Spring 2013

Kenji Yoshino – Constitutional Law – Attack Outline

8 Short answer questions (1:30, 40%)

* Designed to test breadth
* Lay out the doctrine, use examples from case law covered in class!

Issue spotter (1:15, 30%)

* Fact pattern, sample statute
* Mechanical – spot the issues
	+ No points for creativity
	+ IRAC!
* Lay out the doctrine, apply the facts, compare and distinguish case law!!

Essay (1:15, 30%)

* Descriptive and normative component
	+ Lay out state of the law – EASY POINTS!
	+ Evaluate it
		- Take a stand
		- Have a thesis
	+ Criticize and reconstruct it
		- Apply it!
* Address counter arguments

**Be sure to include the information in the boxes!**

**STICK TO YOUR OUTLINE!**

1. **MODALITIES OF CONSTITUTIONAL INTERPRETATION**
	1. **The Constitution (1789)**
		1. Art. 1: Legislative Powers
		2. Art. 2: Executive Powers
		3. Art. 3: Judicial Powers
		4. Art. 4: Relationships Among the States
		5. Art. 5: Amendment Procedure
		6. Art. 6: National Debt and Supremacy Clause
		7. Art. 7: Ratification Procedures
	2. **Bill of Rights (1791)**
		1. Am. 1: Freedom of Expression (Religion, Speech, Press, Assembly, Petition) and Establishment
		2. Am. 2: Right to Bear Arms
		3. Am. 3: Quartering of Troops
		4. Am. 4: Unreasonable Search and Seizure
		5. Am. 5: Due Process of Law (Grand Jury, Double Jeopardy, Self-Incrimination, DPC, Takings)
		6. Am. 6: Right to Fair Trial (Speedy, Public criminal trial, Confrontation, Subpoena, Counsel)
		7. Am. 7: Trial by Jury in Civil Cases
		8. Am. 8: Cruel and Unusual Punishment
		9. Am. 9: Unenumerated Rights
		10. Am. 10: States’ Rights
		11. Am. 11 (1795): Sovereign Immunity
		12. Am. 12 (1804): Reforming Executive Election Procedures
		13. Am. 13 (1865): Abolish Slavery
		14. Am. 14: (1868): Privileges or Immunities, DPC, EPC
		15. Am. 15 (1870): Abolish Race-Based Voting Restrictions
		16. Am. 16 (1913): Income Taxes
		17. Am. 17 (1913): Direct Election of Senators
		18. Am. 18 (1919): Prohibition
		19. Am. 19 (1920): Women’s Suffrage
		20. Am. 20 (1933): Lame Ducks
		21. Am. 21 (1933): Repeal of Prohibition
		22. Am. 22 (1951): Presidential Term Limits
		23. Am. 23 (1961): Electoral Votes for D.C.
		24. Am. 24 (1964): Banning Poll Tax
		25. Am. 25 (1967): Presidential Succession and Disability
		26. Am. 26 (1971): Suffrage for Young People
		27. Am. 27 (1992): Limiting Congressional Pay Raises
	3. **Bobbitt’s Modalities of Constitutional Interpretation**
		1. **Historical (Intentional)**: Intentions of the framers/ratifiers
			1. Gives weight to original purpose, clarifies ambiguities
			2. Changed role argument 🡪 Framers vs. Congressman
			3. Must of what we rely on for intent are persuasive arguments/documents, often written/spoken by one person (e.g. Federalist papers)
		2. **Doctrinal**: *Stare decisis* – Rules generated through judicial precedent
			1. Easy to follow, evolves with time
			2. But obscures original intent and gives significant power to judiciary
			3. Can perpetuate incorrectly decided cases in the name of precision over accuracy
		3. **Ethical**: Interpreting the Constitution to reflect American ethos
			1. Consider: Unenumerated rights, like *Miranda*; or “small government”
			2. Dynamic – “Living Constitution” – can change over time
			3. But subjective – Significant judicial power
		4. **Textual**: Meaning of the specific words in the Constitution
			1. Changed circumstances – Changing technology, etc. that didn’t exist at framing
			2. Hyper-textualism would require constant amendments
			3. Intra-textualism – The same word means the same thing throughout (*McCulloch*)
		5. **Structural**: Inferring rules from the structural relationships in the Constitution
			1. E.g. Separation of powers, or federalism
				1. Congress regulates army/navy (Art. 1), President is commander in chief (Art. 2), Art. 3 is silent 🡪 judiciary should give lots of deference in this area
		6. **Prudential**: Cost/benefit with respect to a particular rule
			1. Pops up in emergencies 🡪 “Constitution isn’t a suicide pact”
	4. **Example – *Marsh v. Chambers* (1983)**
		1. Burger – Holding that Neb. State legislature didn’t violate Establishment Clause (1st Am.) in permitting/paying for prayers before legislative sessions, paid with public funds

Note: Violation of Establishment Clause gives tax-payer standing

* + - 1. Establishment Clause: “Congress shall make no law respecting the establishment of religion” (U.S. Const. Am. 1)
			2. **Historical**: Framers passed statute authorizing chaplain for Congressional prayer, paid with public funds then voted on Am. 1 3 days later
				1. Could not interpret Am. 1 as not allowing what they just passed
		1. Brenan J. Dissenting
			1. **Historical**: Constitution as moment of higher lawmaking vs. ordinary lawmaking; Historical intent of framers *and* ratifiers (Bill of Rights was a condition imposed by the states, not Congress); Constitution is not static, fixed @ framing
			2. **Doctrinal**: *Lemon* Test – Statute must have secular legislative purpose; Primary effect neither advances/inhibits religion; doesn’t foster excessive entanglement with religion
			3. **Prudential**: Separation of church and state protects both religion and states
			4. **Ethical**: Prayer is part of American culture
			5. **Textual**: “Establishment of Religion” referred to the Church of England
1. **JUDICIAL REVIEW**
	1. **Analysis**
		1. **Political Question Doctrine (*Baker v. Carr*, 1962)**
			1. Textual Constitutional Commitment to another branch 🡪 someone is SATPOP

PQD: (Cite *Baker*)

ALL THREE!

1. Commitment
2. Competence
3. Comity
	* + - 1. *Nixon v. US* (1993) – Judges should rule on removal of other judges

Judicial impeachment is an Art. 2 power of Congress

* + - 1. Institutional Competence – Lack of discoverable/manageable standards
				1. *Coleman v. Miller* (1939) – No standard to determine what is “too long” for voting on a Constitutional Amendment
			2. Comity – Prudential reasons to abstain (respect for coordinate branches)
		1. **Standing**
			1. Π must allege (1) an injury in fact that is (2) fairly traceable to Δ’s conduct and (3) likely to be redressed by a favorable federal court decision

Tax-payer standing results in too many suits; injury is *de minimis*

Exception: Use of taxes in violation of Establishment clause (*Marsh v. Chambers*)

Note: These are prudential gloss, not constitutional rule 🡪 Congress can override – *see also Strauder* Jury selection case

* + - * 1. *Lujan v. Defenders of Wildlife* (1992) – Group sues US for violating endangered species act abroad – no economic injury (need to buy plane ticket to go see African tigers)
			1. Prudential – Prohibition on asserting rights of 3rd parties or generalized grievances of a group (“taxpayer”/“citizen”); asserting claim outside of “zone of interests” protected by Congress
				1. *Elk Grove Unified Sch. Dist. v. Newdow* (2004) – Father can’t sue on behalf of daughter because mother was primary caretaker
		1. **Ripeness**: No review of matters that are premature
			1. *Ohio Forestry Assoc. v. Sierra Club* (1998) – Can’t sue forestry to prevent development that hadn’t been planned yet
		2. **Mootness**: No review of matters where no relief can be granted
			1. *City News and Novelty v. City of Wankesha* (2001) – Refused to review city restriction on adult book store because store had already gone out of business
			2. Exception for matters evading review but capable of repetition (*Roe v. Wade*)
		3. ***Certiorari* Practice**

Note: *Michigan v. Long* allows same-sex marriage proponents to hide the ball from SC-USA

* + - 1. 80-150 cases out of 7,500 per year
			2. Conflicts between circuits, and/or state supreme courts
			3. No *cert.* if there is an adequate and independent ground for lower court decision in state law (*Michigan v. Long*, (1983)
		1. ***Stare Decisis* (*Planned Parenthood v. Casey*, 1992)**
			1. Prudential factors to overrule past doctrine
				1. Change in doctrine (*Darby*) – Change in law 🡪 abandoned doctrine
				2. Change in fact – or changed perception of similar facts
				3. Central rule is unworkable
				4. Reliance interests in previous doctrine
		2. **Jurisdiction Stripping – Exceptions Clause**
			1. Congress can remove the lower federal courts
			2. Congress can strip Supreme Court Appellate Jurisdiction (Art. 3, § 2 “with such exceptions, and under such regulations”) (*Marbury* – what is taken from appellate is not placed in original 🡪 Congress could strip all appellate jurisdiction)
			3. Could increase or decrease the amount of justices
	1. **Judicial Review – Policy and Justifications**
		1. **Generally**
			1. Interpretation – Resolve statutory ambiguities
			2. Review – Determine if statutes comport with the Constitution
			3. Authority – *Marbury v. Madison*
			4. *McCulloch v. Maryland* – “[I]t is a Constitution we are expounding… [A] Constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs” – Constitution ≠ Statute
		2. **Judicial Review Controversy** – Final arbiter of Constitution’s meaning is the least democratic branch 🡪 least politically accountable
		3. **Counter-Majoritarian Difficulty**: When SC declares a statute unconstitutional, it thwarts elected representatives of the people
			1. Dahl – SC justices are elected every 22mo+/-, so their policy views are usually close to the majority – SC only cuts against the majority during short-lived transitional periods, or under exceptional circumstances
		4. **Additional Justifications**
			1. Supervise inter/intra-governmental relations
				1. *Martin v. Hunter’s Lessee* (1816)

Uniform Constitutional interpretation across the country

Supremacy of federal law and the Constitution over state law

* + - * 1. *Cohens v. Virginia* (1821)

Power of judiciary is co-extensive w/ Constitution 🡪 can review state law

* + - * 1. *Martin*/*Cohen* 🡪 SC can review state decisions and state laws
			1. Preserving Fundamental Values (Bickel)
				1. No political pressure: Life tenure, time to develop views, “way of the scholar”
				2. Legislative myopathy – Congress legislates prospectively, judges adjudicate the impact with benefit of hindsight
			2. Protecting the Integrity of the Democratic Process (Ely)
				1. Judiciary should scrutinize legislation that (1) “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or (2) that is based on “prejudice against discrete and insular minorities, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”

Ely idea is process-only

Problem: All laws pick winners/losers, so even process only selection of cases will pass substantive judgment at some point

* + - * 1. Tyranny of the majority – Super-majoritarian protection of the minority over majority rule (the Constitution)
				2. Political process – Break-down of the political process – majority systematically over-ruling everything from a particular minority
			1. NOTE: Bickel is concerned with outcome, Ely is concerned with process
	1. **Constitutional Text**
		1. **Art. 3, § 1: Judicial Powers**: “The judicial power… shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish. The Judges… shall hold their offices during good behavior…”
		2. **Art. 3, § 2: Jurisdiction**: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the SC shall have original Jurisdiction. In all other cases… the SC shall have appellate Jurisdiction… with such Exceptions, and under such Regulations as the Congress shall make.”
	2. ***Marbury v. Madison* (1803)**
		1. Federalists (big government) lose election, attempt entrenchment 🡪 Establish circuit courts (16 judges), appoints John Marshall to SC, appointed justices of the peace
		2. Jefferson instructs secretary of state to withhold commissions from 17 justices of the peace 🡪 Marbury sues seeking *writ of mandamus* to compel Madison to deliver
		3. Issue: § 13 of the Judiciary Act gave SC original jurisdiction to issue *writs of mandamus* 🡪 Not one of the enumerated areas of original jurisdiction in Art. 3, § 2
			1. Does Marbury have a right to the commission? Do the laws afford him a remedy? And can the SC issue this remedy?
		4. Reasoning – Authority for Judiciary to review constitutionality of exec./leg. acts
			1. **Constitutional Supremacy**
				1. Intent of framers – original government charter
				2. Constitution is written – Sets metes and bounds of discretion
				3. Art. 4 Supremacy Clause – “This Constitution, and the Laws… which shall be made in Pursuance thereof”

“Constitution” is first, and laws must conform in order to trump state law

* + - 1. **Judiciary as Interpreter of the Constitution**
				1. Textual – Courts hear all cases “arising under” the Constitution
				2. Judicial Competence – Interpreters of law/expertise in conflict resolution
				3. Judicial Oath to protect the Constitution
		1. Holding: § 13 is unconstitutional because Congress can’t allow original jurisdiction beyond what is enumerated in the Constitution
			1. Marbury is entitled to the commission, judicial remedy wouldn’t interfere with executive discretion, *mandamus* is the appropriate remedy, Madison cannot assert sovereign immunity, § 13 authorizes the *writ* in this case
	1. **Escape Hatches**
		1. **Recusal** – Marshall was Secretary of State when Marbury was appointed
		2. **Contract Law** – Decide the commission only vests on delivery (rather than appointment) 🡪 NOTE: Does not work if Π is SATPOP – revoke any time
		3. **Political Question** – If Constitution gave power over this decision to another branch
		4. **Statutory Interpretation** – Interpret § 13 to allow SC *appellate* rather than *original* jurisdiction over *writs of mandamus* 🡪 no conflict
		5. **Constitutional Interpretation** – Secretary of state as a “minister”
			1. Exceptions Clause – Make an exception that adds original jurisdiction
1. **FEDERALISM**
	1. **Analysis**
		1. **Values of Federalism**
			1. Efficiency
				1. Local issues should be resolved at local level (States – environmental regulations), larger national issues should be resolved at the federal level (defense, transportation, communication)

Solves collective action problems (*See Hammer and Darby*)

Provides finality

* + - * 1. BUT can just have central government with local municipalities
			1. Individual Choice

Assumes population mobility

Really only applies to police powers

* + - * 1. States give menu of options assuming mobile population
				2. One state bans smoking 70/30, one does not 40/60 🡪 Nationally 110/90

So if federal 🡪 90 pissed off, if state 🡪 70 pissed off (30 + 40)

* + - 1. Experimentation – Very similar to Individual Choice
				1. *New State Ice*, Brandeis dissenting – “Laboratories of experimentation”
				2. State policies can spread, then be adopted nationally later
				3. States build on a floor of federal policy, articulates different mores, innovate
			2. Citizen Participation

*Lopez* (Kennedy) – Keep the lines clear so we know what political parties are accountable

* + - * 1. States are more approachable than feds, more responsive to local issues
				2. Easier to pass a local ordinance, or statute
			1. Prevent Tyranny
				1. Separate sovereign is better able to stand up to the other than individuals
				2. E.g. D.C. has problems because it doesn’t have sovereign status
				3. Role of states asserting communal rights (think Yucca Mountain)
				4. States interact with administrative agencies 🡪 federalism and SOP
			2. NOTE: We may be so integrated that these values aren’t what they once were
		1. **Necessary and Proper Clause**
			1. If the end is within the Constitution, and the means is plainly adapted to that end and is consistent with the Constitution 🡪 Constitutional (*McCulloch*, 1819)
				1. BUT Court will strike down pretextual use of N&PC (*McCulloch*)
			2. *See Comstock* (2000) – Upheld civil commitment of “sexually dangerous persons” on say so of the AG under N&PC
		2. **Commerce Clause**
			1. Congress CC power is plenary (unlimited) – has political check (*Gibbons*; *Darby*)
				1. Court doesn’t look at Congress’s motives
			2. Analysis – (Shadows of the old direct/indirect flow/out-of-flow distinctions)
				1. Channels of Interstate Commerce (*Gibbons v. Ogden/Darby*/*Heart of Atlanta*)
				2. Instrumentalities of Interstate Commerce, or Persons or Things in Interstate Commerce (Trucks, Boats, Cars, Trains) (*J&L Steel*, Breyer dissent in *Lopez*)
				3. Activities that “Substantially Affect” Interstate Commerce (*Jones & Laughlin*)

Is the activity economic in nature?

No crime (*but see Raich*), families, or education

*Distinguish Wickard* – Economic activity (*Compare* Stevens Dissent)

There is a market in guns, but statute does not address gun market

Is there a jurisdictional element? – Yoshino considers this dispositive

Include “guns that have moved in or that otherwise affect interstate or foreign commerce” – unreviewable issue of fact – act not commodity

Are there Congressional findings? 🡪 Never dispositive

Sufficiently close link between the activity and interstate commerce?

*See* Breyer/Stevens dissent – guns in classroom diminish learning environment – undermines the workforce – or too many causal steps?

