

## Constitutional Law

- I. Origins of the US Constitution
  - a. Articles of Confederation
    - i. no federal power to tax or regulate commerce
    - ii. no executive or judiciary branch
- II. **Marbury v. Madison** (1803)
  - a. Facts:
    - i. Marbury (appointed justice of the peace under President Adams – Federalist) sought writ of mandamus (court order) compelling President Jefferson’s (Republican) Secretary of State, Madison, to deliver his commission
  - b. Holding:
    - i. Supreme Court does not have power to direct the President to deliver commission
  - c. Rationale:
    - i. SC has power to declare acts of Congress unconstitutional (judicial review)
    - ii. midnight judges bill (Judiciary Act of 1800)
      - 1. 16 new federal circuit court judges (staffed by Federalists)
      - 2. replaced system of SC justices “riding circuit”
      - 3. reduced SC from 6 to 5 justices (to deny Jefferson appointment)
      - 4. empowered President to create justice of the peace positions (Federalists)
      - 5. Republican legislature repealed provision creating circuit court positions
        - a. unconstitutional? legislature eliminated SC’s 1802 term, so that they could not interpret repeal
    - iii. Jefferson refused to deliver JOP commissions (Marbury)
    - iv. Marbury holding (Marshall):
      - 1. power of SC to grant writ of mandamus (Judiciary Act of 1789)
        - a. but, prohibited by a provision of the Constitution – Article III, Section 2
          - i. SC only has appellate jurisdiction (with exceptions for original jurisdiction in narrow category of cases)
          - ii. no exception for writ of mandamus
        - b. Alternative interpretations available:
          - i. Marshall does not mention clause allowing Congress to create exceptions to SC’s appellate jurisdiction
          - ii. SC could interpret Constitutional enumeration of original jurisdiction category as a minimum
          - iii. But, Marshall uses decision to establish judicial review
        - c. unconventional form of opinion:
          - i. merits placed before jurisdictional decision, so that Marshall can assert that Jefferson’s action was illegal (otherwise, lack of jurisdiction analysis would preclude the discussion)
- III. **Judicial review:** power of SC to declare acts of Congress, Executive, and states unconstitutional (state or fed. level)
  - a. justifications:
    - i. written constitution
      - 1. limits should not be surmountable by those to whom those limits apply (legislature and executive)
      - 2. comparable to “the fox guarding the henhouse”
    - ii. judicial role
      - 1. Article III – “arising under” jurisdiction
    - iii. supremacy clause
    - iv. grant of jurisdiction

- v. judges' oath
    - 1. superior to legislators'/executives' oaths?
  - b. judicial review in the constitution
    - i. un-enumerated
    - ii. precedent of judicial review in state courts under Articles of Confederation
      - 1. but empirically, state courts did not exercise power of judicial review
        - a. state judges were threatened w/ impeachment when exercising judicial review
    - iii. Hamilton's Federalist 78
      - 1. argues for JR; favoring constitution over inconsistent statutes
      - 2. not mentioned in other Federalist papers
- IV. Ratification of the Constitution
- a. Anti-Federalist fears
    - i. centralization of government robs citizens of public participation
  - b. Federalist argument:
    - i. Republican form of govt. avoids problems inherent in representations
    - ii. managing factions
    - iii. JR limited to undisputable Constitutional violations
      - 1. assumption that judges abide by their consciences (to protect Constitution); otherwise, people would have the right to revolt (since govt. ignores the Const.)
  - c. **Departmentalism:**
    - i. court as a co-equal interpreter of the Constitution
      - 1. in practice, branches defer to the interpretations of the other branches
    - ii. judicial exclusivity? no;
      - 1. *Cooper v. Aaron* (SC 1958) – desegregation order
        - a. state executive refuse to abide by order, assert own constitutional interpretation
      - 2. but, *Marbury v. Madison* interpreted as SC's effort to assert judicial supremacy
    - iii. presidential constitutional interpretation
      - 1. competing interpretations? often resolved by political actors (legislature and executive); see torture memos, DOJ, etc.
    - iv. enforcement question: why do parties abide by the constitution?
      - 1. preserve social order
    - v. "under-enforcement" of Constitutional norms
      - 1. allows other branches to interpret Constitution more expansively than the SC
- V. Democratic deficit (counter-majoritarian problem)
- a. legitimate political authority derived from will of the people
  - b. How to reconcile democratic legitimacy conception with judicial review (by unelected judges)? Especially when contradicting majority political consensus?
    - i. Same issue as applied to constitutionalism broadly
  - c. Conventional explanation; Marshall (*Marbury*) and Hamilton (Federalist 78):
    - i. people (supreme democratic authority) ratified Constitution and Amendments; so, principles ratified carry democratic mandate (ideal of democracy; highest expression of American democratic decision-making)
      - 1. takes precedence over lower forms of democratic decision making (legislative statutes, etc.)
      - 2. Hamilton's justification:
        - a. judges exercise judgment, not will (will is to be exercised by the people)
          - i. statutory interpretation example (judgment based on intent of the people, rather than ideology of the judge)
          - ii. Hamilton: if judges can interpret statutes, they can accurately interpret the constitution, as a translation of the public's will

- iii. so, when a judge strikes a law down, it is the people who initially determined that the law was unacceptable, by stating principles in constitution
  - d. Dworkin's moral interpretation of judicial responsibility
- VI. Originalism and textualism
  - a. text is insufficient to create all operative structures
  - b. but, originalists seek to look beyond text to general principles, to reconstruct framers' intent
  - c. Dworkin (Moral Reading):
    - i. constitution embodies broad principles/general concepts (e.g. equal protection); no need to consult framers' prescriptive solutions (applications) to discrete problems (such as racial discrimination), since current legislature can fill in the content of the principles → core debate in constitutional interpretation (living constitutionalism v. textualism)
      - 1. framers of 14<sup>th</sup> Amendment supported racial discrimination (segregating schools at time of ratification)
- VII. Hamilton/Marshall framework ("People trump people")
  - a. what to do in the case of disagreements between current citizens and Constitution?
    - i. counter-majoritarian objection
    - ii. dead hand problem of judicial review (why should we be governed by the dead hand of the past?)
      - 1. complaints of democratic deficit
      - 2. "Jefferson's problem" – "the dead have no rights"
      - 3. ratification conventions were only open to landowners, whites, males; votes to ratify were close
  - b. possible answers:
    - i. constitution can be amended
      - 1. although, very difficult process (requires dual super-majorities)
    - ii. people should have freedom to bind themselves in the future
      - 1. thoughtful v. emotional decisions?
    - iii. Ackerman: "constitutional moments" – elevated democratic politics (3 moments in American history- founding, reconstruction, New Deal)
      - 1. but, much of the constitutional decision-making was based on political compromise, rather than high-minded principled decision-making (based on values)
    - iv. content of the constitutional commitments
      - 1. vague; allow for judicial flexibility in interpreting content
      - 2. delegated judicial paternalism?
- VIII. Responses to the **counter-majoritarian objection**:
  - a. Courts' political accountability
    - i. elected judges
  - b. "political" branches (executive and legislature) also lack democratic imprimatur in many ways
    - i. mal-apportioned Senate
    - ii. mal-apportioned Electoral College
    - iii. filibuster; committee system; other minority veto-points
    - iv. statutes actually require super-majority (majority elects president, different majority elects legislature, etc.) for passage
    - v. interest groups
  - c. senatorial confirmation of presidential judicial appointments
  - d. legislature's ability to supersede SC decisions by statute
  - e. Congress controls the budgets and size of the federal courts
    - i. impeachment power
  - f. Congress could limit fed. courts' jurisdiction (such as limiting its Federal Question jurisdiction)
    - i. *Ex Parte McCordle*

1. Court acknowledges that the legislature has control over its jurisdiction
  - g. Although Congress and the President have the power to strip the courts of their power, they have never done so in a significant way; politically untenable option
    - i. interpretation A: these “weapons” are ineffective, can’t be used
    - ii. interpretation B: SC is aware of the power of the political branches and acts accordingly, to preserve its power
    - iii. political branches have other options:
      1. ignore SC decisions (Lincoln)
- IX. Dworkin’s moral reading
- a. Why should we care about majoritarianism, as opposed to democracy?
    - i. collective v. individual conception
    - ii. representation allows for deliberation in decision-making
      1. Federalist 10 (Madison)
        - a. representatives “refine and enlarge” the public’s views through their wisdom, patriotism, etc.; qualitatively better forum
          - i. allows for independent judgment of the right decision (representatives should do the “right” thing, not the thing that we say we want)
          - ii. as opposed to civic republicanism, which expects citizens to engage in deliberate decision-making themselves
          - iii. displaces decision-making to the national level
      - iii. Dworkin: judges and courts should engage in same process of representation as the legislature
        1. insulated decision-making; SC is last institution capable of enacting Madison’s ideal
          - a. unelected; no cameras allowed; private deliberations; designed to create a “sanctuary”
            - i. critique: only 9 justices, not representative of their constituents
        - iv. problem of tyranny of the majority (undesirable result, but consistent with majoritarianism)
    - b. Why should we care about majoritarianism OR democracy? We should prioritize justice
      - i. for example, slavery; Jim Crow segregation laws

X. **McCulloch v. Maryland** (SC 1819)

    - a. Facts:
      - i. Fed. govt. established 2<sup>nd</sup> Bank of US; Maryland attempts to tax the bank
      - ii. McCulloch: head of Baltimore branch of Bank of US; refuses to pay the tax levied by Maryland
    - b. Holding (Marshall):
      - i. Congress has authority to establish bank under “necessary and proper” powers; Maryland cannot tax bank, since the tax would be levied without required representation (Maryland would tax citizens outside of the state)
      - ii. broad reading of “necessary”; opponents interpreted decision as giving federal government an unlimited grant of power
    - c. Rationale:
      - i. importance of a national bank (precursor to the federal reserve)
        1. ability of the national govt. to regulate commerce, encourage a thriving commercial economy
        2. contrary to Jefferson’s initial opposition, favoring strong states and an agrarian economy
        3. War of 1812 so disruptive to the economy that opponents of national bank are convinced
          - a. but, state governments, with state banks in constituency, opposed the national bank, attempt to tax the bank
          - b. question of constitutional federalism arises

- c. Jackson's veto of the 2<sup>nd</sup> bank of the US, citing that bank is unconstitutional
        - i. as President, Jackson had power to veto bank, just on policy grounds; but, specifies his constitutional interpretation
        - ii. departmentalism
  - ii. Congressional powers under the Constitution
    - 1. Congress only has power to do what it is empowered to do by the Constitution
    - 2. Article I lists powers:
      - a. tax; national defense and general welfare; borrow money; regulate interstate commerce; patents; roads; print currency
      - b. as opposed to Madison's Virginia Plan at Constitutional Convention
        - i. proposed that Congress have general power to legislate anytime that states would not be "competent"
        - ii. instead, powers are enumerated in Constitution
          - 1. state powers are the default; not limited by any grant of power in the Constitution
            - a. but, Constitution lists exceptions to default state power (coining money and interfering in contracts)
          - 2. Constitution creates NEW powers for the fed. govt.
          - 3. made explicit in the Tenth Amendment
    - 3. Congress' power to create a national bank is not enumerated in the Constitution
      - a. Marshall relies on the "necessary and proper" clause
        - i. Article I(8): necessary and proper for carrying into execution their enumerated powers
          - 1. not an independent source of lawmaking power; must refer to another enumerated power (expands the enumerated powers)
        - ii. national bank assists Congress in carrying out its other functions
      - b. how broadly to interpret the word "necessary"?
        - i. Jefferson: "necessary" as strictly necessary (would not allow the clause to expand enumerated powers)
        - ii. as opposed to Hamilton: "necessary" as useful, convenient (broad interpretation)
    - 4. Marshall: "we must never forget it is a Constitution we are expounding"
      - a. intended to endure; so, must adapt to changing circumstances (distinct from a mere legal code or statute)
        - i. less specific; not subject to legislative change (except through onerous amendment process)
        - ii. but, "dead hand" problem
      - b. compare with Marshall's stance in *Marbury*
        - i. Constitutional interpretation should be bound to the text and original understanding
        - ii. but, judicial advocacy problem
- iii. methods of constitutional interpretation
  - 1. For a federal law:
    - a. Does the Constitution give Congress or the President the power to enact the law?
    - b. Even if the Constitution grants Congress or the President the power to enact the law, does the law violate another aspect of the Constitution?
  - 2. For a state law:
    - a. Does the law violate a specific prohibition in the Constitution (free speech; violating contractual obligations)
  - 3. federal preemption doctrine (where there is a conflict between federal and state law)

4. Marshall's argument (*McCulloch*):
  - a. text of the Constitution
    - i. competing schools for prioritizing the text (textualist v. living constitution)
    - ii. Marshall's textualist arguments:
      1. even 10<sup>th</sup> Amendment omits the word "expressly", which had been included in Articles of Confederation
        - a. refers to reservation of powers not granted to the federal government by states
        - b. omission of "expressly" implies that federal gov't.'s power may be expanded
      2. comparison of text with text use in other parts of the Constitution; use of "necessary" in other Constitutional provisions
  - b. meaning of the Constitutional text (original understanding)
    - i. which meaning? popular understanding? framers' individual understanding? "original" understanding?
  - c. judicial precedent:
    - i. Scalia: most Constitutional cases are decided without reference to the text, but under standard common law model of judicial decision-making
    - ii. Marshall: consults previous decisions by political branches in regards to the bank controversy (since there is no precedent to consult; beginning of judicial review)
    - iii. why do courts follow precedent, doctrine of stare decisis?
      1. perverse incentive to compound the errors of past decisions (since otherwise, a correct decision on the merits of a case would coincidentally result in the same decisions)
      2. benefits of predictability v. substantively correct rules
      3. constitutional stare decisis v. common law stare decisis
        - a. common law precedent allows legislatures to pass legislation if they disagree with court's decision (in cases of statutory interpretation, this would be evidence that the court's decision was incorrect)
          - i. not the case with constitutional law; requires constitutional amendment
  - d. arguments from structure:
    - i. after establishing that Congress can charter a bank, Marshall must dispose of Maryland's right to tax the bank
      1. "the power to tax is the power to destroy"; contrary to Congress' power to create
        - a. so, federal law must trump state law
    - ii. does not apply to Maryland's power to tax generally (such as the property on which the bank sits)
      1. tax levied on all land is subject to constituents' approval; so, subject to democratic check
        - a. not so with a tax on the bank, the majority of whose shareholders are out-of-state, not voting for the Maryland legislature
        - b. general rule: states cannot tax federal entities; no taxation without representation

- i. principle is not enumerated in the Constitution, but is derived from structure by Marshall

- e. “impermissible” arguments?

- i. Does not argue that the nation would be better off with a national bank, or with a centralized Federalist economic structure
  - 1. policy argument
- ii. judge’s role: judgment, not will (no explicit ideological preference)
  - 1. but, ideology inevitably plays some role
  - 2. Dworkin: judges are inevitably engaged in a moral reading, but this is seen to be illegitimate; so, judges provide legalistic rationalizations (text, legislative intent, etc.) instead of acknowledging ideology
- iv. power of the national government generally, vis a vis the states
  - 1. question of federal power was significant in background issues, such as the power of the national government to restrict slavery
    - a. Southern opposition to *McCulloch*
  - 2. federal government expanded rapidly, but not until after Civil War (50 years after *McCulloch*)

XI. Living Constitutionalism (Strauss)

XII. Originalism (Scalia)

- a. Scalia: “I’m an originalist, but not a nut”; “faint-hearted originalist”
  - i. willing to accept stare decisis, even though he might think precedent is wrong

XIII. *District of Columbia v. Heller* (SC 2008)

- a. Facts:
  - i. contesting legality of DC law prohibiting possession of handguns in the home
- b. Holding (Scalia):
  - i. statute held to be unconstitutional; 2<sup>nd</sup> Amendment creates an *individual* right to bear arms
    - 1. “operative clause” of the 2<sup>nd</sup> Amendment; right to bear arms in the context of individuals defending themselves and their homes against crime
  - ii. inter-textual argument: 4<sup>th</sup> Amendment gives rights to “the people,” which may be invoked by individuals
  - iii. “militia” applies to all able-bodied members of a state who may be organized if the need arose
- c. Dissent:
  - i. collective rights/states rights view of the 2<sup>nd</sup> Amendment
    - 1. 2<sup>nd</sup> Am. designed to protect the “well regulated militia” against a national army; “prefatory” clause
    - 2. right of state militias to exist and protect against disarmament
      - a. militia = 2<sup>nd</sup> Amendment intended to protect the types of weapons used by the militias
      - b. militia = meaningless in the modern world
    - 3. collective right of “the people”
    - 4. “bear arms” referred to bearing arms as a soldier
- d. Rationale:
  - i. all justices consult the text and original meaning, but come to different conclusions; “moderate originalist” approach
    - 1. “militia”; “bear arms”; “keep arms”; “the people”
  - ii. impute framers’ opinions on modern circumstances? illogical exercise
    - 1. how to translate originalism in modern world?
      - a. which elements are retained, which elements are deemed inapplicable?
  - iii. reasonable person? divided opinions

- iv. relevant precedent:
  - 1. *US v. Miller*
    - a. only certain types of weapons (sawed-off shotguns), not typically possessed by law-abiding citizens for self-defense, are excluded from 2<sup>nd</sup> Am.
  - 2. *US v. Cruikshank*
  - 3. *Presser v. Illinois*
- v. Justices' policy/ideological views on gun control
  - 1. where arguments cannot be attributed to originalist or other justifications
  - 2. Breyer: surveys gun control studies
    - a. 2<sup>nd</sup> Am. right in a balancing test of interests (govt. regulation v. individual rights) → court's role is to establish appropriate balance
  - 3. Scalia: weight of evidence re: effect of guns and gun control has NO effect on constitutional interpretation
    - a. but, still subject to criticism of judicial activism, as opinion relies on analysis of 2<sup>nd</sup> Am. as protecting right to bear arms for self-defense (and those types of arms typically used for self-defense) → no justification for this position in the text or in the original understanding
  - 4. majority opinion seems to match the opinion of the median voter at the time of the decision
    - a. a super-majority of the population would likely support the majority opinion, rather than the DC handgun law
  - 5. decision likely permits any type of politically-feasible gun control legislation (such as those proposed in the wake of Newtown)
- vi. Federalism question:
  - 1. fed. govt's power to invalidate local regulations?

#### XIV. Federalism

- a. how the Constitution divides power between the states and fed. govt.
  - i. states' power:
    - 1. matters solely within the state
    - 2. police powers
  - ii. federal power:
    - 1. enumerated powers
    - 2. inter-state matters; **commerce**, "general welfare"
    - 3. international matters/commerce
- b. See notes on Federalism
  - i. federalism: sharing power between decentralized and centralized government units; system of "dual sovereignty"
  - ii. enumerated powers v. explicit limitations
    - 1. Bill of Rights opponents: limitations should be unnecessary and are potentially dangerous
  - iii. Values served by federalism (see also McConnell, below):
    - 1. Efficiency
    - 2. Promoting individual choice
    - 3. Encouraging experimentation
    - 4. Promoting democracy
    - 5. Preventing tyranny
    - 6. Protecting liberty
  - iv. Forms of federalism:
    - 1. Neither state nor national govt. has power to act
      - a. 1<sup>st</sup> Am. applied to states by 14<sup>th</sup> Am.; neither state nor fed. can enact a law in violation

2. Fed. govt. has exclusive power to regulate
    - a. For example, coining money
  3. States have exclusive power to regulate
    - a. Subject of extensive debate (see Reconstruction and New Deal cases)
  4. State and national governments have concurrent power to regulate
    - a. subject to supremacy clause
- XV. McConnell book review: justifications for federalism
- a. founder's design promotes three objectives:
    - i. secure the public good
      1. allows for individualized preferences, rather than overarching federal policy for all issues (social, etc.)
        - a. "responsiveness to diverse interests and preferences"
        - b. mobility solution for certain preferences (geographical federalism)
      2. destructive competition for the benefits of government
        - a. problem of externalities/tragedy of the commons
          - i. Public choice movement and externalities
          - ii. incentives to concentrate benefits in jurisdiction while costs are externalized elsewhere
        - b. federal power to spend for the general welfare/common defense
          - i. appropriation must be "general," not local
            1. such as common defense, coining money, weights and measures, IP laws
            2. inter-state commerce: direct result of externalities problem
              - a. coordination problems with revolutionary movement's protest against British trade restrictions/duties
            3. central government's power is limited (not plenary authority):
              - a. self-imposed limits (fed. govt. does not want to exercise all regulatory authority)
                - i. relies on delegated authority
          - c. states' right to establish rules based on preferences within own state is preserved
        3. innovation and competition in government
          - a. innovation more likely on the national level
          - b. state's competition with each other
            - i. welfare benefits
            - ii. school systems
            - iii. products liability laws
          - c. economy of scale/coordination benefits of centralization
      - ii. protect private rights
        1. Madison's tyranny of the majority faction argument
        2. 14<sup>th</sup> Amendment/New Deal legislation
        3. liberty through mobility (individual "**sorting**")
          - a. but, sorting is based on the demand side of personal preference
            - i. so, results are not what the government would want (race to the bottom)
              1. not necessarily resulting in innovation, etc.
            - ii. competition amongst localities is not necessarily analogous to competition amongst corporations
              1. rather, localities want to attract residents who will contribute more to the tax base than the benefits that they will consume or detriments that they will contribute (such as pollution, etc.)

- b. rather than competing for maximum jobs, economic success, jurisdictions actually compete for individual preferences (which may include jobs and tax revenues but also include protecting the environment, social welfare, etc.)
- c. adverse selection problem in redistribution:
  - i. analogy with Obama healthcare legislation, or class-action opt-outs (where members with higher-value claims opt-out, resulting in lower settlements for the rest of the class)
  - ii. incentive to flee v. incentive to flock
  - iii. solutions?
    - 1. Obama's solution: individual mandate
    - 2. restrict opt-outs
    - 3. **centralized government programs**
- 4. problem of self-interested government
  - a. otherwise, regulation would be entrusted to national govt. if it was more capable of regulating
    - i. criticism: national govt. would take over all aspects of authority, rather than sharing with the states (power-hungry fed. govt.); **consolidate** the states into a single union
    - ii. judicial review provided a solution, to police the boundaries of federalism
      - 1. counter-argument by Madison (Fed. 45 and 46) → see below
- 5. diffusion of power
  - a. two distinct governments to control each other
- iii. preserve the spirit and form of popular government
  - 1. enforcement of laws (voluntary compliance)
  - 2. nature of representation
  - 3. cultivation of public spiritedness

XVI. *Sienz v. Rowe* (SC)

- a. unconstitutional for CA to impose one year waiting period for receiving welfare benefits
  - i. CA: generous welfare benefits; waiting period reacting to influx of people migrating to CA to receive greater benefits
  - ii. SC: infringing on "right to travel"
- b. good for poor people?
  - i. but, consider adverse selection problem
  - ii. states are responsive to welfare benefits offered by neighbors
- c. "Sorting"

XVII. **Political Constraints v. Judicial Enforcement**

- a. Federalist 45 and 46 (Madison):
  - i. Members of Congress' respect for local governments would check abuse of power
  - ii. also suggested that local militias could be formed to repel abuse of national govt. power
    - 1. but, at time of founding, no federal employees, no standing army; compared to large state govt. structures, etc.
      - a. not relevant in modern setting
  - iii. local govt. would influence national officials if attempting to exercise undue power
    - 1. **incentives:** for national officials to acquire power over more areas, for local officials to push back on national attempts to regulate in new areas
      - a. so, system must just ensure that local officials have the tools to push back
      - b. but, local governments often benefit from expanding federal power (for ex., expanding military by building a base in a certain state), so do not check federal power
        - i. see: federal farm subsidies, anti-terrorism funding,

- b. Wechsler:
  - i. Updated Madisonian argument: modern political devices (filibuster and seniority) have allowed Senate to function as guardian of states' interests
- c. Choper
- d. Kramer
- e. *Garcia v. San Antonio Metropolitan Transit Authority* (SC 1985)
  - i. Blackmun/Powell:
    - 1. Debate over judiciary's role in protecting states from federal overreaching
      - a. structural argument: judicial v. political limitations on federal power
        - i. political limitations are ineffective when the group discriminated against is not fully enfranchised
- f. 17<sup>th</sup> Amendment
  - i. changed election of senators to direct popular vote; rather than elected by state legislatures (removed a local check on national power)
- g. Unfunded mandates reform
- h. Structural argument:
  - i. Incentives in constitution for political actors to pass legislation respecting constitutional norms
  - ii. Purpose of the 27<sup>th</sup> Am.

### XVIII. Federal implied powers under the Commerce Clause

#### XIX. *Gibbons v. Ogden* (SC 1884)

- a. Facts:
  - i. NY legislature enacted statute granting Fulton (inventor) and Livingston the exclusive right to operate steamboats in NY → licensed to Ogden
    - 1. Gibbons runs a ferry service conflicting with NY statutory monopoly
    - 2. Ogden seeks an injunction against Gibbons; Gibbons appeals to SC on ground that federal statute permits him to run his ferry service, which trumps the NY monopoly statute
- b. Holding (Marshall):
  - i. Federal statute permitted other vessels (including Gibbons'), so NY monopoly statute was invalid under supremacy clause; injunction denied
  - ii. "commerce"
    - 1. narrow v. broad reading; commerce v. navigation (commerce as only the trade or exchange of goods)
      - a. Marshall's interpretation of commerce: "intercourse"
        - i. could mean: travel, communication, social intercourse? range of activities, not nec'y economic in nature
          - 1. any kind of human activity?
      - 2. original understanding of "commerce"?
    - iii. "among the several states"
      - 1. Marshall's interpretation:
        - a. Congress has power to regulate commerce amongst states but has no power to regulate completely internal commerce of a state, only when:
          - i. Power to regulate internal activity reserved for the state
          - ii. Where commerce does not "affect other states"; included commerce's effects
          - iii. Where it is "unnecessary" for Congress to regulate commerce
        - b. economic activity's *effects* must cross the boundaries of states; externalities
          - i. interstate effects of purely intrastate activities
- c. Rationale:

- i. typically considered, with *McCulloch*, as a foundation decision pushing toward nationalization
- ii. before robust patent system was instituted, monopoly grants were common
- iii. Ogden’s argument:
  - 1. federal statute is unconstitutional
- iv. under Marshall’s analysis, any limits to federal commerce power?
  - 1. Congress can’t have unlimited powers; under Constitution, Congress has enumerated powers, with any others reserved for the states
    - a. Marshall reserves state inspection laws for the states; purely domestic forms of regulation
      - i. but, no intuitive reason why state inspection laws (dealing directly with the effects of interstate commerce) would be exempt
        - 1. at the time, inspection laws were classic exercise of state’s police power, regulations that states would always impose themselves
          - a. provision exempting states’ inspection laws in Article I
            - i. same phrase containing “absolutely necessary” that Marshall contrasts with “necessary and proper” in *McCulloch*
        - ii. but, Marshall implies that inspection laws might even not be sacrosanct
  - 2. test of federal commerce power seems to include everything, and Marshall acknowledges that his test relies on Congressional discretion

**XX. Limiting the commerce clause:**

- a. Internal limits
  - i. Power to regulate certain areas (specific subject matter)
    - 1. “commerce”
    - 2. “among the several states”
    - 3. “regulate”
- b. External limits
  - i. Power to regulate in commerce broadly regarded, with limits imposed by other aspects of the Constitution (1<sup>st</sup> Am.)
    - 1. Noted by Marshall in *McCulloch*

**XXI. Congressional Commerce Power Post-Civil War**

- a. Historical causes:
  - i. Slavery preventing consensus on national commerce
    - 1. Post-Civil War: interconnected economy
  - ii. Rights of freed slaves not adequately protected by state governments
  - iii. Experience of national mobilization in Civil War
  - iv. nationalized capital and labor markets
    - 1. railroads, goods increasingly being sold across state lines, using materials from other states
      - a. increasing interstate externalities
      - b. implications of economies of scale; coordination
- b. Interstate Commerce Act of 1887
  - i. federal regulation of railroads
- c. Sherman Antitrust Act of 1890
  - i. federal regulation of monopolies; no states willing to regulate monopolies (sorting problem, since if one state did not regulate, monopoly would move to that state and confer its benefits on it)

**XXII. *US v. EC Knight Co.* (SC 1895)**

- a. Facts:
    - i. first important case under Sherman Act; American Sugar Refining Company consolidation
      - 1. period of rubber barons, cartelization of important industries
  - b. Holding (Fuller):
    - i. strictly limits the constitutional scope of the Sherman Act; national regulation impermissible
      - 1. despite argument that no state can regulate monopolies
    - ii. distinguishes between manufacturing and commerce
  - c. Dissent (Harlan):
    - i. monopoly problem can only be addressed by national regulation
- XXIII. *Houston, East & West Texas Railway v. US (The Shreveport Rate Cases)* (SC 1914)
- a. Facts:
    - i. Different rates charged for interstate v. intrastate shipments; Interstate Commerce Commission regulates rates to correct discrimination
  - b. Holding (Hughes):
    - i. federal regulation of intrastate rates to prevent injury to interstate commerce is permissible, even though regulated route is entirely within Texas
      - 1. consistent with “current of commerce” analogy (see *Stafford* below)
        - a. so, railroads are in the current; factories and manufacturing are before the current
        - b. although metaphorically compelling, current analogy draws little legitimacy from the constitution
          - i. if Congress is the only capable regulator, and if effects of activities regulated affect interstate commerce, why should federal regulation be impermissible?
          - ii. but, court adds more factors to the “current” test (see *Coronado Coal*)
- XXIV. *Coronado Coal Co. v. United Mine Workers* (SC 1925)
- a. Facts:
    - i. Sherman Act applied to union workers striking (also an uncompetitive “combination” practice);
  - b. Holding:
    - i. although mining precedes commerce (not in the current), if activity regulated has a “**direct**” **effect** on interstate commerce, federal regulation is permissible
      - 1. argues that sugar monopoly in *EC Knight* is “indirect”
- XXV. *Stafford v. Wallace* (SC 1922)
- a. Facts:
    - i. Sec. of Commerce regulating anti-competitive activity (collusive price-fixing practices) in stockyards/meatpacking
      - 1. activity in question only occurred in one state
  - b. Holding (Taft):
    - i. upholds national regulation; “**current of commerce**” **argument**
      - 1. similar to Marshall’s argument in *Gibbons*
    - ii. stockyards are in the “middle” of current of commerce
      - 1. in *EC Knight*, regulation of the factory (“before” the current of commerce) was impermissible; could be considered consistent with Taft’s holding
- XXVI. *Southern Railway v. US* (SC 1911)
- XXVII. *Swift & Co. v. US* (1905)
- XXVIII. *Champion v. Ames (The Lottery Case)* (SC 1903)
- a. Facts:
    - i. federal statute prohibiting interstate shipment of lottery tickets (through the mail)
  - b. Holding (Harlan):
    - i. adopts current of commerce argument, permits federal regulation

