Constitutional Law - Berman Spring 2019

Alex Mueller

# The Judicial Role

## Judicial Review - Marbury v. Madison

### Marshall Opinion

* Issue 1: Does Marbury have right to judgeship/commission?
  + Legal Premise: You have a legal right to commission once it has been signed and becomes valid
  + Factual Premise: John Marshall (Sec. of State) signed the commission, thereby rendering it valid
  + Conclusion: Marbury has a right
* Issue 2: If there is a right, is there also a remedy?
  + There is no question that every legal right necessarily has a legal remedy, as a matter of civil liberty. However, specific issue is whether court could give remedy against executive branch
  + Court draws distinction between when judiciary can and cannot provide remedy: Where there is a specific duty to a particular person but not where it is a political matter left to executive discretion
* Issue 3: Can Supreme Court issue this remedy? Is writ of mandamus appropriate?
  + Judicial review and writ of mandamus are only appropriate in the first category described in the distinction above
  + Those executive exercises of power within discretion of president cannot be judicially removed
* Issue of Original Jurisdiction
  + Marbury argues that §13 of 1789 Judiciary Act gives Supreme Court original jurisdiction to hear suit for mandamus. Court agrees
    - Is this correct interpretation of the statute? Perhaps it is more plausible that this section refers to appellate jurisdiction since it was the only type explicitly referenced in the preceding text
    - It could also be referring to court's authority to issue writs for cases that it already has original jurisdiction over
    - In these alternative interpretations, Marbury would have lost and court would have lost chance to declare statutes unconstitutional. Perhaps the court's interpretation was strategic?
* Does this violate Article III of the Constitution
  + Court holds that Art. 3 enumerates jurisdiction, which can't be enlarged by congress. This includes original jurisdiction for suits involving foreign ministers. Allowing congress to expand beyond that enumerated would be "mere surplusage...entirely without meaning"
    - Congressional power to expand is disputable. Article III might just set a floor rather than a ceiling
    - However, this remains law today
  + Thus, Court says congress could not add mandamus cases to the list enumerated in Art 3., meaning Judiciary Act of 1789 violates Constitution
* Can Supreme Court declare laws unconstitutional?
  + Having found statute violates constitutional, question asked is "whether an act, repugnant to the Constitution, can become the law of the land", one that Marshall states is deeply interesting to the US.
  + **“It is emphatically the province and duty of the judicial department to say what the law is.”**
  + Marshall offers multiple arguments for judicial declaration of unconstitutionality:
    1. Limits on government powers meaningless unless subject to judicial review. Allowing legislature to “do what is expressly forbidden” would give it “omnipotence"
    2. Inherent to the judicial role to decide constitutionality of the laws
    3. "Arising under" implied power to declare unconstitutional laws
    4. Judge take an oath of office that would be violated if they were to enforce unconstitutional laws
    5. Article VI makes constitution the supreme law of the land, meaning it should control over all other laws
* Note that it’s not a given that the judiciary gets to decide whether there is a conflict. Possible interpretations of Marshall’s assertions:
  1. Each branch decides for itself (pluralism)
  2. Each branch is authoritative in its own area of expertise (departmentalism)
  3. A single authoritative interpreter for everybody (supremacy)

### Contemporary Judicial Review

* It’s enough to know that our system has settled on Judicial Supremacy, and Marbury has been read to hold that the judiciary is the authoritative interpreter of when the constitution and laws are in conflict for every branch, and the states
  + Review from state courts, and of state laws (*Hunter’s Lessee* (1816))
  + From *Marbury* to *Cooper v. Aaron* (1958): “[T]he federal judiciary is supreme in the exposition of the law of the Constitution”
* Qualifications on Judicial Supremacy
  + Some nods to departmentalism (e.g. deference to other branches on certain issues or imposing prudential limits which effectively allow other branches to control)
  + Asymmetrical: other branches are bound by a holding that a law is unconstitutional, but don’t need to be bound by a holding that a law is constitutional. This allows other branches to operationalize their own judgements where doing so is not unconstitutional

## Judicial Supremacy

* While all government institutions are required to engage in constitutional interpretation, there is the question of who should be the final or most authoritative interpreter. Three [3] options for who gets to decide when there is an ultimate conflict with Constitution:
  + Pluralism - All branches decide for themselves, no single branch is regarded as authoritative
    - This would present obvious difficulties; things would be left unsolved and there would be frequent conflicts
  + Departmentalism - Identity of interpreter changes based on the part of the Constitution at issue
  + Judicial Supremacy - Single authoritative interpreter in the judiciary (i.e. judicial review)

### Arguments for Judicial Supremacy

* Judicial supremacy is (arguably) endorsed by the decision in *Marbury v. Madison*
  + *Marbury* interpreted as saying the judiciary is the authoritative interpreter (See quote above)
  + Marshall outlines several reasons that seem to advocate for
  + However, the decision can be read as ambiguous and as not resolving the question of whose interpretation controls
    - Says nothing about whether other branches are bound to follow the Court's interpretation
* Hamilton also makes argument in Federalist No. 78
  + Points out that judges are insulated from political pressures and the judiciary has the function/duty of interpreting the laws
    - Least dangerous and offensive to political rights of the constitution due to a smaller capacity to annoy them. It has no influence over the sword or purse. It has neither force nor will, but merely judgement
    - The permanent tenure and thus insulation from political pressure contributes to the independent spirit of the judiciary
  + Complete independence of the courts is essential in a limited constitution. Its duty must be to declare all acts contrary to the Constitution void
    - Congress derives power from Constitution, therefore no legislative act Contrary to it can be valid
    - Rather than having representatives substitute their own will for that of their constituents when exercising judgement, its more reasonable to suppose that the intended role of the courts is to keep legislature within limits of assigned authority
    - Interpretation of laws is the proper province of the court and Constitution is to be preferred where conflicts with laws exist
  + Courts are thus an intermediary between the people and the Constitution - Does not suppose power of courts is superior to legislature (i.e. ability to overrule), but simply that power of the people is superior to both and the will of the people is reflected in the constitution
    - Exercise judgment (objective/reason) over will (subjective/desire)
    - Must declare the sense of the law and act as a safeguard against partial/unjust laws that threaten the rights of particular classes of citizens
      * Operates as a check against legislature, who in perceiving expected obstacles from the scruples of the court, become compelled to qualify their attempts
* **Will vs. Judgment** – why judges are better suited to exercise judgment over will:
  + Permanent judicial tenure insulates from political pressures
  + Training and expertise necessary for a judicial role aid in constitutional interpretation
  + Status and prestige comes with doing a good job as opposed to popularity among constituents
  + Courts have a different temporal posture and look at things later on; not “in the moment”
  + Judicial craft = manner of reaching and defending its views. However, legal realism allows for manifestation of the will
* **Counter-majoritarian difficulty**
  + Undemocratic to have unelected judges overturn popularly adopted laws
  + However, this is an **objection to constitutionalism**, not judicial review itself. The constitution is always counter-majoritarian anytime popular will diverges from the constitution
  + Courts are still responsive to this concern, which undergirds both the constitutional avoidance cannon and the justiciability doctrines
* **Limits on Judicial Tyranny**
  + Constitutional amendment process via Article V
  + Threat of impeachment via Art. III, §1 and political control of appointment process via Art. II, §2, Cl. 2
  + Norms – belief in limited political capital
  + Political control over jurisdiction via Congress
  + Justiciability rules via “case or controversy” limitations

## Constraints on the Judiciary

### Jurisdictional Stripping

* Congressional reduction of the power of the judiciary by limiting federal jurisdiction via statute
  + Example: No federal jurisdiction to hear challenges of state abortion laws
* Justifications
  + Textual basis - Art.III of Constitution creates “exceptions” clause to SCOTUS appellate jurisdiction
  + Congress has greater power to create lower fed. courts, so must have lesser power over their jurisdiction
  + Can’t remove jurisdiction for all courts since constitutional rights must allow some court for due process
* Counterarguments
  + Circumvents Marbury; gets around judicial review and court supremacy in constitutional interpretation
* It’s not exactly clear whether Congress can do this. The best answer is probably that due process requires some forum for judicial review, but state-only jurisdiction might satisfy

### Justiciability

* Justiciability doctrines determine which matters federal court can hear and decide and which must be dismissed
  + Justiciability rules work to keep courts from reaching the merits; dismissal is not a judgment on the merits
  + Constitutional limits cannot be overruled by Congress, such a "cases and controversies" limitation
  + Prudential limits can be overruled by statute
  + Justifications: Separation of powers, conservation of judicial resources, improve judicial decision making, promote fairness
  + Goal is to strike balance between restraint an review, don't want courts to abdicate parts of their essential function
* **Advisory Opinions**
  + Federal courts will not opine on pending or proposed government action or legislation
  + Based on “cases or controversies” text in Article III, §2; questions are not cases or controversies
    - Counter: text may just represent a minimum; doesn’t say judiciary should “only” exercise judicial power
  + Justifications
    - Erroneous advisory opinions can be costly (facts alter decision, composition of court changes, time passes)
      * Adversarial argumentation is the engine of truth-finding; don’t have that here
    - Conserve judicial resources; opportunity cost b/c not able to hear as many live disputes
    - Follows separation of powers by keeping courts out of the legislative process
  + Not an advisory opinion when (1) actual dispute between adverse parties and (2) substantial likelihood of decision favoring claimant will bring about some change or effect
    - This means declaratory judgements are not categorically prohibited under this doctrine
* **Standing**
  + Determines whether a person is the proper party to bring a matter before the court for adjudication
  + Rules
    - Constitutional
      * Plaintiff must face concrete injury or the real and immediate threat of one
        + Must be personal injury to common law rights (i.e. contractual, property, or tort-based rights), constitutional rights, or statutory rights
      * Injury caused by D’s conduct - must allege and prove injury is fairly traceable to D's unlawful conduct
      * Redressable by favorable ruling; decision will have an effect likely to remedy the injury
    - Prudential
      * Not a generalized grievance [injury shared in substantially equal measure by all or large class of citizens]
        + Where harm is concrete though widely shared, court has still found injury in fact
      * Does not involve rights of third parties; can't present claims suffered by parties not part of the lawsuit
        + Exceptions: substantial obstacles for injured party, close relationship with injured party, associations on behalf of members
      * Claim must be within the zone of interest protected by the statute in question; must be part of group intended to benefit from law
  + Justifications
    - No harm, no foul for people who do not have a stake in the decision. Prevents people from suing purely on ideological grounds
    - Conserves judicial resources and judicial capital - prevents flood of cases from those not affected
    - Adversarial process is good engine for bringing forward best cases and improves judicial decision-making
    - Promotes fairness to those substantially affected by decision; only raise own rights and concerns and prevents intermeddlers
    - Reduces intra-branch friction by minimizing judicial opportunity to overrule laws or actions
  + Criticisms
    - Causation and redressability - improper determination based on pleadings, unprincipled because dependent on court's characterization of the injury, and that court manipulates these factors based on its view of the merits
    - Generalized grievances can be view as an abdication of judicial role in upholding Constitution
    - Some of the tests have been criticized as unnecessary in light of the others
* **Ripeness**
  + Requires the injury to have already occurred; matter cannot be premature for review. This is factored into hardship determination
    - However, may be unfairness in requiring someone to wait and endure harm in order to challenge it
  + Values: (1) separation of powers; (2) judicial economy; (3) decision enhancement (adequate record)
  + Requirements: (1) substantial hardship (harm in denying review); (2) fitness of the issues (legal issues independent of factual context are more likely to be found for ripeness)
* **Mootness**
  + An actual controversy must exist at all stages of the federal court proceeding; live and ongoing dispute
  + Rooted in prohibition against advisory opinions: if nothing stands to be resolved
  + Causes: death of a party, settlement, challenged law repealed or expires, or changes in facts
  + Exceptions
    - Secondary or collateral injury survives after primary injury resolved
    - Wrongs capable of repetition yet evading review (i.e. abortion prohibition)
    - Defendant voluntarily ceases alleged improper behavior, but is free to return to it at any time
    - Properly certified class action may continue even after named P’s claims are rendered moot
* **Political Questions Doctrine**
  + Subject matter deemed inappropriate for judicial review; unconstitutional government conduct best left to politically accountable branches of government
  + Baker v. Carr Disjunctive Test (only need one)
    - Textually demonstrable commitment of issue to coordinate political department; power to interpret scope
    - Lack of judicially discoverable and manageable standards to resolve issue (i.e. partisan gerrymandering)
    - Impossibility of deciding case without initial policy determination of kind clearly for non-judicial discretion
    - Impossibility of court’s undertaking independent resolution without expressing lack of respect for coordinate branches of government
    - Unusual need for unquestioning adherence to a political decision already made
    - Potentiality of embarrassment for multifarious pronouncements by various departments on one question
  + Justifications
    - Conserves judicial resources and judicial capital
    - Preserves separation of powers and avoids controversial constitutional questions
  + Criticism
    - Inappropriate to leave constitutional questions to political branches of government
    - Deference need not mean abdication

# Federalism

## In General

* The central question of federalism is: what is the scope of federal (i.e. Congressional) power in relation to the states?
  + States have police powers, which are ability to adopt any law not prohibited by Constitution
  + Federal government only has enumerated powers, which means ability to only make laws via express powers
  + Dual federalism: federal and state governments are separate sovereigns, each having separate zones of authority

### *McCulloch v. Maryland*

* Background
  + Specific issue giving rise to the case is whether state (MD) could impose tax on Bank of the United States
  + Two main questions
    1. Does Congress have authority to create bank in the first place?
    2. Is a state tax on the bank constitutional?
* Holdings:
  + **If the end is legitimate and within the scope of the Constitution, then all means appropriate and plainly adapted to that end are constitutional if not prohibited**, thus congress has authority to create bank
    - Means must be “consistent with the letter and spirit of the Constitution”
  + People of single state cannot confer sovereignty extending over people of all states, thus unconstitutional for state to collect tax on national bank that would be imposed on individuals without representation in that state
* Significance of *McCulloch*
  + Finds power to do something that isn’t even in the Constitution
    - Sets the stage for expansive national government powers, especially post-New Deal
  + Method by which Marshall got to the conclusion in first holding is unique
    - *Marbury* uses express language and points directly at Constitution [restrictive]
    - *McCulloch* adds on to what it says in Constitution [expansive]
* Key discussion points
  + Rejection of notion of compact federalism
    - Compact federalism views states as supreme and retaining ultimate sovereignty, as they are the ones that ratified constitution in the first place and delegated powers to federal government. Under this view, federal power must be exercised in subordination to the states.
    - Marshall rejects this idea, holding that the people, not states, were the ones that ratified the constitution and are thus sovereign. Ratification by the states was an instrument of the people's will and thus affirmance can't be negated by state governments.
    - Marshall's view has controlled throughout history and was most recently reaffirmed in *Term Limits*
  + Scope of congressional powers
    - Just because bank creation powers are not specifically enumerated in the constitution, this is not dispositive. It would be unreasonable for constitution to list ever conceivable power
    - Marshall, in famous quote, reminds us that it is a "constitution we are expounding", meaning it is a document intended to endure and thus adapt. If powers limited to those enumerated, unlikely the constitution would have survived, at least without constantly being amended
    - Ultimate conclusion is that congress may chose any means not prohibited by the constitution to carry out its lawful authority, thus congress can create a bank as means of carrying out its other powers
    - Keep in mind, court adopts this expansive view BEFORE discussing the N&P clause
  + Necessary and proper clause
    - IF end is legitimate and in the scope of constitution; AND means are appropriate, adapted to that end, and does not violate the letter or spirit of then constitution; THEN the means is constitutional
    - Marshall opinion rejects narrow definition of necessary as essential or indispensable for achieving a goal. Instead, necessary is interpreted a useful or desireable. Need for endurance and adaptation at the heart of this definition
    - Fact that N&P clause located in §8, which expands congresses power, is evidence. The power is not unlimited, however. Court must declare unlawful those means that violate constitution or enacted under the pretext of executing lawful powers in order to achieve otherwise impermissible ends
  + Ability of states to impede exercise of federal power
    - Power to tax includes power to destroy or render useless, thus allowing MD to tax bank would greatly impede operation of lawful federal power
    - Court notes that state tax on federal bank is effectively tax on other states. Since residents of those states have no representation in MD, the tax is illegitimate
    - Based on principle that it is unfair to allow states to regulate those who have no representation in that state, which also likely serves as a basis of congressional power to regulate interstate commerce

### *Term Limits v. Thornton*

* General Overview
  + Arkansas state amendment which would add additional qualifications to membership of the House that would prohibit an incumbent who has served two terms from appearing on the ballot
  + Two issues
    1. Does Constitution forbid States from altering qualifications specifically enumerated in the Constitution?
    2. Does fact that it is formulated as a ballot access measure as opposed to an outright disqualification matter?
* Significance of the decision
  + Is evidence of two relevant phenomena that have defined and shaped constitutional law since our nation's conception
    1. Differences in views on federalism
    2. Differences in constitutional interpretations
  + Majority and dissent reference the same constitutional language and cases, yet diverge in their conclusions
    - This could be the result of differences in constitutional interpretation or related to the substantive values (and balance thereof) on each side of the federalism issue
* Stevens' Majority Opinion
  + Preclusion Argument (Divestment of Power)
    - Text and structure of Constitution, historical practice, and democratic principles show Qualifications Clause intended to preclude states from any power to add/amend qualifications fixed in the Constitution
  + Framers’ intent shows desire for fixed and exclusive qualifications divesting states of power to add other qualifications (Extension of 1st main proposition from *Powell* and preclusion argument)
    - Court reaffirms proposition from *Powell* that qualifications in constitutions are fixed insofar as they can't be altered by congress, though this doesn't directly address the issue of whether the states can do so
      * Historical evidence - No addition of a property ownership qualification, which was discussed
    - Uniformity in considerations of qualifications desired, which would be undermined by a patchwork of state qualifications (those elected whom would exclusively represent the interest of the state)
    - Elected officials owe their allegiance to the people rather than their respective States/constituencies
    - No discussion at all about states being able to add qualifications (silence)
  + Democratic principles also compel a fixed set of qualifications [2nd main proposition in *Powell* and preclusion argument]
    - Opportunity to elected office must be open to all, subject to age and residency needs
    - Term limits restrict ability of voters to vote for whom they wish
    - People should be able to choose representatives, not the States [egalitarian value]
  + 10th Amendment Argument
    - Argument Premises
      1. States only have those powers that 10th Amendment grants/recognizes
      2. 10th Amendment only reserves powers that preexisted the constitution
      3. State lacked power to add congressional term limits before constitution because congress didn't exist
    - Conclusion: States lack power to add term limits (i.e. add to the Qualifications Clause)
* Kennedy Concurrence
  + State does not serve as intermediary between people and federal government. The relationship between people and federal government is a direct one
  + Maintaining this unique, “national” character of the federal government is necessary for maintaining the political identity of United States citizens as members of one nation, in addition to members of individual states
* Thomas Dissent
  + Default rules
    - If not specifically enumerated in the constitution, not within federal powers
    - All unenumerated powers reserved to the states
  + Agrees with outcome of *Powell*, but rejects majority reasoning, as *Powell* was merely the result of congress lacking a power (i.e. adding qualifications) due to the default rules espoused in the dissents view. Thus, *Powell* is consistent with idea that where constitution does not speak on power either expressly or by necessary implication, the government lacks that power and states enjoy it
    - However, necessary implication language seems to conflict with the reasoning of the court in *McCulloch*
  + Constitution does not recognize undifferentiated people of Nation; splits into states made up of people that comprise the nation.
  + Doesn’t make sense to reserve only powers previously controlled; there would be no powers to reserve in that case

## Commerce Clause

* Most important of the 18 clauses in the constitution addressing specific congressional powers is Article I §8
  + The Congress hall have the power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...
* Throughout the eras, court has essentially been considering three questions related to commerce clause and its scope
  1. What is commerce?
  2. What does among the several states mean?
  3. Does 10th amendment limit the scope of congress' commerce powers?

