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OUTLINE

VI. Introduction/Pre-Civil War

a. Background to the Constitution [CLASS 1]

- *Articles of Confederation* adopted by 2nd Continental Congress
  - Problems:
    - Very weak government
    - No executive branch
    - Central power was Congress – but had very little power
    - No power to regulate interstate / foreign commerce
    - *No power to tax citizens*
  - Shay's Rebellion showed the weakness of the federal government (500 farmers w/pitchforks brought Mass to a halt, and fed gvt powerless)
- Led to Constitutional Convention in Philly & 3 major Constitutional Compromises
  - *Connecticut Plan / "Great Compromise"*
    - Bicameral legislature
      - House: apportioned by population
      - Senate: equal among states (2 for each state)
  - *3/5 Compromise*
    - South wanted slaves counted as people so they could have more representation in the House, but didn't want to be taxed more
    - North wanted slaves counted for taxation purposes, not representation
    - Led to 3/5 compromise = *Slaves counted as 3/5 of a person for taxes and apportionment of congressional seats & electoral votes*
    - Enhanced political power of the South
  - *Madisonian Compromise*
    - Constitution would authorize, but *not require*, lower federal courts
- Still some major constitutional problems with the US Constitution (see notes)

b. The Federalists v. the Anti-Federalists [CLASS 1]

i. Bill of Rights Argument: Purpose of Bill of Rights was to reign in fed gvt

- Anti-Federalists
  - Felt Constitution created a *national government* that was *too powerful* and went beyond the powers of a central government
    - Worried that the Constitution implies a lot of powers, so the government would take its powers too far
  - *Wanted Bill of Rights to enumerate personal/individual freedoms*
- Federalists
  - Pro-Constitution
  - Included Alexander Hamilton, John Jay, and James Madison
  - Federalist Papers = PR for the Constitution
    - Series of 85 essays over 2 months to convince NY and VA especially to ratify the Constitution
  - *Worried that Bill of Rights is unnecessary and could be dangerous*
    - *Hamilton said that it would create exceptions to powers which aren't even granted in the 1st place:*
      - *Eg:* Why do you need to say that liberty of press shouldn't be restrained, when there's no power given to the government to even restrict it in the first place?
      - *Think that it will encourage federal government to abuse their authority and impose restrictions, saying that Bill of Rights implies that gvt has the authority to restrict*
      - **Big point**: If you write down certain rights, everyone will think you're excuding other rights, and the ones that are written are the only ones that matter
      - **The rights that individuals have should not be defined by listing the restrictions on the federal government**

ii. Debate over the National Bank

- Issue: *How much power does the federal government have over states?*
    - Battle over federalism
- Madison and Hamilton, who wrote the federalist papers together, break over the idea of having a national bank
    - Madison says it's unconstitutional b/c *not in the Constitution*
        - Afraid that it will give Congress, by having borrowing power and running this bank, could give fed gvt unlimited power
    - Hamilton disagrees (national bank was his idea)
        - 3 reasons for it:
            - Helps fed gvt stabilize credit, pay debts, borrow money
            - Earns revenue
            - Good for currency – helps stabilize the dollar
    - Leads us to *McCulloch*

c. *McCulloch* and Federal Supremacy [CLASS 2]

McCulloch v. Maryland

- **Facts:** MD tries to tax the National Bank, and they refuse to pay tax, so MD sues
- **Issue:** 2 questions posed:
    - #1: Does Congress even have the power to incorporate a national bank?
    - #2: Does MD have the power to tax the US Ntnl Bank?
- **Holding:** (Marshall)
    - #1: Yes, Congress has power to incorporate a national bank
        - No explicit power granted in Constitution about a national bank
            - Drafters were vague on purpose
        - **Congress has the power to make necessary and proper laws**
            - **Government has the means to reach the appropriate ends**
                - Constitution allows Congress to carry out legislation that will execute its powers that *are* expressly laid out in the Constitution (like the power to borrow money is expressly laid out, so can legislate to create a national bank to reach that end)
            - **The means do not have to be expressly laid out in the Constitution**
        - Court gives a lot of deference to decisions reached by Congress
    - #2: No, States can't tax the operations of the federal gvt
        - Federal gvt is sovereign over the states – they are not equal
        - National bank meant for citizens of other states too – MD can't tax citizens of other states through taxing the national bank
        - **B/c people of the US are supreme, and they ratified the Constn, the Constn is supreme (for the people, by the people)**
- **Big takeaway:**
    - *McCulloch about the relationship b/w states and fed gvt*
    - Question of sovereignty and **why the Constitution is the law of the land**
        - Marshall **couldn't just say fed gvt had powers b/c Constitution said so: needed to say *why* we have to even listen to the Constn**
        - Had to prove the Supremacy Clause and why the fed gvt is supreme
- **2 types of powers**
    - **Inherent powers**
        - Don't depend on the existence of *any* textual argument
    - **Implied powers**
        - Implied = linked to the textually assigned powers in the Constitution
            - Help serve the menas to the end of what Congress is supposed to do → power to create national bank is implied
- Key Quotes from *McCulloch*:
    - *"…we must never forget that it is a Constitution we are expounding"*

- We have implied powers and we're elaboratingon a roadmap that began with limitations → Constn isn't all-inclusive
- *Let the end be legitimate, let it be within the scope of the constitution…"*

d. *Marbury* and Judicial Review / Supremacy [CLASS 3]

i. ***Marbury v. Madison***

- **Facts:** Marbury appointed by Pres. Adams as Justice of Peace and signed Marbury's commission, but Sec. of State, John Marshall, failed to deliver commission to Marbury. Jefferson took over as president and ordered commission not to be delivered (b/c different political party than Adams)
- **4 questions (3 explicit, 1 implicitly added by Justice Marshall)**
  - #1: *Does Marbury have right to his commission as Justice of Peace?*
    - Yes: Look at what point the decision to give commission was completed – it was *when the president signs*
  - #2: *If he was entitled to commission, does he have a legal remedy?*
    - Yes: When a duty is assigned by the law, then he's given a **legal right**, and with legal rights come **legal remedies**
  - #3: *If he does get a remedy, is it the job of SCOTUS to provide it?*
    - Heart of the case – power of judiciary and SCOTUS to provide remedies
    - Yes: Constitution explicitly states where Sup Ct has original jurisdiction
      - **So, if Constn states it, then not for legislature to decide when Sup Ct gets original jurisdiction or appellate jurisdiction** (which is what Congress tried to do w/ the Judiciary Act of 1789)
  - #4: *If Congress unconstitutionally given SCOTUS power to provide Marbury with remedy, does Ct have pwr to invalidate Congress' statute?*
    - Yes: **Judiciary Act is unconstitutional – not for Congress to expand Sup Ct's powers beyond what Constitution explicitly states**
      - **Constitution is supreme, and if Judiciary Act conflicts, courts have the power to strike it down**
      - Job of the Courts, under pwrs given by Constn, is to interpret and speak the law, which includes interpreting the Constitution itself
    - Note Marshall **giving power to Ct**
      - *Goes out of his way to strike down Judiciary Act*
      - *Wants to give courts the power for judicial review*

ii. Judicial review vs Judicial Supremacy – different or same?

- Marshall suggests that courts have the final word
  - But do we want courts to have that much power?
- If SCOTUS misinterprets the Constitution, we can amend it (though it rarely happens)
- Also remember that courts only *review* by deciding the cases that come before it – they never get to actually instigate and bring up the issues they decide

iii. Counter-majoritarian difficulty

- ***Marbury* seems to go against the ideals of our democracy –** 50 yr old white men can reverse the legislature's opinion – and the legislature is elected by the people
  - ***So in effect, Ct can overrule what the people want***

iv. Justifications for judicial supremacy (Why *Marbury* is ok, despite the fear above)

1. *Supervising Inter- and Intra- governmental Relations*
   - Federal uniformity to keep everyone in check – especially States and Congress
2. *Preserving Fundamental Values*
   - Have a broader vision since they're in for life terms and harmonize judicial decisions for long-term vision
3. *Protecting the Integrity of Democratic Processes*
   - Just b/c 55% of public approves, doesn't mean it's ok
   - Courts protecting the minority from tyranny of majority
4. *Is Judicial Review Actually Countermajoritarian?*
   - SCOTUS generally follows political sentiment of country

- Justices nominated by President and confirmed by Congress (both are democratically elected)
- SCOTUS rarely strikes down legislature

- *Martin v. Hunter's Lessee* (also in Class 4 slides)
  - Established that the constitutionality of the Sup Ct's jurisdiction to hear appeals from state courts raising "federal questions"
    - So a Sup Ct can sit in judgment of *any* state ct decision that nullifies federal law (why the Sup Ct **is final** word)

e. Internal and External Checks on the Judiciary Review (Class 4)

- Big takeaway: SCOTUS is **final word** – but can get it horribly wrong (*Dred Scott*) and then we run into mistakes – especially when SCOTUS is the final body that gets to interpret the Constitution
  - *Marbury* evolved now that SCOTUS is trusted so they get to be the supreme interpreters of supreme law

i. *Limitations on Judicial Power*

- Jurisdiction Stripping:
  - *Congress' power over the lower federal courts, so they can potentially say what these courts can't hear, and prevent controversial topics from reaching SCOTUS* → but nobody's answered if Congress can keep cases away from the courts altogether
  - **Art. III**: Judicial power extends to all cases arising under Constn
    - State courts can hear Π's claim if you take away federal jurisdiction → just making sure that as long as you can go to *some court*, not right to a specific court
  - Habeas problem = Lawsuits by federal prisoners on habeas can't be heard by state courts, so taking away federal jurisdiction *would* be a problem
- Justiciability
  - *Is this the right case at the right time?*
  - 2 doctrines:
    - Standing
      - *Art. III limits judicial power to resolving "cases" and "controversies"* – need courts to only redress wrongs
      - *Court limiting their own power to preserve legitimacy*
      - Look at 3 things:
        - Injury in Fact
          - Were you the Π actually injured?
        - Causation
          - Did the Δ cause at least a part of your injury, and is it someone agst whom you can recover?
        - Redressability
          - Can the court actually give you the relief you want against the person you're suing?
      - Can also *lose standing through*
        - Mootness: No longer an issue (eg: law student sued to get into law school but by the time it got to Sup Ct, he was almost about to graduate)
        - Ripeness: Whether it's too early to decide a case
    - Political Question Doctrine
      - Not unconstitutional for legislature to make stupid laws
      - 2 types of political questions
        - Textual
          - Constitution gives the power to another body, not the Cts (like Senate has power to decide impeachment rules, not Cts)
        - Judicially unmanageable standards

- Gerrymandering is too partisan of an issue
- But controversial, b/c why did they decide Bush v. Gore?

ii. What if President Disagrees with Judiciary Review? (Class 4)

- *Ex Parte Merryman*
  - **Facts:** Lincoln ordered General to suspend writ of habeas corpus (so persons deprived of liberty can't challenge legality of detention in ct); Merryman was a prominent politician in antiwar riot and was arrested by military and detained
  - **Holding** (CJ Taney): *President can't suspend habeas corpus b/c not in his constitutional power*
  - **But: Lincoln ignores the Supreme Court**
    - Addresses Congress and says should be ok to suspend one minor law to prevent riots and treason to keep the country together
      - Congress passed act allowing Pres to suspend habeas
    - Issue:
      - *Do we think it's more important to preserve our gvt from being overthrown or to preserve 1 law (allowing it to be ignored could cause legal system to fall apart)*

iii. What if Congress Disagrees?

- *Dickerson v. US*
  - **Facts:** Miranda warnings *must* be given before interrogation but Congress passed a statute that basically overruled *Miranda*, allowing suspect's voluntary statements to be admitted, w/o Miranda warnings
  - **Holding:** Congress' statute is *unconstitutional*, b/c *Miranda* warnings are a constitutional rule, not an evidentiary rule
    - Court refuses to overrule *Miranda*, and would rather strike down statute b/c *Miranda* is such a heavy precedent
    - **Congress can only overrule courts on issues of evidence and procedure, not on constitutional issues** (saying *Miranda* based on 5th Am's self-incrimination rule)
  - **Dissent** (Scalia): Says *Miranda* warnings not required by the Constitution, so it's not a constitutional issue

iv. What if States Disagree?

- *Cooper v. Aaron*
  - **Facts:** Little Rock school board trying to integrate, post-*Brown* but governor is anti-integration.
  - **Holding:** Pres sends in Army to protect 9 black students who are trying to integrate into high school
  - **Takeaway: SCOTUS is the final word**
- Remember op-ed arguing states shouldn't follow SCOTUS in *Roper v. Simmons*
  - Argues liberal justices made unconstitutional decision in *Roper* and state courts should be allowed to adopt contrary interpretation
  - Response to him:
    - If states go against SCOTUS, we lose uniformity
    - States should just be allowed to appeal to SCOTUS and can revisit old issues
- How do *Marbury* and *Cooper v. Aaron* interconnect?
  - *Cooper* has this whole thing about establishing judicial supremacy, but all *Marbury* establishes is the power of judicial review
  - But *Marbury* itself did not equate judicial review with judicial supremacy
    - Doesn't say anything directly about judicial supremacy
    - *Cooper* just read *Marbury* that way – that it established judicial supremacy

f. *Dred Scott* (CLASS 5)

- 3 big issues showing tension b/w north and south and slavery:
  - For representation, how to reach good #s balance b/w slave and free states
  - Whether there would/should be slavery and *who decides* (Congress or States)
  - If free states should protect fugitive slaves by preventing their capture / return

- Fugitive Slave Act of 1973:
  - Crime to assist a fugitive slave, even in free states
  - Procedures for returning slaves found in free states; they're always fugitives
- Missouri Compromise
  - Maine admitted as "free" state
  - Missouri "slave" state
  - Slavery prohibited in Louisiana territory north of Missouri's southern border (aka – *Missouri Compromise line* – important in *Dred Scott*)
- *Dred Scott v. Sanford* (p. 243)
- **Facts:** Π was a slave from Missouri and taken to Illinois, held there as a slave, and then moved with his master to upper part of Louisiana territory (above the "line"). Then Π and his wife and kids conveyed to Δ. Π says once he crossed over into IL, a free territory, he became a free man.
- **Issue –** 2 main questions:
  - #1: *Is Scott a "citizen" of MO, w/in the meaning of the Constn?*
    - Need diversity jurisdiction to even be able to raise this claim
  - #2: *Did Congress have the power to prohibit slavery in territories north of the MO Compromise line?*
    - Didn't even need to reach #2, since there wasn't even jurisdiction!
- **Holding:** (Taney)
  - #1: No, Scott is not a citizen of MO
    - Says it was clear that when Constitution was written, blacks were inferior race, and never meant to be treated as "fellow-citizens and members of the sovereignty"
      - Curtis' dissent: *African men helped ratify the Constitution too, and so Constn not meant to exclude all black men* – so Scott had the oppty to become free black man – not all black men are slaves w/o the right of being citizens
  - #2: No, Congress didn't have the power to prohibit slavery above the MO Compromise line
    - *Essentially saying MO Compromise was illegal*
    - Slaves are property, and federal gvt can't deprive citizens of their vested property rights
      - Since Congress doesn't have power to deprive of property in the states, they also can't do it in territories
      - *Taney is wrong though*
        - Constitution does give Congress the power to regulate and Congress can do away w/laws in territories
        - Also makes the Louisiana Purchase unconstitutional

g. The Civil War / *The Prize Cases* (CLASS 5)

- *The Prize Cases*
- **Facts:** Lincoln issued proclamations blockading Confederate ports and authorizing seizure of ships caught carrying goods to them, and shipowners sued, claiming this was beyond President's authority, in absence of congressional recognition of war
- **Problem faced by Ct:**
  - If they say Pres' blockade was illegal under laws of war, by just saying Confederacy is insurrection, then takes away any authority for powers that come from the laws of war
    - Thus invalidating the Civil War by saying it's not a war
  - If they say it is legal, then giving Pres a lot of powers, in absence of war b/w 2 countries (which is usually the only time Pres would get such powers)
    - Would also have to recognize Confederacy as a foreign nation
- **Holding:** President didn't have time to wait for Congress to get back into session to wait for recognition of war in order to institute blockades