- c. Dissent (Fuller):
  - i. if regulation of commerce is a **pretext** for regulating morality, regulation is impermissible (legislative intent analysis)

XXIX. *Hammer v. Dagenhart (The Child Labor Case)* (SC 1918)

- a. Facts:
  - i. Challenge to constitutionality of the Child Labor Act of 1916
- b. Holding (Day):
  - i. Congress does not have power to regulate internal, “purely local” matters under commerce clause, even if conditions in one state create unfair competition (such as by permitting child labor)
    - 1. argues that he is actually sympathetic to child labor laws
      - a. at the same time, routinely upholding state child labor laws (and striking down uncompetitive state economic laws)
- c. Dissent (Holmes):
  - i. By sending products across state lines, states submit to federal authority
    - 1. An Act should not be considered less constitutional due to its indirect effects
  - ii. cites *Champion* line of precedent
- d. Rationale:
  - i. key precedents: *Knight* and *Champion*
    - 1. current of commerce + pretext test (Congress’ purpose for regulation)
  - ii. what is the explanation for the court’s inability to apply a consistent doctrine to the line of cases?
    - 1. commerce doctrine as transparent pretext for imposing policy decisions in each case
      - a. for example, permissible to bust unions in *Coronado Coal* but not to bust monopolies in *Knight*
        - i. conservative, pro-business, anti-labor, etc.
        - ii. but, more complicated than just conservative justices for conservative outcomes
          - 1. see Day’s opinion in *Hammer*
          - 2. court upheld Sherman Act in other instances of monopolies, refused to bust unions in others
            - a. revolved around govt’s ability to prove whether monopoly had a “direct” v. “indirect” effect on interstate commerce
            - b. so, outcomes were not always pro-business
    - b. selection bias problem:
      - i. only legally difficult, unclear cases make it to the Supreme Court
      - ii. political ideology in SC decisions?
        - 1. quantitative analysis of voting trends
        - 2. identification of variables that render political determinations more likely

XXX. **The New Deal Crisis**

- a. Frankfurter:
  - i. History of pre-New Deal commerce clause jurisprudence is a history of the court applying legal fictions/artificial patterns (“current of commerce”; direct/indirect) on the free play of economic life
    - 1. Categories will always be arbitrary (since every activity has some appreciable economic effect across state lines)
    - 2. But, framers lived in localized economy; no national or international effects from many activities
      - a. Development of international commerce and labor markets

- b. Expanded federal power as that originally intended
          - i. Especially if extended to cover all activities
          - ii. Contrary to federalism rooted in enumerated/limits powers
  - b. How to draw the line/limit centralized power?
    - i. Limit regulated activities to those that the national government is uniquely able to address (externalities over state lines; economies of scale; national interests, etc.)
  - c. Plausible original understandings of Commerce power under Article I, Section 8
    - i. grant of broad/near-unlimited national power? Marshall
    - ii. must be limited (structural argument, based on federalism theory)
  - d. Great Depression:
    - i. Congressional efforts to stimulate the economy
      - 1. In the face of dramatic economic depression, fomenting revolution
    - ii. Roosevelt election in 1933
    - iii. Unprecedented scale of legislation/regulation
      - 1. Argument that Constitution should be waived or read in an expansive, permissive way to address national emergency
  - e. Supreme Court split:
    - i. Block of 4 conservative justices (4 horsemen)
    - ii. 2 moderates
    - iii. 3 liberal justices
  - f. Clash between the judiciary and elected majority
- XXXI. *Home Building & Loan Assoc. v. Blaisdell* (SC 1934)
- XXXII. *Nebbia v. NY* (SC 1934)
- XXXIII. *Norman v. Baltimore & Ohio RR* (SC 1935)
- XXXIV. *Panama Refining Co. v. Ryan* (SC 1935)
- a. Invalidated a portion of the National Industrial Recovery Act of 1933; excessive executive powers
- XXXV. *Railroad Retirement Board v. Alton Railroad Co.* (SC 1935)
- a. Facts:
    - i. Invalidated Railroad Retirement Act of 1934; compulsory retirement and pension plan
  - b. Holding (Roberts):
    - i. Activities regulated “too remote from any regulation of commerce as such”
- XXXVI. *ALA Schechter Poultry Corp. v. US* (SC 1935)
- a. Facts:
    - i. National Industrial Recovery Act allowed President to enforce codes of fair competition in various industries (pricing, labor provisions)
      - 1. Slaughterhouse in Brooklyn charged with violating poultry code (in part by refusing to purchase diseased chicken)
  - b. Holding (Hughes):
    - i. All justices strike down NIRA; regulation did not relate to interstate commerce
      - 1. Rejects permissive reading of Commerce Clause
        - a. Extraordinary conditions do not create or enlarge Congressional power
        - b. Law applies equally in historical circumstances
    - ii. Slaughterhouse at the end of the current of commerce, rather than in the current
      - 1. Poultry had come to a permanent rest in the state
  - c. Concurrence (Cardozo):
    - i. draw distinction between large effects and small effects (degree)
      - 1. argument based on proximate cause (based on responsibility for harm)
      - 2. centralization must be in accord with the constitution
  - d. Notes:
    - i. Goals of NIRA:
      - 1. Stabilize production and labor force

2. Keep prices artificially high by helping industries cartelize
  - a. Demand-side economic theory (not ultimately successful)
- ii. Uses direct/indirect test of *Coronado Coal*
- iii. FDR: “relegated to a horse and buggy definition of commerce”
  1. Congress passed an act identical to NIRA, Coal Conservation Act of 1935
    - a. Dares SC to strike the act down, while emphasizing national importance of legislation

XXXVII. *Carter v. Carter Coal Co.* (SC 1936)

- a. Facts:
  - i. Bituminous Coal Conservation Act of 1935
  - ii. Govt. argument:
    1. Adopts logic of Cardozo’s concurrence in *Schechter* by arguing that extent of effect of labor unrest on commerce is large
- b. Holding (Sutherland):
  - i. Strikes down act as unconstitutional
    1. Labor unrest occurs in the coal fields, before current of commerce
    2. Activity’s effect on commerce is **indirect**, does not matter how large
  - ii. Distinction between what is important for the country and what is constitutional
    1. If sufficiently important, amend the constitution
- c. Dissent (Cardozo):
  - i. Disagrees with majority that there is an inherent qualitative difference between direct/indirect effects
    1. Maintains compromise test of degree

XXXVIII. *NLRB v. Jones & Laughlin Steel Corp.* (SC 1937)

- a. Facts:
  - i. Nat. Labor Relations Act (Wagner Act), similar substance to Coal Act
- b. Holding (Hughes):
  - i. Dismisses all previous limiting categories, maintains that current of commerce, direct/indirect effects test were just metaphors
    1. Activity must only have a **substantial effect** on interstate commerce (implicit adoption of Cardozo’s test)
  - ii. Return to Marshall’s interpretation of Commerce power in *Gibbons v. Ogden*
- c. Rationale:
  - i. One term after *Schechter* and *Carter Coal*
  - ii. **The New Deal Switch** – what explanation?
    1. SC resistance broke down in the face of overwhelming public consensus
      - a. Threat of FDR court packing
  - iii. FDR’s options
    1. Court packing
    2. Jurisdiction stripping
      - a. Constitutional amendment to expand congress’ commerce power
        - i. Not practical, slow process
        - ii. judges may interpret any resulting amendment just as narrowly
  - iv. implications:
    1. constitutional law increasingly viewed as “living”
      - a. if one believes in a living constitution, no need to formally amend
      - b. Marshall in *McCulloch*, although not in *Marbury* (mechanical approach)
  - v. Prior decisions reinforced impression of majority’s interpretation of federal power:
    1. *Morehead v. New York ex rel. Tipaldo*
      - a. Invalidated minimum wage law as violating due process
  - vi. Identical law later held as valid after the “Switch” (see below)

1. *West Coast Hotel v. Parrish*
  - a. Upheld minimum wage statute
  - b. In each of the cases that come out in opposite directions on similar laws are decided with the same four justices on each side, with Roberts switching
    - i. *Carter Coal* versus *Jones & Laughlin*
    - ii. Explanation for Roberts' switch?
      1. During debate over *Brown v. Bd. Of Ed.*, Frankfurter produced a memo that Roberts allegedly wrote, claiming that he switched his vote because the lawyers in *West Coast Hotel* distinguished *Morehead*
        - a. "Roberts was not influenced by public pressure and neither will we"
      2. Other evidence:
        - a. Roberts continued to vote to expand federal power after 1936/7
        - b. *West Coast Hotel* vote took place before FDR announced court packing plan
2. Revisionist interpretation:
  - a. Conservative interpretation of federal commerce doctrine was not as extreme as the conventional wisdom suggests
    - i. Still room for significant federal regulation, as long as it was structured in the right way
  - b. Different results explained by different facts, different lawyers, rather than different doctrine
    - i. Regulation in *Jones & Loughlin* was more carefully drafted than Coal Act (prologue, statement of findings)
      1. But, Hughes seems to reject previously-formulated categories themselves, rather than applying facts
- vii. Central question:
  1. Do politics affect courts by immediately causing justices to switch positions, or just through the process of appointing new justices?
- viii. Internal opposition to court packing plan
  1. Progressives feared effect on civil liberties
- ix. Public perception of the SC:
  1. Protector of civil liberties (but, at the time that *Brown v. Bd. Was* decided, affirmative action statutes were being struck down)
  2. Public accepts SC, even if it comes to unattractive outcomes
    - a. "package deal"; "diffuse" support for the court
    - b. Intuitively attractive processes
      - i. Public, adversarial

XXXIX. *Wickard v. Filburn* (SC 1942)

- a. Facts:
  - i. D charged a fine for exceeding wheat allotment established by Agricultural Adjustment Act (AAA); excess wheat was consumed on the farm, but was required to be included in quota
- b. Holding (Jackson):
  - i. Regulated acts (purely local personal consumption) only need to exert a "substantial economic effect on interstate commerce" for fed. govt. to regulate
    1. Dispenses with test of production v. commerce (or consumption, or marketing), direct v. indirect effects
  - ii. Even home-grown wheat competes with wheat in commerce
    1. Aggregation of all such effects

- c. Rationale:
    - i. Jackson: FDR's former AG
    - ii. majority aggregates effect of all activities "similarly situated"
      - 1. same limitless implications as Marshall in *Gibbons*
      - 2. commerce test after *Wickard*: every activity is fair game, through aggregation
- XL. *United States v. Darby* (SC 1941)
- a. Facts:
    - i. Minimum wage regulation in Fair Labor Standards Act of 1938
      - 1. Prohibits interstate shipment of goods produced under unfair labor practices
        - a. Strategy of *Hamer v. Dagenheart* (child labor case)
      - 2. Applies wage/hour regulations directly to employers producing goods destined for interstate shipment
        - a. Regulates directly and indirectly
  - b. Holding (Stone):
    - i. Congress may prohibit shipment of goods
      - 1. Overrules *Hamer* in favor of Lottery Case holding
    - ii. Congress' motive/purpose of regulation is not considered by the court
      - 1. As long as regulation is targeted at goods moving across state lines
      - 2. Left to legislative judgment (no constitutional restrictions)
  - c. Rationale:
    - i. Wage/hour regulation similar to *Knight*
      - 1. Distinguishes *Knight*, holds that regulation is a necessary and proper means of regulating commerce
        - a. First sign of necessary and proper argument
    - ii. Commerce power post-*Wickard* and *Darby*:
      - 1. Regulate goods in interstate commerce, with no pretext
      - 2. Congress can regulate activities that would not have been permissible under old doctrinal categories (mining, manufacturing, etc.) as "necessary and proper" for regulating an eventual good in interstate commerce
      - 3. Congress can regulate activities that would otherwise be impermissible, because of their effects
- XLI. *Heart of Atlanta Motel v. United States* (SC 1964)
- a. Holding:
    - i. discrimination had an adverse effect on interstate commerce, since it discourages blacks from traveling
      - 1. flow of people in interstate commerce equivalent to flow of goods in interstate commerce
  - b. Rationale:
    - i. 1964 Civil Rights Act
      - 1. prohibits discrimination in public accommodations
      - 2. Section 5 of the 14<sup>th</sup> Amendment
        - a. Congressional power to enforce substantive provisions of 14<sup>th</sup> Amend., including equal protection of the law
    - ii. but, SC had established bad precedent, questioning whether Congress could pass 1964 or 1975 Civil Rights Acts
      - 1. court traditionally interpreted 14<sup>th</sup> Amend. to only apply to the government, rather than privately-owned entities
        - a. so, not unconstitutional for private actors to discriminate
      - 2. since court held that the 14<sup>th</sup> Amend. could not be used to grant Congressional power, court turned to the Commerce Clause
- XLII. *Katzenbach v. McClung (Ollie's Barbecue)* (SC 1964)

- a. Facts:
  - i. local restaurant, some of the food served traveled across state lines
- b. Holding:
  - i. upheld Civil Rights Act as applied to restaurant; substantial effect on interstate commerce
  - ii. *Wickard*:
    - 1. discourages blacks from traveling
    - 2. segregation deters workers and businesses from relocating to the area
  - iii. *Darby*:
    - 1. extends power to regulate interstate commerce to intrastate activities with substantial affect on interstate commerce
- c. Notes:
  - i. limits on Congressional power?
    - 1. regulate anything, as long as a line of inferences can be drawn to interstate commerce
  - ii. Formalist justifications for limiting Congressional powers:
    - 1. direct/indirect
    - 2. current of commerce v. before/after current
  - iii. avoids deciding whether Congress can prohibit private race discrimination, or whether private race discrimination is unconstitutional
  - iv. use *Darby* and *Wickard* to address modern problems through connections with interstate commerce
    - 1. explosion of new regulations

XLIII. SC switches direction

XLIV. *United States v. Lopez*

- a. Facts:
  - i. Gun Free School Zones Act
- b. Holding (Rehnquist):
  - i. Act struck down as unconstitutional
    - 1. return to “original understanding” of Commerce Clause
- c. Concurrence (Kennedy; O’Connor):
  - i. Cautions against imprecision of content-based boundaries
    - 1. Gun control statute requires “stronger connection” with commerce
  - ii. Look to how much a given statute upsets the federal balance
- d. Concurrence (Thomas):
  - i. an arbitrary line on Congressional power is better than no line at all
- e. Dissent (Breyer):
  - i. judicial determinations of whether commerce power is exercised appropriately should defer to Congressional judgment
    - 1. use rationality rule (legislature just needs a rational basis for exercising power)
    - 2. majority’s holding resembles old distinction of direct/indirect (Souter)
  - ii. determination of permissibility should rest on whether link between regulated activity and commerce is “substantial”
    - 1. distinction based on degree
- f. Notes:
  - i. Gun Free Schools Act federal law, duplicating state law
    - 1. law enforcement is traditionally a state concern
    - 2. redundancy
  - ii. connecting federal criminal law to interstate commerce:
    - 1. class of activities regulated has a substantial effect on interstate commerce
      - a. “commerce hook”
        - i. federal regulations now contain an interstate provision as an element of the offense (jurisdictional element)

1. for example, gun statute has element where gun must have been transported over state lines
  - a. in effect, every illegal gun, or drugs, has crossed state lines
2. Gun Free Schools Zone Act did not contain a “commerce hook”
  - a. and Congress did not include any findings on gun regulation’s effect on interstate commerce
    - i. easy enough to make the connection; guns’ effect on education, education as substantially affected interstate commerce
      1. Breyer finds the connection in his dissent
      2. majority criticizes practice, as connection with interstate commerce could just as easily be made with family law, direct regulation of education (state’s regulatory power)
  - iii. subsequent version of Act included jurisdictional element
  - iv. permissible use of federal regulation under Commerce Clause
    1. channels of interstate commerce
    2. persons or goods moving in interstate commerce
    3. activity that has a “substantial effect” on interstate commerce, unless regulated activity is “non-commercial” in nature
      - a. if non-commercial, aggregation (under *Wickard*) cannot be used
        - i. in *Wickard*, aggregation of effect of private wheat consumption was deemed to be commercial in nature
        - ii. determining whether an activity is “non-commercial” leads to legal uncertainty, since any activity could be categorized as commercial at some level of generality
      - b. justification for the distinction?
        - i. why should the nature of the activity matter, as long as it has a substantial effect on interstate commerce?
          1. Breyer’s analogy to a non-commercial pollutant; or a computer virus
  - v. Marshall’s challenge in *Gibbons*:
    1. majority challenges dissent to point to a test limiting Congressional power under commerce clause; no line can be articulated
      - a. majority’s opinion, however arbitrary, provides a limit
  - vi. decision leads to challenges on federal regulations, which are largely upheld until *US v. Morrison*

XLV. *United States v. Morrison*

- a. Facts:
  - i. Violence Against Women Act; creates a private cause of action for damages where P is harmed by gender-motivated violence
- b. Holding:
  - i. Act struck down under *Lopez*
    1. but, non-commercial distinction replaced by economic/non-economic distinction (likely used in the same sense)
      - a. since Congress cannot aggregate effects of non-economic activities, the isolated act does not have a substantial effect on interstate commerce
- c. Dissents (Breyer and Souter):
  - i. majority’s decision represents a return to “random results” of Formalism
    1. disputes that non-economic categorization is relevant
      - a. Congress can regulate muggings, but not rape?
- d. Notes:

- i. Act was sufficient in including findings of regulated activity's effect on interstate commerce and including jurisdictional element
- ii. "formalism" v. "realism"
  - 1. rules v. standards
  - 2. facial purposes v. actual purposes (commerce v. morality)
  - 3. Souter:
    - a. formalist distinction between non-economic and economic activities as a rule with no underlying purpose
    - b. realist approach: consult the actual economic impact of the regulated activity
      - i. but, economic impact itself is not connected to the purpose of the regulation
    - c. debate between Cardozo and Sutherland in *Coronado Coal*:
      - i. Sutherland: direct effects
      - ii. Cardozo: effects must have reference to the purpose of the regulation (big effects v. small effects)
        - 1. but even this doctrinal line ignores purpose in some sense; equally formalistic
- iii. implications on Congress's enforcement power under 14<sup>th</sup> Am. (see below)
  - 1. states not taking violence against women seriously enough, so states are violating 14<sup>th</sup> Am. equal protection clause
    - a. so, 14<sup>th</sup> Am. applied against private actors (prophylactic remedy); private damages actions are therefore permitted
- iv. After *Morrison* and *Lopez*:
  - 1. economic/non-economic activity

XLVI. *Gonzalez v. Raiche* (SC 2005)

- a. Fact:
  - i. federal drug laws regulating home-grown marijuana used for medical purposes (legal in some states)
    - 1. can federal government enforce drug laws as applies to home-grown medical marijuana
- b. Holding (Stevens):
  - i. federal government can regulate drug law, as in *Wickard*; has "substantial effect" on interstate commerce
    - 1. analogous to wheat growing for personal consumption
    - 2. marijuana growing is an economic activity (involves a commodity)
- c. Concurrence (Scalia):
  - i. proper exercise of federal power under necessary and proper clause (in service of regulating commerce)
    - 1. home-grown marijuana will inevitably find its way into the interstate, illegal, market
- d. Dissent:
  - i. no substantial effect on interstate commerce; not a commercial activity
    - 1. distinguished *Wickard*, since personal wheat was grown in conjunction with a large amount of commercial wheat
- e. Notes:
  - i. context of drug laws; differently decided if involving a different activity? such as environmental, etc.
    - 1. political motivations for justices' voting trends
    - 2. is a commitment to federalism any less political than a desire to regulate drugs?

XLVII. *National Federation of Independent Business v. Sibelius* (SC 2012)

- a. Facts:

- i. challenge to the constitutionality of the “individual mandate” provision of the Affordable Care Act
  - 1. insurers required to take all patients under ACA (no exclusion for pre-existing conditions); instead, rates must be based on “community rating”
    - a. necessitates that everyone buys into the insurance market, due to adverse selection problem (only sick people buy insurance)
- b. Holding (Roberts):
  - i. under the Constitution, Congress has the power to regulate economic activity, but not economic *inactivity* (such as the decision to refrain from purchasing insurance)
    - 1. no precedent for distinction in commerce clause jurisprudence
  - ii. although individual mandate may be necessary in regulatory scheme, it is not proper (giving “proper” a limiting function)
  - iii. invokes constitutional avoidance canon
    - 1. if a statute has two plausible meanings, one of which violates the constitution, courts should interpret the constitution to avoid conflict
- c. Dissent (Ginsburg):
  - i. collective-action problem (individual states cannot address health care problem) necessitates Congressional intervention under commerce and necessary and proper powers
  - ii. test applied should be “substantial effects” + rational basis (*Raiche*)
    - 1. *Wickard*: distinctions should give way to a consideration of actual effects
  - iii. activity/inactivity distinction is moot, since generally all consumers will eventually avail themselves of health care
  - iv. democratic process as limiting force on Congressional exercise of commerce power
- d. Dissent (Scalia):
  - i. Regulation cannot apply to inactivity
    - 1. Both cases upholding the most expansive assertions of commerce power (*Wickard*; *Perez v. United States*) applied to activity
      - a. Commerce clause cannot be used to compel “entry into commerce”
- e. Notes:
  - i. requiring people to buy unwanted products is contrary to libertarian principles (based in rights), less intuitive as a limit on congressional power
    - 1. see: vaccinations, driver’s licenses and liability insurance, maintain arms in the early republic, pay taxes, compulsory education
      - a. for instance, Congress could have forced taxation to pay for health care in a single-payer system (where govt. is the single payer)
      - b. but, there is usually a “way out”, even in these situations
  - ii. broccoli/car market analogies
    - 1. the “broccoli horrible”
  - iii. limit on Congressional regulation under Government’s argument?
    - 1. same problem as in *Lopez*
  - iv. alternatives?
    - 1. fine those who choose to opt out
    - 2. deny a full income tax rebate
  - v. authority to impose individual mandate found under Congressional taxation authority
  - vi. Silverman opinion:
    - 1. critical of Obama, but dismisses the activity/inactivity distinction
  - vii. circumstantial evidence that Roberts changed his opinion, after initially indicating that he would strike down the ACA
    - 1. possibly cautious of a political attack on the court, after President’s response to *Citizens United* decision

## XLIX. Congress's Enforcement Power Under the Reconstruction Amendments

- a. 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> Amendments – direct Congressional response to *Dred Scott* decision
  - i. each include enforcement clauses
    1. section 5 of the 14<sup>th</sup> Am.:
      - a. “Congress shall have power to enforce, by appropriate legislation, the provisions of this article”
      - b. Construed to give Congress power to provide private causes of action to individuals
      - c. Authorizes Congress to develop unique remedies
    - ii. 14<sup>th</sup> Amendment incorporates other rights found in the Constitution (Bill of Rights), applied against the states
  - ii. 14<sup>th</sup> Amendment incorporates other rights found in the Constitution (Bill of Rights), applied against the states
- b. 1964 Civil Rights Act –
  - i. Congress could have invoked power under 14<sup>th</sup> Amendment
  - ii. but, 14<sup>th</sup> Am. only applies to government actors, not private actors
    1. so, used Commerce Power to pass 1964 CRA
- c. Interpretations of Congress's enforcement power:
  - i. departmentalism:
    1. even if Court has limited equal protection clause to apply only to states, Congress can pass a statute applying clause to states (thereby defining the right)
  - ii. Congress respects Court's definition of the right but enforces regulations that are prophylactic
    1. prophylactic measures can have present effect
  - iii. Court's interpretation of Congress's enforcement power dovetails its interpretation of its Commerce Power

## L. *Katzenbach v. Morgan* (SC 1966)

- a. Facts:
  - i. constitutionality of provision in the Voting Rights Act of 1965, prohibiting literacy tests
    1. direct Congressional response to *Lassiter v. Northampton Election Board* (SC 1959), which held that English language requirement for voting did not violate 14<sup>th</sup> and 15<sup>th</sup> Amend's
- b. Holding (Brennan):
  - i. appropriate exercise of Congress's enforcement powers
    1. weighing of interests a matter for legislative deliberation
      - a. it is enough that the court perceives a basis for the decision (rational basis test-but, now generally replaced by congruence and proportionality (*Boerne*))
        - i. possible discriminatory effects on Puerto Rican population resulting from disenfranchisement
        - ii. statute as a prophylactic measure; “prevent downstream discrimination”
      - b. permissive view of Congressional enforcement power
- c. Dissent (Harlan; Stewart):
  - i. rational basis test; section 5 permits Congress to define the substantive scope of the equal protection right; allows Congress to define its own power (and swallow state's authority in certain fields)
- d. Rationale:
  - i. holding rooted in departmentalism, rather than judicial supremacy
  - ii. decision in a period where limits to enforcement power have not been delineated
    1. in context of legislature's and Court's interest in correcting racial discrimination

## LI. *City of Boerne v. Flores* (SC 1997)

- a. Facts:

- i. right of free exercise of religion (right to take peyote) and Religious Freedom Restoration Act of 1993 (RFRA)
    - 1. RFRA enacted to restore free exercise regime to pre-*Smith* regime; imposes “effects test”
      - a. prevents govt. from burdening religion in the absence of a significant interest
  - ii. free exercise right earlier defined in *Employment Division v. Smith*
    - 1. court held that generally-applicable, religion-neutral law that happen to exert a disparate impact on religion does not violate 1<sup>st</sup> Am. rights
- b. Holding (Kennedy):
- i. Congress does not have the power to change a Constitutional right, or to determine whether a right has been violated
  - ii. prophylactic enforcement?
    - 1. accepted in principle (to some extent); but, Court’s job is to police the extent to which Congress can enforce the right
      - a. standard of “**congruence and proportionality**” between means and end
        - i. Congress must convince the court that they are enforcing the right, as defined by the court
- c. Notes:
- i. RFRA passed after fear that state is manipulating zoning laws, or drug laws, to burden religion
  - ii. McConnell’s criticism:
    - 1. Congress should be able to define Constitutional rights

## LII. *Shelby County v. Holder*

- a. Facts:
  - i. challenge to the Voting Rights Act coverage provision (section 4)
- b. Holding (Roberts):
  - i. section 4 invalidated as unconstitutional; no longer any reason to believe that coverage provisions correspond with states that are especially likely to engage in voting discrimination
    - 1. no evidence of current conditions; no congruence or proportionality
- c. Rationale:
  - i. Voting Rights Act:
    - 1. “coverage” provisions
      - a. requires federal preclearance of any changes to voting policies
  - ii. upheld by SC in 1966 as a permissible exercise of enforcement power under 14<sup>th</sup> and 15<sup>th</sup> Am.
    - 1. preclearance regime as only practical way to address documented discrimination, even though it is a prophylactic, over-inclusive measure
  - iii. 2006 renewal of coverage provisions, without revisiting the justifications for which regions were included
    - 1. argument that there is no longer a justification for the coverage regime (now argued to lack congruence and proportionality)

## LIII. State sovereign immunity

- a. *Alden v. Maine*; *Kimmel*; *Tennessee v. Lane*; etc.
- b. *Seminole Tribe*
  - i. court develops constitutional rule:
    - 1. Const. forbids suits by private individuals against state governments for violations of federal statutes where monetary damages are relief sought
      - a. applies to patent laws, age discrimination statutes, etc.
      - b. Congress has power to pass such laws under Commerce Power
        - i. individuals may seek injunction relief against states who violate these federal statutes

- c. grounded in 11<sup>th</sup> Am.
  - i. 11<sup>th</sup> Am. forbids suits against states by citizens of other states → evolved to prohibit suits in federal or state courts, where monetary damages are sought
    - 1. does not apply to statutes passed for enforcement of 14<sup>th</sup> Am. rights, only under commerce clause
    - 2. so, implications for whether Congress can justify statute as an exercise of section 5 (of 14<sup>th</sup> Am.) enforcement power, or as an exercise of commerce power
      - a. for example, FMLA held to be exercise of section 5 power, to eliminate incentive to discriminate on the basis of gender
        - i. court upheld as a prophylactic measure
        - ii. but, no effort to target the legislation toward a sector or jurisdiction shown to exhibit gender discrimination (so, congruent and proportional?)

