

CONSTITUTIONAL LAW—PROF. YOSHINO, SPRING 2009

Constitutional Structure: Articles & Amendments

- I: Legislative Powers
- II: Executive Powers
- III: Judicial Powers
- IV: Relationships among the States
- V: Amendment Procedures
- VI: National Debt/Supremacy (catch-all)
- VII: Ratification Procedures
- Bill of Rights:
 - not exhaustive list
 - fear of *expresio unius exclusio alterius*: see Amend. IX
- Amendments
 - Types: 1) overruling SCOTUS decisions (e.g., 11A and *Chisholm v. Georgia*)
 - 2) correct original Constitution (e.g., 12A and preference for VP and Pres to be same party)
 - 3) changing social attitudes (e.g., 13A prohibition on slavery)
 - Reconstruction Amendments: 14A = P&I, DP, EP
 - Progressive Era
 - Post WWII

Constitutional Functions: separation of powers, federalism, individual rights (*but see* state action doctrine)

Anti-majoritarian function: protects minority rights (esp. in crisis), shield long term values from short-term passions

Constitutional Interpretation

When is interpretation necessary?

- when constitution does not expressly consider an issue
- where text is open-ended
- determine when government concerns are sufficient to permit interference with rights
- ?) where rights are non-textual

Originalism:

- Framers' specific conceptions OR (moderate) general concepts
- Drafters specifically, OR (Scalia) original meaning (from historic practices and understandings)
- Ely: nonoriginalism is okay where court is exercising procedural expertise to ensure political participation, and supporting democratic ideals
- Seen as a constraint on the power of judges

Nonoriginalism

- Constitution evolves by *both* amendment and interpretation, necessary to meet needs of changing society
- Framers' intent is elusive and shaded by contemporary values, so even originalism is really nonoriginalism
- This IS what Framers' intended, for evolving interpretations

Which branch should engage in interpretation?

- ANY: *see* Jackson's veto of National Bank charter renewal, *see* AttyGen Meese's critique of judicial supremacy
- DIVIDED: allocated among the branches, in practice now, *see* political question doctrine
- JUDICIARY ONLY: umpire role, *Marbury*. (But, could narrow reading of *Marbury* mean that judiciary is supreme interpreter of Article III only, or that it can interpret but subject to other branches?)

Modalities of Constitutional Interpretation

Example of good lawyering: cycle through modalities and find the one that best fits your case

Marsh v. Chambers (1983): *atheist legislator sues b/c of legislative chaplain on state payroll*

HOLD: no violation of Est. Clause, Framers paid for legis prayer (ignores Lemon test)

Robert Post: Doctrinal, Historical, Responsive (nonexhaustive).

• **Historical Modality:**

- *Marsh* majority's slam dunk (What Would the Framers' Do?)
- Other pressures on Congress aside from constitutionality
- Bruce Ackerman: **moment of higher lawmaking**, not quotidian (more fundamental)

- Intent of ratifiers is different from intent of lawmakers (even if same individual people)
 - Framers' intent manifested in Federalist papers, but no evidence of ratifiers' intent
- **Authority of consent:** social contract theory, consent through ratification, inherited by present generation.
- **Doctrinal Modality:**
 - *Marsh* dissent: Here, Court overlooks *Lemon* test (purpose, intent, entanglement)
 - From silence as to precedent, assume that court is carving out an exception
 - **Authority of law:** stability and reliability to organize institutions and lives.
 - Reliance and path dependency, *stare decisis*
 - Holmes: the grounds vanish, and the rule persists from "blind imitation of the past" ...justification for suspending bad precedents?
- **Responsive/Ethical Modality:**
 - Diverse polity, sociological facts taken into account when analyzing what the Framers' actions meant
 - Purpose of clause was not to degrade religion: what is required to accomplish this, given today's polity?
 - *Marsh* dissent rests on this: dynamic Constitution
 - **No Authority:** from the national ethos, assuming one exists (*Cf.* Robert Bork, this is a collection of individual interests
 - Countermajoritarian problem: courts don't have access to national ethos, legislative is closer

Philip Bobbitt: Doctrinal, Historical, Responsive/Ethical, Textual, Structural, Prudential (exhaustive, acc. Bobbitt)

- **Textual Modality:** looks primarily to Constitutional text itself, rules like *expressio unius*
 - Improper when conflicts with deeply held principles
 - Rarely available
- **Historical Modality:** meaning derived from original intent (Framers, Ratifiers, People)
 - See Ackerman's moments of higher law making: Founding, Reconstruction, New Deal
 - Consent/social contract theory
- **Doctrinal Modality:** *stare decisis* controls, logical consistency
 - But, guise of fidelity causes loss of transparency
- **Structural Modality:** Relative positions of various bodies of government, interpret to avoid conflicts
 - Stable, consistent constitutional blueprint
- **Ethical Modality:** countermajoritarian challenge best met when remedying political entrenchment
- **Prudential Modality:** cost/benefit analysis
 - e.g., *Home Building & Loan v. Blaisdell*, didn't uphold contracts if it will cause wide economic strife
 - desirability of results, but shouldn't this be province of democratic branches

Judicial Review

Article III

- Federal system, SCOTUS and lower fed courts as Congress establishes
- Life tenure for judges, good place to secure individual rights
- Two categories of jurisdiction: cases & controversies, and between states/citizens
- Original jurisdiction in Constitution, and appellate jurisdiction from Congress
- Jury trial guaranteed for Crimes, Definition of Treason
- Limited by subject matter jurisdiction, restricted access, and Congress limits on app. juris

History: Error, Overcorrection, Equilibrium

- Colonial History: tyranny, central authority
- Articles of Confederation: diffuse sovereignty of states
- Federalist/Republican tensions between strong and weak central government
- Federalists lose election of 1800, reaction is reentrenchment (try to get control of judiciary)
 - John Marshall appointed to SCOTUS CJ
 - Fed. Congress passes Circuit Court Act, 6 new Circuit Courts/16 judges
 - Organic Act, Adams appoints 42 Justices of the Peace for 5 year terms (midnight judges)
- Republican Backlash
 - Repeal Circuit Court Act, Cancel SCOTUS 1802 term, Deny commissions to Justices (incl. Marbury)
- *Marbury*: Court establishes Judicial Review as *power to strike down an act of a coordinate branch of gov't as unconstitutional*

Marbury v. Madison (1803)

Marshall could have avoided the judicial review issue:

1. Recusal: had been issuing Secretary of State. But at the time, recusal statute was lax.
2. Delivery essential to the validity of the deed (not commissioned until receipt), but Marshall instead ruled that appointment is valid, delivery is just transmission (like a mailbox rule), vests upon sign and seal, not delivery
3. Political Question Doctrine: president's discretion to use political powers, accountable to electorate not court. Appointment power in the executive, not judiciary (textual commitment, comity, institutional competence)
4. Statutory/Constitutional interpretation: interpret Judiciary Act as consistent with Constitution

Marbury seeks commission, writ of mandamus. §13 of Judiciary Act:

- gave court original juris over writs of mandamus
- Doesn't necessarily conflict with Const: Court can give writ under appellate juris, even if SCOTUS can't have original juris to issue writ.
- Even if it DOES give original juris, Art. III has exceptions clause "with such exceptions as Congress shall make"
- Held: Jud. Act violates Constitution, as Art. III §2 defines SCOTUS's original jurisdiction as a closed set.

Marshall manufacturing conflict? Judicial Review requires conflict between statute and Constitution.

- Capitulating to Jeffersonian concerns, court is fragile and can't enforce its pronouncements
- Takes opportunity to establish judicial review and sacrifice Marbury
- Gives up power to get power:
 - Congress can use exceptions clause to take from appellate jurisdiction and add to original
 - Congress's power to remove appellate jurisdiction and strip court of all but original
- Review on executive actions, but not when political (i.e., veto)
- §13 of Judiciary Act CAN be read to only give SCOTUS power to grant writ when case is already w/in its (appellate) jurisdiction. Enumeration of original jurisdiction, says Marshall, however, would render Art. III's enumeration superfluous (but maybe not, if you consider Art. III a floor that Congress can add to).

Marshall's justifications:

- Constitutional Supremacy
 - Intent of Framers to bind future generations with principles
 - Written, *Cf.* British heritage of unwritten constitutionalism
 - Supremacy Clause, Art. IV: laws made in pursuance of Constitution. Unchangeability of Constitution compared to other laws. (structural argument)
 - BUT some have argued this is *procedural* not *substantive* regularity: laws in pursuance thereof means enacted in accordance with the procedures set forth in the Constitution
- Judicial Review: Judiciary as Agent of Constitutional Interpretation
 - Judicial competence to interpret laws
 - Competence to hear cases, i.e., treason (though, *expresio unius* works against this)
 - Oath to uphold constitution (though, all officers swear this oath)
 - Province of judicial department to say what the law is (if they have to apply it, they should also be the branch to interpret it)

Other justifications

- Tie yourself to the mast: commitment to fundamental principles w/o following politics
- Countermajoritarian: Constitution is supermajoritarian, cleave to the text (problem when they don't cleave)
- Checks and balances must be meaningful, other branches already weighed in on constitutionality, via enactment and signing
- Supervisory role over lower courts
- Keep political process pure (Ely: processual theory)
 - Animus prevents individuals from expressing selves as citizens, so legislature has a legitimacy deficit that courts can overcome
 - Protect minority from majority tyranny
- NOT distinctly countermajoritarian, as compared to the other branches / somewhat political via nomination and confirmation process

Judicial Review of State Actions:

Martin v. Hunter's Lessee (1816): federal treaty > state action; Congress gave SCOTUS appellate juris & made NO necessary lower federal courts, therefore SCOTUS has to have review of state courts in order to have ANY app. review

Cohens v. Virginia (1821): when conviction violates Constitution, state convicts can appeal to SCOTUS

Amanda Bakale 4/25/09 11:55 AM

Comment: See handout on BB

Arguments for Judicial Review:

Alternative is self-reg by other branches (political pressures)

Least dangerous branch (no purse, no sword)

Can't enforce so relies on strength of reasoning

Arguments against:

Countermajoritarian, and not in the Constitution (judiciary exercising an unenumerated power)

Limitations on Judicial Review

- Political Question Doctrine
 - Avoiding the question, don't opine in the case. Not because politically charged, but deference to political branches
 - Disjunctive test
 - Textual Commitment: powers to other branches, such that court should not get involved
 - E.g., impeachment processes, *Nixon v. US*: judge impeached, HELD: procedures are sole province of Senate
 - Comity: no intervention where it would undermine prerogatives of another branch
 - E.g., *Luther v. Borden*, Congress, not court, guarantees republican form of state gov't
 - Institutional competence: which branch has access to relevant information
 - E.g., voting rights cases: courts won't intervene as statisticians to draw districts
 - Also: *Baker v. Carr* (1962)
 - Lack of judicially discoverable standard
 - Need for initial policy determination
 - Need for adherence to political decision already made
 - Potential embarrassment from pronouncement by various depts. on one question
 - Preserve political legitimacy, expertise, prevent oversight of other branches checks on judiciary (e.g., don't interfere in Congressional self-governance)
- Standing
 - Distinguish between constitutional and prudential requirements for justiciability.
 - Prudential: conserve resources, separation of powers, better decisions, fairness of limiting to parties
 - Constitutional ground for standing doctrine: Art. III "cases and controversies" (no advisory opinions)
 - Separation of powers concern, waste of resources if couldn't pass legislature anyway, limit to specific disputes
 - Conjunctive test
 - Injury in fact (concrete, imminent)
 - Injury requirement manipulable by court, how to characterize the harm
 - *Baker v. Carr*, e.g., harm was not "getting in," but the chance of getting in
 - Traceable to the *θ*'s conduct (causal connection)
 - Likely, not speculative, that injury will be redressed by favorable decision
 - *Lujan v. Defenders of Wildlife*: no standing b/c ambiguous as to what the harm would be from a loss of environmental protection of lands): makes harm a constitutional, not prudential, requirement for standing
 - *Lyon*: standing for injunctive relief: must be likelihood of future harm
 - Prudential factors
 - Prohibition on assertion of 3rd parties' rights
 - Except where 3rd party can't sue, i.e., restrictive covenants, *Baird v. Eisenstadt* where unmarried couples seeking contraception would never be litigants, but are harmed
 - Also, except where there is a close relationship (*Pierce v. Soc'y of Sisters*, between school and parents)
 - Prohibition on generalized grievances (i.e., no taxpayer standing...except for establishment clause exception, see *Marsh v. Chambers*)
 - Prohibition on asserting claims outside the zone of interests that Congress sought to protect
- Ripeness
 - Timing: too early to bring a case
 - Preenforcement allowed IF hardship to denial of review, e.g., if forced to choose between foregoing lawful activity or risking sanctions, or where there is merely a delay in enforcement
 - Hardship and fitness for judicial review (might need better record of the facts, therefore not ripe)
 - See *Ohio Forestry v. Sierra Club*: EPA violated by development, but no development plans yet

- Can bring the case later when the facts gel
- Mootness
 - Matters have proceeded in such a way that renders decision useless
 - See *City Novelty v. City*: challenging ordinance to shut down adult bookstore, but store closes for economic reasons
 - Exception: matters evading review but *capable of repetition*, i.e., abortion cases (litigation takes longer than gestation, so abortion case would ALWAYS be moot) (not just capable of repetition really, but will always be moot in repeated circumstances...)
 - Not moot if, even when primary injury resolved, there are secondary effects (such as criminal history impacts or continuing injury, i.e., need backpay)
- Certiorari Practice
 - Right to file in federal court, right to federal appeal, but no right to appeal in SCOTUS
 - 7000-8000 cases filed, only heard 70-80

Congressional ability to repeal federal court appellate jurisdiction

Ex parte McCardle, majoritarian check on judiciary, (though *Marbury* would be meaningless if Congress could remove ALL appellate review)

Sovereign Immunity

Unless: 1) state officers (state not named, *Ex parte Young*: state officers can't violate federal law)

2) waiver (rare)

3) when Congress acts in pursuance of §5 of 14A (*Seminole Tribe v. Florida*, but limited by *Boerne*, see below) 11A, intense reaction to *Chisholm v. Georgia* (1793), where SC citizen sued GA successfully.

- Restricts SMJ of fed courts in all cases, or in cases founded on diversity juris (as *Chisholm* was only div juris)
- Second view inconsistent with *Hans v. Louisiana* (state can't be sued by either citizen or noncitizen)

Federalism and Congressional Powers

Congress has limited (and enumerated) powers as a check on its capacity to trump state legislation

Article I, Section 8, Clauses 1-10

1. Power of taxation (see problems with Articles of Confederation, need \$)
2. Power to borrow money on credit of US
3. Power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."
4. Power over Naturalization and Bankruptcy
5. Power to coin money and set weights and measures
6. Power to punish counterfeiting
7. Power to establish post roads
8. Power to create incentives for intellectual property
9. Power to create courts under Supreme Court
10. Power to punish felonies on the high seas and offenses against law of nations

Article I, Section 8, Clauses 11-16: war powers

11. Power to declare war
12. Power to raise and support Army
13. Power to raise and support Navy
14. Power to regulate Army and Navy
15. Power to call forth militias
16. Power to regulate the militias

Article I, Section 8, Clauses 17-18

17. Power over District of Columbia
18. Power "to make all Laws which shall be necessary and proper to carrying into Execution the foregoing Powers."

Clause 18 is a rider clause: so long as you have the power, you can engage in necessary and proper means to effectuate that power. The meaning of this clause is at issue in *McCulloch v. Maryland*: expansive interpretation of N&P clause, grant of broader powers to Congress.

Article I §9: Powers Denied to Congress

Amendment X: all powers denied to Congress residually fall back to states

Federalism: State/Federal divide and 10A

Prevention of tyranny

double security, control each other (but Supremacy Clause), states can grant more rights than fed

Enhancing democratic rule with governemtn closer to the people

Efficiency: national versus state issues better solved on that level

Individual choice: increase satisfaction, vote with your feet, autonomy (more influence at local level)

Nat'l gov't coordinates, maximize collective goods

Citizen participation, similar to arguments for localism: but socially non-optimal policies b/c states compete

Potential problem: Madisonian factions

States are laboratories for new ideas (e.g., no fault divorce, welfare, seatbelts)

Commerce Clause

Reach of Federal legislature against States: Far reaching, under N&P and Commerce

Substantive DP roots: unenumerated "contract" rights in DP (rescind after New Deal, plenary power to Congress until the Rehnquist revolution)

McCulloch v. Maryland (1819): uses "Necessary and Proper Clause" to increase Congressional power

- Washington signs legislation creating Bank, despite controversy. Congress refuses to renew charter
- After War of 1812, Madison signs Second Bank's charter
- Maryland imposes tax on all non-state banks (Second Bank is the only one)...McCulloch is bank cashier and refuses to pay the tax.
- Justice Marshall again pursued Adams' Federalist vision in *McCulloch*.
- After the case, Jackson vetoes the renewal of the bank's charter, argues that *McCulloch* shouldn't bind

Questions: 1) does Congress have the power to create a Bank (unenumerated power); 2) if so, can the state tax it?

Modalities of constitutional interpretation applied to *McCulloch* question 1), does Congress have bank power?