- Confederacy was insurrection, and Congress gave President the power to blockade as part of his broader authority under the Militia Acts, to suppress insurrections
- Keeps the idea that Civil War doesn't mean war b/w 2 countries
  - South *never leaves the Union* – just treated as insurrection
  - **Also recognized President's broad power to use force he deemed necessary to put down insurrection**
    - Scary to think about now – suspension of habeas

VII. Federal & State Powers from Reconstruction to the Present –

→ About 1 big overarching question: *How does the Constitution allocate power b/w Congress and the States?* (Regulatory power; limits on Congress' & States' power and where they come from)

a. Early limits on 14th Amendment (leads to questions about limits on Congress' & States' powers)

i. 14th Amendment Background (CLASS 6)

- Congress overrode Pres. Johnson's veto of Civil Rights Act of 1866:
  - Civ Rights Act overrode Dred Scott – allowing anyone born in US to be citizens & gave basic rights (except political rights)
  - *Problem w/ Civil Rights Act* → *Exceeded Congress' powers b/c it wasn't anywhere in the Constitution to enact civil righs laws*
    - So led to14th Amendment (ratified before South came back)
- 3 Important Clauses in 14th Amendment
  - **Due Process Clause**
    - Can't take away life, liberty, property w/o due process of law
  - **Equal Protection Clause**
    - Can't deny *equal protection* of the laws
  - **Privileges and Immunities Clause**
    - *There are some things you can't do, period, even if you provide due process and provide equal protection (don't discrim)*
      - Argument about what thes fundamental rights are (heart of *Slaughterhouse* – does free labor fall under it?)
        - #1: Just what's under the Bill of Rights
        - #2: Fundamental and natural rights

ii. ***The Slaughterhouse Cases:* Privileges and Immunities Clause (**(CLASS 6)

- **Facts:** Louisiana legislature stated that all the butchers had to go to 1 state-created butcherhouse & pay to use it and slaughter their meat there. Butchers say it interfered with their right to free labor, agst 14th Am's privileges and immunities clause: *No State shall make or enforce any law which shall abridge the privileged or immunities of citizens of the United States*
- **Issue:**
  - Does the P-I Clause include a right to free labor that the state can't take away?
- **Holding:** (Miller)
  - No – Louisiana has right to create slaughterhouse
  - 14th Am only protects **fundamental** rights that are the privileges and immunities protected by **national citizenship**
    - 14th Am clearly distinguishes b/w state and national citizenship
    - Free labor doesn't fall under fundamental rights of US citizens – that is a right left up to the states to regulate
    - 14th Am grants protection from federal government but **won't limit states if they are not interfering with federal rights**
      - Eg: **14th Am only protects citizens from state interference of "national" rights –** *Court recognizing broad state power to interfere with labor rights*
- **Field's Dissent:** (Seen as origin of *substantive due process*)
  - Majority's interpretation of 14th Am. is wrong:
    - Supremacy Clause already protected privileges and immunities of national citizenship

- 14th Am meant to protect *fundamental rights that "belong to the citizens of all free governments"*
  - **14th Am meant to protect citizens from the states**
  - One of the fundamental rights includes right to pursue employment w/o state interference
- Not just that states can't act arbitrarily; there are actual, substantive limitations on what states can't do – and the **purpose of 14th Am is to limit states' power**
  - There needs to be a good reason for limiting fundamental rights, and Louisiana not meeting this standard
  - **Fields dissent argues that: There are *substantive* limits on the states' police powers**

iii. **14th Am & Race** (CLASS 7)

- **3 ways of framing 14th Am**
  - Civil Equality → at bare minimum, 14th Am protects this
    - Rights you have as part of member of civil society
    - Are absolute and personal
    - Eg: Rights to sue, testify, contract
  - Political Equality
    - Eg: Right to vote, have an active political voice/representation
    - Conditioned and dependent upon discretion of the elective or appointed power (Fields definition in *Ex parte Virginia*)
  - Social Equality → **heart of *Plessy***
    - Eg: Right to select one's associates
- **2 ways of addressing idea of "equal protection"**
  - #1: Laws treat everyone equally
  - #2: Laws should promote equality & get us to the ideal pt of equal rights
- *Strauder v. West Virginia*
  - **Facts:** Δ is black man, tried in WV, which excludes all non-whites from jury; he says the statute violates the Equal Protection Clause
  - **Holding:** (Strong)
    - 14th Am meant to protect exclusion based on race/color from jury
      - *Aim of 14th Am was to prevent discrimination b/c of race or color* (Strong doesn't protect females or non-citizens)
    - **2 types of discrimination:**
      - De jure = statute clearly discriminates (as in *Strauder)*
      - De facto = hush hush discrimination; not on its face, but clear from the impact that it discriminates
      - Strauder only prevents de jure discrimination
  - **Dissent:** (Fields)
    - #1: Majority implying that white jurors aren't fair and impartial, and that they can't be trusted to be on a jury if black man is at trial – doesn't think that's a fair distinction
    - Sending signal that how juror try a case depends on skin color
    - #2: This is issue of *states rights* – leave them alone to decide
      - Fields says 13th and 14th Am *only protect civil rights, but States should be able to decide who has political rights* → Can't tell States who serves on their juries
- *Plessy v. Ferguson*
  - **Facts:** Plessy (Π) was 1/8 white, and Louisiana statute rqd diff passenger cars on railroads for blacks v. whites. Π claimed the Louisiana statute violated 13th and 14th Amendments
  - **Holding** (Brown):
    - 13th Am not applicable b/c slavery not involved

- 14th Am holding most important:
- Separate but equal treatment does not violate equal protection
- Louisiana law *only about social equality*, not about political or civil equality, so Ct won't step in
  - Social equality is not a goal of the Equal Protection Clause
  - Separating the races doesn't mean they're not getting equal treatment
  - For social purposes, Louisiana doesn't want integration – and Ct says social equality must be a voluntary action by *individuals*
    - Asserts it's not Court's place to *force* integration
  - Disagrees that separating the races creates a **"badge of inferiority"**
    - *Blames blacks for such stereotypes & refuses to force comingingling*

- **Dissent** (Harlan):
  - **"Our Constitution is color-blind"**
    - *By separating, we're allowing the gvt to perpetuate racism*
    - *States have no right to regulate how citizens occupy public space*
    - *Laws of Louisiana can't make the choice for individuals who want to sit on the same car*
  - Starting point was so unequal that separation will reinforce stigma and social hierarchy that we will never move forward
  - Predicts Jim Crow:
    - Suggests states will find all kinds of *facially neutral ways* to separate everything and will undo laws for equality

- *Civil Rights Cases* – **Origin of "State Action" Doctrine**
  - **Background:** Congress enacted Civil Rights Act of 1875
    - Congress prohibited all people from denying equal access to inns, public transpo, theaters, and other places of public accommodation, just based on race
  - **Facts:** Consolidated cases from a bunch of states – arose out of exclusion of blacks from inns, theaters and railroad
  - **Issue:** Note that those are *privately-run business* – Did Congress have the power, through Civil Rights Act, to regulate their actions?
  - **Holding:** No, Congress can't regulate privately-run businesses: the Civil Rights Act *invalidated* by the Court
    - **State Action Doctrine** = *Constitution only applies to state actions (eg – governmental actions), and can't limit purely private conduct* → ***Narrow view of Congressional power***, which later impacts its power to prevent segregation
      - So in this case, Congress can't use Constitution to say it has power to limit the conduct of innkeepers, theater managers, etc – they're running private businesses
      - Only 2 exceptions (Where private acts *can* be limited):
        - 13th Am: Prohibits slavery
        - 18th Am: Prohibition of alcohol
    - Congress' regulatory power comes from 2 ways:
      - § 5 of 14th Am
      - § 2 of 13th Am
      - Both give Congress power to enforce those 2 amendments by enacting leg
    - Major holdings in *Civil Rights Cases:*
      - #1: *§5 of 14th Am gives Congress the power to regulate **state interference** w/the 14th Am,but **not private** conduct*
      - #2: 13th Am not applicable
        - That was only about abolishing slavery

- **Harlan's dissent:** Main issue = *Whether these are public services or private services, **not** whether this is state action v. non-state action*
  - Inns, theaters, railroads are public services, even if they're not state-run (they are *agents of the state*; public places controlled by the state, even if the owners are private individuals)
  - Need a broad view of 13th and 14th Am: gives Congress the power to eradicate previous discrimination agst blacks

b. *Lochner* and the "*Lochner* Era" (CLASS 8)

- **Background:** Big issue now = *Can states use police power to dictate and regulate private economic policy?*
  - *Slaughterhouse* said yes, states have this broad power
  - *Now, moving away from that, and Ct suggesting that private companies **are** subject to regulation*
  - Moves more and more into Ct being able to check the *reasonableness* of legislatures' regulations (*Minnesota Rate* cases: *judge can now second-guess the legislature*)
    - **Courts begin to expand their reach to decide if the state's police power is reasonable →** road to *Lochner*
    - Part of big lassaiz-faire (free market) and Darwinism (survival of fittest) = states should stay out of regulating
      - So Ct coming in to strike down state regulations and uphold these econ and social theories to keep gvt out
- *Lochner v. New York*
  - **Facts:** NY legislature passed law preventing any baker from working 60+ hrs/wk or 10+ hrs/day; Π claims NY law violates *liberty of contract* in 14th Am
  - **Holding:**
    - Yes, NY law is unconstitutional b/c it violates the liberty of contract protected by 14th Am's Due Process Clause
      - States can't label everything for the public good
        - Here the line is arbitrary (how to say 10 hrs is bad, and 9 hrs ok?)
        - Also, not making the bread safer for the public by affecting 1 individual's right to contract w/his employer on his hours
      - Accusing the legislature of some other motive (unions)
    - Ct's only job = to decide if state is acting w/in its power (not whether they agree with the statute) → here, Ct thinks it's beyond state's pwr
  - **Dissents:**
    - Harlan: Yes, room to 2nd-guess legislature, but here, this is a borderline case: *When there is real and substantial relation b/w means and the end (like here), then Courts shouldn't interfere*
    - Holmes: *Liberty of contract is just based on free market economics that most of the country doesn't even follow* (should only limit states when they're engaging in *arbitrary* decision-making – not the case here)
  - **Takeaway:**
    - Opposite of *Slaughterhouse* – now states can't regulate w/o Ct stepping in
    - After *Lochner*: Court usually upholds max hr laws, strikes down min wage
      - Maximum hr laws = affecting public health, so ok
      - Minimum wage laws = affected liberty of contract, so bad
- **Limits on Congress's Commerce Power**
  - *3 doctrinal issues of Commerce Power*
    - #1: **Whether the *subject* of the congressional regulation is "interstate commerce" and not local activity**
    - #2: **Whether the *purposes* of the regulation are consistent with *why* Congress was delegated the power to regulate interstate commerce**

- Remember, basically from *McCulloch*:
  - States = General legislative authority
  - Fed gvt = Lawmaking authority given to fed gvt to achieve only certain objectives (Can't go beyond this scope)
- #3: **Whether, regardless of** #1 & #2, **the regulation of interstate commerce is consistent with other constitutional issues** *(check if it conflicts w/reservation of powers to the States given by 10th Am)*

- *The Lottery Case / Champion v. Ames*
  - **Facts:** Congress passed act prohibiting sending lottery tix through mail, from 1 state to another. Δs challenged Congress' pwr to prohibit sending the lottery tickets
  - **Holding:** Congress *can* regulate sending lottery tix through the mail:
    - Tickets are purchased – so they're commerce
    - Once tix put in the mail, they become interstate
    - Congress has the power to regulate interstate commerce, so this is within their rights
    - 10th Am doesn't limit Congress' commerce powers
  - **Takeaway:** *Court will not look into the reasonableness of regulation – **role of the Court is to decide if w/in Congress' power***
- *Hamer v. Dagenhart* & Prisoner's Dilemma
  - **Facts:** Congress passes a statute prohibiting transportation in interstate commerce of goods that were manufactured by child labor
  - **Holding:** Statute is unconstitutional – this goes *beyond* Congress' powers under the Commerce Clause
    - Commerce Clause doesn't extend to the regulation of manufacturing
      - Goods aren't commerce when they're being manufactured
      - Congress can't regulate manufacturing under the pretext of the Commerce Clause
      - Up to states to regulate internal matters, like child labor
  - **Prisoner's Dilemma:**
    - *Federal regulation is necessary b/c otherwise, states will just do whatever it takes to produce cheap goods and undercut other states → even if states try to make an agreement to not use child labor – one state could lie and continue to use it to get cheapest goods*

c. The New Deal & Emergence of Modern Judicial Scrutiny (CLASS 9)

i. Phase I: *Nebbia & Blaisdell*

Nebbia v. New York

- **Facts:** NY Milk Control Board set a price floor for milk; milk farmers were really hurt by price-cutting.
- **Holding:** Court upholds the price floor / state regulation / interference:
  - *"No constitutional principle bars the state from correcting existing maladjustments by legislation touching prices"*
  - Considers the price floor a valid exercise of state's police power
  - Follows *Lochner*'s reasoning (though diff result)
    - **Allow government regulation if it relates to the public interest** (in *Lochner,* Ct struck it down b/c they said it only benefited bakers, and not benefiting public)
    - *"There is no closed class or category of business affected with a public interest"*

Blaisdell (Minnesota Mortgage Moratorium Case)

- **Takeaway:** Ct upheld MN's mortgage moratorium law b/c:
  - *It's in public's interest to protect mortgages*
  - *Gvt " retains adequate authority to secure peace and good of society"*

- Unlike before, moving away from only caring about individual rights, looking at broader economic structure "upon which good of all depends"
- **Cardozo's concurrence: A "promise exchanged b/w individuals was not to paralyze the state in its endeavor in times of direful crisis to keep its lifeblood flowing"** (aka – state has interest in public welfare – and that can't be trumped by individual right to contract)

ii. Phase II: *Morehead* & Nondelegation

Morehead

- **Takeaway:** Conservative judges on Ct (4 horsemen) strike down a NY min wage law for women, relying on *Adkins* → reaffirms *Lochner*
- Even though *Blaisdell* & *Nebbia* allow gvt interference, *Morehead* reminds us we're not yet there → FDR wins election and SCOTUS is the only thing standing in his way (Congress packed with New Deal progressives)

iii. Turning Point: *West Coast Hotel*

- **Holding:** Ct overturns *Morehead* and *Adkins*, and upholds Washington's min wage law for women
  - **Court won't 2nd guess the legislature anymore**
    - *It's good enough to have an argument that min wage laws good for the public*
  - **Rejected unlimited liberty of contract idea of *Lochner***
    - Women had *inferior bargaining power* and min wage regulation needed to readjust/equalize the bargaining power
    - *Regulation ensure that workers get living wage is legitimate limitation on freedom to contract*
- *Nebbia* and *West Coast Hotel* preserved a "real and substantial relation" requirement b/w econ regulation and legit state objective → cases after *West Coast Hotel* abandoned the means to ends scrutiny in economic cases

iv. Redefining the Court's Role: *Carolene Products*

United States v. Carolene Products

- **Facts:** Congress prohibited shipment in interstate commerce of filled milk (skim milk filled with nondairy fat, like coconut oil)
- **Holding**: Due Process Clause doesn't prohibit such regulation, so the filled milk act is valid regulation of interstate commerce
  - ***Court made it clear that they were no longer going to scrutinize what the legislature does, as long as there is a RATIONAL BASIS***
  - *Presumption of constitutionality of regulatory legislation affecting commercial transactions – only strike it down if it's not rational*
- **Famous Footnote 4:**
  - Higher scrutiny to protect minorities who otherwise can't go through the normal political process to make changes
    - *"prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon...call for a correspondingly more searching judicial inquiry"*
  - **We don't always trust the democratic process, and need more than rational basis to justify regulation**
  - Leads to 3 tiers of modern judicial scrutiny (Strict, Intermediate, Rational Basis review)
    - Job of the court is to protect people who get intermediate and strict scrutiny
      - *Let legislatures deal with everything else*

v. Economic Due Process After the New Deal (*Williamson v. Lee Optical*, etc)

