

NYU School of Law Outline:
Constitutional Law, Barry Friedman

Will Frank (Class of 2011)

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1 What Is a Constitution, And How Do We Interpret It?

- “What is a constitution?”
- It’s hard for a document to be both the ultimate legal authority, and aspirational. Either it’s the law or it isn’t. (“Aspirational” usually means “not enforceable right now.”)
- How do we interpret a constitution?
 - The text of the document.
 - * What people *then* would have thought it meant.
 - * What people *now* think it means.

- The consensus of meaning.
 - Original meaning (principles and application, if not literal meaning).
 - Past decisions (court decisions or past practices as a country or people).
 - Translation/changed circumstances.
 - Consequentialist/pragmatic/prudential (“not a suicide pact”).
 - Natural law?
 - National mythology
 - Morality?
- All of this is valuable. Do we want to be locked in to prior ideas?

1.1 *Brown v. Board of Education*

- Segregated school districts; can “separate but equal” be equal under “equal protection of the laws” in the Fourteenth Amendment?
- Court’s holding: “Separate is not equal”: segregated schools are not OK.
- Plaintiffs’ argument: Textual. “The text of the Amendment says equal, and separate is not equal.”
- Defendants’ arguments:
 - Look at what the text *means*: there’s no mention of education.
 - Some stuff wasn’t included in the Fourteenth: social rights, civil rights... political rights (voting) were separately guaranteed in the Fifteenth.
 - The intent was for segregated schools: Congress couldn’t pass a school-desegregation bill, there were still segregated schools after the Amendment, the DC schools even were segregated!
- *Plessy v. Ferguson*: Segregated train cars were challenged under the Thirteenth and Fourteenth Amendments. Court: “The object of the Fourteenth Amendment was to establish equality of the two races under the law, but not to destroy obvious color-based distinction or social equality.”
- The graduate cases (*Sweatt, Gaines*) start to cut down the idea of segregation surviving, but in those cases, the facts showed a clear failure to be equal; it wasn’t a matter of fundamental inability to be equal.
- So, if (as the Southern Manifesto claimed) equality was feasible, then separate could be equal.
- *Sweatt* turned on the intangible factors; reputation, &c. Even if there’s equitable per capita or gross spending, the intangibles block equality at the graduate level.

- But that doesn't really apply to elementary schools.
- *McLaurin*: Even if the black student is in the same classroom in a taped-off area, he's being deprived of the full opportunity of education. Still, that was tied into the idea of the nature of the education (and does not overturn *Plessy*).
- The plaintiffs move to public policy: the Commies are using segregation in their anti-American propaganda, and separate but equal has a stigma attached.
- The propaganda point fails (Constitutions put us in a box and define the rules inside and outside, but the consequentialist "the box is bad" arguments are difficult), but the stigma argument wins the day.
- "Separate but equal fails to be equal because the segregation affects the hearts and minds of schoolchildren, making the black children believe they are inferior—therefore, *Plessy* is overruled as it applies."

1.2 Constitutional Interpretation and History

- Con Law is the lawyerly equivalent of Civics.
- The "modalities of constitutional argument":
 - Text: What do the words say?
 - Intent: What did the people who wrote/ratified the text *mean*?
 - * Specific intent: What did they think would happen in specific cases?
 - * General intent: What *concepts* was the text set up to achieve in general?
 - * Intent versus understanding: What did the people who *wrote* think, versus those who *ratified*?
 - Practice: What have we, as a polity, done?
 - * Prior practice: What practices were common before the adoption? This goes to intent; policies before adoption probably tie into the reasons for adoption (probably to overturn them).
 - * Post practice: What practices were common after adoption? It's dramatic to undo longstanding policies because we later decide they're unconstitutional.
 - Precedent: What has the judicial practice been since ratification? *Stare decisis* doesn't work the same way in constitutional context.
 - Prudential/consequential: What will happen if we interpret in a given way?
 - Ethical/moral: What does the majority of people in the country think the text means?

- This is a rough hierarchy of constitutional argument. The last three bounce around in ordering.
- There is not a real consensus of the ordering; there’s an “originalist”/“living Constitutionalist” holy war in the country.
- Generally, judges follow that ordering in constitutional rulings. Not always, but a lawyer rarely starts with what the Gallup polls say.
- Back to *Brown* for a few seconds: Is it right? Would it have been right ten years prior? What about the day after it passed?
- The effect of changed circumstances is among the hardest Con Law questions.
- Constitutional humility (recognizing a conflict of sources, and admitting that your interpretation can lead to decisions you disagree with) is good.
- The black-letter law of *Brown* is that separate-but-equal is not allowed under equal protection.
- The methodology/policy/theory aspect is the stigma, due to changing circumstances.
- In the 1980s, “originalism” became something of a fetish to undermine the Warren Court (who used original intention too, of course).
- Originalism looked to what the people who *ratified* the Constitution thought, but sooner or later collapsed into textualism.

2 Federalism

2.1 Ratification

2.2 Federation or Nation?

2.3 *McCulloch* and the Scope of National Power

- *Maryland v. McCulloch*: The question was whether the US had the power to charter a national bank. Arguers were Maryland (MD) and the United States Government (US). Arguments, textual first:
- *MD*: Congress does not have the power to charter a bank, because it is not one of the enumerated powers in Article I §8 of the Constitution.
- *US*: The Bank is intended to make it more convenient to tax (sort of a proto-IRS), so it’s an extension of the power to tax.
- *MD*: Banking is not taxing.
- *US*: Then the Bank promotes the general welfare.

- *MD*: Under that logic Congress could do anything, in violation of the Tenth Amendment principle that any powers not *specifically* delegated to the Federal Government is reserved for the States.
- *US*: But promoting the general welfare *is* specifically delegated.
- *MD*: First, you know better (this is an intent argument; the intent was clearly *not* to give such wide-ranging power to Congress), and second, “general welfare” is a clause of laying and collecting taxes, duties, imposts, and excises.
- *US*: OK, then Congress is making all laws necessary and proper to execute its powers, and a bank is.
- *MD*: A bank is not “necessary,” because it’s not indispensable. It might be useful, but that’s different.
- *US*: “Necessary” doesn’t have to mean “indispensable,” it can mean “useful” or “convenient.” What would be the need for “proper” if “necessary” meant “indispensable”?
- *MD*: There can be actions which are considered necessary, but violative of the Constitution. “Proper” covers those (that is, excludes them).
- *US*: First, the Constitution (unlike the Articles of Confederation) allows implied powers, and the Bank charter is one of those; second, Article I §10 says “absolutely necessary,” so the Framers knew the difference and could have said that in §8. They didn’t.
- *MD*: The “necessary and proper” clause is intended to limit Federal power.
- *US*: No, it’s meant to expand it. It’s at the end of the powers of Congress, not its restrictions.
- *MD*: Actually, that’s a power: the law-making power.
- *US*: Nice try. The power to make laws is spelled out elsewhere.
- And now, the intent arguments:
- *MD*: The Framers voted 8-3 against a canal-making corporation, and a clause allowing the Federal government to charter corporations was specifically left out of the Constitution. It didn’t even get to a vote (because they’d lose and there would be a record).
- *US*: The Confederacy had a Bank.
- *MD*: And that power was not carried over.
- *US*: The first post-Constitution Congress had a Bank.
- *MD* Just because they did it doesn’t make it Constitutional.

- Once all the arguing is done, when the dust clears, we also have to look at Madison. He was a bit vindictive, and also principled—he wanted corporation chartering in the Constitution, but short of that, he wouldn't vote for a bank.
- He was also a federalist: he wanted only powers specifically enumerated.
- A lot of people who were upset about the Court upholding the bank in *McCulloch* thought the Bank was OK and even constitutional. They were worried about Marshall's decision. Why?
- “Let the end be legitimate, let it be in the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the Constitution, are constitutional.” Slippery slope right there.
- Some hypotheticals: Can Congress ban drugs? Well, is there a legitimate end? Not really.
- The State can, though—it has the police power.
- Can Congress ban drugs to promote a healthy citizenry for the Army? Well, there's no “plainly adapted for that end” argument that would pass muster.
- Maryland doesn't even need pretexts, short of getting around equal protection (later).
- Congress can't ban bad-mouthing the Army under the power to raise it, because that would be prohibited (not consist with the letter and spirit).
- Thanks to the Fourteenth, Maryland can't do that either, as much of the Bill of Rights applies against the States. But not all.
- Some things we think ought to be left to the States:
 - Local transportation networks
 - Education
 - Speeding
 - Building codes
 - Zoning
 - Licensing professionals
 - Elections
 - Crimes
- Some reasons why we leave things to the States:
 - It's easier to make local change if you don't like something.

- Local conditions can vary. (Underlies the rest.)
 - It maximizes welfare (vote with your feet; if you don't like the laws move to another state).
 - It's fiscally efficient.
 - It gets better accountability.
 - Experimentation: states as testing grounds
 - Better protects liberty
- “Who made the Constitution and why do we care?” The Alien & Sedition Acts were opposed by the KY and VA resolutions claiming that they had the right to veto laws passed by Congress in their states. (Read mildly, it becomes “should urge Congress to overturn”; broadly, it's the “interposition/nullification” arguments of 1954.)
 - Webster-Hayne: Hayne argued that the States were in a compact, and could strike down laws they disagreed with. (This reduces the Constitution back to the Articles of Confederation.)
 - Hayne argued that the people, not the States, were sovereign; they would have to change things. In the meantime, the Supreme Court had the authority to decide Constitutional questions. (This raised concerns about the Federal government regulating itself; the fear was that the Court would not stand up to Congress and the President.)
 - The rock bottom of the debate about the Acts as well as the Bank was “We don't like your laws and we're going to say no.” The States require strict accounting of Federal power.
 - So what happens when the States want one thing and the Feds want another?
 - Elections, or else revolution.
 - The second part of *McCulloch* was taxation: Maryland claimed that the Bank was in Maryland, and therefore they could tax it.
 - Marshall pointed out that Maryland would, in effect, be taxing other states. However, it could tax the real property (universally, of course—leading to Maryland complainants).
 - *Congress may do anything calculated to achieve a reasonable and valid end, so long as it's not prohibited by the Constitution, and Congress is not acting pretextually.*
 - What do we want the Federal government to do?
 - Interstate highways
 - Free trade

- Army
 - Foreign affairs
 - Disputes between states
 - Arbitrate constitutionality
 - Currency
 - Environmental regulation
 - The space program (but just because the Feds are permitted doesn't mean the States are barred)
- Each of the reasons for the State to have a power has a counterpoint in why the Feds should have power in certain spheres.