Textual	Must combine powers to infer banking power (Marshall does not specify). Intertextualism: one word means the same throughout the document Does not say, "absolutely necessary" (another section of the Constitution uses "absolutely")	Not on §8 laundry list. Not by ordinary meaning of "necessary and proper."
Historical	Washington signed the first bank.	Framers didn't found a bank, much opposition.
Doctrinal	No precedent, but practice as precedent (congeals over time w/o challenge)	
Prudential	Lack of bank was constrictive, embarrassment during War of 1812	Expression of strong power leads to tyranny
Structural	Federal government supreme but limited, and N&P gives a long leash	Again, tyranny
Ethical	Sovereignty in people, vested in gov't	Sovereignty in states, limited federal

Q1) Congress CAN establish a bank:

- History/practice goes to presumption of constitutionality
 - see also *Youngstown Sheet & Tube*: systematic, unbroken executive practice long pursued...gloss on executive power
- Compact federalism: people, not states, are sovereign—no state veto of federal legislation, limited ability of states to interfere
- Not in text, but Constitution is not a legal code "it is a *constitution* we are expounding"
 - Con: Unenumerated power of Congress
- N&P clause: legitimate and appropriate and not prohibited = constitutional, N&P to unnamed power of Congress (in *Gibbons*, Marshal relates it to the Commerce Clause power)
 - Con: N&P is a limiting principle, or else surplusage

Q2) State can NOT tax the bank:

- Dominant modality is *structural*: allocation of state/fed power.
- Concurrent power to tax, but power to tax = power to destroy
 - Where there is hostility between powers, the federal power trumps
 - Let ambition counteract ambition, can't have confidence in states' restraint
- State legis overturning fed tax w/o representation of other 49 states.
- This is taxation w/o representation

Gibbons v. Ogden (1824): settles on Commerce Clause as warrant for government intervention

- O has ferry between NY/NJ, exclusive license from NY state. G competes, cites fed statute granting him license.
- 10A: Congress must have authority to legislate, 10A does not limit legislative power, divide *police* power and commerce
 - 10A does not invalidate laws w/in scope of Congress's power
- Congress statute gives G right, O can't monopolize interstate transportation
 - Fed preempts state if valid
 - Fed license valid b/c Congress has power to regulate interstate commerce, including interstate navigation
- Justify power expansion as consonant with Constitution
 - Commerce: includes navigation
 - Regulate: limited only by Constitution and political processes
 - Interstate: anything that's not intrastate
- Necessary and proper in pursuance of the Commerce power
- Johnson's concurrence: more radical, deny states the power to regulate commerce (even if Congress hadn't)
 - Fountainhead of *dormant commerce clause jurisprudence*

Substantive DP in the Lochner Era

Trend toward national economy increasingly brings the commerce clause into play

Commerce: Congress can regulate intrastate activity if it affects interstate activity

Late 1800s - 1930s: era of increasing economic and regulatory legislation + activist judicial review

Industrial revolution, growth of cities and working class, abusive contracts

Rise of laissez faire economics and social Darwinism

Commerce = state of business *separate* from production

10A allows states to regulate production, federal legislation can't invade zone of state

Pre-1937 Commerce Clause distinctions

- | | |
|--|--|
| <ul style="list-style-type: none">• Valid:<ul style="list-style-type: none">◦ Interstate (stream of commerce)◦ Commerce in goods that already exist◦ Direct effect on commerce◦ Items in the flow of commerce | <ul style="list-style-type: none">• Invalid<ul style="list-style-type: none">◦ Intrastate commerce◦ Agriculture, manufacture, mining◦ Indirect effects on commerce◦ Inherently dangerous goods (compare <i>Champion</i> and <i>Hammer</i>)◦ Items that have not yet entered or have exited the flow of commerce (<i>Schechter</i>) |
|--|--|

Champion v. Ames (1903): validates act of Congress banning interstate trade in lottery tickets

- Congress's power to regulate *includes* the power to prohibit (can exclude evil items from commerce)
 - Similar to *McCulloch*, the power to tax = power to destroy
- Lotto tickets count as commerce, they have contingent value and monetary value (purchase price)

Hammer v. Dagenhart (1918): invalidating act of Congress banning goods made by child labor

- 10A reserves a zone to the states: here, power to regulate manufacture, so federal law is unconstitutional
- Statute was attempt to level playing field between states that do and do not allow child labor
 - Collective action, Congress pushes to maximized position
- Interstate commerce NOT necessary to accomplish the manufacture (the thing being regulated)
 - Product versus process: if you can't tell the evil by looking at the product, then interstate commerce does not apply
 - Overruled after switch in time: process/product distinction meaningless
- Dissent (Holmes): similar to *Champion*, goods in interstate commerce
 - Here, the Act doesn't affect intrastate activities, states in opposition to Congressional trade sanctions are denied the "race to the bottom"

Carter v. Carter Coal (1934): strikes down Bituminous Coal Conservation Act

- Acts that try to regulate working conditions, and not shipment/sale, are overreaching (police power of state)
- Struck down as indirect, although Act discussed coal's importance to national economy

Schechter Poultry Corp. v. US (1935): strikes down National Industrial Recovery Act (statute prevented sellers from forcing buyers to buy sick along with healthy chickens from slaughterhouses)

Lochner v. New York (1905): bakers maximum hours legislation struck down (5-4, strong dissents)

- Court strikes down state court's ruling that there is no "freedom of contract" in Constitution
 - Freedom of contract is a basic right under DP clause
 - Gov't can interfere with freedom of K only for valid police purpose: police powers not implicated in limiting working hours, and public safety is not implicated
 - Judicial role is to scrutinize legislation interfering with freedom of K, passed for proper purpose
- Economic substantive DP: unenumerated rights and economic freedom (importing substance into DP)
 - Bakers are not wards of the state, don't interfere with their judgment
 - Limiting hours was not related to public health rationale
- State cannot bargain away police power, so state CAN abrogate contracts under *police power*
- Harlan's dissent: there is a relation to police power objectives
 - Public health issue
 - Judicial deference to legislative choices
 - Sociological characterization of bakers (more like miners than professionals, need special protection)
- Holmes's dissent: reasonable exercise of police power
 - No embodiment of economic theories (*laissez-faire*) in Constitution
 - Court is being countermajoritarian:
 - Unelected judges substituting values for those of legislature to protect unenumerated rights
 - Court can assume an unenumerated ONLY where deeply rooted in nation's history and/or implicit in notions of ordered liberty (freedom of K doesn't fit)

Note: *Lochner* and unenumerated rights: not a protected class, similar to contraception, same sex marriage, sodomy?
After *Lochner*, must show that law is closely related to police power of advancing public health, safety, morality
Introduction of Brandeis briefs, using sociological data (see *Muller v. Oregon* (1908) and women's health)

Growth of Commerce Power up to New Deal:

- *Lochner* era protection of economic right under DP clause, makes K clause superfluous
 - Congress's scope of power limited, and 10A reserves zone of authority to states (Court protected economic rights from both state and federal interference)
 - *Lochner* had read *laissez faire* into the Constitution, which is neither implicit in ordered liberty or rooted in traditions/history
- Freedom of Contract was a block to other government regulations besides health, safety, morality
- New Deal programming seen essential but Court shuts it down. FDR and the switch in time, court packing plan (within power, as Art. III does not specify number of justices on SCOTUS).
- Then *no enactment of Congress under Commerce power is struck down between 1937 and 1995*, no textual limit on federal government's seemingly plenary power. Also, K clause only used twice to strike down laws.

Substantive DP in the New Deal Era: Economic Rights

1905 *Lochner v. New York*, freedom of contract

1923 *Meyer v. Nebraska*, parental autonomy

1925 *Pierce v. Society of Sisters*, parental autonomy

1937 *West Coast Hotel v. Parrish*, freedom of contract

Substantive DP, Second Wave in 20th C: Privacy Rights

1965 *Griswold v. Connecticut* (contraceptive use)

1973 *Roe v. Wade* (abortion)

1992 *Casey v. Planned Parenthood* (reproductive autonomy)

2003 *Lawrence v. Texas* (sexual intimacy)

NLRB v. Jones & Laughlin Steel Corp. (1937): New Deal legislation, NLRB orders reinstatement of union members

- Court has Damoclean sword of the Court Packing Scheme: Roberts switches. Distinguishes *Schechter* on grounds that the labor practice is less remote in the stream of commerce: substantial effect
- Test: does a close and substantial relation exists between the intrastate activity and interstate commerce
- Here, "hear of a self-contained, highly integrated body": draw resources from and sell output nationally
 - But employees just being involved in production is not enough in itself
 - Plenary power because of interstate nature of getting supplies/where supplied to
- Chips away at *Hammer* w/o directly overruling

US v. Darby (1941): Fair Labor Standards Act: minimum wage/maximum hours, upheld

- Flatly overrules *Hammer v. Dagenhart*, process/product distinction does not control...initial step to stopping transportation is stopping production
 - rejects 10A approach to state regulation of production
 - 10A does not invalidate federal laws that are w/in scope of Congress's power (10A has no substantive content)
 - purpose of the Act in question was to prevent use of interstate commerce to promote race to the bottom between states (substandard working conditions)
- Abandon notion that power to prohibit interstate commerce is limited to articles which are harmful in themselves (argue that *Hammer* was the departure, this notion was never in Constitution)
- Rejected both substantive DP and federalism arguments, overruling limits on Congress's power

Overruling precedent: (see *Planned Parenthood v. Casey*, below): *US v. Darby* fits all 4 standards

- Workability (substantive experience)
 - Binaries of manufacture/trade, direct/indirect effect &c difficult to apply
 - Distinctions aren't formulaic for decision making purposes
- Change in fact/perception of facts (such that precedent is seen as an abandoned doctrine)
 - Laissez faire undermined by Depression
- Change in doctrine (chipping away at case, silence on issue indicates it is passé)
 - *NLRB* case chips away at *Hammer*
- Reliance (don't overrule if people have relied on constitutionality of act)
 - *Hammer* does not have substantial reliance

Wickard v. Filburn (1942): wheat allotment case, upheld agricultural caps on production, even if for private use

- Neither interstate nor commerce: Rationale: impact on interstate commerce because he withdrew his demand from the market
- Agriculture/mining/manufacture versus commerce distinction has disappeared
- This is the case to beat...even *Lopez* doesn't overturn, just gets around it.

Due Process Clause: squeeze the balloon, couldn't squeeze into freedom of contract

Home Building & Loan Ass'n v. Blaisdell (1934): state mortgage moratorium law upheld against Contract Clause

- Prudential modality: economic crisis
 - Framers' intent irrelevant: this public need not apprehended a century ago
- Contracts Clause initially understood to prevent states protection of debtors, *Sturges v. Crowninshield* (1819)
 - Constricted in *Stone v. Mississippi* (1880), can impair K if for general welfare
 - "What is this freedom of contract? The Constitution does not speak of freedom of contract..."
- "prisoner's dilemma" mentality: let Congressional power cure collective action problems
- Substantive DP: Indicates Court's willingness to defer to gov't economic regulations (legitimate end, reasonable means)
 - Retreat from contract clause jurisprudence
 - Dissent (Sutherland): K clause was debated and included to prohibit state interference with private K *specifically* in times of need

West Coast Hotel v. Parrish (1937): upheld women's minimum wage law, Court rejects freedom of contract defense

- Essentially overrules *Lochner* (overrules *Adkins*, which relied heavily on *Lochner*)
- Liberty can't be deprived w/o due process, constitution doesn't speak of freedom of K.
- Doesn't try to fit into the protection of women rationale of *Muller v. Oregon* (1908)
 - Don't created wards of state by depriving fair labor treatment to women, don't let employers exploit

Second Reconstruction: Deference from 1937-1995

Due Process

- Procedural: notice, opportunity to be heard
- Substantive: rights not enumerated in Constitution, like freedom of K
- Vehicle of incorporation: textually enumerated rights, relevant sovereign

US v. Carolene Products (1938): Filled Milk Act does not violate Commerce Clause, DP

- Dictum: the existence of facts supporting the legislative judgment is to be presumed: *rational basis*
- Commerce Clause—enables Congress to exclude products from the market
- Congressional deference, held committee hearings. BUT even if they hadn't, presumptive rational basis (Court can fill it in for Congress) ← Strong Deference
- End of line for Substantive Due Process cases
- FOOTNOTE 4: (did not get a majority)
 - Court will defer unless statute facially violates a Constitutional principle: if it is possible to conceive any legit purpose for the law
 - More searching inquiry when law interferes with individual rights, restricts political process, or discriminates against a discrete and insular minority
 - “narrower scope for operation of presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution”
 - “unnecessary to consider whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14A than are other types of legis”
 - Court is referee of democratic process, policing political rights
 - No need to enquire whether similar considerations enter into the review of statutes directed at religious, national, racial, whether prejudice against discrete and insular minorities may be a special condition, which curtails the operation of political processes that usually protect minorities
 - Countermajoritarian function of Court to protect minorities
 - Ely: Court steps in to protect society's pariahs
 - Tribe: choosing which groups to protect depends itself on power of the “powerless” group
 - Ackerman: “discrete and insular” requires that minorities must be ghettoized to be protected
 - Under game theory, those groups that are insular can mobilize better?
- Overview: Plenary power, and deferential judiciary (only get heightened scrutiny if blatant BofR violation, democratic process fail, or democratic tyranny over discrete and insular minorities)
 - Express rights in Bill of Rights
 - Distinguish *Lochner*, which relied on unenumerated right
 - Incorporated via 14A
 - Infringes on democratic process
 - Vote, assembly, association, &c.
 - Court is countermajoritarian, but protects functionality of democratic system
 - Does not implicate *Lochner*, because right is political, not economic
 - Harmful to discrete and insular minorities
 - Perennial lowers suggest a democracy fail, protect minorities to fold them into the majority
 - Discrete and insular: history of discrimination, political powerlessness, immutable/visible/distinguishing characteristics
- Court's substantive value judgments under *Carolene*
 - Which groups are discrete/insular minorities
 - Which government interests are compelling
 - What level of generality at which to identify the competing individual right
 - Balancing

Williamson v. Lee Optical (1955): Statute distinguishes ophthalmologists/optometrists and opticians: upheld

- DP and EP challenges, extreme deference to legislature—any imaginable rationale
 - Prescriptions contain important information
 - Eye exams can detect latent ailments

- Remove from commercial realm
- Can only exhaust rationality when you can show that animus is the only reason
- Need for judicial deference: legislature, not courts, balance advantages and disadvantages
 - Hypothesized reasons for the legislature
 - DP clause no longer used to strike down regulations of business for being out of mode with a particular school of thought (laissez-faire)

Civil Rights Act upheld under Commerce Clause (Plenary Power of Congress)

Heart of Atlanta Motel v. US (1964): Civil Rights Act upheld under Commerce Clause

- Rational basis: it affects commerce, not decided under 13/14A
 - hotel gets out of state business
 - lack of accommodations for blacks is severe
- Civil Rights Act of 1875, similarly prohibited race-based discrimination in public accommodations, was stymied under 13.2 and 14.5
 - Normative difficulty when announcing under Commerce Clause
 - Commerce Clause very powerful at the time, but ebbing in strength—problem?
- Test privileges motive, but only if invidious in nature

Katzenbach v. McClung (1964): restaurant gets meat from out of state, sufficient to apply Commerce Clause

- Artificial restriction on market (no blacks spending) interferes with flow
- Unrest/depressed business activity in segregated communities
- Deterrence of professional/skilled labor classes from inhabiting segregated areas

US v. Lopez (1995): Gun Free School Zones Act overturned, no nexus between guns in schools and commerce. Guns in schools is national, but not federal problem. Education and crime are traditionally state concerns.

