

I. Text of the Constitution

Constitutional Interpretation tools – Text, Contemporary views of framers, Influences on Framers, Logic/Inference, History, Language, Structure, Precedent, Current social values, politics, Role of Supreme Court? International Precedent?

C cannot answer all questions – broad language doesn't provide easy answers

- Adhere closely to text (textualism/originalism)?
- SC interprets ambiguous terms based on its own principles and basic ideas

Articles of Confederation (1781) – failure – didn't work. Central govt. had no power to tax, no central leader – no court system. Many states coming together to form union but no states gave anything up (weren't willing to)

- Central government dysfunctional
- Couldn't amend it w/o unanimous agreement between all states- impossible
- Philadelphia Convention 1787 – assembled to rewrite Articles – new form of the articles in a more workable framework. Not charged with scrapping existing structure and creating new Constitution, but only way to do it

Constitution developed /adopted

- New C specified real genuine powers to be given to central government – to all three branches
- Coming together to states – willing to give up some power to central government – willing to bind selves to go along with national government
- In their vision, this was not just charter to create new government/structure, was charter to limit that structure. Giving power specified in document and that is all.
 - Debate – Most framers believed they didn't need to provide Bill of Rights because government has no power without states to restrict rights. No place in federal government that can regulate freedom of speech, religion. Evidence that they envisioned limited powers for central gov't.
 - Needed Bill of Rights because some states were concerned (Anti-Federalists) and wouldn't ratify unless promised that there would be BoR in first Congress.

Under original constitution, not much of a role for Judicial Branch. Powers undefined. There was no power of Judicial Review. Then came Marbury v. Madison...

Marbury v. Madison (1803, p. 2)

- Marbury was a last-minute appointee of Adams, commission as DC court judge signed and sealed but never delivered. Jefferson refused to deliver commission. Marbury asked SC for writ of mandamus against Jefferson
- Marshall's 3 part opinion
 - Marbury had a right to his commission since Adams signed it and it was valid
 - Since Marbury's rights were violated, he had a right to relief
 - ...but NOT from the SC. SC had no power to issue WoM under Judiciary act of 1789, because Article III only gave it appellate jurisdiction in these cases.
- Basic Principles of Case
 - Doctrine of Judicial Review – Where C (as interpreted by SC) conflicts with the laws or actions of the other branches, these laws/actions are invalid.
 - SC can declare acts unconstitutional – “a law repugnant to the constitution is void”

- "It is emphatically the province of the judicial department to say what the law is"
- Unanswered Questions:
 - Judicial review is not controversial today – but is the SC really the last word on the law?
 - When SC is parsing ambiguities, there is no accountability
 - Counter-majoritarian difficulty – Court can act against will of majority?
 - CMD can be solved by getting "inactivist" judges
 - Sometimes rulings are resisted (school desegregation), repeatedly challenged (abortion), or just plain ignored (school prayer)... another check?

II. Justiciability

Five Justiciability Issues – any one is fatal to a case

- Rules that come from C. Court should decide cases and controversies. Means that we want courts to use resources carefully – deciding disputes with legitimate interests and are going to engage in the dispute. Otherwise, may have parties filing suits w/o purpose.
- **Cases and Controversies**
 - SC has an Art. III mandate to decide ONLY concrete legal disputes between parties with vested interest in disputes, not abstract theoretical disputes
 - No advisory opinions – Washington asked for one. SC: Not our job!
 - Some state SC's do give advisory opinions (MA)
- **Ripeness**
 - If lawsuit is time continuum, ripeness means filed too soon. Somewhere down road, law may take effect that harms interest in some way, and at that moment, may have valid suit, but suit was filed before law was passed. May suffer injury from law, but must wait. If ahead of injury, case is not right.
- **Mootness**
 - If it took effect, and waited for a year after law to file suit, but law expired yesterday, and file suit today. Even if likely that new version will be passed next week, too bad. May have had claim during the year, but now it is too late.
 - EXCEPTION: An issue that is “capable of repetition, yet evading review.” Often applies in abortion cases (Roe) – the case is about the issue, not the party. (Not always followed.)
 - Want case to be between ripe and moot
 - Judge-made doctrines can be stretched to mean what judges want them to mean.
- **Standing**
 - 3 Lujan Elements for a party to have standing
 - Actual/Imminent Injury (not conjectural/hypothetical)
 - Caused by conduct of Defendant (not 3rd Party)
 - Can be redressed by Court
 - Allen v. Wright (1984, p. 35)
 - Black parents sued IRS over tax status of racially discriminatory schools. Congress says schools can get tax exemptions even though they were segregated. Kids didn't try to enter school, but parents sued claiming that students would be denied right to integrated schools/desegregated public schools. Harder for kids to get education at desegregated school.
 - Court: Not the kind of injury that standing requires – not direct, redressable injury to satisfy the case or controversy argument of Art 3. Courts over years have said that means real disputes with real parties whose interests are affected by the lawsuit.
 - In order to have standing, must have P who is injured, and caused by actions of D, and it has to be reasonably redressable.
 - Injury has to be more than that which might be shared by every citizen or taxpayer. (Child that applied to one of the schools, and was turned down based on the policy, etc. – may not be basis for suing government, but may be for school).
 - Dissent: there was injury, makes it more difficult for access to desegregated education.

- Standing requires a plaintiff to allege a personal injury fairly traceable to the defendant's conduct that can be redressed by requested relief.
 - City of Los Angeles v. Lyons (1983, p. 42)
 - P stopped by LAPD for traffic violation; officers subjected him to choke hold. P sued city, requested injunction banning choke hold
 - Court: No standing – past exposure to illegal conduct does not show case or controversy. P's claim is too speculative. Predictions of future behavior beyond SC's function. This is a question of public policy, not Constitutional rights.
 - Dissent: P was injured and could be injured again. His rights were violated. Majority improperly uses standing – nobody can challenge this policy!
 - Lujan v. Defenders of Wildlife (1992, p. 45)
 - P's challenged DoI rule that said Endangered Species Act applies only in US territory. ESA allowed for citizen suits to challenge violations
 - Court: C does not allow Congress to permit "citizen suits" that confer standing on citizens who cannot allege any other "injury in fact."
 - To permit Congress to convert the undifferentiated public interest in executive officer's compliance with the law into an individual right, is to permit Congress to transfer from the President to the courts the duty to "take care that the laws be faithfully executed.
 - Dissent: Courts applying this doctrine will exclude too many people from access to courts – "procedural injuries" should be enough
 - Massachusetts v. EPA (2007, handout)
 - EPA refused to regulate CO2 as a pollutant, states sued claiming EPA had power and requirement to do so.
 - Court: This case is different from Lujan – States are suing, not individuals. States are not normal litigants, face unique demands
 - Injury is imminent and not hypothetical – evidence of climate change
 - EPA's inaction is not justified – no need to resolve issue in one fell swoop
 - Dissent: This is a problem for Congress and President. States should get no special exemption from Lujan standing rules
- **Political Question Doctrine**
 - Questions involving the discretionary authority of Legislative or Executive Branches should be left to those branches.
 - Baker v. Carr (1962, p. 68)
 - P's sued to force TN to reapportion its legislative districts, which had not been done since 1901. Previous apportionment case (Colegrove v. Green) brought under Art. IV.4 Guaranty clause ruled to be PQ
 - Court: This case arises under 14th Amd. Equal Protection, not Guaranty clause. Guaranty clause is PQ, EP is not.
 - Six Factors that indicate Political Questions
 - 1. Textually demonstrable constitutional commitment of the issue to a coordinate political department
 - 2. Lack of judicially discoverable and manageable standards for resolving it
 - 3. The impossibility of deciding without an initial policy determination of a kind clearly intended for nonjudicial discretion
 - 4. Impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government

- 5. Unusual need for unquestioning adherence to a political decision already made
 - 6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question [esp. foreign policy]
- Dissent: this is just like Colegrove – it's a PQ no matter what clause it comes in under
- Nixon v. U.S. (1993, p. 95)
 - P was federal judge investigated for taking bribes and convicted of perjury. Refused to resign, and was impeached by House, Senate appointed cmte. to hear evidence. Full Senate voted to remove P from office. P sued claiming C requires full Senate to hear evidence
 - Court: • look at meaning of "try" – has broader definition now. Then look at word "sole," which means back off, it's the Senate's call
 - PQ IFF:
 - 1. Involves issue clearly dedicated/committed by Constitution to another branch of gov't AND/OR
 - 2. Involves an issue for which there are no judicially enforceable standards - i.e. does the Court have a way to interpret those words? Did the framers give us the power to define these terms?