2.4 Interstate Commerce

2.4.1 *Gibbons v. Ogden*

- New York State granted an exclusive right to operate steamboats in New York to Fulton; it was assigned to Ogden. Gibbons ran steamboats from NJ to NY, despite the license, and claimed that he was licensed under an act of Congress.
- Three counterarguments:
 - “This is about the state regulating its own commerce” meets the point that it affects multiple states, and the federal law wins under the Supremacy Clause.
 - “The law doesn't say that” is an Admin Law question.
 - “The Congressional law is unconstitutional; Congress doesn't have that authority” is the Con Law question.
- Marshall examines three questions about the Congressional law:
 - Is it within the commerce power?
 - Is the power concurrent with a state's power?
 - Do (or “where do”) the statutes actually collide?
- He does open with “who formed the Constitution” and beats that dead horse for a while before moving on.
- Ogden tries to argue that navigation is not commerce, but Marshall says that yes, it is.
- Marshall says that Congress's power to regulate commerce is plenary, limited only by the Constitution. This means the limits tend to be:
 - Congress may not regulate purely internal commerce.

- Congress may not act pretextually.
- Congress, if it doesn't want to be voted out of office, shouldn't anger the people too much. (Political process theory.)
- So, Ogden then argues that the powers are concurrent, and the State can still regulate.
- Marshall outlines two scenarios:
 1. Congress has passed no statute addressing the matter. The State argues that in this case it, too, can regulate commerce.
 - Marshall ducks the question, because this situation does not apply.
 - Johnson says “no, the power to regulate commerce was exclusively Congress's.”
 - The State argues that if it can tax alongside the Federal government, it should be able to regulate commerce too. Marshall calls that comparison flawed, because the taxation power is non-exclusive and divisible.
 - The State claims that Article I §10 suggests that states can lay taxes on import and export, which is commerce, but Marshall says that's taxation.
 - The State claims that it can prohibit hoof-and-mouth disease by blocking diseased cattle, but Marshall calls that police power for health and safety.
 2. There is a Congressional statute. In this case, as long as Congress is acting within its Constitutional authority, any state laws that conflict with the Congressional statute are overturned.

2.4.2 The Division of Power

- *E. C. Knight*: “Manufacturing” versus commerce.
 - American sugar company wanted to buy four more refining companies, which would give it 98% of the market. The US sued claiming that the Sherman Anti-Trust Act prohibited the monopoly.
 - The company claimed two things: First, this doesn't violate the Sherman Act; second, the Act itself is unconstitutional, either on its face or as applied here!
 - The Government says that the Sherman Act is constitutional, because it regulates commerce.
 - The Court agrees...but rules that manufacturing is *not* commerce.
- *Champion v. Ames*: Champion sues Ames for transporting lottery tickets across state lines.

- Ames claims it’s unconstitutional to prohibit the lottery tickets.
- Champion claims that this is commerce, under *Gibbons* reasoning.
- Ames claims there is no value in the tickets.
- Champion points out the facial value; it may be negligible, but transporting things of value is commerce.
- Ames tries to claim it’s pretextual to a police power: “You don’t like lotteries, so you use the fact that they go across state lines to attack them.”
- The Court doesn’t care: it’s still commerce.
- As a saving throw, Ames claims that there is a difference between “regulate” and “prohibit,” but the Court dismisses that right quick.
- *Hammer v. Dagenhart*: An attempt to enjoin an anti-child-labor law passed via commerce.
 - Defendant (for US) claims that all that’s being done is, as in *Champion*, the regulation of transporting goods—in this case, goods made with child labor—across state lines.
 - Court responds that in *Champion*, the goods were “evil (intrinsically harmful,” but non-evil goods are not subject to regulation through a pretextual commerce clause claim.
 - Holmes in dissent argues that this is what we now call a prisoner’s dilemma: a state that wanted to ban child labor would be giving its own manufacturers a disadvantage to another state. And besides, transport across state lines is commerce period. But that’s in dissent.

2.4.3 Post-1937; The New Deal Fight

- *Schechter Poultry*: Schechter was a kosher chicken seller who argued and won that the chickens weren’t going out of state anymore when he got them, so his prices were immune to Federal regulation, in a sort of equal-but-opposite *E.C. Knight*.
- *Carter Coal*: The Court rules that Acts requiring recognition of unions are interferences with the manufacturing process, not commerce. (They probably would have lost under *Hammer* if they’d tried another way.)
- *NLRB v. Jones & Laughlin*: The National Labor Relations Act of 1935 prohibits employers from engaging in any unfair labor practice affecting commerce. The Court holds this one up.
 - The “multistate company” argument fails because the Court upheld the Act regarding *Friedman-Harry Marks Clothing Co.*
 - The Court rules that as long as the effect on interstate commerce is “close and substantial” Congress can regulate it under the guise of commerce; here, unfair labor practices will lead to strikes.

- So the test has changed: “Congress can regulate anything that has a substantial effect on interstate commerce.”
- *Darby*: The Fair Labor Standards Act sets minimum wage and maximum hour laws on goods related to interstate commerce and prohibits the interstate commerce of goods produced in violation of same.
 - Under *Hammer* Congress doesn’t have the power to regulate business practices that promote unfair competition, unless the goods in question are intrinsically bad.
 - So the Court throws out *Hammer*, and says that the doctrine in *Carter Coal* is “limited” and is no longer binding law—though they don’t expressly throw it out.
- *Wickard v. Filburn*: A farmer grows wheat in excess of his allotment, for private use, in violation of the Agricultural Adjustment Act (passed to control prices).
 1. It’s purely internal (satisfies *Gibbons*).
 2. It’s production, not commerce (satisfies *E.C. Knight*).
 3. It has no substantial effect on commerce (satisfies *Jones & Laughlin*).
 4. It’s not crossing state lines (satisfies *Champion*, though this is repeating oneself with 1).
 5. It has indirect effects on commerce, at best (satisfies *Carter Coal*).
 - And yet, the Court sides with the government.
 - The Court rules that if the activity has an effect on commerce in the *aggregate*, Congress can regulate it. Congress needs to regulate wheat commerce interstate, so they can regulate the farmer.
- *Heart of Atlanta*: A motel was segregated, in violation of the Civil Rights Act of 1964, which the motel claimed was unconstitutional.
 - Black travelers would have to seek out other places to stay, which could lead to less travel to the places that were segregated.
 - There was also *Swift*, the “if it’s in the stream of commerce, Congress can regulate it” case.
 - In opposition was a “pretextual” claim.
 - Congress won.
- By now pretext is dead as an argument. There’s no reason to argue about whether Congress has acted pretextually. (Not that the argument was ever very strong: see *Champion*.)
- *Katzenbach v. McClung*: The same reasoning as *Heart of Atlanta* applies to restaurants.

- The opposition basically said “you have to be kidding.”
- The Court developed the “rational basis plus deference” test: “Where we find that the legislators... have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”
- *Daniel v. Paul*: Same logic as *Katzenbach*, on deference grounds.

2.4.4 The Search for Limits

- *Lopez*: Possession of a firearm in a place known to be a school zone is prohibited. Constitutional?
 - *Katzenbach* “rational basis” test should be satisfied by the empirical link in evidence between education and commerce.
 - But the rule in *Lopez* is that the “substantially affects” test must refer to an *economic* effect. (Which it’s arguable *Lopez* was, of course, but the Court says no dice.)
 - It’s a normative turn, going away from doctrine. Breyer thinks keeping guns out of schools has an effect on interstate economy, but Kennedy argues that it would undercut the states-as-labs argument.
- So, right now, the powers of the federal government can affect lottery tickets and child labor laws, but not guns? What about race?
- Why should the *national* government do things, as opposed to the states?
 - Coordination (railway track gauges, national highways...).
 - Avoid a race to the bottom (breaks the prisoner’s dilemma explored in *Hammer*; also, environmental concerns).
 - Externalities: create positive and control free riders, avoid negative.
 - Public good: If standardized, more efficient. (The army or a national park, maybe.)
 - The tyranny of the majority/faction problem.
- In each of the five major reasons for the states to act there is a counterpoint.
 - Participation at the state level *vs* standardization of public goods.
 - Accountability *vs* control of externalities.
 - Experimentation *vs* coordination.
 - Welfare maximization *vs* avoiding a race to the bottom.
 - Liberty maximization *vs* avoiding the tyranny of the majority.
- So, in synthesis: Before *Jones & Laughlin*, what is the law governing Congress’s commerce authority?

