

ConLaw Outline

- I) The Constitution – What Is this Crazy Thing? A Quick Outline of Important Parts
- A) **Article I: Legislative Powers**
 - 1) **Art I § 2 Clause 1:** House shall be composed of “people of the several states.”
 - 2) **Art I § 2 Clause 5:** The House “has the sole power of impeachment.”
 - 3) **Art I § 3 Clause 6:** Senate tries all impeachments.
 - 4) **Art I § 7 Clause 1:** Bills for raising revenue shall originate in the House.
 - 5) **Art I § 7 Clause 2:** Presentment to the executive and his veto power/override.
 - 6) **Art I § 8:** Congress’s affirmative powers. Commerce clause is Clause 3; court clause is clause 9; Necessary and Proper is clause 18.
 - 7) **Art I § 9:** Congress’s affirmative prohibitions on power.
 - 8) **Art I § 10:** Limitations on State Power. Contract clause (a “dead letter” by the time of *Lochner*) is in Clause 1.
 - B) **Article II: The Executive.**
 - 1) (We didn’t really deal with specific provisions herein)
 - C) **Article III: The Judiciary**
 - 1) **Art III § 1:** The judicial power is vested in the Supreme Court and in such inferior Courts as Congress may establish. Also includes provisions re. “good behavior.”
 - 2) **Art III § 2 Cl 1:** Establishes the original jurisdiction of the federal court system.
 - 3) **Art III § 2 Cl 2:** Establishes the original jurisdiction of the Supreme Court; mentions Supreme Court appellate jurisdiction, which is subject to limitation by Congress.
 - (a) (*Marbury* would seem to imply that Congress cannot limit the Court’s original jurisdiction)
 - D) **Article IV: Relationships Between the States**
 - 1) **Art IV § 1:** Full faith and credit given in each state to the public Acts, Records, and judicial Proceedings of the other states. Congress sets the standard of proof for this.
 - 2) **Art IV § 2 Cl 1:** Privileges *and* immunities of the “citizens in the several states.”
 - 3) **Art IV § 4:** Republican guarantee clause.
 - E) **Article V: Amendment Procedures**
 - F) **Article VI: Debts, Supremacy, Oaths**
 - 1) **Article VI Clause 2:** Supremacy clause.
 - G) **Article VII: Ratification**
 - H) **The Bill of Rights**
 - 1) Amendment I: Freedom of Expression (Religion, Speech, Press, Assembly, and Petition) and Establishment
 - 2) Amendment II: Right to Bear Arms
 - 3) Amendment III: Quartering of Troops
 - 4) Amendment IV: Unreasonable Searches and Seizures
 - 5) Amendment V: Due Process of Law (Grand Jury, Double Jeopardy, Self-Incrimination, Due Process, Takings)
 - 6) Amendment VI: Right to a Fair Trial (Speedy and Public Criminal Trial, Confrontation, Subpoena, Counsel)
 - 7) Amendment VII: Trial by Jury in Civil Cases
 - 8) Amendment VIII: Cruel and Unusual Punishment

- 9) Amendment IX: Unenumerated Rights
- 10) Amendment X: States' Rights
- D) Constitutional Incorporation
 - 1) Post 14th-amendment, Court said "Due process incorporates the substantial guarantees of the bill of rights. 14th amendment clearly *does* run against the states."
 - 2) Rights that have *not* been incorporated:
 - (a) Right to bear arms.
 - (b) 3rd amendment.
 - (c) 5th's grand jury clause
 - (d) 7th amendment's jury guarantee in civil cases.
 - (i) (This just means that you don't necessarily have a federal Constitutional right to this.)
 - (e) 8th's bail provision (although there's some dicta on this)
- J) Reverse Constitutional incorporate
 - 1) The 14th amendment's equal-protection guarantee is "reverse incorporated" via 5th-amendment intratextualism to apply to the states. (*Bolling v. Sharpe*)

II) Modalities of Constitutional Interpretation

- A) Post's modalities
 - 1) Doctrinal
 - 2) Historical
 - 3) Responsive
- B) Bobbitt's Modalities (refining and expanding Post's)
 - 1) Doctrinal
 - (a) Applying rules generated by precedent
 - 2) Historical/Intentional
 - (a) Relying on the intentions of the framers and ratifiers of the Constitution
 - 3) Ethical (Post calls this "Responsive")
 - (a) Deriving rules from those moral commitments of the American ethos that are reflected in the Constitution
 - 4) Textual
 - (a) Looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"
 - 5) Structural
 - (a) Inferring rules from the relationships that the Constitution mandates among the structures it sets up
 - 6) Prudential
 - (a) Seeking to balance the costs and benefits of a particular rule.
 - (b) (*Blaisdell* is the standard-bearer for this modality)
- C) *Cases
 - 1) ***Marsh v. Chambers** (US 1983, *Blackboard*): In an action challenging the practice of employing a chaplain to open each legislative session with a prayer, the district court held only that the payment of the chaplain with public funds was unconstitutional, and did not enjoin the practice of opening each session with a prayer. The appellate court held the entire practice unconstitutional. The Court reviewed the long history of opening legislative sessions with prayers. It held that the

founding fathers certainly did not view the practice as violating the Establishment Clause because in the same week as they approved a draft of the First Amendment for submission to the states they also voted to appoint and to pay a chaplain for each house. The Court noted that the practice had become part of the fabric of society, and fears that it would lead to the establishment of a national religion were unfounded. The Court held that the remuneration of the chaplain from public funds was a longstanding practice, initiated by Congress, which did not violate the Establishment Clause. The fact the current chaplain had been reappointed to the position for 16 years did not violate the Establishment Clause. Court reversed the CoA. (Lexis)

- (a) Burger uses the historical/intentional modality: framers approved this by proxy
- (b) Dissent (Brennan) unpacks this, noting the varying actors who supported and ratified the Constitution cannot be presumed to have these simple rationales. He dodges the doctrinal modality, though, which would seem to invalidate this on its face as a violation of *Lemon*.

III) Judicial Review – Background, Justification, and Marbury

A) Supreme Court – Its Genesis

- 1) Supreme Court began as something of a runt
 - (a) Washington and Adams, for example, had difficulty attracting people to serve.
 - (b) Only decision of note in this period is *Chisholm v. Georgia* (1793), in which the Court has little trouble in holding that Georgia was indeed liable to suit by private individuals, though it had not waived sovereign immunity.
 - (i) 11th Amendment exists in response to this.
 - 01) Aside: Courts have read the 11th amendment broadly. *Hans v. Louisiana* held that the amendment prohibit suits against a state by one of its own citizens.

B) Judicial Review

- 1) **No provision of the Constitution explicitly authorizes federal judicial review.**
 - (a) No direct precedent from England applies.
 - (b) Locke’s social compact redefined government as having select powers delegated by the people.
 - (c) In no way was judicial review established by the time of the Constitutional Convention.
- 2) Judicial Review Problems in a Democratic Polity
 - (a) **The countermajoritarian difficulty.**
 - (i) Bickel: Judicial review is countermajoritarian in character, and is basically the concept of this minority overruling the expressed will of the majority. Judicial review is thus a deviant institution.
 - (ii) Others: This really isn’t all that deviant. Several aspects of American government are countermajoritarian: the filibuster, ratification, etc.
 - (iii) Dahl: This isn’t majoritarian! It’s the product of aggregate minorities. The Supreme Court has a tendency to be part of a larger national policy alliance. It doesn’t find itself too far outside of the mainstream too often.
- 3) Justifications for Judicial Review
 - (a) Practical consideration: the Court far more frequently reviews *state* legislation, making that aspect of its power far more prominent and germane to these discussions.

- (b) Holmes and Jackson: Monitoring state legislation is far more important than monitoring Congressional legislation.
 - (i) (*Martin and Cohens* settle the Sup. Ct.'s authority to revise the judgments of state courts.)
- (c) Supreme Court must have supervisory role
- (d) Courts protect fundamental values
- (e) Courts keep political process pure (so-called "processual" theory associated with John Hart Ely)
- (f) Courts protect minorities from majority tyranny
- (g) Court is not a distinctively counter-majoritarian body
- 4) Protecting the Integrity of Democratic Processes
 - (a) Ely: The vindication of fundamental values model for review is awful! Better to focus on judicial review as participation-oriented and representation reinforcing.
 - (b) More Ely: Democratic malfunction occurs when the processes above are undeserving of trust.
 - (c) Shapiro: Besides, seeing the Supreme Court as the problem misses the point that the *other* branches frequently have, shall we say, noticeable problems of judgment.
 - (d) Graber: Legislators also enjoy sending tough issues to the courts rather than having to weigh in on them and face potential repercussions.
 - (e) Popular Constitutionalism – **Larry Kramer** argues that popular constitutionalism was widely accepted at the Founding. Therefore, it was assumed that popular elections would be the main battleground over Constitutional meanings.
- C) **Limits on the Judiciary**
 - 1) Congressional Limits: Jurisdiction stripping! Lower courts need not exist, for one. For another, Congress can use its Constitutional power to make exceptions and regulations to the Supreme Court's appellate jurisdiction.
 - (a) Two basic schools:
 - (i) Hart – Congress may indeed combine its powers over lower federal courts and over the Supreme Court's appellate jurisdiction, but such exceptions should not go so far as to tread upon the Supreme Court's "Essential functions," whatever they are.
 - (ii) Story – Mandatory language! Congress can restrict the lower federal court jurisdiction and the Supreme Court's appellate jurisdiction, but may not do both at the same time. This is the two-tiered theory.
 - 2) Additional Prudential/Structural Limits
 - (a) **Standing**
 - (i) **Constitutional Requirements** (note that this is a conjunctive test)
 - 01) An "injury in fact" that is
 - 02) "fairly traceable to the defendant's conduct," AND
 - 03) "likely to be redressed by a favorable federal court decision."
 - (ii) **Prudential Standing Limitations**
 - 01) A prohibition on the assertion of the legal rights of third parties;
 - 02) A prohibition on asserting generalized grievances shared widely among a large group of people (no "citizen" or "taxpayer" standing, with one exception);

03) A prohibition on asserting claims not within the “zone of interests”
Congress sought to protect.

04) (*Elk v. Newdow*)

(b) **Political Question Doctrine**

(i) Constitution assigns adjudicatory power to a coordinate branch of government (textual commitment);

01) Constitution seems to emphasize that a different branch of government should handle this.

02) See: *Nixon v. US*. Nixon complains that fact-finding, etc. wasn't done correctly by the Senate. Court: you could be right, but we ain't touchin' it.

(ii) Lack of judicially administrable standards (institutional competence); OR

01) We see this a *lot* in elections cases, at least early on.

(iii) Prudential reasons against interference (comity)

01) Basically, even if it isn't enumerated, it would be a slap in the face to another branch in order to intervene.

(c) *Baker v. Carr* Political Question Factors:

(i) "Textually demonstrable constitutional commitment of the issue to a coordinate political department;" as an example of this, Brennan cited issues of foreign affairs and executive war powers, arguing that cases involving such matters would be "political questions"

(ii) "A lack of judicially discoverable and manageable standards for resolving it;"

(iii) "The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;"

(iv) "The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;"

(v) "An unusual need for unquestioning adherence to a political decision already made;"

(vi) "The potentiality of embarrassment from multifarious pronouncements by various departments on one question."

(d) Ripeness

(i) Too early to bring your suit

(e) Mootness

(i) Too late to bring your suit.

(ii) Exception: Matters that are capable of *repetition*. See *Roe v. Wade*.

(f) Certiorari practice

(i) The Court does *not* need to grant cert in most cases.

(ii) **Court will not grant certiorari if there is an *adequate and independent ground for the lower court decision in state law.***

IV) Judicial Review – The Marbury Question (for *Stare Decisis*, see **Planned Parenthood)**

A) Historical Background to *Marbury*

1) Federalist attempts at entrenchment post-Jefferson's election

(a) Federalist President Adams names Federalist John Marshall Chief Justice.

(b) Federalist Congress passes the Circuit Court Act, creating six new circuit courts with sixteen judges.

(c) Federalist Congress adopts Organic Act authorizing Adams to appoint 42 Justices of the Peace for five-year terms

- (d) Basic idea: Midnight appointments, potentially for life, of bulwarks against Republican edicts.
- (e) (Remember, the SCOTUS is a very fragile institution at this time.)
- 2) Republican Backlash
 - (a) Republican Congress repeals the Circuit Court Act of 1801.
 - (b) Republican Congress cancels the 1802 Term of the Supreme Court.
 - (c) Republican President Thomas Jefferson instructs his Secretary of State James Madison to withhold commissions from 17 Justices of the Peace (including William Marbury).
 - (d) Note: Marbury ain't an Article III judge, because he has a five-year term.
 - (e) (Congress is involved because this is DC)
- B) Justifications for Judicial Review in **Marbury**
 - 1) Justification for Constitutional supremacy. Three justifications (poorly ordered)
 - (a) Intent of framers to bind future generations
 - (b) Written-ness of the Constitution
 - (c) Supremacy Clause states US Constitution is supreme law of the land.
 - 2) Justification of Judiciary as Ultimate Interpreter of Constitution.
 - (a) Judicial competence to interpret all laws
 - (b) Judicial competence to interpret at least some cases under the Constitution (e.g., treason)
 - (c) Judges take an oath to uphold the Constitution
- C) The Countermajoritarian Difficulty
 - 1) Judges are not elected representatives. So why is it that nine elderly lawyers in Washington, DC get to tell the rest of the country that an enactment of Congress is unconstitutional? This is known as the countermajoritarian difficulty, as the court is moving against a majority.
- D) *Cases
 - 1) ***Stuart v. Laird** (US 1803, 104): This case deals with a land dispute and jurisdiction thereover (and attaches to the historical material contained early in the reading). Petitioners argued that the Supreme Court justices held commission to be Supreme Court justices but **not** circuit court judges; they should not ride circuit. There's other stuff about undermining judicial independence. **Held: the transfer of the case from a circuit court established by the now-repealed Judiciary Act to a reconstituted, "supreme" Circuit Court posed no Constitutional problems. (note that Marshall was, in fact, the Supreme at the lower level)**
 - (a) This case signifies the capitulation of the new Supreme Court to Republican hegemony.
 - 2) ***Marbury Pt. 1** (US 1803, 108): Marbury was appointed by Adams as a Justice of the Peace of DC, but his commission wasn't delivered in time by then-Secretary of State Marshall, and *certainly* wasn't delivered by his successor, James Madison. We're in SCOTUS under original jurisdiction.
 - (a) Issue #1: Did Marbury have a right to a commission?
 - (i) Yes, he did; a commission was to be delivered due to his appointment.
 - (b) Issue #2: Does he have a remedy?
 - (i) Yep; where a specific duty is assigned by law...it seems clear that the individual who considers himself injured has a remedy.

- (c) Issue #3: Is mandamus appropriate?
 - (i) Yes (We get little insight on this).
- (d) Issue #4: Can the writ issue from the Supreme Court?
 - (i) **This is the biggie.** The act establishing judicial courts of the US authorizes the SCOTUS to issue writs of mandamus. However, Article III seems to say that the Supreme Court would *only have appellate jurisdiction* over this matter. Marbury had argued that the Constitution was only intended to set a floor for original jurisdiction that Congress could add to. **Marshall disagreed and held that Congress does not have the power to modify the Supreme Court's original jurisdiction.** Consequently, Marshall found that the Constitution and the Judiciary Act conflict. (wiki) Marshall examines historical evidence to conclude that when a repugnant statute and the Constitution collide, Constitution wins. He also wrangles the Supremacy clause and bunches of other stuff. Sum: “We can’t issue the writ. Sorry.”
- (e) How could Marshall have avoided judicial review?
 - (i) Recusal
 - (ii) Delivery is unnecessary. Mailbox rule.
 - (iii) Political question. “It isn’t judiciable.”
 - (iv) **Escape Hatches 4 & 5: Statutory and Constitutional Interpretation**
 - (v) (Marshall seems to manufacture a conflict)
 - (vi) In short: Marshall sacrifices a pawn (Marbury) for a queen (longer-term power)

V) Commerce Clause I: Commerce Clause in the 19th Century

A) Art I, § 8, Cl. 3:

- 1) The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes

B) Federalist Background of the Commerce Clause

- 1) Federalism = Governmental structure through which two sovereigns occupy the same physical space.
 - (a) Ex: Income tax. NY can set state income tax without any intervention from Congress. We thus have *two* taxes from *two* sovereigns.
- 2) Values of Federalism – Why have these two overlapping spheres?
 - (a) Promotion of efficiency
 - (b) Promotion of Experimentation
 - (i) “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 309-11 (1932) (Brandeis, J., dissenting).
 - (c) Promotion of Individual Choice
 - (i) Permitting states to come to their own solutions ensures that more people’s preferences are satisfied.
 - (d) Promotion of Citizen Participation
 - (i) “If there is some genuine room for noninstrumental participation in American political life, it can realistically exist only on the local level.” Andre Rapaczynski

- (e) Prevention of Tyranny
 - (i) “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.” Federalist 51.
- 3) The Originalist Vision of Federalism
 - (a) Under the Constitution, the Congress was to have limited and enumerated powers as a check on its capacity to trump state legislation.
 - (b) Thus, if Congress enacts a statute that is consonant with the Constitution both procedurally and substantively, then it is the supreme law of the land, second only to the Constitution itself.
 - (c) **Thus, if we have a federal statute that conflicts with a state statute, the federal law will always trump.**
- 4) The Originalist Vision: RIP
 - (a) 1819: *McCulloch* decisively increases Congressional power via N&P clause.
 - (b) 1824: In *Gibbons*, the Court settles on the Commerce clause as its warrant for intervention.
 - (c) ~1900s-ish: By the early 20th century, cases under the Commerce Clause are going both ways, with some Congressional acts validated (*Champion* (1903)) and others invalidated (*Hammer* (1918)).
 - (d) 1917-ish: Great Depression forces yet another realignment...four horsemen, court-packing, etc. The “switch in time” occurs and the Court backs down over reviewing Congressional enactments. No enactment is struck down as being in excess of the Congress’s powers under the Commerce Clause from 1937 to 1995.
 - (e) 1995: In *Lopez*, the Court finally strikes down the Gun Free School Zones Act as being in excess of Congress’s commerce power. This is a major part of the Rehnquist Revolution that returns power to the states. The Court is still working out the metes and bounds of the Rehnquist Revolution. Zombie Rehnquist has little to add to it all.
- C) The Necessary and Proper Clause
 - 1) What this says is that so long as you have the power, you can engage in N&P means in order to effectuate it.
 - 2) *McCullough* stands for the principle of expansion of this clause into something far broader than it was originally.

Grants and Denials of Power in Art I.

	Granted	Denied
Congress	Powers in Art I, § 8	Powers in Art I, § 9
States	All other powers (as guaranteed by 10 th amendment)	Powers in Article I, § 10

D) *Cases

- 1) ***McCulloch Pt 1** (US 1819, 38): In 1818, MA enacted a law imposing a tax of \$15k on all banks/branches in the state not chartered by the legislature. **The only bank**

fitting this description was the US bank; McCulloch is the local cashier who refuses to pay the tax. MD managed to sue him in state court to recover the penalty for failure to comply. It gets punted up to the SCOTUS.

- (a) Issue #1: Can Congress incorporate a bank?
- (i) Marshall emphasizes that since the US government was created by the people to bind the states, that it is in fact the “Supreme” government...that, properly, its laws control. Federalism!
 - (ii) He goes on to argue that while the bank isn’t specified in the constitution, it does not take a great flight of imagination to infer it; it would be absurd to assume that, with the great grants of power contained in the Constitution, that its specificities were to be denied to (say) Congress. If one establishes a post office and post road, is it unusual to infer mail-carrying from that grant of right?
 - (iii) Seizing upon the “necessary and proper” clause, he contradicts Maryland’s argument, which is that these words imply a *binding* upon Congress; Marshall uses textualism to argue that “necessary” here doesn’t mean “*absolutely* necessary.” **The Congress should have the tools available to carry out the tasks entrusted to it.** The particular clause focused on in an implied fashion is the commerce clause.
 - (iv) He does, however, take pains to reassure readers that there *are* limits on Congressional action.
 - (v) **Holding: Thus, yes; the Act to incorporate the bank is a law made in compliance with the Constitution.**
- (b) Issue #2: Can Maryland tax the US bank without violating the Constitution?
- (i) Marshall equates the power to tax with the power to destroy, and emphasizes the limits on a state’s ability to tax; notably, it can tax its own subjects, but not those “above” it, like the federal government. He employs a slippery slope argument to show the potential terrors of an untrammelled state right to tax the federal government.
 - (ii) **Holding: states cannot tax the operations of the federal government.**
- (c) Modalities employed
- (i) Textualism/Intratextualism: Most of this is focused around necessary and proper. The interpretation Marshall wants is that “necessary” means “convenient.” As elsewhere the Constitution uses “absolutely necessary,” there exists a decent basis on which to build this.
 - (ii) Intentional/Historical - Maryland’s argument: Discussion around the time of the founding implied that explicitly including these provisions might bring the entire Constitution down!
 - (iii) Doctrinal – Nothing on point.
 - (iv) Prudential – What is a world without a bank? Versus: expansive reading of federal power will lead to tyranny!
 - (v) Structural – Feds: Yes, we agree that fed gov’t is limited and enumerated, but N&P is in Const, and this gives us a very long leash.
 - (vi) Ethical – Where is sovereignty located? The states or the people who have delegated power?