*See also Morrison* – Gender violence 🡪 productivity = too attenuated

* + 1. **Due Process Clause (EPC/DPC analysis converge under Rational Basis Review)**
			1. No person shall be deprived of life, liberty, or property, w/out due process of law
				1. “Freedom of K” (*Lochner* creates, *West Coast Hotel v. Parish* takes away)
				2. Parental autonomy (*Meyer v. Nebraska*; *Pierce v. Society of Sisters*)
				3. Contraception (*Griswold v. CT*); Sexual intimacy (*Lawrence v. TX*)
				4. Reproductive autonomy (*Roe v. Wade*; *Casey v. Planned Parenthood*)
			2. Rational Basis Review
				1. *Fritz* (1980) – Absent a reason to infer antipathy, we rely on political check

***Caroline Products* RBR:**

Facts supporting legislative judgment is presumed

Can proceed step-wise

FN provides the origin for heightened scrutiny status and maybe Rational Basis with Bite

* + - * 1. *See Cleburne* – Desire to harm a politically powerless group
				2. *Caroline Products*

Existence of facts supporting legislative judgment is presumed

Can be step-wise – needn’t regulate the whole industry (margarine)

EPC doesn’t require regulation of all like evils (rational basis)

The political check should be above judicial review, except in specific circumstances where it may be undermined (footnote 4)

¶1: Enumerated Right in the Constitution; ¶2: Restricts the political process which would repeal an unjust law; ¶3: Legislation is directed at a discrete and insular minority

* + - 1. Categories that trigger heightened scrutiny

|  |
| --- |
| Classifications That Get More than Rational Basis under EPC |
| Strict Scrutiny – Need compelling government interest | Race (*Korematsu* (1944)); National Origin (*Oyama* (1948)); Alienage (*Graham v. Richardson* (1971)) |
| Intermediate Scrutiny – Substantially related to important government interest | Sex (*Craig v. Boren* (1976)); Non-marital Parentage (*Trimble v. Gordon* (1977)) |
| Rational Basis “With Bite” | Disability (*Cleburne v. Cleburne Living Center* (1985)); Sexual Orientation (*Romer v. Evans* (1996)) |
| Rational Basis | Age (*Murgia* (1976)); Professions (*Lee Optical* (1955)) |

* + 1. **Spending Power**
			1. Spending Power (*Dole*)

For (a) – Congress gets deference, apply RBR

For (c) – Analyze over/under inclusiveness (*see* O’Connor in *Dole*)

For (d) – Can’t back-door what you can’t front door (*but see Dole* – beyond CC power but still ok)

For Coercion – Can’t “compel” can only provide “mild encouragement” – compare #’s

* Are you *taking away* funding, or just *not giving new* funding?
	+ - * 1. Conditions on federal grants “must be in pursuit of the general welfare”
				2. Conditions must be unambiguous so states know consequences of their choice
				3. Conditions must be related “to the [asserted] federal interest” – the “nexus” requirement – otherwise illegitimate
				4. Conditions can’t be in conflict with another Constitutional provision
				5. Conditions can’t be coercive/draconian (0.5% (*Dole* ok) < x < 10% (*Sebelius* not ok) of state budget) (this is not a factor, gloss from Rehnquist)
			1. Taxing Power – Congress can levy taxes, not impose penalties (*Sebelius*)
				1. Amount of tax is less than amount for insurance
				2. Absence of scienter requirement
				3. Administered by IRS
				4. No adverse consequences other than payment of the tax
				5. Inactivity? 🡪 General tax for healthcare with exemption for people that buy their own insurance – adjusted for income, etc.
		1. **Dormant Commerce Clause – Horizontal Federalism**
			1. Does state regulation **impinge** on an activity covered by federal legislation?
				1. If yes, state law is invalid if preempted by federal law
				2. Consider savings/express preemption clause: frustration/impossibility/field
			2. Does state regulation facially/pretextually **discriminate** against IC?
				1. If yes, invalid unless it meets strict scrutiny (*PA v. NJ*), or state is a market participant (*Hughes v. Alexandria*)
				2. Strict Scrutiny

Legislation must be justified by an **actual and compelling non-economic** state interest and the legislation must be **precisely tailored** to meet it

*Maine v. Tailor* (1986) – Maine bans out-of-state baitfish constitutional because they are protecting from *undetectable* parasite found in out-of-state fish (no reasonable alternative)

Pretext – *Hawaii* regulation on all alcohol with an exception for alcohol made with a plant only found in HI 🡪 unconstitutional

* + - * 1. Market Participant Exception

State acting as a market participant (purchase, sell, subsidize, etc.) can act like any other private participant (but no regulation)

*Reeves, Inc. v. Stake* (1980) – Upheld SD state-owned cement plant selling primarily to in-state companies

*South Central Timber Dev. v. Wunnicke* (1984) – Overturned regulation requiring Alaska timber to be “partially processed” in state even though state was also a timber processor

* + - 1. Does the (non-discriminatory) state regulation **burden** interstate commerce?
				1. If yes, invalid unless state’s interest in regulation outweighs the burden on interstate commerce (*Pike v. Bruce Church*) (remember market participant)
				2. *Pike* Balancing (*Hughes v. OK*, 1979)

Whether statute regulated even-handedly with only “incidental” effects on interstate commerce or instead discriminated against interstate commerce facially or in practical effect (i.e. threshold)

*Pike* balancing asks (a)

*Hughes* lays out 3-factors

All is subject to market participant exception

Whether the statute serves a legitimate local purpose, and if so

Whether alternative means could promote this local purpose as effectively without discriminating against interstate commerce

* + 1. **Privileges and Immunities Clause – Horizontal Federalism**
			1. Art. 4, § 2 – “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states”

Citizens of each state are entitled to the P&I of citizens of the several states – *Corfield* defines the entitlements

Invalid unless the state has a substantial justification and there are no less restrictive means

* + - 1. Is Π a corporation or foreigner? 🡪 If yes, no standing, not a citizen of states
			2. Does entitlement infringe a fundamental right? (*Corfield v. Coryell* (1823))
				1. Right to pass through or travel in state
				2. Right to “reside in state for business or other purposes”
				3. Right to do business there whether it involves “trade, agriculture, professional pursuits, or otherwise” – “pursue a livelihood”
				4. Right to “take, hold, and dispose of property, either real or personal”
			3. Right to pursue a livelihood
				1. *Toomer v. Witsell* (1948) – Struck down SC statute requiring non-residents to pay 100x the licensing fee of in-state residents for commercial shrimp boats
				2. *Baldwin v. Montana Fish and Game* (1978) – Upheld MT statute charging out-of-staters more for elk hunting licenses (non-livelihood)
			4. No violation unless there is discriminatory purpose
		1. **Compare DCC and P&IC**
			1. *United Building and Construction Trades Council v. Camden* (1984)
				1. City ordinance requiring 40%+ of contractor/sub employees = Camden residents
				2. DCC – Market participant exception (city construction projects)
				3. P&IC – Livelihood – in/out-of-staters treated differently
				4. Invalid under P&IC, despite political check by discriminated in-staters

|  |  |
| --- | --- |
| Dormant Commerce Clause | Privileges and Immunities Clause |
| Discriminating state regulation is invalid unless it1. Furthers important, non-economic state interest and there is no reasonable non-discriminatory alternative or
2. The state is a market participant
 | State regulation that deprives an (individual) out-of-stater of important economic interest (livelihood) or civil liberties* Invalid unless the state has a substantial justification and there are no less restrictive means
* No market participant exception
 |
| No discriminatory purpose, but discriminatory effect* Invalid if the burden outweighs the state interest (*Pike* Balancing – as stated in *Hughes*)
 | If the law has no discriminatory purpose it is presumed valid |
| Aliens and corporations can be plaintiffsCongress can always bless what the states have banned or *vice versa* | Aliens and corporations cannot be plaintiffsCongress cannot alter the rights granted to citizens under the P&IC |

* + 1. **Full Faith and Credit Clause – Horizontal Federalism**
			1. Art. 4, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state”)
	1. **Generally**
		1. **Federalism**
			1. Arises when two sovereigns have power over the same geographic space
			2. The Federal Government is supreme within its enumerated powers
			3. Am. 10 gives any power not given nor forbidden by the Constitution to the states
		2. **Constitutional Text – Art. 1, § 8 (Compare Art. 1, § 9 limits on Congress)**
			1. “The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the US; by all Duties, Imposts and Excises shall be uniform throughout the US”
			2. “To borrow money on the credit of the US; to regulate commerce with foreign nations, and among the several states and with the Indian Tribes; …; To constitute tribunals inferior to the SC; …; to declare war, grant letters of Marque and Reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; …; and (cl. 18) to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the US, or in any department or officer thereof
		3. **Arcs of Congressional Power**
			1. *Lochner* Era (1800 – 1937)
				1. Federal Power: Weaker – CC – State Power: Stronger – 14th DPC – Individual Rights – 5th DPC
			2. 1938 – 1995
				1. Federal Power: Maximum; State Power: Minimal; Individual Rights: Secondary to Federal Interests
			3. Rehnquist Revolution (1995 – Present)
				1. Federal Power: Some limitations; State Power: Minimal but increasing; Individual rights: Secondary to federal power
	2. ***Lochner* Era (1800 – 1937)**
		1. **Generally**
			1. *McCulloch v. Maryland* (1819) – SC can strike down State laws
				1. Holding: If the end is within the Constitution, and the means is plainly adapted to that end and is consistent with the Constitution 🡪 Constitutional

Interprets N&P clause broadly to let Congress choose the means to carry out the enumerated powers

* + - * 1. Issues: (1) Can Congress charter a national bank? (2) Does the state have the power to tax the national bank?
				2. Reasoning – Question 1

Feds have supreme power within their sphere; Congress can lay and collect taxes, regulate commerce, declare/wage war; To achieve the enumerated ends, N&PC gives Congress any constitutional means to achieve those ends; The bank is a means 🡪 Constitutional

BUT Court will strike down pretextual use of N&PC (*McCulloch*)

Text: No enumerated power; but Art. 1, § 8 N&PC

Art. 1, § 10 uses “absolutely necessary” language

Intra-textualism 🡪 Same word is the same unless modified

Historical: Intent of framers to expand articles of confederation which was restrictive – concern about judges being the ones to interpret this

Ethical: Constitution not a legal code – doesn’t spell out metes and bounds

Prudential: Embarrassment of 1812 when feds couldn’t fund troops during war without national bank

* + - * 1. Reasoning – Question 2

Structural: Power to tax is the power to eliminate the bank altogether

Feds have no state representation, tax on citizens has political check

Textual: Supremacy clause, limitations on state taxes of import/export

* + - 1. *Gibbons v. Ogden* (1824)
				1. Ogden operates ferry between NY/NJ on NYS exclusive license; sues Gibbons to prevent operating same under federal license
				2. Step 0: This is an inter-state, not intra-state regulation
				3. Step 1: “Congress shall have the power to **regulate commerce** with foreign nations, and **among the several states**…”
				4. Reasoning

Commerce includes commercial intercourse between the states

Power to regulate doesn’t stop at the border of the state, can enter the state to the extent that intra-state regulations affect inter-state commerce

* + - * 1. NOTE: Power to regulate interstate commerce is plenary, only political check
				2. Johnson Concurring: State can’t regulate even in absence of federal regulation

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| **Pre-1937 CC Distinctions** (No longer used) |
| **Valid** | **Invalid** |
| Interstate (“throat of commerce,” “stream of commerce”)*Safford* (Stockyard cases, regulate stockyards even though entirely intra-state) | Intrastate*Schecter* (Chickens has come to rest – fallen out of stream of commerce) |
| Commerce | Agriculture, Manufacture, Mining*Carter Coal* (Manufacture is antecedent to commerce) |
| Direct Effects | Indirect Effects |
| **Distinction** | **Reasoning** |
| Product/Process (*Compare Ames with Hammer*) | If product is indistinguishable from acceptable goods, can’t regulate with CC |
| Pretext (*Ames* Dissent) | CC can’t be used as pretext for police power |

* + 1. **Commerce Clause Distinctions**
			1. Sharp distinction between commerce power and police power (reserved to states in 10th Amendment) (*E.C. Knight Co.* [*The Sugar Trust Case*] (1895))
			2. Textually this is a fight about “regulate” “interstate” and “commerce”
			3. *Champion v. Ames* (1903; *The Lottery Case*)
				1. Upholds law that prohibits shipping lottery tickets between states and US/foreign countries

Police power is reserved to the states in the 10th Am.

Fed. Gov. gets police power where it doesn’t exercise concurrent power: D.C., military bases, Puerto Rico, Native American Lands

* + - * 1. Holdings

Power to “regulate” is the power to “prohibit”

Does not interfere with intra-state lotteries, feds helping states that want to prevent out-of-state tickets from entering

Note that it is the tickets *themselves* that are the problem

* + - * 1. Dissent argues pretext for regulating morals
			1. *Hammer v. Dagenhart* (1918) – **Overruled by *Darby***
				1. Struck down congressional regulation forbidding inter-state shipment of goods if they are the product of child labor
				2. Holding: Congress can regulate harmful *products* in commerce, but not the *process* that made otherwise benign products (*Distinguish Ames*)
				3. Race to the bottom: States that enact child labor laws are at economic disadvantage – interest of the collective is not the same as individual
		1. **Substantive Due Process**
			1. *Lochner v. New York* (1905) – **Indirectly Overruled by *West Coast Hotel***
				1. Struck down NYS maximum hours law for bakers
				2. “Freedom of Contract”
				3. *Compare Holden v. Hardy* – Allowing max hours for miners

Argument that miners/women/etc. are vulnerable classes

Bakers are not a vulnerable class – argument otherwise are pretext

* + - * 1. Harlan Dissent: Argues for deference to Congress since the health effects and vulnerability of bakers is at least debatable – political check
				2. Holmes Dissent: Reading unenumerated “right of K” into the Constitution – court is importing social policy without a political check
			1. Art. 1, § 10 – Contracts Clause – “No state shall… pass any… law impairing the obligations of Ks” 🡪 *Stone v. Mississippi* (1880) interprets state police power as an exception to the K-C; now only applies is state is a party to the K
			2. NOTE: Epstein argues if you like *Roe*, you need to swallow *Lochner*
	1. **Federalism from 1937 to 1995**
		1. Historical Circumstance: FDR New Deal policies under attack by conservative SC justices under CC/DPC grounds, FDR threatens court packing plan (add 6 liberal justices to total 15 and over-rule the conservatives)
		2. Period that greatly expands the reach of the federal government at a cost to states
		3. **Commerce Clause**
			1. *NLRB v. Jones & Laughlin Steel* (1937)
				1. Upholds the NLRA which enables the NLRB to require J&L to rehire workers fired for engaging in union activity
				2. Steel is a good in the flow of commerce (*Distinguish Schecter*)
				3. Control of steel has a direct effect on commerce – close and substantial relationship, control protects commerce from burdens/obstructions
			2. *United States v. Darby* (1941) (Overrules *Hammer*)
				1. Strikes down product/process distinction in *Hammer* as novel and note grounded in the Constitution
				2. CC power extends to intra-state activity that substantially affect inter-state C
				3. Reaffirms *Gibbons* concept that Congress CC power is plenary, has only political check – otherwise is unlimited 🡪 Ct won’t look @ motives
			3. *Wickard v. Filburn* (1942) (Economic Aggregation)
				1. Secretary of agriculture penalized farmer for growing personal wheat that put his total over the statutory allotment under Agricultural Adjustment Act
				2. Reasoning

Growing personal wheat over allotment takes that farmer out of the market

Aggregation principle – **Economic activity** can be aggregated so even *de minimis* effect of one person can be considered to affect commerce

* + - 1. Notes: Springs from the concept that “the National Legislature ought to be empowered to… legislate in all cases to which the separate States are incompetent, or in which the harmony of the Unites States may be interrupted by the exercise of individual legislation” (Philadelphia Convention, 1787)
		1. **Due Process Clause**
			1. *West Coast Hotel Co. v. Parish* (1937) (Indirectly Overrules *Lochner*)
				1. WA minimum wage statute, hotel asserts freedom of K defense
				2. Overrules *Adkins* (followed *Lochner*) overruling minimum wage for women
				3. *Muller v. OR* (1908) – Women are a protected class – max hour restriction
				4. Reasoning: “The Constitution does not speak of freedom of [K]. It speaks of liberty and prohibits the deprivation of liberty without due process of law”

Broader than *Muller*

* + 1. ***Caroline Products v. United States* (1938)**
			1. Holdings
				1. The “Filled Milk Act” doesn’t violate CC

Congress can police anything in commerce

Injurious to public health, morals, or welfare

* + - * 1. The “Filled Milk Act” doesn’t violate the DPC

Rational Basis Review

Existence of facts supporting legislative judgment is presumed

Though congress also made findings here about health issues

Can be step-wise – needn’t regulate the whole industry (margarine)

EPC doesn’t require regulation of all like evils (rational basis)

* + - * 1. **The Key**: The political check should be above judicial review, except in specific circumstances where it may be undermined (footnote 4)
				2. Footnote 4 – How to rebut presumption of rational basis

¶1: Enumerated Rights – No deference if legislation is within a specific prohibition of the constitution

E.g. Affecting something in the Bill of Rights

NOTE: All rights are incorporated against the states **EXCEPT**

3rd Am. – Quartering soldiers

5th Am. – Grand jury clause (*Hurtado v. CA*, 1884)

7th Am. – Jury guarantee in civil cases (*Minneapolis v. Bombolis*)

8th Am. – Bail and fines provision

¶2: Political Process – No deference if legislation restricts political process that would repeal undesirable legislation

E.g. Right to associate, free speech/assembly, right to vote (unenumerated rights – consider Jim Crow laws)

¶3: Minorities – No deference if legislation is directed at particular religious, national, or racial minorities

Discrete (easily identified) and insular (grouped together in one place so they can easily be ignored)

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| Classifications That Get More than Rational Basis under EPC |
| Strict Scrutiny – Need compelling government interest | Race (*Korematsu* (1944)); National Origin (*Oyama* (1948)); Alienage (*Graham v. Richardson* (1971)) |
| Intermediate Scrutiny – Substantially related to important government interest | Sex (*Craig v. Boren* (1976)); Non-marital Parentage (*Trimble v. Gordon* (1977)) |
| Rational Basis “With Bite” | Disability (*Cleburne v. Cleburne Living Center* (1985)); Sexual Orientation (*Romer v. Evans* (1996)) |
| Rational Basis | Age (*Murgia* (1976)); Professions (*Lee Optical* (1955)) |

* + 1. **Example**
			1. *Williamson v. Lee Optical* (1955)
				1. Upholds statute distinguishing ophthalmologists, optometrists and opticians
				2. Rational basis – Court considers rationales even when Congress is silent

Enough there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it

* + - * 1. EPC = DPC in situations where the problem is economic
		1. **Commerce Clause (1960s)**
			1. *The Civil Rights Cases* (1883) – Congress can only regulate government, not private conduct under the 14th Amendment
				1. So Civil Rights Act of 1964 regulates private conduct under CC power
			2. *Heart of Atlanta Motel* (1964) – Motel can’t racially discriminate
				1. Fact that Congress was dealing with a moral problem doesn’t diminish the evidence that discrimination in hotels against black people affected commerce
			3. *Katzenbach v. McClung* (1964) – Restaurant can’t racially discriminate
			4. NOTES – *Atlanta/Katzenbach* can’t be decided under 13th (slavery) or 14th (EPC/DPC) Amendments because these are private actors
				1. But using CC becomes a liability when SC-USA decides to take away some of that power, good argument that they should have tried to overturn *The Civil Rights Cases*.
	1. **Federalism (1995 – Present) Rehnquist Revolution**
		1. ***United States v. Lopez* (1995)**
			1. Struck down Gun-Free School Zones Act which forbids “any individual knowingly to possess a firearm at a place that [he] knows… is a school zone”
			2. Controlling CC Test – Congress can regulate
				1. Channels of Interstate Commerce (*Gibbons v. Ogden/Darby*/*Heart of Atlanta*)
				2. Instrumentalities of Interstate Commerce, or Persons or Things in Interstate Commerce (Trucks, Boats, Cars, Trains)
				3. Activities that “Substantially Affect” Interstate Commerce (*Jones & Laughlin*)

Is the activity economic in nature?

2 Acts of Rehnquist Revolution

*Lopez* & the 4-factor test + *Boerne* & congruent and proportional = more state power @ expense of federal power

*But see Raich* (Fed. reg. of in-state activity) *and Hibbs* (relied on disparate impact & non-state actor activities)

No crime (*but see Raich*), families, or education

*Distinguish Wickard* – Economic activity (*Compare* Stevens Dissent)

There is a market in guns, but statute does not address gun market

Is there a jurisdictional element?

Yoshino considers this dispositive

Include something like “guns that have moved in or that otherwise affect interstate or foreign commerce”

Becomes an issue of fact for the jury – not reviewable

NOTE: This way, you can’t change the Constitutional test

NOTE: This *should* read: “*substantially* affects” 🡪 should track the Constitutional standard

Are there Congressional findings? 🡪 Never dispositive

Sufficiently close link between the activity and interstate commerce?