III. Federalism

McCulloch v. Maryland (1819, p. 101)

- MD imposed a tax on the Bank of the United States. Bank's cashier refused to pay the tax. MD sued claiming that the bank was unconstitutional and could be forced to pay state taxes.
- Marshall's Arguments
 - *Textual C* – necessary & proper Art I, § 8, last graph – to carry out foregoing powers. Q is what means, is it blank check to Cong, or is there more specific meaning
 - Reliance on text – When C says Cong has power to make laws N&P, doesn't say essential or absolutely necessary. If framers want to limit to required powers, would have said, given Cong narrower power. Framers didn't modify it – must have intended open-ended
 - *Structural* – Limits power of Cong – meant to be limited powers N&P – could have made limits – but is expansion of powers b/c put in powers section not limitations section
 - *Intent* – Not code, list of all powers. Outline. Intended to create framework & have it interpreted – lots of powers enumerated, bank may have been as well
 - A C is a general plan of gov't – not suppose to contain everything. "We must never forget that it is a Constitution we are expounding."
 - Art. VI – C is supreme law of land, laws created under are supreme laws. If action of states conflicts with C, supremacy clause = Fed action prevails
 - 10th Amd. – Powers not delegated to US nor prohibited to states are reserved to states or people. May not be limitation. 10th Amd. could mean that default is to states/people. "Expressly" was left out of 10th Amd. For a reason – it was in the original articles and had caused numerous problems.
 - Creating National Bank is plausible action, N&P clause, 10th Amd. doesn't interfere b/c doesn't have narrow limitation
 - N&P should be interpreted to expand the powers of Congress - that's where it was put! But it must be tied to one of the enumerated powers. (And covered by Judicial Review)
 - The power to tax is the power to destroy, and a state cannot destroy what is within the powers of the federal gov't to create.
- Significance of McCulloch
 - 1) Q of Congress's power under N&P to carry out other enumerated powers – ex: Air Force – related to Army, to provide for defense, N& P to carry out
 - 2) Interpretation of document – Marshall writes manifesto about how to interpret C and considers *Text, Omission, History, Structure, Original Intent, Role of Judiciary*

IV. Commerce Clause

Congress has power to regulate Commerce among the states. But...

- What is Interstate Commerce? Who Decides – Congress or SC?
 - How should Congress justify whether something part of IC or not (if required at all)
 - How broadly can Congress regulate? Can it regulate intrastate that have impact on IC?
 - Role of SC? What is Ct requiring of Congress? Is SC going to require elaborate explanation of IC? Any deference?
 - What standard using when reviewing Act of Congress? Test/Standard? Special wording?
 - Limiting power of national gov't is one goal of C, if Congress wants to do something, must find words in C
- When Congress wants to legislate, looks at enumerated powers, most of time ICC

Gibbons v. Ogden (1824, p. 113)

- D got NY ferry license, P got federal ferry license. Question: Can a state legislate in ICC in a way that conflicts with federal law? Or can the federal gov't under the ICC tell a state what to do?
- Court: Fed. Gov't can control state actions affecting IC. The only limit is the Constitution itself.
- Commerce can be anything, must be more states than one, excludes activity in one state, with no effect on other states
- Even if internal, but affects other states, can still be interstate commerce

Commerce Clause History:

- 1824-1890 – Post Gibbons, few cases on Commerce Clause. Challenges to state regs of commerce. Then America began industrializing. Pressure to regulate everything.
 - Interstate Commerce Act of 1887 - Created Interstate Commerce Commission (now defunct.) Power to regulate interstate freight - standards, rates, etc.
 - Sherman Antitrust Act of 1890 - regulated competition in commerce. Congress asserting broad regulatory authority. These assertions bumped up against SC
- 1890-1937 – SC takes narrow view of Commerce clause and Congress' power.
 - Things that were not interstate commerce - manufacturing, mining, production, some aspects of agriculture
 - Vs. "Police Power" - regulatory power, policing health/safety/welfare of citizens. Police Power belongs to the states.
 - Hammer v. Dagenhart - Power of Congress to regulate child labor under commerce clause. SC says Congress has no power - narrow view of commerce clause, and attempting to usurp state Police Power.
 - Growing national awareness of poor working conditions vs. SC saying, "not Congress' job!" - States not wanting to lose business, first out the door problem, local corruption, and regional differences.
 - Great Depression - FDR's New Deal, need for broad, dramatic, national solutions. Congress passes sweeping national regulatory scheme, SC strikes them all down 5-4 - going beyond Congress' commerce power.

- FDR's Court-Packing Plan and "The Switch In Time That Saved Nine." - One of the 5 majority justices (O. Roberts) changed his mind in West Coast Hotel - court upheld a New Deal Plan 5-4.
- Modern Era: 1937-1995
 - NLRB v. Jones & Laughlin Steel Corp. (1937, p. 131)
 - National steel co. sued for violating National Labor Relations Act, which was predicated on commerce power. J&L claims law exceeds IC power
 - Congressional Power to regulate interstate commerce extends to regulation of intrastate activities that burden interstate commerce. (Questioned by Morrison?)
 - There must be a "close and substantial relation to interstate commerce" –if it's intrastate when separate but interstate when combined, Congress can regulate
 - Dissent: Between materials, production, and shipping, everything industry does is now interstate commerce!
 - U.S. v. Darby (1941, p. 134)
 - Lumber company violated min wage/max hour laws. Claimed laws an overreach of IC power
 - Court: These laws are IC. Congress has power to exclude from IC any article that it deems injurious to public health, morals, or welfare
 - Overrules Hammer v. Dagenhart, Congress can also regulate interstate goods made with child labor.
 - Manufacturing exemption gone for good – It's all IC now
 - Congress has a police power!
 - Wickard v. Filburn (1942, p. 136)
 - P exceeded quota for wheat production (for his own consumption) and was fined. Claimed quotas were an overreach of IC power
 - Court: IC authority extends to all activities have a substantial effect on interstate commerce, including those that do not have an individual effect but a strong aggregate effect.
 - Wheat can be regulated, even if it doesn't cross state lines. Anything that has an indirect connection to interstate commerce may be regulated. Same "cumulative" regulation rule.
 - High-water mark of IC power
 - Heart of Atlanta Motel v. U.S. (1964, p. 139)
 - HoAM wanted to be segregated in spite of 64 Civil Rights Act that barred race discrimination in public accommodations
 - HOAM was participating in interstate commerce - by turning away African Americans
 - Court: Under CC, Congress can regulate local activities that effect interstate commerce
 - Concurrence: Why not use 14th Amendment? (Because 14th only applies to state action, not private actors)
 - There were lots of Congressional findings here... made clear that public accommodations affected IC
 - Katzenbach v. McClung (1964, p. 141)
 - Birmingham BBQ near highway, segregated, but located near interstate highway and bought meat from out of state – CC hook!
 - Court: CC extends to any public commercial establishment selling goods that have moved in interstate commerce or serving interstate travelers
 - Refusal of service ends up impacting IC

- Hodel v. Indiana (1981, p. 143) – case about strip mining, Court can invalidate legislation passed under CC “only if it is clear that there is no rational basis for a Congressional finding that the regulated activity is interstate commerce.” (OVERTURNED BY LOPEZ)
- Perez v. U.S. (1971, p. 143) – case about loan-sharking... how can Congress regulate it under CC?
 - Three Bases of Interstate Commerce
 - **1) Channels of interstate commerce - Highways/Waterways**
 - **2) Instrumentalities - Vehicles - things that move on channels**
 - **3) Activities that effect interstate commerce in the aggregate (intrastate)**
 - Court also finds Congress need not make particular findings to legislate under CC. (THIS PART OVERTURNED BY LOPEZ)
- In 1976, Rehnquist begins saying that 10th Amendment imposes bound on Commerce Clause
- National League of Cities v. Usery (1976, p. 145) (OVERTURNED BY GARCIA)
 - Cities/Staates had to abide by federal hour/wage standards passed in 1974. Beyond CC power?
- Rehnquist: CC does not allow Congress to regulate state/local governments in their integral functions – 10th Amendment does not allow it. Feds cannot abrogate “separate and independent existence of states”
 - Dissent: This is an SC power grab!
- Garcia v. San Antonio MTA (1985, p. 148)
 - Fair Labor Standards Act applied to city transit system – revisit Usery?
 - Court: Yes. Congress has full authority under CC to regulate core functions of states/cities, 10th Amendment notwithstanding. Congress can only be blocked from regulating “integral operations” of states/cities
 - If you adopt Rehnquist traditional function test, who decides what's a traditional gov't function. It's the court! How does that advance state sovereignty?
 - Free hand for Congress to meddle?
- Post-Modern Era: 1995-Present
 - U.S. v. Lopez (1995, p. 153)
 - Student charged with federal crime under Gun-Free School Zones Act. Is that IC?
 - Rehnquist Court: No. Congress can only regulate under CC if the activity rationally implicates channels, instrumentalities, or activities having a substantial effect on IC
 - Bringing a gun into a school is not interstate commerce. It does not have an effect on interstate commerce. If we use this logic, every crime would be a federal crime.
 - GFZA has no findings - Congress generally adds findings to a law.
 - First time in 60 years IC clause use held invalid - No longer an automatic free pass.
 - U.S. v. Morrison (2000, p. 165)
 - Rape victim sues attacker under Violence Against Women Act. Is VAWA IC?
 - Rehnquist Court: No. Congress can't regulate local activity under CC solely on the basis of its aggregate effects on IC
 - Implicit overrule of NLRB v. Jones & Laughlin?