- 2) ***Gibbons v. Ogden** (US 1824, 168): NYS legislature grants Livingston and Fulton the *exclusive* right to operate steamboats in NY waters. They assign to Ogden the exclusive right to operate steamboats between NYC and NJ. Ogden brings suit to enjoin Gibbons from operating steamboats between NY and NJ; Gibbons responds that his boats are licensed pursuant to a 1793 act of congress. NY courts held for Ogden. At issue is the commerce clause. NY argues for a narrow reading, limited “commerce” to buying and seller and not including navigation. Marshall uses textualism to define “among” and “commerce” expansively. **As commerce among states must necessarily require travel, Marshall uses the “necessary,” unenumerated expansion to conclude that navigation *must be within* Congress’s commerce powers.** Thus, the next question: *can the state take parallel jurisdiction over the commerce clause grant? No, it cannot regulate this commerce (though it of course may partake in it).* Consequently, Gibbons’s grant is valid.
 - (a) Concurrence by Johnson presents a dormant-commerce-clause addition: The real difference between the majority and the concurrence is that Johnson believes that even if there had been no Congressional license authorizing Gibbons, the state of New York still could not have passed the statute, because Congress occupies the field of interstate commerce even in the absence of any enactment.

The *Lochner* Era – Commerce Clause and Substantive Due Process

VI) Commerce Clause In and Around the *Lochner* Era

- A) Short History of the Commerce Clause in the 19th and early-20th Centuries
 - 1) Before the Civil War, the focus of adjudication under the commerce clause was the validity of state regulation of commerce when Congress was silent.
 - 2) However, post-War, the Court finally began to tackle issues of Congress’s legislative powers.
 - (a) ***US v. DeWitt** (1869): Court holds that a congressional safety regulation lays beyond the congressional power.
 - 3) The Interstate Commerce Act of 1887 and the Sherman Antitrust Act inspired Congress to intervene significantly in interstate economy. The Court’s response was mixed: anything involving Railroads was within Congressional power, for example.
 - 4) Response to Sherman:
 - (a) **US v. EC Knight**: Court dismisses an action brought under the Sherman Act to set aside the American Sugar Refining Co’s acquisition of four other refinery companies. This was *manufacture*, said the Court, and not Commerce.
 - 5) Three doctrinal issues reoccur during this period
 - (a) Is the particular subject of congressional regulation interstate commerce or local activity?
 - (b) Are the purposes of regulation consistent with the purposes for which Congress was delegated the power to regulate interstate commerce?
 - (c) Does a particular instance of Congressional regulation of interstate commerce run afoul of the reservation of powers in the Tenth Amendment?
- B) Pre-New-Deal Distinctions and Limitations on the Commerce Clause
 - 1) Manufacture versus commerce – the Commerce Clause does not cover “manufacture” in this period.

- (a) Def of Manufacture from **Kidd**: “Manufacturing is transformation – the fashioning of raw materials into a change of form for use. The functions of commerce are different.”
 - (i) ***US v. E.C. Knight**: Court refuses to apply the Sherman act to a trust that manufactured 95% of the sugar in the USA.
- (b) Def. of Commerce from ***Carter v. Carter Coal Co**: Commerce is equivalent to the phrase “intercourse for the purpose of trade.”
 - (i) Basic idea from that case: the evils here are *local* evils over which the federal government has no control. These evils do have an effect on commerce, but the effects are secondary and remote, and not direct/immediate.
- 2) “Flow of Commerce” distinction
 - (a) ***Swift & Co v. US**: Upholds the Sherman Act as applied to the price-fixing practices of stockyard owners, because the stockyards were the place through which the “current flows.”
 - (i) (No, this doesn’t make much sense, and the pre-SiT Court doesn’t extend this holding beyond the facts)
 - (b) **Schechter Poultry Corp** (US 1935, 448): “Sick chicken” case. Strikes down federal regulation of the NY poultry industry because the chickens have “come to rest” there, despite being shipped from another state.
 - (i) (No, this *also* makes no sense)
- C) ***Cases**
 - 1) ***Champion v. Ames (The Lottery Case)** (US 1903, 437): An 1895 congressional act prohibits sending lottery tickets through the mails or from one state to another.
 - (a) D argues that the carrying of lottery tickets from one state to another cannot be commerce, and that regardless, lottery tickets have no inherent value (so their carriage cannot be commerce);
 - (b) D also argues that this is *prohibition*, which is not the same as the Constitutional “regulation.”
 - (i) (Court kills this distinction quickly; consequently, the regulation/prohibition question has no vitality after Champion)
 - (c) Government insists that express companies engaged for transport are instrumentalities of commerce among the states.
 - (d) The Court quickly dismisses the idea that the tickets have “no inherent value.” Regarding regulation versus prohibition, the treatment seems cursory, emphasizing the evils of the lottery and not dawdling on doctrinal concerns.
 - (e) Harlan makes the intriguing comparison that states are able to regulate lotteries; thus, why not the federal government, especially (jumping the tenth) if commerce is specifically delegated to Congress?
 - (f) Harlan emphasizes that Congress is only intending to disrupt *interstate* lottery sales; “we should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.”
 - (g) **Thus, the Court holds that the trafficking of lottery tickets can be regulated by Congress.** Congress’s power to regulate interstate commerce is *near-plenary*.
 - (h) Fuller, in **dissent**, objects that this is an exercise of a fictitious “Congressional police power.” He notes that this is even questionable as commerce, pointing to

an earlier case where the interstate furnishing of insurance contracts was adjudged to be contract, not commerce. Fuller bemoans the likely slippery slope that will result from this. There's also another (Cursory) treatment of the regulation/prohibition divide.

- 2) ***Hammer v. Dagenhart** (US 1918, 441) (*Overruled by NLRB inferentially; explicitly overruled by US. v. Darby.*): Congress passes an act intended to prevent interstate commerce in the products of child labor. Basic issue: is this within Congress's power?
 - (a) The Government contends that the source of authority is (as usual) the commerce clause.
 - (b) The Court first takes pains to distinguish prior cases (including *Champion v. Ames*) on the basis that, in those cases, interstate transport was necessary to accomplish the ostensibly harmful results, whereas here the actual "harm" was unrelated to transport—the goods themselves are ostensibly harmless.
 - (i) Harmfulness versus harmlessness. The goods themselves are harmless.
 - (ii) Congress in *Hammer* case attempts to strike at the process versus the product.
 - 01) In *Champion*, the lottery tickets themselves are ostensibly harmful; here, it's the process that's dangerous (this is a fusion of the two points articulated above).
 - (c) In response to the government's assertion that this prevents unfair competition between the states, the Court quite stridently notes that there's no power vested in Congress to eliminate unfair competition.
 - (d) ***The Court sees this as an attempt by Congress to control the States in their exercise of the police power; thus, this violates the tenth amendment, and is clearly a pretextual move. The act is invalidated.***
 - (e) HOLMES, in his dissent, notes that the Act on its face (pretext or not) is prima-facie constitutional, as it regulates the passage of items in interstate commerce; "the power to regulate commerce...could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state."

VII) Due-Process Clause In and Around the Lochner Era

- A) Due-Process Overview: The Two Arcs:
 - 1) Arc 1 ("Economic" rights)
 - (a) 1905: *Lochner* (Freedom of contract)
 - (b) 1923: *Meyer* (parental autonomy)
 - (c) 1924: *Pierce* (parental autonomy)
 - (d) 1937: *West Coast Hotel* (freedom of contract, disestablishment of)
 - (i) (DEAD DEAD DEAD).
 - 2) Arc 2 (right to privacy)
 - (a) 1965: *Griswold* (contraception)
 - (b) 1973: *Roe* (abortion)
 - (c) 1992: *Casey* (see above)
 - (d) 2003: *Lawrence* (consensual private sexual activity)
- B) Due Process Defined
 - 1) Procedural Due Process (notice, opportunity to be heard)
 - 2) Substantive due process (substantive rights not textually enumerated in Constitution like freedom of contract)

- 3) Due Process as Vehicle for Incorporation (substantive rights textually enumerated in Constitution, but not against relevant sovereign)
- C) Lochner-era due-process analyses focus on individual rights, shrinks state power, and *really* shrinks federal power
- D) Post-1938 world: lots of federal power, some individual rights, no state power, basically. Federal government can do basically whatever it wants through its commerce clause power viz. the states.
- E) History and Development of the Lochner-era Substantive Due Process
 - 1) The post-Civil-War period was marked by an intense consolidation of capitol in the hands of large entities. Legislators begin to act in regard to even the playing field; corporations struck back by encouraging the Court to nullify these regulations.
 - 2) The Supreme Court initially resisted using the 14th Amendment to strike down economic regulation
 - (a) After the Slaughterhouse Cases, corporations could not expect aid from P or I, which had been effectively demolished to that case.
 - 3) State courts act first:
 - (a) ***Matter of Jacobs** (NY 1885, 412): NY C of A strikes down a statute prohibiting cigar manufacture in tenements. The public-health rationale of the statute is not enough to overcome the interference with property of the owner or lessee and its impingements upon his liberties.
 - (b) Not all state courts were hostile to social legislation, but decisions like Matter of Jacobs were increasingly common.
 - 4) Federal courts don't immediately follow
 - (a) ***Munn v. Illinois** (US 1877, 413): Upholds a state law limiting the rates charged by grain-storage warehouses. Court asserts that state *does* have the police power to regulate the conduct of its citizens. However, the Court decides that private property may be regulated when it is "affected with a public interest," and that property becomes so affected "when used in a manner to make it of public consequence."
 - (i) This is the "bete noire of laissez faire conservatism."
 - (b) ***Railroad Commission Cases** (US 1886, 414): Court upholds state regulation of RR tariffs. Same rationale as before, but Court cautions that "under pretense of regulating fares, the State cannot require a railroad to carry persons or property without reward" nor engaged in takings without due process of law.
 - (c) ***Santa Clara County v. Southern Pacific Railroad** (US 1886, 414): "Person" in DPC of 14th amendment encompasses corporations.
 - (i) These decisions indicate a gradual weakening of the Court's anti-substantive DPC stance.
 - 5) The tipping point!
 - (a) ***Minnesota Rate Cases** (US 1890, 414): The Court strikes down a statute granting a state railroad commission unreviewable authority to set rates. The Court reasoned that this deprivation of lawful use of property amounted to a taking without due process of law
 - (i) This opinion implied that that the judiciary's role could be expanded to determine reasonableness of rates.

- (ii) Within a decade, the Court expanded its inquiries to address the substantive validity of almost *all* legislation.
 - (iii) “Economic and social theories largely abandoned in the academies found their last refuge in the judiciary.”
- 6) **Aside: Fifth Amendment gets incorporate to the states through Burlington and Quincy Railroad v. Chicago.**
- F) The Transformation and Federalization of General Constitutional Law
 - 1) *Lochner* expands the scope of federal jurisdiction by federalizing the principles of “general constitutional law.”
 - (a) Core of this law: the vested rights doctrine, which assumed the validity of a given legal regime, but protected individuals against the retroactive impairment of rights.
 - (i) *Lochner* signals a restricted view of the police power.
 - 2) “Liberty,” “Property,” and “Process”
 - (a) ***Allgeyer v. Louisiana** defines “liberty” as “embracing the right of the citizen to be free in the enjoyment of all his faculties” and to be free to use them in all lawful ways, to earn a lawful livelihood, etc.
 - (b) ***Gitlow v. NY** (US 1925): Court assumes that freedom of speech and press are among the fundamental personal rights and liberties protected by the 14th Amd.
 - 3) Scope of the Police Power
 - (a) There’s a difference between *mass* public welfare and “individual” public welfare, apparently.
 - (b) Distinctions are raised about interference with personal liberty/property being an impermissible primary object of a statute during this period
 - 4) **Net effect: Apparently, the Court upheld many statutes; it wasn’t just knocking them down left and right.**
 - (a) The Court let stand most laws that appeared to protect the health, safety, or morals of the general public or to prevent consumer deceptions
 - (b) (the few exceptions generally addressed enormously burdensome regulations when there was a less-onerous alternative)
 - (c) Cases break *both* ways before 1937, but break *only* towards Congressional power afterward.
- G) Why is *Lochner* so reviled?
 - 1) In cases where there are unenumerated rights, you are trying to protect a historically disenfranchised group. The whole Bikellian notion of judicial review involves the countermajoritarian protection of those who cannot protect themselves. But in the case of *Bakers*, it isn’t clear that this is a vulnerable minority that needs to be helped.
- H) ***Cases:**
 - 1) ***Lochner v. New York** (US 1905, 417): New York passes legislation limiting bakery workers to sixty hours a week of employment.
 - (a) The Court notes first that the statute interferes with the right to contract, here seen to inhere in the fourteenth amendment’s liberty concept.
 - (b) The Court also delineates the idea of police powers, which it defines partially as relating to the safety, health, and general welfare of the public; it situates the police powers within the state, and not the federal government.

- (i) The State, therefore, can prevent the individual from making certain kinds of contracts, which the federal government cannot interfere in.
- (ii) **We therefore have a conflict: the right of the State to limit contracts via the police power clashes with the liberty-protecting interest of the 14th amendment.**
- (c) The Court distinguishes an earlier case, *Holden v. Hardy*, as dealing with a valid exercise of the police power (re. smelting, mining, etc). ← police power as dealing with public nuisance and social danger.
- (d) By contrast, **the Court rules that there is “no reasonable ground” for interfering with those in the occupation of bakers; they are in no sense wards of the state, and the law must be seen as one pertaining to the health of the individual engaged in the role of a baker.** The Court bats aside justifications of “making the population strong and robust” (“meddlesome interference”) and ensuring the cleanliness of the baker’s product (connection is tenuous). It sees health and welfare to be a mere pretextual use of the police power, as they have an incidental and remote connection to the law.
- (e) **Thus, the Court holds that the limits of the police power have been breached, and there is no reasonable foundation for this to be necessary or appropriate as a health law.**
- (f) HARLAN, dissenting, takes a “this isn’t our business” tack, leaving the legislature to deal with the legislation. He does, however, do more than feint in the direction of acknowledging that baking can be a precarious profession.
- (g) HOLMES, dissenting, notes that the Constitution does not embody the theory of laissez faire capitalism and/or social Darwinism (via Herbert Spencer’s Social Statics), and that individuals are interfered with *all the time*; a reasonable person could think it a proper measure to enact this statute. There are countermajoritarian concerns, too.

VIII) Commerce Clause in the New-Deal Era

A) The Switch in Time via NLRB

- 1) Before 1937, the Justices were arranged as follows:
 - (a) Left: Cardozo/Stone/Brandeis
 - (b) Moderate: Hughes/Roberts
 - (c) Right: Butler/McReynolds/Van Devanter/Sutherland.
- 2) Position of the Right: Look, either amend the Constitution or don’t do this. The commerce clause, etc., cannot support these sweeping changes.
- 3) Roberts: Switched! Consistently voted with the left.

B) Roosevelt’s Plot

- 1) Judicial Reform Act: Add one Justice to the federal bench for each justice who did not retire within six months of his seventieth birthday, up to fifteen justices total. There was also a *schweet* retirement package attached.
- 2) This plan would *not* be an Article III violation. Congress can do this and has done this. Thus, FDR’s proposal was technically permissible.

C) *Cases

- 1) ***NLRB v. Jones & Laughlin Steel Corp** (US 1937, 549): *Switch-in-time*. National Labor Relations Act prohibits employers from engaging in any unfair labor practice affecting commerce. The act contains a *broad* definition of commerce and

- “affecting.” D in this case is a very large, multistate entity, but the Court goes beyond the obvious “stream of commerce” metaphor.
- (a) *Hughes notes that “if activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”* He uses an extraordinarily relaxed standard to note that unfair labor practices, leading to strife, leading to shutdown would have cataclysmic interstate effects.
 - (b) Distinction with Schechter: Schechter’s effect on interstate commerce was too remote. Here, however, there’s an immediate and direct effect; stoppage of operations due to industrial strife has an instant impact on interstate commerce.
 - (i) **This is the direct/indirect test.** “In view of respondent’s far-flung activities, it is idle to say that the effect would be indirect or remote. It would be immediate and perhaps catastrophic.”
 - (c) *H:* Thus, the statute is upheld.
- 2) ***NLBR v. Friedman Harry Marks Clothing Co** (US 1937, 550): Switch-in-time-pt. 2. Essentially the same rationale as before, only this addressing a small clothing manufacturer with various interstate ties.
 - 3) ***US v. Darby** (US 1941, 551): FLSA prescribed minimum wage and maximum hours for employees engaged in the production of goods related to interstate commerce, and prohibited shipment in interstate commerce of goods by violators.
 - (a) Issue as framed by the Court: does Congress have the constitutional power to prohibit this?
 - (b) Court completely switches tacks, *holding that pretext (“you actually want to regulate hours”) is irrelevant so long as the tools are appropriate.* It indulges in some rationale that unfair competition will result from allowing this to go forward and *explicitly overrules* Hammer v. Dagenhart. With regard to the wage and hour requirements, the Court frames the issue again as to whether the production of goods for interstate commerce is so related to the commerce that Congress can regulate it. *Court holds that it is.*
 - 4) ***Wickard v. Filburn** (US 1942, 553): Agriculture secretary wants to punish a farmer for growing wheat in excess of his allotment under the AAA, even though the wheat would’ve been used for personal consumption only. In easily the worst decision on this point ever, the Court holds that even though the farmer’s actions may be local, it will still cause a dimple on interstate commerce/market conditions due to his decreased demand (“homegrown wheat in this sense competes with wheat in commerce”); in effect, the Court embraces an indirect effect rationale.
 - (a) **This is the hilarious height of commerce-clause rationalizing;** it will come back up in Raich.

IX) Substantive Due Process in the New-Deal Era

- A) The Decline of the Judicial Intervention Against Economic Regulation
 - 1) 1934: Some cases here come before the Court’s action against economic regulation
 - (a) ***Nebbia v. New York** (US 1934, 500): Storekeeper sells milk below minimum retail price established by NY. Roberts upholds the regulation, equating due process with a lack of arbitrariness or capriciousness and rational relation. “No

constitutional principle bars the state from correcting existing maladjustments by legislation touching prices...”

- 2) **1935-37**: Court busily strikes down many of the New Deal recovery measures.
 - (a) From one case: “The state is without power by any form of legislation to prohibit, change, or nullify contracts...”

B) *Cases

- 1) ***Home Building and Loan Association v. Blaisdell** (US 1934, 501): Minn legislature enacts the Mortgage Moratorium Law, which allowed courts to extend periods during which a defaulting mortgager might redeem his property. Loan company challenged the law on the ground that it violated the Contract Clause.
 - (a) Court discusses the relationship of emergency to constitutional power, noting that enlargements of power in light of emergency must be in response to particular conditions.
 - (b) **It holds that, since an emergency existed in Minnesota, this legislation was addressed to the legitimate end; moreover, additional features, such as its temporary nature and reasonable “balancing,” allow further argument in favor.**
 - (c) ***The statute is upheld, with the Court noting that the Depression may “justify the exercise of [the State's] continuing and dominant protective power notwithstanding interference with contracts.”***
 - (d) SUTHERLAND’s dissent emphasizes that the original intent of the contract clause clearly proscribed this sort of statute and outcome and disputes the novelty of the Depression as an exigent emergency. “The only legitimate inquiry we can make is whether it is constitutional.”
 - (e) This is the quintessential case for Bobbitt’s prudential modality.
- 2) ***West Coast Hotel v. Parrish** (US 1937, 511): Minimum wage regulation for women exists, in ostensibly violation of the freedom to contract. HUGHES waxes poetic about the exploitation of women and of economic skullduggery, ***and ends up explicitly overruling Adkins v. Children’s Hospital/Lochner doctrine and upholding the minimum wage regulation.***
 - (a) From wiki: the Constitution permitted the restriction of liberty of contract by state law where such restriction protected the community, health and safety or vulnerable groups.
 - (b) Indirectly overrules *Lochner* by overruling *Adkins*, which relied on *Lochner* to overrule a federal minimum wage for women. Notice that the Court takes the broader ground for overruling, rather than fitting this case into the *Muller v. Oregon* exception.

X) Commerce Clause from the Second Reconstruction to the Rehnquist Revolution

A) Historical Background

- 1) Court becomes increasingly more progressive; even the minimal requirements of *West Coast Hotel* fall into doubt.
- 2) **Basic idea: during this era, most Congressional trammeling upon the States gets reviewed via a commerce-clause version of Rational Basis**, which we will later see more prominently in the Equal Protection context.

- 3) Ely: Courts should exercise judicial review almost exclusively to protect democracy and guarantee the fairness of legal processes.
- B) **Introduction to Tiers of Scrutiny**
- 1) **Strict Scrutiny** (“narrowly tailored to a compelling government interest”) – race, alienage, national origin, with a “government function” exception.
 - 2) **Intermediate Scrutiny** (“substantially related to an important gov’t interest”) – Sex, non-marital parentage (Craig v. Boren, Trimble)
 - 3) **Rational Basis “with bite”** (“rationally related to a legitimate gov’t interest”) – Disability, sexual orientation (Romer)
 - 4) **Rational basis** (“rationally related to a legitimate governmental interest”) – Everything else. Age! Opticians!
- C) **Carolene Products Footnote 4: A Study**
- 1) Footnote 4 allows for heightened scrutiny when
 - (a) legislation appears on its face to be within a specific prohibition of the Constitution, i.e. enumerated rights
 - (b) legislation restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation (this paragraph is needed due to the unenumeration of most voting issues), or
 - (c) statutes directed at particular religious or ethnic minorities, or prejudice against discrete and insular minorities.
- D) ***Cases (Pt 1)**
- 1) ***US v. Carolene Products Co** (US 1938, 513): Issue: Does Congress’s “filled milk act” transcend the power of Congress to regulate interstate commerce and/or does it infringe the Fifth Amendment DPC?
 - (a) In a redacted portion, Court holds that Congress has the power to prohibit shipment of adulterated foods.
 - (i) Precedent in play: *Champion v. Ames*. If a good is harmful in and of itself in crossing state lines, then Congress can regulate it as part of its commerce clause power
 - (b) Second: “We might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute...The FMA was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified.”
 - (c) On the due process front, the Court engages in a lengthy tribute to the virtues of “pure milk,” and of years and years of adulterated foods causing problems. It smacks down D’s argument that this unfairly targets Milnut by noting that the fifth amendment doesn’t have any EPC (this is before *Bolling v. Sharpe* incorporates the EPC into the 5th).
 - (i) ***It develops a rule: regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.***
 - (ii) Rational basis having been formed, this statute passes the test.
 - 2) ***Williamson v. Lee Optical Co** (US 1955, 520): Optician discrimination. This law required every individual seeking to have eye glasses made, repaired, or refitted to obtain a prescription. ***Basically assigned to show the absurd extents to which***

rational relations can reach, as the Court speculates wildly on the potential rationale behind the Oklahoma statute in order to find it constitutional. Douglas: “The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”

(a) Williamson often stands for the end of the Lochner era and the use of economic substantive due process to invalidate laws passed by legislatures.