- Congress can regulate 3 broad categories of activity
 - Channels of interstate commerce (waterways, transport)
 - Instrumentalities of interstate commerce, or persons or things in interstate commerce (carriers)
 - Activities that “substantially affect” interstate commerce
 - Economic in nature: distinguishes *Wickard v. Fillburn*, growing wheat is economic in nature, whereas gun possession is not
 - Jurisdictional element: “that has moved in or that otherwise affects interstate or foreign commerce”, here, guns didn’t have to be guns that had moved in interstate commerce
 - Congressional findings: here, nothing in legislative history...findings are neither necessary nor sufficient, but they help
 - Nexus: here, link between activity and interstate commerce can’t be *too attenuated* (Breyer’s suggested link is too attenuated)
- Ackerman: moment of higher law-making, new Constitutional era?
 - Kennedy’s concurrence: structural modality, principles of federalism
 - Education is state concern
 - States are laboratories of experimentation
 - Thomas’s concurrence: open to revisiting pre-1937 cases, treating post-New Deal era as aberration
 - Textual: aggressively originalist, narrow use of “commerce,” or else other enumerated powers are surplusage
 - Intratextual, commerce should always mean the same thing (in Port Preference Clause, Commerce means sale/transport)
 - Steven’s dissent: miscalculated categories, the guns are category 2, “things in interstate commerce”
 - Souter’s dissent: doctrinal/prudential: doctrinal instability of pre-1937 jurisprudence
 - Breyer’s dissent: more deference to Congress required, link between guns and schools is rational, court must review cumulative effects with latitude

US v. Morrison (2000): Violence Against Women Act, civil action to rape victims—link too attenuated

- Reaffirm *Lopez* test (channels, instrumentalities, substantial effect)
- Litigation occurred before Congress could amend VAWA after *Lopez*
- O’Connor’s swing vote goes because of the state’s rights issue: states have civil action provisions: traditional area of state law, and not economic
 - Congress INCORRECTLY concluded that it does affect Commerce (no deference)
 - Dissent: not the business of the Court to second guess Congressional findings

Gonzales v. Raich (2005): state marijuana laws, but no exception for medical use in fed law

- Test case: all purchase/use in CA, no connection to interstate commerce, but upheld *Wickard v. Filburn*
- Applied *Lopez* test: intrastate product of commodity sold in interstate commerce IS economic in nature
 - Can have substantial effect based on cumulative impact
 - Court aggregates, even if not purchasing interstate, you are taking demand out of the interstate market
- Congress DOES have power to regulate, and federal law trumps state law (state won't prosecute, but feds can)

NOTE: as Commerce Clause plenary power is withdrawn, Congress turns to other powers to regulate (i.e., spending power, with draw federal funding unless states comply)

Spending Power Alternative: provisions for general welfare (Art.I §8 Cl.1) and taxation power (infer spending)

When Congress can't achieve things through direct regulation (i.e., restraint on Commerce Clause post-*Lopez*)

South Dakota v. Dole (1987): when Congress can use federal funding as incentives for state activity

- Act gave states incentive to raise drinking age to 21, to get highway funds
- Test: 4 requirements for conditions on federal grants
 - In pursuit of general welfare
 - Unambiguous, so that states know ramifications of noncompliance
 - Related to the federal interest in particular national projects or programs
 - May not violate other constitutional provisions

Horizontal Federalism: Limits on state power

Preemption (where Congress has acted, Supremacy Clause, can be express or implied)

Dormant Commerce Clause (where congress hasn't acted, but states can't burden interstate commerce)

Privileges and Immunities (Art. IV) (limits ability of states to discriminate against out-of-staters)

Full Faith and Credit (Art. IV)

Dormant Commerce Clause

- Even when Congress hasn't acted, the Commerce Clause restricts state regulation of interstate commerce such that states cannot engage in economic protectionism. (states may not burden interstate commerce)
- Courts have power to place limits on state authority
 - Arguments for: historical, economy better off w/o state protectionism, political representation uneven between residents and nonresidents of states (*McCulloch*)
 - Arguments against: no textual basis, P&I in Constitution, job for Congress not judiciary to decide what states retain control over (though, can Congress engage in this much oversight?),
- Congress also cannot exercise certain powers delegated to Congress in absence of Congressional action:
 - NO War/treaty powers
 - YES taxation (concurrent power)
 - No enumeration indicates which powers are exclusive or concurrent (doctrine/history decides)
- State laws that discriminate against out-of-staters (suspicious, only allowed if necessary and least restrictive), or state law that treats the same but still burdens (balancing test)
- Exceptions:
 - Congress has plenary power to regulate commerce, may authorize state laws
 - Market participant exception (state gov't may favor own citizens in dealing with gov't owned businesses: as consumers, states can prefer the supply of their own citizens)
- Not exclusive: state actions may also be challenged on P&I (fundamental right or important economic activity) or EP (laws that discriminate against out-of-staters can be challenged)

Gibbons v. Ogden (1824):

Marshall: power "to regulate" excludes the actions of others on the same thing

- Broad definition of Congress's power:
 - Commerce = all states of business, "among the states" = anything affecting more than one state
 - Independent limit on state power, even where Congress hasn't acted: where state regulates commerce with foreign nations or among the states

Concurrence: even stronger, state can't give monopolies on interstate commerce even where Congress has acted

Wilson v. Black-Bird Creek Marsh Co. (1829): Delaware authorized a dam

- Here, state action is distinguished because building a dam is permissible exercise of police power
 - Reject dormant commerce clause to uphold state action: police powers are not repugnant to interstate commerce if no economic protectionism
- Allowed Delaware to engage in activity that affects interstate commerce as long as Congress hasn't spoken
- Congress needs to speak if it's going to get what it wants

Problem with *Gibbons v. Ogden* test: police power and commerce regulation overlap

Other factors to balance: national/state subject matter, direct/indirect effects on commerce

Dormant Commerce Clause analysis of State Regulation

1. Strong presumption of invalidity if statute discriminates against out-of-staters'
 - a. If discriminatory, then upheld *only if* it is necessary to achieve and important purpose
 - b. If nondiscriminatory, then invalidate *only if* its burdens on interstate commerce outweigh its benefits
2. Does state regulation impinge on activity covered by state regulation?
 - a. YES: invalid under pre-emption analysis if conflicts (*Gibbons v. Ogden*)
 - b. NO: go to question 2
3. Does state regulation discriminate against interstate commerce?
 - a. Facial Discrimination: invalid unless it meets strict scrutiny, virtual *per se* rule of invalidity.
 - b. Exceptions: Narrowly Tailored or Congressional Approval or Market Participant Exception
 - i. Narrowly Tailored: non-economic state interest and no reasonable nondiscriminatory alternatives. Means-end tailoring important. No economic protectionism, more than mere deference to "legitimate purpose"
 1. Limiting access to in-state resources
 - a. *Hughes v. Oklahoma* (1979), invalid law that reserved profiting from minnow fishing to state residents
 - b. *Philadelphia v. New Jersey* (1978): ban on importation of waste is struck down, protectionist limit of access to in-state resources
 2. Limiting access to local markets
 - a. *Maine v. Taylor* (1986): ban on importing out-of-state fish upheld
 - i. Threat of infection/nonnative species threat to environment
 - ii. No less discriminatory means to promote local purpose
 3. Requiring use of local businesses
 - a. *Pike v. Bruce Church* (1970), invalidated AZ reg that cantaloupes grown in state be packed in state:
 - i. Court suspicious of statutes requiring business operations to be performed in state where they could be more efficient elsewhere
 4. Invalid if there are available nondiscriminatory means (*Hughes v. Oklahoma*)
 - ii. Congressional approval:
 1. Congress can enact legislation *permitting* the state regulation, where there would otherwise be a Dormant Commerce Clause problem.
 2. Congress can ban what the Court has blessed, and bless what the Court has banned.
 - iii. State is a market participant
 1. State may favor its own citizens in dealing with gov't owned businesses and receiving government benefits
 2. No dormant commerce clause where the state is NOT a regulator
 - a. Note: just b/c DCC doesn't apply, Art. IV P&I or 14A EP might
 3. *Hughes v. Alexandria Scrap Corp.* (1976): state not acting as a regulator
 - a. MD rids state of abandoned automobiles by paying for inoperable cars. More proof of ownership required for out-of-staters.
 - b. As market participant (buying the cars) state can exercise its right to favor its own citizens
 4. Conditions imposed must not have substantial regulatory effect outside the market.
 5. Where state is speaking, 1A doesn't apply, b/c state has a forum to drown out others
 6. Line between regulator and market participant is blurry, can still be protectionist
 - c. No discrimination: Balance burden on interstate commerce against local benefits. Go to question 3.
 4. Does the state regulation burden interstate commerce? Balance benefit of state law and burden on commerce

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Comment: See flowchart for Dormant Commerce Clause analysis of state regulation

- a. Invalid if burdens, unless the state's interest in regulation outweighs the burden on interstate commerce.
 - b. Problem: is this balancing test suited to judiciary? State interests and commerce burdens are difficult to compare.
5. Can be discriminatory in effect, if not in purpose.
- a. *Pike v. Bruce Church* (1970):
 - i. TEST: where statute regulates evenhandedly for legitimate local interest, and the effects on interstate commerce are only incidental, it will be upheld unless the burden on commerce is clearly excessive in relation to the local benefits
 - 1. Least restrictive alternative (can interest be promoted as well with a lesser impact on interstate commerce), but court has never invalidated on this grounds (all rejected laws under dormant commerce clause have been discriminatory, but door is open) However, least restrictive means is generally only used where there is heightened scrutiny
 - 2. Is regulation even-handed with incidental effects on commerce, or does it discriminate against interstate commerce on face or in effect? (EITHER intent or effect)
 - ii. Courts can exercise lots of discretion
 - iii. No intent to discriminate against out of state commerce, but burden on commerce exceeded the state benefits.
 - b. *Hughes v. Oklahoma* (1979): statute prevents transport of minnows for sale outside the state
 - i. Refined *Pike* rule
 - 1. Does challenged statute regulate even-handedly with only incidental effects, or does it discriminate against interstate commerce on its face or in practical effect
 - 2. Does statute serve a legitimate local purpose, and if so, can alternative means promote this purpose as effectively without discriminating.

Privilege and Immunities Clause (rights are unenumerated)

States cannot discriminate against out-of-staters with respect to either *fundamental rights* or *important economic activities*

Fundamental rights—can be constitutional, but suits generally brought under BofR/14A anyway

Economic activities—most deal with local laws interfering with ability to earn a livelihood.

Ex., can't restrict entry to a profession, can't charge more for license

Allowed ONLY IF substantially related to a substantial state interest.

Limited to citizens (corporations and aliens cannot sue under P&I)

Distinguish from Privileges or Immunities Clause of 14A: 14A has narrow construction, rarely used.

Art. IV rights are not fundamental rights in the traditional sense...P&I rights in 14A are fundamental (*Corfield*)

***Corfield v. Coryell* (CCED Pa 1823):** SCOTUS riding circuit, recognizes several P&I (general, abstract)

- o Protection by government
- o Life and Liberty
- o Right to pass through/travel in a state
- o Right to reside in a state for business or other purposes
- o Right to do business in a state
- o Right to take, hold, and dispose of property, either real or personal
- Equality principle: citizens of other states must have same rights
 - o Rights held fundamental in Constitution or in doctrine, not enumerated in P&I clause

P&I (Art. IV) Test

1. Does legislation treat out-of-state citizens different wrt a recognized P&I? (No per se rule, but strong presumption)
 - a. Substantial reason for difference in treatment
 - b. Substantial relationship to state's objective (i.e., availability of least restrictive means)
 - i. *NH v. Piper* (1985): justifications for limiting bar to citizens were rejected
 1. Out-of-staters could also be ethical, know local rules, be available, do pro bono
2. If yes, is the legislation tailored to a substantial justification?

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Comment: Not in course?

- a. *Toomer v. Witsell* (1948): Court strikes down statute requiring non-residents to pay much higher license fee for shrimp boats.
 - i. Commercial activity is w/in purview of P&I.
 - ii. Doing business on terms of substantial equality with state citizens.
- b. *Baldwin v. Montana Fish & Game* (1978): Court upheld licensing scheme that charges nonresidents more for hunting license
 - i. Elk hunting neither fundamental right nor important economic activity
 - ii. business treated better than pleasure: not a means to livelihood

Dormant Commerce Clause	Privileges & Immunities Clause
Laws can be invalidated regardless of whether they discriminate against out-of-staters.	Laws must discriminate against out-of-staters.
Corporations and aliens can sue.	Only US citizens can sue.
If state regulation discriminates, the action is invalid unless it either <ol style="list-style-type: none"> 1. Furthers an important, non-economic state interest and there are no reasonable non-discriminatory alternatives; or 2. The state is a market participant. 	If state regulation deprives an out-of-stater of important economic interests (e.g., livelihood) or civil liberties, the law is invalid unless the state has a substantial justification and there are no less restrictive means. There is no market participant exception.
Economic protectionism goes to DCC.	Disparate treatment goes to PIC.
Pertains to Congressional power.	Pertains to equality among Citizens.
If Congress approves state laws, there is no violation, and if Congress has acted, then the commerce power is not dormant.	Congress cannot undo Court's status quo by approving a P&I violation. No assumption that Congress is "dormant."
Market participant exception.	No market exception.

Full Faith & Credit Clause

FF&C given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Art. IV, §1.

FF&C Requirements for Judicial decisions

- Court must have jurisdiction,
- Case must be decided on the merits, and
- Decision must be final with respect to the originating state.

Separation of Powers

- Judiciary:
 - judicial review over executive
 - judicial review over legislature
- Executive:
 - appointment and non-enforcement over judiciary
 - veto over legislature
- Legislature:
 - impeachment, amendment via state ratification, jurisdiction-stripping, court-packing, budgeting over judiciary;
 - impeachment and veto override over executive

War Powers

- Congress: declare war, create army/navy, control militia
- President: commander in chief, enforcement of the laws
- Judiciary: try cases

Art. II: Executive powers and checks

Unless Art. I language ("All legislative powers herein granted...") there is no restrictive language in Art. II ("The executive Power shall be vested..."). Alternate view, only Art. II enumerated powers.

War time

Veto and 2/3 override (§3, cl.2)

Pardon, not for impeachment or state criminal law (§2, cl.1)

Treaty power, advice and 2/3 consent of Senate, can bypass w/executive agreement (not in Const) (§2, cl.2)

Speed and secrecy important?

Hierarchy: US Const, Treaties/Statutes with last in time rule, Executive Agreements, State laws

Appointment of ambassadors, public ministers, justices, officers of US, advice and consent of Senate (§2, cl.2)

Congress can allocate the appointment of inferior officers as they see proper in:

The president

The courts of law (i.e., Ken Starr appointed by the court, not the president investigated)

The heads of departments

Youngstown Sheet & Tube v. Sawyer (1952): strike during WWII, steel necessary to war effort, directed seizure

- Majority: impermissible seizure. Textualist, this power is not in Constitution
 - No inherent presidential power; may act only if there is express constitutional or statutory authority
 - President can't make laws, can only act via constitutional powers or via Congress delegation
 - Commander-in-chief: scope does NOT include seizure of private property
 - See laws faithfully executed: president is NOT a lawmaker
- Frankfurter's concurrence: Structural and Ethical/Doctrinal
 - President may exercise unenumerated powers if he doesn't violate a statute or the Constitution
 - Congress has *forbidden* presidential seizures, though prudential concerns might permit
 - Taft-Hartley Act provides for strike procedures NOT including presidential seizure
 - Traditional ways of governance can give meaning to Constitutional text
- Douglas's concurrence: reject prudential approach.
 - Inherent authority unless it interferes with the functioning of other branches
 - Text and intent show deliberate choice of Framers to vest takings power in Congress
- JACKSON'S CONCURRENCE: (Jackson was executive insider, prior FDR Cabinet member)
 - Where president acts with express or implied authority of Congress
 - his authority is at height (presumptively valid)
 - judiciary gives extreme deference, invalidate only for constitutional principle (BoFR)
 - Where president acts with Congressional silence
 - upheld as long as it does not take over the function of another branch of government (impossible to formulate general rules, depends on imperatives of events)
 - Where president acts against the express will of Congress
 - invalid unless the law enacted by Congress is unconstitutional
 - judiciary gives no deference, may be presumption against
 - Here, Category 3: assuming that Taft-Hartley Act expressly prohibits seizure
- Vinson's dissent: inherent powers that may not be restricted by Congress, only Constitution renders invalid
 - Taft-Hartley Act does not prohibit seizure, and therefore the case is in Category 2
 - Stewardship theory: executive subject only to the people, valid unless Constitution explicitly forbids
 - Congress committed to war, president executing, congressional silence on Truman's announcement can represent affirmation, therefore the case *could* be Category 1

Korematsu v. US (1944): crime to violate military commander's order. Order for Japanese descent to report to Assembly Centers. Korematsu remains in home despite exclusion order, conviction upheld. (DP, not EP, case)

- First EP case decided NOT wrt blacks
- Majority: All restrictions of civil rights based on race or national origin are facially suspect, Strict Scrutiny:
 - Narrowly tailored to a compelling governmental interest. Here, national security.
 - *Hirabayashi* (1942), same statute upheld wrt curfew provision b/c of gov't interest in preventing espionage and sabotage
- Frankfurter's concurrence: prudential/structural
 - Action should not be stigmatized as lawless because it is during wartime (*inter arma silent leges*)
 - Deference to military in times of war (Judiciary has no power over military, unlike other branches, so it would stand down)
- Murphy's dissent: fails under rational basis

- Over-inclusive (no reliable evidence of disloyalty) and under-inclusive (Japanese, but not Germans, Italians).
- Classic Strict Scrutiny: can't use pretext. Racial animus, not national security pretext, motivates here.
- Jackson's dissent:
 - Poorly tailored statute fails Strict Scrutiny
 - Judicial opinions last longer than executive orders.

Habeas Corpus: redress for unlawful detention, not enumerated in Constitution, but inferred from suspension clause: "The privilege of the writ of HC shall not be suspended, unless when in cases of rebellion or invasion public safety may require it." Implication: w/in Congress's prowess only, since in Art. I, §9 (list of restrictions on Congress's powers).

Ordinary trial	Military tribunals
Jury	Military judges (not ArtIII with tenure)
Speedy and public	Non-public
Right to confront witnesses and subpoena defense witnesses	No compulsory process for defense witnesses
Proof beyond reasonable doubt for criminal convictions	No burden on prosecution to carry proof
Detailed procedural protections to ensure accuracy before death penalty is imposed	No unanimity requirement for death penalty (though military regulations now require this)
Indictment by a grand jury	No indictment by grand jury

Ex parte Milligan (1866): planned uprising during Civil War, military concerned that Indiana courts would acquit.

- Court orders release, military can only try individuals when civilian courts are closed.
 - Indiana is not a theater of war, other possible administration of justice.
 - Limited duration, can't continue after courts reinstated.
- Concurrence: military courts can try individuals when civilian courts are open under some circumstances
 - Not in this case: no expediency concern, tribunals not necessary

Ex parte Quirin (1942): Nazi saboteurs, FDR orders exec order for military trials, Court upholds death sentences

- Uphold use of military tribunals: president has constitutional authority to try individuals
- Distinguish *Milligan*:
 - Punishable acts are of a different character (offenses against law of war, not triable by jury)
 - Distinguish lawful/unlawful combatants: unlawful may be tried by tribunal when tribunal is created by executive subject to Congressional delegation
 - lawful combatants subject to capture as POWs
 - unlawful combatants are subject to trial and punishment by military tribunals for unlawful acts (here, unlawful b/c they buried their uniforms, law of war requires identification as enemy)
 - US citizenship of one θ does not relieve him of consequences of combatant status

Hamdi v. Rumsfeld (2004): US citizen, seized in Afghanistan, must be accorded DP and meaningful factual hearing
O'Connor's Plurality opinion: enemy combatants can be detained, but have right challenge their combatant status. Can be tried by military tribunal if it accords them due process rights.

