to ability to contribute to society.
 - Congress has become increasingly sensitive to sex-base classification → points to existence of ERA as evidence of legitimacy of judicial action.
 - Political powerlessness of women: more than half the population, but not represented in positions of power.

- Under SS, administrative convenience is an insufficient motivation.
 - Powell concurrence, finds that in light of the ERA it would be prudent to wait to establish the new suspect class.
 - Note possibility that this case took the wind out of the sails of the ERA. Note concern that passage of ERA would limit extension of rights to other groups.
- *Craig v. Boren*, 1976, a majority of the court settles on an intermediate scrutiny standard, overturning a law that allows girls but not boys to buy near beer.
 - History of discrimination.
 - Political powerlessness.
 - Obvious or immutable characteristics.
- A note on suspect classes: Who deserves the special solicitude of the court? Who should just use the political process?
 - Discrete and insular minorities, *Carolene Products*
 - Ackerman, notes that diffuse and anonymous minorities are more in need of protections.
 - Discrete could mean obvious.
 - Insular could be tied to the home closet.
 - John Hart Ely, women are the classic non-Carolene products group. They don't deserve the solicitude of the court, because they are such a large group and should be able to use the political process.
 - Sex-race analogy factors: *See Bowen v. Gilliard*, 1987
 - History of discrimination
 - Obvious, immutable or distinguishing characteristics
 - Political powerlessness.
 - Note change over time in what this means from *Frontiero* to *Cleburne*.
 - Is having ability to cover/exit really a persuasive reason not to extend protection?
 - Beyond, Beyond Carolene Products → diffusion/cover → access to the halls of power.
- Real Differences Doctrine:
 - Intermediate scrutiny applies to gender discrimination, but the law will be upheld if the classification is based on real differences between men and women as opposed to gender role stereotypes.
 - *Geduldig v. Aiello*, 1974, holding that discrimination based on pregnancy is not sex-based. Validating a law that excludes disabilities incident to normal pregnancy.
 - The law classifies based on status as pregnant v. not pregnant, which does not track women v. men. Thus Stewart applies a rational basis test.

- This case takes abortion off of the equal protection table, only after pregnancy is taken off the table does the court extend heightened scrutiny to women (note this case precedes *Craig v. Boren*).
- *General Electric Corp. v. Gilbert*, 1976, drawing same conclusion as Geduldig in the Title VII context, leading Congress to amend Title VII to explicitly extend its protections to pregnant women.
- *Michael M. v. Sonoma County*, 1981, upholding a CA law that holds men alone criminally liable for the act of sexual intercourse with a minor not his wife.
 - Rehnquist, for 4 members, notes that all the consequences of teenage pregnancy fall on women.
 - Stewart finds that the statute is based on real biological differences. Equal protection doesn't call for physiological differences to be ignored.
 - Facial discrimination → intermediate scrutiny, but it is survived because there is an important governmental interest (preventing teen pregnancy) and there is tailoring (women are punished with the pregnancy, men are not – need additional punishment to make equal).
 - Sometimes you need to treat people who are dissimilarly situated differently under the law in order to make them equal.
- *US v. VMI*, 1996, establishing the real differences doctrine and requiring integration of the VMI: Ginsburg.
 - Stated ends:
 - Single sex education is important and provides diversity of educational forms. Real differences do exist and can be the basis for legal classification, but not if the purpose is to denigrate → but in this case this is a pretext, a post hoc justification. Note that Rehnquist concurs to say that Ginsburg has the wrong jumping off point. Should look to justifications made after *Hogan*.
 - Accepting women would require changing the adversative model → but women are not categorically unable to adhere to this model.
 - New test?
 - Is “exceedingly persuasive” a different formulation of intermediate scrutiny? Or is this just a description of how hard it is to meet the test?
 - Requires ex ante articulation of purpose.
 - Generalizations about the way women are no longer justify denying opportunity to women whose talent and capacity place them outside the average description. If one woman can do it... Arguably this is a heightened standard because it requires look at the exceptional woman rather than the average woman.
 - Analogy to *Sweatt v. Painter* on the insufficiency of VWIL.

- Rehnquist concurrence: should start in 1981, when court announces *Hogan*.
- Scalia, in dissent, charges that Ginsburg is actually applying strict scrutiny.
- *Nguyen v. INS*, 2000, upholding Congressional statute that automatically grants citizenship to non-marital child of an alien father and citizen mother, but imposes certain evidentiary requirements in the case of an alien mother and citizen father.
 - Real differences explains why we apply strict scrutiny to race but intermediate scrutiny to sex.
 - Fear of number of children men can father and increased difficulty of establishing paternity.
 - Rationales:
 - Ease of establishing maternity, knowledge of birth
 - Women have bonds with their children automatically, while men do not → concern about deadbeat dads.
 - O'Connor Dissent points out that these actually are gender stereotypes.