E) Williamson and Beyond

- 1) Gerald Gunther: The Court should be less willing to supply justifying rationales by exercising its imagination! Rather, rational basis should require a statement of the state’s purpose as gleaned from some authoritative source.
- 2) The above, however, is not how it works: existing doctrine treats the actual purposes behind economic legislation as largely irrelevant to its constitutionality.

XI) The Commerce Clause in the Civil-Rights Context

A) Basic debate: should the civil rights acts rely on commerce powers or the 13th/14th amendments?

B) In the end, Congress chose to place primary emphasis on the interstate commerce clause in enacting Title II of the CRA.

C) *Cases

- 1) ***Heart of Atlanta Motel v. United States** (US 1964, 560): An Atlanta hotel challenges Title II of the CRA. *The Court notes that the Motel is easily accessible from interstate highways and advertised in various national media...* it also had a clientele comprised of 75% people from out-of-state. Court: Commerce clause gives Congress ample power in this case, and the statute is constitutional.
- 2) ***Katzenbach v. McClung** (US 1964, 560): Ollie’s BBQ! The Court notes that the testimony heart affords ample basis for the conclusion that established restaurants in such areas sold less interstate good because of the discrimination, that interstate travel was obstructed, that business in general suffered, etc. This utilizes something akin to the **Wickard** test in upholding the statute’s validity under the commerce clause.

XII) The Commerce Clause Meets its Match – The Rehnquist Court

A) **Rehnquist’s Commerce Clause Test (Use This!)**

- 1) Congress can regulate three broad categories of activity.
 - (a) **Channels of interstate commerce; or**
 - (i) (e.g. railroads, etc.)
 - (b) **Instrumentalities of Interstate Commerce or persons or things in interstate commerce; or**
 - (i) (e.g. boats, or merchandise that is traveling)
 - (c) **Activities that “substantially affect” interstate commerce**
 - (i) Questions to ask (factors, not elements):
 - 01) Is the activity economic in nature?
 - 02) Is there a jurisdictional element?

 - 03) Are there specific congressional findings?

- 04) Is there a sufficiently close link between the activity and interstate commerce?
- 2) What is a Jurisdictional Element?
- (a) An element in a statute that limits its applicability
 - (b) Note that the presence of a properly worded jurisdictional element will safeguard the statute from a challenge based on the Commerce Clause
 - (c) *US v. Jones* example: crime to damage a building used in interstate or foreign commerce. The statute gets challenged on Commerce Clause grounds after Jones throws a Molotov cocktail into his cousin's window. The Court (Ginsburg, J.) states that the statute cannot be applied to Jones, because the house in question was not used for commercial purposes.
 - (i) Observe that the Court does *not* hold that the statute is unconstitutional.
- B) Aftermath of *Lopez*: Congress has moved towards relying on the spending power.
- C) ***Cases**
- 1) ***US v. Lopez** (US 1995, 601): A senior in high school is charged with violating the Gun-Free School Zones act of 1990, which forbids "any individual knowingly to possess a firearm at a place he knows is a school zone. He challenged the act as beyond the scope of Congressional power.
 - (a) Court delineates three zones that Congress may act under the Commerce grant: 1) channels of interstate commerce, 2) instrumentalities of interstate commerce, though threats may only come from intrastate activities, and 3) activities that "substantially affect" interstate commerce. It notes that category 3 has been vague as to whether "affects" or "substantially affects" is appropriate, and goes with the latter.
 - (b) The Court quickly notes that this clearly falls under 3, if any, and that it is a criminal statute that by its terms has nothing to do with commerce.
 - (c) The government makes the usual expansive "but it *does* affect commerce!" argument; Court sees this as a slippery slope that could (plausibly) lead to almost anything. ***Rehnquist holds that the possession of a gun in a school zone is in no sense an economic activity; it thus gets reversed and remanded.***
 - (d) *Kennedy concurs* and argues that this upsets the balance of federalism (e.g. education is a state concern).
 - (i) Kennedy gives great weight to the doctrinal modality; however, he's also very much in favor of states' rights.
 - (e) *Thomas concurs* on the basis that the current interpretation of the commerce clause is bad.
 - (f) The dissents discuss a) education as an element of commerce, b) problems of "renewed judicial activism" in reviewing statutes, and c) a proper "totality" analysis.
 - (i) (Basically, this seems to pass "classic" rational basis)
 - (ii) "We should be talking about this question one removed. We shouldn't be assessing whether this link is too attenuated; we should be assessing whether *Congress* thought this link was tight enough."
 - 2) ***US v. Morrison** (US 2000, 623): Another statute invalidation, this one with VAWA. Governed squarely by *Lopez*. ***Violence against women is not particularly***

commercial nor interstate in character; thus, the interstate commerce clause could not provide a proper foundation for congressional legislation.

- (a) O'Connor: Just because the federal government can't govern the remedies here doesn't mean the states can't act!
- 3) ***Raich v. Gonzales** (US 2005, 624): *A departure from the other Rehnquist cases.* Court upholds congressional laws criminalizing marijuana even when these laws prohibited local cultivation pursuant to a valid California statute. Court reaffirms Lopez, but also addresses Wickard (of all things), **holding that Raich's activity has a "ripple" effect on interstate commerce, much as the wheat did in Wickard.** Both wheat and marijuana are **fungible commodities**. There's also an intimation that Congress can carve out a "special" prohibition where a more general prohibition already exists.

XIII) Horizontal Federalism – The Relationship Among the States

- A) Definition: Horizontal federalism is about the relationship among state governments, while vertical federalism is about the relationship between the federal government and the state governments.
- B) The Spending Power
- 1) **Dole's limits on spending power**
- (a) Exercise of the spending power must be in pursuit of the general welfare, though Congress is entitled to deference re. definition of "welfare."
- (b) If Congress desires to condition in this fashion, it must do so unambiguously
- (c) Conditions may be illegitimate if they are unrelated to federal interest in programs
- (d) Other constitutional provisions may provide an independent bar.
- (i) This last has been held to prohibit, say, inducing the states to behave in ways that are contrary to the Constitution.
- 2) ***Cases**
- (a) ***South Dakota v. Dole** (US 1987, 627): Congress passes a statute withholding highway funds from states that don't have a 21-year-old drinking age. SD argues that the statute is unconstitutional under the 21st amendment. Rehnquist held that acting indirectly under the spending power is entirely permissible, even if Congress may not regulate the drinking age directly. **"Objectives not thought to be within Art I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grants of federal funds."** This "mild encouragement" was not compulsion, and the thing was upheld.
- (i) **O'Connor** dissents, finding the link to be absolutely too attenuated. This is a blatant attempt at regulation! I tend to agree.
- C) The Dormant Commerce Clause
- 1) Definition: The idea behind the Dormant Commerce Clause is that this grant of power implies a negative converse — a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. The restriction is self-executing and applies even in the absence of a conflicting federal statute.
- (a) The textual embarrassments of DCC doctrine have led some to call for extreme restraint in this domain.

- (b) ***There is a really great chart on the Powerpoint slide that I should print out***
 - (c) Congress can bless what the Court has banned and ban what the Court has blessed. If there is a Congressional allowance of a state practice, there is no DCC problem.
- 2) **Situation 1 - Statutes that facially discriminate against interstate commerce as *virtually per se invalid* unless the State passes strict scrutiny or is a market participant.**
- (a) In cases where state law overtly discriminates against out-of-state economic interests (e.g. tariffs, quotas, etc), things are almost always per-se invalid. Note that the Court occasionally “reads into” facial discrimination (i.e. an overly burdensome law can be found to be facially discriminatory), but this was not raised in class.
 - (i) ***Philadelphia v. New Jersey** (US 1978, 732): Court invalidated a NJ statute that prohibited the importation of most solid or liquid waste originating from outside of the state.
 - 01) An invocation of benign purpose did *not* save the statute.
 - (b) To survive, regulations must *either* (1) meet strict scrutiny or (2) fall into the market participant exception.
 - (i) To meet strict scrutiny, the statute must further an important, non-economic state interest and there must be no reasonable nondiscriminatory alternatives). See **Maine v. Taylor** (1986) (Maine ban on out-of-state baitfish constitutional); “Our cases require that justifications for discriminatory restrictions on commerce pass the “strictest scrutiny.”” (**Oregon Waste Systems**)
 - (ii) Market-participant exception
 - 01) Basic idea: if the state is a market-participant, you can have facial discrimination.
 - 02) To fall under the market-participant exception, the state must be acting as a purchaser, seller, subsidizer, or some other kind of participant in the market. Because the commerce clause responds principally to state taxes and regulatory measures, the state is exempt when acting in its proprietary capacity. See ***Reeves, Inc. v. Stake**, 447 U.S. 429 (1980) (South Dakota’s state-owned cement plant’s practice of favoring in-state customers upheld)
 - 03) ***Hughes v. Alexandria Scrap Corp** (US 1976, 732): MD has a “remove abandoned cars” statute that preferences, via lenient documentation requirements, in-state firms. Question: When a state enters the market as purchaser, may it restrict its trade to its own citizens or businesses within the state? Apparently yes.
- 3) **Situation 2 – Statutes that are not discriminatory in purpose, but are discriminatory in effect**
- (a) Development of a balancing test
 - (i) Early cases attempted to divine a “direct” vs “indirect” burden on commerce.
 - (ii) ***Pike v. Bruce Church** (US 1970, 731): Statute requires that all cantaloupes grown in AZ and offered for sale be packed in AZ before shipment out of state

- (b) ***Pike** test: Where the statute regulates evenhandedly to “effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed in such commerce is clearly excessive in relation to the putative local benefits. If a legitimate public interest is found, then the question becomes one of degree.”
 - (i) (notoriously mushy)
 - (ii) This test essentially asks whether the interstate burden outweighs the state’s interest in the law.
 - (c) ***Hughes v. Oklahoma** test (refines Pike):
 - (i) Whether the challenged statute regulates even-handedly with only “incidental” effects on interstate commerce, or instead discriminates against interstate commerce either facially or practically;
 - (ii) Whether the statute serves a legitimate local purpose
 - (iii) Whether alternative means could promote this local purpose as effectively without discriminating against interstate commerce
- D) Privileges and Immunities Clause (Art IV § 2 Cl. 1)
- 1) The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States.
 - 2) Basic idea: You can’t favor your own citizens over citizens from other states.
 - (a) For example: It’s not OK for New York to say “New Yorkers can be lawyers; out of state citizens cannot.”
 - 3) **Corfield v. Coryell** (Circuit court case from the early nineteenth century): The privileges and immunities recognized in the case include
 - (a) Right to pass through or travel in state
 - (b) Right to “reside in state for business or other purposes.”
 - (c) Right to do business there whether it involves “trade, agriculture, professional pursuits or otherwise”
 - (d) The right to take, hold, and dispose of property, either real or personal.”
 - (i) The Supreme Court has repeatedly referenced Corfield in defining what P&Is exist.
 - (ii) The catalog of rights under Corfield is not fundamental in the same way that first amendment rights are fundamental.
 - (iii) Note also that in the *Slaughterhouse* cases (1873), the Court distinguishes the privileges *or* immunities of the 14th (Actual fundamental rights) from the P & I of Article IV.
 - 4) **Test: Does the legislation treat out-of-state citizens differently with respect to a recognize privilege and immunity? Use Corfield to determine the P&I interest.**
 - (a) **If so, is the legislation tailored to a substantial justification?**
 - 5) An individual *may not* sue his own state if it denies him one of these rights, though he may sue another. This requires an *interstate* action.
 - 6) ***Cases**
 - (a) In *Toomer v. Witsell* (1948), the Court struck down a South Carolina statute requiring non-residents of the State to pay a license fee of \$2,500 for each commercial shrimp boat, and residents to pay a fee of only \$25.
 - (b) In *Baldwin v. Montana Fish and Game* (1978), the Court upheld a Montana licensing scheme that charged out-of-staters more for elk-hunting licenses.

“Whatever rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them”

E) Privileges and Immunities versus Dormant Commerce Clause

- 1) Goods: Dormant commerce clause.
- 2) People, especially out-of-staters: P&I.

DCC	P&I
If state regulation discriminates, the action is invalid unless	If state regulation deprives an out-of-stater of important economic interests (e.g. livelihood) or civil liberties, the law is invalid unless the state has a substantial justification and there are no less restrictive means. NO MARKET PARTICIPATION EXCEPTION.
1) It either further an important, non-economic state interest and there are no reasonable non-discriminatory alternatives, or	
2) The state is a market participant.	
If the law does not have a discriminatory purpose, but has a discriminatory effect, then the law is invalid if the burden outweighs the state’s interest.	If the law does not have a discriminatory purpose, then the law is valid.
Aliens and corps can be plaintiffs	Aliens and corps cannot be plaintiffs

XIV) Presidential Powers in Time of War (Separation of Powers 1)

A) Separation of Powers: Early Visions

- 1) Montesquieu coins the term “separation of powers,” observing that the legislature makes the laws, the executive executes them, and the judiciary interprets them.
- 2) In Madison’s vision, the idea was not that the branch would be “separated” from the others. To the contrary, he believed that each branch should “check and balance” the others. What Madison feared was not the interaction of the branches, but rather the concentration of all powers in one branch of government.

B) In individual rights cases, the Court frequently rejects the claim that X practice is constitutional due to its longstanding history. By contrast, in National Power cases, the historical progression of a doctrine is extraordinarily influential on any given case’s outcome.

C) Checks

- 1) Legislature
 - (a) Checks on executive
 - (i) Power to override veto
 - (ii) Declare war
 - (iii)Block appointments
 - (iv)Block treaties

- (v) Impeach
- (vi) Try impeachments
- (b) Checks on judiciary
 - (i) Block appointments
 - (ii) Initiate amendments
 - (iii) Create inferior courts
- 2) Judiciary
 - (a) Checks on legislature
 - (i) Judicial review
 - (b) Checks on executive
 - (i) Judicial review
 - (ii) CJ presides over Senate during presidential impeachment
 - (c) Note that judicial review could be housed under separation of powers
- 3) Executive
 - (a) Checks on legislature
 - (i) Power to veto
 - (ii) President is Commander in Chief of the Military
 - (iii) VP is President of the Senate
 - (iv) President can force adjournment when both houses cannot agree on adjournment
 - (b) Checks on judiciary
 - (i) Power to nominate judges
- D) Some Constitutional Limits on Executive Power
 - 1) Veto power (Article I, Section 3, Clause 2)
 - (a) Congress can override veto.
 - 2) Pardon power (Article II, Section 2, Clause 1)
 - (a) The President cannot pardon anyone for a violation of a state criminal law, as Article II, Section 2, Clause 1 only refers to “offenses against the United States.” (think of this as a check based in federalism, not separation of powers). In addition, the President cannot pardon someone who has been impeached (a separation of powers check).
- E) Emergency Power in War-Time
 - 1) Jackson’s **Youngstown** factors:
 - (a) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess plus all that Congress can delegate.
 - (b) When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain.
 - (c) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any of Congress over the matter.
 - 2) ***Youngstown Sheet and Tube Co v. Sayer** (US 1952, 823): Dispute arises between steel companies and their employees. The employees threaten to strike. Long story

short: in wartime, the President believes that a work stoppage would be deleterious, so he issues an executive order that, inter alia, seizes the steel plant.

- (a) BLACK notes that any eminence of Presidential power here must stem either from an act of Congress or the Constitution. Finding there to be no authorizing statute on point, he states that the only possible authority for such Presidential action must flow from the Constitution. Black is leery of a Constitutional source of this authority. All in all, Black sees this seizure as being more properly a Congressional action, as Congress has exclusive legislative control in this domain.
 - (b) FRANKFURTER concurs, noting that the Labor Management Relations Act did *not* lodge this power with the President; he distinguishes away prior seizures either on pre-authorization ground or, in the case of Lincoln, by making a distinction between home territories and hostile (i.e. confederate) territories.
 - (c) DOUGLAS concurs, worrying about the expansion of executive power allowing the seizure would effect, and rejects the prudential modality in locating the power to take in the 5th Amendment and Congress.
 - (d) JACKSON concurs most famously, noting three categories of authority and finding that the current controversy lodges in the third.
 - (e) The DISSENTS note that these were extraordinary times, that the mills were seized for public use, and that Congress had ratified similar action in the past. Besides, this was a stopgap, not a permanent seizure!
- 3) Youngstown Interpretations
- (a) Those in the majority see this as a case about strikes and industrial peace, stressing that the President has statutorily no power to act as he did. The dissenters see this more as a tapestry of laws that the President attempts to balance.
- 4) Epilogue: War Powers Act of 1973
- (a) Inserts Congress more forcefully into declarations of war. President must submit a report to Congress within 48 hours of the introduction of American troops, in the absence of a declaration of war; this triggers a 60-day decisionmaking period, at the end of which the President must withdraw troops unless the Congress has declared war, extended the period, or is physically unable to meet.
 - (b) (Every President since Nixon has argued that the “termination with no approval” provision is unconstitutional as a trammeling upon the President’s commander-in-chief powers)
 - (c) Moreover, the Act is mostly irrelevant, as many conflicts since have proceeded with nary a Congressional whisper.
- F) Race, National Origin and Reasonableness in Wartime Powers
- 1) ***Korematsu v. United States** (US 1944, 966): Executive Order No. 34 states that all persons of Japanese ancestry are to be removed from Military Area No. 1 to detention camps (this is supported by a coterminous Congressional statute). Fred Korematsu challenges the Order’s constitutionality.
 - (a) Despite announcing early in his opinion that decisions based on race are immediately suspect, Black fudges, later declaring that this isn’t about race but instead about security. He balances the balance of powers and finds it sound, seeing a distinct Congressional delegation of authority combined with a proper emergent situation to encourage deference given to the legislative actors: “we

cannot say that the war-making branches...did not have ground for believing that in a critical hour such persons could not be readily isolated and separately dealt with.”

- (b) The majority opinion does not touch on the other, ancillary aspects of the Order, and merely addresses the Constitutionality of the exclusion order in question (in other words, it does not adjudicate the Constitutionality of the various reporting provisions).
 - (c) FRANKFURTER somewhat ironically sees this as a “reasonably expedient military precaution,” and would thus find this to be a war power properly flexed during a time of war.
 - (d) MURPHY, in dissent, sees this as a gross violation of the 14th amendment, based on race and with no real articulated rational basis (despite the use of “rationality” here, this is closer to actual SS analysis).
 - (e) JACKSON, dissenting, predicates his discontent on the philosophy that military reasonableness in wartime should not confer immediate Constitutionality. Courts may be generally unable to review these military orders—which, while unconstitutional, will generally be fleeting—but that does not mean that they should be found to be Constitutional *should* they be reviewed by a Court; and, particularly, he despairs the precedential impact of this outcome.
 - (i) Korematsu may *invoke* strict scrutiny, but it certainly isn’t applied in the form we know, and Black dodges extravagantly in saying that this *isn’t* about race.
- G) The Great Writ
- 1) Habeas, Defined
 - (a) Habeas Corpus is a writ dating back to at least the 13th century. It’s the legal action that challenges an unlawful detention.
 - (b) This isn’t an affirmative right, per se, but there’s a suspension clause. From this, then, has been an inference that we have this right so long as there’s been no suspension. See Art I § 9.
 - (i) (Lincoln did this!)
 - (ii) Suspension of the writ tightly bound to martial law.
 - (c) **Only Congress has the power to suspend the writ of Habeas Corpus**
 - 2) Ordinary Courts vs. Military Tribunals
 - (a) Ordinary trials: trial by jury! Speedy! Right to confront! Proof beyond reasonable doubt! Procedure! Indictment!
 - (b) Military tribunals: military judges are arbiters! Non-public and not especially speedy. No compulsory processes for defense witnesses. No BoP on prosecution. No unanimity requirement for the death penalty (originally; this has been changed). No GJ indictment.
 - 3) ***Cases**
 - (a) ***Ex Parte Milligan** (US 1866, 287): Milligan is arrested by US officials in Indiana in 1864 and is charged with planning an armed uprising to seize Union shiz. Indiana was *not a theater of military operations*; however, as Indiana is not a Confederate-unfriendly jurisdiction, the military elects to try Milligan before a military commission.

- (i) **The Court declares that “martial rule can never exist where the courts are open” and their jurisdiction unimpeded.** Moreover, other options were available, to the full knowledge of the military commanders.
 - 01) Unless martial law has been declared in the country, this is the only circumstances under which a military tribunal can step in, because the military is the only entity left that can exercise sovereignty.
- (ii) **H: *Thus, the Constitution was plainly infringed by this action.***
- (iii) CHASE concurs, noting that Milligan is entitled to be tried in a civilian court, but noting further that Congress has failed to authorize any deviations from trial by jury in a time of war; he construes the Habeas Corpus Act, which gives the President the power to suspend the writ, as demonstrating this only more strongly by the lack of suspension.
 - 01) Military courts can do this, but only if Congress authorizes them, which it hasn't.
- (b) ***Miller v. US (US 1871, 290):** The Court upholds the constitutionality of the Confiscation Acts, which allowed ex parte seizure of property belonging to persons believed to have supported the rebellion.
 - (i) Strong places the authority for this within the war powers of the government, and are thus not negated by the statements to the contrary found in, inter alia, the fifth and sixth amendments: “any property which the enemy can use...is a proper subject of confiscation.”
- (c) ***Ex Parte Quirin (US 1942, 872):** Eight Nazi saboteurs, all in a row, land in NY and get arrested. One argues that he's an American citizen; meanwhile, Roosevelt issues an order authorizing military tribunals for them, and they are charged with violating the law of war. They seek habeas review.
 - (i) The Court notes that Congress has explicitly created these tribunals for violations of the laws of war, and brushes aside complaints that “laws of war” goes undefined by Congress; clearly, the Court suggests, spying without uniform is a contravention of these codes.
 - (ii) **Moreover, American citizenship is irrelevant, and does not relieve an enemy combatant of the consequences of belligerency.**
 - 01) Scalia would disagree *furiously* about the citizenship distinction, as we see later. “If you're a citizen, you get the rights, unless Congress has suspended.”
 - (iii) The Court distinguishes Milligan by emphasizing that Milligan had never been a resident of the states in rebellion, and was not a belligerent either for POW purposes or for law-of-war-contravention purposes.
 - (iv) **H: The Court limits its eventual holding to a finding that Haupt's conduct was, indeed, a violation of the law of war that the Constitution and Congress authorize to be tried by military tribunals, and that the President's order was properly supported by Congressional authorization (i.e. Youngstown Cat. 1).**
 - 01) (Implicit factual distinction from Milligan: it was unclear whether Milligan was actually guilty of any offense, and as such his guilt/innocence was inseparable from the jurisdictional question. Haupt,

by contrast, is *actually* a belligerent, albeit not one as yet found as such in court.)

