

I. Intro + Modalities of Const. Interpretation

❖ Road-Map of Const.

- Articles
 - Article I: Legislative Powers
 - Article II: Executive Powers
 - Article III: Judicial Powers
 - Article IV: Relationship Among States
 - Article V: Amendment Procedure
 - Article VI: National Debt/Supremacy
 - Article VII: Ratification Procedures
- Bill of Rights:
 - [One objection to Const. was didn't guarantee rights to ppl
 - But if we enumerate it will be exhaustive list (through *expressio unius*)
 - 9th Amendment addresses this in “unenumerated rights”]
 - Amendment 1 Freedoms, Petitions, Assembly
 - Amendment 2 Right to bear arms
 - Amendment 3 Quartering of soldiers
 - Amendment 4 Search and arrest
 - Amendment 5 Rights in criminal cases
 - Amendment 6 Right to a fair trial
 - Amendment 7 Rights in civil cases
 - Amendment 8 Bail, fines, punishment
 - Amendment 9 Rights retained by the People
 - Amendment 10 States' rights
- 11th and 12th Amendments
 - Amendment 11 Sovereign Immunity
 - Amendment 12 Reforming Executive Election Procedures
- Reconstruction-era Amendments
 - Amendment 13 (1865) Abolition of Slavery
 - Amendment 14 (1868):
 - Privileges AND Immunities
 - Due Process
 - Equal Protection
 - Amendment 15 (1870) Abolition of Race-Based Restrictions on Vote
- Progressive-era Amendments
 - Amendment 16 (1913) Income Tax
 - Amendment 17 (1913) Direct Election of Senators
 - Amendment 18 (1919) Prohibition
 - Amendment 19 (1920) Women's Suffrage
 - Amendment 20 (1933) Lame Ducks
 - Amendment 21 (1933) Repeal of Prohibition
- Post WWII Amendments
 - Amendment 22 (1951) Presidential Term Limits
 - Amendment 23 (1961) Electoral Votes for DC
 - Amendment 24 (1964) Banning Poll Tax

- Amendment 25 (1967) Presidential Succession and Disability
 - Amendment 26 (1971) Suffrage for Young People
 - Amendment 27 (1992) Limiting Congressional Pay Raises
- ❖ Modalities of Const. Interp (Bobbit's 6 modes + Post's sources of authority)
 - 1) historical (intentional)
 - Authority of consent
 - Problem is different make-up of society at moment of consent (minorities + women not included)
 - Response: implied consent of all citizens through non-exit
 - Rebuttal: exit is impracticable for most
 - 2) textual
 - 3) structural (various parts of gov't vis-à-vis each other)
 - 4) doctrinal
 - Authority of law
 - 2 problems
 - 1) issue of infinite regress (at T1 take historical approach, means at T0 there was an arbitrary decision – i.e., to drive on left or right)
 - 2) can impede progress
 - 5) ethical (responsive)
 - “national ethos”
 - Not really a source of authority
 - Raises counter-majoritarian difficulty
 - 6) prudential (cost-benefit analysis)
- ❖ **Marsh** (1983, Burger): *uses historical modality to decide state-sponsored prayer is OK, dissent uses intentionalist, doctrinal and responsive*
 - Facts: Chambers was raised religious, now bitter. Palmer being paid by NE state legislature to lead prayers – same guy for years. Chambers would leave out back door.
 - Holding: OK for legislature to pay for prayer, even if it's led by clergy from one religion
 - Historical argument: Framers' intent immediately preceding adoption of Establishment clause → they established prayer in Fed gov't
 - Wouldn't have then turned around to abolish in establishment clause
 - Dissent (Brennan):
 - Internationalist modality:
 - Framers DID contradict themselves bc accession to state-sponsored prayer in Const. was compromise and establishment clause in BoR was “moment of higher lawmaking” (Ackerman)
 - i.e., expression of ideal we cannot currently live up to
 - Doctrinal: open and shut case if we follow precedent
 - No elements of test from *Lemon* met here
 - Burger ignored bc was too stringent – Brennan himself doesn't even rely on it
 - Responsive***: this is most important for Brennan

- Our society's views on religion have changed – cant assume a convergence anymore

II. Judicial Review

❖ History

- Art III deals with courts, but judicial review (power of courts to strike down laws) not addressed textually
 - error, correction, movement toward center
 - King George: centralized power of tyrant too strong, so reaction
 - Articles of Confederation: fed gov't was too weak → no nat'l economy
 - Constitution: have to interpret strength of fed gov't
 - Federalists: stronger fed gov't
 - [NOTE that term “federalism” refers only to inquiry into question of strength of fed gov't vis-à-vis other sovereigns, not a specific view]
 - Republican: weaker fed gov't
 - Election of 1800: Federalists lose big time, then try to entrench themselves through sketchy maneuverings
 - 1) Circuit Court Act, creating six new circuit courts w/ sixteen judges
 - Repealed by Republicans
 - 2) Organic Act authorizing Adams to appoint 42 Justices of the Peace for DC for 5 year terms (Marbury is one of these)
 - Marshall, a Federalist, appointed as chief justice by outgoing lame-duck Federalist pres. Adams
- ❖ **Marbury v. Madison** (1803, Marshall): *establishes power of judicial review, political question doctrine, [different types of jx]*
- Facts:
 - Commission was never delivered to Marbury by Secretary, administration leaves, new secretary of course doesn't want to deliver it to him
 - BUT MARSHALL WAS SECRETARY (then in opinion uses passive voice and says “commission was never delivered to him”)
 - Tried to get James Madison to deliver commissions, Madison didn't get around to Marbury's/forgot
 - Holding: Marshall establishes judicial review (gives up little power over writs Marbury's appointment for far greater power of strong fed gov't)
 - ignores 5 possible escape hatches
 - 1) first escape hatch since Marshall was implicated he could/should have recused himself like he did in *Stuart vs. Laird*
 - he didn't do this bc a) no recusal stnd in English CL and b) recusal statute of 1792 only re. District Court judges
 - Today: Marshall would have to recuse himself (modern recusal statute 28 U.S.C. § 455 (1974) originally passed in 1948 (if SCOTUS justices don't recuse themselves only recourse is impeachment)
 - 2) Marbury has no legal entitlement to position bc commission had not been delivered yet (like mailbox rule in contracts)

- BUT INSTEAD he says (P. 110 paragraph 10): delivery is just ministerial, vests when its signed and sealed and doesn't require delivery
- 3) political question doctrine: certain issues are “political in their nature” and should be dealt with by executive/legislators not judiciary
 - If explicit in Constitution that president/congress has power it falls under doctrine
 - Marshall could say Const. gives pres power to appoint all officers (changed later) – pres has discretion, we cant decide this on the merits
 - Doctrine now
 - **Baker**: 3 factors to decide if political question
 - 1) Institutional competence
 - 2) Textual commitment (does part of Const. give this power to another branch of govt)
 - 3) Comity (respecting other branches of govt)
- 4) statutory interpretation: Marshall's interp of Art III §2 as a constant (assume he's right): DOES NOT allow SCOTUS original jx over issues over issuance of writs of mandamus
 - can still interpret sec 13 of Judiciary Act to comport w that interp of art III§2
 - can say last sentence describes what SCOTUS can do pursuant to appellate jx → i.e., does not explicitly give SCOTUS original jx over issuance of writs of mandamus
 - [Different kinds of jxs:
 - Original: you look at it first, decide facts and law
 - can have original but not exclusive
 - Appellate: you look at it after another court, law only
 - Exclusive: person filing MUST file it w/you, you look at it first, decide facts and law]
 - Marbury loses if we take this route, but he could go to state court bc this route says no original jx for SCOTUS
- 5) constitutional interpretation: Marhsall's interpretation of Sec 13 of Judiciary Act as a constant: SCOTUS has original jx over issuance of writs of mandamus
 - Can still interpret Art III§2 to comport w that interp. of Judiciary Act

- Art III §2 contains exceptions clause – cong. can do what it wants bc const. gives them permission to adjust balance btw appellate and original jxs
 - ***Yoshino says failure to use either 4) or 5) means Marshall is manufacturing a conflict btw statute and the Const. instead
 - Perverse consequence to this opinion: a sense in which this opinion weakened court's power relative to Cong.
 - Under Marshall's interp, cong. can use exceptions clause to take a bite out of appellate jx and give to other courts, leaving SCOTUS w less jx and that slice of original jx
 - OR could even strip out all of SCOTUS' appellate jx and give to other courts and leave SCOTUS w nothing but that slice of original jx over irrelevant cases
- ❖ Rationales for Judicial Review (constitutional supremacy + judiciary-branch supremacy)
 - 3 rationales for constitutional supremacy
 - 1) “moment of higher lawmaking” – trumps ordinary statutes (that's the purpose of constitutions)
 - 2) framers intended this to last through the ages
 - Textual reason: supremacy clause from Article VI: *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.*
 - Article VI is a catch-all (supremacy clause, debts incurred under A of C to be honored under Constitution)
 - Other reasons for supremacy clause (**Venelstein**): Could read “all laws...which shall be made in pursuance thereof” to mean that the const. establishes *procedural regularity*
 - Can push back and say all the stuff re. procedure in const. is surplusage,
 - but can then just say to read this interp. lightly
 - 3) constitution is written
 - Contrast w/unwritten constitution in Britain
 - 3 rationales for judiciary branch supremacy
 - 1) institutional competence: this is the role of the courts bc they have to apply the law to particular cases
 - Judges do this all the time, only difference is the constitution trumps other laws
 - 2) the oath taken by judges (weakest rationale)
 - “the constitution and laws” means constitution trumps
 - BUT stupid argument to say it trumps just because it comes first in an oath
 - ALSO all federal officers swear this oath, not just judges
 - 3) juridical competence to interpret some laws under constitution directly (like treason) – (also a weak rationale)
 - Other possibilities:

- Could have multiple and co-equal const. interpreters (not just judiciary)
- Could have emphasized the nature of the judiciary as a non-political (i.e., non-majoritarian) institution
 - **Bickel**: courts are ultimate arbiters of constitution bc they are best at protecting fundamental values of our society from the vicissitudes of fundamental change
 - Court's insularity from politics is why we want them interpreting constitution
 - Argument against is counter-majoritarian difficulty
 - Court's insularity from politics is why we DON'T want them interpreting constitution
 - Particularly acute when "ethos" is modality of interpretation (bc we cannot locate authority)
- *Could say it is giving to judiciary chance to deal w/legislation since the other 2 branches had a crack already (exec has veto power, power to pardon)****
 - [Once Cong passes, executive decides it's workable, judiciary final arbiter bc it is uniquely positioned to protect values (Bickel)?
 - Democracy does NOT = majoritarianism]
- Processural theory: courts keep political process pure (**John Hart Ely's** theory)
 - Minorities need to be insulated from majority's power
 - Courts can be their voice to make up for lack of legitimacy of legislature in terms of representing their interests
 - Reverses spin of countermajoritarian difficulty
- Courts protect minorities for majority theory (somewhere btw Ely and fundamental values theory)
 - We are committed to equality so courts upholding that fundamental values
 - If minority losing bc of bad reason like prejudice courts can step in
- Court is not a distinctively countermajoritarian body
 - Not a normative argument against countermajoritarian difficulty, but a descriptive one
 - Our entire system suffers from countermajoritarian difficulty
 - Senate is an example
 - **Dahl's** political research: justices replaced an average of one every 22 months

❖ Limitation Placed on Judicial Review

- Justiciability Doctrines
 - 1) Political Question Doctrine
 - See *Baker* factors above
 - Simultaneously an act of deference and an act of supremacy – we are punting, but get to decide when (can use as a shield)
 - 2) Standing: You have to be the right person to be bringing the case
 - Constitutional standing requirement: **Luhon** (1992) tries to make sure ppl have a dog in the fight – so P must allege:

- An injury in fact
- Fairly traceable to D's conduct (causation)
- Likely to be redressed by the court (redressability)
- Prudential standing requirement: can be overridden by statute but court uses as guides:
 - **Elk Grove Unified School District** (2004) – prohibitions on
 - Assertion of rights of 3rd parties
 - Asserting claims not w/in the “zone of interest” Cong. sought to protect
 - Asserting generalized grievances shared widely by large group of ppl
 - no standing as a state taxpayer
 - ONE EXCEPTION is violations of establishment clause where money is being paid (in *Marsh* he could have argued TP standing)
 - Only reason is **Flast v. Cohen**, some case that hasn't been overturned
- 3) Ripeness (temporality): too early
 - Ex. is **Ohio Forestry Assoc. vs. Sierra Club** (1998): Sierra Club thought EPA would be violated by development project, developer didn't even have plans yet
- 4) Mootness (temporality): too late (**City News**)
 - Ex. is case re. adult bookstore that went out of business before it reached SCOTUS, court says moot now (need a dog in the fight)
 - EXCEPTIONS for “matters evading review but capable of repetition”
 - Ex. is *Roe*/abortion cases (“litigation takes longer than gestation”)
- 5) Certiorari Practice
 - Have a right to file a case in fed court, have a single appeal to fed appellate court
 - DON'T have an appeal as a matter of right to SCOTUS
 - Have to file petition of certiorari, SCOTUS decides to grant or not
 - 7,000 or 8,000 cases a year result in petitions, SCOTUS hears 70 or 80 (and that number is going down)

III. Federalism: Commerce Clause

- ❖ Art I § 8 (18 clauses): list of powers that congress has (states try to argue that if power isn't on this list congress cant make law that trumps state law) – *guns and butter*
 - Clause 3 is Commerce Clause: The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes
 - Economic concerns – needed a stronger centralized economy (problem w/ A of C)

- Also to wage war
 - War power shared btw congress and executive (we will cover in separation of powers section)
- Power over DC (entity created by federal govt)
- Clause 18: Necessary and proper clause for carrying into execution the powers of the fed gov't
 - A kind of rider clause (doesn't grant additional powers)
 - Says you can engage in necessary and proper means to effectuate power you already have

❖ Original vision: Congress cannot delegate more powers to itself

	Granted	Denied
Congress	Powers in Art I § 8 (also other Articles and Amendments)	Powers in Art I § 9
States	All other powers (as guaranteed by 10 th Amendment)	Powers in Art I § 10

❖ History of Commerce Clause Jurisprudence

- Rise of Congressional Power
 - 1819: *McCulloch* increases Cong. power through interp. of necessary + proper clause
 - 1824: *Gibbons* – court settles on commerce clause for fed intervention
 - Early 1900s: *Lochner* era – cases under commerce clause going both ways
 - Substantive Due process = individuals challenging state/fed law as violating their personal rights
 - Vis-à-vis states = 14th amendment
 - Vis-à-vis fed = 5th amendment
 - Pincers: cong power being challenged from state side vis-à-vis commerce clause and individual side under due process clause
 - Whatever *Lochner* allows individual to have under 14th amendment vis-à-vis states will also be a right against the fed govt under due process clause of the 5th amendment
 - They would eventually become coextensive in both directions
 - *Champion* (1903): court validates Cong. act, fed can regulate
 - Lottery tickets – *product* is what is being regulated
 - *Hammer* (1918): court INvalidates Cong. act, fed cannot regulate
 - Child labor – *process* is what is being regulated
 - Leads to prisoner's dilemma
 - Eventually overturned
 - Distinction btw *Champion/Hammer* no longer relevant
- The Heyday of Congressional Power (1937-1995)
 - In Great Depression, pres annoyed bc court kept striking down relief legislation
 - Standown btw executive and courts: courts blinked here and the ripples in cong doctrine sent down through history

- 1937: “switch in time” – nothing struck down after this, until...
 - Devolution of Power Back to States (1995-present)
 - 1995: *Lopez* – Rhenquist revolution – strikes down Guns Free School Zone Act as in excess of Cong. power under commerce clause
- ❖ 5 Values of Federalism
 - 1) efficiency
 - Why states need some power: Some things better taken care of at state/municipal level
 - Why fed needs power:
 - nat’l economy/prevent trade wars btw states
 - coherent foreign policy
 - national projects/environmental issues (negative externalities – moral hazard problem for individual states)
 - *Hammer*: race to the bottom re. child labor means no one states want to pass laws preventing
 - 2) individual choice: States being able to come up w more solutions insures that more ppls preferences are satisfied
 - If ppl don’t like laws in one state, they can vote w their feet and move to a state w laws they like more
 - Ex: smoking ban from **McConnell**
 - BUT Usually ppl care about a lot of things, so one issue wont really motivate ppl to move
 - 3) experimentation:
 - **New State Ice (Brandies)**: states can serve as experimental labs for the rest of the country without harming the entire country if it doesn’t work (ex.s are seatbelts, welfare, no-fault divorce)
 - BUT most states followers rather than leaders
 - 4) Localism – **Rapaczynski** (ex’s. are schools boards, the referendum, town hall meetings)
 - BUT difficulty is meetings happen at municipal, not state, level
 - Constitution only recognizes one break point, btw fed and states, in terms of sovereignty
 - 5) prevention of tyranny: **Federalist Paper #351** – double security for citizens bc different gov’ts will control each other (federalism) at same time that each will be controlled by itself (separation of powers)
 - Conflicts:
 - State says no Nazi rally in Skokie, fed says its free speech
 - Fed says no marijuana, state of CA says its OK
 - Diff levels of scrutiny possible
 - *Fed law forms floor w/r/t individual rights, states can build above the floor*
 - Ex: HI has more protection for sex discrim than fed law requires
- ❖ **McCulloch** (1819, Marshall): *Extends the meaning of necessary and proper clause → Federalist agenda, use of intratextualism, “this is a constitution we are expounding”, facially neutral laws can have a “pre-text”*

- Facts: MD tries to levy tax against the federal bank
- Holding: 2 questions
 - 1) Does Cong. have power to create Bank of U.S.? (YES)
 - Textual argument
 - Necessary cant mean *absolutely* necessary, bc then it would be surplusage
 - another section of the constitution says “absolutely necessary”
 - Intratextualism: we assume that when ppl are framing a document the same word means the same thing across the same document
 - Ethos-based arguments
 - Marhsall says nec and prop clause in Art I Sec 8 (not 9): interpret by its placement in const. to expand powers rather than restrict them
 - “*This is a constitution we are expounding*” – by nature it speaks in generalities so we must give it leeway
 - If everything the framers intended would be outlined, it would be incomprehensible to layperson, would not be a democratic document – “would partake of the prolixity of a legal code” (hidden insult to the French)
 - MD argues very idea of this country is sovereignty of states
 - Marshall rejects: sovereignty resides in *the people* who delegate authority to BOTH states and fed through conventions of the ppl and various states
 - Intentionalist argument
 - There was a bank for 20 years, constitutionality of it not raised at the time
 - Here similar to doctrinal mode – practice as precedent (Dauber)
 - Prudential argument
 - lack of a bank horrible for nation in war of 1812
 - Structural Argument
 - MD arguest re. potential for federal tyranny
 - Marshall says its part of powers, nec + prop
 - 2) Does a state have power to tax it? (NO)
 - Structural modality (federalism, separation of powers, judicial review)
 - Fed gov’t has power to establish
 - If we give state power to tax it, we give them power to destroy it
 - Also, w/in a state ppl will overtax themselves, but cannot give them power to tax citizens of other states