- Production versus commerce: Congress can only regulate the latter, but could not regulate the former (*E.C. Knight, Schechter*).
 - Inherent harm: “Inherently harmful” goods can be *barred*; goods that weren’t inherently harmful couldn’t (*Champion, Hammer*).
 - Direct versus indirect: Congress can only regulate the former (*Carter Coal, Swift*).
 - Pretext: Congress can’t use the commerce power as a pretext to do something else (*McCulloch*).
- What about before *Lopez*?
 - Congress can regulate anything that has a “substantial effect” on interstate commerce (*J&L*).
 - The substantial effect may be in terms of the regulated property in the aggregate (*Wickard*).
 - If Congress seems to have a rational basis, the Court will defer to it (*Katzenbach*).
 - Pretext doesn’t matter (*Heart of Atlanta*).
 - What changed between those two? The Court changed its mind. Why? Debated. Roosevelt threatened the Court with humiliation (or, the Court made a sacrifice to protect the rule of law), the Court looked at what the 1936 election results meant, and so on.
 - Some argue instead that it was simply a matter of doctrinal refinement.
 - And now, what’s the law governing Congress’s commerce authority *after Lopez*?
 - Lopez “synthesizes” the law.
 - The Court may regulate three areas:
 1. The channels of commerce (*Darby, Heart of Atlanta*).
 2. The *instrumentalities* of commerce (such as a train).
 3. Anything with a substantial relationship to, or effect on, interstate commerce. . . specifically, *on economic activity*, which *Lopez*’s law is not.

2.5 Other Limits

- *National League of Cities* had said it was unconstitutional for the federal government to regulate states *qua* states, if they will disrupt essential state functions in areas of traditional state responsibility.
- The potential issue had been firefighters, police. . . applying federal minimum wage and maximum hour standards would be potentially devastating to the state budgets for those services.

- *Garcia*: Overturned *National League*.
 - The Government had planned to argue that the San Antonio mass transit system (which was required to follow the FLSA, they claimed) was not an area of traditional state function.
 - But the Court decided that the *National League* test needed reexamination; it was impossible to define “traditional governmental functions,” the three-prong test came out of nowhere, and most of all, it’s the political process, not the Court, that protects the authority of the states.
 - The Rule: The Courts won’t protect federalism. The political process will.
- Of course, in *Lopez*, the Court protected federalism. Overturning *Garcia*?
- *US v. Morrison*: the Violence Against Women Act created a civil remedy in federal court for violence against women.
 - Constitutional? *Garcia* suggests that the Court shouldn’t interfere in federalism concerns.
 - And *Heart of Atlanta/Brown*, since the VAWA was patterned after the Civil Rights Act.
 - On the other hand, the “not economic” argument from *Lopez* looms large. And *Jones & Laughlin* still requires a “substantial effect.”
 - The Court rules that the aggregate effect in a *Wickard* test must be about economic effects—it sort of applies *Lopez* to *Wickard*.
- *Raich v. Gonzalez*: California laws allow medical marijuana, federal drug laws don’t.
 - State claims police power, purely internal (*Gibbons*), non-economic (*Lopez*).
 - Government claims that Raich’s drugs will get partially diverted to the interstate drug market (*Wickard*).
 - In *Wickard* versus *Lopez*, *Wickard* tends to win. The diversion argument, and the “spillover” rule, tend to be the key.
 - To get around that problem, we need to overturn a case saying that the government could regulate drugs in the first place, namely, *Champion*.
- The *Garcia* rule: “Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate. . .”
- So, really, *Lopez* must have in effect overturned *Garcia*.

- *New York v. US*: The National Government cannot force state legislatures to enact national laws.
- *Printz v. US*: The Handgun Violence Prevention Act set up a background check system, and in the meantime, required the local officials to do background checks.
 - The issue is, does Congress have the power to require state and local executive officials to enforce Congressional laws?
 - The Court says no: Congress cannot require the executive officials to enforce federal law. (That doesn't mean they can violate them, but they can't be forced to collect taxes or the like.)
 - There can be incentivization (“we'll give you money”), or “we'll adopt this unless you do,” but no coercion.

2.6 Other Powers

- *Gregory v. Ashcroft*: Missouri had a mandatory retirement age for its justices), but Federal laws prohibited age discriminatory hiring processes. Congress, says the Court, can't change the fundamental nature of the constitutional balance between Federal and States unless it makes its intention fundamentally clear in statute.
- *South Dakota v. Dole*: Congress enacted a condition on its highway funds: states must set their drinking ages to 21.
 - The Court said that general, unconditional spending must be for the general welfare, and not otherwise forbidden under the Constitution.
 - But *conditional* spending must be related to the general welfare, unambiguous, related to the federal interest of the program, constitutional, and encouraging—not coercion.
 - Which of these is easy or hard?
 1. General welfare: Easy. Courts defer to Congress.
 2. Unambiguous: Easy. They say what to do.
 3. Relate to the federal interest? Hard. In this case, the Court points to the “blood borders” issue.
 4. Is it prohibited? Maybe easy, maybe hard. The test is whether something violates a Constitutional provision.
 - * In this case, we have the Twenty-First Amendment.
 - * That says that the states can regulate alcohol.
 - * But the Court rules that it's unconstitutional for Congress to incentivize the States to do something the *States* can't do. The States can regulate alcohol, so Congress can incentivize them.

- 5. Is it coercive? Hard. Coercion violates *New York v. US*; *Bailey v. Drexel Furniture* suggests that if Congress can tax the States to do things it can't do, its power would be unlimited. But it's hard to know what amount crosses the incentive/coercion line.
 - The majority and dissent only disagree on the definition of “related.” The dissent doesn't buy blood borders.
- *Missouri v. Holland*: Same thing, but it's the treaty power. Congress rules that overrides the others, and the federalism safeguard is that Senators have to approve treaties.
- Congress can't commandeer legislative or executive functions.
- Taxing and spending are not limited by the enumerated powers; where the spending has conditions there is a five-part test.

2.7 The Dormant Commerce Power

- *Philadelphia v. New Jersey*: A New Jersey statute prohibits importing solid waste from other states; does the Resource Conservation and Recovery Act preempt, and is the state law therefore unconstitutional?
 - If there was a Federal law on the matter, there might be a conflict and a Supremacy Clause case. But there isn't. Is there a *National League* or *Printz* or *New York v. US* analogy?
 - This is much more like *Gibbons*. This is the Johnson concurrence case: no Federal law, but a Federal area.
 - The NJ representatives would claim it was the police power, not the commerce power. Health, safety, welfare, maybe morals. Regulating waste is the same as quarantine. Besides, Congress hasn't acted.
 - The Court, however, argues that a line of cases (including *Raymond Motor Transportation, Inc. v. Rice*) says the Commerce Clause can operate without specific Federal law.
 - There is a three-part test in areas where the State has acted and Congress hasn't (the “dormant Commerce Clause”):
 1. There must be no discrimination (economic protectionism), except where there is a legitimate non-discriminatory purpose and no other way to do it but through discrimination;
 2. The effect on interstate commerce must be incidental;
 3. The burden imposed on interstate commerce must not be “excessive in relation to the putative local benefits,” including whether there are less commerce-impactful alternatives. (Balancing test.)
 - We want to prevent a state from protecting its internal commercial interests at the expense of those out of state. Avoid a race to the bottom, and the people being hurt often have no voice in New Jersey's political process.

- States can regulate under their police powers even if it affects commerce, unless Congress has acted on the matter. But if they act, their action must not be protectionism, and the burden on commerce must be incidental.
- Here, the New Jersey law was protectionist, in effect if not in purpose.
- Either way, effect or purpose, it’s discriminatory.
- There is a two-step test these days:
 1. Does the law discriminate? Facially, in intent, or in effect? If so, it’s out—unless there is a legitimate purpose and there’s no other way to do it. (This is hard for the State to win.)
 2. If it doesn’t discriminate, if it burdens commerce, the burden on commerce is balanced against the benefit to the state. (Easier for the state, except in standardization-of-channels-of-commerce cases like railroad gauges.)

3 Separation of Powers

3.1 Executive and Legislative Powers

- *Chadha*: recall facts from Admin.
 - Chief Justice Burger: When Congress acts in a legislative manner, the Constitution requires bicameralism and presentment.
 - This is legislative ,as it “affects the rights, duties, and obligations of people outside the legislative branch.”
 - Dissent: Congress is giving its power away; it deserves a check.
 - Burger’s opinion is formalist (the Constitution requires); dissent’s is functionalist (this is how it works in the real world).
- Formalism is often used to strike down laws, and functionalism to keep them up.
- Why do bicameralism and presentment exist?
- Checks and balances (each branch exerts influence on the other branches) and separation of powers (each branch has its own isolated responsibilities).
- Checks/balances and separation of power avoids aggrandizement of too much power in one person; we want all constituencies represented; and faction is offset by deliberation, producing better laws.
- The powers of the three branches:

- Legislature: Enact laws. Creates the general rule. In some cases, they can pass specific bills, but only to give people things; taking them away seems a lot like Bills of Attainder, banned by the Constitution.
 - Executive: Enforce laws. Apply the general rule to specific cases.
 - Judiciary: Review laws. Determine whether the general rule was correctly applied, and whether the rule is consistent with constitutional norms.
- Administrative agencies don't violate; legislature creates, executive controls, and judiciary reviews.

3.2 Emergency Power

- *Habeas corpus* is actually fairly limited; it only demands that a person be produced, and that the authority holding him show that he was jailed due to lawful authority.
- *Youngstown*: Truman wants to seize the steel mills.
 - Justice Jackson describes the three-part test:
 1. Where Congress expressly or implicitly authorizes the President to act, his power is subject only to Constitutional limitations.
 2. Where Congress is silent, the President's power is not plenary; Congress may still act and the President will have to abide by that action. (Past practice/inertia will likely be determinative of how much power the President has.)
 3. Where Congress expressly or implicitly *denies* power to the President, his power is limited only to his inherent Constitutional powers: being Commander-in-Chief and "faithfully executing the laws."
 - Being Commander-in-Chief wouldn't give Truman the power to seize the mills; he's CINC of the *military*, not the country, and the reach of war does not extend into private property.
 - So, if this is category 3, there's no power to do what he did.
 - Interestingly, a majority (7-2) of the justices agree that if this was category 2 the President would have the authority; also interestingly, a majority (5-4) thinks it's a category 2 case. But yet Truman loses.
 - Some of the justices who think it's category 2 also think the President loses in category 2. And the Justices vote on the judgment, not the issues.
 - Note that in the actions leading to *Youngstown*, Truman had invited Congress to pass a law saying he couldn't do what he'd done and he swore to follow it.