02) (Some realism: Milligan was decided after hostilities had ended. Quirin was *not*.)

H) War on Terror and the Separation of Powers

1) Timeline of cases and statutes

(a) **June 24, 2004: Hamdi and Rasul**

- (i) Hamdi holds that ECs can be detained, but they have the right to challenge their classification as combatants. They can be tried by a military tribunal so long as that tribunal accords them DP rights.
- (ii) Rasul: Do non-citizen detainees at Gitmo had the right to petition for statutory habeas in US federal courts? Statutory habeas is distinct from Constitutional habeas. To file for habeas, one must either be a citizen or be under the jurisdiction of the court. Cuba has “de jure” sovereignty over Gitmo, but we basically control it. Court decides that *CONTROL* is the issue. So yes. Result: even though there are precedents to the contrary (esp in Eistranger), Gitmo is different due to the level of US control
- (iii) Sum: Detainees must be permitted to challenge their enemy combatant status, and are permitted to file habeas petitions, regardless of whether they are citizens or not, and regardless of whether they are in the state or on Guantanamo. The DoD creates Combatant Status Review Tribunals to determine whether individuals are ECs.

01) Only question before a CSRT: Are you an EC? If you are deemed to be an EC, then you can be detained

(b) **December 30, 2005: Bush signs DTA.**

- (i) Detainee Treatment Act is sponsored by John McCain. It goes through Congress because it splits the difference: it protects all prisoners from inhumane treatment but also strips the habeas jurisdiction of the Supreme Court.
- (ii) (this jurisdiction stripping is AOK via Marbury)

(c) **July 27, 2006: Hamdan**

- (i) Stevens makes two major claims here:
 - 01) The DTA, AUMF, and UCMJ do not permit these tribunals because they merely acknowledge them, rather than authorizing them
 - 02) The UCMJ prohibits these tribunals, both through its uniformity requirement and its internalization of the laws of war.
- (ii) In essence, Stevie is saying that this violates the UCMJ, and through the UCMJ, the Geneva Convention. Why is this a *constitutional* case as opposed to merely a case regarding statutory interpretation?

(d) **October 17, 2006: MCA**

- (i) Returns the issue of tribunals to Youngstown category 1 in unequivocal terms.

(e) **June 12, 2008: Boumediene**

- (i) Boumediene says habeas can apply to foreign nationals apprehended and detained in distant countries during a time of serious threats to our Nation’s security.

- (ii) Boumediene squarely poses the question of whether the Congress has unconstitutionally suspended habeas. Unlike the DTA at issue in *Hamdan*, the MCA at issue in *Boumediene* clearly strips SCOTUS over pending cases. The question is whether this is tantamount to a suspension without being framed by Congress as one.
- (iii) Kennedy factors:
 - 01) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;
 - 02) the nature of the sites where apprehension and then detention took place; and
 - 03) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."

2) *Cases

- (a) ***Hamdi v. Rumsfeld** (US 2004, 841): Gov't alleges that Hamdi (born an American citizen) has taken up arms against the US, and wishes to classify him as an "enemy combatant" whose status justifies holding him in the US indefinitely.
 - (i) Issue 1: does the executive have the authority to detain citizens who qualify as "enemy combatants," which SDOC defines as "part of or supporting forces hostile to the US or coalition partners?"
 - 01) Gov't argues that the executive possesses plenary authority to do so via Article II; however, the Court (O'Connor) dodges this by agreeing that Congress authorized detentions through the AUMF (the Court also uses the AUMF to neatly deal with Hamdi's Non-Detention Act concerns), which puts this into **Youngstown Category 1**.
 - 02) The Court uses Quirin for the principle that Hamdi's citizen status is absolutely irrelevant to this determination, and distinguishes Milligan (which it needs to do, as it supports the basic idea of detention of enemy combatants) based on that case's lack of an active theater of war.
 - 03) **H1: Thus, the executive can detain enemy combatants, as properly authorized by Congress and supported by an active theater of war.**
 - (ii) Issue 2: What is due citizens who contest EC status?
 - 01) The Court emphasizes that there is a significant factual issue attaching to Hamdi's detention that is not as nearly cut-and-dried as the government suggests, and it rejects the government's suggestion that investigations would be deleterious to national interests.
 - 02) **H2: The Court, finding the government's balance to be ill-conceived, holds that a citizen-detainee seeking to challenge his classification as an EC must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's assertions before a neutral decisionmaker (with fewer privileges afforded than those of a civilian court; however, with a greater BOP on the government than a "some evidence" standard, which is adjudged to be Constitutionally impermissible on DPC grounds); however, these proceedings may be tailored based on the realities of the current wartime exigencies. Oh, and Hamdi also has a right to counsel on remand.** The Court explicitly

rejects the Government's rationale that SOP principles mandate a heavily circumscribed role for the courts.

- (iii) SOUTER's partial concurrence disputes the holding that Hamdi's categorization of an EC is authorized by the AUMF as required by the non-detention act. Err on the side of liberty in interpreting the NDA!
 - 01) Souter believes that the non-detention act was *not* superceded by the AUMF. He thus throws this in **Category 3 of Youngstown**.
- (iv) Scalia's dissent (joined by Stevens, of all people) has, as its core principle, the idea that you can either suspend HC or not, but that you can't half-ass it; as it is clear that the AUMF is not an implementation of the suspension clause, Scalia would *completely* reverse the lower court.
 - 01) **Scalia also makes a clear citizenship distinction: if you're a citizen, you get tried according to "established" DPC principles.**
- (v) Thomas, on the other hand, would completely defer to military judgment in this case and unitary executives 'til he's blue in the face.
- (b) ***Rumsfeld v. Padilla** (US 2004, 863): Padilla is an American citizen arrested at O'Hare, declared an Enemy Combatant and thoroughly limboed. The Court punts on his habeas petition, holding that he should have properly filed it in a different district court.
- (c) ***Rasul v. Bush** (US 2004, 868): Two Australians and 12 Kuwaitis captured abroad are held at Guantanamo. They challenge the legality of their detention, arguing that they had never been combatants against the US and had been afforded no process.
 - (i) STEVENS holds that they have the right to bring a HC petition. He distinguishes Eisenstranger (which held that there was no constitutional or statutory relief to HC for German citizens captured by US forces in China) by focusing on that case's core factors of enemy aliens who had never resided in the US who were tried and convicted by the military for offenses outside of the US. These guys were not nationals of countries at war with the US, denied that they had engaged in nastiness, and were imprisoned in what was (functionally) a US jurisdiction (Kennedy concurs forcefully in this point). Thus, Congress had provided a statutory right to habeas protection in US courts.
- (d) ***Hamdan v. Rumsfeld** (US 2006, S.87): Hamdan is a citizen of Yemen and a driver formerly employed to work on an agricultural project that Osama bin Laden created to support the people of Afghanistan. Hamdan was captured by militia forces during the invasion of Afghanistan and turned over to the United States, then sent to the Guantanamo Bay Naval Base in Cuba. In July 2004, he was charged with conspiracy to commit terrorism, and the Bush administration made arrangements to try him before a military commission authorized under Military Commission Order No. 1 of March 21, 2002. Hamdan filed a petition for a writ of habeas corpus, arguing that the military commission convened to try him was illegal and lacked the protections required under the Geneva Conventions and United States Uniform Code of Military Justice.

- (i) **H: STEVENS creatively interprets the Detainee Treatment Act to conclude that Hamdan’s action is not barred, due to its pending status and what was likely sloppy drafting.**
- (ii) The Court notes that Quirin authorizes *some* MCs, so this isn’t a total preclusion; he reframes the question as to whether *this* commission is justified. And there are problems! Firstly, the charge seems unsupported by facts. Moreover, the Government’s stated procedures will violate the Geneva Conventions.
 - 01) Justice Breyer wrote a one-page concurring opinion, joined by Justices Kennedy, Souter, and Ginsburg. Breyer contended that the commissions are not necessarily categorically prohibited, as long as Congress approves them.
 - 02) SCALIA dissents, hating everything.
 - 03) THOMAS also dissents, UNITARY EXECUTIVE. Also, POLITICAL QUESTION.
- (iii) The key constitutional principle of Hamdan, mentioned only briefly, seems to be that the Executive must follow valid laws passed by Congress, even if these laws constrain how he conducts warfare and foreign policy.
- (iv) Hamdan *also* holds that Common Article 3 is incorporated into the UCMJ as part of the laws of war.
- (e) ***Boumediene v. Bush** (US 2008, Supp 62): (Wiki) In 2006, Congress passed the Military Commissions Act of 2006 (MCA). The Act eliminates federal courts' jurisdiction to hear habeas applications from detainees who have been designated (according to procedures established in the Detainee Treatment Act of 2005) as enemy combatants.
 - (i) The majority found that the constitutionally guaranteed right of habeas corpus review applies to persons held in Guantanamo and to persons designated as enemy combatants on that territory. For one, the US maintains de facto sovereignty over Guantanamo Bay, which connotes rights—and extends the suspension close—to those held there. If Congress intends to suspend the right, an adequate substitute must offer the prisoner a meaningful opportunity to demonstrate he is held pursuant to an erroneous application or interpretation of relevant law, and the reviewing decision-making must have some ability to correct errors, to assess the sufficiency of the government's evidence, and to consider relevant exculpatory evidence.
 - (ii) ***The court found that the petitioners had met their burden of establishing that Detainee Treatment Act of 2005 failed to provide an adequate substitute for habeas corpus.***
 - (iii) SOUTER concurs, emphasizing that this holding (and especially the determination of sovereignty over Guantanamo) is no bolt from the blue.
 - (iv) ROBERTS dissents, calling the procedural protections the most “generous” afforded aliens.
 - (v) SCALIA is even more unbearable, rending his garments at the thought of more AMERIKUNS being killed because you gave someone the opportunity to file a petition.

XV) The 14th Amendment – Promise and Limitation

A) History of the 14th Amendment

- 1) Prompted at least in part by ***Dred Scott** (1857), which held that Dred Scott was not entitled to sue because he was not a citizen. No individual of African descent could be a US citizen.
- 2) Just because DS was a citizen of a state did not mean that he was a citizen of the US, and one of the rights reserved to the latter was the right to sue in federal court.
- 3) 14th Amendment explicitly supersedes this via § 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.

B) Form and Function of the 14th Amendment

- 1) § 1 of the 14th amendment received surprisingly little attention during the legislative process.
- 2) Rogers Smith: 13th and 14th amendments must be understood in the context of the “free labor” ideology of the Republican party.
- 3) § 2: Privileges or immunities of the United States, equal protection, and due process.
 - (a) **Important note:** PorI here is read *very differently* from P&I in Article IV.
 - (b) The most sensible reading here is that PorE grants substantive rights, due process makes sure that those rights cannot be denied without certain procedures being followed, and equal protection to mean that if something is not a right, it will be disbursed in an evenhanded manner.
 - (c) (We depart from this, however, as the legislative history is far from clear and the Slaughterhouse cases ruin the PorI clause right out of the gate)

C) Types of “Rights”

- 1) Civil rights: sue, testify, travel, etc.
- 2) Social rights: Choose one’s associates, associate, marry
- 3) Political: Voting, hold office, etc.

D) Different conceptions of race adopted by the Court (Gotanda)

- 1) Status race (race as a marker of social status)
 - (a) This is the white supremacy problem.
- 2) Formal race (Race as bloodlines or skin color)
 - (a) Very *thin* racial model.
 - (b) Leads to color-blind EP jurisprudence, sometimes known as the anti-classification principle.
- 3) Historical race (race as a phenomenon that creates difference only through contingent historical practice)
 - (a) All a function of historical movements
 - (b) leads to remedial EP jurisprudence...the anti-subordination approach. When courts argue that racial distinctions are odious because they breed interracial hostility, this is historical race.
- 4) Culture race (race as culture, community, and consciousness)
 - (a) leads to pluralist EP jurisprudence, sometimes known as the diversity principle.
- 5) Ian Haney-López: Race is strictly a social and historical construct!
- 6) Kwame Anthony Appiah: Race is just a placeholder or a metonym for culture.

E) *Cases

- 1) ***Strauder v. West Virginia** (US 1880, 351): Strauder is convicted of murder in a state court by a jury that excluded black persons.
 - (a) Issue: Whether citizens have the right to a trial by a jury selected without racial discrimination.
 - (b) Court, in adopting a somewhat “paternalist” view of the 14th amendment, declares that it should be interpreted liberally; moreover, it decides that the Virginia statute is clearly discriminatory. It finds the clearest articulation of the 14th, however, in solving divisions predicated on race.
 - (c) **H: *The Court therefore finds a clear discrimination on the basis of race in violation of EPC, and while it hedges somewhat (in saying that the State can set certainly qualifications for juries), it finds a relatively expansive power to fix the wrongs of a discriminatory statute.***
 - (d) Dissent distinguishes between political, civil, and social rights, holding that the fourteenth only protects the civil in character; additionally, it finds galling the *very idea* that all-white juries may not be fair!
 - (e) Standing issue: We don’t have the prudential standing doctrine yet; besides, this isn’t a requirement. Also, if you look at the purposes of standing law, what you really want is zealous advocacy. Those concerns aren’t really implicated here.
- 2) ***The Slaughterhouse Cases** (US 1873, 320): Louisiana enacts an act “protecting the health of the city of New Orleans,” whose purpose was to remove slaughterhouses from the more densely populated parts of the city. It authorizes the incorporation of a company to construct a large slaughterhouse available to any butcher upon payment of reasonable compensation, while locking out competition; it is, as the Court puts it, a “monopoly granted by the legislature.”
 - (a) The Court situates this action in the category of **preventing a nuisance**, which would imply a flexing of the police power. Noting the uncomfortable distinction here of the State forming a corporation as the governing entity (instead of, say, granting this power to New Orleans, which the Court assumes would be entirely uncontroversial as an exercise of the police power), Justice Miller cites McCulloch’s “necessary and proper” framework to imply that the corporate step is but a small one.
 - (b) Court brushes aside objections under the 13th amendment (“***this has nothing to do with slavery; the 13th isn’t this metaphorically broad***”), and it reads the 14th’s PorI language to mean that the states cannot abridge rights of citizens of the *United States* (which are narrow: high seas protection, and so on and so forth), distinguishing this from the (broader) P&I grant in Article IV.
 - (c) H: Miller dispenses quickly with due process concerns (“this isn’t a deprivation of property”) and EPC worries (“applies to Negroes as a class”) to ***hold, finally, that the Louisiana action was Constitutional.***
 - (d) FIELD dissents, extolling a broader reading of the 14th and, particularly, a fundamental-rights framework for PorI.
 - (e) BRADLEY dissents, citing freedom of trade as a fundamental right inherent in PorI.
 - (f) SWAYNE gives a lovely dissent touching on the necessity of state guarantees of freedoms.
 - (g) Three moves made by the Court:

- (i) It acknowledges that P&I (Art 4) is a robust set of rights, though it has no substantive content of its own.
 - 01) (precedent at this time dictates that the rights of citizens in the several states are robust)
 - (ii) It distinguishes between P&A of the states of Art 4 and P or Immunities of the US.
 - (iii) It implies that P&I of the states is greater than P or I of the US.
- F) The Slaughterhouse Cases and Bifurcated Citizenship
- 1) Summary: The Slaughterhouse cases emphasize the distinction between a “US Citizen” and a “citizen of a state.”
 - 2) ***US v. Cruikshank** (US 1875, 334): Supreme Court relies on Slaughterhouse to quash indictments under the 1870 Enforcement Act. Really ugly fact pattern, and (from what I understand) a really unfortunate holding; basically, this is *anti-incorporation*, holding that the BoR doesn’t apply against the states at all. “The Court did not incorporate the Bill of Rights to the states and found that the First Amendment right to assembly "was not intended to limit the powers of the State governments in respect to their own citizens" and that the Second Amendment "has no other effect than to restrict the powers of the national government."” (Wiki)
 - 3) ***US v. Reese** (US 1875, 335): Strikes down provisions 3 and 4 of the Enforcement Act. Court notes that the right to vote is a right guaranteed by the states; as such, Congress overstepped its reach here in legislating without specifically requiring a showing of racial animus.
 - 4) ***Loan Association v. Topeka** (US 1874, 331): Invalidates the state’s granting of municipal bonds on the theory that they lie beyond the state’s taxing power. The Court here finds its authority in a “general” constitutional law of opposition to unlimited power.
 - 5) ***Davidson v. Louisiana** (US 1878, 331): Ps claim that a property tax deprived them of their property without DP. Court: The state tax may violate some provision of the State Constitution, but the US Constitution imposes no restraint on the state here; it may violate some principles of general constitutional law, but we’re not sitting in review of a federal court decision here!

XVI) 14th Amendment Part II – Further Limitation and the Road to Brown

- A) The Civil Rights Cases (see below) further limit the reach of the reconstruction amendments by establishing four propositions:
- 1) 13th Amendment does not prohibit or empower Congress to prohibit most racially discriminatory practices, other than involuntary servitude (which is colorblind).
 - (a) The Court sets a high boundary for “slavery.” Basically, the idea is that this doesn’t rise to the level of slavery or involuntary servitude.
 - (b) What the Court is doing here is saying “You are absolutely right that the 13th Amendment applies to private actors. But the catch here is that slavery is very narrowly construed, and the badges and incidences of slavery are not broad enough to cover the problems contained herein.” Court’s generous reading of the amendment *textually* doesn’t translate into an expansive reading conceptually.
 - 2) Power of the 14th Amendment is essentially remedial

- (a) (this does not, however, imply that Congress must wait to pass a law, but merely that it must tailor the law to respond to potential mischief)
- (b) “Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against”
- 3) “State Action Doctrine via § 5” – 14th amendment does not empower Congress to forbid discrimination by private persons.
 - (a) ***US v. Harris** (US 1883, 384): Court invalidates the KKK Act, overturning criminal convictions against members of a lynching party on the ground that Congress has no power to reach private conspiracies under § 5 of the 14th Amendment.
 - (i) But see: ***US v. Guest** (US 1966, 383) does allow Congress to regulate private parties who conspire with state officials to abridge constitutional rights.
 - (ii) ***Ex Parte Yarbrough** (US 1884, 384): Court upholds Congress’s right to reach purely private conspiracies to interfere with the right to vote in federal elections. This is an early (and, from what Law of Democracy suggested, somewhat anomalous) expression of the “political processes are different” rationale.
- 4) “State Action Doctrine inherent” – 14th Amendment does not of its own force prevent private discrimination, as distinguished from discrimination imposed or supported by the state. This remains the articulated doctrine today.