Substantive Due Process: Regulation of Unenumerated Rights

The Lochner Era

- The court embraced the idea that it could use the 14th amendment to strike down state legislation that it found unreasonable: using the 14th amendment to police legislative responses to industrialization and urbanization.
- *Lochner v. New York*, 1905, overturning a law capping hours that a baker could work on the grounds of **freedom of contract**.
 - Property and liberty are subject to police power, but police power is subject to reasonableness assessment.
 - Hours worked has no bearing on public health. Bakers themselves have contracted away private health and have the freedom to do that.
 - Bakers are professionals. Don't need protection.
 - Dissent (Harlan) notes that there is debate as to public health issue and as to whether states are class in need of protection, which should be resolved in favor of the legislature. Bakers are more like miners than like lawyers.
 - Dissent (Holmes) countermajoritarian difficulty: courts should not act in a countermajoritarian way when the state is acting to protect a vulnerable group. Unenumerated rights exist, but this isn't one of them.

Decline of Judicial Intervention: Reflecting judicial acknowledgement of the progressive project: in the modern world the balance between individual rights and public welfare shakes out differently than it did in the agrarian republic.

- *Nebbia v. New York*, 1934, upholding price floor for milk finding that the means was reasonable to protect dairy farmers and finding a nexus to public interest.
- *Home Building & Loan Association v. Blaisdell*, upholding a MN law expanding the period for redemption before foreclosure on the ground that the

Contracts Clause must be constrained to protect the peace and that the law was reasonable and there was a reasonable relationship between means and ends. Note Justice Hughes's strong use of the prudential modality—need to deal with emergency. Note: this is a contracts clause case not a SDP case.

- *West Coast Hotel v. Parrish*, 1937, indirectly overrules *Lochner* by overruling *Adkins v. Children's Hospital*, finding that liberty in constitutional sense is not absolute.
 - Liberty is subject to the police power, so long as that exercise of the police power is reasonable.
 - State legislatures have a right to identify harms and offer protections.
 - Protecting those with unequal bargaining power protects the public generally by keeping them off state dependence.

Modern Doctrine of Economic Substantive Due Process

- *United States v. Carolene Products*, 1938, upholding “Filled Milk Act” and establishing modern doctrine:
 - Rational Basis Test
 - Legitimate purpose (hear it is public health)
 - Notes that Congress articulated a reason, but, even if it hadn't...
 - Reasonable means
 - Presumption of Constitutionality: Rebutting presumption:
 - Facts show lack of rational basis.
 - State of facts has changed.
 - Over-inclusive (in an as-applied challenge).
 - Meriting a heightened scrutiny: fn 4
 - A) In contravention of a specific constitutional prohibition: protection of the supermajoritarian vision. → basis for selective incorporation.
 - B) Interferes with democratic process → a justification for deference. If the process is pure...
 - C) Prejudice against “a discrete and insular minority” → protect against tyranny of the majority
 - John Hart Ely, this prong allows for court to use its countermajoritarian power to correct legitimacy deficits.
 - Bruce Ackerman, discrete and insular status requires political power, most very oppressed groups today are anonymous and diffuse.
- *Williamson v. Lee Optical Co.*, 1955, upholding an OK law distinguishing between optometrists, ophthalmologists and optician.
 - If the court can imagine any rational basis...
 - All legislation distinguishes between classes. If court engaged in heightened review in every instance it would become a super-legislature.
 - Rational basis is a smokescreen. Economic substantive due process is really dead.

The Revival of Substantive Due Process

Modern Unenumerated Rights

- Rights Receiving some degree of scrutiny, mostly under due process
 - Right of Privacy: zonal, decisional, and relational
 - Marriage
 - Contraception
 - Abortion
 - Obscene materials in the home
 - Keeping extended family together (*Moore v. city of Cleveland*)
 - Parental control of children
 - Intimate sexual conduct in the home
 - Right to vote
 - Right to travel
 - Right to refuse medical treatment
- When does a right become fundamental?
 - Deeply route in the nation's traditions and history
 - And implicit in the concept of ordered liberty

Rights regarding childrearing and education

- *Meyer v. Nebraska*, 1923, overturning an NB law prohibiting teaching of foreign languages before the 8th grade. The law was anti-German.
- *Pierce v. Society of Sisters*, 1925, overturning a state law requiring all children to go to public school. The law was anti-Catholic.