- ❖ **Gibbons** (1824, Marshall): *Commerce clause most expansive warrant for fed power, dormant commerce clause*
 - Facts: Competing ferry services, one says has exclusive right to operate under state law, the other says he has right to operate under fed law
 - Holding: fed regulation trumps bc of commerce clause
 - Marshall finally settles on commerce clause as ground for all of this congressional action
 - In *McCulloch* he never said which power the power to est bank was nec + proper TO
 - Concurrence (Johnson): goes further than Marshall – says power to regulate interstate commerce not only granted to Congress but *exclusively* to Congress and not states
 - Marshall says only have power when states haven't acted (dormant commerce clause)
- ❖ **Lochner** (1905): *substantive DP (freedom of contract)*
 - Facts: bakers challenge maximum hours legislation in NY State as violation of freedom of contract
 - Holding: strikes down legislation under DP clause
 - “freedom of K” not in constitution (an unenumerated right)
 - Art I Sec 10: limitations on state govt includes contract (contracts clause) → by *Lochner* this has been interpreted away
 - But like squeezing a balloon – issue pops back up elsewhere (here DP clause) bc ppl still have deep-seated belief that the state should not interfere in Ks
 - Based on laissez-faire capitalism/social Darwinism
 - Dissent (Holmes): social Darwinism is a fad, Court is giving DP a substantive dimension
 - I.e., this is countermajoritarian
 - Dissent (Harlan): being a baker not so dangerous (distinguishes from miners in *Holmes*)
 - Why is *Lochner* so reviled?
 - 9th amendment says there ARE rights that are not enumerated in const.
 - Can we really distinguish from recent attempts to create unenumerated rights (right to privacy etc)?
 - You could say that court should only be countermajoritarian when protecting a minority that is oppressed by majority
 - BUT could say that *Lochner* is a baker w no power (like a minority)
 - Could then respond and say he's a master baker who is trying to work his employees more than they wanted to (Harlan mentions coercion of apprentice bakers in his dissent)
 - Over 90% of ppl in the legal academy would revile *Lochner* and embrace *Roe* – scholars need to understand if there is a ground to do so other than politics

- [Possible answer: difference between commercial rights and other (more sacred) personal rights – i.e., we need to protect ppl from unfettered capitalism, but what you do w/your body is your business...]
- ❖ Switch-in Time + Summary of Substantive DP
 - Switch-in-Time (1937)
 - 3 progressives (Cardozo, Stone, Brandeis)
 - 4 horsemen (Butler, McReynolds, Sutherland, Devanter)
 - *Hammer*, *Carter* (strikes down Bituminous Coal Conservation Act), *Schechter Poultry* (strikes down National Industrial Recovery Act)
 - Distinctions:
 - Process/product distinction (subject matter distinction)
 - Manufacturing, agriculture, mining vs. commerce
 - Direct/indirect effect on commerce
 - Flow of commerce (interstate vs. end point)
 - “the chickens had landed” in *Schechter* the end point was in NY – chickens not in stream of commerce
 - 2 swing voters (Hughes (chief), Roberts*)
 - Roberts switched during switch-in-time
 - Judicial Reform Act – a court-packing scheme to add justices to get up to 15
 - Pretext was judges are overburdened in time of nat'l crisis
 - All 4 horsemen over 70 (encourage them to retire)
 - Act is Const. permissible, # of justices has changed over time
 - BUT Cong cant abolish the court (Art III does say there must be a supreme court)
 - History of Substantive DP – 2 forms
 - 1) Economic rights
 - *Lochner* (1905) to *West Coast Hotel* (1937): commerce clause jurisprudence moves from total supremacy of freedom to contract to an elimination of that right from CL
 - Aberrations: early non-economic substantive DP rights
 - *Meyers v. Nebraska* (1923)
 - Do parents have right to permit children to study a foreign language? (Didn't want parents teaching kids German at too young an age.) Court says parents have rights.
 - *Pierce v. Society of Sisters* (1925)
 - Parents must send kids to public school? Court says violates parents' rights.
 - 2) right to privacy

- *Griswold*: brings back freedom to contract in context of contraception
 - but needs to distinguish *West Coast Hotel*
 - fears of *Lochnerizing*
 - fountainhead of right to privacy
 - we squeezed the balloon on states power in commerce clause – it tried to resurrect itself in freedom of contract – ultimately constitutional value died here
- ❖ **NLRB v. Jones & Laughlin Steel** (1937, Hughes): *post switch-in time*
 - Facts: steel co. (intrastate) fires workers engaged in union activity, activity protected by NLRA, NLRB arbitrates claims + orders their reinstatement, co. refuses under grounds that NLRA is unconstitutional
 - Holding: NLRA is constitutional
 - "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."
 - Distinguishes from **Schechter Poultry**:
 - Close relationship to interstate commerce – direct effect on it so cong. has power to regulate
 - In *Schechter* chickens came to rest, but here we are dealing with heart of a “self-contained, highly integrated body”
 - Interrelated organism – no stopping point for steel
 - Before switch in time, likely court would have said this is process and therefore not w/in cong. power under commerce clause
 - ❖ **West Coast Hotel v. Parrish** (1937, Hughes): *overrules Lochner (via Atkins)*
 - Facts: WA has min wage legislation, Parrish sues hotel for violating legislation, hotel claims it has freedom of K, court finds for Parrish
 - Holding: *DP clause does NOT protect freedom of K*
 - Broad ground of overruling – this is w/in Cong. power in commerce clause
 - Really overrules **Atkins v. Childrens Hospital** which relied on *Lochner* re federal min wage law for women
 - Ignored the **Muller v. Oregon** which made an exception for women w/out overruling *Atkins/Lochner* line (Cong. CAN regulate women’s labor b/c of physical differences)
 - ❖ **US v. Darby** (1941, Stone): *overrules Hammer*
 - Facts: Fair Labor Standards Act re min wage and max hours for employees of lumber company
 - Holding: 2 reasons we can overrule *Hammer*
 - 1) personnel of court changes
 - 2) *Hammer* hasn’t been followed
 - We are restoring a line of reasoning from which *Hammer* was an aberration

- See *Planned Parenthood v. Casey* for elaboration of when precedent should/can be followed/overruled (Re. *Roe*)
- ❖ ***Home Building Loan Association v. Blaisdell*** (1934, Hughes): *prudential modality (economic crisis), no freedom of K in constitution*
 - Facts: MN legislature enacts Mortgage Moratorium Law – emergency measure granting relief (don’t have to pay back), challenge based on contracts clause (need to uphold binding legal status of Ks)
 - Holding: prudential modality
 - “this is a constitution we are expounding here”
 - External shocks to the system
 - In *Darby + NLRB* crisis went unmentioned
 - Freedom to K not in const.
 - Contracts clause was meant to prohibit debtor relief laws
 - Prudential modality expresses itself by saying we are in crisis, if we don’t act we will cause terrible econ damage
- ❖ ***Carolene Products*** (1938, Stone): *Cong. now has plenary power under comm. clause (r-b review), but fn 4 lays out 3 aces up court’s sleeve for more robust judicial review*
 - Facts: Filled Milk Act bans skim milk based on shoddy science, claimed to be in violation of Cong. power
 - Holding: it is w/in Cong. power to ban skim milk
 - 1) does NOT violate Commerce Clause
 - Cong can regulate injurious products (like lottery tax in *Champion* from 1933)
 - 2) does NOT violate 5th Amendment DP
 - “affirmative evidence” cited by court
 - Dicta: regulatory legislation only needs to meet “rational basis” test
 - Court won’t even look into Cong’s rationale, but presume it is there if a rational basis *could* exist
 - Becomes holding in *Williamson*
 - FN 4: 3 situations calling for more robust review
 - Paragraph #1: DP clause of 14th amendment can be used to transpose textually enumerated right against one sovereign onto another sovereign
 - “specific prohibitions”
 - Contrast w/general ideas like “liberty” that are being used to infer unenumerated rights
 - “which are deemed equally specific when held to be embraced w/in the 14th amendment”
 - Bill of Rights incorporated against the states through the DP clause of the 14th amendment
 - Think *Marsh*: NE state legislature and not federal Cong, but we can charge their laws and unconstitutional through the DP clause of 14th amendment
 - Incorporation:
 - Originally the Bill of Rights only ran vs. the fed govt

- Selective incorporation (includes most of it) against states after 14th amendment in 1868
 - Amendments that are NOT incorporated vs. states: 2nd, 3rd, 5th, 7th, 8th (**MEMORIZE THIS LIST**)
 - *Hurtado* is actual case law describing lack of rts. vs states
 - Debate btw Black and Frankfurter
 - Black: framers of 14th amend intended ALL of BoR to apply to states – rejects “natural law” (idea that court has boundless power to expand/contract constitutional standards)
 - Frankfurter: accepts “natural law”
- So 3 functions of DP clause of 14th amendment
 - 1) “Procedural” DP rights: notice + opportunity to be heard
 - 2) “Substantive” DP rights: not textually enumerated but we intuit into Const. (*Lochner* relied on this)
 - 3) DP as a vehicle for incorporation: right is textually enumerated but against the wrong sovereign – we transpose onto other sovereigns
 - [Yoshino thinks 2) and 3) should flow from privileges and immunities clause instead]
- Paragraph #2: court MAY decide in the future – more robust review for legislation that is going to restrict operation of political processes that could bring about its repeal
 - Rt to vote, not to be restrained in disseminating info, non-interference w/political orgs, rt of peaceable assembly
 - Court being “aggressively diffident”
- Paragraph #3: court MAY decide in the future – more robust review for legislation that affects minorities (religious, racial, national)
 - Worried about “prejudice against discreet and insular minorities”
 - Reverses spin of countermajoritarian difficulty → now we are worried about the legislature overreaching
 - Problem: subjective judgment to decide who is minority
 - Tribe: not a logical claim, but a matter of social movements
 - Conundrum of civil rights law: in order to be acknowledged you have to have political power so you can come across court’s radar

- Ackerman: odd formulation, clearly based on African Americans, doesn't work for all minorities
 - Af Ams are *visible + ghettoized*
 - Not the only way to describe disenfranchised minority (like gays who are *anonymous + diffuse*)
 - **ADD SOMETHING RE. ROBERT COVER ARTICLE**
- ❖ **Williamson** (1955, Douglas): *rb review moves from dicta → holding, one-step-at-a-time inquiry, court will proffer rationales never offered by Cong.*
 - Facts: opticians distinguishes from ophthalmologists/optometrists, seems arbitrary
 - Holding: striking level of deference – rb test – just has to be some rational basis out there, don't even need to see if Cong argued it at all
 - Court is avoiding becoming superlegislators
 - [Yoshino thinks they still could have included more procedural requirements forcing Cong to cough-up their reasoning]
 - The relevance of motive
 - “pre-text” from *McCulloch*
 - *Darby*: court doesn't look at motive, just result (do we infer a motive from the result?)
 - Standard now: worried about “invidious hidden intent” (*Washington v. Davis*)
 - Deference if facially neutral and no intent detected behind it
 - pre-textual motive counts only if invidious in nature (not worried re. result at all)
- ❖ **Heart of Atlanta** (1964, Clark) & **Katzenbach v. McClung** (1964, Clark)
 - Civil Rights Act (1964) Title II: Outlawed discrimination in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce; exempted private clubs without defining the term “private.”
 - Holding: court upholds under commerce clause
 - Why not 13th and 14th amendments?
 - 13th amendment: only runs against private actors (not states)
 - 14th amendment: only runs against states (not private actors)
 - 1875 Civil Rights act was struck down bc court found Cong didn't have power under 13.2 or 14.5
 - BUT dangerous to hang these rights on comm. clause bc Cong. power scaled back by *Lopez*
- ❖ **Lopez** (1995, Rhenquist): *re-emergence of states' rights (end of Cong.'s plenary power)*
 - Facts: Guns Free School Zone
 - Holding: strikes down Act as in excess of Cong. power under commerce clause
 - 3 pt OR test + 4 factors for “substantially affects” (see *Morrison*)
 - Distinguishes **Wickard** (wheat made in one place affects entire market)
 - Here Cong. said nothing re. commerce
 - Can't be a trivial effect
 - No “aggregation” here (if action by one wheat farmer was taken by hundreds would have big econ impact)

IV. Vertical + Horizontal Federalism

- ❖ Vertical Federalism (fed vs. states)
 - Spending Power: “pay debts, provide for common defense and general welfare”
 - OR inference drawn from taxing power
 - Dormant Commerce Clause
 - Negative inference drawn from interstate commerce clause that says *even when states have not acted the commerce clause restricts state regulation of interstate commerce such that states cannot engage in economic protectionism*
 - Some powers Cong. has explicitly and CL does not need to develop dormant jurisprudence to deal with (print money, postal service, war powers)
 - *Gibbons*: Marshall punts on dormant comm. clause issue, Johnson concurrence claims cong. occupies filed
- ❖ **South Dakota v. Dole** (1987, Rhenquist): *Cong can coerce states through spending power (must meet 4 conditions)*
 - Facts: at the time SD drinking age is 19, fed Cong passes legislation that makes federal highway funding dependent on states’ raising drinking age to 21
 - Holding: statute upheld (although Rhenquist is usually a fan of states’ rights)
 - Cong. coercion must meet 4 conditions
 - 1) be in pursuit of the general welfare
 - Madison used to think spending power could only be exercised vis-à-vis enumerated powers
 - Now we have moved very far from that conception, but still shoving spending power in under “general welfare” (cant just be for fun)
 - 2) conditions must be unambiguous so states no consequence of their noncompliance
 - Issue is accountability – voters must be able to hold the right legislators accountable if don’t like change in law
 - 3) broad federal interest
 - Don’t want feds intruding on narrow areas of traditional state concern
 - Here majority says fed control over highways and drinking age are linked through issue of drunk driving
 - 4) conditions may not violate other constitutional provisions
 - There are some provisions that have to do w/ money explicitly
 - You also cant create incentives w/ money to violate other parts of the constitution
 - Dissent (O’Connor): Restrictions are not sufficient – gives Congress plenary power to do things forbidden to it through the backdoor
 - Undermines idea of limited + enumerated powers
 - Even more true after 1995 when Congress turned to spending clause in order to get things it couldn’t achieve under shrunken conception of commerce clause

- With bailouts now we see exercise of spending power + limitations, not a ton of criticism as overuse of Cong spending power
 - Prudential modality: we are in FDR mode, don't need to worry about constraints right now
 - Doctrinal: these are squishy constraints
- ❖ **Black-bird Creek Marsh** (1829, Marshall): *rejection of dormant comm. clause, purpose is very local (w/in state's police power)*
 - Facts: DE authorized a co to build a dam across a navigable waterway, Wilson had fed license from *Gibbons* and used to break dam, Marhsall holds for DE
 - Holding:
 - Limits on Fed power – Cong does not monopolize the field (as they do w waging war)
 - DE can regulate activity that has effect on interstate commerce, and that's ok as long as Cong hasn't spoken
 - If Cong had clearly stated “break the dam” of course that would trump
 - Also, DE's purpose is very local, to drain a swamp to avoid pestilence in DE (w/in their police power – “health, safety, morals of DE citizens”
 - Has effect on interstate commerce but DE has to do it anyway
 - If it had been a major waterway Marshall may have come down the other way
- ❖ Dormant Comm Clause analysis today
 - Does state reg impinge on activity covered by a fed reg?
 - Y: state reg invalid (*Gibbons*)
 - N: does state reg discriminate against interstate commerce? Discrimination means that the state either:
 - 1) mentions the word “state” or “out of state” (facial discrimination) OR
 - 2) if it has the purpose of discriminating against out of staters under a facially neutral pretext
 - Y: state reg is per se invalid (*Phila. v. NJ*) UNLESS
 - It meets strict scrutiny: in order to meet, either
 - narrowly tailored to a compelling governmental interest (both means & ends) (*Phila. v. NJ*) OR
 - no reasonable nondiscriminatory alternative (*Maine v. Taylor*, ME trying to prevent its own baitfish from being infected, passes facially discriminatory law, court says no intent to interfere w/interstate commerce + no alternative)
 - ALWAYS HAVE TO LOOK AT IF MEANS OR ENDS OR BOTH ARE PROBLEMATIC
 - Hawaii Pineapple example:

- Ends are fine (excluding infected fruit like the ends in *Maine*)
 - Means are a problem (bc we have another means of excluding them – they turn bright fuchsia)
 - State is a market participant (*Reeves v. Stake*, state can discriminate to help state-owned factory)
 - State itself is in the business that is subject of the statute
- N: does reg burden interstate commerce?
 - Y: reg is per se invalid UNLESS
 - State's interest outweighs burden on interstate commerce (*Pike v. Bruce Church*, AZ law that required cantaloupes grown in state to be crated in state, court struck down law bc costs exceeded benefits)
 - Notoriously mushy
 - Means-ends analysis, a more lenient standard for states
 - *Hughes* standard is refinement of this balancing test
 - 1) whether statute regulates even-handedly w/only “incidental” effects on interstate commerce, or instead discriminates against interstate commerce either on its face or in practical effect
 - 2) statute serves a legitimate local purpose
 - 3) if alternative means could promote local purpose as effectively w/out discriminating against interstate commerce
- If fed cong passed law that said the state reg was ok then obviously would be fine bc no longer dormant
 - *Cong can bless what the courts ban and ban what the courts bless*
 - When Cong speaks it can change status quo → unlike other areas of law when we

say cong cant trump, but here bc its courts creating a dormant jurisprudence (“bc cong has not spoken we find...”)