- **When it comes to econ regulation, as long as it's not affecting discrete and insular minorities, the legislature can do whatever it wants**
  - *Belief that the democratic process works, and if the people are unhappy with the econ regulation, they will elect new legislators*

- **Economic Due Process in modern times** = Trust the legislature
  - Almost anything is ok – Court will accept *almost any* reasoning the legislature provides
  - Court only worries if:
    - Legislature picking on particularly discrete groups who can't adequately defend themselves
    - Legislature interfering with fundamental rights

d. Congressional Power Post-New Deal (CLASS 10)

i. The New Deal & Commerce Power (§ 5 of 14th Am)

- *NLRB v. Jones & Laughlin Steel Corp*
  - **Takeaway:** Court upheld the part of Nat'l Labor Relations Act that prohibits employers from engaging in any unfair labor practice affecting commerce
    - *Court signifying it's willingness to take less restrictive view on Congress' power*
- *United States v. Darby*
  - **Facts:** Congress enacts Fair Labor Standards Act (FLSA) prescribing min wage, max hrs for employees engaged in producing goods related to interstate commerce
  - **Holding:** Congress can use unconstitutional means (interfering in states' rights) to get to an end, as long as there's a **rational basis** for it
    - **Reaffirms the broad scope of Congress' Commerce Power**
    - Won't 2nd guess Congress' intentions, unless clearly shady – *overrules Hammer v. Dagenhart* (child labor case)
    - Like *Carolene Products* & *West Coast Hotel*
    - Court uses Prisoner's Dilemma to justify national regulation
- *Wickard v. Filburn*
  - **Facts:** Congress enacted Agricultural Adjustment Act limiting wheat production of farmers, and wanted to punish farmer Wickard for growing wheat in excess of his allotment. Wickard said it was not for interstate commerce b/c he was only growing it for his *own* consumption – unconstitutional for Congress to regulate his personal wheat growing, since it wasn't being shipped out of the state
  - **Holding:** Congress can use its Commerce Power to regulate a private farmer who's growing wheat for his own purposes b/c it **affects the entire market**
    - **As long as goods impact interstate commerce** (if you personally consume your wheat, you don't buy interstate commerce goods, and if everyone does that, has a big impact)**, it is subject to Congressional regulation**

ii. Commerce & the Civil Rights Movement

- *Civil Rights Cases stood in Congress' way to regulate discrimination* (remember, Ct then said that Congress *can't* regulate *private conduct*)
- So instead, Congress used broad reading of Commerce Clause to regulate discrimination in "public accommodations"
- Civil Rights Act of 1964:
  - Congress used the Commerce Clause to enact the Title II of the Civ Rights Act of 64
  - Worried that if they used their explicit authority under §2 of 13th Am or §5 of 14th Am, that it would be thrown out (p. 558) – so used commerce clause authority instead
  - Prohibited discrimination and segregation in places of "public accommodation" if the "operations affect commerce"
  - *Atlanta Motel* and *Katzenbach v. McClung* upheld this power of Congress to legislate in this manner
- *Heart of Atlanta Motel v. United States* & *Katzenbach v. McClung* (p. 560; CLASS 10)
  - Title II of Civil Rights Act = A*ll persons shall be entitled to full and equal enjoyment of public accommodations, w/o discrimination*
  - **Takeaway:** Court upholds Title II of the Civil Rights Act in both cases b/c it finds that Atlanta hotel and a restaurant are both off interstate highways and related to interstate

commerce – so within Congress' power to regulate their conduct under the Commerce Clause

- **Issues w/this**: *Why are we trying to hide equality under Commerce Clause? Should just overrule Civil Rights Cases for racial equality.* (Douglas' point)

iii. Congressional Power & the Voting Rights Act

- About the "enforcement clauses" in the Reconstruction Amendments (13, 14, 15th Am) that gave Congress power to enforce the Am by "appropriate legislation"
- So impt question now is: What is "appropriate" legislation? See next 2 cases

- *South Carolina v. Katzenbach* (p. 572; CLASS 10)
  - **Facts:** Congress enacted Voting Rights Act (VRA) to get rid of racial discrim in voting
  - **Issue:** Does Congress have the power under 15th Am to prohibit certain jurisdictions from conditioning the right to vote upon whether or not voters pass literacy test?
  - **Holding**: Yes, Ct upholds Congress' ban on states' requiring voters to pass literacy tests under the VRA; Ct giving Congress this blanket to enact and enforce VRA to eradicate discrimination
    - Congress has such pwr to prohibit clear violation of the 15th Am
- *Katzenbach v. Morgan* (p. 576; CLASS 10)
  - **Facts:** NY law required voters to be able to read and write in English but VRA §4 prevents denial of any person who shows at least 6th grade was completed in US or territory, even if they can't read/write/understand English
  - **Issue:** Is VRA §4 constitutional? NY asserts that Congress shouldn't be able to interfere w/states' voting regulations using the VRA if regulation itself isn't unconstl
  - **Holding:** Congress can prohibit some state voting regulations through VRA, so §4 isn't unconstl.
    - If Congress could have rationally thought that 14th Am was being violated, they **can act to *prevent* a violation** (**rational basis test**)
    - **2 theories:** (in slides and p. 586, n.3)
      - **Remedial** = State violates Constn and Congress remedies it (what usually happens); Congress' statutes shouldn't in itself criminalize state conduct
      - **Substantial** = Congress gets to decide for itself whether the state's practice is unconstl – they have the power to act if they think 14A is violated
  - **Harlan's dissent**: This is a threat to Ct's power
    - *It's Ct's role to decide whether the Constitution is violated, not Congress' role*
  - **Brennan's response to Harlan**:
    - § 5 of 14th Am gives Congress pwr to enact legislation to prohibit Constl violations → Congress' only power shouldn't be waiting for the Ct to decide
      - But remember: **Court will always still have final word, because they can strike down an act of Congress**
- *Oregon v. Mitchell, Mobile,* and *City of Rome* (p. 583-4)
  - Later voting rights cases → see ppt slides (p. 7)
  - *Oregon v. Mitchell* = Ct upholds temp suspension of literacy tests in *all* US elections
  - *Mobile* = §1 of 14 and 15th Am only prohibited *intentional* discrimination
  - *City of Rome* = VRA could have a "preclearance" requirement if a state wants to change election procedures, even if there's no discriminatory purpose (eg – state needs to get permission before changing its election regulations)
    - *As long as there's a rational basis for Congress prohibiting behavior, even if it's not necessarily unconstitutional behavior, it's ok* (allows Congress to interfere to achieve equality)
    - Rhenquist dissents and soon his views become part of the majority (Late 60s – height of Congress' power)

e. The Rhenquist Court and "Federalism" I (CLASS 11)

- Court using the idea of federalism as its limitation on Congress' power

i. Rhenquist Court and the Commerce Clause / § 5 of 14th Am again

- *US v. Lopez* (p. 601)
  - **Facts:** 12th grader in TX carried handgun to school and charged w/violating the Gun-Free School Zones Act of 1990.
  - **Issue:** Did Congress have the power to prohibit possession of guns near schools? Act was challenged as going beyond Congress' pwr under the Commerce Clause
  - **Holding**: 3 categories that Congress can use to regulate under Commerce Clause
    - Channels of interstate commerce (p. 603)
    - Instrumentalities, persons or things moving through interstate commerce (even if threat is actually from interstate *activity*)
    - Substantially affects interstate commerce
    - Schools aren't channels of interstate commerce or moving through it, so the only argument Congress can make is that handguns substantially affect interstate commerce → *not a good enough reason*
    - Ct doesn't overrule anything but just saying that this Act doesn't make the commerce powers cut – it had nothing to do with commercial regulation
      - Saying this is not like *Filburn* or *Darby* – that was for a broader regulatory scheme, which doesn't exist here
      - Don't want to allow this and 1) risk commercializing schools and 2) creates slippery slope for when Congressional pwr is allowed
    - Federalism argument (adds another reasoning layer)
      - There are 2 governments under the Constitution:
        - Federal government
        - State governments
      - **States have a bubble of rights that fed gvt can't interfere with**
      - State power lmts federal pwr and vice-versa - keep boundaries
        - Shouldn't blur the line by allowing federal gvt to overtake state regulatory powers
      - Earlier in *Darby*, Ct advocated for just rational basis for Congress to enact legislation – but now Ct implying there are limits
  - **Thomas' Concurrence**
    - Dissent and majority wrong: *Commerce means "commercial activity"* so it's limited to *pure economic transactions* (he oversimplifies it though)
  - **Breyer's Dissent** (p. 614)
    - Lays out 3 basic principles to show that Commerce Clause should apply:
      - Commerce power includes power to regulate local activities as long as they significantly affect interstate commerce
      - To determine significant effect, consider cumulative effect of the local activity (like what Ct did in *Wickard*)
      - "Courts must give Congress a degree of leeway" to determine conxn b/w regulated activity and interstate commerce
    - Basically says that as long as there's a rational basis, we should allow it
      - Accepts the government's facts that show possn of guns affects economy (see notes for how it impacts)
        - Majority says – allowing this argument will allow unlimited federal police power / infringe on states' rights
    - Dissent: legislature in best position to decide if activity is connected to interstate commerce and if there is a doubt, even if **indirect link**, allow it
  - **Big tension:** Who is right among Dissenters v. Rhenquist?
    - **Souter**: as long as there is an effect, that's all we need (rational basis)
    - **Breyer** says there is a link b/w guns in schools & econ → indirect link
    - **Rhenquist** says too far-reaching → want direct & substantial effect
- *US v. Morrison* (p. 623)

- **Facts:** Congress enacts VAWA (Violence Agst Women Act) to empower battered women in all states to take action (some states make harder for women to sue)
- **Issue:** Can Congress create a federal civil remedy for gender-motivate crimes?
- **Holding**: No – not under the Commerce Clause
    - Gives no deference to findings (that do show econ impact of violence agst women) saying it didn't show an interstate problem calling for a fed soltn
    - Allowing this would go beyond Congress' powers, allowing them to regulate any crime like murder or other types of violence
    - Not an econ activity, so can't fall under Commerce Clause powers

- *Gonzales v. Raich* (p. 624)
    - **Issue:** Can Controlled Substances Act constitutionally prohibit the use of marijuana for medical reasons (even if it wasn't bought/sold/crossed state lines)?
    - **Holding**: Yes, reaffirms *Wickard*
        - Congress can use commerce power agst private econ activity (applies *Wickard* standard – even if used/bought locally, related to interstate econ)
        - *Raich suggests that Morrison and Lopez were aberrations and not turning-point cases* – upheld older cases and just making point that we just need some real showing of econ activity, like in this case, to uphold (Ct not going to strike down all legislation passed under commerce pwr)
        - Here, Congress regulated *purely non-commercial and local activity b/c it reasonably believed that failure to regulate would jeopardize larger regulatory scheme* – **Ct says this is ok**

ii. Rhenquist Court and the Spending Clause

- Under *Spending* power, Congress "may provide for common Defense & general Welfare"
- Rhenquist court takes broad view of Congress' powers under the Spending Clause (contrasted with narrow view of Congress' powers under Commerce Clause)
- *South Dakota v. Dole* (p. 627)
    - **Facts:** Congress passes statute empowering the Sec of Transportation to condition a percentage of federal highway funding upon states raising drinking age to 21
    - **Issue:** Can Congress impose conditions upon states to do what they want?
    - **Holding:** Yes, Congress can condition how states use funding under its "spending" power: *focuses on link b/w highway safety and teen drinking*
        - Congress can do things through Spending Clause that it couldn't otherwise constitutionally force the states to do by tying it to spending
            - Gives states the option of rejecting the policy, so not technically forcing (but can argue that it's not a choice if states really need $)
        - Must follow 4 principles to exercise spending power: (slides & p. 627)
            - Exercise of spending power must be in pursuit of general welfare
            - Conditions must be unambiguous
            - Conditions on federal grants may be illegitimate if unrelated to federal interest in particular national projects
            - Other constl provisions might bar it (like Equal Protection)
    - **O'Conner dissent**: Not addressing the majority of drunk drivers – *is overinclusive and irrational* Congressional act

iii. Rhenquist Court and Enforcement Power

- *City of Boerne v. Flores* → relate to *South Carolina v. Katzenbach* & *Rome v. US*
    - **Facts:** Congress passed Religious Freedom Restoration Act (RFRA): gvt can't substantially burden a person's exercise of religion through facially-neutral act
        - Response to peyote case, when Native Americans denied employment benefits b/c they'd used peyote as part of their religion and ct said ok
    - **Issue:** Is RFRA valid exercise of Congress' power under § 5 of 14A (enforcement clause – allows for Congress to enforce 14th Am)

- **Holding**: Ct finally makes it clear: Court alone, not Congress has the power to define constitutional rights, even if those rights, like under 14th Am give Congress explicit remedial power
  - RFRA exceeds Congress' power under § 5 of 14th Am
  - For Congress to use its enforcement powers: **"There must be a congruence and proportionality b/w the injury prevented or remedied and the means adopted to that end."** (Congruence/Prop test)
    - Needs to be a line b/w what is and isn't permissible legislation – use that test to decide
    - RFRA is too sweeping – anyone could say a law interferes w/their right to freedome of religion – need to confine
    - Test must show: *some* pattern of *prior state action*-based discrim to justify future-looking legislation
      - Historical evidence of discrimination
      - Why this problem will fix it
- *US v. Morrison*
  - Ct strikes down VAWA saying that it's not "congruent & proportional response" to the injury & not valid §5 statute bc for private axn (see class 12 slides)
    - § 5: Ct holds that 14th Am only prohibits *state action* (under *Civ Rights Cases*) so §5 pwr can't be used to provide for *private remedies for discrim*; even if states *were* discriminating, not "congruent/proportional"
- § 5 Power & Sovereign Immunity (note 3, p. 647)
  - §5 of 14 Am = Congress' enforcement power
    - So Congress can subject states to suit (states not sovereign immune) if it's relating to their enforcement power under §5
    - So where Congress is getting their power for a statute **does** matter
  - An example is *Hibbs* – upholds the Family Medical Leave Act under its §5 power of enforcement of 14th Am

f. **The Rhenquist Court and "Federalism" / Congressional Power II** (CLASS 12)

i. FLSA as Congressional Regulation of the States

- Background of FLSA (Fair Labor Stds Act)
  - *Darby* = Ct upholds FLSA's min wage/max hrs as valid exercise of Congress' commerce powers
    - But that was about regulating *employers*
    - Things change when Congress directly regulating states
  - *Ntl League of Cities* = Can't apply FLSA to states
  - *Garcia* = Now you *can* apply FLSA to states
  - *Alden* = Can apply FLSA to states, but *can't sue the states*
- Round I: *National League of Cities v. Usery*
  - **Takeaway:** Strikes down FLSA as applied to states
    - 10th Am immunizes "traditional government functions" from federal regulation (traditional gvt function = ie - police & fire services)
    - **But** if you look at 10th Am, nothing written about immunizing states from fed regulation – at best, it's implied (even though Rhenquist says 10th Am embodies federalism, it's not actually in the text) – see slide
- Round II: *Garcia v. SAMTA*
  - **Takeaway:** Reverses *Nat'l Leage of Cities* and says the "traditional gvt functions" test is unworkable
- Round II: *Alden v. Maine*
  - **Takeaway:** Can apply FLSA to the states but just can't sue them

ii. "Anticommandeering" & 10th Am

- *New York v. US* (p. 674)

- **Facts**: Congress created incentives system to get states to create their own waste disposal sites (see notes for details). At the end of 7 yrs, if they weren't part of a regional compact to deal with the waste, states were forced to take title.
- **Holding**: The incentive to take title to the waste if not part of a compact invalid
  - Congress has substantial pwrs to govern the Nation directly, but Constn doesn't give Congress power to **require states to govern according to Congress' instructions** (can't "commandeer the legislative processes of the states by directly compelling them to enact & enforce a fed regulatory program)
    - Congress can't *force* states to either 1) join compact or 2) take title
    - This is **commandeering of state processes** (ie **coercion**) – can't tell states what to do at will, no matter how strong fed interest is
      - Under *South Dakota v. Dole*, Congress can attach conditions to receipt of federal funds, but:
        - There it was more of a "choice" if states wished to comply or not (bribery, not coercion, like here) – here it's not attached to spending power
  - Implictly understood that **10th Am restrains Congress' power**
  - **Constn divides authority b/w federal & state gvts to protect individuals**
- **White's Dissent**
  - Consent issue: Congress responded to request by states to fix this problem
    - Congress is not forcing its will upon the states
  - History problem: Disagrees w/O'Conner/majority's history recounting
    - Need to look at recent history, not just what happened when Constn founded; post-New Deal, Reconstruction, etc, Congress can regulate