Note: implicit use of *Youngstown's* categories in evaluating executive action

1. Does executive have authority to detain citizens who qualify as "enemy combatant"? YES (pursuant to an act of Congress, the AUMF)
 - a. Define enemy combatant: "part of or supporting forces hostile to US...engaged in armed conflict against US"
 - b. Congressional Authorization for the Use of Military Force (9/18/01) gave president authority to detain citizens. (*Youngstown* Category 1)
 - i. AUMF: president authorized to use necessary and appropriate force against those who planned terrorist attacks, in order to prevent future acts of terrorism
 - ii. Non-Detention Act of 1971: no citizen shall be imprisoned or otherwise detained by the US *except pursuant to an act of Congress*
 - iii. Acc. Plurality, the AUMF is such an act of Congress, as "necessary and appropriate force" includes detention (N&A is a broad grant, similar reasoning as N&P in *McCulloch*)
 - iv. President's power stronger when Congress supports (*Youngstown* Category 2)
 - c. Note: detention can only last as long as the conflict
 - i. But, as nature of conflict changes, detention may be extended, not traditional war
 - ii. Majority hesitant to hold executive to compliance with international law

2. What process is due a citizen who contests his "enemy combatant" status?
 - a. Because habeas corpus is NOT suspended by Congress, θ can contest status before neutral tribunal
 - b. Gov't argues:
 - i. No judicial review of individual process, only review "whether legal authorization exists for broad detention scheme"
 - ii. Judicial deference
 - c. *Mathews v. Eldridge* test: deciding when a deprivation has occurred and DP is required: balancing
 - i. Private interest (detention)
 - ii. Risk of erroneous deprivation and Probable value of additional procedural safeguards
 - iii. Government's interest (security)
 1. (no guidance, however, on how to balance the competing interests...discretion to ad hoc weighing lets Court subjectively value the underlying interests)
 - d. Process required:
 - i. notice of allegations
 - ii. opportunity to rebut before neutral tribunal (military tribunal might work)
 - iii. criminal procedure standards (but evidence rules may be relaxed)
 - iv. habeas review in federal court
 - e. Plurality rejects both gov't arguments: remand for balancing test from *Mathews v. Eldridge*
 - i. War is not a blank check to president, individual process applies, at minimum requires notice, a meaningful factual hearing, and representation by counsel
 1. Lower standards: i.e., hearsay, burden of proof on θ ? Remand, but case settled so no occasion for Court to announce these procedures (Hamdi surrenders US citizenship)
 - ii. Military cannot create, adjudicate, or process rules

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Comment: see powerpoint

Souter's concurrence/dissent

- Congress must expressly authorize. Non-Detention Act, can't hold US citizen as enemy combatant
- AUMF doesn't explicitly authorize detention of enemy combatant

Scalia/Stevens dissent: no authority to detain unless Congress expressly suspends habeas

- Citizen/noncitizen distinction matters
 - Hamdi is citizen, courts are open (*Milligan*)
 - Suspension clause: detained citizen will be tried or released...government can try Hamdi in an Art. III court, or Congress can suspend habeas.

Thomas dissent: DP doesn't require second guessing the president. Citizen/noncitizen distinction matters

Padilla v. Rumsfeld (2004): arrested in US for crime planned in this country

- Bring habeas petition in the place where detained, against the person responsible for detention (brought in the wrong place)
- Dist Court: gov't must criminally charge θ or release him...4th Cir reversed. Gov't in 2005 issues indictment, no longer held as enemy combatant.

Rasul v. Bush (2004): non-citizens detained at Gitmo have habeas right, according to Congressional *statute*

- Limited to whether federal courts can hear habeas petitions of Gitmo detainees
- To file for habeas, must be citizen OR under the court's jurisdiction.
- Distinguishes *Johnson v. Eisentrager (1950)* (no statutory right to habeas for German citizens capture by US forces in China, combatants cot military tribunal trial), because Gitmo, unlike China, US courts have exclusive jurisdiction, Gitmo detainees don't get tribunal trial.

Hamdi + Rasul = detainees can challenge enemy combatant status, can file habeas petitions whether citizen or not, and whether in the US or Gitmo. DoD creates Combatant Status Review Tribunals, to determine combatant status.

Hamdan v. Rumsfeld (2005): Government seeks dismissal (DIG) because of intervening Detainee Treatment Act:

Protects prisoners from inhumane treatment, but strips SCOTUS's habeas juris

Congress can control appellate juris of SCOTUS, *Marbury*

- 1) despite DTA, Court can hear the case
 - a. DTA §1005(e)(1) strips jurisdiction to hear habeas petitions, and §1005(e)(2)-(3) placed exclusive jurisdiction from review tribunals in DC Circuit
 - b. (e)(2)-(3) were applicable to pending cases, but not (e)(1), so court's jurisdiction NOT stripped
- 2) military commissions are not a constitutional exercise of executive authority
 - a. unlawfully detained because military tribunal improperly constituted

- b. Universal Code of Military Justice, and DTA, AUMF, do not permit these tribunals b/c they acknowledge, but not authorize them
- c. UCMJ internalized law of war, including Geneva Convention (if violates, Geneva Convention, then violates UCMJ)
 - i. Rules of court-martial and military tribunals must be uniform, but tribunals:
 1. Nondisclosure of certain evidence to θ and attorney
 2. Inability of attorney to discuss evidence with θ
 3. Relaxed rules of evidence (just probative)
 4. No Art. III appeal
- d. *Youngstown* analysis:
 - i. *Executive power* not category 1 if the statutes do not authorize the executive to detain
 1. Dissenters argue that this IS Category 1, based on interpretation of UCMJ
 - ii. Acc. Stevens, this is Category 3, since Congress indicates otherwise
 1. President may not disregard limitations that Congress has, in proper exercise of its own war powers, place on his powers. President could have acted if Congress had been silent
- e. President can return to Congress and seek the authority he wants.

Kennedy concurrence: does not join opinion wrt whether "conspiracy" is a war crime

Scalia dissent: DTA strips habeas review of Gitmo detainees, noncitizen difference = no rights under Suspension Cl

Thomas dissent: no habeas per Scalia, AUMF authorizes exec use of military tribunals

Balancing: civil courts, court-martial, military tribunal...military wants to keep individual away from full panoply of rights, b/c of terrorism risk

Court martial	Military Tribunal
Presiding officer must be military judge	Presiding officer can be a military lawyer
5 member court required	3 member court sufficient
Evidentiary standards based on Federal Rules of Evidence	Relaxed evidentiary standards (hearsay, unsworn declarations, coerced statements admissible)

Boumediene v. Bush (2008): Bust signs Congress's Military Commissions Act, as per *Hamdan* decision, seeking Congressional authority to act. This returns the *Youngstown* analysis to Category 1. Now, no jurisdiction for habeas if θ detained as enemy combatant, all provisions apply to pending cases.

- CONSTITUTIONAL habeas claim (not statutory, as in *Rasul*)
- Has Congress unconstitutionally suspended habeas?: NOT extreme circumstances (not martial law)
- Do foreign aliens have habeas rights?
 - If no, then Congress hasn't unconstitutionally suspend a right that doesn't exist.
 - Historical modality shed little light on whether aliens have habeas rights.
 - Structural modality: sovereignty/control. US has no sovereignty (Cuba) but it does control.
 - Court acts in institutional self-interest, trumping political branches
- TEST: Acc. Kennedy, all 3 factors met
 1. citizenship and status of the detainee and the adequacy of the process through with the status determination was made
 2. nature of the sites where apprehension and detention took place
 3. practical obstacles inherent in resolving prisoner's right to habeas
- Dissent: this was a bait and switch: *Hamdan* invited Congress to respond, and Court then undermines

Future: Obama closing Gitmo, habeas petitions allowed. *Al-Mari* case is test for Obama to distance from Bush policies w/o giving up national security (how robust should θ 's rights be at trial...will presidential power continue to self-aggrandize?)

Fourteenth Amendment

Pre-14A: BofR not applicable to states. *Barron v. Baltimore*: restrict federal actions, not state and local. (the gov't that created the instrument)

Dred Scott v. Sanford (1857): slave sues for freedom, in free state: Court says no, not citizen

- State citizenship did not guarantee π US citizenship
- Slaves are not citizens, so cannot bring suit in federal court
- Congress must give citizens full protection of BofR (property = slaves)

14A, §1: (passed by victorious North after Civil war, 1868, implicitly overruling *Dred Scott*): "All persons born or naturalize in the US, and subject to the jurisdiction thereof are citizens of the US and of the state wherein they reside."

14A, §2: "No state shall make/enforce any law which shall abridge the *privilege or immunities* of citizens of the US; nor shall any state deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction the *equal protection* of the law."

- P&I-substantive rights (P&I also referenced in Art. IV, protects fundamental rights, disputable claim that Framers' intent was to apply the BofR to the states via 14A)
- DP-procedural rights
- EP-substantive rights disbursed in even handed manner

14A, §5: "Congress shall have the power to enforce, by appropriate legislation, the provision of this article." Breadth? Ratification under military occupation of Reconstruction South, Congress shut out Southern members to get 14A passed—procedurally flawed, but (Ackerman) moment of higher lawmaking.

Strauder v. West Virginia (1880): African American convicted by jury from which AAs are excluded by statute. EP violation.

- EP does not guarantee a member of *∂*'s own race, but there cannot be a racial bar: civil right to jury of peers
- Rights of excluded potential juror and rights of *∂*: political right, not initially envisioned as under EP
 - Potential jurors and standing problem: aren't trying to get on juries, not likely to bring his own claims, allow 3rd party (*∂*) to bring claim
 - Ability to serve on juries is equal across aces
 - Constitution of juries is important part of right to jury trial, so rights of *∂*
 - Likely to be treated better based on demographic similarity
- BOTH the anti-subordination and anti-classification cut against this discrimination
 - These paths diverge in affirmative action cases...see below
- Limits: e.g., women *∂*s don't have right to not have females excluded from jury
- Dissent: 14A protects civil, not political or social rights.
 - Civil: hold property, sue, contract, travel
 - Political: vote, hold office
 - Social: associate, marry

Neil Gotanda: *A Critique of "Our Constitution is Color-Blind"* and different conceptions of race

- Status: market of social status, esp. white supremacy
 - Consensus that this is invidious
- Formal: bloodlines/skin color (thin biological concept)
 - Anti-classification, repress color
- Historical: phenomenon creates difference only through contingent historical practice
 - Anti-subordination, don't repress difference
- Culture: community and consciousness, observe connections and statistics w/o assumptions
 - Pluralist, diversity is a benefit (assumes that different races *actually* have different perspectives)

Court is inconsistent in how it conceives of race (same implications for gender in transgendered cases)

- *Ozawa v. S (1922)*: Asians can't naturalize, just be born. Upheld, *biological*
- *US v. Thind (1923)*: white means caucasian, and many biologists consider South Asians Caucasian. Court says what it really meant in *Ozawa* was *public knowledge*

Legal treatment based on *status* is classic EP: member of class and treated differently b/c of status.

Racial formation versus racial treatment: defining race (i.e., immigration law) and treating race (civil rights)

Racial treatment cases: Court lets states define race as they will (i.e., one-drop rules)

The Slaughterhouse Cases (1873): LA law grants monopoly to Slaughterhouse company over all butchering in NO. 13 and 14A challenge. Law upheld against both. *Narrow reading of Priv. or Imm. Clause.*

- P&I rendered meaningless: Court failed to conceive of the Reconstruction Amendments as shifting the federalist balance away from states.
- 13A and 14A solely to protect former slaves: unity of purpose
 - 13A: butcher's monopoly is not slavery
 - 14A DP: at this point, DP = notice and opportunity to be heard. No substantive DP.
 - Note: if *Slaughterhouse* hadn't happened, then *Lochner* would have been decided under P&I.
 - 14A EP: high level of generality in text, susceptible to ethical modality.
 - 14A P&I: NOT a violation, though deprives a privilege to pursue a vocation...
 - P&I is robust under Art. IV's equal treatment requirement.
 - Contrast Art. IV with 14A language. P&I of US citizens is not as robust as the former.
 - Federal/state distinction: guarantee rights against state gov't, can only bring Art. IV claim against another state. NOT your own state.
- Note: all other restrictive interpretations of 14A were subsequently overturned, except for P&I
 - DP later interpreted to protect right to practice trade
 - EP later interpreted to protect others than blacks
 - P&I's restrictive interpretation has prevented the use of that provision to apply the BofR
- Field's dissent: 14A meant to ensure that state's citizens could sue for same P&I that non-citizens could sue for under Art. IV.
 - Majority's interpretation makes P&I surplusage, granting only rights that already existed: P&I null
 - Currently, Art. IV P&I is interpreted as the EP clause functioning across state borders
- Bradley's dissent: broader understanding of 14A P&I, as incorporating the BofR
 - Falls to DP: repository of unenumerated rights under substantive DP vehicle and incorporation
 - This eventually becomes the majority view of SCOTUS

Saenz v. Roe (1999): revival of 14A P&I

- First time P&I used to invalidate a state law (law limited welfare benefits for new residents of a state to the level of those of the state they moved from)
- Stevens: right to travel is fundamental, new residents treated the same b/c of P&I
 - State concern about being a magnet for those who want higher benefits: burden too small to justify under strict scrutiny
- Related to commerce and dormant commerce clause (can't burden interstate commerce) and Art. IV P&I (can't discriminate against out-of-staters)
 - Facilitates strength of union, national citizenship shouldn't be impeded by provincialism)
- Uncertain future of P&I: new versus long time residents of a state, but, involves state's ability to define when a person becomes a resident of a state for the purposes of receiving a benefit (such as in-state tuition)
 - Might be used to protect rights thus far guarded under DP (such as privacy or application of BofR)

Ely: right to relocate, escape from oppressive environment (further, vote with your feet)

See also *Shapiro v. Thompson*: can't impose year-long residency requirements for state benefits

Workhorse function of DP:

- Notice and opportunity to be heard (Procedural in nature, text, and intent)
- Repository of unenumerated rights via substantive DP
- Incorporation of BofR against the states
 - Yoshino: shouldn't give the last 2 to DP, but rather, P&I. Can't, b/c of *Slaughterhouse*.
 - Ex. *Gitlow v. NY* (1925): 1A applies to states
 - Ex. *Powell v. Alabama* (1933): denial of counsel in capital case violated DP (Scottsboro)
 - Selective versus total incorporation
 - Historical: arguments on both sides
 - Federalism: federal restrictions on states, faith in states' extension of rights w/o BofR
 - E.g., Thomas and denying that Establishment Clause impacts states: "Congress shall make no law..."
 - Role of judiciary: selective gives judges discretion/subjective choice

- Cardozo: DP clause included principles of justice rooted in tradition and conscience...and implicit in the concept of ordered liberty. *Palko v. Ct.* (1937)

Incorporated Rights:

- 1A (establishment, exercise, speech, press, assembly, petition)
- 4A (search and seizure, warrant/probable cause, exclusionary rule)
- 5A (double jeopardy, self-incrimination, just compensation)
- 6A (speedy trial, jury, notice, confront adverse witnesses, compulsory process to find favorable witnesses, assistance of counsel for possible imprisonment)
- 8A (excessive bail, cruel and unusual punishment)

Unincorporated Rights:

- 2A (upheld gun control laws)
- 3A (never deemed b/c never reached the court)
- 5A (right to grand jury in criminal indictments)
- 7A (jury trial in civil cases)
- 8A (excessive fines)

Limitation: Civil Rights Cases to Brown

13A §1: no slavery or servitude, except convicts can do hard labor

13A §2: Congress shall have power to enforce this article by appropriate legislation

13A §2 Enforceable against public and private actors for badges and incidents of slavery (only action against private actors)

14A §1: state denial of EP is self-activating, do not need Congressional action to bring EP claim

14A §5: Congressional action needed: Congress has power to independently enforce other provisions, but not §5

14A §5 against public actors only for badges/incidents, EP, and violations beyond badges/incidents

The Civil Rights Cases (1883): Requirement of state action (private conduct need not comply). Until state law has been passed taking action adverse to the rights of citizens, then Congress can not pass legislation under 14A

- Strikes down Civil Rights Act of 1875 as in excess of Congress's power under 14A §5.
 - Legislation should be adapted to the mischief and wrong which 14A was intended to provide against: state action adverse to the rights of the citizen secured by the amendment
 - Congress cannot legislate proactively wrt private actions
 - Can be prophylactic IF it sees the state legislation coming
- Not intellectually coherent, but Congress later uses Commerce Clause (plenary power) to pass CRA 1964
- Contracts Clause (Art. I §10), what states are prohibited from doing; once state acts to violate K clause, then Congress can legislate. (BUT this suggests that §5 is surplusage...)
- No power under 13A §2, refusal to serve is not a badge of slavery, just civil injury
- State Action Doctrine: conceptual disaster area: murky line between state and private action
 - Acc. Majority, only company towns (*Marsh v. Alabama* 1946) or running elections can private actor be deemed a state actor
 - State inaction: *DeShaney* (1989), failure of state to intervene in child abuse, no EP claim against Dept of Social Service for *failure* to act
 - No affirmative right to medical care, only when in state control/custody b/c of state action
- Harlan's dissent: public accommodations are public, even though run by private entities
 - Functionalist, not formalist: burdens and disabilities which constitute badges of slavery

State action:

Few constitutional rules apply to private actors (e.g., 13A)

Exceptions:

- Public functions: private conduct that is traditionally exclusive gov't domain (*Marsh v. Alabama*)
- Entanglement: if gov't affirmatively authorizes/encourages/facilitates unconstitutional conduct (*Shelley v. Kramer* (1948): court enforcement can't support private agreements to discriminate, *Bell v. Maryland* (1964): state using police to enforce segregation of restaurants was state action)
- Statutory: state and federal statutes can require private conduct to meet higher standards

Arguments for state action doctrine:

- Textual: "nor shall any state..." 14A
- Historical: common law and natural law, personal liberties
- Policy: private autonomy, and zones of state sovereignty

Plessy v. Ferguson (1896): LA law separating RR cars, 1/8th black is removed, challenged on EP grounds

- Collusive suit, test case with π who looked white.
- Claim: misclassification takes away “status” property of being white.
 - Court: π isn’t white, so nothing taken away
 - Social rights excluded from 14A protection, states can regulate reasonably
- Harlan’s dissent (reflected in *Brown*)
 - Separation is stigmatizing, based on white supremacy. Civil, not social, right.
 - “Constitution is color blind” and does not tolerate caste systems
 - Chinese can sit w/whites and they can’t even be citizens (but, in that case, they are not a threat the way that blacks are)
 - Both anti-subordination and anti-classification

Equal Protection

EP analysis

1. what is the classification
 - a. facially discriminatory
 - b. facially neutral but discriminatory impact (must have discriminatory impact AND *purpose*)
2. what is the appropriate level of scrutiny: depends on classification (consider immutable characteristics, did not choose, can’t change, ability of group to protect itself politically, history of discrimination)
 - a. Strict: race, national origin
 - i. necessary to achieve compelling purpose, gov’t has burden of proof, almost always fatal
 - b. Intermediate: gender, nonmarital children
 - i. Substantially related to important gov’t purpose, gov’t has burden of proof
 - c. Rational Basis: rationally related to legit gov’t purpose, challenger has burden of proof
3. does the government action meet the level of scrutiny
 - a. means and ends relationship (is law under/overinclusive?...not necessarily fatal, but considered, esp in heightened scrutiny)

Separate But Equal Disestablished

Social factors: black soldiers in WWII, race-hate of Nazis exposing hypocrisy in treatment of blacks
Marshall and Houston’s NAACP Litigation strategy: Separate but equal will collapse under its own weight if you REALLY make them have 2 of everything be truly equal. Start with graduate schools that are harder to duplicate and move down. (Less resistance to grad schools as opposed to primary schools, fear of miscegenation).