- N: reg is valid

- ❖ Horizontal Federalism (states vs. each other): Privileges AND Immunities (vs. Privileges OR Immunities)
 - **Slaughterhouse cases**: drives a wedge btw traditional fundamental rights in P OR I clause (14th Amend §1 Cl 2) and equality principle in P AND I clause (Art IV §2 Cl 1)
 - These do radically different things
 - Not like due process in 5th amend vs due process in 14th amend where DP means the same thing just runs against diff sovereigns (fed in 5th, states in 14th)
 - We can use intratextuality by DP to say they mean the same thing
 - But CANNOT use intratextuality by PI
 - “citizens of each state shall be entitled to all the Privileges and Immunities of citizens in the several states”
 - Those P+I are not specified in constitution
 - Look to doctrine
- ❖ **Corfield v. Coryell** (1823, Washington): a circuit court case by a SCOTUS justice, equality principle for P+I for list of rights
 - Facts:
 - Holding: An equality principle that occurs across state borders
 - Can deprive out of staters of rights on this list as long as you deprive your own citizens of these rights
 - State has option of leveling up or down (give everyone or no one the right)
 - P+I: need even-handedness btw in-staters and out-of-staters when it comes to these rights
 - 1) right to pass through or travel in state
 - 2) right to reside in state for business or other purposes
 - 3) right to do business (trade, agriculture, professional, otherwise)
 - 4) “take, hold and dispose of property either real or personal”
- ❖ Out of stater can only sue a non-home state only if they grant the right to its own citizens
 - But only a necessary, not a sufficient condition, states can still do this sometimes
 - P+I test:
 - 1) does legislation treats out of staters differently w/r/t a recognized privilege and immunity (*Corfield* list)?
 - 2) if so, is the legislation tailored to a substantial justification?
 - **Toomer**: commercial fishing is livelihood
 - **Baldwin**: MT licensing elk hunting OK bc hunting is recreational (not one of the rights that requires equality)
- ❖ Distinguishing btw dormant commerce clause and P+I
 - DCC: aliens and corps can be Ps

- state reg invalid unless it either
 - 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 law has no discrim purpose but discrim effect, then invalid if the burden outweighs state interest
- P+I: aliens and corps CANNOT be Ps
 - if state reg deprives an out of stater of important economic interests (e.g., livelihood) or civil liberties, the law is invalid UNLESS
 - State has substantial justification AND
 - There are no less restrictive means
 - NO MARKET PARTICIPANT EXCEPTION
 - If law does not have a discrim purpose, it is valid
- Changing status quo
 - Cong can do this under DCC
 - Under P+I no assumption of congressional dormancy, so cong cannot change status quo

V. Separation of Powers

❖ History

- Idea comes from **Montesquie** (*The Spirit of the Laws*, 1748)
- **Madison's chiddush**: checks and balances – allow departments to interact
 - Federalist Paper 51: “double-security”
 - Expect depts. to rationally peruse self-interest, but structure such that when one goes to far another will check it
 - “ambition must be made to counteract ambition”
 - “Checks and balances” – this is the proper term

❖ Art II: deals w/separation of powers

- Power of pres in time of war w/in that article (we focus on this)
- Other powers of Pres
 - Veto Power (Art I § 3 Cl 2)
 - Executive check on legislative power, Cong can respond by overriding – a legislative check on executive power
 - Pardon Power (Art II § 2 Cl1)
 - Seems like checks and balances doesn't really apply here (a “gimmie” for the pres)
 - BUT pres can only pardon for federal crimes
 - State crimes can only be pardoned by head of that state → *a check based on federalism*
 - ALSO pres cannot pardon someone who has been impeached
 - Treaty Power (Art II § 2 Cl2)
 - Only requires Senate to vote (legislative check on executive power)
 - Smaller group of ppl that pres knows better → need *speed and secrecy* for treaties
 - Side note: Treaties and executive agreements in hierarchy of law
 - US Constitution

- Treaties or Statutes (last in time controls)
 - Executive Agreements
 - Increasingly replacing treaty as form of int'l agreement bc pres can make on his own
 - State laws
- Appointment Power (Art II § 2 C12) Power is to appoint ambassadors, public ministers, etc.
 - Legislative check is advice + consent of Senate
 - Congress has exclusive power over inferior officers
 - “independent counsels” like Ken Starr to investigate for impeachment (don't want pres appointing this person)
- Art II vs. Art I
 - Art I begins w “all legislative powers herein granted” – enumerated powers
 - Art II begins w “executive power shall be vested in the pres” w out “herein granted”
 - More similar to Art III w/r/t judiciary
 - Idea of limited and enumerated powers does not apply to Art II
 - There are those who believe in “imperial presidency”
- ❖ **Youngstown Sheet and Tube v. Sawyer** (1952, Black): *delineates line btw pres power and cong power, Jackson concurrence is now rule – sliding scale, ALWAYS THINK YOUNGSTOWN WHEN WE DEAL W/ SEPARATION OF POWERS*
 - Facts: Pres orders seizure of steel mills to end strike (national emergency)
 - Holding: impermissible seizure by pres
 - no authorizing statute on point, power to do so rests in Const.
 - possible arguments for grounding in Art II
 - commander in chief
 - theatre of war (but here reject bc war not being fought *in* Youngstown)
 - faithful execution power
 - taking care that law is being executed (but here not executing/effectuating any particular/actual law)
 - Black is rigid textualist
 - Frankfurter concurrence: Not just that there is no Cong authorization, but Cong has actually forbidden pres from doing this
 - Taft-Hartley Act has procedures for resolving strike → pres is not involved
 - Leaves open possibility that prudential, structural, ethical modalities could permit presidential seizures during wartime
 - Douglas concurrence: Seizure of steel mills is a taking, cant be a taking w/out just compensation
 - Congress is the only one that can compensate
 - Takings Clause of 5th Amendment
 - Belief that only Cong has ability to compensate relate to Cong. power to tax/spending power
 - Jackson concurrence***: more important than holding

- Test: a sliding-scale, better than the textual parsing of which power this falls under (practical wisdom)
 - 1) Pres acts w/ express or implied authority of Cong, his authority is at its acme
 - Warmaking powers btw Cong and Exec – speaking in one voice, judiciary should just defer
 - 2) Pres acts in the face of Cong silence, his actions will be upheld so long as it does not take over the function of another branch of gov't or prevent it from performing that function
 - 3) where pres acts against the express will of Cong, he has little authority and his action is most likely invalid (here)
 - An issue of statutory interp of Taft-Hartley Act
 - Just like in *Gibbons* where Marshall and Johnson interpret statute differently, here too diff justices interpret act differently
 - Jackson's is similar to Frankfurter – the Act says to pres “you cannot seize steel mill”
- Dissent (Vinson): can assimilate into Jackson's framework – they place this situation in either category 1) or 2)
 - 1) cong has authorized all these things, pres exercising what they want
 - 2) Taft-Hartley doesn't say anything re. prohibiting seizure of steel mills
 - Statute is silent w/r/t seizure
 - Different reading of scope of statute
- ❖ **Korematsu v. US** (1944, Frankfurter): *military deference, most rigid (strict) scrutiny (met here), reviled opinion*
 - Facts: Japense Americans interned in WWII
 - Holding: military deference means strict scrutiny met here (prudential modality)
 - If we think strict scrutiny can be met in these sorts of cases and say “in time of war law is silent” it means the courts are granting the military an extraordinary amount of deference
 - Dissent (Murphey): means/ends (based in “pretext” from *McCulloch*)
 - National security is legitimate end, but *means* analysis fails here
 - Means have to bear relationship to end
 - Here legislation is overinclusive (not all Japanese are disloyal) AND underinclusive (what about Germans?)
 - It is tracking a group rather than nat'l security concerns
 - Dissent (Jackson): an argument for the political question doctrine
 - Either strike this down, or call it a political question
 - But do not ratify: ratification by judiciary will outlast war – will be a loaded weapon waiting for the hand of any authority
 - Such a reviled opinion it never really became a problem
- ❖ The Great Writ: *Habeas Corpus*
 - = “you have the body” (13th C from Magna Carta, writ to produce bodies of those who may be unlawfully detained)
 - No affirmative right in const.
 - Suspension clause in Art I § 9 gives situations where right can be excluded

- Cases of rebellion or invasion, public safety requires
- We infer that we have the right as long as it hasn't been suspended (Doesn't really logically follow...)
- Has been suspended very few times
 - One famous time was Lincoln's suspension during civil war (confederates subject to martial law)
 - Many argued this was unconstitutional (appears in Article I § 9 – so seems like a restriction on cong. power)
- ❖ **Milligan** (1866, Davis): *high water mark of limited executive power*
 - Facts: Milligan working for confederacy, charged w planning armed uprising in Indiana, govt worried local sympathizers will acquit him, pursuant to Lincoln's suspension of habeas tried in military court and sentenced to death
 - Holding: unanimous holding that he should be released
 - 5 member majority: military courts can only try individuals when civilian courts closed (state of martial law)
 - Didn't have here in Indiana (although we did have in other states)
 - Concurrence (4 members): military courts can try individuals when congress wants it, here congress didn't say anything
 - This is the big case for those who want to say that w/out martial law being declared we have a requirement to honor habeas corpus
 - If you want strong executive power/military tribunal you must distinguish it from *Milligan*
 - Like distinguishing *Wickard* to get to *Lopez*, this is the high water mark of limiting executive's power
- ❖ **Quirin** (1942, Stone): *asserts power of pres, lawful vs. unlawful combatants, belligerency matters to determine enemy combatant status (not citizenship)*
 - Facts: 8 nazi saboteurs caught, sought habeas review
 - Holding: Upheld military convictions + death sentence
 - Distinguish from *Milligan*
 - Belligerent vs. non-belligerent
 - Here belligerent, there non-belligerent
 - Also, Lawful vs. unlawful combatants
 - out of uniform
 - rules that obtain to POW don't count if you are a spy/unlawful combatant
 - Citizen vs. Non-citizen
 - Haupt is one of the 8 saboteurs but is also a naturalized US citizen – does NOT change the outcome of his case
 - he was an enemy combatant, doesn't matter if he was a citizen or not, unlawful belligerency matters
 - also a citizen in *Milligan*
 - Scalia in *Hamdi* would think it would matter – has to distinguish this case from *Hamdi*
 - Not decided based on citizenship (Milligan, Haupt, Hamdi are ALL citizens)

- *Milligan*: neither entitled to POW status nor subject to penalties of unlawful combatants
 - *Not entitled to benefits or burdens of the laws of war*
 - Foreshadows the way in which *Hamdi* relies on the distinction btw enemy civilian and combatant
- Question of *who* decides who is a belligerent is central to this jurisprudence.
 - Can a military tribunal assign someone the status of enemy combatant thus pushing them into *Quirin* land?
 - You would think under *Milligan* that if state courts are open (we aren't in martial law) that they would have to decide, not military tribunal
 - Military tribunal: departs from const. requirements available in ordinary trial

<u>Court</u>	<u>Military Tribunal</u>
Trial by jury	Trial by military judges (not Art III tenure)
Speedy and public	Non-public
Confront witnesses/subpoena D witnesses	No compulsory process for D witness
Proof "beyond a reasonable doubt" (crim)	No burden on P to carry proof
procedural protections before death penalty	No unanimity req for death pen (military regs require this now)
Indictment by a grand jury	No indictment by a grand jury

- ❖ ***Hamdi v. Rumsfeld*** (2004): *about distinction btw enemy combatants and enemy civilians (rather than distinction btw lawful and unlawful combatants), ALWAYS THINK YOUNGSTOWN WHEN WE DEAL W/ SEPARATION OF POWERS, "enemy combatant" DP rights can be met by military tribunal, in response congresses passes DTA to strip SCOTUS of habeas jx*
 - Facts:
 - 2001: Hamdi (a US citizen) seized by Northern Alliance in Afghanistan as illegal enemy combatant (not wearing a uniform) → Guantanamo Bay
 - US has lease for land in Cuba – idea is that we have geographical rights over the area but its not US territory for habeas purposes
 - 2002: Hamdi transferred to Virginia bc he is American citizen
 - Father files petition, writ of habeas corpus, claims Hamdi went to Afghanistan to do relief work, had been there less than 2 months
 - HC claim: you have been *unlawfully detained* and you want fed court to review bc the body doing this unlawful detaining is itself a court (here military tribunal)
 - Holding: 4-2-2-1
 - Plurality (O'Connor)
 - Souter + Ginsberg join her in result
 - Scalia+ Stevens: hard line position to the left of O'Connor
 - No suspension of habeas = they have a right to Art III court
 - Thomas: executive can do whatever he wants
 - An originalist, a textualist, and someone who believes Art II has been under-read (strong executive power)
 - 2 questions:

- 1) does pres have authority to detain citizen who is an enemy combatant? (clashing statutes are Nondetention Act and AUMF)
 - Souter + Ginsberg: no, read AUMF differently than O'Connor
 - We are in *Youngstown* category III bc of Nondetention act (AUMF does not apply)
 - O'Connor: yes, even in absence of Cong. authorization pres has power
 - Plus here we are in *Youngstown* Category I land bc of Authorization of Use of Military Force
 - Broad reading of AUMF (“Necessary and appropriate force” is an echo of “necessary and proper” clause)
 - Also, *doesn't matter that Hamdi is citizen (Quirin, doctrinal mode)*
 - Can at least be detained while we are at war in Afghanistan, perhaps longer (chilly)
 - Distinguishes from *Milligan* (there citizen arrested at home, non-belligerent) → same argument in *Quirin*
 - “enemy combatant” vaguely defined as “part of or supporting forces hostile to US...”
- 2) what process does detainee have to challenge enemy combatant status?
 - 2 possible schemes:
 - 1) NO judicial review over specific processes (only review over broader detention scheme)
 - 2) “some evidence standard” (deferential, court assumes accuracy of articulated basis for detention, merely assess if this articulated basis was sufficient)
 - O'Connor plurality: neither scheme sufficient
 - Instead use mushy *Matthews v. Eldridge* balancing test that weighs private interest affected against gov't's asserted interest
 - Scalia: this is from a different context
 - Rejects 1) bc condenses power in executive branch (violates *Youngstown* which says war not a blank check for pres power)
 - BUT says their DP rights can be met by military tribunal in theory
 - Here not enough
- Dissent (Scalia + Stevens): absent suspension of writ, pres does not have power to detain w/out a charge
 - Distinguishes *Quirin*: there they were “admitted enemy invaders”
 - *It matters that Hamdi is a citizen*

- Dissent (Thomas): agrees that Cong has authorized this, disagrees that DP requires second-guessing of pres as to Hamdi's enemy combatant status
- ❖ **Hamdan** (2006, Stevens): *SCOTUS can hear tribunal cases pending when DTA passed, distinction btw acknowledgment and authorization, military commissions are unconstitutional exercise of pres power, in response Cong passes MCA to push into Youngstown I land*
 - Facts: Osama's driver detained in 2002, Hamdan NOT A CITIZEN
 - Questions:
 - 1) Can SCOTUS hear this case given that DTA attempts to strip it of jx? (YES)
 - Resolved purely as matter of statutory interp
 - Stevens majority: recognizes DTA is touching upon vulnerability left open by *Marbury* re appellate jx of SCOTUS
 - BUT Poor congressional drafting
 - §1005(e)(1): strips jx of courts to hear petitions from aliens at Guantanamo
 - (e)(2) and (e)(3): exclusive jx to DC Circuit, explicitly apply to pending cases
 - *Stevens points out (e)(1) does not explicitly say it is applicable to pending cases like Hamdan's*
 - *Ashlander* avoidance canon: go to Const. arguments as a last resort – if you can interpret statutes (fairly) to conform to Const. then you should do so
 - The Constitutional issue behind the statutory interp is separation of powers → Where are we in *Youngstown* land? Maj and Dissent interpret these 3 statutes differently to arrive at different results
 - Stevens says category 3 (Cong hasn't authorized – just acknowledged tribunals and then restricted what they can do in UCMJ).
 - Thomas in dissent says category 1 (Cong has lined itself up w executive – zenith of exec power)
 - 2) are the “military commissions” a const. exercise of executive authority? (NO)
 - Stevens makes two major claims
 - 1) the DTA, AUMF and UCMJ do NOT authorize these tribunals, merely acknowledge that they exist
 - *Distinction btw acknowledgement and authorization*

- This is the way he dismisses DTA and AUMF
 - Nat'l security justices emphasize that DTA and AUMF apply, dealing w/non-citizens
 - 2) the UCMJ (Uniform Code of Military Justice) prohibits these tribunals through
 - 1) Uniformity requirement (“insofar as practicable”)
 - Practicable can = at least a court martial standard across the board if tried by military
 - But there is room to wiggle here to go below court martial
 - Scale from civilian trial → court martial → military tribunal
 - UCMJ good for exec bc acknowledges that military tribunals can exist, although bad for exec bc it places limits on them
 - 2) Internalization of laws of war (includes Art III of Geneva Conventions)
 - Even if you want to say Geneva Conventions not self-executing and need Cong approval, the UCMJ requires adherence to laws of war of which Geneva Conventions is one
- Breyer’s Concurrence: always a legislative response to judicial action
- “dismissal of *Certiorari* is improvidently granted” (DIG): granted cert then let go of the case → outcome is as if it had never granted to begin w
 - Either bc court thinks was an error to take in the first place
 - OR bc govt seeks dismissal bc of DTA
 - Govt saying DTA hadn’t been passed when you granted cert, now its clear DTA resolves all the issues re executive authority to do what he is doing (this is the Cong authorization *Hamdi* requires + gives the amount of process it requires as well)
 - SCOTUS rejects this DIG motion bc its concerned that DTA will be applied to cases like *Hamdan* which were pending at time DTA was enacted
 - Bars in Const re retroactive legislation
 - This dynamic is analogous to dormant commerce clause analysis bc *cong can come back and respond*
 - Generally cong is not allowed to pass legislation that seeks to supercede SCOTUS’ const jurisprudence

- ❖ **Boumediene** (2008, Kennedy): *foreigners may assert privilege of writ*
 - Facts: citizen of Bosnia being held in Guantanamo
 - Question: has Cong unconstitutionally suspended habeas in MCA? YES
 - the jx stripping tantamount to suspension of habeas
 - Const says “writ of habeas cannot be suspended” in Art I (=Cong)
 - Cong can only suspend in times of rebellion/invasion
 - Kennedy’s majority: do aliens have habeas rights at all? Yes if they meet test (met here)
 - If no then Cong hasn’t suspended habeas bc they didn’t have right in the first place
 - If yes then court will also find MCA is effective suspension of writ → violation of prisoners’ rights
 - Kennedy uses historical modality to discuss if CL affords aliens right of habeas
 - Sometimes yes (Ireland) sometimes no (Scotland) → indeterminate, history not dispositive
 - Similar to *Brown vs. Board of Ed* – inconclusive evidence from history re. intent of framers in 14th amendment
 - Relies on structural modality to come up w result: YES if they meet 3-part test***
 - Uses distinction from *Rasul* re sovereignty vs. control
 - Guantanamo is analogous to Ireland/Scotland – we are not sovereign but have control
 - Sovereignty too narrow a conception by which to limit habeas rights
 - Structural issues: think back to double-security of federalism from Federalist #51 – Kennedy wants to aggrandize judicial power as much as possible
 - Thomas critiques in dissent – don’t need to peruse institutional self-interest here bc we are not dealing w countermajoritarian difficulty
 - Scalia calls this a naked power-grab for judiciary by Kennedy
 - *City of Bornie v. Flores*: same emphasis by Kennedy on concern re power of court
 - 3-part test to see who gets habeas – Kennedy thinks all met here
 - 1) the detainees’ citizenship and status and the adequacy of the process through which that status was determined;
 - 2) the nature of the sites where apprehension and then detention took place; and
 - 3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ
 - Dissent (Roberts): DTA system is adequate
 - The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. *Hamdi* concluded that American citizens detained as enemy combatants are entitled to only

limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

❖ Timeline of Military Tribunal Cases + Statutes

- 1) June 2004: *Hamdi* and *Rasul* on same day
 - *Hamdi*: enemy combatants (citizens) can be detained during war in Afghanistan but have their right to challenge their status as enemy combatants
 - 1) how do you get shunted into this category?
 - 2) what rights do you have when under this category?
 - Ginsberg's plurality: *the level of due process can be met by a military tribunal*
 - Enemy combatants have minimal DP rights, but she is elliptical re. what those rights are
 - **Rasul**: non-citizens have habeas rights
 - Talking about statutory habeas (*Boumediene* is re. const. habeas)
 - Don't really need to know distinction
 - Stevens majority: US not sovereign over Guantanamo but what matters here is CONTROL, we have indefinite control over lease
 - *Ahrens*: control more important than sovereignty (Stevens was law clerk)
 - Distinguishes from *Eisenstreich* (where court found no habeas rights for foreigners captured overseas)
 - There US had no control over prisoners
 - Here US does have control in Guantanamo
 - Their combined effect:
 - Detainees can challenge enemy combatant status, whether or not they are citizens
 - In response congress creates CSRTs (Combatant Status Review Tribunals)
 - Only question they deal w is "are you an enemy combatant?"
 - If yes, then you can be detained and thrown into military commission system
 - Even after *Boumediene* not sure how low the DP threshold can go for these types of tribunals
 - That uncertainty is part of right wing justices' legit critique of *Boumediene*
- 2) Dec 2005: Bush + Congress sign DTA - protects prisoners from inhumane treatment (sponsored by McCain, classic logroll statute – appeals to both sides) and also strips *SCOTUS of habeas jx for these prisoners and gives to DC Circuit court* (more conservative)
 - can Cong do this? Go back to *Marbury v. Madison*