*See* dissent – guns in classroom diminish learning environment which undermines the workforce

Majority argues this is too many causal steps

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| **Souter Dissenting** | **Stevens Dissenting** | **Breyer Dissenting** |
| **Doctrinal**: Judicial restraint is embodied in rational basis reviewDistinction between what substantially affects and what doesn’t is like the old distinctions | Guns as things in interstate commerce – Welfare of the nation depends on education | **Doctrinal**Power to regulate IC encompasses local activities that affect IC (*Wickard*)To determine, consider aggregate, not individual actsApply RBR – Link guns to quality of education to workforce |
| **Kennedy/O’Connor Concurring** | **Rehnquist Majority** | **Thomas Concurring** |
| **Structural**: Separation of powers, and state’s rightsConcerns that federal government is taking traditional state policing power – no local political checks, undermines political responsibility(Education is a traditional concern of the states, doctrinal principles militating for restraint) | **Structural**: Maintain balance of power between coordinate branches“**Cost of crime**” argument creates unlimited federal CC powerLays out **controlling CC analysis** – Doctrinal modality, but clarifies analysis in substantial effects test – reasoning from first principles | **Historical**: Constitution uses “commerce” in the narrow sense – wants the old distinctions**Textual**: Development of N&PC has rendered other Art. 1 § 8 powers superfluous |

* + 1. ***United States v. Morrison* (2000)**
			1. Strikes down Violence Against Women Act under *Lopez*
			2. VAWA gave victims of gender-motivated violence a private cause of action
			3. Analysis
				1. No jurisdictional statement or legislative findings
				2. Too attenuated a link between regulated activity and commerce
				3. This is a non-economic family issue that is a traditional area for the states
			4. Reasoning that violence against women is a “national” problem, but not a problem “among” the states 🡪 federal problem
			5. NOTE: Can’t use 14.5 because these are not state actors (*The Civil Rights Cases*)
		2. ***Gonzalez v. Raich* (2005)**
			1. Upholds federal criminalization of MJ against challenge by Raich that they are unconstitutional as applied to her privately grown medicinal MJ under CA law
			2. Reasoning under *Wickard* – Fungible commodity that can end up in the large interstate black market for MJ (*distinguish Morrison* and *Lopez* as non-economic)
	1. **Spending Power**
		1. Art. 1, § 8, cl. 1 – “The Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States”
		2. ***South Dakota v. Dole* (1987)**
			1. Upheld federal statute withholding highway funds from states w/ drinking age under 21y
			2. **Test**
				1. Conditions on federal grants “must be in pursuit of the general welfare”
				2. Conditions must be unambiguous so states know consequences of their choice
				3. Conditions must be related “to the federal interest in particular national projects or programs” – the “nexus” requirement
				4. Conditions can’t be in conflict with another Constitutional provision

Conditions can’t be coercive/draconian (0.5% (*Dole* ok) < x < 10% (*Sebelius* not ok) of state budget)

* + - 1. O’Connor Dissenting – Both over-inclusive (stops teens from drinking even when they wouldn’t drive) and under-inclusive (teens aren’t the only DUIs)
		1. ***National Federation of Independent Business v. Sebelius* (2012)**
			1. Anti-injunction problem – Tax cases can’t be brought until levied 🡪 ripeness
				1. Not a tax for purposes of anti-injunction act
				2. That act is an act of Congress, so Congress gets to say what counts
				3. NOTE: Standing is OK because people arrange their affairs around the law
			2. Individual Mandate – Requires everyone to purchase healthcare or pay penalty; economically necessary to fund pre-existing conditions and rate limits
				1. CC – Majority: Feds don’t have power to affirmatively order citizens to buy insurance, power to regulate = power to prohibit (*Gibbons*) ≠ power to require
				2. CC – Ginsburg Dissent: Not like other goods, all people will need it and it is provided whether people can pay or not – characterized *act* of self-insurance
				3. Taxing Power – Congress can levy taxes, not impose penalties

Amount of tax is less than amount for insurance

Absence of scienter requirement

Administered by IRS

No adverse consequences other than payment of the tax

Inactivity? 🡪 General tax for healthcare with exemption for people that buy their own insurance – adjusted for income, etc.

* + - 1. Medicaid Expansion – Induces states to expand Medicaid to cover all under 65y with income below 133% of poverty line – threatens loss of Medicaid
				1. Not allowed under *Dole* – Incentive amounts to compulsion
				2. Saving interpretation – Can only withhold the incremental expansion
	1. **Horizontal Federalism**
		1. Origins
			1. “Dormant” CC (Art. 1, § 8, cl. 3)
			2. P&IC of Art. 4, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states”)
			3. Full Faith and Credit Clause of Art. 4, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state”)
		2. Rationale – Resolve collective action problems, avoid trade wars, avoid protectionism
		3. **Dormant Commerce Clause**
			1. Generally
				1. Where Congress has not acted, CC restricts state regulation of IC
				2. Prudential/Structural: Congress is slow, would be impossible to address individual state actions as they arise
				3. Reliance on DCC doctrine – *Gibbons v. Ogden*
			2. Analysis
				1. Does state regulation **impinge** on an activity covered by federal legislation?

If yes, state law is invalid if preempted by federal law

Consider savings/express preemption clause: frustration/impossibility/field

* + - * 1. Does state regulation facially/pretextually **discriminate** against IC?

If yes, invalid unless it meets strict scrutiny (*PA v. NJ*), or state is a market participant (*Hughes v. Alexandria*)

Strict Scrutiny

Legislation must be justified by an **actual and compelling** state interest and the legislation must be **precisely tailored** to meet it

Important **non-economic** state interest

No reasonable nondiscriminatory alternative

Carefully consider comparisons to the following examples

*Maine v. Tailor* (1986)

Maine bans out-of-state baitfish constitutional because they are protecting from *undetectable* parasite found in out-of-state fish

Pretext – *Hawaii* regulation on all alcohol with an exception for alcohol made with a plant only found in HI 🡪 unconstitutional

Market Participant Exception

State acting as a market participant (purchase, sell, subsidize, etc.) can act like any other private participant (but no regulation)

*Reeves, Inc. v. Stake* (1980) – Upheld SD state-owned cement plant selling primarily to in-state companies

*South Central Timber Dev. v. Wunnicke* (1984) – Overturned regulation requiring Alaska timber to be “partially processed” in state even though state was also a timber processor

* + - * 1. Does the (non-discriminatory) state regulation **burden** interstate commerce?

If yes, invalid unless state’s interest in regulation outweighs the burden on interstate commerce (*Pike v. Bruce Church*)

State regulation has nondiscriminatory *purpose*, but discriminatory *effect*

*Pike* Balancing (*Hughes v. OK*, 1979)

Whether statute regulated even-handedly with only “incidental” effects on interstate commerce or instead discriminated against interstate commerce facially or in practical effect (i.e. threshold)

Whether the statute serves a legitimate local purpose, and if so

Whether alternative means could promote this local purpose as effectively without discriminating against interstate commerce

*Pike v. Bruce Church* (1970) – AZ law requiring cantaloupes grown in-state to be crated in-state before shipping, Church wants to crate in CA

Struck down even without intent to discriminate because costs exceeded benefits

* 1. **Privileges and Immunities Clause**
		1. P&IC – If a state gives a right to its citizens, it must give the same right to citizens of other states
		2. *Corfield v. Coryell* (1823)
			1. Right to pass through or travel in state
			2. Right to “reside in state for business or other purposes”
			3. Right to do business there whether it involves “trade, agriculture, professional pursuits, or otherwise”
			4. Right to “take, hold, and dispose of property, either real or personal”
		3. Right to pursue a livelihood
			1. *Toomer v. Witsell* (1948) – Struck down SC statute requiring non-residents to pay 100x the licensing fee of in-state residents for commercial shrimp boats
			2. *Baldwin v. Montana Fish and Game* (1978) – Upheld MT statute charging out-of-staters more for elk hunting licenses (non-livelihood)
	2. **Compare DCC and P&IC**
		1. *United Building and Construction Trades Council v. Camden* (1984)
			1. City ordinance requiring 40%+ of contractor/sub employees = Camden residents
			2. DCC – Market participant exception (city construction projects)
			3. P&IC – Livelihood – in/out-of-staters treated differently
			4. Holding: Invalid under P&IC, despite political check by discriminated in-staters

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| Dormant Commerce Clause | Privileges and Immunities Clause |
| Discriminating state regulation is invalid unless it1. Furthers important, non-economic state interest and there is no reasonable non-discriminatory alternative or
2. The state is a market participant
 | State regulation that deprives an (individual) out-of-stater of important economic interest (livelihood) or civil liberties* Invalid unless the state has a substantial justification and there are no less restrictive means
* No market participant exception
 |
| No discriminatory purpose, but discriminatory effect* Invalid if the burden outweighs the state interest (*Pike* Balancing)
 | If the law has no discriminatory purpose it is presumed valid |
| Aliens and corporations can be plaintiffsCongress can always bless what the states have banned or *vice versa* | Aliens and corporations cannot be plaintiffsCongress cannot alter the rights granted to citizens under the P&IC |

1. **SEPARATION OF POWERS**
	1. **Analysis**
		1. **Jackson Concurrence *Youngstown***
			1. **Zone 1** – President acts with **express/implied** authority of Congress

Take Care Clause

The executive can refuse to defend a statute when: (1) They are not trammeling the Constitutional prerogatives of the executive, and (2) Something is clearly unconstitutional & the executive is not required to defend it

This is not concurrent power to interpret the constitution, only a determination that SC-USA would obviously hold it unconstitutional

Note that in *Perry*, 11/13 circuits held that sexual orientation does not garner heightened scrutiny

* + - * 1. President is executing a statute – but must be within the statute
				2. President can direct discretion – forcing someone to act or not to act
				3. Art 2, § 3 – “Take care that the laws are faithfully executed” (approve/veto)
				4. Limitation: Non-delegation – Requires intelligible principle (need two of: procedural limits, discretional limits, jurisdictional limits)
				5. Limitation: Statute itself is outside the power of Congress (i.e. not CC power)
			1. **Zone 2** – President acts in the face of Congressional **silence** – “Zone of Twilight”
				1. Manager/diplomat in chief (Note that war powers are limited to war theater)
				2. Special need for speed or detail
				3. Public property or government personnel (like market participant)
			2. **Zone 3** – President acts **against** express/implied will of Congress
				1. Spot: Private rights at stake or justification is pretext
				2. Must be clearly an Art. 2 power: Written opinion of officers, treaties, commander/diplomat in chief, appointments (SC justices, Non-inferior WACOS), granting of pardons
		1. **Detainees**
			1. Art. 1, § 9: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it” – Martial Law
			2. Strict Scrutiny Tailoring (*Korematsu*): *Compare* Majority (no good way to parse good and bad Japanese) *with* Jackson Dissenting (Over/under inclusive – Sweep in good Japanese and leave out bad German/Italians) – “Smoke out pretext”
			3. **Definitions**
				1. Lawful Enemy Combatant: Opposing force wearing a uniform
				2. Unlawful Enemy Combatant: Opposing force not wearing a uniform

Cannot be a POW under the Geneva Convention

* + - * 1. Enemy Belligerent: Both of these

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| **Differences between Civilian Courts and Tribunals** |
| Civilian Court Procedural Protections | Military Tribunal Departures from Civilian Practice |
| 1. Trial by Jury
2. Jury trial is speedy and public
3. Right to confront witnesses and subpoena defense witnesses
4. Proof beyond a reasonable doubt
5. Detailed procedural protections to ensure accuracy before death penalty is imposed
6. Indictment by grant jury
 | 1. Trial by military judges (need not be Art. III judges)
2. Non-public trials
3. No compulsory process for defense witnesses
4. No burden on prosecution to carry proof
5. No unanimity requirement for death penalty (now required by regulation)
6. No indictment by grand jury
 |
| **Comparison between Court-Martial and Military Commission** |
| Court Martial | Military Commission |
| Presiding officer is military judge, 5-member court, Federal Rules of evidence apply, Accused is present | Presiding officer is military lawyer, 3-member court, hearsay/unsworn statements/coerced statements allowed, accused can be excluded |

* + - 1. **Test – Detainees**
				1. Does Δ have a habeas right or an adequate substitute?

Citizens and aliens on US soil have habeas right (*Hamdi*)

Enemy Combatant supports forces hostile to US & can be detained for the length of hostilities (*Hamdi*)

Definition of “hostilities” is an open question

If an unlawful combatant citizenship is irrelevant (*Quirin/Hamdi*)

Guantanamo Δs get habeas – strong *de facto* sovereignty (*Boumediene*)

Δs at Bagram don’t have habeas (*Maqaleh* – but subverting habeas not ok)

Test for a new scenario (*Boumediene*)

(1) Citizenship/status of Δ and adequate process that the determination is made, (2) Nature of site where apprehension/detention took place (theater of war/not, permanent/temporary base), (3) Practical obstacles in resolving Δ’s status

* + - * 1. Is the detention authorized? – i.e. is Δ classified as an enemy belligerent?

Noncombatants must be released (*Milligan*/*Hamdi*)

AUMF authorizes detention during hostilities (*Hamdi* Plurality + Thomas)

Detention w/out Congressional authorization is an open question (*Hamdi*)

* + - * 1. If yes, has Δ been given adequate opportunity to contest status (due process)?

If Δ is unlawful combatant, citizenship status is irrelevant (*Quirin*/*Hamdi*)

Δ must receive notice of the factual basis for status and opportunity to rebut before a neutral decision maker (*Hamdi*)

Must pass *Matthews* balancing – Hearsay may be ok, but “some evidence” standard is inadequate, presumption in favor of government is ok, tribunal could be adequate with proper procedures

Weigh private interest against government interest

Risk of erroneous deprivation against probable value of additional/substitute safeguards

Scalia would give civil trial for treason to US citizens on US soil

* + - * 1. If yes, has Δ been given an adequate trial?

Must be consistent with UCMJ (Articles of War)

Uniformity: Consistent with court martial, departures must be tailored to the necessity requiring them (presence/evidence are key) (*Hamdan*)

GC requires regularly constituted courts affording judicial guarantees recognized as indispensable by civilized people

* + - 1. **Policy Considerations**
				1. Court limits detentions (*Hamdi*/*Boumediene*) which pushes them to “black sites” where we never hear about them
				2. Court limits military commissions (*Hamdan*), so we don’t give them trials, just hold indefinitely
				3. Dworkin argues that we should not treat aliens and citizens differently, at least give them what we give our soldiers (likes *Boumediene* test)
				4. Madisonian Nightmare – Creating, executing, and adjudicating laws all by one branch of government 🡪 Too much power concentration
	1. **Generally**
		1. Consider parallels between SOP and Federalism – Both based on better government through competition amongst the constituent parts – Ambition counters ambition

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| **Legislative Branch** |
| **Checks on Executive** | **Checks on Judicial** |
| Power to* Override presidential veto
* Declare war
* Block departmental appointments (Senate)
* Block treaties (Senate)
* Impeach (House)
* Try impeachments (Senate)
* Block appointment of federal judges (Senate)
 | Power to* Initiate constitutional amendments
* Create courts inferior to the SC-USA
* Alter jurisdiction of courts (jurisdiction stripping)
* Impeach (House)
* Try impeachments (Senate)
 |
| **Judicial Branch** |
| **Checks on Executive** | **Checks on Legislative** |
| * Judicial Review
* Chief Justice presides over Senate during presidential impeachment
 | * Judicial Review
 |
| **Executive Branch** |
| **Checks on Judicial** | **Checks on Legislative** |
| Power to* Nominate judges
* Pardon federal offenses
 | * Presidential veto
* Power as Commander in Chief of the Military
* VP presides over the Senate
* Power to force adjournment when both houses can’t agree on adjournment
 |

* + 1. The President has unenumerated powers
			1. *Compare* Art. 2, § 1, cl.1 (“The executive power **shall be vested** in a President of the USA”) *with* Art. 1, § 1, cl.1 (“All legislative powers **herein granted** shall be vested in a Congress of the US”)
	1. ***Youngstown Sheet and Tube v. Sawyer* (1952)**
		1. Steel workers threaten nationwide steel strike during Korean War, Truman directs Secretary of Commerce to take over mills, informs Congress and invites Congressional action – EO provides nearly unlimited secretion to SOC to run mills
		2. NOTE: Congress could pass bill to take over steel mills under CC or War Powers (subject to Takings Clause – Also hadn’t declared war formally)
		3. Majority (Black) – Seizure was impermissible because Presidential action must flow from statute or Constitution
			1. Commander in Chief – No because this is too far from the theater of war
			2. Take Care the laws be faithfully executed – President can’t *make* laws, can only act within a statute, approve/veto statutes, etc.
		4. Jackson Concurring – Lays out Zone 1-3, indicates this is Zone 3
			1. President isn’t enforcing the Constitution
				1. Structural/Ethical: War powers are limited to the theater of war, not interpreted to allow a military state
				2. Prudential: Emergency powers tend to kindle emergencies
			2. President is acting against Congressional statute – Taft-Hartley Act gives procedures for President to resolve labor disputes but requires approval of Congress which he doesn’t have here
		5. Vinson Dissenting – Military procurement and Anti-inflation program = Zone 1
	2. **Detainees**
		1. Art. 1, § 9: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it” – martial law
			1. *Habeas Corpus* – Legal action to seek redress for unlawful detention
		2. *Korematsu v. United States* (1944)
			1. Congress enacts legislation making it a crime to violate an order by a military commander – Military orders Japanese to report to internment camps
			2. Majority (Black) – Racial discrimination invokes strict scrutiny
				1. Zone 1: President and Congress are acting together here
				2. War powers: West coast was arguably a theater of war
				3. Tailoring: There was no efficient way to parse loyal and disloyal Japanese
				4. *See also Hirabayashi* upholding Japanese curfew to prevent sabotage
			3. Jackson Dissenting
				1. Over/Under inclusive: Sweep in many innocent Japanese, but don’t include Italian or German people even though US is at war with them also
				2. “A military order, however unconstitutional, is not apt to last longer than the military emergency… but once a judicial opinion rationalizes such an order to show that it conforms to the constitution… the Court for all time has validated the principle of racial discrimination… The principle then lies about like a loaded weapon ready for the hand of any authority.”
				3. Argument that this is asking for Political Question Doctrine

Institutional competence – Military issue

Textual Constitutional commitment – Commander in chief

Let the order lapse with the emergency rather than calling it Constitutional

* + 1. **Definitions**
			1. Lawful Enemy Combatant: Opposing force wearing a uniform
			2. Unlawful Enemy Combatant: Opposing force not wearing a uniform
				1. Cannot be a POW under the Geneva Convention
			3. Enemy Belligerent: Both of these