#### LIV. **Commandeering**

- a. Modern revival of Tenth Amendment-Based Restraints on Federal Regulation of State and Local Governments

#### LVI. *National League of Cities v. Usery* (SC 1976)

- a. Facts:
  - i. Challenge to Congressional enforcement of minimum wage provisions of Fair Labor Standards Act, as applied to states “in areas of traditional government functions” (govt. human resources/personnel)
- b. Holding:
  - i. struck down minimum wage provisions of FLSA, as applied to state and local employees
    - 1. Congress may not regulate “states as states”
    - 2. may not regulate in areas of “traditional government functions”
      - a. states conceived of as employers, rather than lawmaking bodies
  - ii. prohibited by 10<sup>th</sup> Am.
- c. Notes:
  - i. states conceptualizing rights that they can reserve against the exercise of federal power

#### LVI. *Garcia v. San Diego Metropolitan Transit Authority* (SC 1985)

- a. Holding (Blackmun):
  - i. overruled *National League of Cities*
    - 1. invoked political safeguards of federalism argument (democratic accountability)
- b. Dissent (Powell):
  - i. Democratic accountability argument fails to consider effect of special interest groups
    - 1. Political process may not safeguard states’ rights

#### LVII. *New York v. United States*

- a. Facts:
  - i. federal regulation of low-level radioactive waste disposal
    - 1. to address free-rider problem of states shipping waste out-of-state
    - 2. Congress enacts into federal law a statute that states develop in Nat’l Assoc. of Governors
      - a. three-prong program:
        - i. financial incentives for states to develop disposal sites
        - ii. states w/ disposal sites allowed to deny access
        - iii. “take-title” provision:
          - 1. requires states to take ownership of radioactive waste (which subjects state to suit)
- b. Holding:
  - i. third provision (take title provision) is unconstitutional “**commandeering**” of state by the fed. govt. (unconstitutional violation of state sovereignty) -> constitutes coercion

1. finds prohibition against coercion in 10<sup>th</sup> Am. (even though acknowledged as a tautology); Article I's limited power

c. Notes:

i. "dormant commerce clause"

1. prohibition read into the commerce clause discrimination against out-of-state actors as related to commerce
2. but, states can discriminate if they do so with Congressional permission (as in *New York*)

ii. decision in *New York* is distinct from that in *Garcia*

1. applies to state alone

iii. defining features of commandeering

1. only applies to states, not private entities
  - a. only applies to fed. govt. ordering states to legislate

LVIII. *Printz v. United States* (SC 1997)

a. Facts:

- i. Brady Act challenged; state executive officials required to conduct background checks under Act

b. Holding:

- i. background check process constitutes "commandeering," is unconstitutional
  1. applies holding in *New York* to state executive officials (in addition to state legislatures)

c. Dissent (Breyer):

- i. invokes European system, in which central government commandeers local governments to enact regulations, rather than regulating citizens directly
  1. intention to protect citizens, respect state sovereignty
  2. commandeering as *solution* to growth of centralized power

d. Notes:

- i. court acknowledges that it does not find its prohibition against commandeering in Constitutional text
  1. original understanding of the principles of federalism
    - a. move from Articles of Confederation to Constitution
      - i. makes direct relationship between states and federalism a substitute for commandeering?
- ii. democratic accountability problem:
  1. federal government can take credit for addressing gun control (Brady Act), while financial cost is suffered by states
  2. federal govt. insulates itself from democratic accountability, by imposing procedure on states
    - a. voter confusion re: who to hold accountable?
      - i. voters could just as easily credit state officials for fed. programs
    - b. line of responsibility argument
  3. but, contrary to constitutional separation of powers structure
  4. ability of interest groups to discern ultimate responsibility

LIX. Alternatives to commandeering:

a. direct regulation of commercial/economic activity

- i. ban radioactive materials in states without disposal sites
- ii. require local gun shop to pre-clear sales with the FBI directly
  1. both valid exercises of Commerce Power

b. preemption:

- i. Supremacy clause ensures that federal regulations take precedence
  1. Congress could pass statute trumping California's compassionate use marijuana law

- c. commandeering doctrine questionable, as protection of state autonomy
  - i. commandeering as upholding the “etiquette of federalism” (*Lopez*)
    - 1. symbolic affirmation of states’ dignity
- d. permissible Congressional power to tax and spend:
  - i. power to induce states to cooperate, using incentives

LX. **Spending Power and Conditional Spending**

- a. conditional spending is permissible:
  - i. Congress could have conditioned federal funds issued to state in *Printz* on their compliance with background check regulations
    - 1. this approach is encouraged in commandeering cases, even though it could be just as problematic in practice
  - ii. harder for states to make the case that they were compelled to act as the federal government wanted
    - 1. example of NYU allowing military recruiters on campus (due to Solomon Amendment, denying federal funding for rejecting military recruiters), despite anti-discrimination policy (problem of military’s anti-gay policy)
      - a. difficult for NYU to make the case that their decision was compelled (even though it was not a direct order)
      - b. exacerbates anti-democratic problem of commandeering
- b. SC now more inclined to place limitations on fed. govt. to use funding to coerce states and localities, but still in formulation

LXI. *South Dakota v. Dole* (SC 1987)

- a. Facts:
  - i. 5% of highway funds conditioned on imposing 21 year old drinking age
    - 1. 21<sup>st</sup> Am. understood to reserve to the states the power to regulate alcohol policy
- b. Holding:
  - i. Court upholds constitutionality of spending provision
    - 1. but, notes limitations:
      - a. any condition must be related to the purpose of the federal spending program
        - i. so, main purpose of highway funding is safe interstate travel; drinking age related to safe travel
      - b. must constitute “mild encouragement”, rather than coercion
        - i. amount of money at stake was minimal

LXII. *NFIB v. Sibelius* (SC 2012)

- a. Facts:
  - i. expansion of Medicaid program under ACA requires states to provide Medicaid to all adults making less than 138% of federal poverty line
  - ii. ACA threatens to cut off all federal Medicaid funding for states that refuse to accept expanded version of program
- b. Holding (Roberts):
  - i. provision tantamount to commandeering by conditional spending
    - 1. purpose of existing Medicaid is to assist discrete groups of people
      - a. the ACA Medicaid program is a different *kind* of program, rather than just different in degree
        - i. argument used to defeat fair warning argument (that states were informed that Congress could change the program at will when they first accepted the funding)
  - ii. states that reject ACA will impose additional taxes on residents who already pay federal taxes for Medicaid recipients in other states
    - 1. Dissent argues that states do not have claim on their citizens’ federal taxes
- c. Dissent (Ginsburg):

- i. expanding Medicaid to the poor is linked to purpose of spending program
- ii. Congress could have repealed Medicaid and enacted Medicaid II
  - 1. but, court could still determine that 2<sup>nd</sup> Act is an extension of previous act, just enacted at a different time
- d. Rationale:
  - i. 7-2 vote
    - 1. Kagan and Breyer join Roberts and majority, despite initial skepticism that such conditional spending constituted commandeering
      - a. speculation that they switched their votes in exchange for Roberts' upholding ACA overall (in severability argument)
  - ii. states threatened with a significant loss of their budgets (although then they would not have to spend the budget on Medicaid)
    - 1. political pressures of rejecting federal funding are accounted for in majority decision
  - iii. perverse incentive:
    - 1. the more likely that all states will sign on, the more coercive and unconstitutional?
    - 2. without conditional spending, federal govt. could just operate directly on citizens (such as single-payer system, where govt. taxes and spends to deliver healthcare)
      - a. with conditional spending, responsibility reserved for states

### LXIII. Separation of powers: Madisonian theory and the *Youngstown* Framework

- a. horizontal distribution of powers, as opposed to vertical (federalism)
- b. primarily a discussion of how power is shared between President and legislature
  - i. for instance, executive power and war
- c. combines two sets of ideas:
  - i. literal separation/division of powers
    - 1. assigned by Articles I-III of USC (Montesque; Madison in Federalist 47; Black in *Youngstown*)
      - a. Federalist 37: in reality, all three branches "make law"/policy decisions
        - i. how to define legislative, executive, and judicial power?
    - 2. non-delegation doctrine (delegation of power must be made with legislative guidelines)
      - a. *Schechter Poultry*
      - b. easily supplanted (Congress still able to delegate vague laws, as long as they contain an "intelligible principle")
    - 3. delegation to the judiciary
      - a. court as legislating? executing?
    - 4. the above throws into question the efficacy of Black's categorization in *Youngstown*
      - a. possible solution analogous to Cardozo's magnitude argument for commerce power (magnitude of effects)
  - ii. checks and balances:
    - 1. power of each branch is "mixed" with others
    - 2. examples:
      - a. presidential veto power
        - i. executive's role in legislation
      - b. Senate's role in advising/approving executive appointments and treaties
        - i. Senate exercising executive power
      - c. Congress declares war, President as commander in chief
    - 3. de facto mixing of power in administrative agencies
- d. separation of powers' foundation in theories of "mixed government"
  - i. promotes social cohesion by allowing all classes to participate in government
    - 1. government makes accommodation between competing interests, which balance each other's ambition

- 2. constitutional structure substitutes class divisions for institutional divisions (and thus disregards political parties)
- e. Madison 47 & 48 – rationalizing the system of separation of powers
  - i. efficient method of governance
    - 1. division of labor; specialization (each branch applies its own expertise to lawmaking process)
  - ii. inefficient method of governance
    - 1. bicameral legislative structure; three branches involved in lawmaking
    - 2. deliberate “cooling” mechanism; encourages deliberation
    - 3. less prone to corruption by tyrannical majorities (since all three branches would have to be corrupted)
      - a. problems inherent with “too much democracy” (factions) and “too little democracy” (dictatorial rule)
- f. Federalism 51:
  - i. pit branches against each other, in competition for power; “invisible hand” competitive dynamic generates a self-sustaining equilibrium
    - 1. same argument made for federalist division (at the extreme, no need for judicial review); Choper
  - ii. is competition more inevitable than cooperation or collusion between branches?
  - iii. What role for policy outcomes in debates over government structure?
    - 1. for instance, the President declaring a popular war, without Congressional approval
    - 2. or, the New Deal (policy consequences at the expense of the institution)
- g. de facto arrangement, since WWII:
  - i. Presidents have exclusive control over national security issues, war; interests of all will be served
    - 1. such as preventing a terrorist attack
    - 2. Congress has no incentive to take responsibility for national security
      - a. President can be a scapegoat or offer a bandwagon (held accountable for foreign policy and national security)
      - b. “defending turf” v. “shirking responsibility”
  - ii. Congress responsible for setting fiscal policy
    - 1. but, the President can still be held democratically accountable
    - 2. leads President to accept power, since he will be held responsible
- h. interesting issues implicated by administrative agencies, legislative veto, etc.
  - i. separation of powers debates implicate relatively insignificant details
    - 1. typically less adjudication on issues such as executive power in wartime
- i. alternative structure found in parliamentary systems
  - i. President as the head of the legislature
  - ii. tradeoff between efficiency and accountability
- j. Levinson and Pildes:
  - i. separation of power arguments defeated by the significance of political parties
    - 1. branch activity/governmental functions dictated more by unification v. division of branches by political parties than competition amongst the branches themselves
      - a. party affiliation greatest predictor of a legislator’s policy agreement or disagreement with the executive
      - b. in unified system (same parties holding executive and legislature), cooperative decision-making results
      - c. in divided system, structure resembles separation of powers in Federalist 51
        - i. budget deadlocks, competitive appointment hearings, etc.
  - ii. Justice Jackson’s concurrence in *Youngstown* (see below)

- k. balance of power between branches has evolved into a structure distinct from that envisaged by the Framers
  - i. power of legislature has been supplanted by power of executive
    - 1. post-New Deal growth of executive power
  - ii. but, Framers were relatively unconcerned with a strong president, surprisingly, despite experience with monarchy (Articles of Confederation did not provide for an executive; weak governors, elected by legislatures and lacking veto power) → reflected in Madison's Virginia Plan
    - 1. Philadelphia convention decided that President would be popularly-elected; independent veto power; etc.
      - a. Framers even anticipated that President would have more power in practice, due to practical authority of institutional advantages of office's structure
        - i. executive office as a single person, rather than cumbersome, deliberative body like the legislature; also allows for secrecy
          - 1. perceived importance in conducting national security and foreign affairs
    - 2. Article II powers:
      - a. President responsible for executing and implementing the laws of Congress
      - b. commander in chief; pardons; treaties; vetoes; judicial appointments
        - i. Are specifically enumerated powers exclusive of President's power, or just examples?
          - 1. parallel with legislature? agreement that Congress ONLY has enumerated powers
            - a. argument that President has implied/inherent powers
      - c. Vesting Clause
        - i. does not include "All" and "herein granted", as included in Article I
          - 1. implies that President has more powers than those enumerated
          - 2. contrary to surplussage argument; expressio unius

LXIV. *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)* (SC 1952)

- a. Facts:
  - i. 1952 steel seizure during Korean War
    - 1. Truman worried that impending strike in steel mills would impede war effort
  - ii. Truman: powers are implied under aggregate of executive powers in USC
    - 1. inherent powers theory rejected by SC
- b. Holding (Black):
  - i. seizure of steel mills not a valid exercise of executive power
    - 1. President works for Congress, main task is to enforce its legislation
  - ii. commander in chief authority must be read "narrowly and suspiciously", especially in regards to policy on the homefront
  - iii. Two ways President could justify seizure:
    - 1. pursuant to "take care" clause of Article II:
      - a. must be acting on statutory authorization (executing legislation)
    - 2. pursuant to commander in chief power
      - a. but, limited grant of power; too much of a stretch to allow CIC power to extend to labor disputes outside of the theater of war
  - iv. seizure powers were explicitly rejected in Taft-Hartley Act of 1947
- c. Concurrence (Jackson):
  - i. Rise of political parties has supplemented executive authority
  - ii. three classifications of legal permissibility of executive action
    - 1. where explicitly authorized by Congress

2. where Congress and Executive have concurrent authority, and Congress has not legislated (power through legislative quiescence)
  3. where Congress has explicitly expressed or implied contrary will
    - a. reads Presidential power in *Youngstown* to fall under this category (as do a majority of justices)
- d. Concurrence (Frankfurter):
- i. President can act in certain areas where Congress has not established boundaries, until checked by Congress
    1. then, assume that President's exercise of power is constitutionally permissible
    2. so, looks to historical precedent for Truman's action but does not find sufficient justification
  - ii. if Congress has not protested to an executive power for a significant period of time, it cannot then prohibit the power, since it would be considered constitutional
    1. example of Obama in Libya; whatever the constitutional status of sending troops abroad without congressional approval initially, the fact that past presidents had done so without congressional checks rendered such action permissible (past practices can become constitutional)
- e. Concurrence (Douglas):
- i. Power to authorize seizure must rest in branch able to pay for the seizure (Congress)
  - ii. Necessitated by 5<sup>th</sup> Am. (due process for deprivation of prop.)
- f. Dissent (Vinson):
- i. President has additional constitutional powers during emergencies
    1. special responsibilities for running the govt. during emergencies
    2. Hamilton, Federalist 70:
      - a. Presidency is never in recess
      - b. ability to make decisions quickly
      - c. Romans: govt. switched from democracy to autocracy during war
- g. Notes:
- i. Truman could have sought an injunction under Taft-Hartley Act
    1. but, Truman is opposed to labor injunctions (unions as important political constituency)
    2. also, seizure provision explicitly rejected in drafting of Taft-Hartley Act
    3. generates skepticism amongst SC
  - ii. govt. would seize steel mills, come to independent agreement with unions
    1. steel as vital to war effort
    2. but, after SC decision, union strikes with little effect on war effort
  - iii. Truman notifies Congress of action but does not ask for permission
    1. Congress does not react; both legislature and executive controlled by Democrats
      - a. separation of powers doctrine would call for legislature to check executive in such a situation
      - b. not a battle between legislature and executive; private companies file suit against govt. for seizing steel mills
    2. Truman acknowledges that he will abide by Congress's decision
      - a. but does not specify whether he will abide by Congressional statute or whether he will only abide by veto-proof legislation
  - iv. adjudicating on the margins:
    1. Truman's power to seize steel is at issue, but not his unfettered authority to engage in an unauthorized war in Korea
  - v. context of past wars against tyrants (fear of dictatorial presidency) and current Cold War (strong presidency to combat communism)

- a. Executive Authority to act without Congressional power
  - i. scope of commander in chief authority left largely undefined after *Youngstown*
    - 1. when does commander in chief power allow President to overrule competing legislative authority?
- b. Where statute expressly prohibits or authorizes executive action
  - i. Jackson's second category in *Youngstown*
  - ii. statutory interpretation can be ambiguous
    - 1. legislative history v. text of the constitution, etc.
    - 2. entails an examination of entire US code to identify Congressional approval for Presidential action
      - a. meanwhile, opposition can find opposing statutory language
        - i. ex. Feed and Forage Fund of 1861 invoked to authorize Presidential funding of Vietnam War
- c. where Congress is silent:
  - i. also open to competing interpretations
- d. distinct Presidential emergency powers?

#### LXVI. The Emergency Constitution

#### LXVII. Implied and Emergency Executive Powers

- a. Hamilton: absence of "herein granted" qualification of "executive power" in Article II confirms that executive power is not limited to enumerated powers
- b. extent to which the Constitution should be suspended or interpreted more permissively during times of war or emergency, in respect to executive power and civil rights/liberties?
  - i. empirical observation: during war and other emergencies:
    - 1. executive power expands
    - 2. individual rights are curtailed
- c. Roosevelt:
  - i. stewardship theory of Presidential powers
    - 1. President should be able to do anything that is necessary, not expressly prohibited by the Constitution, without Congressional permission
- d. emergency powers not enumerated in Constitution
  - i. Jackson view of emergency powers:
    - 1. President acting outside of law, out of practical necessity
  - ii. Vinson:
    - 1. President acting under formal legal authority
    - 2. embraced by constitutions around the world
      - a. German constitution delegated powers to executive in times of emergency, co-opted by Nazi administration (indefinite suspension of habeas corpus)
  - iii. relevant constitutional provisions:
    - 1. organize a militia
    - 2. suspend habeas corpus in times of rebellion
    - 3. both of the above emergency powers are delegated to legislature
- e. fear that emergency powers "tend to kindle emergencies"
  - i. *Youngstown* example (dubious emergency; acts regulated relatively unrelated to war effort)
  - ii. Latin American dictators, ruling by decree
- f. Justice Jackson's view:
  - i. Presidential emergency powers constitute perpetual lawlessness
    - 1. distinct from argument that President should invoke emergency powers if necessary

#### LXVIII. Issacharoff & Pildes

- a. Courts generally deferential to emergency powers if enacted by both executive and legislature (bilateralism)
- b. Civil War cases:

- i. Lincoln at outset of civil war:
    - 1. spent un-appropriated funds; blockaded Confederate ports
    - 2. suspended habeas corpus
      - a. but, general consensus holds that suspension power is reserved for legislature
      - b. allowed Lincoln to prohibit Maryland from seceding (by arresting legislators) and prevent Confederates in Baltimore from shutting down RR
    - 3. actions retroactively validated by Congress when it came back in session
      - a. Supreme Court ignored actions, then retrospectively authorized them
        - i. Tawney personally sent Lincoln writ of habeas corpus re: Merriman; Lincoln ignored the writ
          - 1. Tawney – authored *Dred Scott*
    - 4. Lincoln:
      - a. willing to bend the Constitution in the service of preserving it (and the Union)
        - i. also made legal arguments on Constitutional interpretation
          - 1. mixture of Jackson and Vinson approaches
      - b. Emancipation Proclamation:
        - i. limited emancipation to exclude border states, since he feared that they would ally with Confederacy if forced to emancipate slaves
  - ii. *Ex parte Milligan* (1866)
    - 1. Civil War- trial by military commissions, rather than civilian courts
      - a. Milligan- civilian associated with anti-war group, suspected of plotting to free Confederate prisoners in Indiana
    - 2. conviction reversed; held that subjecting civilians to military tribunals is unconstitutional, when civilian courts are available
      - a. in areas outside of hostilities
    - 3. violation of due process rights? or *Youngstown*-type holding? whether President has legislative approval?
      - a. if based on rights, even congressional approval will not save the measure, since it will always be held to be unconstitutional
        - i. causes a backlash, since popular opinion would allow legislature to use extraordinary methods to deal with emergencies
  - iii. *Ex parte McCardle* (1868)
    - 1. President Johnson
    - 2. steps back from holding in *Milligan*
    - 3. Congress may strip SC jurisdiction
  - iv. *Mississippi v. Johnson* (1866)
  - v. *Vlandigham*
    - 1. convicted in military tribunal for “expressing sympathy to the enemy”, in midst of Civil War
      - a. SC dismisses case on a technicality; after war is over, SC decides *Milligan* and goes back to protecting rights
- c. Japanese Internment
  - i. *Korematsu* (1944)
    - 1. ethnic Japanese “excluded” from West Coast “war area” governed by martial law; citizens and aliens interned in camps
      - a. military policy based on racist and economic bias, after Pearl Harbor attack
      - b. other ethnic groups (Germans and Italians; Japanese in Hawaii) protected due to greater political clout
    - 2. SC upholds constitutionality of exclusion order (discriminates against Japanese Americans on the basis of race and ethnicity)
      - a. curfew already held to be constitutional in *Hirabayashi* (see below)

- b. average length of internment = 3 years
      - i. SC takes 2+ years to decide the case
- 3. 6-3 majority (including civil libertarians such as Douglas and Black)
  - a. “under normal circumstances” order obviously violates constitution (equal protection)
    - i. under a normal equal protection analysis, Govt. would only have a slim chance of success by asserting that racial discrimination was the only way to prevent an impending disaster (probably involving death) (compelling governmental interest)
      - 1. Govt. asserts this argument in *Korematsu*, no evidence presented or demanded by SC
  - b. context of WWII
    - i. Roberts Commission report (Justice Roberts of “the switch in time that saved 9”) investigating Pearl Harbor attack finds scant evidence of Japanese espionage (some evidence found in Hawaii, none in California; no evidence of any continuing security risk); still concludes that Japanese in California presented a security risk
      - 1. but, Roberts dissented in *Korematsu*
- 4. Ordinary constitutional rights shrink or disappear in wartime, if they stand in the way of Presidential or national determination of necessary action
  - a. early-1942: belief that a wholesale Japanese invasion of the US mainland was impending
  - b. different situation in 1944
    - i. Japanese soldiers volunteering for US Army
    - ii. exclusion order repealed the day before SC issued its decision in *Korematsu*
- 5. Jackson’s dissent:
  - a. judicial review is inappropriate in wartime
    - i. paramount consideration is that measures be successful in wartime, rather than legal
  - b. dangerous to ask courts to decide such cases as *Korematsu*, since such is to distort the constitution and create precedent
    - i. better to perceive executive power as exercised in an extra-constitutional way
  - c. how can courts evaluate whether military recommendations from military sources are appropriate?
    - i. defer to military’s judgment
- ii. *Ex parte Endo* (1944)
  - 1. detention of Japanese held to be unconstitutional, since not authorized by Congress (ongoing detention is beyond the scope of congressional authorization)
    - a. but, by the time *Endo* and *Korematsu* are decided, the war is over and there is no political will to continue internment
      - i. although release of detainees was delayed until after the Presidential election
      - ii. decision in *Endo* was arguably timed to coincide with release
  - 2. questions whether SC actually acts as a check on executive authority in wartime, since *Milligan* and *Endo* decisions actually came after wartime
    - a. but, both mark the end of wartime jurisprudence, where SC is again ready to enforce rights
- iii. *Hirabayashi v. United States* (1943)
  - 1. SC upholds constitutionality of curfew

- d. Probing the limits:
  - i. *Ex parte Quirin*
    - 1. WWII German saboteurs; tried for war crimes by a military commission and sentenced to death
      - a. appealed to SC with habeas corpus petition
    - 2. SC unanimously upheld sentencing
      - a. applies *Youngstown* framework, rather than rights-driven interpretation
        - i. finds that Congress authorized commissions in several provisions of US Code
    - 3. Roosevelt had already decided to execute saboteurs, despite whatever the SC decided, and Stone/Black knew of his decision; in conjunction with massive public consensus that saboteurs should be executed
      - a. SC didn't have any choice
    - 4. also, FBI concocted story of heroic capture, wanted secret trial so that the reality was not revealed
  - ii. Release of frozen Iranian assets during hostage negotiations
- e. Executive detention of "enemy combatants"
  - i. *Padilla v. Bush* (NY 2002)
    - 1. Congressional Authorization for Use of Military Force (AUMF) (2001)
  - ii. *Hamdi v. Rumsfeld* (4<sup>th</sup> Cir. 2003)

LXIX. Posner: How does national security shape rights?

- a. "Constitution is not a suicide pact"
  - i. Constitution allows flexibility in responding to national security risks
- b. reflects the above debate between Jackson and Vinson:
  - i. torture in "ticking time bomb" cases or outlaw torture in all situations, with expectation that officials will break the law when necessary
- c. Cold War context
  - i. national climate leading Humphrey (liberal) to propose bill criminalizing Communism
    - 1. SC rejects all challenges re: constitutional rights of suspected communists
- d. different tradeoffs (different balance between rights and security) for different national security situations (threat v. sacrifice of liberties); optimal balance
- e. security guard paradox (analogous to internment of Japanese/enemy combatants)
  - i. a perfectly effective security guard will be fired (since such will prove that there is no real threat of shoplifting)
- f. similar to Dworkin's moral constitutionalism or living constitutionalism
  - i. pick constitutional interpretation that creates more benefits than costs (economic analysis)
    - 1. historical understanding not prioritized
  - ii. disputes Jackson's caution that Constitution will be like a "used sweater" – if you stretch it too far it won't go back to its original shape

LXX. Cole

- a. Posner's interpretation of emergency powers
- b. pattern of executive power expansion w/ rights shrinkage represents constitutional failure
  - i. irrational judicial "panic"
  - ii. or, judicial awareness that their opinions will be overridden or ignored by executive branch in wartime
    - 1. as when Lincoln ignored Tawney
    - 2. contrary to idea that pre-commitment to Constitution preserves values during changing circumstances
- c. strict originalist interpretation for preservation of rights in wartime

LXXI. Executive Authority After 9/11

- a. Constitutional design invites power struggle between Congress and President over war-making authority
  - i. Article I:
    - 1. Congress has power to declare war, maintain navy, organize militias, etc.
    - 2. Congress has power over appropriations (limits for military appropriations to 2 years)
  - ii. Article II:
    - 1. President is commander in chief of armed forces
- b. Madison:
  - i. healthy push and pull between branches leads to equilibrium where branches maintain their own power (share the power of war; both need to approve of the war)
    - 1. not how the political dynamic has operated in US history
    - 2. for instance, political pressure may lead Congress to capitulate after President has decided to commit to a war
- c. What kind of Congressional permission does the President need before engaging US forces in combat?
  - i. President is not allowed to fight with the military in an offensive hostility before gaining a declaration of war from Congress
    - 1. 5 times in US history (not since WWII)
    - 2. WWII, Congress issued individual declaration of war statutes against Germany and Japan
    - 3. not so for invasion or self-defense
  - ii. not clear that President needs a formal declaration, rather than an authorization for the use of military force
    - 1. modern conventional wisdom
    - 2. Vietnam, Korea, two Iraq wars, Afghanistan
- d. difference between army and navy in the constitution
  - i. historical precedent – navy was used for defending ships, while army could be used to control civilian population
- e. Sunstein critique of Yoo's book (the 9/11 Constitution)
  - i. Yoo: if President has armed forces at his disposal (and does not need to raise an army or funds for an army), he can use the forces as he wants, without Congressional approval
    - 1. finds precedent in British law
      - a. but, were Framers embracing British system or rejecting it?
  - ii. declare war clause?
    - 1. only talks about “declaring” war, which can be distinguished from fighting wars, or “making” wars
      - a. inclusion of “making” was rejected in drafting of USC
        - i. declaration of war applied special rules of international law, distinguished conflict from other types of fighting/hostilities
    - 2. Congressional power to define (and fund) a war or conflict, executive power to conduct the war
      - a. Congress' power to “conduct” war: conditions placed on certain military appropriations for certain purposes
        - i. in Vietnam, explicit refusal to fund military excursions into Cambodia
          - 1. debate between Nixon and Congress (Church Amendments)
        - ii. ceasing funding for Somalia conflict
        - iii. Congress cutting off funding for Reagan's secret intervention in Nicaragua
          - 1. leads to Iran-Contra scandal; executive officials selling arms to Iran to fund conflict
      - b. debate over constitutional line between defining and conducting the conflict

- i. limiting funding to limit troop levels? air war but not ground war?
          - 1. serious questions about congressional authority to infringe on executive commander in chief authority
            - a. usually subject to departmental compromise (no SC cases have adjudicated the constitutional issue)
          - 2. political pressures also prevent Congress from cutting off funding to a war in progress
- f. Bush Administration interpretation:
  - i. authorization of use of military force by Congress authorizes coercive interrogation, indefinite detention of enemy combatants (see *Hamdi*)
    - 1. but, argument that executive power permits such activities precludes Congress from removing executive authority
  - ii. “category 3 power” – from Jackson’s dissent in *Youngstown*
    - 1. when Congress forbids executive action
      - a. arguably non-existent
      - b. violation of commander in chief provision for Congress to take control of military (speaker of House as commander in chief = unconstitutional)
- g. Obama administration: “low-level” conflicts do not require either Constitutional declaration or Congressional approval re: authorization, since do not constitute war or hostilities
  - i. Libya
- h. Savage article:
  - i. Obama’s decision to (not) send troops to Syria to destroy chemical weapons
    - 1. Obama chose to seek congressional permission, even though he asserted that it was not nec’y
      - a. desire to share the blame (since dubious international legality)
      - b. accepting precedential effect of decision (could be used in the future to argue against executive power to pursue military intervention)
- i. War on Terrorism
  - i. a “real” war? then constitutional law will treat it as such (expansion of executive authority, reduction in rights)
    - 1. analogy to FDR in WWII: authority to capture enemy soldiers and detain them for the duration of the conflict, with no habeas corpus
      - a. military tribunals
      - b. mass detentions of ethnic groups (Japanese internment)
      - c. espionage, domestic spying
      - d. assassination of enemies domestically and abroad, without a trial
    - 2. AUMF analogous to declaration of war in WWII
    - 3. but, clear differences:
      - a. identifiable enemies (members of nation-states, wearing uniforms, etc.)
        - i. al Qaeda not well-defined, membership diffuse, unclear whether an unified organization even exists
        - ii. command structure unclear, no fixed “base”
          - 1. different nationalities involved
        - iii. scope of battlefield and duration of conflict potentially unlimited (no military or government can surrender, no possibility for a treaty)
      - b. BUT, supported by many countries, large populations, significant funding
        - i. claim to be supported by well-defined ideologies
        - ii. manifested objective of killing Americans, innocent civilians
          - 1. possibility of massive destruction renders law enforcement model of reacting to crime undesirable
  - ii. qualitatively different that a war such as WWII