- Court there is saying that Cong CAN strip appellate jx of SCOTUS w/out adding to original jx of SCOTUS
- Except for very small set of cases enumerated in Art III where court has original jx, Cong has power to strip all the jx from the SCOTUS
- This is the first case where we have seen that vulnerability *Marbury* created in the SCOTUS being taken advantage of
- 3) July 2006: *Hamdan* – DTA’s stripping of SCOTUS jx does not apply to cases pending when DTA was passed
 - Case was supposed to be about whether *Hamdi* extended to non-citizens
 - Became a case re. whether or not SCOTUS could take this case to begin w/ bc if DTA were good law, SCOTUS couldn’t hear case
- 4) October 2006: Military Commissions Act (MCA) passed directly in response to *Hamdan*
 - Right at issue in these cases is are detainees in Guantanamo being *unlawfully detained*
 - “unlawful”
 - Govt argues NOT UNLAWFUL, we have created these tribunals and all of this is occurring under rule of law
 - Petitioners argue YES UNLAWFUL bc you cant create tribunals w/out preconditions being met
 - In *Hamdan* the minimum requirement was that Cong + Pres speak together (Stevens said they weren’t)
 - After MCA: now obviously in category 1 – Cong + pres speaking together
 - Jx-stripping provision again (this time says it relates to ALL of the provisions, w/r/t pending cases)
 - Now we have to deal w question directly: does deference to exec w/ cong speaking together enough to justify this scheme of military tribunals? Answerd in *Boumediene*
- 5) June 2008: *Boumediene* strikes down provisions of MCA that set up military commissions bc what Cong + Exec are trying to do is to suspend writ of habeas corpus
 - → if they want to do that have to engage in an affirmative suspension of great writ & they wont for political reasons (now a Democratic congress)
- 6) Jan 2009: Obama signs executive orders
 - 1) to close Guantanamo w/in a year
 - 2) disavowed torture
 - 3) Create task force for systemic review of all individual cases that balances policies and procedures

VI. The 14th Amendment

- ❖ **Dred Scott** (1858): *blacks are not citizens of US*
 - Slave sued in Fed court for freedom on ground that master had taken him into a free state
 - Holding: not entitled to sue bc he was not a citizen
 - *No individual of African descent could be a citizen of US*
 - He was born + raised in US
 - He was a citizen of the state in which he was born, but not of any nation (including US)
- ❖ 14th Amendment (1868): supercedes
 - Section 1:
 - *all persons* born or naturalized in US are citizens
 - “no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the US, nor shall any State deprive any person of life, liberty or property”
 - 3 moving parts:
 - 1) privileges or immunities
 - Gives citizens substantive rights
 - 2) due process
 - Makes sure those rights cannot be denied w/out certain procedures being followed
 - i.e., *Goldberg v. Kelly*
 - 3) equal protection
 - Ensures that rights are dispersed w/ an even hand
 - Not that simple bc
 - legislative intent of amendment is not clear
 - Don’t have record (closed-door meetings)
 - *Slaughterhouse* cases strangle privileges or immunities in its crib
 - African Americans are now citizens, so now justice Miller wants to make sure they do not get robust rights
 - Subverts original understanding of how 14th amendment was supposed to work
 - Section 5:
 - “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”
 - Will deal w/breadth of this power later
 - 3 kinds of rights at time of 14th Amendment (we don’t split them up this way now)
 - 1) Civil:
 - To hold property
 - To sue
 - To contract
 - To travel
 - 2) Political:

- To vote
 - To hold office
 - 3) Social:
 - To associate
 - To marry
- ❖ **Strauder v. W. VA** (1880): *no-blacks on jury rule violates 14th Amend. EP rights of both potential juror and D*
 - Facts: At the time, West Virginia excluded African-Americans from juries. Strauder was an African-American man who, at trial, had been convicted of murder—convicted, by an all-white jury. Strauder appealed his conviction, contending that West Virginia's exclusionary policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
 - Holding: violates 14th amendment EP rights
 - Whose EP rights were violated? (really both are violated)
 - The potential juror?
 - The criminal defendant?
 - His standing is actually problematic
 - Why does he get to bring the claim of the excluded juror?
 - Look at purposes of standing law: we want zealous advocacy
 - Ppl more likely to engage in zealous advocacy on their own behalf
 - most excluded jurors don't want to serve on juries, don't feel it's a real violation
 - criminal defendants will engage in more advocacy
 - are visions of race adopted w/r/t each right different?
 - Juror: no difference btw blacks & whites in terms of capacity
 - weak conception of race
 - Defendant: if doesn't have someone of own race on jury will get different outcome bc of group solidarity
 - strong conception of race
 - Dissent: Can classify *Strouder* as a political rights case rather than a civil rights case (jurors vote)
 - 14th amendment is re. civil rights not political/social rights
 - 15th Amend does not apply in this case (it is very narrow)
- ❖ Different Conceptions of Race:
 - status (marker of social status)
 - most ppl reject out of hand
 - formal (bloodlines, skin color)
 - leads to color-blind EP jurisprudence, aka the “anti-classification” principle

- historical (only through contingent historical practice)
 - leads to remedial EP jurisprudence, aka the “anti-subordination” principle
 - If we are really concerned about subordination we have to suck it up and classify ppl to give them benefits like affirmative action to make-up for past discrimination
 - cultural (“culture, community and consciousness”)
 - leads to pluralist EP jurisprudence, aka the “diversity” principle
 - [argue this is the best conception of race bc diversity principle not limited to racial groups, opens-up const. interpretation to any group that defines its own community, interprets const. and is committed to its interp (Cover, *Nomos and Narrative*)]
 - [if a group can prove commitment will avoid White’s slippery slope problem]
 - court has been chronically inconsistent in way it defines race (formulation cases)
 - **Ozawa**: fed statute limited immigration by Asian Americans
 - Court: if you are white or black you can naturalize, you aren’t either
 - P says race is a matter of skin-color, my skin is whiter than many “whites”
 - Court: no, race is a matter of bloodlines
 - In later case court says race a matter of “public knowledge” (we know it when we see it)
 - Other EP cases are re. *treatment* not formulation
 - *Strouder*: we all know he is black, question is has he been treated differently?
 - Affirmative Action (1978): until then statutes had been discriminating *against* African Americans
 - You will strike down previous racially discriminatory statutes if you are anti-classification OR anti-subordination
 - But the two theories diverge at affirmative action, bc it permits classification but rejects subordination
- ❖ **Slaughterhouse cases** (1873): *P OR I (14th Amend) is small set of rights (distinct from Art IV P AND I)*
 - Holding: most important part is the court reads P or I clause of 14th amendment narrowly
 - Grant of monopoly to corp not deemed to violate 13th amendment?
 - Butchers are not slaves
 - Why doesn’t grant of monopoly violate DP or EP clauses?
 - Substantive DP takes off after these cases
 - Bc P or I clause is squeezed off, DP clause has to take up that slack
 - why we get DP protections like freedom of K
 - Yoshino thinks this stuff would have been P or I if it weren’t for these cases

- EP/DP: general enough that they are susceptible to ethical modality of interp
 - Roberts: we should be attentive to the level of generality in which statutes are framed
- Not deemed to violate P or I clause
 - BUT *Corfield* said it is a “privileged” right to pursue a calling
 - Why doesn’t being a butcher fall under this?
 - Court makes three moves
 - 1) acknowledges that P and I of citizens of several states is a robust set of rights (Art 4 P AND I)
 - 2) distinguishes btw P AND I from Art 4 and P OR I from 14th Amend
 - Does so by reading “citizens in the several states” as one bucket of rights that is very full and distinct from
 - “citizens of United States” which isn’t very full
 - 3) P OR I is very small set of rights → only vs. fed govt
 - Right to pursue a calling not included
 - *Federal/state distinction binds these rights together*
 - Right to be protected on the high seas
 - Fed govt polices int’l issues
 - Right to peaceably assemble runs against fed govt in 1st amend
 - So why don’t butchers bring P AND I claim from Art 4?
 - You can only bring those claims against another state
- DP has to pick up the slack after this – 3 functions
 - 1) procedural DP
 - 2) substantive DP (unenumerated)
 - 3) substantive DP – incorporation of BoR such that they run against the states
- Yoshino thinks 2) and 3) would have been better served had they fallen under P OR I clause
 - *Slaughterhouse* killed this possibility
 - but our commitments to 2) and 3) are strong enough that when we squeezed the balloon DP clause picked them up

❖ *Civil Rights Cases*

- Civil Rights Act of 1875
 - Challenges brought to public accommodations provision saying beyond Congress’ power to enact
 - Similar to 1964 Civil Rights Act seeks to vindicate promise that Civil Rights Act of 1875 couldn’t really fulfill
 - Fit under the commerce clause in 1964 (1937-1995 Congress has plenary power under commerce clause)
 - *Heart of Atlanta Motel*

- Counterintuitive: we would assume this would fit under 13th and (section 5 of) 14th amendments, not really related to commerce
 - Had to do it this way bc...
- **Civil Rights Cases** (1883, Bradley): *CRA of 1875 struck down as overreach of Congress' power under § 5 of 14th Amendment, Cong. can only "enforce" §1 of 14th amend*
- Section 1: individuals can sue the state when their equal protection rights are violated
 - Self-executing, don't need Congressional authorization to bring a claim
 - State action requirement ("no state shall deny") – can bring a suit against a state
- Section 5: Congress has power to enforce, by appropriate legislation, the provisions of 14th amendment
 - Question is how much more broadly can Congress sweep beyond power of what Section 1 gives on its own?
- Majority: reads "enforce" in a very narrow way (only enforce section 1)
 - Can sue under section 1 against state action
 - Cannot sue under section 1 against private actors
 - All of the individuals and institutions that CRA of 1875 tries to reach are non-state actors (inns, restaurants, places of public amusement)
 - Congress cannot reach these actors under Section 5
 - *Congress can only enforce section 1, which doesn't cover private actors*
- Alternative ways of viewing word "enforce"
 - **Katzenbach v. Morgan** : *expansive conception of word enforce*
 - Facts
 - In 1965, Congress passed the Voting Rights Act of 1965, which sought to safeguard the voting rights of previously disenfranchised minorities. Among other provisions, the Voting Rights Act made some literacy tests illegal. Section 4 (e) was aimed at securing the franchise for New York City's large Puerto Rican population and "provides that no person who has completed the sixth grade in a public school, or an accredited private school, in Puerto Rico in which the language of instruction was other than English shall be disfranchised for inability to read or write English."
 - Registered voters in the state of New York brought suit, alleging that Congress exceeded its powers of enforcement under the 14th Amendment and alleging that Congress infringed on rights reserved to states by the 10th Amendment.

- Holding: upheld
 - Justice Brennan stressed that Section 5 of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees." Justice Brennan applied the appropriateness standard of *McCulloch v. Maryland* (1819) to determine whether the legislation passed constitutional muster.
- Civil rights cases still good law w/r/t idea that there is a state action requirement under section 1 and that congress cannot sweep more broadly to regulate private actors under section 5
- Analogy to contracts: p.374
 - Contracts clause: article 1 § 10, says states are inhibited from impairing the obligation of Ks
 - Part of the constitution that outlines what the several states are prohibited from doing
 - Fact that the states are prohibited from doing something under K clause, does not thereby give Congress the power to regulate Ks
 - What's good about analogy:
 - Simply bc states are forbidden to do something doesn't mean that cong can automatically enter the field
 - Once the state acts in a way that violates the provision that forbids it from doing something, then Cong has power to act
 - Distinction btw secondary/corrective legislation by Cong (states have passed legislation that needs corrective) and primary/direct legislation (Cong passes law w out states doing anything)
 - (Under § 5 need some colorable claim that states are *going* to violate EP if they haven't yet → can engage in ex ante corrective legislation when it sees state legislation coming down the pipe)
 - Whats bad about this analogy:
 - suggests that § 5 is surplusage
 - No specific power in Const given to Cong to enforce through legislation idea that states cant interfere w Ks
- Court also says cant enact CRA under § 2 of 13th amendment
 - No state action requirement in 13th amendment
 - Private individual enslaving another is constitutional violation
 - This is very rare – usually const runs against states/govt

- But majority says Congress' reach under this power limited to slavery (discrimination at an inn is not slavery, not a badge or incident of slavery)
 - BUT "badges and incidents" are not in the text...
- Section 2 is en pare materia Section 5 of 14th amendment
- 2X2 matrix: Bradley (majority) says this case falls in bottom right hand corner

	Public Actors	Private Actors
Prohibition of Badges and Incidents of slavery	13.2 14.5	13.2
Prohibition of EP violation even if its NOT B&I of slavery	14.5	Neither*

- **Charles Black** calls "State action" doctrine a conceptual disaster area
 - Sometimes extremely clear (legislature enacting a law, individuals operating in their individual capacity)
 - Often murky
 - See Harlan's dissent in Civil Rights Cases
 - Says this is going to lead to incoherence
 - We call these "public accommodations" for a reason!
 - We should conceptualist rather than formalist approach to defining state action
 - Modern courts parsimonious in saying private actors are taking on a public function, if it is a
 - 1) Traditional public function
 - 2) Exclusive public function
 - 3) running a state election
 - Company town is a good example
 - **Marsh** (1946)
 - Also, if a private actor is Generally attenuated activity is going to be deemed private
 - Also, state INaction will not be considered state action
 - **Descheny** case: police refuse to intervene when father beating son
- ❖ **Plessy** (1896): "separate but equal", Harlan dissent validated in *Brown v. Board of Ed.*
 - Facts:
 - "Octoroon" could not ride on train with whites
 - Facially racially discriminatory legislation requires separate but equal train cars → Plessy challenged as violation of EP rights
 - Holding:
 - Statute is OK bc not making one race worse than another, no "subordination"
 - Whites are naturally dominant in society
 - Law is color blind here

- Reputation of being white = property
 - If he had been white, conductor would have misassigned him and he would have prop interest that was violated
- BUT here under Louisiana law even a drop of black blood makes you black, he has it so he isn't white, wasn't misassigned
- Harlan dissent: validated in *Brown v Board of Ed*
 - This IS discrimination under the law
 - Like majority agrees that whites are dominant race socially (distinction btw law and non-law)
 - We need colorblindness under law, but ppl don't need to change
 - Separation of races on trains not going to undermine white supremacy
 - Harlan doesn't need to worry re subordination
- 3 kinds of rights: majority and dissent differ on what right is under scrutiny here
 - Civil rights (property, contract, travel)
 - Dissent thinks about case as right to travel (covered by 14th amendment, likely to be protected)
 - political rights (vote, hold office)
 - also likely to be protected
 - social rights (associate, marry)
 - majority thinks about case as right to association (not covered by 14th amendment, less likely to be protected)

VII. Equal Protection

❖ Road to *Brown*

- NAACP litigated cases – genius strategy was to make “separate but equal” collapse of its own weight
 - not saying it was unconstitutional, saying equal must really mean equal
- *Missouri vs. Canada* (1938) (interstate no good)
 - Separate but equal not satisfied just bc blacks could attend law schools in adjacent states
- *Sweatt v. Painter* (1950) (intrastate no good)
 - Facts: U of Texas knows it cant ship black students out, so builds a black law school
 - Separate but equal not satisfied by hastily constructed law school that mimics U of Texas law school
 - Library, faculty, alumni connections not comparable
- *McLaren* (1950) (intrainstitution no good)
 - U of Oklahoma knows it cant create sham separate university, cordons off black students
 - Court says doesn't satisfy separate but equal bc black students not having equal university experience if they are segregated

❖ History behind *Brown*

- 3 oral arguments in this case re. 14th amendment – took 1 year
 - 1) framers direct intent (historical/intentional modality)
 - Evidence is mixed here
 - 2) framers higher-level intent (ethical modality) (aka “springing” intent)

- higher level of generality
 - think “it is a Constitution we are expounding” and “it cannot partake of the prolixity of a legal code” from *McCulloch*
- i.e., door open for future generations to expand equality
- Public education in nascent for in 1868 when 14th amendment ratified
- NAACP: But amendment framed in broad terms (*Strouder*)
 - EP clause does not frame itself in narrow terms of race or a particular right
 - Equality not restricted in Constitution by particular group or set of rights
 - Terms are as comprehensive as possible
 - Imagine if Constitution had been drafted differently, on basis of race, would not have EP guarantees re. gender, etc.
- Opponent: BUT CL shows that courts have upheld constitutionality of *Plessy* (can cite 7 cases)
 - Doctrinal argument that tries to foreclose intentionalist argument
- 3) judicial power independent of framers intent
 - NAACP: equalization cases mean that circumference in which separate but equal has to be equal has been narrowed
 - Opponent: we have come so far w/r/t equality
 - Aesop’s fable re. dog w bone in its mouth, looking into river from bridge, sees reflection and wants bone, in going for phantom bone loses its own bone
 - Saying you have to be really careful, cant push too hard
 - NAACP: we have engaged in incrementalism already
- Why were these questions asked?
 - Frankfurter worried about dissenting justices and that Vinson might dissent
- Can say this was purely doctrinal analysis or realpolitik to stall for a year
 - Get consensus of court
 - Take temperature of country to see how revolutionary would be
 - Yoshino thinks stalling-tactic hypothesis is more cogent
 - Facts are only one paragraph in opinion
- Between questions 1 and 2 Vinson dies of a heart attack
 - Warren replaces him, court gets more liberal
 - Not from SCOTUS judiciary!
 - Generally when a chief justice retires or dies, not replaced by elevating an associate justice but by a new justice
 - Rhenquist was exception
 - Don’t want justices getting feathers ruffled by having one of their fellow justices who they have disagreed w for years being elevated above them

- Also, important that SCOTUS justices not be looking for another job
 - If a justice wants to become a chief justice, may cause them to vote in ways inconsistent w what they think is actually right
 - Warren was a governor, a politician
 - This is harder for us to understand
 - Usually justices have experience in federal judiciary (now all 9 do)
 - Individual rights expanded radically under Warren
 - Warren wants to strike this doctrine down *unanimously* and wants to *sell it to the country*
 - Warren was politician (Obama has mentioned he would want a politician on the court)
 - As AG he condoned internment of Japanese – not a great civil libertarian
 - But does 3 things to make opinion in *Brown* effective
 - 1) he wrote it himself
 - Similar to Rehnquist in *Lopez*
 - 2) wrote it to be “short, readable by lay public, non-rhetorical, non-emotional and above all non-accusatory”
 - Greek oral culture to ensure laws were encoded in poetry like axioms so they could be disseminated broadly
 - 19th C: common for SCOTUS opinions to be published in their entirety in newspapers around the country
 - This was one of Warren’s aims in writing a short opinion
 - 3) works to get unanimous vote
 - Amazing that he was able to pull this off
 - Leaned on his fellow justices
 - Frankfurter and Jackson wanted to write concurrences but he wouldn’t let them
 - Jackson was in hospital, Warren goes there to talk him out of concurrence
 - If a justice had dissented would have given fodder for southern rebellion
- ❖ ***Brown v. Board of Ed*** (1954, Warren): *overturns “separate but equal”, deferral of remedy (role of legal imagination)*
 - Holding: separate education facilities are inherently unequal
 - Overruling precedent
 - When *Darby* overruled *Hammer* court said doctrine had been chipped away by recent cases, overruling it actually brings doctrine in line w recent cases
 - Same thing here citing equalization cases
 - Importance of education
 - Nature of public education at time of 14th amendments passage was nascent