- The problem is, the President has inertia on his side—Congress is slow to act. Plus, the President can veto the law. It’s a bit much to demand a supermajority.
- Hypothetically, though, the Court could have seen a vetoed law as Congressional intent for a category 2 analysis.

3.3 Detention

- *Hamdi v. Rumsfeld*: US citizen who moved to Saudi Arabia and was captured by the Northern Alliance and turned over to the US, who put him in Gitmo and then a military brig on mainland US.
 - Hamdi’s father filed a writ of *habeas corpus*. The Government claimed that they needed to detain him because he was an enemy combatant. (They did not claim that the writ didn’t apply; they would do that later, in *Boumediene*.)
 - So. Can the Executive detain “enemy combatants,” for how long, and what process if any is due them?
 - *Detention*:
 - * Plurality (O’Connor, Rehnquist, Kennedy, Breyer): The AUMF is a statutory provision allowing detention. (This is probably as an implicit effect of the ability to carry out military operations.)
 - * Concurrence-in-part (Souter, Ginsburg): The AUMF does not override the Non-Detention Act.
 - * Dissent 1 (Scalia, Stevens): The only way for the Executive to detain individuals without charge is to suspend the writ of *habeas corpus*; which it has not done. Short of that, no detention.
 - * Dissent 2 (Thomas): The executive is acting “pursuant to the powers vested in the President. . . and with explicit congressional approval.”
 - Side note: *Milligan*: The Executive may not hold US citizens on US soil, where civilian law operates, without the grant of the provisions of the Constitution, unless the writ has been suspended. (Though Congress did *ex post* authorize Lincoln’s suspension of the writ.)
 - *How long?* Plurality: Until the end of hostilities (which could be the end of the War on Terror).
 - *What process is due?*
 - * Plurality: The accused has a right to contest his characterization as an enemy combatant. *Matthews v. Eldridge* provides the three-part balancing test, and in this case, he deserves:
 1. Notice
 2. An opportunity to be heard and rebut evidence—though the evidentiary standard is lower, as the Government may have a rebuttable presumption and may rely on hearsay

3. Access to counsel

- * Concurrence-in-part: Why do we care? There's no legal detention. But let's use the Geneva Conventions—that's what they're there for!
 - * Dissent 1: Absent suspension of the writ, the accused gets a full criminal trial on the charge of treason. item Dissent 2: No more process is needed.
- And the decision is vacate and remand for “more process consistent with the plurality.”
- *Rasul*: *Habeas* applies to Gitmo. An earlier case suggests a foreign national captured outside the US doesn't get it, but in *Rasul* the Court said things were different—there was a claim these weren't enemies, and besides, Gitmo had *de facto* sovereignty.
 - The *Hamdi* Rule: The President has the authority to detain US citizens when authorized by an act of Congress (here the AUMF), but some process is due to those detained. The process, though, does not rise to the level of a jury, indictment, or normal criminal procedure.
 - Factoring in *Milligan* and *Quirin*, enemy combatant status becomes a jurisdictional matter. If you admit to being an enemy, you are subject to military jurisdiction under *Quirin*. If not, you're civilian, under *Milligan/Hamdi*.
 - The fundamental tension is a classic: liberty versus security. And the Court thinks that if liberty is to be restrained, Congress needs to do it.
 - So it all goes back to *Youngstown*. And what category is *Hamdi*? Unknown.
 - The Court tends to demand that Congress act, by collapsing category 2 into 3. No twilight zone; a default rule forces Congress to deliberate.
 - That's what happened. Only not.
 - After *Hamdi*, the Executive set up the CSRTs and Congress passed a statute stripping the Courts of *habeas* jurisdiction.
 - *Hamdan*: The Court held that the commissions violated Congressional statutes (after jumping through some hoops about the jurisdiction stripping) and sent them back.
 - Congress passed another statute, and the Executive tried again.
 - And then we get to *Boumediene*, wherein the Court admitted that faction had infected the process to the point that Congress would just follow the President's lead, and there wasn't enough division of power to make the *Youngstown* default rule system work here. So they threw it out, declared

Habeas to follow authority instead of national boundaries, and said enough was enough.

- Arguably, *Boumediene* overturns *Hamdi*. It's hard to reconcile them.

4 The Fourteenth Amendment

4.1 Background: Slavery

- *Dred Scott* had ruled that “those of African descent” can't be citizens of the US, period.
- After the Civil War three new Constitutional amendments passed. The Thirteenth banned slavery, the Fifteenth protected voting rights, and the Fourteenth:
 - “No State shall:
 - abridge the privileges or immunities of citizens of the United States
 - deprive any person of life, liberty, or property, without due process of law
 - deny to any person within its jurisdiction the equal protection of the law”
- The Fourth Amendment took some big hits right after it was enacted.

4.2 Limits on Scope

- *The Slaughter-House Cases*: A Louisiana law created a corporation with a monopoly for the slaughter of livestock in New Orleans.
 - A group of (white) butchers sued. but their various grounds got gradually struck down.
 - Thirteenth Amendment “this forces us into slavery for the corporation” argument: weak and they knew it.
 - Fourteenth Amendment had three arguments, all shot down.
 1. Life, liberty, property: This had due process; the law was deliberated, passed, and signed. Also, work does not rise to the level of a property interest.
 2. Equal protection: No, that's for protecting black people, as “everybody knows.”
 3. Privileges and immunities: No, this law deprives a *state* privilege, and the Amendment protects *federal* privileges. (This was an evisceration of the Clause.)
 - The Court didn't want to become the censors of state laws, even after the Civil War arguably decided the states' rights issue.

- Nowadays we have a “substantive due process” claim that could have made a difference; back then, no such.
- Why did the Court rip into the Amendment like that?
- Couple of reasons:
 - It was expensive to continue Reconstruction.
 - The 1873 economic crash.
 - A renewed Federalism.
- In 1876, there was a complicated election, ending in Hayes winning the Presidency for a deal that ended Reconstruction.

4.3 State Action

- *The Civil Rights Cases*: Was the 1875 Civil Rights Act, prohibiting discrimination in public places (except schools and cemeteries), constitutional?
 - Legal under the Thirteenth Amendment? Only if a law regulates “the badges and incidents of slavery.” Which the discrimination here is not (“just because”).
 - Legal under the Fourteenth Amendment? No. *State laws or practices* are regulable under the Fourteenth Amendment, but the actions of private individuals are not. Wording of the Amendment: “No state shall. . .”
 - This creates the “state action requirement.” Here, the States had laws on the books prohibiting discrimination, so those discriminated against could sue in State court.
 - Majority: It is not legitimate for Congress to get at private conduct under the Fourteenth Amendment.
- Examples of state action:
 - A segregated cafe within a parking garage leased from the state: State action.
 - A racially discriminatory club is granted a state liquor license: Not state action.
 - Company town prohibits protest/leafleting: State action.
 - Mall prohibits protest/leafleting: Not state action.

- There's also a matter of First Amendment rights. If a group has a message that would be destroyed in violation of their First Amendment rights if they were told to adhere to the Fourteenth Amendment, they're safe. The Boy Scouts of America with gay scoutmasters, or Irish-American pride parades prohibiting homosexual groups, for example. But not Junior Chambers of Commerce with women.

4.4 The Negative Constitution

- What if a State just *doesn't do something*?
- *DeShaney*: Department of Human Services investigates allegations of abuse, but doesn't remove the kid, who is subsequently beaten into a coma. Other parent sues, saying that not taking the kid constituted state action. Court rules that they don't hold the States liable for *inaction*, just action.
- There are limits, though; a prisoner with health trouble is a ward of the state and therefore not bringing him to medical attention is deliberate indifference, for example.
- But what about where State laws prohibiting discrimination are not enforced?

5 Equal Protection of the Laws

5.1 Rational Basis Scrutiny

- Equal Protection is a “core notion” that like should be treated alike. So we are concerned if like are treated differently, or if different are treated alike.
- *R.E.A.*: The city adopts a rule that there can be no advertising on the side of trucks; but you *can* advertise yourself. Railway Express claims that two entities, themselves and The New York Times Company, are being treated differently. (Court rejects.)
- The doctrine has two basic rules:
 1. Low level (commercial, economic, &c): The Courts require give “rational basis scrutiny,” requiring a *rational relation* to a *legitimate state interest*. There is a lot of deference given to the governmental entity.
 2. Heightened standard (race, alienage, national origin): The Courts give “strict scrutiny,” requiring a *narrowly tailored* law to serve a *compelling state interest*. There is no deference.
- Strict scrutiny categories are called *suspect classifications*; in substantive due process, *fundamental rights*.

- *Beazer*: The Transit Authority had a rule forbidding its employees to be drug users, with no exemption for those on methadone.
 - The Plaintiffs claim that the general populace are being considered, while methadone users are not; this is, they claim, like being treated differently.
 - The Court ends up saying that there is a rational relation.
- Generally speaking, and *Korematsu* as a notable exception, strict scrutiny leads to laws being struck down, while rational basis scrutiny leads to laws being upheld.
- Why does rational basis scrutiny have deference?
 - No line is perfect.
 - It's impossible to consider every case.
 - There is legitimacy on the part of the legislature.
 - The legislature has more knowledge of the instant circumstances.
 - The legislature solves problems piecemeal.
 - There could be interest groups involved legitimately.
- All laws discriminate—that is, separate out groups or cases. So absent some compelling reason (such as a suspect classification), the courts will defer to the legislature's line-drawing.