1. metaphorical war
2. different constitutional framework
  - a. Cole: war on terrorism is similar to law enforcement operation, with concomitant constitutional framework (limited executive power, full observation of rights- meaning trials, etc.)
  - b. competing analogies (drugs v. Hitler), neither of which perfectly suit the conflict
    - i. challenging to existing legal analysis, which usually operates via reasoning by analogy

LXXII. *Hamdi v. Rumsfeld* (2004)

- a. Facts:
  - i. US citizen detained at Guantanamo filed writ of habeas corpus requesting judicial review of detention
    1. only two known enemy combatants who are US citizens (Hamdi and Jose Padilla)
  - ii. argued that 18 USC 4001 (and Geneva Conventions, in the alternative) prohibited detention
- b. Holding (O'Connor):
  - i. adopts analogy to conventional war but acknowledges that habeas must be evaluated on case by case basis
    1. Hamdi detention held to be valid, since he was captured in a war zone and since hostilities had not yet ended (still troops on the ground)
      - a. but, acknowledges that analysis might be improper if conflict turns out to be perpetual
- c. Concurrence (Souter and Ginsburg):
  - i. Congress has not authorized detention of US citizens (non-detention act trumps AUMF), so executive is in "category 3" of *Youngstown* framework, without commander in chief authority
- d. Dissent (Stevens and Scalia):
  - i. civil libertarian analysis; govt. can try enemy combatants in civilian court (for treason), or Congress can suspend the writ of habeas corpus altogether
    1. no other Constitutional method available
- e. Dissent (Thomas):
  - i. President has commander in chief authority to hold enemy combatants, regardless of congressional authorization
- f. Notes:
  - i. enemy combatants after 9/11
    1. terrorist suspects arrested globally (many in Afghanistan as effective POW's), detained across the world
    2. Guantanamo detainees submit writs of habeas corpus, government argued that detainees had no right to access US courts, since they were not held on US sovereign territory (objective of detaining prisoners in Cuba)
      - a. Govt. relied on WWII precedent (*Johnson v. Eisentrager*)
        - i. upheld by *Rasul* (2004); detainees must have access to US courts if detained in Florida, but not in Afghanistan
          1. question of quasi-sovereign nature of Guantanamo
        - ii. Congress abrogated *Rasul* decision by passing two statutes denying access to US courts to non-citizens held at Guantanamo as an enemy combatant in the war on terrorism, or elsewhere in the world
          1. Military Commission Act and Detainees Act
          2. authorizes appeals to the DC Circuit; but, DC Cir. is limited in ability to review detentions (can only review procedures for

military's determination of enemy combatants but can't assess substantive evidence in each case)

3. *Boumediene v. Bush* (2008)
  - a. significant for court's constitutional decision against clear Congressional authorization (first time in American history that Court has invalidated a wartime measure during wartime that has bilateral support and explicit Congressional approval; *Youngstown* "category 1" case) → the "real" *Milligan*
- ii. indefinite detention:
  1. post-9/11 context, where pool of potential detainees has no limits and conflict has no discernable end
- iii. non-detention act:
  1. prohibits detention without "an act of Congress"
  2. passed in response to executive assertion of power to detain anyone during wartime
    - a. designed to prevent situations like the Japanese internment
- iv. post-9/11 AUMF:
  1. blanket authority for executive to prosecute war on terrorism
  2. plurality: AUMF counts as "act of Congress" under non-detention Act, despite silence on detention question
- v. procedural due process:
  1. fair notice, opportunity to be heard, etc.
  2. "balancing test" of private v. governmental interests – *Mathews v. Eldridge*
  3. granted only to US citizens (no rights recognized for aliens)
- vi. *Padilla v. Rumsfeld* (SC 2004)
  1. accused of plotting to deploy "dirty bomb" in Chicago, detained and interrogated in military prison
    - a. charges never litigated in any court, evidence asserted but not proved
  2. President released Padilla and tried him in a civilian court before the SC could review the detention
    - a. Padilla convicted in civilian court

LXXIII. *Hamdan v. Rumsfeld*

- a. Facts:
  - i. former driver for Osama bin Laden, accused of war crimes
- b. Holding (5 out of 8, with Rehnquist abstaining) (Stevens):
  - i. executive did not have authority to establish military commissions in absence of Congressional approval
    1. relevant statutes (AUMF and others) only authorize commissions in a certain form; current military commissions are not authorized by any congressional statute
    2. concern with exclusion of D from trial and evidence
- c. Dissent:
  - i. reads statutes to provide Congressional authorization to executive authority to enact military commissions
- d. Notes:
  - i. evidence and secrecy concerns
  - ii. Obama: switches focus to trying detainees in civilian courts
    1. efforts to try Kalid Sheik Mohammed in SDNY generated political backlash; statute passed prohibiting Guantanamo detainees to be tried in US courts
  - iii. military tribunals in US history
    1. Civil war
      - a. debate over whether military commissions can be used in parts of country not affected by war, where civilian courts are available
    2. WWII and *Quirin*

- a. FDR only had *Milligan* as precedent (so easier for Bush, Obama, who can use *Quirin* precedent to justify military trials)
- iv. plurality and dissent differ on Congressional approval; category 3 v. category 1
  - 1. category 2? but Court does not want to categorize anything as category 2, since result is unknown
- v. Congress reacts to *Hamdan* decision by passing Military Commissions Act of 2004
  - 1. abrogates *Hamdan*, explicitly authorizes military commissions and broadens definition of “enemy combatant”
  - 2. declares that Geneva Conventions will not be honored in US courts
  - 3. bans habeas petitions from aliens seeking review of detention in US courts

#### LXXIV. Targeted killings abroad

- a. Anwar al-Awlaki and underwear bomber
- b. Cole/Posner debate re: justifications for targeted killings; OLC white paper
  - i. analogous to conventional war? AUMF authority
  - ii. informed, high-level official in executive branch decides that target is a ranking member in al Qaeda who poses a risk of imminent attack against the US, and whose capture is not feasible (applies to even US citizens)
    - 1. higher standard than in conventional war
    - 2. feasibility of capture – risky or costly
    - 3. See *Matthews v. Eldridge* balancing test (again, only for US citizens)
- c. AG Holder’s comment to Rep. Paul during Brennan nomination:
  - i. executive does not have the authority to authorize killing of US citizen on US soil if the individual is not involved in “combat”
    - 1. are members of al Qaeda presumed to be engaged in perpetual combat with the US
- d. Cole:
  - i. Republican Congress’ authorization of military force during Bush Administration is consistent with Congress’ historical role in wartime
    - 1. damning indictment on Isaacaroff/Pildes conception of judicial role in wartime
    - 2. questions the reality of the *Youngstown* framework
  - ii. Bush/Obama authority has been relatively open-ended since 2001, with fairly minimal independent input from Congress (effective monarchy (although elected); imperial presidency) → Congress has abdicated the field, despite framers’ intentions
    - 1. but, in WWII, Congress resisted FDR’s efforts to bring the US into the War
- e. soft congressional power:
  - i. when Congress resists executive’s war-making but political pressures render cutting off funding infeasible
  - ii. use of the bully pulpit (leveling public criticisms); holding hearings, etc.
    - 1. soft power likely to be greatest when opposition power holds one or both houses of congress
- f. judicial review:
  - i. although courts have weighed in on indefinite detention, etc., the court has not ordered the release of any detainees (little effect on substantive policies of war on terror)
    - 1. but, perhaps judicial oversight acted as a deterrent, where executive voluntarily released certain detainees under the threat of judicial review

#### LXXV. *Rasul v. Bush* (2004)

- a. Facts:
  - i. three British citizens held as enemy combatants in Guantanamo bay (captured in Afghanistan)
- b. Holding:
  - i. asserted judicial jurisdiction to review detention cases for Guantanamo detainees
- c. Notes:

- i. Court primed not to repeat mistake of *Korematsu*, with executive willing to subvert constitutional rights protections
- ii. competing constitutional theories:
  - 1. Con. should change with changing circumstances
    - a. increased need for national security is one such circumstance
    - b. rational deference to executive
      - i. requires “unitary executive”; no bad actors in executive abusing increased power
  - 2. Con. and Con. law should stay the same
    - a. value of pre-commitment
    - b. Con. law prevents erosion in rights during wartime (civil libertarian view)

**LXXVI. Equal Protection: Slavery to Reconstruction; Incorporation**

- a. structure to rights (content); but, enforced by courts so a somewhat misleading distinction
  - i. content and structure often have identical goals:
    - 1. preventing tyranny of the majority
    - 2. protecting individual rights
- b. initial conception of individual rights:
  - i. protection of rights against infringement by federal government
  - ii. rights shared between states and individuals, to protect against federal intrusion

**LXXVII. 14<sup>th</sup> Amendment**

- a. equal protection clause
- b. source of constitutional protection from discrimination on the basis of race, gender, possibly sexual orientation
  - i. designed to protect newly-freed slaves in the South from discrimination
    - 1. practical significance of 14<sup>th</sup> Am. has often been about racial discrimination

**LXXVIII. Pre-history of the 14<sup>th</sup> Am.**

- a. slavery, race, and the Constitutional significance of race
  - i. original understanding: pro-slavery document (compact with the devil)
    - 1. bargain/compromise between deeply conflicting interests re: slavery
      - a. but, never a serious discussion of abolishing slavery in original constitution, since Southern states would not join the Union (economically-dependent on slavery through plantations/agriculture)
        - i. Northerners also feared that the abolition of slavery would lead to an influx of freed slaves in Northern territories
- b. explicit provisions:
  - i. states’ power to suppress insurrection
  - ii. ban on Congressional export taxes
    - 1. southerners feared that goods produced via slave labor would be taxed
  - iii. slaves as 3/5ths of a person, as counted in a state’s population (for apportionment of congressional representation)
    - 1. compromise suggested to base representation on wealth, so that slaves could be counted as property
    - 2. prohibits federal govt. from outlawing global slave trade until 1808 (to allow southern states to “stock up”)
      - a. made “un-amendable” by Article 5
      - b. eventual outlaw of slavery by Jefferson in 1808
        - i. short-term and long-term benefit to slaves
          - 1. resulting scarcity of slaves leads to better treatment and migration to highest-value uses; less slaves in border states, such as Maryland, leading border states to stay with the Union in the Civil War

- iv. fugitive slave clause
  - 1. leads to Northern resentment toward southern slave-catchers, leading incursions into northern territory to capture escaped slaves and mistakenly capture free blacks
  - 2. *Prigg v. Pennsylvania* (SC 1842)
    - a. personal liberty laws; prevent free blacks in PA from being kidnapped
      - i. also, expression of abolitionist sentiment
    - b. SC holds: PA personal liberty law violates fugitive slave clause of constitution
      - i. PA reaction: govt. refuses assistance to slave catchers, will not provide any state assistance
        - 1. debate over fugitive slave provisions continues until Civil War
        - 2. federal fugitive slave act
- c. constitutional debate over slavery in the territories:
  - i. will slavery be permitted in large areas of the country? longer-term future for slavery in the nation?
    - 1. implications for political representation, electoral college, etc.
    - 2. political compromises prevent country from fracturing for several years
      - a. Missouri Compromise (1820)
        - i. Maine a free state, Missouri a slave state; divides other territories acquired in Louisiana Purchase at Missouri's southern border
      - b. Compromise of 1850
        - i. California as a free state; Utah and NM as slave states
      - c. see accompanying compromises

LXXIX. *Dred Scott v. Sandford* (SC 1857)

- a. Facts:
  - i. slave sues master for freedom, since he resided for 2 years in a free state
- b. Holding (Tawney):
  - i. black people, whether free or slaves, cannot be citizens under USC, at least for purposes of Article III
    - 1. so, D can't sue in federal court, since he cannot claim diversity of citizenship from his master (since he is not a citizen of any state)
    - 2. bases interpretation on original understanding (no framer would have considered black people to be included in "we the people")
  - ii. dicta:
    - 1. Congress has no constitutional authority to bar slavery in existing territories; such would violate the property rights of slave owners
    - 2. Congress also has no constitutional authority to bar slavery in future territories
      - a. Missouri Compromise is by itself unconstitutional, so D has no federal remedy
      - b. bases rationale on property rights of slave owners under 5<sup>th</sup> Am. (comparable to a takings); and asserts that Congress does not have plenary power to regulate the territories
- c. Notes:
  - i. proximate cause of the Civil War?
  - ii. practical consequences:
    - 1. privileges and immunities clause between states
      - a. only applies to citizens; so, when free blacks from the north travel to the south, they can be thrown in jail under state laws, etc.
        - i. southern states can bar free blacks, or enact legislation enslaving free blacks who enter territories
  - iii. issue of slavery in the territories was the most significant political issue of the time
    - 1. competing interpretations:

- a. Northern Whigs: “free soil”; Congress must ban slavery in all territories
- b. Northern Democrats: popular sovereignty (individual territories should decide slavery question)
- c. Southern Democrats: territories must be left open to slavery, so that Southerners can bring their slaves into those territories (common property view)
- d. original understanding:
  - i. Congress can ban slavery but Congress must explicitly do so
- iv. public regards decision as a purely political decision
  - 1. but, Tawney always committed to states’ rights but personally opposed to slavery
- v. Northern accusations as a southern “slave power conspiracy”
  - 1. Lincoln debates Stephen Douglas in Senate campaign debates
    - a. 1858 “house divided” speech; accuses Douglas and President Buchanan as subverting the constitution to spread slavery into the North

LXXX. Civil War:

- a. Lincoln and Northern Republicans – committed to saving the Union, rather than abolishing slavery
  - i. abolitionists occupying an outlier, unpopular position (William Lloyd Garrison)
    - 1. de Tocqueville: racial prejudice stronger in the North than the South
      - a. Lincoln: keep black people out of the northern territories, so that they could be kept open for white people (mainstream opinion)
- b. Congress banned slavery in territories, ignoring *Dred Scott*
- c. Lincoln’s Emancipation Proclamation
  - i. war measure under commander in chief authority (deprive south of labor and allow recruitment of slaves into Union army)
  - ii. no conceived as an ideological crusade
    - 1. unpopular in the North
      - a. Union General McClellan vowed to refuse to fight for such a document
        - i. believed that it was unreasonable to unleash such “savagery” on the South (against the laws of war)
    - 2. race riots across North, lower-class whites enraged by prospect of being drafted to fight for blacks (NYC)
- d. end of War marked the fait accomplis of the end of slavery
  - i. consequent change in the constitution

LXXXI. Structural shift in the constitutional conception of the purpose of rights (also shift in federalist relationship)

- a. Reconstruction:
  - i. shift from protection of rights from infringement by federal govt. to fear that States would fail to protect rights
    - 1. Southern states enacting laws to recreate conditions of slavery for newly freed slaves
  - ii. original constitutional conception: protections for rights applied only to the federal govt. (see Bill of Rights; view of anti-federalists – protect majority from centralized govt.)
    - 1. contrasted with view that constitution designed to protect minorities from tyranny of the majority
  - iii. Madison, Federalist 51 – guard against oppression of tyrannical rulers, rather than guarding one part of society against injustice of the other part
  - iv. state governments as protecting majority of its citizens from national tyrants
- b. Transforming conception of the Bill of Rights
  - i. original Bill of Rights
    - 1. first draft contained 12 provisions, rather than the 10 that were initially ratified
      - a. original first amend. capped congressional membership

- i. federalists favored larger congressional membership, since more members would mean that each member was less beholden to constituents
    - b. orig. second amend. is now the 27<sup>th</sup> amend. (finally ratified in 1992)
      - i. re: raising salaries for congress members
  - 2. 10<sup>th</sup> Amend. epitomizes Bill of Rights' application against national govt.
    - a. States = the people
    - b. first amend: "*Congress* shall pass no law"
    - c. Establishment clause: protect ability of states to establish/prefer any church; only prevents Congress from establishing a national church, which would displace any states' endorsed religion
  - 3. 5<sup>th</sup>/6<sup>th</sup> Amend.'s protection for jury trials
    - a. fear that corrupt federal prosecutors and judges pose threat to citizens
      - i. majoritarian tyranny not a concern
  - 4. 2<sup>nd</sup> Amend. originally designed to protect state militias (state-level majorities defending against national govt.)
- ii. Civil War reversed conception of greatest threat to individual/minority rights
  - 1. concern that democratic (white) majorities will suppress the rights of individuals/minorities (blacks; freed slaves)
    - a. national govt. perceived as the protector of rights
      - i. consolidating victory by protecting rights of freed slaves

## LXXXII. Reconstruction Amendments

- a. 13/14/15 Amendments
  - i. statement of rights
  - ii. grant of enforcement to Congress
- b. 13<sup>th</sup> Amend.
  - i. prohibits slavery, grants Congress power to enforce provisions by "appropriate legislation"
    - 1. cements Emancipation Proclamation
    - 2. consensus that 13<sup>th</sup> Am. does little more than abolish slavery
- c. 15<sup>th</sup> Am:
  - i. prohibits denying right to vote on the basis of race, grants Congress power to enforce
    - 1. Southern states disenfranchise blacks notwithstanding 15<sup>th</sup> Am.
    - 2. Congress used enforcement power to pass Voting Rights Act of 1965
- d. 14<sup>th</sup> Am. (ratified 1868)
  - i. equal protection clause
  - ii. due process clause
    - 1. along with 1<sup>st</sup> Am., main font of individual rights in the Constitution
  - iii. Section 1
  - iv. Sections 2, 3, and 4
    - 1. address immediate political concerns of Republicans in Reconstruction period (short-term political agenda)
      - a. desire to consolidate power despite the elimination of the 3/5<sup>th</sup>'s clause
    - 2. creates incentives for Southern states to enfranchise black voters (who would likely vote Republican)
      - a. threatens reduction in Congressional representation for states that do not enfranchise black voters
    - 3. excludes ex-Confederates (not Republican voters)
    - 4. protects payment of federal debts
  - v. Section 5
    - 1. enforcement power
  - vi. Section 6

1. citizenship clause
    - a. overrules *Dred Scott* on its citizenship holding
  2. privileges and immunities clause
    - a. applies to States
  3. due process clause
  4. equal protection clause
- vii. legislative action designed to invalidate Black Codes in the South
1. denied blacks the right to own property, engage in contracts, avail courts, hold jobs other than agricultural labor
  2. section 1 designed to provide constitutional support for congressional exercise of this power
    - a. Civil Rights Act of 1866 – negates Black Codes, point by point
      - i. collection of rights protected (access to court, protection of property, protection from violence) classified as “civil rights”
        1. contract, property, court access, protection against violence
      - ii. does 14<sup>th</sup> Am. protect any other rights?
        1. political rights? right to vote/serve on juries
          - a. from an original perspective, political rights not included (this necessitated the 15<sup>th</sup> Am.)
        2. social rights? right to education/accommodations/marriage
          - a. original conception, social rights not included
          - b. only seen as applying to racial discrim. on a certain set of rights (not applied to other rights, or other groups, such as women or gays)
- e. Southern states argued that reconstruction amendments were never officially ratified, since they were forced to ratify
- i. Congress enacted Reconstruction Acts under ongoing war powers, which reconstructed Southern state governments by imposing military governors and installing carpetbaggers as governing officials
    1. also, enfranchised southern blacks and sent federal troops to enforce enfranchisement
      - a. disenfranchisement of southern democrats (ex-Confederates)
    2. reconstructed governments ratified amendments
- f. Congress used reconstruction amendments to enact legislation protecting southern blacks
- i. attempted to prevent private discrimination through legislation but attempts were invalidated by SC
    1. Civil Rights Cases
    2. *Harris*
    3. *Crutchshanks*
  - ii. private conduct cannot violate a constitutional right, so Congress cannot address privately-inflicted discrimination under enforcement power
- LXXXIII. SC interpretation of reconstruction amendments, in regards to application to states
- LXXXIV. *Slaughterhouse Cases*
- a. Facts:
    - i. five years after ratification, at the end of Reconstruction, when political landscape had shifted in favor of southern democrats
      1. less political will for robust interpretation of 14<sup>th</sup> Am.
    - ii. Louisiana statute authorizing grant of monopoly to slaughterhouse
      1. challenged under equal protection clause (freedom to slaughter own livestock)
      2. argument that state has violated a privilege of national citizenship (also protected by 14<sup>th</sup> Am.) -> right to free labor

- a. demise of slavery connected to right to free labor/right to free market (connection with later free market cases, such as *Lochner*)
    - 3. 13<sup>th</sup> Am. argument – monopoly tantamount to involuntary servitude (must access one slaughterhouse)
  - b. Holding:
    - i. rejects argument that 14<sup>th</sup> Am. equal protection clause applies
      - 1. holds that purpose of Am. is only to address racial discrimination
    - ii. rejects privileges and immunities arg.
      - 1. denies that 14<sup>th</sup> Am. incorporates any existing rights
      - 2. only protects privileges and immunities of national citizenship, not state citizenship
        - a. original understanding of national citizenship rights:
          - i. right to habeas corpus
          - ii. right to travel on the high seas
        - b. but, these rights are already protected by statute
          - i. so, SC reads 14<sup>th</sup> Am. to protect no additional individual rights; guts the privileges and immunities clause, still largely dead letter
            - 1. SC has attempted to revive P&I clause, with little effect
              - a. *See McDonald*
                - i. incorporation of 2<sup>nd</sup> Am. into equal protection clause
              - b. *Sainz*
                - i. right to travel included in P&I clause
- c. Notes:
  - i. 14<sup>th</sup> Am. argument:
    - 1. 14<sup>th</sup> Am. designed to prohibit
  - ii. 14<sup>th</sup> Am.:
    - 1. new rights created by 14<sup>th</sup> Am.
    - 2. gave Congress power to enforce new rights
    - 3. applied existing rights to protection from states
      - a. existing rights incorporated as privileges and immunities and protected against states
      - b. which rights?
        - i. Bill of Rights?
  - iii. Holding (Miller):
    - 1. broad reading of P&I clause would radically change the relationship of state to national govt. and from state to individuals
      - a. national govt. as monitor of state govt.
      - b. but, this was Congressional intent behind reconstruction amend's
    - 2. hesitant to enact radical reform to federalist structure, despite congressional intent
  - iv. court gradually came to accept post-Civil War paradigm shift
    - 1. over the period of 150 years (incorporation controversy)
- LXXXV. **Incorporation**
- a. Does the 14<sup>th</sup> Am. incorporate a pre-existing right that applied against the federal government to apply against a state govt.?
    - i. all/some of the rights in the Bill of Rights?
    - ii. legislative history of 14<sup>th</sup> Am.:
      - 1. incorporates free speech
      - 2. did not expect entire Bill of Rights to apply
        - a. states' individual criminal procedure provisions (framers of 14<sup>th</sup> Am. did not intent 5<sup>th</sup>/6<sup>th</sup> Am. to apply against state govt.'s)
    - iii. redundancy between due process clause in 5<sup>th</sup> Am.

1. so, likely not conceived of being incorporated
- iv. other fundamental rights (not explicitly included in Const. or Bill of Rights) thought to be “incorporated”
  1. right to an abortion
  2. right to freedom from discrimination by other classes
  3. privileges and immunities as including an “open set” of rights
    - a. original understanding: “some of the Bill of Rights plus some unenumerated rights” incorporated
- b. Due Process clause of 14<sup>th</sup> Am.
  - i. constitutional hook after P&I taken off the table by *Slaughterhouse*
    1. procedural rights interpreted to include substantive rights by SC
      - a. liberty that states may not deprive under due process clause includes at least some of the rights in the Bill of Rights, as well as some other fundamental rights that may be discovered in the future
        - i. as the P&I clause was “supposed” to operate
    - ii. process happens gradually
      1. courts first strike down some state laws taking property (also violates Takings Clause)
        - a. but, interpreted to violate liberty under due process clause of 14<sup>th</sup> Am.
      2. new rights incorporated in 1920’s/30’s – 50’s/60’s (New Deal and expansive national power)
        - a. free speech, right to counsel in capital cases
          - i. Ct. decides each right on its own merits (refuses to incorporate dbl. jeopardy and self-incrimination provisions)
          - ii. Ct. applies a standard:
            1. does this right count as a fundamental right of liberty
            2. or of the very essence of an ordered scheme of liberty
    - iii. debate between Justice Black (total incorporation) and Justice Frankfurter (piecemeal incorporation)
      1. Black: all of Bill of Rights, only Bill of Rights
      2. Frankfurter: some in Bill of Rights, possibly including others
    - iv. Ct.’s evaluation of incorporation initially adopts pretense of interpreting “liberty” in 14<sup>th</sup> Am. as including incorporated rights, later drops pretense
      1. Bill of Rights protections NOT incorporated largely include those rights whose enforcement is unnecessary or redundant (although 2<sup>nd</sup> Am. has changed)
      2. every important constitutional right now applies equally to fed. and states
    - v. equal protection right?
      1. applies to states but not to federal govt. (no redundancy, as with due process clause)
        - a. significant in *Brown v. Bd. of Ed.* (doctrine of reverse incorporation)
      2. 13/15 Am. apply on their face to the nat. govt. and the states
  - c. to incorporate rights, Ct. must transform their substantive meaning (since rights were originally conceived of as being possessed BY states – see establishment clause history above)
    - i. so, the meaning of the right must be changed
      1. reinterpreted as individual rights, applied against any government
        - a. vastly different definition than originally intended
      2. so, SC creates “fictional history” of rights as individual
        - a. See *Heller* and recreation of 2<sup>nd</sup> Am. right as individual
          - i. enables court to easily decide issue in *McDonald*
            1. incorporation not decided in *Heller*, since jurisdiction was Washington, D.C. (creation of fed. Congress)
      - ii. Justice Thomas is the only Justice advocating original understanding re: incorporation
    - d. Breyer/Ginsburg/Sotomayor (*McDonald* dissent):

- i. 2<sup>nd</sup> Am. alone should be deemed not fundamental enough to incorporate against the states
- e. Stevens dissent (*McDonald*)
  - i. return to early twentieth century approach
    - 1. conceive of due process and liberty as protecting certain interests (instead of moving rights from one place in the constitution to another)
      - a. this approach would protect abortion, privacy, etc. but not nec’y right to bear arms (other ordered republics prohibit gun ownership without infringing on liberty/due process)
  - ii. Scalia response:
    - 1. judges cannot choose which rights are consistent with “liberty,” etc., so incorporated rights should only be those included in Bill of Rights
- f. 9<sup>th</sup> Am. as a potential signal that new rights should be incorporated
  - i. but, Ct.’s hesitant to read 9<sup>th</sup> Am. as a “blank check” to apply rights to state govt.’s
- g. Expansion of equal protection to cover other forms of discrimination, beyond race
  - i. doctrine applied to race carried over to apply to gender, and beyond

LXXXVI. Civil Rights Cases and the **state action problem**

- a. 14<sup>th</sup> Am. protections only apply to state govt.’s, not to individual (private) actors
  - i. state action problem applies to entire Constitutional structure of rights (not just race)

LXXXVII. *Civil Rights Cases*

- a. Facts:
  - i. 1875 Civil Rights Act
    - 1. prohibited race discrimination in hotels and public accommodations (but not schools)
    - 2. direct precursor to 1964 Civil Rights Act (upheld in *Ollie’s BBQ* and *Heart of Atlanta Motel* under Congress’ Commerce power)
      - a. did not use 14<sup>th</sup> Am. power in these cases, due to precedent of *Civil Rights Cases*
- b. Holding:
  - i. strikes down 1875 Civil Rights Act; a private individual cannot deprive a citizen of his constitutional rights
    - 1. Congress cannot enforce 14<sup>th</sup> Am. to reach private discrimination/conduct
      - a. same logic as modern court in *Morrison* (Violence Against Women Act)
    - 2. but, what about 13<sup>th</sup> Am.?
      - a. directed explicitly and self-consciously at private conduct
      - b. Ct. acknowledges that congress can target the “badges and incidents” of slavery but reads such “badges and incidents” narrowly, not to include discrimination in accommodations
        - i. this result has been analogized in future cases (1918 compulsory draft case; child abuse in *DeShaney*; Violence Against Women in *Morrison*; 13<sup>th</sup> Am. invoked to protect abortion rights – analogous to enslaved women forced to bear children)
    - 3. allows private violence, private exclusion of blacks from accommodations
- c. Notes:
  - i. incorporation of rights applied against the national government to states, through interpretation of 14<sup>th</sup> Am. due process clause
    - 1. broad reading of “liberty” in 14<sup>th</sup> Am. due process clause to include those rights in the Bill of Rights
  - ii. state action problem in Civil Rights cases:
    - 1. state governments violate equal protection through inaction (not preventing private race discrimination that it could prevent)

- a. argument fails in Civil Rights Cases, since Civil Rights Act applies to all states, regardless of record of discrimination (anti-discrimination not tailored to address actual harms) (Bradley’s correspondence)
  - i. as in *Shelby County* (same anti-discrimination regime applied to all states, regardless of evidence of discrimination in each particular state)
- b. holding can be interpreted as allowing federal legislation to address state inaction
  - i. this interpretation has not always prevailed in state action cases
    - 1. *Morrison* – state inaction implicated specifically; argument categorically rejected by court, who point to private nature of domestic violence
- iii. states may pass statutes prohibiting private discrimination (re: race, sexual orientation, disability, religion, etc.)
  - 1. modern understanding: private action is not subject to constitutional law (may be regulated by statute) and cannot be equated to state action by pointing to a state’s omission to prevent such action
    - a. more restrictive than expansive reading of Civil Rights Cases (where constitutional issues arise when states can prevent private discrimination but do not do so)