- If you actually segregate ppl in education, will affect their hearts and minds in a way unlikely ever to be undone
 - Idea of ruined children, on both sides of color line
 - Autobiographical: the justices on this court are ruined children themselves, products of segregated upbringing
 - Sociological evidence (FN 11)
 - Famous KB Clark dolls study
 - Both white and African American kids think “good” dolls are white dolls
 - Thomas hates this footnote and everything it stands for in terms of relying on social science data in order to prove a legal point
 - Deferral of remedy:
 - Marshall said “no right w/out remedy” but that’s actually wrong
 - Warren saying that the remedial question is so complicated, talking about schools all across the country (14 districts affirmatively segregated, 4 more leave it up to locals)
 - Need another year to figure out remedy
 - Another stroke of genius on Warren’s part according to Yoshino
 - Saying, I will give this country a year to live under this ideal before I force this country to live up to that ideal
 - **Brown II**: remedy is that schools have to be executed w out deliberate speed
 - this has been criticized as allowing the south to have more deliberation than speed
 - but Yoshino thinks again this was wise to give south opportunity to live under idea before executing
 - role of legal imagination: to articulate an ideal w crystalline purity that is pure precisely because it lacks the force of violence/coercion
 - inverse relationship btw violence and fancy
 - see his article “Imagining Utopias”
 - important to have places in the law where we evacuate the law from its force to articulate ideals – the hortatory statements become mandatory later
 - Japanese law has a tradition of this
 - [can also say that Harlan’s dissent in *Plessy* resurfacing here → another example of crucial role of legal imagination]

- Aftermath
 - Some in African American community thought getting rid of “separate but equal” would eliminate jobs created by the existence of African American institutions and make de facto segregation easier
 - **Rosenberg:** *Brown* was not important
 - Argues nothing changed btw *Brown* and CRA of 1964
 - Argument against:
 - This is a stingy way of reading what influence is
 - Can say *Brown* influenced passage of Civil Rights Act
 - Impetus of CRAs passage was groundswell of support and backlash re civil rights that swirled up around *Brown*
 - Have to consider impact on governmental and non-governmental actors
- ❖ ***Bolling v. Sharpe*** (1954): *Apply Brown to fed gov't, reverse incorporation (structuralist argument that what applies to states must apply to fed)*
 - Decided on same day as *Brown*
 - Problem is how to make it all apply to the feds (holding in *Brown* applied to states, under EP clause)
 - Holding: unthinkable to apply a lesser duty to federal government
 - The DP clause in 5th amendment that runs against feds incorporates EP from 14th amendment
 - Incorporation (we discussed re. *Marsh v. Chambers*)
 - In *Marsh* we applied against states through fed
 - Here it's the reverse
 - Why is reverse incorporation an issue?
 - We can understand how framers might have thought to incorporate the bill of rights against the states
 - Yoshino thinks this is true (but that it was through privileges and immunities clause, not DP clause)
 - To flip the argument and say that framers in 1789 wanted to incorporate rights given to individuals against states in a future date to run against fed gov't strains credulity from an intentional perspective
 - BUT Warren not making an intentionalist argument, making a structuralist argument
 - “unthinkable that the same Constitution would impose a lesser duty on the Federal Government”
 - Fed gov't inherently has to behave better than states (structural)
- ❖ ***Loving v. Virginia*** (1967, Warren): *strict scrutiny (“compelling state interest”), protecting racial purity not a compelling state interest*
 - Facts: statute saying whites and non-whites cannot marry is challenged in EP grounds

- Government argues “equal application”: non-discriminatory in that it treats whites and non-whites the same way (punished in the same measure)
 - Holding: “Equal application” still violates 14th amendment, strict-scrutiny applied for first time in modern era
 - Court redefines the act being criminalized
 - Look at act as marrying a white person
 - An African American cannot engage in that act
 - A white person can engage in that act
 - It violates EP
 - Court also looks at purpose of statute
 - We know from the way the statute is written that it is about protecting the Caucasian race, not about separating all the races
 - Non-whites of different races can marry under this statute
 - Strict scrutiny:
 - “Permissible” state interest is now “compelling” state interest
 - protecting racial purity not a compelling governmental interest
 - but what if govt DID articulate rationale saying racial purity was goal in order to protect mixed-raced kids from psychological harm
 - tailoring idea/means issue has its bite here
 - the statute here is not tailored to the end of keeping races separate
 - statute is tailored to govt purpose of white supremacy, which violates 14th amendment
 - court also rules on DP grounds
 - why the double rationale? It’s uncommon for court to do this...
 - to avoid *Bolling* awkwardness
 - there Warren said 5th amendment does not contain DP component applying to fed govt, but some violations are so egregious we will say they are (reverse incorporation)
 - here we are against states, not fed, so just say that DP clause contains protections that pertain to equality
 - right to marry has limit point (no animals, polygamy) but we want to strike down racial discrimination and this alternate rationale helps us do that

❖ Levels of Scrutiny – 3 groups from paragraph 3 of *Carolene Products*

Strict Scrutiny (“narrowly tailored to a compelling governmental interest”)	Race (United States v. Korematsu (1944)); National Origin (Oyama v. California (1948)); Alienage (Graham v. Richardson (1971)) (note political function exception)
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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”)	Disability (Cleburne v. Cleburne 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))

- 3 forms of scrutiny (MEMORIZE 5 classifications that get either strict or intermediate scrutiny)
 - Strict
 - 1) race
 - 2) national origin
 - 3) alienage
 - Intermediate
 - 1) sex
 - 2) non-marital parentage (illegitimacy)
 - Rational basis
 - In practice split into
 - Normal RB
 - RB w/bite
 - Few RB w/ bite classifications
 - We don’t really know what this means, courts don’t use the phrase, academics apply it to set of cases in which court says to be applying RB but strikes down
 - **Cleaver** (home w/disability zoned out)
 - **Romer** (discrimination based on sexual orientation)
 - NOT EXHAUSTIVE
 - Result of these cases is odd – think *Williams v. Lee Optical*
 - RB supposed to involve court coming up w/rationales for why gov’t passed the statute, court playing guessing games there, don’t have that here just struck down

	<u>Means</u>	<u>Ends</u>
<u>Strict</u>	Narrowly tailored	Compelling governmental interest
<u>Intermediate</u>	Substantially related	Important Government Interest
<u>Rational Basis</u>	Rationally Related	Legitimate Governmental Interest

	<u>Rights-Based Strict Scrutiny (Liberty)</u>	<u>Rights-Based Rational Basis Review (Liberty)</u>
<u>Classification-Based Strict Scrutiny (Equality)</u>	Law Barring Marriage on the Basis of Race	Law Barring Welfare Entitlement on Basis of Race
<u>Classification-Based Rational-Basis Review (Equality)</u>	Law Barring Marriage on the Basis of Age	Law Barring Welfare Entitlement on the Basis of Age

- liberty and equality intertwine re. interracial marriage
- but often times when we talk re. liberty interests like marriage, we see carveouts in that liberty based on equality concerns
 - ageism re. marriage
 - many liberty cases have equality undertones
- ❖ Race based cases
 - **Brother** (2003): actual case that classifies on basis of race, draws strict scrutiny and is still upheld **GET FACTS**
 - We might want race-based strict scrutiny to be per se invalid
 - **Johnson v. California** (2005) (strict scrutiny applies to race-based cell assignment program)
 - **Morales v. Daley** (S.D. Tex. 2000) (strict scrutiny does NOT apply to census questions soliciting race-based identification)
 - Govt using info to understand its own demographics
 - **Brown v. Oneonta** (2d. Cir. 1999) (strict scrutiny does NOT apply to police use of racial suspect descriptions to conduct race-based “sweeps”)
 - Ends of police-based searches seems unquestionable
 - *Morales* and *Brown*: contort themselves to get out of box of strict scrutiny to avoid striking down laws
 - But after *Brother* (2003) much more give
 - See *Johnson* above

- We have unchained ourselves – if a lower court wants to say that race was permissibly used we are going to allow it
 - Still a virtual rule of invalidity, but not a per se rule
 - gains/losses
 - Gaines: analytic clarity
 - Can now avoid contortions of *Morales* and *Brown*
 - Can just inquire into validity of govt action
 - Losses: idea that race is not so pernicious when used by govt that we cant ever let them use it
- ❖ Types of Statutes Raising Claims of Race Discrimination
 - Facially discriminatory
 - *Strauder* (1880): no blacks on juries
 - *Loving* (1967): VA statute forbidding interracial marriage
 - Facially neutral, administered in discrim manner
 - *Yick Wo* (1886): no licenses for running a laundry business given to Asians, they were given to whites
 - Facially neutral law passed w discrim intent
 - *Hunter* (1985)
 - Article VIII, § 182, of the Alabama Constitution of 1901 provides for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including "any . . . crime involving moral turpitude."
 - Facially neutral law passed w/out discrim intent (as defined by Court) w/disparate impact
 - *Davis* (1976) – see below
 - Facially neutral statutes passed w/out discriminatory intent but have a disparate impact on a protected group treated differently under Title VII and Const
 - Title VII
 - Civil Rights Act upheld under *Heart of Atlanta* and *Katzenbach*
 - Title VII applies to employment discrimination on basis of
 - Race
 - National origin
 - Color
 - Religion
 - Sex
 - Diff w/EP protected groups
 - “color” and “religion” don’t appear in EP context
 - But here we don’t see “alienage” or “non-marital parentage
 - Employer can defend against facial discrim only on basis of “bona fide occupational qualification” (BFOQ)
 - NO BFOQ defense for race – facial discrim is per se invalid
 - Employer can only claim business necessity defense if no facial discrim but disparate impact
 - Decision Tree for Employment Discrim under Title VII
 - Is the employer policy racially discrim on its face?

- Y: invalidated
- N: Facially neutral but discrim in intent?
 - Y: invalidated
 - N: Disparate impact on a racial minority?
 - Y: can employer produce business justification?
 - Y: policy OK
 - N: invalidated
 - N: policy OK
- Decision Tree for EP Claim of Race-Based Challenge to State Action
 - Is state action racially discriminatory on its face?
 - Y: strict scrutiny (action generally invalidated)
 - N: state action facially neutral but discrim in intent?
 - Y: strict scrutiny (action invalidated)
 - N: does state action have a disparate impact on a racial minority?
 - Y: action validated (unless impact is probative of intent)
 - N: action validated
 - Major diff is no facial discrim, no discrim intent but disparate impact:
 - Statutory claim: need business necessity
 - Const claim: rational-basis review (state action will basically be validated)
 - (UNLESS impact is probative of intent)
 - Example:
 - English-only workplace
 - if employer shows business necessity will be OK otherwise invalidated
 - If English is made official language of state of Texas
 - Likely to be validated bc state does not have to respond w/ reason for why they are doing it
 - Statute must be facially neutral in terms of intent (legislators cant say “we want to discrim against Hispanics)
 - Why does court treat disparate impact differently under Title VII and Const.?
 - Majority (White) in *Davis* says worried about overreach of applying strict scrutiny to everything
 - Scope of Title VII limited to employment
 - Contrast w/*Davis*: *Griggs v. Duke Power* (1971): Title VII employment case, NOT const. law case at all
 - High school diploma/intelligence test requirement, has disparate impact
 - Yoshino thinks this is transferred de jure discrimination
 - Bc of terrible education system blacks will have far lower chance of getting these jobs
 - Court strikes down: cant build-in headwinds

- “fox and stork” Aesop’s fable: fox serves milk to stork in flat dish, stork serves meat in long vase
 - Sometimes you have to treat ppl differently to treat them equally
 - We don’t often hear this in EP context
 - In Title VII context entire court is willing to go along w/ it
 - (age of innocence, court not yet aware how complex civil rights project will be)
- ❖ **Davis** (1976, White): *for Const. discrim need impact + intention, intention = purpose (“not in spite of but bc of its consequences on protected group”)* from *Feeney*
 - Facts: DC police employment requirements create disparate impact against blacks
 - Brought const. claim – 5th amend EP
 - Title VII did not extend to fed employees until 1972
 - The Ps should have amended complaint
 - Either bad lawyering
 - OR they thought they could advance Title VII principle into const. context
 - Holding: even tho disparate impact need some discrim intent
 - Struggles w/ precedents that rely on impact like *Palmer* (1971)
 - *Palmer* said legislative purpose was irrelevant
 - Court distinguishes by saying subsequent cases like *Lemon* (1971) validated close inquiry into purpose of challenged statute
 - P. 1030: if we say impact is enough, it will invalidate benign govt actions that have disparate impact on protected groups but aren’t really discriminatory
 - w/r/t facially neutral statutes, question for CONST purposes (as opposed to Title VII) is does discrim intent exist?
 - If so, strict scrutiny as if it were facially racial discrim
 - If other forms of discrim draw other forms of scrutiny (sex discrim = intermediate scrutiny)
 - If not, r-b review (a pass for the statute)
 - What kind of intent do we need?
 - Purpose
 - As opposed to knowledge
 - List is not an exact hierarchy
 - Intentionally
 - Knowingly
 - Recklessly
 - Negligently
 - None (strict liability)
 - This is true for sex + race
 - **Personnel v. Feeney** (1979, Stewart)
 - Veterans in MA get preference for civil service jobs

- Woman was acing civil service exams, but was getting edged out by veterans
- Claim was that draft is male-only, not many female veterans
- Holding: legislature knew that preference would have disparate impact on women, but *purpose* was to favor veterans not dis-favor women
 - “intent means something more than knowledge, in order for something to be intentional or purposeful you have to have engaged in action *not in spite of but bc of its consequences on protected group*”
 - So no intermediate scrutiny here
- *Davis* after *Feeney*
 - After *Feeney* ratchets-up purpose (“bc of and not in spite of”) killed disparate impact in Const context
- ❖ **Arlington Heights** (1977): *factors that constitute purpose when there is disparate impact*
 - Facts: zoning ordinance that in a practical way barred families of various socio-economic, and ethno-racial backgrounds from residing in a neighborhood
 - Holding: ordinance is OK – facially neutral, disparate impact but to determine intent look to factors below
 - 1. Impact of action
 - Only important insofar as it is probative of existence of discrim purpose (*Yick Wo*)
 - 2. The historical background of decision
 - **Lane v. Wilson** (1939, Frankfurter): voting rights in OK, by 1939 had a long history of denying blacks right to vote
 - 3. Sequence of events leading up to challenged decision
 - Ex. from housing law – immediate
 - 4. Departures from the normal procedural sequence
 - 5. Substantive departures where the factors usually considered strongly favor a decision contrary to the one reached
 - 6. The legislative or administrative history
- ❖ **US v. Clary** (1994, 8th Circuit): *disparate impact case, no discrim purpose*
 - Facts: get much worse punishment for crack than cocaine
 - Disproportionate crack use for blacks, cocaine use for whites
 - Holding: facially neutral, disparate impact but NO discrim purpose
 - BUT statistics make it seem like must have been purpose to discrim against blacks, newspaper articles at the time
 - Court says there were enough motives based on greater potency, addictiveness, affordability of crack, etc. to support govt claim that there was no discrim purpose

❖ Progressive Critique of *Davis*

	“Malign” – hurts subordinated group	“Benign” – helps subordinated group
Facially discrim (draws strict scrutiny)	<i>Strauder, Plessy, Korematsu, Loving</i>	Affirmative Action cases (<i>Croson, Adarand</i>)
Facially neutral (usually draws r-b)	<i>Davis, Clary</i>	Racially neutral Affirmative Action plans (TX 10% plans)

❖ Affirmative Action: *Bakke to Seattle School District*

<u>Case</u>	<u>Context (Rationale)</u>	<u>Promulgating Entity</u>	<u>Majority Opinion</u>	<u>Level of Scrutiny</u>	<u>Result</u>
<i>Bakke</i> (1978)	Education (Remedial and Diversity)	State	No	Intermediate (Brennan op.)	Invalidated
<i>Fullilove</i> (1980)	Contracting (Remedial)	Federal	No	Unarticulated (Burger op.)	Upheld
<i>Wygant</i> (1986)	Education (Remedial)	State	No	Strict (Powell plurality)	Invalidated
<i>Croson</i> (1989)	Contracting (Remedial)	State	Yes	Strict	Invalidated
<i>Metro B</i> (1990)	Broadcasting (Diversity)	Federal	Yes	Intermediate	Upheld
<i>Adarand</i> (1995)	Contracting (Remedial)	Federal	Yes	Strict	Invalidated
<i>Grutter</i> (2003)	Education (Diversity)	State	Yes	Strict	Upheld
<i>Gratz</i> (2003)	Education (Diversity)	State	Yes	Strict	Invalidated

- 2 types of cases
 - Contracting (remedial rational)
 - Education (remedial and diversity*** rationales – no exchange of ideas in contracting context)
 - Promulgating entity: no longer matters → now everything draws strict scrutiny
 - Used to matter if it was city/state (*Croson*) vs. fed Cong (*Fullilove*)
 - That distinction used to favor fed (intermediate scrutiny, harder to claim discrim against fed)
 - *Adarand* case (federal contracting) erased this distinction
 - Congruency principle
 - Level of scrutiny: becomes strict for everything by the end (after *Adarand*)
 - Since *Loving* (1967) – non-affirmative action discrim always draws strict scrutiny
 - In affirm action context court does apply lower levels of scrutiny for awhile
 - *Adarand* (1995) says that all types of discrim (doesn't matter if minority is hurt or helped)
 - Consistency principle
 - 2 questions to pass strict scrutiny:
 - 1) does compelling gov't interest exist/what is compelling gov't interest?
 - 2) is program narrowly tailored to meet this interest?
- ❖ **Bakke** (1978, Powell): *quota education program invalidated (EP based on individual, not group rights), state has substantial interest in diversity rationale, remediation rationale OK as long as its for past discrim by state actor*

- Facts: Quota system:
 - whites cannot compete for all the slots
 - Berkeley med school class of 100 students
 - 16 spots set aside for non-whites
 - Contrast quota system with “plus factor” system where whites can compete for all slots but being a racial minority is a plus factor
 - Plus factor programs wont always pass strict scrutiny, but has a much better chance
 - Quota systems basically per se invalid after *Bakke*
- Holding: 4-1-4 decision, so Powell’s opinion
 - 4 Burger Justices: violates Title VI (no race discrimination for education getting fed funds)
 - 4 Brennan Justices: Intermediate scrutiny, violates EP and Title VI
 - Powell: splits difference, strict scrutiny for EP
 - Violates EP bc it is a quota (EP based on individual not group rights, quotas violate individual rights)
 - Doesn’t mean you can never have a program where race is a plus factor
 - See Harvard College’s program
 - Application of Brennan’s level of scrutiny if program is plus factor
 - State has substantial interest in diversity rationale
 - This is not dicta bc he is overturning lower court’s statement that cannot have any racial basis for admissions at all even plus factor, had issued injunction against that
 - Since this pt of opinion necessary for disposition of this particular case, it is not dicta but part of holding
 - Rationales for AA: remedying past discrim by state actor and diversity are accepted by court
 - Racial balancing (14% of pop is black, must have 14% of class black)
 - REJECTED bc like quota
 - Remediation for past discrimination***
 - OK as long as it is past discrimination by state actor
 - REJECTED if it is remediating vague societal discrim not caused by state actor
 - See O’Connor in *Croson*: state not meeting burden of proof to show past discrimination exists
 - Promoting Health Care
 - REJECTED
 - Diversity***
 - OK