Missouri ex rel. Gaines v. Canada (1938): separate but equal not satisfied by claims that law students can go to law school in another state

Sweatt v. Painter (1950): Separate but equal not satisfied by hastily constructed law school for blacks

McLaurin v. Oklahoma (1950): Separate but equal not satisfied by separate sections for African Americans in classrooms, libraries, and cafeterias (hindered ability to learn, exchange views, &c)

Brown v. Board of Education (1954): unanimous decision undermines separate but equal. Warren Court era, judicial liberal activism (Warren replaced Vinson on court, V would likely have dissented, now it’s unanimous)

Justices ask litigants to address 3 issues:

- Framer’s direct intent
 - NAACP/Marshall & Robinson: Fears of integration expressed in floor debates, but not quashed
 - Davis: 29th Congress proposes 14A AND votes out funding to black schools
- Framer’s “springing” intent
 - NAACP/Marshall & Robinson: 14A framed in broad terms, *Strauder v. WVa*
 - Davis: Repeatedly in Courts, Framer’s intent has not be interpreted to permit desegregation
- Judicial power independent of Framer’s intent
 - NAACP/Marshall & Robinson: Judiciary has already required *de facto* desegregation in the rigorous equalization cases
 - Argument for Repeal.
- Opinion is unanimous, non-accusatory, readable, non-rhetorical, unemotional.
 - Jackson: in hospital, Warren gets him to sign. Reed: Southerner, his dissent would have given South reason not to comply, which would be bad for nation, so he signs.

- Institutional decision (like when Marshall court deviated from seriatum).
- Structure of argument
 - Dismisses historical evidence as inconclusive
 - Description of cases that chipped away at Sep but Equal
 - Important of education
 - Contemporary sociological evidence (doll study)
 - Separate facilities are inherently unequal
 - Deferral of statement of remedy: let people live under ideals before forced to live up to them (all deliberate speed) Flexible enforcement, not direct coercive effects (idealistic)
 - But, Hollow Hope.
- Questions: is separate really unequal? EP requires similarly situated be treated the same...overstep?
 - Should court have relied on psychological studies to strike down SbutE? What if scientific conclusions change?
- Originalism:
 - Original intent: meaning ascribed by Framers
 - Original understanding: as understood by ratifiers, or plain meaning
 - Original application: meaning is that attributed by Framers and ratifiers during the period of enactment
- Brown skirts question of originalism
 - Inconclusive (no consensus)
 - Inapposite (in light of changed circumstances)
 - Inquiry must be for intent of immediate AND long-term effects
 - Bickel: CRA of 1866 moved away from civil rights to DP formulation

Bolling v. Sharpe (1954): *Brown's* counterpart for DC (argued separately b/c it addressed the federal not state gov't)

- Constitution prohibits state from maintaining racially segregated public schools, so same Constitution can't permit Feds to do it.
- EP applies to federal government through 5A (discrimination may be so unjustifiable as to violate DP)

Aftermath of *Brown*: series of per curiam decisions extends it past educational context to other public services.

The Southern Manifesto: *Brown* violates Constitutional principles of judicial review: restraint, adherence to long-existing precedent, fidelity to original understanding, respect for federalism

Incorporation/reverse incorporation

BofR → 5A DP → limit fed gov't

14A → 14A DP → limit state gov't

14A → 5A DP → ? incorporate BofR against states

Strict Scrutiny

Classifications Receiving More than "Rational basis" Under Current EP Doctrine:

Strict Scrutiny: narrowly tailored to a compelling governmental interest	Race (US v. Korematsu, 1944) National Origin (Oyama v. CA, 1948) Alienage (Graham v. Richardson, 1971,) political function exception
Intermediate Scrutiny: substantially related to an important governmental interest	Sex (Craig v. Boren, 1976) Non-marital parentage (Trimble v. Gordon, 1977)
Rational Basis with Bite: rationally related to a legitimate governmental interest (not incredibly deferential, cf optometrist case)	Disability (Cleburne v. Cleburn Living Center, 1985) Sexual Orientation (Romer v. Evans, 1996)
Rational Basis: rationally related to a legitimate governmental interest	Everything Else Age (Massachusetts Board of Retirement v. Murgia, 1976) Opticians (Williamson v. Lee Optical, 1955)

Alternate conceptions: Court exercises flexibility (i.e., undue burden standard in *Casey*)

Normative argument in favor of a sliding scale, rather than levels (Marshall and Stevens, *Craig v. Boren*): consider constitutional and social importance of interests affected and the invidiousness of the basis on which the classification is drawn...more candid discussion of the competing interests.

Reality is a range of standards anyway (see undue burden, rational basis with bite)

Means/Ends Analysis Under Different Tiers of Scrutiny:

	Means	Ends
Strict	Narrowly Tailored	Compelling Govt Interest
Intermediate	Substantially Related	Important Govt Interest
Rational basis	Rationally Related	Legitimate Govt Interest

Equality/Liberty matrix:

	Rights-based strict scrutiny (liberty)	Rights-based rational basis review (liberty)
Classification-based strict scrutiny (equality)	Law barring marriage on basis of race	Law barring welfare entitlement on basis of race
Classification-based rational-basis review (equality)	Law barring marriage on the basis of age	Law barring welfare entitlement on the basis of age

Essentially a per se rule of invalidity: don't want lower courts to apply Strict Scrutiny to race and find statutes valid. Do NOT let gov't use race as a proxy (essentially because of potential in situations like *Korematsu*)

Naim v. Naim: prior to *Loving*, Court holds that integrity of races is sufficient justification to uphold VA's antimiscegenation statute (equal application)

After *Naim*, political climate shifts, more support for civil rights movement, Civil Rights Act of 1964.

McLaughlin v. Florida (1964): struck down law punishing interracial cohabitation more severely than other cohabitation, EP requires Court to analyze classifications drawn for arbitrary or invidious discrimination (beyond surface of law)

Loving v. Virginia (1967): interracial couple marries in DC, returns to VA, where marriage not enforced

- Statute: whites can't marry member of another race (except Native Americans), does not prevent other races from marrying each other.
- Rational basis insufficient: strict scrutiny requires that statute be narrowly tailored to compelling interest
- Marriage is a *fundamental right* under DP clause
- Pierce the veil to show discriminatory purpose
 - Equal application argument rejected b/c it does not treat whites/nonwhites the same: equal application does not guarantee equal protection
 - Court defines the act as marrying a white person, and whites/blacks treated differently
 - Smacks of white supremacy, unconstitutional
 - No overriding purpose independent of invidious racial discrimination
 - Equal application is NOT enough to exempt a statute from 14A scrutiny
- *Carolene Products* fn4, para 3: "nor need we enquire...whether prejudice against discrete and insular minorities may be a special condition...which may call for a correspondingly more searching judicial inquiry"

From *Loving* until *Grutter* in 2003, strict in theory is fatal in fact.

Palmore v. Sidoti (1984): custody awarded to white father when white mother married black male

- Best interests of child may incorporate social prejudice against interracial families
- Social prejudice can NOT be a compelling gov't interest

Johnson v. California (2005): strict scrutiny applies to race-based cell assignment program

- Court is competent, needed defer to prison policy...more than just rational basis
- EP against racial classification is not incidental to incarceration
 - Not narrowly tailored, conceivable that policy will actually further violence: remanded on this issue
- Concurrence: anti-subordination principle should govern to permit benign racial classifications, but this one is NOT benign
- Dissent, Stevens: should be more narrow, could screen potentially violent prisoners
- Dissent, Thomas/Scalia: deference is due in prison context

Morales v. Daly (S.D. Tex. 2000): strict scrutiny does NOT apply to census questions soliciting race

- Government interests are compelling and narrowly tailored
 - Assessing racial disparities in health and environmental risks
 - Racial redistricting requirements
 - Enforce provisions of CRA

Brown v. City of Oneonta (2d Cir. 1999): police use victim's description (incl. race)

- strict scrutiny does NOT apply to police use of racial suspect descriptions to conduct sweeps
- disparate impact, but NOT purpose or application: contextual (i.e., how many blacks in community, burden on those citizens, symbolic harm, weighed against seriousness of crime and law enforcement needs)
- Victim made race salient, police allowed to use characteristics (don't hobble police investigation)

Until *Grutter*, strict in theory is invalid in fact.

Morales/Oneonta: get out of "per se" invalidity by saying that strict scrutiny does not even apply

- race-based differentials based on *treatment* draw strict scrutiny, but those based on *classification* or *formation* do not draw strict scrutiny

Disparate Impact Doctrine

Statutes that raise claims of racial discrimination

1. Facially discriminatory
 - a. Mentions race on its face: *Strauder*, *Loving*
 - b. Different burdens to different groups (*Strauder*), or formal equality of application (*Loving*)
2. Facially neutral, applied in a discriminatory manner
 - a. Classic Case: *Yick Wo*: facially neutral, but administered with "evil eye and uneven hand"
3. Facially neutral law passed with discriminatory intent
 - a. *Hunter*: law disenfranchised felons, facially neutral, but intended to discriminate
 - b. Piercing the veil reveals a discriminatory purpose
 - c. Similar to *McCulloch*, Congress can't act under a pretext and get deference w/o scrutiny
4. Facially neutral law passed w/o discriminatory intent that has a discriminatory *impact*
 - a. Discretionary enforcement permitted and allows for discriminatory application
 - b. IF discriminatory effects were not foreseeable (*Washington v. Davis*) or if discriminatory effects were foreseen but not the specific purpose (*Feeney*): rational basis review

All categories except for #4 will draw strict scrutiny. If no *intent*, then no amount of impact will cause the statute to draw anything higher than rational basis review

- Level of intent must be so high that the mere knowledge of discriminatory impact will not equal intent; discriminatory purpose must be more than mere knowledge
 - *Rodgers v. Lodge*: GA legislature maintained that law was not originally intentionally discriminatory
 - Court holds it a violation of EP because legislature had *maintained* it
- Statutory treatment of disparate impact
 - More protection under Title VII for pure impact claims
 - Title VII includes color and religion, not just race
 - Employer can defend facial discrimination only on basis of bona fide occupational qualification (but there is no bfoq for race)
 - Employer can defend against disparate impact only on the basis of business necessity.
 - Under Constitution, employer has no obligation to address impact if he has no intent (only rational basis review)
- Distinguish between intent and impact
 - Is the facially neutral policy simply a pretext for discriminatory *intent*?
 - If Yes, invalid.
 - If No: does the policy have a discriminatory *impact*?
 - If yes: can the employer produce a business justification for the policy?
 - If yes, valid.
 - If no, invalid.
 - Example: English only requirements: (disparate impact for national origin)
 - Title VII: not racially discrim on face → probably no intent, hard to prove → disparate impact on national origin → employer must show "business necessity" justification

Constitutional Context

- Facially neutral, but with discriminatory intent: classic “pretext”
 - Strict scrutiny applies
- w/o intent, and with impact, there is still cause of action under Title VII but NOT constitution
 - only rational basis applies
 - exception: if the impact is probative of intent (egregious)
- Example: official language is English
 - Facially discriminatory? No.
 - Discriminatory intent? No.
 - Disparate impact? Yes.
 - But likely to be validated under rational basis...state not required to respond with it’s valid reasons (unlike Title VII situation)
- Title VII stronger protection, partly because it is limited in scope to employment context. To see difference, contrast *Griggs* (Title VII) and *Washington v. Davis* (Constitutional)

Discriminatory purpose: hard to prove (often unconscious)...but equality or results not necessary, only stopping gov’t discrimination

- History of the action
- Stark pattern of impact
- Legislative or administrative history

If facially neutral, π’s burden to show purpose and effect

If shown, gov’t can attempt to show it would have done the same regardless of race/origin

If gov’t shows this, then rational basis applies

If not, then invalid, strict scrutiny analysis unnecessary b/c purpose cannot be compelling

Yick Wo v. Hopkins (1884): laundry in stone/brick or need permit, no Chinese got waivers but all non Chinese did

- “as applied”, discriminatory, reversed conviction
- Stark, statistical pattern of impact alone can sustain EP claim

Griggs v. Duke Power (1971): Requirement for high school diploma and intelligence test that impacts blacks

- Struck down. Must treat people differently in order to treat them equally
- Allowable discriminations are for business necessity: absence of malicious intent on part of employer does not save
- This is a Title VII case

Washington v. Davis (1976): similar fact pattern, testing for police force, blacks failed more than whites, EP claim

- Unlike Title VII, EP does not allow for mere showing of disparate impact
 - More than rational basis review *only* if there is discriminatory purpose, no amount of disparate impact will be sufficient alone.
 - Slippery slope argument: could invalidate so many government activities on disparate impact alone
 - Appropriate remedy for disparate impact is legislation (such as Title VII)
- Everything turns on **intent**. Here, intent left undefined. Court uses intent for “purpose,” wanting the result, not just knowing that X will result.
- Stevens concurrence: balance merits of individual cases

Arlington Heights (1977): six places we can look for discriminatory purpose

- One of these factors is **impact**, insofar as it is probative of discriminatory purpose
- Historical background of legislation
- Sequence of events leading up to legislation
- Procedural departures from the norm
- Substantive departures
- Legislative or administrative history

Personnel Administrator v. Feeney (1979): preference for veterans in civil service jobs, excludes women

- Court uses intent for “purpose,” wanting the result, not just knowing that X will result.
- Foreseeable impact insufficient to ascribe discriminatory intent of legislature (contingent on facts?)
- Knowledge that it would impact women disparately, but not *purpose*.
 - Must engage in activity not *in spite of* effect, but **because of** the effect (heightened scrutiny only for the latter)
 - Proving purpose requires more than awareness of consequences
- If we accept disparate impact that shifts the burden to the government to show rationales for all policies with impact, there will be endless litigation (Justice White loves slippery slopes arguments).

US v. Clary (8th Cir. 1994): 100-1 disparity in sentencing for crack cocaine versus powder

- Disparate impact case:
 - Not discriminatory on face, no findings support theory of unconscious racism in Congress
 - Rational basis review: not enacted with discriminatory purpose (based on dangerousness of drug)
 - Mixed motive cases: enough legitimate motives to justify

Ratcheting up “purpose” requirement in *Feeney* makes it hard to show purpose.

Also, institutional competence: who should decide, Congress or Courts, what purpose is legitimate.

Amanda Bakale 4/29/09 11:21 PM

Comment: See table on PPT slide

Affirmative Action

Where a group (i.e., racial minorities) are being *advantaged* by the state. Can state do this, under EP?

Equalization: provide advantage to counterpoint history.

Anti-classification principle prevails: Constitution is not color-blind.

- Congruency: past distinction between federal/state affirmative action programs: after *Adarand*, both federal and state programs get strict scrutiny (fed no longer gets court sympathy)
- Consistency: regardless of which group is affected (advantaged or disadvantaged group), always strict scrutiny
- Context: Two main contexts: contracting and education
 - Contracting: remediation of past discrimination rationale
 - Education: remedial and diversity rationales
 - Note: remediation and diversity are *compelling government interests* under strict scrutiny standard
 - Ask if this interest actually exists.
 - Is there narrow tailoring to the interest?

Amanda Bakale 4/30/09 2:16 PM

Comment: See handout

Objectives of AA: remedy past discrimination, diversity, role models, increased services to minority communities (rigid review).