Rights to procreate

- *Skinner v. Oklahoma*, overturning a law that required sterilization of felons after third conviction for certain enumerated felonies, finding that list was arbitrary (excluded most white-collar crimes), and that strict scrutiny applied because right to procreate was fundamental.

Contraception and Abortion: From Zonal/Relational to Decisional Privacy

- *Griswold v. Connecticut*, 1965, overturning a state law that criminalized use of birth control by married women and the distribution of birth control by doctors to married women.
 - Douglas: The Penumbra Theory → extends privacy to the marital bedroom (zonal and relational)
 - First (relational, decisional, and zonal) → association, education of children
 - Third (zonal) → privacy of home
 - Fourth (zonal) → privacy of home and person
 - Fifth (decisional) → privacy of person
 - Ninth → general privacy
 - Harlan: privacy is fundamental → SS
 - White: means/ends problem → ban for married person will not curb extramarital sex
 - Black, dissent, no such protection within any enumerated right. Rejection of general constitutional law.
- *Loving v. Virginia*
 - Violation of the freedom to marry. Decisional privacy.

- Choice cannot be restricted by invidious racial discriminations
- *Eisenstadt v. Baird*, 1972, extends *Griswold* to all contraceptive distribution and use, overturning conviction of woman who distributed contraception at a public meeting. Argument that law must treat married and unmarried people in the same way to give meaning to the privacy right (decisional nature of privacy in this case). But this case is decided under the equal protection doctrine.
- *Carey v. Population Services International*, 1977, overturning a law that prohibits sale of contraceptives to minors.
- *Roe v. Wade*, 1973, overturning a TX law that prohibits abortions unless medically necessary.
 - Blackmun:
 - Abortion was common and generally legal throughout much of western history → right is not categorically foreclosed by history.
 - Standard justifications:
 - Discourage illicit conduct → discredited
 - Risks of procedure → for early term, this is no longer serious
 - Life of the fetus → open question of when life begins
 - Does fetus have rights? It is not a person, until viability. Excludes fetus through intratextualism.
 - Focuses on term viability rather than life to sidestep the more complicated question.
 - Abortion = private decision b/w a woman and her medical professional, but state has a legitimate interest
 - Developing the trimester framework
 - First trimester: neutral regulations related to licensing
 - Second Trimester: state interest in health of the mother
 - Third trimester: state interest in fetal personhood.
 - Douglas, puts it in the first amendment. Decisions respecting marriage, procreation, contraception, and education → SS
 - Stewart puts it 14th due process → liberty in childrearing.
 - Statute suffers from a tailoring problem
 - Rehnquist, dissent, noting that abortion is not about privacy, it is about liberty, which may be deprived by due process of law, and that due process requires just rationality (*Williamson*).
 - White expresses concern about judicial overreach.
- *Planned Parenthood v. Casey*, 1993, validating all elements of an abortion statute except the one requiring married women to obtain spousal consent.
 - Affirming Roe's position about the need for abortion for women to be equal participants in society.
 - Stare decisis: prudential and pragmatic: majority
 - Workability: no problem here, points to example of 10th amendment jurisprudence on traditional government functions.
 - Reliance: Interest of those who have relied on availability of abortion.

- Change in doctrine: bare remnant of abandoned doctrine. This is not true in this case.
- Change in fact or perceptions of constant fact: changes in reproductive technology: movement of viability line and risk of procedure line.
- Other concerns related to the legitimacy of the court
 - Anti-vacillation principle
 - Autonomy of law from politics: these justices were put on the court to overturn Roe.
- Reworking Roe: characterizes these things as not part of the essential holding. Plurality
 - Replaced trimester framework with binary rule: before and after viability.
 - Eliminating the first trimester safe harbor.
 - Pre-viability: state is free to protect its interest in the potentiality of human life so long as does not erect an undue burden on a woman's right to choose.
 - Post-viability: state is free to strike whatever balance it likes between the mother's interest in choosing and the potential life, but it cannot compromise the life and health of the mother.
 - Adopts the undue burden test, which is more of a balancing than a means ends fit test: plurality in this opinion. Becomes the law after Stenberg. Pre-viability the state may not place an undue burden on a woman's right to reproductive autonomy. In other words, the state may not place substantial obstacles in the way of obtaining an abortion. In practice this is a balancing test.
 - States interest in potential life (need exception for health and life of mother).
 - Mother's interest in decisional privacy.
 - Pre-viability state may strike any balance that it likes between these two provided that it does not erect a substantial obstacle. Post-viability, it may strike any balance it likes provided it makes for life and, perhaps for health.
 - Application:
 - Medical emergency (majority upheld) provision for life/health of mother.
 - Informed consent (plurality, upheld) required 24-hour waiting period and provision of information about alternatives and risks of procedure
 - Spousal notification (majority, overturned) burden because of risk of spousal abuse: will deter getting abortions at all.
 - Parental consent for minors (plurality upheld)_upheld because of judicial bypass exception