5.2 Suspect Classifications

- Given the above, the big question is, why do we give strict scrutiny in some cases and not in others?
- *Loving v. Virginia*: Anti-miscegenation statute in Virginia.
 - The Court notes that the statute contains a racial classification, which they say activates strict scrutiny.
 - The Virginia Court had said that the purpose of the statute was to maintain the purity of all races, but the Court finds that the purpose was to maintain the purity only of the White race.
 - Even if it was about all races, it's arguable whether the statute succeeded.
 - Also, is this a racial classification? It doesn't treat blacks and whites differently. But the Court says that the statute "takes race into account," which is enough.
- Discrimination against a class of one *is* actionable under Equal Protection, but the case is very, very hard to win.

- Suspect classifications include race, alienage, maybe religion and national origin.
- Also, to classify by race is to include race as a criterion.
- *Korematsu v. US*: Do the War Powers include removing people from their homes based on race? (This all predates our modern understanding of the Fifth Amendment; and the Fourteenth didn't apply because this was the US, not a state.)
 - What's wrong with this classification?
 - It's overinclusive (targeting all Asian-descended people) as well as underinclusive (it doesn't target German- or Italian-descended people).
 - There might have been another way to tailor it, but the Government might not have been able to for administrative costs.
- It's not enough to say that "racial classification is illegal," because there could be cases where race is both determinative and important. Sickle-cell anemia and African-Americans, for example.
- *Johnson v. California*: The California Department of Corrections segregated based on race
 - The Government argued that there's deference in prison matters.
 - The Court shot that down. "All racial classifications... must be analyzed by a reviewing court under strict scrutiny."
 - The problem that the State wanted to deal with might be exacerbated. But that's more of a policy issue.
 - O'Connor wants to "smoke out" illegitimate uses of race. The scrutiny test puts the burden on the government to state its compelling interest; the Court can then examine the interest and determine whether the law is pretextual to that purpose.
 - If a law is written for a compelling interest, but it isn't narrowly tailored and it doesn't fulfill the purpose, we wonder whether it's really for that purpose.
 - Strict scrutiny also minimizes occurrences of racial classification and reveals motives behind the statute that could be valid under some circumstances and invalid under others.
 - Effectively, as in *Philadelphia v. New Jersey*, if there's a non-racial way of doing something, we are suspicious that race is the real goal, and that's no good.
- The big question: *What is a suspect classification?*
- Some of the ways we determine:

- Text of the constitution: equal protection is afforded to all.
- The intent of the Framers: Was this a group they were concerned about? Argument: The only intent was to strike down the black/white divide, according to *Slaughter-House* and *Civil Rights*. Or at least, racial distinctions. (Which could be expanded to national origin, if we knew what “race” meant. What about Jews and Arabs, which were races at the Framers’ time?)
- Moral relevance: How relevant is the trait to the kinds of regulations? Circular reasoning: How do we know something is relevant unless we know what it is and what’s been legislated? We’ve answered the question when we pick the scrutiny. We can’t make something a suspect classification unless we can question the relevance of a trait.
- Whether the class is immutable: can it be changed? That’s not always enough... plenty factors are divided up into classifications, and many factors aren’t really immutable.
- Footnote 4 of *Carolene Products*: Historical advantage.
- *Hernandez v. Texas*: A race can be determined socially; at the time, Mexican-American was a racial group socially speaking.

5.3 Gender

5.3.1 Historical Background

- *Bradwell v. Illinois*: Myra Bradwell sued for a license to practice law in Illinois under the “privileges or immunities” clause. The majority said that the choice of occupation is not one of the privileges and immunities, under *Slaughter-House*. The dissenters from that say that practicing law is not one of the “privileges or immunities of the sex.”
- “Gender”: Cultural or social constructions. “Sex”: Biological. Thank Ruth Bader Ginsburg.

5.3.2 Modern Era

- *Reed v. Reed*: An Idaho statute said that when two individuals were equally entitled to be an estate administrator, the male should be preferred. Litigated under rational basis, with the claim that “men are as a rule more conversant with business affairs.” The Court threw that out.
- *Frontiero v. Richardson*: Servicewomen were not equally entitled to dependency benefits as servicemen. Majority cites *Reed* and says that was really strict scrutiny, so the same is here. Concurrence says that with the equal rights amendment up for debate it’s not the Court’s place to draw those lines.

5.3.3 Theoretical Basis for the Standard

- Is strict scrutiny for sex classification appropriate? Moral relevance? What about text (“all people”) versus intent (“no way!”)?
- Argument: The Nineteenth Amendment extended equal protection to women.
- How often, probabilistically, does gender matter? How many statutes are there, and how often did the legislature get it wrong?
- Political process theory suggests that pre-1920 (pre-suffrage) laws definitely need strict scrutiny.
- *Carolene Products* footnote 4: the Court abdicated responsibility for closely examining legislation for constitutionality. It set out when the Court *will* look more closely:
 1. When laws are within Constitutional provisions (such as the Bill of Rights)
 2. When the political process fails (such as when laws prohibit people from voting, or speaking, or the like; therefore, stopping the system from fixing itself)
 3. When the laws have “prejudice against discrete, insular minorities.”
- What is discrete and insular? Identifiable, definable (group cohesion); and shared values, separate from everyone else.
- The Court has to step in when groups can’t operate in the “pluralist bazaar” because other groups refuse to work with them. The “rationality” of the laws can’t be based on the stereotypes which might, or might not, be in the legislature’s heads.
- *Craig v. Boren*: OK had different drinking ages for men and women. The Court set up “intermediate scrutiny.”
 - The sex-based criteria must be “substantially related” to “important governmental objectives.”
- The *Cleburne* court discussed a spectrum of scrutiny, and asked whether the group under fire had a history of discrimination. From that we extract a level of scrutiny.
- Why not go for strict scrutiny?
- In some higher number of cases (relative to race, say) there could be bona fide reasons to justify disparate treatment.
- Strict scrutiny also might not permit remedial laws.
- Of course, that’s all self-justifying.

- *US v. Virginia (VMI)*: The women who want to attend VMI sue; the Court of Appeals orders either acceptance of women as candidates, or establishing a “parallel institution or program for women.”
 - The State claims a compelling state interest: the adversative method is not suited to women. Also, the state policy of diversity in public education allows single-sex schooling.
 - The Court looks to the history and finds no purpose of diversity (Rehnquist just looks at evidence after VMI was “put on notice.”)
 - The State doesn’t really insist it would have to change so much; it just says it “can’t work with women.”
 - Ginsburg and Rehnquist say that the end must be legitimate, not just the means.
 - Scalia hammers diversity: women, he says, are not discrete and insular.
 - The State waited to get sued—it was hard to argue that they wanted diversity. If they’d created VWIL voluntarily, they could have shown their case of trying to achieve diversity better.

5.4 Discriminatory Purpose

5.4.1 Neutral Laws

- *Plessy and Loving*: Clearly, they’re really subordination cases, and we know it’s pretext. What if we don’t know?
- *Ho Ah Kow v. Nunan*: SF jail had a haircut policy at odds with a Chinese religious custom; the claim was that the statute was intended to discriminate. Strict scrutiny didn’t exist yet, but since “everybody knew” that the purpose was clear, it was overturned.
- *Yick Wo v. Hopkins*: SF Board of Supervisors granted permits to 80 Caucasians and denied them to 200 Chinese applicants. Even a neutral law can be enforced discriminatorily.
- The starkness of statistical evidence creates a presumption of discriminatory purpose.
- *Gomillion*: Redistricting threw all the blacks out of town. No legitimate purpose, so clearly discriminatory.
- *Griggs v. Duke Power*: Tests with no relationship to job performance had a racially disparate impact on hiring practices. Plaintiffs claimed a violation of Title VII; the defense said the tests applied to everyone. Court: “Good intent or absence of discriminatory intent does not redeem. . . ‘built-in headwinds’ for minority groups that are unrelated to measuring job capacity.”

5.4.2 Intent Versus Effect

- *Washington v. Davis*: Blacks trying to become DC police officers sued for Fifth Amendment violations. This was a Fifth Amendment test, but the defense also claimed a relationship to job performance.
- In general, the question is, do we look at the impact of a law, or its intent?
- If we don't go by impact, we'll be left with laws that don't mean to discriminate but still do.
- If we don't go by intent, we'll have slippery slope arguments—someone is always on the wrong side.
- What about correlation? If wealth correlates with race, isn't that a racial undercurrent?
- It ends up varying. The Civil Rights Act requires a showing of impact and then a burden shifting to the defendant to showing necessity.
- The Constitution requires a purpose, but Stevens leaves the door open for “extremely disproportionate impact” proving purpose even without clear evidence.
- *Arlington Heights*: Sets out a bunch of factors for discriminatory purpose.
 - The factors try to define the thought process to conclude discriminatory purpose: “Why did you do this? Was it different this time? What's normal?” And so forth.
 - The *Griggs* test and this are getting at the same thing for the same reason.
- *Personnel Administrator v. Feeney*: Passed over promotion in favor of veterans; claiming this amounted to discrimination against women.
 - State claims no discrimination based on sex, but veteranship.
 - Plaintiff says the state knew better.
 - State claims that there was another reason, and this harmed a lot of men, too.
 - Court: “Discriminatory purpose means taking a course of action *because of* its adverse effect, not *despite* it.”
 - The Government also can have reasons for acting (such as promoting people getting diplomas, or promoting treatment of veterans) the way private employers don't.