	Public Actors	Private Actors
Prohibition of Badges and Incidents of Slavery	13.2, 14.5	13.2
Prohibition of EP violations beyond B&I of slavery	14.5	Neither

- B) ***The Civil Rights Cases** (US 1883, 373): § 1 of the CRA of 1873 provided that all persons within the US be entitled to the full and equal enjoyment of most public accommodations.
 - 1) The Court frames the issue at hand as the Constitutionality of the CRA itself. It focuses upon the “enactment” clause of the 14th (upon which the CRA is predicated), and characterizes it as essentially *remedial*/corrective; in other words, Congress can only *correct* errant state action, not proscribe action which is within the proper boundaries of state regulation.
 - 2) The CRA, the Court observes, “makes no reference whatever to any supposed or apprehended violation of the 14th amendment.” The Court distinguishes the “jury” prong of the CRA (which had recently been found to be Constitutional) by characterizing *that* particular provision as corrective in character, pointing to a plenitude of state laws which the CRA did, in fact, correct through its application.
 - 3) It also (somewhat tenuously) distinguishes the Enforcement Act provisions which guarantee the “classic” civil rights (sue, give evidence, etc.) as also being corrective, but again, the rationale here is not entirely clear.
 - 4) An attempt to tie this in under the 13th amendment enforcement prong also fails, as the 13th amendment *forbids* slavery, while the 14th amendment is a “mere prohibition”

- on certain state laws (I know, I know...); **thus, 13th Amendment action can be direct, whereas 14th amendment action can only be corrective.**
- 5) This is moot, though, **as the Court reasons that exclusion from inns “has nothing to do with slavery or involuntary servitude,” and is thus not a “badge or incident” of slavery.** The opinion ends with an awful aside about how a person, emerging from slavery, must at some stage become an “ordinary citizen.”
 - 6) **H: The relevant portions of the CRA are thus ruled void.**
 - 7) HARLAN I dissents, finding that the 13th Amendment should properly allow for the Congressional routing of the “badges and incidents” of slavery; thus, given the public or quasi-public nature of most of the prohibitions contained in the CRA, it should be upheld under these grounds. He extends this public institution/government-regulation rationale to a similar 14th-amendment reasoning.
- C) Separate but Equal – The establishment
- 1) Basic idea: post-Strauder, most cases seem to follow that decision’s aside about blacks being “abject and ignorant” post-slavery than its more-empowering language about rights.
 - 2) Historical flashpoint: Compromise of 1877, in which Southern Democrats abandoned their support of Sam Tilden and supported Pres. Hayes in exchange for the end of reconstruction.
- D) ***Plessy v. Ferguson** (US 1896, 359): Louisiana statute requires railroads carrying passengers within the state to “provide equal but separate accommodations” for the races, and imposed misdemeanor penalties for those who would insist on crossing those boundaries. There were also penalties (and obligations) attached to railroad officers. P was an “octoroon” who attempted to sit in a coach reserved for whites. Anyway, P attacks this on 13th and 14th amendment grounds.
- 1) The 13th is dispensed with quickly on the usual servitude distinctions, and the Court’s analysis turns to the 14th. **It declares that the separation of the races abridges neither P&I, nor DPC, nor EPC (although it acknowledges that the responsibilities and immunities granted to train officers are probably unconstitutional).**
 - 2) First, while the Court accepts the idea that a “reputation” can be property, it fails to see how refusing to sit a black man in a white car affects that reputation, as he never possessed the “property” of white reputation. It limits the slippery slope argument by emphasizing that exercise of the police power must be “reasonable,” citing Yick Wo; thus, the inquiry becomes a gauging of the reasonableness of the instant statute.
 - 3) **The Court concludes that enforced separation does *not* stamp blacks with a “badge of inferiority,” as only *discrimination*, and not segregation, is pernicious; this, combined with ruminations on the “proper” mode of interracial colloquy, leads to the conclusion that the statute is not unreasonable.**
 - 4) HARLAN dissents, resurrecting his “badges and incidents” language, and at least partially urging race-blindness in statutory construction. While giving a quick sop to immediate conditions of white supremacy, he sees the rationale adopted by the majority as being a sort of willful blindness. He would hold that the arbitrary separation of citizens on the basis of race is a badge of servitude wholly inconsistent with equality before the law.
- E) The Spirit of Plessy

- 1) Charles Black, *The Lawfully of the Segregation Decisions* (368) - Segregation is and always has been directly tied to white supremacy and the creation of a community of “others.”
- 2) Reconciling *Strader* and *Plessy* :it is possible to argue that while *Strader* treated blacks different by excluding them from juries in an explicit fashion, the law upheld in *Plessy* was “conceptually” neutral, prohibiting each race from mingling with the other.
 - (a) (in this sense, *Plessy* was presaged by ***Pace v. Alabama***, which upheld the prohibition of interracial marriage; the punishment there was bidirectional, as the persons of both races were subject to the same punishment)
- 3) C. Vann Woodward: The Court, from 1880 to 1930, is engaged in a bit of reconciliation achieved at the Negro’s expense.
 - (a) Exception: ***Buchanan v. Warley*** (US 1917, 370) in which the Court holds invalid under the DPC a Louisville ordinance prohibiting black persons from residing in a majority-white block and vice versa. The fact pattern of this one dealt heavily with the “right of a seller to dispose of his property,” and also (just coincidentally) happened to, again via its fact pattern, injure the black defendant, so take this with a grain of salt. This is best distinguished under the headings of uniqueness of real property and the vagaries of economic DP.
 - (b) Another exception: Court struck down several blatant statutory attempts to circumvent the 15th amendment. However, the disenfranchisement of Southern blacks was accomplished by other means.
 - (c) ***Giles v. Harris*** (US 1903, 372): Basic idea: we’re not granting injunctive relief and putting the South in political receivership.

XVII) Equal Protection I – Separate but Equal Disestablished

- A) The Road to *Brown* – The NAACP as the major engine of civil right litigation between *Plessy* and *Brown*.
 - 1) ***Missouri v. Canada*** (1954): Separate but equal not satisfied by University of Missouri Law School’s claim that AAs could attend law school in an adjacent state.
 - 2) ***Sweatt v. Painter*** (1950): Separate but equal not satisfied by hastily constructed law school that mimicked U T Law.
 - 3) ***McLaurin v. Oklahoma*** (1950): Separate but equal not satisfied by separate sections for AAs in the classroom, library, and cafeteria.
 - 4) Strategy: Chip away at *Plessy*.
- B) *Brown* background
 - 1) *Brown* was a joinder of four cases from Kansas, Delaware, South Carolina, and Virginia. A fifth case, from D.C., is decided on its own as *Bolling v. Sharpe* (1954).
 - 2) There are three oral arguments. After the first, in 1952, the Justices ask the litigants to answer questions concerning:
 - (a) Framer’s direct intent;
 - (b) Framer’s “springing” intent;
 - (c) Judicial Power independent of Framer’s intent.
 - (d) Between oral arguments 1 and 2, Chief Justice Fred Vinson dies of a heart attack and is replaced by Earl Warren. This inaugurates the famous Warren Court years

(1954-69), seen as a period of judicial liberal activism in the areas of (1) criminal procedure, (2) voting rights, (3) school prayer, and (4) free speech.

3) Arguments in Brown

- (a) Shorter Davis: Fighting for a way of life. Framers of 14th amendment did not intend to permit desegregation.
- (b) Marshall: 14th amendment is framed in broad terms! Strouder! Also, public education is in an incredibly nascent state at the time. Also: the 14th amendment frames itself in several expansive ways, and doesn't limit itself to a specific group or a specific area of rights.
- (c) Davis: Look, the courts have repeatedly interpreted this to not lead to desegregation. I cite seven! The Court keeps upholding separate but equal. The 14th might be broad, but it isn't enough to invalidate SBE based on the doctrinal modality. Every line of doctrine must come to some repose.
- (d) Marshall: Look, the Court has already required *de facto* integration!

C) ***Brown v. Board** (US 1954, 898): Court analyzes the effects of segregation on the institution of public education itself. It casts public education as the most important function of state and local governments, and frames the issue thusly: *does segregation, even though "tangible" factors may be equal, deprive minority children equal educational opportunities?* Yep. Relies on Sweatt v. Painter and McLaurin for the idea that intangible considerations can be just as pressing as more obvious, tangible factors. **Thus, the Court holds that in the field of public education, "separate but equal" has no place.**

D) Responses to Brown

- 1) Southern Manifesto, summarized: lots of disingenuous posturing about the Court introducing hatred and uncertainty into what had previously been a paradise of friendly relations. Yeah, whatever. Commends the intention of States to resist forced integration.
 - (a) Argues for
 - (i) Judicial restraint
 - (ii) Adherence to long-existing precedents
 - (iii) Fidelity to original understanding
 - (iv) Respect for structural principles of federalism
- 2) Alex Bickel: The Original Understanding and the Segregation Decision
 - (a) Shorter: The conclusion here is that § 1 of the 14th amendment carried out the relatively narrow objectives of the moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation, nor segregation.
 - (i) (evidence: Thad Stevens hated this)
 - (b) Proposition: The search for congressional purpose should be twofold:
 - (i) Congressional understanding of the immediate impact of the enactment on conditions then present.
 - (ii) What, if any, thought was given to the long-range effect?
- 3) Some academics (e.g. Gerald Rosenberg) challenge the efficacy of Brown, noting that *nothing really happened* post-Brown until the implementation of the CRA.
- 4) Arguments against the above: This is a stupidly minimalist way of reading the influence of a court opinion. At the most basic level, it seems silly to assert that

Brown did nothing until the CRA without, y'know, investigating whether Brown had *something to do* with the CRA.

E) Reverse-incorporation of Brown

1) ***Bolling v. Sharpe** (US 1954, 913): ***Supreme Court holds that the segregation of DC schools is unconstitutional.***

- (a) Notably, the Court engages in “reverse incorporation.” The 5th amendment does not contain an equal protection clause; accordingly, the Court makes the lateral declaration that, while EPC is obviously a more explicit safeguard of prohibited unfairness (and thus, EPC and DPC won't always be interchangeable), discrimination may be so unjustifiable as to be violative of DPC.
- (b) Using an expansive definition of liberty, the Court then invalidates segregation under rational basis (!!!), holding it not reasonably related to any proper governmental objective. Warren also incorporates prudential values, writing that “it would be unthinkable that the same Constitution would impose a *lesser* duty on the federal government.”
 - (i) Warren uses DPC as a “Teleporting” device for rights.
 - (ii) Warren's argument isn't intentionalist, though; it's a structuralist argument.
 - (iii) Reverse incorporation lacks an intent rationale. You can say “the framers of the 14th intended to incorporate rights inherent in the Constitution or earlier amendments.” But you can't do the same for the things that came first against the things that came second.

XVIII) Equal Protection and the Birth of Strict Scrutiny

A) The Antidiscrimination Principle and the Suspect Classification Standard

1) Origins of the SC doctrine

- (a) Brown conspicuously lacks language of classification on the basis of race, emphasizing instead the harmful consequences of separating schoolchildren in specific institutional contexts.
- (b) Court soon makes clear that Brown's holding is not limited, issuing a series of per curiam decisions extending Brown beyond the context of education.
- (c) It was clear, however, that the Court was not acting on the assumption that all state action classifying on the basis of race is unconstitutional
- (d) ***Naim v. Naim** (US 1956, 958): Court whiffs on an early potential challenge to Virginia's ban on interracial marriage, ruling that the appeal from Virginia's Supreme Court was improvidently granted.

2) By 1964, however, the political situation changes:

- (a) **McLaughlin v. Florida** (US 1964, 958): A statute punishes interracial cohabitation more severely than cohabitation by persons of the same race. Court invalidates this, in the process repudiating *Pace v. Alabama*. **The Court notes that the fourteenth amendment's central purpose is to eliminate racial discrimination emanating from official state sources; thus, this strong policy renders racial classifications constitutionally suspect.**

B) Anticlassification vs. Antisubordination

- 1) **Anticlassification**: Prohibits certain kinds of classifications, which are assumed by their nature of be invidious.

2) **Antisubordination**: prohibits government action that helps sustain or reinforce unjust forms of social hierarchy.

C) ***Loving v. Virginia** (US 1967, 959): Mildred Jeter (black) and Richard Loving (white) marry in DC. They return to Virginia, after which they get charged (after a whole host of shenanigans) with violating Virginia’s ban on interracial marriages (which includes marrying out of the state in hopes of evading the ban). The statute in question, intriguingly, only addresses miscegenation that includes a white participant. Issue: Does a Virginia statutory scheme preventing marriages between persons solely on the basis of racial classifications violate EPC and EPC?

- 1) State: The statute punishes equally both the white and the black participants, and are thus not an invidious discrimination; moreover, the test here should be whether there is a rational basis for a State to treat interracial marriage differently.
- 2) First, the Court rejects the “equal punishment as equal protection” reasoning, rejecting *Pace v. Alabama* in the process.
- 3) The Court then moves on, citing *Korematsu* for the idea of an increased level of scrutiny here; it then emphasizes that, given the statutory framework that makes miscegenation unlawful only if it includes whites, that there is no legitimate overriding purpose of the statute *other* than racial discrimination. **After a perfunctory EPC analysis, it holds that marriage, as a basic civil right of man, cannot be restricted by invidious racial discrimination.**
 - (a) “white person” in this case is defined as a person having not one drop out non-Caucasian blood, with the bizarre exception of those who are less than 1/16 Indian, due to the incredibly stupid Pocahontas rationale.
 - (b) Loving is the *origin* of modern EPC Strict Scrutiny, but it uses an almost-unrecognizable version of the governing SS language: “necessary to the accomplishment of some permissible state objective.”
 - (c) (there’s a hint of substantive due process riding here as well)

<ul style="list-style-type: none"> ▪ Strict Scrutiny (“narrowly tailored to a compelling governmental interest”) 	<ul style="list-style-type: none"> ▪ Race (<i>United States v. Korematsu</i> (1944)); ▪ National Origin (<i>Oyama v. California</i> (1948)); ▪ Alienage (<i>Graham v. Richardson</i> (1971)) (note political function exception)
<ul style="list-style-type: none"> ▪ Intermediate Scrutiny (“substantially related to an important governmental interest”) 	<ul style="list-style-type: none"> ▪ Sex (<i>Craig v. Boren</i> (1976)); ▪ Non-marital parentage (<i>Trimble v. Gordon</i> (1977))
<ul style="list-style-type: none"> ▪ Rational Basis “with bite” (“rationally related to a legitimate governmental interest”) 	<ul style="list-style-type: none"> ▪ Disability (<i>Cleburne v. Cleburne Living Center</i> (1985)); ▪ Sexual Orientation (<i>Romer v. Evans</i> (1996))
<ul style="list-style-type: none"> ▪ Rational Basis (“rationally related to a legitimate governmental interest”) 	<ul style="list-style-type: none"> ▪ Everything Else ▪ Age (<i>Massachusetts Board of Retirement v. Murgia</i> (1976)); ▪ Opticians (<i>Williamson v. Lee Optical</i> (1955))

D) (What’d odd about these cases is the result. Rational basis with bite cases are pretty idiosyncratic, for example; they seem to actually have teeth)

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

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

E) Tiers of Scrutiny: Definitions

- 1) **Important note:** Rational relation rarely deals with over/underinclusiveness...you're allowed to take the problem one step at a time. The hesitation in my response is that it doesn't imply that there's a free pass. The court pegs on ideas of rationality.
- 2) **Compelling** means whatever the Court wants it to mean.

F) The Reach of Suspect Classification Doctrine

1) Prisons

- (a) ***Lee v. Washington** (US 1968, 990): Court summarily affirms desegregation of Alabama prison system, but emphasizes that nothing prevented allowances for the necessities of prison security and discipline.
- (b) ***Turner v. Safley** (US 1987, 992): Holds that when prisoners allege that prison regulations violate their fundamental rights, deference to prison administrators counsels a relaxed standard: **courts should ask only whether the regulation was reasonably related to legitimate penological interests.**
- (c) ***Johnson v. California** (US 2005, 991): California Dep't of Corrections has a "holding cell" policy for new inmates, which assigns cellmates based on race (down to specific country categorizations). CDC defended this policy as being necessary to prevent racial gang violence. ***Court (through SDOC) holds that the CDC policy is subject to strict scrutiny, emphasizing that all governmental racial classifications should be examined as such, and remands for reconsideration.*** Distinguishes Turner by arguing that the right to not be discriminated against on the basis of race is not one that need be abridged for proper prison administration; Turner holds only for fundamental rights whose exercise is inconsistent with proper incarceration.
 - (i) STEVENS dissents, although only because he disagrees with the idea of remanding for further findings and would prefer to kill it now.

- (ii) SCALIA and THOMAS would have applied the relaxed Turner standard to racial classifications in prison.
- 2) Government Collection and Use of Racial Data
 - (a) ***Anderson v. Martin** (US 1964, 999): Court unanimously invalidates a Louisiana statute requiring that ballots in all elections designate candidate race. It rejects the usual “this applies equally” argument.
 - (b) ***Tancil v. Wools** (US 1964, 999): Court *affirms* a lower-court judgment invalidating Virginia laws that required officials to keep voting and property-owner records on a racially segregated basis but *sustaining* a law that required every divorce decree to recite the race of the spouses.
 - (c) ***Morales v. Daley** (S.D. Tex. 2000, 999): Ps object to the census’s request for racial and ethnic identities, alleging that this violates the DPC of the 5th amendment (in its *Bolling v. Sharpe* EPC-incorporated guise). The court here makes a distinction between the *collection* of data and the *use* of said data; there’s also another principle at work here about self-reporting.
 - (d) ***New York v. Dep’t of Commerce** (2nd Cir. 1994, 1002): Court holds that the census bureau’s decision to adopt methods that would systematically undercount minorities was subject to review under something more akin to SS.
 - (e) ***Prieto v. Stans** (N.D. Cal. 1970, 1002): Court rejects a claim that a failure to include “Mexican-American” as a separate category on the census would lead to significant undercounting and, thus, fewer resources, noting that any discrimination here is the non-legal kind that must occur when making classification judgments.
- 3) Descriptions of Suspects
 - (a) ***Brown v. City of Oneonta** (2d Circuit 1999, 1004): A victim of a crime says that her assailant was a young black man who was wielding a knife. Police track the perp’s scent to SUNY Oneonta, where fewer than 300 blacks live and 2% of the students are black. The police then engage in a series of activity culminating in a “sweep,” wherein they question non-white persons on the street and inspect their hands for cuts. Some of these detained people sue, alleging impermissible profiling under the EPC.
 - (i) ***Court rejects this on summary judgment, arguing that Ps were not questioned on the basis of race but instead on the basis of the provided description, which happened to include a racial element.*** It uses *Washington v. Davis* to further bolster its position, arguing that while there may have been a disparate impact here, it was not one undertaken with discriminatory intent.
 - 01) Rationale: It wasn’t the state that produced the race of the suspect. It was an individual, private citizen who made race salient, *not* the officer. (partial)

XIX) Equal Protection III – Disparate Impact

A) Race-dependent decisions: definitions:

- 1) Most obvious: a statute that by its very terms classifies by race.
- 2) Less obvious: covert, racially motivated decisions (herein, “motivation” is not intended to have a necessarily prejudicial overtone)

- 3) Do different kinds of race dependent decisions have different legal consequences?
Two things to keep in mind:
 - (a) What obligations does the antidiscrimination principle impose on the initial decisionmaker?
 - (b) Under what circumstances will a reviewing court inquire whether that decisionmaker's decision was race-dependent?
- B) Discriminatory Administration of an Otherwise "Neutral" Statute
 - 1) ***Yick Wo v. Hopkins** (US 1886, 1021): San Francisco board of supervisors grants laundry permits to no Chinese applicants and almost all Caucasian applicants. The Court held that the motive obviously employed twisted the otherwise-innocuous statute and the combined implementation and discriminatory effects were thus impermissible.
 - 2) (Courts frequently rely on statistical analysis of this sort to find unlawful activity)
- C) The Race-Dependent Decision to Adopt a Nonracially Specific Regulation or Law
 - 1) ***How Ah Kow v. Nunan** (CCD 1879, 1022): Basically, the court nails an imprisoned-male-haircutting law as being adopted to obviously target and harass the Chinese. Disguised as neutral, but with clear purpose.
 - 2) ***Gomillion** (US 1960, 1023): Clear gerrymandering racial pretext killed under the 15th amendment.
 - 3) ***Griffin v. Prince Edward County School Board** (US 1964, 1023): The board shuts down the school after a court had ordered that it be desegregated. The Court ordered it reopened, finding that this action in opposition to desegregation was not constitutional.
- D) Transferred de Jure Discrimination
 - 1) A practice that does not itself take race into account may disproportionately disadvantage a racial minority as a result of casually related de jure discrimination.
 - 2) ***Gaston County v. US** (US 1969, 1023): Can a county use a voting literacy test that disproportionately disenfranchised blacks? Court notes that the sorry state of the black school system in the county negates the county's insistence that it had administered the tests in a fair and impartial matter, as even this "impartiality" cannot make up for a lack of educational opportunities.
- E) **Summary**: types of status raising claims of race discrimination
 - 1) Facially discriminatory law. *E.g.*, *Strauder* (1880); *Loving* (1967).
 - 2) Facially neutral law administered in discriminatory manner. *E.g.*, *Yick Wo* (1886).
 - 3) Facially neutral law passed with discriminatory intent (pretextual law). *E.g.*, *Hunter* (1985).
 - 4) Facially neutral law passed without discriminatory intent (as defined by Court) that has a disparate impact. *E.g.*, *Davis* (1976).
- F) **Disparate Impact in a Statutory Context - Title VII of the Civil Rights Act** (in comparison with the Constitutional standard)
 - 1) Forbids employment discrimination for covered employers on the basis of race, national origin, color, religion, or sex.
 - 2) An employer can defend against facial discrimination only on the basis of a bona-fide occupational qualification. **There is no BFOQ defense for race, however.**
 - 3) An employer can defend against disparate impact only on the basis of business necessity.

- 4) ***Griggs v. Duke Power Co** (US 1971, 1024): Griggs deals with Title VII of the CRA of 1964. An employer wants to require high school diplomas of job applicants and to subject them to a general intelligence test. Court emphasizes that the CRA prohibits practices that are fair in form, but discriminatory in function. The test in Griggs is as follows: if the employment practice which operates to exclude blacks cannot be shown to be related to job performance, the practice is prohibited; this burden of proof falls on the employer to demonstrate. ***As the evidence demonstrates that the tests in question have no bearing on performance, they are invalidated under Title VII.***
- (a) Griggs was qualified by Wards Cove Packing Co; reaction to that case led to the CRA of 1991, which codified a modified-yet-recognizable Griggs rule (job-related and consistent with business necessity/burden-shifting) in what I can only assume is Title VII.
- (b) Otherwise, the Griggs formula is invalidated as of *Washington v. Davis*.
- G) **Disparate Impact in the Constitutional Context**
- 1) **!!!!USE THIS FORMULA ON THE TEST!!!!**
- (a) Use *Davis* to find purpose, *Feeny* to define the purpose, then elucidate the *Arlington Heights* factors. *Arlington Heights* determines intent, and does not in and of itself elevate this beyond rational basis.
- (b) *Arlington Heights* factors:
- (i) the impact of the official action;
 - 01) Impact is only important insofar as it is probative of the existence of discriminatory purpose. Impact in and of itself isn't going to be able to figure anything higher than rational basis.
 - (ii) "the historical background of the decision";
 - (iii) "[s]equence of events leading up to the challenged decision";
 - (iv) "[d]epartures from the normal procedural sequence";
 - (v) "substantive departures [where] the factors usually considered . . . strongly favor a decision contrary to the one reached";
 - (vi) "[t]he legislative or administrative history."
- 2) ***Washington v. Davis** (US 1976, 1026): Ps are black officers whose police applications had been rejected because they had failed a written personnel test; they sued under the 5th Amendment (we're in DC). At the time, Title VII did not cover municipal employees. CoA used the Griggs test, but the Court departed significantly from that basis.
- (a) The Court emphasizes that the Constitutional rule for adjudicating claims of invidious discrimination is *not* the same as the statutory (Title VII) one.
- (b) **Instead, the Court rules, the invidious quality of a law claimed to be racially discriminatory must be traceable to a discriminatory purpose—such a purpose need not be explicit, but it must be demonstrable via a totality analysis (of which disparate impact is but one portion).** It also proposes a burden-shifting model to deal with allegations of invidious conduct.
- (c) **Sum:** proof of a discriminatory racial purpose is *necessary* in making out an EPC claim relying upon disparate impact.
- (d) STEVENS concurs, but takes pains to demonstrate that the line between discriminatory purpose and discriminatory impact is not frequently very bright.