- Reporting (plurality, upheld) record requirements reasonably relate to health
- *Gonzales v. Stenberg*, overturns a NE law that bans partial-birth abortion law.
 - Law makes exception only for LIFE, and, on its face it doesn't distinguish between d&E and intact D&E.
 - Law doesn't make pre/post viability distinction.
 - No exception for health of mother, which is required even post-liability.
 - Establishes undue burden test as law.
- *Gonzales v. Carhart*, upholding the federal Partial-Birth Abortion Act law that does distinguish between the two procedures despite not including an exception for the health of the mother. Kennedy
 - No health exception is okay because of availability of other methods → distinguishing *Stenberg*.
 - Defers to legislature because it finds uncertainty as to necessity of health exception, not that Ginsburg points to the hundreds of pages of evidence of such necessity on the record.
 - Distinction between procedures is fine because the intact d & e is more brutal → appears of infanticide and blurring line between harm infliction and protection.
 - Announces it will hear as applied challenges from women needing Intact D&E for health reasons.
 - Ginsburg, court is stepping back from equality rationale into romantic paternalism, objecting to Kennedy's assertion (based on no evidence) that women need to be protected from making decisions they will regret. She also points out that that both procedures are equally brutal.

Gay Rights: Reversion to Relational Privacy

- *Bowers v. Hardwick*, 1986, upholding a Georgia law that criminalized all sodomy with penalty of up to 20 years.
 - Tribe opts not to consolidate with *Baker v. Wade*, which dealt with statute abolishing homosexual sodomy, because he wanted to emphasize due process issue rather than equal protection issue.
 - White: reads the law as applying only to homosexual sodomy.
 - Earlier SDP cases do not create a general right of privacy.
 - There is no deep history of right to engage in sodomy → points to long history of criminalization.
 - Concern about court getting ahead of popular opinion.
 - What about the zonal privacy of the home?
 - Not a shield from illegality generally.
 - Parallels to doing drugs at home. Distinguishes *Stanley* (obscenity in the home case).
 - Morality is a legitimate end.
 - Shift toward relational notion of privacy that doesn't apply to homosexuality because sodomy is unrelated to marriage, family, and procreation.
 - White distinguishes *Griswold* as being about relational rather than decisional privacy.

- Burger points to ancient routes of prescription against sodomy.
- Powell concurs only because he finds no fundamental right at stake. But sees a possible 8th amendment violation.
- Blackmun dissents offering a more functionalist reading of the precedent as providing a general right of privacy and arguing that the act proscribes both hetero and homo sexual behavior. Protection of religious values is insufficient.
- Stevens points to the right to have sex not for the purposes of procreation.
- Bowers has implications for gay rights in other contexts.
 - No student groups
 - No employment protection.
 - Sanctioning marginalization. Norm-enunciative aspect of harm. If state says that is okay then anti-gay violence is okay.
 - If conduct is criminal, then status can only draw rational basis.
- *Romer v. Evans*, 1996, overturning a CO constitutional amendment prohibiting antidiscrimination laws on the basis of sexual orientation.
 - Kennedy notes that the state characterizes the amendment as leveling, but the purpose is clearly discriminatory.
 - The provision curtails the right to seek equal protection
 - Case could be read as curtailing the ability to pass a such a ban for all groups, or it could be read as recognizing equal protection for homosexuality.
 - End, classification, is impermissible. You can't foreclose the political process to a group based on animus alone.
 - Means is overbroad for stated ends of conserving resources and freedom of association. Also too narrow.
 - In dissent, Scalia argues that the court should stay out of this culture war. But he also goes on a rant that Kennedy shouldn't call these people bigots they are just protecting their values. OMG polygamy.
- *Lofton v. Secretary of Dept. of Children and Family Services*, FL, 11th, upholding law that prohibits adoption by homosexuals, finding a distinction between a negative right to engage in private conduct and a positive right to receive official recognition, and finding the law meets rational basis test.
- *Lawrence v. Texas*, 2003, invalidating sodomy laws everywhere.
 - Kennedy:
 - Overrules Bowers:
 - No longstanding history of prohibitive laws. Bowers was based in part on bad history.
 - Points to changed legal practices (MPC).
 - Points to Romer to suggest change in doctrine. Bowers was aberrant.
 - Finds no reliance.
 - Points to international law → sodomy rejected in other parts of the world.
 - Declining to find a fundamental right. But finds unenumerated right in sexual intimacy.