- But Congress made lots of findings? Here, it didn't matter one bit.
 - Modern Rule – IC allows regulation of channels, instrumentalities, substantial effects
 - IC needs to be economic activity to be regulable under CC – money must change hands
 - Statute must have jurisdictional hook – activity must take place in IC
 - This is tougher than rational basis analysis
- Other Bases of regulating commerce – commandeering, preemption (not on exam) and spending power
- Commandeering - Congress, even if it is targeting commerce, cannot regulate commerce by telling states what to do. (But it can still regulate articles of commerce created by states). Usery lite?
 - New York v. U.S. (1992, p. 177)
 - Congress required states to provide for radioactive waste disposal or take title to waste.
 - Court: No. Congress cannot commandeer state governments (esp. legislative branch) into implementing federal regulatory schemes
 - 10th Amd. Is not a dead letter!
 - Printz v. U.S. (1997, p. 186)
 - Brady Act required local police chiefs/sheriffs to administer background checks for gun buyers. LEO's challenged as commandeering.
 - Court: Congress cannot circumvent anti-commandeering rule by compelling state or local officials (esp. executive branch) to implement federal regulatory programs.
 - EXCEPTION: Reno v. Condon (2000, p. 195)
 - Congress blocked states from selling private info on driver's license holders to private companies. Commandeering?
 - Court: No. DL info is a thing in interstate commerce, and can be regulated by Congress. Valid exercise of CC power trumps anti-commandeering rule
 - Hard Case: Gonzalez v. Raich (2005, handout)
 - California allows medical marijuana. Feds don't recognize it. Can Congress regulate intrastate medical marijuana?
 - Court: Yes. Exact Same reasoning as Wickard.
 - Scalia: Not about Wickard, these are drugs. Thomas: But they're not IC – too broad
- Spending Power (AKA Congress' Golden Rule) – Art. I ss. 8 gives Congress power to spend money and place conditions on how the money must be spent. relatively uncontroversial. But Sometimes the conditions can go too far - the conditions can't be coercive.
 - Sabri v. U.S. (2004, p. 201)
 - Federal anti-bribery statute that applied to any organization receiving fed \$. D charged, challenges law.
 - Court: Under Spending Clause, Congress can use all necessary and proper means to further its spending power. No nexus needs to shown between bribery and fed \$. (McCulloch reasoning)
 - South Dakota v. Dole (1987, p. 205)
 - Federal law withholds highway funds from states with drinking ages less than 21.
 - Court: Valid way to get around 21st Amd, otherwise cannot regulate drinking age directly
 - Spending Power subject to three restrictions:
 - **1) \$ Must be used for the general welfare**

- **2) Conditions must be unambiguous and give states meaningful choice to accept or reject \$**
 - **3) Conditions must be related to the federal interest in the programs/projects being funded**
 - Conditions cannot be “coercive?” Cannot diminish funds already provided
- Dormant Commerce Clause – Congress regulates interstate commerce, which precludes the states from doing so. It's not that Congress is regulating, it's simply because states cannot impose barriers to interstate commerce. (Limited exception for temporary regulations under police powers.)

V. 14th Amendment §5

14th Amendment allows Congress to pass laws enforcing due process and equal protection against states

- Civil Rights Act of 1875, struck down in Civil Rights Cases of 1883 - Government cannot control private entities directly under 14.5
- SC: Meaning of the 13th Amendment is not just to abolish slavery, but all the badges and incidents of slavery. (Incl. state “black codes”)
- Congress couldn't pass laws restricting private discriminations, but could pass giving all citizens same rights as white citizens, gave citizens all same right to make contracts (to counter black codes) OK because they were dealing with state laws\
- Ex. U.S. v. Morrison (same as above, 2000, p. 209)
 - Is VAWA an unconstitutional exercise of 14.5?
 - Court: Yes. Congress's authority to regulate under 14.5 extends only to state activity, not that of private individuals. Here, private actor had no public function, and no nexus between state/private actor
- Katzenbach v. Morgan (1966, p. 213)
 - NY law requires voters to be able to read English, Congress said no in Voting Rights Act
 - Court: 14.5 authorizes Congress to enact remedial legislation prohibiting enforcement of state laws that affect civil rights, even if the state laws are themselves constitutional
 - Congress says literacy test discriminatory on basis of language, origin, wants to do something about it – use 14.5
 - VRA is necessary and proper enforcement of Equal Protection clause.
 - Dissent: You're breaking the boundary between legislative and judicial authority!
- City of Boerne v. Flores (1997, p. 216)
 - Prior to 1990, when SC interpreted Free Exercise Clause of 1A, states had to have laws that required reasonable accommodation of people's worship. Before 1990 if required to work for worship & were fired, could have filed suit violating Free Exercise. Led to law struck down in Borne. In 1990, SC decided Employment Division of Oregon v. Smith. Smith & other members of relation using peyote as ritual, but were drug counselors for state. Fired, filed claim. State didn't have to give benefits b/c drug was illegal.
 - Scalia: Accommodation no longer required. New Test: When state has neutral law of general applicability, state doesn't have to create exception to law for beliefs. Law violated wasn't to prohibit users of peyote, state-wide drug law.

- Turning understanding of free exercise upside down! Congress thought terrible decision, would lead to discrimination, passed law Religious Freedom Restoration Act – standard would again be strict scrutiny
- Instant case: Church wanted to expand, city said no. Archbishop sued under RFRA.
- Court: 14.5 gives Congress power to pass remedial laws, but doesn't give Congress power to define substantive scope of Constitutional guarantees (that's SC's job). Here, Congress may not alter meaning of 1st Amd. Free Exercise clause. Same as Katzenbach dissent.
- Test: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Otherwise, it's substantive act and not allowed under 14.5.
- If congress wants to use its 14.5 power, it must be applying intermediate or strict scrutiny (heightened scrutiny), not a rational basis test. Can only use 14.5 to remedy things that Court thinks falls under heightened scrutiny.

Conflicts between 14.5 and 11th Amd

- Chisholm v. Georgia - Citizen of SC can sue GA in Fed. Ct. under Art. III
- States - NO! That's not what Art. III means! Proposed 11th Amd., ratified in 1798.
 - 1890 - Hans v. Louisiana - 11th bars citizens suing their own state in Fed. Ct. too. There's no difference. (It doesn't say that! But nobody challenges it, and it's precedent.)
 - **States are basically immune from citizen lawsuits in Federal Court, but three exceptions:**
 - **State official can be sued in Fed. Court - but can't get damages if the state's paying**
 - **Can challenge how the law is applied/enforced (esp. against protected class)**
 - **State can waive immunity by passing a law (similar to Federal Tort Claims Act)**
- Fitzpatrick v. Bitzer (1976, p. 224)
 - Civil Rights Act allows private federal cause of action against states for employment discrimination
 - Court: OK under 11th Amd. Nothing in C prohibits Congress from providing for a private cause of action in federal courts to enforce 14th Amendment.
 - Congress can use 14.5 to trump 11th Amd. State sovereign immunity. (The states ratified this; they knew what they were giving up.)
- Pennsylvania v. Union Gas – Brennan's last attempt to put teeth in 11th Amendment. Didn't work - Congress can use any power it wants to waive state sovereign immunity. (OVERRULED BY SEMINOLE TRIBE)
- Seminole Tribe of Florida v. Florida (1996, p. 226)
 - Indian Gaming Regulatory Act challenged under 11th Amd. In federal lawsuit
 - Court: outside of 14.5, Congress may not allow federal lawsuits against states - 11th Amd.
- Kimel v. Florida Bd. Of Regents (2000, p. 235)
 - Congress applied age discrimination laws to states under 14.5. 11th Amd Allows?
 - Court: Here, no. Age discrimination does not require heightened scrutiny, so Congress has no power to abrogate 11th Amd. State sovereign immunity
 - In order to 14.5 remedial legislation against States to be valid, the substantive remedial act must be congruent and proportional to the unconstitutional actions of the States (City of Boerne echo?)