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| **Differences between Civilian Courts and Tribunals** |
| Civilian Court Procedural Protections | Military Tribunal Departures from Civilian Practice |
| 1. Trial by Jury
2. Jury trial is speedy and public
3. Right to confront witnesses and subpoena defense witnesses
4. Proof beyond a reasonable doubt
5. Detailed procedural protections to ensure accuracy before death penalty is imposed
6. Indictment by grant jury
 | 1. Trial by military judges (need not be Art. III judges)
2. Non-public trials
3. No compulsory process for defense witnesses
4. No burden on prosecution to carry proof
5. No unanimity requirement for death penalty (now required by regulation)
6. No indictment by grand jury
 |

* + 1. *Ex Parte Milligan* (1866)
			1. Δ is US citizen arrested in Indiana during Civil War – Suspected of planning armed uprising/seizing weapons/kidnap governor – never associated with south
			2. Military tribunal sentences him to death
			3. Majority: During an invasion/civil war, when the courts are closed, in the theater of active military operations 🡪 Tribunal is allowed, otherwise civilian court
				1. Martial Law cannot exist where the courts are open
			4. Chase Concurring: Congress could still authorize a tribunal since the country was at war, though Congress did not do so here 🡪 civilian court required
		2. *Ex Parte Quirin* (1942)
			1. Δ is an American Nazi who comes to US by submarine, ditches uniform and prepares to engage in sabotage – All are tried by tribunal and executed
			2. Articles of War, Art. 15: Provides that military tribunals have jurisdiction to try offenders against the law of war in appropriate cases (10 U.S.C. § 821 (1994))
			3. Δ was an unlawful enemy combatant – *distinguish Milligan* (Milligan was not an enemy belligerent, only suspected, here Δ is an admitted unlawful combatant)
			4. Holding
				1. Lawful combatants are captured and detained; unlawful combatants are captured, detained and tried by tribunal – US citizenship doesn’t save you
		3. **Brief Timeline of Modern Detainee Doctrine Development**
			1. **June 28, 2004**: *Hamdi v. Rumsfeld*/*Rasul v. Bush*
				1. *Hamdi*: Enemy combatants can be detained during hostilities with Afghanistan, but must be permitted to contest enemy combatant status (can be in front of tribunal, *See Boumediene*)

If enemy combatant, either detain (*Hamdi*) or send for trial (*Hamdan*)

* + - 1. **Dec. 30, 2005**: Bush signs Detainee Treatment Act (DTA) (contains tribunals)
				1. Protects prisoners from inhumane treatment, strips SC-USA of habeas jurisdiction, restricts alien Guantanamo detainees habeas claims
				2. § 1005(e)(1): No court can hear habeas petition of alien Guantanamo detainee
				3. § 1005(e)(2)/(3): Tribunal/military commission have exclusive jurisdiction
			2. **July 27, 2006**: *Hamdan v. Rumsfeld*
				1. Alien detainee in Guantanamo (driver of Bin Laden, Citizen of Yemen)
				2. Under DTA, can SC-USA hear this case? 🡪 Yes
				3. Under DTA, can Hamdan be tried by military commission? 🡪 No
			3. **Oct. 17, 2006**: Bush signs Military Commissions Act (MCA)
				1. President and Congress acting together – Zone 1 (response to *Hamdan*)
				2. Sets up military commissions similar to those invalidated in *Hamdan* and strips habeas jurisdiction for enemy combatants held overseas
			4. **June 12, 2008**: *Boumediene v. Bush*
				1. Holding that jurisdiction stripping provision of DTA/MCA are constitutional, but impermissible because procedures are an inadequate substitute for habeas corpus thus MCA is unconstitutional suspension of the writ
				2. Holds that habeas rights extend to aliens in Guantanamo – 3-part test

(1) Citizenship/status of detainee and adequate process, (2) Nature of site where apprehension/detention took place (theater of war, permanent/temporary, etc.), (3) Practical obstacles in resolving Δ’s status

* + - 1. **Jan. 22, 2009**: Obama EO that Guantanamo will be closed in 1y
			2. **May 21, 2010**: *Maqaleh v. Gates* (D.C. Cir.)
				1. *Boumediene* does not extend to Bagram AFB in Afghanistan – Guantanamo is equivalent to national sovereignty, Bagram is in theater of war – no habeas
		1. *Hamdi v. Rumsfeld* (2004)
			1. American citizen seized by Northern Alliance as Unlawful Enemy Combatant moved to Guantanamo then VA when they determine he is a US citizen
			2. Two statutes
				1. AUMF: Authorizes President to use all necessary and appropriate force against anyone the President determines helped terrorists or was a terrorist
				2. Non-Detention Act: No citizen can be detained except pursuant to an Act of Congress
			3. Issue 1: Can executive detain “enemy combatants”? – NOTE **plurality** here
				1. Zone 1 or Zone 3?
				2. “Enemy Combatant” is a person supporting hostile forces in Afghanistan who engaged in an armed conflict against the US there
				3. O’Connor Plurality: Zone 1 – NDA requires act of Congress, AUMF is such an act and authorizes the detention

Capture/detention of lawful and capture/detention/trial of unlawful combatants during hostilities are incidents of war

Citizens/aliens can both be enemy combatants (*Quirin*)

“Necessary and appropriate force” includes detention (AUMF)

* + - * 1. Souter Concurring: Zone 3 – Would require a plain statement above what is in the AUMF to over-ride the NDA, but concurs in order to guarantee detainees have come Due Process rights
				2. Scalia/Stevens Dissenting

Absent suspension of the writ of habeas corpus, executive can’t detain citizens without charge – would require either suspension, constitutional amendment, or civil trial for treason

NOTE: Citizen held outside US soil is a different situation for Scalia

*Distinguish Quirin* as an admitted enemy combatant (though disagrees)

* + - 1. Issue 2: What process is due a citizen who contests “enemy combatant” status?
				1. NOTE This is a **binding majority opinion**
				2. Concern is a tourist/journalist is classified as an enemy combatant
				3. Rejects lack of judicial competency argument (Thomas Dissenting argues court is not competent – AUMF gives executive unenumerated war powers)
				4. Rejects “some evidence” standard (Mobbs conclusory declaration)

Thomas Dissenting supports “some evidence” standard

* + - * 1. Due Process analysis under *Matthews v. Eldridge*

Weigh private interest against government interest

Risk of erroneous deprivation against probable value of additional/substitute safeguards

* + - * 1. Military tribunal is adequate to provide this level of due process
				2. Holding: Must receive notice of factual basis for classification and opportunity to rebut before a neutral decision maker
				3. NOTE: Habeas corpus is only available to Americans or those on US soil

Note also that indefinite detention of unlawful combatants is constitutional

* + 1. *Rasul* (2004) holding that aliens captured abroad, held at Guantanamo had habeas
		2. *Hamdan* (2004) Military commissions convened to try Δ were illegal because they lack structure and procedure violating UCMJ and Geneva Convention
			1. Δ is enemy combatant in Guantanamo, trial after determination he is a combatant
			2. UCMJ requires, to the extent practicable, something resembling court martial
			3. Δ is on trial for conspiracy which is not even a recognized war crime
			4. Concerns about “**Madisonian Nightmare**” – too much power concentrated into one branch 🡪 creating/executing/adjudicating laws all by one branch 🡪 would require a plain statement because UCMJ/AUMF do not expressly authorize such a commission – Congress responds with MCA (Z3🡪Z1)

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| **Comparison between Court-Martial and Military Commission** |
| Court Martial | Military Commission |
| Presiding officer is military judge, 5-member court, Federal Rules of evidence apply, Accused is present | Presiding officer is military lawyer, 3-member court, hearsay/unsworn statements/coerced statements allowed, accused can be excluded |

1. **13TH AND 14TH AMENDMENTS**
	1. **Analysis – Modern State Actor Determination**
		1. **Is state action required?**
			1. 13th Am. – No state action required, *all* slavery abolished, not just state imposed
			2. 14th Am. – Yes, only prohibits discrimination by state actors
		2. **Who is the actor?**
			1. State Government – 14th Am. (*Brown*)
			2. Federal Government – EP component of 5th Am. DPC (*Bolling*)
			3. Private Party – See State Action Test (iii)
		3. **State action *may* exist when the actor performs**
			1. **A public function that “traditionally, exclusively” is conducted by the state**
				1. *Smith v. Allwright* (1944)

Primary election conducted by political party is state action

* + - * 1. *Marsh v. Alabama* (1946)

Company town’s decision to prohibit leafleting is state action

Town owned by private company, could not tell where public land ended and the company town began

* + - * 1. *Jackson v. Metropolitan Edison* (1974)

Private utility is not state action even if under government monopoly

* + - * 1. E.g. – Shopping center not state actor (no free speech there), attorney exercising peremptory challenge is state actor (like an election)
			1. **A partnership role – Entanglement between the state and a private party**
				1. *Burton v. Wilmington Parking Authority* (1961)

Private restaurant is state actor because public parking authority was in symbiotic relationship – focus on *economic interdependence*

* + - * 1. *Moose Lodge No. 107 v. Irvis* (1972)

Private organization’s reliance on liquor license not enough to be state

Entanglement requires more than just licensing

* + - * 1. E.g. – Guy riding around with cop harassing people 🡪 state actor
			1. **Judicial enforcement of a private agreement**
				1. *Shelley v. Kraemer* (1948)

Judicial enforcement of racially restrictive covenant is state action

To enforce covenant Π must go to court

Note: swallows this whole test because Π must always sue to enforce private rights

* + 1. **State’s failure to act is *not* state action**
			1. *DeShaney v. Winnebago County Dept. of Social Services* (1989)
				1. No state action though state had intervened at one point then refused later
	1. **Text of 13th and 14th Amendments**
		1. 13th Am., § 1: “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the US, or any place subject to their jurisdiction”
			1. §2: “Congress shall have the power to enforce this article by appropriate legislation”
		2. 14th Am., § 1: “All persons born or naturalized in the US, and subject to the jurisdiction thereof, are citizens of the US and of the states wherein they reside”
			1. Directly overturns *Dred Scott* (1857) which held AAs not citizens
			2. “No **state** shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”
			3. §5: “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”
	2. **Generally**
		1. **Conceptions of Race (Gotanda)**
			1. Status Race – Marker of social status (“White Supremacy”)
			2. Formal Race – Race as a thin attribute – blood line/skin color (aesthetics)
				1. Foundation of anti-classification jurisprudence (Thomas especially)
				2. Undermines affirmative action as unconstitutional
			3. Historical Race – Race as a thick attribute – a phenomenon that creates difference through contingent historical practice
				1. Foundation of anti-subordination remedial jurisprudence
				2. Remediation has an inherent time limit
			4. Cultural Race – Race as “culture, community, and consciousness”
				1. Foundation of “diversity” principle – positive effects associated with race
		2. **Badges and Incidents of Slavery**
			1. *Civil Rights Cases* – Narrow 🡪 close to subjugation/involuntary labor
			2. *Jones v. Mayer* (1968) – Expands to racially restrictive covenants
				1. Congress has power under 13th Am. rationally to determine what are the badges and incidents of slavery and authority to translate that into legislation
		3. **Traditional Breakdown of Rights**

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| **Civil, Political, and Social Rights** |
| Civil | Political | Social |
| Right to hold propertyRight to sueRight to contractRight to travel | Right to voteRight to hold office | Right to associateRight to marry |
| **Prohibitions in 13.1 and 14.1** |
|  | Public Actors | Private Actors |
| Prohibition of Badges and Incidents of Slavery | 13.1/14.1 | 13.1 |
| Prohibition of Equal Protection Violations beyond B&I of Slavery | 14.1 | Neither |

* 1. **Cases**
		1. *Strauder v. West Virginia* (1880)
			1. Δ convicted by jury where African Americans were excluded
			2. Holding
				1. Δ has a right to jury of his peers, no right to *have* AA on the jury but has a right to *not have* them excluded based on race
				2. Statute excluding AAs from the jury is discrimination of potential jurors
			3. Note standing issue: Since no potential juror would ever challenge the law, court allows Δ to challenge (also constructs injury through exclusion argument)
			4. Dissent argues this is a political right, points to 15th Am. right to vote separate
			5. Consider: Jurors anti-classification, Δ’s anti-subordination interest in having AAs on the jury 🡪 both cut the same way here
			6. Remaining issue of how far EPC should extend
				1. Intentionalist: 13th and 14th are only about slavery/race
				2. Textual: 13th specifically refers to race, 14th is broader
		2. *The Slaughterhouse Cases* (1873)
			1. LA law moving animal slaughter below NOLA and granting monopoly to the Slaughter House Company is challenged by butchers under 13/14th Am.
			2. 13th Am. claim is dismissed – exclusion from practice is not slavery
			3. EPC claim dismissed – does not recognize occupational distinctions
			4. DPC claim dismissed – no substantive element 🡪 only procedural
			5. PorI of 14th Am. Analysis – Three interpretations
				1. Grants something *intra-state* similar to what the P&I of Art. 4 grants *inter-state* (*see Corfield v. Coreolis* – Shrimp boat case 🡪 pursue a calling) (Fields Dissenting – Intra-state comity)
				2. Grants only those rights for citizens *of the US*, not of the states

Protection on the high seas, right to petition the government, right to acquire and possess property, pursue and obtain happiness and safety, subject to restraints the government may prescribe for the good of everyone (Majority – parsing text between citizens of US and state)

* + - * 1. Incorporates Bill of Rights against the states (Bradley Dissenting)
		1. *The Civil Rights Cases* (1883)
			1. Challenges to Civil Rights Act of 1875 which proscribed denying persons access to public accommodations on the basis of race (under 13/14th Am. powers)
			2. Where are we? 🡪 Not badge or incident of slavery, and this is private actors
			3. 14.5 Argument
				1. Majority: Congress can’t use 14.5 to regulate private actors; can only act by prohibiting state action that violates 14.1; Congress *could* act prophylactically by regulating a proposed bill before it is passed; Congress can create remedies (i.e. § 1983) but must be pegged to *state actions* that violate 14.1
				2. Harlan Dissenting: Places of public amusement may be state/quasi-state actors
			4. 13.2 Argument
				1. Majority: Refusing admittance has nothing to do with slavery (Civil Rights Act of 1866 – Right to make/enforce Ks, sue, be parties, give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of the laws)
				2. Harlan Dissenting: Refusal here is a badge of servitude which Congress can prevent under 13.2 – One historical restriction of slavery was limitation on mobility 🡪 can’t stay at Inns
		2. *Plessy v. Ferguson* (1896)
			1. Foundation of “Separate but Equal” doctrine – LA law that provides for separate rail cars for “white” and “colored” people – Π, octaroon, challenges the law
			2. Argument under 14th Am. that the reputation of belonging to the white race is property, and a white man assigned to the black coach usurps that property
				1. Holding that Π, as a black man under the statute, never had that property – if he were white under the statute then he has a separate action
				2. 14th Am. provides equality before the law, but didn’t abolish distinctions based on color or enforce social equality
			3. Argument that separation is a badge and incident of slavery under the 13th Am.
				1. Holding separation is only a badge if Π puts such a construction on it
				2. Civil/political rights are the only thing Congress can equalize, social rights are outside Congress’s power (note that this is *perpetuating* social inequality)
			4. Harlan Dissenting
				1. “The Constitution is color blind”
				2. Congress can grant civil equality (civil right to travel) without granting social equality – considers separation by law a badge/incident of slavery
		3. *Compare Strauder* (Facially discriminating statute) *with Plessy* (Facially neutral statute – i.e. white people can’t go in color car, and vice versa)
1. **EQUAL PROTECTION**
	1. **Analysis**
		1. Basic EPC question is what level of scrutiny will govern a given challenge

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|  | **Means** | **Ends** |
| Strict Scrutiny | Narrowly Tailored | Compelling Government Interest |
| Intermediate Scrutiny | Substantially Related | Important Government Interest |
| Rational Basis | Rationally Related – Can be step-wise | Legitimate Government Interest |

* + 1. Note that *Korematsu* and *Grutter* are the only cases surviving strict scrutiny

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| **Classifications That Get More than Rational Basis under EPC** |
| Strict Scrutiny – Need compelling government interest | Race (*Korematsu* (1944)); National Origin (*Oyama* (1948)); Alienage (*Graham v. Richardson* (1971)) |
| Intermediate Scrutiny – Substantially related to important government interest | Sex (*Craig v. Boren* (1976)); Non-marital Parentage (*Trimble v. Gordon* (1977)) |
| Rational Basis “With Bite” – Requires finding of animus | Disability (*Cleburne v. Cleburne Living Center* (1985)); Sexual Orientation (*Romer v. Evans* (1996)) |
| Rational Basis | Age (*Murgia* (1976)); Professions (*Lee Optical* (1955)) |

* + 1. **Political Function Exception for Discrimination by Alienage**
			1. If a position holds a function that goes to the core of American self-governance
			2. Police/Parole officers, public school teachers 🡪 Rational Basis
			3. Notaries public 🡪 Strict Scrutiny
		2. **Determine if a New Group Should get Heightened Scrutiny (*Frontiero*/*Bowen*)**
			1. History of Discrimination – Historical limitation on rights
			2. Marked by an obvious, immutable or distinguishing characteristic – e.g. religion is not an immutable characteristic 🡪 protected under 1st Am.
			3. Capacity – Whether characteristic bears a relation to ability to perform/contribute to society 🡪 sex vs. intelligence/physical disability (*Fronteiro*/*Cleburne*)
			4. Politically Powerless
				1. Representation in government? (*Frontiero*)
				2. Ability to get the attention of lawmakers (*Cleburne*)
				3. Structural or historical impediments despite voting power
				4. Social acceptability of discrimination against a group
				5. Discrete/insular minority (*Caroline Products* FN4¶3)
				6. Paradox of Political Power – Requires significant political power to get the court to find you’re a minority with insufficient political power bringing you under EPC
			5. Remember – All laws categorize people
			6. NOTE: Ginsburg brief in *Reed* argues “it is presumptively impermissible to distinguish on the basis of congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized”
			7. Other tests
				1. Ackerman – Beyond *CP*: protection needed for the anonymous/diffuse
				2. Stevens (*Parents Involved*): No tiers, use one balancing test
				3. Marshall (*Cleburne*): Spectrum that varies with societal/constitutional importance of group and animus on basis the classification is drawn
				4. John Hart Ely: If not restricted from voting 🡪 political process
				5. *Caroline Products* – Judiciary only step in when political process breaks
		3. Intersection of EPC/DPC

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|  | **Fundamental Right (DPC)** | **No Recognized Right (DPC)** |
| **Heightened Scrutiny (EPC)** | Law barring **marriage** based on **race** | Law barring welfare entitlement based on **race** |
| **Rational Basis (EPC)** | Law barring **marriage** based on age | Law barring welfare entitlement based on age |

* + 1. **Test for Discrimination Claims – EPC Challenge to State Action**
			1. Is the law **discriminatory on its face**? 🡪 Heightened Scrutiny (HS)
				1. *Strauder* (1880) – No African American jurors
				2. *Loving* (1967) – No inter-racial marriage