### Gibbons v. Ogden (SCOTUS 1824) - The Grandfather of Commerce Clause Cases

* Background
  + Fulton and Livingston given monopoly to operate steamboats in NY waters, who license Ogden to operate ferry boat between NYC and NJ
  + Gibbons maintains he has right to operate his ferry because he had a federal license under federal law ("vessels in the coasting trade")
* Outcome
  + 1. Federal law preempts state law
    2. NY monopoly unconstitutional restriction on interstate commerce
* Rule
  + Power to regulate is to proscribe the rule by which commerce is to be governed, and this power is complete in itself; limited to specified objects and plenary as to those objects.
* Key Discussion Points
  + Commerce is more than buying and selling; it is intercourse. Regulates commercial intercourse between nations, parts of nations, and in all its branches, by prescribing rules for carrying on that intercourse
  + Commerce is not just traffic, but all phases of business including transportation.
  + Three Possible Meanings of “Among the States”
    - 1. Limit Congress to regulated interstate activities; no intrastate commerce regulation
      2. Concerning more than one state – regulate intrastate commerce if affects other states
      3. Define as in the midst of – regulate all commerce, even in an individual state
  + *Gibbons* court settles on the middle definition, which would require case-by-case inquiries as to whether a particular commercial activity has interstate effects
  + Court asserts there are no 10th Amendment restraints where object of regulation falls within commerce. Courts have zig-zagged on this view over periods since *Gibbons*

### From the Gilded Age to New Deal

* Period from 1887 to 1937 characterized by concept of dual federalism, which was embodied in 3 different doctrines:
  1. Narrow definition of commerce so as to leave a zone of power to the states. Commerce was viewed as a stage of business distinct from resource extraction, production, etc. These were left to state regulation
  2. Restrictive definition of "among the states", allowing congress to regulate only when there was a **substantial effect** on interstate commerce
  3. 10th Amendment interpreted as reserving zone of activities to the states so that even federal laws consistent with commerce clause were unconstitutional by invading that zone
* Narrow Definition of Commerce
  + *U.S. v. E.C. Knight* (1895): commerce does not include manufacturing; effect of manufacturing monopoly on interstate commerce is indirect
    - Application of Sherman Antitrust Act preventing 98% market share via acquisition unconstitutional
    - Direct/indirect distinction - it would be too far reaching to allow Congress to act wherever commerce may be affected
    - Manufacturing is not commerce ("commerce succeeds manufacturing and is not part of it")
  + *Carter v. Carter Coal* (1936): Bituminous Coal Conservation Act of 1935 regulating wages and hours unconstitutional
    - Act regulates production rather than trade; can’t set up coal boards to set min. wages and hours
    - Mining is not commerce (consistent with *EC Knight*)
    - Outside stream of commerce and indirect effect on interstate commerce (consistent with *Schecter Poultry*)
    - Dissent
      * Cardozo says should focus on substantiality rather than directness; need to draw lines
* Restrictive Definition of “Among the States”
  + *Swift v. U.S.* (1905): Congress may regulate meat packing under Sherman Act because it is “within the stream of interstate commerce"
  + *Shreveport Rate Case* (1914): Can regulate intrastate railroad because of direct impact on interstate railroad activity, even if intrastate transaction of interstate carriers are also affected
    - Regulation of intrastate commerce is permissible if “close and substantial” relationship to interstate commerce
    - Need to prevent price discrimination against Louisiana railroad activity into the state
  + *Schecter Poultry Corp. v. U.S.* (1935): regulation of chicken sales and work conditions in NYC unconstitutional because it affects intrastate business operations more than interstate transactions
    - NIRA wage and hour regulations applied to wholesale chicken industry
    - Stream of commerce concept has come to an end w/ this case; indirect effect not close and substantial
    - Congress only has authority to regulate where there are direct affects on interstate transactions
* 10th Amendment Limitations
  + *Champion v. Ames* (1903): federal law prohibiting interstate shipment of lottery tickets constitutional because it limits what may be sold in interstate commerce
    - Motivated to protect public morals, not to protect commerce; harm has yet to come at time of regulation
    - Power to regulate interstate commerce is complete in itself (cf. *Gibbons*)
    - Dissent = Fuller quotes pretext passage in *McCulloch*; concerned w/ motivations behind this federal law
      * Has been reluctance by courts to consider motive as long as activity falls within definition of commerce (i.e. moral end instead of economic end), though this appears to conflict with *McCulloch*
      * When contrasted with *Hammer*, it becomes clear that there is an arbitrariness in how the court applied this doctrine
  + *Hoke v. U.S.* (1913): upholds Mann Act prohibiting interstate transportation of women for immoral purposes
  + *Hammer v. Dagenhart* (1918): Act banning interstate shipment of goods produced by child labor is unconstitutional because controls production rather than commerce
    - Necessary effect of ban is to regulate hours of child labor in manufacturing and mining occurring intrastate
    - Court concludes that 10th Amendment reserves control of activities such as mining and manufacturing, so federal laws regulating interstate commerce were unconstitutional if they sought to control mining
    - Court argue that if upheld, there would be far reaching effects of allowing to control matters reserved for local authorities simply by prohibiting the movement of commodities out of state would effectively end state control over the matters
    - Court claims it is not inquiring into congressional purpose or motive
    - Champion and Hoke, harm was yet to come; here harm complete prior to start of interstate comm.
* At end of this period, there was significant pressure for a change in doctrine, as the court's interpretation limited congressional commerce power, overturning important pieces of new deal legislation. The doctrines were also intellectually vulnerable because the decisions appeared to have rested on arbitrary distinctions and reasoning

### Post New Deal Relaxation of Limitations (*Wickard* and *Darby*)

* *NLRB v. Jones & Laughlin Steel* (1937) - NLRA challenged by Steel Industry, Court reverses direction:
  1. Rejects categorical approach to commerce (e.g. *Knight*); steel “production” is no bar: "...that the employees were engaged in production is not prohibitive"
  2. Cardozo is avenged. Directness based approach is rejected. Power under the commerce clause is "necessarily one of degree"
  3. Court speaks broadly about Congress' commerce power: The power to regulate is plenary and may be exerted to protect interstate commerce no mater what the source of the dangers which threaten it. Not as clear at the time, but signals the major shift captured in *Darby* and *Wickard*
* *U.S. v. Darby* (1941) - FLSA prevents good failing to meet labor standard from being shipped or produced for purpose of interstate commerce
  1. Power to regulate w/in the bounds of ICC is plenary, courts will not inquire into motives to determine constitutionality (*Hammer* and seems to conflict with *McCulloch*)
     + - Rejects view that activities such as production reserved exclusively to the states
  2. Even purely intrastate activity (production) satisfies among the states because of substantial interstate effects
     + - Failing to pay minimum wage in one state would drive down wages in nearby states to compete -> interstate effects
       - Power over interstate commerce extends to intrastate commerce so affecting interstate commerce as to make regulation an appropriate means to a legitimate end
  3. 10A is not an independent external constraint on the commerce power, it merely “states a truism.” We already know that powers not granted to congress are reserved to the states.
* *Wickard v. Fillburn* (1942) - Quota on wheat production challenged subsistence farmer
  1. Cannonizes rule that would control until 1995: Regulation constitutional so long as Congress could rationally conclude the activity, in the aggregate, had a substantial effect on interstate commerce
     + - Substantial Effects is the first prong, which looks at economic measures in the aggregate. Though P's own homegrown wheat didn't have any direct affect on interstate commerce, this activity collectively has effects on wheat market demand and thus interstate commerce
       - Rational Basis
  2. Rejects the formalistic distinctions from the former era such as commerce vs. production or indirect vs. direct effects. These are irrelevant if the substantial affects, measured in economic terms, support the reach of power
* Other Cases and Developments
  + Elimination of the word substantial in *Hodel*, where court could only invalidate if there is no rational basis that the regulated activity affects interstate commerce. Hard to imagine anything could not be regulated under this broad interpretation of the clause
  + Implications of the trilogy above:
    - Congress can set terms of items shipped interstate; it could virtually regulate anything that could potentially travel over state lines
    - Purely intrastate activities could be regulated so long as there is rational basis for believing there is an interstate effect or that it is necessary to protect its regulation of interstate activities
  + Criminal Civil Rights Laws
    - In *Heart of Atlanta*, Court upheld law that outlawed discrimination by private places of public accommodation (e.g. hotels, restaurants, etc). Court found that only relevant question was whether there was rational basis for finding discrimination by hotels affected interstate commerce and whether the selected means where reasonable and appropriate
      * Reiterated in *McClung*
    - *Perez* upheld Consumer Credit Protection Act because there is no need for proof of effects on interstate commerce, just belief that it is affected. Thus, loan-sharking activities, which often occur interstate, can be regulated under commerce clause powers
    - Question about motive/desired end had constitutional implications

### *US v. Lopez* (1995)

* Majority (Rhenquist)
  + Three categories of activity that can be regulated:
    1. Use of the channels of interstate commerce (i.e. sales directly interstate)
    2. Instrumentalities of interstate commerce (e.g. highways, railroads, things used to conduct commerce across state lines)
    3. Intrastate activities that have a “substantial relation” to interstate commerce
  + Proper test for the third category requires an analysis of whether the regulated activity "substantially affects" interstate commerce
  + Possessing a gun near a school did not substantially affect interstate commerce and thus law was unconstitutional
    - The "soup" of considerations that the majority cites in decision (e.g. concerns about federalism, directness, substantial affects, economic in nature, etc) **leave us with a pretty incoherent framework**
    - **Ultimately concludes that the statute has nothing to do with commerce and lacks jurisdictional element that would ensure its relation to interstate commerce**. It can't be sustained that the activities related here substantially affect interstate commerce in the aggregate
      * Purpose of the jurisdictional element requirement seems to preventing law from upsetting the balance of federalism
      * While no formal burden to show the effects, majority contends there are no findings that support a basis for the belief
      * Those arguments government presents to show a reasonable basis are dismissed because of there implications for federalism
* Concurrence (Thomas)
  + Rejects the third category and argues for a far more narrow view of congressional power. This would look something like a return to pre-New Deal doctrine
  + Substantially affects standard swallows up all powers in Art. I §8
* Concurrence (Kennedy/O'Connor)
  + Stress principles of limited federalism and importance of preserving intended relationship between congress and state authority
  + Emphasizes that the government had gone too far in that specific instance, but disclaims a formalist test that gives too little weight to the Congressional interest in regulating for the economic well-being in the modern economy
* Dissent (Souter)
  + Majority is saying that the economic character question bears on whether courts defer to Congress (i.e. If non-economic character in question, the no rationality deference to Congress)
    - Rehnquist is wrong in reviewing the Court’s rationale; need to give deference
    - Distinction between what is commercial and non-commercial is return to formalistic jurisprudence from 60 years ago
* Dissent (Breyer)
  + Criticizes majority for judicial activism and abandoning precedent of last 60 years. Appeals to the rational basis principle that an activity affect interstate commerce and that guns are inherently part of interstate commerce and have economic impact that justifies the regulation

### *US v. Morrison* (2000)

* Background: Violence Against Women Act provided a federal cause of action for violent crimes against women (purely intrastate activity). Congress made extensive legislative findings about the substantial effects of such violence on interstate activity
* Outcome: 3 part test as articulated in *Lopez* is affirmed. Court struck down VAWA, because there was no “substantial relation” to interstate commerce under category 3
* Majority:
  + This is a regulation of non-economic activity and non-economic activity has traditionally been dealt with by state laws
  + Gender-motivated crimes are in no sense economic. There has been no precedent by which aggregate effects of intrastate non-economic activity have been considered and used to uphold regulation of this activity
  + Congress' findings related to the impact on the economy are not sufficient by itself, as allowing Congress to rely on the attenuated effects of a long causal chain would allow them to regulate just about anything
    - Looks a lot like the directness test from Pre-1937
    - Concerns about limits and federalism
* Dissent:
  + Souther stresses deference to congress. Congress has conducted voluminous hearings and found significant effects on the economy.
* New limitations following *Lopez* and *Morrison* - Congress cannot regulate **non-economic activity** based on aggregate substantial effects on interstate commerce in areas that have **traditionally been regulated by the states** (i.e. intrastate activity)

### *Gonzales v. Raich* (2005)

* Facts:
  + California’s Compassionate Use Act of 1996 allows for the possession and cultivation of marijuana for medicinal purposes upon physician recommendation
  + Under Controlled Substances Act, manufacture and possession of marijuana is illegal
  + Raich prescribed marijuana for medical purposes; relies on home-grown marijuana; challenges constitutionality of CSA
* Majority (Stevens)
  + Within congressional commerce power if congress has a rational basis to conclude that the activity:
    1. Is part of an economic class of activities that cumulatively has a substantial effect on interstate commerce OR
    2. Even if non-commercial, failure to regulate would undercut the regulation of a greater overall economic activity
  + They find that the greater overall activity that is being regulated (interstate marijuana sales) is of a commercial quality and even if possession is assumed to be non-economic, there is rational basis for believing that not regulating intrastate possession would frustrate (i.e. undercut) the federal interest in regulating the interstate market
  + This distinguishes the case at hand from *Morrison* and *Lopez*
* Concurrence (Scalia)
  + Within congressional commerce power if congress has a rational basis to conclude that the activity:
    1. Activity cumulatively has a substantial effect on interstate commerce and doesn't rely on remote chain of inferences (unless activity is economic) OR
    2. Congress reasonably concludes that activity, if unregulated, could undercut a larger reign of economic activity
  + Determines that this satisfies 2, relying on N&P Clause in addition to the Commerce Clause
* Dissent - (O'Connor)
  + Presents a conjunctive test:
    1. Must belong to a class of economic activities AND
    2. Must substantially affect interstate commerce
  + Attacks second prong, though is skeptical about the first as well. Argues that there is an empirical gap in the effects on interstate commerce

### *NFIB v. Sebelius* (2012) - Commerce Clause Portion

* Facts:
  + Affordable Care Act requires individuals to purchase health insurance as part of a “three-legged stool” solution: (1) insurer reform; (2) individual mandate; (3) Medicaid expansion
  + Government argues that individual mandate is necessary to prevent cost-shifting by healthy and death spirals caused by adverse selection problem
* Outcome - Individual mandate is an unconstitutional use of Congress’s Commerce Clause powers. Congress may only regulate pre-existing activity and may not compel activity
* Roberts Opinion
  + Must be an activity to be reachable under Commerce Clause, and this individual mandate is not regulating an activity but rather inactivity. Improper for Congress to draw into regulatory sphere those who would be outside it
    - Activity/Inactivity distinction comes from the meaning of "regulate", as you cannot regulate activity that is not taking place
    - Government's logic would allow use of commerce power to compel individuals to act, which would be of significant consequence
  + N&P Clause involves authority derivative of a granted/existing power, where as the individual mandate is the exercise of a "great substantive and independent power"
  + Primary distinction with cases like *Raich* is one of regulating classes of individuals rather than classes of activities:
    - *Raich* dealt with an individual instantiation of a class of activity (i.e. in-state growing and possessing marijuana), however it did not specifically regulate individuals themselves (statute prohibits an activity)
    - *NFIB* is not aimed at any activity in the affirmative sense, but is directed at a class of individuals (i.e. the uninsured). The object of this regulation falls outside of the three categories, as those who haven't purchased health insurance are not "persons involved in interstate commerce"
      * "The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity"
* Ginsburg
  + Recites formulation of the rule. Congress has power to regulate economic activities that substantially affect interstate commerce. When appraising this legislation, ask only whether there is rational basis for concluding substantial effects AND whether there is reasonable connection between regulatory means and asserted ends.
    - Only invalidate laws upon plain showing that Congress acted irrationally
  + The word regulate can mean to “direct,” which is to tell people what to do [precedent is in *Seven-Sky*]. Also, this is regulation of activity because everyone actively involved in healthcare market or engages in self-insurance when not purchasing from company
    - We got rid of formulas and line-drawing because of their limitations, but Roberts bringing back activity/inactivity distinction
  + Fundamental precept: Congress has sufficient regulatory authority to meet the economic needs of the nation in all cases where uniform measures are necessary (see Madison)
    - Majority decision does not allow Congress to adopt the practical solution it devised for the health care problem
* Scalia
  + Cannot regulate or “direct” commerce that does not exist by compelling its existence
  + Distinguishes Raich because here there are multiple ways of achieving regulatory goals
  + Fundamental precept: Federal government cannot do everything; enumerated powers

## 10th Amendment

* Two approaches on 10th amendment as limit on congressional power
  1. 10th Amendment is not a separate constraint on Congress, but rather a reminder that Congress my only legislate if it has authority under the constitution. No independent basis for invalidating on 10th Amendment grounds, this merely means Congress has exceeded the scope of powers delegated in Article I
  2. 10th Amendment protects state sovereignty from federal intrusion and is a key mechanism for maintaining the appropriate balance of power/federalism and states power. Zone of activity for state's exclusive control and any federal laws that intrude are unconstitutional
* Benefits of protecting state sovereignty from intrusion
  1. Decreasing likelihood of federal tyranny - Is this still as important in modern national market economy?
  2. Enhancing democratic rule by providing government that is closer to the people - However, consider Madison's concern about factions of special interests dominating local levels of government
  3. Allowing states to be labs for new ideas - When is it worth experimenting if rights/liberties are at stake?

### Restricting Laws of General Applicability

* As a general rule, Congress may regulate states as a part of a regulatory regime of “general applicability” that applies to private actors and the states equally. No immunity for States; treated just like private parties except when the political safeguards breakdown
* *New York v. United States* [NY I] (1946)
  + Facts: State of NY bottles and sells mineral water; taxed via 1932 Revenue Act §615(a)(5)
  + Holding: - The State of New York is not immune from this federal tax since it is operating a mineral spring in a conservation effort
    - “No restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.”
  + **Non-discriminatory rule**: can’t tax State activities while leaving the same activities by private parties untaxed; cannot treat the States worse than private parties
* *National League of Cities v. Usery* (1976)
  + Background:
    - The only case between 1937 and the 1990s to deviate and find that a law violated the 10th Amendment
    - Issue was whether Congress could enforce FLSA requirements of minimum wage against State governments
  + Outcome:
    - Court held that Congress violates 10A when it interferes with traditional state and local government functions, though it did not specifically define what these functions were
    - Binary rule: Where X = traditional or integral function of state government -> Yes to regulating if X, and no to regulating if ~X
    - J. Blackmun, who was the deciding vote, said he viewed majority decision as a balancing test in which exercise of federal power would be permissible in areas where the federal interest is demonstrably greater than that in protecting state sovereignty
  + Cases following *Usery* provided clarification and narrowed the scope of this ruling
    - *Hodel* made it clear that it applied only when Congress was regulating state governments, not private conduct. Must regulate states as states an not directly impair ability to perform essential functions
    - *United Transportation* further narrowed this application so that only violates 10A when would be likely to hamper the state government's ability to fulfill its role in the Union
* *Garcia v. SAMTA* (1985) - *Usery* expressly overturned in
  + FLSA imposed min wage and max hours on county public mass transit system in Texas
  + We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is 'traditional' or 'integral'.
    - Concern that it invites imposition of judicial will based on policies it prefers and ones it doesn't
    - Protection of state prerogatives should be through the political process
      * Political safeguards of federalism: ordinary political process can be relied upon to keep Congress in check and prevent overly burdensome rules from being applied to the States
  + **Exception**: when the political safeguards break down, though not clear when that will be (dissent hits on this)
    - It must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”
  + *Garcia* is still good law, means that that laws of general applicability can constitutionally apply to the states
* *Gregory v. Ashcroft* (1991) - Rule of construction to avoid preemption conflicts
  + If Congress wishes to regulate a core state function, it must make its intent "unmistakably clear" in the statutory text
  + The Court did not use the Tenth Amendment to invalidate the federal law on its face or as applied. Instead, the Court used the Tenth Amendment and federalism considerations as a rule of construction
  + Stressed significance of 10A as constitutional protector of state sovereignty