- Bd. of Trustees v. Garrett (2001, p. 239)
 - State employee sued state agency in federal court for violating ADA – P had cancer and lost her job while being treated.
 - Court: No. ADA was not passed under 14.5 (disability is only subject to rational basis review under equal protection), so it can't be used to abrogate state immunity
- Nevada Dept. of Human Resources v. Hibbs (2003, p. 246)
 - P fired for caring for sick wife, sued state under Family and Medical Leave Act? 11th Amd?
 - Court: Does not apply here. FMLA passed to deal with gender discrimination, which is a heightened scrutiny category, so Congress can use 14.5 to abrogate state immunity.
- Tennessee v. Lane (2004, p. 251)
 - Paraplegics sued state for not providing handicapped access to court buildings under ADA
 - Court: This is OK – here, handicapped were being denied a guaranteed right (right of access to the courts), so Congress can regulate through 14.5.

VI. Executive Power and Separation of Powers

Executive, Legislative, and Judicial powers should be distinct – many exceptions in recent years

President Increasing Own Power

- **Youngstown Sheet & Tube Co. v. Sawyer** (Steel Seizure Case) (1952, p. 272)
 - Truman nationalized steel mills during Korean war to prevent strike
 - Court: President does not have the inherent authority to compel surrender of private property to government. Power must either come from statute or Constitution. (Here, the closest statute was Taft-Hartley act, but that only allows President to order cooling-off periods.)
 - **Jackson's Three Tiers:**
 - **1) If President acts concurrent to express or implied statutory authorization, he has all his own powers plus all those of Congress. Only way actions can be unconstitutional is if the whole Federal Gov't lacks power**
 - **2) When Congress is silent, President can rely only upon his own powers, not Congress's. Constitutionality will be very situation-specific.**
 - **3) When President acts contrary to express or implied will of Congress, his power is at its lowest ebb. He cannot do anything that is the responsibility of Congress, even to help preserve Congress' ability to act.** That's what Truman was doing here.
- **United States v. Nixon** (1974, p. 282)
 - Nixon claimed executive privilege during Watergate, refused to turn over tapes
 - Court: Executive privilege is not absolute. The only kind of executive privilege that counts is the ones that deal with military or diplomatic secrets.
 - Executive privilege does not cover evidence required for criminal trials.
 - Congress Increasing Power of President
- **Clinton v. City of New York** (1998, p. 288)
 - Congress gave President Line Item Veto – constitutional?
 - Court: No. President must veto bill in its entirety. LIV occurs after bill becomes law, that makes it a "repeal" of legislation, and the President cannot unilaterally repeal acts of Congress

Congress Increasing Own Power

- **INS v. Chadha** (1983, p. 299)
 - Congress had "legislative veto" over certain executive acts, including orders to stay deportation of aliens
 - Court: Not allowed. Congress must pass all laws through bicameral passage and presentment to the president.
 - Dissent: But there are 200 situations allowing legislative veto! Turmoil in Congress!

Appointment/Removal/Powers of Federal Officers

- **Morrison v. Olson** (1988, p. 307)
 - Independent Counsel Law, response to "Saturday Night Massacre" - AG could ask judicial panel to name IC to investigate scandal. Appointment of IC constitutional? Does president have to appoint?
 - Court: No. President does not have exclusive appointment authority.
 - Two kinds of Officers-

- Principal Officers (selected by president, confirmed by Senate)
 - Inferior Officers (selected by Department Heads or President Alone)
- Is IC Principal Officer or Inferior Officer? Clearly inferior
 - Does not have unlimited Jurisdiction, AG can remove, limited in tenure and purpose
- Dissent: Investigation/Prosecution are executive functions. President should have sole control.
- Myers v. U.S. (1926, p. 313)
 - President has exclusive power to remove Executive Branch officials
 - Cabinet Secretaries/Assistant Secretaries – Any Reason
 - Civil Service protections apply to inferior officers – statutory
 - Appointment/Removal Power is based on who the official works for - Separation of Powers
 - Removal Power - Myers was a Principal Officer... but still can be fired by President alone, serve at President's Pleasure. To allow legislative branch to retain some role in firing would breach separation of powers.
 - Independent Agencies themselves:
 - Agency – rulemaking (quasi-leg) by making rules, adopt definitions
 - Agency – power to enforce them – sounds like exec, but more quasi-judicial
 - Exist in gray area – legislative AND executive AND judicial
 - Only time SC has addressed constitutionality of Indep. Agencies– “power cannot be doubted”
- Humphrey's Executor v. U.S. (1935, p. 314)
 - President wanted to fire Commissioner of FCC
 - Court: No. Congress can impose conditions on removal of Commissioners of Ind. Agencies. They DO NOT serve at pleasure of President.
 - Independent Agency Commissioners are still principal officers, but Congress gets to place many limitations on their appointment and removal - fixed terms, mix of political party affiliations. Commissioners are not removable by president at will, but only for cause (i.e. wrongdoing)
- Bowsher v. Synar (1986, p. 317)
 - Bowsher deals with new ideas, new ways of doing things. Compromise of all time b/w Congress & President. After years of deficit spending, anytime anyone does anything about it, someone blinks. Don't agree which programs to cut
 - Congress – Act of 1985. Congress gets estimates from President, Congressional Budget Office for targets to reduce, Controller General has to trigger budget cuts that they will have to meet target budgets (3d party)
 - Court: Since GAO/Controller General is arm of Cong, problem for Court is that Controller removable by Congress, not President, but giving him power to implement law. Cong delegating budget-cutting authority to leg official. Can't do it
 - Legislative Power here, Cong doesn't have power to delegate legislative authority official
 - Like LIV – all parties in favor except court

Foreign Affairs Power

- Congress has power to declare war, raise armies/navies, appropriate funds, make laws governing the discipline of the military
- President is Commander-in-Chief, he directs the military during wartime
- The bind Congress is in - can't really make a formal declaration of war (it's technically illegal - yeah right), plus nobody can argue that President can commit troops to protect the nation or repel an attack

- But power to commit troops overseas? Controversial.
- War Powers Act is Congress trying to get back in the game. Notification of war w/ 48 hours, but if no approval within 90 days, troops must withdraw. (Two-house legislative veto?)
- U.S. v. Curtiss-Wright Export Corp. (1936, p. 321)
 - Gun maker selling arms to Bolivia in violation of Executive Order passed under Joint Resolution of Congress
 - Exception to Non-Delegation doctrine: Congress can delegate authority/discretion to President in Foreign Affairs
 - Court: Big difference between internal and external affairs. Power to negotiate with other countries and define the foreign policy of the nation is inherently executive power. If Congress had not passed this joint resolution, President could still decide which countries to sell arms to.
- Dames & Moore v. Regan (1981, p. 325)
 - President made EA dismissing litigation against Iran in favor of international arbitration
 - Court: Unilateral authority to settle international claims OK. Well-established historic practice to settle international claims by executive agreement, Congress has frequently acquiesced to it.
- Hamdi v. Rumsfeld (2004, p. 332)
 - Hamdi detained as enemy combatant in Afghanistan, given no hearing, detained under sole authority of President as CinC
 - Court: Detainees challenging classification must receive notice of basis for charges and a fair opportunity to challenge the charges before a neutral decision maker. If that happens, detention OK.
 - Individual due process rights must be balanced against national security.
 - Dissent: What is court doing in this area? Courts have no competency to decide national security cases like this.
- Hamdan v. Rumsfeld (2006, handout)
 - Hamdan detained as EC, charged with conspiracy, brought habeas challenge to military commissions that were to try him
 - Court: Commissions violate both UCMJ and Geneva Conventions – acts of Congress. President’s military commissions violate these, exceed the limits of his power
 - Dissent: President needs ability to act in a situation where Congress has not yet spoken

VII. Due Process

How do rights work? Where do they come from?

- Challenge: Put aside your stance on things and ask if the court is doing an effective job in finding the right.
- Due Process Clause: Straightforward way to think about it. Due process is focused on preserving liberty. But we are going to the SC talk about liberty as not just about physical freedom from restraint, but about list of substantive rights. Two separate lists
- Explicit Rights: Incorporated Provisions of the BoR into the Due Process Clause
- Implicit Rights: ?
- Court Rejects incorporation in Twining, But in 1927 out of nowhere the Court says the Speech clause applies to the states, then freedom of religion, then free exercise, then others follow...
- Black vs. Frankfurter in Adamson v. California - Black says total incorporation, Frankfurter says it would tear up the fabric of state law. Frankfurter wins.