LXXXVIII. Modern state action doctrine:

- a. spectrum between private action and public (state) action
  - i. also constitutionally protected activity at each pole (for instance, first amendment rights to expressive association; freedom of religion, etc.)
    - 1. area in between the poles can be considered “constitutionally indifferent”
    - 2. protected activity is often self-limited (for instance, exemptions in Title VII and other anti-discrimination statutes)
  - ii. constitutionally protected right to arrange own living arrangements (court recognizes parental autonomy, etc., allowing private discrimination as regarding the home/familial relationships)
    - 1. also, sexual autonomy, right to contraception, gay sex, etc.
  - iii. further protection of private discrimination:
    - 1. permitted by free exercise clause for religious organizations (e.g. churches do not have to hire female/Jewish priests)
- b. first amendment claims of expressive association
  - i. *Dale*
    - 1. holding: Boy Scouts may discriminate against gays, despite state anti-discrimination statute, since statute would violate BSA’s freedom of expressive association
    - 2. dissent (Ginsburg):
      - a.
  - ii. *Christian Legal Society Chapter v. Hastings*
    - 1. holding: law school permitted to refuse funding to Christian group but would not be permitted to force group to accept gay members
      - a. only applies to a public law school (otherwise, student group would not have a constitutional claim)
  - iii. not so with Jaycees (male membership not crucial to group’s expression)
    - 1. group does not have a clear message (or, message does not concern gender of members)
  - iv. St. Patrick’s Day parade
    - 1. *Hurley*
      - a. Irish parade organization has a first am. right to exclude gay group from parade, despite MA statute prohibiting discrimination based on sexual orientation

- i. holding: MA may not apply statute to parade, since parade group has 1<sup>st</sup> Am. right to express traditional Irish (Catholic) values

v. *Rumsfeld v. Fair*

- 1. law schools challenge Solomon Am. (requiring schools to allow military recruiters on campus, or risk losing federal funding)
  - a. law schools argued that Solomon Am. violated expressive association rights, since it would dilute its anti-discrimination message
    - i. holding: hosting interviews is not “communication” or expression, so does not compromise the law school’s expressive message; also, only compelling law school to allow temporary visitors, not members of the community
- c. Constitutionally indifferent sphere:
  - i. everything other than families, churches, some types of private clubs
  - ii. govt. CAN prevent private actors from discriminating in these contexts, but may choose not to do so

LXXXIX. *Hobby Lobby*

- a. challenge to Affordable Care Act’s provision that private employers provide health insurance for their employees, including reimbursement for contraception
  - i. invokes Religious Freedom Restoration Act
    - 1. *See City of Burney* (RFRA struck down as applied to state/local governments)
      - a. but, RFRA still applies to federal statutes (fed. govt. can require its own laws to exempt religious objectors to a given federal statute)
  - ii. statutes that are silent on religious objections should be read as not to apply to religious objectors
- b. does RFRA compel exemptions for religious objections to ACA contraception provision by corporations?
  - i. must show a substantial burden
  - ii. some constitutional rights (free speech, 4<sup>th</sup> Am.) have been held to protect corporations as well as individuals

XC. government contributing to private discrimination

- a. government’s power to prevent discrimination by enacting statutes
- b. government benefits (maintenance of transportation, etc.) service private actors
- c. police protection to enforce private rights (fire, gas, electric)
- d. structure of market economy that allows for private enterprise (contracts, torts, property)
  - i. incorporation of business, federal currency, etc.
- e. government as a “partner” with private (discriminating) actor
  - i. parallel with other types of discrimination (freedom to choose marriage partner dictated by state statute – permits discrimination on some bases but not others, such as quantity)
  - ii. complicates the state “action” requirement as a but for cause of discrimination

XCI. *Miller* (cedar rust case):

- a. Facts:
  - i. govt. orders cedar trees to be cut down
    - 1. economically-important apple industry in Virginia, compared with little use for cedar trees
  - ii. cedar tree owners argue violation of Takings clause
- b. holding:
  - i. not a taking that requires just compensation; Virginia had to choose between property of one and property of another, no less of a choice to act or refrain from acting (just as responsible for inaction in allowing apple trees to die)
  - ii. argument that choice to NOT act to prevent discrimination is equivalent to state discriminating itself

XCII. *DeShaney v. Winnebago County*

- a. Facts:
  - i. father physically abuses son, county social workers aware of abuse but do not take son away, father kills son
  - ii. mother sues county for violating her due process rights
    1. tantamount to the state inflicting physical harm on son
- b. holding:
  - i. state did not make a choice to fail to prevent child abuse
  - ii. holding constitutes the rule, *Miller* the exception
- c. Dissent (Brennan):
- d. Notes:
  - i. rule:
    1. if govt. does nothing, it is almost always not liable for any constitutional violation
    2. distinguishing acts from omissions is problematic re: the government, since the govt.'s role is pervasive
      - a. role of social services in lives of DeShaney family
      - b. cannot envisage situation in the absence of government, since statutes provide all precursors for ultimate injury
    3. only exception is in prison/custodial settings (prison officials can be held responsible for injuries caused by other prisoners)
      - a. impossible to distinguish omission from surrounding action, considering government's role in sanction and imprisonment
      - b. but, just an extension of the issue in *DeShaney*?
  - ii. alternative seems equally unacceptable
    1. government as responsible for every private act by its omission, since it could always structure itself to prevent any action
      - a. so, inaction is generally not considered a cause of discrimination, not subject to regulation
  - iii. what to do when two types of constitutional rights conflict?
    1. preferably, democratic discretion allows courts to avoid deciding which rights to prioritize
  - iv. state action problem:
    1. court's primary tool to avoid "constitutionalizing" all conflict between private actors
    2. method:
      - a. focus first on state's affirmative acts causally connected to injury
        - i. child custody rules, acts of social workers, etc.
      - b. determine whether certain acts contributing to injury were violations of a constitutional right (for gender discrimination, state must INTEND to discriminate based on gender; must have gender in mind; discriminatory purpose)
        - i. state action was not intended to harm child (does not violate anyone's constitutional rights)
  - v. WWII to 1964
    1. court chipping away at racial segregation

XCIII. *Shelley v. Kraemer* (1948)

- a. Facts:
  - i. racially restrictive housing covenants (purely private discrimination)
- b. Holding:
  - i. entering into private contracts alone could not violate equal protection
    1. but, state court enforcement of those contracts counts as state action and violates equal protection

- ii. rejects argument that enforcement of racially-restrictive housing covenants against whites causes enforcement not to violate equal protection clause

c. Notes:

- i. pattern of prior discrimination
- ii. judicial action as state action (contract enforcement)
  - 1. discriminates on the basis of race? or just enforcing any contract without regard to content
  - 2. state must intend to discriminate, rather than decisions causing discriminatory results
- iii. never cited as precedent
  - 1. stands for the proposition that the court “sometimes cheats” to regulate some forms of discrimination
- iv. *Buchanan*:
  - 1. statutes cannot mandate discrimination
- v. does it really matter whether discrimination is achieved by private or state action?

XCIV. *Burton v. Wilmington Parking Authority* (1961)

a. Facts:

- i. private restaurant located in publicly-owned parking garage, discriminates against blacks

b. Holding:

- i. state facilitation of private discrimination constituted violation of equal protection
- ii. municipality only acting as a landlord
  - 1. but, although the restaurant is a private actor, the state is “facilitating” the private discrimination (state so “entangled” with the operation of the private entity that it should be considered a partner)
    - a. extent of facilitation (since state is always facilitating activities within its jurisdiction to some degree)

XCIV. *Moose Lodge v. Irvis* (1971)

a. Facts:

- i. state issues liquor license to club that refuses to admit blacks

b. Holding:

- i. issuing liquor license does not constitute state action

c. Notes:

- i. how to reconcile *Moose Lodge* and *Burton*?
  - 1. post-Civil Rights Act (1964) decision
    - a. once equality of accommodations was mandated by statute, the court no longer felt that enforcement of non-discriminatory accommodations was unnecessary (preferred to defer to legislature the whole time)
  - 2. sit-in cases, pre-Civil Rights Act
    - a. argued that state enforcement of trespass statutes violated equal protection (citing *Shelley v. Kraemer*)
      - i. direct challenge to segregation
    - b. court reacts by addressing each case on its facts, so as to free all of the petitioners, without creating precedent

XCVI. *Marsh v. Alabama* (1946):

a. Facts:

- i. company town (officially private, governed like any public municipality)
- ii. security officer arrests Jehovah’s witness

b. Holding (Black):

- i. enforcement of trespass law violates the 1<sup>st</sup> Am.
- ii. violation would still exist even if state courts had not been involved in enforcing the law
  - 1. public has identical interest in communication rights in private and public towns (identical interest in free expression)

- a. but, parallel to newspapers? not typically how state action analysis works
  - 2. limiting principle:
    - a. public function notion
    - b. private actors may not violate constitutional rights when performing functions that are not traditionally performed by the government
      - i. so, would not apply to newspapers
    - c. extension of rationale to “white primaries” by Democratic party
      - i. *Smith v. Allwright* (1944)
- c. Notes:
  - i. exception to state action doctrine:
    - 1. officially private actors should be understood as de facto state actors for purposes of constitutional analysis -> **public function** argument
      - a. series of cases focusing on actions of private actors, re-labeled as public actors
    - 2. one strategy by court:
      - a. “fudge” the analysis, as in *Shelley v. Kraemer*
    - 3. alternative approach:
      - a. public function argument
  - ii. after public function doctrine, court confronted with defining what constitutes a public function
    - 1. reluctant to impose public function label, as regarding:
      - a. heavily-regulated industries that avoid due process
      - b. shopping centers that restrict speech in leafleting (modern equivalent of town squares)
      - c. private schools that restrict the speech of students or teachers
        - i. but, charter schools (usually nominally labeled “public” as the state) have been classified as state actors under public function analysis
        - ii. same for private prisons, operating under government contract
        - iii. discriminatory preemptory challenges of jurors in civil litigation
          - 1. unconstitutional for private parties or their lawyers to strike potential jurors on the basis of race or gender
    - iii. formulating limitations:
      - 1. function must traditionally be an *exclusive* state function
        - a. but, there must be at least one private party (the respondent)

**XCVII. *Plessy v. Ferguson* (1896)**

- a. Facts:
  - i. statute requiring separate but equal railroad cars
- b. Holding (Brown):
  - i. separation/segregation is consistent with mandate of equality
    - 1. Court endorses Jim Crow segregation
  - ii. equal protection clause:
    - 1. prohibits unequal treatment, silent on separation/segregation
    - 2. original understanding of 14<sup>th</sup> Am. was likely not to compel integration (or that equality in cases like *Plessy* was even required)
      - a. original intention of equal protection clause was to create equality in *civil* rights, not equality in other types of rights (political, such as voting; social, such as accommodations); “equal protection under the *law*”
  - iii. 14<sup>th</sup> Am. not intended to enforce social equality under terms unsatisfactory to either
    - 1. must be the result of voluntary consent of individuals
      - a. private choices
      - b. similar to government’s reluctance to regulate the family sphere (and living arrangements, etc.)

- i. almost as if there is no state action
        - 1. but, violation of the segregation statute will result in imprisonment (state action)
        - 2. but, Jim Crowe was enforced by private pressure/norms, backed by threat of government coercion
          - a. so, even if the statute disappeared, the practice would not change (train cars would remain segregated)
      - 2. legislation is powerless to correct social inferiority of one race
      - 3. 14<sup>th</sup> Am. as minimum requirement for all citizens to be able to access civil mechanisms
    - iv. fallacy of dissent:
      - 1. “badge of inferiority” is not inflicted by government or statute, it is self-inflicted
      - 2. outside of government’s domain of responsibility
      - 3. hypothetical discrimination law passed by a “black legislature”
  - c. Dissent (Harlan):
    - i. segregation laws, passed by white legislatures at a time when blacks were dis-enfranchised, had the intent to subordinate blacks, transmit the message of white superiority
      - 1. common understanding of intention/meaning of segregation
        - a. although majority might admit this intention, they would argue that it is legally-irrelevant (not a constitutional harm, since it does not result from law; result of private understandings)
    - ii. constitution is colorblind/no caste here
      - 1. Harlan: former slaveholder, opposed Reconstruction Amendment
        - a. change of heart re: race after witnessing lynching of blacks after Civil War
      - 2. does not apply to Chinese
- d. Notes:
  - i. Homer Plessy:
    - 1. 7/8ths white, argues that Louisiana’s denial of “whiteness” constitutes deprivation of property
      - a. Court also rejects this argument, leaves determination of race to state statute (one drop, etc.)
    - 2. argues:
      - a. legislation transmitting message of inferiority teaches the public that inequality is just (not just reflecting a pre-legal understanding)
        - i. can’t draw a clear line between the symmetry of the statute and the social asymmetry of meaning
      - b. racial segregation is irrational (race is irrelevant to government decision-making, as is hair color, house color, etc.)
        - i. adopted by the dissent
      - c. current SC doctrine: requires that all governmental decisions classifying people must be “rational” or “reasonable”
        - i. arbitrary classifications are per se unconstitutional
  - ii. arguably creates a “private function” exception to state action doctrine
    - 1. statute just realizes existing social functions
    - 2. as much about state action as the content of equal protection (and the limits of the domain in which it protects against racial discrimination)
      - a. reminiscent of the category on one end of the spectrum where activity is so private that it should itself be constitutionally-protected from state regulation (family, home, etc.)

XCVIII. *Cummings*

- a. Facts:

- i.
  - b. Holding (Harlan):
  - c. Notes:
    - i. holding by Harlan: author of dissent in *Plessy*
    - ii.
- XCIX. *McCabe* (1914)
- C. *Sweatt v. Painter*
- a. Facts:
    - i. black student denied admission to University of Texas law school
      - 1. argued that separate black law school was not equal
  - b. Holding:
    - i. equality of public education is required under “separate but equal” doctrine
    - ii. tangible and intangible factors contribute to inequality
      - 1. reputation as well as size of library
      - 2. also, exclusion of white population deprives black students of interaction with white students
  - c. Notes:
    - i. NAACP strategy
      - 1. target graduate schools, knowing that government will never have resources to fully fund separate but equal schools
        - a. less opposition to desegregation in higher education
        - b. unequal divisions more clear in professional schools
      - ii. black veterans taking advantage of GI bill to apply to colleges and graduate schools
- CI. *Brown v. Board of Education of Topeka (Brown I)* (1954)
- a. Facts:
    - i.
  - b. Holding (Warren):
    - i. holding appears to contradict controlling law and original understanding of 14<sup>th</sup> Am.
    - ii. leading precedent – *Plessy*
      - 1. numerous challenges to school segregation struck down
    - iii. Warren holds that original understanding is not inconsistent with school integration, alternatively that original understanding is inconclusive
      - 1. but, disingenuous in this holding (original understanding clearly did not envisage school integration)
        - a. Bickle’s memo for Frankfurter concludes as much
          - i. but, legislative history suggests that equal protection of the law does not include only civil rights or a specific set of applications
            - 1. rather, a framework that could be adapted by courts to reflect changing circumstances (living constitution argument)
    - iv. segregation of schools is unequal treatment on account of race
      - 1. contrary to *Plessy* (symmetrical separation, no inequality)
        - a. Ct. rejects *Plessy* holding
      - 2. segregation of children generates a permanent feeling of inferiority; psychologically damaging and detrimental to race relations (stigma argument)
        - a. argument in Harlan’s dissent in *Plessy* (rejected by majority)
        - b. underlying fallacy of *Plessy* argument of separate but equal
      - 3. adverse effect on educational progress of children (black children at an educational disadvantage)
        - a. criticism:

- i. SC after *Brown* issued a series of decisions in other spheres (transportation, beaches, golf courses, etc.), with no further explanation
      - 1. decisions based on *Brown* (educational disadvantage does not seem to be a necessary feature)
    - b. footnote 11:
      - i. Warren cites social science empirical studies supporting educational argument
      - ii. widely criticized rationale
        - 1. argument that decision should have rested on unambiguous legal arguments, rather than fallible scientific fact
      - iii. now considered “scientific racism” (mainstream consensus at the time)
        - 1. but, still more advanced scientific understanding than under *Plessy* (genetic disadvantages)
  - v. segregation laws as state action
    - 1. social stigma is a sufficient harm, and is created by segregation laws (not solely a private construction)
- c. Notes:
  - i. dismantling of Jim Crow segregation
    - 1. recognized as legally correct, even by opponents of affirmative action
  - ii. Justices Vinson and Reed – initially opposed to dismantling segregation
    - 1. Frankfurter and Jackson – wavering
      - a. personal views re: immorality of segregation conflicted with their legal judgment that the equal protection clause provided no basis for enforcing integration of public schools
        - i. believed that *Plessy* was rightly decided
        - ii. both appointed by FDR to consolidate “switch in time”
          - 1. believed that court should not stand in the way of progressive legislation
          - 2. Jackson’s dissent in *Korematsu*:
            - a. importance of separating law from politics
            - b. limited role of courts in deciding deeply-contested political issues re: constitution
          - 3. Frankfurter: Nazi Germany and Jim Crow are moral equivalents
    - 2. Jackson’s proposed concurrence:
      - a. concurring in judgment but maintaining that the court’s holding is an act of civil disobedience (illegal decision)
        - i. convinced to join majority after Warren visited Jackson in the hospital
    - 3. Frankfurter stalls for time
      - a. in the meantime, Vinson dies and Eisenhower appoints Earl Warren as Chief Justice
        - i. Warren convinces court to speak with a unanimous voice
        - ii. opinion written to be read from the bench and broadcasted to the public via radio
  - iii. Warren – ideological holding? or living constitutionalism?
  - iv. Weschler criticism:
    - 1. Toward Neutral Principles
      - a. illegal subversion of democracy by the court; “naked power organ”
  - v. changing social circumstances for blacks between WWII and *Brown* (Klarman)

1. external political, social, economic changes made *Brown* possible where it was inconceivable in 1896
  - a. made social change (desegregation) inevitable, whether or not *Brown* had been decided – broader changes in American society in respect to race, external to law, courts, and constitutional understandings
2. parallels to switch in New Deal era
  - a. political forces can upend longstanding constitutional understandings (**externalist perspective**); not internal to law
  - b. change internal to law (**internalist perspective** of legal change)
    - i. justice’s evolving understandings of limitations on their power, the power of Congress
  - c. two understandings not necessarily incompatible; narrow (internal) v. broad (external) foci
    - i. judicial decisions take place within political structure, within context of historical period
    - ii. explanation for Justice Roberts’ switch:
      1. equivalent question in *Brown*: extent to which the court hastened desegregation, without traditional mechanisms of social change (legislation)

## CII. *Bolling v. Sharp*

- a. Facts:
  - i. decided the same day as *Brown*
  - ii. “reverse incorporation case”
- b. Holding:
  - i. segregation held to be unconstitutional in Washington, D.C.
    1. 14<sup>th</sup> Am. does not apply to fed. govt.
    2. Ct. holds that due process clause of 5<sup>th</sup> Am. protects the same rights as the equal protection clause of the 14<sup>th</sup> Am.
      - a. as in *Brown*, ignores original understanding
      - b. “unthinkable” that the constitutional would bar segregation by states but not the federal government

## CIII. *Brown II*

- a. Facts:
  - i. Ct. ordered re-argument on remedy question
  - ii. unclear what affirmative steps to desegregate *Brown I* mandates
- b. Holding:
  - i. remand cases to district courts, ordered to integrate “with all deliberate speed”
    1. little actual impact on integration
- c. Notes:
  - i. post-*Brown I* effect on desegregation
    1. states simply removing desegregation laws from the books would have little actual effect
      - a. desegregation could always be maintained through informal norms and social enforcement
      - b. in context of schools, neighborhood schooling results in de facto segregation
        - i. as opposed to de jure segregation (segregation by law)
          1. does *Brown* prohibit only de jure segregation?
          2. *Brown I* opinion sends mixed signals
            - a. stigma argument – only results from state-imposed segregation

- b. educational disadvantage argument – requires actual parity in schooling, integration

- ii. “all deliberate speed”
  - 1. intentionally flexible requirement (anticipating Southern resistance)
    - a. stalls for time until a solution to compel South to buy into integration emerges
  - 2. power of the gavel v. power of Southern populations
    - a. national military eventually used, but under the control of the President (must wait until the President is in agreement with the Court)
    - b. at the time of *Brown II*, President cautioning moderation and restraint
- iii. politics in the South moved far to the right after *Brown* (massive resistance to racial equality)
  - 1. legal and extra-legal resistance

CIV. *Cooper v. Aaron* (1954)

a. Facts:

- i. Gov. Faubus stationed troops in Little Rocks to prevent integration, National Guard called in
  - 1. similar to James Meredith blocked admission to Ole Miss

b. Holding:

- i. court orders desegregation to proceed, asserting judicial supremacy
  - 1. court’s confidence bolstered by Eisenhower’s decision to back its decisions with the military

c. Notes:

i. *Griffin* (1964)

- 1. court holds that shutting down of public schools to prevent integration is unconstitutional
- 2. ten years after *Brown*

ii. Civil Rights movement:

- 1. lunch counter sit-in’s; effect of television
- 2. strategy of non-violent provocation; freedom riders
- 3. George Wallace election on a segregation platform
  - a. Birmingham; Bull Connor, incapable of refraining from violence
- 4. Civil Rights Act of 1964
  - a. authorizes the government to enforce desegregation
  - b. immediate dismantling effect on segregation
- 5. Voting Rights Act of 1965

iii. Klarman:

- 1. effect of *Brown* on desegregation were perverse and accidental
  - a. decision catalyzed Southern racists, easier for Civil Rights activists to provoke violence

CV. *Green*

a. Facts:

- i. “freedom of choice” plans; choice is not really free (choosing to desegregate met with retaliation)

b. Holding:

- i. constitutional problem? no state action
  - 1. no enough for the school board to allow private choices to allow segregation; school board must take *affirmative steps* to transform the schools from dual schools to a unitary school system
    - a. not just the legal status; actual desegregation mandated

c. Notes:

- i. neighborhood schools, rather than freedom of choice – results in desegregation in rural communities

1. but, what to do in the cities? neighborhood race divisions result in de facto segregation

CVI. *Swann v. Charlotte-Mecklenburg Board of Education*

a. Facts:

- i. neighborhood school system in Charlotte keeps schools segregated
  1. district judge mandates elaborate bussing system
    - a. where does district judge get the power to mandate bussing system, if government is not doing anything to further segregation?
      - i. no intentionally discriminatory choice re: school system (posture of neutrality)

b. Holding:

- i. endorses remedy of bussing to address school segregation
  1. insists that only de jure segregation violates the constitution
    - a. if govt. is not involved in further segregation, no constitutional issue is presented
  2. approves bussing by embracing a “presumption”
    - a. in school districts that had previously practiced de jure segregation (every Southern school district), then it is presumed that any de facto segregation is a causal result of the prior decision to legally segregate schools
      - i. logic – families have relocated to live near schools
        1. empirically, racial segregation in neighborhoods was NOT a result of segregation of schools
          - a. when schools were desegregated, neighborhood and housing segregation became MORE pronounced
  3. presumption:
    - a. justices are not prepared to live with segregated schools, even if it means bending the law (and bending facts with empirically-questionable theories)

c. Notes:

- i. desegregation strategy:
  1. *Green* for rural schools
  2. *Swann* for urban schools
- ii. as a result, southern schools become more integrated than northern and western schools (since no legacy of de jure segregation in the North)

CVII. *Keyes v. School District*

a. Facts:

- i. segregation in Denver schools (never mandated by statute)
- ii. but, legacy of informal methods to maintain segregation
  1. gerrymandering school districts to maintain racial segregation (intentional decisions, based on race = unconstitutional)
    - a. but, only affects a small part of the school district

b. Holding:

- i. so long as P’s can show that there was de jure segregation in “some meaningful portion” of the school district, district-wide relief is justified under *Swann* presumption
  1. Northern cities treated the same as those in the South

c. Concurrence (Powell):

- i. attacks de jure/de facto (state action limitation) distinction
  1. school districts should have an affirmative obligation to desegregate, even if solely the result of private action
    - a. state action limitation should be irrelevant to constitutional principles
      - i. radical opinion re: state inaction
        1. applies only to school context (state acts or omissions)

2. not fair to treat South and North differently
3. politically-savvy
  - a. if North was forced to bus students, political resistance would cause the end of bussing; proven to be correct

- d. Notes:
- i. bussing:

1. Boston race riots (“Common Ground”)

CVIII. *Milliken v. Bradley*

- a. Facts:
- i. Detroit bussing case; broad demographic trends involving “white flight” to the suburbs, increasing concentration of minorities in the city, with massive population decrease
    1. desegregation under *Swann* necessitated bussing between city and suburbs
- b. Holding:
- i. rejects bussing from suburbs if de jure segregation only took place in the urban school system (absent showing of de jure segregation in the suburbs, which were never necessary, due to homogeneity of white population in the suburbs)
- c. Notes:
- i. bussing’s disastrous effect from social policy perspective (causes remaining white in the city to flee, where they are safe from bussing system)
    1. *Swann* and *Keyes* are the stick which drives whites to the suburbs, *Milliken* is the carrot reassuring them that they would not be bussed into urban schools
      - a. results in poor, urban schools attended by minorities; wealthy, successful suburban schools, attended by whites
  - ii. unclear who is benefiting from racial integration in public schools (more important to improve the opportunities available to black students)
    1. emphasizing the equality prong (Prof. Derrick Bell’s argument)
      - a. if schools were to be segregated anyway, improve black schools
      - b. District judges adopt this argument out of necessity

CIX. *Missouri v. Jenkins (Jenkins II)* (1995)

- a. Facts:
- i. Kansas City schools- history of various forms of de jure segregation
    1. rejects bussing (large percentage of remaining whites will flee to suburbs)
  - ii. orders drastically increased funding for city schools (creation of magnet schools)
    1. under logic that whites will re-enter city, thus creating more integration
    2. actual rationale- improve education of urban students (emphasizing low education achievement in urban schools; educational disadvantage comes from de jure segregation, reminiscent of *Brown*)
      - a. inter-generational transmission of educational disadvantage
- b. Holding:
- i. rejects both of the above rationales
    1. argues that educational disadvantage must be empirically linked to de jure segregation, which was impossible (as was not asserting as concerning housing patterns in *Swann*)
    2. rejects *Brown* educational disadvantage argument
    3. white students in affluent suburbs are “off-limits” to bussing under *Milliken*
- c. Notes:
- i. fewer school districts are now under federal supervision (run under desegregation decrees)

CX. Effect of *Brown* in retrospect?

- a. beginning of the end of Jim Crow
- b. perception of Court/judicial review as protector of individual liberties
- i. as opposed to *Plessy*, *Dred Scott*, New Deal opposition

- c. Klarman argument:
  - i. desegregation would have happened anyway, might have happened more quickly and peacefully
- d. hard to view desegregation as a success from a social policy perspective
  - i. now, schools more segregated than before *Brown*, more unequal

**CXI. Equal Protection Methodology: Two-Tiered Approach**

- a. EP – not a blanket protection for all groups in society (every law/policy/decision classifies society into groups (*discriminates*), imposing burdens on some for the benefits of others)
  - i. criminal laws, min. wage laws, etc.
  - ii. Civil Rights Act of 1964
    - 1. benefits racial minorities at the expense of Southern whites who are interested in discriminating
- b. Which kinds of classifications are permissible? Which groups can be selectively burdened? On what basis?
  - i. two-tiered structure of EP, based on:
    - 1. how has the govt. defined the group (“means”)?
      - a. Default: Rationality review
      - b. Suspect classifications = heightened, or strict, scrutiny
    - 2. what is the goal that the govt. is pursuing (“ends”)?
    - 3. Is there a sufficient connection between the means the government is using and the ends it is pursuing (“fit” or “nexus”)?
  - ii. categorically, certain types of groups and classifications (especially those based on race or gender), are treated differently
    - 1. court suggests that analysis of constitutionality of a classification should not be based on which group is targeted, but on how closely tailored (fit) the classification is to the government’s interest
      - a. when groups not based on race or gender are the subject of the classification, the fit need not be as close as with race/gender

**CXII. *New York City Transit Authority v. Beazer* (1979)**

- a. Facts:
  - i. NYCTA forbids hiring of any individual who uses narcotics, including methadone users
    - 1. sub-group of methadone users argue:
      - a. as a class, they are statistically no less employable than any randomly selected individual
        - i. as defined by the government, the class of methadone users is no less employable than any other applicant
- b. Holding (Stevens):
  - i. classification does not violate EP
    - 1. government may exclude a class of persons if they have a “relevant purpose” for doing so (safety)
      - a. in context of personnel decisions
      - b. EP analysis and governmental policymaking
        - i. all rules are under- or over-inclusive, relevant to its purposes
        - ii. courts have acknowledged that they are less capable of analyzing the efficacy of rules based on agency expertise
          - 1. judicial review of agency action typically focuses on procedure, rather than substance
  - ii. test:
    - 1. whether the exclusion of methadone users bears a **rational relationship** to policy goal
    - 2. classification is arbitrary, violates EP?