### Anti-Commandeering Principle (*New York* and *Printz*)

* *New York v. United States* [New York II] (1992)
  + Law requires states to pass laws regulating disposal/treatment of radioactive waste, those that failed to comply would take legal title to the waste
  + Court held the Act was unconstitutional because it attempts to commandeer the States by imposing option to either properly dispose of or take title to waste. **Congress cannot command/compel States to enact or administer federal regulatory program**
    - **Electoral accountability principle** - Basis for anti-commandeering principle. If state is effectuating congress' will, recourse for voters is not clear. Voting state legislators out of office will have little effect if congress is pulling the strings
  + While central holding is that it is unconstitutional for Congress to compel state legislatures to adopt laws or state agencies to adopt regulations. The Court, however, indicated that Congress was not powerless
    - Congress may set standards that state and local governments must meet and thereby preempt state and local actions
    - Also, Congress may attach strings on grants to state and local governments and these conditions induce state and local actions that it cannot directly compel
* *Printz v. United States* (1997)
  + Congress creates CLEOs (chief level enforcement officers) in each state to enforce gun background check system on people
  + **Modalities of interpretation** - Both the majority and dissent in Printz agree that the proper interpretive modalities to resolve the question are:
    1. Text - What constitutional provisions speak to the issue
    2. History - Historical practice
    3. Structure - Gesture towards framers intent for internal features and logic inherent to new government. What its like and must have in order to operate successfully
    4. Precedent
  + Majority - Unconstitutional to command state executive officials to enforce a federal regulation
    - Text - No specific enumeration in text; Residual state sovereignty is implicit in text; Not proper under N&P
    - Historical - Congress has not traditionally commanded the states and Federalist Papers do not support commandeering power
    - Structural
      * System of dual sovereignty and horizontal separation of powers. Experience under AoC persuaded them that using States as instruments of federal governance was ineffective. Explicitly chose constitution that confers power upon Congress to regulate citizens, not states. Its power would be augmented immeasurably if able to control police officers of the 50 states, increasing risk of tyranny
      * Congress cannot bypass executive powers of enforcing laws, as this disrupts balance of powers. Constitution vests all executive power in executive branch and congress has impermissibly delegated it to states without meaningful presidential control
    - Precedent - NYII establishes anti-commandeering; same electoral accountability issues exist in this case
    - Rejects balancing test - wants to limit room for subjectivity and judicial will
  + Dissent - Same modalities support upholding the law

## 11th Amendment Sovereign Immunity

### Overview

* 11th Amendment
  + The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state
  + As interpreted, the Eleventh Amendment prohibits suits in federal courts against state governments in law, equity, or admiralty, by a state's own citizens, by citizens of another state, or by citizens of foreign countries
  + Additionally, 1999 SCOTUS decision held sovereign immunity bars suits against state governments in state court without their consent
  + The Court thus has ruled that there is a broad principle of sovereign immunity that applies in both federal and state courts; the Eleventh Amendment is a reflection and embodiment of part of that principle
  + **Still no agreement on its proper scope**
* Possible scopes of 11A - Modern court likely split between 2 and 3
  1. Federal judicial power does not extend to suits against State A by citizen of State B (citizens can still sue own states)
  2. Federal diversity jurisdiction does not cover suits against states (narrower restriction on subject matter jurisdiction)
  3. Federal judicial power does not extend to suits against State A by ANY person (most expansive)
* Expansive Reading
  + Effectively immunizes the actions of state governments from federal court review, even when a state violates the most fundamental constitutional rights
  + protects state autonomy by immunizing states fromm suits in federal court, but it provides this independence by risking the ability to enforce basic federal rights
  + Virtually the entire class of modern civil rights litigation plausibly might be barred by an expansive reading of the immunity of the states from suit in federal court
* Response to the limitations imposed by sovereign immunity
  + Supreme Court has devised a number of ways to circumvent the broad prohibition of the Eleventh Amendment and to ensure federal court review of allegedly illegal state actions
  + Three primary mechanisms for circumventing the Eleventh Amendment and allowing federal courts to ensure state compliance with federal law:
    1. Allowing suits against state officers
    2. Permitting states to waive their Eleventh Amendment immunity and consent to suit
    3. Sanctioning litigation against the states pursuant to statutes adopted under the Fourteenth Amendment
* Underlying policy issues
  + Supporters of sovereign immunity argue it was a principle that predates the Constitution and is part of its very structure; Safeguarding state governments, and particularly their treasuries, is deeply embedded in the Constitution; There are other ways of holding state govts accountable, such as suits against state officers and suits by the federal govt
  + Opponents argue that it is a principle not found in the text or intended by framers; It wrongly favors govt immunity over accountability and is inconsistent with notion of a govt under law; People can be deprived of rights but left with no remedy and thus no due process; States can violate the Constitution and nowhere be held accountable
  + Kennedy addresses concerns in Alden v. Maine
    - The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution...The States and their officers are bound by obligations imposed by the Constitution...We are unwilling to assume the States will refuse to honor the Constitution...The good faith of the States thus provides an important assurance [of constitutional supremacy]
    - Opponents argue this trust into the good faith of state govts is misplaced and they must be held accountable when violating constitution

### Cases (*Chisolm*, *Hans*, and *Alden v. Maine*)

* *Chisholm v. Georgia* (SCOTUS 1793)
  + Overview:
    - SC citizen held debt in GA from Revolutionary War and wants payment from GA. Sues state of GA directly in Supreme Court
    - Court accepts jurisdiction, holding GA does not have sovereign immunity from the suit
    - Interprets Article III as authorizing private citizen to sue another State w/o its consent
  + Arguments
    - Framers intent - No record of debate at Convention. Issue raised at ratification debates with several signers arguing states are suable
    - Sovereignty - Immunity is inherent in nature of sovereignty (Hamilton in Fed Papers). Jay, CJ - In the US, people not states are sovereign
    - Justice - Would harm principle of free/equal national government and its objective of ensuring justice for all
    - History - No immunity in ancient Greece
  + Response to decision
    - GA legislators are outraged. Congress immediately proposes action
    - 11th Amendment (ratified in 1794) enacted to overrule the holding in this case
* *Hans v. Louisiana* (SCOTUS 1890)
  + Holding:
    - **11A bars citizens from suing their own State under federal question jurisdiction**
      * Endorses broadest of the three possible scopes proposed above
    - Reasoning
      * Interpretative modality is structural/non-textualism
      * Implicit sovereign immunity is a necessary principle **separate from text of 11A**
        + Sovereign immunity is a consitutional limitation placed on federal judicial power in Article III
      * 11A only talks about “citizens of another state,” so Hans (P) would have won on purely textualist interpretation
    - Inconsistent with "diversity only" interpretation of the scope, which states that sovereign immunity does not apply to federal question jurisdiction because *Chisolm* and 11A were only aimed at modifying diversity
    - Has been reaffirmed over last century despite calls to overturn it
* Limitations on *Hans* and Expansive Scope
  + Suits by U.S. or by other states
    - If sued by state, it must be doing so to protect own interests
  + No immunities for municipalities or state political subdivisions
    - Significant because much of the social service in our country are administered at this level
  + **Suits for injunctive relief that name state officials**
    - *Ex parte Young* is credited with establishing principles that 11A does not precluded suits against state officers for injunctive relief, even if the remedy will enjoin the implementation of an official state policy
      * Court reasoned suits against state officers for injunctive relief are not against the state and hence not barred
      * **Cannot be for money damages since that comes out of the State treasury**
      * Need this necessary fiction to make Constitution and federal laws binding on the states
    - *Edelman v. Jordan* (1974)
      * Suit against IL State commissioner of DPW charging violation of federal standards for processing welfare applications
      * Held: Injunction requiring future compliance okay; injunction requiring payment of illegally withheld sums barred
      * Prospective/retrospective distinction
        + **11A does not prohibit fed court from providing injunctive relief against state officer even though compliance with the injunction will cost state great deal of money in future (prospective relief)**
        + Still prohibits awarding retroactive relief--damages to compensate for past injury--when those damages will come out of state treasury
    - Has become primary way of ensuring state compliance with federal law
  + **Abrogation**
    - Argument that Congress should be able to override 11A and authorize suits against states in fed court because 11A is a limit on the federal judiciary's power, not on Congress. Federal statutes are supreme over the states
    - By legislation enacted under 14A5
      * *Fitzgerald v. Bitzer* (1976): **14A5 overrides 11A since enacted later in time and abrogates state sovereign immunity**
        + When suing under Equal Protection Clause of 14A, Congress can allow damage suits against States for violations
      * *Quern v. Jordan* (1979) - Intent to abrogate must be clear
    - By legislation enacted under Art. I Powers
      * *Pennsylvania v. Union Gas Co.* (1989): Congress can abrogate State sovereign immunity under Commerce Clause
        + Congress can authorize suits against the State pursuant to any of its constitutional powers
      * *Seminole Tribe of FL v. FL* (1996): **Congress may only abrogate States’ sovereign immunity when acting under 14A5 powers**
        + Overrules *Union Gas Go.*
      * *Central Virginia CC v. Katz* (2006) - **No state sovereign immunity in bankruptcy proceedings**
        + Art. I §8 powers to create uniform bankruptcy rules override state sovereign immunity. It wasn't the Bankruptcy Act abrogating sovereign, but the fact that such proceedings arise under constitutional bankruptcy powers given to Congress
  + **Waiver and Consent**
    - States may always consent to suit
      * No constructive waivers - must be explicit waiver of immunity from suit in federal court in order to be effective
* *Alden v. Maine* (1999) - States cannot be sued in state court without their consent
  + Background: Probation officers sue State of Maine for violating FLSA overtime provisions. Fed case dismissed, so file in Maine state courts. Provision in FLSA allowing private action for monetary damages against parties that violate
  + Holding: - Congress cannot subject nonconsenting States to private suits for damages in state courts
  + Kennedy Majority
    - 11th Amendment is only evidentiary; reminds us of principle of state sovereignty
      * "Sovereign immunity derives not from the 11A but from the structure of the original Constitution itself"
      * *Chisenholm* was wrongly decided from the get-go, and 11A only stood to correct it
    - States enjoyed sovereignty prior to ratification of Constitution and later amendments
      * General sense in which Constitution preserves state sovereignty
    - Text of Constitution nor precedent indicate Congress has power to subject the states to suits within their own courts --> laws must be valid in order to be supreme at fed. level
    - Silence in historical record shows Framers understood Congress to lack this power
      * Unthinkable to suggest states would have ratified with understanding that they could be subjected suits in their own court system
    - No early Congresses subjected states to suit in their own courts
    - Many SCOTUS 11A cases implicitly relied on conception of sovereign immunity
    - **Power would be inconsistent w/ constitutional structure because assault on state dignity**
    - States cannot disregard federal law: (1) may consent to suit; (2) US may sue; (3) Bitzer is still good law; (4) sub-state entities not protected via sovereign immunity; (5) Ex Parte Young necessary fiction still exists

## Tax Power

* General Rule: Tax upheld if reasonably related to revenue production or Congress has power to regulate the activity taxed
  + Must either raise revenue or regulate pursuant to enumerated power
  + Cannot be a penalty
* The use of Congress' tax power as a backdoor when commerce power is unavailable is arguably more important than the outright exercise of tax power itself
* Historically there were distinctions between direct and indirect taxes as well as between revenue raising and regulatory taxes
  + Constitution holds that direct tax (e.g. capitation, poll tax) must be apportioned among the states based on the census, thus it mattered
    - Passage of 16th Amendment changes this, as apportionment no longer matters. Thus, court abandons this direct/indirect distinction
    - Regulatory/revenue-raising distinction was judicially created
      * Distinction is inherently arbitrary and a false dichotomy - it can be both at the same time
      * Court in *McCrary* - If tax within lawful power, that power may not be judicially restrained because of results from its exercise
        + Ancillary effects don't matter so long as it is an actual tax
      * Court in *Sonzinsky* - Every tax is regulatory by some measure. Inquiry into the hidden motives behind Congress' enactment of a tax is "beyond the competency of the courts"
        + Thus, the Court rejects a standard that would require a case-by-case pretextual analysis (as some would argue is necessary in light of *McCulloch*) on grounds that doing so is not judicially manageable
  + **These distinctions are no longer significant in determining constitutionality of a tax imposed by Congress**

### Constitutional Basis

* **Art. I, §8 Cl. 1** – “Congress shall have Power To lay and collect Texas, Duties, Imposts and Excises…but all Duties, Imposts and Excises shall be uniform throughout the United States.”
* **Art. I, §2**– direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective number
* **Art. I, §9**– no capitation, or other direct, tax shall be laid, unless in proportion to the census.

### *United States v. Kahriger* (1953)

* Facts:
  + Revenue Act of 1951 levies tax on gamblers by requiring persons who have engaged in accepting wagers to register IRS. This was a tax on private individuals
  + Ps challenge the constitutionality of the tax, arguing it is an improper attempt to penalize intrastate activity under the pretense of exercising tax powers
* Outcome - Valid tax because all provisions of excise are adapted to the collection of revenue
* Rule - **Unless there are provisions extraneous to any tax need, courts are without authority to limit taxing power of Congress**. Nominal tax is a tax so long as it produces some revenue, unless penalty provisions extraneous to any tax need (not clear what this would look like)
* Majority Reasoning
  + Court recognizes few constraints on tax power. Power to tax is not questioned, nor is power to impose penalties for non-payment of taxes
    - Court also recognizes *McCulloch* and its duty to prevent Congress from accomplishing an object outside of its constitutional authority under the pretext of executing its lawful powers
    - However, in the regulation of commerce, Congress has long been able to effect matters that are ordinarily of state concern. Why should tax powers be more limited with respect to its effects on traditional state matters? Court says it shouldn't
    - Here, all provisions of this excise were adapted to the collection of a valid tax. Other regulatory provisions (e.g. registering) are in aid of collection purpose, thus are also not extraneous to any tax need
  + Regulatory effect of tax does not have a bearing on whether tax is legitimate; it produces revenue, which is consistent with other taxes the court has declared valid
* Concurrence (Jackson) - Argues that he is concurring only because the dissent goes too far by proposing a standard that would impair the legitimate tax power of Congress
  + Difficult to regard tax as rational revenue measure, despite deference due to Congress (pretext)
  + It is dangerous to jeopardize public trust in the tax system by using it as an instrument to achieve unauthorized ends
  + However, it is more dangerous to impair those tax powers that are legitimate though an excessively strict judicial standard
  + The former can be corrected democratically ("the evil that can come from this statute will probably soon manifest itself to Congress"), but the latter is much more difficult this evil might not be transient"). Thus, the majority is the lesser of two evils
* Dissent (Frankfurter) - Courts can step in when legislation appears truly regulatory rather than revenue-seeking. Ulterior purpose cannot be stated in ways negating revenue words expressed on their face

### NFIB v. Sebelius (2012) - Individual Mandate Tax Portion

* Facts:
  + Affordable Care Act imposes an penalty on individuals whom do not purchase health insurance coverage. Earlier in the opinon, the court held that this individual mandate was an invalid exercise of Congress' commerce power. Thus, the Court moves on and considers whether it can be justified under Congress' tax power
* Outcome - Individual mandate is within Congress’s taxing powers
* Rule - **Irrelevant that this part of the legislation was not explicitly designated as a tax. Constitutionality of action by congress does not depend on recitals of power which it undertakes to exercise** When determined that Congress permits a tax, not role of courts to forbid tax or judge
* Majority (Roberts)
  + References principle of construction articulated by Judge Story in which a court should avoid adopting interpretations that would make it unconstitutional in favor of one that would make it valid, regardless if unintentional
  + Mandate looks like a tax in many respects. Is assessed and collected in same manner
  + While lack of "tax" label may be fatal to enforcement of Anti-Injuction Act, this is not fatal in viewing it as an exercise of tax powers
  + Functional analysis used in prior cases also support this conclusion
    - Not a penalty because not an exceeding burden (never more than price of coverage), no scienter requirement, and IRS handles tax
  + Not a punishment for criminal act or omission, failing to purchase coverage is not a crime; Taxes may be regulatory and seek to shape decisions (i.e. incentives)
  + Taxing inaction is not troubling because constitution is clear you cannot avoid taxes thru inactivity (capitation is explicitly authorized; people are taxed merely for existing)
  + Limit on taxing power of Congress is that it be non-penalizing in nature. Can't sanction or imprison under tax powers like with commerce powers
* Dissent (Scalia)
  + No way to read the statute as a tax, but rather it is a mandate enforced via penalty
    - The words shall and penalty denote a sanctioned prohibition or punishment
  + There as a clear line between penalty and tax in Court's decisions; its either one or the other and Congress clearly framed it as a penalty
    - To interpret the mandate as a tax goes beyond construction; it is to re-write it
    - Case comes down to language of statute; if called tax rather than penalty, no issues
  + Anti-Injunction Act not a problem because there is no tax
    - Critical of Majority reasoning that holds the mandate is not a tax for purposes of AIA, but is a tax for Constitutional powers

## Spending Power

* Art. I, §8, Cl. 1 – “Congress shall have Power…to pay the Debts and provide for the common Defense and general Welfare of the United States.”
* Main Rule: **Congress possesses expansive power to spend in any way it believes would serve the general welfare so long as it does not violate another constitutional provision**
  + This broad scope of Congress' spending powers was articulated in *Butler* reaffirmed in subsequent cases
  + In *Sabri*, court upheld law prohibiting bribery of state/local officials officials that receive greater than $10k in federal funds, even if the bribery was unrelated to activities that the funding is for. Court argued that money is fungible and bribed officials are untrustworthy stewards of public funds and thus Congress has power to bear federal power on individuals who convert public funds for personal gain
* Conditions on state grants
  + General Rule: **Court has held that Congress may place conditions on such grants, so long as the conditions are expressly stated, have some relationship to the purpose of the spending program, and are not unduly coercive**
  + While having no power to regulate state and local political activities, it does have power to fix the terms upon which its money allotments to states shall be disbursed
  + In *Halderman*, court held that if Congress intends to impose a condition on federal grant money, it **must be unambiguous and expressly stated** so that states know the consequences of their choosing to take federal funds
  + Court recognized that at some point, "the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion"
    - Court has recently continued to enforce this limitation on Congress' power to put conditions on grants: **They cannot be unduly coercive**
* Anticoercion Principle: If a State really has no choice other than to accept the package, then the offer is coercive and cannot be sustained under the spending power. [Joint dissent in *NFIB*]
  + Need this principle in case coercion is used to confer benefit getting State to waive a right
    - Anticoercion = anticompulsion = magnitude of pressure (~Y) is too burdensome (NFIB) --> Compulsion
    - Anticoercion = antiextortion = withholding benefit (~Y) is wrongful (Nollan) --> Coercion
* Conditional Offer Problem: Federal government conditions a benefit that it is not constitutionally obligated to provide on the offeree’s relinquishment of some constitutionally protected interest or right
  + Example: Plea bargaining
  + Federal government provides some benefit X if and only if State does not exercise some right Y
  + Tension:
    1. Greater power not to off any benefit includes lesser power to confer some benefit by condition
    2. Shouldn’t do indirectly through compulsion what government cannot do directly
  + Duty holder cannot act to make exercise of my right more costly
* Relatedness Requirement
  + "Germaneness of the condition to the federal purpose" - Dole
  + **To satisfy relatedness test, the conditioned imposed must not be unrelated to the purpose behind which the funds are expended**
  + Example: The purpose of highway funding is safe interstate travel, a purpose that can be frustrated by the drinking age if a state has set it too low. Thus, the condition that states increase drinking age is related to the purpose federal highway funding
  + Court in *Dole* declines to define outer limits of germaneness and hold that conditions on federal funds is legitimate only if it relates **directly** to the purpose of the expenditure to which it is attached

## *United States v. Butler* (1936)

* Facts:
  + Agricultural Adjustment Act of 1933 regulated production and consumption of agricultural commodities using tax on processors and subsidies to farmers
* Holding:
  + Unconstitutional because it used legitimate means to an unconstitutional end.
* Rule:
  + Substantive power to spend is broad, and only limited in that it shall be used to provide for the general welfare of the United States
* Majority (Roberts)
  + Court endorses Hamiltonian view, asserting that Congressional spending power is not limited by direct grants of power in Constitution
    - Proceeds to directly contradict itself by accepting Madisonian reasoning to conclude that such exercise of powers is used to achieve unconstitutional end (that reserved by states) and thus violates 10A
      * That right is the ability of the State to regulate production (*Carter Coal* is still good law at this point in history)
  + Rejects government's contention that regulation was voluntary. Instead, holds that it was coercive by economic pressure
    - Cost of refusal would is the loss of benefits, would be financially ruinous -> those who do accept subsidies would be able to undersell him
    - Coercion = pressure where power to confer or withhold benefit is power to destroy
  + While Government has clear right to appropriate money through contracts with individuals, expenditures for proper governmental purpose (i.e. for general welfare) can't be used to justify contracts not within federal power. Contracts **for** the reduction of acreage are outside the range of that power
    - There is obvious difference between statute stating conditions upon which money shall be expended and one that requires individual to submit to otherwise impermissible regulation in order for it to have effect (actually doing vs. agreeing to do)
    - Hamilton himself would not have even suggested that power granted in Constitution could be used for destruction of local/state power
    - Government's interpretation effectively argues that, after all the effort framers took to limit and delineate federal powers, they intended to wipe it all away with clause, that granting tax and spending powers, that would allow federal gov to ignore those barriers
* Dissent:
  + No support for the idea that the spending program is coercive
    - Essence of economic coercion is threat of loss rather than hope of gain
    - This looks more like inducement
  + The legitimate ends in the case is the promotion of national general welfare thorough spending. This is an enumerated power, so it shouldn't be a problem
* Notes
  + Madisonian view: Tax and spending power confined to enumerated powers committed to Congress. Can only be used to achieve regulatory ends otherwise available as an enumerated legislative power
  + Hamiltonian: Tax and spending power distinct from others enumerated; only limit is that it must provide for the general welfare of the United States