- P. 495 - Burton v. Wilmington Parking Authority - discriminatory lunch counter on public property, pre-civil rights act - state action? Yes, even if it's a private business on public property
- P. 501 - Rendell-Baker v. Kohn - private school for wayward kids that takes in kids from public schools, dismissal of employee?- PRIVATE ACTION.

Application of BoR to the States

- Barron v. Baltimore (1833, p. 447) – Pre 14th, Amd. BoR did not apply to states at all.
- Slaughter-House Cases (1873, p. 449) – post 14th Amd.
 - Butchers challenged state law giving monopoly to local slaughterhouse – challenged as infringement on Privileges or Immunities of Citizenship
 - Court: 13th and 14th Amds. Protect only former slaves, and do not make BoR applicable against states. Narrow Read of 13th Amendment, Court said PoI clause applies only to prevent return of slavery. Rights covered already protected by states - merely applies to rights of "national citizenship" - BoR? Nope. Just right to liberty and property, come to seat of gov't, and be protected from gov't, subject to whatever constraints the Gov't may put on you.
 - John Bingham of OH - Chief sponsor of 14th Amd - he thought that P&I restricted states from infringing of BoR. This would have been an easy fix to the incorporation problem.
 - Without PoI, SC must Incorporate BoR through Due Process and Equal Protection
 - PoI only protects rights of national citizenship:
 - Right to acquire and possess property
 - Assert claims against and do business with government
 - Access Courts
 - Travel freely

Due Process and Incorporation

- Duncan v. Louisiana (1968, p. 464)
 - Man charged with battery demanded jury trial, was denied. DP violation?
 - Court: Yes. Sixth Amendment guarantees fundamental right to jury trial, denial by state is state action and a DP violation
- Jackson v. Metropolitan Edison Co. (1974, p. 476) – actions of private entity are not state action unless there is a close nexus between the state and the challenged action
- Shelley v. Kraemer (1948, p. 487)
 - Race-based restrictive covenants enforceable?
 - Court: No. Enforcement of contracts is a state action, so 14th Amd. Applies.
- Lugar v. Edmonson Oil Co (1982, p. 490) – Seizing property by collecting a judgment is state action
- Edmonson v. Leesville Concrete Co. (1991, p. 493) – Jury selection is state action, no peremptory challenges to jurors based on race

Economic Due Process

- Allgeyer v. Louisiana (1867, p. 524)
- (1867, p. 524)
 - LA banned out of state corporations unless they had offices/agents
 - Court: Liberty defined as economic: pursue vocation, make contracts. (Natural Law? Common Law, non-interference of contracts? 9th/10th Amendments?)
 - Liberty means not just freedom from physical restraint, but freedom to use all faculties in lawful ways
- Lochner v. New York (1905, p. 526)

- Bakery challenged state law regulating hours bakers could work – economic due process?
- Court: Law not reasonable exercise of state police powers. Police powers that interfere with individual freedom of contract must directly relate to public health or safety
- Dissent: Court is substituting its own ideology – of course there’s health/safety interest here.
- Mueller v. Oregon (1908, p. 534)
 - Challenge to law restricting hours of women workers
 - Brandeis Brief – demonstrated through social science statistics that long working hours are dangerous to women – women are a protected class
 - Right to Contract not absolute, but subject to reasonable restrictions by government
- Adkins v. Children’s Hospital (1923, p. 536)
 - Challenge to DC minimum wage law for women
 - Court: Law invalid. Freedom of contract is the rule, exceptions must be justified by exceptional circumstances
- Nebbia v. New York (1934, p. 539)
 - Grocer fights law setting minimum price for milk
 - Court: Law OK. Laws restricting prices are constitutional if they are nondiscriminatory and bear a reasonable relationship to a proper legislative purpose – here, paying dairy farmers enough to produce quality milk that doesn’t make people sick!
 - Beginning of the end... counter-Lochner view
- West Coast Hotel Co. v. Parrish (1937, p. 541) – the switch in time that saved Nine?
 - Challenge to minimum wage law for women
 - Court: Law OK. Reasonably related legislation to a subject that is adopted in the public interest satisfies due process
 - Freedom to Contract not in DP Bucket after all
- U.S. v. Carolene Products (1938, p. 543)
 - Challenge to ban on Filled Milk
 - Court: Law OK. Existence of facts supporting legislation is to be presumed. Not unconstitutional unless there is no rational basis.
 - Footnote Four: When we’re talking about fundamental rights, higher scrutiny required
 - 1) Provisions which violate bill of rights
 - 2) Legislation which interferes with the political process that allows for the making or repeal of laws (voting, standing for office)
 - 3) Provisions affecting "discrete and insular minorities" - equal protection
- Williamson v. Lee Optical (1955, p. 545) – From now on, Economic legislation will be upheld so long as there is any rational basis for it
- BMW of N.A. v. Gore (1996, p. 547) – Resurrection of Economic SDP?
 - Punitive damages awards that are grossly excessive to state’s legit interest in punishing tortfeasors and criminals are arbitrary, violate 14th Amd.
- State Farm v. Campbell (2003, p. 551)
 - In evaluating punitive damages, court must weigh reprehensibility of D’s conduct, disparity between harm and damages awarded, and disparity between compensatory and punitive damages. Anything greater than 4:1 is suspect, more than 9:1 unconstitutional violation of DP

Due Process of Fundamental Rights – Marriage and Children

- Loving v. Virginia (1967, p. 821) - Right to marry is a fundamental right, cannot be restricted by race
- Zablocki v. Redhail (1978, p. 822)
 - WI man challenges statute that denies him marriage license until he pays child support
 - Court: Unconstitutional. Infringements on right to marry cannot be upheld unless they are supported by sufficiently important state interests and closely tailored to effectuate only those interests
- Stanley v. Illinois (1972, p. 827) – Right to custody of children, even if unmarried parents
- Michael H. v. Gerald D. (1989, p. 829)
 - Birth father of child sued legal father for visitation of illegitimate daughter
 - Court: Interest not protected here. Asserted liberty interests must be both fundamental and traditionally protected by society at large.
 - Dissent: Right should be broader – right of kids to have relationship with parents
- Moore v. City of East Cleveland (1977, p. 835)
 - Grandmother allowed grandsons to live with her, violation of city ordinance.
 - Court: Ordinance unconstitutional. Right of family members to live together is a fundamental right protected by DP.
- Meyer v. Nebraska (1923, p. 839)
 - Teacher prosecuted for teaching German, law required lessons to be in English
 - Court: Law unconstitutional. Parents decide how their children are to be educated. Gov't may not, under public interest guise, interfere with fundamental liberties by acts that are arbitrary or without reasonable relation to legit gov't purpose.
- Pierce v. Society of Sisters (1925, p. 840) – right of parents to send their kids to private schools
- Troxel v. Granville (2000, p. 842)
 - Grandparents of dead husband sued mother for additional visitation time, allowed under state law
 - Court: Law unconstitutional. Parents have fundamental right to the care and control of their children, any interference will be closely scrutinized

Due Process of Reproductive Rights – Contraception and Abortion

- Buck v. Bell (1927, p. 847) – sterilization of mentally disabled OK (OVERRULED IN PRACTICE)
- Skinner v. Oklahoma (1942, p. 849)
 - Habitual criminals can be sterilized?
 - Court: No. Sterilization laws reviewed under strict scrutiny to avoid invidious discrimination. Procreation is a fundamental right.
- Griswold v. Connecticut (1965, p. 850)
 - Birth Control counselor convicted under state law for providing contraception info to married couples
 - Court: Law unconstitutional. There is a constitutional right to privacy in the penumbra of the BoR. Penumbra [shadow] comes from
 - 1st - Privacy in Association
 - 3rd - Privacy in House
 - 4th - Privacy of Persons, Houses, Papers, Effects - Zone of Personal Privacy
 - 5th - Privacy of the Mind
 - and 9th - Rights retained by the people - other rights still exist!