- a. equal protection should police government's drawing of classifications to ensure that it is tailored to its policy objectives
      - i. here, government purpose = general objectives of safety and efficiency in city employees
  - iii. all job applicants need not be treated the same
    - 1. distinguishing amongst job applicants can be done using classifications (no blind people, high school graduates only, etc.)
      - a. reasons for classification (applicants in these categories less "employable") need not be borne out in each individual case
        - i. only if, on average, group members are less employable
- c. Notes:
  - i. "stereotyping" – attributes of a group attributed to each individual member of the group, even if they do not possess those attributes
  - ii. legitimate v. illegitimate govt. purposes
    - 1. exclusionary line must represent a policy choice, rather than expressing animus toward a group
      - a. policy v. prejudice/bias
  - iii. rational basis test:
    - 1. law or classification must be "rationally related" to a legitimate state purposes
      - a. rationally related = fit
      - b. legitimate = permissible purposes
  - iv. govt. may satisfy equal protection by refusing to grant benefits to either class (e.g. men or women)

CXIII. *Railway Express Agency v. New York* (1949)

- a. Facts:
  - i. NY law prohibits "advertising vehicles" but allows advertising on delivery vehicles
    - 1. differentiates between advertising on
- b. Holding (Douglas):
  - i. No EP violation – rational basis for govt. action
    - 1. No requirement of EP that "all evils of the same genus be eradicated or none at all"
- c. Concurrence (Jackson):
  - i. New York City newspapers lobbied for an exemption, so that they could keep ads on their delivery trucks
    - 1. the "real" purpose behind the classification
      - a. otherwise, distinction is arbitrary as to the goal of traffic safety

CXIV. *Minnesota v. Clover Leaf Creamery* (1981)

- a. Facts:
  - i. law requiring that milk within state be sold in paper containers, rather than plastic
    - 1. actual motivations are redistributive
- b. Holding (Brennan):
  - i. Court articulates a rational basis for the government
    - 1. accepts (theoretical) environmental protection purpose, rather than (actual) economic protectionist purpose
  - ii. actual basis review:
    - 1. "states are not required to convince the courts of the correctness of their legislative judgment"

CXV. *Williamson v. Lee Optical* (1955)

- a. Facts:
  - i. legislation proscribing that only licensed optometrists may fit lenses into frames
    - 1. stated purpose: public health, consumer protection, etc.
    - 2. "actual" purpose: optometrist lobby better organized

- b. Holding (Douglas):
  - i. Legislation does NOT violate EP
    - 1. Rational basis found
- c. Notes:
  - i. relationship between purpose and fit
    - 1. cases in reality motivated by imposing a benefit on a well-organized group
    - 2. court's options:
      - a. rewarding given industry is a legitimate governmental purpose, so classification fits purpose
      - b. rewarding given industry is not legitimate, but fit is "good enough"
        - i. rationally related = conceivably related on a hypothetical set of facts
        - ii. strategy adopted by the SC

CXVI. *City of Cleburne v. Cleburne Living Center* (1985)

- a. Facts:
  - i. exemptions not offered to homes for the mentally disabled, offered to hospitals, etc.
- b. Holding (White):
  - i. Ordinance violates EP
    - 1. classification based on excluding the mentally ill
      - a. lower court = mental retardation as a "quasi-suspect class"
      - b. immutable characteristic?
        - i. but, NYTCA could refuse to hire blind bus drivers
        - ii. immutability defeats one possible government purpose (getting people to change) but does not defeat every possible purpose
          - 1. depends on permissibility of purpose
    - ii. classification NOT rationally-related to legitimate govt. interest
      - 1. based on irrational prejudice toward mentally retarded
- c. Concurrence (Stevens):
  - i. Rationality review implies that govt. purpose has legitimacy and neutrality

CXVII. *US Dept. of Ag. v. Moreno* (1973)

- a. Facts:
  - i. statute prohibiting receipt of food stamps by unrelated household members
- b. Holding (Brennan):
  - i. governmental interest is not legitimate
    - 1. bare animus toward a politically unpopular group
  - ii. apply rationality review, governmental interest was to cut off "hippies" from receiving food stamps
    - 1. but, compare *Beazer* (methadone users as an unpopular political group)

CXVIII. *Romer v. Evans* (1996) (see below)

- a. Facts:
  - i. CO Const. Am. prohibiting local govt. from enacting gay anti-discrimination statutes
- b. Holding (Kennedy):
  - i. Am. violates EP (lacks a rational relationship to legitimate state interests)
    - 1. Disadvantage imposed borne of animosity
- c. Notes:
  - i. discrimination against gays/lesbians/mentally-ill (*City of Cleburne*) should be placed on the second level of EP analysis
    - 1. but, court does not articulate its decision as such, so must base its decision on rationality review
      - a. must explain that governmental purpose is dictated by irrational animus
  - ii. See *Allegheny Pittsburg* (1989)

1. SC held that state law precluded the state's explanation of a legitimate interest (assessments of property must be based on current value, where tax assessor was weighting tax assessments in favor of long-held property)
  - a. The rare case where a regulation violates EP because of its actual, rather than stated, purpose

CXIX. Levels of Scrutiny and *Carolene Products*

- a. first tier –
  - i. rationality review
  - ii. equivalent rationality review in DP clause (after New Deal era)
  - iii. where classifications are not based on race, gender, or sexual orientations
    1. exceptions:
      - a. where a group argues that it should be elevated to second tier (mentally ill; women in early gender discrimination cases)
      - b. where a law seems arbitrary but where it cannot be distinguished from similar laws held to be rational
- b. second tier –
  - i. heightened scrutiny
  - ii. which groups are included?
  - iii. what happens when EP is applied to these groups?
- c. How does court explain this two-tier structure in light of Equal Protection?
  - i. historical understanding:
    1. concerns that motivated the Reconstruction Amendments
      - a. how literally should courts interpret original understanding?
        - i. what level of specificity? only applies to those forms of racial discrimination originally understood to violate 14<sup>th</sup> Am. (civil rights, not social rights or segregation; focus solely on descendants of slaves)
        - ii. or, on the other extreme, how far to generalize?
          1. groups that are especially victimized or oppressed
            - a. which groups?
              - i. women, gays, poor people, disabled, prisoners
    - ii. most elaborate explanation: *Carolene Products* n. 4 (see Ackerman)
      1. theory about why some groups should get special constitutional protection
        - a. structural theory, not based on historical understanding, resting on foundations of well-functioning democracy
      2. courts should not contradict the products of democratic decision making
        - a. but, when the system is “broken” in some way, courts ought to play a role in fixing the “blockage” by protecting under-represented groups
          - i. *Kattzenbach* – disenfranchised group must be protected from majoritarian oppression by enfranchising them
            1. *McCulloch* – court must protect bank because stakeholders in bank are not present in jurisdiction, cannot protect their interests by voting
      3. *Carolene Products* emerges in the wake of the New Deal judicial crisis
        - a. *Lochner* – court recognizes right of “freedom of contract”/“economic liberty,” strikes down governmental regulation of employment contracts (minimum wage laws in bakeries) (pre-Switch in time)
          - i. during this period, court invalidated hundreds of laws
        - b. post-“switch in time”:
          - i. court repudiated economic liberty as an individual right
            1. earlier decisions reflected justice's ideologically-conservative (fiscally) policy views

- a. open to countermajoritarian criticism (thwarting democratic decisions)
- c. problem of addressing race discrimination (since court must protect minorities – like business elites in *Lochner* – while standing in the way of democratic majorities passing laws that justices are morally opposed to)
  - i. solution: footnote 4 (Justice Stone)

CXX. *United States v. Carolene Products* (1938), Footnote 4:

- a. in context of typical rationality review of Congressional regulation of “filled milk” products
  - i. type of case court was striking down regularly before 1937, affirming after 1938
  - ii. in the course of announcing holding, Court suggests what it might do if regulation affected vulnerable groups
    - 1. if regulation results from an unfair democratic process (absent democratic legitimacy)
- b. John Hart Ely:
  - i. footnote theory developed into theory of judicial review
- c. n. 4:
  - i. 3 paragraphs, describing exceptions to presumption of constitutionality of democratic decisionmaking
- d. paragraph 1:
  - i. regulations that appear to be in derogation of specific constitutional prohibitions (regulations that can be tied closely to text of the constitution will be enforced – regulations carry democratic imprimatur under the constitution)
    - 1. examples: free speech
- e. paragraph 2:
  - i. heightened scrutiny of laws that restrict political processes that can ordinarily be expected to overturn undesirable legislation
    - 1. examples: restrictions on political speech or voting
      - a. these regulations are less responsive to democratic will be enacting distortions in the democratic process
    - 2. logic can be extended to laws that harm groups that are not adequately represented
      - a. *McCulloch* rationale
        - i. if its not possible to allow stakeholders of the bank to vote in Maryland elections, next best solution is to protect stakeholders’ interests in the courts
          - 1. could be invoked to address segregation in post-*Brown* era, since huge portions of black population were not enfranchised
          - 2. approximate the outcomes of a functioning democratic process
            - a. Ackerman: but, this does not help for present-day racial discrimination
              - i. when racial minorities are fully-enfranchised, voting in similar proportions as whites, can’t use rationale from paragraph 2
- f. paragraph 3:
  - i. political process is contaminated not just be formal exclusion (disenfranchisement, etc.) but by “prejudice against discrete and insular minority groups”, giving as examples racial and religious minority groups
    - 1. systematic disadvantage that is tantamount to disenfranchisement
    - 2. political disadvantage is not shared by other disadvantaged groups, like the poor, uneducated, etc.
      - a. prejudice on the part of government officials and popular majorities who are reluctant to form coalitions with these groups lead to irrational political decisions

- i. as a result, these groups do worse than they should in a representative democracy
      - 1. Ackerman criticism: problem of retaliation against legislators that would form coalitions with blacks not empirically shown at time of *CP* (especially because disenfranchisement widespread)
    - ii. court's role is to protect these groups, due to malfunctioning of democratic system
      - 1. **Political Process Theory**
      - b. contra: *Claiborne*
  - ii. Ackerman criticism: What is the source of the judgment that discrete and insular minorities do worse than they should in the democratic process?
    - 1. similar to the problems in rationality review (government's pursuit of "purposes")
    - 2. minorities should be expected to lose more in a democracy
      - a. how to determine whether these minorities are losing for an illegitimate reason?
        - i. what characteristics? discreteness and insularity of the groups
        - ii. Ackerman argument:
          - 1. discreteness and insularity are actually political advantages
            - a. contrasts with gays and Jews (identity is not inevitably visible; ability to closet or assimilate yourself makes the group less discrete)
            - b. inability to disguise identity removes possibility of "exit", so only option is to complain in political process ("voice") (Herschman)
              - i. possibility of exit results in dilution of a group's united political voice (typical in "anonymous" groups)
      - b. insularity:
        - i. groups is isolated from society but is concentrated (breadth and intensity of insularity; close-knit)
          - 1. Ackerman: lower organizing costs, constant communication, ease of overcoming collective-action/free-rider problems → all political *advantages*
            - a. contrast diffuse groups (the poor, consumers)
              - i. not well organized, little ability to mobilize to form a cohesive political interest group (again, free-rider problems)
  - g. Ackerman:
    - i. does not deny that blacks should warrant special protection under EP but denies that the court's rationale in n. 4 is logical (court has made a value judgment in a wholesale way, after being told that it is not allowed to make value judgments that thwart the will of the majority)
      - 1. court should accept that discriminating against racial minorities is morally worse than discriminating against other groups
      - 2. can't be on the side of democracy and the side of justice at the same time
- CXXI. Tier Two – "Suspect" Classifications are subject to "Strict Scrutiny
- a. in contrast to rationality review but similar
    - i. requires a weighty governmental interest
    - ii. classification must be "necessary" and "narrowly-tailored" to address a "compelling" government interest
      - 1. strict scrutiny is not an absolute ban on racial classifications

- a. see government's argument in affirmative action cases
  - i. but, these classifications are designed to advantage a group
- b. where classifications disadvantage suspect classification, "strict" scrutiny is actually fatal
  - i. last case where the court has upheld such a statute: *Korematsu* (under special wartime conditions)
    - 1. furthest the court has gone since: segregating races in prisons to prevent riots (but, not disadvantaging either race) has been suggested to be permissible in dicta (California prison system sorting of prisoners prior to screening prisoners for gang membership)
      - a. *California v. Johnson* (9<sup>th</sup> Cir.)
        - i. upheld as separate but truly equal (not disadvantaging either group; violence as a real threat)
        - ii. SC reversed under strict scrutiny (O'Connor):
          - 1. strict scrutiny always applies to racial classifications, even if will save hundreds of lives
          - 2. close to a clear rule (with important caveat re: affirmative action)

CXXII. What is race discrimination under EP?

- a. a law that, on its face, discriminates on the basis of race; racial discrim. written into the statute
- b. a law that is silent on race (facially race-neutral) but which is *motivated* by a racially-discriminatory purpose
  - i. racial purpose
  - ii. interpreted as if Congress wrote race into the statute
  - iii. *Washington v. Davis*
    - 1. laws that are genuinely racially-neutral on its face and in its motivations, but that have a discriminatory *impact* or *effect*
      - a. *Beazer* (exclusion of methadone users), may disproportionately disadvantage black and latino job applicants

CXXIII. *Washington v. Davis* (1976)

- a. Facts:
  - i. entrance exam (verbal skills test) for applicants to police department
  - ii. disproportionate failure rate for black applicants
    - 1. no argument that test was designed to disadvantage black applicants
    - 2. but, petitioners argue that test violates EP by having a discriminatory effect
- b. Holding (White):
  - i. racially discriminatory effects alone do not invalidate statute
    - 1. discriminatory purpose must be shown
  - ii. a disparate impact rule would force the court to invalidate tax codes, etc., as long as whites are disproportionately wealthier than minorities (every law with an economic impact will disadvantage poor people)
    - 1. same logic for educational requirements, criminal laws, etc.
- c. Concurrence (Steven):
  - i. legislative purpose = "evidence of what actually happened" as a result of the law
    - 1. disparate effect as main evidence of purpose
- d. Dissent (Brennan):
  - i.
- e. Notes:
  - i. cites *Keyes* (Denver segregation case)
    - 1. also, see *Swann*
    - 2. in these cases, de jure segregation rendered discriminatory effect (or de facto segregation) to violate EP

- ii. *See also Griggs v. Duke (1971)*
- iii. what options are left for the court to address disparate impacts?
  - 1. separate requirements for racial classes
  - 2. gerrymandering of every law or policy to render equal outcomes
  - 3. perpetual race-conscious decision-making
    - a. impossible; undesirable
    - b. ignores possibility that govt. could address the underlying inequalities that result in disparate impacts of race-neutral laws
      - i. social inequalities do not raise constitutional issues under EP
      - ii. distinguished from *Swann* and *Keyes*
    - c. ignoring racial inequalities presents no constitutional difficulty but does nothing to correct problems of racial discrimination
  - 4. in *Washington v. Davis*, neutral test + system of educational inequality = discriminatory hiring practice
- iv. question the “neutral” part by arguing that the government could have another policy, or an affirmative policy, that does not result in discriminatory effect (or corrects effects of underlying inequalities)
  - 1. Washington made a choice to impose a test that it knew would have discriminatory effects, while also maintaining an educational system that has unequal effects based on race, and while also having a history of segregation/discrimination
    - a. state affirmatively contributed to systematic inequality, leaves inequalities in place, chooses a test that has discriminatory effects
      - i. See state action doctrine; *DeShaney*
      - ii. but, alternative is probably unconstitutional (race-conscious legislation to correct racial inequality; affirmative action)
- v. Title VII claim structure:
  - 1. employer can defend against a claim of racial discrimination by identifying a business reason for the classification/effect (to rebut presumption of a racial motivation)
    - a. effects test under Title VII:
      - i. must balance benefits to minorities and cost to employer
    - b. works like a purpose test:
      - i. since for violations, employer can’t articulate any reason for test/practice (likely a racist practice)
    - c. result of *Washington v. Davis* suggests that there is not much difference in effects test and purpose test
      - i. result suggests an intermediate balancing test
        - 1. but, courts must perform balancing test, and virtually every law or policy can present EP problems

CXXIV. The Discriminatory Purpose Requirement

- a. discovering a single purpose of a legislature is problematic (not a group psychology idea)
  - i. rather, an interpretive construct imposed by courts onto legislative decisionmaking
- b. ask: would same law or policy have been enacted if legislators did not consider race
  - i. how plausible is the non-racial explanation?
    - 1. so, a law with disparate effects might have a plausible non-racial (or non-gendered) explanation
- c. rule stated in *Washington v. Davis*

CXXV. *Personnel Administrator v. Feeney*

- a. Facts:
  - i. MA law that give civil service preferences to veterans (98% male)
    - 1. does this employment preference reflect a gender-discriminatory purpose?
- b. Holding:

- i. finding a discriminatory purpose requires more than showing that the govt. was AWARE of the discriminatory consequences of a policy
        - 1. must pass the law BECAUSE of, not merely in SPITE of, disparate effects
    - c. Notes:
      - i. method for discovering discriminatory purpose:
        - 1. switch the groups – would legislature still have enacted policy?
- CXXVI. *Yick Wo v. Hopkins* (1886)
- a. Facts:
    - i. wooden building laundry exception permits denied to every Chinese applicant while being granted to white applicants
  - b. Holding:
    - i. discriminatory purpose found from the disparate impact of the statute’s application
      - 1. found to be discriminatory even in the era of *Plessy*
      - 2. does not examine subjective intentions of government officials
- CXXVII. *Gamillion v. Lightfoot* (1960)
- a. Facts:
    - i. Alab. statute that redraws Tuskegee border to remove every black voter from the city limits but not a single white voter
  - b. Holding:
    - i. again, disparate impact evidence of discriminatory purpose
      - 1. no other explanation for redrawing border in that fashion
- CXXVIII. *Village of Arlington Heights v. Metropolitan Housing Corp.* (1977)
- a. Facts:
    - i. non-profit developer wants to build low-income housing, denied permit
      - 1. argues that policy was motivated by city’s desire to exclude minorities (proportion of low-income residents)
  - b. Holding (Powell):
    - i. not discriminatory
      - 1. city articulates policy of maintaining neighborhoods of single-family homes
    - ii. methods of finding racial motive (what evidence is considered)?
      - 1. consult historical context to support or refute government’s explanation
        - a. cites *Griffin* (where county closed public schools in the face of a desegregation order)
      - 2. procedural norms
        - a. consistent with case at hand? if significantly more hurdles for minorities, evidence of racial motive
      - 3. legislative history
        - a. racial motives evinced by individual legislators?
          - i. typically not available
        - ii. problematic in ascribing collective intent
- CXXIX. *Hunter v. Underwood* (1985)
- a. Facts:
    - i. Alabama statute- disenfranchisement for “crimes of moral turpitude”, which include passing bad checks, etc. but not assault, etc.
      - 1. provision adopted in 1901 by an Alabama convention established by state mandate to “establish racial supremacy” in the state
        - a. suffrage committee careful to select those crimes more commonly committed by blacks than whites
  - b. Holding:
    - i. historical evidence of racial motive found to prove discriminatory purpose

1. Alabama might have been able to articulate a legitimate purpose, but for racist history behind statute

c. Notes:

i. issue of causation:

1. Alabama defends provision by arguing that an additional purpose of provision was to “take the ballot away from poor people”
  - a. court finds that racial motivation was at least part of the reason for the statute (otherwise, a poll tax would have been a more direct way of excluding poor voters)

ii. converse case:

1. purpose, with no effects
  - a. affirmative action

iii. separate but equal segregation laws

1. classify based on race, with no burden on either race
2. in *Brown*, court avoided the question about what EP says about TRULY separate but equal segregation (instead, showed why separate schooling was NOT equal; also, problem of stigma)
  - a. same answer in *Loving*

CXXX. *Loving v. Virginia*

a. Facts:

- i. 1662 Virginia law barring interracial marriage, specifying “one-drop” definition of racial composition
  1. exception for 1/16 American-Indian

b. Holding:

- i. statute struck down, even though law is racially-symmetrical
  1. court dodges the question by pointing out that the statute only applies to whites (for instance, law does not specify whether blacks and American Indians can marry)
    - a. so, determined that law was designed to maintain white supremacy
      - i. as in *Brown*, facially symmetrical law held to not actually be symmetrical
      - ii. but, court suggests that even a uniform interracial marriage statute would violate EP

CXXXI. *Palmore*

a. Facts:

- i. custody battle between two white; wife re-marries black man
  1. custody transferred to father, due to interest of child in living in an all-white household

b. Holding:

- i. court reverses decision as violating EP
  1. despite argument that social stigma re: interracial marriage that has an adverse impact on a child
- ii. unconstitutional, simply because children should not be allocated on the basis of race (regardless of asymmetrical effects)

c. Notes:

- i. see *California v. Johnson* (prison segregation case)
  1. no disadvantage to any race; still unconstitutional
- ii. court has moved away from an examination of effects, toward an almost exclusive focus on purpose
  1. presumptive ban on government race consciousness (constitutional mandate of “colorblindness”)
    - a. with the exception of affirmative action

2. under *Washington v. Davis* disparate impact rule, government would have been required to be perpetually race-conscious (opposite of colorblind in line of cases beginning with *Brown/Plessy* and concluding in *California v. Johnson*)

CXXXII. Affirmative Action

- a. should race-based affirmative action, with purpose of benefiting racial minorities, be treated differently?
  - i. Yes;

CXXXIII. *Regents of the Univ. of California v. Bakke*

- a. Facts:
  - i. challenge to UC Davis med. school affirmative action program
- b. Holding (Powell):
  - i. affirmative action is only constitutional if it is administered properly
    1. deciding vote
  - ii. affirmative action is subject to strict scrutiny
    1. applied to classifications that have the effect of advantaging racial minorities
  - iii. in the context of affirmative action, two potential compelling interests:
    1. **remedying past discrimination** (backward-looking)
      - a. only acceptable as a narrowly-tailored remedy to account for specific findings of past discrimination against the beneficiaries of affirmative action
        - i. ambiguous:
          1. discrimination on the part of UC Davis? Cal. university system? state of CA?
        - ii. but must be identifiable
          1. UC Davis can identify no past practice of discrimination
      - b. Limiting principle across *Bakke/Adarand/Crosby*:
        - i. Remedial justification must be limited to past discrimination by the government who is administering the affirmative action plan (although no explanation for why this should matter)
          1. Otherwise, extent of past discrimination in American history could potentially justify any remedial action
        - ii. Must tailor the compensation from affirmative action to those individuals were disadvantaged by past discrimination, must be proportional
          1. Can't presume that all blacks were discriminated against (no debtor/creditor races)
          2. Otherwise, stigma argument (reinforces black inferiority/white superiority)
    2. attainment of a diverse student body (**diversity justification**; forward-looking rationale):
      - a. as applied to race, "diversity" invented by Powell
        - i. but, meant as a legal term of art, rather than a moral principle
      - b. political compromise:
        - i. university admissions may take race into account for achieving diverse racial composition, so long as race was taken into account in a way that is "as invisible and as subtle" as possible
          1. also, must take other factors into account
        - ii. can't achieve this interest in a direct way (as in UC Davis' case, where 16 seats are reserved for racial minorities)
          1. Harvard example:

- a. affirmative action administered by treating race as one factor within many (a “plus factor”, like being a football player)
  - 2. but, what constitutional difference between an implicit and an explicit target?
    - a. the less visible affirmative action is, the less divisive/stigmatizing it will be
    - b. appearances are as important as reality
      - i. diversity means racial representation without making apparent the means
  - c. spheres of affirmative action are relevant:
    - i. in education, but not in employment
    - ii. only in higher education?
  - iv. must be narrowly tailored to one of the interests
- c. Concurrence:
  - i.
- d. Dissent:
  - i. colorblindness should be the rule of EP
- e. Notes:
  - i. 4/4/1 split – consistent in affirmative action cases
    - 1. Powell, then O’Connor, then Kennedy – deciding votes
      - a. Powell’s position on affirmative action becomes the basic doctrinal framework (similar to Jackson concurrence in *Youngstown*)

CXXXIV. *Adarand v. Peña* (1995)

- a. Facts:
  - i.
- b. Holding (O’Connor):
  - i. benefits must be concrete, as weighed against cost of drawing racial distinctions (strict scrutiny)
- c. Concurrence (Scalia):
  - i. court will not accept that there are creditor and debtor races but will accept that individuals should be made whole
    - 1. compare *Missouri v. Jenkins*:
      - a. state must prove that individual students are disadvantaged due to unequal education (disadvantage cannot be presumed)
- d. Concurrence (Thomas):
  - i. remedial racial preferences (racial paternalism) can be poisonous/racist (*Plessy* dissent stigma argument, adopted in *Brown* to apply to separate but equal)
- e. Dissent (Stevens):
  - i. affirmative action should be treated differently
    - 1. nothing in the original understanding of 14<sup>th</sup> Am. can be construed to NOT support benefiting racial minorities (Freedman Bureaus)
      - a. but, can always raise the level of generality in analyzing original understanding – OU was to administer equal laws
- f. Dissent (Souter)
- g. Dissent (Ginsburg)
- h. Notes:
  - i. *CP* n. 4 analysis:
    - 1. plenty of support for laws that advantage minority groups
  - ii. competing view:
    - 1. colorblindness

- a. benign racial classifications are no different from malign, or from separate but equal (any race consciousness prohibited)
- b. effects are irrelevant

CXXXV. Affirmative Action in Employment

- a. implemented by legislatures and by court-ordered remedial policies in response to Title VII violations
  - i. employers have also voluntarily taken measures to avoid litigation

CXXXVI. *City of Richmond v. Croson Co.* (1989)

- a. Facts:
  - i. similar to *Adarand*
  - ii.
- b. Holding (O'Connor):
  - i. as in *Bakke*, government must show that it is remedying past discrimination, and must be narrowly tailored
    - 1. not categorically opposed to affirmative action; just requires programs to be narrowly tailored to past discrimination
      - a. maintains that some programs will be able to survive strict scrutiny
  - ii. govt. can't rely on a generalized assertion of discrimination across the construction industry as a whole
    - 1. How much discrimination? Which firms were disadvantaged? How much should be given in compensation? Too vague
      - a. The 30% subcontracting requirement seems arbitrary
      - b. Set-asides available to Eskimos – no evidence of discrimination
        - i. Evidence that compensation is not tailored to past discrimination, but an attempt at racial balancing for its own sake (diversity argument, but not compelling enough of an interest here)
    - 2. Presume that entire gap between market share of minority contractors and their proportional representation in the community as a whole is due to discrimination?
      - a. But no evidence of causality (speculation, as in *Bakke*, where amount of minority students accepted would be speculative in the absence of evidence of past discrimination)
- c. Concurrence (Stevens):
- d. Concurrence (Scalia):
- e. Concurrence (Kennedy):
- f. Dissent (Marshall):
- g. Dissent (Blackmun):
- h. Notes:
  - i. same constitutional standard should apply to fed. govt. and states (affirmative action at any level of govt. is subject to strict scrutiny)
    - 1. differential standard not adopted
  - ii. strict scrutiny:
    - 1. what counts for a compelling govt. interest?
      - a. in employment context, only remedying past discrimination (*Bakke* interests)
      - b. in *Croson* and *Adarand*, court rejects diversity interest as not applicable in employment context
    - 2. how can an affirmative action program be narrowly tailored to fit with compelling interest?
  - iii. *Croson* set-aside plan for BME contractors modeled on the one upheld in *Fullilove*
    - 1. But, Congress has broader remedial powers than do states and local legislatures (in *Fullilove*, program was part of the Public Works Employment Act of 1977)
  - iv. In *Croson*, set-aside plan approved by all-black Richmond City Council; relevant?