### *Steward Machine Co. v. Davis* (1937)

* Facts: Title IX of Social Security Act taxes total wages payable to employer; allows 90% credit for contributions to a state unemployment fund created under state law
* Outcome: Act upheld as within Congress’s broad spending power
* Rule: Spending power broad, but cannot be coercive (point at which pressure turns into compulsion, and ceases to be inducement)
* Majority (Cardozo):
  + No coercion because states choosing to enact legislation at their own will w/o compulsion
  + Distinguishes Butler:
    1. Funds not earmarked for a special group [i.e. Butler was for farmers]
    2. States enact their own legislation;
    3. Condition not aimed at unlawful end;
    4. States may repeal laws
  + Congress can use spending power to achieve ends it could not otherwise achieve directly
* Dissent (McReynolds)
  + States should be free to exercise sovereignty w/o interference from federal government
  + Decision here is practical annihilation of vertical separation of powers; allows anything
* Dissent (Sutherland)
  + Tax is within powers and not coercive
  + 10A infringed because conditional agreement with states asks them to surrender power over lawmaking
* Notes
  + Coercion as a wrong is a normative principle not explicitly in Constitution

### *South Dakota v. Dole* (1987)

* Facts: Conditional grant says enact min. drinking age of 21 or 5% highway funds withheld.
  + South Dakota allows 19 year olds to purchase beer containing up to 3.2% alcohol.
* Outcome: Statute making conditional offer is constitutional.
* Rule: Spending Power Test
  1. **Must be for general welfare w/ substantial deference to Congressional judgment**
  2. **Unambiguous conditions allow States to exercise choice**
  3. **Conditions must be related to federal interest in particular national program**
  4. **May not violate other constitutional provisions [activity of States constitutional]**
  5. **Coercion - Not so coercive as to pass point at which pressure turns into compulsion**
* Majority (Rhenquist)
  + First 3 easily satisfied: Clearly in pursuit of general welfare because prevents young drunks driving across borders; Conditions clearly stated in unambiguous terms; Conditions related to federal interest in highway safety by withholding funds
  + Is 21A an independent constitutional bar?
    - Recognizes that post-*Butler*, court has held that 10A limitation on regulating state affairs did not concomitantly limit range of conditions legitimately placed on federal grants
      * No violation of State sovereignty where state could adopt the "simple expedient" of not yielding to what it urges is federal coercion
    - "Independent constitutional bar limitation...is not a prohibition on the indirect achievement of objects which Congress is not empowered to achieve directly. **Instead, power may not be used to induce the States to engage in activities that would themselves be unconstitutional**
      * So such thing is occurring here
  + Is the conditional grant coercive?
    - No because relatively small percentage of funds withheld; this is merely “mild encouragement”
* Dissent (O’Connor)
  + Issue with related purpose – drinking age is not related to road construction
  + Conditional grants should only specify how money should be spent, but nothing else
  + If not a condition, then a regulation, which is valid only if falls within delegated powers
* Dissent (Brennan)
  + Statute infringes on 21A and the State constitutional power to regulate in this area
* Notes:
  + Relatedness requirement of conditional spending does the most work; bi-conditional offer
  + Would have been lawful under Commerce Clause, but 21A might prevent this
  + Spending power can get around the *Lopez* and *Printz* laws

### *NFIB v. Sebelius* (2012) - Spending Portion

* Facts: Medicaid expansion making States cover all under 65 w/ incomes below 133% of federal poverty; condition is withholding all of the States’ Medicaid funding
* Outcome: Medicaid expansion program unconstitutional under spending power
* Rule:
  + **State must voluntarily and knowingly accept terms of to be constitutional spending use**
  + **Pressure so great that there is no meaningful choice --> Coercion**
* Majority (Roberts)
  + Too coercive; more than mild encouragement, it is a “gun to the head” - accounts for 20% of State's budget
    - Rejects dissent's contention that this is merely expanding the existing program; Holds that this is essentially an entirely new program - unforeseeable expansion to States
      * This is highly disputable - Medicaid has always been means tested
    - No real choice for the States in participating in the program
      * Similar to *New York II*, where condition to participate in federal regulatory program was viewed as an illusory choice
    - No need to fix a line because wherever it is, this is clearly beyond it
    - Do not need to invalidate all of ACA b/c of the severability clause
* Dissent (Ginsburg)
  + States have no entitlement to receive Medicaid funding and Congress can set limits
  + Medicaid Act has been amended 50+ times increasing coverage; this is no different
  + Coercion is not a part of the Dole test; was merely dicta
  + Just a way for political judgments defying judicial calculation to enter the test
* Joint Dissent: Need to limit broad spending power with coercion because can’t blur political accountability
  + Coercive: If States really have no choice other than to accept the package
  + Should not be severable b/c it is critical to the overall goal of universal coverage
* Notes: Legal rationale for the anti-coercion principle
  + Political accountability [idea from New York II]
    - Problem is that accountability calculations harder w/ hard choice vs. no choice
    - Biggest political accountability issue arises when the choice is actually okay
  + Contract principles require voluntariness
    - Magnitude of the pressure cannot be used to void a contract via unvoluntariness
    - To void contract, would need a real big pressure and wrongful threat
  + Dole precedent: Coercive when pressure becomes compulsion
    - Not good law b/c coercion was not used in Dole as a factor to reach holding
  + Structure of Conditional Grants
    - If C, then B = Offer
    - If ~C, then ~B = Threat
    - If ~B is too burdensome, then exceeds spending power
  + In this case, ~C is the right. Gov cannot compel C because *Printz* says cannot commandeer
  + Berman: Issue not with too much pressure, but wrong to withhold the benefit without legitimate reason

# Horizontal Separation of Powers

## A. State-State Relationships

* Full Faith and Credit (Article IV, Section 1)
  + Requires states have to respect the "public acts, records, and judicial proceedings" of every other state
* Privileges and Immunities (Article IV, Section 2)
  + All citizens *in* a state are entitled to the same privileges and immunities as the citizens *of* that state
  + Protects fundamental rights of individual citizens and restrains state efforts to discriminate against out-of-state citizens
* Dormant Commerce Clause (Implicit in the Commerce Clause)
  + Prohibition against states passing legislation that discriminates against or excessively burdens interstate commerce (can't discriminate against out-of-staters)
  + Prevention of protectionist state policies that favor state citizens or businesses at the expense of non-citizens conducting business within that state
  + Example: A state tax on a good must apply equally to locally-produced and imported goods

## Topics in Horizontal Separation of Powers

* **The Administrative State**
  + Nondelegation Doctrine
    - Can't delegate legislative powers to non-legislative entities (e.g. administrative agencies)
    - Congress is able to work around this by creating statutory schemes with gaps that it leaves to be filled be regulatory agencies
  + Presidential Control of the Federal Bureaucracy
    - Occurs mostly through appointment and removal powers
* **The Scope of Presidential Power**
* **Presidential Immunities**

### Key Trends and Takeaways Had We Spent More Time on This Subject

1. Massive expansion of presidential power via other actors (Congress, the Courts) from the New Deal era onwards
2. Changes in Horizontal S.o.P.
   * As manifested in Federalist No. 51, intent of the structure of our government was for "ambition to counter ambition". The objectives and motivations of each branch would act as a check on the others
   * However, there has been a growing trend of the displacement of these checking power, partially due to increased levels of partisanship in all 3 branches
3. Judiciary takes a decided back seat on these issues
   * Has become increasingly inclined to issue decisions that are under-enforcing/deferential to other branches
   * Using standing or political question doctrine to decline adjudicating these issues and allowing other branches to hash it out

# Equal Protection

## Classifications Based on Race or National Origins

### *Strauder v. West Virginia* (1879)

* Facts - WV law only allowed white male citizens of State over 21 to serve as jurors. Strauder convicted and sentenced for murder by an all white male jury. He moved to remove into Federal Court on the grounds that, having been a slave, he had reason to believe h could not have full and equal benefit of laws/proceedings of state
* Question: (1) Does Constitution afford every citizen right of trial by jury selected without discrimination against his race or color and on the basis of race or color; and (2) if he has such a right and it is denied, may he remove case to federal court?
* Outcome - Right to have a jury not discriminating against ones’ race or color is affirmed, as is right of removal because of the clear constitutional conflicts
* Rule - **Object of 14A EPC is absolute equality of two races before the law, which includes necessary right of colored race for freedom from legal discriminations**
* Majority:
  + Pervading Purpose - Spirit and meaning of 14A is to give blacks equal civil rights
    - 14A was "designed to ensure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government whenever that enjoyment should be denied by the states"
    - Note that Courts' construction of 14A only applies to races; can discriminate against women
  + Cannot deny class full enjoyment of laws by having jury prejudiced against that class. EPC denies states the power to withhold equal protections of laws from persons of color. However, Law expressly disadvantages blacks
    - The fact that blacks are singled out and expressly denied participation in the administration of the law despite their citizenship is an assertion of their inferiority and stimulant to prejudice which impedes the equal justice the law is intended to secure
    - White men are entitled to jury selected without discrimination against his race, yet colored men are not. This is inequality
  + Even if political rights not within scope of EPC, civil rights are implicated with this law
* Dissent - Not a denial of equal protection because 14A only protects civil rights
  + Political – Jury service, voting
  + Civil – Rules of evidence, Right to contract, property, standing to sue
  + Social – Ordinary social interaction or intercourse of the people (e.g. being treated in proper station)
* Notes - Are political rights outside EPC [interpretive modalities], and if so, what are these rights?
  + If right to vote is indeed protected by 14A, then big surplusage problem because 15A not needed then
    - Can’t just be right to vote, but this leads to inference that all political rights would be removed from 14A
  + Promotes the interest of blacks; broad language includes other groups like Irish & Chinese
    - Language may be even broader than race or ethnicity

### *Korematsu v. United States* (1945)

* Facts: Exclusion orders required Japanese Americans to (1) depart area, (2) report to assembly center, and (3) remain in relocation center under military control. Korematsu did not depart out of fear of being detained, thus violated the first order. Challenges the constitutionality of the exclusion orders as a defense
* Outcome - Actions taken under the law were not unjustified and the Order is valid. The orders involving the detention of Japanese Americans were not addressed since that is not the alleged violation here
* Rule - **Constitutional restrictions on civil rights based on racial classifications must be subject to rigid scrutiny, but may be upheld in cases of pressing public necessity**
* Majority Reasoning
  + Starts off by acknowledging that **legal restrictions which curtail civil rights of a single racial group are immediately suspect and must be subjected to most rigid scrutiny**. Racial antagonism is never justified
    - Extends EPC to not just white and black, but all races
  + Orders must be looked at separately since they impose distinct duties, thus the focus is only on the violation of the first order related to evacuation
    - Evacuation order is similar to *Hirabayashi* where curfew was upheld as a defense measure for military. It was justified on the grounds that it was necessary to prevent spying and sabotage; protect dangerous situations
    - Can't say as a matter of law or fact that evacuating to assembly facility would have resulted in long term detention at a relocation center. Thus, his justification for violating the first order is unfounded
  + D was excluded from area not because of hostility towards race, but because of war with Japan and legitimate fear of invasion that prompted military to take necessary security measures. Congress, expressing confidence in them, determined military leaders should have power to do this during war time
    - Overinclusiveness of the law is okay because unascertained number of disloyal Japanese
* Dissent (Murphy) - Essential that there be definite limits to military discretion. Test for military deprivation: whether deprivation is reasonably related to an immediate, imminent, and impending public danger
  + No racial classifications that disadvantage racial minorities
  + Most Rigid scrutiny -> Ends = Compelling; Means = Reasonably related
  + Bad assumption to say all persons of Japanese ancestry have dangerous tendencies
  + Hugely over and under-inclusive, but Murphy wrong to say no reasonable relation
  + Gets equal protection preventing racial discrimination in 5A from “spirit of Amendments”
* Dissent, Jackson - Courts should not decide these cases at all because military will always win
  + Cannot allow the Courts to be used as a tool for the military
  + Guilt is not inheritable, thus basis of exclusion on parents place of origin conflicts with principles underlying constitution
* Notes
  + This is a 5A case since it is not based on state law. 5A is relevant here because liberty is being deprived. However, 5A also has some equal protection force implied
  + Although Court deferential to military in times of war, these are when rights need the most protection from pressure and hysteria

### *Plessy v. Ferguson* (1896)

* Facts - LA law mandates separate but equal railcars for the white and colored races for all railroad comps. Plessy was 1/8 black, 7/8 white and refused to sit in colored car after being ordered. Plessy challenges the act asserting that it conflicts with both the 13th amendment and the 14th amendment
* Outcome - Law authorizing or even requiring separation of two races in public place not unreasonable exercise of state police powers
* Rules
  + Majority formal equality rule – Mus provide formal (de jure) equality and also do not purposely communicate or enforce badges of inferiority
  + Dissent anti-subordination rule – Regardless of intent, do not act in any way that (predictably) reinforces inferiority/castes/classes
* Majority Reasoning - If one race is inferior to the other socially, the US Constitution cannot put them on the same plane -> Two races meeting on social equality must do so by mutual appreciation
  + Clearly no violation of 13A - legal distinction does not re-establish state of involuntary servitude
  + Court interprets 14A(5) as authorizing only to provide redress or correcting effects of hostile state legislation. It does not permit direct legislation on matters related to that which the states are prohibited from making/enforcing
    - Thus, exercise of 14A must be predicated upon state laws that violate 14A and directed to the correction of their operation/effects
  + Intention of 14A was clearly to enforce absolute equality of two races between the law and protect against hostile state legislation, however **requiring/permitting separating races in places of likely friction does not necessarily imply inferiority and has been recognized as within competency of state's exercise of police powers so long as they are reasonable and enacted in good faith** (as opposed to the annoyance or oppression of a particular class)
    - Must give large discretion to state legislature in determining reasonableness. State is at liberty to act with reference to established usages/customs/traditions with a view to the promotion of their comfort and the preservation of public order and peace
    - Can't say this separation is unreasonable under this standard
  + Distinction between laws interfering with political equality and those requiring separation in public places has been drawn by Court
    - **Law can’t be for the purpose of creating inferiority, but there is no constitutional issue if the law has the effect of enforcing inferiority**
      * Separate but equal schools are okay because they don’t necessarily imply inferiority of a race
    - Law cannot abolish social distinctions based upon color or enforce social equality (rather than political) upon two races
      * Not the role of the courts to impose social values upon people under guise of Constitution
    - Saying this law stamps the colored race with a badge of inferiority is a construction that the colored race themselves chooses to put upon the law
* Dissent (Harlan) - Everyone knows this law stamps a badge of inferiority upon the colored race
  + Cannot arbitrarily separate citizens on the basis of race because inconsistent with equality
  + Law has meaning of arousing race hate, perpetuating distrust, and degrading. Underlying purpose is based on the inferiority of the colored race
  + Cannot act, under guise of giving equal accommodations, to compel blacks to keep to themselves
  + Two strands in Harlan’s dissenting opinion
    1. No superior, dominant ruling class of citizens -> No social hierarchy or caste
    2. The Constitution is colorblind -> Can’t account for races at all; Amendments removed the race line from our government system and put races on equal footing
* Notes
  + Too much talk of inferiority in the majority to think they only require formal equality
  + Different from *Strauder* because the law in *Strauder* treated blacks different than whites

### *Brown v. Board of Education* (1954)

* Facts - Black students sought aid of the courts in obtaining admission to public schools on a non-segregated basis within their community. This segregation was alleged to deprive Ps of equal protection of the laws under 14A
* Outcome - Separate educational facilities are inherently unequal; later argument for de-segregation plan
* Rule - **The doctrine of separate but equal has no place in the field of public education. Where physical segregation enforced on the basis of race necessarily commands inequality under the law, regardless of tangible factors being equal, any state law attempting to effectual such enforcement is unconstitutional**
* Unanimous Opinion - Relied on psychological effects on black students unlikely ever to be undone
  + Cannot solve constitutionality of segregation on Framers’ intent because inconclusive and there has been enormous change in nature of education making history of little use
  + Can’t depend on equality among resources and tangible factors when looking for inequality in the education context; education and its role in society is constantly evolving, thus effects of segregation extend far beyond educational facilities
  + Public education important because (1) foundation of good citizenship; (2) awakens the child to culture value; and (3) prepares children for later professional training
    - Thus, **where state has undertaken opportunity to provide education, it is a right which must be made available to all on equal terms**
  + State mandated segregation inherently stamps black children as inferior and impairs their educational opportunities, thus **separate educational facilities are inherently unequal**
* Notes
  + Doesn’t quite overrule *Plessy* because holding only applies to public education
    - Seems to turn on importance of public education, though an argument could be made that this badge inferiority could extend to many other contexts
    - Post-Brown per Curiams seem to extend beyond education (e.g. public beaches, golf courses, buses, courtroom seating, etc.)
  + Connecting the holding of this case to the Constitution
    - Legal premise = No promoting racial subordination / No castes / Const. is colorblind
    - Factual premise = Racially segregated schools impose stigma on minority children and create disparate educational outcomes
    - Holding = separate but equal has no place in public education
    - Possible legal premise might also be “treat races formally equally.”
    - Interpretive modalities that may be used to get to the legal premise
      * Framers’ intent – withr/t specific practices or constitutional principles [different levels]
      * Framers’ purpose – purpose is more general or ultimate [distinct from motivations]
        + Motive is separate, and is considered “the” ultimate
        + Purpose describes state of affairs; intent used as a means to reach purpose
  + Note that we have not yet reached the point of applying strict scrutiny
* Brown 2: Courts issue remedy, though unclear what exactly was required
  + Possible interpretations:
    - School's are required to end de jure segregation
    - Schools required to maintain a racially integrated and diverse student body (i.e. de facto desegregation)
  + It ultimately turned out to be the middle ground - Schools that were found to have enforced de jure segregation were required to eliminate all vestiges. Those schools that had not been segregating had no affirmative obligations

## Tiers of Scrutiny and Modern Framework

* Discriminatory classifications - Two types
  + (1) Classification exists on the face of the law or
  + (2) Discriminatory impact or effect and purpose of the law
* Factors for choosing level of scrutiny
  + Discrete and insular minority
  + Immutable characteristics
  + Ability of group to protect self through political process
  + History of prejudice and discrimination
* In evaluation of a law, focus on both the ends and the means by looking at the degree of fit
  + Only concerned with whether a fact finder could have thought rationally related…not actually
  + Any heightened scrutiny requires actual justifications rather than hypothetical justifications