- O'Connor argues that case should be decided on equal protection grounds, and holding would thus be limited to laws barring homosexual sodomy. But she will entertain Yick Wo challenges!
- Scalia dissents arguing that majority is not engaged, as it claims to be, in rational basis review, and arguing that the majority has changed the stare decisis rule. He also argues that there is no EPC claim because the law bars all people from engaging in same sex sodomy. Rejects characterization of the liberty right and notes that only US tradition is relevant.
- Liberty v. equality
 - Liberty:
 - Closeting problem
 - Problems exacerbated if the liberty is privacy
 - Liberty performs a kind of empathy (human rights)
 - Emphasizes shared humanity
 - Equality
 - Norm-enunciative effect
 - Binary identity: essentializing
 - Still makes differentiation
 - Equality asks people for empathy (gay rights)
- Military Service
 - 1981: ban on gays in the military
 - 1994: DADT
 - Prohibits conduct
 - Speech creates rebuttable presumption that you engage in the conduct. Hard to rebut because it includes presumption of propensity to engage in conduct in the future.
 - Is this worse than a categorical ban? It seems more liberal, so easier to defend.
 - 1996: *Thomasson v. Perry*, 4th Cir. 1996, DADT upheld under rational basis review,
 - Rule is partially shielded by military deference.
 - Legitimate concern about unit cohesion.
 - Impact of Lawrence:
 - *US v. Marcus*, no implications for UCMJ ban on sodomy, because *Lawrence* is contextual
 - *Witt v. US Airforce*, plaintiff was fired in 2003, two years before her retirement, and ninth circuit required something more than rational basis. Lawrence jacks up the level of scrutiny from rational basis.
 - Raising essentially irrebuttable presumption that you have engaged in gay conduct → turns status into conduct. But will making this argument get you anywhere is that there is no heightened scrutiny attached to discrimination based on status. All we get under Due Process is universal protection of conduct.
- Marriage Rights

- Sex discrimination v. sexual orientation discrimination
 - Facially, sex discrimination, it is one's gender that restrict one's rights
 - But see Sylvia Law, sexual orientation discrimination is based in gender role stereotyping, so ultimately is sex discrimination
 - Sex discrimination triggers intermediate scrutiny (VMI: it's strict!)
 - Sexual orientation discrimination is the real harm, animus is against gay people not against men or women—sex discrimination classification lack norm-enunciative quality
- Why fight for marriage right?
 - Counterarguments:
 - Rights have a channeling function. Rich culture of union is stifled by fitting into the marriage track (note history of union among slaves, when marriage was banned).
 - Something is lost by subsuming gay culture into the majority.
 - Marriage has lots of negative entailments: coverture, legalized prostitution.
 - Note social theorists Nancy Fraser's distinction between "politics of redistribution" and "politics of recognition" in Justice Interruptus (1997)
 - Redistribution: about stuff, class based activism
 - Recognition: about dignitary recognition from the State
 - Arguments for:
 - Cultural value
 - Material value (parallel to intellectual property).
 - Public recognition
- Legal strategy: state by state
 - Pragmatic: some states are more hospitable than others
 - States as laboratories of democracy
 - Keep it out of federal courts until farther along
 - How much of a patchwork is enough? Only 16 states still banned miscegenation when SCOTUS overturned it.
- 1993: Hawaii Sup. Ct. subjects restriction to strict scrutiny. Legislature overrides with constitutional amendment committing decision to legislature.
- 1996: Defense of Marriage Act
 - Permits states not to recognize same sex marriage in other states:
 - Full faith and credit – non-starter because of the Congressional exceptions clause and the long doctrinal history of public policy exceptions
 - Defines marriage for federal purposes as one man and one woman:
 - in four states same sex couples are married under state but not federal law.