5.5 Affirmative Action

- *Richmond v. Croson*: Regulations had a mandatory minority business enterprise (MBE) requirement; contractor denied a waiver sued.
 - Compelling interest: Remedying discrimination.
 - Narrowly tailored? The end has issues with the facts; social discrimination, says the Court, is not a valid purpose.
 - Remedying past individual discrimination is OK, but what about the building trade? That gets scrutiny, but is there clearly a problem being fixed?
 - The Court finds no direct evidence that there was discrimination in Richmond.
 - Richmond claims a general Congressional finding, but the Court says that doesn't cut it.
 - The Court says Richmond is trying to create minority businesses, not remedy past discrimination, and that doesn't cut it.
 - Marshall votes for intermediate scrutiny, because this is a remedial classification, not a discriminatory one.
 - But that's complicated—did the Framers really envision a difference? And how can you tell when a program is remedial?
 - And the other way, would the program stigmatize people, or harm innocent third parties?
- *Adarand*: Congressional affirmative action programs get held to strict scrutiny.
- The Courts are tricky, not wanting to point fingers at legislative motivations.
- We're not sure that the five-factor test requires scrutiny; the intent, moral relevance, political process... not so clear.
- But looking at the alternatives, the Court settled on strict scrutiny.
- *Grutter, Gratz, Parents Involved*: Affirmative action.
- *Parents Involved*: Challenges to placement programs in Louisville and Seattle. The rule separates out *de jure* discrimination from *de facto*: systems remedying former *de jure* discrimination can have the programs, but not if it was *de facto*.
 - The difference between majority and dissent comes down to: is the Constitution color-blind (suspecting race classification by nature) or color-conscious (admitting that sometimes it's necessary)?
 - The majority wants color-blindness.

- The dissent says that that won't work; have color-consciousness, and let those who are behind catch up, *then* ban it. Stopping classification now will further disadvantage the disadvantaged.
- *Grutter* and *Gratz*: Affirmative action policies of U. of Michigan Law School, and U. of Michigan undergraduate.
 - The Law School admissions policy encouraged a “critical mass” of minorities (among others). Undergraduates had a point system, with a certain number of points allocated for being a minority.
 - Strict scrutiny, no question. What is the compelling interest for the Law School?
 - Stated interests:
 - * Eliminate stereotypes.
 - * Prepare law students to work in a diverse society.
 - * Promote varied viewpoints and perspectives.
 - * Prepare law students professionally.
 - * Legitimize government, helping minorities feel they can participate.
 - In *Bakke*, Justice Powell rejected a bunch of these arguments, leaving only “the attainment of a diverse student body.”
 - *Grutter* doesn't really look like a classic affirmative action case; the beneficiaries of the program as designed are to the students at large.
 - The Supreme Court concludes that the government, in its educational capacity, can use race-conscious measures to create diverse classrooms. Not for the minorities, but society at large. So that settles the compelling interest.
 - However, they still discuss narrow tailoring. *Grutter* was, because it included minority status with a number of other categories on an individual level. *Gratz*, with raw numbers (or maybe its substantial dispositive factor—20 points out of 100 needed), was not.
 - This may have been a matter of keeping the door open but minimizing the controversy.
- Back to *Parents Involved*:
 - Under *Grutter*, individualized assessment that acknowledges race is OK, but categorizing is not, under *Gratz*.
 - Breyer thinks the two standards are insane. If there was a trial, that would have led to a decree making it OK; but a settlement makes it not?
 - Kennedy wins for getting the fifth vote, and his point is that the plans are vague, and therefore insufficiently narrowly tailored.

- There’s also an objection to the stark racial lines–“white” and “non-white” versus “black” and “other.”
- Given tipping points and white flight, what can one do? The schools are sited where they are. Maybe the issue is to do this at the wholesale level.

6 Judicial Review

6.1 Origin of the Doctrine

- *Madison v. Marbury*, of course.
 - The *issue* of the case: “Should the Supreme Court issue a writ of mandamus to force Madison to give Marbury the commission Adams had signed, that Jefferson had told Madison not to deliver?”
 - There were a lot of questions. Marshall called this a delicate case, among others, because they didn’t know whether the Court could tell the President what to do.
 - Marshall finds three issues:
 1. Does Marbury have a right to the commission? Yes; once it was signed it was a closed matter. (Lacking that, Marbury couldn’t have sued.)
 2. If so, and if his right has been violated, does he have a legal remedy? Yes–the essence of civil liberty is that a right, if violated, implies a remedy.
 3. If so, *is the remedy a writ of mandamus from the Supreme Court?* Well, this was a non-political act (the Executive cannot be sued for political acts), and the right dates from common law. . .
 - This is where we stand. Marshall says “He has the right, and can claim the remedy; the Executive can be held to obey the Courts in this matter, and the Courts interpret the law.”
 - Marshall makes the Constitution the realm of the judges; it is their job to interpret it.
 - There are three parts to the *Marbury* opinion.
 1. As above, Marshall outlines the situation and lectures the new government that we are of laws, not men; yes, we had an election, but they still must follow the law.
 2. Marshall rules, though, that the Supreme Court *lacks the authority to grant the writ*.
 - * The Court can hear cases affecting ambassadors and public ministers, and cases to which a State is party, as an original matter.
 - * In everything else, they only have appellate jurisdiction.

- * *However*, the Judiciary Act of 1789 says that any person holding office in the United States may bring a case in the Supreme Court to get a writ.
3. So Marshall says this is about whether the Supreme Court should follow the Constitution (they can't hear the case) or the Act (they must hear the case).
 - * The interpretation of the law creates a conflict. Which is supreme?
 - * The Constitution says that Congress can make exceptions to the two-jurisdictions system.
 - However, Marshall holds as a matter of law that Congress cannot move cases from appellate to original jurisdiction. (Or vice versa?)
 - As an aside, this suggests that the "exceptions" clause means that Congress may move cases out of the Supreme Court's jurisdiction entirely, or else the clause has no meaning.
 - * So the question remains: Constitution or statute?
 - * Marshall divides this question in half. First, is the Constitution superior to the law? Absolutely—no controversy.
 - * This is the controversial part: Who gets to say what the Constitution means? *The Judiciary*.
 - * "It is emphatically the province and the duty of the judicial department to say what the law is."
 - * Eventually, the country accepts this.
 - Marshall brings up a number of arguments why the Judiciary gets to decide the meaning of the Constitution.
 - * Judges swear an oath to defend the Constitution (doesn't get there; so do the Executive and Legislature).
 - * The Supremacy Clause might not help either, as that seems directed at State courts.
 - * But it might get us there. If the Clause says that federal law trumps state law, there will be a conflict in State laws versus Constitutional guarantees. In that case, the Supreme Court can now rule State laws unconstitutional.
 - * But it might work for federal laws, too. If a state and federal law conflict, and the State court can hold that the federal law is unconstitutional, the State law can trump... and that will make its way to the Supreme Court on appeal.

6.2 Standing and Justiciability

- Is it true that any time there is a conflict, the Supreme Court can rule? No.

- There's no case.
- But *what makes a case, and why do we care?*
 - We get the adversarial system and a fight of ideas.
 - We also get specific facts, without which the Court shouldn't decide matters.
- But what is a case?
 - A traceable, and redressable, injury.
 - *Allen v. Wright*: There is only standing to bring a case if there is an injury.
 - * Petitioners claim two ways the Government conduct (not challenging the tax-exempt status of segregated schools) harms them:
 1. The government is breaking the law, which stigmatizes them.
 2. The results are fostering segregation by letting white parents avoid integration by putting their kids into the segregated schools, which are cheaper than they otherwise would be.
 - * The Court throws these both out. The stigma argument is a slippery slope, and besides, that the government is breaking the law is not enough to constitute an injury.
 - * The segregation argument is speculative.
- The general theory is, there must be an injury. If you come to court after a legal injury, you have a right to be heard and a right to have the court resolve your dispute. If there is a conflict of laws, the court picks the higher one.

6.3 Judicial Supremacy and the Countermajoritarian Problem

- *Cooper v. Aaron*: the Arkansas Governor argued he could call out the National Guard to block desegregation of Central High.
 - In *Prigg v. Pennsylvania* the Court ruled that the Fugitive Slave Clause did not require the States to enforce return of fugitive slaves.
 - The governor was not a party to *Brown*; why was he bound?
 - There is a claim that there was precedential effect; if sued, he'd lose. But that's akin to the Court acting without a case.
- There is a second interpretation of *Marbury*: Marshall could have (maybe should?) found that the Constitution allowed Congress to move cases from one jurisdiction to another, but didn't.
- Marshall also didn't say that delivery was a requirement—so there might not have been an injury to the plaintiff, or even a conflict.

- This leads to the second reasoning: the Court can say what the law is, period.
- This “law-saying” model is that the Courts speak on the meaning of the Constitution. Pretty big deal.
- Starting in the 1960s we began to see public litigation—about issues, often class actions challenging the government. So people began to wonder: “do we really need an injury?”
- Back to *Cooper*: is the Arkansas governor bound by *Brown*?
- Arguments in favor of binding:
 - Weakly, Supremacy Clause in and of itself: “the judges shall be bound” makes no reference to executives.
 - Besides, the Clause could only mean that Federal law trumps State; this is a matter of two interpretations of the Constitution, one by the Supreme Court and one by the Governor of Arkansas.
 - The Supremacy Clause plus *Marbury*: the Constitution is the supreme law, and *Cooper* claims that the Supreme Court is the supreme interpreter.
 - But *Marbury* doesn’t really say that, as such.
 - Duty to follow precedent: the Governor knew that if brought into a lawsuit, he’d be told to desegregate. So there was a duty to not preemptively violate.
 - It’s an efficiency argument.
 - But if efficiency trumps the rule of only binding the parties, why can’t the Court issue advisory opinions?
- What if the Governor had said he wasn’t bound? Does every jurisdiction have to be litigated separately?
- Well, the people he answered to thought *Brown* was wrong and wanted to contest it.
- What if the President had ordered the National Guard to bar the DC schools from being desegregated after *Bolling*?
- In the Lincoln-Douglas Debates, there was a certain amount of friction about this. Douglas thought that once the Court had decided, it was done.
- Generally, legislatures can pass laws at odds with Court decisions, but executives can’t enforce them.
- The “marketplace of ideas” point: bad to cut off the discussion of ideas before it starts.