### Rational Basis

* Rational Basis Test - The minimal level of scrutiny that all government actions challenged under equal protection must meet
  + Default level of scrutiny. Unless the government action is the type that warrants intermediate or strict scrutiny, rational basis review is used
  + One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary
    - Constitutional safeguard is offended only if classification rests on grounds irrelevant to achievement of State's objective
  + There is a strong presumption in favor of laws that are challenged under rational basis review. It is difficult for a law to fail this test, though it is possible (see *Romer*)
    - If law does not employ suspect classifications or impinge on fundamental rights, there must be clear arbitrariness or irrationality in order to violate EPC
    - Virtually any goal that is not forbidden by the constitution will be deemed to sufficient to meet rational basis test
* **Legitimate Purpose** - Must be legitimate government interest
  + Under rational basis review of a law, the **actual purpose is irrelevant. The law must be upheld if facts support any reasonably conceived justification**
    - That Congress or state legislature "could have believed" is sufficient and those attacking thus have burden to negate every conceivable justification for the discrimination
  + Traditional police powers - advances traditional purpose of protecting safety, public health, and public morals
    - Public morals
      * In *McGowan v. Maryland*, law prohibiting businesses to be closed on Sundays is upheld. Uniform day of rest to spend time with family and community is sufficient interest
      * Some moral justifications cannot satisfy requirement. *Romer v. Evans* – Can’t pass law preventing future laws protecting homosexuals from discrimination because no legitimate interest in harming politically unpopular group
  + Economic effects
    - Limited by dormant commerce and privileges & immunities clauses (See limitations below)
    - *Metropolitan Life Insurance* - Law imposing higher tax on out-of-state insurance companies was unconstitutional. Improving economy at expense of out-of-staters was not legitimate purpose
  + Limitations
    - Cannot be bare legislative desire to harm politically unpopular group
    - Cannot infringe 1A or favor in-state over out-of-state businesses
* **Reasonably Related** - Classification is reasonably related to the interest
  + Not concerned with actual closeness of fit, but **whether legislators could have reasonably believed that the classification would further the interest**
  + Deference in finding rational relationship - only overruled where clearly wrong and arbitrary
  + Tolerance of underinclusiveness, overinclusiveness, or both
    - Laws are **underinclusive** when they do not regulate all who are similarly situated
      * Raises concerns that government has enacted law that only targets politically powerless group or exempts those with more influence
      * Has been tolerated on basis that government often needs to take incrementalist approach, addressing problem most acute to the legislative mind
    - Laws are **overinclusive** if it regulates individuals who are not similarly situated, thus covers more people than needed to accomplish its purpose
      * Concern that it is unfair to those unnecessarily regulated and leaves politically powerless more vulnerable
      * Has been tolerated on grounds that alternative measures are less precise or more costly
  + Cannot be an arbitrary and unreasonable law
    - Court has struck down laws for being based on nothing other than irrational prejudices
    - These are cases where classifications schemes have no reasonable relationship with the interest they are intended to advance, thus legislators could not have believed this was not arbitrary
* Issues
  + Consistency of the court in applying the test
  + Argument that the Court has gone too far in its deference under this standard, as some legitimate purpose can be identified in nearly every law
    - Argument that we should only look at the actual purpose, but this is difficult to ascertain and a single legislative purpose often doesn't exist

### Intermediate Scrutiny

* Standard: Must be substantially related to an important government interest
  + Ends = important
  + Means = substantially related
* Classifications based on gender and nonmarital children

### Strict Scrutiny

* Standard: Necessary (or narrowly tailored) to achieve a compelling government interest
  + Ends = compelling
  + Means = necessary or narrowly tailored
    - Least restrictive alternative
* Classifications based on race, national origin, and aliens
  + *Fisher v. UT Austin* - "Judicial review must begin from the position that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect"
* “Strict in theory, fatal in fact”, though not so much after *Bakke* and *Grutter*
* Theories behind strict scrutiny
  + Evidentiary – Something akin to the “smoking out” illegitimate purposes rationale from Justice O’Connor in *Grutter*. A law will only pass this test if actually tailored to something compelling, thus putting suspicions about pretextual purposes to rest
  + Justificatory - Some classifications can lead to substantial injury to historically disadvantaged classes. Since costs are greater, justification should be stronger. Strict scrutiny helps determine whether the purpose is of sufficient purpose to justify costs

## Race-Neutral Laws With Racially Disparate Effects

* Overview of Framework
  + Law facially race-neutral, but racially discriminatory impact is so unequal that it is determinative of intent -> apply strict scrutiny (*Yick Wo*)
  + Law facially race-neutral, but racially discriminatory impact -> ask whether there was racially discriminatory purpose
    - If no, then apply rational basis
    - If yes, then was purpose a but-for motivation?
      * If no, then apply rational basis
      * If yes, then apply strict scrutiny
* Some laws that are facially race neutral are administered in a manner that discriminates against minorities or has a disproportionate impact against them. Court has held that there **must be proof of a discriminatory purpose** in order for such laws to be treated as racial or national origin classifications
  + Laws that are facially neutral on matters of race/national origin will only receive rational basis review unless this proof is met
  + *Washington v. Davis* (1976) – Facially neutral laws with discriminatory impacts must have proof of discriminatory purpose to be treated as a racial classification receiving strict scrutiny - "discriminatory impact, standing alone, does not trigger...strictest scrutiny"
  + Justification
    - EPC is concerned with prohibiting government's discriminatory acts rather than bringing equal rights. *Mobile v. Bolden* - Only if there is purposeful discrimination can there be a violation of the EPC
    - Allowing impact to suffice in proving racial classification would potentially invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and blacks than they are to whites
  + Note - Some civil rights laws provide that discriminatory impact alone can prove violation of that respective law, but this is not so for EPC
* Some laws that are facially race neutral have a clear discriminatory purpose, but fail to have a discriminatory impact. This raises question about whether the discriminatory effect is also required to achieve strict scrutiny?
  + According to the Court, the answer is yes. **Need both proof of discriminatory impact and purpose in order to achieve strict scrutiny**
    - *Palmer v. Thompson* (1971) - Suggests discriminatory purpose, alone, is insufficient to prove that a facially neutral law constitutes a race or national origin classification. Can't strike down law solely on basis of motives by those who voted for it
    - *US v. Armstrong* (1996) – Declares EPC challenge of race neutral law needs proof of both discriminatory effect and purpose
* How to prove discriminatory purpose
  + Must show that it desired to discriminate, not that it merely knew it would have these consequences. Must be because of, not in spite of
* Two-steps in establishing the proof necessary for strict scrutiny
  1. Plaintiff must show a prima facie case of discriminatory purpose
     + Need not show this was dominant or primary purpose, but merely that it as motivating factor
  2. Burden shifts to the government to prove that the discriminatory purpose is not a but-for cause of the action
     + Must show it would have taken the action even if the impermissible purpose had not been considered
  + *Arlington Heights* (1977) – Supreme Court explained different ways to prove a discriminatory purpose:
    - Impact of the law is so discriminatory as to allow no other explanation than that it was adopted for impermissible purposes
      * Example: In *Yick Woo* law was applied so unequally for a particular class of individuals, it warranted conclusion that regardless of legislative intent, the law was administered by state with mind so unequal and oppressive that it amounted to practical denial of equal protection. Pattern is so stark that impact alone is determinative of purpose
    - History surrounding the government’s actions
    - Legislative or administrative history of the law

## Benign Racial Classification to Benefit Historically Disadvantaged Groups

* Key themes and takeaways
  + **Diversity is a compelling interest in education and universities may use race as a factor to ensure diversity, but quotas or numerical quantification of benefits is impermissible**
    - First articulated by Powell in *Bakke* and later adopted/adhered to in *Grutter*
  + Affirmative action or "benign" racial classification is **NOT permissible when the purpose is**:
    - To remedy long history of racism throughout society
    - To provide role models in society or to enhance services to minority communities (e.g. healthcare argument from *Bakke*)
  + **Judicial review must begin from the position that nay official action that treats a person differently on account of his race or ethnic origin is inherently suspect**
    - Powell argues for strict scrutiny in *Bakke*, *Grutter* reaffirmed this by reviewing under strict scrutiny to smoke out illegitimate uses, and applied in *Fisher* so that government bears burden of proving the reasons for classifications are identified and legitimate
    - Pro-Strict Scrutiny arguments in affirmative action - Any race divisions create hostility/resentment and danger of stigmatic harm; government required to treat equally regardless of race
    - Anti-Strict Scrutiny arguments in affirmative action - Long history of racism/discrimination against minorities but not white. Reaching social equality and closing disparities requires remedial action. There is also difference between majority discriminating against itself and against the minority

### *Regents of University of CA v. Bakke* (1978)

* Facts - White male denied admission to UC Davis Med. School while others with lesser credentials specially admitted due to their race or ethnicity. 16 seats in class of 100 reserved for Blacks, Chicanos, Asians and American Indians
  + Parties disagree over degree of judicial scrutiny warranted and purpose of the admissions program
    - California - Strict scrutiny should be reserved for classifications that disadvantaged discrete and insular minorities. Admissions program establishes goal of diverse student body
    - Bakke - Strict scrutiny because degree of scrutiny is not contingent on being in a discrete and insular minority. Personal rights are being deprived on the basis of racial classification. Admissions program is a quota
* Outcome:
  + Admissions program violated Title VI (5-4): Powell (arguing it failed strict scrutiny) and conservative plurality (statutory grounds only)
  + Race can be considered as factor in admissions (5-4): Powell and liberal plurality SCOUTS holds the admissions scheme violates Title VI of the Civil Rights Act. Court also rules that race may be used as a factor more generally in the application process
* Rule - **There may be no quota, but race may be used as a factor more generally in application**
* Powell Opinion
  + Title VI extends to limit of EPC and the EPC calls for strict scrutiny
  + Agrees with Baake: all racial classifications are subject to strict scrutiny, not just members of a discrete and insular minority. If groups not accorded the same protection on basis of race, then not equal. Entitled to judicial protection against classifications of race because they impinge his personal rights, not because he is a member of a specific group. This is needed for consistent application of consitutional standards
    - Rejects argument that discrimination against white majority can't be suspect if purpose is benign. There is inherent unfairness here that is being prescribed on the basis of race
    - Not judicially manageable to determine which groups require heightened scrutiny and which don't
    - **Racial and ethnic distinctions of any sort are inherently suspect and call for strictest scrutiny** (5-4 vote on this assertion)
  + Strict scrutiny standard - Classification must be precisely/narrowly tailored to serve compelling government interest. Government must show that:
    1. **Interest/purpose is both constitutionally permissible and substantial (compelling)**
    2. **Use of classification is necessary to accomplice purpose of safeguarding this interest (narrowly tailored)**
  + Court considers each of the interests the admissions scheme purports to serve:
    - No legitimate interest to have a specific percentage of a race in the class - preference for no reason other than race is discrimination for its own sake
    - No interest in ameliorating effects of discrimination - university in no position to decide and remedy societal, past de jure discrimination
    - No evidence that program is even geared to promote goal of aiding underserved health communities (needs to be an actual purpose with interest)
    - **Interest in a diverse student body is compelling** and constitutionally permissible
      * Race and ethnicity only one element of diversity, however
  + Court hen considers if classification is narrowly tailored to the interest
    - **Not narrowly or precisely tailored and is both over and underinclusive, so fails strict scrutiny**
      * Can consider race/ethnicity as factor when all vie for the same seats, but cannot reserve seats on the sole basis of race. Must treat each applicant as an individual. To foreclose from consideration on the basis of race because all reserved spots have been filled fails to do this
        + Whites are excluded from consideration for a fixed percentage of available seats based on nothing other than race
        + This is equivalent of facial intent to discriminate, and since a holistic approach would achieve the same end (diversity) without doing this, the classification fails the test of necessity
* Concurrence/Dissent (Brennan + 3 Justices)
  + Whites as a class do not have any of the traditional indicia of suspectness, so apply intermediate scrutiny rather than strict scrutiny
  + State may adopt race-conscious programs if the purpose is to remove disparate racial impacts its actions might otherwise have or due to past discriminations
    - Impossible to do this in a racially neutral way, so appropriately tailored
  + The admissions scheme is acceptable under Title VI = EPC; race can be used
* Concurrence/Dissent (Stevens + 3 Justices )-
  + Avoid constitutional questions where avoidable, and here we have a statutory means
  + Special admissions policy excludes π on basis of race and violates Title VI
  + Never reaches the question of using race in admissions under EPC
* Notes - Title VI passed under the spending power of Congress; conditional spending grant
  + Strict scrutiny still being formulated here: “precisely tailored” but also permissible and substantial interest substituted for compelling
  + Not yet clear what level of scrutiny will apply in affirmative action cases
  + Focus is only enlightenment with robust exchange of ideas provoking confrontation

### *Grutter v. Bollinger* (2003)

* Facts - White female application with 3.8 GPA and 161 LSAT rejected from Michigan Law. Michigan Law admissions looks at applications individually; race considered as a factor
* Outcome - EPC does not prohibit Law School’s narrowly tailored use of race in admissions
* Rule - Compelling interest in obtaining educational benefits flowing from diverse student body
  + **Flexible, nonmechanical admissions program with individualized consideration is a narrowly tailored plan satisfying strict scrutiny**
* Majority, O’Connor - All racial classifications imposed by the government are subject to strict scrutiny
  + All racial classifications are inherently suspect
    - Apply strict scrutiny to smoke out illegitimate uses of race by assuring government pursuit of a goal important enough to warrant a highly suspect tool
    - Applies strict scrutiny even for majority because we cannot tell whether a law is really benign or not (not judicially manageable)
  + Strict scrutiny standard - **Must be narrowly tailored to further a compelling government interest**
    - Constitutional precept – do not racially discriminate absent great need
    - This does not guarantee being struck down as unconstitutional
  + Obtaining education benefits flowing from diverse student body is a **compelling interest**
    - Essential to educational mission and robust exchange of ideas
    - Business success depends on exposure to widely diverse people, cultures, views
    - Need openness and integrity in education training given lawyer’s societal importance
    - Visibility – Positions of leadership appear open to all domains of people in order to retain legitimacy
  + Law school's admissions plan **bears hallmarks of a narrowly tailored plan**
    - **Must remain flexible enough to ensure each applicant is evaluated as an individual and not in a way that makes race ethnicity the defining feature of her application**
    - Here, there is individualized consideration to applicants of all races. Diversity factors other than race taken into account, such as life stories and personal background. This is consistent with Powell's description of a permissible holistic program in *Bakke*
    - Gives deference to Law School's selection of this method over possible racially neutral alternatives and intermittently reviewing the necessity of the program in the future (satisfies durational requirement)
* Concurrences (Ginsburg) - Cannot sunset affirmative action because we can only hope for improvement of race relations, not firmly forecast
* Dissent (Scalia) - No compelling interest to maintain prestige of law school
  + Constitution prohibits government discrimination on basis of race
  + Benefits provided by diversity are not unique to an educational context
  + Discriminatory questions now center on individuality focus, good faith efforts of admissions committee, and zealous pursuit of reaching “critical mass” – too subjective
* Dissent (Thomas)
  + Fredrick Douglas – a black man who cannot stand on their own legs should be let to fall
  + Agrees that (1) further use of race in admissions unlawful and (2) not compelling in 25 yr
  + Demeans everyone to place citizens on racial register;
  + Compelling interest is educational benefits, but no real improvements made w/ program
    - Only interests are (1) educating State’s citizens and (2) training state’s lawyers
    - Only 27% MI residents at Law School and only 6% make up MI bar
  + Creates dependencies, entitlement attitude, and stamps a badge of inferiority
  + Constitution forbids affirmative action in the University admissions process
  + EPC renders the color of one’s skin constitutionally irrelevant to Law School’s mission – calls majority’s belief in Law School interest an “aesthetic”
    - Racial classifications offend the Constitution; presumptively unconstitutional regardless of the motives that are behind it
    - Doesn’t think that the doctrine is “smoking out” anything
* Dissent (Rehnquist) - Majority gives too much deference to the University; not enough independent scrutiny
  + The connection between the ends and the means must be precise
* Dissent (Kennedy) - Majority deforms strict scrutiny test to the point where it cannot be said to be applying it
* Notes - Focus is on extrinsic social goods like professionalism, citizenship or leadership
  + Mismatch stigmatizes minorities and reinforces stereotypes/inferiority
  + Thomas seems to be making a moral equivalence argument: race-based AA vs. Jim Crow
  + EPC might mean (1) desire to harm unacceptable and (2) public benefits > social costs
    - This can’t be right because it does not align with the smoking out rationale
    - Harmful to those disadvantaged on account of their race, but also harmful in keeping race alive since puts off day of colorblind world -> balancing act

### *Fisher v. UT-Austin* (2013)

* Facts: New admissions plan adopted by UT system after student body was becoming less diverse. 10% program, where top 10% at any public high school in state would gain automatic admission, was aimed at increasing acceptance and enrollment of racial minorities in light of being barred from using race as an explicit consideration in admissions. 75% of UT class was made up by 10% enrollees, while other 25% were admitted on the basis of a calculated "admissions score" based on test scores and personal achievements. 5th Circuit held this program satisfied standard in *Grutter* and permissibly used race as factor in admissions
* Rule: **University must prove, without deference, that there were no other means to achieve diversity and that the means selected were thus narrowly tailored to that goal**
* Holding: In 7-1 decision, Court reverses 5th Circuit decision
  + Narrow tailoring requires that the reviewing court verify that it is necessary to use race to achieve benefits of diversity. This includes careful judicial inquiry into whether university could achieve the goal without using racial classifications
    - While doesn't require it exhaust every conceivable alternative, strict scrutiny requires court to examine with care and not merely deference to a university's good faith consideration of alternatives (Kennedy, who is writing for the majority, raised this same argument two decades prior in *Grutter*)

## Based Discrimination

* Gender based classifications get intermediate scrutiny
  + Hs roots in *Reed* which struck law down ostensibly under rational basis
  + *Craig v. Boren* canonizes intermediate scrutiny
* Not clear that Ginsburg’s “exceedingly persuasive justification” in VMI is not even higher than intermediate scrutiny

### *Bradwell v. Illinois* (1871)

* Facts: Woman in state of IL is denied license to practice law because of state law which prohibits women from doing so. She argues that she is a citizen of the United States and, having previously been a citizen of Vermont, is entitled to the same rights in IL as she was in the latter state.
* Holding: Upheld law prohibiting women from being licensed to practice law
  + Court rejects argument that practicing law is a privilege of citizenship that is protected by the PIC of 14A. Right to practice law is not one of the rights which a state is forbidden to abridge. If it was a right at all, it would belong to the citizenship of the state and thus is not protected by the Federal government
  + In concurrence pinion, Justice Bradley opined the state was justified in excluding women from the practice of law, stating that the: “Paramount destiny and mission of women are to fulfill the noble...offices of wife and mother. This is the law of the creator. The rules of civil society must be adapted in the general constitutional of things and cannot be based on exceptional cases...it is within the province of the legislature to ordain which...callings shall be filled and discharged by men”
    - This is institutionalize chauvinism

### *Craig v. Boren* (1976)

* Facts: Oklahoma passes law allowing women to buy low alcohol beer (3.2%) at age 18, but banning men from buying such beer until age 21. Vendor brings claim challenging ths constitutionality of the law and has standing independently (constricts potential consumers). Other P has since turned 21 as thus is would lack standing for mootness. However, vendor still may rely on equal protection challenge challenge to constitutionality because he can assert rights of third parties whom would be adversely affected if his claim was dismissed ofr lack of standing (i.e. those whom he would indirectly violate rights of by refusing to sell to if the law is upheld)
* Question: Is the difference between sexes with respect to purchase of 3.2% beer sufficient to warrant differential in age drawn by the state statute?
* Rule: **To withstand constitutional challenge, classifications of gender must serve important government objectives and be substantially related to those objectives**
* Holding:
  + *Reed* and cases after it make clear that administrative ease is not a sufficiently important objective to withstand challenge (this was under rational basis test). This provides underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other more germane bases of classification
  + Traffic safety is a legitimate government interest (gets further than *Reed*)
  + Gender discrimination not substantially related to that objective - "unduly tenuous fit"; offers weak answer to equal protection question
    - While disparity in drunk driving stats is statistically non-trivial (2 percentage point difference), it hardly can form basis for gender line classification device
    - Prior cases have rejected use of sex-based classifications where empirical relationships were stronger than in the instant case
    - Also ignores the fact that such low alcohol content is thought to be nonintoxicating, which makes
* Dissent (Rhenquist)
  + The majority is wrong to apply any more stringent scrutiny than rational basis for gender classifications. State legislatures are entitled to great deference in their judgments
* Reed v. Reed (1971) - Partial basis for the ruling in *Craig v. Boren*
  + Law giving preference to two competing applications for administration of estate to males over females is an unconstitutional gender classification. First time court had invalidated a gender classification
    - Applied ration basis test - gender irrelevant factor