- *Baker v. State*, VT, 2000, finding ban violated states common benefits clause, and state can fix it by either expanding marriage or by providing comparable benefits.
 - Couples get material benefits of marriage (politics of redistribution) without its symbolic value (politics of recognition) See Nancy Fraser, Justice Interruptus.
- 2003: Fed. Const. marriage amendment introduced in the house.
- 2003: *Lawrence v. Texas*
- *Goodridge v. Dept. of Public Health*, MA, 2003
 - No need to determine what the appropriate level of scrutiny is because ban on gay marriage failed even rational basis test.
 - Proffered rationale are insufficient:
 - Favorable setting for procreation
 - But civil marriage is actually about commitment
 - If it were a procreation institution, the ban would be massively under and over inclusive.
 - We don't bar sterile people from marrying.
 - We let gay people have children.
 - Protection of children is a legitimate state interest, but this doesn't turn on sexual orientation of parents
 - Preserving scarce financial resources: financial necessity is not a prerequisite for marriage.
 - Concurrence: Greaney, argues that this should have been decided under Equal protection because the law classifies based on gender, noting parallel to *Loving*
 - No sexual orientation discrimination on its face, while there is sex discrimination, which draws higher scrutiny anyway.
 - Dissent argues that the *Loving* analogy doesn't follow because there is no gender hierarchy being preserved by this law. But see Sylvia Law critique.
 - Dissent argues that there is uncertainty about parenting question, so defer to the state, and points out that majority isn't actually applying a rational basis test.
- 2006: NY Court of Appeals, in *Hernandez v. Robles*, rules that state constitution does not guarantee rights for same-sex couples. In a strange, *Bradwell v. Illinois* type argument, the court argues that homosexual parents are more stable and in less need of the institution of marriage, don't need support from the state on child rearing. The case also adopts the MA dissent's interpretation of *Loving*: there is no argument that the statute is meant to subordinate men to women or women to men.
- 2008, May: CA sup ct holds that state constitution guarantees marriage right. Extends right on equal protection and due process.
- 2008 (Oct) *Carrigan v. Commissioner of Public Health*, CT sup. Ct. holds that state const guarantees marriage right. Applied intermediate scrutiny.
- 2008 (NOV): CA passes prop. 8 by referendum.

- 2009 (Mar): complaint against DOMA filed in D. Mass. *Gill v. Office of Personnel Management*, challenging under federal EPC: raises interesting issues of federalism as marriage is an area of traditional state control.
- 2009: *In re Marriage* CA court hears oral argument in case challenging prop. 8. Question is whether it should have been a revision or an amendment and what to do about the people who already got married.
 - Concern about returning to courts after losing in the political process: judicial closet and the legislative alter.
 - Gay rights movement must win in the courts of public opinion. Prop. 8 is arguably the proper democratic response to overreach by a countermajoritarian court.
 - Discrete and insular minorities have political power to exert voice and garner the solicitude of the court. Compare to anonymous and diffuse minorities that have only exit. On the other hand, the advantage of being anonymous and diffuse is the ability to gain access.
- 2009: *Varnum v. Brien*, Iowa court decides 7-0 to uphold marriage right.
- 2009: VT overturns veto to enact law legalizing same sex marriage.

Family Relations

- Living Together: Compare *Village of Belle Terre v. Boras*, 1974, finding that an ordinance barring six unrelated college students from living together was constitutional WITH *Moore v. City of East Cleveland*, 1977, holding that an ordinance barring extended family from living together was unconstitutional.
 - Powell (plurality) held that the due process clause protects the family, because the sanctity of family is deeply rooted in the nation's tradition and history.
 - Stevens (conurrence) Finds a fifth amendment takings problem.
 - Rehnquist (dissent) distinguishes right of family to live together (not fundamental) from decisions to marry, bear, and raise children.
- Parental Access Rights: *Michael H. v. Gerald D.*, 1989, Scalia upholds a CA law that deems the husband to be the father of the wife's baby.
 - Procedural due process → denial of hearing is not a PDP problem because the law is substantive, not procedural. This is an example of the laws performative function; it calls the reality into being.
 - Substantive due process →
 - Tradition has always protected the husband at the expense of the non-marital father → in the interest of an aversion to declaring a child illegitimate and an interest in protecting the peace and tranquility of the family.
 - Footnote 6 (Scalia and Rehnquist only): Categorize right at the narrowest possible stage at which there is a tradition. O'Connor dissents from this fn on the basis that it is inconsistent with doctrine.
 - Balkin objects that liberty and tradition are not always so clearly aligned.

- Traditions are not necessarily discrete or normatively correct.
- Tradition as betrayal of alternatives for future, of current competing traditions, of itself.
 - Court shouldn't take sides between interests of father and interests of husband → defer to legislature.
- Kennedy and O'Connor sign the opinion to everything but the Fn.
- Brennan, dissenting, argues that there is a liberty interest in the natural father's relationship with the child. Doctrine protects family interests, and this is within that ambit. Brennan articulates test and argues that the plurality conflates the two steps.
 - 1. Ask if the right merits constitutional protection.
 - 2. Assess the right in light of state interests.
 - There many traditions in a pluralistic society; how do we know when one peters out and another takes its place. Stigma of illegitimacy is no longer strong; whereas blood ties have become very important.
- White, dissenting, argues that the fact that he is the natural father is dispositive.