- v. After *Croson* and *Adarand*, unclear whether the court still considers diversity a compelling state interest – Is *Bakke* still good law?
  - 1. Court revisits *Bakke* in *Grutter* and *Gratz*
- vi. Affirmative Action in Employment
  - 1. implemented by legislatures and by court-ordered remedial policies in response to Title VII violations
  - 2. employers have also voluntarily taken measures to avoid litigation

CXXXVII. *Grutter v. Bollinger* (2003)

- a. Facts:
  - i. Whether the use of race as a factor in student admissions by the Univ. of Michigan Law School is unlawful
    - 1. Affirmative action plan carefully designed to align to *Bakke* requirements (Harvard idealized model) of individualized, holistic assessment
      - a. Race as one factor among many (test scores and “soft” variables)
      - b. goal of achieving diversity
- b. Holding (O’Connor):
  - i. Upholds affirmative action program (contrasts with the program in *Gratz*, which is struck down)
    - 1. Reaffirms Powell’s *Bakke* opinion (and diversity as a compelling state interest)
  - ii. Affirmative action program must base admissions on individualized assessments
- c. Concurrence/Dissent (Scalia):
  - i. Benefit of cross-racial understanding is not unique to higher education (better off taught to students “three feet shorter and twenty years younger”)
    - 1. Rationale would force affirmative action in civil service system
  - ii. Affirmative action perversely designed to perpetuate discrimination (and litigation)
- d. Dissent (Thomas):
  - i. Affirmative action aims for “aesthetic” racial balancing
    - 1. See argument below re: role of affirmative action in legitimization of white hegemony in positions of elite leadership
  - ii. Cites Frederick Douglass (“let him alone”)
  - iii. Thomas shaped by his biography; confirmation hearings:
    - 1. Animus toward Washington (liberal) elites, media, Yale Law School (treated paternalistically as an affirmative action “token”)
- e. Notes:
  - i. Given that the remedying past discrimination interest is so narrow, possibility that diversity argument could be extended beyond graduate admissions context?
    - 1. Such as employment preferences for black police officers
      - a. Diversity argument – legitimize police force in eyes of the community
      - b. Unlikely to succeed, based on signals in *Adarand/Croson*, and in *Grutter* (institutions of higher learning occupy a special role in society and development of “cross-racial understandings”)
    - ii. stigma argument; contributing to racial divisiveness
    - iii. educational argument - students admitted under affirmative action “tantalizes” sub-par students who cannot succeed in “cauldron of competition” (Thomas)
      - 1. do benefits of attending higher-ranked law school outweigh costs of getting lower grades?
        - a. supported by empirical studies (using LSAT/undergraduate GPA to predict grades) (Sander)
      - 2. but, also depends on the specific school
  - iv. externalities:

1. feelings of racial inferiority, divisiveness, etc.
  - a. does not account for individual agency (individual student chooses whether to take the benefit)
- v. How is the benefit of cross-racial understanding unique to education?
  1. O'Connor: higher education as feeder for national leaders (broad benefits for society, not just individual educational benefits – since O'Connor rejects that minorities would necessarily have different classroom perspectives)
    - a. Path to leadership must *visibly* be open to minorities
      - i. Legitimacy; foundation of American class system (possibility of upward mobility) -> affirmative action perpetuates impression of mobility, which is not borne out in fact
        1. Michigan solicits amicus briefs from elite business, military leaders (unity of elite opinion supporting affirmative action)
          - a. Military – officer corps is mostly white; to maintain legitimacy of officer corps to enlisted soldiers (mostly black), use affirmative action to elevate a few minorities to leadership positions
- vi. University policy of holistic admissions, to guarantee diversity of all types; to what end?
  1. Academic success is predictive of success in college, but institutions are measuring the success of its graduates
    - a. Best students do not necessarily make the biggest impact in society; colleges look to talents outside of academics
      - i. Preferences for both football players and students from adverse backgrounds
- vii. History of university admissions process
  1. Ivy's adopted "holistic" approach after large proportion of Jews were admitted to elite institutions on the basis of their standardized test scores (allowed universities to meet specific ethnic quotas – less than 15% Jewish)
    - a. Elite colleges obsessed with "manliness" – WASP charisma, extrovert nature; described as "character", systematically lacking in Jews, Catholics, people with "homosexual tendencies" but prevalent in prep school graduates
      - i. Asian-Americans = "the new Jews"
        1. Must score 140 points higher than white applicants on the SAT's
      - ii. Holistic approach = preferences easier to disguise, easier to explain
        1. Harvard: 16.5% across decades, so implicit racial quota (despite increase in qualified Asian applicants)

CXXXVIII. *Gratz v. Bollinger* (2003)

- a. Facts:
  - i. Use of race in undergraduate admissions at Univ. of Michigan through point system (20 points for being a minority)
- b. Holding (Rehnquist):
  - i. Program struck down for using point distributions (rather than "goals" in *Grutter*)
    1. No individualized assessment
- c. Dissent (Ginsburg):
  - i. Holding requires universities to "disguise" affirmative action plans, administer them through "winks, nods, and disguises"
    1. But, as in *Bakke*, appearances make all the difference
      - a. Stigma argument

- b. But, still exists in individualized assessments – define each student’s race; race more determinative for some students than others (articulate the contours of race)

d. Notes:

- i. Distinction between program in *Grutter* (where hard variable such as test scores retain most of the weight in admissions decisions, as in all law schools) and in *Gratz* (soft variables more likely to be considered in undergraduate admissions)
  - 1. Connected to argument that graduate school is unique institution (free speech; contributing to classroom discussion; etc.)
    - a. But see Scalia’s argument that cross-racial understanding is actually more important in primary schools (“three feet shorter”)

CXXXIX. *Fisher v. University of Texas* (2013)

a. Facts:

- i. Texas undergraduate admissions – two tracks
  - 1. *Grutter*-style plan of holistic evaluation, counting race as one factor among many
  - 2. 10% plan (initiated in Texas) – guarantee admissions to top 10% of all students in state high schools (by grades and SAT’s)
    - a. Given that schools are segregated, 10% plan guarantees racial representation (31% of freshman are black or Hispanic)
    - b. Explicit purpose – to restore racial diversity after old affirmative action plan was struck down
      - i. But, plan billed as a race-neutral approach to achieving racial diversity
        - 1. Only facially neutral (was motivated by a racial purpose)
      - ii. 10% plan was not challenged in *Fisher*
        - 1. P’s argued that the 10% plan made the *Grutter*-style plan unnecessary, violates EP
  - 3. Racial effects of 10% plan
    - a. Would not pass scrutiny of *Washington v. Davis* test (would be treated as a racial classification)
      - i. Racial classification using “numbers” (specific quotas) would fail under *Bakke*

b. Holding (Kennedy):

- i. Case remanded with instructions to apply strict scrutiny (as described in *Grutter*)

c. Concurrence (Thomas):

- i. Students admitted under 10% plan were admitted without discrimination

d. Dissent (Ginsburg):

- i. Discriminatory purpose requirement applies for all racial classifications

e. Notes:

- i. *Washington v. Davis* distinction:
  - 1. Between facial use of race and non-facial use of race
    - a. Even if there is a racial purpose, does not trigger strict scrutiny unless classification is explicitly based on race
      - i. Invisible as possible (Powell in *Bakke*)
- ii. Political movement to ban affirmative action
  - 1. Michigan (like California) approved statewide initiative banning racial preferences in university preferences and contracting in employment
    - a. 6<sup>th</sup> Circuit held that repeal of affirmative action was unconstitutional; SC granted cert. in *Schuett*
      - i. SC reversed circuit’s holding in *Schuett*, upheld constitutionality of amendment barring affirmative action

2. Universities in Michigan and California (UCLA, Berkeley) had substantial decrease in minority enrollment following passage of amendments, with uptick in recent years
  - a. Administrators have denied taking race into account and have claimed to be weighing admissions toward lower-income students
    - i. But, lower-income weight would also include poor whites and Asians, can't fully explain uptick
- iii. Life span of affirmative action programs
  1. Cannot be indefinite (O'Connor in *Grutter*)
    - a. But, 25 year mark looks optimistic in light of current educational achievement statistics
- iv. Role of affirmative action in private institutions
  1. Constitution does not apply to private university but private institutions are heavily federally-funded, so are subject to Title VI and Title VII of the Civil Rights Act
    - a. Same import as Equal Protection?
      - i. *Bakke* = as applies to affirmative action, Title VI = EP
      - ii. Other court interpretations
        1. Civil Rights Act allows more room for disparate impact claims
          - a. So, could be used to attack affirmative action programs
      - b. Private entities can invoke 1<sup>st</sup> Am. freedom of expressive association:
        - i. To justify affirmative action (express inclusivity, etc.)
          1. Not generally successful
- v. Court's increasing skepticism re: affirmative action linked with court's skepticism re: school desegregation: *Parents Involved v. Seattle*

CXL. *Parents Involved in Community Schools v. Seattle School District No. 1* (2007)

- a. Facts:
  - i. School districts voluntarily using race-conscious student assignment plans to integrate schools by race
- b. Holding (Kennedy):
  - i. School districts' assignment plans were not sufficiently narrowly tailored (individual racial classifications not tied to stated goals of achieving diversity)
    1. However, achieving racial diversity is a compelling state interest
      - a. Other types of methods might be permissible:
        - i. Individualized assessments that take account of race, in addition to numerous other factors
        - ii. Gerrymandering school districts with demographics in mind (facially race-neutral mechanism)
          1. But, same as *Keyes*, where racial purpose of integration plan rendered the plan impermissible, despite facial race-neutrality
        - iii. Allocated resources to magnet schools
          1. But, held to be impermissible in *Missouri v. Jenkins* (a form of race-conscious integration)
    - ii. Remedial rationale – make up for history of past discrimination
      1. But, Seattle has never been proven to embrace de jure segregation
        - a. In Louisville, all past vestiges of discrimination had been remedied
- c. Concurrence (Roberts):
  - i. Diversity rationale is unique to higher education – here, assignment plan is crude “racial balancing”
- d. Concurrence (Thomas):
- e. Concurrence (Kennedy):
- f. Dissent (Stevens):
- g. Dissent (Breyer):

- h. Notes:
  - i. Affirmative Action after *Grutter/Schuett*
    - 1. affirmative action is “optional” – left to states, local voters
  - ii. which opinion is most faithful to *Brown*?

#### CXLI. Gender Equal Protection

- a. gender follows race, historically and doctrinally
- b. why should gender be treated the same as race under EP?
  - i. original understanding:
    - 1. framers of 14<sup>th</sup> Am. did not intend Am. to apply to women/gender discrim.
  - ii. after 19<sup>th</sup> Am., how are women disadvantaged in the political process?
    - 1. arg.: women must be disadvantaged, given their inability to pass more progressive feminist legislation, despite comprising the majority of voters
      - a. but, many women do not favor those policies (opinion surveys, empirical basis re: abortion rights, etc.)
  - iii. reasoning by analogy to race:
    - 1. women are similarly situated to blacks and other racial and ethnic minorities; vulnerable to discrimination
      - a. but different historical contexts/ideological bases for discrimination (analogy only goes so far; many salient dis-analogies as well)
    - iv. women and racial minorities are both discriminated on the basis of immutable characteristics
      - 1. but some immutable characteristics (mental retardation, blindness) form the basis of acceptable classifications, and some mutable characteristics (methadone use, verbal aptitude) form the basis of unacceptable classifications
        - a. unlike other immutable characteristics, race and gender have no effect on ability to function in society
          - i. but, depending on perceptions on gender, differences might have implications on success/functioning in society (men and women should have different social roles)
            - 1. SC has largely rejected this reasoning
- c. differences:
  - i. some classifications based on gender are permissible (classifications based on distinctions that are physiological and unobjectionable)
    - 1. no racial equivalent in EP

#### CXLII. SC and Gender EP

- a. no equivalent to *Brown*
  - i. court has been behind the curve of the political mainstream
- b. Supermajority of Congress passed the ERA
- c. post-WWII SC upheld statutes that discriminated on the basis of gender
  - i. prohibiting women from serving on juries, working as bartenders, etc.
- d. 1970's and early-80's
  - i. SC struck down statutes that would never be enacted in modern context
- e. state action problem:
- f. disparate impacts routinely generated by gender-neutral policies, due to underlying inequalities
  - i. discriminatory purpose req.
    - 1. *see Feeney*
- g. Notes:
  - i. why intermediate scrutiny, not strict?
    - 1. not all gender classifications are unconstitutional; necessitates a separate category (rational basis= always OK; strict scrutiny = never OK); two important functions recognized
      - a. affirmative action

- i. upheld actions that materially advantage women, that are narrowly tailored to remedy past discrimination
  - 1. diversity justification has never been tested
- ii. actions that paternally advantage women, seen to require outside assistance (Thomas' critique in race context)
  - 1. examination has near-exclusive focus on purpose, rather than effect
    - a. long-view re: goal of EP: eventually, women and minorities are better off living in a colorblind society (and good for everyone in society)
      - i. purpose of EP not just to protect groups
  - b. recognizing actual/real gender differences
    - i. no analogue in the context of race EP
- ii. if not based on either of the above interests, regulation held to be an overbroad generalization, perpetuation of illegitimate stereotypes
  - 1. illegitimate stereotype = does not depend on the accuracy of the stereotype
    - a. same situation as with race discrimination (as when race is a predictive statistical proxy for prison violence, etc.)
      - i. such as when gender is correlated with physical strength, economic dependence, etc.

CXLIII. *Frontiero*

- a. Facts:
  - i. statute requiring that women in military prove that husbands are economically dependent on them to receive spousal benefits
    - 1. law both advantages women (in role of spouses, easier to receive benefits) and disadvantages women (in role of soldiers, compensation is reduced due to absence of automatic benefits)
      - a. as a net, benefits women, since more women are economically-dependent on husbands
      - b. irrelevant effect test to SC
- b. Holding:
  - i. statute struck down; majority focuses on purpose, not effect
    - 1. statute materially and ideologically reinforces inequalities in economic dependency based on gender (perpetuation of traditional gender roles, based on bias)

c. Notes:

CXLIV. *Orr v. Orr*

- a. Facts:
  - i. Alabama alimony law, under which divorced husbands, but not wives, are forced to pay alimony
    - 1. based on stereotype/reality that women are less likely to be wage-earners, more dependent on alimony
- b. Holding:
  - i. although statute advantages women, it perpetuates differences
    - 1. marginally effects ability of husbands and wives to arrange their lives
- c. Notes:
  - i. hypo: if Alabama dismantled its alimony policy altogether:
    - 1. where women disproportionately sacrifice their careers, they are hugely disadvantaged after a divorce
      - a. as a consequence, women are disadvantaged in their marriage (lack of "bargaining power")
        - i. any EP problem?

1. no; genders treated the same by the govt., in the long-term hope that economic differences will disappear (gender-blind)
  - a. in the short-term, effects are enormously adverse, but do not matter for EP purposes

CXLV. *Miss. University for Women v. Hogan*

- a. Facts:
  - i. exclusion of men from a state nursing school
    1. materially impact of the policy is to advantage women at the expense of men
- b. Holding:
  - i. policy struck down
    1. perpetuates stereotype of nursing as a women's profession
- c. Notes:
  - i. calcification of traditional gender roles disadvantage both women and men
    1. derogates women and makes it difficult for men to choose alternate professions, societal roles
      - a. does not depend on accuracy of stereotypes/generalities, despite the court's rationale in the early gender cases (purporting to perform rationality review – implicating fit and purpose)

CXLVI. *Reed v. Reed* (1971)

- a. Facts:
- b. Holding:
- c. Notes:
  - i. In early-70's, courts invalidated statutes that discriminated on the basis of gender under rationality review (no indication that
    1. *See Claiborne*
    2. statutes were "irrational" or "served no legitimate purpose"

CXLVII. *Craig v. Boren* (1976)

- a. Facts:
  - i. statute prohibiting sale of low-alcohol beer to male youths (but not women)
    1. state justifies distinction on the basis of preventing drunk driving -> point to statistics re: prevalence of males involved in drunk driving accidents
- b. Holding (Brennan):
  - i. gender classifications get "intermediate scrutiny";
  - ii. doctrinal test: gender classifications must be "substantially related" and "necessary" to an "important" government interest
    1. complicated in *EMI*
  - iii. majority adopts the language of rationality review (fit)
    1. over-inclusivity of statute (but actually an argument against all criminal law?)
      - a. irrelevant, since strength of the fit is not determinative to the majority
        - i. as in *Johnson*, where court was uninterested in stats re: prison violence
    2. but, acknowledges that fit does not matter, since statute perpetuates stereotypes (of men as aggressive/dangerous)
      - a. govt. should be disallowed from considering gender stereotypes

c. Notes:

CXLVIII. *JEB*

- a. Facts:
  - i. peremptory gender-based challenges of jurors
- b. Holding (O'Connor):
  - i. govt. should ignore gender differences, in the hope that they will eventually disappear
- c. Notes:
  - i. permissibility not based on:

1. advantage/disadvantage of statute to women
2. accuracy of stereotype
  - a. in *JEB*, that women are more sympathetic to rape victims, etc.

CXLIX. Where court has upheld gender classifications:

- a. Affirmative action:
  - i. govt. has some room to maneuver to benefit women in a remedial, short-term fashion
    1. many of the above statutes could be classified as affirmative action (*Craig v. Boren*, etc.)
      - a. if Okla. statute has affirmative action, purpose would be to ensure availability of low-alcohol beer for women had previously been deprived of it

CL. *Califana v. Goldfarb*

- a. Facts:
  - i. SS provisions that grant survivor benefits to widows automatically, but to widowers only if they had been receiving over 50% of their income from their wives (see *Frontiero*)
    1. govt.: policy benefits widows, who are more likely to be needy
- b. Holding:
  - i. court strikes down policy under EP (forward-looking assumption that women will be more dependent on their husband's income)
    1. although statistically true, does not make up for past discrimination, roughly calibrated to make up for amount of discrimination suffered
- c. Concurrence (Stevens):
  - i. distinguishes between forward-looking policy and affirmative action to remedy past discrimination
    1. tailoring must be "good enough"
- d. Notes:

CLI. *Califana v. Webster*

- a. Facts:
  - i. SS benefits for female wage-earners higher, since females allowed to exclude years where they earned lower salary
- b. Holding:
  - i. statute upheld under rationale that policy was affirmative action, with purpose of benefiting women in a remedial fashion
- c. Notes:
  - i. compare *Goldfarb* to *Webster*: any difference?
    1. in the latter, court is persuaded that the general purpose is remedial
      - a. different treatment of men and women was not accidental result of stereotypes, but conscious effort to benefit women
        - i. legislative history: calculate SS benefits to remedy prior wage discrimination
          1. also, law contained provision that it would be phased out once wage discrimination in the workforce disappears
      2. also, intermediate scrutiny gives govt. more leeway to enact affirmative action policies based on gender
        - a. or, timing argument:
          - i. after *Adarand*, gender-based affirmative action might need to be more narrowly tailored
    - ii. diversity as a compelling state interest?
    - iii. classifications based on gender differences that are natural/real (as opposed to stereotyped) = permissible classification
      1. physiological differences
        - a. pregnancy/childbirth

- i. the difference cannot be changed (so, argument that refusal to uphold classifications will cause stereotyped differences to disappear does not apply)

CLII. *Gedoldig*

- a. Facts:
  - i. state insurance program that does not cover pregnancy-related disabilities
    - 1. challenged as violating EP
- b. Holding:
  - i. statute upheld, since it does not discriminate on the basis of gender (applies to ALL pregnant individuals)
    - 1. disparate effect on women (100% of pregnant individuals are women) is irrelevant; see *Feeney*
  - ii. govt. may treat pregnancy differently (but court does not yet have a doctrinal way of explaining why, since it is operating in the context of racial discrimination)
    - 1. ct. would have explained decision differently in modern context
      - a. would have acknowledged that statute represented a gender classification, but would assert that it was based on a natural/real difference

CLIII. *Michael v. Sonoma County*

- a. Facts:
  - i. statutory rape law applying different age standards for men and women
- b. Holding:
  - i. statute upheld, since it is substantially related to the state interest in preventing teenage pregnancy
    - 1. govt. is permitted in treating natural/real difference differently (unique vulnerability to pregnancy of females)
- c. Dissent:
  - i. gender classification must be motivated by something more than teenage pregnancy (since criminal penalties for both men and women would have an increased deterrent effect)
    - 1. actually based on stereotypical idea of men as predatory, etc. (behavioral)
      - a. so, should be struck down as unconstitutional

CLIV. *Winn* line of cases:

- a. court flip-flops on upholding and striking down statutes imposing differences re: men and women in marital situations
  - i. natural differences between unmarried mothers and fathers in custody situations:
    - 1. mothers are easier to identify (present at birth)
    - 2. on the other hand, sociological stereotype that mothers play a larger role in raising the child (greater parental responsibilities)

CLV. *Miller v. Albright*

- a. Facts:
  - i. child born overseas to a US mother is automatically a US citizen, where a father's US citizenship requires proof of paternity
    - 1. no further proof nec'y for mother, since she is present at birth
- b. Holding:
  - i. upholds classification as a recognition of a natural difference
- c. Dissent:
  - i. statute reflects stereotypes re: parental roles, should be struck down
- d. Notes:
  - i. precursor to *Winn*

CLVI. *Winn*

- a. Facts:
  - i. child born in Vietnam taken to US and raised by father (no paternity test)

1. child later commits a crime, INS initiates deportation proceedings
  2. father obtains DNA proof, INS proceeds with deportation
    - a. negates “natural” difference between men and women in proving parentage
- b. Holding:
- i. upholds INS policy but must tweak rationale:
    1. natural difference between ability of mothers to form relationships with child, due to presence at birth
    2. majority of justices willing to acknowledge natural difference, extending proof of heredity to post-birth ability to form a relationship
- c. Dissent (O’Connor):
- i. crosses the line into stereotyping re: mother’s relationship with children, since father has the same opportunity to form a relationship with the child

CLVII. *Rosker v. Goldberg* (1981)

- a. Facts:
- i. women excluded from registering for the draft
    1. arg: exclusion based on natural difference that women are excluded from combat
- b. Holding:
- i. classification upheld as permissible, without deciding EP validity of combat exclusion
- c. Notes:
- i. If military had not preempted EP challenge to combat exclusion?
    1. court might point to pregnancy as “natural” difference that could justify exclusion
      - a. vulnerability to rape that could result in pregnancy
      - b. general health concerns re: pregnancy
    2. differences between physical strength and stamina?
      - a. argument that differences are based on societal stereotypes, since combat is no longer so dependent on physical strength

CLVIII. *US v. Virginia*

- a. Facts:
- i. all-male institution (VMI), funded by state, with parallel all-women’s institution (VWIL)
- b. Holding (Ginsburg):
- i. all-male admission policy violates EP
    1. closer to strict scrutiny (“exceedingly persuasive” as compared to important)
    2. same issue of fit
  - ii. stigma argument (gender-blindness), while some differences can be celebrated (but not allowed to perpetuate stereotypes- effects argument)
- c. Concurrence (Rehnquist):
- i. all-male admission policy would not violate EP if there were truly separate but equal institutions (admission policy does not violate EP, but inequality of funding does)
- d. Dissent (Scalia):
- i. extended tribute to VMI
    1. alternate argument on appropriate gender roles
  - ii. argues that the majority’s intermediate scrutiny resembles strict scrutiny, where gender classifications should be examined under rational basis test
- e. Notes:
- i. alternative rationale: use natural differences (Ginsburg receptive to idea in dicta, although she adopted intermediate scrutiny as the test)
  - ii. precedent favoring govt.:
    1. *Hogan* – Miss. nursing school case
      - a. argument that natural differences are relevant in military schools, but not nursing schools

- i. physical demands, “adversative method” of military teaching and its suitability to gender-based differences in development
  - b. majority rejects this argument (although does not categorically reject natural differences rationale, just not the same as pregnancy)
    - i. doctrinally, effects don’t matter – e.g., court would not examine whether classification was designed to advantage or disadvantage pregnant women
- 2. Ginsburg blurs doctrine between *Orr/Hogan/Godoldig* and *VMI*
  - a. gender blindness problem
    - i. existence of VMI perpetuates stereotypes
      - 1. males benefit from education based on discipline, etc.
    - ii. existence of VWIL exacerbates stigma
      - 1. women benefit from education based on community, etc.
    - iii. nothing to do with the quality of either VMI or VWIL
  - 3. *Sweatt* – Texas law school
- iii. logistical argument – desegregating school would require fundamental changes (architectural, curriculum, etc.)
  - 1. military’s policy on physical requirements – no separate physical fitness requirements for men and women (except for officers)
    - a. gender neutral requirements that have a disparate impact on women
      - i. but, no discriminatory purpose
        - 1. *Feeney* analysis
      - ii. but Ginsburg suggests that this disparate impact would violate EP, so VMI would be forced to change its requirements to accommodate women
        - 1. as in police dept. in *Washington v. Davis*
  - iv. extend holding to single-sex public schools?
    - 1. Ginsburg: not willing to extend holding (although articulates the principle of diversifying education)
      - a. so long as all-women’s institutions are present and equally funded
        - i. Rehnquist adopts this argument, which would never be permissible if based on race

#### CLIX. Individual Rights under Due Process

- a. EP – prohibits govt. from taking into account certain group traits when assigning benefits/burdens
- b. DP – protection of fundamental *liberty* rights
  - i. prevents govt. from interfering with an individual’s right to *x*
  - ii. 1866 Civil Rights Act
    - 1. provides for equality between blacks and whites, but only for certain civil rights (access to court, freedom to contract, etc.)
- c. two phases in SC enforcement of fundamental rights:
  - i. enforcement of economic rights (economic liberty; freedom of contract) – no longer exists in constitutional law after its repudiation in the New Deal
    - 1. *Lochner* era
  - ii. enforcement of modern privacy rights
    - 1. sex, marriage, family
- d. express (enumerated) rights v. implied (unenumerated) rights
  - i. should courts ever be allowed to enforce rights that are not explicitly in the constitution?
    - 1. e.g., abortion
    - 2. find source of right elsewhere, if not in the text
      - a. unhelpful distinction, since much of the text is vague (“equal protection of the laws”, etc.)

- i. “inventing” rights may just be an act of interpretation
- ii. implied rights:
  - 1. from morality, political justice, religion, other higher law
    - a. implicit in the social compact

CLX. **(Implied) right of economic liberty**

- a. Due process –
  - i. no deprivation of property (5<sup>th</sup> and 14<sup>th</sup> Am.)
  - ii. takings clause
  - iii. privileges and immunities clause (14<sup>th</sup>)
  - iv. contracts clause
- b. broadened to encompass a right to free exercise of the market

CLXI. *Calder v. Bull* (1798)

- a. Facts:
- b. Holding (Chase):
  - i. redistribution of property is akin to “punishing the innocent”
    - 1. finds support in natural law
- c. Concurrence (Iredell):
  - i. criticizes invocation of natural law (regulated by no fixed standard, no agreement on contours)
- d. Notes:

CLXII. *Slaughterhouse Cases*

- a. Facts:
- b. Holding:
- c. Notes:
  - i. privileges and immunities of citizenship to be filled in by rights seen as inherent in citizenship at a given time
    - 1. natural right? or privilege of citizenship?
    - 2. P&I dead letter after *Slaughterhouse Cases*
    - 3. for incorporation, Due Process replaced P&I; same transition for economic liberty
  - ii. Field:
    - 1. all state-imposed monopolies are unconstitutional
      - a. rationale?
        - i. not original understanding, or textual analysis of constitutional
          - 1. consults Adam Smith’s “Wealth of Nations” to find economic liberty as a P&I
  - iii. post-industrial progressive backlash leads to movement to regulate the economy, redistribute wealth
    - 1. businesses start to lose politically, find support in judiciary, who are willing to support *Slaughterhouse*

CLXIII. *Lochner v. New York* (1905)

- a. Facts:
  - i. minimum wage and hour law for bakers
- b. Holding (Peckham):
  - i. statute violates individual economic liberty, protected by 14<sup>th</sup> Am. Due Process protection of liberty
    - 1. government is constitutionally required to stay out of free market economic arrangements between employees and employers, and between businesses and customers
  - ii. government regulation represent the evil violating natural law that was articulated by Chase in *Calder*
    - 1. libertarian principle

2. but, not an absolute principle
  - a. presumption against govt. regulation of markets could be overcome where govt. is acting for the “public good”, not just to redistribute wealth (police powers argument)
  - b. distinguishes *Holden* (see below)
    - i. mining is an especially dangerous industry, while bakers are ordinary workers who govt. does not have any cause to worry about
- iii. health and safety arguments are tenuous, leads to suspicion that law was passed for another motive (labor reasons, economic redistribution)
  1. government must serve the interest of all (protect both A and B, even if it likes A – the worker – better)
  2. argument colored by ideological beliefs re: economic policy:
    - a. redistribution: making B better off at A’s expense
      - i. alternate view:
        1. govt. trying to make life better for unemployed, sick and disabled, uneducated, etc.
          - a. foundation of the welfare state
- c. Dissent (Harlan):
  - i. cites Hearst treatise re: diseases of the worker to support the point that baking is dangerous
- d. Dissent (Holmes):
  - i. accuses majority of substituting personal judgments for will of the people or textual support in the constitution
  - ii. adheres to a contrary economic policy (as he argues does the majority of the country) but is not willing to enact his policy, since he finds no support for it in the constitution
    1. “a constitution is not intended to embody a particular economic theory”
    2. laissez faire should not be applied to economics, but to politics
- e. Notes:
  - i. with *Plessy* and *Dred Scott*, infamous decision
    1. bakers – recent immigrants, economically-desperate
    2. unionized bakers passed maximum hour law to level the playing field, keep immigrants out
      - a. redistribution of wealth from vulnerable immigrants to organized interests
      - b. *Lee Optical, Ferguson* – redistribution of wealth from vulnerable to powerful should not be supported by the state
        - i. rather, govt. can only do the opposite, as correcting a flaw in the democratic system (*Carolene Products*)
  - ii. compare with *Holden v. Hardy*
    1. court upholds wage and hour law as applies to miners
      - a. legitimate exercise of police power to regulate health and safety, so does not violate constitutional right to economic liberty
  - iii. contrast *Muller v. Oregon*
    1. court upholds maximum hour law for women working in industrial labor
      - a. state may regulate to protect women, who may be taken advantage of by employers (legitimate public purpose justifying state intervention)
        - i. while in *Lochner*, bakers are all men who can arrange their affairs (no need of govt. protection)
    2. most famous “Brandeis brief”:
      - a. introduction of social science evidence to support legal argument
        - i. “healthy mothers are essential to vigorous offspring”
  - iv. *Adkins v. Children’s Hospital*
    1. minimum wage law for women struck down as unconstitutional

2. women in the workplace can no longer be considered wards of the state
  - a. new era of equality
- v. *Pollock*:
  1. court struck down 1895 progressive income tax
    - a. reversed by 16<sup>th</sup> Am. in 1913
  2. SC then struck down hundreds of state and federal laws as violating economic liberty
    - a. overlapped with Commerce Clause jurisprudence and *Carolene Products*
    - b. end of the *Lochner* era coincided with the “switch in time”
      - i. switch between *Carter Coal* and *Jones & Loughlin*
      - ii. switch between *West Coast Hotel* (Hughes)
        1. revisionist account for switch:
          - a. court already renounced substantive due process in *Nebia* (Roberts votes with majority to uphold a price control, reasonably designed to protect the public)
  3. court abandoned economic liberty in 1934 or 1937 (New Deal)
    - a. gave way to virtually-unlimited governmental power to regulate the economy
- vi. government is neutral when it leaves a private arrangement (market) alone
  1. criticism:
    - a. government is responsible for these arrangements in the first place (by facilitating the legal structures that create the market)
    - b. government is always capable of changing these structures
      - i. parallel to school desegregation arguments
  2. FDR: government may not disclaim responsibility by leaving the free market alone (misunderstanding re: how the free market works)
    - a. right for B to stake a claim to a right of redistribution of A
      - i. but, SC never followed the critique of *Lochner* to logical conclusion embraced by FDR
- vii. Substantive Due Process, as compared to Equal Protection
  1. rationality review – some equal protection cases are also substantive due process cases
    - a. *Lee Optical*
  2. demise of *Lochner*
    - a. certain types of redistribution are impermissible (since they do not serve any public purpose)
    - b. intermediate option?
      - i. broader assessment of what counts as a permissible purpose but still invalidate laws that have no other purpose than rewarding a powerful group
      - ii. Holmes – no guidance in the Constitution for which laws are “public regarding” and which constitute interest group capture
        1. gay rights, affirmative action, health care, etc.
- viii. Structure of Due Process, doctrinally
  1. two-tiered:
    - a. rationality review (*Lochner*)
    - b. interests protected by a higher form of review (analogous to strict scrutiny)
      - i. Warren court identified new fundamental rights worthy of protection under due process (outside of
        1. sex, family, etc.