### United States v. Virginia

* Facts: VMI was all-male public institution focused on instilling physical and mental discipline in cadets; had adversarial teaching method with little privacy, required physical rigor, and induced mental stress. VWIL set up as women’s alternative with focus on cooperative learning and reinforcement of self-esteem; lower standards to get into institution, less prestigious, smaller endowment. Challenge to exclusion of women brought on equal protection grounds
* Issue: Does exclusion of women from educational opportunities provided exclusively by VMI deny equal protection of laws under 14A?
* Rules:
  + **Intermediate scrutiny - must serve some important governmental interest and means are substantially related to its achievement**
  + **State seeking to defend gender-based government discrimination must demonstrate an exceedingly persuasive justification for the action, one that does not rely on overbroad generalizations about the different talents, capacities, or preferences of men and women**
  + **Justification must be genuine, not hypothetical or post-hoc**
* Holding:
  + Ginsburg, writing for the majority, applied intermediate scrutiny (with some bite)
    - However, precedent clear it does not fall under strict scrutiny. Inherent physical differences are recognized, though as cause for celebration and not for denigration or imposition of artificial constraints
    - Classifications may not be used to perpetuate legal, social, and economic inferiority
  + Justification must be exceedingly persuasive; burden is demanding and rests entirely on the state - here they are not
    - Virginia argues that there are benefits of single-sex education and admitting Women to VMI would require large changes and would lose some of that benefit
    - Court says that Virginia has not shown that enhancing educational opportunities by excluding women is the actual purpose. Must be actual purpose, not rationalization of actions that is grounded in other reasons
    - Historical record shows this has always been deliberate. No persuasive evidence that purpose offered by the state is the actual one
    - Aspects of VMI's program (physical training, adversative approach, absence of privacy) would require some accommodations, but no disputing that it **could** be used to educate women
    - State controlling the gates to opportunity may not exclude qualified individuals based on fixed notions concerning the roles and abilities of men/women. **Although most women would not chose VMI method, you can't constitutionally deny those women who have the will and capacity the opportunity VMI uniquely affords**
  + Establishment of VWIL was insufficient to remedy exclusion. Fact still remained that women were still denied opportunities available only to men
    - Proper remedy for unconstitutional exclusion aims to eliminate past discriminatory effects and bar like discrimination in the future. Here, the discriminatory effects and exclusionary policy are left intact
    - VMIL offers unequal tangible and intangible facilities. Also lacks the prestige and large alumni base as VMI in addition to rigorous military training approach to education. Withholding these benefits cannot be justified on the basis of inherent differences between the genders (i.e. based on "the way women are")
    - Thus, State has **failed to provide comparable single-gender women's institution**
* Concurrence (Rehnquist)
  + No exceedingly persuasive justification needed, just need to satisfy intermediate scrutiny
  + Only look at actions after Hogan which put VMI on notice about gender classifications to infer purpose for maintaining exclusionary policy
  + However, if benefits from diversity of education opportunity were the actual purpose, it would still be problematic because the interest appears to be those benefits insofar as the relate to men
  + Substantially comparable schools may be okay, as it isn't the fact that Women are excluded isn't what violates equal protection. VWIL is clearly inferior here and maintaining all-male institution without providing comparable all-female one is what violates it

## Classifications Based on Sexual Orientation

* Legal Standard
  + Rational basis – rationally related to a legitimate government interest [no SCOTUS ruling yet, though]
* History
  + Long history of discrimination against gays, lesbians and bisexuals
  + Discriminatory laws usually reflect prejudice and stereotypes rather than actual differences
  + Sexual orientation is immutable
* Animus
  + We think that animus is different from discriminatory purpose
  + Refers to ill-will, lack of adequate regard, malice, spite, disrespect
    - Law adopted due to poor attitudes
  + Discriminatory purpose – a mediate purpose that is not an ultimate purpose
  + Something could be motivated by animus even if there is no discriminatory purpose
  + There might be an interest even if someone isn’t moved by it (i.e. – no desire to read, yet learning to read is good for you), while with animus we think that it must motivate the action

### *Romer v. Evans* (1996)

* Background: CO Amendment to repeal all state and local laws prohibiting discrimination against gays and preventing future laws that provide protection to this class
* Holding: Unconstitutional because it fails rational basis review (animus is an issue)
  + Denies a single-named group protect of the laws without legitimate purpose
    - "Homosexuals are put in a solitary class with respect to transactions and relations in both private and the governmental sphere. The amendment withdraws from them, but no others, specific legal protection from injuries caused by discrimination"
  + Animosity towards gays and lesbians seems to be the only purpose - bears no rational relation to any legitimate state purpose
    - Animus against gays and lesbians, even when presented as a purported "moral" basis for a law, is not sufficient to meet rational basis test

## Congressional Enforcement

* It is clear that §5 of the 14th Amendment cannot be used to regulate private activity. However, what is the scope of Congress's enforcement power under 14A5? Two primary positions on this question
  1. Nationalist perspective - Can use 14A5 to independently interpret constitution and expand the scope of rights (see *Katzenbach*)
  2. Federalist perspective - 14A5 cannot create new rights or expand the scope of rights; it can only act to prevent or remedy violations of rights and such laws must be narrowly tailored (*Boerne*)
     + Arguments for: Has virtue of protecting judiciary as authoritative expositor of the constitution. Is also consistent with more restrictive view of federalism that had defined recent decisions in other key areas
     + Arguments against: Denies Congress power to expand scope of rights. Constitution has long been regarded as the "floor" or the minimum liberties possessed by all - that government is invited to expand is an idea consistent with 9A as well

### Enforcement Powers

* **Simple** – Congress not prohibiting any conduct beyond what judiciary would hold unconstitutional [11A abrogation]
  + **Penalizing** – provide for penalties for constitutional violations
  + **Procedural** – Congress creates procedures for adjudicating violations
* **Complex** – Congress does prohibit some conduct that judiciary would not itself determine is unconstitutional
  + **Prophylactic** – Congress creates a broad statutory prohibition encompassing a narrower constitutional prohibition to minimize false negatives in adjudication. Constitutionality is often difficult to prove or judicially determine (evidentiary problems) even when the actual purpose is unconstitutional. Expanding prohibition beyond that which is judicially ascertainable allows Congress to catch those under-the-radar instances
    - *South Carolina v. Katzenbach* (1966) – Upholds 1965 Voting Rights Act prohibiting writing tests in states with history of discrimination even though Court said need proof of discriminatory purpose
  + **Remedial** – Congress prohibits/mandates some conduct as a means to remedy what the Court has determined to be a constitutional violation
    - **Curative** – Eliminate or reduce current harms that are consequence of past constitutional violations
      * Constitutional violation and past discrimination; prohibits some law otherwise constitutional
    - **Preservative** (Representation reinforcing) – Eliminate present constitutional violations by better enabling victims to help themselves
      * Prevent other unconstitutional violations
  + **Substantive** – Congress prohibits conduct even though Court has determined that the conduct is not unconstitutional
    - **Interpretive** – Congress concludes judiciary has misinterpreted a relevant constitutional provision
    - **Applicatory** – Congress applies judge-made doctrine to find a constitutional violation (e.g. *Morgan*, suggesting Congress might have found NY law was adopted for an ethnically discriminatory purpose)
      * **Fact-finding** – Congress concludes some conduct violates Constitution after finding brute fact (e.g. record shows State's purpose clearly discriminatory)
      * **Evaluative** – Congress concludes some conduct violations constitution in making an evaluative judgment (i.e. whether the interest is “compelling” )

### *Katzenbach v. Morgan* (1966)

* Facts: Voting Rights Act says no person completing 6th grade in Puerto Rico can be denied right to vote due to failing English literacy requirement. Prohibits enforcement of an NY election law requiring ability to read and write to vote. Passed in response to court upholding constitutionality of a English literacy test in order to be eligible to vote, which posed difficulties for those not speaking english as their primary language
* Issue: Question is not whether determine whether NY literacy requirement itself violated EPC, but whether Congress had power under 14A5 to prohibit NY law as an enforcement of the EPC
* Holding: Court upholds this provision as a **proper exercise of powers granted under 14A5**
* Majority Reasoning
  + Issue implicit in this case was whether Congress was limited to remedying what the Court had previously found to be unconstitutional discrimination or if it could independently interpret the Constitution
    - Court ultimately **speaks broadly of Congress's powers under 14A5 and expressly rejected argument that legislative powers were confined to the insignificant goal of abrogating state laws that the judiciary was prepared to declare unconstitutional**)
      * Court says that interpretation of 14A5 requiring judicial determination that state law precluded by Congress violated the constitution (14A1) would depreciate Congressional resourcefulness and responsibility for implementing 14A
      * Broad powers in 14A5 similar to those expressed in N&P clause - **must be regarded as enactment to enforce EPC, must be plainly adapted to that end, and must be consistent with the letter and spirit of the constitution**. All of these are met
  + Two reasons to support its conclusion
    - Congress could have concluded that granting Puerto Ricans the right to vote would empower them and help them to eliminate discrimination against them. In essence, this was a remedy for discrimination against them (Remedial - Preventative)
    - Could conclude the literacy test denied equal protection, even though earlier Court decisions held that this was not the case (Prophylactic)
  + NY responds with its own 5A argument, asserting this discriminates against U.S. citizens born and educated outside of U.S. territory
    - Court rejects this. Not excluding from the franchise, but simply further extending it. Can't strike down the law because it could have gone further than it did (tolerance for tolerance for underinclusiveness "reform may take one step at a time")
  + In a footnote, Brennan says that §5 does not grant Congress power to exercise discretion in the other direction and enact statues to dilute equal protection and due process decisions of the court
* Dissent (Harlan)
  + Concerned about ability of Congress to negate constitutional rights
  + Congress does not have power to limit effect of judicial opinions of what is or is not constitutional under the Equal Protection Clause
  + Congress may take remedial measures to redress and prevent wrongs

### *City of Boerne v. Flores* (1997)

* Facts: Permit to expand church that is in historic district was denied by city in Texas; Archbishop sues under RFRA. RFRA enforcing Free Exercise Clause which is incorporated against states by 14A. RFRA requires compelling interest for laws substantially burdening religious exercise and it be the least restrictive means for achieving that interest. Passed in response to (and against) *Smith*, a SCOTUS decision that narrowly interpreted Free Exercise Clause and held that it could not be used to challenge neutral laws of general applicability (neutral insofar as it lacks motivation to interfere with religion and applies to everyone equally)
* Rule: **Congress, under 14A5, may not create new rights or expanding the scope of rights; it may only pass laws that prevent or remedy violations of rights recognized by the Court and must be narrowly tailored - "proportionate" and "congruent" - to the constitutional violation**
* Holding: RFRA was held to be unconstitutional exercise of Congressional power under 14A5
* Majority Reasoning (Kennedy)
  + Congress' power under 14A5 only extends to enforcing the provisions of the amendment. It does not have the power to determine what violates a constitutional violation, else it would not be "enforcing" in any meaningful sense. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing it
  + Quoting *Marbury*, restated the importance of the Judiciary as the authoritative interpreter of the constitution
    - If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and like other acts, ... alterable when the legislature shall please to alter it'
  + Congress given great deference to determine line between measures that remedy or prevent unconstitutional actions and those that make substantive changes to the governing law. Must be congruence and proportionality to between the injury prevented/remedied and means adopted to that end
  + RFRA’s restrictions are too broad; not proportional and congruent
    - Reach and scope extend to any level of government, at any time, whenever an individual feels a law has placed a substantial burden on his free exercise of religion. Legislative record also contained little evidence of consitutional violations
    - The RFRA **prohibits too much that would not violate the constitution and thus exceeded scope of 14A5 powers**
* Dissent, O’Connor
  + Smith was wrongly decided and should be overruled
  + Agrees with the majority about the power of Congress under 14A §5
* Notes
  + Complex enforcement
    - Prophylactic because RFRA broader than limited cases with anti-religious purpose alone that are unconstitutional under *Smith*
    - Permissible to use complex prophylactic, but must satisfy proportionality and congruence test. It failed to in *Boerne*
  + Substantive interpretative because Congress effectively implies *Smith* was wrong and *Sherbert* was right
    - Court says **substantive interpretive is not permissible**

### *Kimel v. Florida Board of Regents* (2000)

* Facts: ADEA prohibits discrimination on the basis of age (40+) with an exception for bona fide occupational qualifications reasonably needed for normal operation of particular business. Any person aggrieved by violation of the act has private right of action, including violations by the States. FSU faculty and librarians sue state for not allocating funds for market adjustment of salaries, which has a disparate impact on base pay for older employees. District court dismissed suit on the basis of 11th amendment immunity. CoA affirmed, holding that ADEA does not validly abrogate the States' 11A immunity
* Issues: Does ADEA contain clear statement of Congress' intent to abrogate 11A immunity, and if so, was ADEA a proper exercise of constitutional authority under §5?
* Holding: ADEA clearly expressed intent to abrogate, but exceeded Congress' authority under 14A5
  + Majority reasoning:
    - Long been established that can't abrogate through exercise of Art. I power (e.g. commerce clause). However, 14A5 does grant Congress the authority to abrogate State sovereign immunity - this is a necessary limitation of 11A in light of the enforcement provision of 14A
    - **Applying congruence and proportionality test, ADEA is not appropriate legislation** under 14A5
      * Substantive requirements imposed on state and local governments were disproportionate to any conceivable unconstitutional conduct targeted by the act. Also, lack of widespread evidence of constitutional violations by States
      * Only rational basis review for age discrimination because no historical basis and not discrete and insular minority. Age is also often a legitimate criteria for employers
        + Judged against backdrop of EPC jurisprudence, ADEA is **so out of proportion to supposed preventative object that it can't be understood as responsive to unconstitutional behavior**. No reason for Congress to believe such broad prophylactic legislation was necessary in this field
* Facts: ADA prevents discrimination against disabled; must make reasonable accommodations. P diagnosed with breast cancer and had to take substantial leave from job at public university in order to seek treatment; she was told that she would have to give up her Director position and take a job paying much less. She brought suit under the ADA
* Holding: State governments may not be sued for violating Title I of the ADA - Congress lacked authority to abrogate State 11A immunity under 14A5
* Majority Reasoning (Rhenquist):
  + ADA is a substantial expansion of rights compared to the Constitution. He explained that under EPC analysis, discrimination based on disability only need meet a rational basis test, being rationally related to a legitimate government purpose. The ADA prohibits much more tl1an would fail a rational basis test, and its requirement for reasonable accommodation of disabilities is significantly greater than the Constitution requires
    - Legislative record also showed a lack of a pattern of irrational state discrimination
    - Thus, failed to satisfy the "proportionate and congruent" test
* Dissent (Bryer):
  + Plenty of evidence in the record (over 300 examples) to show unconstitutional behavior - Court's failure to find this sufficient may rest on its decision to hold Congress to a strict judicially create evidentiary standard
  + Give great deference to Congress to determine is rationally related to interests
  + Discrimination resting solely upon negative attitudes/fears/irrational prejudice violates the 14th Amendment (Cleburne)
  + There is a disconnect between doctrinal standard (rational basis) and the constitutional precept
    - What rational basis requires is not what the EPC requires. It is a judicial doctrine which often underenforces
    - Using constitutional precept instead of judicial doctrine, then the law looks much more congruent and proportional
    - Precept = there should be no purposeless discrimination against the disabled

# Fundamental Rights Beyond Those Enumerated

* **State Action Doctrine** – constitutional rights apply only to the governments and not to private entities and individuals
* Framers thought Bill of Rights was not necessary
  + Limited government powers via enumeration
  + List of rights would be dangerous because inevitably incomplete, though incorrectly viewed as exhaustive
* Selective incorporation – incorporate rights sufficiently fundamental to apply to states and local governments
  + (1) Must be in the Bill of Rights and (2) must be fundamental protection

|  |  |  |
| --- | --- | --- |
| Type | Incorporated Rights | Unincorporated Rights |
| Procedural | 4A, 5A, (double jeopardy; self-incrimination), 6A | 5A (grand jury indictment), 7A |
| Substantive | 1A, 2A, 8A | None, but 3A yet to be decided |

* **Procedural due process**, as the phrase implies, refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. Classic procedural due process issues concern what kind of notice and what form of hearing the government must provide when it takes a particular action
* **Substantive due process** asks whether the government has an adequate reason for taking away a person's life, liberty, or property. In other words, substantive due process looks to whether there is a sufficient justification for the government's action. Whether there is such a justification depends very much on the level of scrutiny used
  + Existence of this has been contested, as some argue "process" denotes procedures and that it is incorrect to use the due process clause as the place for protecting substantive rights. Many argue 14A PIC is the appropriate place for safeguarding substantive rights (Narrow interpretation of PIC in *Slaughterhouse* has precluded this)
    - Critics argue that the Court acts illegitimately when it protects rights that are not explicitly enumerated in the Constitution or intended by its framers
    - The use of the doctrine to curb progressive era reforms has also drawn criticism which often fails to be separated from the doctrine itself
  + Defenders argue that it does not put substantive limits on government, but restraints on the executive/legislative powers. The clause does not speak solely of due process but, rather, "due process of law," and it is argued that an action is not in accord with the law of the land if it violates the substantive guarantees of the Constitution
    - The due process clause has been found to incorporate provisions of the Bill of Rights that are deemed fundamental and to protect these rights from state and local interference. This is substantive due process in that it uses the due process clause to protect rights and only allows interference if there is a sufficient justification
* It is possible to distinguish procedural and substantive due process based on the remedy sought. If the plaintiff is seeking to have a government action declared unconstitutional as violating a constitutional right, substantive due process is involved. But when a person or a group is seeking to have a government action declared unconstitutional because of the lack of adequate safeguards, such as notice and a hearing, procedural due process is the issue

## First 100 Years

* Three possible interpretations of the 14A PIC might cover:
  + (1) All fundamental rights -> Field and Bradley dissents; Historical and/or moral bases; P&I might cover rights that are fundamental but not explicitly enumerated.
  + (2) Incorporation of BoR (Amendments 1-8) -> Prenumbral view; PIC was meant/should be used to incorporate the enumerated bill of rights protections against the states
  + (3) Incidental national rights -> PI only encompasses rights that arise from the existence of a national government. The narrowest/most restrictive view and the one adopted by the *Slaughterhouse* majority

### *Slaughter House Cases* (1872)

* Facts: After breakout of disease caused by contamination of water supply by waste from a slaughterhouse located near the city, Louisiana passed law that granted a private company a 25-year monopoly in the livestock landing and slaughterhouse business. The law also required that the company allow any person to use the facilities to slaughter animals for a fixed fee. Several butchers brought a lawsuit challenging the constitutionality of the grant of a monopoly on the following basis:
  + It established involuntary servitude in violation of 13A
  + It violated the privileges or immunities clause
  + It violated the equal protection clauses of 14A
  + It denied their right to practice their trade and thus violated the due process clause
* Holding - The LA law is constitutional as a valid exercise of state police power
* Majority
  + Power exercised by state is an essential one: the **police power**. While incapable of being precisely defined, this power concerns the security of social order, the life and health of citizens, the beneficial use of property, and the enjoyment of private and social life
    - Authority of state of LA to pass law under this power is valid unless some restraint on the exercise on this power is found on the constitution
  + Not protected by 13A prohibitions against slavery, which was enacted for the purpose of forbidding any and all forms of African slavery. 14A EPC also only intended to protect freed slaves
  + **The PIC of 13A only protects the privileges and immunities guaranteed by the United States and not by the individual states**
    - State and national citizenship are distinct ("of the United States" vs. "of the several states")
    - Article 4 prohibits discrimination against out-of-state citizens with respect to P&Is, but all such individuals treated the same under the LA state law
    - Likewise, 14A PIC prohibits States from abridging the P&Is of citizens of the United States, meaning only those associated with national citizenship
  + Privileges and immunities of citizens of the several States are those which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign
    - If the P&Is associated with National citizenship were expanded to included these same rights and thus subjecting the states to congressional control with respect to them, it would greatly disrupt the balance between state and federal governments
    - Thus these P&Is are left to the states to protect and secure and not placed in the special care of the federal government. This does not, however, mean that there exists no such P&Is belonging to national citizenship (e.g. access to seaports, rights while in jurisdiction of foreign government, etc.)
  + Finally, Court emphasized that DPC only concerned the procedures that government must follow and thus could not be used to challenge the law for interfering with the right of butchers to practice their trade
    - Thus, **Court flatly rejects the idea that the due process clause could be used to safeguard a right to practice a trade or profession from arbitrary government interference**
* Dissent (Fields)
  + Majority interpretation of 14A PIC render it a vain and idle enactment, meaningless and accomplishing nothing. It would be impossible for a state to interfere with these narrow category of National P&Is through its laws and there would be no reason to adopt a constitutional provision, thus 14A PIC must be something more
  + Interprets the words "liberty" and "property" in the due process clause of 14A as limiting the ability of states to adopt arbitrary laws that such interfere with one's calling, profession, or trade. This due process protection extends to any laws that interfered with natural rights