- *Printz v. US* (p. 693)
  - **Facts:** Congress passes Brady Bill to control flow of guns; until system up and running, Act *required local law enforcement officials to run background checks*
  - **Issue:** Can Congress commandeer state officials to conduct background checks for federal gvt?
  - **Holding:** No – Congress can't require ("commandeer") state executive officers to enforce federal law
    - Following *New York v. US* – Congress can't compel States to enact or enforce a federal regulatory program – and part of this is making the state's officers do this
    - Even if Congress is regulating validly, they still can't infringe on states' powers – under the federalism *implied* in the Constn
    - 4 reasons that Scalia gives:
      - Comandeering state officers inconsistent w/ Founders' original understanding of "sovereignty"
      - Comandeering interferes w/separation of powers
        - Pres has the power to decide how best to enforce federal law – and this can't even be waived if Pres signs bill
      - "Unfunded mandate" – Congress isn't funding the officers' work, so states have to fund Congress' bidding
      - Supported by prior jurisprudence
  - **Stevens' Dissent:**
    - Conogress isn't telling states what regulations to enact, just asking officers for completion of duties in accordance w/federal laws
    - Believes Founders wanted local officers to comply w/ntnl gvt
      - But does think it's an issue that states are paying for this
    - "A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural prob"

- **Souter & Breyer dissent**: See slides from CLASS 12 (not impt)

iii. Sovereign Immunity & 11th Am

- 11th Am = "Judicial pwr of the US shall not be construed to extend to any suit commenced or prosecuted agst one of the US by citizens of another State"
- Federalism vs. Individual Rights
  - *Hans v. Louisiana* – SCOTUS holds that 11th Am applies to suits against your own state (not just another State)
  - *Seminole Tribe v. Florida* – Can't sue a state in *federal* court
  - Can't sue the state you live in in state or federal court (*Alden* says Congress can't pass a statute by subjecting a non-consenting state to suit) → but § 5 of 14th Am does allow for Congress to pass a statute that allows states to be subject to suit
  - Implications = You give federal rights to US citizens, but if they're violated, there's no court open to them to seek remedy (*but can get states to stop acting unconstitutionally by enjoining – just can't get damages*)
- Goes back to O'Conner's big point in *New York*:
  - **Sending the wrong signal if we're telling citizens they can't sue the state (eg – you're employed by the state and they're not paying you the federal min wage – but you can't get damages for this violating)**
- Putting States and Federal gvt on the **same playing field**
  - Even though Reconstruction, Warren Ct and New Deal eras elevated fed gvt above states, we're bringing fed gvt down a notch under Rhenquist Ct

VIII. Executive Power and the Separation of Powers

a. Executive Power

i. Executive Power, I: Discretion & Internal Control / Privileges and Immunities (CLASS 13)

- Executive Power and Constitutional Text
  - Art. II, § 1, Cl. 1 = "Vesting" Clause: *"The executive Power shall be vested in a President of the USA"*
  - But Art. I Vesting Clause*: "All legislative powers herein granted shall be vested in a Congress of the US"*
  - Art. II, §3: Take Care Clause: *"He shall take care that laws be faithfully executed"*
- Power to not prosecute / "(Non-) Prosecution" Power
  - *United States v. Cox:* The Mississippi grand jury case (p. 737)
    - **Facts:** US sued Mississippi to enforce voting rights of blacks under Civ Rights Act & 14th Am; 2 black men testified there was discrimination but a judge prosecuted them for lying (perjury). US Atty General told the US Atty in Miss not to sign the grand jury indictment (partly b/c it would undermine the ability of fed gvt to ask people to testify and partly b/c it was a false claim) → see notes
    - **Issue:** Can a prosecutor be forced by a grand jury to sign a presentment?
    - **Holding:** No – US Attny *not* rqd to sign a valid grand jury presentment
      - Had **discretionary power**
      - Protects individual who could otherwise be abused by the power of the state or maybe decide not to bring a case forward for ntnl security or foreign relations schemes
      - Exec discretion = don't have to explain *why* to the grand jury (free from ct interference; but may need to explain why to ppl)
      - But potential prob = *If US Attnys, under instruction from US Atty Gen, refuses to open investigations agst its own partys*
- Executive privilege with *Nixon* (*US v. Nixon & Nixon v. Fitzgerald*)
  - *US v. Nixon* (p. 749)
    - **Facts:** Cox is an appointed "special prosecutor" to investigate Watergate and issues subpoena for records and tapes in Nixon's possession. [See "Saturday Night Massacre" in slides] – Cox fired and new prosecutor indicted Nixon

staffers and President's counsel tries to quash subpoena, claiming it's privileged, internal info and Pres can refuse to disclose to ct

- **Issue:** Is Pres required to comply w/subpoena?
- **Holding:** Even though Pres **does** have "executive privilege" that generally shields him frim disclosing confidential exec branch communications: **there are limits to these privileges**
    - There are situations when there are stronger reasons to compel disclosure than privilege
    - President can have *absolute privilege* if it involves ntl security (judge just has to accept if they say it's a "state secret")
        - Problem –this could make everything about "ntl security"
    - Weigh privilege of confidentiality v. privilege of fair criminal justice trial – in this case *criminal justice wins*
        - *Due process interests in protecting **integrity** of crim justice system far outweighs president's claim* – takes precedence over presidential privilege

- *Nixon v. Fitzgerald*
    - **Takeaway:** Holds Pres entitled to "absolute" immunity for official acts while in office (Nixon sued in his personal capacity, while he wasn't president, for things he did while in office but given immunity)
        - Absolute immunity = No excuses needed for behavior
        - Qualified immunity = Good faith immunity – need a reasonable belief that you thought your actions were legal when you did it

- *Clinton v. Jones*
    - **Takeaway**: President not entitled to immunity from civil litigation for actions conducted before he became president
    - **Hard to see why *Nixon v. Fitzgerald and Clinton* didn't come out the same – why is *Clinton* bigger threat to office of presidency than *Nixon*?**
- Appointment / Removal Power
    - *Morrison v. Olsen* (aka *In Re Sealed Case*; p. 761) – DC Cir. case
        - ***This case goes to SCOTUS and overturned*** (see below)
        - **Facts:** Ethics in Gvt Act creates Indpt Counsel (IC) who's appointed by special panel of 3 judges. An indpt counsel, Morrison, subpoenaed gvt officials, who sued, saying the Act is unconstl
        - **Holding:** Yes, it is unconstitutional, for 3 main reasons:
            - Art. II, § 2, cl. 2: Appointments Clause–shows how officers apptd
                - Morrison is a principal officer (not inferior officer)
                - Under Constn, she must be appointed by Pres and confirmed by the Senate – since she's apptd by court, it's unconstitutional
            - Even if she *is* an inferior officer, separation of powers prevents inter-branch appointments
                - Here, court is appointing an inferior executive officer (can only appt inferior judicial officers)
            - Act violates separation of powers by:
                - Limiting President's ability to remove/supervise the IC
                - Invests special court with "executive" function (apptg IC)
                    - Could argue we need an indpt arm to be watchdogs – but the judge here says that's what impeachment is for
        - 2 big ideas emerge: [**Scalia's dissent in *Morrison* later uses these**]
            - **Formalist** idea = There are **bright lines** that we adhere to in the separation of powers

- **Functionalist** idea = Go with the situation – isn't a rigid framework to follow; is **subjective** (tied to idea that Constn is *living* document and adapting to circumstances over time)

ii. Executive Power, I: Removal and the Veto (CLASS 14)

- *Morrison v. Olsen* (SCOTUS; p. 773)
  - **Holding**: Sup Ct *reverses* DC Cir decision – upholds indpt counsel statute
    - Morrison is an inferior officer for 4 reasons
      - She can be removed by Atty Gen (higher Exec official)
      - Empowered only to perform certain lmtd duties
      - Can only act w/in scope of given by the Special Court
      - Limited tenure – only for duration of investigation
    - This is a permissible inter-branch appointment
      - *There's a limitation on interbranch appointments if there's "incongruity" b/w the functions of what appointee is doing and what appointing branch does*
      - Ok to give cts the power to appoint this indpt counsel (and cts prob best branch to do this); Congress has discretion to decide whether to make inter-branch apptmts
    - Precedent: Unlike *Bowers* and *Myers*, Congress isn't increasing its own powers; giving this power to another branch and not taking Pres' powers for their own purposes (so not violation of separation of pwrs)
    - Functionalist = Majority
  - **Scalia's dissent**: Says Majority is full of crap
    - Should be asking 2 questions
      - Is the conduct of a criminal prosecution and investigation to decide whether to prosecute under pure executive power?
        - Yes – so w/in President's power
      - Does the indpt counsel statute deprive President *exclusive control over the exercise of that executive power?*
        - Yes – **if we are taking some power away, that's enough** (otherwise abusing separation of pwrs)
        - Understands that separation of powers have potential for abuse, but there are 2 checks: 1) other 2 branches; 2) voting executive out (political check)
    - Making argument for **Formalism:**
      - **Majority blurring distinctions b/w the branches and replacing it with unclear balancing test**
      - Need to adhere to **strict lines** of separation of powers
    - Majority's main points are unconvincing:
      - **Indpt counsel *is not* an inferior officer** – she's not subordinate to any officer in Exec branch
    - Predicts Ken Starr = *We're setting up a system where indpt counsel is targeting a person/group, instead of looking for specific crimes*
      - Always easy to dig and find someone guilty of violating law
    - Problems w/ Scalia's argument
      - What to do about administrative agencies? (see p.4 of notes)
        - Congress gives them legislative and judicial powers
        - Tension in applying Scalia's formalism in this world
    - **Additional:**
      - **How convincing is line b/w principal and inferior officer?**
        - See note 3, p. 787
- *INS v. Chadha* (p. 796)

- **Facts:** Attny Gen suspended deportation of a student whose visa expired b/c he found hardship and Chadha lived in US for 7 yrs. But Immigration and Nationality Act gave House or Senate pwr to veto Atty General's determination that someone shouldn't be deported.
- **Issue:** Is this legislative veto constitutional?
- **Holding:** No – legislative veto violates Art. I § 7 (Bicameralism & Presentment)
  - Art I §7, cl. 2:
    - **Bicameralism**: Should be passed in both Houses of Congress
    - **Presentment** to Pres: Must be presented to the President
    - Under cl. 3 – applies to everything, not just for bills
  - When Congress overrides the Atty General's decision, they are legislating, so they **must follow Bicameralism & Presentment under §7 – there is no way around this**
    - *Chadha is very **formalistic***
    - In order to overcome AG's decisions, **must go through entire legislative process**
  - P. 803 – there are only *4 instances* when Congress can act outside of this or each house can act by itself – absent these narrow provisions, Congress doesn't have authority
- **White's Dissent**
  - Congress now has impossible choice:
    - Either not delegate any power at all, or delegate pwr w/no limits
    - Deprives Congress of reserving a check on legislative functions by other branches
  - **Ignores that administrative agencies get legislative authority**
    - Nobody says that every executive agency decision that is of a lawmaking nature needs to be confirmed by both houses of Congress and confirmed by presidential signature
      - If Congress can delegate legislative powers to admin agencies, why can't it also reserve a check on legislative power?
    - Now Congress has to create new legislation any time they want to *undo the actions of admin agency* – **no more 1-house veto**

- After *Chadha*, the only way Congress can take back delegation of authority to President/Executive once it's conferred (eg, undo an admin agency decision) is through:
  - Sunset provision (p. 790-92; note 7)
  - Old-fashioned process (House, Senate (no filibuster) and President *all* agree to alter the delegation of authority)
  - Veto-proof super-majority of House and Senate agree to alter delegation of authority

b. The Separation of Powers as a Limit on Executive Power (CLASS 15)

i. Congress v. President: Framing the Problem

- **What if Congress constrains Pres by simply *not acting in the first place?***
- What are the limits on President's power to act:
  - Without authorization
  - Or in the face of *contrary* congressional legislation?
  - Usually a big deal during war/emergency b/c during that time, Pres has strongest claim that he has inherent authority to act
- *Little v. Barreme* (p. 138)
  - **Facts:** A ship is coming from a French port and Congress passed an act that no American ships could go to any French ports (Pres has authority to seize ships going to French ports). Pres Adams issues orders telling captains they can seize ships going to and from French ports. Ship coming from French port is seized.

- **Issue:** Does Congress, by giving Pres specific powers and by being silent on other powers, imply that Pres can't act beyond the powers given to him?
- **Holding:** President doesn't have power to go beyond what Congress gives
  - *If Congress has a statute with clear restrictions, there is a clear line & Congress intentionally not giving pwr beyond that line, Pres must follow*

- **Takeaway**: How we interpret Congressional silence is **very context-specific** (silence *could* mean acquiescence)
- *Ex parte Milligan* (p. 138)
  - **Facts:** Milligan & other Confederate sympathizers were arrested by military officials and Pres unilaterally convenes military commissions to try them in IN.
  - **Issue:** Are such military commissions, nowhere near theater of military operations, constitutional?
  - **Holding:**
    - **Davis:** No, such military commissions can **never** be constitutional when there are functioning and unobstructed and available civilian courts
    - **Chase**: The real issue isn't that courts are open, the real issue is Congress didn't act – if Congress doesn't provide authority, then it's not ok (so there's cases where it could be constl– only if Congress allows it)

ii. *Youngstown Sheet & Tube Co. v. Sawyer* (p. 823)

- **Facts:** During Korean War, Truman intervened in a potential strike in steel mills, saying steel was necessary for war materials. Issued an exec order directing Sec of Commerce to seize the mills and operate them under federal direction. No request for Congressional approval of the seizure, and steel companies sued saying seizure not w/in Pres' powers
- **Holdings:** ***All justices agree that Congress' never gave this power to the President –*** he needed Congressional or Constitutional power in order to act, and didn't have it, so ***seizing the steel mills was beyond his authority***
  - Black's majority opinion:
    - **President must get power for legislating/lawmaking from somewhere** (this is clear usurpation of Congress' lawmaking power)
      - *Extremely formalistic – there are* ***bright lines*** in lmts to pwr
      - Art. II powers only give him the power to ensure laws are "faithfully executed" – not pwr to *make* laws
    - Seizure not the right way for a Pres to settle labor disputes: Doesn't have power to take possn of private property as Commander in Chief
      - That is not a job for military authorities; is a job for lawmakers
  - Frankfurter's opinion
    - More *functionalist:* Attached importance to fact that Congress previously and repeatedly *explicitly rejected* plant seizure as a way of handling labor disputes
    - In 1947, Congress debated the exact authority that Truman used and deliberately left out seizure powers – Congressional silence means Pres doesn't have that authority
    - Congress knew they could've given Pres the pwr of gvt seizure (evidenced by their debate), but chose to leave this power out – that means they *withheld this power on purpose*
    - Walks through history – the only time Pres has unilaterally seized industry came during declared wars (Korean War not declared war; US was pulled into it by the UN)
      - *When it's not a* ***declared war,*** *there is no domestic emergency, so Exec can't interfere w/civilian affairs (like seizure of mills)*
  - Douglas' opinion
    - Closer to Black's; *fairly formalist*

- Need to keep the separation of powers, even during present emergency; can't rewrite it to make it legislative process easier/faster – that defeats the whole purpose of separation of powers (state of emergency doesn't create extra power)
- Constitution is clear that only Congress has legislative powers
  - Even if we disregard all other arguments: 5th Am says: *No taking of property for public use w/o compensation* – and Pres must get Congressional approval for this compensation/funding
  - Pres has enough powers, and there is a limit to them