- We don't want to block a law *ex ante*, we just want to stop its enforcement *ex post*.
- So what's an executive to do, when facing a law at odds with a Court decision?
- Jackson claimed that the President and Congress also have a right to interpret the Constitution.
- Countermajoritarian: There is a legitimacy problem when unelected judges make decisions that trump the elected officials' will. Such as child labor—not enough support for a supermajority, so the Court kept kids in sweatshops.

6.4 The Vulnerable (and Emboldened) Court

- Jackson: “John Marshall has made his order, let him enforce it.” What if Ike had said much the same about *Cooper* instead of sending in the 101st Airborne?
- There are three models of judicial decisionmaking:
 1. Legal: Case precedent, which probably should have led to the other result in *Cooper*.
 2. Attitudinal: Justices just vote their precedents, period.
 3. Strategic: If it won't be enforced, they won't make a rule. (In *Allen v. Wright*, Congress had blocked the strengthening of the IRS guidelines, and the Executive had suggested it wasn't going to enforce.)
- Even under the “law-saying” model, the Courts would need to get someone to enforce the decisions, and wouldn't want to become a laughingstock, and wouldn't want governmental punishment (jurisdiction stripping, court packing. . .).
- There tends to be diffuse support for the Court, but the Court's protection of minority rights seems to be limited to how much slack the majority cuts the Court.

7 Constitutional Liberty

7.1 Incorporation

- *Barron v. Baltimore* had said that the Bill of Rights only applied against the Federal government, not the states.
- With the privileges and immunities clause dead in the water, and the Equal Protection clause likewise, all that was left was due process.

- Incorporation: the claim that the Fourteenth Amendment’s due process clause makes the Bill of Rights apply against the states.
- Several theories:
 1. Total Incorporation: All of the rights apply.
 - The problem is, some of the rights don’t seem to fit. Ninth and Tenth refer to the States.
 - Second talked about protecting the States from the Feds.
 - Establishment Clause likewise: protect the States from Federal control.
 - And the Fifth’s Due Process clause getting incorporated through a due process clause?
 - It’s tricky, but might have been what the Amendment’s framers meant.
 2. Frankfurter/Harlan theory: the Amendment required that the States obey principles of “fundamental fairness and ordered liberty.” This might overlap the Bill but was not necessarily connected.
 - Case-by-case: Did the government violate fundamental fairness here?
 - Venn diagrams.
 3. Selective Incorporation (Brennan): Limit incorporation to the Bill, but use the “fundamental fairness” idea to decide what amendments needed to be incorporated. If a clause was intended to protect a fundamental individual right, it applied against the States. If not, not.
 - Clause-by-clause: less plodding than Frankfurter/Harlan.
 - So far, all but the Tenth Amendment, the Second (though there isn’t much precedent), the Third (no cases whatsoever), the grand jury requirement of the Fifth, and the Seventh’s jury rules (to avoid the \$20 issue and overturning known structures of state juries).

7.2 Procedural Due Process

- Imagine a hypothetical of marching in Dayton, but a statute saying no larger than 150 people; and the permit is denied despite there being 120 people.
- The procedural claim is that the sheriff denied liberty without due process of law.
- Procedural due process: “I want to prove that I meet the statutory requirements.”

- The substantive claim (later) is “The statute draws an unacceptable line.”
- *Goldberg v. Kelly* New York’s system for deciding to cut off a welfare recipient, even though the recipient had a post-termination hearing, was a denial of due process. The plaintiffs would suffer grievous loss if they didn’t get a hearing before termination.
- *Roth and Sindermann*: Professors who weren’t rehired claimed to have a due process violation.
 - They claimed property interest in being rehired, as well as a liberty interest in having been fired for illegitimate reasons.
 - Both wanted a hearing on why they weren’t rehired—they wanted process.
 - Roth had no legitimate expectation of rehiring, because his employment had no renewal provisions in the contract.
 - But Sindermann had an expectation due to the informal tenure system at Odessa College.
 - Standards create a target to prove that he reached, giving him a valid property interest claim.
- Procedural due process is about getting an *opportunity* to prove you met a standard. Lacking the standard there is no procedural due process.
- There is a two-part procedure for due process cases:
 1. Is there any process due? “Is there a life/liberty/property interest?” (These interests come from positive law—law, customs, or standards—creating interests and/or entitlements.)
 2. If process is due, what process?
- *Matthews v. Eldridge*: Plaintiff wants a hearing on getting his social security disability benefits revoked.
 - The Court describes a balancing test: Weigh the following:
 1. The private interest at stake
 2. The risk of erroneous deprivation of the interest
 3. The government’s interest (too much burden on the Government and it may eliminate the benefits entirely; administrative costs; no way to take back benefits erroneously given)
- The elements of procedural due process:
 - Notice
 - Opportunity to be heard
 - Neutral decisionmaker
 - Counsel (not necessarily at governmental expense, though)

7.3 The Substantive Content of Due Process

7.3.1 *Lochner*

- Bakery owner violated a state labor law that bakers (employees) couldn't work more than 10 hours/day, or 60/wk.
- The Court held that New York's law was not a valid exercise of the police power; the right to contract is a Constitutional right.
- First question: Is there a right to contract? Yes—part of liberty.
- But the State has the police power to pass laws for health, safety, welfare, and (maybe) morals.
- The conflict is right to contract versus police power.
- The Court says the police power has limits, and there's a means/ends analysis: are the ends legitimate, and do the means achieve them?
- The Court says no in this case. Being a baker isn't unhealthy enough to justify state control. And bakers working longer hours don't harm the general public. Besides, the bakers aren't a protected class—they can contract.
- Anti-*Lochner* arguments:
 - There is no substantive due process: all legislation validly enacted (with due process) should be upheld.
 - The right to contract is not protected by due process.
 - The means do achieve the ends (the studies in dissent, that the majority ignores).
 - Judicial second-guessing of the legislature is disfavored; the legislature said it was, though. Institutional competence.
 - Bad balance striking (the Court drew a different legal conclusion from the legislature—countermajoritarian).
 - Inconsistent, class biased (protected freedom of contract between employer and employee, but not, for example, unionization).
 - It's a legitimate end (the Court thought it was illegitimate for the legislature to insert itself into general labor relations. Nowadays we don't think that).
- This was “class legislation,” disfavored back then.
- *Adkins*: Minimum wages aren't OK (except in *Muller* for women, who must be protected).
- Generally, the Court used means/ends because it is how we do things. We measure the right or the claim against what the government is doing, ask why the legislature is acting, then whether the law achieves the goal. Rights aren't ultimate trumps.

7.3.2 The Demise of Economic Rights

- *West Coast Hotel*: “This minimum wage law means that the government doesn’t have to support, so it relieves the burden on taxpayers. Rational basis scrutiny.”
- *Carolene Products*: “This ban on filled milk is supported by the rational basis on the facts. There is a state of facts that can support the legislature’s move and that’s enough.”
- *Williamson v. Lee Optical*: “The reason doesn’t even have to make sense, as long as there is one.”
- The Court got the message: “don’t interfere in government regulation of the economy.”

7.3.3 “Individual” Rights

- *Griswold*: Planned Parenthood violates law prohibiting distribution of birth control, claims Fourteenth Amendment violation (state claims police power).
- The Court says it’s a violation, because “rights have penumbras” which aren’t in the wording but are in the larger zone created by a right.
- There is no right with a penumbra of privacy, but where several penumbras meet privacy is a “created right.”
- There’s also a Ninth Amendment claim that doesn’t quite work—if we incorporate that, what rights are granted? Why is *Lochner* now disavowed?
- And then there’s the claim that the “traditions and customs of the American People” create substantive due process rights.
- There is a backward history and tradition argument (Harlan), and a present/forward-looking view. The Court prefers to look backwards, because consensus is a problem—they’re not Gallup. Besides, it’s not a good idea to peg rights to what people think at a given time.

7.4 Reproductive Choice

- So, once we have *Griswold*, what’s the right? Privacy? Marital privacy? Control of a reproductive system? And so on.
- *Eisenstadt* points out the equal protection issue if birth control is only limited to married people.
- So *Lochner*, which may have done a lot of things wrong, but it did find a liberty right not in the Constitution. How is *Griswold* different? We have theories about how to find the rights, but we don’t know how to define them.

- And then we come to *Roe v. Wade*. A Texas statute prohibited procuring or attempting abortion except for the mother's life; and also a Georgia case, *Doe*, which is much more procedural.
 - Blackmun wrote an opinion looking to reconcile the arguments and the people.
 - The question in *Roe* was whether Texas could limit a woman's right to choose whether to have an abortion.
 - The Court holds a trimester test.
 1. No abridgment of the right to choose in the first trimester.
 2. In the second trimester, the State can promote its interest in the health of the mother, and regulate abortions related to that.
 3. In the third trimester (the viability point, when the fetus can be medically sustained without the mother), the State may prohibit for the sake of life and health, except in emergencies.
 - The opinion has two parts: rights and interests.
 - First, Blackmun goes through the history of abortion to find a historical basis for the right and/or the state's interests in regulating it.
 - The *Lochner* problem: Where does the right come from? Due process? How?
 - Maybe penumbras, sexual privacy, Ninth Amendment... not history and traditions, though.
 - But the Court settles on liberty encompassing beyond what's written down (*Lochner*).
 - So what's the State's interest?
 - The Court finds one the state doesn't argue (Victorian social concern/prudism), and two it does:
 - * Protection of the mother from unsafe abortions—less of an issue thanks to medical improvements, but valid to the extent of the danger. Compelling at the end of the first trimester, opening the door for regulation, but not banning, based on mother's health. Those regulations would be examined for the extent of how much it was actually a safety issue.
 - * Protection of prenatal life. Does the State have that interest? The Court says that viability (where the fetus can survive outside the womb) is where that interest becomes valid.
- Really, *Roe* reads like *Lochner*. Right, interest, balance. But the life concern makes people crazy.
- *Roe* is a lot like a statute; the Court could have just struck down the statute for unconstitutionality, but then there would be a whole lot of cases until the legal statute had been shaped.