## *Lochner* Era

* *Lochner* era – protected rights not specifically provided in Constitution under DPC by means of some form of heightened scrutiny
  + Analyze ends served (permissible; i.e. – police powers) and also the means used (direct and substantial)
  + Unenumerated rights and protection via heightened scrutiny
  + Laissez fair jurisprudence – many laws unconstitutional for interfering w/ freedom to contract; others upheld
* Laws protecting unionizing; protection of maximum hours laws; no minimum wage laws for women; protected business entry; some consumer protection legislation upheld

### *Lochner v. New York* (1905)

* Facts - D violated state law prohibiting bakery employees from working 10+ hours per day or 60 hours per week
* Issue: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?
* Holding - Statute, restricts free bargaining between employers and employers over hours worked, unjustly interferes with right to freedom of contract protected by 14A DPC
* Rules:
  + **Liberty (right to purchase or to sell labor) and freedom to contract cannot be infringed unless the State directly and substantially serves a police power (health, safety, morals, or general welfare)**
  + Test
* Majority (Peckham)
  + State has power to prevent individual from making certain kinds of contracts, but only those that it can prohibit in the legitimate exercise of its police power
  + Police powers must have limits to prevent use as a mere pretext; not a reasonable use here
    - The law was passed for ulterior motives of regulating hours of labor in private business. Lacked safety, moral, or health grounds
    - Baking not the type of employment/labor where it is reasonable to interfere, like it is with mining or smelting
    - Health reasons for law, as they apply to either Bakers or the general public, not direct or substantial enough
      * Connection between healthful quality of bread and hours worked is far too tenuous
      * Small amount of unhealthiness; police power would be too broad if we let this in
  + Can’t have economic redistribution where one class is favored over another; freedom of K
* Dissent (Holmes):
  + Test is whether a reasonable person would say statute infringes fundamental principle as they have been understood by traditions of our people and our law - should not function to prevent the exercise of a dominant opinion among states
    - Constitution gives States the power to make their own judgments about what laws are best for their individual citizens
    - Rejects the idea that Constitution should be used to protect a particular economic theory which largely unsupported by the popular will
* Dissent (Harlan) - Majority rule is okay, but law does protect the health of people because exposure to dust and illness
* Notes
  + The Court is applying heightened scrutiny to strike down state legislation. The test requires that the State regulation:
    1. **Serve a legitimate police power** (e.g. public health, safety, morals, welfare, etc.)
    2. The means of achieving this must have a **direct and substantial relationship** to the objective
  + Majority finds that the NY statute fails on the second prong. Limiting the hours of bakers does not promote public welfare or the welfare of bakers in any easily recognizable way. Instead, it limits autonomy to contract
  + **3 Key Themes that Persisted Through *Lochner* Era**:
    - (1) 14A DPC protects freedom to contract
    - (2) Government can only interfere with freedom of contract to serve valid police power
    - (3) Judicial role to carefully scrutinize legislation interfering with liberty
  + Was *Lochner* wrongly decided?
    - Unequal bargaining power may mean no real freedom to contract
      * However, even if directed at labor protections of bakers, could be viewed as protecting a particular class of individuals at the expense of another. Thus this would not be a permissible police powers objective since it doesn't have a net benefit to the public and merely redistributes
    - Inconsistent application of this doctrine leads to unpredictable and nonsensical results
    - Judiciary should not be invalidating laws adopted through democratic process; judicial values substituted (Excessive judicial activism by unelected judges)
    - Concerns over judicial heightened scrutiny and counter-majoritarian difficulty
    - Seems to have disregarded the "without due process" part of the 14A

### Cases Following *Lochner* (*Adkins* and *Morehead*)

* *Adkins v. Children's Hospital* (1923)
  + Struck down law setting minimum wage for women, holding that I interfered with freedom of contract without valid police powers objective
    - Court rejected the argument that without a minimum wage women would be forced to earn money in an immoral manner (e.g. prostitution)
    - It asserted that diminishing inequality has eliminated any such need for interference
* *Morehead v. New York ex rel. Tipaldo* (1936)
  + Once again, Court declared unconstitutional a state minimum wage law for women
  + Reaffirming *Adkins*, it found that the minimum wage law impermissibly interfered with freedom of contract because it did not serve a valid state police purpose

### *Meyer v. Nebraska* (1923)

* Facts - NE state law made it unlawful to teach foreign language to a child before passing 8th grade
* Issue - Whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by 14A
* Rule - **Cannot interfere with liberty under the guise of protecting public interest by legislative action which is arbitrary or lacking reasonable relation to some purpose within the competency of the state to effect**
* Outcome - Statute violates 14A DPC because there is fundamental right to teach children
* Majority (McReynolds)
  + Right of parents to control education of their own kids and right to teach
  + Legislature also interferes with calling of modern language teachers (a fundamental right)
  + Statute is arbitrary and without reasonable relation to an end within competency of State
    - No reasonable harm in teaching the German language. While easy to appreciate State's interest in fostering a homogeneous people with American ideals prepared readily to understand current discussions of civic matters, the means adopted, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error
* Notes
  + Liberties identified thus far: (1) contract; (2) occupations; (3) acquiring useful knowledge; (4) marriage; (5) raise family; (6) worship God; (7) enjoy traditional common law privileges essential to happiness
  + Solidified the idea of substantive due process rights

### *West Coast Hotel v. Parrish* (1937)

* Background: Case that formally brought *Lochner* era to an end; Court upheld state law requiring minimum wage for women and expressly overruled *Adkins* and *Morehead*
* Holding
  + Test: **law/regulation must be reasonably related to an interest in the community -> heightened scrutiny**
  + Redistribution of wealth among economic classes not strictly prohibited
  + Court effectively declares that it no longer would protect freedom of contract as a fundamental right, that state government could regulate to serve any legitimate purpose, and that the judiciary would defer to the legislature's choices so long as they were reasonable
* What is this freedom of contract? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law...Regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process
* *United States v. Carolene Products Co.* (1938) – confirms holding in *West Coast Hotel*; upholds Act barring filled milk using double standard of review
  + Economic regulations upheld so long as they are supported by conceivable rational basis
  + Defer to government and uphold the law if reasonable
  + Deference not extended to laws if (A) interferes with fundamental right on its face violates a Constitutional provision, (B) restricts political process, or (C) discriminates against discrete and insular minorities

## Modern Era

* To restate the scrutiny tests:
  + (1) **Strict Scrutiny -> Fundamental Rights: Unconstitutional unless restriction on liberty is narrowly tailored to achieve a compelling state interest**
    - State has the burden of showing, and the interest must be the real interest for which the law is adopted, not just a conceivable interest
    - Under/over inclusiveness fails narrow tailoring, where it would not be a problem for rational basis
  + (2) **Rational Basis -> Non-fundamental Rights: Only unconstitutional if the restriction is not rationally related to a legitimate interest**
    - Can be any rational basis that the state might have had
* The differing conceptions of the tests for what unenumerated rights are "fundamental" and deserve heightened scrutiny in *Griswold*:
  + (1) Penumbral - Majority’s test: Rights that found in the the penumbras of Bill of Rights guarantees, which are formed by emanations which give those guarantees life and substance, are fundamental -> strict scrutiny
  + (2) Traditions & Conscience - J. Goldberg concurrence: roughly equivalent to the "rooted in history" approach; DPC protects rights "so rooted in the traditions and conscience of our people to be ranked as fundamental."
  + (3) Implicit in Ordered Liberty - J. Harlan concurrence: "basic values implicit in the concept of ordered liberty," completely independent of incorporation of the BoR
  + (4) None at All - J.J. Black and Stewart dissent: rejection of Lochner was a rejection of unenumerated fundamental rights. Court has no power of heightened scrutiny over infringements of unenumerated rights.
    - This can’t be what the framers intended. As Goldberg points out, this would directly conflict with 9A, which holds that the enumeration of rights should not be viewed as exhaustive or used to disparage those retained by the people. This in itself evidence of the framers intent belief in fundamental unenumerated rights
* There is also that expressed by Harlan in *Ullman*: Neither the B.o.R. or 14A mark the outer limits of the substantive sphere of liberty. It is a rational continuum which broadly speaking, includes a freedom from all substantial and arbitrary impositions and purposeless restraints
* Abortion
  + Potential approaches to overturning *Roe*
    - (1) Right to abortion is not "fundamental" or a protected liberty interest
    - (2) Fetus is a life in the morally relevant sense from conception
    - (3) Fetus is a person within the meaning of the DPC; every state would have to prohibit abortion
    - (4) No trimester framework (more of a revision than an overruling)
  + *Roe* trimester framework replaced with the undue burden test in *Casey*
  + Post-*Roe* Abortion Jurisprudence
    - *Danforth* (1976) – invalidated law requiring spousal consent, + for < 18 parental consent, prior to abortion
    - *Akron I* (1983) – reaffirmed right to choose abortion; invalidated the following regulations:
      * 24 hour waiting period after written consent; detailed info guidelines for informed consent
    - Maher v. *Roe* (1977) – upheld law limiting Medicaid benefits non-medically necessary abortions
      * *Roe* was not an unqualified right to an abortion, but a right to freedom of choice
    - *Harris v. McRae* (1980) – upheld law limiting fed. Medicaid funds to abortions necessary to save mother
    - *Webster v. Reproductive Health Services* (1989) – Kennedy stated that he would overrule *Roe*
      * Upheld MO law: banned use of public facilities for abortions and required extensive viability tests

### *Griswold v. Connecticut* (1965)

* Facts - D, a health care provider, convicted as accessory (advising) under law prohibiting others using contraceptives. Law prohibits the use, but not distribution, of contraceptives. D challenges the constitutionality of the law
* Outcome - Law violates right to privacy implicit in Bill of Rights and incorporated by 14A DPC. Court takes a non-*Lochner* path to this conclusion
* Rules
  + The use of contraceptives in marital bedroom is a fundamental right; penumbral approach
  + Strict Scrutiny Test – Law unconstitutional unless restriction on liberty is narrowly tailored to promote a compelling interest
* Majority (Douglas) - 14A DPC not the guide in this case (doesn’t want to fall into *Lochner* mess)
  + Right to privacy found in the penumbras of 1A, 3A, 4A and 5A + 9A (further rights), getting around the unenumerated issue
    - Penumbral approach to find right to privacy informed by Harlan dissent in *Poe v. Ullman*
    - The animating principles behind the Bill of Rights are broader than what is explicitly enumerated; they give rise to other rights whose existence can be viewed as implicit
  + Right to privacy includes the use of contraceptives by married couples (located within a "zone of privacy" implicit in guarantees of the bill of rights)
  + Connecticut law seeks to prohibit the use of contraceptives in the marital relationship and in doing so violates this area of protected freedoms
    - Decisional autonomy is an important liberty interest, as well as right to privacy
    - Cannot have laws sweeping unnecessarily broadly and invading area of protected freedom (resembles strict scrutiny test)
* Concurrence (Goldberg)
  + Fundamental rights not confined to those enumerated; look at rights rooted in traditions and conscious of our people -> 9A informs rights and points outside Bill of Rights (not simply confined to first 8 amendments)
    - Instead, it emanates from the underlying principles and purposes of the entire constitutional fabric (fundamental principles of liberty and justice which lie at the base of all our civil and political institutions)
    - It is supported by numerous decisions of the Court, as well as specifically by the language and history of 9A. Additionally, right of privacy in marriage is rooted in the "traditions and collective conscience" of people and is therefore a fundamental right
    - 9A says "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"
    - If the Court denies the existence of a marital right of privacy simply because it is not enumerated in the first eight amendments, it is essentially denying all meaning in the Ninth Amendment
  + Strict scrutiny applies here. State fails to show there is both compelling interest and means narrowly tailored. There were clearly less restrictive means available, thus it is unnecessarily broad
  + However, holding here should not be taken to mean that regulating sexual promiscuity or misconduct (fornication) automatically subject to strict scrutiny
* Concurrence (Harlan)
  + Test for fundamental rights is whether it is implicit in the concept of ordered liberty
  + Can use the 14A DPC directly to invalidate this state law
* Concurrence (White) - Scope of law too broad because infringes rights of married persons; no compelling reason Dissent (Black) - There must be specific text in the Constitution to find a fundamental right
  + 9A does not create any new rights; DPC and 9A cannot be used to strike down state laws
* Dissent (Stewart) - DPC inapplicable because law not vague and doesn’t deny procedural due process
* Notes
  + Steps in application of strict scrutiny test
    - (1) Identify the interest (prevent illicit sexual relations)
    - (2) Is the interest compelling (not compelling here, but no reasoning provided)
    - (3) Law narrowly tailored (Court says the statute is too broad)
  + If fundamental right, apply strict scrutiny. Otherwise, liberty interest gets rational basis
  + Observations/Comments on the Majority Opinion
    - Majority has some discussion of the protection of the home as one’s castle
    - Problem with the penumbras approach is almost anything can be found to be supported by penumbras of some of the bill of rights provisions
    - Describes privacy right in terms of the state-protected marital relationship. It is totally unclear coming out of Griswold how broad the right to privacy will end up being, or how "private" the act will need to be.

### *Roe v. Wade* (SCOTUS 1973)

* Facts: TX law makes it a crime to procure an abortion except to save the mother’s life. Roe challenges this as a violation of 14A due process, arguing that the right to chose is embodied in personal/familial/sexual privacy found either in the penumbras of th B.o.R. or among those reserved to the people by 9A
* Outcome: Statute is unconstitutional because it is too broad and doesn’t distinguish at compelling points
* Rule: Fundamental constitutional right to procure an abortion founded in right to privacy
* Majority - (Blackmun):
  + Historically, there were broad termination rights; only justifications for curbing those have been interests in: preventing illicit sexual conduct; concern for mothers health; and protecting prenatal life (Court says this is the only compelling one)
  + Right to privacy, whether it come from 14A, 9A, or B.o.R. is broad enough to encompass woman’s right to terminate
    - Not all privacy rights get strict scrutiny. Rather, only those privacy rights that are also able to be "deemed fundamental" or "implicit in the concept of ordered liberty" get heightened scrutiny
  + Right (privacy) is not absolute; some regulations is justified under the circumstances. **Must be balanced against state interests**
  + Applies heightened scrutiny: **Must be justified by a compelling state interest and narrowly drawn to express only the legitimate state interests**
    - Steps: Identify interest, ask if compelling, determine if narrowly tailored
  + State has important and legitimate interests in protecting the health of the mother and protect potential for life -> grows more compelling as woman approaches term
    - Compelling points are at end of 1st trimester when mother’s health is at greater risk and at end of 2nd trimester (point of viability) where there is potential for human life
    - At first trimester, can regulate to the extent it reasonably relates to maternal health (e.g. heightened licensing requirements on who can perform procedures)
    - At point of viability, state with interest in protecting fetal life can prohibit abortions except when necessary to protect health of mother
  + Here, statute makes no such distinctions and sweeps to broadly - cannot survive constitutional challenge
* Concurrence – (Stewart): Liberty protected by 14A includes personal choice in matters of marriage and family life
  + Compelling state interests do not meet broad statutory language, so unconstitutional
* Concurrence – (Douglas): Wants to stick with BoR penumbras. Zones of privacy include autonomous control over self, freedom of choice in life decisions, and freedom from bodily restraint or compulsion
* Dissent – (White): Judiciary imposing views of life existence on people; should leave to political process
* Dissent – (Rehnquist): Liberty not guaranteed absolutely against deprivation, only against such without due process
  + Adopts the "so rooted in traditions and conscience" formulation - only those rooted in longstanding historical traditions should be considered fundamental
  + Test should be whether the law has a rational relation to a valid state objective; not a fundamental right
    - No rational basis if not protecting when the mother’s health is in danger
  + Decision here is similar to that in Lochner where court passes value judgments on laws
* Notes: Texas said fetus is a living person for purposes of strict scrutiny; majority says they can’t really believe this b/c they don’t call it murder when killing to protect the mother’s health
  + Standing because mootness overcome when issue capable of repetition yet evading review
  + Majority applies strict scrutiny which produces the trimester framework
  + Not everything in privacy bubble is fundamental right; only those things that are also implicit in the concept of ordered liberty. Perhaps privacy is not doing any work here

### *Casey v. Planned Parenthood of S.E. PA* (1992)

* Facts - PA statute requires informed consent 24 hrs prior to abortion, requires minors to get consent from parent (judicial bypass in some cases), married woman must notify spouse, exceptions for medical emergencies
* Outcome - Reaffirmed Roe; all provisions constitutional except spousal provision
* Rule - Undue burden if purpose or effect is to place substantial obstacle in the path of woman seeking an abortion before the fetus attains viability; no more trimester framework
* Joint Opinion (Kennedy, O’Connor, Souter) - Roe: recognize woman’s right to choose prior to point of viability, confirm state power to restrict after viability, and recognize state legitimate interests in woman’s health and life
  + "At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life." -> freedom to make personal choices
  + "Stare decisis is not an inexorable command". It can be overruled, especially in constitutional cases (these can't be corrected by congress)
  + Stare Decisis Test
    - (1) Intolerable rule because it defies practical workability (not the case here)
    - (2) Rule subject to the kind of reliance lending special hardship as a consequence of overruling and adding inequity to the cost of repudiation (has shaped a generation's expectations w.r.t. reproductive decisions)
    - (3) Related principles so far developed as to have left old rule as a remnant of abandoned doctrine (liberty and personal autonomy arguments still strong)
    - (4) Facts have changed or are now seen so different that old rule robbed of significant application or justification (not here)
  + Tests reveals that underpinnings of *Roe* have not been weakened in any way. Cannot overrule Roe because it would run counter to precedent and would weaken legitimacy and good faith of public by giving in to public pressures
  + Keeps point of viability as the point where the line is drawn, but abandons trimester framework in favor of the undue burden test
    - Viability is kept because of both stare decisis and the fact that it represents the point in which protecting the existence of independent life can override the rights of the mother
    - Trimester framework is nonessential to holding in *Roe* and rejected. State can have interest in protecting the unborn. The rigid prohibition of interference prior to viability goes too far and misconceives state's potential interest in potential life; ensuring that woman is making an informed and thoughtful choice does not offend constitution at this stage
    - **The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does is it violate DP**
    - A finding of an undue burden is a shorthand for the conclusion that a state regulation **has the purpose or effect of placing a substantial obstacle** in the path of a woman seeking an abortion (this is not a permissible means of serving a legitimate end). Thus, the means for furthering the interest at hand must be calculated to inform woman's free choice, not hinder it (if no substantial obstacle, then pro-life regulation is fine)
      * Waiting period is not undue burden. Burdensome does not necessarily mean it is undue or create a substantial obsticle
      * Spousal consent is, however, is an undue burden because may lead to child abuse, psychological harm, etc.
* Concurrence/Dissent (Stevens) - Don’t get rid of trimester framework; undue burden if too severe or lacking legit. justifier
  + 24 hour informed consent mandate should be unconstitutional because its coercive
* Dissent (Blackmun): Right to terminate protected in early stages; subject all restrictions to strictest scrutiny
  + A single vote separates two very different worlds; fears future overturning of Roe
* Dissent (Rehnquist): Roe wrongly decided and should be overruled; PA statute entirely constitutional
  + No strict scrutiny for abortion legislation; apply rational basis test b/c no fundament. right
* Dissent (Scalia) - Test: whether text expressly provides right or longstanding tradition in society
  + Wants a sharp line rule instead of a standard
    - What's the difference: standard calls for a certain amount of evaluative judgement in its application while a rule doesn't rely on such
  + Apply rational basis test and uphold the statute in its entirety; no fundamental right here
  + Cannot overrule trimester framework, but reaffirm Roe, because that is central to holding Notes - Stare decisis is given less weight in constitutional cases given tough amendment process
  + Majority never calls abortion a "fundamental" liberty; related to autonomy, personhood
  + Undue burden standard prior to viability, but rational basis applies post-viability