- 3) ***Feeny v. Personnel Administrator of Massachusetts** (US 1979, 1031): Feeny involved a challenge to a Mass statute that provided a civil service preference for veterans, a preference that effectively excluded most women from the upper levels of civil service. P: The Massachusetts legislature could easily have foreseen this result! Court: The foreseeable impact of a statute is not sufficient to prove discriminatory purpose. *Instead, such a purpose must show that an actor took action at least in part “because of,” not “in spite of,” its adverse effects upon an identifiable group.*
 - (a) Thoughts on Feeny/Davis
 - (i) Reva Siegel: The Davis/Feeny approach limits the reach of the 14th amendment’s equality norm! Because doctrines of heightened scrutiny now require legislators to articulate legitimate, nondiscriminatory reasons, there is now an incentive to cloak motive.
 - (ii) Book: Was the Court trying to limit the scope of EPC claims here by cabining the more expansive variety of disparate impact in the employment-focused arena of Title VII?
 - (iii) Krieger: The Davis/Feeny framework does not take into account scientific theories of human cognition, especially the idea that stereotype bias can be cognitive rather than motivational.
 - (iv) Charles Lawrence: Courts should use the cultural meaning of social practices as a proxy for unconscious racism.
- 4) ***Village of Arlington Heights v. Metropolitan Housing Development Corp** (US 1977, 1039): City refuses to rezone a 15-acre parcel from single-family to multiple-family classification. MHDC planned to build townhouses for low-income tenants.
 - (a) *In reversing the CoA’s holding that the plan had a disparate racial impact, the Court offered a list of factors for courts to use to determine whether governmental decisions were racially motivated.* Even had racial discrimination been established as a partial motive, this would have merely activated a burden-shifting that would have required the Village to demonstrate that the same decision would have resulted had the impermissible purpose not been considered.
- 5) ***Hunter v. Underwood** (US 1985, 1040): Court cites Arlington Heights in striking down a provision of the Alabama Constitution that disenfranchised persons convicted of crimes involving “moral turpitude.” The Court concluded that the provision was racially motivated upon its adoption, and that the *additional* purpose of discriminating against poor whites did not render the racially impermissible portion nugatory.
- 6) ***Palmer v. Thompson** (US 1971, 1041): Ps challenge a decision by the city council to close the city’s public swimming pools following a deseg order. TC had found that the closing was justified to preserve peace and order; thus, this didn’t violate EPC. Surprisingly, the Court affirms, with Black writing that “no case in this Court has held that a legislative act may violate EP solely because of the motivations of the men who voted for it”; if this were the case, Black argued, then the law could be “Constitutionalized” merely by having a different group repass it.
- 7) ***Rogers v. Lodge** (US 1982, 1042): DC finds that Georgia’s at-large voting system was racially neutral when adopted, yet is being maintained for invidious purposes. Supreme Court affirms.
- 8) ***US v. Clary** (8th Cir. 1994, 1045): Ds bring an EPC challenge to the federal sentencing guidelines based on the cocaine/crack sentencing disparity. Court uses the

Feeny analytical model, emphasizing that Congress clearly had rational motives for creating this distinction; it is not satisfied that Congress selected this course of action “because of” and not just “in spite of” its adverse impacts. Unconscious racism, in other words, is not enough.

XX) Equal Protection IV: Affirmative Action

A) “Preferential” Treatment for Racial Minorities

- 1) Until several decades after *Brown*, the Court had no occasion to consider the permissibility of race-dependent decisions designed to benefit minorities.
- 2) ***Montgomery/Swann**: Court cautiously approved of the race-conscious assignment of teachers and pupils.
- 3) ***DeFunis v. Odegaard**: P is denied admission to U of W Law school, sues challenging the preferential admissions program. Court dodges on mootness grounds.

B) ***Regents of the University of California v. Bakke** (US 1078, 1072): Med school at UC Davis sets aside 16 seats out of 100 for economically disadvantaged and/or members of minority groups. By 1974, those seats are reserved only for minority students. Candidates with GPAs under 2.5 are automatically rejected from the regular program but *not* the special seats. P is rejected from the general program twice; in both years, people were admitted under the special program with substantially lower qualifications. P sues under the EPC and under Title VI of the CRA. Powell’s separate opinion is the one that is generally followed (there was no majority), and he strikes down the UC Davis program but eliminates an injunction on *any* consideration of race.

- 1) He raises three primary issues: what is the appropriate level of scrutiny, what constituted a compelling interest, and how states could prove that they met the standard.
- 2) Powell rejects a “two-class” theory of race, and advances the idea that strict scrutiny should apply here as in elsewhere. While he rejects several “compelling” interests advanced, he agrees that the attainment of a diverse student body seems to pass muster.
- 3) **That said, he argues that setting aside a specified number of seats was not an appropriate means to achieve the goal of diversity, as it tells certain applicants that they are *totally excluded* from a certain percentage of the seats in an incoming class; rather, a totality analysis, like the one performed by Harvard, would be significantly more appropriate.** Thus, the quota system is inappropriate, and is eliminated.
- 4) BRENNAN, dissenting, argues *inter alia* that states should be permitted to adopt race-conscious programs if their purpose is, in part, to remedy past discrimination.
- 5) BLACKMUN thinks that this is somewhat nearsighted given the sheer amount of preferentialism liberally doled out by most institutions of education

C) Powell’s Affirmative Action Rationales from Bakke (not joined by the other justices)

- 1) Racial Balancing
 - (a) **This is so close to a quota system that racial balancing has been categorically rejected by the Court.**
- 2) Remedying Past Discrimination by State Actor
 - (a) This rationale has been accepted by the Court, but with steep BOP.
- 3) Remedying Societal Discrimination

- (a) This is *not* a permissible justification.
- 4) Promoting Health-Care Delivery in Minority Communities
 - (a) This seems like stereotyping candidates at the point of entry?
- 5) Diversity

(a) **Powell endorses this as a rationale that passes strict scrutiny.**

Burger Four	Powell Opinion	Brennan Four
U.C. Plan Violates Title VI	U.C. Plan Violates Equal Protection Clause under strict scrutiny	
	Lower courts erred in stating that U.C. can never consider race consistent with Equal Protection Clause	U.C. Plan Is Valid Under Both Equal Protection Clause (intermediate scrutiny) and Title VI

D) Affirmative Action from Bakke to Croson

- 1) ***United Steelworkers v. Weber** (US 1979, 1078): Court upholds a private employer’s voluntary AA plan under Title VII without addressing any constitutional issues.
 - 2) ***Johnson v. Transportation Agency** (US 1987, 1078): Court upholds a voluntary affirmative action program benefiting women under Title VII.
 - 3) ***Fullilove v. Klutznick** (US 1980, 1078): Court upholds the minority business enterprise provision of the Public Works Employment Act of 1977, which required that 10% of federal funds must be used to procure services from businesses owned by minority group members. BURGER found this to be within Congress’s § 5 powers under the 14th. He dodges the question of what standard of review is being applied.
 - 4) ***Wygant v. Jackson Board of Ed** (US 1986, 1080): Court rejects a local school district’s AA plan that would lay off nonminority teachers first in order to preserve the current percentage of minority personnel employed at the time of the layoff. Court applies strict scrutiny and declares that alleviating the effects of societal discrimination and providing minority faculty role models were not compelling state purposes. **Rather, a public employer must have convincing evidence that remedial action is warranted and sufficient evidence to justify the conclusion that there has been prior discrimination**
 - 5) ***United States v. Paradise** (US 1987, 1081): Court narrowly upholds a court order against the Alabama Department of Public Safety arising out of protracted litigation and consistent noncompliance with previous court orders. Plan passed even Strict Scrutiny. Hooray!
 - 6) **Summary:** Generally, in the contracting context we see the remedial rationale...while in education we see remedial and educational.
- E) ***City of Richmond v. JA Croson Co** (US 1989, 1081): Richmond City Council adopts a Minority Business Plan, which requires prime contractors to subcontract at least 30% of their work to a minority business enterprise. The city adopts the plan after a hearing seems to suggest that there is a large deficit of minority contract work, though no evidence of discrimination. P is a contractor whose request for a waiver of the MBE requirements had been denied. Relying on Wygant, P argues that the city must limit any

race-based remedial program to remedying past discrimination. State argues that Fulilove controls.

- 1) In distinguishing Fulilove, the Court notes that Congressional acts (of the sort Fulilove addressed) are different, given the specific Congressional mandate under § 5 of the 14th amendment. It observes that, as in *Wygant*, that the stated rationale does not pass muster; a generalized assertion of past discrimination is not enough and provides no narrowing scope for legislative action. **Note that this rationale dies as of *Aderrand*.**
- 2) Moreover, the 30% figure cannot be tied to any specific injury, nor is it particularly flexible.
- 3) *The Court then proceeds to tear apart the entire factual rationale underlying the policy, until the state is almost begging for the sweet release of death; lunging for the kill, it points out that “none of the evidence” points to any identified discrimination in the construction industry. Snap! And heck, the city had “a whole array of race-neutral devices” at its disposal, such as simplification of bidding procedures, etc. Look, this is dead and gone; let’s give it a moment of silence.*
- 4) Sadly, this isn’t a majority opinion throughout the entirety of the piece.
 - (a) The part of the opinion that lays out the standard *doesn’t* garner a majority...but the part of the opinion applying the standard *does* garner one.
- 5) Court rejects five arguments about end of remedying past discrimination (this is for the Court)
 - (a) ordinance declares itself to be remedial;
 - (i) (Just because you recite a benign or legitimate purpose doesn’t make it true.)
 - (ii) proponents of measure testify to past discrimination in construction industry;
 - (iii) minority businesses receive .67 percent of prime contracts from city while constitute 50 percent of city’s population;
 - (iv) very few minority contractors in local and state contractors’ associations
 - (v) Congress made determination in 1977 that the effects of past discrimination had stifled minority participation in the construction industry nationally.
 - 6) Summary: What O’Connor is *not* saying here is that this remedial intent is *not* a compelling gov’t interest. It is! She’s saying that Richmond hasn’t made a good enough showing about the actual wrongs that are being addressed.
- F) ***Metro Broadcasting:** We didn’t read this. The Court upholds a federal affirmative action program by a 5-4 vote. It subjects the FCC’s minority preferences to *intermediate* scrutiny, on the ground that they were forms of federal, “benign” race-discrimination. It finds that the FCC’s policies are substantially related to the important governmental interest of broadcast diversity. *Metro Broadcasting* gets overruled by *Adarand* (1995) with respect to the level of scrutiny applied to race-based preferences.
- G) ***Adarand Constructors v. Pena** (US 1995, 1109): *Adarand* submits the low bid for a project, and challenges the award of the contract to another group. § 8 of the SBA awarded compensation to prime contractors doing business with the federal gov’t if they hired subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals. P challenges the racial reading of this as unconstitutional.
 - 1) Sifting through the caselaw, the Court discerns three general propositions with respect to governmental racial classifications: **skepticism, consistency, and congruence.**

- 2) Congruence, in this case, *means eliminating the divisions between EPC in state and federal contexts, which in turn means that federal action suddenly hits the strict scrutiny review.*
 - 3) *The Court holds that all racial classifications, imposed by whatever governmental actor, must be analyzed under strict scrutiny; thus, Fullilove is no longer controlling in a federal context. It remands for further consideration, given the sudden changing of the rules.*
 - 4) SCALIA concurs in part, but dislikes the idea of the “remedial” warrant for engaging in beneficial racial classification.
 - 5) STEVENS dissents, disagreeing with the majority’s equating of all racial classification.
- H) ***Grutter v. Bollinger** (US 2003, 1120): U Mich Law School case. Racial consciousness in applications gets hit with strict scrutiny; following Bakke, this means that an admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.
- 1) *Astonishingly, the law-school’s program passes the narrow tailoring and survives strict scrutiny, with its compelling interest being the goal of attaining a “critical mass of underrepresented minority students.” Holistic! Individual! Not a quota, so good. Additionally, insofar as narrow tailoring is concerned, the school apparently did consider workable (emphasis mine) race-neutral alternatives.*
 - 2) Sunspot: SDOC emphasizes that race-conscious programs must be limited in time; she speculates that a 25-year period should be enough for the plan to exhaust its usefulness or necessity.
 - 3) Dissent: If you’re so interested in diversity, then other forms should matter to you too! Talent! Life pursuits! Those things seem to matter in the U of M...but not nearly as much as racial diversity.
- I) ***Gratz v. Bollinger** (2003): The Court strikes down a racial preference plan for the University of Michigan that assigns a 20 points (out of a possible 150) to certain racial groups. 100 points were needed for admissions. Awards for personal achievement, leadership, or public service were capped at 5 points.
- J) ***Parents Involved v. Seattle School District** (2007) (this was optional): Court strikes down a voluntary school integration programs in Washington state and Kentucky. Subjecting the program to strict scrutiny, the Court finds that (1) remedial rationale does not justify the programs, and (2) while diversity rationale could justify these programs, they are not narrowly tailored to that end.
- 1) Kennedy filed a concurrence that presented a more narrow interpretation, stating that schools may use "race conscious" means to achieve diversity in schools but that the schools at issue in this case did not use a sufficient narrow tailoring of their plans to sustain their goals. (wiki)

XXI) Equal Protection V – Intermediate Scrutiny and Gender

- A) How to do: Use “standard” intermediate scrutiny, and then the VMI construction?
- B) Quick overview of modern IS arc:
 - 1) 1971: *Reed v. Reed* (majority applies rational basis “with bite”)

- 2) 1973: *Frontiero v. Richardson* (**plurality, not majority**, gives “strict scrutiny”)
 - 3) 1976: *Craig v. Boren* (majority settles on intermediate scrutiny)
 - 4) 1996: *United States v. Virginia* (majority— according to some—gives more bite to intermediate scrutiny)
 - 5) Sum: We’re tacking from RB up to SS, but only through a plurality...and then Virginia throws IS in its place via a majority. Maybe.
- C) The Court’s Initial Reception of Sex Equality Claims
- 1) Basic idea: early on, the Court was *not* receptive to equality claims that suffrage movements advanced under the 14th amendment.
 - 2) Justice Bradley in *Bradwell v. Illinois*: Different “spheres” for men and women are enshrined in civil law.
 - 3) **Minor v. Happersett**: 14th amendment doesn’t grant women the right to vote.
 - 4) ***Muller v. Oregon** (US 1908, 1181): Court holds that states may regulate women’s employment in ways *Lochner* barred because the two sexes differ in body, strength, etc.
- D) Post-Nineteenth Amendment
- 1) Quick summary: After the Nineteenth, the Court retreated from its earlier, occasionally gender-differentiated framework for determining whether protective labor legislation violated the usual *Lochner* rules.
 - 2) ***Adkins v. Children’s Hospital** (US 1923, 1181): Court rules that a minimum wage law for women violated liberty of contract. Inequality of the sexes has continued with “diminishing intensity.” No more special protection!
 - 3) However, by the late 1920s, the Court had limited the 19th amendment’s import to voting only, and by 1937 *Adkins* died a post-switch-in-time death.
 - 4) ***Goesaert v. Cleary** (US 1948, 1182): Court sustains a Michigan statute forbidding a woman from working as a bartender unless she was the wife or daughter of the male owner. State is not precluded from “Drawing sharp lines” between the sexes.
 - 5) ***Hoyt v. Florida** (US 1961, 1182): Court upholds a law that included women on jury lists only when they requested it. “A women is still regarded as the center of home and family life.”
- E) **Movement Roots of Modern Sex Discrimination Law**
- 1) ***Reed v. Reed** (US 1971, 1183): Court holds that an Idaho law that preferred men over women as estate administrators was arbitrary, and thus forbidden by the EPC (ostensibly only through rational basis). **For the first time in history, the Court used the EPC to invalidate a statute on the grounds that it discriminated against women.**
 - (a) This decision represented *years* of work by second-wave feminists.
 - 2) Pauli Murray: Victories of the civil rights movement could be replicated for the women’s rights cause by persuading courts that sexism and racism were analogous!
 - (a) ***White v. Crook** challenged the exclusions of blacks and women from an Alabama jury that acquitted white defendants accused of murdering civil rights workers. District Court rules that the exclusion of women is arbitrary, and even though it doesn’t track entirely with the racial analysis, it still counts as an early victory, or so Brest insists.
 - (b) Race/Gender Commonalities (from *Bowen v. Gilliard*...**USE THESE initially**)
 - (i) History of Discrimination;

- (ii) Political Powerlessness;
- (iii) Immutability/Visibility;
- (iv) Irrelevance of the Characteristic.

F) ***Cases**

- 1) ***Frontiero v. Richardson** (US 1973, 1188): Congress establishes a scheme for provision of various benefits for members of the uniformed services. Shorter: serviceman may claim his wife as a dependent without regard to whether she is in fact dependent on him, but a woman must demonstrate that her husband is dependent on her. P claims that this is a violation of the DPC of the 5th (as it incorporates the EPC). DC upheld this on rational relations. POWELL wants to rely on Reed and leave the heavy lifting to the ERA.
 - (a) Court relies on *Reed v. Reed* for the proposition that an upward departure from rational basis is justified, and it settles upon strict scrutiny as the proper test. As this seems to the Court to be an arbitrary legislative choice, it is struck down. **NOTE THAT ONLY A PLURALITY ADOPTS STRICT SCRUTINY;** this would cede to intermediate scrutiny later.
 - (b) Military deference doesn't apply here, as this is a mere benefits scheme.
- 2) ***Craig v. Boren** (US 1976, 1214): Adopts a framework that makes sex-based state action presumptively unconstitutional: to regulate in a sex-discriminatory fashion, the government must demonstrate that its use of sex-based criteria is substantially related to the achievement of important government objectives. (This was the *near-beer* case)
 - (a) Court in *Craig* does *not* adopt the race-based analogy, instead warning against sex-based state action predicated on misconceptions concerning gender roles.

G) **In a series of EPC cases in the 1970s, the Court struck down sex-based laws premised on the male breadwinner/female caregiver model.**

- 1) Examples: Weinberger; Califano; Kirschberg (1215-16)
- 2) The court *never* ruled that family dependency itself was a wrong or a harm, but it did assert repeatedly that gender-based laws enforcing gender roles violated the Constitution. Orr v. Orr!

XXII) Equal Protection VI: "Real Differences" Doctrine

A) Real Differences – An Important Note

- 1) AT THE SUPREME COURT, THE ONLY REAL DIFFERENCE THAT HAS BEEN RECOGNIZED IS PREGNANCY.

B) ***The VMI Case (US v. Virginia)** (US 1996, 1229): VMI is the sole single-sex school in the Virginia public higher-education system; it's also the only one that builds *cadets of steel* using the adversative method, and so on. While the DC had ruled in favor of VMI, the 4th Circuit had reversed, arguing that a policy of diversity must do more than favor one gender and that nothing in VMI's programme is inherently unsuitable to women. On remand, Virginia picked the option of creating a "parallel" program, and failed miserably at this, producing a gross parody of something appropriate. Anyway.

- 1) ***On review, the Court adopts an interesting new fork of the IS test: parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action, with said burden resting entirely on the state...which must, therefore, show that the classification serves important governmental objections and that the discriminatory means employed are***

- substantially related to the achievement of those objectives.* It accepts that the “diversity” rationale could pass the test in some cases, but not here, due to the school’s utter uniqueness.
- 2) Moreover, while it is uncontested that women’s admissions would require changes at VMI, it is *also* clear that the VMI method could certainly be used to educate women—Ginsburg emphatically rejects the idea that programs must be designed around the “rule,” and not the exception, as it is these very “exceptions” who are losing out under Virginia’s policy.
 - 3) ***Thus, the policy is smacked down.***
 - 4) REHNQUIST concurs in the judgment, but worries that Ginsburg has conflated a description of intermediate scrutiny with an element thereof.
 - 5) SCALIA waxes rhapsodic about vanishing ways of life.
 - 6) Virginia defends based on two grounds:
 - (a) Single-sex education provides diversity within the state.
 - (i) This is the idea that the state should offer a diverse array of school options and configurations. Ginsburg finds this questionable in context.
 - (b) Women and men require different things from education.
 - (i) Ginsburg feels that if some women are able to handle it, they should be allowed in.
 - (ii) The relevant Constitutional question is **whether some women would thrive under the adversative method.**
 - 7) **VMI can be read as ratcheting up intermediate scrutiny**, especially given its emphasis on exceptionalism.
- C) Pregnancy – Stuck on Rational Basis
- 1) ***Geduldig v. Aiello** (US 1974, 1276): California excludes disabilities incident to normal pregnancies from a disability insurance scheme. ***Court upholds under rational basis; there is no risk from which men are protected and women are not, and vice versa. “The program divides potential recipients into two groups - pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits thus accrues to members of both sexes.”***
 - (a) Under Geduldig, laws regulating abortion do not classify on the basis of sex, and as such are not subject to heightened scrutiny.
 - (b) Geduldig *also* shields from constitutional scrutiny regulation of pregnant women that purports to promote the welfare of the unborn. Punitive and unpleasant.
 - 2) ***General Electric v. Gilbert (1976)**: The Gilbert Court interprets pregnancy discrimination to fall outside of the ambit of Title VII’s prohibition of sex discrimination.
 - (a) In 1978, Congress responds to Gilbert by passing the Pregnancy Discrimination Act, defining “because of sex” in Title VII to encompass “because of or on the basis of pregnancy, childbirth, or related medical conditions.”
- D) “Real Differences”
- 1) **Michael M. v. Sonoma County** (1981): California’s statutory rape law makes men alone criminally liable for the act of sexual intercourse with a minor not his wife. ***A majority of the Justices use some version of “real differences” in their reasoning to uphold the statute.*** “Because virtually all of the significant harmful and inescapably

- identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish on the participant who, by nature, suffers few of the consequences of his conduct” (opinion of Rehnquist, J., for four members of the Court) (emphasis added). “[T]here are differences between males and females that the Constitution necessarily recognizes. . . . In short, the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded” (Stewart, J., concurring).
- 2) **Clark v. Arizona Interscholastic Ass’n**, 695 F.2d 1126 (1982): Ninth Circuit held that strength was a “real difference” in upholding a state athletic associations ban on men playing in a women’s volleyball league
 - 3) ***Tuan Anh Nguyen v. INS** (US 2001, 1296): 8 USC § 1409 automatically grants American citizenship upon birth to a child born out of wedlock in a foreign country if born to an American mother, but does *not* do the same if the only American parent was the father, unless a paternity decree is entered before the child turns 18. P and his father argue that the statute violates EPC.
 - (a) ***Kennedy adopts the VMI standard, and finds that the statute...passes.***
 - (b) He articulates many somewhat revolting justifications, including the idea that the dad “need not be present at birth,” whereas the mother must by definition be present. He identifies two important governmental interests: the importance of assuring that a biological parent-child relationship exists, and ensuring that the child and the citizen parent have some demonstrated opportunity to develop a “real relationship.” He shrugs off concerns about overbreadth by noting that no statute needs to reach its ultimate goal in *every* instance.
 - (i) SCALIA concurs based on the idea that the Court has no power to invalidate this sort of Congressional rule or grant relief of the sort required here, namely citizenship.
 - (ii) O’Connor vigorously dissents, finding that even the case at hand seems to dispel the stereotype relied upon by Kennedy.