Rationales for AA: (bolded remain)

- Racial balancing (reflect percentage in the population): close to quota system, so Categorically Rejected
- **Remedy past discrimination by state actor:** must be by same state actor that is promulgating the remedy
 - This is why Univ. Michigan did not rely on remedial, but rather diversity rationale
 - Broad/narrow (class or individual)
 - Or in a field where there is past discrimination, *Fullilove v. Mutznick*, upheld law for funds for minority-owned businesses (but overruled by *Adarand/Crosby*)
- Remedy societal discrimination: Affirmative Action can NOT be used to remedy
- Promote health care in minority communities: has disappeared as rationale, form of stereotyping
- **Diversity:** survives strict scrutiny acc. Powell in *Bakke*

Education/employment divide: in first, diversity of viewpoints is compelling, but no such 1A issue in employment.

Goals versus quotas: goals are permissible, case by case analysis of applicants, but quotas are not allowed.

Regents of the University of California v. Bakke (1978): UC Davis med school’s quota system: 16 seats for minorities

- Quota systems get struck down *per se* (whereas race as a plus factor for those seats might survive)
- Title VII and Constitutional analysis identical
- 4-1-4 decision. Powell splits the difference
 - **EP** violation under strict scrutiny, add Burger 4 (intermediate) to strike program down
 - But also, you might have a program that considers race, add Brennan 4 to uphold using race as a factor (not dicta: narrow tailoring requires a *goal*, not a *quota*)
 - Only part where 5 justices with is that “race can be a plus factor”
- Strict scrutiny:
 - Harms:
 - Whites may be harmed by burden of quota system
 - Blacks may be harmed by reinforced stereotypes and fostering dependence
 - Government interests considered:
 - Increasing number of minority physicians: rejected, not compelling as no empirical evidence that they will serve in minority communities
 - Countering social discrimination: must be supported by legislative findings that suggest more narrow problem sufficient to justify shifting the burden to whites
 - Brennan 4 finds the diversity argument compelling: 1A rights of univ to pick diverse student body
- Dissent: (Brennan 4): don’t use strict scrutiny
 - Whites lack traditional indicia of suspectness
 - No historical discrimination

- Not saddled with disabilities
- Not relegated to political powerlessness
- Apply intermediate scrutiny
 - Important gov't purpose, substantially related
 - Some heightened scrutiny: paternalistic stereotype, insular poor whites suffer
- Blackmun: management of schools is beyond competence of court
- Stevens: Title VI should decide the case, not EP (no discrim by institutions receiving fed funds)

Anti-subordination rationale: *Carolene*, look to court to remedy past discrimination, those who are disadvantaged in the political process.

Fullilove v. Klutznick (1980): federal contracting AA program, set aside funds for minority businesses

- No majority opinion, 3 for intermediate to uphold, 3 to uphold as justified to remedy past discrim, and 3 dissenters for strict scrutiny
- Burger: unarticulated standard to uphold because *CONGRESS* articulated in under 14A §5, but §1 is a limit on states (distinction between constitutionality of federal and state AA programs)
 - Light burden spread across innocent white population
- Powell, concurrence, would apply SS, finding compelling interest

Wygant v. Jackson Board of Education (1986): role model rationale: need someone who looks like me to look up to. Disregarded, skeptical. AA plan replaces "last hired, first fired" with categorical rule that minorities are fired last

Strict Scrutiny:

- State purposes rejected:
 - Remedial: no factual findings of past discrimination
 - Diversity/role models: allows for no stopping point, tied to %age in student body
- Not narrowly tailored:
 - Heavy burden on innocent parties
- Dissent: urgency of preserving integration would pass SS, and even active recruitment of minorities is useless b/c of first-fired rules

City of Richmond v. J.A. Croson Co. (1989): contracting, contracts to minority owned companies

- No majority for defining standard, but majority in applying standard
- Strict scrutiny (O'Connor: stigmatic harm of AA)
- For remedial rationale, look to promulgating entity of the AA program: the actor must have engaged in the past discrimination
- No majority:
 - Remedial for past private discrimination can be compelling IF evidence suggests that state was a passive participant (but no findings here)
- Court rejects state rationales
 - relevant denominator is not the percentage of minorities in entire population, but the percentage of minorities who are *qualified*
 - Powell's distinction between society and state discrimination has bite
 - Affected by path dependencies or cultural differences
 - number of people who actually want to do this and/or are qualified
 - national discrimination is not equal to Richmond's discrimination. Congress has special authority (later O'Connor repudiates her own claims here in *Adarand*)
- City has not met its burden of showing that it was acting to remedy its *own* past discrimination
 - Must be past discrimination with continuing effects into the future
- Can state inaction count as state action?
 - Generally no, see *DeShaney*.
 - Here, O'Connor, w/o the court's support, writes about passive participation by state (perhaps why she didn't get the rest of the court on this)
- Tailoring problems
- Not narrowly tailored: city didn't consider a race-neutral option, 30% quota is not related to a goal, percentage not tied to actual injuries, just racial balancing (culturally, no reason to require race to be equally represented in all professions, though maybe you would under formal concept of race)

Note: Title VI requirements are viewed to be essentially the same as those under EP

Metro Broadcasting v. FCC (1990): in broadcasting contest, only intermediate scrutiny, based on diversity rationale (diversity in programming/opinions)

Intermediate scrutiny: *Fullilove*. Addressing, not alleviating harms of past conduct. Federal classification has less scrutiny than state/local, or maligned race-based classifications

O'Connor dissent: federal bound to same EP as states

Kennedy dissent: regulation stereotypes "minority viewpoints," harm to whites

Metro Broadcasting overruled on scrutiny grounds by *Adarand*. Between 1990 and 19905, therefore, best time for AA programs for federal entities. Now, Court unlikely to accept diversity in broadcasting as a rationale.

Ely: when the group controlling the decisions chooses to benefit not itself but a minority, less suspicious, a white majority is unlikely to disadvantage itself b/c of prejudice

Adarand Constructors v. Peña (1995): strict scrutiny to preference of contracts that employ social or economically disadvantaged subcontractors (black, Hispanic, native amer, asian amer)

Three principles

1. Skepticism: toward *any* race-based distinction
 - a. EP protects people, not groups
 - b. Anti-classification principle
 2. Consistency: can't have different standard for whites than for racial minorities (overrules *Metro B.*)
 - a. SS regardless of purpose
 - b. Can't distinguish maligned from benign purposes
 3. Congruency: no difference between federal and state programs
 - a. One EP doctrine, *Bolling* extended 5A to feds
- Scalia: no compelling gov't interest in "making up" for past discrimination.
 - Thomas: equivalence between paternalistic race-based legislation and racial discrimination.
 - Stevens: Difference between benign and maligned, congruence not required (14A §1 regulates States, §5 empower Congress)

Strict Scrutiny is not *fatal in fact*.

But, at this point, no program has, in fact, survived (even *Adarand* was struck down on remand)

Grutter v. Bollinger (2003): Univ. Michigan Law use of race in admissions SURVIVES strict scrutiny

- Narrowly tailored to government interest in *educational diversity*
 - **Compelling:**
 - Necessary to prepare people for increasingly globalized work force (limited to educational context)
 - Narrow because only using race as a plus factor
 - School considered race-neutral alternatives but none available (won't lower academic standards)
 - *Sunset* provisions: the moment it is no longer necessary, it sunsets (25 years)
- Critique (Rehnquist/Thomas dissents)
 - Ends: why is racial diversity an end? (esp as compared to other forms of diversity)
 - O'Connor: race is different b/c of history of race relations, but then, isn't this remedial work through the loophole of "diversity"?
 - Tailoring: jiggering in terms of admitting more minorities, this is a hidden quota system
 - Thomas: do more harm than good in patronizing African Americans with AA programs, create stereotypes about African Americans as protected and underperforming
 - The only compelling interest to pass SS is national security, *Korematsu*
 - No deference to academic institutions, *US v. Virginia*
- Multiple and conflicting conceptions of race. More than formal race. O'Connor using cultural/historical), but goes back and forth.... "critical mass" regards formal.

Gratz v. Bollinger (2003): Michigan undergrad program: strikes down racial preference the same day as it upholds law school's in *Grutter*

- Undergrad program is more like a quota, because points assigned for race are out of proportion.
- Point systems are likely to get struck down.
 - Not narrowly tailored: school must be sufficiently small that it can afford individualized assessment plus factors in order to maintain AA
- Ginsburg, dissent: this will force plus factors underground, less frank and less fair/less transparent

Amanda Bakale 4/30/09 2:54 PM

Comment: See slide

Key to being upheld: use diversity rationale, consider race-neutral alternatives, no point system.
 No quotas, set-asides must pass strict scrutiny and are unlikely to for broad patterns of discrimination
 Race can be a factor, but factor must be narrowly tailored
 See difference between *Grutter*, *Gratz*: only O'Connor & Breyer voted differently

Parents Involved in Community Schools v. Seattle School Dist. No. 1

Amanda Bakale 4/30/09 3:49 PM
 Comment: ???
 Amanda Bakale 4/30/09 4:00 PM
 Comment: see ppt for timeline of modern cases on sex discrim

Intermediate Scrutiny and Gender Classifications

Immutable, history of discrimination, reject romantic paternalism and separate spheres

Bradwell v. Illinois (1873): paramount mission of woman is as wife and mother: women denied right to form contracts is the basis for denying women entry to law school. Separate spheres argument.

Mutter v. Oregon, West Coast v. Parrish: used romantic paternalism, protection

Adkins v. Children's Hospital (1923): overruled *Muller*, 19A emancipates from protection (shortlived)

Reed v. Reed (1971): rational basis with bite applied to preference for male executors, struck down

Rational basis: fails, arbitrary choice forbidden by EP: selecting against women was worse than picking at random

With bite: there is animus, unconvinced by any state rational the court strikes it down

Frontiero v. Richardson (1973): plurality gives strict scrutiny to disparate military benefits to dependents

- Servicemen can claim wives as dependents, but servicewomen can only claim husbands if they are the primary wage earner
- No deference to military, not the heart of military function (only EP case military has lost)
- Strict Scrutiny in plurality only, never a majority
 - Harm:
 - Procedural: heightened requirement of proof of dependency
 - Substantive: servicemen get more aid than servicewomen when spouse is not dependent
 - Gov't interest:
 - Administrative efficiency is NEVER sufficient under strict scrutiny
 - No evidence that the presumption actually saves the military money
- Powell does NOT join plurality, despite unconstitutionality, as Congress has acted (so don't include gender in suspect class)
 - EP guarantee via 5A DP
 - Court intervenes when people can't get attention of lawmakers
 - Court doesn't intervene when people have attention of Congress, but doesn't prevent Court from also acting
- ERA: proposed in 1972
 - Equality of rights under law shall not be denied or abridged by the US or any state on basis of sex
 - Fails, women's movement hostile to new wave feminism arises, based on family value fears of:
 - On demand abortion
 - Homosexual protection
 - Enlisting women in military
 - At time of case, in ratification mode
 - Did opinion take wind out of sails for ERA political momentum?
 - Court's role is NOT to get politically involved in democratic process
- Thomas: interpret Constitution independently of social movements, no sociological analysis?
- Brennan: *Reed* used heightened rational basis with bite, already did this kind of engaging, capacity to get attention of lawmakers is a reason for Court to also act.
 - Women are neither discrete nor insular, but populous and diffuse. They have the ear of the legislature...heightened scrutiny justified b/c they have internalized male dominance? Paternalistic.
- Now, only blacks get SS, basically: otherwise, defer under *Carolene*, let democratic process remedy

Justifications for strict scrutiny:

- Compare race and sex: both immutable, relate to status/conduct distinction, don't burden people for things they can't help
- History of discrimination (on a pedestal or in a cage)
- High visibility, impossible to ignore the characteristic

- Political powerlessness, despite majority of population they are not represented
 - Capacity to get attention of lawmakers though might be reason NOT to act, see *Cleburne* below
 - *Carolene Products*: women are neither discrete nor insular
 - Not ghettoized, but separate spheres sequestered

MacKinnon, *Feminism Unmodified* (1987): most of what is “feminism” in law has been attempt to get for me what little has been reserved for women

Gender < Race in scrutiny protection

1. Original understanding of 14A
2. Concerns about intervention in pending ERA decisions (interfere with legislature)*
3. Numerosity of protected class (women are not a minority)
4. Facially benign character of much sex discrimination

Real Differences Doctrine

***Geduldig v. Aiello* (1974)**: CA disability insurance that excludes pregnancies. Sex discrimination here NOT given heightened scrutiny, only rational basis (pregnancy doesn't get heightened scrutiny)

- Not treated as disparate impact: 2 groups are pregnant (women) and not pregnant (men and women)
 - Predates *Washington v. Davis*
 - *Cf. Feeney*, where it was at least conceivable that woman could be veteran, so less of a disparate impact, but here, only women can be pregnant
- Brennan dissent: discrimination on basis of gender b/c men-only conditions get full coverage
- Overruled by Congress with Pregnancy Discrimination Act, but Court can still apply this reasoning (trait based classification, not gender, even though only women are affected)

***Craig v. Boren* (1976)**: majority settles on intermediate scrutiny for 3.2 beer case (women drink at 18, men 21)

- Intermediate scrutiny: generalization is in tension with EP

Feeney: rational basis review

- slippery slope denial of heightened scrutiny: passed in spite of, not because of, discrim effects (ratcheting up the standard to make intent a malice requirement)
- dissent: overinclusive, discrim purpose b/c has exceptions for secretarial work, less burdensome alternatives available.

***General Electric v. Gilbert* (1976)**: interprets pregnancy discrimination to fall outside Title VII's prohibition of sex discrimination

- 1978, Congress responds with Pregnancy Discrimination Act to define Title VII's “because of sex” to include pregnancy, childbirth, or related medical conditions

PDA has no impact on *Geduldig*, however, as *Gilbert* was statutory, but *Geduldig* decided on EP grounds.

***Michael M. v. Sonoma County* (1981)**: statutory rape law makes men alone liable for act of intercourse with a minor

- majority of justices (though no majority opinion) uses “real differences” in upholding statute
- All harmful consequences of pregnancy fall to girls, then it's justified. Physiological differences do not have to be ignored b/c of EP and intermediate scrutiny.
 - Survives intermediate scrutiny b/c of tailoring, substantially related to important gov't interest
 - Deference to gov't, didn't articulate a level of scrutiny
- Real differences allows stereotypes to persist! Freezing norms. Brennan, dissent: this is about female chastity

***US v. Virginia* (1996)**: majority gives more bite to intermediate scrutiny (Ginsburg's opinion is closer to strict, more likely to be invalidated than not, real differences carve-out gets smaller)

- Biological differences rationale...skeptical, line between nature and culture is itself rooted in culture
- VMI: mission to promote citizen soldiers, all male environment, most spending of any VA school
 - Single-sex school adds to diversity of educational environment in VA
 - Important rationale, but court holds to be pretext
 - All male b/c of history, not diversity
 - Willing to entertain single-sex universities, but only if diversity of education IS an important government goal, and they have to be equal

- On notice after *Mississippi v. Hogan*, after first round of litigation, created VWIL
 - Admitting women would force school to make changes
 - All women can't handle the school, just as men. Only admit those who can
 - Women can be educated via the adversative method
 - Look at women with talent and capacities....can't deny qualified women on the basis of overgeneralizations about women
- Is proffered justification exceedingly persuasive. Burden of justification rests on state
 - Important governmental objectives
 - Discriminatory means employed are substantially related to achievement of those objectives
- Ginsburg: states CAN use real differences as a ground for legislation
- Rehnquist, dissent: this "exceedingly persuasive" standard is ratcheting up intermediate scrutiny
- Scalia, dissent: elegezes a way of life, majority really applying SS (goal of educational objectives would be met under intermediate scrutiny)

Sociological analysis of Citadel: preservation of uniquely feminine male culture: better to keep women out not so men can be men, but so men can serve women's roles

Nguyen v. INS (2001): Federal immigration statute grants citizenship to nonmarital child of citizen mother, but not of citizen rather, when other parent is noncitizen

- Intermediate scrutiny: uphold legislation on real differences ground
 - Fathers have to affirm parenthood, mothers have childbirth
 - Assure that biological relationship exists
 - Child has opportunity to have connection to the US via parent
 - Stereotype: by giving birth you are connected to child, and not if the father
- O'Connor dissent: this is rooted in stereotype, not real difference

Note: pregnancy is the only "real difference" that the Court has held to justify discriminatory policies.

Ely: women are majority, if they don't protect themselves it is because they place it on low priority (BUT shouldn't force women to have to vote as a block to get equal treatment)

Same as showing racial classification: facial, or purpose and effect

Gender classifications benefitting women:

Not based on role stereotypes

Can remedy past discrimination

Biological "real differences" okay (*Michael M., Nguyen*, but these can be proxies for social/stereotypes)

Substantive Due Process: Unenumerated Rights

EP suggests that freedom is limited by harm principle, has protected people identified by common history and immutable characteristics.

b/c of slippery slope, court hasn't extended suspect classifications.

Autonomy rights are not always in BofR: Privacy (marriage, contraception, abortion, obscene material in the home, extended families, parental control, sexual intimacy)

Others: vote, travel, refuse medical treatment

For almost all, SCOTUS gives strict scrutiny: necessary to a compelling gov't purpose

Enumerating new rights: 1) deeply rooted in traditions and history, 2) implicit in concept of ordered liberty

DP: is interference justified by sufficient purpose?