### *Washington v. Glucksberg* (1997)

* Facts - WA law makes person guilty for knowingly causing or aiding another to attempt suicide. Voters in WA rejected ballot referendum that would have effectively permitted physician assisted suicide (P.A.S.) and shortly thereafter, this was expressly excluded from Natural Death Act which made it so withholding life-sustaining treatment would not constitute suicide. Phsyicians who occasionally treat terminally ill patients brought suit in federal court seeking declaration that the law is, **on its face**, unconstitutional
* Holding - No fundamental liberty interest protected by DPC for physician assisted suicide; WA state law is upheld
* Rule - Substantive due process analysis – conjunctive test to find fundamental right
  + Two primary features of substantive due process analysis
    - **(1) It specially protects fundamental rights/liberties which deeply rooted in Nation’s history and tradition and implicit in the concept of ordered liberty**
    - **(2) A careful and narrow description of asserted liberty interest at stake is required**
* Majority (Rehnquist) -
  + Long tradition (700+ years) of disapproving and punishing suicide and assisted suicide. This is longstanding expression of State's commitment to the protection and preservation of human life
    - Attitudes haven't real changes with respect to this issue and it continues to be strongly condemned
  + Applies due process analysis defined above, reasoning that only recognizing those rights deeply rooted in legal tradition it reins in subjective elements
  + Concludes that not rooted in tradition which "consistently and universally" rejects the asserted right and thus not fundamental liberty interest protected by DPC
    - P's rely on both *Cruzan* and *Casey*
      * Reliance on *Cruzan* is misguided – it dealt with the right to refuse lifesaving hydration and nutrition based on informed consent, something entirely distinct from the decision to commit suicide with the assistance of another (the former also having roots in the common law right to refuse forced medication)
      * As it pertains to *Casey* – Holding that rights and liberties protected by DPC sound in personal autonomy does not warrant a sweeping conclusion that all are so protected
  + Since not fundamental, it applies rational basis test. **State's ban must only be rationally related to some legitimate government interest, which the court concludes it is**
    - State interests: Preservation of human life; Protecting integrity and ethics of medical profession; Public health problem with mentally ill and depressed patients changing minds; Protection of vulnerable grounds (elderly, poor, disabled) from coercion or abuse; Slippery slope to voluntary and perhaps even involuntary euthanasia
      * Court finds no need to get into specifics as theses are unquestionably important and legitimate
  + Ban on P.A.S is at the very least reasonably related to these legitimate interests
* Concurrence (O’Connor) - Terminal sedation
  + Can give sufficient medication if patient is in extreme pain, even if the amount to be given would kill the patient -> right to be free from extraordinary pain
    - Key factor – amount of pain and suffering. Those not facing imminent death or unbearable suffering don't have rights sufficient to outweighs state's interest in protecting and preserving life
* Concurrence (Stevens)
  + Though ban is not invalid on it's face, there are still applications where the circumstances would render it invalid
  + Key factor should be whether terminal or not; deciding how to die versus when to die
* Concurrence (Souter)
  + Test = whether statute sets up one an arbitrary imposition or purposeless restraint at odds with 14A DPC (citing Harlan in *Poe*); look at arbitrariness and evolving legal tradition
  + Harlan dissent in Poe – judicial obligation to give detailed look at reasonableness
  + Slippery slope issue is important, which looks at voluntary versus involuntary distinction
  + Key factor – dignity; doing the action on your own vs. someone else doing it
* Notes - Note that if you do not think the right is tethered to history, get a range of opinions
  + As-applied holding for competent, terminally ill adults hastening death
  + All justices would allow the withdrawal of life support (Cruzan)
  + The patient must be terminally ill for justices to look at as-applied challenge here (none of the opinions would support P.A.S. where patient is not facing inevitable death)
  + Canadian Approach (from *Carter v. Canada*)
    - Canadian approach is similar to the European one; Increased emphasis on dignity and autonomy
      * **Two-handed balancing test**: Proportionality review in which the law must have hard pressing and substantial objective and the means chosen are proportional to that objective
        + Law is proportionate if means adopted are rationally connected to the objective, minimally impairing of the rights in question, and the deleterious and salutary effects of the law are proportional
    - This can be contrasted with the more rigid and "one-handed" American approach in which the right at issue determines the level of judicial scrutiny, but only the governmental interest and its germaneness to the means are considered once operating inside this tier of scrutiny

### *Bowers v. Hardwick* (1986)

* Facts: Georgia law criminalizes sodomy (oral or anal sex) as it applies to any person (not just homosexuals), even if consensual. Hardwick (R) was charged with violating the statute by committing that act with another adult male. R brought suit in Federal court challenging the constitutionality of the statute insofar as it criminalized consensual sodomy
* Issue: Whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time
  + Implicit in answering this question is a call for some judgment about the limits of the Court's role in carrying out its constitutional mandate
* Holding: Court rules 5-4 in favor of upholding the statute as constitutional
* Majority (White)
  + Distinguished from cases involving reproductive rights such as *Griswold*, **Roe**, and *Casey*. Court thinks it evident that none of the rights announced in those cases bears any resemblance to claimed right of homosexuals to engage in acts of sodomy; no connection between family, marriage, or procreation on the one hand and homosexual activity on the other
  + Two conceptions of the type of rights that warrant heightened judicial protection that the court has relied on:
    1. **Those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if sacrificed."**
    2. **Those liberties that are "deeply rooted in this Nation's history and tradition."**
  + Neither of these formulations extend fundamental rights to include consensual sodomy
    - These acts have been condemned and forbidden throughout our nations entire history and long before then
  + Court also declines to adopt more expansive view and discover new fundamental rights
    - Concerns with "Lochnerism" - "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution"
  + Rejects R's argument that this type of conduct should be protected when it occurs in the home
    - Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home
  + Since not a fundamental right, statue must satisfy rational basis which it does
    - Interest in banning acts that are believed immoral and unacceptable. If this were held to be an invalid interest, much of our nations laws would be vulnerable to being invalidated
* Concurrence (Burger)
  + Writes to emphasize view that there is no fundamental right to commit acts of sodomy. This been deeply maligned and regarded as heinous acts for thousands of years, a view firmly rooted in Judeo-Christian morals. Burger argues this can't simply be cast aside
* Dissent (Blackmun)
  + Right of sodomy isn't what is at issue here. This case is really about privacy and the right to be let alone for private consensual sex acts. **R's claim must be viewed in light of the values that underlie right to privacy** (framing issue?)
    - Court has long recognized constitutional privacy interest with reference to both decisions and places simultaneously (i.e.protecting the home)
    - These rights are protected because they form so central a part of an individual's life. "The concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole"
  + This ability independently to define one’s identity is central to concept of ordered liberty
    - The ability depends on "emotional enrichment from close ties with others" -> Sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality
    - Thus Majority refuses to recognize fundamental interest at stake: that which an individual has in controlling intimate associations with others
  + Applying heightened scrutiny, the State's justifications for the statute not strong enough to warrant dismissing R's claim
    - No evidence that sodomy adversely affects public health and welfare. The fact that these things have simply been condemned for centuries is also insufficient
* Concurrence (Stevens) - Cannot have a law totally prohibiting sodomy given precedent protecting martial sex

### *Lawrence v. Texas* (2003)

* Facts: - Texas law makes it a crime for same sex individuals to engage in "deviate" sexual conduct (i.e. oral or anal sex). P's arrested for violating the statute. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment
* Issue: Whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution
* Holding
* Majority (Kennedy)
  + Could have taken an alternative angle in challenging under the EPC (see *Romer*), but Court found it necessary to use this case to address *Bowers*. Stare decisis is not inexorable and *Bower* is re-worked through the stare decisis analysis defined in *Casey*. It ultimately holds *Bowers* was wrongly decided and overruled because:
    - Framing the issue around the fundamental right for homosexual sodomy demeans persons. Penalties and purposes of these statutes reach far beyond prohibiting certain sexual acts: they touch upon the most private of human conduct in the most private of places
    - Historical basis of the proscription is not valid because there are not many records of convictions for consensual acts performed in the privacy of one's home (i.e. any such convictions were instances of rape or predation). Likewise, virtually none of the laws in our nation's history were directed at homosexual conduct as a distinct matter
      * At the very least, these historical roots are overstated
    - Traditional considerations of ethics and morals does not answer to the issue of personal autonomy which is at stake here
      * Had this been considered, Majority in *Bowers* would have seen emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex
      * While this emergence has been more recent (over last half-century), it is clear that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Additionally, other countries that share this tradition have since accepted this freedom sought by P's
  + Decision on substantive guarantee of liberty advances both EPC and DPC interests. Has been affirmed by court many times now
  + Our **Constitution protects liberty which is central to human dignity and autonomy - this gives individuals right to engage in their conduct without intervention from the government**; the state cannot demean their existence or control their destiny by making there private intimate conduct a crime
  + The Texas statute offers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."
  + Could probably get rid of the word "legitimate" and get the same result here
  + Two-handed balancing between interest and private/personal life of individual
  + This isn’t really application of rational basis, as Scalia purports. The analysis is also very thin
* Concurrence (O'Connor, in judgement)
  + Does not want to overrule Bowers, but the Texas law should be struck down as unconstitutional via 14A EPC
* Dissent (Scalia)
  + Stare decisis should have lead to upholding of *Bowers*, as lower courts have relied on it in making decisions about other liberty interests. Also, no changing societal circumstances or legal developments exist that justify overturning it
    - Claims that majority's decision to do so is derived primarily from the widespread criticism of that decision
  + Majority's decision has almost no relevance to the instant case and leaves the central legal issue untouched
    - Nowhere does it declare that homosexual sodomy is a fundamental right, nor does it subject it to the appropriate level of scrutiny (strict)
    - It's subsequent application of the rational basis review would have far-reaching consequences. In failing rational basis, the court effectively holds that the state's interest in morality is not a sufficient interest to justify the law. This would mean every other law prohibiting a non-fundamental right, justified by the state's interest in preserving morality, could be invalidated
  + Right to privacy, as viewed by court at the time of *Bowers*, was reliant on doctrine of "substantive due process" (as suggested by the majority), but instead grounded in the penumbras of the constitution

### *Loving v. Virginia* (1967)

* Facts: Inter-racial couple challenge constitutionality of Virginia statute that prohibits and criminalizes inter-racial marriage and eloping with the purpose of cohabiting as married couple after returning to Virginia. It also voids all such marriages automatically without a judicial proceeding. The definition of inter-racial marriage in the statute only extended to that between a white person and a colored person. State contends that there is no EPC violation since applies to both races equally
* Holding: VA state statute ruled unconstitutional as violation of 14A
* Majority (Warren):
  + Court rejects the notion that the mere "equal application" of a statute containing racial classification is sufficient to remove it from 14A's prohibition of invidious racial discriminations, nor does it immunize it from the heavy burden of justification required by 14A of statutes drawn according to race
  + EPC requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of 14A was to eliminate all official state sources of invidious racial discrimination in the States. This, at the very least, is grounds for treating the classification as highly suspect and subjecting it to the strictest form of judicial scrutiny
    - No question but this miscegenation statute rest solely upon distinctions drawn according to race
    - There is patently **no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification**. Clearly a measure designed to maintain white supremacy
  + Court also holds this deprives P's of liberty in violation of 14A DPC, as the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men
    - **To deny this fundamental freedom on so unsupportable a basis** as racial classifications, directly subversive of the principle of equality at the heart of 14A, **surely deprives citizens of liberty without due process** of law

### *Zablocki v. Redhail* (1978)

* Facts: Wisconsin statute prevented members of a certain class of residents from marrying without first obtaining a court order granting them permission to marry. This class was defined by the statute to include any Wisconsin resident required by court order or judgment to pay child support to a minor that was not in his custody. P fathered a child as a high schooler and was ordered to pay monthly child support until the girl reached age eighteen. D was unemployed and indigent and was unable to make any child support payments. As a result, he was subsequently denied an application for a marriage license under tha statute. D brought suit against state official in federal district court on the grounds that the statute violated the EPC of 14A
* Majority (Marshall)
  + Precedent of the Court has treated right to marry as fundamental, long recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men
    - More recent decisions have established that the right to marry is part of the fundamental “right of privacy” implicit in the 14A DPC. Court in *Griswold* and after have routinely categorized the decision to marry as among the personal decisions protected by the right of privacy
      * While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage - Loving v. Virginia
  + Although this right is fundamental, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed
    - However, **the statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry**. Notwithstanding serious concerns about the effect on those without the financial means to escape the classification, those who can be persuaded to meet the statute’s requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental
  + Court applies some variant of EPC heightened scrutiny, requiring the a classification interfering with a fundamental right be **supported by sufficiently important state interests and is closely tailored to effectuate only those interests**
    - While the interests in protecting the welfare of the out-of-custody child and counseling the applicant of his support obligations are legitimate and substantial, **the means selected by the State for achieving these interests unnecessarily impinge on the right to marry**
    - Less discriminatory means exist by which the Court may compel delinquent persons to fulfill child support obligations, thus the means in the statute are excessively broad and thus render it a violation of **equal protection** under 14A (not substantive due process - this is of significant importance)
* Concurrence (Stewart)
  + Majority improperly determines that the statute violates the EPC. The application of the EPC is improper because it deals with the prevention of invidious discrimination and not the protection of fundamental rights and freedoms, which
  + Application of the DPC is proper here. Since the law particularly burdens the liberty interests of the indigent, as it completely eliminates their ability to marry for financial reasons
    - The statute is thus unconstitutional as a violation of substantive due process under 14A
* Dissent (Rehnquist)
  + Marriage is not a “fundamental right” triggering the application of strict scrutiny. Rational basis review should be applied
  + Under rational basis review, the statute is a permissible exercise of a state’s power to regulate family life and to assure the support of minor children
* Notes:
  + What's happening in the majority opinion is the introduction of the "fundamental rights" branch of equal protection scrutiny
    - This adds an additional element to the EPC analysis: even where not based on a suspect classification, the thing involved with respect to the classification scheme is deemed so important as to require some form of heightened scrutiny

### *Obergefell v. Hodges* (2015)

* Facts: In response to some states legalizing same-sex marriage, various states enacted laws and constitutional amendments defining marriage as between one man and one woman. Multiple same-sex couples in the states of Kentucky, Tennessee, Ohio, and Michigan brought suit against officials responsible for enforcing the laws in that state claiming they violate 14A by denying them right to marry or to recognize marriages performed out of state
* Majority Opinion (Kennedy):
  + Right to marry is a fundamental right as held by the Court on multiple occasions
    - Fundamental liberties not limited to those enumerated in B.o.R. or 14A - **these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs**
    - Identifying fundamental rights has not been reduced to any formula - it requires court exercise reasoned judgement in identifying interests of the person so fundamental that the State must accord them respect (standard, not a rule). This determination is guided by the broad principles set forth in other constitutional provisions, along with history and tradition (though these two do not set outer limits)
    - Those who ratified 14A and B.o.R. entrusted future generations to protect liberty as we learn its meaning; when new insight reveals discord between the Constitution's central protections and perceived legal structures, the claim to liberty must be addressed
    - Applying these tenets, Court has long held marriage to be protected as fundamental, calling it one of the "vital personal rights essential to the orderly pursuit of happiness by free men". Essential attributes of this right are based in history, tradition, and other constitutional guarantees. 4 principles support this:
      * (1) Right to personal choice regarding marriage is inherent in the concept of individual autonomy, similar to choices regarding procreation and family relationships
      * (2) It supports a two-person union unlike any other in its importance to the committed individuals - right to enjoyment of intimate association
      * (3) It safeguards families and children, thus draws meaning from related rights of childbearing, procreation, and education
      * (4) Nation's traditions make it clear that marriage is keystone of our social order. Mutual recognition of support between the couple and society; also a basis for an expanding list of governmental rights, benefits, and obligations
        + No difference between same-sex and opposite-sex couples with regard to this principle, yet sex couples are excluded from this institution and its corresponding benefits, much to their detriment
        + **It demeans gays for the state to lock them out of the most central institution of the Nation's society. This inconsistency with the fundamental right to marry is now obvious**
  + Case history is instructive that the inquiry should be directed towards the right to marry in the comprehensive sense, asking if there was justification from excluding right from a particular class, rather than an inquiry into whether there exists a fundamental right with reference to that class
  + Right of same-sex couples to mary also derives from 14A EPC - there is interrelation between EPC and DPC and lead to a stronger understanding of each other. Reasons why marriage is a fundamental right becomes more clear and compelling from full awareness of the hurt that has resulted from unequal application
    - These considerations lead Court to the conclusion that **the right to mary is a fundamental right inherent in the liberty of the person and under both the DPC and EPC of 14A, same sex couples cannot be deprived of that right**
  + While democracy is appropriate process for change, this is only the case insofar as that process does no abridge fundamental rights. Where rights of person are violated, Constitution requires redress by the courts notwithstanding values of democratic decision making
* Dissent (Roberts): There only exists a right to traditional marriage
  + Right to marriage is only fundamental insofar as it refers to monogamous, heterosexual marriage. This right is subject to heightened scrutiny
  + No such fundamental right to a definition of marriage that extends to whatever we want it to
  + There is no 'Nobility and Dignity' Clause in the Constitution, and thus the majority position has no basis in principle or tradition (this seems to be of clear constitutional significance, to deny this seems disingenuous)
* Dissent (Thomas): There is no right to legally recognized marriage
  + Marriage is effectively a conditional offer for a government entitlement. State will recognize marriage and provide benefits associate with marriage under the condition that it conform to the traditional definition of marriage (i.e. 1 man, 1 woman)
  + Idea of substantive due process is a distortion of the constitution. It only guarantees whatever "process" is "due" before a person is deprived of life, liberty, and property (i.e. procedural due process). SDP invites judiciary to substitute their personal views as a guide for constitutional interpretation (charges of Lochnerism)
  + There is no negative liberty interest (individual freedom from governmental action) at stake here, and this is the only type protected by the DPC. This is merely the conditioning or selective denial of government entitlements. Petitioners have not been deprived
    - This is different than *Loving* and *Zablocki*, as there where negative liberty interests involved in the form of absolute prohibitions on private actions associated with marriage
    - Critique of this dissent - Thomas dismisses the "dignity" argument by arguing the government does not bestow dignity on individuals but it is in fact innate, thus they are not being deprived of dignity when excluded from some entitlement. However, the issue is whether denial of the benefit of legally recognized marriage offends constitutional principles by **failing to respect** the dignity of gays. Thomas clearly recognizes the constitutional significance of this type of injury when the issue of race is at stake (see *Bollinger*)
* Notes on *Obergefell*:
  + 3 possible approaches to challenging the constitutionality of the state laws here: EPC, DPC, and EPC with fundamental rights branch
    - Pure EPC - Must do three things to be successful: (1) Get intermediate scrutiny for classifications discriminating on the basis of sexual orientation; (2) Get the state laws viewed as discrimination on basis of sexual orientation; (3) Show that this fails intermediate scrutiny
      * (1) likely poses the greatest challenge. While "inequal" in commonsense ways, it is not obvious that they strongly implicate inequality with respect to “protection” of the laws. In *Romer*, this was only entitled to rational basis review. Likewise, this doesn't seem to fit the definition of a "discrete and insular minority" - there is no hostility or unwillingness to cooperate with that frustrates the ability of LGBT people to remedy their situation through the political process (this category seems to be reserved exclusively for race)
    - Substantive Due Process under 14A - Must show that this is a fundamental right implicit in the concept of ordered liberty
      * Possible rebuttal - This must be objectively, deeply rooted in history and tradition, per *Gluckbsburg*. The right of same-sex marriage is not supported by the historical traditions and practices of our country. However, in *Lawrence*, court exclaimed that history and tradition may guide the fundamental rights inquiry, but it doesn't create outer limits
      * Also the framing/scoping issue. How narrowly circumscribed must the right at issue be viewed? *Glucksberg* would suggest the inquiry relate specifically to the right of same-sex marriage (i.e. "careful description") whereas *Loving* and *Zablocki* seem to inquire about the right to mary in its comprehensive sense. *Lawrence* Court also accused the Court in *Bowers* of framing the issue too narrowly
    - Some hybrid combination of the two, which appears to be the one that the majority adopts
      * Marriage is both 'one of the vital personal rights essential to the orderly pursuit of happiness by free men' and the exclusion of same-sex couples from marriage is demeaning and serves to disrespect and subordinate them