CLXIV. **Privacy**

CLXV. *Myer v. Nebraska*

- a. Facts:

- b. Holding:
  - i. Due process right to teach foreign languages in schools
    - 1. right to establish a home and bring up children as they'd like
- c. Notes:
- CLXVI. *Pierce v. Society of Sisters*
  - a. Facts:
  - b. Holding:
    - i. right of parents to raise their children
  - c. Notes:
- CLXVII. *Skinner v. Oklahoma*
  - a. Facts:
    - i. Okla. law that provides for the mandatory sterilization of habitual criminals
  - b. Holding:
    - i. fundamental right to procreation
  - c. Notes:
    - i. holding a reversal from earlier cases, where court had upheld mandatory sterilization
      - 1. *Buck v. Bell* (1927) (Holmes)
        - a. sterilization of the insane; "three generations of imbeciles is enough"
- CLXVIII. *Griswold v. Connecticut*
  - a. Facts:
  - b. Holding (Douglas):
    - i. CT may not criminalize a married couple's use of contraceptives
      - 1. characterized as a "right" to privacy
        - a. no such right explicitly enumerated in the Constitution
        - b. eventually grounded in Due Process clause
          - i. but, hesitant to identify fundamental rights protected under due process, because of shadow of *Lochner*
          - ii. P&I cannot form basis of rights after *Slaughterhouse*
      - ii. so, majority finds right in "emanations" from the "penumbras" of the first ten Amendments
        - 1. several enumerated rights in Bill of Rights deal with privacy in some sense
          - a. 1<sup>st</sup> Am. – permits NAACP to withhold member list from examination by states
          - b. 4<sup>th</sup> Am. – protects privacy of persons and effects
          - c. 3<sup>rd</sup> Am. – protects domestic privacy
        - 2. Court may generalize from specific privacy protections to a broader, more general right to privacy
      - iii. conception of a Bill of Rights as an overarching umbrella for privacy, rather than specific enumerated rights
        - 1. *Lochner* could be defended under the same rationale
          - a. *ejusdem generis* would allow for many words in the Bill of Rights to be generalized (fairness; wisdom)
  - c. Concurrence (Goldberg):
    - i. 9<sup>th</sup> Amendment provides a textual invitation to identify fundamental rights retained by the people
      - 1. but, as a matter of original and ongoing understanding, 9<sup>th</sup> Am. conceived of as just a restriction on the national government
  - d. Concurrence (Harlan):
    - i. substantive due process is roughly equivalent to 9<sup>th</sup> Am.
  - e. Dissent (Stewart/Black):
  - f. Notes:

- i. local outliers – only two states criminalized contraceptives at the time of *Griswold* (CT and MA), and the laws were not vigorously enforced
  - 1. laws designed to block poor women from accessing contraceptives at free clinics
    - a. Planned Parenthood – initially motivated by a eugenic agenda of preventing overpopulation (esp. amongst the poor)
- ii. privacy right cabined in two important dimensions
  - 1. right is to protect the sanctity of the bedroom from police intrusion
    - a. tied to the marital relationship
      - i. marriage as a right “older than the Bill of Rights” (Douglas)
  - 2. *See Eisenstat*

CLXIX. *Eisenstadt v. Baird* (1972)

- a. Facts:
  - i.
- b. Holding (Brennan):
- c. Concurrence (Douglas):
- d. Concurrence (White):
- e. Notes:
  - i. drops limitations on privacy rights (no longer only applies to marriage and procreation; threat of police intrusion, since no longer applies to sale or distribution)
    - 1. applies to decision to engage in sex, decide whether to reproduce
      - a. add *Skinner* (right to reproduce) = right of privacy that protects the liberty of individuals to decide whether (or not) to reproduce
  - ii. privacy:
    - 1. right to keep information secret
    - 2. right to seclusion
    - 3. how does right to reproductive autonomy connect to either conception of privacy?
      - a. privacy allows *Griswold* court to avoid answering the question of whether sex/reproduction are specific rights deserving of special constitutional protection
        - i. avoids *Lochner* rationale
  - iii. right to choose whether to reproduce leads to abortion cases
    - 1. but also takes into account interest of government in protecting the life of a fetus

CLXX. *Roe v. Wade* (1973)

- a. Facts:
  - i. govt. argument:
    - 1. abortion is murder, regardless of negative impact of unwanted birth on mother
- b. Holding (Blackmun):
  - i. finds privacy right in due process, but perhaps in 9<sup>th</sup> Am., or in penumbras of 1<sup>st</sup> and 4<sup>th</sup> Am.’s
    - 1. wherever the right is located, it is broad enough to encompass a woman’s right to terminate her pregnancy
      - a. strict scrutiny: must be narrowly tailored to a compelling state interest
        - i. protecting the health of the mother
        - ii. protecting the life of the fetus
  - ii. each of the above interests starts off as “merely legitimate” but develops into “compelling” with the growth of the fetus
    - 1. balancing test yields the trimester framework
      - a. 1<sup>st</sup> trimester: neither of the state interests has become compelling, so state cannot regulate abortion at all

- b. 2<sup>nd</sup> trimester: state interest in protecting the life of the mother becomes compelling, so state can regulate but ONLY in interest of maternal health (only licensed physicians can perform abortions, etc.)
    - c. 3<sup>rd</sup> trimester: interest in protection of the life of the fetus becomes compelling at the time of “fetus viability”; state may regulate abortion or prohibit abortion (except where abortion is nec’y to protect maternal life or health)
  - iii. wholesale balancing test to determine the boundaries of the right
    - 1. this has become the framework for analyzing substantive due process
  - iv. should fetuses be conceived of “persons” as used in the Constitution?
    - 1. persons understood as only post-natal persons
      - a. intratextual evidence (fetuses have never been counted in the census)
    - 2. also, state action problem:
      - a. killing of fetuses is a strictly private action
    - 3. “we need not resolve the difficult question of when life begins”
      - a. judiciary should not speculate, where science and theology cannot resolve the question
        - i. but, holding pins compelling nature of state interest on fetal viability
- c. Concurrence (Burger):
- d. Concurrence (Douglas):
- e. Concurrence (Stewart):
- f. Notes:
  - i. bigger step for the court politically than *Griswold*
  - ii. mother’s interest in terminating pregnancy – what is the source of the right?
    - 1. sources of constitutional interpretation:
      - a. precedent (*Griswold, Eisenstadt*) – points in the general direction of abortion rights
        - i. but, adding life of the fetus into the equation makes precedent not determinative
        - ii. also, what was the source of the right in the first place?
      - b. history of abortion:
        - i. Ancient Greeks -> English common law -> early American legislation
        - ii. abortion laws have only been on the books in USA for about a century
          - 1. relevant?
  - iii. Constitutional justifications for right to choose:
    - 1. abortion rights are best defended on grounds of gender equal protection, rather than liberty rights protected by due process
      - a. gender discrimination (see *Casey*)
  - iv. Political effects:
    - 1. *Roe*:
      - a. leads to decades of polarized political debate re: abortion
      - b. pre-*Roe* (1960’s)
        - i. states liberalizing abortion laws
          - 1. some allow on-demand abortion, some allow abortions for rape, risks to life or health, etc.
        - ii. perhaps SC justices perceived political process as moving toward liberalizing abortion (as in *Brown*), conceived of decision as a moral triumph
          - 1. did not come to pass (misprision re: direction of the political consensus)
            - a. incited political backlash (mass mobilization of fundamentalist Christians and a subset of women who

had not previously been politically active against abortion rights)

- b. contributed to Republican electoral success, election of Reagan and Bush -> judicial appointments
  - i. Bork nomination: political battle over abortion
  - ii. Bork defeated, but 5 new justices appointed by Republican Presidents (context for *Casey*)

c. Ginsburg:

- i. SC did more harm than good to the future availability of abortion by preemption what might have been a gradual liberalization through state/local legislative processes

d. *Casey* dissent (Scalia): *Roe* turned abortion into a politically costly issue to a degree that never would have obtained had abortion not been turned into a constitutional issue

CLXXI. *Planned Parenthood v. Casey* (1992)

a. Facts:

- i. challenged five provisions of PA abortion statute imposing burdens on ability to obtain an abortion (spousal notice, etc.)

b. Holding (Blackmun):

- i. spousal notice provision constitutes an undue burden
- ii. *Roe* affirmed in a plurality opinion
  - 1. although likely that a majority of the justices in *Casey* would have recognized an abortion right but for *Roe*
    - a. plurality acknowledges the binding force of precedent (even though some viewed the *Roe* holding as incorrect)
- iii. When are justices bound by “incorrect” precedent (when should SC correct prior decisions that it views as wrongly-decided)? Plurality gives criteria, in arguing that the benefits of overturning *Roe* would be outweighed by the court’s loss of legitimacy:
  - 1. where precedents are “unworkable”, impossible for the court to administer
    - a. example: *Garcia* overruling *Usury* (wage and hour case, unclear scope of the right established in *Garcia*)
      - i. compare Commerce clause cases (no workable test for limitations on congressional power, but still count as good law)
  - 2. “evolution of legal principles”
    - a. other cases in the field have evolved in a direction away from the precedent
      - i. precedent as an outlier
      - ii. as where *Plessy* was overruled by other cases in the field (*Sweatt*, etc.)
  - 3. reliance; whether a rule can be changed without significant inequity, damage to society
    - a. compare *Brown* – reliance investments built up on constitutionality of separate but equal (Southern way of life – reliance cost could not be higher)
  - 4. precedent should not be overruled in the absence of changing facts, or a changing understanding re: facts
    - a. *Lochner* – overruled in *West Coast Hotel*; SC referenced fundamentally false assumptions re: capability of unregulated market to meet needs of social welfare
    - b. *Plessy* – overruled once it was recognized, as a matter of fact, that separate but equal created system of inferiority
- iv. constitutional guarantees on gender equality
  - 1. state conscripts women’s bodies into its service by prohibiting abortions without compensation

- a. women can be forced to accept the status and incidents of motherhood
  - v. current framework for constitutional framework for abortion
    - 1. “undue burden” standard:
      - a. what can states do to prevent abortions before the point of viability?
        - i. so long as the purpose or effect of state action is not to place a “substantial obstacle” in woman’s ability to get an abortion
          - 1. permissible state interference:
            - a. 24 hour waiting period
            - b. informed consent requirements
            - c. parental consent requirement for minors
            - d. reporting requirements for providers
          - 2. impermissible regulation:
            - a. spousal notification requirement
              - i. special concern re: spousal coercion and abuse
              - ii. convinced O’Connor that abortion was a matter of equal protection
- c. Concurrence/Dissent (Scalia):
  - i.
- d. Notes:
  - i. abortion as similar to forced blood transfusions or marrow transplants, to protect children
    - 1. but, no such legal obligation for parents with children of leukemia
      - a. only other requirement is in the peculiar context of abortion
        - i. so, special obligation of a woman to her fetus and to the enterprise of motherhood
          - 1. the type of obligation that the court views as illegitimate under gender equal protection
      - b. obvious problem:
        - i. pregnancy is the type of “natural difference” where the state may treat women differently
        - ii. response: abortion restrictions ALSO perpetuate stereotypes (men are not conceived of having any special obligation to the life of the fetus or child)
          - 1. but, there is no equivalent in men’s obligations, where an inequality could be identified
            - a. special burden is only imposed in context of pregnancy and abortion (*Geduldig*)
            - b. Thompson thought experiment:
              - i. unconscious violinist attached to circulatory system
              - ii. women’s special obligation
  - ii. Substantive due process
    - 1. women’s liberty interest in NOT being pregnant/being a mother
      - a. but balanced against state’s interest in protecting the fetus
  - iii. Equal protection
    - 1. Is female obligation to carry a fetus to term a physical difference or is it based on gender stereotypes?
  - iv. *Casey* holding politically surprising, given partisan nomination of new justices in wake of *Roe* (see above)
    - 1. Justices who are opposed to abortion (see Kennedy in *Gonzalez*; “the Dred Scott of our time”) support majority in saving *Roe*

- a. unpredictability of Justices once they are appointed to the SC and given lifetime tenure
  - b. or, Justices putting institutional concerns above their own moral judgments
- v. “substantial burden” test:
  - 1. bans on partial birth abortions (SC initially struck down in *Stenberg* but later upheld)
  - 2. applied to 2<sup>nd</sup> trimester abortions (rare); dilation and evacuation procedure (Nebraska statute bans an alternate procedure, where fetus is delivered intact – resembles ordinary childbirth, blurs the line between abortion and infanticide)
  - 3. *Stenberg* – statute impermissibly restricts women’s right to choose abortion (no provision for maternal health exception)
    - a. no meaningful distinction between various 2<sup>nd</sup> trimester procedures (risk that physicians will not perform either procedure under statute)
      - i. held to constitute an undue burden on abortion right
        - 1. if statute were written to include above provisions, it would likely be permissible (Congress eventually passes federal ban on partial birth abortions)
        - 2. but, federal statute neglects to include relevant provisions
  - 4. but, statute upheld in *Gonzalez v. Carhardt* (only difference in *Stenberg* is composition of the SC – one new justice)
    - a. in the course of upholding the partial birth ban, SC recognizes new interests that the govt. may invoke (since protecting the health of the mother, or the fetus, is not relevant here):
      - i. Kennedy: state interest in “promoting respect for life”
        - 1. power of partial birth abortion to “devalue human life”
      - ii. state interest in protecting a woman from making a decision that she will later regret
        - 1. evidence that restrictions on abortion rights are based on impermissible stereotypes? (see Ginsburg)
  - 5. new “burdens”:
    - a. longer waiting periods
    - b. abortion clinics must be supported by hospitals (sometimes impossible)
- vi. precedent and the legitimacy of the court
  - 1. “to overrule under political fire” would be to subvert the effectiveness/legitimacy of the court
    - a. public perception that SC is “doing law, not politics”
      - i. Weschler criticism in *Brown*; Ely in *Roe*
  - 2. but, awareness of appearance is political in itself (not grounded in principle)
    - a. legitimacy must be a byproduct, cannot be pursued directly

**CLXXII. Sexual Orientation**

- a. gender equal protection/due process right of reproduction led gay rights groups to push for recognition of expanded privacy rights

**CLXXIII. *Bowers v. Hardwick* (1986)**

- a. Facts:
  - i. constitutionality of Georgia sodomy statute
    - 1. applies equally to same-sex and opposite-sex sodomy, but never applied to heterosexual sex
  - ii. *Bowers* arrested when police officer entered home to serve him with a fine
    - 1. defended by Tribe
      - a. argument on precedent
        - i. right to reproductive autonomy in *Griswold* and *Roe* should extend to right to sexual autonomy (implicit in reproduction cases)

1. recognizing a right to contraception and abortion is not recognizing a reproduction right (since people could already choose not to reproduce by not having sex), but recognizing a right to sex
2. here, no countervailing state interest in protecting the life of the fetus
  - a. only in protecting the public's moral sensibilities
- iii. argument that state was only enforcing sodomy law against homosexuals was left open, raised again following *Bowers* as an equal protection claim (military service, employment discrimination, eventually marriage)
- b. Holding (White):
  - i. constitutionality of sodomy statute upheld
  - ii. dis-analogy between gay sex and contraception/abortion (sex that is potentially procreative)
    1. right to gay sexual autonomy bears no resemblance to privacy right in abortion cases (privacy right only protects activities related to family, marriage, and procreation)
      - a. but, requires a generalized level of abstraction, since the activities at issue re: preventing pregnancy
    2. substantive due process rights must reflect values that are deeply rooted in history and tradition (long part of the American moral tradition)
      - a. higher level of generalization – value of government interference with free choice of intimate relationships; level of generality at which the liberty interest is defined can always be gerrymandered as consistent or inconsistent with traditional moral values
  - iii. Finds legitimate state interest in enforcing majority values re: morality of gay sex
- c. Concurrence (Burger):
- d. Concurrence (Powell)
- e. Dissent (Blackmun):
  - i. enforcing Judeo-Christian values should not be considered a legitimate state interest
    1. but, all laws can be considered to encompass public morality (murder laws also reflect Judeo-Christian values)
      - a. Blackmun: state has no legitimate interest in prohibiting private conduct that does not have any material impact on 3<sup>rd</sup> parties
        - i. foreshadowing *Romer*
        - ii. but, regulation of pornography, consensual prostitution, use of drugs - all laws that address moral objections to conduct
          1. use of drugs, smoking, social security contributions
            - a. enacted for paternalistic reasons
        - iii. in *Bowers*, state argued that it was protecting third parties by preventing AIDS (court might accept this as a state interest, even with no factual basis, under rationality review)
- f. Dissent (Stevens):
- g. Notes:
  - i. sodomy laws:
    1. use to express moral outrage toward homosexuality
      - a. other outliers where statutes have been used to address prostitution, sex in public, etc. (never to prosecute heterosexual couples having consensual sex in private home)
  - ii. substantive due process rights
    1. must be rooted in history and tradition (traditional values);
      - a. Scalia: must be defined specifically

- i. same argument that Scalia uses for originalism (as opposed to Dworkin's originalism – Framers' original meaning at the level of equality, liberty, etc.)
      - 1. specific level of interpretation v. general (both can claim to be originalist, with different outcomes)
- iii. *Michael H. v. Gerald D.*
  - 1. constitutionality of a statute defining “child of the marriage” for heterosexual couples
    - a. allows state to restrict rights of genetic fathers
    - b. Is relevant due process right requested in accord with traditional values?
  - 2. Scalia's holding: No tradition of facilitating adultery
  - 3. Brennan's dissent: Tradition of parenthood, recognition of fatherhood
- iv. state interest in prohibiting consensual gay sex?
  - 1. even though court is unwilling to recognize a due process right, state still subject to rationality review
- v. conception of sexual orientation is both over- and under-inclusive as related to same-sex sexually activity
  - 1. range of identity and behavioral choices (not always a defining characteristic)
    - a. otherwise, the government could not criminalize the conduct that was definitive of the identity (especially after blacks and women were elevated to the status of suspect classes)

CLXXIV. *Romer v. Evans* (1996)

- a. Facts:
  - i. Colorado constitutional amendment repealing all gay anti-discrimination laws (such as in liberal cities and towns) and barring all such laws in the future
- b. Holding (Kennedy):
  - i. invalidates amendment as unconstitutional
    - 1. purports to be applying rationality review under equal protection analysis
      - a. but, under *Bowers*, state interest in enforcing majoritarian moral preferences was upheld as a legitimate state interest
    - 2. court replies that the only explanation for Amendment was animus (see *Claiborne; Moreno*)
      - a. bare desire to harm a disfavored group cannot constitute a legitimate state interest
    - 3. opinion does not mention *Bowers*
      - a. overruling sub silentio?
      - b. or some conceptual difference between moral disapproval and animus?
  - ii. Amendment nullifies legal protections for a class in almost all contexts; sheer breadth is unprecedented and inexplicable by anything BUT animus
    - 1. but compare a state anti-discrimination law re: race, gender, disability; such a law, in standard form, would prohibit discrimination in all contexts (just as broad as Amendment Two, but prohibiting discrimination)
      - a. or, 1964 Civil Rights Act
    - 2. state is “doing nothing” by refusing to recognize anti-discrimination laws
      - a. state action; *Washington v. Davis*
  - iii. Kennedy: amendment imposes a special burden on gays, since other anti-discrimination laws remain enforceable, and since other groups do not NEED anti-discrimination laws
    - 1. compare *Schuett* (Michigan outlaws affirmative action programs)
      - a. SC, through Kennedy, holds that *Romer* does not invalidate *Schuett* amendment (but does not distinguish *Romer*)
        - i. eliminating preferential treatment for minorities restores a baseline (just as Scalia argues in *Romer*)

- ii. difference in *Romer*?
- iii. If Congress repealed the 1964 Civil Rights Act – violate EP? or restore a baseline?

c. Dissent (Scalia):

- i. rejects distinction between animus and moral disapproval in *Bowers*
  - 1. voters in Colorado have simply expressed their moral objection and want the right to disassociate with homosexuals

d. Notes:

- i. Should gays and lesbians be treated as a suspect class under EP? Analogous in relevant respects to race and gender?
  - 1. But, SC has never articulated a basis for which groups should be protected; categories are both over and underinclusive
    - a. history of discrimination?
      - i. but, see pedophiles
    - b. immutability of characteristics
      - i. but, see blind bus drivers
    - c. *CP* n. 4 (inadequate political power due to an encumbrance that can be analogized to dis-enfranchisement)
      - i. but see Ackerman’s alternate argument (gays may “exit” the group identity, if necessary, to achieve parity in political representation)
      - ii. other arguments that gays are disproportionately represented in political system
    - d. purpose v. effects
  - 2. question left open in *Romer*
    - a. but, majority does not consider homosexuality an affront to society’s morals as did White in *Bowers*, but rather a bare animus (confirmed in *Lawrence*)

CLXXV. *Lawrence v. Texas* (2003)

a. Facts:

- i. constitutionality of statute criminalizing same-sex sodomy challenged
  - 1. even though a variety of laws regulating sexual activity were repealed in the 70’s
    - a. “homosexual conduct law”
- ii. Lawrence’s arguments:
  - 1. law violates EP (gays are a suspect class)
    - a. law violates EP (law constitutes animus; not a legitimate state purpose)
  - 2. law violates substantive due process (overrule *Bowers*)

b. Holding (Kennedy):

- i. Texas sodomy law struck down as unconstitutionally infringing on due process right to privacy; overrules *Bowers* (not correct when it was decided, not correct today)
  - 1. *Bowers* incorrect in its analysis of traditional values
    - a. majority offers a different perspective (following Blackmun dissenting in *Bowers*)
      - i. emphasizes the **relationship**, rather than the actual act (“when sexual conduct finds an expression in intimate conduct”)
        - 1. redefines the relevant moral issue (and relevant tradition) as relationships, not sex
        - 2. but, concedes that social condemnation of homosexuality has been traditionally evident
          - a. argues that history and tradition are only one aspect of analysis
            - i. “emerging awareness” of gay rights are most relevant (cites recent developments)

- ii. amounts to a tradition that is short, of increasing tolerance but maybe not approval (none speaks to original understanding of the 14<sup>th</sup> Am.)
    - iii. Kennedy claims that original understanding of 5<sup>th</sup> and 14<sup>th</sup> Am.'s is consistent
    - iv. Framers would have been more specific if they had insight into potential scope of liberty
    - v. adopts philosophy of Dworkin or Marshall of *McCulloch*
  - 2. stare decisis:
    - a. Kennedy is not troubled by overruling *Bowers* (even though he emphasized stare decisis in *Casey*)
      - i. do criteria from *Casey* apply? or is Scalia's critique in *Lawrence* relevant re: *Roe*
    - b. retain legitimacy by predicting mainstream political consensus (as in *Brown*)
      - i. reaching "good results", rather than "doing law instead of politics"
        - 1. *Plessy* – law instead of politics
- c. Concurrence (O'Connor):
  - i. EP argument would allow court to preserve *Bowers*
- d. Dissent (Scalia):
- e. Notes:
  - i. Kennedy emphasizes substantive due process protections for intimate, enduring relationships
    - 1. even though relationship in *Lawrence* does not appear to be enduring
      - a. is private homosexual activity constitutionally protected? since such is crucial to the intimate, enduring relationships that Kennedy finds fundamental
        - i. Kennedy argues that there is a distinction between sexual activity and marriage, but Scalia argues that there is no such distinction
          - 1. drawing distinctions between straight and gay marriage = animus
            - a. needs some state interest other than morality
          - 2. O'Connor: distinguishes laws supported by genuine interest in preserving traditional institution of marriage (but, does this go beyond morality?)
  - 2. other state interests:
    - a. primary purpose of marriage is to promote procreation (marriage as a state subsidy, normative imprimatur)
    - b. promoting stability in opposite sex relationships (straight couples might have children on "impulse," where gay couples have planned children – more likely to be products of stable relationships, does not require marriage to promote stability)
    - c. children's benefit in having mother/father, or having 2 biological parents (empirically unsound, likely not sufficient to pass rationality review)

## CLXXVI. Gay Marriage

- a. see *Lawrence* notes re: implications for gay marriage
  - i. MA legalizes gay marriage in wake of *Lawrence*
    - 1. precursors:
      - a. 1993 Hawaii SC decision invalidating ban on gay marriage under Hawaii const.
        - i. led to state amendment overruling decision, passage of Defense of Marriage Acts by 30 states and Congress (1996)

1. no state obligated to recognize same-sex marriages from other states; denied marriage benefits to gay couples
    - a. later overturned in *Windsor*
  - b. Cal. Prop. 8 (2008) -> political backlash against CA SC decision legalizing gay marriage
  - c. gay marriage v. civil unions
    - i. civil union: legal rights associated with marriage, without formal title of marriage
      1. initially garnered dramatically more support than gay marriage
  - d. rapid evolution of political mainstream consensus supporting gay marriage
    - i. recent polls: evenly split or leaning pro-gay marriage
  - b. claims to morality are invalid, even under low-level rationality review (*Lawrence*)
- CLXXVII. *United States v. Windsor* (2013)
- a. Facts:
    - i. Const. challenge to DOMA's denial of benefits provision
  - b. Holding (Kennedy):
    - i. DOMA provision struck down
      1. provision reflects animus, not a compelling state interest
        - a. violates EP? DP? talks about both but does not specify which is determinative
          - i. but, either would be violated under rationality review (violates either or both)
          - ii. no mention of heightened scrutiny, treating gays as a suspect class, or fundamental rights
        2. DOMA: effect of expressing disapproval and imposing stigma (unworthy of federal protection)
          - a. animus against gay couples and their children
          - b. even the name of the act is designed to "take sides"
      - ii. same theory as *Lawrence* and *Romer*, with the same questions left open
        1. does animus mean anything more than moral objections to homosexuality?
        2. what other types of contexts would moral beliefs be invalidated?
          - a. what about polygamy? (Scalia)
            - i. morality-based objection? does this reflect animus as well?
          3. what about laws passed by states, limiting marriage to straight couples?
      - iii. distinction between DOMA and bans on same sex marriage by states:
        1. DOMA as an issue that also involves federalism
          - a. DOMA departs from the history and tradition of reliance on state laws for the protection and definition of marriage
            - i. but Congress may tailor the administration of benefits pursuant to its enumerated powers
    - c. Dissent (Roberts):
      - i. federalism argument
    - d. Dissent (Scalia):
      - i. no distinction between federal and state bans, logic of majority leads to right to gay marriage
        1. leads District Courts to adopt his opinion in striking down state bans on gay marriage
    - e. Dissent (Alito):
      - i.
    - f. Notes:
      - i. stakes: hundreds of govt. programs and policies administering benefits to married couples
        1. estate tax owed to Windsor upon her partner's death
      - ii. procedural posture:

1. Obama ordered DOJ to stop defending constitutionality of federal DOMA, since he interpreted DOMA to be unconstitutional
  - a. prime example of **departmentalism**
  - b. continues to enforce the law but refuses to defend its constitutionality
    - i. creates a justiciability problem, where neither party is willing to defend constitutionality (no adverse party)
  - c. House Republicans intervene in the litigation for the purpose of defending the Const. of DOMA (Bipartisan Legal Advisory Group – staffed by House leadership: 3 from majority, 2 from minority)
    - i. hires Paul Clement, who leaves firm after firm refuses to defend DOMA
    - ii. SC holds that the Article III requirements of justiciability were met by availability of an advocate (BLAG + Paul Clement)
- iii. Kennedy + four liberals = strike down DOMA provision

CLXXVIII. *Hollingsworth v. Perry* (2013)

- a. Facts:
    - i. Const. challenge to CA Prop. 8
      1. litigated by Boyes and Olsen (opposite counsel in *Bush v. Gore*)
        - a. supporters saw likelihood that the SC would reject a right to gay marriage, setting back litigation
          - i. 9<sup>th</sup> Circuit – invalidated Prop. 8 under *Romer* rationale (and *Schuett*)
            1. removing rights reflects animus
            2. Reinhardt opinion was designed to brief Kennedy, since he was receptive to rationale
  - b. Holding (Roberts):
    - i. 9<sup>th</sup> Cir. judgment vacated on standing and justiciability grounds
      1. governor and AG of CA refused to defend constitutionality of Prop. 8
        - a. group that defended Prop. 8 (sponsors of the ballot measure) lacked standing
          - i. no distinctive personal stake in the outcome
          - ii. cannot represent the state of CA
        - b. worse than justiciability issues in *Windsor*?
          - i. SC did not want to reach the merits in *Perry*
      - ii. constitutionality of gay marriage left an open question
        1. District court verdict, invalidating Prop. 8, stands
- c. Dissent (Kennedy):
  - i.
- d. Notes:
  - i. petitioners' possible arguments:
    1. EP violation in states that offer civil unions but withhold the title of marriage
      - a. can only be explained as an expression of moral judgment, animus
      - b. either get rid of civil unions or add the title of marriage
    2. address broader question of whether there is a constitutional right to gay marriage under EP or DP that would apply in all states
      - a. the Obama position – gays should be a suspect class, should get heightened scrutiny in all states
    3. feared a political backlash if the SC had found a right to gay marriage
      - a. many supporters found that the SC's decisions in *Windsor/Perry* struck the appropriate balance
        - i. see effect of *Roe*; mistake to decide *Roe* at a time when states were in the process of liberalizing abortion laws
  - ii. national right to gay marriage

1. progression beginning with *Bowers* (1986) – rapid social/political progression for a constitutional issue
  2. 1975 – Civil service lifted ban on employing gays
  3. political/social gay rights movement – 1969 Stonewall uprising
  4. 2010 repeal of ban on gays in the military
  5. religious challenges to state bans on gay marriage (ministers prohibited from blessing gay marriage – free exercise challenge under 1<sup>st</sup> Am.)
- iii. median justice in 1986 (Powell)
1. wavered in *Bowers*, as he viewed homosexuality as a pathology; questioned his decision later
  2. social change – primarily a function of law? or social movements?