- ❖ **Fulilove** (1980, Burger): *fed contracting program upheld bc its from Cong – principle nullified later*
 - Holding:
 - Major reason program is upheld is bc Congress promulgated it
 - In *Croson* this case cited
 - §5 of 14th Amend gives Congress special power to enforce provisions of EP clause
 - Court must be more deferential to Cong programs than state programs
 - This principle disappears through congruency in *Adarand*
- ❖ **Wygant** (1986): *education – role modeling rationale rejected, program invalidated*
 - Holding: Role modeling rationale rejected by court
- ❖ **Croson** (1989, O'Connor): *contracting program struck down bc of remedial rationale (ends) – remedying past discrimination promulgated by entity that was engaged in past discrim (too vague), “Relevant statistical pool is # of minorities qualified to undertake particular task”, not sufficiently tailored (means)*
 - Facts:
 - 30% of Richmond city contracts must go to MBE (minority owned businesses)
 - Lower court strikes down as discriminatory against whites
 - Holding: some parts get majority (standard), some do not
 - Part 3(b): standard to reject the 5 rationales city of Richmond using in order to defend its program – CITY OF RICHMOND HAS NOT CARRIED BURDEN TO SHOW IT IS REMEDYING DISCRIM OF A SPECIFIC VARIETY (ends)
 - 1) ordinance declares itself to be remedial
 - Court says self-serving statement
 - 2) past discrim in construction industry
 - Court says this is conclusory, self-serving statement w/no data
 - 3) MBE’s receive .67% of contracts in city, but blacks constitute 50% of city’s population
 - Court says doesn’t matter what the makeup of city’s population is, only matters how many MBE’s exist
 - “Relevant statistical pool is # of minorities qualified to undertake particular task”
 - 4) few minority contractors associations
 - Same rejection as above
 - 5) discrim has stifled minority participation in construction nationally
 - Court says national discrim not same as local discrim
 - Cong has special prerogative acting under §5 – distinguishes *Fulilove* by saying that is Cong, this is local where states don’t have power under 14th amend Cong does

- BUT later on in *Adarand* O'Connor abolishes distinction btw fed and state through congruency principle
 - *Need to show past discrimination by entity promulgating program w/continuing effects into the future*
 - Part 4: NOT SUFFICIENTLY TAILORED (means) – 2 reasons says court
 - 1) no consideration of race-neutral alternatives
 - 2) 30% quota is not narrowly tailored to any goal
 - Rests on unrealistic assumption that “minorities will choose a particular trade in lockstep proportion to their representation to the local population”
 - Resurfacing of what she said in 3(b) (#3 above)
- ❖ **Metro Broadcasting** (1990): *gets overruled, intermediate scrutiny in broadcasting context, acceptance of diversity rationale*
 - Facts: FCC race-based affirmative action
 - Holding: Diversity useful in media as well as education → less than strict scrutiny
- ❖ **Adarand** (1995, O'Connor): *all race-based preferences get strict scrutiny, program struck down*
 - Holding:
 - 3 principles
 - 1) skepticism
 - 2) consistency
 - 3) congruence
 - Strict in theory is not fatal in fact
- ❖ **Grutter** (2003, O'Connor): *program upheld under strict scrutiny for first time, diversity rationale*
 - Holding:
 - Upheld bc
 - 1) there is a compelling governmental interest in educational diversity
 - 2) program here is narrowly tailored enough to meet that interest
 - School had considered race-neutral alternatives
 - Race was a plus-factor
 - We are trying to level the playing field for employment context
 - We will make this lawful in the future – give it 25 years
 - Heavy reliance on the “3M brief” – submitted by a bunch of corporations
 - They say that if you shut down affirmative action they will not be able to draw on diverse talent pool, and employees won't know how to be sensitive re globalization, different perspectives, etc.
 - Dissent (Rhenquist):
 - Why is racial diversity privileged? Under diversity rationale other forms of diversity should matter as much as race
 - O'Connor: race is different bc of our country's “unfortunate history” of race relations
 - BUT Rhenquist points out that this is remediation through the back door

- we want ppl to come into school feeling like they are baring gifts and not grievances
 - Dissent/Concurrence (Thomas):
 - there is no compelling state interest in Michigan maintaining an elite law school, due to the fact that a number of states do not have law schools, let alone elite ones.
 - Moreover, Justice Thomas noted that in *United States v. Virginia*, the Court required the Virginia Military Institute to radically reshape its admissions process and the character of that institution
 - Also, Berkeley Law has been barred by CA statute from any race-based preferences but still has a diverse student body
 - Also, disagrees w/time-line, thinks should be illegal now bc don't want to put court's imprimatur on discrim (cites Harlan dissent in *Plessy*)
- ❖ **Gratz** (2003, O'Connor): *point-value racial AA struck down ("naked" plus factor)*
 - Facts:
 - Same day as *Grutter*
 - Undergrad program at U Mich assigns certain number of points for race
 - Not really a quota, just a big/quantified bump
 - Holding: overturned, looks too much like a quota
 - Dissent (Ginsberg + Souter): this is just words being turned into math
- ❖ **Sex Discrimination:** Evolution of scrutiny for sex discrim – majority has never given strict scrutiny (just plurality in *Frontiero*)
 - 1971: *Reed* (men preferred over women for executors)
 - R-b (“w/ bite” bc statute stricken down)
 - 1973: *Frontiero* (women have to apply for military benefits to families, men don't)
 - Strict scrutiny (plurality)***
 - 1976: *Craig* (women can drink beer at 18, men have to wait until 21)
 - Intermediate scrutiny (majority settles)
 - 1996: *US v. Virginia* (military college excludes women)
 - Intermediate scrutiny (majority gives more bite according to some)
- ❖ **Bradwell** (1873, Bradley Concurrence): separate spheres for men and women
 - Facts: IL law said women could not be lawyers, challenged by a woman
 - 14th amendment: isn't specific to race, women tried to use to get EP on basis of gender
 - Contrast w/15th amendment which refers to race specifically
 - Concurrence: women should be wives + mothers according to law of Creator
 - Difference w/racial discrim: w/r/t race whites were superior, w/r/t gender “separate spheres”
 - Even Harlan's dissent validated this principle
 - Here we have separate spheres – diff btw men/women tracts capacity to operate in those spheres
 - Idea is not that women are inferior, no role denigration
 - Idea is that women are too “good” to be lawyers

- Natures law + God's law, human law should not deviate from it
- ❖ **Frontiero** (1973, Brennan plurality): *strict scrutiny*, *Bowen test for heightened scrutiny*, *imminent passage of legislation evidence of consensus vs. wait for legislature* (*countermajoritarian anxiety is now the dominant view*), *race/sex analogy (3-pt test)*, **KNOW EACH JUSTICE'S ARGUMENT**
 - Facts:
 - Servicemen can always claim women as dependents
 - Servicewomen have to show that husband relies on her for more than half of support
 - 5th amendment case (fed gov't action)
 - a "reverse incorporation" case (like *Bolling*)
 - Holding: conflict btw intervention of court and legislative process
 - no military deference (like was cited in *Korematsu*)
 - administrative convenience is reason for scheme here – not a military function
 - benefits scheme not heart of military enterprise like national security
 - Powell concurrence
 - Wants to wait for Equal Rights Amendment, which is pending in many states at the time
 - Might not need to read EP principle into constitution once we have this amendment
 - Anxiety over counter-majoritarian difficulty
 - Brennan Plurality
 - Strict scrutiny for sex discrim
 - Cites imminent passage of ERA as justification – shifting tides of public opinion in democracy
 - Wants to move court in same direction
 - Usually court says Congressional action means we shouldn't act (Powell's view)
 - This is dominant view now
 - Subscribes to race/sex analogy
 - Both are :
 - Immutable attributes
 - Status-conduct distinction
 - Shouldn't burden ppl through things they cannot help
 - Crim law: addicts w/marks on their arms cant be punished for use itself
 - Long history of discrim
 - Bradley breaks the analogy here in his concurrence

- There are real differences between men and women that are cause for celebration and so might be constitutional
 - Dissent (Scalia): Ginsburg is actually ratcheting-up the standard here
- ❖ **Geduldig v. Aiello** (1974): *r-b scrutiny, would be overturned after Feeney*
 - Facts: CA disability insurance scheme that excludes disabilities incident to normal pregnancies. Plaintiffs sue maintaining that preg discrim is sex discrim.
 - Holding: not discriminatory, using r-b scrutiny (prior to 1976 intermediate scrutiny)
 - case differs from the previous ones in that there is no mention of men or women on the face of the statute
 - while all pregnant people are women, but non-pregnant people are both men and women
 - So giving something to the later group, isn't discriminatory
 - This case is wrongly decided in terms of *Feeny*
- ❖ **Michael M. v. Sonoma County** (1981): *intermediate scrutiny, real differences btw sexes*
 - Facts: CA statutory rape laws make only men criminally liable – reason is all the problems of teenage pregnancy dealt with by women
 - Holding: statute upheld under intermediate scrutiny – real biological differences
 - The law addresses dissimilarly situated individuals according to nature by inversely dissimilarly treating them in turn
- ❖ **Tuan Anh Nguyen v INS** (2001): *intermediate scrutiny, real differences btw sexes*
 - Facts: US Law granting citizenship to non-marital children of citizen-women/alien-man, but not to alien-women/citizen-man parents. The statute dealt with the fact that it's easy for men to go abroad and knock up lots of foreign women, and all their kids could come to the US and become welfare dependants
 - Holding: court upholds statute under intermediate scrutiny “real differences” doctrine
 - 2 justifications
 - 1) it's easy to prove the maternity, but hard to prove the paternity - women know when they give birth, men may not know when their children are born*** (we like this one)
 - 2) the relationship between the child and the mother is different than that between child and father (we don't like this so much)

VIII. Modern Due Process

- ❖ 1965: Renaissance of Substantive DP and unenumerated rights – Timeline:
 - 1905-1937 – 1st Arc of Substantive DP
 - *Lochner* – freedom of K, overruled
 - *Meyer v. Nebraska* (1923)*** - not economic, not overruled
 - Can Nebraska have a statute that prevents children from learning a foreign language from age of 8 (meant to discriminate against German speakers, facially neutral)
 - Court strikes down not bc discriminatory, but bc parents have a right to control education of their children
 - This line of argument is resuscitated by court later
 - *Pierce**** - not economic, not overruled
 - *West Coast Hotel* – freedom of K, overruled

- 1937-1964
 - 9th amendment: there are unenumerated rights in constitution
 - But after 1937 court worried about being countermajoritarian body
 - So court retreats from substantive DP as well
- 1965-Present – 2nd Arc of Substantive DP
 - *Griswold* (1965) right to contraception
 - *Loving v. Virginia* (1967): holding both EP and DP holding
 - *Roe v. Wade* (1973): right to have an abortion w/certain restrictions
 - *Bowers v. Hardwick* (1986):
 - *Casey v. Planned Parenthood* (1992): right to abortion w/restrictions
 - *WA v. Glucksberg* (1997): no right to suicide
 - *Lawrence v. TX* (2003):
 - *Gonzales v. Carhart* (2007): how far to take partial birth abortion
- ❖ Unenumerated Rights drawing some degree of heightened scrutiny [MEMORIZE THIS]
 - Right of privacy
 - to marriage
 - to contraception
 - to abortion
 - read obscene material
 - keep extended family together
 - parents to control children
 - intimate sexual conduct
 - right to vote
 - right to travel
 - right to refuse medical treatment
- ❖ *Griswold v. Connecticut* (1965, Douglas): *right to privacy (contraception) – penumbra theory, 3 types of privacy (zonal, relational, decisional)*
 - Facts:
 - CT statute banned contraception
 - not condoms – by women
 - executive director of Planned parenthood fined, challenges statue
 - Holding: there is a const. right to use contraception
 - Nowhere in bill of rights/const is there a right to privacy (much less a right to contraception)
 - Has to be protected other than through textual modality (court does point to some part of the text)
 - 2) Court distinguishes this right from freedom of contract
 - Disavows reliance on line of repudiated doctrine (*Lochner/West Coast Hotel/Williamson v. Lee Optical*)
 - Still don't want justices interfering w/economy
 - Escapes charge of Lochner-izing (“freedom of K not in const!”)
 - 1) Court finds/invents right to privacy
 - Penumbra theory
 - Textually enumerated rights are in const.- 1st, 3rd, 4th, 5th
 - Right to privacy not mentioned

- BUT each of these amendments casts a shadow that creates a sense of a right to privacy
- These shadows overlap – area of overlap gets darker and darker as one shadow is overlaid over another
 - Right to privacy is common shadowy entailment of all 4 of these enumerated rights
- 3 types of privacy
 - 1) zonal: particular physical space/place conceptions of privacy
 - 2) relational: intimate relations that we should be allowed to control
 - Ex: *Pierce/Meyer* – parenting control over their children
 - 3) decisional: internal to a person
 - Yoshino thinks 1) and 2) are subsumed into this one bc you get to make a decision
- Amendments implicated diff notions
 - 1st: assembly (relational/decisional)
 - 3rd/4th: quartering soldiers/search and seizure (zonal)
 - 5th: self-incrimination (decisional)
- In *Griswold*:
 - We would not allow police to search home for contraceptives – repulsive to our conceptions of privacy “sacred precincts of marital bedrooms”
 - Relational (“marital”)
 - Zonal (“bedrooms”)
- ❖ ***Eisenstadt v. Baird*** (1972): *r-b w/bite, contraception NOT a fundamental right, decisional right to privacy (right of individuals not married couple)*
 - Facts:
 - Baird convicted of distributing contraceptive foam to married and unmarried ppl
 - Arrested under MA statute that prohibits sale to unmarried ppl
 - Challenges w/EP claim
 - Holding: Statute struck down under r-b review (w/bite)
 - Some rights under right of privacy fundamental rights (strict scrutiny)
 - Right to vote, free speech
 - some are not (some kind of intermediate scrutiny)
 - contraception
 - abortion
 - Right of privacy = right of *individuals* (not married couple)
 - Zonal/relational thus don’t count for much
 - Decisional notion of privacy is justification here
 - But in *Bowers* court cycles back to relational notion
- ❖ ***Roe v. Wade*** (1973, Blackmun): *statute preventing abortion struck down, cites Griswold as precedent and avoids problems of textualism/Lochner (doctrinal mode), history*

(ethical mode), decides fetus is not a “person” (intratextual), trimester framework splits difference of absolutes

- Facts:
 - TX statute prohibits procuring or attempting abortion except to save mothers life.
 - Unmarried pregnant woman challenges
- Holding: court strikes down statute 7-2
 - Court choosing btw
 - Penumbra analysis?
 - 9th amendment? (too broad)
 - DP right to privacy in 14th amendment?***
 - In 1965, court used penumbra
 - Subsequent cases can use doctrinal mode by relying on *Griswold*
 - This is the maneuver around *Lochner*
 - Once *Griswold* is decided and we have revived DP (this time in terms of privacy) court can use doctrinal grounds to decide and avoid textual question
 - History in the opinion
 - Restrictions on abortion not as restrictive in history of western civ than they are today
 - He is trying to create an “ethos” here (ethical modality)
 - *Palco v. CT*: unenumerated right will be a fundamental right if
 - 1) deeply rooted in nations tradition + history, OR
 - 2) implicit in concepts of ordered liberty
 - Yoshino’s problem w/history
 - Under *Palco* need rooted in tradition + history but also has to show right isn’t foreclosed in history
 - Ultimately might have to hang on second part of test (implicit in concepts of liberty)
- **Larry Tribe** – “clash of absolutes”
 - Rights of mother
 - Equality concerns/liberty concerns
 - Life of child
 - If you believe fetus is a person the constitutional inquiry ends here – of *course* the state has an interest in protecting life
 - Only life of mother could knock this out (life vs. life)
 - But there is a debate as to whether the fetus is a life
 - Blackmun decides it is not a person for constitutional purposes
 - Where “person” appears in const: “person born or naturalized in US” → have to be born already (textual mode)
 - Never refers to pre-natal life
 - Think “necessary” in *McCulloch*

- If subject to adverbial modification cant be absolute
- Think “commerce” in *Lopez*
- ❖ *Roe* and *Casey* splits the diff btw absolutes (in diff ways)
 - In *Roe* we have trimester framework
 - 1st trimester:
 - Decision is woman’s/doctors
 - 2nd trimester:
 - State can regulate only to protect health/life of mother (if there are harmful abortion practices state can regulate by trumping doctor here)
 - 3rd trimester (after fetus is viable outside of womb)
 - State has interest in fetus itself
 - In *Casey*: state has to meet “undue burden” test – can do at any point
 - Gets rid of 3 month grace period
 - But harder for state in 3rd trimester than under *Roe*
 - Advance of medical technology: *Roe* on a collision course with itself (viability being pushed back earlier, principle behind 1st trimester getting later and later)
- ❖ *Planned Parenthood v. Casey* (1992): *reaffirms commitment to Roe but rejects trimester framework for undue burden test (not majority), stare decisis analysis (majority)*
 - Facts:
 - PA statute regulating abortion challenged
 - Holding (abortion part): DOES NOT CARRY WEIGHT OF MAJORITY

	Joint Opinion (O’Connor, Souter, Kennedy)	Stevens Opinion	Blackmun Opinion	Rhenquist Opinion (w/White, Scalia, Thomas)	Result
Woman must give informed consent 24 hour prior to abortion	Valid	Invalid (but info re. risks of abortion valid)	Invalid	Valid	Valid (7-2)
Minors must get informed consent of parent	Valid	Invalid	Invalid	Valid	Valid (7-2)
Married woman must notify spouse	Invalid	Invalid	Invalid	Valid	Invalid (5-4)
Reqs above waived for medical emergency	Valid	Valid	Invalid	Valid	Valid (8-1)
Reporting requirements	Valid	Valid	Invalid	Valid	Valid (8-1)

- Court reaffirms commitment to *Roe*
 - BUT rejects trimester in favor of undue burden test
 - No rigid trimester framework
 - Instead binary rule based on viability line
 - In *Roe* trimester system based on 2 state interests
 - Interests are
 - 1) health of mother
 - In *Roe* 1st trimester, but now being pushed later and later
 - 2) potential life of fetus
 - In *Roe* 2nd trimester, but now being pushed earlier and earlier
 - So now court says make it one line, that shifts according to medical opinion → now 5 months
 - Before viability, state can do various things to encourage women not to have an abortion
 - In *Roe* all women needed was physician's OK – relationship w/physical was key
 - So *Casey* is a step forward and back
 - Forward: woman is focus
 - Back: no more grace period in terms of regulation
 - After viability, state can regulate/proscribe abortion
 - Undue burden analysis still applies – state just given freer reign to act
 - Needs to make provisions for life and health of mother if it wants to restrict abortion
 - No more language re. fundamental right (strict scrutiny) w/r/t abortion
 - *Undue burden is something like intermediate scrutiny, but language not used*
 - Abortion treated as sui generis in terms of DP
 - So how faithful is court really being to *Roe*?
- Stare decisis analysis – written for the court (MAJORITY), binding as precedent but court itself says “prudential considerations” (not constitutionally required)
 - “prudential and pragmatic considerations” (problem is “prudential” is term of art, problem of regress)
 - 1) workability
 - Workability of const. rule articulated in the challenged precedent
 - i.e., does trimester framework/guarantee to right to abortion in *Roe* prove to be workable?
 - Does NOT relate to statutory scheme itself
 - Something you can really only see in hindsight
 - 2) reliance
 - Most often asserted in commercial context