Right to Die

- *Washington v. Glucksberg*, 1997 (Rehnquist), upholding the WA law barring physician-assisted suicide.
 - Distinguishing between not providing life saving care and assisting in death → causal difference.
 - Tradition: Plaintiff bears burden to show it is deeply rooted deeply rooted in our nation's traditions and history AND implicit in ordered liberty.
 - Longstanding prohibition on suicide. Lessening of punishment signaled unfairness in punishing family, not acceptance of the practice.
 - Purpose of this test is to reign in subjective element.
 - Distinguish *Cruzan* – right to refuse medical treatment is not the right to die.
 - No fundamental right → apply the rational basis test:
 - 1. Preservation of human life → concern that permitting assisted suicide would lead to unnecessary death and untreated depression.
 - 2. Integrity of the medical profession (compare to *Carhart v. Gonzalez*)
 - 3. Protect vulnerable groups from coercion/manipulation → treat all life equally. Note overlap with equal protection here. Parallel this romantic paternalism to that of *Carhart v. Gonzalez*.
 - 4. Slippery slope to involuntary euthanasia.
 - In concurrence, Souter argues that court should balance state interest with private interest in bodily integrity, but he finds reason three dispositive.
 - This is a legislative matter → room for legislative change, with safeguards.

- *Vacco v. Quill*, 1997, rejecting an equal protection challenge to an NY law distinguishing between assisted suicide and DNR.
 - Distinction is rational → changes cause of death, and the motives are valid, see *Glucksberg*.
 - O'Connor, in concurrence, argues that there is room for future as applied challenges where the person's life is intolerable and there is no error or coercion.
- Note on equality in the due process context:
 - No new heightened scrutiny groups since 1977.
 - No disparate impact claims since 1976.
 - Restrictions on what Congress can do under section 5., Rehnquist in *Garrett*.
 - Conclusion is that court has move these inquiries over into the due process clause → this is an attractive solution for the court in the era of proliferation of groups. Note explicit language to this effect in *Employment Division v. Smith* → no disparate impact under the free exercise clause.
 - See *Lawrence, Lane, Meyers, and Pierce* → gives equal rights by universalizing the right.
 - Note also that equality concerns can act as a brake in the liberty context. See *Glucksberg*, using protection of a vulnerable group and desire for protection of equality as a reason not to extend rights. This makes sense because equality (or the need to participate in society) has always been the backstop to liberty. Equality is implicit in the idea of order, within the concept of ordered liberty.

The Modern Test

- What is the right in question? See Michael H. fn. 6
- Is it deeply rooted in our nation's history and tradition AND implicit in the concept of ordered liberty?
 - Courts tend to focus only on the former. SDP is a backward looking inquiry (see Cass Sunstein, contrasting with the forward-looking nature of EPC)
 - But is strongly deemphasized in *Lawrence*. Note difference between finding a tradition of protection and a tradition of not prohibition. He brings in modern changes; framers understood that our conceptions of liberty would change over time – intentional choice of broad language – see 14th and 9th amendment.
 - Look to Brennan dissent in Michael H → allow for change over time.
 - Whose ethos?
 - What about foreign history? Contrast Kennedy's approach in *Lawrence* with Scalia who argues that it is THIS nation's history that is relevant. "This is an American constitution we are expounding."
 - Kennedy and Rehnquist both look to a large democratic community

- Kennedy in Lawrence
- Rehnquist in Glucksberg
- Tiered structure of due process:
 - Fundamental rights → strict scrutiny
 - Unenumerated rights → heightened scrutiny (e.g. undue burden test in abortion context or rational basis with bite in *Lawrence*)
 - Otherwise → rational basis