XXIII) Modern Due Process I: The Renaissance of Unenumerated Rights

- A) Antecedents of Fundamental Rights Adjudication
 - 1) **Palko v. Connecticut: Fundamental rights are those that are “implicit in the concept of ordered liberty.” (USE THESE)**
 - 2) **Moore v. East Cleveland: Fundamental rights are those that are “deeply rooted in this Nation’s history and traditions.” (USE THESE)**
 - 3) Heir to 3 traditions
 - (a) Continues a tradition of judicial protection of rights that goes back to “general constitutional law.”
 - (b) Outgrowth of the resurgence of judicial protection of individual rights that followed WWII.
 - (c) Very, *very* similar to *Lochner*.
 - (i) The language of the period, specifically the language in *Meyer* and *Pierce*, suggests that the Court did not consider economic and personal interests discrete areas of concern.
 - (ii) ***Meyer** (1340): Teacher is convicted under a state law prohibiting the teaching of a foreign language to any child not yet in the eighth grade. Court

strikes down the law, viewing it as an incursion of the teacher's right to teach and the rest of parents to engage him to instruct their children.

(iii)***Pierce**: Suits challenge required public-school attendance (over, say, private schools). Court invalidates this based on personal liberty of parents to control the upbringing of children.

(iv)The Court abandons economic due process in 1937, but does not entirely abandon the noneconomic portion.

4) The idea, then, is that there are unenumerated rights; however, after 1937, the Court really does not want to be sitting as a countermajoritarian superlegislature. Thus, it retreats from economic and substantive due process. The idea is that between '37 and '65, it's hard to find cases under which the Court says "we strike this down on SDP grounds."

B) Summary of Second SDP Arc

- 1) 1965 *Griswold v. Connecticut*
- 2) 1967 *Loving v. Virginia*
- 3) 1973 *Roe v. Wade*
- 4) 1992 *Casey v. Planned Parenthood*
- 5) 1986 *Bowers v. Hardwick*
- 6) 1997 *Washington v. Glucksberg*
- 7) 2003 *Lawrence v. Texas*
- 8) 2007 *Gonzales v. Carhart*

C) **!!!IMPORTANT!!! Unenumerated Rights Drawing Some Degree of Heightened Scrutiny (some only rational basis with bite)**

- 1) Right of Privacy
 - (a) Right to Marriage
 - (b) Right To Use Contraception
 - (c) Right to Abortion
 - (d) Right to Read Obscene Material
 - (e) Right to Keep Extended Family Together
 - (f) Right of Parents to Control Children
 - (g) Right to Intimate Sexual Conduct
- 2) Right to Vote
- 3) Right to Travel
- 4) Right to Refuse Medical Treatment

D) **Three Constructions of Privacy**

- 1) Zonal privacy – Space/time construction of privacy
- 2) Relational privacy – Parents and family members (useable to exclude others, as well)
- 3) Decisional privacy – Personal autonomy (possibly subsumes the other two)
- 4) **The notion of privacy takes many different forms, and the Court cycles among various iterations thereof. You should always be asking "which of these forms is the Court specifically invoking?"**

E) ***Cases**

- 1) ***Griswold v. Connecticut** (US 1965, 1342): Statute criminalizes the selling of a drug, article, or instrument for the purpose of preventing conception (it also criminalizes aiding and abetting the above). Ds gave information, instruction, and advice to *married people*.

- (a) Court declines to explicitly review under *Lochner*, preferring to cling to the *Pierce* and *Meyer* cases.
 - (b) *Douglas engages in a “penumbral” analysis; for example, the first amendment has a penumbra of privacy associated with it, as do the third, fourth, fifth, and ninth amendments. This case, then, concerns a relationship lying within the “zone of privacy” created by several constitutional guarantees, especially as it concerns the “marital bedroom”; within this right to privacy, the statute cannot flourish, and it is negated.*
 - (c) GOLDBERG concurs, on the basis that the concept of liberty is expansive and supported through the Ninth Amendment; a “totality of tradition” must be used to determine whether a right is fundamental. In determining which rights are fundamental, judges must look to the “traditions and collective conscience of our people” to determine whether the right is, in fact, fundamentally rooted.
 - (d) HARLAN does...*something*, and focuses on due-process and liberty.
 - (e) WHITE also sees the liberty interest as being deprived in violation of DPC here.
 - (f) BLACK, dissenting, argues that privacy is too flexible to be the basis for the holding.
 - (g) STEWART, also dissenting, thinks the law stupid but can find nothing unconstitutional about it.
 - (h) **This is a “disguised” DPC case**, as the 1st is incorporated as a fundamental due process issue via the 14th.
- 2) ***Eisenstadt v. Baird** (US 1972, 1353): D gives contraceptive foam to individuals, both married and unmarried. State law allows married persons to receive contraceptives (only from a doctor if to prevent pregnancy; from anyone to prevent disease, which single persons can also do) and prohibits single persons from receiving contraceptives to prevent pregnancy. *Kay*.
- (a) *Court holds that this violates the EPC under rational basis because this did not further a legitimate state interest. If the right to privacy means anything, Brennan says, it is the right of the individual to be free from unwarranted governmental intrusion.*
 - (b) BURGER dissents, distinguishing between the use prohibition in *Griswold* and the distribution prohibition here.
 - (c) This case shows *Griswold* being incorporated to single people via EPC.
 - (d) (this focuses on the *decisional* mode of privacy)
- 3) ***Carey v. PopServInt** (US 1977, 1354): Court strikes down a NYS law prohibiting the sale of contraceptives to minors under 16 and limiting sales to druggists. Brennan: “*Griswold* may no longer be read as holding that only a state may not prohibit the use of contraceptives.” Instead, *Griswold* is to be read as protecting individual decisions in matters of childbearing.
- 4) ***Zablocki v. Redhail** (US 1978, 1354): Court strikes down a Wisc statute conditioning...marriage...public charges...anyway, Marshall finds the right to marry to be fundamental, and subjects this to heightened scrutiny via EPC. Stewart concurs, saying he would’ve used DPC instead of EPC.

XXIV) Modern Due Process II – Abortion and Stare Decisis

A) Casey Stare Decisis factors - **!!!USE THESE IN ALL CONTEXTS!!!!**

- 1) Workability

- 2) Reliance
 - (a) “Whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling.”
 - (b) In *Casey*, reliance is broadened to include the interest of people in the United States to rely on the availability of abortion
 - 3) Change in Doctrine
 - (a) Notice that the “bare remnant of abandoned doctrine” language suggests that precedents can be undermined incrementally before they are flatly overruled.
 - 4) Change in Facts or Change in Perception of Facts
- B) Abortion – The Beginning**
- 1) ***Roe v. Wade** (US 1973, 1388): Texas statute makes it a crime to procure an abortion except with respect to saving the life of the mother.
 - (a) Blackmun conducts a searching (Apparently, this is cringeworthy and inaccurate. An 18-page children’s history of abortion) survey of the history of abortion, concluding that various implementations, including the English common-law, didn’t proscribe it per-se, or only considered it problematic post-Quickening. Common law had fewer restrictions!
 - (b) State elucidates three reasons for the prohibition: discouraging illicit sexual contact, the hazards of abortion, and the concern for prenatal life.
 - (c) Blackmun doesn’t contend with 1 (it hasn’t been advanced) and easily dispels 2, thanks to advances in medical technology. He invokes the “**fundamental/implicit in the concept of ordered liberty**” rights that are under the penumbral zones, and finds that this right to privacy extends to a woman’s decision to have an abortion.
 - (d) Using intratextualism, the concept of fetal “personhood” is knocked out of the debate.
 - (e) *Holding: balancing the state’s interest in preserving life with the privacy interests of the mother, Blackmun sets up a “trimester” framework: in the first trimester, there are basically no regulations by the state; in the second, there are regulations reasonably relating to the preservation and protection of material health; in the third and final trimester, the state may proscribe abortion except to preserve the life and health of the mother.*
 - (f) DOUGLAS concurs (in *Doe v. Bolton*), and finds that these fundamental rights come within the term “liberty” as used in the 14th amendment, and implies that their impediment requires strict-scrutiny analysis.
 - (g) REHNQUIST disputes that this sort of transaction can be private; moreover, he finds that the strict rules against abortion in most states seem to interrupt Blackmun’s analysis that it was “so footed in the traditions and conscience as to be ranked as fundamental.”
 - (h) WHITE finds this to be judicial overreaching, and would leave it to the legislature.
 - (i) THE TRIMESTER FRAMEWORK IS NOT REALLY WITH US ANYMORE (thanks largely to *Casey*).
 - 2) ***Planned Parenthood v. Casey** (US 1992, 1424): Pennsylvania act requires three things: a woman must give her informed consent, be provided with *certain information* 24-hours before, and a married woman must sign a statement indicating

that she has notified her husband. A minor must gain the consent of parents, but there's a judicial bypass option; there's a general medical emergency option as well.

- (a) SDOC specifically grounds this opinion in SDPC, recognizing the rights of the individual to be free from unwarranted government intrusion into matters so fundamentally affecting a person.
- (b) She analyzes *Roe* against the stare decisis framework above and finds it sound; additionally, as compared with *Lochner* and *Plessy*, no such revelatory paradigm shift has occurred that would warrant prudential modification. She throws the Court at the feet of public opinion, explaining that frequent overruling would create great cynicism in the workings of the Court, and that—as a divisive controversy—any other action would create the perception of *political* machinations.
- (c) Despite this language of tribute, however, SDOC sees fit to modify much of *Roe*, departing from *Roe*'s trimester framework and embracing, instead, the idea that the State can enact rules and regulations from the beginning, mostly on the side of dissuasion. “Not every law that makes a right more difficult is, ipso facto, an infringement on that right!”
- (d) **The Court thus adopts an “undue burden” analysis, finding that an undue burden exists, and a provision of the law is invalid, if its purpose or effect is to place a substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability (it doesn't get a majority here, though, so it's really a product of Stenberg).**
- (e) The Court uses this to uphold many parts of the Pennsylvania statute, including the definition of “medical emergency” and the informed consent requirement/24 hour waiting period, along with the minor parental notification plank (with adequate judicial bypass available); however, it smacks down the spousal consent provision, citing *Danforth* for the proposition that the Constitution does not permit a state to require a married woman to obtain her husband's consent before undergoing an abortion.
 - (i) STEVENS concurs in part, finding that the interest in protecting potential life is not grounded in the Constitution and serves only an indirect interest in minimizing offense of pro-life folks.
 - (ii) The REHNQUIST folks laugh and say “hey, you're really not upholding *Roe* at all,” and they're sort of right; they would hold abortion statutes, fundamental right or no, to a rational basis test.
 - (iii) SCALIA waxes rhapsodic as usual and manages to compare SDOC to *Taney*.
- (f) **Casey/Stenberg Framework:**
 - (i) **Prior to viability** (generally 5 months), the state can regulate abortion only if that regulation does not place an “undue burden” on the right.
01) (there is no extra analysis here: if something is found to be an undue burden, it is invalid, period)
 - (ii) **After viability**, the State can regulate and even proscribe abortion to promote its interest in the potentiality of human life, so long as it creates exceptions for the preservation of the life or health of the mother.
- (g) **One of the ways in which we know that abortion *isn't* a fundamental right in Casey is that Strict Scrutiny is supposed to attach to these. And it doesn't!**

Undue burden seems to be closer to RR with bite, perhaps. We already know that, by 1992, “fundamental right” language has baggage.

- 3) ***Stenberg v. Carhart** (US 2000): Stenberg concerned a Nebraska statute that prohibited any “partial birth abortion” unless that procedure is necessary to save the mother’s life. It defines “partial birth abortion” as a procedure in which the doctor “partially delivers vaginally a living unborn child before killing the . . . child,” and defines the latter phrase to mean “intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the . . . child and does kill the . . . child.”
 - (a) *The Court strikes down the Nebraska statute under the Casey analysis, observing, inter alia, that (1) there was no distinction between pre-viability and post-viability abortions; (2) there was no distinction between D&E and intact D&E; and (3) there was no exception for the health of the mother, which was required even for post-viability abortions.*
- 4) ***Gonzalez v. Carhart** (US 2007, S.173): Congress’s “Partial Birth Abortion” act. Under this law, “any physician who, **in or affecting interstate or foreign commerce** (i.e. predicated on the commerce clause), knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.” It prohibits the intentional performance of intact D&E, but not ordinary D&E. **There is an exception for the life of the mother, but not for the health of the mother.**
 - (a) Kennedy takes great pains to laud the integrity of the act; the State, he insists, has a legitimate interest in protecting fetal life; the Act itself has a mens rea component, so it cannot be a good-faith trap; thus, it imposes no undue burden on the right to have an abortion.
 - (b) Kennedy infamously writes, at one point, “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 they once created and sustained.”
 - (c) Amazingly, despite there being no health-of-the-mother exception, the Act passes scrutiny, due to the “significant medical disagreement” as to whether the Act would ever impose health risks on women (we’re not erring on the side of caution, in other words); Kennedy finds a “zero tolerance policy” for medical disagreements to be too restrictive.
 - (d) *Thus, he holds that the act is facially constitutional, though he is willing to entertain as-applied challenge.*
 - (e) GINSBURG hates this, finding it astonishing that the majority so blithely skims over the elaborated health risks presented. She notes that the Act cannot be read to preserve and promote fetal life, as it saves not a single fetus from destruction, targeting only a method of performing abortion. She bemoans the downward-shifting trend of the Court’s scrutiny in this arena.

XXV) Modern Due Process III and Equal Protection

- A) ***Bowers v. Hardwick** (US 1986, 1466): Boiling this down: Hardwick challenges the Georgia statute as it applies to consensual homosexual sodomy (the statute is facially neutral).
- 1) Court distinguishes the right from those fundamental ones protected in *Pierce*, *Meyer*, etc; it satisfies neither the Palko “ordered liberty” test nor the Moore “deeply rooted in this Nation’s history” test; the Court worries about its vulnerability when it deals with judge-made law having *no* basis in the Constitution.
 - 2) It dismisses P’s protests about the setting of the home, distinguishing *Stanley v. Georgia* by saying that illegal conduct is not always immunized in the home (White employs his slippery slope frequently throughout this opinion).
 - 3) The Court is also unwilling to categorize moral rational bases as illegitimate (as this isn’t a fundamental right, rational basis is the most it can hope for). ***The Court declines to invalidate the sodomy law.***
 - 4) BLACKMUN, in dissent, writes that this case is *not* about homosexual sodomy, per se, but is rather about “the most comprehensive of rights”: the right to be left alone. Zonal and decisional. Moreover, the dissent thinks that open reliance on religious mores should be *detrimental* to the status of the law.
 - (a) The prior cases **are distinguished on the relationship idea of privacy**. These cases were about marriage and the family, according to the Court (parallel to the idea that a family living together would get doubt-benefits that unrelated college kids would not). It’s only when the Court says that homosexual act has nothing to do with marriage, child-bearing, and contraception—thus divorcing it from prior precedent—that it is free to wrangle with it on otherwise untrammelled ground.
- B) ***Romer v. Evans** (US 1996, 1505): Colorado voters adopt Amendment 2 by state-wide referendum, which limits the ability of municipalities to adopt “protected status” for homosexuals. The state argues that it puts gays and lesbians in the same positions as all other persons;
- 1) the Court, however, finds this implausible, and worries about the potentially broad reach of the amendment (will it deprive gays of the protection of general laws?). It reads the amendment as instead applying a *special disability*; it imposes a broad and undifferentiated disability on a single group and its sheer breadth is so discontinuous with its justifications that it seems solely explainable via appeals to animus.
 - 2) ***Applying rational basis with bite, the Court cannot find any identifiable legitimate purpose or discrete objective, and strikes it down.***
 - (a) There are two interpretations of this. Potentially, it could imply that this decision has nothing to do with gay people—that subbing in firemen or fishermen would yield the same result. Thus, what is so offensive about the legislation is its structure, and any statutory format like “no protected status based on X” would be unconstitutional.
 - (i) Lower courts have traditionally relied upon this interpretation to de-fang *Romer*, basing it entirely on scope. See Lofton, *infra*.
 - (b) It could also be giving a “stealth” heightened scrutiny to gays.
- C) ***Lawrence v. Texas** (US 1482, 2003): Texas statute makes it a crime for two persons of the same sex to engage in sodomy.

- 1) Surprisingly, Kennedy casts this as a SDPC 14th amendment “liberty” case, instead of going the obvious equal protection route—perhaps to avoid dealing with explicit ideas of scrutiny.
 - 2) Marshalling the *Casey* factors, Kennedy finds Bowers to be in deprecated state (“bare remnant” due to subsequent cases). He says that “the right to liberty under the DPC gives them the full right to engage in their conduct without intervention of the government.” He thus situates this within the *very broad* category of the right to decisional privacy, rather than actually contending with the issue of sexual interaction. *Thus, the law dies.*
 - 3) SDOC concurs in the judgment, but would have used the EPC instead to invalidate the obvious disparity between the ban on homosex and the permission of heterosex equivalents; moral opprobrium, she implies, would not pass rational basis.
 - 4) Lawrence does adhere to the Glucksberg formulation, at least insofar as it goes through the historical formulation. But then, at the end, Kennedy engages in an analysis that seems to cut against the idea of history as a guide.
- D) ***Lofton v. Secretary** (11 Cir. 2004, 1515): Florida gay adoption case. The 11th circuit upholds the law, arguing that Lawrence was premised on rational basis and did not recognize a new fundamental right; moreover, this involves (ugh) minors, and is easily distinguishable. *Romer* is distinguished based on grounds of scope. Or so they say. Anyway, the court knocks down an EPC claim through very-credulous rational basis review, and yeah.

XXVI) Gays in the Military

- A) Until 1994, the military was governed by a 1981 Department of Defense regulation that categorically banned gays from the military. In 1994, Congress enacted the “don’t ask, don’t tell” policy.
- B) DADT. Etc. Creates a *rebuttable presumption*.
 - 1) Servicemembers can escape discharge even if they have engaged in homosexual conduct if they can demonstrate that this is not their normal behavior.
 - 2) Additionally: servicemembers who self identify as gay are hit with a presumption of homosexual conduct that must be rebutted.
- C) **Every challenge to this failed. The reason why this hasn’t made it to the Supreme Court is that the first few cases got cut down very strongly. A lot has relied on military deference grounds.**
- D) ***Cases**
 - 1) ***Thomasson v. Perry** (4th Cir. 1996, 1539): Former Lt. declares his homosexuality, challenges the constitutionality of DADT and the accompanying DoD directives. Court emphasizes that military deference is the proper road here, applying rational basis to uphold the statute. There’s a lengthy exegesis about how, though DADT is over *and* underinclusive in ways, that its lack of a perfect fit is not dispositive to its validity.
 - 2) ***Witt v. United States Air Force (9th Cir. 2008)**: Major Margaret Witt was separated from the Air Force in 2003 when her commanders found out that she is a lesbian. Her separation from the Air Force came two years before her retirement, ending her eighteen-year career as an operating room and flight nurse. The Ninth Circuit held that after *Lawrence*, something more than “rational basis” had to be

applied under her due process challenge and remanded to the lower court to apply that standard.

XXVII) Modern Due Process IV: Gay Marriage

A) Selected Chronology of Same-Sex Marriage

- 1) 1993: Hawaii Supreme Court subjects restriction of marriage to one man and one woman to strict scrutiny. Legislature overrides with state constitutional amendment.
- 2) 1996: Clinton signs Defense of Marriage Act (DOMA)
- 3) 1999: Vermont requires that same-sex couples get all the material benefits of marriage under the “common benefits clause” of the state Constitution.
- 4) 2003 (May): Federal Marriage Amendment introduced in House.
- 5) 2003 (June): *Lawrence v. Texas* decided by SCOTUS.
- 6) 2003 (Nov.): Massachusetts Supreme Court holds that state constitution guarantees marriage rights for same-sex couples.
- 7) 2006 (July): New York Court of Appeals rules that state constitution does not guarantee marriage rights for same-sex couples.
- 8) 2006 (July): House rejects FMA (236 yea to 187 nay, 290 needed).
- 9) 2008 (May): California Supreme Court holds that state Constitution guarantees marriage rights for same-sex couples.
- 10) 2008 (Oct.): Connecticut Supreme Court rules that state Constitution guarantees marriage rights for same-sex couples.
- 11) 2008 (Nov.): California voters approve Proposition 8, overturning the Supreme Court’s ruling in favor of gay marriage and amending the state Constitution to prohibit it.
- 12) 2009 (Mar. 3): Gay-rights organization files complaint to challenge federal statutory definition of marriage as between one man and one woman in Massachusetts district court.
- 13) 2009 (Mar. 6): California Supreme Court hears oral arguments in case challenging validity of Proposition 8 (opinion is due by June 6, 2009).
- 14) 2009 (Apr. 3): Iowa Supreme Court rules that the state Constitution guarantees same-sex couples the right to marry.
- 15) 2009 (Apr. 7): Vermont Legislature overrides veto by Governor Jim Douglas, enacting law that legalizes same-sex marriage.
 - (a) Note social theorists Nancy Fraser’s distinction between “politics of redistribution” and “politics of recognition” in *Justice Interruptus* (1997).
 - (b) The Loving Analogy: Note this.