- Burton's & Clark's opinion (basically say the same thing)
  - Congress acted and didn't go any further
    - Congressional silence means that President can't go beyond what he's given

- Justice Jackson's Tripartite Taxonomy
  - Presidential pwrs aren't fixed, so use a flexible approach to decide
  - **3 categories of Pres' power:**

    #1: President may act pursuant to ***express or implied authorization Congress*** *– here his* ***authority is at a max***
    - Eg: Korematsu (Congress authorized what the Pres did)

    #2: ***Twilight zone where Congress and Pres have concurrent authority:*** *President acts in absence of congressional grant or denial of authority (if you can't really decide what Congress was saying – totally silent and no history on it)*
    - Test depends on circumstances; formalism doesn't work here
    - Note 10, p. 839 (*Dames and Moore*) – Pres doing something that Congress never contemplated (so Congress implicitly authorized it' maybe by history of allowing similar acts)

    #3: ***Powers @ its lowest ebb:*** If Congress doesn't agree and President still acts, he can only rely on his *own constitutional powers minus constl pwrs of Congress* (when Pres acts in **contradiction** to will of Congress)
    - If Congress did have pwr to set a limit and it's inconsistent w/what the Pres is doing – Congress wins
    - This case clearly falls into Category #3 = President is going beyond the express or implied will of Congress; can't increase Pres' pwr at expense of Congress claiming "public safety"

- **CJ Vinson's Dissent**
  - President didn't hide his actions from Congress – he went to them the next morning and told them they could enact legislation to strike down his acts
    - Not a case of tyranny; these are *extraordinary times* and the seizure was justified given the emergency nature
    - President was just acting to *temporarily preserve the status quo until Congress could act* – no reason to wait
    - Doesn't think Pres needed to 1st exhaust statutory procedures to act
  - Dissent is dangerous b/c it inverts powers laid out by Constitution

- Implications: Framework Statutes & War Powers
  - War Powers Resolution enacted by Congress: If we haven't "declared war" or no specific statutory authorization, but US armed forces engaged in hostilities abroad, Congress may direct the president to remove the forces by concurrent resolution
  - But under *Chadha*'s legislative veto provision, this may be unconstitutional
  - But, does put all unilateral uses of military force under category 3

iii. *Korematsu v. US* (p. 966)

- **Facts:** Roosevelt issues exec order empowering military leaders to confine movement to certain areas where people can come and go. Congress then passes statute making it a crime

to violate those military orders. Under Roosevelt's exec order, Gen DeWitt orders all people of Japanese ancestry to be moved to detention camps

- **Issue:** Is the removal to detention camps (and exec order) constl under Pres' authority?
- **Holding:** Yes, <u>we were under state of national emergency and this was necessary for national security</u>
  - **Enough that Congress approved it**, so it's legal
- **Jackson's dissent**:
  - There are things that happen during wartime that the court shouldn't uphold
  - Once a judicial opinion distorts the Constn to validate such an order, we're justifying racism under the guise of "emergency"
  - Ct opened dangerous doors approving this illegal act of racism
- <u>Implications:</u> The Non-Detention Act & AUMF
  - Passed the NDA to repudiate *Korematsu* – no citizen shall be otherwise imprisoned or detained <u>except pursuant to an act of Congress</u>
  - So then the issue becomes: <u>does the AUMF authorize detention by giving Pres power to use "all necessary and proper force" agst those *he determines* were involved in 9/11</u>??

c. <u>"Enemy Combatants", Guantanamo, and the "War" on Terror</u> (CLASS 16)

i. <u>9/11, AUMF & "Enemy Combatant"</u> (see above for AUMF and slides)

- U.S. Citizens: *Hamdi v. Rumsfeld* (p. 841)
  - **Facts:** US citizen captured in Afghanistan and deemed an "enemy combatant" by the gvt. His father brings a habeas petition on his behalf.
  - **2 Issues:**
    1) Does the US gvt have the authority to detain citizens, even assuming they are "enemy combatants"?
    2) If yes, what evidence is necessary to determine that he's an enemy combatant? (Shouldn't he be entitled to due process to determine he is?)
  - **O'Conner's Plurality Opinion** (Rhenquist, Kennedy, Breyer)
    - <u>AUMF gives gvt the authority to detain Hamdi</u>
    - **<u>But</u>**<u>, Hamdi *does* have a due process right to contest the factual basis for his detention *before a neutral decision-maker*</u>
    - <u>During war</u>, we give up certain things and it's ok under laws of war
      - Accepting the traditional war paradigm (that we're in a real war b/c troops are in Afghanistan)
      - But Congress <u>did not authorize *indefinite* detention</u>
    - Ct placing *some* limits on Pres authority (only proper to detain if there's ongoing military conflicts)
    - Even though there's the Non-Detention Act (no citizen can be imprisoned/detained except pursuant to act of Congress) – the AUMF is the act of Congress that satisfies it & allows citizens to be detained
  - **Souter & Ginsberg:** ("concurrence")
    - There's no statute specifically authorizing detention (AUMF doesn't authorize it), so Hamdi's detention is illegal
    - Hamdi is a citizen and <u>unless Congress *speaks clearly* that the Non-Detention Act doesn't apply (AUMF doesn't mention detention)</u>
    - Even if Geneva Conventions give authority to detain Hamdi as a prisoner of war, we're not abiding by the GCs protections for such a POW, so can't apply the "laws of war" argument
    - Concurs b/c he still *agrees* w/ the *outcome* of rejecting gvt's position
  - **Scalia's Dissent:** (w/Stevens)
    - Agrees w/Souter – AUMF isn't clear enough to authorize gvt detaining US citizens (and anyway – can't detain w/o suspending habeas, which didn't happen here)

- Where a <u>US citizen is held in the US</u>, can't hold them w/o a trial unless habeas is suspended – <u>habeas not suspended in this case</u>
  - Narrow definition: If a citizen is captured and held *outside* the US, the constitutional requirement might be different
- Gvt might have impt and sensitive interests in not allowing detainees to go to trial – but must weigh agst individual rights we give to our citizens (can't have an unchecked detention system)

- *Rumsfeld v. Padilla* (p. 863)
  - **Facts:** Padilla was a US citizen arrested in Chicago pursuant to "material witness warrant" and 2 days before his trial, declared an "enemy combatant" and sent to South Carolina. Filed a habeas petition.
  - **Big takeaway:**
    - Breyer had been the plurality in *Hamdi* but <u>dissents</u> in *Padilla* → <u>Breyer would've gone to a plurality to say there's no authorization under AUMF for the detention of *US citizens* ***arrested in the US***</u>
    - If Padilla's case wouldn't have mooted, <u>SCOTUS was about to draw the line between when it's ok to detain citizens (on and off the battlefield)</u>
      - Majority would've been ready to say Padilla's detention not authorized b/c he's a US citizen arrested in the US
- Non-citizens & Guantanamo: *Rasul v. Bush* (p. 868)
  - **Facts:** Habeas petitions brought by non-citizens held at Guantanamo
  - **Holding:** SCOTUS said they had a right to bring habeas
    - Also holds that <u>statute</u> but not necessarily Constn guarantees habeas
    - Finally – footnote suggests the detentions (w/o access to counsel and w/o being charged w/wrongdoing) violates custody under Constn, laws, or treaties of the US
  - **Kennedy** (p. 689): Gitmo *is* under US territory (lease gives US full control)
- Aftermath: CSRTs and "Merits" of Detention
  - US establishes CSRTs to determine if detainees *are* enemy combatants
  - Congress enacts Detainee Treatment Act, part of which allows lmtd appeal of CSRT's final determination of detainee's enemy combatant status and maybe right to appeal military commissioni conviction
    - DTA purports to overrule *Rasul* and preclude federal jurisdiction

ii. <u>*Hamdan* & Question of Military Tribunals</u>

- *Ex Parte Quirin* (p. 872)
  - **Facts:** German saboteurs snuck into the US w/intent to blow up bombs in some cities & 1 confessed to FBI; they were all caught. Pres created a military commission to try them for violations of laws of war, violation of Art. 81, 82 of Articles of war, and conspiracy
  - **Issue:** Did Pres. have authority to try them by military tribunal for their offenses (they claim they're entitled to be tried by civil courts, w/ a jury trial and the procedure and method for review of the tribunal conflicts w/the Articles of War that Congress adopted)
  - **Holding:** Ct adopts a strained reading of Art. Of War 15 (Art 21 of UCMJ) to say Congress <u>did</u> give gvt power to create military tribunals (MT)
    - <u>There must be an offense and offender who the laws of war say can be tried by a military tribunal</u> (if you're a combatant who violated the laws of war, then you can be tried under the laws of war, ie under MT)
- *Hamdan v. Rumsfeld* (handout)
  - **Facts:** Hamdan accused of conspiracy (being bin Laden's bodyguard/driver)
  - **Takeaway:**

- Footnote B (p. 4 of handout): Under *Youngstown*, even if the Pres has independent power (absent congressional authorization) to convene military commissions, can't disregard limitations placed by Congress
- DTA and AUMF don't expand president's authority to convene MCs
  - *Absent Congressional legislative authority, Executive can't assert unilateral authority*
- Under *Quirin*, can only try Hamdan if he's an offender and committed an offense recognized by the laws of war
  - Crime of conspiracy is *not a war crime*

iii. Torture, Wiretapping, & Presidential Power → See slides

IX. Antidiscrimination: Race and Sex

a. *Brown* & Modern Racial Equality Debate (CLASS 17)

i. Higher ed. cases: *Missouri ex rel. Gaines; Sweatt v. Painter; McLaurin* (see notes/slides)

ii. *Brown v. Board of Education I* (p. 898)

- **Issue:** Is racial segregation of public elementary schools and secondary schools violating the Equal Protection Clause of the 14th Am?
- **Holding**: Yes, separate educational facilities are inherently unequal (overrules *Plessy*)
  - Looks to the **effect** of racial segregation on public education
    - On its face, even if the facilities are equal, there are long term effects that has horribly unequal effects
  - There isn't really a lot of legal analysis – p. 899 talks about 14th Am briefly
  - Comparing to higher education cases and saying this is similar

iii. Southern Manifesto (p. 902)

- Signed by deep South Congressmen/Senators who claimed there were *amicable relations* b/w blacks and whites and the Ct's decision will now make things hostile
- Accused Ct of abusing their power and legislating from the bench
- They assert 14th Am not written to include a right to desegregated public schools – education and its regulation is within states' rights so federal courts shouldn't interfere

iv. *Bolling v. Sharp* (p. 913)

- **Takeaway:** Decided the same day as *Brown;* Ct unanimously held segregation of public schools is unconstitutional under 5th Am of the Due Process Clause
  - Couldn't use 14th Am b/c that only applies to states and DC not a state
  - Relies on idea of liberty: *Being free from gvt discrimination, so segregation violates due process*

v. *Brown v. Board II* (p. 928)

- **Takeaway:** Almost nothing happened after *Brown I*, so Ct decided that District Cts had to enter orders/decrees consistent with *Brown I* "as are **necessary and proper** to admit to public schools on a racially nondiscriminatory basis **with all deliberate speed the parties to these cases."**
- SCOTUS didn't want to legislate by telling school districts what to do – that would undermine Ct's credibility; so left it up to District Cts
- Warren wanted *Brown II* to be unanimous (like *Brown I*) –had to water down language

vi. Implementing *Brown*

- Steps forward → *Green, Swaan,* and *Keyes*
  - *Green v. New Kent School Board County* (p. 932)
    - **Facts:** Small school district had 2 schools – 1 black, 1 white, and removed *formal barrier* and just gave "freedom of choice", which didn't eliminate segregation (all kids just continued to stay @ schools)
    - **Holding:** Giving students freedom of choice doesn't always solve the problem of desegregation (but it *could*) –
      - Like in this case, if freedom of choice **continues to perpetuate segregation, then can't continue to use it**

- - - <u>*States have an affirmative duty to end vestiges of separate and unequal*</u> – must actually pursue integration
  - *Swaan* (p. 935)
    - **Facts:** After *Green*, school districts moved twd geographic zoning, which resulted in racially segregated schools (since neighborhoods are usually segregated); to remedy this, district ct in NC ordered massive busing for racial balance in schools
    - **Holding:** <u>District court **did** have the power to require busing b/c it found a constitutional violation</u>
      - But <u>once the affirmative duty to desegregate is accomplished, dist ct can't interfere;</u> if dist ct can't show that agency of state (like school authorities) <u>deliberately</u> tried to affect racial composition (to keep it segregated) then dist ct can't further intervene
  - *Keyes* (p. 937)
    - **Facts:** Dist ct concludes Denver engaged in race-conscious manipulation of zoning to keep one part of the city's school system racially segregated (but didn't do this in inner-city)
    - **Holding:** <u>Purposeful discrimination **is** de jure discrimination</u> (emphasized that <u>only have de jure segregation if there's *purpose/ intent* to segregate</u>)
      - Burden was on Denver to show its policies *didn't mean to segregate* inner-city schools too
      - Had the power to require all of Denver to be involved in the remedy, and order busing in <u>both</u> inner-city and outlying school districts (<u>very divided court</u>)
- Steps back → *Milliken* and *Jenkins*
  - *Milliken v. Bradley I* (p. 941)
    - **Facts:** White flight in 60s produced white suburbs, inner-city black schools in Detroit area. Dist Ct finds de jure segregation and wants to bus everyone from inner city and 53 surrounding school districts
    - **Holding:** *For 1st time since Brown, SCOTUS strikes down desegregation efforts*
      - <u>The right of Dist Cts to remedy segregation **doesn't extend to de facto segregation**</u>: *There was no evidence that the city lines were drawn w/any intent to segregate on basis of race*
    - **White dissent:** Detroit was a perpetrator of discrimination and should be required to participate in the remedy
    - **Marshall dissent:** Can't absolve the state of its responsibility for causing the problem in the first place
      - Ct allowing white flight to succeed & perpetuating segregatn
  - *Milliken II* (p. 943)
    - If Dist Ct not allowed to use busing, then they ordered educational reform, remedial education, higher salaries and training for teachers to raise the quality of education in inner-city Detroit
      - So even if they couldn't fix white flight, they were still going to solve disparity b/w inner-city and suburban schools
      - SCOTUS affirms this approach
        - Note that Dist Ct forced *to only improve quality of the schools, but no oppty to desegregate them*
  - *Brown v. Jenkins* (p.945)
    - **Facts:** Dist Ct in Missouri ordered school district to use a host of measures to attract white students from the suburbs to attend inner-city public schools

- **Holding:** SCOTUS (5-4 vote) says no – there's no constitutional violation that allows this kind of **inter**-district relief
  - *Milliken II* allowed for **intra**-district relief like this, but didn't sanction the use of inter-district remedies in the absence of inter-district constitutional violations
- **Thomas' dissent:** We're losing sight of the possibility that separate doesn't mean unequal – an all-black school isn't inferior and Ct is implying this if we keep focusing on segregation
  - What's wrong w/this argument: It presupposes that we're *already at equality, but we're not*

b. Antidiscrimination (CLASS 18)

- **Takeaway** = **All gvtl classifications that discriminate "based upon race" are *subject to strict scrutiny*** (*Loving; Johnson v. Cal.*)

i. *Brown* & Anti-Discrimination Debate → *McLaughlin v. Florida* (p. 958)

- **Issue:** Is it violating the 14th Am if there's state law that punishes living w/someone of a different race (inter-racial) more severely than if you lived w/someone of same race (*intra*-racial); not married to the person in either case?
- **Holding:** Yes, under *equal protection, all groups should be treated the same by laws*
  - Starts the ball rolling that facially neutral statutes still get some scrutiny to determine that there's no discriminatory impact
  - Court's focus shifts to **whether the law is necessary to the accomplishment of a permissible state policy**
    - Compare to earlier in *Brown*, when Ct struck down racial segregation w/o looking to whether states had *any* reason to discriminate

ii. *Loving v. Virginia* & Anti-Classification v. Anti-Subordination (p. 959)