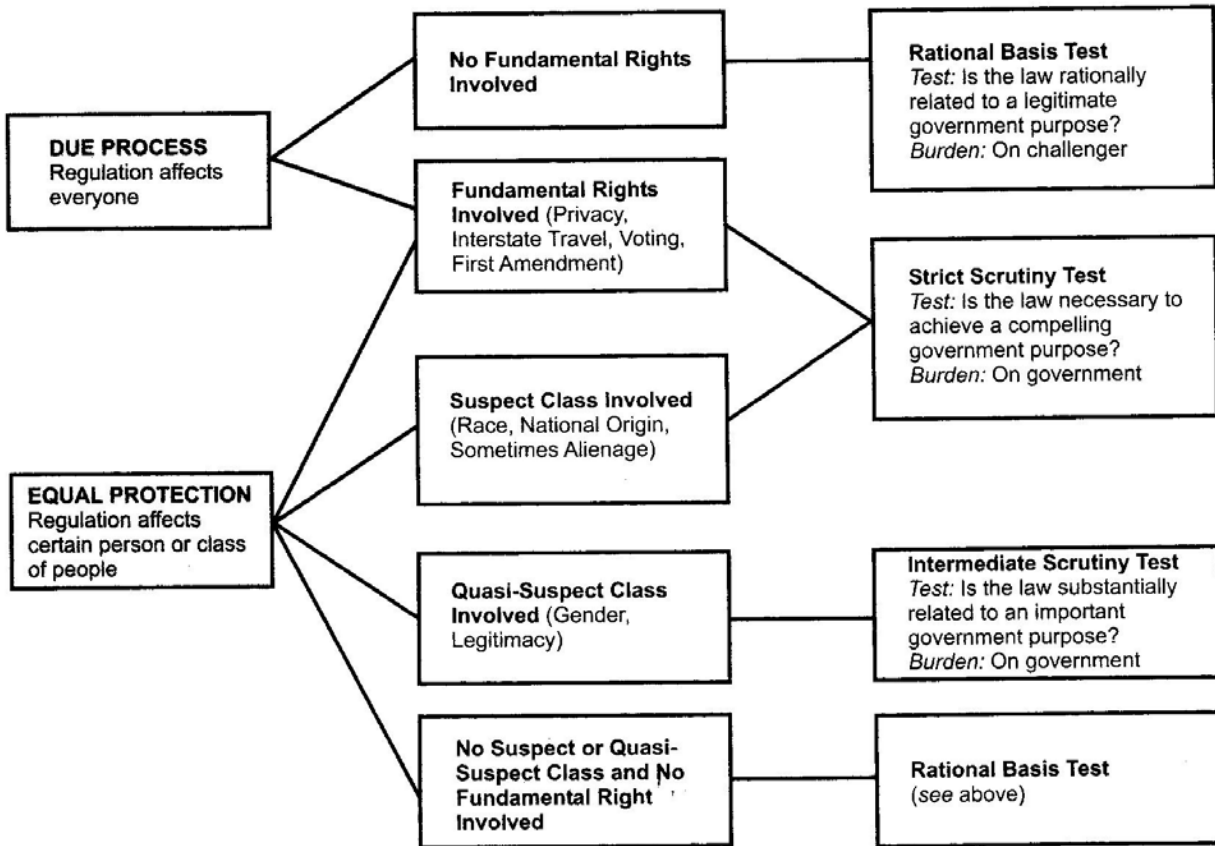
- Dissent: Use 9th Amendment, forget penumbras (but what rights does 9th create?)
 - Dissent: Law is silly, but not unconstitutional
- Eisenstadt v. Baird (1972, p. 856)
 - Lecturer arrested, law forbids him from giving out contraception to unmarried couples
 - Court: Unconstitutional. Griswold applies to unmarried people, too.
 - Right of reproductive autonomy is strictly personal... leads to Roe
- Roe v. Wade (1973, p. 859)
 - Challenge to TX criminal law prohibiting all abortions save to preserve life of mother
 - Court: Unconstitutional.
 - Blackmun - What is the status of a fetus under the 14th Amendment? There's no societal consensus. We're not going to settle this... but the fetus is not a person. Texas can't assert it is because there is no consensus on the subject. ["So we'll just substitute our own consensus?"]
 - Knocks down history - there never has been a history or tradition of banning abortion. He then admits that yes, we've been engaging in substantive due process the whole time, and that's what it's based on. No more penumbras.
 - Framework - right of personal privacy includes the abortion decision
 - Trimester framework - different stages of legitimate regulation
 - 1) 1st 12 weeks - there is no legit state interest in banning abortion
 - a. There are no health issues! Not until the 2nd trimester
 - 2) 12 wks Until Viability - only legit interest is to protect the health of the woman
 - a. Abortion becomes more dangerous as pregnancy develop
 - b. But there's no other interest in regulating - none in the fetus
 - 3) Post viability (24 wks - when fetus can survive outside mother's womb) - state now has legit interest in life of fetus
 - a. State does not lose requirement to protect mother's health
 - b. State can require doc to pick procedure that would save fetus only if It provides exceptions for the health of the mother
- Planned Parenthood v. Casey (1992, p. 867)
 - Clinic challenged state law placing restrictions on abortion – informed consent, notification of husband, restriction on minor, reporting requirements
 - Court: State can regulate abortion as long as regulations do not place “undue burden” on ability to obtain abortion. All regulations upheld except spousal notification
 - Reaffirms Roe's essential holding, then proceeds to redefine it
 - Right of a woman to choose an abortion prior to viability
 - Confirmation of state's power to restrict abortions after viability with life/health exceptions
 - State has legit interests in both life of fetus and mother at all times - (W: not what Roe said!)
 - Souter - Sec. III - when does stare decisis apply? p. 870 - in order to decide whether a decision is precedential?
 - 1. Has prior ruling proven to be practically unworkable?
 - 2. Has there been societal reliance on the decision?
 - 3. Has the law doctrinally changed in such a way that the old legal principle is outdated?

- 4. Have the facts so changed that the original ruling has no practical application?
 - Applied to Roe, these four factors do not imply a need to overrule
 - Reaffirm central holding of Roe, but trimester framework is not part of the essential holding, replacing it with "undue burden" test - state may not regulate abortion in a way that places an undue burden on a woman's right to seek an abortion. No substantial obstacles in a woman's path. Increased \$ cost of an abortion is not enough to make it an undue burden.
- Maier v. Roe (state) and Harris v. McRae (federal) – no right to public funds for abortion
- Stenberg v. Carhart (2000, p. 879)
 - NE bans partial-birth abortion (D+E vs. D+X.. was it just outlawing D+X or both?)
 - Court: Void for vagueness. Applied Casey framework. In every abortion case up until this one, SC said there must be an exception for the life or health of the mother. NE law had no exception for the mother's health - struck down.
- Gonzalez v. Carhart (2007, handout)
 - Federal PBA ban – Bans D+X
 - Court: Congress defined procedure precisely. Law imposes no undue burden
 - Kennedy still uses undue burden test, joins majority.
 - First time SC states an abortion law need only have a life exception, not a health exception.
 - SC - Congress got some facts wrong - procedure is sometimes necessary, not never necessary as Congress stated.

Other Due Process Rights – Medical Care and Sexual Orientation

- Cruzan v. Director (1990, p. 906)
 - Parents of daughter in persistent vegetative state wanted to terminate treatment, state hospital refused without court order
 - Court: There is a basic right to refuse unwanted medical treatment, but the guardian must show by clear and convincing evidence that the patient would have wanted such a termination of her life.
 - Dissent: This should be left to the states!
- Washington v. Glucksberg (1997, p. 913)
 - WA banned assisted suicide. Constitutional?
 - Court: Yes. 14th Amd. Creates no constitutionally protected right to physician-assisted suicide, and does not bar states from making it a crime.
 - Rational basis to ban PAS:
 - Preservation of life
 - Public health problem – may have depression or disorder
 - Ethics of medical profession
 - Vulnerable groups – elderly, sick, etc.
 - Interest in preventing forced euthanasia
 - Palliative care exception (wink wink?)
 - **Rehnquist summary of fundamental due process rights:**
 - **Right to Marry**
 - **To have children**
 - **To direct education of your children**
 - **To marital privacy**
 - **To use contraception**
 - **To bodily integrity**
 - **To abortion**

- **To refuse unwanted medical treatment?**
- **Lawrence v. Texas** (2003, p. 920)
 - D convicted of deviate sexual intercourse with another man, banned by state statute
 - Court: State laws criminalizing homosexual relations violate substantive due process
 - Overruled Bowers v. Hardwick (1985). Was this about a right to sodomy? No, it was about a right to privacy.
 - Why make this due process?
 - Court never tells what the basis of this decision is - Kennedy says it's not equal protection, but he didn't want to elide down into gay marriage. If we make it equal protection, TX can apply law to heterosexuals as well
 - So why make this a due process case?
 - Bowers misread history - sodomy bans were about morality - banning non-procreative sex
 - Laws never really enforced against consenting adults
 - Laws were being repealed – pre-Bowers, half of states repealed sodomy laws
 - Changing attitudes internationally?
 - Bowers was wrong when it was decided and it was overruled - CYA?
 - 4 part stare decisis test in Casey - does not appear in Lawrence - Scalia calls them out on it



VIII. Equal Protection

Two Kinds of Equal Protection

- Fundamental Rights (Privacy, Interstate Travel, Voting, First Amendment, same legal standards)
- Suspect Classes (Race, nationality, alienage, gender, legitimacy)
 - Classifications are everywhere, but are they legitimate
 - Levels of scrutiny – rational basis, intermediate scrutiny, strict scrutiny.