- *Casey v. Planned Parenthood*: PA statute imposed restrictions on abortion.
 - Statutory rulings get more deference than constitutional rulings; the statute can be fixed by the legislature, but the constitutional interpretation, only the Court can reexamine.
 - The Court says there is a test for knowing when a Constitutional ruling should be overturned.
 - So, *stare decisis* is important but “not an inexorable command” against constitutional cases.
 - Four part test for overturning a Constitutional ruling:
 1. Whether the central rule is proven to be unworkable.
 2. Whether there was reliance on the rule that would be hurt by overturning.
 3. Whether the rules around central rule have changed to the point that it doesn’t fit.
 4. Whether the facts have changed to make the rule wrong.
 - The *Roe* doctrine is workable.
 - There has been reliance on the *Roe* doctrine (not just “people getting abortions,” which could be handled with a nine-month sunset, but “women controlling their reproduction”).
 - The *Roe* doctrine is not anachronistic.
 - The *Roe* doctrine might be in some trouble given the medical technology changes moving the viability point forward, but generally the facts haven’t changed.
 - These factors aren’t new, and can apply to other decisions.
 - What about the question “was *Roe* wrong?”
 - The Court examines *Lochner* and *West Coast Hotel*, along with *Plessy* and *Brown*: “These are cases of taking heat and reversing. Is this like these?”
 - Fundamental gestalt shift: When we realized we were wrong about the world, we changed our mind.
 - And in *Casey* the Court says “no gestalt shift. And we can’t keep overruling ourselves.”
 - Scalia disagrees: “*Roe* is *Dred Scott*.”
 - The Court sets up the “undue burden” test: A statute is unconstitutional if it places a substantial obstacle in the way of a woman’s right to an abortion before the viability point where the State’s interest in protecting fetal life has reached its peak.
 - This is sort of an overrule of *Roe*, in that it broke a logical trimester format, and allowed all sorts of substantial obstacles *Roe* wouldn’t have.

- There's no real talk about congressional overreaching, because Congress supports protection of abortion clinics too. Neither side is willing to give up going to Congress.
- *Carhart II*: The Partial Birth Act.
 - After *Casey*, the question is whether the Act poses an undue burden, whether it is a substantial obstacle.
 - The Court says that it doesn't matter that this is a "life" exception, not "life or health," because the "health" circumstance can never occur.
 - The Court also finds some ridiculous interests: integrity of the medical profession? Protecting the mother from the grief of realizing her child's skill was crushed?
 - There is no life interest; if that was the case more than just one procedure (D&X) would be banned.

7.5 Sexual Choice

- *Bowers*: A Georgia law criminalized sodomy. The Court upheld it, saying there was no fundamental right to homosexual sodomy.
 - There was a straight couple trying to bring a challenge, too. The Court tossed that on standing/justiciability grounds, keeping this from being about sodomy in general.
 - Where do we look for fundamental rights? The Due Process clause? Sure. But where do we find what the substantive due process rights are?
 - Tradition and history.
 - The Court relies on its claim about a long history of condemning homosexuality in history. (Debatably the case.)
 - But what is the right?
 - * Sexual conduct: *Griswold, Eisenstat, Roe...*
 - * Right to be Let Alone: probably not.
 - * Right to shape your intimate relations: doesn't cut it, tends to be narrow.
 - * Right to privacy in the home: maybe. The porn-in-the-home case (*Stanley*) gets dismissed as First Amendment. But here the cops were legally present.
 - There's also a question of polling the states. The data didn't support it—even if legitimate, which is debatable.
- What about morality? Is public morality a rational basis for a law?

- Would equal protection help? Is “sodomy is OK but homosexual sodomy isn’t” OK under equal protection?
- The classification doesn’t appear to be suspect. Or at least, that’s very complicated.
- Technically, the classification is “those who want to engage in homosexual sodomy,” but *Washington v. Davis* can get that to become “homosexuals” with relative ease.
- Is discriminating based on orientation OK?
- No help in text, or intent; maybe immutability, moral relevance is a double edged sword, and teh political process is complicated. . .
- So in *Lawrence* the Court focused on due process.
- O’Connor went to *Cleburne*, applying “rational basis with bite” scrutiny. Her argument was that laws that do nothing but express moral disapproval got RBWB.
- O’Connor also claimed a valid interest in protecting “the traditional institution of marriage,” argument by assertion.
- Changes between *Bowers* and *Lawrence*?
- New justices, cultural shift (higher support of gay rights), &c.

7.6 Guns & Death

- *Heller*: Does the DC prohibition on the possession of useable handguns in the home violate the Second Amendment? Yes.
- Structure of the Amendment: Does the prefatory (“militia”) clause limit the operative (“shall not be infringed”) clause?
- Court says no, P. does not limit O. (If it did, the right would probably have referred to the right of the people to be in state militias to oppose the federal government, so the Feds couldn’t limit the militias, but states could.)
- Scalia concludes that there was a preexisting right, an individual right.
- The rule is tricky.
- Breyer suggests a balancing test, pointing out historical gun-control laws that Scalia dismisses in an odd sweep.
- Oddly, Scalia–Mr. Textualism–starts with the Text, then teh Original Meaning, then Post-Ratification through to the Civil War, then precedent (*Miller*), then contemporary views, and finally the consequences.

- Maybe he needed Kennedy’s vote? Or couldn’t get the result he needed otherwise—had to use consequentialist reasoning to settle why some prohibitions and not others were OK.
- Scalia makes a big change—the right becomes one of self-defense, not defense against a tyrannical government.
- There also seems to be a penumbral argument, not that Scalia will admit that.

8 Section V

- *City of Boerne v. Flores*: Does the Religious Freedom Restoration Act exceed Congress’s authority? Yes.
 - In *Smith* the Supreme Court held that the compelling interest test was not appropriate where general prohibitions got opposed by free-exercise challenges.
 - The Court held that a facially neutral, secular law drafted without animus did not violate the Free Exercise clause period.
 - Congress responded by passing the RFRA to return the test to compelling interest. Might not be Constitutional, though, as Congress can’t tell the Court what to do.
 - Congress gets its authority from the Fourteenth, §5: “We’re guaranteeing §1 as we are authorized to do under §5.”
 - So what’s the proper interpretation of §5? And is there a federalism concern?
 - (Note: Wasn’t the Amendment passed to stop the states from violating the provisions granted in the fourteenth? So is federalism appropriate?)
 - The Court rules that Congress has the power to “enforce” the provisions of the Amendment—but it *cannot* define the rights in question. That’s the Court’s job.
 - Kennedy points to how the original formulation of the Fourteenth allowed Congress to “secure” rights, but that was rejected. Securing would be active; enforcement is passive, remedying only.
 - The Court claims that the way to tell if an action is enforcement is to look at “congruence and proportionality”:
 - * “Congruent”: Must be related to the injury, caused to an individual/group by the State, of a Fourteenth Amendment right.
 - * “Proportional”: Must not do more, must be limited to that injury.

- Recall that in *South Carolina* literacy tests were banned, and the Court upheld them while saying that the tests are not inherently unconstitutional. Here, it was that Congress was worried about the tests being used in discriminatory ways. The Court says prophylactics are OK—but it makes a difference, namely, congruence and proportionality.
- The upshot: Look at what Congress said was a violation of a right, and what Congress did to correct it. If they’re not congruent and proportional, Congress went too far.
- What about the RFRA?
- The Court finds no evidence that the States are running around denying religious rights with facially neutral laws. The laws step on religious rights, but under *Smith*, that happens, deal with it.
- The difference between RFRA and the literacy test (or facially-neutral laws that discriminate in employment) is no history of pretextual-but-facially-neutral laws.
- *Alabama v. Garrett*: the Americans with Disabilities Act requires reasonable accommodations for disabilities.
 - The ADA is either the Commerce power (for private individuals) or §5 for governments.
 - When an employee of the state sues for money damages, the Eleventh Amendment says no Federal money suits against states, overriding the Commerce clause. But not overriding the Fourteenth.s
 - So, therefore, the anti-discrimination laws have to be passed under §5.
 - But that means they have to be congruent and proportional.
 - *Cleburne* suggested that the disabled aren’t a suspect classification!
- *Morrison*: Didn’t pass under Commerce. What about §5?
 - The Court says it might be OK for Congress to want to correct state inaction, as in here, but there isn’t enough evidence in congressional findings in this case. No luck.
- Two post-*Boerne* rules: “No suing the States in federal court without findings,” and “no suing individuals on the grounds that there was State inaction without findings.”
- There is debate about whether *Boerne* was decided right, or extended right.
- The biggest argument is that now the scrutiny levels and sufficiency of evidence, normally for the courts, are being assigned to Congress.

- One more: The FMLA was ruled to be within §5, because gender discrimination is different than the disabled.
- Back to Congress interpreting the Constitution. Why not? Because the Court said so in 1803. But maybe Congress is in change of the Fourteenth Amendment...?