- **Facts:** Black woman and white man (VA couple) married in DC, moved back to VA, where they were indicted for violating VA's ban on interracial marriages.
- **Holding:** VA's state law banning interracial marriage violated the 14th Am
  - 3 strands of arguments:
    - **"Very heavy burden of justification"** needed for any state statute drawn according to race
      - *1st time we see strict scrutiny:* ***all racial classifications get SS***
      - Court *rejects* VA's argument that statutes should be upheld if there's a *rational basis*
    - Equal protection not just about invidious classification, but also about **subordination** (see anti-classification v. anti-subordination note below)
      - VA doesn't just lack a legitimate reason for their statute, they also have *inappropriate* reason for their interracial marriage ban
      - The purpose of the statute subordinates non-whites- this is not ok
    - Even if the law wasn't discriminating on race, couple has a **fundamental due process right to marry**
      - **Due Process** = **if it's a fundamental right, can't take it away** (doesn't matter if it's discriminatory or not)
        - *Everyone has the right to due process*
  - **Anti-Classification v. Anti-Subordination** (n.1, p. 963; n.2, p. 966; slides p. 3)
    - In *Loving,* CJ Warren gives 2 theories of how to interpret equal protection
      - Anti-classification = Racial classification is not ok
        - *Does statute/gvt axn involve facial classification or secretly intends to classify based on race* (aff axn not ok)
      - Anti-subordination = Equal protection about protecting against subordination of races (would find aff action ok)
        - *Does state action in fostering or reproducing an unjust social structure have an impact?*

- Like Harlan's dissent in *Plessy* – here, the state helping people draw racial distinctions by perpetuating a system of racial heirarchy

iii. Strict Scrutiny & Suspect Classifications (note 3, p. 966)

- **Strict scrutiny** = *State action that classifies* ***on the basis of race*** *must be "narrowly tailored to achieve a compelling governmental interest*"
- Race is a "suspect" class subject to strict scrutiny
- What is a suspect class – *what do we look to?*
  - *Immutable characteristics*
    - Characteristics where you don't have a choice, like skin color;
    - But what about being tall?
  - *Defect of process idea:*
    - Protect groups who aren't proportionately represented by democratic process (point of *Carolene Products* footnote 4)
  - *Narrow argument*
    - 14th Am isn't about broad equality, just pure racial equality
  - *Unfair discrimination* = subordination of a particular group
    - Problems w/where to draw the line

iv. The Reach of Suspect Classification Doctrine

- *Johnson v. California*
  - **Facts:** CA segregated male prisoners upon arrival: inmates divided by racial groups for 60 days, then could choose their cellmates; to avoid racial violence
  - **Issue:** If all inmates are put in the same times of jail cells, is this a racial classification subject to strict scrutiny?
  - **Holding:** Yes – when the state draws racial lines, it's subject to strict scrutiny
    - *All racial classifications are dubious* (O'Conner)
    - ***ALL RACIAL CLASSIFICATIONS (even in prison) SUBJECT TO STRICT SCRUTINY*** (comes *after Adarand* – which said that all *gvt* axns using racial classification are subject to strict scrutiny)
  - **Ginsberg/Souter/Breyer concurring:**
    - There are *some* cases where *we shouldn't apply strict scrutiny*
  - **Scalia & Thomas dissent:**
    - Less rigorous standards apply to racial classifications in prisons (basically, you have less rights in prison)

v. *Brown v. City of Oneonta* (p. 1004) → 2d Cir

- **Facts:** 77 yr old woman reported someone broke in w/a knife and couldn't identify his face but said he was a black man based on her view of his hand and forearm, he was young because of the way he moved, and he cut his hand on the knife. Police got a list of all the black men from local college and rounded them up to question them, and even started stopping young black males on the street (city had less than 300 black people)
- **Issue:** Was the police sweep "racial profiling" in violation of Equal Protection Clause?
- **Holding:** Police weren't acting on racial classifications, so it's ok
  - Doesn't answer- *What role should intent and impact play in racial classifications?* [And reality = they were classifying on race – at one pt, stopped a black woman, even though description clearly said he was *male*]

c. What constitutes "race-based" discrimination? (CLASS 19)

- **Takeaway**=**A gvt classification will only be "based upon race" if one can establish that it had a "racially discriminatory *purpose*" and *not just* a racially disparate impact** (*Wash v Davis)*

i. Some "race-dependent" decisions → *Yick Wo; Oh Ah Kow v. Nunan*

- *Yick Wo* (p. 1021)
  - **Facts:** San Fran rqd permits for laundromats but denied permits to all 200 Chinese applicants but only 1 Caucasion applicant.

        - **Takeaway**: When a state takes a neutral policy (all laundromats permits) need that is *clearly discriminatory*, it is treated as a race-based decision → looked at impact
    - *Oh Ah Kow v. Nunan* (p. 1022)
        - **Takeaway:** Any male prisoner in SF had to have his hair shaved; on its face, seemed neutral, but knew that Chinese men had their hair braided into a queue for religious reasons and shaving it would violate their faith
            - *Supposedly facially-neutral regulation adopted for purely race-dpdt reason*
    - **Transfer *de jure* desegregation**
        - State using previous discrimination as a proxy for otherwise neutral regulations
            - *Knowing that previous segregation helps perpetuate the impact of discrimination* (eg: using a literacy test, knowing it shuts out blacks)

ii. Harder Examples I: *Disproportionate Impact*

- *Griggs v. Duke Power Co.* (p. 1024)
    - **Facts:** A high school diploma & intelligence test required to be hired & its effect was to disadvantage black applicants; diploma and test not crucial for job success
    - **Holding**: B/c there's no relationship b/w the requirement of diploma and intelligence test and the job performance, **the showing of disparate impact is enough**
        - *Even if it's "race-neutral"* not ok if it perpetuates previous status quo of discrimination
            - **Disparate impact** or present effects of past unequal treatment is **enough** if the reason is **so blatant & not related to job performance** (no good purpose)
        - This violates Title VII of Civ Rights Act of 64 says employers can't discriminate b/c of race
- *Washington v. Davis* (p. 1026)
    - **Facts:** DC police dept uses Test 21, which is harder for blacks to pass than whites, and you couldn't get the job if you didn't pass this written personnel test
    - **Issue:** Was the disproportionate (disparate) impact *enough* to make it unconstl?
    - **Holding:** No, **standing alone, disparate impact is *not* enough → must show *purpose or intent to discriminate* too**
        - Law claimed to be racially discriminatory *must be tied to a racially discriminatory purpose*
        - Just b/c a facially-neutral law that is trying to serve an otherwise legal end (in this case, making sure you had police officers who could read and write) – and even if the law *does* impact 1 race over another, Ct won't strike it down → not enough to trigger "racial discrimination" (which would subject the regulation to *strict scrutiny*)
    - **Stevens concurring:**
        - Line b/w impact & purpose not so easy to draw → when the impact is great, we *should* apply strict scrutiny
        - Here, the test is necessary for job performance, so Stevens saying it's ok
- *Personnel Administrator of Mass. v. Feeney* (p. 1031)
    - **Facts:** Mass statute provides civil service preference for vets, but excludes most women from upper levels of civil service (b/c women excluded from army before)
    - **Holding:** Even if legislature could have reasonably foreseen that women may be excluded from these jobs, **not sufficient enough to prove discriminatory purpose under the Equal Protection Clause**
        - Need more of an intent to have adverse effects on a particular group (not just *awareness* that it might harm a specific group)
        - **So big ? = How do you say there's discriminatory purpose? Legislatures can get pretty good at hiding it**

iii. Harder Examples II: *Inquiry Into Motivation*

- The test: *Village of Arlington Heights* (p. 1039-40)
  - Court holds intent to discriminate *doesn't need to be the dominant factor of state action – just need intent to discriminate as a **motivating factor***
  - 6 considerations to take into account to decide: (p. 1040)
    - Disparate impact
    - Historical background (if some pattern of discrim among the same actors)
    - Sequence of events (eg: memo of explicit racism right before the action)
    - Was something really different done w/o a good reason?
    - Was this a weird decision for this person/org to make?
    - Legislative/admin history where there are statements by members of decision-making body

- The Futility: *Palmer v. Thompson* (p. 1042)
  - **Black** in *Palmer* argues there's *futility* in invalidating law b/c of improper motives
    - *The law could just be reenacted for better concealed illicit reasons* or might just *find a reason to show "proper reasons"* (still w/disparate impact though) → so we're not solving the problem
    - Hard to really determine the motivations behind legislative enactment
- Whose Motivation: *McClesky v. Kemp* (p. 1055)
  - **Facts**: Black man charged w/killing a white police officer during a robbery and convicted of death penalty. Seems like a fair trial, but *challenges his death penalty b/c capital punishment is massively racially disproportionate* (more likely for blacks – so says it's invalid under 14th Am)
  - **Holding:** Georgia's capital punishment statute does not violate 14th Am
    - There *is* some intent to discriminate, but doesn't invalidate death penalty
    - The Bladus study does show jury may discriminate and disproportionate impact on blacks, but *legislature entitled to some discretion, & the study can't outweigh that discretion* → *need stronger proof* (but what's stronger?)
    - Also, can't show race was a factor in *this specific case*
    - Afraid it will lead to frivolous lawsuits, and no way for state to rebuff claims (can't call in prev. jurors to explain if they were racially motivated)
  - **Blackmun's dissent:**
    - Π meets all 3 factors:
      - Member of a recognizable, distinct class
      - Showed substantial degree of differential treatment
      - Established the procedure isn't racially neutral
    - Clear that race affects criminal law and ct being worried of frivolous lawsuits not enough to deny equal protection in this case
- Problem of Racial Profiling: *US v. Armstrong* & *US v. Whren* (see notes and slides)
  - **Takeaway**: For racial profiling, Ct said that 4th Am on unreasonable searches and seizures not to be used → use the 14th Am – but it gets *strict scrutiny*, which means you have to prove whites aren't prosecuted for the same crimes (really hard to do this)
  - *Armstrong* → Must prove that people of a diff race aren't being pulled over for traffic stops – impossible for a Π to prove that!

d. Affirmative Action I (CLASS 20)

i. *Regents of the Univ of Cal v. Bakke* (p. 1072)

- **Facts:** UC-Davis holds 16 out of 100 seats for economically and educationally disadvantaged applicants. When Bakke, a white male, applied, those seats were reserved for minorities and he says this is race-based discrim
- **Holding:** The special admissions program is unlawful
  - 4 justices = Violates Title VI of the Civil Rights Act, so they don't need to touch on constitutional issues (but Powell says no and joins the dissent on this issue – so the holding is *resolve this by reaching constitutional issues*)

- 4 justices dissent
- Powell left in the middle – his solo opinion becomes *plurality of 1:*
  - Rejects the argument that 14th Am only applies to minorities' rights
    - This program **must** be subject to **strict scrutiny** – but there *are situations when race could be a factor* (could be a compelling interest to justify such a racial classification → points to Harvard's program that takes race into account among a number of factors)
  - But not in this case: Quotas are impermissible
  - Ask: *Whether racial classification is necessary to promote interest of diverse student body*
- **Brennan's dissent**
  - Whites don't need strict scrutiny–they're the majority; only apply intermediate scrutiny
  - We've had a legacy of special treatment for whites, so allow the same for minorities to fix injustice of the past
  - No need to strike down Davis' program b/c Ct prefers Harvard's admissions program
  - *Invokes Carolene Products Footnote 4:* Use heightened scrutiny if the group has been discriminated against; whites don't need this kind of protection since they can go through the regular methods of politics to redress their harms
    - Compare to Powell, who says Equal Protection Clause is about *equality* – don't distinguish it based on race, just make sure everyone's treated *equally*

ii. After *Bakke*: *Fullilove & Wygant* → see Class 20 slides

iii. *City of Richmond v. JA Croson Co.* (p. 1081)

Facts: Richmond required city contractors to award subcontracts worth at least 30% of $ amt of contract to a Minority Business Enterprise (MBE)–business owned/controlled 51% by minorities

Holding: Strict scrutiny applies to this kind of race-based gvt classification

O'Conner's majority opinion:

3 big reasons:

Strict scrutiny must apply to differentiate b/w benign or remedial classifications and illegitimate notions of racial inferiority

City failed to show compelling interest in apportioning public contracting on basis of race

Failed to show there was historic pervasive pattern of racial discrimination in that field (see class notes, top of p. 4)

Plan not narrowly tailored, given absence of race-neutral measures and such a rigid quota

O'Conner is *like Powell in Bakke*

The key is narrow tailoring – **remedy must be fine-tuned to the identifying harm**

O'Conner **doesn't think strict scrutiny is fatal**

Also – city council *controlled by blacks* – we distrust race prefs when they favor the group in charge

Stevens' concurrence: *3 reasons why he agrees with O'Conner* (slides, p. 3, bottom)

Kennedy's concurrence: (see slides, bottom p. 3)

Unlike O'Conner, thinks strict scrutiny will almost always fail

Marshall's dissent:

Remedial measures shouldn't get strict scrutiny, per *Fullilove*

Richmond *does have prior discrimination* and deference should be given to the State to remedy it

iv. Applying it to the Feds:

Metro Broadcasting v. FCC

Standards adopted by Congress subject to less scrutiny – so *Croson* prob doesn't apply if Congress acting pursuant to §5 power to enforce 14th Am.

Adarand Constructors,Inc. v. Pena (end of Class 20, beginning of class 21)

Overrules *Metro Broadcasting* – No difference b/w aff action policies adopted by federal gvt or any other gvtl actor → they all get **strict scrutiny**

Takeaway = **All racial classifications by any gvt actor subject to strict scrutiny** (kills Brennan's argument in *Bakke* that historically privileged groups get less scrutiny)

- After *Adarand* comes *Johnson* (p. 33 of outline, supra) – which says that it's not just applied to *gvt* axns, but all race-based classifications subject to strict scrutiny

2 BIG QUESTIONS TO ASK:

1st = Is it race-based classification? (*Washington v. Davis*)

2nd = Is it narrowly tailored to fulfill a compelling interest?

e. Affirmative Action II (CLASS 21)

i. *Grutter v. Bollinger* (p. 1120)

Facts: UM law school case; Grutter was white woman w/ 161 LSAT and 3.8 GPA suing b/c they used "soft variable" of race and says their admissions policy violated 14th Am and Title VI of Civ Rights Act (rqrs recipients of fed funds not to discrim on basis of race). Other soft variables: enthusiasm of recommenders, quality of essay; Π says race is a predominant factor. Law school has commitment to ethnic and racial diversity and wants a "critical mass" of underrepresented minority students.