Rational Basis Scrutiny

- New Orleans v. Dukes - no more pushcart licenses
 - If no fundamental right and no suspect class, economic regulations will be upheld
 - Court requirement that the discrimination must be intentional and cannot be explained by other factors
- Romer v. Evans (1996, p. 625)
 - Challenge to CO amendment prohibiting localities from banning discrimination based on sexual orientation
 - Court: Law invalid. Laws making it more difficult for one group of citizens to seek aid from government is a literal denial of equal protection
 - Sexual orientation is not a suspect category, and there is no fundamental right, so this is rational basis test
 - No basis for this action other than animus - that's not a rational basis for a law.
- U.S. Railroad Retirement Bd. v. Fritz (1980, p. 630)
 - Retired RR worker sued to challenge law making him ineligible for increased benefits. Violation of EP?
 - Court: No. Rational basis test requires only that there is a plausible reason for challenged legislation, regardless of reason behind law.
 - "when there are plausible reasons for Congress' Action, our inquiry is at an end."
- FCC v. Beach, p. 633 - "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it."
- Railway Express Agency v. New York (1949, p. 634)
 - Challenge to NYC ban on ads on vehicles (except for delivery vehicles). Violation of EP?
 - Court: No. Where government chooses to regulate an activity, the regulation will not be invalidated because it doesn't cover every form of that activity.
 - Underinclusiveness is OK under rational basis review
 - Jackson - if you treat something under due process, and it violates substantive due process, gov't can't regulate that field at all. But if you look at where they drew the line under equal protection, gov't can just redraw the line in a different place.
- NYC Trans. Auth. v. Beazer (1979, p. 637)
 - Challenge to NYC transit rule barring applicants and employees from being on methadone maintenance for heroin addiction
 - Court: Law OK. An exclusionary scheme not directed against an individual or suspect class, but which is a policy choice made by government, so long as it does not designate an unpopular class.
 - Overinclusiveness is OK under rational basis review
 - Personnel policy is Economic regulation - this is a personnel policy, we defer to gov't even if overinclusive.

- Dept. of Agriculture v. Moreno (1973, p. 640) – the anti-hippie case!
 - Regulations stated that households with unrelated persons could not get food stamps
 - Court: Unconstitutional. Even under rational basis scrutiny, a classification must further some legitimate gov't purpose. This regulation, even if it aims at promoting stable families, does not do anything to make them more stable.
 - Here, the classification was so irrational that it fails even rational basis scrutiny.
- City of Cleburne v. Cleburne Living Center (1985, p. 643)
 - TX city denied zoning permit to group home for mentally disabled. Violation of EP?
 - Court: Yes. Unsubstantiated fears or negative attitudes aimed at group are not permissible bases for classification. This fails rational basis review
 - Disability is not a suspect or quasi-suspect class, so they fall under rational basis review
 - Four Factors for suspect class:
 - **1) Political powerlessness**
 - **2) Nature of the Immutable characteristic - is the thing changeable?**
 - **3) Need for special protection - has the need been met?**
 - **4) History of Discrimination**

Strict Scrutiny – Race, citizenship, alienage, and Intermediate Scrutiny - Gender

- Prigg v. Pennsylvania (1842) - upheld Fugitive Slave Act -preempted laws of free states against slavery
 - Slaves were not human beings, but property. They could get state citizenship, but not national citizenship.
- Dredd Scott v. Sandford (1856) (OVERTURNED BY 13th/14th AMD.)
 - Slave who accompanied master to free state sought to remain there
 - Court: No. "Citizen" does not include "slave."
- Korematsu v. U.S. (1944) (IMPLICITLY OVERTURNED BY FED. DIST. CT.)
 - Japanese-American fought conviction for remaining in "exclusion zone."
 - Court: Military necessity may justify placing legal restriction on a single racial group
 - This is where strict scrutiny should have come in... court incorrectly applied it.
- Loving v. Virginia (1967, p. 659)
 - Challenge to VA law prohibiting whites from marrying nonwhites
 - Court: Freedom to marry cannot be restricted by race. Even if law had equal impact on all races, racial classifications are inherently suspect.
- Palmore v. Sidoti (1984, p. 661)
 - D petitioned for custody of daughter after ex-wife began living with a black man
 - Court: Private racial bias is not a justification for state action. "The Constitution cannot control such prejudices, but neither can it tolerate them."
- Plessy v. Ferguson (1896, p. 663) (OVERTURNED BY BROWN V. BOARD)
 - Challenge to Jim Crow law requiring separation of races in transit
 - Court: Law OK, just regular example of police power. 14th Amd. Does not prohibit
 - Harlan - "the constitution is colorblind, and neither knows nor tolerates classes among citizens." (But he joined Cumming, p. 665?)
 - Separate but equal was never meant to be equal
- Brown v. Board of Education (Brown I) (1954, p. 667)
 - Challenge to segregated schools

- Court: States may not segregate schools on racial basis
- Clark "doll research" - Court "separation of races makes Black children feel inferior." (Footnote)
- Court cites no case law in its decision - no precedent cited, case built entirely on the social science
- Washington v. Davis (1976, p. 671)
 - Challenge to use of standardized test in police hiring – discrimination against blacks?
 - Court: Reg OK. A facially neutral law or official act will be held unconstitutional only if there is proof it has a discriminatory purpose
 - How to prove? Impact is not proof of intent. Use stats to prove? Look at relevance, extreme disparity, relevant exclusion, if can be explained other than race, but harder to prove disparate effect.
- McCleskey v. Kemp (1987, p. 674)
 - Challenge to death sentence... is death penalty applied in a discriminatory way to blacks?
 - Court: No. Statistical evidence indicating that race may play a role in capital sentencing does not prove an equal protection violation.
 - Why is it race discrimination if the person is being sentenced on the basis of the person he chooses to kill?
- Personnel Administrator of MA v. Feeney (1979, p. 686)
 - Female employee challenges policy granting preferential treatment to veterans. Gender discrimination?
 - Court: No. To be purposefully discriminatory, a government act must be taken because of, not in spite of, adverse effects on an identifiable group.
 - Here, purpose was to reward veterans, not discriminate against women
- Village of Arlington Heights v. Met. Housing Dev. Corp (1977, p. 688)
 - Was denial of a rezoning request for low-income housing racially discriminatory? Must a plaintiff show that the challenged action is motivated solely by race?
 - Court: No. Where there is proof that a discriminatory purpose was a motivating factor, judicial deference is not warranted.
 - Look for History/Background of rule, sequence of events, legislative history, overwhelming irregularities in process - more nuanced test than Washington v. Davis

Remedies for Discrimination

- Brown v. Board of Education (Brown II) (1955, p. 692)
 - How should schools be desegregated? Timetable?
 - Court: No timetable... "all deliberate speed." Courts can use full equitable powers to ensure implementation of desegregation
 - SC Failed to do a critical thing - it didn't define an objective in Brown. It's clear there's a problem and the Constitution doesn't permit them to have segregated schools. But what is the goal? To eliminate the barriers of segregation? Or to fully integrate all school system? SC never articulates what the end result would be.
 - The missing objective was characteristic in all the school desegregation until the end of school deseg in the 1990's
 - Brown reads like an advisory opinion. The NAACP came into Brown II ready to talk about time tables. But the only standard they came up with was that deseg must be pursued with "all deliberate speed."
 - The Supreme Court didn't require that anything happen. And that's what we got

- Cooper v. Aaron - Eisenhower sends in federal troops to enforce when Gov. Faubus sends in AR national guard to enforce segregation
 - All 9 justices signed opinion in Cooper - never happened before or since
 - Footnote in Cooper - it's now 1958. New justices said they all supported Brown I.
 - Third thing of Cooper - In effect, SC says that anything they say in interpreting the law is the law of the land, same as text itself. Controversial
 - Title IV of Civil Rights Act - AG got power to intervene in school desegregation.
- Swann v. Charlotte-Mecklenburg Bd. of Ed. (1971, p. 697)
 - Court: Once it has been shown that school officials have failed to comply with constitutional principles of Brown, district court has broad equitable powers to remedy violation.
 - I.e. They can write the whole plan themselves. In this case, that included forced busing to make racially balanced schools, and gerrymander school districts to achieve desegregation.
- Milliken v. Bradley (1974, p. 700)
 - Can courts order remedies that include redrawing entire metro school district boundaries?
 - Court: No. Before boundaries of autonomous school districts can be set aside, it must be shown that there has been a constitutional violation within one district that has effects on another.
 - If the burbs had no part in the constitutional violation, you can't force a remedy on them.
- Board of Education of OKC Public Schools v. Dowell (1991, p. 703)
 - Black students wanted school desegregation case reopened – district had still not achieved unitary status
 - Court: No. A desegregation decree should be dissolved upon a local showing of constitutional compliance with it. Look for good faith, and elimination of discrimination to extent practical
- Parents Involved v. City of Seattle (2007, handout)
 - School districts classified children by race, and assigned to achieve "diversity."
 - Court: No. Era of Brown is over. If you're not under an order to formally desegregate, then voluntary use of diversity violates equal protection clause.