**STOP!**

1. Do you have a state actor?
2. What level of scrutiny will apply?
3. What is the test at that level?
4. Determine if Π has a discrimination claim
	* + - 1. *But see City of Oneonta* (1999) – Race as one part of a suspect’s description
				2. Exception for real biological differences doctrine
			1. Is the law **facially neutral** but **administered in a discriminatory manner**?🡪 HS
				1. *Yick Wo* (1886) – SF Board of Supervisors was only issuing licenses to certain laundries – all but one white owned got one and no Chinese owned got one
				2. Also would fall under *VMI*, though unclear
				3. Also subject to real biological differences doctrine
			2. Is the law **facially neutral** but **passed with discriminatory intent** (pretext)?– HS
				1. *Hunter* (1985) – Struck down AL law that disenfranchised persons convicted of certain enumerated felonies – found the felonies intentionally tracked race

Intent to discriminate was the “but for” cause of passing the law

Note that two legislatures could pass same law with different result

* + - 1. Is the law **facially neutral**, passed without discriminatory intent, but has a **disparate impact**? 🡪 Rational basis if *without intent* (*Davis*, 1976)
				1. The legislature must select or reaffirm a course of action *at least in part* **because of**, not merely **in spite of** its adverse effects on a group (*Feeney*)

Foreseeability alone is not enough – must know and want impact (*Feeney*)

Look for animus (*Cleburne*, *Romer*, *Moreno*)

DI alone not enough (*Clary*), not 1-1 mapping WRT impact (*Geduldig*)

* + - * 1. *Arlington Heights* (1977) Factors

Impact of the action (clear pattern, unexplainable other than by race)

Historical background of the decision (look for invidious purposes)

Sequence of events leading to challenged decision

Departures from normal procedural sequence (procedural irregularities)

Substantive departures: factors usually considered important strongly favor a contrary decision (decision against the evidence)

Legislative/administrative history (especially contemporary statements)

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| Consider: anti-subordination principle is backwards in *Davis*/AA cases | “Malign” – Effect of hurting subordinated group | “Benign” – Effect of helping subordinated group |
| Facially Discriminatory – Strict Scrutiny | ***Strauder*, *Plessy*, *Korematsu*, *Loving***Argument that this box is important historically, but no longer relevant | **Affirmative Action (*Croson*, *Adarand*)**Criticism of the court stepping in here, but ignoring disparate impact in other cases |
| Facially Neutral – Rational Basis (*Feeney*) | ***Davis*, *Clary***Criticism that this box represents a deferential stance by the court in the face of subordinating legislation | **Racially Neutral Affirmative Action**Argument that this box may allow people with negative purpose to sneak legislation through |

* + 1. **Affirmative Action – Strict Scrutiny Analysis**

*Grutter*: Strict in theory isn’t fatal in fact

* + - 1. Program must be **narrowly tailored** to a **compelling government interest**
			2. Compelling Government Interest
				1. Remedying *continuing effects* of past discrimination *by the promulgating government entity* (*Bakke*; *Croson*)

Need appropriate statistics (*Croson*, *Grutter* Rehnquist dissenting)

* + - * 1. Diversity – Tied to 1st Am. interests in academic freedom, exchange of ideas – must be narrowly tailored (*Bakke*)

May be limited to higher education (*Grutter*; *Parents Involved*)

But consider *Grutter* – Kennedy concurring + 4 Dissenting

* + - * 1. Private discrimination may be CGI if state actor has become a passive participant (*Croson* plurality)
				2. Non-Balkanization/Racially Integrated Environment

(*Parents Involved* – Kennedy Concurring + 4 Dissenting)

* + - * 1. Illegitimate

Remedying broad societal discrimination (*Bakke* Powell Concurring; *Croson*; *Wygant*)

Role Model Theory (*Wygant*)

Promote minorities in X profession in X area: Requires stereotype about where they will go after professional school (*Bakke*; *Croson*)

Racial Balancing – Not allowed (*Bakke*, *Croson*)

Would require quotas, also Thomas argument that either students would be over their heads, or they would have a stigma

* + - 1. Narrow Tailoring – See (4) and (5)
				1. Durational Limit (*Grutter*)
				2. Race-neutral alternatives (*Croson*) – No need to compromise status (*Grutter*)

Consider race conscious, but non-classifying alternates – school sites, school zoning, special programs, targeted recruiting (*Parents Involved*, Kennedy Concurring)

* + - 1. Successful Remedial Program – Narrow Tailoring
				1. Qualitative +-factor, not quantitative (*Gratz*), no quota (*Bakke*)
				2. Use relevant stats – Applicants, Acceptance, Minority representation, # of eligible applicants (*Croson*)
				3. Narrow tailoring – Only provide +-factor for groups *actually* discriminated against, still feeling the effect of that discrimination today
				4. Consider race-neutral alternatives – Commission a report (*see* TX 10%)
				5. Ensure those that implement aren’t those that benefit (*Croson*)
			2. Successful Diversity Program – Narrow Tailoring
				1. Compelling interest in diversity in higher education – 1st Am. issue 🡪 deference to university on the definition of “diversity” – debate about “Critical Mass” (*See Fisher v. Texas*; *Grutter*)
				2. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, and does not require university to compromise elite status

Does require serious, good faith consideration of neutral alternatives

* + - 1. “Critical mass” ok (*Grutter*), No quotas (*Bakke*; *Croson*), no arbitrary % goals that parallel population (*Croson*; *Parents Involved*; *Grutter* Rehnquist dissenting)
		1. **Challenges to Sex Classifications – Intermediate Scrutiny Analysis**
			1. State must show the challenged classification serves an **important government objective** and that the discriminatory means employed are **substantially related** to the achievement of those objectives (*Craig v. Boren*; *VMI*)
				1. The reviewing court must determine whether the proffered justification is **exceedingly persuasive** (*Feeney*; *VMI*)
			2. Is there an important government interest?
				1. Justification must be genuine, not hypothesized or invented post hoc in response to litigation (*VMI*)

Continuing historical tradition is not ok if tainted with discrimination

*Compare* *VMI* Majority *with* *VMI* Rehnquist Concurring

* + - * 1. Must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females (*VMI*)

Generalizations about “the way women are,” estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description (*VMI*)

* + - * 1. Ensuring diverse educational options may be ok, compensating women for past economic disabilities ok, promoting equal employment opportunities ok (*VMI*)
				2. Budgetary constraints/administrative ease are illegitimate (*Fronteiro* Plurality)
			1. Is there a substantial relation?
				1. Real Biological Differences Doctrine

*Geduldig*: not a 1-1 correlation between women and preggos

For RBD, cite-and-distinguish each of *Michael M.*, *Nguyen* – Note both had a penalty on the man rather than just shitting on women

Discrimination based on pregnancy draws rational basis (*Geduldig*)

Real differences in ramifications of pregnancy (*Michael M.*)

Real differences in opportunity to bond with children (*Nguyen*)

Real differences in strength (*Clark*, 9th Cir.)

Real difference in treatment due to external forces (*Rostker*)

**CONSIDER** – Is this a biological difference or a social norm?

The line is always blurry, need to find which is the driving force

Consider whether the difference is group *categorical* vs. group *salient*

* + - * 1. Consider sex neutral alternatives?

Under RBDs, don’t need to search too deeply (*See Nguyen*)

Difficult to administer?

COMPARE *VMI* case! Created VWIL!

* + 1. **Challenges to Classification Based on Sexual Orientation or Disability**
			1. Program must be **rationally related** to a **legitimate government interest**
				1. Sexual orientation (*Romer*), Disability (*Cleburne*), “Hippies” (*Moreno*) 🡪 look for animus
	1. **Striking Down Separate But Equal**
		1. **Historical Perspective – Road to Brown**
			1. *Missouri ex rel. Gaines v. Canada* (1938) – Missouri Law School claim that black students can attend schools in adjacent states struck down
			2. *Sweatt v. Painter* (1950) – Hastily constructed law school mimicking TX law school struck down as not equal
			3. *McLaurin v. Oklahoma State Regents* (1950) – Separate sections for black students in library/classroom/cafeteria struck down as undermining the education experience of interacting with other students
		2. ***Brown v. Board of Education of Topeka Kansas* (1954)**
			1. Legal strategies on both sides

|  |  |  |
| --- | --- | --- |
|  | **NAACP** | **John Davis (former SG)** |
| **Framer’s Direct Intent** | Fears of integration expressed in floor debates, but not quashed | 39th Congress proposes the 14th and also votes to fund black-only schools |
| **Framer’s Springing Intent –** What framers anticipated would happen over time | 14th Amendment framed in broad terms. *See Strauder* | Framer’s intent has not been interpreted to permit desegregation – *but* different roles |
| **Judicial Power Independent of Framer’s Intent** | Judiciary has already required *de facto* desegregation (*see* Road to *Brown*) | Argument for repose |

* + - 1. Consider: Davis argument about direct intent undermines modern conservative ideas about Affirmative Action 🡪 if the enacting Congress voted out “AA-type” funds, then how can AA be unconstitutional? 🡪 “Moment of higher lawmaking”
			2. Reasoning
				1. Dismissal of historical evidence as inconclusive
				2. Doctrinally the “equality” cases already chipped away at “separate but equal”

Consider *Strauder* and *Civil Rights Cases* – States can’t discriminate

Argument *Plessy* was aberrational and about transportation not education

Consider Road to Brown cases – none of this is actually equal

* + - * 1. Importance of education
				2. Footnote 11 – “The Doll Studies”
				3. Holding: Separate educational facilities are inherently unequal – defer remedy
			1. NOTE: Unanimous court – critique is that tradeoff allowed for massive foot dragging 🡪 consider that this allows for better articulation of principal
				1. Some argument that sticking with “equality” strategy rather than overruling *Plessy* would have been a more powerful rhetorical device over time
				2. Rosenberg argument that not much happened until Congress stepped in
		1. ***Bolling v. Sharpe* (1954) – Reverse Incorporation of EPC Through 5th Am. DPC**
			1. Changed circumstances/structural argument that framers of 5th Am. could not have foreseen there would be more rights against states than federal government
			2. Strikes down segregation in DC public schools

Note: Reverse incorporation is less plausible under intentionalism because of chronology 🡪 there is no way 5th Am. DPC was intended for reverse incorporation whereas 14th Am. DPC plausibly was designed to incorporate the original 10 Amendments against the states rather than just against the Feds.

* 1. **“Suspect Classification” Standard Invoking Strict Scrutiny**
		1. **Anti-Classification vs. Anti-Subordination**
			1. Anti-classification aims to root out facial (or pretextual) classifications thought to be inherently invidious
			2. Anti-subordination aims to prevent actions that help sustain or reinforce unjust forms of social hierarchy
		2. ***Loving v. Virginia* (1967) – Origin of Strict Scrutiny**
			1. Struck down VA statute against inter-racial marriage
			2. “Equal Application” argument – Statute punishes white/non-white people alike
				1. Reality is that the statute only forbids marrying white people 🡪 if statute is meant to forbid inter-racial marriage, the means are not narrowly tailored
			3. The statute facially classifies by race which draws strict scrutiny
				1. Classification must be necessary to the accomplishment of a permissible state objective (anti-classification principle is overriding)
			4. NOTE: *Carolene Products* FN 4, ¶3: Prejudice against a discrete and insular minority draws a more searching judicial inquiry
			5. NOTE: This is both anti-classification (racial discrimination) and anti-subordination (white supremacy) at work
		3. Note on Alienage
			1. Government regularly discriminates on alienage (e.g. can’t hold office)
			2. Consider that this is often a proxy for race (e.g. Mexican immigrants in CA)
			3. Political Function Exception – Jobs that have a function that goes to the core of American self-governance don’t draw strict scrutiny
				1. Police/Parole officers, Public school teachers 🡪 Rational Basis
				2. Notaries public 🡪 Strict Scrutiny
		4. **Identifying Race Based Classifications**
			1. *Morales v. Daley* (S.D. Tex. 2000) – Rejects the argument that the census questions about race are race-based discrimination
				1. Distinguishes between collecting data and using it for illegitimate purposes
				2. Rational basis applies – Note perversion here because, at the time, courts considered Strict Scrutiny fatal so they justify not finding it necessary
			2. *Brown v. City of Oneonta* (2d Cir. 1999) – Police manhunt based on victim description of a young black man resulted in entire male population of the city being questioned by police
				1. Rational basis applies – Description (1) was based on victim statement (not government discrimination) and (2) the description included more than race
		5. **Disparate Impact**
			1. Title VII vs. Constitution
				1. Scope

Title VII covers race, color, national origin, and sex discrimination

Constitution covers only heightened scrutiny categories

* + - * 1. Intent

Facial discrimination can be defended under Title VII with a bona fide occupational qualification (BFOQ)

i.e. an airline can’t discriminate based on sex for flight attendants, but a strip club could (purpose is to “titillate” patrons, not transport them)

Disparate impact under Title VII must be defended with a business necessity for the practice (NOTE: not necessary under Constitution)

* + - * 1. Basic Analysis Flow Charts

**EPC Race-Based Challenges to State Action**

**Title VII Race-Based Challenges to Employment Practices**

 

* + - 1. Title VII
				1. *Griggs v. Duke Power Co.* (1971)

Struck down policy requiring high school diploma or passing a general intelligence test for entry level position under Title VII

On the record, neither requirement was shown to bear on job performance and the practice created a disparate impact

No disparate impact without business necessity especially if the practice functions to freeze the prior-discriminatory status quo

Good intentions, or absence of animus is not enough to dispel procedures that operate as “built-in headwinds” against minorities

NOTE: Court is invoking a historical/cultural rather than formal conception of race

* + - 1. Constitution
				1. *Washington v. Davis* (1976)

African Americans challenge written personnel test to become DC police officers (at the time Title VII didn’t apply to municipal employees)

Holding: Disparate impact alone is not enough if it can’t be traced to a racially discriminatory purpose (for EPC analysis)

Declined to import Title VII analysis into EPC

Argument that this would trigger strict scrutiny for tax, public welfare, licensing, etc. (counter: “regulatory necessity” defense)

* + - * 1. *Personnel Administrator v. Feeney* (1979)

Challenge to MA statute providing civil service preference for veterans – effectively excluded women because most veterans are men

Holding: Foreseeable impact of the statute is not enough to prove discriminatory purpose

The legislature must select or reaffirm a course of action *at least in part* **because of**, not merely **in spite of** its adverse effects on a group

i.e. We love veterans, we don’t hate women (in spite of, not because of)

* + - * 1. NOTE: Scalia in *Edwards* (1987) lambasts use of legislative history as entirely unreliable – discerning the motivations of legislators is impossible
				2. NOTE: Under Title VII, business justification is still an objective inquiry managed by experts, under Constitution, discriminatory intent is subjective and places control in the court’s hands
				3. *United States v. Clary* (8th Cir. 1994)

EPC challenge on crack sentencing being 100x powder cocaine

Law is not facially discriminatory, but significant disparate impact

Argument that Congress felt crack was cheaper, stronger, and more dangerous so unless Π can demonstrate intent 🡪 rational basis

* + - 1. Modification and Critique of the *Davis* Doctrine
				1. Argument that *Davis* is inconsistent with framers intent WRT EPC

Broad language is closer to Title VII

* + - * 1. Argument that *Clary* is an incorrect application of *Arlington*
				2. Change *Feeney* to require “knowing” rather than “purposeful” intent
				3. Comparison to environmental law where we routinely require the government to justify its actions
	1. **Affirmative Action**
		1. **Timeline**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Case** | **Context****(Rationale)** | **Promulgating Entity** | **Majority Opinion** | **Level of Scrutiny** | **Result** |
| *Bakke* (1978) | Education(Rem. & Div.) | State | No | Intermediate(Brennan op.) | Program Invalidated |
| *Fullilove* (1980) | Contracting(Remedial) | Federal | No | Unarticulated (Burger op.) | Program Upheld |
| *Wygant* (1986) | Education (Remedial) | State | No | Strict (Powell Plurality) | Program Invalidated |
| *Croson* (1989) | Contracting(Remedial) | State | Yes | Strict | Program Invalidated |
| *Metro B.* (1990) | Broadcasting(Diversity) | Federal | Yes | Intermediate | Program Upheld |
| *Adarand* (1995) | Contracting(Remedial) | Federal | Yes | Strict | Program Invalidated |
| *Grutter* (2003) | Education (Diversity) | State | Yes | Strict | Program Upheld |
| *Gratz* (2003) | Education (Diversity) | State | Yes | Strict | Program Invalidated |

* + - 1. Note that between 1990 and 1995 Federal programs didn’t get strict scrutiny because 14.5 gave prerogative to feds to undo discrimination
			2. Key distinction here is that anti-classification and anti-subordination cut in opposite directions in these cases
		1. **Two Government Interests**
			1. Remedial Interest – Remedy past discrimination that has current effects
				1. E.g. Often pops up in contracting cases
			2. Diversity Interest – Areas where there is significant exchange of ideas
				1. E.g. Education and broadcasting
				2. Amar argues that we want to foster robust exchange of ideas
		2. **Cases**
			1. *Regents of the University of California v. Bakke* (1978)
				1. 4-1-4 decision with Powell in the middle considered the controlling opinion
				2. Challenge to Davis medical school AA program that reserved 16/100 seats for minority students, allowed below 2.5 GPA, etc.
				3. Struck down naked “quota” but suggested that “+-factors” would be ok
				4. Burger 4: Plan violates Title VI (federally funded programs can’t discriminate on race) – Powell argues this is failing strict scrutiny (+-factor ok, no quota)
				5. Brennan 4: UC plan valid under Title VI/EPC applying intermediate scrutiny

Gov. can adopt race conscious program if purpose is to remove disparate impact and there is reason to believe the disparate impact is the product of past discrimination

Powell argues lower court erred in stating UC can *never* consider race consistent with EPC/Title VI

* + - * 1. NOTE: Powell rejects the idea that strict scrutiny doesn’t apply because white people are not a discrete and insular minority

Argument that otherwise, we would always be asking when someone ceases to need special scrutiny, etc. 🡪 justiciability issues

Marshall argues that African Americans shouldn’t have to demonstrate they are victims of racism because it is so pervasive

Blackmun points out the irony of legacy programs which create massive disparate impact but couldn’t be challenged under *Davis*

* + - 1. *Fullilove* (1980) – Upheld 10% MBE set aside program under 14.5 as remedial, convinced there was sufficient evidence of past discrimination
			2. *Wygant* (1986) – Rejects school district AA program that would lay off non-minority teachers first to preserve % of minority teachers – not narrowly tailored
			3. *City of Richmond v. J.A. Croson Co.* (1989)
				1. Minority business utilization plan requires prime contractors with city contracts to subcontract at least 30% of $ to Minority Business Enterprises
				2. Arguments (improper ends)

Ordinance declares itself as remedial – Self-serving and conclusory

Proponents testify to past discrimination in construction industry – Conclusory

MBE get 0.67% of prime Ks while constituting 50% of population (and 5/9 seats on council) – Have to look at % of qualified workforce; it is an invalid assumption that the qualified workforce will move in lock-step with population