If law denies right to everyone, then argue DP

EP: is discrimination as to who can exercise the right justified by sufficient purpose

If law denied right to some, then discrimination under EP or violation of right under DP

Under either DP or EP, court must decide:

1. Is there a fundamental right?
 - a. *Carolene*, defer to legis unless discrimination against discrete and insular minority, or infringement of a fundamental right
 - b. Strict, moderate, or non-originalism
 - i. Moderate: judiciary should implement *general* intent of Framers', not specific
 - c. History and tradition: is it deeply rooted (specific or general level of abstraction?)
2. Is the right infringed?
 - a. Direct and substantial interference

- b. Unconstitutional conditions doctrine: forego a constitutional right in order to receive a gov't benefit?
- 3. Is there justification to infringe?
 - a. Fundamental right: compelling interest
 - b. Nonfundamental right: legitimate purpose
- 4. Is the means sufficiently related to the purpose?
 - a. Can't achieve via a less restrictive means (compare to rational basis, then only "reasonable")

Fundamental rights Adjudication

- Judiciary needed where old laws on the books are entrenched, and then used against individuals.
- Conventional morality: interest groups interfere with democratic process, judiciary, however, is subjective and unelected
- Rights-based: autonomy and entitlement of equal respect and concern, protect against tyranny of majority
 - But, Ely: no objective, universal morality (though, Rawls' original position?)
 - Pragmatic challenge: judges merely interpret statutes as aristocracy

Lochner-era: penumbral rights

Meyer v. Nebraska (1923): violates DP to prevent students from instruction in foreign language until 8th grade

Pierce v. Society of Sisters (1925): violates DP to prevent students from attending parochial schools

Then, **Loving v. Virginia**, decided both on EP (discrim against blacks) and DP (right to marry) grounds

Griswold v. Connecticut (1965): criminal penalties on use of contraceptive drug/device, *os* are doc and director of Planned Parenthood

- Right of privacy is fundamental. Not DP, but patched together from other Amendments
 - 1A, 3A, 4A, 5A
 - place: to assemble (relational, decisional)
 - home: free from gov't, zonal
 - search and seizure: zonal
 - self-incrimination: body privacy, autonomy privacy (decisional)
 - 9A also reserves rights to people, endorses recognition of new rights in general
 - Penumbra overlap to create a privacy right out of textually enumerated rights
 - Substantive DP in personal rights, distinct from economic rights
- Three areas of privacy
 - Zonal
 - Relational
 - Decisional (personal autonomy)
 - Decisional ultimately subsumes the other 2
 - Both zonal and relational are limiting principles on the state, concrete examples of fundamental decisional privacy
 - Here, zonal (bedroom) and relational (marital) are implicated (NOT decisional)
- Concurrences:
 - 9A authority for nontextual rights (Warren/Brennan)
 - liberty under DP clause (Harlan) "implicit in concept of ordered liberty"
 - fails rational basis (White) end is to stop illicit relationships, so preventing married couples from using contraceptives is unrelated
- Dissent: textually absent, no privacy right (Black/Stewart)

See Harlan's dissent in *Poe v. Ullman*: DP not about procedural protections post hoc, but against arbitrary legislation, and not limited to enumerated rights

Eisenstadt v. Baird (1972): EP: extends right to contraception to unmarried couples

- Decisional privacy: right of individual to be free from unwarranted gov't intrusion into personal matters (Brennan)...no legitimate government purpose here
- Unenumerated, not considered by Framers, but still protected
- Welfare entitlement parallel: not entitled to welfare, but gov't must distribute in even hand.
 - If married persons have right, then unmarried persons must have same
 - Same reasoning for most autonomy rights

Roe v. Wade (1973): TX statute prohibits procuring abortion except for saving life.

- Doctrinal ground: *Griswold*. Maneuvering around *Lochner*. Gets rid of penumbra argument, puts it under DP
 - Government can't prohibit, regulation must meet strict scrutiny
 - Balance state's interest in fetus and woman's fundamental right to abortion
- Rejected state claims to interest in prenatal life, fetus not a person for 14A
 - Intratextual: in Constitution: "persons born or naturalized", birth is defining moment
 - Dodges question by focusing on viability, not life (lower political temperature)
- Blackmun: 18p historical analysis of abortion
 - Ethos: history shows a broader ethos than present day
 - Doctors as decision makers (but this still takes women out of equation)
- State interests: health of mother, potential life of fetus
 - Tempered by women's liberty and question of when life begins
- TRIMESTER FRAMEWORK
 - 1st: woman in consultation with physician (only regulate the same for any other medical procedure)
 - risk outweighed by risk of pregnancy
 - risk decreases w/medical advances, but viability also gets earlier
 - 2nd: state can regulate, but only abortions that are undertaken for health of mother
 - 3rd: government may prohibit except for the life/health of mother
- Dissent: this should have been left to legislature
 - Rehnquist: rational basis review a la *Lee Optical*, abortion not fundamental
 - See O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health* (1983): trimester framework is unsound, science changes and moves the lines
 - Viability itself is arbitrary, court just skirting the question of when life (and therefore state's interest) begins

Companion case *Doe*, GA law w/ exceptions for life/health of mother, fetal defect, or rape

- Unconstitutional to regulate in 1st trimester, certification standards too high, unduly restrictive in requiring permission and 2 doctors, unconstitutional under P&I to restrict to state residents
- Douglas, concurring: 9A does recognize existence of 14A liberties...
 - Autonomous control over development and expression of personhood
 - Autonomy of choice in basic decisions (subject to basic regulation where narrowly tailored...)
 - Autonomy of physical body (subject to same)

Correctly decided?

Not narrowly tailored, reads like legislation

Strict scrutiny applied rigorously, better an EP case though, as Substantive DP more subject to debate

Tied to medical/sociological data, risk of debunking the court (avoided this tactic, unlike *Brown*)

Ely: no, superprotected right can't be inferred from Constitution, this isn't a constitutional question

But, other areas of family law are?

Tribe: liberty is personal autonomy and independence and afforded DP

Court, in evaluating state's interest in life of fetus, assumes biology < law, arbitrariness of "viability" or trimester in triggering states' interest in life

MacKinnon: this is an EP problem, gender inequality of forced motherhood (but EP analysis would be the same)

Political mistake: provoked restrictive state policies and right to live movement, froze liberal reform

Roe, DP, not EP:

Pregnancy discrimination separated from gender discrim after *Feeney*, *Geduldig*.

Proponents are medical profession and groups like Planned Parenthood.

EP better? Gender-based, forcing women to bear children, foreclosing economic opportunities.

Or, SubDP, level of generality should have been at bodily/decisional autonomy and privacy

Post-*Roe*:

State funding never mandated, public hospitals not required to provide.

Informed consent, biological father notification, parental consent w/o judicial bypass: struck down

Republican party and Christian right alignment, Court nominations

Abortion and Stare Decisis

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): upholds *Roe*, outlines *stare decisis*

- Joint opinion abandons trimester framework/strict scrutiny in favor of viability and “undue burden” test
 - Undue burden only for pre-viability, after that state can regulate w/freer rein
 - Concurrences, would have upheld trimester framework
 - Main thrust of *Roe* upheld, abortion is a fundamental right
- Applying that test, creates majorities to uphold most of the provision in the statute
- Joint opinion: 3 justices write together w/o clarifying which was the author.
- New binary rule
 - Pre-viability, state can regulate ONLY IF does not place undue burden
 - Post-viability, state can regulate and proscribe to promote interest in life of fetus, as long as it has exceptions to preserve life and health of mother
- *Roe’s* two interests: mother/fetus
 - Health of mother kicks in after 1st trimester in *Roe*...this gets later and later
 - Life of fetus: kicks in at 2nd trimester, but will get earlier and earlier
- Undue burden is new way to reconcile state interest and woman’s liberty (does not get majority until *Stenberg*)
 - Test conflates questions of infringement, sufficient purpose, and means/end tailoring
 - No level of scrutiny (strict, intermediate) stated
 - “substantial obstacle”: can act w/intent to discourage, but undue burden only if it will prevent woman from getting
 - Here, spousal notification IS undue burden, would prevent many women from getting them b/c of abuse
 - 24 hour waiting period, however, is NOT undue burden
- Scalia, dissent: political debate should remain in polity
 - Translating moral arguments into the realm of fact has cooling effect, but also papers over the heart of the disagreement.

	Joint opinion (O'Connor, Souter, Kennedy)	Stevens	Blackmun	Rehnquist (with White, Scalia, Thomas)	Result
Informed consent	Valid	Invalid (though info about risks of abortion valid)	Invalid	Valid	Valid
Minors must bet informed consent of parent	Valid	Invalid	Invalid	Valid	Valid
Married woman must notify spouse	Invalid	Invalid	Invalid	Valid	Invalid
Requirements above waived for medical emergency	Valid	Valid	Invalid	Valid	Valid
Reporting requirements	Valid	Valid	Invalid	Valid	Valid

- Stare Decisis: four *prudential and pragmatic* considerations
 1. Workability
 - a. Of constitutional rule in challenged precedent, not the statute at hand
 - b. Unworkable rules tend to be “too vague”
 2. Reliance
 - a. Traditionally in commercial context
 - b. Precedents better to be overruled quickly (in tension with vacillation)
 - c. Shift from economic to nonfungible personal realm
 - i. Problematic: is it a stretch that women structure their lives around availability of abortions?
 3. Change in Doctrine
 - a. Likely to overrule when precedent is ‘bare remnant of abandoned doctrine’
 - b. Precedents undermined incrementally by chipping away
 4. Change in Facts, or in Perceptions of Facts (seems like this is at play in *Casey*...)
 - a. Actual changes, like medical technology, or perceptions

- b. Whatever the sociological understanding of the day, *Plessy* was wrong when it was decided
 - c. Countermajoritarian problem?
- Not an elements or factors test, but list of considerations
- Comports with other famous reversals: *West Coast Hotel* and *Lochner*; *Brown* and *Plessy*
- Where Court should be careful about overturning
 - Anti-vacillation (too quickly)
 - Political fire (promoting litmus test behavior, judicial integrity prevents from ruling on political preferences, rather, uphold stare decisis)
- Rehnquist dissent: old stare decisis: only correct poor reasoning, only Amendment can correct the Court
 - Majority is really just conceding that *Roe* was wrong and substituting an undue burden test
- Scalia dissent: no right to abortion, irrelevant rhetoric would equally support fundamental right to polygamy, suicide, incest, &c

Stenberg v. Carhart (2000): statute prohibits partial birth abortion unless for life of mother, defines as delivering a living unborn, or substantial portion thereof before killing the child. Doesn't distinguish between D&E and D&X. Struck down.

Abortions: 90% in 1st trimester, vacuum aspiration. 10% in 2nd trimester, D&E or D&X
 D&E: dilate, remove and scrape D&X: fetal skull too large, pull out body then crush skull and remove
 Legislation drives a wedge between 2 procedures. Intact D&E preferred, acc. Dr. Carhart

Casey analysis:

- No distinction between pre/post viability
- No distinction between D&E and D&X
 - Prohibited normal procedure that was safer than the allowed ones, should allow to protect health
 - Doc can't know if D&E would have to be D&X
- No exception for *health* of mother

O'Connor's concurrence: send signal to legis that bans must be narrower

Ginsburg's concurrence: state trying to chip away at *Roe*, a la *Casey* analysis re: abandoned doctrine

Thomas's dissent: state should be able to regulate a procedure than many view as infanticide

Gonzales v. Carhart (2007): upholds statute, distinguish from *Stenberg* on procedural distinction

Respect for human life and bond of love, some women regret choice to abort. Overbroad Stereotypes!

Facial versus as-applied challenges: can't wait for application b/c of gestation < litigation.

Chips away at *Roe*, making *Casey*'s bare remnant tactic?

Amanda Bakale 4/30/09 5:52 PM

Comment: see ppt

Equal Protection: Sexual Orientation and Privacy

Bowers v. Hardwick (1986): GA statute bans sodomy regardless of sex. Court upholds against DP challenge

- Prev rights are family/procreation: homosexual activity doesn't fit
 - No fundamental right: neither "implicit in concept of ordered liberty" nor "deeply rooted in history and tradition"
- Half the states at the time have sodomy statutes, but rarely enforced.
 - Harm of unenforced statute: denial of entitlements if criminal record
 - Ex., *Bowers* himself fired a staff atty b/c he was committed gay, and presumptively engaging in sodomy
- Rational basis review...status created by statute
- Chose NOT to combine with sex-based statute case
 - If you go EP for gays, have to argue for a right
 - If you go on privacy grounds, then all people have the right (GA statute was more inclusive)
- Right to privacy grounds out, despite zonal (home) and decisional privacy (intimate)
 - 1A case, *Stanley v. GA*, privacy in home, distinguished b/c of constitutional moorings
- Powell, concurring, 8A claim b/c punishment too much
- Blackmun et al., dissenting: misidentified level of generality, should be right to be left alone
 - Decisional autonomy, i.e., sexual intimacy
 - Spatial autonomy, 4A provides
 - If SS had been applied, gov't interests are not compelling: no hazards to decent society

Distinguish adultery and incest: sexual autonomy, esp within home, those prohibitions are also rooted in traditions and history. Can't be upheld as a matter of principle.

Collective action problem: it's not immutable, perhaps, but can be hidden, coming out to join social movement incurs costs (maybe not so much anymore, getting better?)

Romer v. Evans (1996): CO passes amendment to state constitution that there will be no protected status for sexual orientation

- No heightened scrutiny, but prevents state from exercising desire to harm a politically unpopular group
- Rational basis review: CO imposes special disability, explained only by animus
- Court does not take rational basis reasons at face value, exhausted every rationale except animus
- Rational basis with bite: no legit purpose other than excluding a group from political process (pierce the veil)
 - Shift in public's ideology: what was once rational, is now animus
 - Animus presented as "moral" basis for law isn't rational
- Dissent, Scalia, Rehnquist, Thomas: public morals can be legit interest, Court shouldn't strike down majoritarian belief (animus not unconstitutional)

Lawrence v. Texas (2003): equality case: straight can engage in sodomy but not gays

- Privacy: zonal, relational, decisional: fundamental to personhood
 - Trace SubDP law from *Griswold*, find that decisional and spatial autonomy suggest that *Bowers* was counter-doctrinal
 - *Bowers* does real and symbolic harm, broad liberty protection under SubDP
 - Animus has ancient roots, anti-sodomy statutes are fairly modern
 - Majority may not enforce animus via state
 - Controversial appeal to international law
- Focused on privacy and DP, not EP, didn't articulate a level of scrutiny
- O'Connor is the only justice to argue on equality grounds, in concurrence
- Essential part of gay identity, misapprehend a large part of society by letting fed courts tell gays what defines them as a social group (progressive critique of liberal arguments)
- Scalia, dissent: dicta of international should be ignored, let us make our own mistakes
 - Other sexual activities fundamental to personhood? Selective end of morals legislation.
 - Reversal under fire, not a good way to overturn precedent under *Casey*.
- Did NOT identify as a fundamental right or articulate a level or scrutiny
 - Moral judgment is usually enough to pass rational basis, so assume court here intended for some kind of heightened scrutiny

EP and sexual orientation after *Lawrence*

EP and SubDP are analytically distinct (conduct/status distinction)

- Conduct is permissible and either a) status gets rational basis, trust political process or b) powerlessness rationale doesn't control
- Eventually, maybe *Lawrence* will lead to recognition of sexual orientation as a suspect class
 - If relationships protected, then status can't be burdened
 - If status is burdened unjustly, can court intervene
 - Delay recognition? Court's political actions are enough to protect activity in private, can't outlaw moral disapproval
 - Constitutional form of closeting
 - Homosexuals should avoid paradigm of race, seek unique civil rights movement

Discrimination has urged muting of homosexuality in a variety of forms, weakening with rise of gay civil rights movements.

Conversion: APA classified pathology until 1973

Passing demands: gays remain closeted, DADT

Covering demands: tone down stigmatized identity characteristics (appearance, behavior, affiliation, activism,

association: but also, pressure to subsume individual traits to "traits" of group politics?)

Don't Ask, Don't Tell

Until 1994, military governed by a 1981 DoD reg that categorically banned gays. Subject to discharge
DADT: prohibits conduct that is engaging or identifying, speech that creates a rebuttable presumption that you are likely to engage in homosexual conduct
Discipline, morale, trust, integrity of rank, privacy concerns, recruitment/retention, unit cohesion
Military deference: but military focuses on conduct, not status (DADT, rebuttable presumption of behavior)
Statute drafted for safe harbor in *Bowers*

Privileges or Immunities: Same-Sex Marriage

Timeline

1993: Hawaii SCt w/strict scrutiny overrules restriction of marriage. Legislature overrides with const amend.
1996: Clinton signs DOMA:
states don't have to recognize same-sex marriages of other states
for fed purposes, marriage is one man one woman
1999: Vermont requires same-sex couple benefits under communal benefits clause of const
May 2003: Federal Marriage Amend introduced in House
June 2003: *Lawrence v. Texas*
Nov 2003: Mass SCt, state const guarantees same-sex marriage rights
Amendment procedure starts immediately
Must get vote over 2 successive legislature, then people get to vote referendum (unlike CA)
July 2006: NY Ct App, state const does not guarantee same-sex marriage rights
stereotypes about reckless sex of straight couples, need institution of marriage for children's sake
"real differences" arg: progressive rationale for denial of rights
similar to args against women's equal treatment 100 years ago)
July 2006: House rejects FMA
May 2008: CA SCt holds that state const guarantees marriage for ss couples
Oct 2008: CT SCt rules that state const guarantees marriage rights for ss couples
Nov 2008: CA voters approve Prop8 overturning SCt's ruling for marriage rights, amending state const
Mar 2009: Mass Dist Ct: Gay rights org files complaint against fed statutory def of
Mar 2009: CA SCt hears oral args in case challenging validity of Prop8
Apr 2009: Iowa SCt rules that the state const guarantees ss couples the right to marry
Apr 2009: VT legis overrides gov's veto, enacting law that legalizes ss marriage
Apr 2009: NH, ME, NY debating/soon to debate ss marriage in legislatures

Family law is traditionally a state domain. Pragmatic concerns, more momentum at state level.
Opponents of same sex marriage can't take it to SCOTUS: when State SCt decides a matter of state law with adequate grounds, SCOTUS cannot grant cert. No federal question, adequate and independent state grounds.