B) Defense of Marriage Act

- 1) The Defense of Marriage Act (“DOMA”) is a Congressional Act that passed in 1996. It accomplishes two ends:
 - (a) It permits states not to recognize same-sex marriages enacted in other states: “No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage.”
 - (b) It defines marriage, for federal purposes, as a relationship between one man and one woman.

C) *Cases (note varying bases of review)

- 1) ***Baker v. State** (Vt. 1999): The Vermont Supreme Court holds that same-sex couples must receive all the material benefits of marriage under the state Constitution's "Common Benefits Clause." However, the Court does not require that same-sex couples get the symbolism of the word "marriage."
- 2) * **Hernandez v. Robles** (NY 2006): "This is not the kind of sham equality that the Supreme Court confronted in Loving: the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class."
- 3) ***Goodridge v. Dep't of Public Health** (Mass 2003, 1545): Massachusetts marriage case. State provides three legislative rationales: providing a favorable setting for procreation, ensuring the optimal setting for child rearing, and preserving scarce state resources. Court basically finds that all of these fail the rational-basis-with-bite giggle test, fudging the "fundamental rights" calculus and merely saying "this is so bad that it fails the rational basis test." Fantastic.
- 4) ***In re Marriage Cases** (California Supreme Court 2008): The California Supreme Court holds 4-3 that the California Constitution's equal protection clause guarantees same-sex couples the right to marry on both due process and equal protection grounds. It grants sexual orientation strict scrutiny under the state Constitution.
- 5) * **Kerrigan v. Commissioner of Public Health (Conn. 2008)**: On October 10, 2008, the Connecticut Supreme Court holds 4-3 that the state Constitution guarantees same-sex couples the right to marry, applying *intermediate scrutiny* under the state equal protection clause.
- 6) ***Varnum v. Brien** (Iowa 2009): On April 3, 2009, the Iowa Supreme Court holds 7-0 that the state Constitution guarantees same-sex couples the right to marry. It applies intermediate scrutiny under the state equal protection clause.

XXVIII) Modern Due Process V and P&I Pt. 2

- A) SDP cases are generally won or lost on the level of specificity that the Court chooses
- B) Current fundamental rights standard is *Washington v. Glucksburg*: Deeply rooted and implicit *and* carefully described.
 - 1) **Test: Two-prong analysis. We look to see whether or not it's deeply rooted in the nation's traditions and history and inherent in the concept of ordered liberty. Then we define the liberty as specifically as possible.**
- C) Fundamental Rights Cases, Cont'd
 - 1) ***Village of Belle Terre v. Boraas** (US 1974, 1370): Six unrelated college students challenge a local ordinance restricting land-use to single family dwellings, with family defined so as to exclude more than two unrelated people. Court sustains the ordinance, noting that it involved no fundamental or privacy rights. (this is the relational conception of privacy)
 - 2) ***Moore v. City of East Cleveland** (US 1977, 1370): Distinguishes Belle Terre in invalidating an ordinance that limited occupancy to a *nuclear* family; this law "slices deeply into the family itself." STEVENS concurs, viewing this as a taking under the 5th amendment. STEWART dissents, finding that this interest does not rise to the level of "implicit in the concept of ordered liberty."

- 3) ***Michael H v. Gerald D.** (US 1989, 1371): Carole D has an affair with Mike H while married to Gerald D. This affair produces a child; Carole and the daughter return to Gerald. Mike attempts to gain paternity/visitation rights; the kid cross complains in pursuit of a relationship with both parents. They raise a DPC challenge to the statute.
- (a) Scalia, writing for a semi-majority, develops a two-prong test: *the liberty interest must be fundamental, but it also must be an interest traditionally protected by society.*
 - (b) The Court declines to adopt “biological fatherhood,” as the category in question, and decides instead (via the infamous Footnote 6) to embrace the “most specific level at which a relevant tradition protecting the asserted right can be identified.” He defines this as a child born out of adulterous wedlock, and in doing so finds that society rarely awards substantive rights to people in Michael’s position. Multiple fatherhood “has no support in the history or traditions of this country.” *Thus, the SDPC claim is denied.*
 - (i) Scalia gives us a ladder of rights. He takes on Justice Brennan in dissent, complaining that he doesn’t have a methodology of SDP. Essentially, you create a ladder of rights that you think about the individual as holding.
 - 01) Parental rights of adulterous natural fathers. (he ultimately chooses this)
 - 02) Parenthood.
 - 03) Familial relationships
 - 04) Personal relationships
 - 05) Emotional attachments in general
 - (c) O’CONNOR concurs in part, but disagrees with Footnote F.
 - (d) STEVENS concurs, finding that the state protections were enough in this case...he also departs from Footnote F.
 - (e) BRENNAN’s dissent emphasizes that true “tradition” is oftentimes elusive, and that the majority’s reliance on a narrow version thereof ignores the pluralistic reality of American society. Brennan also derides the plurality’s “one-step” analysis, which considers Michael’s liberty interest *and* the state’s interest in tandem, in departure from the usual mode of DPC analysis. WHITE would have found that Michael more than met the mark for establishing a liberty interest.
 - (f) Essentially, what we’re dealing with is a *conclusive* presumption under California law, instead of a rebuttable presumption. Scalia says “you’re confusing an evidentiary rule for a substantive rule.” We’re going to conclusively presume that any couple born to a married couple is the issue of that couple, thanks to the age-old stigma of illegitimacy and bastardhood. *The facts don’t matter.* You can’t say that your procedural DPR were violated, because the very fact of a conclusive presumption means that evidence to the contrary is not relevant.
 - (g) This is the **performative dimension** of the law (NOTE THIS NOTE THIS). The state of the law is called into being by the language. Issue of a married couple is its issue, is its child.
- 4) ***Washington v. Glucksberg** (US 1997, 1579): Washington prohibition-on-suicide case.
- (a) Rehnquist formulates the (most current?) version of the SDPC test: in must be deeply rooted and implicit, but it *also* must be carefully described, as Rehnquist

clearly wishes to be cautious in his analysis. Tradition, he writes, is not on the side of those rallying against the statute.

- (b) He distinguishes P's reliance on Cruzan (in an attempt to situate this in the general liberty/privacy matrix) by pointing out that forced medication is a very different thing from euthanasia. As the interest is not fundamental, the statute draws only RR and passes easily, with a series of potential state interests cited on 1582 and 1583.
- 5) ***Vacco v. Quill** (US 1997, 1586): Court considered an EPC challenge to NYS's law prohibiting assisted suicide. Focus: the distinction between persons who wish to withdraw from lifesaving treatment and those who wish to hasten death is senseless!
 - (a) REHNQUIST: The line here isn't perfectly clear, but "not perfectly clear" is a long way from "irrational." The latter is a form of *intentional killing*; there is a difference between dying "naturally" and hastening artificially.
 - (b) SDOC concurs somewhat tentatively, recognizing that those in full command of their faculties may be able to creatively kill themselves with medication even as the state protects those who are in a more-vulnerable state.
 - (c) STEVENS would entertain as-applied challenges to the statute. BREYER, concurring in the judgment, would construe the liberty interest at stake as "the right to die with dignity."
 - (d) **NOTE NOTE NOTE: YOU CAN USE THIS TO SUPPORT SOME SERIOUSLY ODD 14thA CLAIMS**
- D) The Use of Foreign and International Sources in Constitutional Interpretation
 - 1) ***Atkins v. Virginia** (US 2002, 1365): Court, in an opinion by Stevens, holds that executing mentally retarded criminals violated the 8th amendment's prohibition on cruel and unusual punishments. Stevens namechecks the world community whilst conducting his analysis. REHNQUIST dissents, finding this to be *abhorrent* (as does Scalia).

XXIX) Legislative and Adjudicative Enforcement of the 14th Amendment

- A) **THE LAW OF THE LAND TODAY IN ANALYZING THE § 5 CLAIM IS AS FOLLOWS:**
 - 1) **What are the § 1 violations?**
 - 2) **Is Congress's enactment under § 5 congruent and proportional to remedy the violations of § 1?**
- B) The Reconstruction Power
 - 1) Difference between the 14th and the commerce power: When congress acts under the Commerce power, it need not worry about colliding with state statutes; it only needs to discern whether the proposed law is within its delegated powers and does not contravene any Constitutional limits.
 - 2) Whenever Congress ventures beyond the Court's interpretation of the rights conferred by 14A§1, it no longer is "enforcing" § 1.
 - 3) Amar: Intratextualism reveals a different character here. The 14th amendment should not be read piece by piece! A more holistic reading reveals that the Court's argument in *Boerne* makes no real sense.
- C) Voting Rights Act notes

- 1) ***Oregon v. Mitchell** (US 1970, 582): Court unanimously upholds five-year suspension of literacy tests.
- 2) **Robert Burt's** test of Congressional power under the 14th: Congress is a less-constrained line drawer! It's not burdened under the considerations encountered by the Court.
- 3) **Archibald Cox**: Congress is the superior fact-finder!
- 4) **Will Cohen**: Congress is a superior representative of state governments!
- 5) **Lawrence Sager**: Congress is the Court's junior partner!
- 6) **Post+Siegal**: Congress is a more politically sensitive barometer of evolving Constitutional culture and a more comprehensive regulator of complex institutional settings.
- 7) **Amar**: Congress is a coequal interpretive partner and reflector of fundamental values!

D) *Cases

- 1) ***Katzbach v. Morgan** (US 1966, 576): Puerto Rican schoolkid case. § 4e of the VRA provides that no person educated in an American Flag school in PR should be denied to vote because of his or her inability to write or read English.
 - (a) **The Court ports over the “necessary and proper” power (relying on McCulloch) to determine that Congress has broad powers under § 5 of the 14th amendment, and the statute is upheld.**
 - (b) Brennan articulates the “ratchet” test of Constitutional doctrine, which stands for the proposition that the can only *increase* the Court's bans on states.
 - (c) HARLAN dissents, finding a legitimate concern with promoting and safeguarding the use of the ballot (via Lassiter). Morgan was historically interesting as the high-point. **Please do not cite this as anything other than an artifact of history. Forget it!**
 - (d) Brennan supports this under two alternative theories:
 - (i) Congress can come up with § 1 rationale under § 5 power.
 - 01) (this is extraordinarily broad)
 - 02) Aggressive interpretation: Congress's interpretation of § 1 is what's guiding its powers under § 5. In other words, Congress can come up with its *own* interpretation of § 1. Congress is saying “we disagree with your conclusion that literacy tests violate the 14th amendment.”
 - (ii) § 1 is interpreted by the Court, but Congress can sweep more broadly, pegging its interpretation to the Court but under a deference-inspiring necessary and proper standard.
 - 01) Classic, most minimalist intervention: § 1983 claims. What Congress does in enforcing these rights is give people private CoAs.

E) The Run Up to the RFRA

- 1) 1963: *Sherbert v. Verner*
 - (a) Seventh-day Adventist case. She asks for unemployment benefits. State refuses to give her unemployment benefits because she's turned down paid work.
 - (b) But she turned down paid work because it would've forced her to cruelly violate her Sabbath!
 - (c) Claim: I'm not contesting this as a rule of general applicability. What you have to understand is that I wasn't turning down that paid work because I'm lazy, but

because it violated my Sabbath! Thus, you should religiously accommodate me so I don't have to choose between my livelihood and my religion.

- (d) Supreme Court: Sure! Yes, the law stands as a general matter, but there should be a carve-out for religions. If the state is making individualized determinations, it has to make accommodations for religion where a good-faith religious objection is being made to a rule of general applicability.
 - 2) 1972: *Wisconsin v. Yoder*
 - (a) Wisconsin has a rule that says "you have to attend high-school!" The Amish family doesn't want their kid to go to HS, because they think that high-school is a pit of sex and drugs. "We are quite willing to allow our kids to go to school through middle-school, but after that, we inculcate."
 - (b) SCOTUS: Wow, this is at the intersection of free exercise and the right of parents to control children's education (Meyer). Yes, we'll accommodate you. Therefore, even though Wisconsin's statute was not enacted with discriminatory animus, the fact that the Amish feel this is going to hurt them means that they get an accommodation from the school.
 - (c) **General FE rule: State has to have a compelling interest before a rule of facial applicability can have a disparate impact on a religious minority.**
 - 3) 1990: *Employment Division v. Smith*
 - (a) Replaces *Yoder's* lax rule with a *Davis* variant.
 - (b) "So long as the law is of general applicability, and is not enacted with animus (viz *Washington v. Davis*), it gets rational basis."
 - 4) 1993: Religious Freedom Restoration Act ("RFRA")
 - (a) What is being restored? Well, Congress is trying to restore the Court's original jurisprudence. You got it right in *Sherbert* and *Yoder*; we like those cases better than we like *Smith*! We want to make that the standard that applies to free exercise cases.
 - (b) Congress: Under § 5, we're gonna guarantee the full panoply of rights.
 - (c) "It's fine, for you, as a Court to set a floor. But we want to build up that floor as a statutory matter and grant rights that were not granted by the Court, and essentially restore the *Yoder* standard legislatively."
 - F) ***City of Boerne v. Flores** (US 1997, 629): Religious Freedom Restoration Act case. Notable points: Congress's power under § 5 of the 14th amendment is *remedial* in character.
 - 1) While one might think that the wrong addressed here *was* remedial (occurring as it does to remedy *Smith*), the Court adds another dimension: there must be a congruence and a proportionality between the means used and the ends to be achieved.
 - 2) **As the RFRA is so broad, and so contrary to the Court's interpretation in Smith, it fails under this analysis, and is consequently unconstitutional.**
 - 3) STEVENS would've nailed this on First Amendment grounds.
 - 4) O'CONNOR dissents, as she views *Smith* as wrongly decided and the reasoning flowing therefrom to be erroneous.
 - G) ***US v. Morrison** (US 2000, 643): We've already touched on this once. However, the Court also analyzed this VAWA provision under § 5 of the 14th. The 14th, Rehnquist declares, only affects state action. As none is present here, the statute fails.
- XXX) Sovereign Immunity

- A) Sovereign Immunity aside: (most of this is from slides)
- 1) § 1983 actions do *not* implicate sovereign immunity due to the legal fiction of suing an individual in his *individual capacity*.
- B) Rationale: Congress cannot use the commerce clause in these cases because of Supreme Court caselaw establishing that...commerce clause unavailable in sovereign immunity cases.
- 1) The ultimate guarantee of the [Eleventh Amendment](#) is that nonconsenting States may not be sued by private individuals in federal court. (Kimel)
- C) ***Early Cases**
- 1) *Hans v. Louisiana* (1890) reads the Eleventh Amendment to prohibit suits against a state by one of its own citizens, arguing that otherwise the courts would be discriminating against out-of-staters.
 - 2) In *Ex Parte Young* (1908), the Court permits citizens to sue states for prospective injunctive relief, but affirms in *Edelman v. Jordan* (1974) that citizens cannot sue states for damages paid out of the state treasury.
 - 3) (Equity drops out)
 - 4) In *Alden v. Maine* (1999), the Court finds that a citizen barred from bringing a federal damages suit in federal court could not bring that suit in state court.
 - (a) EXPANSION sovereign immunity. Federal court doctrine sloping down to state court.
 - 5) **In *Seminole Tribe v. Florida* (1996), the Court found that Congress could not abrogate sovereign immunity through its Article I powers. To abrogate sovereign immunity, there must be either**
 - (i) **waiver of immunity by the state; or**
 - (ii) **a clear intent by Congress to abrogate and an action pursuant to proper (i.e. post-Eleventh Amendment) power.**
- D) ***Other Cases (end, please)**
- 1) **Rational Basis with Bite *City of Cleburne v. Cleburne Living Center** (US 1985, 1327): CLC purchases a four-bedroom house for use as a group home for the mentally retarded. City determines that a special-use permit is required, and denies the permit on a vote. DC holds the ordinance constitutional under RB. CoA imposed IS, which it decided that the city failed. WHITE does a number of things in his majority. He first emphasizes that there is a *real difference* possessed by the mentally retarded. Moreover, lawmakers address their problems; they are not a forlorn class in the Carolene Products sense. Finally, they're not politically powerless! Thus, no heightened scrutiny should be provided. Despite this analysis, however, the Court holds that the city's action fails rational basis with bite, as unsubstantiated fear is *not* a rational basis. It thus fails the as-applied challenge. MARSHALL concurs in part and dissents in part, and would have White be honest about the standard of review he applies. He also dislikes the as-applied nature of the remedy.
 - (a) KY: This may seem like we're talking a step backwards: in other words, we seem to be dealing with § 1 of the 14th amendment and not Congress's powers to enforce under § 5.
 - (b) KY: The two are intimately related. What I wanted to show you was the relationship between § 1 rights and § 5 enforceability. When we have a section 1

right that appears to be very weak, then the power Congress has to salve violations thereof is concomitantly weak.

- (c) KY: I want you to draw a distinction between Morrison (VAWA – whether or not Congress has the power to enact VAWA at all) and these cases, where it’s uncontested that Congress has the power to enact this legislation, but what’s at issue is its attempt to abrogate the sovereign immunity of the states?
- (d) THIS IS A DIFFERENT KIND OF RATIONAL BASIS. If we haven’t figured this out yet, well, you’ve got it written in all-caps. To recap:
 - (i) No one-step-at-a-time.
 - (ii) No hypothesizing.
- E) ***Nevada Dep’t of Human Resources v. Hibbs** (US 2003, 1305): FMLA entitles eligible employees to take up to 12 work weeks of unpaid leave annually. Presumably, this is passed through the 14th amendment as an attempt to remedy on invalid stereotypes relied upon by the states. The Court finds this to be both remedial and congruent and proportional to the targeted violation, “narrowly targeted at the fault line between work and family...and affecting only one aspect of the employment relationship.”
- F) ***Alabama v. Garrett**: Employees bring suit under the Americans with Disabilities Act against state employers for money damages. State employers assert an Eleventh Amendment sovereign immunity defense. The Court upholds the defense.
 - We’re moving from the § 1 context dealing with disabilities to the § 5 context.
 - Aside: The ADA puts a duty of reasonable accommodation on employers. Title 2 says that persons with disabilities have to have access to public accommodations. Both of these are seen to be permissible enactments by Congress under its commerce clause powers.
 - What’s at issue is not whether Congress has the power to pass the ADA, but whether it has the power to abrogate sovereign immunity and enable someone to sue a state employer under it.
 - Court states that “Congress may abrogate the States’ Eleventh Amendment immunity when it [1] both unequivocally intends to do so and [2] ‘act[s] pursuant to a valid grant of constitutional authority.’”
 - Why the ADA fails here:
 - It clearly fails under the commerce clause prong. Commerce clause predates the 11th and thus can’t be a sovereign-piercing rationale.
 - It fails under the 14th amendment because of Boerne. The first question you ask is “how many violations of the § 1 right have there been?” The second question is “is the remedy congruent and proportional?” These § 1 rights, by the way, are defined by the courts and *not* Congress.
 - So how does this proper occur in Garrett?
 - Court: There aren’t many violations of § 1 for three reasons
 - First, it maintains that the inquiry as to unconstitutional discrimination should extend only to the states themselves, not units of local governments, such as cities and counties.
 - ◆ IOW: The University of Alabama can assert sovereign immunity, but apparently the University of Little Rock...cannot? This makes *absolutely no*

sense, and seems to be a cheap way of cabining § 1 violations (especially as the EPC covers municipalities).

- The second way the Court argues that there are not many violations of § 1 is that it believes only Title I of the ADA is implicated in this case. It severs Title I, which deals with employment, from Title II, which deals with “services, programs, or activities of public entity.” (Title II is at issue in *Tennessee v. Lane* (2004).)
 - ◆ Again: another cheap way of cabining violations.
 - ◆ Court grants cert, and then says “Oops! We’re gonna dismiss cert as improvidently granted” with regard to Title II.
- Finally, the Court maintains that not all forms of disparate treatment on the basis of disability are cognizable as violations of § 1, because *Cleburne* recognizes that it may be rational to discriminate against individuals with disabilities.
 - ◆ This is where we start to see the consequence of rational basis with bite as counterposed with formal heightened scrutiny.
 - ◆ Court: One of the reasons that Congress’s power to enact the ADA is “limited” is that there’s less likely to be a § 1 violation? Wait, but what about the “real difference” doctrine?

Tennessee v. Lane (2004): Two paraplegics who use wheelchairs for mobility sue after being unable to gain access to Tennessee courthouses. The state raises a sovereign immunity defense. The Court finds that Congress has validly abrogated sovereign immunity under Title II.

- “Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching as the standard that applies to sex-based classifications.”
- State was pretty confident that it was going to win, especially as Garrett was already on the books.
- Stevens: This is about the rights to access the courts under substantive due process.
 - KY: Very interesting move here. When we think about § 5, most of the legislation has been congruence and proportionality with regard to a remedy.
 - Stevens: § 5 is *also* an enforcement prong for the due-process clause.
 - The right to access the Court is given at *least* intermediate scrutiny.
- Something about indigent plaintiffs that cannot afford a stenographic transcript? Court holds that the state must pay for the transcript, as otherwise he will not be able to meaningfully appeal/have access to the Courts.
 - Stevens is gleefully adducing all of the cases that Rehnquist previously cut out.