Few MBEs in contractor associations – Correlation vs. causation – promulgating entity can only clean up *its own* past discrimination; this is just as easily caused by poor education for minorities

Congressional determination that past discrimination caused less MBEs in construction industry – National data is not relevant for Richmond

* + - * 1. Arguments (improper means)

No consideration of race-neutral alternatives

And 30% quota is not narrowly tailored

* + - 1. *Metro Broadcasting* (1990) – **Overruled by *Adarand***
				1. Upholds federal AA program subjecting FCC minority preference to intermediate scrutiny reasoning it was “benign” race-discrimination
				2. Substantially related to important government interest in broadcast diversity
			2. *Adarand* (1995) – Strict scrutiny required
				1. Skepticism – Heightened scrutiny; Consistency – Standard is the same for all races; Congruence – Promulgating actor makes no difference WRT scrutiny level 🡪 NOTE this eliminates intermediate scrutiny for federal AA progs.
				2. Scalia Concurring: We are all one race
				3. Thomas Concurring: Concerns about paternalism
				4. Stevens/Ginsburg Dissenting: Disagrees with consistency emphasis – distinguishes decision by majority to benefit minority despite incidental harm to majority (*See Davis*)
			3. *Grutter v. Bollinger* (2003)
				1. Upholds AA program at law school under strict scrutiny
				2. Compelling Government Interest

No remedial – no past discrimination with continuing effects

Interest in diversity in higher education – Intra-group diversity, cites studies how it benefits business and military (1st Am.-type issue)

* + - * 1. Narrow Tailoring

Race is one of many factors in holistic analysis of applicants

Desire to achieve “critical mass” of students so no student feels they are a spokesperson for their race – “intra-group” diversity

* + - * 1. Consider Race-Neutral Alternatives

Narrow tailoring doesn’t require exhaustion of all race-neutral alternatives

Does not require choice between maintaining reputation of excellence and maintaining a diverse student body

Lottery system would undermine university’s “elite” status

* + - * 1. Time Limited – 25y sunset will be sufficient (25y since *Bakke*)
				2. Summary: Diversity + Limited Use of Race + Time Limited
				3. Rehnquist Dissenting: Argument that critical mass is just calling a quota something else; cites stats that students are extended offers in lock-step with applicant race %; critical mass for 1 race should be the same as others (don’t need 2x African Americans as Hispanics); smells like pretext
				4. Thomas Dissenting: Race neutral alternative is only option for diversity; Argument that admits are under-qualified or if qualified, have a badge that stigmatizes them (assume race is why they’re there)

Counter – this assumes *de jure*/*de facto* barriers are already removed

* + - * 1. NOTE Deference arguments – 1st Am. Academic freedom issues are in play – deference to university to determine the meaning of “diversity”

Undermines the concept of strict scrutiny

* + - 1. *Gratz v. Bollinger* (2003) – Struck down point system awarding 20 out of 150pts to minority students where 100 needed, 5 given for other qualitative factors
			2. *Parents Involved v. Seattle Sch. Dist. Co. 1* (2007)
				1. Primary/secondary school assignment plans relied on race to integrate school system in WA/KY (e.g. plan to maintain between 15-50% black students)
				2. Majority – Invalid ends (KY plan was remedial, but finished – voluntary remedial plan not ok because no current effects; WA plan is not higher education [*Grutter*] and race is not +-factor, may be sole determinant)

Districts also did not consider race-neutral alternatives

* + - * 1. Thomas Concurring: There is nothing to show that integration is necessary to African American achievement
				2. Kennedy Concurring: Race is too large a factor, but preventing racial isolation is potentially compelling – race-conscious school zone drawing
				3. Breyer Dissenting: Valid interest in diversity
			1. *Fisher v. Texas* (2013) (Decision Pending)
				1. TX 10% program + holistic program that considers race
				2. Compelling Government Interest – Diversity

School defines “classroom diversity” rather than “university wide” diversity – scope is more granular – stats highly sensitive to class size

* + - * 1. Argument “critical mass” already achieved

% minorities already high (got awards), *de minimis* effect

Counter – modest impact speaks to it being one of many factors

* + - * 1. Question of whether use/success of race-neutral alternative precludes consideration of race entirely
			1. Hypo – Analyze TX 10% program under *Davis* line of cases
				1. Level of analysis

Not facial discrimination

Facially neutral statute that is pretext for discrimination 🡪 Strict Scrutiny

Disparate impact on white students

Legislative history indicates that this was the intended purpose

* + - * 1. Was this adopted in spite of or because of its negative effect? (*Feeney*)

Argument it is in spite of – desire is helping minorities, not hurting white

BUT *Feeney* was about civil service exam preference for vets who happened to be mostly men, here it is a zero-sum game

* + 1. **Notes**
			1. Consider the “day 3” argument 🡪 non-discriminated class gets the same strict scrutiny as the discriminated one once the discriminated class has a successful challenge
			2. When did X discrimination become illegal under the EPC?
				1. When 14th Am. was ratified
				2. 14th Am. was written with sufficient generality to allow it to change with the times – reliance on judicial interpretation and *stare decisis*
			3. Title VI (any educational institution that receives federal funds 🡪 race specific) moves in lock-step with EPC analysis, Title IX (gender) does not
	1. **Gender Discrimination**
		1. **Timeline**

|  |  |  |
| --- | --- | --- |
| **Case** | **Issue** | **Holding** |
| *Griswold v. Connecticut* (1965) | Statute prohibiting providing information, instruction, and advice on contraception | Struck down under DP right of privacy within “penumbra” of Bill of Rights |
| *Reed v. Reed* (1971) | Statute preferring male over female executors based on generalization that men have business experience | Rational Basis w. Bite strikes down statute – Ignores individual qualifications for similarly situated women and men – arbitrary |
| *Eisenstadt v. Baird* (1972) | Statute prohibits unmarried (but not married) couples from using contraceptives | Struck down under rational basis EPC – Right of privacy is an *individual* right – doesn’t matter if married or single |
| *Roe v. Wade* (Jan. 22, 1973) | Statute prohibiting procuring abortion except to save mother’s life | Struck down under DPC creating trimester framework: no regulating 1st, regulation for mother’s help 2nd, prohibition w/ exception ok in 3rd |
| *Frontiero v. Richardson* (May 14, 1973) | Statute providing auto-benefits to spouses of servicemen, but requiring proof of ½ dependency on spouses of servicewomen | Plurality, Strict Scrutiny strikes down statute |
| *Geduldig v. Aiello* (1974) | Statute excludes disabilities incident to normal pregnancy from disability insurance scheme | Holding that pregnancy discrimination ≠ sex discrimination 🡪 rational basis |
| *Craig v. Boren* (1976) | Statute allowing women under 21 to drink “near beer” but not men based on generalization that men are more likely to DUI | Intermediate Scrutiny strikes down statute |
| *Michael M. v. Sonoma County* (1981) | Statute criminalizes statutory rape with penalties only on men, not women | Plurality, upheld under intermediate scrutiny – Real difference 🡪 women bear almost all the harm from teen pregnancy |
| *University of Mississippi v. Hogan* (1982) |  |  |
| *Casey v. Planned Parenthood* (1992) | Statute limiting abortion | Largely upheld, purports to affirm *Roe*, creates bifurcated test: pre-viability no undue burden, post-viability prohibition with exception for life/health |
| *United States v. Virginia* (*VMI*, 1996) | VMI is an all-men school justified by “diversity” of educational options and value of adversative method | Stronger Intermediate Scrutiny requires school to admit women – rejects generalizations about women to exclude outliers |
| *Nguyen v. INS* (2001) | Statute granting citizenship to children of American mother/alien father, but requires steps for American father/alien mother | Upholds statute under intermediate scrutiny – real biological differences |

* + - 1. Prior to 1971, no sex-based discrimination was struck down
		1. ***Frontiero v. Richardson* (1973)**
			1. Strikes down statute providing automatic benefits to spouses of servicemen, but requiring proof a husband of servicewoman relies on her for ½ of his support
			2. Brenan plurality argues a co-equal branch of government is already going this way, the court should take the case as it comes
				1. History of discrimination – Limited rights throughout 19th Century
				2. Immutability – Sex is an immutable characteristic (e.g. religion no – 1st Am.)
				3. Capacity – Unlike non-suspect statuses like intelligence or physical disability, sex frequently bears no relation to ability to perform/contribute to society
				4. Political Powerlessness – Women are vastly underrepresented in government

Structural impediments even though significant voting power

Consider – Discrete/insular minority (*Caroline Products* FN4¶3); Ability to get attention of lawmakers (*Cleburne*)

Paradox of Political Power – Requires significant political power to get the court to find you’re a minority with insufficient political power bringing you under EPC

* + - 1. Powell Concurring – Arguing that prudential considerations militate towards striking the statute under *Reed* and avoid making sex a suspect classification
				1. Equal Rights Amendment was up for ratification – argument that this decision stole the wind from the ratification sails
				2. Counter – Creates a line-drawing problem about when judiciary should be hands-off

Note Powell’s counter-argument to the counter-majoritarian stance of the court here taking the wind from the amendment

* + 1. ***United States v. Virginia* (*VMI*, 1996)**
			1. VA Military Institute is all male public college focused on producing “citizen-soldiers” prepared for leadership roles using an adversative education method
			2. Court of appeals holds: Integrate, create parallel institution, or withdraw from getting state funding – State makes crappy parallel (VWIL)
			3. Test
				1. The state must show that the challenged classification serves an important governmental objective
				2. And that the discriminatory means employed are substantially related to the achievement of those objectives
				3. The reviewing court must determine whether the proffered justification is “exceedingly persuasive”
				4. Justification must be genuine, not hypothesized or invented post hoc in response to litigation
				5. Must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females
			4. VA proffered government objectives
				1. Provide a “diversity” of education options – “second order” diversity

No evidence from 1839 that this was the thinking

Post-*Mississippi* rationalization that women would be hard to attract is unpersuasive – *Post hoc* rationalization

*See* Rehnquist Dissenting: Should only consider post-*Mississippi* justification – on notice 🡪 they made a committee to examine the issue

* + - * 1. Adversative method is valuable and would have to be changed

Some women are capable of meeting the demands though most women might not like it (note most men don’t like it either)

If end is to produce “citizen soldiers” it is unclear how this is tailored to that end – not persuasive that small accommodating changes will undermine

* + - * 1. Generalizations about “the way women are,” estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description
			1. Scalia Dissenting: Women are not a suspect class under *Caroline Products*, if a practice has a long history and isn’t expressly prohibited in Bill of Rights 🡪 uphold and leave to political process – Argument that this is paternalism
		1. **Real Biological Differences**
			1. *Geduldig v. Aiello* (1974)
				1. Upholds program excluding disabilities incident to normal pregnancies from a state disability insurance scheme
				2. Holding: Discriminating based on pregnancy is not sex discrimination – it distinguishes between pregnant and non-pregnant women, not women and men generally 🡪 Draws Rational Basis Review

Have to show that the distinctions involving pregnancy were pretext

Otherwise this is just disparate impact

Counter – *Feeney* was based on veteran status, but not 100% of veterans are men (just most of them)

* + - * 1. Brenan Dissenting: Men are fully covered for “male only” conditions like prostatectomies, circumcision, etc.
				2. NOTE: This case separates pregnancy issues (abortion) from other sex-based discrimination under the EPC
			1. *General Elec. Co. v. Gilbert* (1976) – SC-USA rejects EEOC interpretation of Title VII to include pregnancy as sex-discrimination
				1. Congress responds with Pregnancy Discrimination Act – Amends Title VII
				2. Title VII proscribes discrimination based on race, national origin, color, sex, or religion – PDA redefines “because of sex” to include “because of pregnancy” 🡪 not the same as enumerating pregnancy on its own
			2. *Michael M. v. Sonoma County* (1981)
				1. Plurality upholds CA statutory rape law that punishes only men
				2. “Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the female, a legislature acts within its authority when it punishes the participant who, *by nature*, suffer few of the consequences of his conduct”
			3. *Tuan Anh Nguyen v. INS* (2001)
				1. Upholding statute that automatically grants citizenship to children of citizen mothers and alien fathers, but requires special procedures for children of citizen fathers and alien mothers (one of several processes before 18y/o)
				2. Rationales

Importance of assuring a biological parent-child relationship exists

Mother is present at birth, father need not be present and may not be father even if present (consider surrogate mothers)

Ensuring potential to develop ties between parent and child and thus US

Legitimate – Mothers are inherently present at birth, father may not even know a child was conceived

Illegitimate – Mothers are more “motherly” than fathers

Concern that Congress is just focused on sailors going abroad and fathering a million kids – cite support obligation, focus on ability to reproduce in greater numbers

Legitimate – Men reproduce efficiently; Illegitimate – men are whores

* + - * 1. Tailoring – Intermediate scrutiny does not require the best possible option, like a gender neutral alternative of requiring DNA testing
				2. Dissent: Should have to use gender neutral alternatives (everyone gets DNA test, simply require regular contact w/ child, etc.)

Statute relies on stereotypes about men and women

Classification is unnecessarily overbroad

* + - 1. *Rostker v. Goldberg* – Upholds male-only draft requirement because only men can be deployed in ground combat – does not address constitutionality of combat exclusion (Don’t want women there who can get pregnant, strength differential, social concerns about women in combat)
			2. *Clark v. Arizona* (9th Cir. 1982) – Holding that strength is a “real difference” in upholding state athletic association banning men from women’s volleyball league
1. **SUBSTANTIVE DUE PROCESS**
	1. **Analysis**
		1. Rights under Substantive Due Process that invoke Strict Scrutiny (light)
			1. Right of Privacy Including the right to
				1. Marriage (*Loving*), use of contraception (*Griswold*), abortion (*Roe*), read obscene material, keep extended family together, parents to control their children (*Meyer*/*Pierce*), intimate sexual contact (*Romer*/*Lawrence*)
			2. Other
				1. Right to vote, travel (*Saenz*), refuse medical treatment (*Cruzan*)
				2. *But see* *Lawrence* – Arguably *not* applying SS
		2. Three Conceptualizations of Privacy
			1. Zonal – Certain places are private (*See* 3rd/4th Am.)
			2. Relational – Interpersonal (*See Meyer*/*Pierce* – Parent/child)
			3. Decisional – Individual autonomy (*See* 5th Am. privilege, *Eisenstadt*)
				1. Yoshino: Zonal/Relational are really subsets of Decisional
		3. **Abortion**
			1. Right to privacy contains a qualified right to terminate pregnancy against compelling state interest in safety of the mother & preserving prenatal life (*Roe*)
				1. 1st Trimester: Abortion decision left to medical judgment of the woman’s attending physician (privacy and health of mother overrides any state interest)
				2. 2nd Trimester (pre-viability): State may regulate abortion in ways reasonably related to maternal health (state interest in mother’s health against privacy)
				3. 3rd Trimester: State may regulate or prohibit abortion subject to exception for the life and health of the mother (state interest in preserving prenatal life)
			2. Undue Burden Test (*Casey/Stenberg*)
				1. **Pre-viability**, the state can regulate abortion provided it doesn’t place an undue burden on the availability of an abortion

Regulation can’t have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. Must be calculated to inform the woman’s free choice, not hinder it

Regulations which do no more than create a structural mechanism by which the state… may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose (*Gonzalez v. Carhart*)

* + - * 1. **Post-viability**, the state can proscribe abortions subject to exception for the life and health of the mother

Test set out in *Casey* gets a majority in *Stenberg*

Pre-viability must be calculated to inform the woman’s free choice, not hinder it – though note that *Casey* upheld a 1-day waiting period

Post-viability state interest in promoting unborn life is significant

Exception is unnecessary so long as regulation does not place an undue burden on the mother (*Gonzalez v. Carhart* CC regulation of medical profession – consideration of safety and balancing risks [ends] so long as regulation is rational 🡪 ok so long as other options are available, mere convenience is not enough to supplant a regulation)

Health exception is properly brought as an “as applied” challenge (though facial challenge should succeed unless the regulation would *never* affect the health of the mother) (*Gonzalez v. Carhart*)

* + - * 1. Pre/Post viability test may be unnecessary if ban doesn’t pose undue burden (*Gonzalez v. Carhart*)
		1. **Contraception and Sexual Intimacy – Generality/Intersection of EPC/DPC**
			1. *Eisenstadt* on EPC – “If the right of privacy means anything, it is the right of the *individual*… to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child”
			2. *Romer* (EPC)
				1. Law must be rationally related to a legitimate interest

Bars a single group based on a single trait (too narrow) from all protections across the board (too broad)

Breadth can only be explained with animus – no rational basis

* + - * 1. *See also Cleburne* and *Moreno*
				2. **PAY ATTENTION** to whether you want to argue EPC or DPC – DPC creates a much broader right and can present a greater challenge, but EPC only applies to specific categories of people – is it a group of people or a behavior you’re defending?
			1. *Lawrence* (DPC – RBRish review)
				1. Holding: The statute furthers no legitimate state interest that can justify the intrusion into the **personal and private life of the individual**

**Level of generality** – *Bowers* was framed too narrowly, not just about gay sex, rather whether you can choose how to conduct personal relationships

* + - * 1. Role of “Moral Objection” – Rational basis with bite, can’t just assert moral objection 🡪 animus – issue is whether the majority can impose its moral view on individuals through the use of the criminal law
				2. “History and tradition are the starting point, but not in all cases the ending point of the SDP inquiry”
		1. **Test for New SDP Rights**
			1. **Two Part Test For Substantive Rights (*Glucksberg*)**
				1. SDP requires a careful description of the asserted fundamental liberty interest

*Glucksberg* Implementing FN6: Careful description reigns in on subjectivity 🡪 like level of generality reasoning in FN6

Counter: No mention of level of generality, also O’Connor/Kennedy join

Kennedy *Lawrence*: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”

Consider Scalia FN 6 (*Michael H.*): Refer to the most specific level at which a relevant tradition protecting or denying protection to the asserted right can be ID’d – But consider O’Connor/Kennedy jump off at this point

Consider Kennedy (*Lawrence*): Intrusions into the life of the individual

* + - * 1. DPC specially protects those fundamental rights and liberties which are objectively **(a) deeply rooted in this nation’s history and tradition AND (b) are implicit in the concept of ordered liberty**, such that neither liberty nor justice would exist if they were sacrificed

If yes 🡪 SS (“fundamental right”) or ~HS (“unenumerated rights”)

Consider Brennan (*Michael H.*): Tradition is as malleable as anything else

Consider Souter Dissenting (*Glucksberg*): Leads to ossification

Consider Kennedy (*Lawrence*): “History and tradition are the starting point, but not in all cases the ending point of the SDP inquiry”

* + - 1. **Should this go under PorI?(*Saenz*) – Only applies to citizens**
				1. *Saenz* – Right to travel
				2. Protection on the high seas, right to petition the government, right to acquire and possess property, pursue and obtain happiness and safety, subject to restraints the government may prescribe for the good of everyone (Majority – parsing text between citizens of US and state) (*Slaughterhouse Cases*)
				3. *Corfield* – P&IC

Right to pass through or travel in state

Right to “reside in state for business or other purposes”

Right to do business there whether it involves “trade, agriculture, professional pursuits, or otherwise”

Right to “take, hold, and dispose of property, either real or personal”

* + 1. **Congressional Enforcement of 14.1 Through 14.5** (*Boerne*)
			1. What is the 14.1 right?
			2. How many violations of the right were there? – Legislative findings?
				1. Infractions must be by state actors (*Morrison*, *The Civil Rights Cases*)

Note: Action by the federal government wouldn’t count

Units of local government (city/county) can’t assert sovereign immunity so they don’t count as state actors (*Garrett*)

E.g. disparate treatment by states and state employers (*Hibbs*)

*But see Hibbs* 🡪 Disparate treatment by private employers

* + - * 1. Only infractions of the specific Title of the Act count (*Garrett* – Separating Title I and Title II infractions of the ADA)
				2. If the group draws rational basis, not all forms of disparate treatment are cognizable (*Garrett citing Cleburne*)

Issues may be EPC or DPC to draw heightened scrutiny (*Lane* holding Title II of ADA enforces basic rights like access to the courts and 6th Am. right to confront witnesses – SDP)

* + - * 1. If the group draws heightened scrutiny disparate impact may be cognizable (*Hibbs*)

Higher Scrutiny = Greater Congressional power under 14.5

Consider: *Cleburne* RB with bite 🡪 *Garret* strikes down; *VMI* HS 🡪 *Hibbs* upholds

* + - 1. Is the legislation **congruent and proportional** to the problem?
				1. How far can congress go?
				2. Was this a right (DPC) or a classification (EPC)?
				3. Heightened Scrutiny or Rational Basis? – Heightened scrutiny lowers the # necessary to satisfy this step (*Garrett*)
				4. E.g. – *Hibbs* found FMLA constitutional exercise of 14.5: Sex-based classifications draw intermediate scrutiny, mandates equal time off for men/women which eliminates the distinction between men and women WRT taking time off for family issues
		1. **Sovereign Immunity**

How many states involved/swept in? Setting a floor as in FMLA? Sweep in more categories than involved in case?