Affirmative Action

- When should affirmative action be acceptable?
 - Diversity?
 - Remedying Past Discrimination?
 - How Specific?
 - How Proven?
 - Other?
- Standard of Scrutiny?
 - Always Strict?
 - Something lesser?
- City of Richmond v. J.A. Croson Co. (1989, p. 708)
 - Contractor lost bid on public project, not enough minority subcontracts
 - Court: Cities may use their spending powers to remedy private discrimination only if the discrimination is identified with particularity required by 14th Amendment. AA MEANS STRICT SCRUTINY

- Croson dealt with past discrimination, Gratz/Grutter with diversity - NOT THE SAME
 - Croson - overbroad remedy to past discrimination (Aleutian islanders?)
 - Richmond language at issue in Croson pulled from Fed. Statutes - 38 states and 200 local governments used the same ones. Croson wiped them all out in one shot.
- Adarand Constructors v. Peña (1995, p. 716)
 - Contractor lost bid for federal highway project, not enough minority subcontracts
 - Court: All racial classifications, imposed by any level of government, must be reviewed under strict scrutiny.
- LOOK AT HANDOUT ON INTERIM AA CASES
- Grutter v. Bollinger (2003, p. 722)
 - White law school applicant challenges use of race in admissions system
 - Court: Educational diversity is a compelling state interest, and as long as the racial classifications are narrowly tailored, they're OK. Race can be used as a factor in student admissions.
- EXCEPTION: Gratz v. Bollinger (2003, p. 740)
 - Point systems that emphasize minority status are not narrowly tailored – unconstitutional
 - Admissions policies must take race into account, but on an individualized basis. Cannot use quotas. (What's a quota?)
- Loans do not make you a state actor, they just allow Gov't to cut off student aid under Title VI of the Civil Rights Act

Intermediate Scrutiny – Gender Discrimination

- Gender Discrimination - Intermediate or Strict Scrutiny? Comparison to Race Discrimination?
- Not until 1970's does the Court consider whether Gender Discrimination raises equal protection issues
- Paternalism - 754-755 - women can't be bartenders? Inappropriate, but exception for family business?
- Hoyt v. Florida - automatic exclusion of women for jury pool unless they opt in - NO
- Late 60's - Ginsburg & ACLU Women's rights project - Incremental litigation, educating the Judicial Branch, hand-selecting cases in which irrationality of gender discrimination was so indisputable, it would get a ruling that could be used as later ammunition.
- Her problem - Liberal wing of court blew it in Frontiero v. Richardson
- Reed v. Reed, p. 755 - who can administer estates? In any category for a tiebreaker, the man takes precedent over the woman - arbitrary? Valid reason? Perpetuating your own discrimination?
- Court - classification must be reasonable, must arbitrary, and have a fair and substantial relationship to the legislative object - rational basis with teeth? (Royster Guano v. Virginia)
- First time the court recognizes the irrationality of a gender classification
- Frontiero v. Richardson (1973, p. 755)
 - Female AF lieutenant challenged policy that gave dependant allowances to married men, but not married women. EP violation?
 - Court: Yes. Gender classifications are inherently suspect, subject to strict scrutiny (OVERTURNED)
- Craig v. Boren (1976, p. 758)
 - OK prohibited sales of non-alcoholic beer to men under 21 and females under 18. EP violation?

- Court: Yes. Gender classifications must serve important governmental objectives and must be substantially related to those objectives.
- First use of intermediate scrutiny – not really precedential.
- United States v. Virginia (1996, p. 761)
 - Female sought admission to all-male VMI, challenged male-only policy
 - Court: States must have an “exceedingly persuasive justification” to support gender-based classifications. (Intermediate scrutiny +?)
 - Purpose must be a purpose, not a rationalization
- Geduldig v. Aiello (1974, p.766)
 - Challenge to CA state disability insurance system which didn’t cover pregnancy. EP violation?
 - Court: No. Discrimination on the basis of pregnancy is not a violation of EP.
 - Dissent: Isn’t this a double standard?
 - Overruled by Congress two years later with Pregnancy Disabilities Act
- Orr v. Orr (1979, p. 769)
 - Challenge to AL law requiring men, but not women, to pay alimony. EP violation?
 - Court: Yes. Classifications benefitting women may not be justified based on stereotypes (here, women being economically dependent upon men.)
- Missouri Univ. for Women v. Hogan (1982, p. 771)
 - Male seeks admission to nursing program at all-women’s university. EP violation?
 - Court: Yes. A state can designate educational opportunities for one sex if they are trying to remedy actual past discrimination related to educational opportunity.
- Michael M. v. Superior Court (1981, p. 774)
 - 17-year old male challenges conviction for statutory rape under law that applies only to men. EP violation?
 - Court: No, state has a compelling interest here. Women face all the consequences of sex (pregnancy, disease, psych damage), men face no risks. Compelling interest of state in law.
 - Would paternalism have counted?
- Rostker v. Goldberg (1981, p. 777)
 - Men have to register for the draft, women do not. EP violation?
 - Court: No. B/c of combat restrictions on women, men and women are not in similar situations w/r/t draft.
 - EP clause applies only to people in similar situations. Are men and women in similar situations here? When you inject this analysis into a gender case, are you preempting the gender element?
 - Factual problem - purpose of draft registration is to have a combat-ready pool of people. But would the military really object to females being drafted? Is the Court deferring to the Congress' view of what the military needs?

Other Classifications: Alienage, Age, Wealth

- Graham v. Richardson (1971, p. 790)
 - AZ law prohibited resident aliens from getting benefits if they had been there less than 15 years. EP violation?
 - Court: Yes. A state’s desire to preserve benefits for its own citizens is inadequate to justify exclusion of resident aliens.
 - Alienage Standard: Strict Scrutiny
- EXCEPTION: Foley v. Connelie (1978, p. 792)
 - Resident Alien challenged law prohibiting aliens from becoming NY state troopers. EP violation?

- Court: No. A state may, consistent with the Constitution, confine participation in police force to citizens.
- Citizenship bears a rational relationship to being a police officer.
- Is it because they fear making exception won't survive strict scrutiny, or do they believe there are legitimate reasons for category? - no answer in *Foley v. Connellie* or *Ambach v. Norwich*
- EXCEPTION *Ambach v. Norwich* (1979, p. 795)
 - Resident Aliens without intent to seek citizenship denied teaching certificates, limited to citizens. EP Violation?
 - Court: Yes. Public schoolteachers come within "governmental function exemption" to strict scrutiny for alienage.
 - Teachers are supposed to be examples, and espouse civic virtues.
 - Dissent: Bad rule. You're favoring bad citizen teachers over capable alien teachers (esp. in languages)? Why?
- *Mass Bd. of Retirement v. Murgia* (1976, p. 807)
 - MA state troopers had to retire at 50. Age discrimination? EP violation?
 - Court: No. Classifications based on age need only have a rational purpose. Here, physical fitness.
 - Dissent: The elderly are a "suspect class" – job discrimination, unable to contribute to society.
 - Age standard: Rational Basis
- *SAISD v. Rodriguez* (1973, p. 999)
 - Edgewood - 1.05 per \$100 - \$26 per student + \$222 state + \$108 fed = \$356 per student. Alamo Heights- .85 per \$100 - \$333 per student + \$225 (!) state + \$36 fed = \$594 per student
 - State Created TX education fund to equalize the difference - didn't work - A gets more money
 - E claims deprivation of fundamental right to education, protected by 14th Amendment
 - Discrimination on the basis of wealth/poverty - suspect class, strict scrutiny?
 - Court: No. Right to public education is not a constitutionally-guaranteed fundamental right.
 - All the glowing rhetoric in *Brown v. Board* - yeah, it was BS, we were kidding, it's not a fundamental right. It's very important, but it's not a fundamental right
 - Education Standard: Rational Basis
- EXCEPTION: *Plyler v. Doe* (1982, p. 799)
 - TX excluded children of illegal aliens from public education (no state reimbursement for local costs as in SAISD). EP violation?
 - Court: Yes. If a state chooses to deny the benefit of free public education to undocumented alien children, it must do so to further some substantial state interest.
 - Alienage in education standard: Rational Basis +