- In *Casey* its broadened to include the interest of the ppl of the US to rely on availability of abortion
 - Suggests that precedents should be overruled quickly (in tension w/anti-vacillation argument)
 - 3) change in doctrine
 - “Bare remnant of abandoned doctrine” language suggests that precedents can be undermined incrementally before they are flatly overruled
 - *Bowers* and *Hammer* are good examples
 - If overruled case is an outlier, but cases before and after chip away at doctrine, makes sense even tho it is directly overruling precedent
 - 4) change in fact or changed perceptions of constant facts
 - Change in actual facts: reproductive technology
 - Change in perceptions of constant facts: segregation’s effect on hearts/minds of children
 - Hard to know how much these matter
 - *Adarand/Lawrence* overrule precedent do not apply these factors in a rigorous way
 - Not an elements test, but a set of considerations court uses
 - *West Coast Hotel* (overruled *Lochner* by overruling *Adkins*) – why?
 - Liaise fair disproved sociologically
 - FDR threatened to pack the court to get New Deal legislation through
 - Switch in time that saved 9
 - Of course no mention of external political events made in opinion
 - 2 instances in which court should be careful about overruling prior precedent
 - 1) cant vacillate too often
 - 2) monumental decisions that affect nation as a whole and where political pressure exists
 - Don’t want to have “nakedly political decisions”
- ❖ **Stenberg v. Carhart** (2000, Breyer): *Modern abortion jurisprudence, majority for undue burden standard*
- D&E vs. intact D&E
 - D&E: fetus’ head doesn’t need to be collapsed – doesn’t need to be partially delivered
 - Intact D&E: fetus’ head too large to pass through cervix – doctor must deliver body first or collapse skull
 - Facts:
 - Nebraska statute prohibited partial birth abortion w/exception to save mother’s life (nothing re. mother’s health)
 - Defined partial birth abortion as “procedure in which doctor partially delivers a living unborn child before killing the child...”
 - Holding: struck down under *Casey*

- Court rejects claim this statute only meant to apply to intact D&E based on plain reading of statute
- Reasons it struck it down:
 - 1) no distinction btw pre and post viability abortions
 - But the viability rules did not get majority of court in *Casey* → well here they do
 - 2) no distinction btw D&E and intact D&E
 - 3) no exception for health of mother (need even for post-viability abortions)
- Legislative response
 - Similar to detainee cases, back-and-forth btw court and congress
 - Partial Birth Abortion Act of 2003
 - Makes partial birth abortions illegal
 - But only prohibits INTACT D&Es
 - Certain anatomical landmarks must be passed before there is liability on part of doctor
 - Mens rea (knowing + intent) requirement for doctor
 - Exception for life of mother but NOT for health
 - ignoring *Stenberg*'s requirement for health of mother
- ❖ **Gonzales v. Carhart** (2007, Kennedy): *court upholds Partial Birth Abortion Act over Stenberg*
 - Proscribes only intact D&E, not D&E itself
 - Lack of health of mother exception not fatal to statute, bc as-applied challenges to statute can still be made on grounds of health of mother
 - As-applied to *me* its unconstitutional, may be OK as-applied to others
 - So cant bring a facial challenge, but can bring an as-applied challenge
 - Is this an attempt to overrule *Roe*? Will it make *Casey* like *Hammer*?
- ❖ Anti-sodomy statutes – if not enforced what's the harm?
 - Affects other areas of doctrine
 - Provides pre-text for de facto discrimination
 - Prevents gays from getting strict scrutiny
 - Obvious point re. the law expressing norms → conflicting nomoi
- ❖ **Bowers** (1986, White): *only a DP case, right to privacy does not extend to gay sex*
 - Facts: GA anti-sodomy statute, bans regardless of sex of participant. Man arrested for sodomizing another man – in private, consensual, adults.
 - Holding: statute upheld against DP challenge, right to privacy does not extend to private consensual homosexual sex
 - Larry Tribe argued the case – decided not to consolidate case w/**Baker**
 - *Baker*: challenged sex-specific sodomy statute in TX
 - meant that he was letting go of equality argument
 - he hammers home that this is not about gays but right to privacy
 - EP argument re. gays has much wider implications
 - But court treats as if statute only applies to homosexual sodomy
 - Meanings of “privacy” can be plural
 - 2 questions to find right for substantive DP
 - 1) is it deeply rooted in nations tradition/history? OR

- 2) implicit concept of ordered liberty?
 - Concurrences:
 - Burger: historical negativity toward homosexuality – would be overturning millennia of “moral teaching”
 - Argument has obvious flaws:
 - Analogy to slavery
 - His “history” is selective and biased
 - Powell: rumor is he barely thought about the case
 - Dissent (Blackmun): court has obsession w/gays here, not dealing w/legal issues
- ❖ **Romer** (1996): *blanket provision preventing LGBTs from being protected group struck down (too narrow and too broad OR r-b w/bite)*
 - Facts: CO amendment to state const that washes-out protections for LGBT individuals in state
 - Holding: struck down – 3 interpretations as to why
 - 1) Structure of statute problematic: no protected status based on “x” is unconstitutional bc *too narrow and too broad*
 - 2) R-b w/bite (something more than r-b as traditionally construed)
 - Bare desire to harm a politically unpopular group needs more justification
 - State *has* proffered rationales (wants to conserve civil rights resources, protect rights of religious groups)
 - But court does not take at face value
 - Does not use *Williamson* to make up rationales state could have used to uphold
 - 3) “violates EP so strongly we don’t need to worry about what level of scrutiny to apply”
 - This is antecedent to deciding question of scrutiny? Hard to know what court is saying
 - Amendment’s language must violate text of EP clause
 - Lower courts have de-fanged this case by saying similar things are OK if they aren’t state-wide (so using interp #1)
 - Scalia: many states have categorical ban on polygamy
 - Gay rights just more robust political movement right now
 - Go back to 19th C – more active polygamist movement
- ❖ **Lawrence v. TX** (2003, Kennedy): *sex-specific anti-sodomy statute only violates DP, overrules Bowers (so now gay sex protected by right to privacy)*
 - Facts: TX anti-sodomy statute, sex-specific, claim brought that it violates DP + EP
 - Holding (5 justices): statute struck down
 - 1) does it violate DP? YES
 - 2) does it violate EP? NO
 - Might want to be careful w/court protecting “identities”
 - Does a bad job at this → sends signals to society essentializing identities
 - No reason anal sex should be a fundamental part of gay identity

- Better to protect conduct “qua” conduct
 - 3) should we overrule *Bowers*? YES
 - intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment
 - *Casey* factors applied here?
 - Brings in some of them
 - Intervening cases (*Romer*)
 - But not rigid
 - Role of international law – recent European laws show that homosexuality not condemned in Western civ
 - Similar moves made in 8th amendment context re. execution of juveniles → look to what other countries do
 - Raises question re. normative claim in terms of which countries you decide to ID with...
 - Concurrence (O’Connor): wants to strike down on equality grounds
 - Even facially neutral statutes will be problematic
 - I.e., legislatures will not be able to enforce statutes in ways that aren’t homophobic → leads to *Yick Wo* EP issues
 - Dissent (Scalia): majority not applying strict scrutiny review here (no fundamental right), but r-b
 - Scalia objected to the Court's decision to revisit *Bowers*, pointing out that there were many subsequent decisions from lower courts based on *Bowers* that, with its overturning, might now be open to doubt
 - *Williams v. Pryor*, upheld AL prohibition on sale of sex toys
 - *Milner v. Apfel*, which asserted that "legislatures are permitted to legislate with regard to morality...rather than confined to preventing demonstrable harms"
 - *Holmes v. California Army National Guard*, which upheld the federal statute and regulations banning from military service those who engage in homosexual conduct
 - *Owens v. State*, which held that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"
 - Criticizes for not respecting *stare decisis* the way they did in *Casey*
- ❖ “Don’t ask, don’t tell” (1994) – tries to only regulate conduct (not speech or status), but speech is practically prohibited and status implicated by “propensity” language
 - Before 1994, gays categorically banned from military
 - This was a compromise
 - Congress: this prohibits conduct, not speech-act/coming-out (at least formally, avoids 1st amendment problems)
 - Speech creates a rebuttable presumption you are gay, but very difficult to rebut so in practice speech prohibited as well
 - Also, “propensity” language means status being implicated as well
 - Value this adds is protection about being asked if you are gay
 - Speech, status, conduct hard to separate here
 - No longer just executive branch’s decision alone

- Used to just be a DoD regulation
 - Now hybrid of statute and DoD order, so if Obama wants to get rid of it has to go to Congress or court has to strike down as unconstitutional
 - Yoshino doesn't think courts will do this, thinks solution will be legislative + executive
 - Military deference (*Korematsu*) – this lives on
- ❖ Same-Sex Marriage – Timeline
 - 1993 - HI subjects hetero marriage to strict scrutiny and remands to lower court. Before it is overruled, the legislature overrode it with a constitutional amendment.
 - 1996 – Clinton signs Defense of Marriage Act
 - Is this response to valid concerns? The “place of celebration” rule for marriages would make people think that gay marriages in one state would have to be respected everywhere. But would contemporary constitutional jurisprudence really have led to this?
 - 1999 - VT requires same-sex couples get all the same benefits as hetero's under the “common benefits clause” of the state Constitution
 - They didn't require “marriage” per-se, but all of the benefits.
 - 2003 (May) - Federal Marriage Amendment introduced in the House
 - Gets defeated
 - 2003 (June) - *Lawrence v Texas* decided by SCOTUS
 - 2003 (Nov) - Mass Sup Ct holds that the state constitution guarantees marriage rights for same-sex couples
 - The MA legislature went back to the court and asked for an advisory opinion if the VT solution would be acceptable. The court said no - they meant marriage.
 - The MA amendment procedure is hard (like Iowa, as opposed to CA) - required it be passed by the legislature twice and then put before the people. It was passed once, but then failed the second time and never went to the ballot.
 - 2006 (July) - NY Ct. of Appeals rules that state constitution does not guarantee marriage rights for same-sex couples
 - Interesting support - one argument was that heteros were more prone to reckless procreation, so marriage was necessary to “shore-up” those weak relationships.
 - 2006 (July) House rejects the Federal Marriage Amendment (236 yea to 187 nay, 290 required)
 - 2006 (May) - CA Sup Ct holds that the state constitution requires marriage for same sex couples
 - 2008 (Oct) - CT sup Ct holds that the state constitution requires marriage for same sex couples
 - 2008 (Nov) - CA voters approve Prop 8, changing the constitution to reverse the ruling and prohibits same sex marriage
 - A result of how easy it is to change the CA constitution
 - Amended over 500 times - 3rd longest constitution in the world
 - Is this a sign of health or sickness of the CA constitutional process?

- 2009 (Mar 3) - gay rights orgs sue over the DOMA in a MA district court
- 2009 (Mar 6) - CA Sup Ct hears arguments over Prop 8
- 2009 (Apr 3) - Iowa Sup Ct unanimously decides that the state constitution requires same sex marriage.
- 2009 (Apr 7) - VT Legislature overrides a veto, approving legislation that enacts same sex marriage
- NH, NY, ME and NJ are considering legislative options as we speak
- ❖ Difference between Marriage and Civil Unions
 - Some states have civil unions that are substantively weaker than marriage, so in those places, it's obvious
 - VT rules that same-sex couples receive all of the “material benefits” of marriage, but not the symbolic value of marriage
 - **Nancy Fraiser**: politics of redistribution (who gets stuff) vs. politics of recognition (who gets what status)
 - Symbolism, of course - and all of the social acceptance that goes along with it (and discrimination/subordination that goes with withholding it)
 - Also the portability of it - marriage transports to other states
 - And the potential for federal/inter-state benefits (e.g. social security, etc., provided DOMA gets repealed)
 - Should gays want marriage?
 - Historically, marriage was very patriarchal (an unequal merger)
 - Remember - rights have a “channeling” function, and it may not always be a good thing
 - It used to be that African Americans could not get married (when they were slaves)
 - They developed a lot of customs or informal ceremonies/structures that worked within that context (including polyamorous relationships)
 - When freedmen were allowed to marry, all of these other structures/ceremonies were eliminated
- ❖ **Goodridge v Dept of Pub Health** (2003, MA): *DP and EP of state const.*
 - *Loving*-style argument
 - State leg then asks for an advisory opinion as to whether civil unions are good enough, and the court says no
 - Is it a question of sexual orientation discrimination, or of “mere” sex discrimination?
 - On some mechanical level, it is a sex discrimination
 - your right to marry a person of gender X is a function of your own gender
 - And one advantage of looking at it this way is you get a higher level of scrutiny
 - But the down-side is that it's hard to argue that it is “invidious” in this way - it doesn't harm one sex over the other (whereas in *Loving*, it did harm non-whites)
 - But the substantive discrimination is *against* people of particular sexual orientation

- Often initially, states will only give rational basis review, and may be willing to give legislatures the benefit of the doubt (e.g. allow them to privilege hetero couples for some claim that they're better at raising kids)
 - But if you can get heightened scrutiny for sexual orientation, then it will be portable to other areas of the law
 - Some people argue that sexual orientation discrimination and sex discrimination are the same - in the sense that gender, as a cultural construct of gender roles, is really what is being privileged in both cases
 - ***Hernandez v Robles*** (2006, NY)
 - Rejected the *Loving* analogy - said hetero marriage does not subordinate men to women or women to men
- ❖ ***In re Marriage Cases*** (2008, CA Sup Ct.):
 - “Only marriage between a man and a woman is valid or recognized in California”
 - Per *Carolene Products* ft. 4, are gays a discrete and insular minorities?
 - Gays don't seem to be - they are among all families and, in most places, don't insulate themselves.
 - **Bruce Akerman**, though, argues that it's not discrete and insular minorities that need help, but diffuse and anonymous minorities, since it's harder for them to organize.
 - So in some ways Scalia is right - it's impressive that ~4% of the population (or even 10%) can move ~46% of the population in their favor
- ❖ ***Varnum v. Brien*** (2009, Iowa): *same-sex marriage OK, intermediate scrutiny*
 - Sup Ct voted unanimously that the state constitution guarantees same sex couples the right to marry.
 - It applies intermediate scrutiny under the state equal protection clause
- ❖ Vermont Legislature (April 7 2009)
 - Voted to override the veto by republican governor Jim Douglas. House vote was 100-49, senate vote was 23-5
 - Days before, it appeared it would fail.

How important was the *Varnum v Brien* decision in flipping the last couple of votes?

 - While it was democratic (vs judicial), it might be naïve to think that this didn't in some way depend on judicial work in other states, or that this will work in all jurisdictions
- ❖ DOMA (Federal Defense of Marriage Act)
 - Permits states to not recognize same-sex marriages in other states
 - Questionable - federal law cannot override the constitution, so if the “full faith and credit” clause requires it, this can't undo it
 - Some argue this is allowed by the clause that states “Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof”
 - But it seems a stretch to argue that this part allows congress to actually restrict which acts/records/proceedings are given full faith and credit
 - But there has been a long history of allowing states to refuse the full faith and credit recognition for strong public policy reasons

- E.g. first-cousin marriages may be rejected by one state even if they think it's a really bad thing
 - So maybe DOMA is both redundant and constitutional at the same time...
- Defines marriage for federal purposes as 1-man/1-woman (this is more relevant - as it determines a lot of the benefits of marriage)
 - **Gill v Office of Personnel Management** - in MA, sued over this clause - claimed it violated the Equal Protection clause
 - No group has gotten heightened scrutiny under *FEDERAL* equal protection clause since 1977 (though many states have given groups such scrutiny), this may be the issue decided here
- ❖ **Michael H** (1989, Scalia plurality): *conclusive presumption (performative utterance) defeats procedural claim, substantive claim – ladder of interests*
 - Facts: CA statute conclusively presumes any child born to a married couple is issue of that couple. Michael H. has evidence he is father although Gerald D. is husband/father on birth certificate. Says evidence suppression bc of statute is process violation, “liberty” interest in being father is substantive violation.
 - Holding: rejects procedural and substantive DP claims
 - Procedural: notice + opportunity to be heard (he claims has been denied latter bc evidence that 98% likelihood he was parent not heard)
 - Conclusive presumption under CA law
 - instead of rebuttable presumption in don't ask don't tell
 - conclusive presumptions: often evidence is empirical
 - conclusive presumption is a performative utterance
 - *Ozawa + Finn*: race cases where individuals said they believed they were white (*Plessy* context)
 - Arguments were white bc of skin color, ethnographic studies
 - But court says “we don't care” → law says what “white” means (like a performative utterance)
 - Substantive: Michael H.'s “liberty” interest in being child's father not strong enough
 - Not deeply imbedded within society's traditions so as to be a fundamental right
 - note that even textualists like Scalia believe in *some* substantive DP
 - but tries to cabin-in by looking at most specific right Michael H. could be articulating
 - cant abolish entire line of jurisprudence (already have *Griswold*, etc.)
 - ladder of rights in FN F (only Scalia + Rhenquist): I, unlike Brennan, have a methodology – goes from most specific to most general
 - parental rights of adulterous natural fathers***

- uses most specific right for which we can find a relevant constitutional tradition
 - cant get more specific (“...fathers in CA”)
 - “parenthood”
 - “family relationships”
 - “personal relationships”
 - “emotional attachments in general”
 - Tradition that speaks to this right has disrecognized the right bc of stigma attached to illegitimacy
 - O’Connor + Kennedy: agree w/entire opinion except for FN F
 - Yoshino thinks they are resisting idea that *Roe* could be chipped-away at in this way
 - Scalia’s analysis would come down hard on *Roe* (would frame as narrow right for women to have abortions – tradition more against this than for it)
 - Level of specificity justices use will determine outcome of substantive DP claims
 - Ex: *Bowers*
 - Tribe when litigating tried to make general (right of all individuals to engage in whatever in their own homes, right to privacy – not homosexual intercourse)
 - Court chooses level of generality lower on scale than statute articulates
 - Statute re sex in general
 - Court makes it about homosexual sex
 - This sets stage for *Lawrence* later
 - If you go specific, more likely court will vindicate right
- ❖ **WA v. Glucksberg** (1997, Rhenquist): *no unenumerated right to engage in physician-assisted suicide, 2-prong analysis to find unenumerated right, slippery-slope re. euthanasia, EP concerns creeping in – can be break as well as goad in defining liberty, here break, now: start w/Glucksberg test and then bring up broader liberty concerns (Lawrence)*
 - Facts: WA has ban on physician-assisted suicide, challenged on DP grounds, court rejects
 - Holding (Rhenquist): no unenumerated DP right
 - 2-prong analysis
 - 1) is it deeply rooted in nations tradition/history AND implicit concept of ordered liberty?
 - Right to commit and assist suicide lack robust tradition
 - Tradition + counter-tradition – leave statute in place
 - 2) define right as narrowly as possible (*Michael H.* at work here)
 - Another limiting principle used here: slippery slope
 - Want to protect medical profession – police line btw healing and hurting
 - Disparate impact on:
 - Poor
 - Disabled