* + - 1. 11th Am. – Sovereign immunity for the states from suits by citizens of the state or other states (*Hans*) for money damages (*Edelman v. Jordan*) in state or federal court (*Alden v. Maine*) – Injunctive relief does not count (*Ex parte Young*)
			2. Must be either **(a) a waiver of immunity** by the state (never happens) **OR** **(b) a clear intent** by Congress to abrogate **AND** an action pursuant to proper (**post-11thAm.)** power (*Seminole Tribe v. FL*)
				1. 14.1/14.5 (EPC/DPC)
				2. 13.1/13.2 (Slavery/Badges and Incidents)
				3. 15.1/15.2 (Right to vote on basis of race)
				4. NOTE question whether you get pre-*Boerne* N&PC-type leash or post-*Boerne* congruence and proportionality leash
	1. **Timeline**

|  |  |  |
| --- | --- | --- |
| **Case** | **Issue** | **Holding** |
| **First Arc: 1905 – 1937 🡪 Fight over Freedom of Contract (*Lochner*) and Education (*Meyer*/*Pierce*)** |
| *Lochner v. New York* (1905) | NYS max hours law for bakers | Struck down under economic “freedom of K” – Bakers are not a vulnerable class |
| *Meyer v. Nebraska* (1923) | Statute prohibiting teaching of German in schools | Struck down under DPC right of parents to control children’s education |
| *Pierce v. Society of Sisters* (1925) | Statute requiring all children to go to public schools | Struck down under DPC right of parents to control children’s education |
| *West Coast Hotel v. Parrish* (1937) | WA minimum wage statute | Struck down, indirectly overruling *Lochner* – DP protects “liberty” |
| **Second Arc: 1965 - 2007** |
| *Griswold v. CT* (1965) | Statute prohibiting providing information, instruction, and advice on contraception | Struck down under right of privacy within the “penumbra” of the Bill of Rights |
| *Loving v. Virginia* (1967) | Statute prohibiting interracial marriage | Struck down under both EPC/DPC |
| *Roe v. Wade* (1973) | Statute prohibiting procuring an abortion except to save the mother’s life | Struck down statute under DPC creating trimester framework: no regulation of 1st, regulation for mother’s help in 2nd, prohibition allowed in 3rd w/ exception for life/health |
| *Casey v. Planned Parenthood* (1992) | Statute limiting abortion | Largely upheld, purports to affirm *Roe*, creates bifurcated test: pre-viability no undue burden, post-viability prohibition with exception for life/health |
| *Bowers v. Hardwick* (1986) | GA statute bans sodomy regardless of the sex of the participants | Through standing, court reframes issue as about right to homosexual sodomy then upholds statute against SDP challenge under state interest in morality consistent with restrictions on adultery, etc. |
| *Lawrence v. Texas* (2003) | Challenge to TX sex-specific anti-sodomy statute | Struck down statute as an unconstitutional intrusion into personal/private life – Called out *Bowers* as framed too narrowly = not just about gay sex, about choosing how to conduct personal relationships |
| *Gonzales v. Carhart* (2007) | Federal ban on partial birth abortion | Upheld under *Casey* without exception for health of the mother or pre/post viability distinction. Reasoning that none of that is necessary if women have other options and doesn’t create undue burden |

* 1. **Contraception**
		1. ***Griswold v. CT* (1965)**
			1. Statute prohibits giving information, instruction, and medical advice as means of preventing conception
			2. Holding: Statute prohibiting married couples from using contraception violated constitutional right of privacy found in the penumbra of the Bill of Rights
			3. Penumbra
				1. 1st Am. – Right of association from textual right to assemble

E.g. No disclosure of membership lists (*NAACP v. Button*)

* + - * 1. 3rd Am. – Idea that person’s home is their castle from prohibition on quartering soldiers during peace time without consent of owner
				2. 4th Am. – Right to be secure in their persons, houses, papers, and effects from unreasonable search and seizure
				3. 5th Am. – Privilege prevents government from forcing individual to surrender to his detriment
				4. 9th Am. – Enumerations in the Constitution won’t be construed to deny or disparage other rights retained by the people (implies rights beyond enumerated)
			1. Zonal/relational privacy: “would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship”
			2. Goldberg (Warren, Brennan) Concurring – Right of privacy in 9th Am.
				1. To determine fundamental rights, judges look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there]… as to be ranked as fundamental”
				2. The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’”
			3. Harlan Concurring – Statute infringes DPC of 14th Am. because it violates values implicit in the concept of ordered liberty
			4. White Concurring – *Meyer*/*Pierce* “realm of family life” which the state can’t enter without substantial justification – if ends is extra-marital sex we’re over-including
			5. Black/Stewart Dissenting – Un-justified return to *Lochner*
		1. ***Eisenstadt v. Baird* (1972)**
			1. Statute prohibits unmarried (but not married) couples from using contraceptives
			2. Married/unmarried distinction didn’t further a legitimate state interest
			3. Struck down (EPC/Rational basis): “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child”
			4. **NOTE**: Yoshino likes this case to cite for gay marriage and related issues!
	1. **Abortion**
		1. ***Roe v. Wade* (1973)**
			1. TX statute prohibits abortion except to save mother’s life struck down 7-2
			2. State interests
				1. Laws were product of Victorian social concern with discouraging illicit sexual conduct – not taken seriously
				2. Concerns about abortion as a medical procedure – was hazardous

Now, 1st trimester abortion is safer than giving birth

* + - * 1. State interest in protecting prenatal life
			1. Holding: Right to privacy contains a qualified right to terminate pregnancy against compelling state interest in safety of the mother & preserving prenatal life
				1. 1st Trimester: Abortion decision left to medical judgment of the woman’s attending physician (privacy and health of mother overrides any state interest)
				2. 2nd Trimester (pre-viability): State may regulate abortion in ways reasonably related to maternal health (state interest in mother’s health against privacy)
				3. 3rd Trimester: State may regulate or prohibit abortion subject to exception for the life and health of the mother (state interest in preserving prenatal life)
			2. Why is a fetus not a “person”?
				1. Intra-textual – Constitutional references to persons are only postnatal

14th Am. reference to those “born” in US for citizenship 🡪 aware

* + - * 1. Historical “quickening” distinction
		1. Sunstein argues that EPC is inherently forward looking (SS to analyze what comes in the future) while DPC is backward looking (reference to nation’s history and traditions)

Ginsberg argues that *Roe* was premature counter-majoritarian use of judicial power because it created backlash – might provoke a constitutional amendment that the court can’t touch

* + 1. ***Planned Parenthood v. Casey* (1992)**
			1. PA statute regulates abortion, challenged under DPC
			2. Decision purportedly reaffirms *Roe* under *stare decisis* while rejecting trimester framework in favor of “undue burden” test
				1. Makes abortion *sui generis* analysis – not strict scrutiny
			3. Holding
				1. Pre-viability, the state can regulate abortion provided it doesn’t place an undue burden on the availability of an abortion

Must be calculated to inform the woman’s free choice, not hinder it

* + - * 1. Post-viability, the state can proscribe abortions subject to exception for the life and health of the mother
			1. Reasoning
				1. “Our obligation is to define the liberty of all, not mandate our own moral code” – Personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education… involving the most intimate and personal choices a person may make in a lifetime, choices *central to personal dignity and autonomy*, are central to the liberty protected by the 14th Am.

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| **Aspect of the PA statute** | **Joint Opinion****(O’Connor, Souter, Kennedy)** | **Stevens opinion** | **Blackmun opinion** | **Rehnquist Opinion (with White, Scalia, Thomas)** | **Result** |
| Woman must give informed consent 24 hours prior to abortion | Valid  | Invalid (though information about risks of abortion valid) | Invalid | Valid | Valid (7-2) |
| Minors must get informed consent of parent | Valid | Invalid | Invalid | Valid | Valid (7-2) |
| Married woman must notify spouse | Invalid | Invalid | Invalid | Valid | Invalid (5-4) |
| Requirements above waived for medical emergency | Valid | Valid | Invalid | Valid | Valid (8-1) |
| Reporting requirements | Valid | Valid | Invalid | Valid | Valid (8-1) |

* + - 1. Prudential/pragmatic considerations for *stare decisis*
				1. Workability: Clarity 🡪 lower courts having difficulty applying?

*See* 10th Am. cases finding “traditional government function’ unworkable

* + - * 1. Reliance: People come to rely on previous rule in organizing affairs

Stevens – Sometimes it’s better the law be settled than settled right

Rehnquist in *Dickerson* discussing reliance on *Miranda*

Possibly limited by “justifiable” reliance (“separate but equal” cases)

* + - * 1. Change in Doctrine: Concept has been chipped away to the point where the original doctrine is just an anomaly

*Metro Broadcasting* 🡪 *Adarand*; *Lochner* 🡪 *Atkins* 🡪 *West Coast Hotel*; *Plessy* 🡪 *Brown v. Board of Education*

* + - * 1. Change in Fact or Changed Perceptions of Constant Facts: Change in circumstance or technology undermines prior assumptions
				2. Consider adding: More *stare decisis* for interpretation of statute where there is political check, but less for Constitution where there isn’t
			1. Blackmun Concurring and Dissenting
				1. Abortion laws force women to endure physical invasions far more substantial than other unconstitutional regulations implicating bodily integrity
				2. Deprive women of critical life choices
				3. Implicates gender equality – Compelling women to continue a pregnancy conscripts a woman’s body into service for the state – the state does not compensate women for this service
			2. Rehnquist (White, Scalia, Thomas) – Overrule *Roe*
			3. Scalia: if (1) Constitution says nothing about a right; and (2) longstanding traditions of American society permitted proscribing it, then no SDP 🡪 political
		1. ***Stenberg v. Carhart* (2000)**
			1. 5-4 decision overturning Nebraska ban on “partial birth abortion”
			2. Reasoning: Lacked health exception, did not distinguish pre-viability/post-viability, no distinction between D&E and intact D&E
			3. Statistics
				1. 90% occur during 1st trimester 🡪 vacuum aspiration
				2. 10% occur during 2nd trimester 🡪 Dilation and Evacuation or intact D&E
			4. Medical advantages of intact D&E
				1. Reduction of tares from sharp bone fragments
				2. Minimization of the number of instrument passes
				3. Decreased likelihood of leaving infection-causing tissue in uterus
				4. Decreased likelihood of potentially fatal absorption of fetal tissue into maternal circulation
			5. Triggers Federal Partial Birth Abortion Ban Act of 2003
		2. ***Gonzales v. Carhart* (2007)**
			1. *Distinguish Stenberg* – D&E/intect D&E distinction
			2. Reasoning
				1. Pre/post-viability distinction not necessary because it doesn’t pose an undue burden on the mother
				2. Health exception is non-justiciable as a facial challenge 🡪 as applied only

Note: Constitutional rule requiring an exception for health of the mother (*Casey*) is flouted, to have a facial challenge **fail**, have to demonstrate that no situation would affect the health of the mother

As applied requires that we wait for a specific litigant to be affected and bring a challenge

* + - 1. Undue burden
				1. Regulations which do no more than create a structural mechanism by which the state, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose
				2. Under the CC in regulating the medical profession – considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends

When standard medical options are available, mere convenience does not suffice to displace them, and if some procedures have different risks than others, it doesn’t follow that the state is altogether barred from imposing reasonable regulations 🡪 even without an exception for the health of the mother

* + - 1. Notions about women
				1. “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life that was once created and sustained. Severe depression and loss of esteem can follow”
				2. Ginsburg dissenting argues that this type of paternalism is expressly proscribed by the EPC and shouldn’t be allowed under DPC

Adolescents and indigents are most likely to need this procedure

Some fetal anomalies don’t develop til later

* 1. **Intimate Sexual Contact**
		1. ***Bowers v. Hardwick* (1986) – Overruled in *Lawrence***
			1. GA statute bans sodomy regardless of the sex of participants, officer arrests Hardwick after finding him having oral sex with another man
			2. At this time, 24 states and DC have sodomy statutes, but are largely unenforced, but consider normative harm 🡪 creates stigma
			3. **Standing**: Case against Π was dropped, but could be reopened anytime 🡪 note that heterosexual couple also joined, but no standing
			4. Allows court to reframe **issue** as whether or not Constitution grants a fundamental right to engage in homosexual sodomy
				1. FN: Court specifies this is a facial challenge, and reserves heterosexual issues for another time
				2. Undermined the strategy of bringing this case as DPC 🡪 tried to bring it home to judges, but they just read it as a “gay case”
			5. We have a facially neutral statute (w/ 20y sentence) discriminately being enforced (*Yick Wo*) – But NOTE it is enforced so rarely it is hard to tell
			6. Court reframes a zonal/decisional privacy issue (like child rearing [*Pierce*/*Meyer*], procreation [*Skinner*], marriage [*Loving*], contraception [*Griswold*/*Eisenstadt*], abortion [*Roe*]) argued as private intimate contact between consenting adults into relational regulation
				1. Not zonal (*Stanley*) because *Stanley* was about possessing obscene materials which is a 1st Am. issue
				2. Allowing voluntary sexual conduct between consenting adults would require allowing adultery, incest, and other sexual crimes (i.e. not decisional)
				3. Passes rational basis because of state interest in regulating morality
			7. **Test**
				1. SDP includes those fundamental liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed (*Palko*, 1937) and those liberties that are deeply rooted in this nation’s history and tradition (*Moore*, 1977)
			8. Ripples: Decision allows for regulations on gay couples adopting children and largely forecloses EPC challenges since the activity is criminalizable for homosexuals, you can’t have EPC protection
		2. ***Romer v. Evans* (1996)**
			1. CO State Constitutional amendment to indicating “no protected status based on homosexual, lesbian or bisexual orientation”
			2. Rational basis – Law must bear a rational relationship to a legitimate state interest
				1. Argument that this is freedom of association for other citizens – landlords/employers who don’t like gay people – Conserve resources to fight discrimination against other groups
				2. Breadth of amendment is far removed from these interests

Bars a single group based on a single trait (too narrow) from all protections across the board (too broad)

Breadth can only be explained with animus – no rational basis

Law can’t simply declare it shall be more difficult for one group to seek redress from the government that anyone else

* + - 1. Consider: Felons barred from voting – but this is a specific penalty imposed on a specific group as a deterrent
				1. For better rational basis with bite cases *see Cleburne* (Law fencing out people with mental disabilities from a neighborhood) *and Moreno* (1973 law denying food stamps from “hippies”)
			2. Scalia/Rehnquist/Thomas Dissenting – If it is constitutionally permissible to make homosexual *conduct* illegal (*Bowers*), then it is permissible to disfavor homosexual conduct in other ways
			3. Ripples – Note that this case, since it is so extreme, has allowed for lower courts to support bans on gay adoption specifically because they are narrowly tailored
		1. ***Lawrence v. Texas* (2003) (Kennedy Majority)**
			1. Police arrest Lawrence in his home having sex with another man under TX sex-specific sodomy statute
			2. Holding: The statute furthers no legitimate state interest that can justify the intrusion into the personal and private life of the individual
				1. Reasoning along zonal (the home/private life), relational/decisional (private and personal choices) lines
				2. Level of generality – *Bowers* was framed too narrowly, not just about gay sex, rather whether you get to choose how to conduct personal relationships
				3. Historically, sodomy laws were passed/enforced on non-consent issues
			3. Changed Circumstance – Now only 13 states have sodomy statutes, 4 sex-specific
				1. NOTE: EPC challenge would only wipe out the 4 sex-specific
			4. Court directly overrules *Bowers* – Does not expressly follow *Casey* Factors
			5. Role of “Moral Objection” – Rational basis with bite, can’t just assert moral objection 🡪 animus – issue is whether the majority can impose its moral view on individuals through the use of the criminal law
			6. “History and tradition are the starting point, but not in all cases the ending point of the SDP inquiry”
			7. Role of international law – Euros had struck down statutes under all three characterizations of privacy (Scalia argues we’re cherry picking/giving votes to non-Americans), but argument that a good idea is a good idea
			8. O’Connor Concurring: Would hold EPC violation under *Evans* (cabins SDP)
			9. Scalia Dissenting: Argues *Casey* factors not present to overrule *Bowers*
	1. **DOMA and Prop 8 – Same-Sex Marriage**
		1. ***Hollingsworth v. Perry* (2013)**
			1. Timeline
				1. May 2008: SC-CA strikes down statute precluding same sex marriage
				2. Nov. 2008: Prop 8 passes amending CA constitution to prevent SSM
				3. June 2009: Olson/Boies file federal suit against Prop 8, governor doesn’t defend, proponents join suit to defend Prop 8
				4. Aug. 2010: DC invalidates Prop 8 on federal EPC/DPC
				5. Feb. 2012: 9th Cir. invalidates Prop 8 on EPC grounds (animus – can’t take away what’s been given by the May 2008 decision)
			2. Standing
				1. Proponents have standing in DC because governor doesn’t defend
				2. Normally no standing to appeal, but otherwise the government could undermine the initiative process which was supposed to circumvent the legislature 🡪 Roberts argues a priest forced to perform SSM might have standing
			3. Movement lawyers wanted more states to legalize before pursuing DPC challenge
				1. Hide the ball by only challenging under state constitutional grounds in states where it was very hard to amend the constitution
			4. DPC: Π seeks the “right to marry” a la *Loving*, but reframe is easy 🡪 SSM is not deeply rooted in the Nation’s history and traditions – hard to cabin (polygamy)
				1. Unite-ive: Everyone should marry who they love
			5. EPC: Π seek equal treatment on basis of sexual orientation (SS or RBR)
				1. Concern: Sexual orientation doesn’t draw heightened scrutiny and *Romer* is easily distinguished (Better to argue under *Cleburne*/*Moreno* as softer standards of what constitutes animus)
				2. Sex discrimination or sexual orientation discrimination?