Enforcement of the 14th Amendment

- 14th amendment enforcement power is limited:
 - State action doctrine – *civil rights cases*
- *Lassiter v. Northampton Election Board* (1955) - § 1 of the 14th amendment does not bar use of a literacy test.
- *Katzenbach v. Morgan*, 1966, Brennan upholds the VRA §4(e) under §5.
 - Does the NY law abrogate the EPC?
 - Interpretation 1: Congress can come to its own determination of the meaning of §1. But this is a one-way ratchet. (see fn a)
 - Interpretation 2: Congress can make a factual finding of discrimination → a more banal interpretation.
 - Is prohibition of the law permissible under §5?
 - Congress has to peg legislation to enforcement of that interpretation, but it may take actions necessary and proper to enforce.
 - It is an affirmative grant of power paralleled to the necessary and proper clause.
 - It is a one way ratchet, relative to judicial determinations.
 - In dissent, Harlan argues that the NY statute is valid on its face, and that there must be an infringement before Congress can act.
- Free Exercise Series
 - 1963: *Sherbert v. Verner*, finding that the law shouldn't force person to choose between religion and livelihood → need for exception to rule of general applicability. On unemployment law denying benefits if a job opportunity was turned down.
 - 1972: *Wisconsin v. Yoder*, finding that state must have a compelling interest before it can allow a rule of general applicability to burden religious group. On law barring removing students from school before 15.
 - 1990: *Employment Division v. Smith*, finding that states need not make exceptions/accommodations to rules of general applicability for minority religious groups → this suggests that Scalia is trying to entrench majority religions at the expense of minority religions. O'Connor distinguishes between constitutive nature of activities related to religious as opposed to those related to race.
 - 1993: Congress passes RFRA, restoring strict scrutiny for burdens on religion.
 - *Boerne v. City of Flores*, holding that Congress cannot reinterpret the 14th amendment in this manner.

- Replacing necessary and proper interpretation with the narrower bound of congruent and appropriate.
- VAWA under §5:
 - State action problem → although see Breyer's dissent
 - Private acts of violence against women are not state action.
 - Sovereign immunity problem
 - Why not uphold under the first clause of section one, the sentence that overrules Dred Scott, because that sentence has no state action doctrine.
- Implications of *Boerne*: Sovereign Immunity
 - *Hans v. Louisiana*, 1890, reads law to include citizens of states suing their own states.
 - *Ex Parte Young*, 1908, reads out the ban on suits in equity.
 - *Alden v. Maine*, 1999, finds that bar extends to state court.
 - *Seminole Tribe v. Florida*, 1996, finds that Congress can only abrogate state sovereign immunity if
 - There is a clear intent to waive immunity.
 - The congressional waiver is pursuant to a proper (i.e. post 11th amendment power). → can only abridge state sovereign immunity in actions taken pursuant to § 5 power.
- In the following cases, statutes were all permissible under the Commerce power, so the essential question is whether they were permissible under §5, which would allow congress to abrogate state sovereign immunity.
- *Alabama v. Garrett*, 2001, addressing permissibility of ADA I under §5. ADA I prohibits employment discrimination on the basis of disability.
 - New section five test:
 - What is the right at issue?
 - How many violations have occurred?
 - Court looks only at violations by state actor, and limits based on determination that some discrimination based on disability is not violative.
 - Is section five enactment congruent and proportional to remedying those violations?
- *Nevada Dept. of Human Resources v. Hibbs*, 2003, upholding the FMLA
 - The section 1 harm:
 - Equal protection problem with leave laws extending to women only.
 - Disparate treatment in hiring by public employers – avoid women who will take leave.
 - Disparate treatment by private employers. → not a § 1 harm see civil rights cases.
 - Disparate impact on women of policies designed without caretaking provisions. → not a § 1 harm, see *Washington v. Davis*.
 - Section 5 remedy:
 - It is congruent and proportional because it is narrowly aimed at a specific problem.

- Perhaps broader treatment is that sex gets heightened scrutiny, in contrast to *garrett*, court is more forgiving here.
 - So while heightened scrutiny makes less difference today in the section one context, it makes enormous difference in the section five context.
- *Tennessee v. Lane*, 2004, upholding ADA II that regulated access to public buildings on the ground that there is a due process right to court house access.
 - Law prevents discrimination from taking place in the first place.
 - Distinguishes from *Garrett*, which was about equal protection.

Move this after discussion to the equal protection section

- *City of Cleburne v. Cleburne Living Center*, 1985, finding that mental retardation is not a suspect class, but finding the law unconstitutional under a rational basis with bite test. WHITE
 - When is a class suspect?
 - History of discrimination
 - Political powerlessness → hear having achieved a degree of congressional solicitude eliminated this. Contrast to plurality in *Frontiero*.
 - White makes a slippery slope argument about when to stop extension. Concern about having a principled line.
 - Applying a rational basis test:
 - Fear and negative attitudes are not a legitimate basis for government action.
 - Concerns about floodplain and overcrowding make the law underinclusive → note contrast to the *Williamson* one step at a time approach.
 - Note that court does not try to imagine reasons as it did in *Williamson*
 - White's gestalt approach leaves us in a nether region where we still have tiers of scrutiny, but the third tier can be applied in multiple ways and there is no basis to tell when it will go which way. KY thinks that it is about court's gestalt sense of animus.
 - Marshall dissents pointing to tragic history and arguing for a sort of sliding scale balancing test. Tiers aren't working anymore.