- Elderly
- None of these are heightened scrutiny groups – EP/liberty concerns rearing their head here
 - Court closing one EP door after another – now
 - 1) no more heightened scrutiny groups
 - 2) no disparate impact claims
 - 3) restrictions on what Cong. can do under §5
 - Like contraception – formally about DP but liberty concerns re. women of course very relevant
 - Also *Lawrence* + *Lane*: liberty cases that smuggle in equality concerns
 - Tradition of this from *Meyer + Pierce*
 - *Lane*: could cong. require states to make courthouses wheelchair accessible?
 - White is concerned re. slippery slope including groups in pluralistic society
 - Movement from groups to universal rights
 - Here equality concerns can act as break as well as goad in consideration of boundaries of liberty
- What does *Lawrence* do to this 2-part test?
 - Adheres to test
 - But at end of opinion, Kennedy rejects history as a guide
 - Reads “liberty” in intentionalist way – internalizes an ethos-based interpretation
 - Framers *could* have chosen a laundry list of liberties and said “this is it” – but 9th Amend explicit re. unenumerated rights
 - 5th/14th Amend framers: left to successive generations to fill-in content of liberty for their own times
 - BUT no direct repudiation of *WA v. Glucksberg*
 - Smart thing to do now is
 - start w/*Glucksberg* test
 - and then say “may have to make some adjustments based on what was said in *Lawrence*”
 - Sunstein: DP backwards looking, EP forward looking
 - Yoshini thinks too simplistic (some DP cases forward looking – *Meyers + Pierce*, etc.)
 - But *Lawrence* makes Sunstein’s formulation more true
- DP: tiered structure of scrutiny, just not as sharply formulated as EP context
 - Have strict scrutiny w/r/t some “fundamental” rights
 - But there are instances in which court gives less than strict scrutiny (less than fundamental)
 - *Casey*’s undue burden test (+ *Stenberg*): rejection of idea that abortion is fundamental right
 - court doesn’t use “intermediate” scrutiny – wants to treat abortion as *sui generis* (doesn’t want to bring up *Virginia*)

- *Lawrence*: “fundamental” and “right” never used together
 - No explicit intent to create status of fundamental right
 - Something akin to r-b w/bite from EP-context, doesn’t use that name
 - *Glucksberg* test seems to apply regardless of standard of scrutiny
- ❖ **Saenz v. Roe** (1999, Thomas): *renaissance of P OR I as repository of unenumerated rights?*
 - Facts: CA has durational residency requirement that limits level of welfare benefits
 - Holding: court strikes down under “Right to travel” embedded in P OR I clause of 14th amend
 - Structural provision rather than group-based civil rights concept
 - Right to travel – in P OR I instead of DP clause of 14th amend
 - Also: rights strand of EP clause
 - Rights
 - Right to access court
 - Right to be free from poll tax (right to vote)
 - Right to travel
 - All relate to poverty/indigency – from 50s and 60s – Warren court trying to give heightened scrutiny but didn’t want to make a group of them (too much like social engineering)
 - Didn’t do under DP bc this is uncomfortable period – fears of Lochnerizing
 - Had been long time since court had decided case under P or I clause
 - Yoshino likes the substantive sound of P or I clause
 - But as it turns out this case is really a blip
- ❖ So we see that unenumerated rights in 3 places
 - P or I of 14th amend (*Saenz*)
 - EP clause of 14th amend
 - DP***
 - Most unenumerated rights come through here
 - Debate re. role of international law
 - Both Kennedy (wants to expand) and Rhenquist (wants to contract) look to other nations
 - Scalia thinks should only look to US history (“*our nation’s* history” in *Lawrence* dissent)
 - Pros: Increasingly cosmopolitan world, comity concerns vis-à-vis other nations, etc.
 - Cons: normative question of which country to look at (picking and choosing), hard to be familiar w/laws of all countries in the world (jurisprudence of where I spent my summer vacation)

IX. Legislative/Adjudicative Enforcement of the 14th Amendment

- ❖ **Katzenbach v. Morgan** (1966, Brennan): *civil rights under 14th amend instead of commerce clause, deferential notion of Cong. power to interp under nec + prop clause (high point of Cong.’s §5 powers)*

- Facts: Voting Rights Act Section 4(e): waives requirement that you speak English that exists under NY State law
 - §1: no state shall deny any person EP
 - §5: Cong. shall have power to enforce this article
 - Holding: upheld under 14th amendment (§1 – EP)
 - *Heart of Atlanta Motel* and *Katzenbach v. McClung* used commerce clause
 - Here we get direct treatment of EP under 14th amend
 - *Lassiter*: prior precedent in which court upheld literacy requirement against EP challenge
 - 2 theories of what *Morgan* is doing: Overcomes precedent w/theory of Congressional power under 14th amend §5 of EP: Cong can come up w/ it's own interp of §1 (References to *McCulloch*: expansive notion of nec+prop)
 - 1) Totally deferential concept of necessary and proper → Cong. decides scope of own power under §5
 - In *Lassiter* (1959) cong. had to choose amongst interps of §1 made by the courts
 - There the Court rejected a black citizen's challenge to a state literacy test, finding that states have broad powers to determine the conditions of suffrage.
 - Here, the Court distinguished *Lassiter* on the ground that the Voting Rights Act addressed discriminatory use of tests, a use *Lassiter* itself questioned.
 - Here can come up w/its own, it trumps past legislation and courts interp
 - 2) somewhat deferential: CANT enact legislation that expressly violates interps of §1 that court has made
 - can increase rights
 - BUT cant make something prohibited court had said was permitted
 - Here: Cont decided this law violated court's interp of §1 (discrim. Re national origin subject to strict scrutiny, fatal in fact, etc.)
 - so cong. is actually deferring to court in a sense
 - true the court in *Lassiter* upheld this legislation
 - but now we have better facts, and when we apply court's interp. of §1 to this situation now we want to override
- ❖ Timeline – DP guarantee of §1 of 14th Amend incorporating free exercise from 1st Amend
 - *Sherbert* (1963): 7th day Adventist, Conn. refuses to give her unemployment benefits bc she turned down paid work
 - No specific animus against her religion (like disparate impact)
 - She didn't contest as rule of general applicability, but saying she should be accommodated under free exercise clause
 - Holding: in her favor – law stands as a general matter but we need a carve-out for religion

- *If state making individualized determinations it has to make accommodations for good-faith religious objections to rule of general applicability*
- **Yoder** (1973): Amish family doesn't want kid to go to high school, Wisconsin has rule saying all kids must go through high school
 - No specific animus against Amish (like disparate impact)
 - Intersection of right of religion/free exercise and right of parents to control kids (*Meyers/Pierce*)
 - Holding: *state has to have compelling interest before it allows disparate impact against a religious minority*
 - Title VII standard applied to free exercise clause
- **Smith** (1990): two guys denied unemployment bc convicted criminals for smoking peyote, part of their religion
 - Holding (Scalia): they lose – r-b review if facially neutral and no discrim intent
 - *in a nation as cosmopolitan as ours, we cant grant specific accommodations to individuals based on religion w/out allowing each individual to become a law unto themselves* (joke re. France and cheese, America and religion)
 - so long as law is facially neutral, not enacted w/animus toward particular religious group, r-b review applies
- 1993: Religious Freedom Restoration Act – claim is *we are co-equal const. interpreters*
 - Tries to restore *Sherbert/Yoder* jurisprudence – high protection for religious minorities (high ceiling)
 - Had been brought down to floor in *Smith*
 - Court responds in *Boerne* by saying changing our jurisprudence to what it was before is not an *enforcement* of a right
 - You could do under *Morgan* theory 1
 - But under *Morgan* theory 2 you cant enact legislation that contradicts our interp of §1 in *Smith*
- O'Connor: impingements on activities in free exercise context much worse for religionists than impingements on activities for racial minorities in EP context
 - Free exercise protects behavior
 - EP protects status
- ❖ **Boerne** (1997, Kennedy): *RFRA is overreach of enforcement powers, Cong.'s §5 powers to enact legislation reduced → response must be “congruent and proportional”, this is the law now*
 - Facts: Bishop applies for permit to enlarge church, denied bc in historic zone, claims ability to act on his beliefs being restricted (RFRA claim)
 - Holding: Bishop loses, RFRA unconstitutional overreach of enforcement powers, restricts Cong.'s §5 powers → Cong. has power to “enforce” not determine what substantive rights are granted under 14th amend
 - Chooses *Morgan* theory 2 over 1
 - Replaces “nec+prop” w/ “congruent and proportional”
 - 3-pt test

- 1) Determine what the §1 violations are (what right the court has guaranteed the ppl under §1)
 - 2) how many violations have there been of that right?
 - 3) Is Cong.’s enactment under §5 congruent and proportional to remedy past violations?
 - ❖ **Morrison** (2000, Rhenquist): *VAWA struck down as overreach of both commerce clause + §5 powers*
 - *Facts*: Cong. enacts Violence Against Women’s Act – argues its valid under both commerce clause power and 14th Amend §5 power
 - *Holding*: struck down as Congressional overreach
 - Commerce Clause powers
 - 3-pt OR test from *Lopez* (not met here)
 - Channels of commerce, OR
 - Instrumentalities/persons or things in commerce, OR
 - “Substantially affects interstate commerce”***
 - 4 factors to determine
 - 1) econ in nature
 - not here
 - distinguishes *Wickard* (wheat case)
 - 2) jurisdictional element
 - None here
 - 3) congressional findings
 - Court deems them insufficiently probative (neither necessary nor sufficient here)
 - 4) links to interstate commerce
 - Here too attenuated
 - Argument was violence makes women less econ. productive
 - §5 powers
 - 3-pt inquiry from *Boerne*
 - 1) §1 violations have to be by the state
 - Private acts of violence don’t count (precedent is *Civil Rights Cases*)
 - 2) how widespread is violation?
 - 3) congruency and proportionality analysis doesn’t matter
- ❖ *Aftermath of Boerne* – need to rely on Cong.’s 14th amend §5 power to overcome sovereign immunity defense
 - If legislation wont work under commerce clause, go to 14§5 analysis
 - 1st: does it overcome sovereign immunity
 - 2nd: is it congruent+proportional (*Boerne* test)
 - NOTE: cannot sue for \$\$ damages under commerce clause (bc pre-11th amendment legislation cannot pierce sovereign immunity)
 - Bc of Rhenquist revolution Commerce Clause is not a playground anymore
 - Sovereign immunity – the sovereign is immune from lawsuits: history

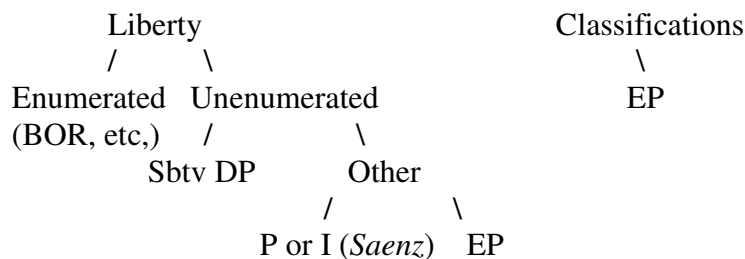
- Colonies hated this
 - **Chisolm** (1793): court said citizens of one state could sue another state
 - leads to 11th Amend (like *Dread Scott*)
 - 11th Amend: judicial power does not extend to a suit against one of the states by citizens of another state (or foreigners)
 - **Hans** (1890): mangles text of 11th amend to protect states from suit by its own citizens as well
 - Argues that to only prohibit out of states would discriminate against them
 - **Ex Parte Young** (1908): court mangles text again (amend “in law or equity”) by permitting citizens to sue states for prospective injunctive relief
 - BUT **Edelman** (1974) says citizens still cant sue for damages from state treasury
 - **Alden** (1999): court mangles text again, citizen barred from bringing a federal damages suit in fed court also cannot bring in state court
 - **Seminole Tribe***** (1996): to abrogate sovereign immunity must be either
 - 1) waiver of immunity by state, OR
 - 2) clear intent by Congress to abrogate and action pursuant to proper power
 - “proper power” = post-11th amend power (i.e., §5)
 - As long as Cong. are using post 11th amend power w/intent to abrogate (has to be on face of statute) citizen can bring suit against the state despite sovereign immunity defense
 - State will always use sovereign immunity defense
 - If you are relying on commerce clause you will lose
 - Only hope of winning is to rely on post 11th amend power
 - This is why the 14th amend §5 analysis is so important
 - Most cases today rely on §5 and not commerce clause
- ❖ **City of Cleburne** (1985, White): *r-b w/bite, state action struck down (bite is operative here), cant use intermediate scrutiny bc of slippery slope w/r/t groups*
- Facts: 13 mentally retarded ppl denied permit for group home, sue under EP clause
 - Holding: r-b applies (like *Romer*) → strikes down requirement to have a permit
 - State action struck down
 - No heightened scrutiny
 - Seems like they meet 3-pt *Bowen* test
 - But majority says doesn’t meet 3) politically powerless bc already legislation passed to protect them
 - The reverse of *Frontiero* plurality, which said Equal Rights Act which says existence of legislation cuts in favor of court intervening

- Recall argument re. role of extant/imminent legislation in determining court's willingness to intervene
 - Con: countermajoritarian difficulty
 - Pro: court's are particularly good at protecting minorities
- Slippery slope consequences to giving them heightened scrutiny – in pluralistic society cant give amorphously defined groups heightened scrutiny
 - White loves slippery slopes
 - *WA v. Davis*
 - *Cleburn*
 - *Bowers*: homosexual sodomy right would lead to letting adultery, etc. happen in the home
- Court giving up on protecting minorities?
 - Later r-b expanded to other mental disabilities
- reasons to strike down state action (have to give them permit)
 - *Palmer v. Hadadi*: we cant regulate private prejudices directly (cite *Civil Rights* cases) – still cant use prejudice of 3rd parties to base gov't action
 - Denial of permit here was product of prejudices of 3rd party
 - Flood plain argument: need to ground refusal of permit in fear of flood and include individuals immobilized for other reason
- Compare to *Williamson* (paradigm r-b case) to here (paradigm r-b w/bite case)
 - 1) no one step at a time
 - *Williamson*: one step at a time formulation (means/ends distinction)
 - There, doesn't matter that legislation is underinclusive
 - Regular r-b: loose fit of legislation to meet ends bc going one step at a time
 - Here ends are helping ppl who live flood plain
 - Legislation has to fit tightly to meet these ends
 - 2) no proffering of rationales by court
 - Also, in *Williamson* court willing to use imagination to think of r-b the gov't could have used to justify legislation
 - Here court is rejecting arguments actually proffered
 - Almost more like intermediate scrutiny here, but court calls it r-b bc it cant give intermediate scrutiny to groups in principled way (slippery slope)
 - More like a gestalt than an analytic
 - We know retarded ppl diff from opticians in terms of their need of protection from discrimination

- We cant isolate the groups, but court still wants to protects groups in less formal, ad-hoc way
 - Uses r-b w/bite to do it
 - We don't know what causes courts to flip from r-b to r-b w/bite
 - "Animus" against a group is by definition irrational
 - If its there we need to protect group
 - But we don't want to give nation set of principles as to what constitutes "animus"
- Ex of 14§1 right deemed to be very weak
 - *Power Cong has to remedy violations of that rights concomitantly weak*
 - Ex: mentally handicapped get r-b scrutiny, weak §1 right
 - The only time they are injured is when state action would be irrational
- VAWA:
 - issue not weather legislation valid at level of enactment (commerce clause) but if its valid at level of ability to pierce sovereign immunity of the states
 - in *Morrison* it is struck down at level of enactment
- AMDA: Title I employment – of course in interstate commerce
- ❖ **Garrett** (2001, Rhenquist): *Title I of ADA cannot be used to sue a state for damages, inquiry under §5*
 - Facts:
 - Title I of Americans w/Disabilities Act – disabled ppl have to have access to public employment
 - Suit by disabled ppl for money damages against state employers
 - Cant sue for \$\$ relief against states, suits must be brought by individuals
 - The reason this is §5 and not commerce clause is bc it's a suit for §§ damages
 - State employers assert sovereign immunity defense
 - Holding: Title I of ADA cannot be used to pierce sovereign immunity
 - ADA not struck down (not a 14§1 debate)
 - Of course OK under commerce clause (*Heart of Atlanta Motel*)
 - just cant use it to pierce sovereign immunity for states (this is a 14§5 debate)
 - so individual cant sue state employer for damages under Title I of ADA
 - *Boerne* 3-pt test for when Cong may abrogate sovereign immunity
 - 1) what is §1 right at issue as defined by court?
 - Not do be discriminated against under EP clause of 14th amend §5
 - 2) how many violations have there been?
 - Not many here – 3 reasons

- 1) inquiry should only extend to states themselves, not units of local governments (like cities and counties)
 - 2) only Title I implicated in this case (DIGs case)
 - Title I deals w/employment
 - Title II w/services, etc.
 - Get rid of Title II issues
 - 3) Cong has power to enact ADA under §5 but its limited bc under §1 disabled ppl can only get r-b review
 - If you only get r-b in §1 it trickles over into §5 jurisprudence in terms of what individuals can do
 - Tricky for disabled ppl bc they often seek state employment bc state can spread risk, accommodate them
 - 3) is cong. remedy congruent and proportional to remedying those violations?
 - Has to operate w/power that post-dates 11th amend (*Seminole Tribe*)
 - ADA too broad to remedy small # of §1 violations
- ❖ **TN v. Lane** (2004, Stevens): *ADA claim upheld (courthouses must be accessible), (substantive) DP claim → intermediate scrutiny for right to access courts*
- Facts: Wheelchair guy cant get access to courthouses in TN (crim charge brought against him) – has to crawl up courthouse steps.
 - Holding: not a case about groups, a case about rights (avoids Rhenquists Title I cases)
 - §1 right at issue here not EP but right to access courts under substantive DP
 - Most §5 litigation re. proportionality and congruency/EP rights
 - But §5 power also enforcement power for substantive DP
 - i.e., cong can enact legislation to remedy violations of substantive DP under §5
 - standard of review – at least intermediate scrutiny for right to access a court
 - at least same level of scrutiny as sex discrim
 - NOT *Cleburn* issue re. groups, but a substantive DP right of the sort in cases decided by Warren court
 - States cannot assert sovereign immunity defense
 - Right that draws at least intermediate scrutiny
 - Title II of ADA is corrective legislation to remedy violations of this right

- Courts not asking states to bear huge costs – just access to system of justice
- ❖ **NV Dept. of Human Resources v. Hibbs** (2003, Rhenquist): *Cong. abrogated sovereign immunity*
 - Facts:
 - Family and Medical Leave Act
 - Seems to be a remedy against some form of disparate negative impact on pregnant women (they are more expensive to hire bc maternity leave is long)
 - Ps sue for \$ damages
 - Nevada asserts sovereign immunity D
 - Holding: Cong. has abrogated sovereign immunity
 - No substantive DP right here, BUT liberal justices get centrists to sign on and Rhenquist even writes opinion (rumor is he has daughter who is single mom...)
 - 1) what is §1 right?
 - Sex discrim (intermediate scrutiny)
 - 2) what are harms/how many harms are there?
 - Disparate treatment on basis of sex by state actors (gets intermediate scrutiny)
 - Against men – parade of male plaintiffs
 - Family leave discrim on basis of sex by state employers is widespread
 - Discrim on basis of sex by private employers
 - This shouldn't count as EP violation (*Civil Rights* cases)
 - Disparate impact on women of workplace policies designed for workers w/out caretaking provisions
 - 3) is response congruent and proportional
 - Sex formally gets heightened (intermediate) scrutiny – so maybe that's the best way to square this case w/*Garrett*
 - Law is targeted at one aspect of work-pregnancy nexus



- P AND I clause of Art IV is not a repository of substantive rights that individuals hold and can assert against a sovereign
 - Better understood as a requirement that in-staters and out-of-staters be treated the same
 - BUT don't have to be treated the same w/respect to everything, only w/rights in *Corfield*