Baker v. State (Vt. 1999): all material benefits, but not symbolism of marriage. Concurrence: reflection of separate but equal.

Nancy Fraser: politics of redistribution and politics of recognition (symbolic dignitary recognition)
VT legislature, Apr 2009, supersedes governor's veto by one vote to pass civil union law (likely not portable from state to state)

Marriage, historically:

Women's identity subsumed, unable to contract/own property, rights merged into her husbands
African American: slaves couldn't marry, had rich culture of relationships that disappeared once marriage was the only acceptable form

Goodridge v. Department of Public Health (Mass. 2003): same sex marriage ban held to violate DP and EP clauses of state constitution, doesn't meet rational basis. Legislation asks for clarification if civil union would be okay, court says no. First state to legalize gay marriage. Strikes down all state's arguments under rational basis:

- No privilege for procreative intercourse, fertility not a condition of marriage, rather commitment.
- Optimal for child rearing: best interest of child doesn't turn on sexual/marital status, gays can be good parents, too, irrational to punish child for sexual orientation of parents
- Preserving state resources: gays likely affluent, don't need benefits of marriage (overlooks other dependents, like children/parents, laws don't privilege receipt of benefits for couples on showing mutual dependence)

- Fundamental value of marriage

Greaney, concurring: marriage is fundamental right, sex based classification (similar to *Loving*), SS required, denial of marriage creates caste-like system

Spina, dissenting: only purposeful discrimination could warrant the action taken by the court, ss marriage not a fundamental right

Cordy, dissenting: rational basis only, e.g., that reasoning would strike down prohibition against polygamy

Majority avoids stats that indicate SS couples child rearing is negative.

Better understood as sex discrimination or sexual orientation discrimination?

Similar to *Loving*: equal application. Lesbians can marry, they just can't marry women.

Loving analogy

Π argues statute barring whites from marrying nonwhites facially discrim on basis of race.	Π argues statute barring women from marrying women facially discrim on basis of sex.
State defends that both whites and nonwhites are prohibited from interracial marriage.	State defends that both women and men are prohibited from ss marriage.
Court rejects state's equal application defense on grounds of "White Supremacy"	(Hypothetically) Court rejects state's equal application defense.

Hernandez v. Robles (NY 2006): NY Const EP and DP challenge to prohibition against SS marriage

Held: legislation not designed to subordinate either sex

Legit state purposes, stabilizing influence of marriage needed, gays can't have kids promiscuously so don't need it!

Loving analogy: history not discriminatory: proposal of SS marriage is modern invention

DP: Gay marriage not rooted in traditions/history so no DP (is this putting cart before horse to circumvent strict scrutiny)

EP: no fundamental right, not a gender classification, reject heightened scrutiny b/c there are legitimate reasons for legislative distinction in context of marriage, so rational basis review is appropriate

Framing the problem: equal application to men and women, not gays and straights

In re Marriage Cases (CA 2008): state const EP clause guarantees right to same-sex marriage on both DP and EP grounds

Prop8: polity articulates disagreement with court with const amend.

Litigation again...Challenge if amend is procedurally valid, and retroactive

Varnum v. Brien (Iowa 2009): state const guarantees right to same sex marriage, intermediate scrutiny under EP

FEDERAL ISSUE:

Defense of Marriage Act (1996):

FF&C Challenge: would lose. Like other Constitutional provisions, there is a Congressional exceptions clause:

Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof

Even absent DOMA, long interpretation of FF&C to allow public policy exceptions (such as first cousin marriages)

Gill v. Office of Personnel Management (2009): gay rights org files complaint challenging DOMA as it excludes same sex couples from marriage under federal EP clause.

Legislative and Adjudicative Enforcement of 14A

EP: history of discrimination is one prong of the heightened scrutiny requirement

DP: history of discrimination stands in support of the *denial* of the right.

Michael H. v. Gerald D. (1989): no rights for unmarried father where mother is married to another man

- What constitutes a liberty interest?
 - Procedural DP: should have opportunity to be heard

- CA rule: status as biological father is irrelevant to inquiry, conclusive presumption, not rebuttable. So no need for evidentiary hearing
 - DP needed only if there were a rebuttable presumption
- Scalia, concurrence: state should recognize liberty interest only if there is a tradition of protection, stated at the *most specific level of abstraction* (this is not a fundamental right at issue)
 - Levels of generality: parental rights of adulterous natural fathers // parenthood // family relationships // personal relationships // emotional attachments in general
 - Ex., *Bowers v. Hardwick*, right to privacy more general than right to sodomy
 - FOOTNOTE 6: court must choose most specific right for which you can find a *tradition* that speaks one way or another to the question of whether it is deeply rooted in the nation's history (here, writing only for himself and Rehnquist)
 - Only way to prevent judicial enactment of personal preferences
 - Otherwise, nowhere to draw the line, and most general would frustrate any gov't purpose
 - Here, strong tradition of protecting the unitary family
- Brennan's dissent: Constitution should protect diverse parental rights, many different types of family arrangements, we are not a homogenous society
- O'Connor/Kennedy opt out of fn6: as inconsistent with past cases (different ways of finding fundamental rights), this would chip away at *Roe*.

Traditional state domain: crime, family. Flouted by enactment of DOMA, e.g., inconsistent.

Washington v. Glucksberg (1997): uphold state ban on physician assisted suicide as SubDP violation, no constitutional right to assisted suicide

Despite change in facts/technology, common law and history prevailed

Two prong analysis (limiting principles) (conjunctive test)

- Is this deeply rooted in nation's history/implicit in concept of ordered liberty
- Careful description of asserted fundamental liberty interest
 - State interest in protecting vulnerable groups and disparate impact (poor, disabled, elderly: not heightened scrutiny classifications)
- No fundamental right, only rational basis test:
 - Passes, b/c it protects vulnerable groups (disabled persons, elderly)
- Court closing one traditional EP door after another
 - No more heightened scrutiny problems
 - Opening liberty door: doing equality work under the rubric of liberty (*Lawrence, Tennessee v. Lane*)...long tradition of doing this (*Meyer, Pierce*)
- Cruzan* (1990) had given right to refuse medical care by competent adults under DP
 - State can require clear and convincing evidence that person wanted termination of treatment
 - May prevent family members from deciding (conflict of interest)
 - Did not articulate level of scrutiny, left what evidence state could require unclarified

Amanda Bakale 4/30/09 10:33 PM

Comment: see ppt

Employment Division v. Smith: peyote case

- Shut down EP venture b/c of pluralism anxiety: can't accommodate all religions when there are so many small groups (cheese/religion)
- §5: White's analysis of too many groups in *Cleburne* is prescient on this point
 - solving the too many groups problem means switching from groups to rights-based reasoning
 - Pluralistic society has to engage in different, but robust civil rights debate
 - Equality concerns are a brake and a goad in the consideration of boundaries of liberty

Lawrence, as changes to *Michael H.* and *Glucksberg*..."implicit in concept of ordered liberty" need no long history, not temporal. In *Lawrence*, this cuts against the idea of history as a guide. Drafters of 5A and 14A knew that times can blind us to certain truths.

Sunstein's distinctions:

- History cuts in opposite directions for DP/EP purposes...more likely to win in DP if rooted in history than EP
- History of discrimination lends weight to heightened scrutiny and invalidation of state action
- Lawrence* undermines this distinction...Framers could have chosen laundry list of liberties but did not
- Protecting liberty w/higher levels of generality, left it to successive generations to determine
- No direct repudiation of *Glucksberg*, start with *Glucksberg* test, and then adjust for *Lawrence*

- DP: Strict scrutiny for fundamental rights, but no tiered system for EP.
 - E.g., *Lawrence* did not intend to give fundamental right status to the right to engage in sodomy

Saenz v. Roe (1999): (see above, also, P&I)

- Struck down durational residency requirements under right to travel embedded in P&I
- NO EP scrutiny b/c not a heightened scrutiny class
- Rights strand of EP clause: class based, and protects rights of access to court, right to be free from poll tax, right to travel
- Thomas would have use revisit SubDP cases and bring them into P&I (blip: *Lawrence* comes along, path dependency of law)

Note: international law as viable alternative to history as a means of disciplining DP rights? (i.e., *Lawrence*)

PRO: increasingly globalized world, network of judges, comity concerns

CON: pick and choose among countries, difficult to know all, transnationalism/countermajoritarian way of smuggling in international norms w/o the imprimatur of democratic process, liberal elite imposing decisions of foreign judges (problems of Koh, lately)

Vacco v. Quill (1997): companion to *Glucksberg*, rational basis review applied to EP challenged to prohibitions on physician-assisted suicide (not a fundamental right, so no strict scrutiny)

- No EP violation:
 - No suspect class, treats all equally, no fundamental right (see *Glucksberg*)
 - Doesn't discriminate between those who can refused treatment from those who would have to get assisted suicide
 - Rational basis
- Left to political process for states to pass laws guaranteeing
- Might be an "as applied" test, hints in the concurrences

Katzenbach v. Morgan (1966): NY literacy requirement for voting, Federal Voting Rights Act mandates that if American finished 6th grade in Spanish language in Puerto Rico, then they can't be denied vote based on English literacy. The federal act is passed pursuant to 14A §5.

- Challenged VRA as in excess of Congress's power to act
- 14A breakdown
 - §1 has state action requirement (public, not private actors)
 - §5, Congress has power to enforce provisions of this article
 - Other Reconstruction Amends have Congressional rider provisions (13A §2, 15A §2)
 - Only 13A has no state action requirement
 - Congress can not act so broadly under 14A §5 as to obviate the state action requirement
 - Can't reach private actors, b/c that is not enforcing §1
 - Here, the state is involved. Congress interested in testing the waters on §5 powers...
- Congress's interpretation of §1 enforced under §5 power: aggressive interpretation of §1 powers. Congress does not defer to SCOTUS's interpretation of §1.
- Court's interpretation of §1 is narrower (what is necessary and proper): Count the violations under §1 as articulated by the COURT, e.g., in *Lassiter*, and then see if Congress is responding to state actor's violations.

Here, Congress determined that the NY law violated EP (disparate impact argument). Congress defers to court wrt fact that national origin discrimination is pernicious, strict scrutiny. BUT Court said in *Lassiter* that the requirements did not violate EP, Congress ignores.

Lassiter v. Northampton Election Board (1959): NC's literacy requirements held not to violate 14A §1.

This precedent makes it hard for Congress to say it is acting to enforce 14A §1, when SCOTUS has spoken. States can determine election standards...

Boerne v. City of Flores: changes the analysis...

- Determine what the §1 rights are, as determined by the Court
- Was Congress's §5 response *congruent and proportional* to remedy the violations.
 - C&P is a *much* shorter leash for Congress than N&P
- Ratchet footnote: §5 power limited to measures to enforce 14A guarantees, but gives Congress NO power to restrict, abrogate, or dilute those guarantees (Congress can prohibit what the Court has permitted, but can't permit what the Court has prohibited).

History...

Sherbert v. Verner (1963): unemployed but won't work b/c of religion. Court carves out an exception for religion
Wisconsin v. Yoder (1972): Amish don't want kids in school past 8th grade. Court accommodates, *Meyer, Pierce*

Free exercise rule must have compelling interest before a rule of general applicability can be asserted against a community/individual against which it has a disparate impact

Employment Division v. Smith (1990): denied benefits b/c of peyote use, sacramental

Scalia: can't grant specific accommodations

Don't get courts into a debate about sincerity of beliefs

Imports *Washington v. Davis* into Free Exercise...generally applicable, no animus toward particular group, then ONLY rational basis review

O'Connor: these are not identity based distinctions, but behaviors that constitute religious identity

Religious Freedom Restoration Act (1993): under §5 powers, high protections of *Sherbert* and *Yoder*, but low in *Smith*

RFRA is Congress's attempt to restore *Sherbert* and *Yoder* standards as Court's coequal interpreter

COURT gives CONGRESS the smackdown...Court is only interpreter, thin protections of *Smith* stand

- Court gets to define §1 rights, Congress can enforce them under §5
 - Congress is trying to enforce rights that are broader than the Court guaranteed under §1 in *Smith*

This is like the squeezed balloon: Commerce Power wanes, so Congress tries to justify under §5

US v. Morrison (2000): binds §5 analysis and *Lopez*: Violence Against Women Act, private cause of action for victims of gender motivated violence, is violating Congress's power under BOTH §5 and Commerce Clause

- *Lopez* test: Channels, instrumentalities, substantially affects
 - Substantially Affects: economic in nature, jurisdictional element, congressional findings, link to interstate commerce (not a balancing test, one can be sufficient)
 - Distinguished *Wickard v. Fillburn*, aggregation only available when activity is economic in nature
 - Here, not economic, no jurisdictional element, findings insufficient, no link to commerce b/c chain of causation is too tenuous
- §5, Congruence and Proportionality to §1 violations
 - applies *Boerne* to §1 right
 - EP from state
 - Can't reach private actors

Aftermath of *Boerne*

Significant in *sovereign immunity* cases, because Congress can't avail itself of Commerce Clause there

Chisholm v. GA (1793), citizens of one state can sue another state

Led to 11A

Hans v. Louisiana (1890): 11A prohibits suit against a state by its own citizens, otherwise discriminating against out-of-staters

Ex parte Young (1908): citizens can sue states for prospective injunctive relief

Edelman v. Jordan (1974): citizens can't sue states for damages from state treasury

Alden v. Maine (1999): citizen barred from bringing federal damages suit in fed court can't bring that suit in state court

Seminole Tribe v. Florida (1996): Congress can't abrogate sov imm via Art. I.

To abrogate state powers, there must be either

Waiver of immunity by the state, or

Clear intent by Congress to abrogate an action pursuant to proper (i.e., post-11A) power

(11A: no preexisting power was sufficient to pierce sov imm, though subsequent amends could)

City of Cleburne v. Cleburne (1985): home for mentally retarded denied permit, Court applies rational basis with bite and strikes down the permit requirement

Legitimate purpose can't be based on prejudice/private bias (compare to others in similar situation)

Uncontested that Congress has the power to Act under Commerce Clause, but the question is whether this is a valid attempt to abrogate the sovereign immunity of the state

Cf. Morrison, where question was whether Congress had power to act

Likewise, wrt ADA in *Garrett*, the ADA Title I deals with employment, and therefore, interstate commerce can apply, and the question is whether the ADA can be used to abrogate sov imm

- Court rejects heightened scrutiny for the disabled: (but, history of discrim, powerlessness, immutable?)
 - Not powerless, b/c they have attention of lawmakers (reverse of *Frontiero* plurality)
 - Slippery slope consequences, others will also expect heightened scrutiny
 - Congress, unlike court, can act w/o stating principled reasons (can just make political preferences)
- Court rejects four rationales of the City Council
 - Negative attitudes of property owners
 - Fear of harassment by nearby school's students
 - Can't regulate private prejudice, but can use it as rationale for reg (*Palmer*)
 - Fear that house was on flood plain
 - Underinclusivity, should apply to anything on flood plain
 - Fear about number of occupants
- Distinguish *Lee Optical*, opticians are different from mentally disabled...based on social animus over time (not formal difference, or you get to slippery slope argument)
- Take away: argue for arbitrariness and unreasonableness of the statute, not that victims are a protected class, to get rational basis with bite instead of failing to get heightened scrutiny

Alabama v. Garrett (2001): ADA suit for damages against state employer, Court upholds 11A defense.

ADA Title I: no discrimination in employment (commerce connection)

ADA Title II: access to public accommodation (similar to *Heart of Atlanta*)

Permissible to enact....sov imm question

- unequivocally intends to abrogate sovereign immunity
- acted pursuant to valid grant of authority (post 11A)
 - *Boerne* model of §5 power
 - Define §1 right (rational basis with bite for the disabled, after *Cleburne* and ADA)
 - Not all forms of disparate treatment are §1 violations, but *Cleburne* recognizes that it *might be* rational to discriminate against disabled individuals
 - How many violations? (not many, extended inquiry only to state, not municipalities)
 - Is congressional remedy congruent and proportional

Tennessee v. Lane: wheelchair accessible courthouse: δ had to climb up steps to answer criminal charges, refuses and is held in contempt

- State raises sov imm claim
- Court upholds Title II as valid §5 enactment. Right to access courts under SubDP
- *Griffin v. Illinois*, transcript needed to have meaningful access to court

Nevada Dept of Human Resources v. Hibbs (2003): Family and Medical Leave Act, sov imm defense

- Harm asserted triggers §1, Congress may act under §5
- Congruent and proportional remedy:
 - Disparate treatment on basis of sex by state actors (extended maternity leave discriminates against men, disparate treatment and intermediate scrutiny)
 - Disparate treatment on basis of sex by state employers results, less likely to hire women b/c they can take leave
 - Disparate treatment on basis of sex by *private* employers (where child care policies exist, men and women get treated differently when asking for leave)
 - *Washington v. Davis*, absent intent, no violation to have disparate impact
 - Here, act protects BOTH men and women, so not overbroad, based on stereotype
 - Disparate impact on women of workplace policies designed for workers w/o caretaking provisions
- FMLA gave unpaid leave w/o regard to sex..."congruent and proportional" to discrimination?

Procedural DP: Roth v. Board of Regents (1970): deprivation included termination from state job (welfare benefits, &c). **Perry v. Sinderman (1972):** property is reasonable expectation to continued receipt of a benefit (tenure case)

***Congress's power under the reconstruction era amendments: CHEM p288-309**