Issue: Is such a preference *narrowly tailored* to fulfill a compelling governmental interest? [This is the strict scrutiny test – must say yes to this question in order to survive strict scrutiny]

Holding: Yes, UM has a compelling interest in creating a diverse law school and **can include race as a soft variable** – this is *narrowly tailored toward its compelling interest of diversity*

Remedying past discrimination isn't enough to uphold agst compelling interest factor of strict scrutiny

But diversity in higher education *is* a compelling reason

Narrowly tailored b/c of 3 reasons:

Not a quota system

Each applicant gets a highly individualized, holistic review – so you can get substantial weight on factors beyond your race (not like *Gratz's* point system)

It's limited in time – won't last forever

O'Conner compares this to *Bakke* and Powell's reasons for rejecting UC-Davis system

Could argue that O'Conner was not really applying strict scrutiny – she gives *deference to UM's educational judgment* (deference not a characteristic of strict scrut)

See class notes, p. 3

Kennedy's dissent:

"Critical mass" is a delusion used by the school to mask its goal of making race an automatic factor

If you look at the numbers, it still looks like a quota system – trying to get to a certain percentage point

For this to be constitutional, can't make race a predominant factor, and UM didn't carry its burden to show that it *isn't a predominant factor*

What *is* critical mass? Why are there 100 Af-Am students, but only 15 Native-Am?

ii. *Gratz v. Bollinger* (pp. 1142)

- **Facts:** UM undergrad assigned points on 150-pt scale for students to be admitted; automatically got 20 pts if you were a member of underrepresented racial/ethnic grp; got pts for other things too though
- **Holding:** The undergrad plan is not narrowly tailored to achieve a compelling gvtl interest
    - *Can't give automatic points based on race* → more like a *quota* system
- **Souter's dissent:**
    - *Bakke* basically told non-minority applicants that no matter how qualified, they couldn't get into the seats reserved for minorities
    - This case is more like *Grutter* than *Bakke* b/c all the applicants compete, and not just on race, but also on grades, alumni relationships, socioecon status, essay
    - 20 pts isn't decisive and not a quota system

- **Ginsberg's dissent:**
  - *Adarand* should only apply if <u>US free of vestiges of rank discrimination long enforced by law</u>
    - *We're not yet on an equal playing field, and until that happens, we can't be a colorblind society*

iii. *Parents Involved in Cmty. Schools* (handout)

- **Facts:** Seattle and Louisville had public schools which allowed students to preference which high school they could attend. In Seattle, if there were too students that wanted to attend the school, they would use tie breakers, like if your sibling went to the school – but one of them was your race. In Louisville, students indicated preference and part of the assignment process included not assigning you to a school if it would cause a racial imbalance.
- **Holding:** Neither plan could be justified as *remedying effects of past intentional discrimtn* or for *promoting diversity in higher education*; neither plan was narrowly tailored
  - Seattle: There was no previous instance of de jure segregation (couldn't show they'd ever been segregated by law)
  - Louisville: Race can't be the *deciding factor* and had "achieved unitary status" so the racial discrimination was remedied
  - **<u>Roberts says:</u>** (following Thomas' line of reasoning) – Taking race into account is racial discrimination
- **Kennedy's concurrence:** We see that he *is* kind of for affirmative action but takes a narrow view of it
  - Recognizes importance of diversity; criticizes Roberts for minimizing its importance
  - There *was* a compelling interest in both districts, but couldn't show how their racial distinctions were furthering it (so not narrowly tailored enough for him)
  - Accepts "race-conscious" integration, but as long as they don't *define* by race
- **Breyer's dissent:** <u>We haven't achieved the purpose of *Brown* yet, so why are we striking this down?</u>

f. The Modern Debate Over Gender / Sex Equality (CLASS 22)

i. The Road to Intermediate Scrutiny:

- *Reed v. Reed* (p. 1189)
  - **Facts:** Idaho statute said if there are 2 people equally qualified to be administrators of an estate, appoint the man over the woman
  - **Holding:** Can't give mandatory preference to 1 sex over the other, just for convenience – violates the Equal Protection Clause of 14th Am
- *Frontiero v. Richardson* (p. 1188)
  - **Facts:** Federal statute gives fringe benefits for armed service members: if you're a male serviceman and you have a dependant, you *automatically* get these benefits (men could list their wives as dependants, even if she wasn't). But if you're a *female servicemember,* then you can <u>only</u> get the benefits *if you show that your male spouse is over 50% dependant on you* (using caregiver-breadwinner model)
  - **Holding:** Congress can <u>not</u> assume the man is the breadwinner – *violates Equal Protection Clause* → but Ct divided on <u>why:</u>
    - 4 justices say statute should be struck <u>based on *Reed*</u> **without** reaching what standard of scrutiny applies to sex-based discrimination
    - 4 justices (*Brennan*, etc) say: <u>Classifications based on sex are *inherently suspect*</u> (sex is an *immutable characteristic*), so they think it should be *subject to strict scrutiny*
- *Craig v. Boren* (p. 1214)
  - <u>Impt case</u> = **Ct decides to use <u>intermediate scrutiny</u> for sex-based discrimtn**
  - **Facts:** Women could buy "near-beer" but men couldn't – worried about men drinking and driving, but presumed women would always be the passengers
  - **Holding:** <u>The government has to show its use of sex-based criteria is **substantially related** to the achievement of **important governmental objectives**</u>

- Says no strict scrutiny, and opts for *intermediate scrutiny*
  - But never explains *why* it uses this standard

ii. **Strict v. Intermediate v. Rational Basis Scrutiny / Tests**

- ***Strict Scrutiny*** = Narrowly tailored to further a compelling state interest
- ***Intermediate Scrutiny*** = Substantially related for achieving an important state interest
  - State has *some discretion* in deciding how to implement the policy and doesn't have to be precisely tailored (narrowly tailored to the interest)
  - Court only looks to the offered reasoning (can't make up its own, like under rational basis review)
- ***Rational Basis Review*** = Rationally related to further a legitimate state interest
  - The court can just find a rational basis for itself, even if it's not the one the state offered (like *Railway* – where you could only advertise on your own van)

iii. Equal Protection & Single-Sex Schools / Activities:

- *United States v. Virginia* [VMI case] (p. 1229)
  - **Facts:** VA Military Institute (VMI) admitted only men and only single-sex school among VA's 15 public schools. It believed its men-only admissions policy was related to its mission of producing "citizen-soldiers." A woman who meets all of the rigorous qualifications is denied admission; sues challenging the men-only admissions policy
  - **Issue:** Is VMI's men-only admissions policy "substantially related to the achievement of important governmental objectives?"
  - **Holding:** No- VA fails to show **"exceedingly persuasive justification"** that they need to exclude women
    - Can't offer a parallel school at Mary Baldwin – not equal, even though they insist it's the same caliber
    - If this had been under rational basis, Ct would've accepted it
    - 2 questions under intermediate scrutiny:
      - Did VA carry its burden of identifying its interests in why they're doing this? (important state interests part)
      - Even if it did, are its actions *substantially related* to its interests?
        - Hardest part of strict scrutiny = *What exactly is substantially related?*
    - VA offers 2 arguments, which Ginsberg says no to:
      - Single-sex education provides important educational benefits and contributes to "diversity in educational approaches"
      - There's a unique VMIA method of training through its adversative approach that they couldn't continue if they admitted women
    - Ginsberg rejects these arguments, emphasizing there isn't proof that admitting women would really impact these 2 factors → they're just using the "old boys" argument to perpetuate the status quo
  - **Rhenquist concurrence:**
    - Disagrees with Ginsberg on 2 points:
      - Attacking VMI's history of gender-stereotyping should only occur after *Hogan*, b/c before then, VMI didn't realize it was illegal
      - It's not a constitutional violation to have a same-sex school, but it is if you don't offer another **comparable institution** for the excluded sex
        - So he's agreeing b/c he doesn't think there's any other women's school that comes close to VMI's caliber, but does think you *could have separate but equal schools*
        - Versus Ginsberg's opinion = ***Separate can never be equal*** b/c no school recently created will ever have the prestige of VMI
  - **Scalia's dissent:**

- Majority is applying strict scrutiny – their opinion making intermediate indistinguishable from strict
  - Problem = intermediate is such a weird middle area that it will always get this kind of attack
- Scalia thinks this ends all single-sex public education; makes it unconstl
  - But not necessarily – just depends on whether you think separate can still be equal
  - If majority thinks all sex-based classification is inherently suspect, Scalia may be right (gets more strict scrutiny; more likely not to pass)

- *Miss. Univ. for Women v. Hogan* (p. 1250)
  - **Facts:** Joe Hogan wants to apply and is denied from an all-women's nursing school near him
  - **Holding:** The all-women policy violates equal protection
    - *No showing that women were systematically discriminated against in the nursing field – that's how they can show there's a reason to exclude men*
    - To carry its burden of showing an important state interest – need to show that there was some discrimination
    - Ct finds that they excluded men based on the stereotypical notion that nursing is a woman's job → archaic stereotypes are not adequate reasoning
  - **Powell & Rhenquist dissent:**
    - Sex-based classifications aren't always harmful in the way that race-based classifications are
    - There hasn't been prior discrim agst men, so shouldn't be applying heightened scrutiny

g. <u>What Constitutes "Sex-Based" Discrimination?</u> (CLASS 23)

i. <u>Sex-Based v. Sex-Neutral Discrimination:</u>

- <u>Veterans</u>: *Personnel Adm'r of Mass v. Feeney* (p. 1262)
  - **Facts:** Mass gives "absolute lifetime preference" to veterans: Anyone who's a veteran applying for a job gets pref over non-vets; Problem = 98% vets are male. Π tried to enlist in the army and was denied earlier, and then when she tried to get into higher level civil service jobs, she was passed up b/c pref given to vets. She argues the absolute preference formula shuts out women since most women were excluded from the army and can't obviously be vets.
  - **Holding:** The MA law <u>is not a sex-based preference, so it doesn't trigger intermediate scrutiny</u> (just get *rational basis review*)
    - The statute gives preference to <u>veterans over non-vets, **not** men over women</u>
    - There might be discrimination in the military that prevents women from being vets – but <u>that is not the issue (discrim in the military not on trial</u>)
    - There was no showing of legislative <u>intent</u> to discriminate agst women by enacting this veterans-preference statute → both men and women are shut out if they aren't vets – not applying more to 1 sex over another
      - The legislature may have *known* that the law would be heavily unfavorable to women, but <u>awareness of the consequences is **not** enough to prove discriminatory purposes</u>
      - Only if the legislature chose this statute "because of" its adverse affects upon women (not just "in spite of" its adverse affects) could Π allege *intentional discrimination*
      - <u>Even if the disparate impact is *foreseeable*, it's still not considered *purposeful*</u>
    - <u>**If a law is facially neutral, even if it has a disproportionately adverse impact, it's unconstitional *if* you can trace impact to *discrim purpose***</u>

- The court only applies rational basis and gives legislature a great amt of deference in deciding how to help vets – ok if it has disparate impact if they weren't purposefully discriminating
- The effect of this is an example of **transfer de jure discrimination**
  - Uses past discrimination to perpetuate it now
- **Marshall's dissent**:
  - Just because the purpose of enacting this statute was not to discriminate against women, that doesn't mean that there wasn't at least *a motivating factor based on sex*
  - Should at least trigger intermediate scrutiny
- Domestic Violence Policies & Marital Rape
  - *Hynson v. Chester* (p. 1271)
    - **Facts:** Police officers engaged in a practice of failing to respond to complaints made by failing to respond to complaints made by females against males they knew; Π argues police treat domestic abuse cases differently than non-domestic violence
    - **Holding:** This behavior is not a sex-based classification, b/c male against a female complaint not treated any differently than female against a male – if that had been the Πs' claim, then maybe it would be different case
      - Doesn't matter that most of the people affected *were* women
- Pregnancy, Round I: *Geduldig v. Aiello* (p. 1276)
  - **Facts:** CA provides public insurance scheme for private employers; gives insurance for disabilities to private employees/-ers but excludes disabilities arising out of normal resources. CA claims it's b/c they have limited resources
  - **Holding: Discrimination based on pegnancy is not sex-based discrimination** (it will **not** trigger **intermediate scrutiny**)
    - CA is discriminating against you b/c you're pregnant, *not* b/c you're female
      - Ignores the fact that only women can get pregnant
    - Ct says legislators free to exclude pregnancy from coverage, just like any other physical condition/disability
      - But ignores that those other disabilities affect both men and women
  - **Brennan's dissent:**
    - State is limiting women from getting full coverage, but men can get it
    - This is 100% impacting only women – this is like *Yick Wo* – when there is a huge disparate impact, it should trigger more than rational basis
- Brief Aside: Abortion and/as Equal Protection
  - Post-*Geduldig*: *Pregnancy by itself isn't a sex-based classification* [1 year after *Roe*]
  - *Geduldig* distinguishes constitutional protections for abortion rights from sex-discrimination (b/c it's saying pregnancy not related to sex-discrimination) → so it's saying *Roe* couldn't have been an equal protection case

ii. Pregnancy as Basis for **Differential** Treatment:

- Statutory Rape: *Michael M. v. Superior Court* (p. 1283)
  - **Facts:** CA has a statutory rape law defined entirely by sex: sex with a female who's not the wife of the perpetrator; so only men can be criminally liable.
  - **Holding:** The statutory rape law **survives strict scrutiny** and doesn't violate Equal Protection Clause
    - CA has a *substantial interest* in preventing illegitimate teen pregnancies (out of wedlock)
    - If the concern is preventing pregnancy, don't need to punish cases where man is the victim since he can't get pregnant
    - Doesn't want to punish female victim b/c then it deters reporting (and Rhenquist thinks getting pregnant is punishment enough)
    - Problems with the holding:

- Automatically assumes that only *women* under 18 can't consent
- Sounds like *Craig* (near beer case) – incredibly paternalistic
- Overinclusive = punishing all sex w/underage women, even if it doesn't result in pregnancy
  - This statute wouldn't survive strict scrutiny
  - But b/c it's intermediate scrutiny used, **as long as there's substantial relationship to impt gvtl objective, it's ok**

- **Blackmun Concurrence**:
  - Snarky concurrence; only concurring b/c he thinks the Δ is a bad guy who should go to jail
  - CA could've been upfront and said that women are sexually victimized more than males that have nothing to do with their ability to become pregnant
- **Brennan Dissent**
  - No plausible argument that the real reason the statute was enacted was to prevent teenage illegitimate pregnancy – really about punishing underage sex
    - Even if the prevention of teen pregnancy is an impt gvt objective and is the objective of this statute, CA still has burden of proving that there would be fewer teen pregnancies under gender-based statutory law than a gender-neutral (need to show substantial relation b/w the act and gvt objective)
    - Brennan says that to meet this burden, State needs to show that it more effectively deters minor females from having sex by only punishing men and not women.

iii. Pregnancy as a Basis for **Equal** Treatment

- FMLA: *Nevada Dep't of Human Resources v. Hibbs* (p. 1305)
  - **Facts:** FMLA (Family Medical Leave Act) entitles employees to take 12 wks upaid leave for men or women for host of reasons, *including pregnancy*
  - **Issue:** Does Congress have the power under § 5 of 14th Am (enforcement clause) to apply the medical leave act to men, even though men weren't subject to prior sex-based discrimination in this area?
  - **Holding:** Yes, FMLA is "congruent and proportional" legislation that provides a prophylactic (ie- preventative) remedy for discrimination against women
    - If it was only provided to women, then it would reinforce traditional stereotypes that women must take time off to take care of the family
    - This statute remedies prior discrim in a comfortable way for Rhenquist:
      - Sex-neutral
      - Congress recognizes past harm
      - Within Congress' powers (§5 enforcement power)

X. Implied Fundamental Rights / Modern Substantive Due Process

a. Origins & Scope of Modern Substantive Due Process (CLASS 24)

- *Remember that Lochner is dead* → no more economic due process (the idea that liberty is based on economic rights, like right to be free from gvt contracts)
- Now we're getting into due process that protects other rights under the "liberty" interest
- 9th Am
  - There are rights "retained by the people" that the gvt can't interfere with, but we don't know what those rights are since not written in Constn (paradox – how do you know what they are?)

i. Right to Marital Privacy: *Griswold v. Connecticut* (p. 1342)

- **Facts:** CT makes it a crime to use or assist someone in the use of contraceptives (drugs, instrument, etc), for the purpose of preventing conception. Challenged on its constitutionality
- **Holding:** The CT law is unconstitutional b/c it violates fundamental right to privacy given by Constn
  - **Douglas' big quote**: *Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance*
    - Basically: We have a lot of implied rights to privacy arising from amendments:

        - Eg: Right of association coming out of 1st Am
        - 3rd Am prohibition of quartering of soldiers w/o consent of the owner
        - 4th Am protecting agst unreasonable searches and seizures
        - 5th Am against self-incrimination creates zone of privacy where citizen doesn't have to surrender to his own detriment
      - Douglas uses other amendments to testify that the right of privacy is a fundamental right given by the Constitution
        - In this case: what happens b/w a married couple falls w/in zone of privacy and the gvt can't interfere w/their relationship by asking about contraceptives
  - **Goldberg concurrence:**
    - Focus on the 9th Am., used in conjunction w/the 5th and 14th Am
    - *Idea of liberty isn't confined to what's in the Bill of Rights* – there are implied rights arising out of the Constn – just b/c they're not explicitly given doesn't mean they don't exist
    - But seems to have a weird circular argument:
      - *In determining which rights are fundamental… we must first look to see if it's fundamental*
      - Wants us to look at "traditions" – but could make an argument that it's not good to always look at traditions (like racism, sexism are in our tradition)
    - If there is an encroachment upon fundamental rights, there should be a compelling subordinating interest (advocating for strict scrutiny)
  - **Harlan dissenting [in *Poe v. Ullman*]** – p. 1346
    - Due Process of 14th Am is a **rational continuum**
      - Full scope of liberty not explicit in the Constitution
      - Thinks Ct needs to use strict scrutiny (though not the exact phrase he uses) and eventually this does become the test: *Gvt restrictions on liberty/implied fundamental rights must be narrowly tailored to meet a compelling gvt interest* [strict scrutiny]
      - Our "tradition is a living thing"- just need to "strike a balance" b/w liberty and the need for an organized society
  - **Black dissent:**
    - Finds the law offensive but not unconstitutional → "government has a right to invade it unless prohibited" by the Constitution (so he's looking for the Constitution to explicitly protect it)

ii. From Due Process to Equal Protection: *Eisenstadt v. Baird* (p. 1353)
  - **Facts:** Mass law allows married people to use contraceptives to prevent pregnancy but single persons can't obtain them to prevent pregnancy. And neither married nor single ppl can use contraceptives just to prevent the spread of disease.
  - **Holding:** Mass law violates equal protection
    - Ct extends marital privacy discussion from *Griswold* to say that this violates the rational basis test of the Equal Protection Clause (only certain classes get heightened scrutiny, so the best they could do was apply rational basis review – and this law even failed that)
      - No rational basis to distinguish b/w the privacy of married v. non-married people
        - No legitimate state interest to further by this distinction
        - Everyone (not just limited to married couples- see Brennan's focus on the individual) should have equal access to contraceptives, regardless of how limited that access is
    - We're seeing how Due Process and Equal Protection fit together to protect rights
      - Beginning of recognizing the right to privacy when it relates to sex or procreation

iii. Identifying Implied Fundamental Rights: *Roper v. Simmons* (p. 1366)
  - Answers the question: *If the courts are to look to history and tradition, to what extent can/should the courts look to foreign/intnl practice as well?* [Should we only care about what Americans think?]
  - **Takeaway:** Juvenile death penalty violates 8th Am's prohibition against cruel and unusual punishments
    - Kennedy used intl sources to decide what is "unusual"
      - US almost alone in imposing death penalty on juveniles
    - Dissent (O'Conner & Scalia)

- Ct should be looking at *national consensus*, not intnl consensus
- We don't need to conform our laws to the rest of the world
- And Ct ignored intnl custom in *Roe*, so at the very least, need to be consistent

iv. Problem of Perspective: *Washington v. Glucksberg* (p. 1579) [didn't really discus *Vacco v. Quill*]

- **Facts:** WA has a law that prohibits against causing or aiding another person to attempt suicide.
- **Issue:** Does the 14th Am Due Process Clause protect a right to assisted suicide? (Do we have an implied fundamental right to be assisted in committing suicide?)
- **Holding:** No, WA law is constitutional – the right to assisted suiced is not a fundamental liberty interest protected by the Due Process Clause
  - 1) There isn't a tradition of protecting the right to suicide, or assistance (not deeply rooted in nation's history or tradition)
  - 2) Required in substantive due process is a "careful description" of the asserted fundamental liberty interest – and that doesn't exist here
- **Souter's Concurrence:** (very much like Harlan in *Poe v. Ullman*- about a continuum)
  - Be careful with using an all-or-nothing analysis
- **Takeaway:** Note how the Ct fights back and forth about what the right actually is

b. *Roe v. Wade* and the Right to Choose (CLASS 25; p. 1388)

- **Facts:** TX law prohibits abortion except to save the mother's life and a GA law (*Doe*) imposes a host of conditions on abortions that make it very difficult to get an abortion.
- **Issue:** Are the TX and GA statutes constitutional, given the right to privacy identified in *Griswold?*
- **Holding** (Blackmun)**:** These statutes violate the privacy-based right of pregnant women to choose to have an abortion absent a compelling state interest
  - Right to have an abortion is not unqualified – **when certain fundamental rights are involved, like in this case, Ct holds that regulation must be justified by a compelling state interest, and the regulation must be narrowly drawn to those interests – STRICT SCRUTINY**
    - ie: Right to an abortion falls under the fundamental right of personal privacy – **any gvt infringement on those fundamental rights is subject to strict scrutiny**
  - 2 state interests when there can be a limitation on the right to abortion
    - #1 = State's interest in the *health/safety of the woman*
      - Breaks pregnancy into 3 trimesters
        - After the 1st trimester, State can regulate abortion *to the extent that the regulation **reasonably relates** to the preservation and protection of maternal health* (eg – could require that after the 1st trimester, all abortions need to be conducted in a hospital)
        - Before the 1st trimester, the only requirement the State can impose is that the *abortion must be performed by a licensed professional/doctor*
    - #2 = State's interest in *protecting "potential life"*
      - State can only interfere after the point of viability (the point at which the unborn child is at least physically capable of living outside the womb)
        - Viability is not a fixed line – depends on medical technology
        - May even ban abortion after point of viability
  - Huge focus on medical aspect to avoid morality issues
- **Rhenquist's Dissent**:
  - This is like *Lochner* and this is judicial activism – this is the Ct legislating from the bench by breaking up the pregnancy into 3 terms – going beyond just interpreting the Constn at this pt
  - Ct should just use rational basis review – that's the traditional test in the area of economic and social regulation (a la *Williamson v. Lee Optical*) b/c this is **not** a case about the right of privacy, so this is not a fundamental right issue
- **White's dissent:**
  - Doesn't think this is a fundamental right at all; Ct went beyond its authority
  - Supports the fetus being a potential life and liberty to be free from death – and the life of the fetus shouldn't be valued less than the mother's (basic pro-life argument)

c. Abortion After *Roe: Casey* to *Carhart* (CLASS 26)

i. <u>Planned Parenthood v. Casey</u> (p. 1424)
- **Facts:** PA statute has a number of requirements – the 3 big ones:
  - *24 hr notice period* – woman gives consent to abortion and then receives info and has to wait 24 hrs before she can actually get the abortion (to give her time to change her mind)
  - *Spousal Notification* – married woman must sign a statement saying she told her husband
  - *Juvenile Parental Consent Provision* – must get informed consent from parents (allows for a judicial bypass)
- **Issue:** *Roe* says there shouldn't be interference with abortions in the 1st trimester – are these regulations inconsistent with *Roe*?
- **Holding:** 2 parts – 1 about *stare decisis* and 1 about *"undue burden" test*
  - ***<u>Main rule = For regulations on abortions that occur before viability, the test is whether or not the state regulation is an unde burden</u>*** (NOT strict scrutiny)
    - **<u>ABORTION IS THE ONLY FUNDAMENTAL RIGHT THAT DOESN'T GET STRICT SCRUTINY</u>**
  - <u>Stare decisis</u>:
    - *Plessy* overruled by *Brown* & *Lochner* overruled by *West Coast Hotel*
    - From those examples, we see its ok to overrule if things have changed in society
    - Things haven't changed that much and precedent is ingrained in society (people have sex informed on their understanding of right to get an abortion)
      - Court risks losing legitimacy by overruling *Roe*
    - See slides, p. 1; 4 reasons for deciding whether or not to overrule
    - Says there are <u>3 parts to *Roe's "essential holding"*</u> and they're <u>keeping</u> that (but <u>note that this actually rejects most of *Roe*</u>):
      - *Recognizes woman's right to choose to have an abortion before viability, w/o undue interference from the state*
        - Before viability, State's interests not strong enough to support banning abortion or imposing substantial obstacles (an undue burden not allowed before the point of viabilitiy)
      - *Confirming state's power to restrict abortions after fetal viability (w/exceptions for pregnancies endangering the woman's life/health)*
      - *State's "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus"*
  - <u>Undue burden</u> (p. 1435)
    - **<u>Rejects the trimester framework of *Roe*</u>**
      - **<u>Keeps line of viability</u>**<u>–before this line though, no undue burdens allowed</u>
    - **<u>New rule:</u>**
      - *Only where state regulation imposes an **<u>undue burden</u>** on a woman's ability to make the abortion decision will it interfere with her fundamental rights and liberty protected by Due Process Clause* [**<u>note that the Ct not applying strict scrutiny, just using an undue burden test – maybe implying that abortion is not a fundamental right subject to SS)</u>**
    - <u>Look at each of the regulations:</u>
      - *<u>24 hour waiting period</u>* - UPHELD
        - Ct says <u>not infringing</u> on physician's 1st Am rights or infringing on woman's fundamental right to choose abortion
        - <u>A burden is not necessarily a substantial obstacle</u> – **only strike down a regulation it becomes an** undue **burden standing in the way of a fundamental right**<u> – but just a burden is ok</u>
      - *<u>Spousal notification</u>* – REJECTED
        - Poses a substantial obstacle and is thus an <u>undue burden</u> b/c it could actually prevent getting the abortion
      - *<u>Parental notification</u>* – UPHELD

- There's judicial bypass, so a court could authorize abortion w/o informed consent

- **Stevens & Blackmun concurrence**
  - Want to reaffirm *Roe* completely
  - Stevens = Thinks the 24 hr waiting period is unconstitutional
    - No evidence that the requirement truly furthered the state's interest in making sure the woman gave informed consent or state's interest in protecting potential life
  - Blackmun = This is a paternalist law and is violating equal protection under gender equality. *We see an intersection of fundamental due process and equal protection*
- **Rhenquist dissent:**
  - Joint opinion basically rejects most of *Roe*, and with this opinion, they've essentially overruled all of its central points – should just admit that they've overruled *Roe* and make it official
  - Keeping *Roe* for all the wrong reasons
  - Abortion is a right that can be restricted; the right to terminate pregnancy not a *fundamental* right
- **Scalia's dissent**
  - Mostly attacks the undue burden principle
  - Disagrees with majority's construction of history
  - Abortion not a fundamental right b/c not explicitly in the Constitution

ii. <u>*Stenberg v. Carhart* (*Carhart I*)</u> (p. 1457)

- **Facts:** Nebraska has a law that bans partial birth abortions, unless it's necessary to save the mother's life. Prohibits this specific method after the 15th week of pregnancy, even though it's generally believed to be the safest for pre-viability second-trimester abortions
- **Holding:** The NE law, which has a very narrow health exception (only to save her life) <u>imposes an undue burden</u> on the woman's right to choose by prohibiting her from using that method (D&E method – the legislature was actually targeting the smaller used D&X method, a variation of D&E)
  - <u>2 reasons</u>
    - #1: Prohibition on 2nd semester abortion needs some kind of health exception
      - Since we know that this is the safer procedure, doesn't make sense why the state is banning this
      - This is pre-viability - <u>use undue burden test</u>, and this *is an undue burden* b/c just moral repulsiveness not a good enough reason to impose burden
    - #2: Statute is overbroad in prohibiting all D&E procedures, not just D&X
- **Kennedy Dissent:**
  - Important b/c he was one of the <u>swing votes in *Casey*</u>
  - Doesn't care if there's methods the state prevents as long as there is some kind of abortion method that women can still use – states should be allowed to make the call about type of method to use

iii. Ct upholds Congress' ban on partial birth abortions [see notes & slides]–O'Conner replaced by Alito

d. <u>Sexual Orientation: Due Process, Equal Protection, or Both?</u> (CLASS 27)

i. <u>Sexual Orientation as Privacy</u> → *Bowers v. Hardwick; Lawrence v. Texas*

- <u>*Bowers v. Hardwick*</u> (p. 1466)
  - **Facts:** Georgia banned sodomy and the application of the law is used to target homosexual acts of sodomy. Π found engaging in oral sex w/a male companion. Even though it's a facially neutral statute, it's applied against homosexuals – hard to prove that though (remember racial profiling hard to prove too); also, they're not a protected class
  - **Holding:** White frames this as a <u>issues of whether the Constn confers a fundamental right upon homosexuals to engage in sodomy</u> (and finds there isn't, so the law is upheld)
    - Tries to avoid reaching a higher level of scrutiny b/c GA law couldn't have been upheld if it was just a challenge to banning everyone's right to sodomy – would've been subject to strict scrutiny under *Griswold* and its right to privacy (not narrowly

tailored to any sort of compelling gvt interest – hard to see state's compelling interest in preventing sodomy)

- Frames as fundamental due process claim:
  - There is *no fundamental right upon homosexuals to engage in sodomy*
  - Since not a fundamental right, only subject to rational basis, and found that GA's interest in morality *enough* to satisfy rational basis review [Law upheld]

- **Stevens' dissent** (used to overturn this case later):
  - This is not about whether there's a fundamental right to engage in *homosexual sodomy* but rather about privacy of all individuals
  - 2 main questions:

    #1: Can the state prohibit this of *anybody* (Due Process Question – is this a fundamental right)

    #2: If it's *not* a fundamental right at stake, then does the state have a rational basis for discriminating against homosexuals as a group? (Equal Protection question)

- *Lawerence v. Texas* (p. 1482)
  - **Facts:** TX prohibits acts of sodomy b/w members of the same sex. Lawrence arrested while engaged in sodomy w/another man and challenge the constitutionality of the TX law (police came into his apartment on a tip from a neighbor about disturbance using weapons)
  - **Holding:** TX law struck down and *Bowers* overruled
    - Kennedy doesn't apply any type of scrutiny
    - Rips apart *Bowers* (and uses Stevens' *Bowers* dissent – see slides)
      - History of *Bowers* is wrong – it overstated our traditions against homosexuality, and over time, we wanted freedom from gvt interference w/your sex life
      - *Bowers* is demeaning – treats lives of homosexuals as only about sexual conduct, which invites discrimination and social stigma
      - Failed to understand the liberty at stake – *Bowers* Ct allowing gvt to impose its own moral judgments on citizens, which *goes agst the heart of liberty*
    - Kennedy can't really articulate if this infringes on a **class or a right – but seems to say it's about *both***: How 1 act historically been used to persecute 1 group
      - *Lawerence is a hybrid of substantive due process that is shaped by concerns that are used for equal protection law*
    - Everyone has the right to conduct their own private lives relating to sex, free from the gvt – this is a **fundamental right**
      - Lawerence entitled to respect for his private life: "TX statute furthers no legitimate state interest that justifies its intrusion into the personal and private life of the individual"
      - **About right to liberty under Due Process Clause**
  - **O'Conner's concurrence**
    - Uses equal protection, not due process to decide that TX statute invalid
    - It treated the same conduct differently, based on the participants
      - Homosexuals not suspect class, so this gets only *rational basis review*
      - Even then, TX statute fails to satisfy rational basis – moral disapproval of a group is insufficient gvt interest
    - She wouldn't overrule *Bowers*
      - GA statute, unlike TX, not facially discriminatory
      - *Bowers* wasn't an equal protection case, so no need to overrule it if you're deciding *Lawerence* on equal protection grounds
  - **Scalia's dissent:** (p. .1492)
    - We use morality as the basis for criminal law all the time
    - *Bowers* is correct – if a governing majority believes something is morally wrong, it should be allowed to pass rational basis
    - Constitution doesn't say homosexual sodomy is a fundamental right under due process

ii. Sexual Orientation as Equal Protection

- *Romer v. Evans* (p. 1505) [was before *Lawerence*; this is also written by Kennedy]
    - **Facts:** CO had Amendment 2 that prohibits any statute from banning discrimination against LGBTs – saying they're not a protected class – is this Am 2 constitutional?
    - **Holding:** Am. 2 bars LGBTs from getting protection against discrimination, so this is burdening a single group of people and under equal protection, CO Amendment struck down
        - Kennedy claims this is under rational basis (Scalia disagrees)
            - *Lacks a rational relationship to legitimate state interests*
            - But this seems like rational basis plus – so it's raising the bar now for rational basis review
        - There are particular areas where discriminating against LGBTs is unconstl:
            - *Sexual activity* (*Lawerence)*
            - *Everyday life activities (Romer)*

e. Modern Constitutional Landscape: Affirmative Rights & Constitutional Conditions (CLASS 28)

i. Welfare State, etc: *DeShaney v. Winnebago; Maher v. Roe; Rust v. Sullivan*

- **Big point from this class:**
    - Once the gvt provides you with certain benefits, you're entitled to due process
        - Though that doesn't mean they have to provide you with those benefits/protections