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| ***Loving* Analogy** |
| Π Argues that statute barring whites from marrying non-whites facially discriminates on raceState argues both whites and non-whites are prohibited from marrying outside their raceRejected “equal application” defense as “White Supremacy” | Π Argues that statute barring women from marrying women facially discriminates based on sexState defends that both women and men are prohibited from marrying someone of their own sexCourt must then find some kind of “male supremacy” grounding in order to reject equal-application defense |

* + - 1. Possible Holdings
				1. No constitutional right
				2. No standing (one state, procedural) – back to DC holding
				3. Dismiss as improvidently granted (one state, procedural) – back to 9th Cir. holding
				4. Affirm 9th Circuit (one state substantive)
				5. “9-state” solution – flip the everything-but-marriage states

Argument that you can’t rely on justifications you’ve relinquishes – i.e. can’t rely on the idea that heterosexual couples are better parents if you allow gay people to adopt

* + - * 1. 50-state solution – EPC/DPC rule covering all states
		1. ***United States v. Windsor* (2013)**
			1. Letter from executive argues that DOMA violates EPC because homosexuals are a group that deserves heightened scrutiny, and DOMA does not pass *VMI*
				1. History of discrimination – *See Lawrence*
				2. Immutable characteristic – “Scientific consensus”
				3. Politically powerless – *Compare VMI* and women, consider laws like in *Romer* and *Lawrence* still exist, ban on gays in military, etc.
				4. Contribute to society – Acknowledgement sexual orientation doesn’t bear on anything to do with this
				5. Apply – record contains numerous references to moral objections to gays and lesbians
			2. §3 of DOMA defines marriage for federal purposes as man and woman
				1. Obama enforces but refuses to defend in court
				2. Federalism issue is what separates this one from Prop 8 (marriage is a state issue – makes the argument stronger here) 🡪 §2 suspends full faith and credit for SSM, but “effects” clause allows these exceptions, so OK

DOMA § 2: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Art. 4, § 1, FF&CC: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such acts, records, and proceedings shall be proved, and the Effects thereof.”

Take Care Clause

The executive can refuse to defend a statute when: (1) They are not trammeling the Constitutional prerogatives of the executive, and (2) Something is clearly unconstitutional & the executive is not required to defend it

This is not concurrent power to interpret the constitution, only a determination that SC-USA would obviously hold it unconstitutional

Note that in *Perry*, 11/13 circuits held that sexual orientation does not garner heightened scrutiny

* 1. **Test for Creating New Substantive Rights**
		1. ***Michael H. v. Gerald D.* (1989)**
			1. Carole, married to Gerald, has affair with Michael resulting in daughter (blood test) Victoria. Carole returns to Gerald and they freeze out Michael
			2. CA rule of evidence creates presumption of paternity unless proven otherwise within 2y – Concern is stigma of illegitimate children
			3. Procedural DP – Rejects Michael’s argument that the presumption prevents him from being able to demonstrate he is biological father
			4. SDP
				1. Argument that biological father has a right to prove paternity
				2. Question of whether we have historically recognized rights of biological fathers *in Michael’s position*

Historically the concern was stigma of illegitimate children, protecting rights of succession/inheritance, and tranquility of the family

* + - 1. FN6 (Scalia/Rehnquist) – Refer to the most specific level at which a relevant tradition protecting or denying protection to the asserted right can be ID’d
				1. History is protecting illegitimate kids 🡪 no right for Michael
			2. Ladder of generality: Rights of natural father of adulterously conceived child (Scalia) < Parenthood (Brennan) < Family Relationships < Personal Relationships < General Emotional Attachments
			3. O’Connor/Kennedy Concurring – Concern about FN6 WRT *Roe* because *Casey* is on the docket and requires higher level of generality (“privacy”)
			4. Brennan Dissenting – Question of whether *parenthood* has received a historical right 🡪 “Tradition” is just as malleable as anything else
				1. Hard to tell when a tradition is “firm” enough to become a liberty interest
				2. Cases like *Roe/Eisenstadt/Griswold/etc*. would all be overturned
				3. Can’t consider changed factual premises (i.e. new technologies, etc.)
				4. “Liberty” has to include the freedom to not conform
		1. Normative issue – 9th Am. indicates there are unenumerated rights, and the purpose of the 14th Am. is to secure rights *against the state* – overreliance on long-standing tradition allows the states themselves to dictate the rights asserted against them
			1. DPC backward looking vs. EPC forward looking argument
			2. EPC would actually be *more* likely to strike down a practice that has been historical (*see, e.g.*, *Loving/Bowen/Cleburne*)
				1. Also note *Loving* requires a higher level of generality (right of marriage)
		2. ***Washington v. Glucksberg* (1997) – Rehnquist**
			1. SDP challenge to WA ban on physician assisted suicide
			2. **Two Part Test For Substantive Rights**
				1. DPC specially protects those fundamental rights and liberties which are objectively **(a) deeply rooted in this nation’s history and tradition AND (b) are implicit in the concept of ordered liberty**, such that neither liberty nor justice would exist if they were sacrificed
				2. SDP requires a careful description of the asserted fundamental liberty interest
			3. Note: *Bowers* reasoning had step (a) in disjunctive “or” 🡪 timeless component
			4. Analysis – *Cruzan* held that there was a right to refuse treatment, but here the physician taken an active role in the patient’s death – Country has a strong tradition of disapproving of suicide 🡪 rational basis
				1. Justifications: Preservation of life, protects medical profession, protects elderly and indigent, slippery slope towards involuntary euthanasia
			5. Normative Issues: What is the effect of new technology? Consideration of international issues: Citation to Netherlands study, Concerns about harmful effects on vulnerable groups
			6. Souter Concurring: Majority approach leads to ossification, rather than common law approach which weighs the relative weights of dignities, etc. Can’t just focus on past practice on a hyper-specific level
		3. **The New Equal Protection**
			1. Thesis: As the court squeezes off EPC rights, DPC rights open up under “liberty”-type reasoning
				1. No more heightened scrutiny groups (since 1977) – *But see Lawrence* – Note sexual orientation is largely conduct based identity
				2. No more disparate impact claims – *But see Roe v. Wade*
				3. Restrictions on what Congress can do under 14.5 – *But see Tennessee v. Lane*
			2. Pluralism anxiety – Too many groups/rights
				1. *See Cleburne* – Can’t give mentally retarded protection because then *everyone* gets protection golly!
				2. *See Boerne* – Too many religions to give everyone EP! and Indians are smelly
				3. *See Lane* – Reasoning about access to the courts as a rights, not handicapped persons as a group
			3. Lesson: The court is eminently more interested in rights based claims rather than wanting special treatment for a specific group
	1. **Congressional Enforcement of the 14th Am. Through 14.5**
		1. **Text of 14.5:** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article
			1. *The Civil Rights Cases* hold that Congress can only enforce against state actors
			2. When Congress legislated under CC, constitutionality of affected state laws is irrelevant, only concern is extent of the CC power
		2. ***Katzenbach v. Morgan* (1966)**
			1. Constitutionality of §4(e) of the Voting Rights Act of 1965 – Can’t deny right to vote from someone that completes 6th grade in public/private school in Puerto Rico for not being able to read/write in English
			2. *Lassiter v. Northampton Election Board* (1959) – English literacy tests are constitutional under 14.1
			3. Issue: Can Congress use 14.5 to prohibit state law even if judicial branch hasn’t declared the state law unconstitutional under 14.1?
			4. Holding: 14.5 is like N&PC 🡪 positive grant of power
				1. Is legislation (1) an enactment to enforce EPC, (2) plainly adapted to that end, and (3) not prohibited by, but consistent with the letter and spirit of the constitution 🡪 same as CC analysis
				2. Note: RBR 🡪 can be step-wise, FN argument that Congress can’t dilute, can only legislate on top of the floor the Court creates
			5. Harlan dissenting argues the Court must first find the practice unconstitutional before Congress can implement a remedy
		3. **Two Theories of 14.5**
			1. Substantive – Congress can come to its own interpretation of 14.1 (co-equal)
				1. i.e. Congress came to its own determination that there was animus independent of the court’s holding in *Lassiter* – “Fox guarding hen house”
			2. Remedial – Congress is liberally enforcing a 14.1 right as interpreted by the court
				1. 14.5 is a positive grant of power and Congress can enforce with N&P legislation (“appropriate”)
				2. Court has held no discrimination on race/national origin, here we have disparate impact (*But see Feeney/Davis*), and Congress intuiting a facially neutral statute being operated with discrimination
				3. N&P reasoning lets Congress circumscribe a big circle around possible discrimination and still remain within 14.5 power (*But see Boerne*)
		4. ***City of Boerne v. Flores* (1997)**
			1. Local zoning decision to deny church a building permit challenged under RFRA
			2. Doctrinal development
				1. *Sherbert v. Verner* (1963) –7th Day Adventist can’t be denied state benefit for turning down employment if job required choice between work/religion
				2. *Wisconsin v. Yoder* (1972) – Amish don’t have to abide law requiring completion of high school – lack of animus doesn’t save
				3. Both general laws, but Π wins under strict scrutiny
				4. *Employment Division v. Smith* (1990) – Free Exercise Clause of 1st Am. doesn’t prohibit denying unemployment to Native Americans for smoking peyote 🡪 Congress passes Religious Freedom Restoration Act (1993)
			3. Holding: Congress power under 14.5 is remedial – can enforce 14.1
				1. There must be **congruence and proportionality** between the injury and the means adopted to remedy it – lacking that, the law may become substantive
				2. RFRA prevents/remedies laws enacted with object of targeting religious beliefs/practices – but is way out of proportion to the problem
				3. Preventative rules are ok, must be congruent and proportional to the problem – legislative record lacks evidence that modern generally applicable laws are passed with religious bigotry in mind
			4. Note level of generality problem again
		5. ***United States v. Morrison* (2000)**
			1. VAWA case – first failed under CC test
			2. Court considered under 14.5
				1. Rule – Congress can only enact legislation that is “congruent and proportional” to the § 1 violations it seeks to remedy
				2. VAWA is not congruent and proportional

COA is against private actors, and 14.1 has a state action restriction (*See The Civil Rights Cases*)

* + - 1. NOTE that this case is different than others in this area because this case was not about 11th Am. veil-piercing
		1. ***City of Cleburne v. Cleburne Living Center* (1985)**
			1. City required a special use permit for a home for the mentally handicapped then denied the permit
			2. Holding: No heightened scrutiny for mentally handicapped (slippery slope), but statute struck down under rational basis with bite
			3. Heightened scrutiny
				1. History of purposeful discrimination – No

Often real differences = different treatment

* + - * 1. Political powerlessness – No

Able to get the attention of lawmakers (John Hart Ely)

Note: *Frontiero* representation in decision making counsels is a plurality

* + - * 1. Immutable characteristic – Yes
				2. (Able to contribute to society)
			1. Slippery slope – If we give heightened scrutiny to the “large and amorphous class of the mentally retarded,” there would be no meaningful way to distinguish “other groups who have… immutable disabilities setting them off from others” – i.e. aging, disabled, mentally ill, infirm
			2. Rational basis – Act is sustained if classification is rationally related to a legitimate state interest
				1. Requiring a permit in this case relies on irrational prejudice against the mentally retarded because the rationalizations offered by the city do not distinguish homes for mentally retarded from apartments, boarding/lodging houses, fraternities, nursing homes, etc. which don’t require permits
			3. NOTE: No new heightened scrutiny groups since 1977 – Fear of a flood of people asking for heightened status
			4. NOTE: In RBR with bite, the court only deals with articulated rationales
		1. ***Alabama v. Garrett* (2001)**
			1. Employees bring suit under Americans with Disabilities Act against state employers for money damages – state asserts 11th Am. immunity
			2. Note: ADA is within Congress’s CC power, question is about 11th Am.
			3. Test – Absent state waiver, Congress can abrogate 11th Am. immunity with (1) clear intent to abrogate and (2) valid exercise of post 11th Am. power (*Seminole Tribe*)
			4. Under *Boerne*, need to see how many violations there are, and determine if the response is congruent and proportional
				1. Unconstitutional discrimination only extends to the state – not units of local government like cities/counties – they don’t have sovereign immunity

Counterexample to intra-textualism

* + - * 1. Separate Title I infractions (employment) from Title II (Services, programs or activities of a public entity) – only Title I infractions count
				2. Not all forms of disparate treatment are cognizable 🡪 *Cleburne* holds it may be rational to discriminate against individuals with disabilities
			1. Holding: ADA Title I is not a constitutional exercise of Congressional 14.5 power
				1. Suggestion that heightened scrutiny would lower the # of infractions needed
		1. ***Tennessee v. Lane* (2004)**
			1. Paraplegic in wheel chair sues after bring unable to gain access to TN courthouse to answer for criminal charges – state claims sovereign immunity
			2. This implicates Title II (not Title I – *Garrett*)
				1. Title II enforces basic rights, including access to the courts (6th Am. right to confront witnesses), that call for heightened scrutiny (more than sex-based)
				2. i.e. this is a DPC not EPC challenge

Under DPC you’ve got: Not a right, Recognized right, Fundamental right

* + 1. ***Nevada Department of Human Resources v. Hibbs* (2003)**
			1. Π sue NV under Family and Medical Leave Act of 1993 (FMLA)
			2. NV asserts sovereign immunity
			3. Findings (score card of infractions)
				1. Disparate treatment on the basis of sex by states – 15 provide maternity, only 4 provide paternity
				2. Disparate treatment on the basis of sex by state employers – Avoid hiring women because they are more likely to take leave
				3. Disparate treatment on the basis of sex by private employers – Men receive discriminatory treatment WRT requests for leave for child care

BUT *Morrison* holds discrimination by private actors not cognizable under 14.1

* + - * 1. Disparate impact on women of workplace policies designed for workers without caretaking provisions

BUT *Davis* holds disparate impact alone is not enough for 14.1 violation

* + - 1. Congruent and proportional – Sex draws intermediate scrutiny – FMLA is congruent and proportional because it simply mandates equal time off for men/women – makes men and women indistinguishable on this issue
		1. **Reconcile *Lane/Hibbs* and *Garrett***
			1. Heightened scrutiny – *Garrett* there is no heightened scrutiny but suggestions that heightened scrutiny might lower the number of violations needed; in *Lane* it is heightened because of fundamental DP rights, in *Hibbs* it is sex discrimination (and suggests that we may expand what we actually look at)
	1. **Sovereign Immunity**
		1. 11th Am. – “**The judicial power of the US** shall not be construed to extend **to any suit in law or equity**, commenced or prosecuted against one of the United States **by Citizens of another State**, or by Citizens or Subjects of any Foreign State.”
			1. “By citizens of another state” – *Hans v. LA* (1890) – 11th Am. prohibits suits against state by citizens of the state (otherwise discriminates against out-of-staters) 🡪 “another” encompasses “same”
			2. “To any suit in law or equity” – *Ex parte Young* (1908) – Citizens can sue for injunctive relief, but *Edelman v. Jordan* (1974) – Citizens can’t sue states for damages paid from the treasury
			3. “The judicial power of the US” – *Alden v. Maine* (1999) – Citizen barred from bringing suit in federal damages action can’t bring state action 🡪 “of the US” means “in the US”
		2. ***Seminole Tribe v. Florida* (1996)** – Congress can’t abrogate sovereign immunity through Art. 1 powers (i.e. can’t use CC powers)
			1. Must be either **(a) a waiver of immunity** by the state (never happens) **OR** **(b) a clear intent** by Congress to abrogate **AND** an action pursuant to proper (**post-11thAm.)** power
				1. 14.1/14.5 (EPC/DPC); 13.1/13.2 (Slavery/Badges and Incidents); 15.1/15.2 (Right to vote on basis of race) 🡪 NOTE question whether you get pre-*Boerne* N&PC-type leash or post-*Boerne* congruence and proportionality leash
			2. E.g. – Congress can say “using 14.5 to pierce AND intend to pierce then have a colorable claim” – but Congress can’t say “using my CC power to pierce AND I intend to pierce”
			3. Example: ADA has clear intent to abrogate, but Court holds it is not 14.5
			4. *See Garrett*, *Hibbs*, *Lane*
1. **PRIVILEGES OR IMMUNITIES**

PorIC includes a narrow set of substantive rights running against the feds (*Slaughterhouse* – though this case poorly defines the rights)

P&IC just gives equal entitlements to citizens of the several states loosely defined in *Corfield*

* 1. *Saenz v. Roe* (1999)
		1. Strikes down CA duration residency requirement limiting welfare benefits to those that live in CA for at least 1y
		2. Violates “right to travel” embedded in PorI of 14.1
			1. Note PorI only protects “citizens” not “persons”
			2. Argument Thomas is trying to cabin who this applies to, but argument that PorI is the appropriate home for individual rights and privileges
	2. NOTE (*Corfield* – P&IC)
		1. Right to pass through or travel in state
		2. Right to “reside in state for business or other purposes”
		3. Right to do business there whether it involves “trade, agriculture, professional pursuits, or otherwise”
		4. Right to “take, hold, and dispose of property, either real or personal”
	3. NOTE: An interpretation of this case is that the *Slaighterhouse* case was clear about what PorI was not, but spongy about what PorI *is*. In this way, as the court cuts down SDP rights, PorI becomes a more interesting.
1. **USE OF INTERNATIONAL LAW**
	1. Cardozo Concurring (*Blaisdell*)
	2. Kennedy Majority (*Lawrence*) – Euro decisions to support expanded rights of individuals WRT intimate sexual contact/autonomy
	3. Rehnquist Majority (*Glucksberg*) – Netherlands study as cautionary tale
	4. Marshall (*Goodridge*) – Compared Canadian decision to refine Common Law definition of marriage which reached the same result
	5. Marshall (*Marbury*) – Compared US “written” Constitution to British Common Law system to support the notion that the written Constitution is supreme

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